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**INTERNATIONAL LAWYERS AND THE DIPLOMACY
OF MODERN STATES, WITH SPECIFIC REFERENCE
TO SOUTH AFRICA**

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
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ABSTRACT

This study explores the role and influence that advisers on international law in foreign ministries have on the diplomacy of modern states. The departure point of the study is the new interdisciplinary scholarship on the relationship between international relations and international law that was triggered by the termination of the Cold War and the bipolar, realist world order. New perceptions of increased interdependence between states resulting from the need for transboundary cooperation to address contemporary international problems also resulted in a renewed focus on the applicability of other theories, besides that of realism, which dominated international relations theory after the Second World War. This interdisciplinary scholarship, conducted by both international relations scholars and international lawyers, has both institutionalist and liberal underpinnings. Within this discourse a renewed focus on the role of advisers to governments on international law has also become evident, but it is generally of a descriptive nature and not directly linked to diplomacy.

This study aims to contribute to this discourse by analysing the direct impact that advisers on international law, in most cases employed by foreign ministries, have on diplomatic decisions and the conduct of diplomacy by modern states, with a specific focus on South Africa.

In the course of the study a number of propositions are explored. This is done by analysing the available literature and by means of three case studies. Two case studies will assess the role that

advisers on international law played during two crises involving the use of armed force. During the Suez crisis of 1956 the realities of the Cold War started to assert themselves in international relations, while the NATO attack on Kosovo of 1999 took place within the post-Cold War paradigm. The third case study will explore the role of the Office of the Chief State Law Adviser (International Law) at the South African Department of Foreign Affairs in the formulation and conduct of South African diplomacy.

The propositions advanced by this study relate firstly to a general approach by states to conduct their diplomacy within the limits of international law (or at least to justify it in terms of international law). The second proposition holds that the influence of law advisers is greater with regard to problems with a high legal content, but less profound in cases of crisis decision-making, with regard to issues with a high policy content or where considerations of security are involved. The third proposition explores two approaches towards the role of the law adviser: the first considers him/ her as an objective analyst of legal rules, while the second provides that the law adviser can choose from various interpretations of international law to advance an opinion that will further the state's interests.

Finally, the changes wrought on the international system, international law and diplomacy by the terrorist attacks against the United States of America on 11 September 2001 and their possible relation to the function of the law adviser, will be explored.

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INTRODUCTION

“Turning foreign policy over to the lawyers is the laziest, the most brainless way to make policy... the law – international law – is an ass. It has nothing to offer. Foreign policy is best made without it.”

Charles Krauthamer, *The Curse of Legalism*, New Republic, Nov 1989

“... the worst kind of diplomats are missionaries, fanatics and lawyers”.

Sir Harold Nicolson, Diplomacy, 1969

The dominant paradigm in international relations after the Second World War was that of realism, positing that power was the dominant concept in international relations. In the spirit of the time diplomacy, as an instrument for the implementation of a state's foreign policy, was during this period also predominantly interpreted in terms of the realist paradigm. Within this power-based conceptualization and taking into account that the impact of power is easily recognisable and directly relevant in international relations, international law has often been dismissed by realists as an almost irrelevant factor in international relations. This was the case despite the fact that international law has since the inception of the modern state system at the Peace of Westphalia in 1648 been one of mechanisms with which states attempted to maintain international peace and order. This state of affairs also prevented a more sophisticated analysis of the relationship between international relations and international law.

The fall of the Berlin Wall in 1989 which resulted in the termination of the Cold War and the bipolar world order, had a profound influence on both

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international law and diplomacy. The reduction in the nuclear threat resulted in a redefinition of international security, and an increased focus on human security at the expense of the state and its physical integrity. Contemporary transnational and international problems like mass migrations and refugee problems, gross human rights violations (often resulting from conflicts and civil wars within the borders of states), fatal diseases, international terrorism, organised crime, environmental threats, the protection of the world's common resources and the issue of sustainable development have resulted in increased interdependence between states in an increasingly complex world. These new trans-national issues, falling outside the exclusive competence of the state, can only be addressed by inter-governmental co-operation (through the instrument of diplomacy) and regime creation (through the instrument of international law), an approach that falls within the institutionalist paradigm. Both diplomacy and international law had to rise to the quantitative and substantive challenges posed by these developments.

Challenges of this nature are, however, not unknown to either diplomacy or international law: in the period prior to the First World War, diplomacy and international law operated mainly in a bilateral context within an international community consisting of a limited number of states. After 1919, and even more so after the Second World War, gravitation from bilateral to multilateral diplomacy and regime creation (for example - issues like arms control and disarmament, human rights¹ and the status of Antarctica) took place. This, together with the virtual explosion in the number of states that took place in the international system, resulted in a considerable intensification of international interaction and diplomacy.

The end of the Cold War has been compared with 1648 (the Peace of Westphalia), 1789 (the French Revolution and the advent of the idea of

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democracy) and 11 September 2001 (the terrorist attacks on the World Trade Center in New York City and other targets in the United States of America) with regard to its impact on the international system and on international law². These developments have resulted in a “profound transformation in the narratives underpinning international law”, which Anne Orford describes as follows:

“A new kind of international law and internationalist spirit seem to have been made possible in the changed conditions of a world no longer structured around the old certainties of a struggle between communism and capitalism. The narratives... are premised on an image of international law and institutions as agents of freedom, order, democracy, liberalisation, transparency, humanitarianism and human rights.”³

Orford argues that while international law was in the past linked to the processes of imperialism, exploitation, domination and colonisation, it is now being idealised as devoted to world order, humanitarianism, human dignity, peace and security.⁴ These historical events and new perceptions have contributed to a new interdisciplinary focus on the relationship between international relations and international law. Within the context of these new narratives relating to international law, the focus of the discourse is to explore the possible applicability of other theories, besides that of realism, on international relations and international law, research in this regard being conducted by both international relations scholars and international lawyers.⁵

More than one hundred works, most of which have been published in the last decade, have been identified in a bibliography of interdisciplinary scholarship.⁶ Apart from these developments on the theoretical front, a

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renewed focus on the role of advisers to governments on international law has also become evident. While this issue has from time to time been addressed in journal articles since the 1960s, the last decade saw a proliferation of writings on this subject, while it is also currently a popular topic for conferences and seminars.⁷ The general approach in these deliberations is of a descriptive nature, aimed at summarising the work of the law adviser, and is conducted with the aim of exploring the relationship between international law and international relations, while also focusing on the influence of the law adviser on foreign policy. A more focused approach, namely the direct impact that advisers on international law to foreign ministries may have on diplomatic decisions and the conduct of diplomacy, has not yet been well explored within the parameters of the discourse on diplomacy⁸ (bearing in mind that there exists a considerable overlap between the definitions and practice of diplomacy and foreign policy).

Most foreign ministries “employ experts to provide routine and other advice on matters of international law and constantly define their relations with other states in terms of international law”.⁹ These experts may be employed by the foreign ministry or by other government institutions like the ministry of justice or the Attorney General, but the general objective remains to serve as a “house counsel” to the government on issues pertaining to international law. A large part of the daily diplomatic dealings of states has an international law content: issues such as the recognition of states and governments, boundary disputes, the interpretation and implementation of treaties and the application of diplomatic privileges and immunities come to mind. The research problem to be addressed in this study will be the role that governmental advisers on international law have on the diplomacy of modern states and their influence in this regard, with specific reference to the diplomacy of South

Africa.

While it is fairly easy to determine and describe the formal role of law advisers, "influence" is a more elusive concept and by its very nature difficult to determine or measure. The role of law advisers in foreign ministries can be deduced from formal job descriptions and tasks and functions allocated to them. It will be more difficult to assess what real impact and influence law advisers have on the formulation and execution of the foreign policy of a state, as the decision-making processes of states are more often than not shrouded in secrecy and impenetrable to the outsider. However, it is submitted that by assessing the propositions against the available literature and the case studies, conclusions could be drawn in this regard.

While this research will have a strong practical focus, as it is considered that the subject matter of this study forms part of diplomatic practice, some attention will be given to the theoretical approaches to international relations that are, as a result of interdisciplinary research, also being made applicable to international law.¹⁰ The first proposition to be explored is that states generally wish to conduct their foreign relations and diplomacy within the limits of international law and, even when transgressing the norms of international law, will seek to justify such conduct by means of a favourable interpretation of the rules of international law. Brownlie¹¹ postulates that there exists evidence that reference to international law has been a normal process of decision making in the British Foreign and Commonwealth Office (FCO)¹². For example, the military action by the US-led coalition against Iraq in 1991 and the subsequent actions like the enforcement of a no-fly zone in the northern part of that state and continued attacks on Iraqi military targets by US and British warplanes have been justified by these states as actions that are sanctioned by international law,¹³ and the same

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applies to the intervention by the North Atlantic Treaty Organisation (NATO) in the Kosovo province of the Federal Republic of Yugoslavia in 1999.¹⁴ Similarly, states also sometimes base foreign policy/diplomatic orientations and policies on international law: the British FCO justifies its human rights policy on an obligation in terms of international human rights law to protect and promote human rights internationally.¹⁵

The second proposition is that the influence of the law adviser is most profound in cases of problems with a high legal content but less direct in cases of crisis decision-making, with regard to issues with a high policy content or where security issues are involved. This happens not necessarily because the policy-makers do not wish to pursue options the least violative of international law, but because the achievement of desired outcomes outweigh legal considerations.¹⁶

Thirdly, it can be postulated that the influence of the law adviser on policy formation and diplomacy will also be dependent upon the degree to which policy considerations are accepted as relevant and being taken into account by the adviser in performing his/her duties. On the one hand, there is an approach that considers the law adviser as an objective analyst and interpreter of international law; somebody who will not justify the non-application of a rule or norm of international law although such an interpretation may serve the interests of the state.¹⁷ In contrast to this approach defining the law adviser as a technician, stands the “political” approach: international law is seen in the context of the broader international decision-making context, rather than as the strict application of norms and rules. This approach has it that the law adviser can choose from a range of various interpretations of international law such interpretation that will most effectively further the interests of his/ her state.¹⁸

For this study the interpretation of Scott with regard to the relationship between international law and policy formulation will be kept in mind. Analyzing a number of case studies on the application of international law regarding bilateral problems between Australia and Japan,¹⁹ she draws the conclusion that: "While an understanding of the impact of international law on foreign policy decision-making varies considerably, the different theoretical perspectives have in common an analysis framed in terms of 'compliance'. Indeed, the very question as to the relationship between international law and foreign policy decision-making and implementation is generally treated as to whether or when states comply with international law." Scott then argues that the conceptual framework of compliance does not capture the inherent dynamic between policy-making and international law, which allows law advisers to have a considerable though largely invisible influence on the process of policy formulation.²⁰

This study will be structured in the following way: at the outset, the basic concepts "international law", "diplomacy", "international relations" and "foreign policy" will be defined, followed by an overview of the major theories on international relations (realism, institutionalism, liberalism and constructivism) and their application to international law. The next chapter will provide an overview of the role and functions of law advisers in foreign ministries, based on the available literature, and will also focus on the respective legal advising systems and the functions of law advisers in foreign ministries. Two chapters dealing with case studies will then follow. The first will focus on the role that international lawyers in the FCO played during two cases regarding the legality of the use of force, namely the Suez crisis of 1956 and the NATO intervention in Kosovo in 1999. The second will study the role in South African diplomacy of the Office of the Chief State Law Adviser (International Law) at the South African Department of

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Foreign Affairs, dealing, amongst others, with the history, organization and functioning of the Office and the way in which the focus of the Office has changed since South Africa's re-integration into the international community in 1994.

The concluding chapter will review the proposition and evaluate the role of law advisers in diplomacy in general, while also considering the future role of such advisers in view of the impact that the terrorist attacks on the USA of 11 September 2001 may have had on the international system, international law and diplomacy.

This study, while focusing on South African diplomacy, is posited within the broad themes of international relations and international law. The subject matter is of such a nature that it cannot be studied or analysed without taking into account its historical context, hence the historical overviews of the role of law advisers in diplomacy since the Middle Ages. A study of this nature is also to an extent directed by the availability of research material. This consideration, as well as the continuity of the theme of the use of force in international relations and its legality in terms of international law, pointed the way to the case studies of Suez and Kosovo, temporally situated more or less at opposite ends of the Cold War. The question of the legality of the use of force also provides a linkage to post-Cold War, contemporary issues in international relations, namely the actions of the US-led coalition in Afghanistan following the terrorist attacks against the USA on 11 September 2001, and the military action by a USA/UK coalition against Iraq in 2003.

Considerable attention will be given to the historical background and a thorough understanding of the Suez crisis, which took place at the beginning of the Cold War, as it is required to inform understanding of

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subsequent approaches with regard to the legality of the use of force in international relations.

With regard to the analysis of the work of the Office of the Chief State Law Adviser (International Law) at the South African Department of Foreign Affairs, an historic overview of the Office and its antecedents has been done with a view to illustrate the continuing relevance that international law considerations had on diplomacy throughout the history of modern diplomacy, and under changing circumstances.²¹ This is also the reasoning behind the references to the history of advice on international law tendered to the British and American Governments.

THEORETICAL AND CONCEPTUAL BACKGROUND

2.1 Definitions

While “international law” is a concept that is relatively easy to define, the concepts of “diplomacy”, “international relations” and “foreign policy” are closely related and to an extent overlapping, and perhaps more difficult to define. Barker²² illustrates this definitional confusion as follows: “The discipline of International Relations is a relatively recent addition to the academic syllabus. However, many of the ‘sub-fields’ that make up the discipline have been around for centuries and include Diplomacy and Diplomatic History, Economics, Geography, Sociology, Psychology and of course, Law. Indeed, International Law was seen by the earliest courses on International Relations as being the ‘best integrated root discipline’ of International Relations.”

The close relationship between the disciplines of Diplomacy and International Law, and the disciplines of foreign policy and International Relations, has been recognized for a long time: an early work aiming at an historical analysis of British foreign policy and diplomacy, Heatley's Diplomacy and the Study of International Relations (1919), focuses strongly on the history of International Law. The author argues that the disciplines of International Law and International Relations are historically intertwined, International Law springing from the interaction between nations and, especially by means of treaties, developed the conventions and standards for such intercourse.²³ The contemporary re-examination of the applicability of International Relations theories within the context of

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interdisciplinary scholarship has also been referred to. This chapter will aim to define these concepts for the purpose of this study, with due reference to the links between them, as well as to consider how the dominant theoretical explanations of how states behave in their interaction with one another regard the place of International Law within the discipline of International Relations.

2.1.1 International Law

Before focusing on a definition of International Law, the purposes of this study require an understanding of the nature and development of International Law. The modern state system dates from 1648, the date of the Peace of Westphalia, which ended the Thirty Years War between Protestant and Catholic princes in Europe, terminating the Holy Roman Empire. From this feudal and hierarchical system, which had the Pope and the Holy Roman Emperor at its pinnacle as the secular and spiritual heads respectively, there emerged a number of independent, territorial states, "the international community [consisting] of co-equal members individually independent of any higher authority."²⁴ Besides the principle of equality between states (at least in a legal sense), sovereignty was the other building block of the new state system. Internally, it meant that the independent state had supreme legislative power and unfettered authority over the individual. In the realm of foreign relations, it meant that states acknowledged no superior authority and were totally free to regulate relations with other states in peace and war.²⁵ This state of virtual international lawlessness could, however, not continue without some form of regulation, which came in the form of International Law, notably in the form of the rules regulating the conduct of warfare and the arbitration of disputes between states. States were the only international actors and bearers of rights and obligations in terms of International Law.

The basis for a considerable evolution of International Law that took place in the twentieth century was laid in the nineteenth century when the prerequisites for the emergence of international organisations were satisfied. The “emergence of a pattern of technologically-based contacts, unprecedented in range and intensity”, resulted in a number of cooperation regimes being created, notably on arms control/disarmament and dispute arbitration.²⁶ The horrors of the First World War resulted in the founding of the League of Nations in 1919 as a formal and universal international structure aiming at the peaceful settlement of disputes between states as an alternative to the practice of states to settle disputes by means of war. The League system was based upon a belief that international peace and order can be obtained by the development of international norms codified in international law. This approach had its origins in the writings of the seventeenth century Dutch international lawyer, Hugo de Groot.²⁷

Since the founding of the League and especially since the creation of the United Nations (UN) and its agencies shortly after the end of the Second World War, international organizations have also been considered, besides states, as subjects of international law. Multilateral diplomacy and the creation of legal regimes to address complicated transnational economic, social and security issues (like aviation, patents and copyright, human rights, arms control and disarmament) resulted in a corresponding growth of International Law to address these new areas of international interaction.²⁸

The end of the Cold War released new forces influencing the international system as well as the institutions of International Law and Diplomacy. The intrusive powers of multilateral and supranational organizations, to which

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states readily transferred authority to deal with complex transnational problems, steadily eroded that cornerstone of the modern state system, sovereignty.²⁹ The development of human rights law resulted in an international concern for the rights of the individual, penetrating the previously impenetrable boundaries of the state. These developments changed the internal dimensions of sovereignty, which is now considered to be no longer located in the government, but in the governed. The emphasis on the rights of peoples and minority groups has resulted in such groups asserting these rights, often aggressively and with the aim of establishing independent nation states.³⁰ Technological innovation, the development of a global economy, the globalisation of “universalist” ideas (like human rights, liberal democracy and capitalism) and the advent of new role-players on the international scene (international organisations, non-governmental organisations and the international media) further serve to erode the authority and external and internal independence of the state and the Westphalian foundations of the international system, while ideas on the normative, legalistic approach to International Relations also resurfaced.³¹

This development that the state is no longer the source of all power, means that Diplomacy must now address new issues like human rights violations by states, intra-state conflicts and environmental problems linked to industrialization and technological innovation, while having to take into account non-state actors in the international system like disaffected ethnic and religious minorities, terrorist groups and the global civil society.³² Similarly, International Law has to continue to address these new international issues and claims to new rights.³³ Regime creation and the formulation of international rules and norms to a large extent take place by means of international meetings and conventions, resulting in consensus being captured in document form (whether as treaties binding

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in international law or as non-binding declarations) and claims to rights being substantiated through international law. Consequently, these developments serve to enhance the linkage between diplomacy and international law.

While the state system may be weakening, there is general consensus that the state will remain the basic organising principle of the international system and the primary subject of international law.³⁴ It is submitted that instead of undermining the role of diplomacy and international law in ordering the international system, these developments will serve to enhance it.

As regards a definition of International Law, a legalistic definition can be found in the major works on this discipline. Starke³⁵ uses the following definition: "International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore commonly observe in their relations with each other." It also includes the legal rules relating to the functioning of international institutions or organizations, their relations *inter se* and their relations with states and individuals, and legal rules relating to individuals and non-state entities insofar as the rights or duties of such individuals and non-state entities are the concern of the international community.

The sources of International Law are twofold: treaties and international custom. Custom, in turn, has two elements: the actual practice of states, and a psychological element (referred to as *opinio iurus*): a conviction by states that a certain form of conduct is required by international law.³⁶ These customary rules, informal and unwritten, evolve after a long process, which then culminates in their recognition by the international

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community.³⁷ The absence of international law institutions mirroring those found in the domestic law of states (the lack of a legislature, effective sanctions and an effective law-enforcement body and the fact that states do not always comply with their obligations and resort to self-help measures) have resulted in popular skepticism about whether international law can really be considered as law.³⁸ However, the major textbooks on international law agree that despite its voluntary nature and weak enforcement measures, there are good reasons why states comply with international law, and that it must consequently be considered as law.

International law has been studied in relation to diplomacy since the early nineteenth century.³⁹ Tunkin⁴⁰ argues that diplomacy, foreign policy and international law are connected by two types of links: concerning the international obligations of states international law acts as a limitation to foreign policy and diplomacy, while with regard to a state's rights in terms of international law, it acts to support its foreign policy and diplomacy. Slaughter,⁴¹ in focusing on the relationship between international law and international relations, defines international lawyering (i.e. the practice of international law) as seeking legal solutions to international problems.

It should also be pointed out that the American school on international law considers the traditional rule-based definition of international law as inadequate. It considers international law rather as a process of authoritative decision-making where besides rules, social, moral and political considerations also play a role.⁴² Bull⁴³ considers international law, together with the balance of power, diplomacy and war, as one of the instruments of effecting order in the international system, although it suffers from limitations in this regard. By way of summary, international law can therefore be considered as a system within which relations between the subjects of international law (states and international organizations)

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and between such subjects and other entities such as individuals and non-governmental organisations, should be conducted.

2.1.2 Diplomacy

Modern diplomacy, originating during the time of the Renaissance, obtained an impetus in the late sixteenth and early seventeenth centuries when the Holy Roman Empire started to break up and the modern state system was established. The institution of resident embassies was followed by the institutionalisation of foreign policy formation and management in specialised departments and ministries, a process that started in France in the second half of the seventeenth century. By the late eighteenth century, most European states had established foreign ministries.⁴⁴

There exists a plethora of definitions for diplomacy, the term having been described as “monstrously imprecise”.⁴⁵ Berridge defines it in the context of negotiation: “Diplomacy is the conduct of international relations by negotiation rather than by force, propaganda or recourse to law, and by other peaceful means (such as the gathering of information or the engendering of goodwill) which are directly or indirectly designed to promote negotiation”.⁴⁶ He also mentions that since the First World War, the focus of diplomacy has to a large measure moved from bilateralism to multilateral fora.

Barston defines diplomacy in a wider sense and places it in context with foreign policy: “Diplomacy is concerned with the management of relations between states and between states and other actors. From a state perspective diplomacy is concerned with advising, shaping and implementing foreign policy”.⁴⁷

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It should be noted that diplomacy is not to be equated with foreign policy or the formulation or conduct thereof. It is rather an instrument by means of which to achieve foreign policy goals (Berridge would say by means of negotiation), while having an influence on the formulation and shaping of foreign policy.

