ESSAY

The Role of the Legal Adviser of the Ministry of Foreign Affairs: The Dutch Approach and Experience*

Johan G. Lammers†

I. INTRODUCTION

According to the "Legal Advisers List" distributed each year by the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, "legal advisers" are "the Heads of the Offices responsible for international legal services of the Ministries of Foreign Affairs of the Member States of the United Nations."[1] The position, rank, and formal title of the "legal adviser" thus described differs in fact from country to country. According to a survey of the Council of Europe, the Legal Adviser is most often the director-general, the director or head of the legal affairs department, or the director or head of the international law department of the Ministry of Foreign Affairs, often with the title of Ambassador.[2] In the United States, the legal adviser holds the position of

---

* Deutsch Lecture given at Tulane University Law School on January 28, 2009.

† © 2009 Johan G. Lammers. Former Legal Adviser of the Netherlands Ministry of Foreign Affairs and Professor Emeritus of International (Environmental) Law at the University of Amsterdam. Visiting Professor at Tulane University Law School in January 2009.

1. Office of Legal Affairs, United Nations [U.N.], Information for Legal Advisers, http://untreaty.un.org/ola/legal_advisors.aspx (last visited Nov. 17, 2009).

2. *See* COMM. OF LEGAL ADVISERS ON PUB. INT'L L. (CAHDI), MEETING REPORT, 30TH MEETING 25-30 (Sept. 19-20, 2005), http://www.coe.int/cahdi (follow "Report" hyperlink under "Previous meetings").

Assistant Secretary of State.[3] Only in some countries does the function of legal adviser appear to be performed by a person or office outside the Ministry of Foreign Affairs, such as the office of the Attorney General in Cyprus and Malta.[4]

In the Netherlands, the Legal Adviser is the Head of the International Law Department, which forms part of the Directorate of Legal Affairs of the Ministry of Foreign Affairs. Other departments within the Directorate of Legal Affairs are the Department of Civil Law, the Department of Administrative Law, the Department of European Law, and the Treaty Department. The line of division between the International Law Department, or Office of the Legal Adviser, on the one hand and the Treaty Department on the other is a rather formal one. All matters concerning the negotiation, interpretation, and implementation of treaties are in the domain of the Office of the Legal Adviser. Once the text of a treaty has been formally adopted,[5] the treaty will go to the Treaty

---

3. *See id.*

4. *See generally* Joint Comm., The Am. Soc'y of Int'l Law & Am. Branch of the Int'l Law Ass'n, *The Role of the Legal Adviser of the Department of State*, 85 AM. J. INT'L L. 358, 359 (1991); Jassim Bin Nasser Al-Thani, *The Role of the Legal Adviser in the Formulation of a State's Foreign Policy*, *in* COLLECTION OF ESSAYS BY LEGAL ADVISERS OF STATES, LEGAL ADVISERS OF INTERNATIONAL ORGANIZATIONS AND PRACTITIONERS IN THE FIELD OF INTERNATIONAL Law 27, 27 (United Nations 1999); Ian Sinclair, *The Practice of International Law: The Foreign and Commonwealth Office*, *in* INTERNATIONAL LAW: TEACHING AND PRACTICE 123, 123-24, 126-27 (Bin Cheng ed., 1982); F.D. Berman, *The International Lawyer: Inside and Outside Foreign Ministries*, *in* TWO WORLDS OF INTERNATIONAL RELATIONS—ACADEMICS, PRACTITIONERS AND THE TRADE IN IDEAS 79, 85 (Christopher Hill & Pamela Beschoff eds., 1994); Franklin Berman, *The Role of the International Lawyer in the Making of Foreign Policy*, *in* THE INTERNATIONAL LAWYER AS PRACTITIONER 3, 3-4 (Chanaka Wickremasinghe ed., 2000); Michael C. Wood, *The Role of Legal Advisers at Permanent Missions to the United Nations*, *in* THE INTERNATIONAL LAWYER AS PRACTITIONER, *supra*, at 71, 73; ANTHONY CARTY & RICHARD SMITH, SIR GERALD FITZMAURICE AND THE WORLD CRISIS: A LEGAL ADVISER IN THE FOREIGN OFFICE, 1932-1945, at 1 (2000); Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 633 (1962); Richard B. Bilder, *International Law and United States Foreign Policy: Some Reflections on the ASIL/ILA Report on the Role of the Legal Adviser*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 201, 202 (1991); Hans Corell, *United Nations Office of Legal Affairs*, *in* INTERNATIONAL LAW: THEORY AND PRACTICE, ESSAYS IN HONOUR OF ERIC SUY 305, 306 (Karel Wellens ed., 1998); Gerald Fitzmaurice, *Legal Advisers and Foreign Affairs*, 59 AM. J. INT'L L. 72, 75 (1965) (book review); Gilbert Guillaume, *Droit international et action diplomatique: Le cas de la France*, 2 EUR. J. INT'L L. 136, 137 (1991); Mathias Krafft, *L'attitude de la Suisse à l'égard du droit international*, 2 EUR. J. INT'L L. 148, 149 (1991); Ronald St. J. Macdonald, *The Role of the Legal Adviser of Ministries of Foreign Affairs*, 156 RECUEIL DES COURS 377, 381 (1977); Robbie Sabel, *The Role of the Legal Adviser in Diplomacy*, 8 DIPL. & STATECRAFT 1, 1-9 (1997); Stephen M. Schwebel, *Remarks on the Role of the Legal Adviser of the US State Department*, 2 EUR. J. INT'L L. 132, 132 (1991); Arthur D. Watts, *International Law and International Relations: United Kingdom Practice*, 2 EUR. J. INT'L L. 157, 157 (1991).