Sir Ernst Satow's definition, namely that diplomacy is the application of intelligence and tact to the conduct of official relations between governments⁴⁸ was approved of by Sir Harold Nicolson,⁴⁹ but the latter also described this definition as somewhat minimalist. Satow, however, linked diplomacy to international law in his writings, stating that as the relations between so-called "civilized" states are being regulated by the rules of international law, diplomacy can have a moderating influence on the pursuit of national interest.⁵⁰

Negotiation is also central to Nicolson's definition: "Diplomacy essentially is the organized system of negotiation between states by which it is aimed to achieve reasonable relations between states."⁵¹ By negotiation he understands the exchange of written documents rather than conversation,⁵² and is quoted as saying that "... an agreement which is committed to writing is likely to prove more dependable in future than any agreement which rests upon the variable interpretation of spoken assent".⁵³ Nicolson also makes a clear distinction between diplomacy and foreign policy:

"Foreign policy is based upon a general conception of national requirements, and this conception derives from the need of self-preservation, the constantly changing shapes of economic and strategic advantage and the condition of public opinion as affected at the time... Diplomacy ... is not an end but a means, not a purpose but a method. It seeks, by the use of reason, conciliation and the exchange of interests, to prevent major conflicts arising

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between sovereign States. It is the agency through which foreign policy seeks to attain its purposes by agreement rather than by war.”⁵⁴

Cohen’s definition is also noteworthy: “... diplomacy is the paramount mechanism available to international society to settle its disputes, conduct its business and address the manifold problems before it, from protecting the environment, promoting international trade, and handling international crises, to fighting international crime and drug trafficking.”⁵⁵ Bull and Holbraad consider diplomacy as the system and the art of communication between powers.⁵⁶

The functions of the diplomatic mission (and by implication of the institution of diplomacy) are listed in Article 3 of the *Vienna Convention on Diplomatic Relations, 1961* as representation of the sending state in the receiving state, protection of the interests of the sending state and its nationals in the receiving state, negotiation with the government of the receiving state, ascertaining by lawful means the conditions and developments in the receiving state and the reporting thereon to the government of the sending state, the promotion of friendly relations between the sending state and the receiving state, and the development of their economic, cultural and scientific relations.

From the above it can be concluded that the major elements of a definition of diplomacy will be the following:

It focuses on the management of relations between states (international relations) and does so by means of negotiation, communication and tact and within the framework of the rules for conduct by states laid down by international law. It is therefore a peaceful instrument of foreign policy (as opposed to other instruments like war or punitive economic measures),

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aiming to achieve foreign policy goals such as the resolution of inter-state disputes and addressing international and transnational problems by means of reaching agreement on such issues.

2.1.3 International Relations

The concept “international relations” is of a somewhat generic nature and often used as a synonym for the imprecise concept of “world politics/international politics.”⁵⁷ As an academic discipline, however, it displays two orientations: as a sub-discipline of political science, dating back to the time of the First World War, or as an interdisciplinary field which serves as a meeting place for international law, international economics and diplomatic history.⁵⁸ Traditional definitions within the parameters of this approach are state centric: Bull and Holbraad⁵⁹ refer to “a highly organized system of continuous relationships ... political and economic, diplomacy and commerce” between independent states/nations/powers. From the state-centric perspective, international law serves as “a sub-system of international relations referring to those patterns of inter-state relations which have become so stable and regular as to attain the significance of norms.”⁶⁰ In view of the changing nature of international society and the role that non-state actors now play in the international system, a workable definition should also include reference to non-state entities. The following definition is therefore offered:

“International relations comprise the *corpus* of relationships between states or between states and international organizations as subjects of international law, as well as relations of an international nature between the state and non-state entities, including the norms and values aimed at regulating such relationships.”

2.1.4 Foreign Policy

Morgenthau⁶¹ gives a classic definition of foreign policy as “the promotion of a state’s interests by changing the minds of its opponents. The instruments to be used by a state include diplomacy, military force and propaganda.” Venter and Johnston⁶² define foreign policy as the “complex of actions and reactions undertaken by governments on behalf of states they represent, in response to structural conditions and events outside their borders and outside their control”. This is principally the actions of other states, but can also refer to non-state actors, like terrorist groups. Henkin⁶³ adds that international law is basic to foreign policy. He considers foreign policy as attempts by a state to maintain international order so that it can pursue its national interest. In this regard, international law provides a mechanism, forms and procedures by which nations conduct their relations and settle disputes.

2.1.5 Conclusion

The definitions of the concepts of “international law”, “diplomacy”, “international relations” and “foreign policy”, though often overlapping and imprecise, provide linkages between the concepts of diplomacy and international law. Diplomacy, as the instrument of foreign policy aiming at reaching objectives by means of communication, negotiation and persuasion, depends on and functions within the rules and norms for the international society and inter-state relations provided by international law.⁶⁴ While international law can be considered as a separate instrument of foreign policy, it can also function as an instrument of diplomacy to achieve diplomacy’s aim of settling inter-state disputes peacefully.⁶⁵

2.2 Theories of International Relations and International Law

2.2.1 Realism

Realism, the dominant international relations theory since ancient times, considers the power concept as the basic factor with which to analyse and explain international relations. "The primary unit of analysis is the state which is regarded as operating within an anarchical international system dominated by conflict. Foreign policy decisions are based on a rational calculation as how to most effectively enhance state power. Realism aligns international law with power in so far as international law is considered as a tool at the disposal of the most powerful."⁶⁶ Realists consequently do not deny the legal character of international law or its binding nature, but question the relevance and effectiveness of international law in the relations between states, due to the absence of a legislature and judicial and executive enforcement institutions.⁶⁷ This absence of centralised authorities that can impose order on states, explain why states rely on power. An early realist, E.H. Carr, also pointed to what he considered the political foundations and nature of international law, viewing all disputes between states as essentially political, as opposed to the view of the well-known international lawyer Lauterpacht who held that all inter-state disputes can in principle be settled by judicial means if the political will exists to do so.⁶⁸ Hans Morgenthau, one of the dominant realist thinkers of the twentieth century, considered international law as based on specific consent by states and "the convergence of national self-interest around specific, deliberately vague and ambiguous treaty provisions."⁶⁹ States consequently comply with international law not because they consider it as an obligation, but because of self-interest.

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Realists therefore believe that although states during the last four centuries have in the most instances scrupulously observed international law, the self-interest factor has the result that international law cannot be considered as an effective instrument to regulate and restrain the struggle for power between states.⁷⁰ Tunkin⁷¹ interprets Morgenthau's approach to mean that diplomacy should not be guided by a "legalistic" approach; to be effective, it should ignore international law and be guided only by the power factor: "The old diplomacy has failed...but so has the new one. The new diplomacy has failed and was bound to fail, for its legalistic tools have no access to political problems to be solved."⁷² A variant of the realist approach is that the characteristic of legal education and of a legalistic way of thinking and approach to problems (analogical reasoning, rigid analysis and methodology, innate conservatism and an insistence upon rules and agreements) are impeding the legal mind from addressing the problems of the international system.⁷³

It follows logically from this state-centric approach that non-state actors in the international system are considered as of secondary importance. Critics of the realist approach to international law point out that this theory cannot explain occasions when powerful states do abide by international law even when such compliance appear to be contrary to their direct interests.⁷⁴ It also does not explain the strong commitment of Third World states to some areas of international law (although it can be argued that their support is based upon a wish to reshape the realist world more in the favour of the weak).

In recent scholarship attempts have been made to create theoretical approaches in which the power element in international relations can more easily cohabit with international law. The view is that at this juncture in history, the powerful states, "are keen to use legal rules and

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institutions to promote their interests," also because of a dispersal of power to the major international institutions.⁷⁵ International lawyers should, according to this approach, not be adverse to reconcile their discipline with the realities of the power element in international politics. Byers⁷⁶ postulates in this regard that, while international lawyers should take account of the impact of "non-legal power" such as military, economic and moral power, on international law and its rules, these rules still have an independent power source in the sense that international rules and obligations do influence states considerably in defining and promoting their interests.

2.2.2 Institutionalism

Institutionalism, like realism, considers the state as the primary actor in international relations and holds that, in the absence of institutions that can assert a moderating influence, states are engaged in the pursuit of power. However, in many areas the interests of states are not in conflict and international institutions, defined broadly to include international legal rules and doctrines as well as formal international organizations, can modify anarchy sufficiently to allow them to co-operate to achieve common interests. Where state interests do not converge, power politics will continue to regulate inter-state relations.⁷⁷

Institutionalists have further re-conceptualised the field of international institutions as one of international regimes, which can be defined as "sets of principles, norms, rules, and decision-making procedures around which actor expectations converge in a particular area."⁷⁸ Keohane considered that international regimes "... enhance the likelihood of cooperation by reducing the cost of making transactions that are consistent with the principles of the regime. They create the conditions for orderly

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multilateral negotiations, legitimise and de-legitimise different types of state action, and further facilitate linkages among issues within regimes and between regimes. They increase symmetry and improve the quality of information that governments receive."⁷⁹ Regimes also increase the likelihood of compliance by states with international agreements by reducing the incentives to cheat, establish legitimate standards of behaviour and facilitate the monitoring of implementation.⁸⁰

Both Byers and Slaughter conclude that as far as institutionalism creates a framework for the development of rules, norms and principles aimed at enhancing co-operation among states, the theory creates a linkage with international law and in this regard all international lawyers can be considered institutionalists.⁸¹

2.2.3 Liberalism

Liberal theory challenges the traditional state-centric assumptions of realism, institutionalism and international law: it defines the fundamental actors in international relations not as states, but as the members of domestic society in the state: individuals and civil society. The state, through its government, acts as representative of its domestic society in international relations based on the preferences of its domestic society. This notion of interdependence between state and society allows individuals and groups to exert pressure on governments. Power is not considered as the primary motivation for state action or for conflict among states. Rather, conflict results from differences between the interests of states resulting from the distribution of preferences in societies.⁸²

This non-state-centric approach allows liberalism to provide for the

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increasing influence of civil society on the foreign policy orientations of democratic states, and hence on the shaping and direction of international law in a globalised world. However, it is applicable to only the liberal democratic state while international law is a universal system of law that operates between all states in international society, irrespective of their domestic political orientation.⁸³

2.2.4 Constructivism

Barker⁸⁴ argues that constructivism may be the theory to which international lawyers most closely relate. Constructivism shares realism's central beliefs that states are the primary actors in the international system, that they behave as unitary actors and that the international system is anarchic and dominated by conflict, ideas with which traditionally minded international lawyers can easily identify. While realists consider the international system to be only composed of what Wendt⁸⁵ described as a distribution of material capabilities like military might and economic, natural and physical resources, constructivism considers that the system is also made of social relationships. An important aspect of the international system as a social system is shared practices, which opens the door for international law to this theoretical consideration. Barker⁸⁶ is of the view that this belief that the international system is also a social system, is pervasive among international lawyers, arguing that Grotius based his philosophy of the existence of natural law on an inherent desire in mankind for society.

Constructivists therefore assign a central role to international law in maintaining international society. Bull⁸⁷ describes a society of states as a situation where a group of states share common interests and values and conceive themselves to be bound by a common set of rules in their

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relations with one another, and international law as providing the basic rules of coexistence to which all states in the global international system have given their formal consent and which then underlies this idea of a society of states. This normative role of international law is aptly described by Hurrel⁸⁸ as “constructive of the structure of the state system itself”. With regard to the approach of states towards compliance with the rules of international law, he makes the following interesting remark: “Being a political system, states will seek to interpret obligations to their own advantage. But being a legal system that is built on the consent of other parties they will be constrained by the necessity of justification of their actions in legal terms”.⁸⁹

2.2.5 Conclusion

The realist paradigm that has dominated international relations theory has, especially since the end of the Cold War, been increasingly questioned by international relations scholars. While realism has subordinated international law to a mere tool of power, the alternative theoretical approaches recognize a distinct role for international law in international relations and, by implication, in diplomacy. In an era of increased interdependence and cooperation between states, these approaches can be helpful in analyzing the relationship between diplomacy and international law, and hence in understanding the role that practitioners of international law play in, and their influence on, the conduct of the diplomacy of the states they serve.

AN OVERVIEW OF THE ROLE OF LAW ADVISERS IN FOREIGN MINISTRIES

3.1 Introduction

It is noteworthy that handbooks on diplomacy and on diplomatic studies pay scant or no attention to the law advisers in foreign ministries. Berridge (Diplomacy: Theory and Practice, 1995), in a chapter on the packaging of international agreements, does not refer to the role of the law advisers in negotiating agreements. Barston (Modern Diplomacy, 1997), in a chapter on foreign ministries and their organisational structures, also makes no reference in this regard, although figures indicating the organization of the foreign ministries of Finland, the United States, the Republic of Korea and the Republic of Lithuania do indicate specific divisions for international legal affairs. In contrast, Feltham (Diplomatic Handbook, 1998) makes specific reference to law advisers in foreign ministries⁹⁰ and includes a chapter on international law and practice. This apparent neglect of the role of the law adviser in diplomacy by the major authors on the subject is not mirrored in the literature on international law: maybe as a result of a nagging doubt about their effectiveness and influence, international lawyers, many in the employ of foreign ministries, are keen to write on this topic and to express their views in the legal literature. Miriam Sapiro, of the Office of the Legal Advisor of the US Department of State, boldly declares: "Lawyers play an essential role in the formulation and execution of foreign policy... lawyers typically work behind the scenes and do not seek the limelight. While the role of the public international lawyer in

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the government is significant, it may, and perhaps should be, largely invisible".⁹¹

Sir Gerald Fitzmaurice, one time law adviser to the British FCO and later a judge of the International Court of Justice (ICJ), in a speech half a century ago, focused on the important place accorded to international law and respect for legal obligations in the UN Charter, implying the legalisation of diplomacy that would result from the institution of the UN and the obligation contained in the Charter on member states to settle disputes peacefully.⁹² Since that time it has become common for foreign ministries to make use of public international lawyers, either employed by the foreign ministry itself or located in another government department, or by using legal academics on a part-time basis.

Within the UN, the Sixth Committee of the General Assembly and the International Law Commission (ILC) are formal institutions for the "progressive development of international law and its codification"⁹³ and serve as focal points for interaction between international lawyers from different states. Networking and liaison also take place in other fora and in less formal environments: the Asian-African Legal Consultative Committee (AALCC), the annual meetings at the UN Headquarters of Advisers and Heads of Offices responsible for International Legal Services of the Ministries of Foreign Affairs of member states of the United Nations and the Council of Europe's Committee of Legal Advisers on Public International Law.⁹⁴ International lawyers are clearly a significant feature of modern diplomacy.

3.2 Historical Overview

It is, however, not a new practice for governments to turn to advisers on international law in their diplomatic dealings. Gentilis, a

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Protestant who fled religious persecution in Italy and became a professor of law at Oxford University, advised the government of Elizabeth I on the matter concerning the Spanish Ambassador Medoza who was alleged to have been involved in a conspiracy to dethrone the queen. His finding that an ambassador cannot be sentenced to death, became one of the cornerstones of the doctrine of the inviolability of diplomats.⁹⁵ In the seventeenth century, Grotius advised both the Dutch East India Company and the provinces of Holland, Zeeland and Friesland on the law regarding free navigation on the high seas. Zouche also advised the government of England on matters of diplomatic law, specifically a case involving a murder committed by the Portuguese ambassador's brother.⁹⁶

There is also evidence that in England doctors in civil law from the universities of Oxford and Cambridge had already been employed by the Crown in the Middle Ages to advise on legal aspects of government, including the negotiation of treaties and the settlement of disputes with other states. In the middle of the sixteenth century, these lawyers were organised into an institution known as "the Doctors Commons" and continued to be consulted by the Crown on matters of international law, which included issues relating to maritime law, the rules of warfare, treaties, piracy, the limits of territorial warfare, state succession and the acquisition of territory.⁹⁷ From their ranks was appointed the King's/Queen's Advocate as a permanent adviser to the Crown on questions of international maritime and ecclesiastical law.⁹⁸ When the Foreign Office (FO) was established as a separate government department in 1782, the King's/Queen's Advocate became its standing law adviser, often being consulted on questions of international law.

However, the King's/Queen's Advocate was not independent in all

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matters: matters were often handled in conjunction with the Attorney-General and the Solicitor-General, the three positions being collectively known as the “Law Officers of the Crown.” This somewhat unusual division of powers, which played a role in the Suez debacle (see Chapter 4 *infra*) has been described by Sir Arthur Watts, a former law adviser to the FCO as follows: “ ...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.”⁹⁹

The office of the King’s Advocate declined in importance, the last holder of the position resigning in 1872. The FO, still requiring specialist advice on international law, appointed a resident full-time adviser on international law in 1886, known as the Legal Adviser of the Foreign Office.¹⁰⁰

The United States Department of State was established in 1789. The Secretaries of State dealt initially with legal work, but the proliferation of work related to international claims resulted in a clerk being appointed in 1848 to deal with claims. The legal work was taken over by the Attorney General upon the establishment of the Department of Justice in 1870. The position of Legal Adviser of the State Department was established by statute in 1931.¹⁰¹

3.3 Legal Advising Systems

Macdonald, in a study of the legal advising systems of ten countries, identified three main types of advising systems: the separate cadre of lawyers (the US, UK and the Netherlands), the lawyer-diplomat

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system (Canada, the Federal Republic of Germany and Japan) and the system of centralized legal services, usually within the ministry of justice or the Attorney-General's Office (Nigeria and Malaysia).¹⁰²

3.3.1 The separate cadre of lawyers

This system where a permanent corps of lawyers is employed in a state's foreign ministry enhances the development of specialized skills, long-term planning and institutional continuity. As a disadvantage in comparison with the lawyer-diplomat system is a possible lack of policy and diplomatic understanding on the side of the lawyer, which may result in an overly "legalistic" approach to policy and diplomacy. It is submitted that prolonged exposure by the professional lawyer to the diplomatic and policy environment of the foreign ministry will, over time, wear off the hard legalistic edges.¹⁰³ Macdonald also points out that this system enhances a "solicitor-client" relationship between the lawyers and the policy-makers, with the lawyer remaining sufficiently independent to be able to provide unbiased counsel.¹⁰⁴

3.3.2 The lawyer-diplomat system

This system provides for the foreign ministry's professional legal officers to serve in diplomatic posts on a rotational basis. Its advantages are that it involves the lawyer in policy decisions and provide intellectual integration between law and diplomacy, which may be of special value in international conference diplomacy where a thorough experience in international law may be very useful to a diplomat acting as negotiator. The disadvantages of the system are that it prevents the formation of a coherent legal team, the development of specialized skills and continuity

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and the development of an institutional memory, factors which in turn turn the advantage of the system of a separate cadre of lawyers.¹⁰⁵

3.3.3 The centralised system

This system is usually found in Third World states where a lack of human and financial resources prevent them from providing the ministry of foreign affairs with specialized advisers on international law.¹⁰⁶ Macdonald lists the advantages of this system as independence, integrity, detachment and lack of bias.¹⁰⁷

However, this is achieved at the expense of involvement in policy and the day-to-day diplomatic dealings. It also precludes the development of specialization in international law, as the government lawyers are required to advise the entire government on all legal matters.

3.4 Functions of Law Advisers in Foreign Ministries

From the available literature, the work of the law adviser in a foreign ministry can be summarized as follows:

3.4.1 Legal advice

The law adviser supplies, on a more or less continuous basis, advice on existing international law as it pertains to a specific issue, problem or situation, in order to provide the policy-makers with the proper legal framework for making policy decisions, so ensuring that such policy decisions are not in conflict with the provisions of international law¹⁰⁸. In this regard, it has been pointed out that advice should be formulated in

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such a way that it will be accepted by policy-makers. Sapiro¹⁰⁹ points out that in practice this will mean that a lawyer, who finds that an envisaged policy objective will be in conflict with international law, should attempt to provide the policy-makers with a legally acceptable alternative, for achieving the objective. This calls for an imaginative approach and a clear understanding of the political and diplomatic framework within which decisions are made.

Legal opinions may be of a formal or informal nature ¹¹⁰ and deal with a wide range of topics: the law of the sea, diplomatic and consular immunities and privileges, international aviation, territorial and jurisdictional issues, the interpretation of treaties, the recognition of states and governments and international regimes like Antarctica.¹¹¹ During the international crisis resulting from Iraq's invasion of Kuwait in 1990, the Legal Adviser to the US Department of State was involved from the beginning in matters such as the drafting of an executive order to impose unilateral US sanctions on Iraq, providing inputs to the US Mission at the UN for the negotiation of UN resolutions laying the legal basis for the subsequent use of armed force against Iraq, analysing the resulting resolutions for their legal effect, the international law violations by Iraq and the applicability of the inherent right of individual and collective self-defence contained in Article 51 of the UN Charter.¹¹² Another important focus point is the relationship between international and domestic law, as conflict between a state's obligations in terms of international law and the provisions of its domestic law should be avoided.¹¹³

Advice may be tendered to the Foreign Minister, or even the head of state, the various divisions of the foreign ministry, other government departments and the Parliament.¹¹⁴ Formal legal advice is done in the

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format of written legal opinions, and advisers are also often called upon to make direct inputs into memoranda or to approve their consistency with international law,¹¹⁵ by which their influence upon policy is considerably enhanced.

Due to the dynamic nature of diplomacy which must often deal with international crises that arise overnight, opinions often have to be given under severe temporal constraints with little time for in-depth research, a factor which adds weight to the argument for well-skilled, professional lawyers.¹¹⁶

The role of counsel does not terminate when a policy decision has been taken. Once a decision has been made, the law adviser is expected to use every reasonable legal argument to justify such decision on behalf of his/her government. It is irrelevant whether the adviser supported the decision or not. Sabel points out that the adviser is morally and professionally bound to defend the policy and, if not willing to do so, is left with no option but to resign.¹¹⁷

This has a direct impact on the debate on whether the law adviser at a foreign ministry should give objective, neutral and independent advice on questions of international law put before her/him, or whether she/he should be considered rather as a policy adviser. The first approach considers the process of providing legal advice as a technical process in which legal rules are impartially analysed, while the second is policy-orientated, considering law as a continuous decision-making process involving decisions between competing norms of international law and selecting the option that will best fit the policy objectives. In making such decisions, the law adviser takes into account factors not contained in the technical legal rules, such as the needs of the international

community and the requirements of national foreign policy.

The disadvantages of the rule-orientated approach are that “the adviser will not appreciate the continuous development of international law, that he will underestimate his own role in that development, that he will not involve himself in the policy decisions of his government that shape international law, and that he will not attempt to judge his governments’ policy against the policy of international law itself, but only against its more concrete rules”.¹¹⁸ The disadvantage of the policy-oriented approach is that law becomes submerged in, and consequently a servant of policy, with law advisers only focusing on the requirements of national foreign policy.¹¹⁹

From a study of the available literature it is clear that law advisers from states with diverse legal and political systems consider their role as that of giving objective, impartial advice on legal questions,¹²⁰ in other words, in their work they clearly draw the line between legal and illegal state actions in terms of international law. The former head of the Legal Bureau of the Foreign Ministry of Ghana summarized this approach as follows:

“The legal adviser’s first responsibility is to tell the Minister and the entire administration candidly and objectively what the law is and what it requires in any given situation. Every lawyer owes this duty to his or her client. In this regard, it must be noted that, unless the Minister and other policy officials are given competent, objective and honest advice as to the legal consequences of proposed actions and decisions, they cannot make informed and intelligent foreign policy judgments or properly balance the national interest involved. Indeed, the success of a decision or policy may depend on its compliance with international law. The legal adviser should, and often does, provide an objective legal analysis together with concrete

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suggestions as to how particular policy objectives can be achieved in a manner that is consistent with international law and with Ghana's obligations and interest".¹²¹

This approach has been strongly evident with regard to the law advisers of the British FCO and it has been said that "In Great Britain there are volumes of opinions of the law officers of the Crown which include numerous instances in which the advice given was that the Government could not take the proposed action...".¹²² It appears that this approach springs from a philosophical view of international law, which has been summarized as follows: " ... it should be viewed as a discipline imposing necessary restraints on the liberty of states to pursue activities which might have adverse and injurious effects on the rights and interests of other states".¹²³

With regard to this approach, it should be pointed out that it is not necessarily easy to provide objective legal advice. International law, nations and individuals are not value-free: "... its concepts and norms are deeply enmeshed in the interest of national states and in the philosophical and political attitudes of diverse social and cultural societies." ¹²⁴ The law adviser is further dependent on very diffused sources. There exists no formalized code of international law and the adviser is dependent upon treaties, decisions of the ICJ and other tribunals, diplomatic correspondence and text books, and must further distinguish between the so-called soft law (the law which in the view of some international lawyers should apply although not yet necessarily accepted as law by the international community) and the other, more clearly crystallized "hard law" principles.¹²⁵ It is consequently often difficult to establish clear rules of international law and to draw strict lines between legal and illegal actions in international law.

These two approaches have a direct bearing on the influence of international law, and consequently governmental law advisers, on a state's diplomacy. With regard to the approach followed in the USA, international law is deemed as a tool to be used in the conduct of diplomacy in order to achieve foreign policy aims; the lawyer is consequently to be considered a tool-maker, somebody who shapes and moulds international law into the form of an effective diplomatic tool. In the case of the tradition prevalent in the United Kingdom (UK) and other states, the law adviser's role in diplomacy resembles that of a referee in a sports game, setting the limits to lawful actions and warning against the possible consequences of diplomacy and foreign policy being clearly conducted outside the limits of legality.

3.4.2 Drafting and ratification of treaties

Treaties are international legal instruments capturing on paper agreement reached in negotiations between states. It therefore stands to reason that law advisors should be involved in the different stages of treaty making. Over the last decades the range of issues addressed by treaties has increased enormously, especially in the multilateral field. Although model texts are often used for treaties in certain fields (like avoidance of double taxation, protection of investments, air services and extradition) and these treaties are as a result of their technical nature usually the responsibility of other line function departments to negotiate and implement, the literature suggests that the foreign ministry law advisers always become involved at some stage during the treaty-making process.¹²⁶

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In the case of non-standard treaties, law advisers may be involved right from the start in drafting the initial negotiating text. In the practice of diplomacy by negotiation, negotiation texts have a strong influence in shaping perceptions during an international meeting; in the present writer's own experience the drafter of text during negotiations has a strong, although almost invisible, influence on the eventual outcome. During such negotiations it is often left to law advisers to interpret decisions and the consensus reached, and to commit such understandings to paper.¹²⁷

The law adviser is also responsible for ensuring the legal-technical accuracy of the text of a treaty and to ensure that it conforms to the general rules of international law¹²⁸ and that it does not violate the domestic law of her/his state.¹²⁹ Depending on the relevant provisions of domestic law, the law adviser may also be involved in the ratification of treaties, both in the process of approval of treaties in terms of the state's domestic law as well as in the drafting of instruments of ratification.¹³⁰

Berridge,¹³¹ in a chapter titled "Packaging Agreements", points out that the format into which agreements reached during international negotiations are cast, is of major importance (without making reference to the role that foreign ministry law advisers may fulfill in this regard.) He argues that the format (packaging) of agreements resulting from negotiations are influenced by four factors: whether the parties wish to create international legal obligations or not, whether they want to signal the importance of the agreement or rather disguise its effects, the fact that some formats are more convenient to use than others, involving fewer cumbersome and time-consuming procedures, as well as "face-saving": the fact that parties to negotiations often wish to disguise

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considerable concessions made. It stands to reason that the technical/legal knowledge and drafting skills of law advisers will be virtually indispensable in the process of giving effect to these policy considerations when the understandings reached during negotiations are captured on paper.

With regard to the first factor, namely the question as to whether legal obligations should be created, it has in recent years often happened that states wish to reach consensus on certain norms and principles to guide and influence state conduct, but without capturing such understandings in a legally binding document. On such occasions, of which the most recent example is the *Kimberley Process Document on the Essential Elements of an International Scheme of Certification for Rough Diamonds With a View to Breaking the Link Between Armed Conflict and the Trade in Rough Diamonds*, a new dimension is added to the role of the law adviser: to scrupulously ensure that the instrument does not contain any language that may imply commitments that are binding in terms of international law.¹³² An adviser on international law of the South African Department of Foreign Affairs was consequently a member of the secretariat of the Kimberley Process during the negotiation process.

The Kimberley Process also provides an example of the face-saving factor. The definition of "Participants" in the Kimberley Process Document provides for only states and international organisations to participate in the certification scheme for rough diamonds, and not for a non-state diamond trading entity like Taiwan. The ongoing negotiations by the Chair of the Kimberley Process, South Africa, with the People's Republic of China and Taiwan to find a formula for Taiwan's implementation of the certification scheme without involving it as a

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Participant (and hence extending recognition of statehood), is fraught with the danger of either side “losing face”. The involvement of the designated law adviser in the negotiations and in capturing their essence on paper, was necessitated by the legal questions regarding statehood and the recognition thereof.

With regard to the factor of convenience identified by Berridge, it is submitted that foreign ministry law advisers will be in the best position to advise on how to formulate and structure agreements in order to ensure their entry into force and implementation with the minimum procedures required. In the South African case, law advisers of the Department of Foreign Affairs are often approached for advice to ensure that agreements are structured as “technical, administrative or executive”, as these categories of international agreements do not require Parliament’s approval for their conclusion by the executive.¹³³

3.4.3 Participation in international negotiations

The participation by law advisors in international negotiations as drafters of text and the central position accorded to negotiation in the definition of diplomacy has already been referred to. In this regard reference should be made to the approach of analysing the negotiation function of diplomacy in terms of the drafting of a text, which requires the skills of composition, persuasion and interpretation¹³⁴ (all of them skills that are developed and honed during the course of legal training and practice). However, law advisers are often involved as negotiators or even leaders of delegations when the negotiations involve legal issues. Today much international conference work involves complicated legal issues, the regimes regulating the oceans, human rights and arms control and reduction being cases in point. This form of international

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interaction has immensely increased since the establishment of the UN and its Specialised Agencies, adding considerably to the workload and responsibilities of foreign ministry law advisers.¹³⁵

The propensity for new issues to be raised on the international scene, often driven by non-governmental organizations,¹³⁶ ensures that the international conference diary remains full. It can safely be concluded that law advisers play an important, and sometimes dominant, role when legal issues dominate negotiations. The negotiations for the *Protocol on an African Court on Human and Peoples' Rights to the African Charter on Human and Peoples' Rights* that took place in Addis Ababa in 1998 were completely dominated by the law advisers of the delegations, as was also the case with the negotiations on the establishment of an International Criminal Court.

3.4.4 Litigation

Depending on the legal system pertaining in a state, foreign ministry law advisers may be called upon to represent their state in litigation before national courts involving issues pertaining to international law, or to represent their states before international judicial tribunals where inter-state disputes are heard.¹³⁷ In recent years a proliferation of international courts and tribunals has taken place, while the workload of the principal international judicial institution, the International Court of Justice, has considerably increased, especially with regard to boundary disputes between states.

International practice shows that in cases of international judicial proceedings, law advisers of foreign ministries are involved in the

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preparation of cases and in many instances also plead a case on behalf of the government. In the case regarding NATO's use of force against the Federal Republic of Yugoslavia (See Chapter 4 *infra*), all the governments involved have nominated foreign ministry law advisers on their legal teams.

With regard to litigation between private parties, foreign ministries of states with legal systems derived from or influenced by English law are often required by the courts to provide a certificate with regard to certain facts considered to be within the knowledge of the foreign ministry. This certificate, in South Africa called the "executive certificate,"¹³⁸ usually deals with aspects such as the recognition by the state in question of a foreign state or government, the commencement or termination of a state of war with another state and whether a particular person is entitled to diplomatic status.¹³⁹ In the British and South African practice, and probably also in many other states, such certificates are drawn up and certified by the law advisers of the FCO and the Department of Foreign Affairs.

3.5 Conclusion: The Influence of Law Advisers on Diplomacy

The exact scope and nature of the influence of advisers on international law on the diplomacy of their states will differ from state to state and will be largely dependent on external factors. A number of factors will play a role in this regard.

Bilder¹⁴⁰ postulates that this influence is most direct in matters with a clear and substantial legal content while also pointing out that, in the

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case of the US State Department, few major decisions do not have a legal content of some or other nature. The continuing increase in the breadth and depth of international law that requires specialist skills of interpretation and understanding must also play a role in enhancing the status and role of the law adviser. The personal prestige of the law adviser, based on professional skills, knowledge of the subject matter and soundness of judgment, as well as the relationship between the law adviser and decision-makers, have also been identified as factors that enhance the law adviser's influence.¹⁴¹

The system within which a law adviser operates, as well as the way the person interprets her/his role, must also be taken into account. Where the law adviser is expected to play a direct role in the policy formulation process, a more direct impact will be felt than where her/his role is to advise on the boundaries of legality. However, as international law in many instances often provides more grey areas than black boundary lines, the individual's interpretation of the state of the law in a specific case may still be of considerable importance.

The role of the law adviser in committing international agreements and understandings into written and permanent form has already been referred to. It takes considerable and specialized skills to draft text in a way that satisfies all sides involved. Though drafting skills are not unique to lawyers, these skills are enhanced by legal training and thinking. Despite his misgivings with regard to the suitability of lawyers for diplomacy, Sir Harold Nicolson placed great value on drafting skills in diplomacy: "Diplomacy is not the art of amicable conversation, but the technique of exchanging documents in ratifiable form; an agreement which is committed to writing is likely to prove more dependable in future than any agreement which rest upon the variable interpretation

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of spoken assent.”¹⁴² The approach of considering the negotiation function of diplomacy as the drafting of an agreed text, adds emphasis to this function of law advisers. The durability of treaties, some remaining in force for hundreds of years, adds weight to the importance of proper drafting.¹⁴³

It has also been pointed out that, in the absence of a central legislature, international law is primarily developed through state practice, of which the main manifestation is the advice given to governments by their law advisers, whether or not acted upon by states.¹⁴⁴ Also, in cases where the law advisers form a permanent corps in the foreign ministry, they form the institutional memory in an environment where officials in the geographical and functional divisions constantly move between the head office and missions abroad, an important consideration if taken into account that international problems and disputes often have a considerable lifespan.¹⁴⁵

Literature and practical experience suggest that while law advisers seldom initiate policy, the influence of the law adviser will be enhanced by the her/his early inclusion in the policy-formulation process as more opportunities will arise to ensure that principles of international law are taken into account in the process of policy-formulation.¹⁴⁶ Macdonald quotes Dr Henry Kissinger, National Security Adviser and Secretary of State in the Nixon Administration as saying that in practice it is very difficult to change a policy once it has been adopted by the decision-making apparatus.¹⁴⁷

While all these factors enhance the law adviser’s influence it should be borne in mind that decision-making is influenced by an array of factors: a senior diplomat or foreign minister will be influenced by political

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(internal and external) factors, economic, social and security considerations as well as bureaucratic influences and personal preferences. In a democracy public opinion, the media and lobby and interest groups will play a role in decision-making. "In the cacophony crescendo of such a chorus, the legal adviser's voice can very easily get lost".¹⁴⁸ However, if one takes the view that governments, where possible, prefer to stay within the boundaries of international law in executing diplomacy, one can safely conclude that the views of law advisers will at least, in most cases, be sought by the decision-makers as part of the decision-making process, though such views may be drowned by other considerations.¹⁴⁹

CASE STUDIES OF THE ROLE OF LAW ADVISERS IN DIPLOMACY: SUEZ (1956) AND KOSOVO (1999)

4.1 Introduction

The secretive way in which governments go about diplomacy, even in modern times, makes it difficult to assess the impact that law advisers have on the formulation of foreign policy and diplomatic decisions and hence to explore the propositions that have been formulated for the purposes of this study. Government papers often remain classified for long periods of time, denying researchers insight into the workings of government machinery. However, two case studies regarding the serious matter of the use of force in international relations, the Suez crisis of 1956 and the NATO attack on the Federal Republic of Yugoslavia in 1999, reveal something of the role of foreign ministry law advisers in diplomatic decision-making.

The case study as a research tool is an ill-defined concept. One approach to definition is to merely define a case study in terms of the choice of a specific object to be studied. It is therefore defined by an interest in individual cases, attempting to draw lessons from specific, single cases. The topic of study may vary widely, and topics that have been studied include decisions, individuals, organizations, programmes, revolutions and international crises like the Cuban missile crisis.¹⁵⁰

Diplomatic case studies, although focused on a specific event, may also have wider relevance: George¹⁵¹ argues that the systematic

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examination of historical experience can contribute to the development of policy relevant theory: “theory to absorb the ‘lessons’ of a variety of historical cases within a single comprehensive analytical framework.”

The same study may contain more than a single case, which will give the study a multiple-case design.¹⁵² Three case studies will be explored in this study, therefore providing a multiple-case design. The case studies regarding Suez and Kosovo both represent crisis case studies as military force was employed in both cases to address domestic events that had international repercussions. The Suez case study is of an historical nature, being posited at the outset of the Cold War in 1956 and at a time when new UN Charter-based rules on the legality of the use of force were crystallizing in international law. The Kosovo study is of a contemporary nature, taking place after the end of the Cold War at a time when international developments resulted in a re-examination of the rules and norms relating to the use of force emanating from the UN Charter. The case study on the Office of the Chief State Law Adviser (International Law) at the South African Department of Foreign Affairs will explore its historical antecedents, its history as well as its present contribution to South African diplomacy, and will hence be of both an historical and contemporary nature.

The aim of research in these case studies is to be able to explore the three propositions that have been formulated in order to understand the role and influence of advisers on international law in the formulation and execution of the diplomacy of modern states. As the three cases are being linked by this aim, they can also be considered to constitute a collective case study.¹⁵³

Suez and Kosovo were chosen because these two crises involved the

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rules and norms of international law relating to the use of force, and place the involvement of advisers on international law in the foreign ministries involved in the diplomatic processes into sharp focus. The two case studies also highlight the relationship between diplomacy and the use of force, linking them to present developments with regard to the contemporary international crisis regarding Iraq. While much has been written on both these crises, Suez has been analysed from historical, military-tactical, decision-making and domestic policy perspectives, while the role of the international lawyers of the Foreign and Commonwealth Office during the crisis recently enjoyed attention.¹⁵⁴ The Suez crisis provides valuable insights as the government documentation has been declassified and thoroughly studied by researchers, which research forms the basis of this study.

The Kosovo crisis has also been analysed from historical, military-tactical and international law perspectives, but a study of the role that law advisers in the foreign ministries of NATO states have played, has not yet been undertaken. Official sources on the Kosovo crisis remain to a large extent classified, but some conclusions can be drawn from open sources, while the NATO attack is also the subject of present proceedings before the ICJ. Both the Suez and Kosovo cases will be analysed from a United Kingdom perspective, as a result of the accessibility of sources.

The case study of the Office of the Chief State Law Adviser (International Law) at the South African Department of Foreign Affairs will focus attention on the role of and influence in South African diplomacy of the law advisers of this Office. In this way it will provide a focus on how South Africa's diplomatic orientation has, due to historical reasons, undergone a dramatic re-orientation in recent years. While

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studies of the law advisers in the foreign ministries of a number of developed and developing states have been done, no such study has yet been done with regard to South Africa. The available literature will be used to describe the history of the Office, while primary sources (including legal opinions) will be employed to analyse its composition, organization and functions.

4.2 The Suez Crisis of 1956

The unit of analysis of this case study is the Suez crisis within the temporal boundaries of 1956, placed within the context of post-Second World War international developments.

The United Kingdom occupied Egypt in 1882, mainly in order to secure the strategically important Suez Canal. Nominal independence was bestowed upon Egypt in 1922, but the UK remained in effective control of the country.

The Suez Canal, running between the Mediterranean and Red Seas, was opened to navigation in 1869. It was built and operated by a commercial entity, *La Compagnie Universelle du Canal Maritime de Suez* that had its seat of operation in Alexandria, but which was incorporated in Paris. The Company was granted two concessions, in 1845 and 1856 respectively, by the Turkish Viceroy of Egypt (Egypt being under Turkish sovereignty at the time) to build and operate the Canal. An agreement between the Company and the Viceroy of 1866 stipulated that the concessions would be terminated 99 years after the opening of the Canal.¹⁵⁵ The Convention of Constantinople of 1888, to which the governments of the major powers of the day, including the UK and France, were party, provided that the Canal "shall always be

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free and open, in time of war as in time of peace, to every vessel of commerce and of war, without distinction of flag".¹⁵⁶ A bilateral Anglo-Egyptian agreement of 1954, regulating the conditions of stay of British forces stationed in Egypt, made reference to the freedom of navigation clause of the Constantinople Convention.¹⁵⁷

The pro-British government of King Farouk was overthrown in 1952 by the Arab nationalist Colonel Gamal Abdul Nasser, who was determined to establish Egyptian independence from foreign domination and to advance the wider cause of Arab nationalism.¹⁵⁸ On 26 July 1956 President Nasser proclaimed Law No. 285, nationalising the company and providing for compensation to be paid to the holders of shares and bonds in the Company. The operation of the Canal was placed under an independent body, and all indications were that Nasser did not intend to interfere with the free flow of international traffic through the Canal.

The UK was at the time busy constructing a series of alliances with the newly independent states of the Middle East in order to establish a barrier against Soviet influence and to protect its interests in the region, where it was, together with France, the dominant power since the end of the First World War.¹⁵⁹ It perceived Arab nationalism in general and the nationalisation of the Canal in particular as direct threats to its security interests in the region, particularly to the uninterrupted supply of oil from the Middle East and to the preservation of its empire and status as an international power.¹⁶⁰ It was further concerned about the growing influence of the Soviet Union in the region.

The British Prime Minister, Sir Anthony Eden, in analysing the situation, drew parallels with the situation prevailing in Europe two decades before, and drew somewhat simplistic analogies between Hitler's and

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Mussolini's actions in Europe in the 1930's and those of Nasser. He judged that any appeasement of Nasser would open the door to a strategy by the latter to expel all Western interests and influence from Arab countries and to replace them with Soviet influence.¹⁶¹ This equation effectively precluded a diplomatic solution to the crisis.¹⁶² A crucial element of Suez was the fact that despite the close alliance between the UK and the USA, the UK's interests did not coincide with American interests in the Middle East. Although also concerned with the containment of communism, the USA's indigenous oil supplies made it much less dependent upon supply from the Gulf through Suez, while it also suspected that the UK's actions with regard to the Suez crisis were motivated by imperial ambitions.¹⁶³

The USA, fearing that open conflict with Nasser would irrevocably drive him into the Soviet camp, wished to rehabilitate Nasser, mainly through economic inducements like financial aid.¹⁶⁴ While Britain and its allies wished for war, the US steadfastly sought a diplomatic solution. It went to such lengths as to block the UK's request for IMF funds to shore up a falling national currency¹⁶⁵ and co-operating with the Soviet Union on the matter in the UN, resulting in UK-US relations reaching an all-time low. Another factor influencing British policy was the perception that Israel, for its own reasons, was planning to invade either Jordan, the UK's principal ally in the Middle East, or Egypt. Faced with a limited range of options, a UK-French-Israeli coalition against Egypt appeared the most sensible option.¹⁶⁶

Apart from strategic, oil and imperialistic motivations that to a large extent co-incided with that of the UK, France had another immediate concern about developments in Egypt under Nasser: it was enmeshed in an escalating and bloody revolution in Algeria that was openly

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supported by the propaganda of Egyptian state institutions. The French believed that, apart from mere propaganda, Egypt actually led and directed the revolt.¹⁶⁷ Consequently the UK and France had two principal aims: stemming the tide of Egyptian nationalism by toppling the Nasser regime and securing control over the Canal: aims which could only be achieved by war.¹⁶⁸ Israel, the only aggressor state that could claim a successful outcome of the military intervention, became involved for its own reasons. Its wished to extend its western border into Sinai with three aims in mind: to gain the strategic depth to prevent terrorist attacks launched from the Gaza territory of Egypt, to obtain an outlet to the Gulf of Aqaba and to prevent Egyptian interference with Israeli shipping in the Suez Canal.¹⁶⁹

By October 1956 the die was cast: during a secret meeting between UK, Israeli and French politicians and senior officials held on 22 October at Sevres outside Paris, a joint military strategy was decided upon which was captured in a treaty, the Protocol of Sevres. The first step would be for Israel to invade Egypt on 29 October and threaten the Canal with a major offensive (although it had very little strategic interest in the Canal). The next day the UK and France would demand an Israeli/Egyptian cease-fire and a withdrawal of their forces to ten miles either side of the Canal. Upon the expected rejection of this demand by Egypt, a joint UK-French attack would be made on Egypt with the aim of occupying key positions on the Canal, ostensibly to ensure freedom of navigation.¹⁷⁰

Despite international attempts to find a peaceful solution, the plan went ahead, with Israel launching her attack on the afternoon of 29 October. Security Council action was blocked because of the French and British vetoes. Egypt responded as expected, playing into UK and French

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hands by scuttling ships in the Canal, so cutting off international oil supplies. The UK and France launched air and naval operations against Egypt on 31 October from the UK's bases on Malta and Cyprus, following up these operations with the landing of troops in Port Said on 5 November.