5. *See* Vienna Convention on the Law of Treaties, art. 9, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331.

Department, which will deal with the formalities of the signature and ratification, acceptance, approval, or accession of the treaty.[6] In addition, the Treaty Department will prepare for a treaty's approval by the Dutch Parliament (where necessary), see to the translation of the text into Dutch, and oversee the publication of the treaty in the Treaty Series of the Kingdom of the Netherlands (*Tractatenblad van het Koninkrijk der Nederlanden*).[7]

The Dutch Office of the Legal Adviser (Office) has expanded considerably over the years. In the 1980s the Office consisted of only seven or eight lawyers and dealt with both international and European law affairs. As of 2009, the Office consists of twelve lawyers dealing strictly with international law affairs. The now separate Department of European Law has a similar, or even somewhat larger, number of lawyers, which illustrates the growing importance of international and European law in the foreign affairs of the Netherlands.

The lawyers of the Office of the Legal Adviser are not the only lawyers in the Ministry of Foreign Affairs dealing with matters of international law. Some policy departments of the Ministry have their own lawyers dealing with day-to-day legal affairs. However, once a legal question becomes less routine and more complex, the Office of the Legal Adviser must be consulted and will even take over the matter.

The lawyers of the Office of the Legal Adviser may be recruited from within the Ministry of Foreign Affairs, but, due to the requirement of specialized knowledge and practice with international law, they are often recruited from universities or law firms. They are also not usually career diplomats and therefore are not or are only incidentally posted abroad. The Legal Adviser of the Netherlands Ministry of Foreign Affairs has always been a longtime specialist in international law, who has often combined his function in the Ministry with a professorship at one of the universities in the Netherlands.[8] The Legal Adviser of the Netherlands Ministry of Foreign Affairs, unlike in some other countries, such as the United States, is not a political appointee and remains in function regardless of the Minister of Foreign Affairs party affiliation.

Within the Office, each lawyer deals with one or more fields of international law, such as treaty law, immunities law, the law of

---

6. *See id.* arts. 10-16.

7. *See* Tractatenblad van het Koninkrijk der Nederlanden (Trb.), *available at* https://zoek.officielebekendmakingen.nl for database (last visited Sept. 22, 2009).

8. After the Second World War, the function of Legal Adviser was held by Professor J.P.A. François, Professor W. Riphagen, G.W. Maas Geesteranus, Dr. A. Bos, and Professor J.G. Lammers (1999-2006). At present the position is held by Dr. Liesbeth Lijnzaad.

international organizations, United Nations law, law of the sea, international environmental law, human rights law, international humanitarian law, international criminal law, international investment law, international responsibility and liability, peaceful settlement of disputes, the use of force, cultural property law, etc. From time to time the dossiers are reshuffled to broaden the expertise of the lawyers and maintain the attractive nature of the work.