In the UN the ball was passed to the General Assembly. On 2 November it convened an emergency session under the Uniting for Peace procedure and called for an immediate cease-fire, withdrawal of all forces behind armistice lines and the establishment of a UN emergency force.

The strong American objections to British and French actions, a dramatic fall in the value of the sterling as a result of the crisis and the general international opposition forced the UK and France to accept a cease-fire by 6 November, which went into operation at midnight on 6/7 November.¹⁷¹ While Israel achieved its essential goals, the Suez operation ended for Britain and France in a military and diplomatic fiasco. They were unable to topple Nasser and bring the Canal under international control. For the UK, instead of enhancing its power and prestige in the Middle East, it meant humiliation and acknowledgement that its days as a major power in the Middle East was finally over, as was the time that force could be used in support of diplomatic policy.

While some of the UK's diplomatic antennas, notably its permanent representative at the UN, registered the change in international climate, the political leadership was out of touch and did not heed the warnings. The UK's political leadership failed to understand the changing post-war diplomatic environment it was operating in, especially the role of the UN and the new dimensions the Charter added to the international law with

regard to the use of force.

Rothwell¹⁷² aptly summarises Eden's approach to the legal basis for the use of force against Egypt as: "... a somewhat cavalier attitude towards the rule of law and a determination to ensure that legal did not override political considerations in the crisis." From the start of the crisis it was the view of the British Cabinet that the use of armed force against Egypt would be a legitimate measure.¹⁷³ Eden also restricted legal arguments to the minimum in his contact with President Eisenhower, whom he knew favoured a resolution of the matter by the ICJ.¹⁷⁴ The Lord Chancellor, Viscount Kilmuir, a political appointee equating that of Minister of Justice in other political systems, supported Eden in this view. Kilmuir applied Article 51 of the UN Charter providing for the use of force in self-defence,¹⁷⁵ though as a last resort, to the situation in Egypt.

The professionals, however, did not agree. The chief law adviser of the FO at the time, Sir Gerald Fitzmaurice, had been employed by the FO since 1929. He was given the task of searching for a legal justification for the use of force. Fitzmaurice developed his arguments over a number of months in a series of opinions and memoranda. Already at the outset he argued that although Egypt breached its obligations contained in the 1888 Convention and despite the fact that the nationalisation of a company of international character constituted a breach of international law, those Egyptian actions *per se* did not justify the use of force.¹⁷⁶ Having considered the possible application of the doctrine of necessity on the case and finding it wanting, he then refined his arguments and based his view on the prohibition of the use of force contained in Art 2(4) of the UN Charter: "All members shall refrain from the threat or use of force against the territorial integrity or political

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independence of any state." He pointed out the following: "Very few people in this country realise the immense change that has taken place in the climate of world opinion on the question of the use of force, especially that particular use of it that takes the form of what might be called 'gun-boat diplomacy'. Justifications that would have been accepted without question fifty or even twenty-five years ago would now be completely rejected".¹⁷⁷ He concluded that an attack on Egypt could not be justified on the basis of self-defence in terms of Article 51 of the Charter, as Egyptian actions against the Company, which was not a UK company, was in essence an internal affair which did not involve any attack by one state on another. Nasser's actions consequently did not constitute the use of force in terms of Charter law.¹⁷⁸

Two other senior law officers, the Attorney-General and the Solicitor-General, the Law Officers of the Crown (and who it will be recalled have the final say pertaining to international law matters) supported Fitzmaurice's views. When their views were communicated to the Lord Chancellor, the latter wrote back disagreeing with them and offering his own interpretation of the doctrine of self-defence so as to justify the use of force against Egypt.¹⁷⁹ An exchange of memoranda between Fitzmaurice and the Law Officers of the Crown on the one hand, and the Lord Chancellor on the other, followed, with the latter refusing to accept their opinions, being clearly out of touch with the impact that the UN Charter had on the law relating to the use of force.

Despite these objections, the decision-making process steamed ahead, the Lord Chancellor offering a memorandum with his interpretation of the right to self-defence, which justified the attack on Egypt to the Cabinet on 29 October.¹⁸⁰ Eden's disdain for the opinion of a highly-esteemed public servant and noted expert on international law is clear

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from his reaction when a junior Foreign Office Minister suggested to him that Fitzmaurice should at least also be consulted on the question of the use of force. Eden is said to have reacted as follows: "Fitz is the last person I want consulted. The lawyers are always against our doing anything ... keep them out of it. This is a political affair."¹⁸¹

The Foreign Secretary, Selwyn Lloyd, offered the Lord Chancellor's interpretation of the right to self-defence to the House of Lords on 1 November. It was based on a right of emergency action to protect the UK's interests and nationals. This doctrine lies at the root of the right to humanitarian intervention, which has been resurrected in the wake of the Kosovo intervention and which was often used in the nineteenth century as a pretext for armed intervention. The FO, contrary to the opinion of its own legal adviser, sent a telegram to its missions in the Middle East advising them that, according to the 'highest legal authority', the UK had a right in terms of the Charter to use force in order to protect its nationals and interests. This action gives the clearest indication that political considerations have overruled sound legal advice in the decision-making process, which was subsequently acknowledged: the secretary to the Cabinet, in reply to letters of protest to Eden and the Law Officers, wrote on 15 November that the Government's decision was taken on policy grounds, and not on the basis of law.¹⁸²

The soundness of Fitzmaurice's advice was borne out by subsequent events: the Suez intervention ended as both a diplomatic and military disaster for the UK. The policy makers failed to recognise that after the Second World War and the advent of the UN, the international diplomatic and legal environment has changed beyond recognition, especially for a former world power that was inexorably on the decline.

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The Suez crisis further illustrated the uneasy relationship that sometimes exists between policy makers and the lawyers in foreign ministries, when international law does not fit neatly into the designs of policy makers.

4.3 The NATO Attack on Kosovo of 1999

In two major subsequent conflicts, which directly involved the UK, the Falklands War of 1981 and the Gulf War of 1990/91, the UK was on *terra firma* as far as the legality of the use of force was concerned. However, the shifting sands of time also cracked the firm foundations of the international law regarding the use of force, and by 1999 the UK, now as part of NATO, again faced complicated legal issues with regard to the use of force within the context of the unfolding human rights and humanitarian crisis in the Kosovo province of the Federal Republic of Yugoslavia.

The unit of analysis of this case study is the intensive aerial bombardment campaign launched by NATO against the Federal Republic of Yugoslavia between March and June 1999, but it will be placed within the context of the disintegration of the Socialist Federal Republic of Yugoslavia that directly resulted from the end of the Cold War, as well as within the context of subsequent armed interventions and new perspectives on the legality of the use of force.

The events leading up to this crisis started shortly after the end of the Cold War and the termination of Soviet hegemony over Eastern Europe and the Balkans. The Socialist Federal Republic of Yugoslavia, consisting at the time of six federal republics, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, Serbia and Montenegro, started to

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disintegrate in 1991. A bloody civil war broke out in the federal republic of Bosnia-Herzegovina in 1992, after its Muslim and Croat populations voted for it to become an independent republic, which was unacceptable to its Serbian community.¹⁸³

The war was driven by Serbian nationalism and the ideal to establish a “Greater Serbia”. The campaign to establish a Greater Serbia was led by Slobodan Milosevic, a former head of the Serbian Communist Party, and was to be achieved by incorporating the Serbian minority communities in Bosnia-Herzegovina and Croatia into Serbia, and expulsion of Croats and Muslims, often by means of violent and horrific campaigns of ethnic cleansing, from all Serb-controlled areas.¹⁸⁴

The war only ended in 1996 with the signing of the Dayton Peace Agreement, which paved the way for international recognition of Bosnia-Herzegovina as a new state designated the Federal Republic of Yugoslavia (FRY) under Milosevic’s leadership.¹⁸⁵ In one of the provinces of this new state, Kosovo, about ninety percent of the population was ethnic Albanian, a non-Slav people of the Muslim faith, while the majority population in the rest of the FRY were Serbs, a Slavic people of the Orthodox faith.¹⁸⁶ An organisation aiming at securing independence of Kosovo from the FRY, the Kosovo Liberation Army (KLA), started attacking government targets, which resulted in full-scale violence breaking out in March 1998.¹⁸⁷ While the KLA also committed human rights violations, the FRY/Serbian forces committed atrocities against the civilian ethnic Albanian population of the Kosovo Province on a massive scale, including summary and arbitrary killings, torture, arbitrary arrests and detentions, rape and other forms of sexual violence, and deliberate property destruction and looting. The Organisation for Security and Cooperation in Europe (OSCE) concluded

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that this campaign was highly organised and systematic and amounted to ethnic cleansing and a clear violation of international law principles regarding the protection of human rights.¹⁸⁸

Besides the human rights dimension, a humanitarian disaster unfolded with more than 1.4 million people, more than half of the total Kosovo population of 2.2 million, becoming displaced, both internally and to neighbouring states. These events raised fears for the stability of the whole of southeastern Europe. Diplomatic efforts to resolve the crisis failed,¹⁸⁹ resulting in the launching of air attacks by NATO against the FRY on 24 March 1999. The alleged purpose of this action was to terminate the gross human rights violations and to restore peace and order in Kosovo. After 78 days of bombardment the FRY capitulated and signed a set of agreements providing for the withdrawal of the FRY forces from Kosovo on 10 June 1999.¹⁹⁰

From an international law point of view the NATO states were in an unenviable position: traditional international law as reflected in the UN Charter is based firmly on the principle of upholding the sovereignty and territorial integrity of states. The Charter prohibits the use of force in international relations unless it has been explicitly authorised prior to the action by the UN Security Council upon determining the existence of a threat to the peace, a breach of the peace or an act of aggression in terms of its Chapter VII powers. (The only exception to this rule is based on Article 51, which contains authorisation for individual or collective self-defence).¹⁹¹

The legal limits for international action with regard to the Kosovo crisis were consequently set by a series of Security Council resolutions. The most significant resolutions were 1160 and 1199. Resolution 1160

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prohibited arms sales to the FRY and consequently to all the parties involved, while 1199 condemned the excessive and indiscriminate use of force by the FRY/Serbian forces, demanded an end to these actions, international monitoring, the return of refugees and a negotiated settlement. While acting under Chapter VII of the Charter in adopting the resolution, the SC did not find the actions by the FRY/Serbian forces to constitute a breach of the peace, a threat to the peace or an act of aggression and it did not authorise the use of force against the FRY. It also became clear that a Security Council resolution explicitly authorizing the use of force would not be forthcoming.

However, it can also be argued that states have an obligation to prevent gross human rights abuses and protect individuals and minority groups against their own governments in terms of the development of international human rights law since the Second World War, of which the earliest roots are also contained in Charter law. A conflict of international obligations has consequently developed: the drafters of the UN Charter did not foresee this development of the tentative human rights provisions of the Charter.¹⁹²

NATO's action, whether inspired by considerations of stability or human rights or both, consequently tested the limits of international law. It is interesting that NATO as an organisation did not present a principled legal justification for its action, but justified it as a humanitarian operation, thus providing a moral justification. Justification offered by individual NATO states included wide interpretations of the Charter, especially its human rights provisions, interpretations of resolutions 1160 and 1199 and a view that the attack was not aimed at "undermining the sovereignty", the territorial integrity or political independence of the FRY,¹⁹³ and consequently not in violation of the

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Charter. Subsequently, an intense discussion on the possible legal grounds for the operation took place in journals on international law and other international law fora, the doctrine of humanitarian intervention often being applied in the search for a justification.¹⁹⁴ However, it appears that disagreement among NATO member states on the existence and limits of such a doctrine outside of the UN system coupled with the risk of possible future abuse thereof prevented an official NATO position on humanitarian intervention being formulated.¹⁹⁵

The UK was the only NATO member to expressly support such a doctrine. In a speech by Prime Minister Blair in Chicago on 22 April 1999, he hinted that the FCO lawyers were instructed by the Government to find a legal justification for the action. On at least one occasion it has been suggested that legal advisors in the Foreign Office had strong reservations about the legal basis of the operation.¹⁹⁶ In a number of speeches and answers to questions in Parliament, where the issue was hotly debated, the Foreign Secretary Robin Cook and junior ministers stated that the action was legal: "We have clear legal authority for action to prevent humanitarian catastrophe".¹⁹⁷ This justification was also set out by the UK Permanent Representative to the UN on 24 March 1999. A note¹⁹⁸ that was circulated by the FCO to other NATO member states points out that while a UN Security Council resolution would give a clear legal base for NATO action, force can in the absence of such a resolution also be justified on the grounds of "overwhelming humanitarian necessity", and then setting a number of criteria in this regard. A memorandum titled 'Kosovo: Legal Authority for Military Action', dated 22 January 1999, submitted by the FCO to the House of Commons Select Committee on Foreign Affairs, also contained a reference to "overwhelming humanitarian necessity", but was criticised by one of the members of Parliament as omitting an

explanation for the legal authority of the doctrine.¹⁹⁹

This doctrine of “overwhelming humanitarian necessity” as a justification for the NATO action became the standard reply by Government spokespersons to questions relating to the legality of the action, and was also the basis for the UK’s legal justification offered when the FRY initiated proceedings in the ICJ against ten NATO member states in the fifth week of the NATO campaign, accusing NATO *inter alia* of violating international law with regard to the use of force.²⁰⁰

It is instructive to note that in 1984 the FCO considered that no doctrine of intervention on the grounds of humanitarian necessity existed in international law at that point in time.²⁰¹ Consequently, the FCO law advisers had done a complete about-turn on this issue by 1992. During a briefing by Mr A. Aust, Legal Counsellor of the FCO to the House of Commons Foreign Affairs Committee on 2 December 1992, he acknowledged with regard to the legality of the intervention by the UK and other coalition states to enforce a “no fly” zone in Northern Iraq that it was not specifically mandated by the UN, but that action was taken “in exercise of the customary international law principle of humanitarian intervention.”²⁰² This changed interpretation of international law forms the basis of the position on the legality of the intervention in Kosovo.

4.4 Conclusion

The two case studies provide a number of interesting insights. The Suez case shows that disastrous consequences may result in cases where governments ignore advice on the legality of their actions where such actions clearly violate the norms of international law. This is especially

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true for states with limited military power and international influence, while a state with clear military superiority may still be able to defy the norms of international law.²⁰³ Weaker states not in such a privileged international position should therefore tread carefully with regard to their obligations in terms of international law.

Secondly, it is clear that the UK government in the Suez and Kosovo cases was at pains to justify its actions on a legal basis (as was also the case with regard to the enforcement of the no-fly zones in Iraq). The arguments advanced by the law advisers of the FCO to the effect that both the NATO action against Kosovo and the enforcement of the no-fly zones in Iraq are justifiable on the purported existence of a customary right of humanitarian intervention, shows how law advisers can support a state's diplomacy in cases where grey areas exist in international law. The vigorous debates in Parliament on the legality of the NATO action against Kosovo and the indications that the Government, especially the Foreign Secretary and the Permanent Representative to the United Nations, relied heavily on the FCO law advisers to provide a legal basis for the NATO intervention, provide evidence of the influence that foreign ministry lawyers may have on the diplomacy of a democratic state.

Thirdly, the two case studies illustrate that the role of the FCO law advisers have changed over the almost half a century. At the time of the Suez crisis, the international law regarding the use of armed force was clear: the law adviser in question could take a principled position based on a legalistic interpretation of the Charter, which had the purpose of regulating conflict between sovereign states. After the Cold War, and to an extent as a result of the termination of the bipolar world order, new problems relating to the disintegration of states, state succession, intra-state protection of human rights and cross-border

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humanitarian disasters challenged orthodox doctrines of international law. New doctrines with regard to the use of force, sovereignty and the protection of the individual and groups in international law precludes the foreign ministry law adviser from seeking answers by employing only a legalistic doctrinal approach.

Ironically, these developments also provide the foreign ministry law adviser with a more creative role, made possible by the discourse on new approaches to and interpretations of international law. The doctrine of humanitarian intervention, so carefully constructed by the FCO law advisers in response to the dictates of the UK's foreign policy, will remain controversial for a long time to come, but the mere fact that a discourse on the matter has begun, is challenging the orthodox approach to international law regarding the use of force. However controversial, the justifications for the UK's participation in the NATO attack advanced by the FCO law advisers go some way in justifying the action by providing sound moral reasoning in addition to legal justification.

In this regard, reference can be made to McWinney,²⁰⁴ who, commenting from an American perspective on the action against Kosovo, expresses criticism of the fact that the State Department lawyers were apparently not much involved in the formulation of policies with regard to Kosovo, and then continues: "The first lesson from the Kosovo crisis is to bring the Legal Adviser in, from the beginning, to the crisis planning; and then to make sure that legal counsel is heard at the critical times when the choice between alternative means of crisis solution is being weighed, as to which options can be exercised compatibly with international law and which cannot." He then quotes the State Department's Principal Law Adviser

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at the time of the Cuban missile crisis, who had been involved in the planning and execution of US policy: “The confrontation was not in the courtroom and in a world destructible by man, a legal position was obviously not the sole ingredient of effective action. We were armed, necessarily, with something more than a lawyers’ brief. But though it would not have been enough merely to have the law on our side, it is not irrelevant which side the law is on. The effective deployment of force, the appeal for world support, to say nothing of the ultimate judgment of history, all depend in significant degree on the reality and coherence of the case in law for our action”.

CASE STUDY OF THE OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW) AT THE SOUTH AFRICAN DEPARTMENT OF FOREIGN AFFAIRS

5.1 Introduction

The object of this case study is an organization, the Office of the Chief State Law Adviser (International Law), a unit at chief directorate level at the South African Department of Foreign Affairs. The Office was officially established within the Department of Foreign Affairs in 1972, and the focus on its composition, organization and functions will therefore cover the period from 1972 to the present. However, to properly contextualise this case study, an overview from the time of the first independent states on the territory of what now constitutes the Republic of South Africa will also be given.

5.2 Historical Overview: 1852-1994

The territory of the Republic of South Africa consists of four territories that were combined into one political unit upon unification in 1910. Two of these, the Cape Colony and Natal, were British colonies, while the two former Boer Republics, the Zuid-Afrikaansche Republic (ZAR – South African Republic) and the Orange Free State Republic (OFS Republic), (which became independent in respectively 1852 and 1854) lost their independence upon surrendering to Britain at the end of the Anglo Boer War.²⁰⁵ Of these four territories, only the two Boer republics

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were therefore, before losing independence, in a position to establish diplomatic services. These date back to the middle of the nineteenth century and provide the origins of the South African Department of Foreign Affairs,²⁰⁶ the diplomatic service of the ZAR being the first to be established.²⁰⁷ Of the two diplomatic services, that of the ZAR was the largest, comprising fourteen officials stationed at head office and a number of overseas missions.²⁰⁸ The diplomatic service of the South African Republic did not have a legal division, but issues pertaining to international law had to be dealt with on a regular basis. In this regard a Dutch national recruited by Pres. Kruger to the public service, Dr W. J. Leyds, played a very prominent role. Leyds studied law at the University of Amsterdam, obtaining a doctorate degree. As part of his law studies he did courses in international law under the guidance of one of Europe's greatest contributors to this discipline, Prof T.M.C. Asser. Leyds held the position of State Attorney from 1884 to 1889, serving as both the chief prosecutor and law advisor to the government.²⁰⁹ From 1889 to 1898 he held the position of State Secretary, a post equal to that of Prime Minister, with direct responsibility for the foreign relations²¹⁰ of the ZAR. From 1898 until 1902 he served as special envoy of the ZAR in Europe.