The Dutch Office of the Legal Adviser makes very little use of outside legal expertise. Occasionally, however, international law problems of a broader or more general scope may, at the request of the Minister of Foreign Affairs and usually by proposal of the Office of the Legal Adviser, be submitted to the Advisory Committee (Committee) on Issues of Public International Law (*Commissie van Advies inzake volkenrechtelijke vraagstukken* (CAVV)).[9] The Committee is independent of the Government, consisting mainly of professors of international law from Dutch universities. The Committee may, however, also decide *ex proprio motu* to deal with a matter, but this does not often occur. The Legal Adviser of the Ministry does not form part of the Committee, but will usually attend its sessions as an adviser on behalf of the Ministry.

Below, I intend to elaborate somewhat more on the role and practice of the Legal Adviser of the Netherlands Ministry of Foreign Affairs, his Office, and my personal experience as its Legal Adviser from 1999 to 2006.

II. THE ADVISORY FUNCTION

The most important function performed by the Legal Adviser and his Office on a day-to-day basis is to advise the Minister of Foreign Affairs[10] and policy advisers on matters of public international law. Such advice is often also given to other ministries or governmental entities, because such ministries or entities are not often confronted with questions of international law and therefore may lack the necessary personnel or expertise.

Of course, advice on international legal questions is often dispensed after coordination with colleagues of other ministries (when those ministries are involved in the matter). Thus, coordination will usually take place with colleagues of the Ministry of Justice, for instance, on

---

9. *See* STAATSBLAD VAN HET KONINKRIJK DER NEDERLANDEN [STB.] 1986, 378; Stb. 1998, 219.

10. The reference to the Minister of Foreign Affairs includes the Minister of Development Cooperation, who also has his office in the Ministry of Foreign Affairs.

human rights problems or international civil liability matters; with the Ministry of the Environment on international environmental problems; with the Ministry of Transport, Public Works and Water Management on problems concerning the law of the sea; and with the Ministry of Defense on the operations of Dutch soldiers abroad, whether or not under the flag or authorization of the United Nations. The advisory function of the Legal Adviser and his Office may in fact relate to any topic of public international law.

Undoubtedly, a most important task is the scrutiny of international agreements that are to be entered into by the Netherlands. Lawyers of the Office of the Legal Adviser are regularly involved in the negotiation of such agreements, but it is impossible and not always necessary for them to take part in all negotiations themselves. It remains, however, necessary that, in principle, all international agreements to which the Netherlands may become a party are reviewed by the Office in order to check whether they are properly drafted, whether they contain adequate final clauses and dispute settlement procedures, and whether they may conflict with other international agreements previously entered into by the Netherlands.

Apart from scrutinizing new international agreements, the Office also has the important task of giving advice on the proper interpretation of international agreements to which the Netherlands is already a party, or on the propriety of reservations made by other countries to agreements to which the Netherlands is or may become a party.[11]

A related task of the Office is to look at all Memoranda of Understanding entered into by Dutch ministries or other governmental bodies in order to ensure that they are drafted in such a way as to not give rise to any misunderstandings regarding the nonlegally binding nature of the Memoranda.

Legal advice is usually given on request, but may occasionally also be given without request. This is very important because policy colleagues are not always aware of the legal implications of their work and the developments in the world with which they have to cope. It also is very important, in view of the mandate given in the Dutch Constitution

11. The Netherlands usually objects to reservations referring to Shari'a law, the national constitution, or other legislation without specifications. Usually, these objections will not preclude the treaty between the Netherlands and the country making the reservation from entering into force.

to the Government, to promote the development of the international legal order.[12]

Thus the Office of the Legal Adviser should not only foresee international legal implications, but also warn its policy colleagues and the Government against potential breaches of international law. This means that the Office must carefully follow the developments in the Ministry, in the country, and in the world that might affect the international legal position of the Netherlands. The Office must follow the news and correspondence within the Ministry, both between the various departments and with the Dutch embassies abroad. It is therefore also important that the Legal Adviser be present at relevant meetings taking place within the Ministry. Thus, the Legal Adviser is always present during the regular meetings of the directors of all the directorates in the Ministry, which is chaired by the Director-General for Political Affairs. During these meetings, the Legal Adviser may thus become aware of developments with international legal implications and intervene during the discussions.

Normally, the Minister and the policy colleagues are prepared to ask for, listen to, and follow legal advice even when it is unsolicited. Unfortunately, however, this is not always the case, especially when matters of high political importance are at stake.

Take, for instance, the North Atlantic Treaty Organization (NATO) action in Kosovo. NATO airplanes started to bomb Serbian targets in Kosovo in March 1999. In October 1998, before the NATO action began, I wrote a memo to the Minister regarding the legal basis for a possible armed NATO intervention in Yugoslavia. I was requested to state what the international legal basis for such action could be in case Yugoslavia did not comply with certain legally binding resolutions of the U.N. Security Council (S.C.), in particular S.C. Resolution 1199.

Explaining the situation and indicating that there was no situation of self-defense that would allow for military action under the United Nations Charter, I indicated that the only legitimation would be a binding decision adopted by the Security Council under Chapter VII of the U.N. Charter. In my view, S.C. Resolution 1199—although imposing legally binding obligations on Yugoslavia—neither explicitly nor implicitly gave the green light for military action in the event that Yugoslavia did not comply with that resolution.

---

12. CONST. OF THE KINGDOM OF THE NETH. [GW.] art. 90 ("The Government shall promote the development of the international legal order.").

On the contrary, S.C. Resolution 1199, paragraph 16, made it clear that the Security Council would have to deliberate further about any measures to be taken in case the resolution was not followed. That an S.C. resolution giving the green light would be adopted was very unlikely in light of a Russian threat to veto any such resolution.

I also mentioned in my memo the possibility of a humanitarian intervention as a possible legitimation for NATO action, but at the same time indicated that such a legitimation was highly controversial in international law. Because I had heard that the United States seemed to have a good legal argument to justify a NATO action, I proposed consultation with the U.S. Embassy on what grounds the United States thought a NATO action could be justified without a new S.C. resolution.[13] The interesting reaction of the Minister on the memo regarding my suggestion to consult the U.S. embassy was: "This does not seem to be useful; I don't find this necessary."

In this case, there was broad support in the Dutch Parliament for the NATO action.[14] The Government emphasized that the NATO action was primarily of a humanitarian nature and that noncompliance with S.C. Resolutions 1199 and 1203 (neither of which gave the green light for a military enforcement action) provided an adequate legal basis.[15] The Government recognized that, in general and in principle, an S.C. resolution legitimizing military enforcement action was necessary but that in exceptional situations, particularly in the case of humanitarian catastrophes as in the case of Kosovo, no such resolution was necessary.

The approach followed by me and my Office was clear. We did not simply try to give the legal arguments for a legitimation of a possible NATO action in Kosovo in the case of noncompliance by Yugoslavia with legally binding S.C. resolutions, which did not explicitly or implicitly give the green light for such an action. We believed that our function was to inform the Minister and the policy colleagues as thoroughly and as objectively as possible of the international legal implications of any action that might be taken by the Dutch Government. Of course, international law, especially unwritten customary or general international law, is not always clear and may contain only fairly general rules or principles. This allows lawyers certain leeway in giving legal advice to their political bosses or policy colleagues. However, there are certain

---

13. Memorandum from Johan G. Lammers, Legal Adviser, Neth. Ministry of Foreign Affairs, to the Minister of Foreign Affairs (Oct. 6, 1998) (Memorandum No. DJZ/IR-442/98).

14. Carl Ek, Cong. Research Serv., Kosovo: International Reactions to NATO Air Strikes 5 (1999).

15. *Id.*

limits imposed by international law that cannot or may not be transgressed; if one does transgress these limits, he is committing an internationally wrongful act for which the state will incur international responsibility. We see it as our task to make the Minister and the policy colleagues aware of those consequences. It remains the political responsibility of the Minister to decide what he will actually do with the advice that has been given. This advice should, however, in principle, be a thorough and objective account of the existing international law, so that the Minister will not be in a position to complain later that the advice given was wrong and has created difficulties for him.

Another notorious situation in which my Office was involved concerned the legitimation of the invasion in Iraq in March 2003. The Netherlands decided to give only political support to the action. Again, the Office was asked to provide the legal arguments for giving support to the invasion. In a memo written before the invasion, my Office gave an answer in two parts. Part A gave the arguments that had already been given by Attorney General Lord Goldsmith in the United Kingdom.[16] It based the legitimation for the U.S./U.K. invasion on a breach of binding S.C. Resolution 1441 and certain other S.C. resolutions (in particular S.C. Resolutions 678 and 687) that had been adopted by the Security Council in connection with the military action against Iraq in order to free Kuwait and restore peace and security in the region. My Office was, however, very skeptical of the correctness of that legal argumentation and in Part B gave legal advice that was critical of the adequacy of the legal arguments presented in Part A.[17] This memo was followed by a memo to the Minister of the Director-General for Political Affairs, which suggested that the legal arguments given by my Office were "not very convincing" but did not give any further support for this view.[18]