Issues pertaining to international law dealt with by Dr. Leyds related to territory, treaties and the interpretation thereof²¹¹, statehood and the laws and customs of war. A protest by the British Government against a proclamation by the ZAR incorporating part of the territory of Bechuanaland had to be addressed by Leyds by means of an interpretation of the *London Convention* of 1884, entered into between the ZAR and Great Britain, as the British protest related to a provision in that treaty providing that the ZAR would not extend its defined boundaries.²¹² Leyds in turn protested against the British annexation of

St Lucia Bay.²¹³ ZAR legislation regarding the status of aliens and a friendship agreement with the OFS Republic of 1897 again elicited a British protest, both actions being considered as a violation of the terms of the *London Convention*. The British protest specifically referred to the status of the ZAR as a suzerainty of the Britain in terms of that Convention. Leyds addressed this protest by means of an analysis of the relationship between the *London Convention* and the *Pretoria Convention* of 1877.²¹⁴

During his time as envoy in Europe, international law matters with regard to the war continued to remain on Leyds' agenda. It is interesting to note that the ZAR legation in Brussels, where Leyds was based, had a legal adviser on its staff.²¹⁵ From Brussels he addressed regular protest notes to foreign governments regarding alleged violations of the laws and customs of war by the British during the Anglo-Boer War. He claimed violations by the British forces of the *Geneva Convention for the Amelioration of the Conditions of the Wounded in War* of 1864, based on alleged incidents of shooting at ambulances and hospitals. He further alleged violations of the *Hague Convention Respecting the Laws and Customs of War on Land* of 1899, pertaining to the use of dum-dum bullets by the British, the execution of Cape rebels, the demolition of private property and the treatment of civilians.²¹⁶ Leyds also unsuccessfully attempted to refer the dispute between the Boer republics and Britain to the Permanent Court of Arbitration, founded in terms of Article 28 of the 1899 *Hague Convention* establishing the court.²¹⁷ With regard to the alleged violations by Britain of the international rules of land warfare, it is also interesting to note that President Steyn and General Hertzog of the OFS Republic communicated with the governments of the USA and a number of European powers on this matter.²¹⁸

The negotiations that led to the conclusion of the *Treaty of the Peace of Vereeniging* on 31 May 1902 also dealt with issues pertaining to international law. General Jan Smuts, a Cambridge-trained lawyer and State Attorney of the ZAR at the time when war broke out, was recalled from O’Kiep in the Northern Cape Province where his commando was operating at the time, to serve as law adviser to the delegations of the Boer Republics.²¹⁹ The status of the Boer republics in international law was one of the major contentious issues of the negotiations: a decision by the representatives of the two Republics who met at Vereeniging to decide on a mandate for the delegation to the peace talks, formally minuted that in terms of (international) law the two republics had the right to independence²²⁰. Smuts, supported by Herzog in a last ditch effort to save some form of independence, proposed that the two Boer republics should have the status of “protected republics” devoid of independence as regards to foreign relations and with domestic governance under British control, a concept that was described by the British commander Lord Kitchener as “a new kind of international animal.” The proposal was not accepted and the Boer republics lost their independence completely.²²¹

Two British-trained lawyers who did not directly participate in the negotiations, N.J. de Wet, assistant state attorney of the ZAR and L.J. Jacobsz, an Orange Free State judge, also supported the Boer delegations.²²²

The first step by the Union of South Africa on the way to an international personality was taken in 1919 when it signed the Peace Treaty of Versailles, together with the other dominions, though as an associated party.²²³ The Union of South Africa had the status of a self-

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governing British colony²²⁴ and hence no international status. The Union's foreign relations were handled by Britain, "the Foreign Office and the Department of the Union Prime Minister and the Governor-General serving as the channel for South Africa's diplomatic activity".²²⁵ By 1923 Britain agreed that its dominions could have diplomatic representation abroad. A small number of South African representatives were appointed to foreign countries, and they fell under the auspices of the departments of finance, mining and industry.²²⁶ The *Balfour Declaration* of 1926 represented the next step in the development of the Union's international personality as it confirmed the dominions' autonomy. The transfer of sovereignty was effected by a British act, the *Statute of Westminster* of 1931, and the *Status Act* of 1934 incorporated its provisions into South African domestic law.²²⁷

These developments resulted in the establishment of the Department of External Affairs, subsequently known as the Department of Foreign Affairs, on 1 June 1927.²²⁸ It was to function as part of the office of the Prime Minister. The Prime Minister at the time, General J.B.M Hertzog, was personally involved in choosing the head of the new department. Bearing in mind his aim of attaining greater independence from Britain, he had in mind a lawyer who could drive the process of developing South Africa's status in international law. He selected a law professor at the University of Stellenbosch, H.D.J. Bodenstein. According to Geldenhuys²²⁹ an important consideration in selecting Bodenstein to head the Department was his expertise in international and constitutional law. Bodenstein's first years in the Department (he served until 1941) was taken up by the question of the Union's status in international law. As member of a legal committee of the Imperial Conferences of 1929 and 1930 he played an important role in the practical implementation of the *Balfour Declaration* and the

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development of the concept of dominion status and independence within the British Commonwealth. He was also the drafter of the *Status Act*.²³⁰

Despite Bodenstern's expertise in international law, the issues of the day were such that a law adviser was appointed to the Department's relatively small establishment of thirteen officials in 1928. Adv. Toon van den Heever, at that stage governmental law adviser at the Department of Justice, is considered by Geldenhuys as to have been the second most influential official in the Department.²³¹ Van den Heever also attended the Imperial Conferences of 1929 and 1930, where he took a prominent part in discussions on the status of the dominions in the legal committee and took part in the drafting of the *Statute of Westminster*, which these conferences recommended to the British Parliament.²³² He also formed part of the South African delegation to the meeting of the League of Nations in 1930.²³³ In 1931 he became Secretary for Justice and Government Attorney, while retaining his position as law adviser to the Department of External Affairs. In 1932 he attended the Ottawa conference on economic relations within the Commonwealth as the law adviser to the Minister of Finance.²³⁴ He was also responsible for the drafting of the Union's first act relating to diplomatic privileges and immunities.²³⁵ He was appointed as a High Court Judge in South West Africa (Namibia) the next year, eventually becoming a judge of the Appeal Court.

L.C. Steyn, later to become Chief Justice, succeeded Van den Heever as law adviser to the Department of External Affairs. The fusion of the posts of law adviser to the Department of External Affairs and to the Department of Justice that occurred in 1931, appears to have been continued, as Steyn was transferred later in the same year as law adviser to the Department of Justice, and acted between 1946 and 1951

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as law adviser to four South African delegations to the United Nations, while also acting on behalf of South Africa before the ICJ in the question of an advisory opinion on the South West Africa/Namibia issue²³⁶.

It appears that after the initial questions regarding South Africa's status in international law were addressed, the law advisers of the Department of Justice could service the legal requirements of the Department of External Affairs and that the former did not maintain its own law adviser. It is clear from the bound volumes of opinions on international law, dating back to 1948, that the Justice law advisers served this need. This practice continued until 1972, when a law adviser at that Department, Adv. John Viall, was transferred to the Department of Foreign Affairs (as it had then become) as Chief State Law Adviser (International Law). Adv. George Barrie, later Professor in International Law at the Rand Afrikaans University, assisted him.²³⁷

The Office of the Chief State Law Adviser at the Department of Justice has continued in existence and now focuses on South African domestic law. The Office of the Chief State Law Adviser (International Law) at the Department of Foreign Affairs is the definitive source on legal advice on international law to the government, and its "clients" include the Minister and Deputy Minister, the Department, all other government departments, Parliament and, on occasion, the Presidency.

South Africa's relative international isolation before 1994 is also reflected in the role that international legal issues played in its diplomacy. It is notable that the founding of the United Nations and its specialized agencies, the activities of which have a high legal content, are not reflected in the legal opinions tendered to the Government after 1948. The reader of these opinions is struck by the small number of

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opinions requested: all the opinions provided form from 1948-1972 are bound in four volumes, while nowadays one year's opinions fill three to four volumes.²³⁸ Since the establishment of the Office in 1972, it is also interesting to note how its work has mirrored South African diplomacy of the time. Recurrent themes included the experiment to give independence to the so-called Bantustan states, purportedly by implementing the right to self-determination, and relations with those entities.²³⁹ Also high on the agenda were relations with states with which South Africa had active relationships despite its international isolation, notably the Republic of China (Taiwan), Israel and Portugal, as well as boundary issues with neighbouring states, the *Geneva Conventions* on humanitarian law, the question relating to the international status of Walvis Bay, South Africa's participation in the UN General Assembly and the international regimes and multilateral treaties in which South Africa was still participating.²⁴⁰

5.3 Composition, Organisation and Functions of the Office: 1994 - 2003

5.3.1 Composition and Organisation

For organizational purposes, the Office functions as a Chief Directorate in the Multilateral Branch of the Department but serves all divisions of the Department, as well as other "clients" within the Government. The international lawyers in the Office are at present the acting Chief State Law Adviser who is assisted by four other staff members, all of whom hold masters' degrees in international law.²⁴¹

Despite the formal public service seniority system and regulations with regard to supervision applying, the Office has an informal culture. The

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law advisers are therefore expected to deal with issues on an independent basis and are allowed to provide legal opinions and advice without seeking approval from senior members, although informal consultations often take place. The entry point for work emanating from the geographical and functional desks of the Department, or sometimes from other government departments, is the acting Chief State Law Adviser, who then distributes the work. While it is expected that the law advisers must be able to deal with all international law matters, functional specialization is also required as a result of the specialised nature of some issues. Once such an issue has been allocated to a law adviser, it is expected that such person will deal with it continuously until its completion. Important issues dealt with recently have included the establishment of an International Criminal Court, the creation of an international legal regime on international terrorism, the establishment of the African Union and the Kimberley Process on conflict diamonds. Functional fields assigned include international humanitarian law, international environmental law, the Antarctica regime, human rights, international trade law and diplomatic privileges and immunities.

A comprehensive library staffed by two librarians and containing most major source works on international law, supports the Office.

The law advisers in the Office are non-rotational: they can generally expect to serve for a whole civil service career in the Office. Only on two occasions have they been placed at missions abroad²⁴² and movement between the line function and the Office is equally rare. This arrangement, providing for continuity, has the result that law advisers often provide the “institutional memory” in long-running issues as a result of the constant turnover of staff of the political line function.²⁴³ The meticulous records kept by the Office also enhance the

Department's institutional memory.

5.3.2 Functions

The role of the State Law Advisers (International Law) is described as follows:²⁴⁴

5.3.2.1 Rendering written legal opinions in respect of international law to the Department of Foreign Affairs and other government departments

This constitutes the bulk of the Office's work. The impact of the normalization of South Africa's international relations since 1994 is illustrated in the vast increase in the number of opinions delivered. In 1972, the first year of the Office's independent existence, a mere fourteen opinions were written, which rose steadily through the years to where it now amounts to between three and four hundred annually. Compared to the situation before 1994, subjects of opinions now include the whole range of topics in international law: diplomatic immunities and privileges, peacekeeping operations, air services, environmental law, human rights, terrorism, transfrontier conservation regimes, extradition, double taxation, arms control and disarmament, incorporation of international agreements into South African domestic law, issues relating to international organizations (particularly the African Union and the Southern African Development Community), state succession, territory, accession to international agreements and statehood and the recognition of states. The increased focus on multilateralism and transboundary issues that characterized post-1994 South African foreign policy and diplomacy, compared to the state-centric, bilateral focus that preceded it, is therefore being reflected in the Offices' work.²⁴⁵ All international agreements entered into by the

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Republic are subjected to a formal opinion as part of its approval process, and the majority of opinions comment on draft agreements.

5.3.2.2 Participating as members of South African delegations in the capacity of legal advisers in international conferences, meetings and conventions, both in local and international fora.

Macdonald²⁴⁶ pointed out that “international conference diplomacy... is closely connected with modern international law-making”. The opposite is equally true: international law instruments and regimes are developed at international diplomatic conferences and may take years to reach finalisation. For example, the Office has been dealing with the International Criminal Court since the middle 1990s, and its involvement only ended in 2002 with the drafting of the Court’s rules of procedure. While participation in international conferences is mainly focused on the drafting of international instruments, the law advisers also sometimes participate in meetings reviewing the state of international law and aiming at its codification, like that of the UN General Assembly’s Sixth (Legal) Committee and the conferences commemorating the centenary of the 1899 Hague Peace Conference. This objective is closely related to, and overlaps to a large extent, with the next one.

5.3.2.3 Negotiating, drafting and/or reviewing, or making an input in the negotiating, drafting and/or reviewing of international agreements, treaties and conventions - multilateral or bilateral.

As already pointed out, the scrutinizing of international agreements with regard to their consistency with international law and South Africa’s international obligations is now a major part of the Office’s work and

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has increased immensely since 1994. A feature of modern diplomacy is the “technocratisation” of international relations: international issues like aviation, trade and taxation have become so complicated and the frequency of international interaction has become so intense that foreign ministries have lost a large part of their domain to other technical government departments. The large number of international agreements now being entered into by South Africa, the involvement of technical departments as primary negotiators and the routine nature of some bilateral agreements, which are based on standard texts (e.g. aviation (Department of Transport), extradition (Justice) and double taxation (Finance) mean that the law advisers often see the text of an agreement for the first time when a draft has already been negotiated. However, in many bilateral negotiations and especially within multilateral negotiations where little precedent exists, legal issues must be addressed and text developed, which require the involvement of the law advisers in the negotiating and drafting stages. The International Criminal Court, the African Union and international terrorism are good examples of regime-creation based on legal texts and where the law advisers were involved from the start at the request of the relevant functional division of the Department of Foreign Affairs.

Even when non-legal instruments are negotiated, legal advice may be required. In the case of the non-binding *Kimberley Process Document* legal issues were involved: clarity had to be obtained on the possible influence that undertakings regarding the control measures for the trade in rough diamonds may have on the obligations of participating states in terms of the *General Agreement on Tariffs and Trade* and related agreements, while careful drafting was required to ensure that the document is not legally binding, a requirement for participation by a number of diamond-trading states in the Process. With regard to the

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restructuring of South Africa's relations with the Republic of China (Taiwan), the de-recognition of that entity and the government's One China policy implied a new set of parameters in international law to be adhered to by the policy makers, requiring the guidance of the law advisers.

5.3.2.4 Approving and certifying international agreements and supervising the registration, publication and safekeeping thereof.

In terms of South African treaty practice,²⁴⁷ all treaties must be scrutinized for consistency with domestic law by the Office of the Chief State Law Adviser at the Department of Justice and by the law advisers at Foreign Affairs for consistency with international law and South Africa's other international obligations, the point at which a legal opinion is written by the law advisers. The law advisers must also certify the final draft before it is accepted by the Presidency, where approval is given for its signature. The law advisers are also often called upon to draft instruments of ratification or accession.

Once this process is complete, the Office's Treaty Section is responsible for the binding of international agreements before signature by the parties. After an agreement's signature, the Treaty Section is responsible for the safekeeping of the South African copies thereof. At present approximately 2400 agreements are registered with the Treaty Section, which will soon embark on a project to register all international agreements entered into by South Africa since 1974 with the UN Secretary General, as is required by the Charter. (This practice was terminated in 1974 after the rejection of South Africa's credentials by the General Assembly and the suspension of its participation in the deliberations of that body).

5.3.2.5 Legislation

The law advisers are involved in drafting legislation in cases where international obligations have to be incorporated into domestic law or where legislation has an impact on South Africa's foreign relations. Recently inputs were made into drafting process of the *Regulation of Foreign Military Assistance Act* (Act No 15 of 2000), prohibiting mercenaries and controlling the activities of private security companies, the *Commencement of the Implementation of the Rome Statute of the International Criminal Court Act* (Act No. 27 of 2002), the *Immigration Act* (Act No 13 of 2002) and the *National Conventional Arms Control Bill*. The *Diplomatic Immunities and Privileges Act* (Act No.37 of 2001) was recently completely redrafted by the law advisers. The latter Act, as well as two other acts, the *Foreign States Immunities Act* (Act No 87 of 1981) and the *African Renaissance and International Co-operation Fund Act* (Act No 51 of 2000) are administered by the Department, which means that the law advisers are frequently required to advise on the interpretations and application of these Acts.

5.3.2.6 Contributing to the codification and progressive development of international law through inputs to the International Law Commission and other international fora.

This may be considered an objective of a secondary nature, as the constant flow of work and deadlines associated therewith leave little time for the law advisers to reflect on issues pertaining to the development of international law. However, at least once a year the Office is required to review the topics under consideration by the ILC and, if required, draft comments and directives for the South African

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delegation to the meeting of the Sixth (Legal) Committee of the General Assembly. The law advisers also contribute, on a fairly regular basis, articles to international law journals, both domestic and international, on aspects of their work, so contributing to the *corpus* of knowledge of the discipline. The main value of these publications is the reflection it provides of South African state practice with regard to international law.

5.4 The Use of Force and International Law

Since the end of South Africa's participation in the internal conflict in Angola in 1989, the South African National Defence Force (SANDF) has only once been used in an offensive capacity in a neighbouring state. The South African intervention in Lesotho in September 1998, backed by a contingent of the Botswana Defence Force, was aimed at stabilising the internal situation in that country after the non-recognition by opposition parties of the results of a national election. The aim of the intervention was to create an environment for negotiation, as well as to protect South African assets in that state and terminate a mutiny by elements of the Lesotho Defence Force.²⁴⁸ The intervention was undertaken at the request of the Lesotho Prime Minister addressed to the Southern African Development Community (SADC), and although some confusion surrounds the precise Lesotho domestic procedures required for an invitation for foreign intervention, the operation was in essence in line with international law, which considers military intervention in a state by a foreign government on request of that state's government to be legitimate.

Although this may be the reason why legal advice was not sought on the matter, it is more likely that the sensitive nature of the operation, probably until the last minute only known to a few top policy-

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makers, precluded such policy-makers from seeking legal advice. This construction supports the hypothesis that in cases of crisis decision-making, pertaining to matters of sensitive political nature or relating to intelligence or security, governments will be less likely to seek advice on the legal parameters of intended action. It is, however, interesting to note that the South African government was at pains to legitimise the intervention: the SANDF maintained that the intervention was done in terms of a proper SADC mandate for which provision is made in SADC agreements, that all attempts to resolve the dispute by peaceful means had failed and that the intervention was also aimed at protecting South African interests like the Katse Dam.²⁴⁹ The South African government's focus on SADC was intended to provide additional (but in this case unnecessary) legitimacy in international law to the operation.

The government's official policy with regard to participation in international peace missions is that it may provide civilian assistance, armed forces and police for "common international efforts when properly authorised by international and domestic authorities" and in support of the UN, the OAU (as it then was) and SADC.²⁵⁰ While an official policy on forcible humanitarian intervention has not yet been approved, an intra-departmental meeting of the Department of Foreign Affairs held on 6 April 2000 discussed this matter in considerable detail, reaching consensus that any international action in this context must be based on a clear mandate from the UN Security Council. During this meeting the inputs of the law advisers were sought with regard to the traditional legal requirements for the use of force, as well as on the developments with regard to the purported right to humanitarian intervention that was used to justify the NATO intervention in Kosovo.

The traditional approach that intervention may only take place in terms

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of the UN Charter as authorized by the Security Council is also taken in the provisions of the *SADC Protocol on Politics, Defence and Security Co-operation* dealing with to intra-state conflict.²⁵¹ The South African government played a leading role in the negotiation of the Protocol, and a law adviser was involved in all stages of its negotiations. This provides support for the hypothesis that governments, as far as possible, wish to conduct diplomacy within the parameters of international law and justify their diplomacy on the basis of international law.

5.5 Law v Policy: the Independence of the Office

The Office's statement on its objectives provides that legal advice will be given freely and frankly, based on professionalism and expertise. Interviews with the law advisers established that they believe that they do provide legal advice in an independent and objective manner, without policy pressures being brought to bear upon them by the clients with a view to influence their advice in one way or the other. However, they also agree with Watts that while in theory it is easy to postulate a distinction between law and policy, the line in practice is considerably more blurred.²⁵²

The law advisers acknowledge that international law does not exist in abstract and isolation, but is firmly embedded in the reality of the interests of the government. It is felt that most issues dealt with have clear policy implications, and that issues where pure legal interpretation can be applied, are relatively rare. The point of departure for legal advice is considered to be to serve the best interests of the government and legal interpretations will therefore naturally in most cases incline towards finding interpretations that will support its policy aims. On the other hand it is felt that more servility in interpretation will not

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serve the best interest of the government and consequently, in cases where international law clearly prohibits a planned course of action, the role of the law adviser must be to find alternative legal ways to obtain the same result, rather than to sanction illegal policy options.²⁵³

One law adviser emphasized the dynamic relationship between law and policy, which makes it possible for the law advisers to have a definite influence on policy formulation from their defined perspective. Another adviser pointed out that this approach is made possible by the very nature of international law, which is in many respects vague and undefined, and consequently flexible enough to accommodate different interpretations. That it is recognized that law and policy do not function in isolation, is clear from the requirement contained in the official legal advice request form that the policy background and implications of a specific problem be stated.

The aim of the Office is therefore to protect its professional integrity while recognizing that it does not operate in a legal vacuum but within a policy environment. Legal advice must therefore be relevant and practical and must serve operational needs. This pragmatic approach, it is submitted, best serves the needs of the government and also enhances the influence of the law advisers on the formulation of South Africa's foreign policy and the conduct of its diplomacy.

5.6 Conclusion

South Africa has since 1994 undergone a dramatic re-orientation in the focus and substance of its foreign policy and diplomacy. The emphasis placed by the new government on multilateralism and international issues

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has coincided with changes in the international system that calls for greater international co-operation and regime creation.

Many of the issues that the Department of Foreign Affairs, and especially its multilateral and African branches, have had to deal with since 1994 have a strong legal content. The increased work load of the Office, the regular involvement of the law advisers in negotiation teams and delegations, its focus in recent times on issues such as the establishment of the AU, SADC, and peace and security issues in Africa, the establishment of the ICC, and arms control and disarmament, and the close working relationship that developed between the Office and the multilateral and Africa branches, serve to enhance and consolidate the Office's influence on South African diplomacy.

CONCLUSION

It has been attempted in this study to contribute to the interdisciplinary scholarship between the disciplines of International Relations and International Law by analysing the impact that practitioners of international law have on the formulation and conduct of diplomacy. The long historical relationship that exists between International Law and diplomacy, also in the case of South Africa, has been mentioned.

The definitions of diplomacy, all somewhat imprecise, have in common that all in one way or the other link conceptually with international law. Berridge's and Nicolson's definitions within the context of negotiation bring to mind the fact that the study showed that negotiation, especially with regard to capturing agreement in written form, has been found to be one of the principal objectives of foreign ministry advisers on international law. Barston's definition focusing on the role of diplomacy as advising, shaping and implementing foreign policy leads to the conclusion that International Law defines the limits of acceptable diplomatic action, a conclusion directly drawn by Satow. Cohen's definition, informed by diplomacy's function to settle international disputes and crises and to address international problems, also encompasses international law, which provides the institutions and rules for dispute settlement and develops new legal cooperation regimes as required by international society.

It is submitted that the three basic propositions advanced in Chapter 1 *infra* have been adequately addressed by means of the historical

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overview, the case studies and research of the available literature.

The study of the use of force in international relations in different temporal and geographic circumstances lends support to the proposition that states generally wish to conduct foreign relations and diplomacy within the limits of international law, and when in danger of transgressing its norms or moving into grey areas of the law, will attempt to find interpretations of international law justifying their actions.²⁵⁴

It has also been shown that most modern foreign ministries appreciate the contribution that law advisers can make to the formulation and conduct of diplomacy. The case studies, especially on the Suez crisis, also support the second proposition, namely that the influence of law advisers is more profound in cases with a high legal content, but less or absent where policy or security considerations dominate or in the case of crisis decision-making, a conclusion also drawn from the research on the South African military intervention in Lesotho.

It is submitted that it has been demonstrated that, especially in cases where an institutionalised corps of international lawyers exists within the state's diplomatic apparatus, they can have a considerable impact on diplomatic decision-making. This can be best summed up as follows: "It should be remembered, furthermore, in computing the sum of the lawyer's influence, that its true measure is not to be found in the more dramatic occasions, such as constitution-making or legislation drafting, but rather in the cumulative effect of multiple thousands of routine, day-to-day presentations of fact and deliverances of opinion."²⁵⁵

It was thirdly postulated that the law adviser's influence will depend upon the degree to which policy considerations will have an influence on

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legal analysis. It can be concluded that practical experience indicates that international law, by its nature vague and undefined, lends itself to dynamic and resourceful interpretation.

In this regard, it should be pointed out that a state's diplomatic orientation and traditions will impact upon the extent to which a law adviser acts completely independently without compromising advice by policy considerations, or whether desired policy outcomes will influence analysis and advice. It is submitted that the realities of modern diplomacy, the nature of international problems in the post-Cold War world and challenges to orthodox doctrines of international law make it impossible for the law adviser to be totally objective and in a position to ignore policy considerations, as is illustrated by the way in which the role of the FCO law advisers have changed between the time of the Suez and Kosovo crises. On the other hand, the American approach to cater legal advice to suit desired policy outcomes may result in serving policy rather than the law, an outcome which pose inherent dangers to the conduct of diplomacy. Diplomacy is by definition an institution seeking to solve international problems and disputes and to enhance the peaceful conduct of international relations, with international law providing the legal framework. International law can only serve diplomacy in this way if its interpretation is not dominated by policy objectives and considerations. While international law is often vague and undefined and lacking institutions that can authoritatively pronounce on its content and limits, the Suez debacle illustrates the inherent dangers posed to a state's diplomacy by policy-driven advice.²⁵⁶

It is submitted that the pragmatic *via media*, espoused by law advisers of the South African Department of Foreign Affairs, guarding

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independence and objectivity but bearing in mind policy concerns and the limits set by international law to policy actions, will best serve the state's diplomatic interests.

No contemporary study of international relations, international law or diplomacy can be considered complete without reference to the changes being wrought on the international system by the terrorist attacks on the United States of 11 September 2001. Reference has already been made to the fact that the end of the Cold War has resulted in a re-appraisal of the realist paradigm in international relations and of this approach being superseded to a considerable extent by an institutionalist paradigm where the focus is placed on interdependence and the building of international institutions and regimes. (The normative role of international law in constructing and maintaining institutions and regimes provide relevance to the theory of constructivism, and if the impact of civil society in diplomacy and the shaping of international law is taken into account, traces of liberalism can also be discerned). The influence of these changes on the relationship between International Law and International Relations (and by implication diplomacy) and the new possibilities created for International Law to be applied by diplomacy in addressing transnational problems and facilitating international co-operation, have also been referred to.

It is submitted that this process will continue due to its inherent momentum. While the state will remain the central building block of the international system, the process of redistribution of authority and functions to associations of states and sub-national institutions and non-state actors will, as a result of the unstoppable force of globalisation, continue.²⁵⁷ Schreuer²⁵⁸ aptly describes this world as "a multi-layered

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reality consisting of a variety of authoritative structures” and points out that this is a much more complex international system than its bipolar, state-centred predecessor.

Moreover, the transformation of the structure of the international system and the character of the state also challenges international law and many of its fundamental principles like the sovereign equality of states, non-interference, non-use of force and the respect and protection of human rights, principles that often come into conflict with each other since they reflect both realist and post-realist characteristics. Furthermore, the trend of the development of new areas of international attention to be regulated by international law will also continue, the putative rights to self-determination and democracy being cases in point.²⁵⁹ These developments in the international system will require professionalism and expertise for successful management, and enhance the role of the international lawyer within the diplomatic apparatus of the state. The function of the law adviser will to a large extent fall within what Orford called the narrative of “world order, humanitarianism, human dignity and peace and security”.²⁶⁰

However, the events of 11 September will exert a profound influence on the approaches of a number of major powers to foreign policy, diplomacy and international law. The 11 September attacks emphasised one of the characteristics of the international system, namely the impact that non-state actors, in this case terrorist organizations, may have. The response by the United States, however, raises some concerns. Coolsaet,²⁶¹ writing within a paradigm of a new realism, postulated a direct relationship between power and diplomacy: “All analysis of possible developments in tomorrow’s diplomacy has to start from the evaluation of the power factor in international relations”.

The USA's unilateralist response to the attacks re-focused attention on the power paradigm, which was ironically triggered by the action of a non-state actor for which realism did not allow. The USA's military action against Afghanistan following the September 11 attacks was not authorized by a Security Council resolution, and the USA and its allies relied on the right to self-defence to justify its actions against the Al-Qaeda targets in Afghanistan and later the *de facto* but illegitimate Taliban government.

While this action was widely supported by the international community, it does not distract from the inherent problems associated with applying the right of self-defence to actions perpetrated by non-state actors against states, and responses by targeted states aimed not at another state or its government, but non-state elements present within state boundaries.²⁶² The present international controversy surrounding the armed attack by the US/UK coalition against Iraq even in the absence of Security Council authority²⁶³ raises the spectre of a new realist, unilateralist and power-based approach by the only remaining superpower and its close allies, notably the UK. This new strategic doctrine that considers preventative warfare against possible future adversaries (terrorist groups as well as the states harbouring them) will have two consequences: undermining the authority of the UN and the constraints placed on state action by the international rule of law, and enabling powerful states to use terrorism as a pretext for abusing the rules of international law.²⁶⁴ This development, as well as the opportunity the "war on terrorism" creates for states to curtail civil liberties and oppress irredentist movements, minority groups or political dissidents, will have dire consequences for the development of especially international human rights law and may in fact threaten the

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very fabric of international law.²⁶⁵ In fact, developments since the end to the Cold War raise the question on whether the state-centric paradigm of diplomacy and international law is adequate to address the challenges to the international system.

It has been established that law advisers in foreign ministries can make a considerable contribution to a state's diplomacy. The nature of this contribution will depend upon a variety of factors, such as the diplomatic orientation of a state, the international issues it is involved in, future developments in the international system, the organization of the state's bureaucratic system, especially its foreign ministry, the point in time when the law adviser becomes involved in an issue, the domestic political culture of the state concerned and the individual's personal orientation.

While the institutionalist paradigm serves to enhance the law adviser's role, the resurfacing of a neo-realist paradigm and an anti-institutionalist unilateralism by powerful states will reduce the law adviser to a mere servant of power.

The question of how to effectively address the threat of terrorist groups within the present structure of international law as well as how to expand the frontiers of traditional international law in order to ensure the intra-state protection of vulnerable individuals and groups, are the two most serious and immediate challenges facing international law. It is submitted that the answers to these questions are to be found within the ambit of international human rights and international criminal law. Instead of becoming beholden to power interests, the foreign ministry law adviser should explore new discourses and approaches to international law in a quest to find solutions to these problems, so

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ensuring an enhanced role and influence in the diplomacy of modern states. An indication of such an approach is evident in the intense activity at the United Nations surrounding the possible use of force against Iraq, which has a strong focus on legal implications. The hand of lawyers can be seen in every resolution and decision passed, which are in turn again analysed for legal effects by lawyers in the capitals of the world.

The guiding principle for the law adviser should be Tunkin's conclusion, namely that as regards the state's international obligations, international law serves as a limitation to foreign policy and diplomacy, while with regard to its rights, international law serves to support its foreign policy and diplomacy. In this period of uncertainty and change which challenges the traditional foundations of international relations, international law and diplomacy, the following words may also be of guidance to a law adviser faced with conflicting challenges:

"In an age of protean threats to national security, transnational in nature and coupled with insidious weapons of enormous destructive capability, the only way forward is through co-operation, preparedness, vigilance and creative diplomacy. The tools to make a safer world already exist: political forums, international law, economic levers, intelligence assets and where necessary, military power. What remains to be harnessed is a collective will to succeed, a will grounded in the *UN Universal Declaration of Human Rights* and the accepted law of nations".²⁶⁶

References

- ¹ For the relationship between diplomacy and the international law of human rights that developed since the Second World War, see Müllerson, R., Human Rights Diplomacy, Routledge, London/New York, 1997.
- ² This is the theme of an unpublished lecture by Prof Rein Müllerson, Professor of International Law at King's College, London, presented during the 2002 annual course in international law at the Institute of International Public Law and International Relations, Tessaoniki, Greece. This comparison is also made by McWinney in a book dealing with paradigm shifts that took place in international law and international relations since 1648: McWinney, Edward, The United Nations and a New World Order for a New Millennium: Self-determination, State Succession and Humanitarian Intervention, Kluwer Law International, The Hague/Boston/London, 2002, pp.1-2.
- ³ Orford, Anne, 'Embodying Internationalism: The Making of International Lawyers', Australian Yearbook of International Law, Vol. 19,1998, p.1-2.
- ⁴ Ibid, p.16.
- ⁵ For a summary in this regard, see Chapter 3 ('International Relations Perspectives on International Law') in Barker, J. Craig, International Law and International Relations, Continuum, London/New York, 2000.
- ⁶ Slaughter, Anne-Marie, Andrew S. Tulumello and Stephan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship,' American Journal of International Law, Vol. 92, 1998, p.367. One of the most active scholars in this field, Professor Anne-Marie Slaughter, J. Sinclair Armstrong Professor of International, Foreign and Comparative Law at Harvard Law School, presented a course titled 'International Law and International Relations' as part of the 2000 Public International Law course of the Hague Academy of International Law, subsequently published (Recueil des Cours/Collected Courses of the Hague Academy of International Law, Vol. 285, Marthinus Nijhoff Publishers, The Hague/Boston/London, 2001). These developments adequately address the lament by Professor Raymond Cohen: "International law – so central to the conduct of diplomacy and understanding of international relations – is not considered a

subject fit for political scientists," (Cohen, R., 'Putting Diplomatic Studies on the Map,' Diplomatic Studies Newsletter, No. 4, 1998, Centre for the Study of Diplomacy, Leicester University, Leicester.)

⁷ The British Branch of the International Law Association held a conference in Oxford in April 1998 with the title 'The Role of Law in International Politics' during which the role of the law adviser to the British Foreign and Commonwealth Office was addressed by Sir Franklin Berman, then the incumbent. The proceedings of this meeting were published in book form (Byers, Micheal, Custom, Power and the Power of Rules: International Relations and Customary International Law, Cambridge University Press, Cambridge, 1999). In November 2001 New York University and the British Institute for International and Comparative Law hosted a conference titled "The Role of the Legal Adviser".

⁸ An article that aims to focus specifically on diplomacy is that of a former law adviser of the Israeli Foreign Ministry: Sabel, R., 'The Role of the Legal Adviser in Diplomacy', Diplomacy and Statecraft, Vol. 8, No. 1., 1997, p.1. Another article in this respect (Grewe, Wilhelm G., 'The Role of International Law in Diplomatic Practice', Journal of the History of International Law, Vol 1., No. 1., 1999, p.22, could not be obtained.

⁹ Brownlie, I., 'The Reality and Efficacy of International Law', British Yearbook of International Law, Vol. 52, 1981, p.1.

¹⁰ The role of law advisers to international organisations consequently falls outside the scope of this research.

¹¹ Op cit. He cites the volumes of the British Digest of International Law from the period 1860 –1914 and the opinions of the Law Officers of the Crown as evidence.

¹² The terms "Great Britain" and "United Kingdom"(UK) will be used interchangeably in this study, as is the case with "Foreign Office"(FO) and "Foreign and Commonwealth Office" (FCO). The Foreign Office became the Foreign and Commonwealth Office upon the integration of the Foreign Office and the Commonwealth Office in the 1960s.

¹³ While the original military action by the US-led coalition against Iraq was sanctioned by United Nations Security Council resolutions and was consequently clearly legitimate in terms of international law, some of the subsequent actions rest on uncertain foundations: see Malan, K., 'Die slagoffers maak/breek reëls en gooi bomme dat dit bars', Beeld, 27 February 2001, with reference to attacks by British

and US planes against Iraqi targets on 16/17 February 2001. See also Den Dekker, Guido and Ramses A. Wessel, 'Military Enforcement of Arms Control in Iraq,' Leiden Journal of International Law, Vol. 11, (1998), p.497.

¹⁴ Justified by some of the proponents as legitimate in terms of the doctrine of humanitarian intervention.

¹⁵ 'Human Rights in Foreign Policy: The Obligation to Promote Human Rights', (1 January 2003) < <http://www.hrpd.fco.gov.uk> >.

¹⁶ The following remark is instructive in the regard: "[international law] ... was infrequently a significant restraint on a nation's freedom to pursue important national interests as seen by diplomats and officials; indeed, if those who conducted foreign policy appeared to give law a significant role, they were likely to be condemned for their 'legalistic-moralistic' approach to international relations," Bernhard, R. (ed.), Encyclopaedia of Public International Law, Vol. 10, North Holland Publishers, Amsterdam/New York/Oxford/Tokyo, 1987, p 183.

¹⁷ Ibid, p.182.

¹⁸ Ibid. The first approach has prevailed in the UK (but appears to be changing), while the attitude in the USA is to place more emphasis on policy orientation: this is also the case in the Office of the Legal Adviser of the Department of State, see Bilder, Richard B., 'The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs', American Journal of International Law, Vol. 56, 1962, p.655.

¹⁹ Scott, Shirley, 'Beyond "Compliance": Recognising the International Law – Foreign Policy Dynamic', Australian Year Book of International Law, Vol. 19, 1998, p.36.

²⁰ The practice in the South African Department of Foreign Affairs is to refer to advisers on international law as "law" advisers which is the preferred terminology. However, they are often in the literature referred to as "legal" advisers, hence references in the original sources of this nature will be reflected as such in this study.

²¹ The Office has not yet been the focus of academic attention. Its existence as part of the structure of the Department of Foreign Affairs has been mentioned in works on South Africa's foreign relations and diplomacy, but without any description or analysis of its functions. See Olivier, G.C., Suid-Afrikaanse Buitelandse Beleid, Academica, Pretoria/Cape Town, 1977, p.188; Muller, M.E., 'South African Diplomacy and Security Complex Theory,' Diplomatic Studies Discussion Paper No. 53, Centre for the Study of

- Diplomacy, Leicester University, Leicester, 1999, p.20. See also the remarks in 3.1 on the general absence of references to foreign ministry law advisers in works on diplomacy.
- ²² Op cit, p.70.
- ²³ Heatley, D.P., Diplomacy and the Study of International Relations, Clarendon Press, Oxford, 1919, p.vii.
- ²⁴ Fenwick, C., International Law, Appleton–Century Crofts, New York, 1965, p.14.
- ²⁵ Lloyd, D., The Idea of Law, Penquin Books, London, 1991, p.174.
- ²⁶ Claude, Inis L., Swords Into Ploughshares: The Problems and Progress of International Organisation, Random House, New York, 1971, p.22.
- ²⁷ Barrie, G.N., “Die Betekenis van De Groot vir die Internasionale Reg,” Tydskrif vir Hedendaagse Romeins-Hollandse Reg, Vol. 46, 1983, p.182. It should be pointed out that while Grotius wrote at the time of the birth of the modern state system and international law, the roots of the philosophy of a normative legal order, like that of realism, date back to classical times.
- ²⁸ Scott, Shirley V., ‘International Law as Ideology: Theorizing the Relationship Between International Law and International Politics’, European Journal of International Law, Vol. , 1994, p.321.
- ²⁹ Geldenhuys, D., ‘The State Between Fission and Fusion’, Politeia, Vol. 20, No. , 2001, p.9.
- ³⁰ Op cit, p.12.
- ³¹ See Simonovic, Ivan, ‘State Sovereignty and Globalisation: Are Some States More Equal?’, Georgia Journal of International and Comparative Law, Vol. 28, No. 3, 2000, p.391. Normative theory and a legalist approach to international relations became revitalised during the time of the Vietnam War in the 1960s. One commentator has asserted that the United States and Europe have now clearly parted ways on the question of power. The present US administration believes that international rules are unreliable, that international law constrains powerful states more than weak states, and that the promotion of security still depends on the possession and use of especially military power. On the other hand, the European states, militarily weak, believe that they are moving beyond power to a self-contained world of laws and rules of transnational negotiation and cooperation, which form the foundation of the European Union. This view offers an explanation for the strong opposition of the

- major European powers against a US-led war against Iraq. See Kagan, Robert, 'US – Europe Divide' The Washington Post, 14 May 2002.
- ³² See in this regard Stemmet, André, 'Globalisation, Integration and Fragmentation: Forces Shaping Diplomacy in the New Millennium', Politeia, Vol. 21, No. 3, 2002, p.62.
- ³³ For example claims that states are under an obligation in international law to implement and maintain democratic government. See Wheatley, Steven, 'Democracy in International Law', International and Comparative Law Quarterly, Vol. 51, No. 2, 2002, p.225.
- ³⁴ Schachter, Oscar, 'The Decline of the Nation State and its Implication for International Law', Columbia Journal of Transnational Law, Vol. 36, 1997, p.21.
- ³⁵ Starke, J.G., Introduction to International Law, Butterworths, London, 1984, p.3.
- ³⁶ Akehurst, Michael, A Modern Introduction to International Law, George Allen and Unwin, London, 1982, p.29.
- ³⁷ Starke, op cit. The other sources of international law referred to in Article 38(1) of the Statute of the International Court of Justice are not relevant to this definition.
- ³⁸ Akehurst, op cit, pp.5-9.
- ³⁹ Do Nascimento e Silva, G.E., Diplomacy in International Law, A.W. Sijthoff, Leiden, 1972, p.25.
- ⁴⁰ Tunkin, G.I., Theory of International Law, George Allen and Unwin, London, 1974, p.279. Brierly also mentions the role of international law in diplomacy in that it can be applied to reduce the inevitable frictions that may occur in relations between states (Brierly, J.L., The Basis of Obligation in International Law, Clarendon Press, Oxford, 1958, p.308).
- ⁴¹ Op cit, p.29.
- ⁴² Bull, H., The Anarchical Society: A Study of Order in World Politics, Columbia University Press, New York, 1995, p.122.
- ⁴³ Ibid, pp. 122-222.
- ⁴⁴ Hamilton, K. & R. Langhorne, The Practice of Diplomacy: It's Evolution, Theory and Administration, Routledge, London, 1997, p.89.

- ⁴⁵ Marshall, P., Positive Diplomacy, Macmillan, London, 1997, p.7. Kissinger's view of diplomacy in his work Diplomacy (Simon & Schuster, London, 1994) is nothing but an equation thereof with the modern political history of Europe. Neither this definition nor that of Kennan expressed in the article 'Diplomacy Without Diplomats', (Foreign Affairs, September-October 1997) which defines diplomacy as an activity that can also be conducted outside the parameters of the state, are applicable within the present context.
- ⁴⁶ Berridge, G.R., Diplomacy: Theory and Practice, Prentice Hall/ Harvester Wheatsheaf, London, 1995, p.1.
- ⁴⁷ Barston, R.P., Modern Diplomacy, Longman, London/ New York, 1997, p.1.
- ⁴⁸ Berridge, G.R., Maurice Keens-Soper and T.G. Otte, Diplomatic Theory from Machiavelli to Kissinger, Palgrave, Houndmills, 2001, p.129.
- ⁴⁹ Ibid, p.156.
- ⁵⁰ Ibid, p.129.
- ⁵¹ Ibid, p.156.
- ⁵² Ibid, p.161.
- ⁵³ Marshall, op cit, p.155.
- ⁵⁴ Berridge, Keens-Soper and Otte, op cit p.163.
- ⁵⁵ Cohen, op cit, p.1.
- ⁵⁶ Bull, Hedley and Carsten Holbraad, Martin Wight: Power Politics, Leicester University Press, London, 1995, p.113.
- ⁵⁷ Bernhardt, op cit, p.207.
- ⁵⁸ Ibid.
- ⁵⁹ Op cit, p.23.
- ⁶⁰ Bernardt, op cit, p.211. For the purposes of this study, such norms should be considered as legally binding.
- ⁶¹ Morgenthau, Hans J., Politics Among Nations: The Struggle for Power and Peace, Albert A. Knopf, New York, 1972, p.333.
- ⁶² Venter A. and A. Johnston, Politics: An Introduction for South African Students, Oxford University Press, Cape Town, 1991, p.49.

⁶³ Henkin, Louis, How Nations Behave: Law and Foreign Policy, Columbia University Press, New York, 1997, p.18.

⁶⁴ A more specific linkage between diplomacy and international law is the branch of international law referred to as “diplomatic law” dealing with the privileges and immunities of diplomatic agents.

⁶⁵ Grotius already subjected all aspects of inter-state relations to law, laying the historical foundation in diplomatic thought for a linkage between international law and diplomacy.

⁶⁶ Scott, op cit, p.314.

⁶⁷ Barker, op cit, p.71. The scope of this study precludes a detailed analysis of the issue, but regarding the view that international law lacks a legislature, it should be kept in mind that the fact that the UN Security Council is authorised to make decisions that are binding on all states, gives it a legislative function. There also exists a school of thought that holds that certain General Assembly resolutions have a binding character. The argument that international law lacks a central judicial organ is probably based on the relatively small number of states that have accepted the compulsory jurisdiction of the International Court of Justice (ICJ). However, the fact that about a third of UN member states have accepted the compulsory jurisdiction of the ICJ and the proliferation of international courts and dispute settlement bodies, ranging from the newly established International Criminal Court to technical bodies such as the International Tribunal for the Law of the Sea, are evidence of a steady “judicialisation” of international relations.