In order to "set things right" and give the Minister as objective a view as possible of the international legal implications, my Office sent (after the invasion of Iraq had started) a very elaborate memo setting forth the governing rules and principles of international law concerning

---

16. *See A Case for War: Lord Goldsmith's Published Advice on the Legal Basis for the Use of Force Against Iraq*, GUARDIAN (U.K.), Mar. 17, 2003, http://www.guardian.co.uk/world/2003/mar/17/iraq2; *see also* Memorandum from Peter H. Goldsmith, Att'y Gen. for Eng. & Wales & N. Ir., on Iraq: Resolution 1441 to Anthony Blair, Prime Minister of the U.K. (Mar. 7, 2003), *available at* http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/28_04_05_attorney_general.pdf (leaking original much more reserved advice of Lord Goldsmith expressing doubts).

17. Memorandum from Johan Lammers, Legal Adviser, Neth. Ministry of Foreign Affairs, to the Minister of Foreign Affairs (Mar. 13, 2003) (Memorandum No. DJZ/IR/2003/96).

18. Memorandum from Dir. Gen. for Political Affairs to the Minister of Foreign Affairs (Apr. 14, 2003) (Memorandum No. DGPZ/982/03).

the use of force. The memo concluded that the invasion could not lawfully have taken place without a new S.C. resolution giving the green light for such an invasion and that such a resolution had been lacking. The breaches of earlier legally binding S.C. resolutions by Iraq could not be regarded as having provided a justification. Furthermore, the memo indicated that in this particular case, the (in any case controversial) legal basis for an intervention on humanitarian grounds did not apply.[19]

The memo further noted that if the case eventually came before the International Court of Justice, it must be feared that the legal reasoning provided by the United States and the United Kingdom, and supported by the Dutch Government in Parliament, for the Iraq invasion would not be accepted by the Court and that in the absence of a further S.C. resolution, the Court would likely consider the Iraq invasion unlawful.[20]

Contrary to the NATO action in Kosovo that had found broad support in the Dutch Parliament, such support was absent in the case of the Iraq invasion. There was, however, enough support for the invasion from the then-existing government coalition, which based its support for the invasion on a breach of S.C. Resolutions 678, 687, and 1441,[21] and from the parties in Parliament that made up the Government.

Criticism in Parliament, however, persisted, especially on the part of the opposition parties. The Government was regularly asked to publish the legal memos that had been given by my Office and the lawyers of the Ministry of Defense. The Government, however, constantly refused to publish the legal memos, stating that such memos were confidential and that it was important to keep them confidential in order to allow the lawyers unhampered freedom to give their Minister adequate legal advice.

The Labour Party and other opposition parties, however, did not rest there. In the campaign for the election of the new Second Chamber of the Dutch Parliament in November 2006, the Labour Party made it a politically important point of its agenda to reopen the discussion of the Government's decision to give political support to the Iraq invasion.

---

19. Memorandum from Johan Lammers, Legal Adviser, Neth. Ministry of Foreign Affairs, to the Minister of Foreign Affairs (Apr. 29, 2003) (Memorandum No. DJZ/IR/2003/138), *available at* http://www.nrc.n1/redactie/binnenland/memo_buza_irak.pdf.

20. *Id.*

21. See Ministry of Foreign Affairs, Antwoorden op vragen Eerste Kamer over politieke steun inval in Irak in 2003 [Answers of the Government to Questions of the First Chamber Regarding Political Support Raid in Iraq in 2003], http://www.minaz.nl/Actueel/Kamerstukken/2008/December/Antwoorden_op_vragen_Eerste_Kamer_over_politieke_steun_inval_in_Irak_in_2003 (last visited Sept. 22, 2009), for the answers of the Government given to questions C3 to C6 of the First Chamber of the Dutch Parliament.

When the new Government was formed after the election in which the Labour Party, which had been in the opposition before, became a coalition partner, the Christian Democrat Prime Minister insisted, as a condition for the participation of the Labour Party in the new Government, that the Labour Party abandon its request to reopen the discussion of the former Government's political support for the Iraq invasion. As a result, no majority was to be found in the new Second Chamber of the Dutch Parliament to reopen that discussion.