⁶⁸ Barker, op cit p.72.

⁶⁹ Ibid, p.37. Bull postulates that states obey international law on the basis of acceptance of the values and objectives contained in an agreement, coercion by a stronger power and self-interest: however when a state’s legal obligations and its interest of being known as a law-abiding state comes into conflict with other interests and objectives considered to be superior, the legal obligations will more often than not be disregarded. (Bull, op cit, p.140).

⁷⁰ Morgenthau, Hans J., Politics Amongst Nations: The Struggle for Power and Peace, Alfred A. Knopf, New York, 1973, p.273.

⁷¹ Op cit, p.284.

- ⁷² Morgenthau, Hans J., Politics in the Twentieth Century, University of Chicago Press, Chicago, 1962, p.358.
- ⁷³ Boyle, Francis A., 'The Irrelevance of International Law: The Schism Between International Law and International Politics,' California Western International Law Journal, Vol. 10, 1980, p.194.
- ⁷⁴ Scott (op cit, p.314) quotes the example of when US Navy ships patrolling the Persian Gulf in 1988 permitted passage of a ship with a load of Silkworm missiles destined for Iran, although the missiles would pose a threat to US ships in the Gulf. The decision was made after the State Department intimated that interceptions and searches of ships on the high seas would constitute breaches of the international law rules applicable to the high seas and with regard to neutrality.
- ⁷⁵ Slaughter, op cit p.199.
- ⁷⁶ Byers, Michael, Custom, Power and the Power of Rules: International Relations and Customary International Law, Cambridge University Press, Cambridge, 1999, p.37. Byers argues that states realise that the application of power through military means or economic coercion promotes instability and the escalation of conflict, hence "... more frequently states will apply power within the framework of an institution or legal system. States seem to be interested in institutions and legal systems because these structures create expectations of behaviour which reduce the risks of escalation".
- ⁷⁷ Slaughter, op cit, p.37.
- ⁷⁸ Byers, op cit, p.76.
- ⁷⁹ Keohane, Robert O., After Hegemony: Cooperation and Discord in the World Political Economy, Princeton University Press, Princeton, 1984, p.244.
- ⁸⁰ Slaughter, op cit p.36.
- ⁸¹ Slaughter, op cit p.39; Byers, op cit, p.76.
- ⁸² Slaughter, op cit, p.41–42.
- ⁸³ Barker, op cit, p.81.
- ⁸⁴ Op cit, p.82.
- ⁸⁵ Wendt, Alexander, 'Constructing International Politics, International Security, Vol. 20, 1995, p.71.

⁸⁶ Op cit, p.82.

⁸⁷ Op cit, pp. 2 & 154-5.

⁸⁸ Hurrell, Andrew, 'International Society and the Study of Regimes: A Reflective Approach', in Rittberger, V. & P. Mayer (eds.), Regime Theory and International Relations, Clarendon Press, Oxford, 1993, p.59.

⁸⁹ Ibid, p.61.

⁹⁰ Feltham, R.G., Diplomatic Handbook, Longman, London/New York, 1998, p.10.

⁹¹ Sapiro, Miriam, 'Advising the United States Government on International Law', International Law and Politics, Vol. 27, 1995, p.619.

⁹² Fitzmaurice, G.G., 'The United Nations and the Rule of Law: Paper Read before the Society at its Meeting in Downing College, Cambridge, July 25, 1952,' Transactions of the Grotius Society for the Year 1952, Vol. 38, Oceana Publications, New York/Wildy and Sons, London, p.135.

⁹³ The command to the ILC contained in Article 15 of the Charter.

⁹⁴ Magnuson, Lars, 'Eleventh Meeting of Legal Advisers of UN Member States', Nordic Journal of International Law, Vol. 59, 1991, p.251.

⁹⁵ Lachs, M., 'Teaching and Teachings of International Law,' Recueil des Cours/Collected Courses of the Hague Academy of International Law, No. 151, 1976, p.218; McNair, Arnold D., 'The Debt of International Law in Britain to Civil Law and the Civilians', Transactions of the Grotius Society, Vol. 39, 1953, p.181.

⁹⁶ Lachs, M., op cit.

⁹⁷ See McNair, op cit. Many of the opinions rendered by the Doctors Commons survive in the Public Records Office as well as in private collections. Opinions given to the Foreign Office, (established in 1782) since 1784, have been bound together and are also to be found in the Public Records Office.

⁹⁸ It has been established that this appointment dates back to at least 1609.

⁹⁹ Watts, Arthur D., 'International Law and International Relations: United Kingdom Practice', European Journal of International Law, Vol. 2, No 1, 1991, p.159.

¹⁰⁰ Sinclair, Ian, 'The Practice of International Law: The Foreign and Commonwealth Office', in Cheng, Bin, International Law: Teaching and Practice, Stevens and Sons, London, 1982, pp 123 –126.

¹⁰¹ Bilder, op cit. pp. 634 –644.

¹⁰² Macdonald, R. St. J., 'The Role of Legal Advisers in Ministries of Foreign Affairs', Recueil des Cours/Collected Courses of the Hague Academy of International Law, No. 156, 1977, pp. 454 –461.

¹⁰³ Some states using this system do make provision to place their lawyers at missions abroad in posts with a specific legal content: the UK places lawyers at the mission to the UN in New York and the European Union in Brussels, and used to have a lawyer in Berlin (due to the international status of that city at the time) and seconded a lawyer to the government of Hong Kong, before that colony's re-integration with the People's Republic of China.

¹⁰⁴ Op cit, p.460.

¹⁰⁵ Ibid, p.456.

¹⁰⁶ All states of the Southern African Development Community (SADC), except for South Africa, use this system.

¹⁰⁷ Macdonald, op cit, p460.

¹⁰⁸ Nick, Stanko, 'The Role of the Legal Adviser in Modern Diplomatic Services,' in Kurbalija, J., (ed), Modern Diplomacy, Mediterranean Academy of Diplomatic Studies, University of Malta, 1998, p.117.

¹⁰⁹ Op cit, p.620.

¹¹⁰ Bilder, op cit, p.639.

¹¹¹ Sinclair, op cit p.128.

¹¹² Williamson, Edwin D., 'International Law and the Role of the Legal Adviser in the Persian Gulf Crisis', International Law and Politics, Vol. 3, 1991, pp. 361-371.

¹¹³ Sapiro, op cit, p.620.

¹¹⁴ Nick, op cit, p.119.

¹¹⁵ Bilder, op cit, p.639.

¹¹⁶ Sabel, one time law adviser to the Israeli Foreign Ministry, relates how he was once woken up in the small hours of the morning with the question of whether the Navy may stop and search a foreign merchant vessel in international waters in order to arrest a terrorist suspected to be on board. This presented an acute dilemma: a

negative answer may result in the loss of civilian lives, a positive answer would result in a diplomatic incident (Op cit, p.5).

¹¹⁷ Sabel, op cit, p.7.

¹¹⁸ MacDonald, op cit, p.296.

¹¹⁹ Ibid. The different approaches are illustrated by reference to the Middle East peace process and the position taken by European states as opposed to that taken by the USA: the European states consider international law as “a set of impartial rules that must be applied to the specific circumstances of that process, while the Americans view it as a political process in which the law to be applied is that on which the parties concerned can reach agreement with the assistance of the United States and others,” Al-Thani, Jassim, ‘The Role of the Legal Adviser in the Formulation of a State’s Foreign Policy,’ Collection of Essays by Legal Advisers of States, Legal Advisers of International Organisations and Practitioners in the Field of International Law, United Nations, New York, 1999, p.27.

¹²⁰ For example, Israel (Sabel, op cit, p.2), Croatia (Nick, op cit, p.117), Ghana (Addo, Emmanuel A., ‘The Role of the Legal Adviser in the Conduct of Ghana’s International Relations to the Present,’ Collection of Essays, op cit, p.3) and the United Kingdom (Fitzmaurice, G.G., ‘Legal Advisers and Foreign Affairs’, American Journal of International Law, Vol. 59, 1965, p.73.)

¹²¹ Addo, op cit.

¹²² Weston, Falk & D’Amato, op cit, p.246.

¹²³ This view was ascribed to Sir Gerald Fitzmaurice, one-time law adviser to the FCO and later a judge of the ICJ, by one of his successors, Sir Ian Sinclair, in a review of the book Judge Sir Gerald Fitzmaurice and the Discipline of International Law. Opinions of the International Court of Justice, 1961-1973. (British Yearbook of International Law, Vol. 69, 1998, p.292).

¹²⁴ Weston, Falk & D’Amato, op cit, p.249.

¹²⁵ Sabel, op cit, p.2.

¹²⁶ Sinclair, op cit, p.129.

¹²⁷ The complexity of this task is illustrated by the following quotation: “It is inevitable that in the course of negotiation and compromise, those who write international instruments will set down on paper whatever will secure agreement, even though the

resulting product may not fall into the neat categories to which lawyers are addicted. The lawyer's task is not only to interpret the resulting consensus but also to make understandings between states as flexible an instrument as possible in order to encourage agreement. He does no service to the establishment of order if he adopts an either-or posture". Baxter, R.R., 'International Law in Her Infinite Variety', International and Comparative Law Quarterly, Vol. 29, 1980, p.565.

¹²⁸ Nick, op cit, p.119.

¹²⁹ Sabel, op cit, p.7. In South Africa's case, specific provisions regarding international agreements are contained in section 231 of the *Constitution of the Republic of South Africa, 1996* (Act No. 108 of 1996).

¹³⁰ It is sometimes called upon the Office of the Chief State Law Adviser (International Law) at the South African Department of Foreign Affairs to launch treaties through the parliamentary approval process, and upon approval, to prepare instruments of ratification. See chapter 5.

¹³¹ Op cit, p.161 –174.

¹³² The states negotiating the *Kimberley Process Document*, which aims at introducing procedures for controlling the international trade in rough diamonds in order to prevent so-called "conflict diamonds" from entering the legitimate trade, chose a non-binding instrument due to the urgency of addressing the problem. It often takes years for legally binding international instruments to enter into force, due mainly to the complicated and time-consuming ratification procedures in many states. It was considered that a quicker way to address the conflict diamonds problem would be for states to enforce the political commitments contained in the Kimberley Process Document by means of domestic regulation.

¹³³ Section 231 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) provides that an international agreement will only bind South Africa after it has been approved by resolution by both the National Assembly and the National Council of Provinces, unless it is of a technical, administrative or executive nature, in which case the only requirement is that it be tabled in Parliament within a reasonable time.

¹³⁴ This interpretation of diplomacy was a theme for discussion at the 'Fourth Pan-European International Relations Conference, United Kingdom, 8-10 September 2001'. (1 January 2003) <<http://www.le.ac.uk/csd/dsp/conference.html>>.

¹³⁵ Fitzmaurice, G. G. & F.A. Vallat, 'Sir William Eric Beckett, K.C.M.G, Q.C. 1896 – 1966,' International and Comparative Law Quarterly, Vol. 17, 1968, p.270.

¹³⁶ The international campaign to ban landmines, which resulted in the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction* (the *Ottawa Convention*) and the campaign against the conflicts in Angola and Sierra Leone, fuelled by the illegal trade of rough diamonds, serve as examples.

¹³⁷ Nick, op cit, p.120; Sinclair, op cit, p.130.

¹³⁸ Dugard, J, International Law: A South African Perspective, Juta & Co, Kenwyn, 2000, p.103.

¹³⁹ Sinclair, op cit, p.131.

¹⁴⁰ Op cit, p.654.

¹⁴¹ Bilder, op cit, p.655; Nick, op cit , p.122.

¹⁴² Quoted in Marshall, op cit, p.154.

¹⁴³ Popular legend has it that the oldest surviving treaty is one of friendship and navigation between Portugal and England dating back to the thirteenth century, forming the basis for the long established wine and port trade between these two states. The oldest treaty to which South Africa, by way of state succession, is party to is the *Treaty of Peace and Commerce between Great Britain and Sweden* of 11 April 1654.

¹⁴⁴ Nick, op cit, p.122; Fitzmaurice (1965) op cit , p.72.

¹⁴⁵ Sabel, op cit, p.6. A case in point is the ongoing restructuring of relations between South Africa and Taiwan following the switch of recognition and the severance of diplomatic relations on 1 January 1998: while the same law adviser has been dealing with this matter during this period, the staff of the East Asia Directorate initially involved have since all been posted abroad and been replaced. The absence of a clearly demarcated river and maritime boundary between South Africa and Namibia has been a feature in the bilateral relationship since that state's independence in 1990 and will still take many years to resolve.

¹⁴⁶ MacDonald, op cit, p.405.

¹⁴⁷ Ibid. This is also the present writer's experience in the South African Department of Foreign Affairs.

¹⁴⁸ Nick, op cit, p.123.

¹⁴⁹ Weston, Falk & D'Amato, op cit, p.247, conclude with regard to the Legal Adviser to the State Department: "It is rare that policy-makers reach a decision without consulting the Legal Adviser, or at least giving him the opportunity to be heard. Rarely is a decision made against strong views by the Legal Adviser that it would constitute a violation of law or agreement". The notable exceptions are in the realm of intelligence activities or national security: it is surmised that the US Government did not obtain legal advice before sending U-2 planes over Soviet airspace in 1960, neither is it probable that the Union of Socialist Soviet Republics (USSR) government obtained an opinion on the legality of its invasion of Hungary in 1956.

¹⁵⁰ Yin, R.K., Case Study Research: Design and Methods, Sage Publications, Thousand Oaks/London/New Delhi, 1994, p.12; Denzin, N.K. and Y.S Lincoln (eds.), Handbook of Qualitative Research, Sage Publications, Thousand Oaks/London/New Delhi, 1994, p.236. A single case can be studied from different perspectives: the Cuban missile crisis has been approached as a study in deterrence, coercive diplomacy, crisis management, negotiation, domestic political influence on foreign policy, etc. See Lauren, P.G., (ed.), Diplomacy: New Approaches in History, Theory and Policy, The Free Press, New York, 1997, p.51.

¹⁵¹ George, A.L., 'Case Studies and Theory Development: The Method of Structured, Focused Comparison,' in Lauren, op cit, p.43-44.

¹⁵² Yin, op cit, p.44.

¹⁵³ Denzin & Lincoln, op cit, p.237.

¹⁵⁴ Marston, G., 'Armed Intervention in the Suez Canal Crisis: The Legal Advice Tendered to the British Government', International and Comparative Law Quarterly, Vol. 37, 1988, p.773.

¹⁵⁵ Although the possibility of successive 99 years concessions was foreseen in the agreement.

¹⁵⁶ Article 1.

¹⁵⁷ Marston, G., op cit, p.773.

¹⁵⁸ Thompson, R., (ed.), War and Peace: An Analysis of Warfare since 1945, Orbis Publishing, London, 1981, p.91.

- ¹⁵⁹ Dutton, P., Anthony Eden: A Life and Reputation, Arnold Publications, London, 1997, p.365.
- ¹⁶⁰ Rothwell, V., Anthony Eden: A Political Biography 1931-57, Manchester University Press, Manchester/New York, 1992, p.207; James, L., The Rise and Fall of the British Empire, Abacus, London, 1995, p.573.
- ¹⁶¹ Rothwell, op cit, p.212.
- ¹⁶² Dutton, op cit, p.396.
- ¹⁶³ Ibid, p.373.
- ¹⁶⁴ Ibid, p.382.
- ¹⁶⁵ Morris, D.M., 'From War to Peace: A Study of Cease-fire Agreements and the Evolving Role of the UN,' Virginia Journal of International Law, Vol. 36(4), 1996, p.853.
- ¹⁶⁶ Aldrich, R.J., 'Intelligence, Anglo-American Relations and the Suez Crisis of 1956', Intelligence and National Security, Vol. (3), 1994, p.548.
- ¹⁶⁷ Thompson, op cit, p.91.
- ¹⁶⁸ Morris, op cit, p.350.
- ¹⁶⁹ Dutton, op cit, p.91.
- ¹⁷⁰ Morris op cit, pp. 853 - 4.
- ¹⁷¹ Thompson, op cit, p.91.
- ¹⁷² Op cit, p.211.
- ¹⁷³ Marston, op cit, p.776.
- ¹⁷⁴ Kyle, K., Suez, Weidenfeld and Nicolson, London, 1991, p.140.
- ¹⁷⁵ Marston, op cit, p.777.
- ¹⁷⁶ Ibid, pp. 779; 783.
- ¹⁷⁷ Ibid, p.787.
- ¹⁷⁸ Ibid, p.789.
- ¹⁷⁹ Ibid, p.793.
- ¹⁸⁰ Ibid, p 800.

¹⁸¹ Ibid.

¹⁸² Ibid., p.802.

¹⁸³ "Kosovo Crisis: Background, Current Situation and South African Policy Options", Department of Foreign Affairs telex number 99vhkxa0358pa of 6 April 1999.

¹⁸⁴ Judah, T., 'Kosovo's Road to War', Survival, Vol. 41(2), 1999, p.12.

¹⁸⁵ Ibid.

¹⁸⁶ Telex number 99vhkxa0358pa of 6 April 1999.

¹⁸⁷ Judah, op cit, p.13.

¹⁸⁸ 'Organisation for Security and Co-operation in Europe: Background Paper-Human Rights in Kosovo,' (13 June 2002) <<http://www.osce.org/kosovo/reports/hr/index.htm>>

¹⁸⁹ Kritsiotis, D., 'The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia,' International and Comparative Law Quarterly, Vol. 9, 2000, p.338.

¹⁹⁰ Hilpold, Peter, 'Humanitarian Intervention: Is There a Need for Reappraisal?,' European Journal of International Law, Vol. 12, No.3 , 2001, p.441. For an account of the history of the conflict, see Roberts, A., 'NATO's Humanitarian War Over Kosovo', Survival, Vol. 41(3), 1999, pp. 102-123.

¹⁹¹ Harhoff, Frederik, 'Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?', Nordic Journal of International Law, Vol. 60, 2001, p.69; Rytter, Jens Elo, 'Humanitarian Intervention Without the Security Council: From San Francisco to Kosovo- and Beyond,' Nordic Journal of International Law, Vol. 70, 2001, p.123.

¹⁹² Ibid., p.76. This dilemma in international law is succinctly summarised by Rytter (op cit, pp 123 –124) as follows:

"On one hand, the development of international law in the 20th century has been dominated by the common experience of two world wars, convincing the international community that recourse to the use of force to solve international disputes is not only a violation of state sovereignty but, in the long run, is also detrimental to the international community at large. The UN Charter has therefore generally outlawed all use of force between states, except for self-defence against an armed attack and use of force authorised by the UN Security Council.

On the other hand, international law is increasingly concerned with the protection of individuals, thereby limiting the sovereignty of states to treat their own citizens at discretion. Since 1945, numerous instruments have been adopted for the protection of basic human rights and for the protection of civilians during armed conflict. The most fundamental norms of human rights and international humanitarian law are now considered obligations towards the international community as a whole (*erga omnes*)."

¹⁹³ Harhoff, op cit, p.76.

¹⁹⁴ The legitimacy and legality of a doctrine of humanitarian intervention without authorisation from the Security Council remains a controversy among states and legal scholars with no consensus in sight. Harhoff (op cit, p.79) summarises three approaches to the matter as follows:

1. "The *affirmative position*, which asserts - on various grounds - that humanitarian interventions are indeed both legitimate and lawful under international law and that the Kosovo intervention, accordingly, had a sufficient legal basis;
2. the *legalist position*, which adversely denies the lawfulness of resort to armed force beyond the accepted *special cases* - regardless of the purpose - and therefore rejects the legality of the Kosovo intervention; and
3. the *reformist position* which holds that international law is currently unable to provide any clear position on the legality of humanitarian interventions and, in the absence of such clarity, *accepts* the possibility that humanitarian interventions after all might be considered lawful *under certain conditions* and therefore focuses on the attempt to identify these conditions and reform the law."

Harhoff (op cit, p.119) comes to the conclusion that "contemporary international law is currently unable to provide a clear answer to the question of whether or not unauthorised armed interventions for humanitarian purposes are unlawful," concluding that NATO's intervention may be considered as part of an emerging customary principle, and can therefore not be dismissed out of hand as unlawful. Other scholars who hold this view have drawn a "checklist" of prevailing conditions that will lend legitimacy to such an operation (Cassese, A., 'Ex iniuria ius oritur: Are We Moving Towards International Legitimizing of Forcible Humanitarian Countermeasures in the World Community?', European Journal of International Law, Vol. 10, 1999, p.21; 'A Follow-Up: Forcible Humanitarian Countermeasures

and *Opinio Necessitatis*, European Journal of International Law, Vol. 10, 1999, p.791; Chesterman, Simon, Just War or Just Peace: Humanitarian Intervention and International Law, Oxford University Press, Oxford, 2001, p.228; Zacklin, Ralph, 'Beyond Kosovo: The United Nations and Humanitarian Intervention,' Virginia Journal of International Law, Vol. 41, 2001, p.936.)

The following criteria to justify humanitarian intervention have been developed:

- gross and egregious breaches of human rights involving the loss of life of hundreds or thousands of people, amounting to crimes against humanity in a sovereign state, either by the central authorities or with their connivance or support or because of their total collapse such authorities cannot impede those atrocities;
- the Security Council is unable to take any coercive action to stop the massacres because of disagreement amongst the P5 or the exercise of the veto;
- all peaceful avenues to achieve a solution based on negotiation, discussion and any other means short of force have been exhausted;
- a group of states (and not a single state) decides to attempt to halt the atrocities, with the support, or at least the non-opposition, of the majority of UN Member states;
- armed force is exclusively used for the limited purpose of terminating the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose.

Other scholars, however, follow the traditional approach, arguing that human rights developments did not have an influence on the importance and interpretation of Article 2(4), that state practice does not support such a rule and that it is open to abuse, while also rejecting justifications for intervention based on "necessity" or "emergency" (See Hilpold, Peter, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' European Journal of International Law, Vol. 2, 2001, p.452; Gazzini, Tarcisio, 'NATO's Coercive Military Activities in the Yugoslav Crisis', European Journal of International Law, Vol. 2, 2001, p.392).

A possible solution to this seemingly intractable dilemma between legal and moral considerations has been proposed by Rytter (op cit, p.158), who argues that interventions like the one in Kosovo should not be justified in legal terms, but that an emergency exit from international law, justified solely on moral grounds, should be recognised in *ad hoc*, extreme cases only: "This leaves open the door for intervention in extreme cases of human suffering, but at the same time avoids jeopardising the existing, hard-earned international legal order and the central role of the Security Council". Another attempt to close this clear and unacceptable gap between the state of international law and reality, is the argument that the matter should not be interpreted within a paradigm of a right to intervene, but that the international community should recognise a "responsibility to protect" civilian populations against excesses such as massacres, mass starvation, rape and ethnic cleansing. Promoted mainly by a former Australian Foreign Minister, Gareth Evans, this new paradigm acknowledges that the primary responsibility to protect populations rests with the state concerned, but that when that state is unable or unwilling to fulfil its responsibility to protect or is itself the perpetrator, the threshold for international responsibility is reached. In a further shift in thinking on the issue, the "responsibility to protect" does not only include reaction to events, but also a "responsibility to prevent" and a "responsibility to rebuild". While certain factual conditions have to be fulfilled before international action can be taken, formal authority for international intervention must also be obtained, either from the Security Council, the General Assembly acting under its "Uniting for Peace" procedure, or by regional organisations under Chapter VII of the UN Charter (subject to subsequent authorisation from the Security Council). (See Evans, Gareth & Mohamed Sahnoun, 'The Responsibility to Protect: Revisiting Humanitarian Intervention', Foreign Affairs, Vol. 81, Issue 6, November/December 2002, pp. 99-111. See also in general Gray, Christine, International Law and the Use of Force, Oxford University Press, Oxford, 2000 and Simma, Bruno, 'NATO, the UN and the Use of Force: Legal Aspects', European Journal of International Law, Vol. 10, 1999, p.1; Guicherd, Catherine, 'International Law and the War in Kosovo,' Survival, Vol. 4 (12), 1999, p.2).

¹⁹⁵ For the controversy that this question elicited in Germany, see the statement by eminent German international lawyers concluding that the NATO intervention was illegal, published in International Peacekeeping, Sept – Dec 1998, p.165.

¹⁹⁶ Eyal, J., 'Kosovo: Killing the Myths after the Killing has Subsided', RUSI Journal, Feb. 2000, p. 21. There are also indications that law advisers from NATO states were

unfavourable towards armed intervention. In an interview with the *Financial Times* of 16 November 1998, the American diplomat Richard Holbrooke blamed the slow response of NATO in reacting to the unfolding humanitarian disaster amongst others on “the lawyers in the NATO alliance” who held that a specific Security Council resolution was required to give intervention a legal basis.

¹⁹⁷ Hansard, 1 Feb 1999, Vol. 605.

¹⁹⁸ ‘FRY/ Kosovo: The Way Ahead: UK View on Legal Base for Use of Force’, dated 7 October 1998; quoted by Roberts, op cit, at p.106.

¹⁹⁹ Marston, Geoffrey, ‘United Kingdom Materials on International Law’, British Yearbook of International Law, Vol. 70, 1999, p.573. A subsequent Parliamentary enquiry found the NATO intervention “... of dubious legality in the current state of international law ... (but) ... justified on moral grounds”. See ‘United Kingdom Parliament: Select Committee on Foreign Affairs: Fourth Report on Kosovo: International Law’, (7 June 2000) <http://www.parliament.the_stationery_office.co.uk/ma/cm199900/cmselect/cmta>.

²⁰⁰ The FRY requested an order from the ICJ regarding provisional measures, in other words an order that NATO should terminate the attack. This was rejected, but the case on the merits is still being considered.

²⁰¹ Document prepared for internal use by the FCO titled “Is Intervention Ever Justified?” See Marston, G., ‘United Kingdom Materials on International Law 1986’, British Yearbook of International Law, Vol. 57, 1986, p.614. The paper concludes with regard to humanitarian intervention: “In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its cost in terms of respect for international law”.

²⁰² US and UK attacks on Iraqi targets to enforce the no fly zone in Northern Iraq were also justified in the British Parliament on the basis of the right of self-defence; other attacks were justified on the basis of material breaches of Security Council resolution 687, the resolution establishing the ceasefire, reference being made to Iraqi efforts to prevent UN arms inspectors to carry out their mandate established by the resolution (Marston, G., ‘United Kingdom Materials on International Law 1993’, British Yearbook of International Law, Vol. 64, 1993, pp. 728; 736-737).

²⁰³ In this regard, the action against Iraq by the administration of Pres. George W. Bush to effect a ‘regime change’ and oust Saddam Hussein will be an interesting

study. Unlike the military action in 1991, which was clearly sanctioned by Security Council resolution 678 and resulted from Iraq's invasion of Kuwait, the failure to obtain a Security Council resolution clearly and unambiguously authorising the use of force, results in uncertainty as to the legal basis for the attack on Iraq that commenced on 20 March 2003. It appears that such a clear-cut legal basis may not exist for a new US attack on Iraq. It is interesting to note that before the passing of resolution 678 the State Department law advisers investigated the possibility of justifying an attack on the basis of Article 51 of the Charter, providing for individual and collective self-defence in case of an armed attack. See also notes 254 & 256 *infra*.

²⁰⁴ *Op cit*, p.73.

²⁰⁵ Some brief remarks are made in note 214 *infra* on the status of the ZAR as an independent state.

²⁰⁶ De Witt, P.J. (ed.), The History of the Department of Foreign Affairs 1927-1993, 2000 (unpublished).

²⁰⁷ Olivier, *op cit*, p.15.

²⁰⁸ *Ibid*. See also in general Nell, P.R., 'Die Konsulere en Diplomatieke Verteenwoordiging van die Suid-Afrikaanse Republiek', Historiese Studies, Vol. 6, No. 3, 1945.

²⁰⁹ See Van Niekerk, L.E., Kruger se Regterhand: 'n Biografie van Dr. W.J. Leyds, J.L. van Schaik, Pretoria, 1985, pp. 1-12.

²¹⁰ *Ibid*, p.50.

²¹¹ The ZAR had concluded treaties with Great Britain, Portugal, France, Switzerland, Germany, Belgium, Italy and the Netherlands. See Olivier, *op cit*, p.25, note 2.

²¹² Van Niekerk, *op cit*, p.50.

²¹³ *Ibid*. p.54.

²¹⁴ The *Pretoria Convention* was concluded in 1881 after a successful rebellion against the British annexation of the ZAR of 1877. It provided for self-government in the ZAR, but also for British suzerainty over that territory. The *London Convention* was entered into after the ZAR complained that the limitations placed on it by the *Pretoria Convention* were too onerous. The *London Convention* did not specifically mention any suzerain status of the ZAR, but provided that the ZAR will not conclude

treaties with any state, other than the OFS Republic, without the permission of Britain. Despite this restriction on the conduct of its foreign relations, scholars generally agree that the ZAR remained a sovereign state. (See Dugard, J., op cit, p.74). The *Treaty of the Peace of Vereeniging* concluded between Britain, the ZAR and OFS Republic proceeded from the premise that both the ZAR and OFS Republic were sovereign states until it entered into force, despite the somewhat ambivalent status of the ZAR and the fact that the British Government purported to annex the two Boer republics by means of proclamations in 1900. In this regard, see also Raath, A.W.G & H.A.Strydom, 'The Hague Conventions and the Anglo Boer War', South African Yearbook of International Law, Vol. 24, 1999, p.149. The annexation proclamations were not recognised by the governments of the Boer republics, and a further British proclamation aiming at banning forever from the two Republics all Boer combatants that did not surrender to the British forces, was considered by Boer commanders to be violating a number of treaties between the Boer republics and Britain. (See Grobler, J., 'Reaksie op Kitchener se Papierbom', Beeld, 6 October 2001).

²¹⁵ One T.K. Hummel. See De Kock, W.J., 'Die Werksaamhede van Dr. W.J. Leyds en die Diplomatieke Korps van die Republiek Tydens die Oorlog', in Breytenbach, J.H., (ed.), Gedenkalbum van die Tweede Vryheidsoorlog, Nasionale Pers, Cape Town, 1949, p.367.

²¹⁶ Van Niekerk, op cit, pp 265-246. For a discussion of the applicability of the *Hague Convention* to the two Boer republics, which were excluded from participation in the Convention due to fear by other participating states that it may result in a British withdrawal, see Raath & Strydom, op cit, p.130. The British expert on land warfare that attended the negotiations for the Convention has advanced an argument that the rules codified in the Convention were applicable to the Boer republics as rules of customary international law.

²¹⁷ Van Niekerk, op cit, p.251.

²¹⁸ Raath & Strydom, op cit, p.161. Both men were eminent lawyers. Steyn studied law in Britain and became a well-known advocate in Bloemfontein before being elected as President and Herzog served as a judge in the Orange Free State before going on commando. Hertzog collected evidence as to the alleged transgressions of the rules of land warfare by British forces. International law issues relating to the war also taxed the British side: Viscount Finlay of Nairn, Solicitor-General from 1895-1900

- and Attorney-General from 1900- 1905, dealt with the legal aspects of the war (See Johnson, D.H.N., 'The English Tradition in International Law,' International and Comparative Law Quarterly, Vol. 11, 1962, p.421).
- ²¹⁹ Grobler, J., 'Die Gevegsfront in Kaapland', Beeld, 4 May 2002.
- ²²⁰ Kestell, J.D & D.E Van Velden, Die Vredesonderhandelinge, Pretoria: Human & Rousueau, 1982, p.96.
- ²²¹ Kestel & Van Velden, op cit, p.169.
- ²²² Beyers, C.J. & J.L. Basson (eds), Suid-Afrikaanse Biografiese Woordeboek, Pretoria, Raad vir Geesteswetenskaplike Navorsing, 1987, Vol. IV, p.134 & Vol. V, p.401.
- ²²³ Muller, op cit, p.47.
- ²²⁴ Wiechers, M., Staatsreg, Butterworth, Durban, 1981, p.202.
- ²²⁵ Geldenhuys, Deon, The Diplomacy of Isolation: South Africa's Foreign Policy Making, Macmillan, Johannesburg, 1984, p.2.
- ²²⁶ Ibid.
- ²²⁷ Ibid.
- ²²⁸ Government Notice No. 915, published in the Government Gazette of 3 June 1927.
- ²²⁹ Geldenhuys, op cit, p.3.
- ²³⁰ Beyers & Basson, op cit. Vol. II, p.67.
- ²³¹ Op cit, p.8. For an account of the establishment of the Department, see Du Plessis, Wennie, 'n Mens vir die Mens, Perskor, 1972, p.4. Van den Heever ranked third on the establishment after the Secretary and Deputy Secretary.
- ²³² Anon, 'In Memoriam: Mr Justice F.P.van den Heever', South African Law Journal, Vol. 73, 1956, p.117.
- ²³³ Jooste, Gerhardt, Diensherinneringe, Perskor, Johannesburg, 1977, p.28.
- ²³⁴ Du Plessis, W., Die Goue Draad, Afrikaanse Pers Boekhandel, Johannesburg, 1977, p.84.
- ²³⁵ Jooste, op cit, p.35.
- ²³⁶ Van der Westhuizen, Johan, 'Ons Hoofregters: L.C. Steyn (1959 –1971)', De Rebus, December 1980, p.609.

²³⁷ Interview with Prof Barrie, March 2002.

²³⁸ It is remarkable that none of the opinions dealt with the number of disputes on South West Africa/ Namibia that served before the ICJ. It is possible that the relevant documentation could be accessed in the National Archives.

²³⁹ The policy of creating “independent” states in Transkei, Bophuthatswana, Venda and Ciskei which was a major focus of South African foreign policy from the middle sixties to the late eighties, is now recognised to have been a violation of the self-determination principle of international law. See Dugard, *op cit*, pp. 76-80; 452-3.

²⁴⁰ Notably the *Antarctica Treaty*, the *London Dumping Convention*, the *UN Conference on the Law of the Sea*, the *International Whaling Commission* and the *World Intellectual Property Organisation*.

²⁴¹ A legal administration officer is also employed by the Office and deals with labour law and private contracts.

²⁴² One was assigned to the mission to the UN in Geneva in the early 1990's and the previous Chief State Law Adviser is presently the law adviser to the Permanent Representative to the UN in New York. It is not clear whether he will be replaced by an official of the Office or whether the post will revert back to the line function. Due to the high legal content of work at multilateral missions, a convincing case can be made for retaining the law adviser's post in New York, and for creating one in Addis Ababa, the seat of the African Union.

²⁴³ The case of the restructuring of relations between South Africa and Taiwan which has been continuing since 1998 without a satisfactory conclusion having been reached, has already been mentioned, as well as the question of the river and maritime boundaries between South Africa and Namibia (Note 145 *infra*).

²⁴⁴ Office of the Chief State Law Adviser (International Law) in the Department of Foreign Affairs: Practical Guide, 2002.

²⁴⁵ See Muller, M.E., 'The Diplomacy of Reintegration: South Africa,' in Melissen, J. (ed.) Innovation in Diplomatic Practice, Macmillan Press Ltd, London, 1999, p.64.

²⁴⁶ Op cit, p.457.

²⁴⁷ As described in the Manual on Executive Acts of the President of the Republic of South Africa, March 1999.

²⁴⁸ See Neethling, Theo, 'South African Military Interventions in the 1990s: The Case of SADC in Lesotho' in Du Plessis, L. & M. Hough (eds.), Managing African Conflicts: The Challenges of Military Intervention, Human Sciences Research Council, CEMIS & ISSUP, Pretoria, 2000, p.288.

²⁴⁹ See in general in this regard, Barrie, G.N., 'South Africa's Forcible Intervention in Lesotho: What Does International Law Say', De Rebus, January 1999, p.46. It appears that no formal SADC decision was made in this regard, but that it has been taken by means of a series of phone calls between the Heads of State of Lesotho, South Africa, Botswana, Zimbabwe and Mozambique. In the event, military units from Zimbabwe and Mozambique never arrived.

²⁵⁰ White Paper on South African Participation in International Peace Missions, Notice No. 2216, Government Gazette No. 20518, 4 October 1999.

²⁵¹ Article 11(3)(d).

²⁵² Op cit, p.160.

²⁵³ It is in the present writer's experience extremely rare that a client will act against clear advice of the law advisers.

²⁵⁴ This conclusion is supported by events surrounding the US-led military actions against Afghanistan and Iraq. In the case of the military action by the US-led coalition against the Al Qaeda movement and the Taliban government in Afghanistan in response to the terrorist attacks of 11 September 2001, both the UK and USA governments were at pains to legally justify the attacks (on the basis of the doctrine of self-defence) (See Katselli, Elena & Sangeeta Shah, 'September 11 and the UK Response', International and Comparative Law Quarterly, Vol. 2(1), 2003 p.249; Ratner, Steven R., '*Jus ad Bellum* and *Jus in Bello* After September 11', American Journal of International Law, Vol. 96(4), 2002 p.905). It is also clear that possible legal justifications for military action by the USA against Iraq has been taxing minds in the Bush administration for a considerable time: "Despite increasingly loud demands around the world for any military action against Iraq to be backed by the United Nations, Washington is unlikely to seek such approval, saying it already has ample legal authority". ('US will not seek UN nod', The Weekly Telegraph, 14-20 August 2002). In the event, the US and UK did seek a resolution specifically authorising the use of force, but withdrew it in the face of an imminent veto by France and Russia. Failing the adoption of the resolution, the USA and UK could have used an interpretation of Article 51 of the Charter providing for the right to collective or

individual self-defence, as it did with regard to action in Afghanistan (See Byers, Michael, 'Terrorism, the Use of Force and International Law after 11 September', International and Comparative Law Quarterly, Vol. 51, (2002), p.401). It should be pointed out that Article 51 does not define the content of the right of self-defence, leaving it open to interpretation (and consequently abuse). Self-defence, especially the doctrine of anticipatory self-defence, is therefore a controversial issue in international law. However, it subsequently became clear that a legal construction based upon "implied authorisation" by a number of Security Council resolutions relating to Iraq would be employed. The UK's Attorney General intimated some days before the attack but after the US/UK-sponsored Security Council resolution was withdrawn, that a legal basis for military action could be found in a series of UN Resolutions dating back to the 1990 invasion of Kuwait by Iraq, which allowed "the use of force for the express purpose of restoring international peace and security" (Gully, Andrew, 'Blow to Blair's Push for War as Cook Quits,' The Sunday Independent, 16 March 2003). The UK Foreign Secretary, in public announcements, has also interpreted Security Council resolution 1441(2002) as providing legal authority for war (Wright, Robin & Joe Laura, 'War Summit Paves Way to Blitzkrieg,' The Sunday Independent, 16 March 2003). The Foreign Secretary was emphatic that "any action we are involved in or in the future will be involved in will be fully consistent with our obligations under international law". This approach has been foreseen for some time and the law advisers of the FCO have clearly been working on devising a strategy to find legal justification for the intended action. ('A Long List of Violations', The Weekly Telegraph, 11-17 September 2002.) President Bush's efforts to obtain a Security Council resolution specifically authorising the use of force was also interpreted as a preference to be on the side of international law. (Olivier, Gerrit, 'No Business as Usual After the Dust Settles in Iraq,' Business Day, 18 March 2003.) The Office of the Chief State Law Adviser (International Law) has concluded that neither of these doctrines will satisfy the requirements of state practice and *opinio iuris* among UN Member States that are required to crystallise them into rules of customary international law. (See Legal Opinion 0391/02 dated 13 December 2002, 'Possible Legal Justifications for the Use of Military Force Against Iraq'). The USA, UK and Australia eventually made formal announcements regarding what they believe to be a legal justification for the attack. In letters by their respective Permanent Representatives to the United Nations to the President of the Security Council dated 20 March 2003, they argued on the basis of the doctrine of implied authorisation. The argument can be distilled as follows: existing Security Council

resolutions, including 678 (1990) (authorising the use of “all necessary means” to terminate the Iraqi occupation of Kuwait) and 678(1991) (the ceasefire resolution) impose a series of obligations, *inter alia* with regard to disarmament, on Iraq as part of the ceasefire conditions. Iraq has been and remains in material breach of these conditions (as explicitly stated in resolution 1441 (2002)), which continue to form the basis for the ceasefire and, so reviving the authority for the use of force under resolution 678. However, this argument is not convincing: besides the lack of state practice required to provide it with legitimacy, resolution 678 explicitly links the use of force to the aim of liberating Kuwait from Iraqi occupation. It refers to a number of resolutions adopted previously, and nothing in the text links it to subsequent resolutions, like 687 (1991) or the other resolutions relating to disarmament (See Legal Opinion 100/03 of the Office of the Chief State Law Adviser (International Law), dated 26 March 2003, “US, UK and Australian Letters to the Security Council on the Legitimacy of the Use of Force Against Iraq”. It is interesting to note the strong focus on the legitimacy of the military action in the face of strong opposition from other UN Member states and the public. The coalition forces also ensured the involvement of law advisers on tactical level in the war: “Dit is die oorlog waarin die koalisiemagte se regsadviseurs ‘n groot rol gaan speel. Omdat dit kragtens internasionale reg onwettig is om burgerlikes aan te val, sal regsadviseurs in die Irak-oorlog eers die groen lig aan bevelvoerders en militêre beplanners moet gee voordat ‘n bepaalde teiken aangeval word”, (Van der Walt, S. ‘Regsadviseurs gaan ‘n groot rol speel in die oorlog,’ Beeld, 20 March 2003).

²⁵⁵ Weston, Falk & D’Amato, op cit, p.254. This conclusion is supported by the present writer’s own experience.

²⁵⁶ In view of the uncertainties pertaining to the legal justification of the US/UK action against Iraq, a strong case can be made out that the legal justification being advanced amounts to abusing international law to serve policy objectives, besides from threatening the international rule of law.

²⁵⁷ Langhorne, Richard ‘Diplomacy Beyond the Primacy of the State’, Diplomatic Studies Programme Discussion Paper No. 43, Centre for the Study of Diplomacy, Leicester University, Leicester, 1998, p.11.

²⁵⁸ Schreuer, Christoph, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’, European Journal of International Law, Vol. 4, 1993, p.448.

²⁵⁹ Wheatley, op cit.

²⁶⁰ Op cit, p.1-2.

²⁶¹ Coalsaet, Rik, 'The Transformation of Diplomacy at the Threshold of the New Millennium', Diplomatic Studies Programme Discussion Paper No. 48, Centre for the Study of Diplomacy, Leicester University, Leicester, 1998, p.1.

²⁶² For a very lucid exposition of the problem of applying the traditional right of self-defence to Afghanistan, see Byers, Michael, 'Terrorism, the Use of Force and International Law After 11 September', International and Comparative Law Quarterly, Vol. 51, 2002, p.401. While emphasising the realist power factor in international relations, this response is also fraught with irony as it undermines the sovereignty of the state, the primary element of the realist paradigm. See Hoffmann, Stanley, 'Clash of Globalisations', Foreign Affairs, July/ August 2002, p.104 for the dilemma posed to realism by transnational terrorism.

²⁶³ See notes 254 and 256 *infra*.

²⁶⁴ Davis, Malcolm, 'The War on Terrorism: The Next Phase', (14 January 2003) <http://www.kcl.ac.uk/depstal/wsg/sept11/papers/davis/html>.

²⁶⁵ Russian and Chinese action against Chechen and Uighur separatists are being justified as wars on terrorism. See Chung, Chien-peng. 'China's War on Terror', Foreign Affairs, July/August 2002, p. 8.

²⁶⁶ Beal, Clifford, 'Everything has Changed... Nothing has Changed', Jane's Defence Weekly, 11 September 2002, p.9.

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