However, calls for a reopening of the discussion remained, and in May 2008 the First Chamber (*Senaat*) of the Dutch Parliament sent a great number of questions to the Government concerning the Government's political support of the Iraq invasion that was given in 2003. These questions were answered in writing by the Government shortly before Christmas 2008.[22] The members of the First Chamber, however, were quite dissatisfied with the answers given by the Government, which were in fact little different from what the Government had maintained in 2003.

The Labour Party in the First Chamber said that it felt "connected to" but not politically bound by, the support given by the political parties in the Second Chamber of the Parliament (including the Labour Party) to the coalition agreement that formed the basis of the new Government. Moreover, the Liberal Party, which at the time of the Iraq invasion had been in the Government but was now in the opposition, indicated that it would support a request from the First Chamber for a parliamentary inquiry in case the Government did not come up with more convincing answers to the questions raised by the First Chamber.

To my great surprise, I was called during my stay as Visiting Professor at Tulane University Law School by a journalist of the authoritative Dutch newspaper *NRC-Handelsblad*. He told me that he had received the eight-page legal memo that my Office had sent to the Minister in April 2003 about the legitimacy of the Iraq invasion and in which the Government's justification for the Iraq invasion had been qualified as inadequate,[23] while the Government had maintained that its political support for the Iraq invasion had been based on what it called "a sound legal foundation."

---

22. *See id.*

23. *See* Memorandum from Johan Lammers to the Minister of Foreign Affairs, *supra* note 19.

The next day, on January 17, 2009, the matter was fully exposed on the front page of the newspaper.[24] The eight-page memo of my Office was posted on the Internet,[25] now available for anybody to view, and many passages from the memo were quoted in the paper.[26] It was also noted that the memo had not been passed on to the Minister and had been sent back to my Office by the Secretary-General of the Ministry with the remark: "Thanks a lot, Please, store it well in the archives for the next generation. Discussion herewith closed for the time being."[27]

The fact that the memo was leaked and printed on the front page of the newspaper created consternation in the Netherlands. Many new questions were put to the Government by members of both Chambers of the Dutch Parliament.

As I have already noted, I see the role of my Office as giving the Minister and the policy colleagues as thorough and objective a view of international law as possible. If a certain proposed action is not possible from an international legal point of view, we will say so. Yet we remain lawyers in the service of the Ministry of Foreign Affairs and, whenever possible, will not limit ourselves to a mere negative reaction. Thus, we may advise that a certain proposed action to achieve a particular result is not legally possible, but that certain other actions would be possible to achieve the same or similar result.

Allow me to give an example. It may not be allowed under international law for the Netherlands to impose certain *obligations* on foreign vessels, for instance, to protect the marine environment from pollution. However, it would be allowed to make certain conduct by such vessels a *condition* for being entitled to enter Dutch internal waters or a Dutch port.[28]

Moreover, it may be that the law on certain points is not well-settled, or even controversial, in which case we will say so, and there will be more freedom for the Government to act. It may be that the law is not yet established but is developing in a certain direction. In such a situation, the Office of the Legal Adviser will say so and possibly advise the Government to support and further strengthen the development of the emerging rule or principle of international law.

---

24. Joost Oranje, *Foreign Affairs Held Critical Opinion Behind Iraq*, NRC HANDELSBLAD (Rotterdam), Jan. 17, 2009, at 1.

25. *See* Memorandum from Johan Lammers to the Minister of Foreign Affairs, *supra* note 19.

26. *See* Oranje, *supra* note 24.

27. Memorandum from Johan Lammers to the Minister of Foreign Affairs, *supra* note 19.

28. *See* United Nations Convention on the Law of the Sea, art. 211(3), Dec. 10, 1982, 21 I.L.M. 1261, 1310, 1833 U.N.T.S. 3.

As Foreign Office lawyers, we may in the end be called upon to defend the policy eventually adopted by the Minister *externally* and, if necessary, before the International Court of Justice (ICJ), in which case we will adopt the role of advocate for the Dutch Government. That does not, however, mean that *internally* we should not give the Minister as thorough and objective a view as possible on the state of international law.

In this connection, it must be stressed that the advisory task of the Legal Adviser and his Office must be limited to giving legal advice and that he should not pursue policy under the guise of law. The advice may not enter the domain of nonlegal policy considerations. It would be an abuse of the position's function, and he should not lend himself to be used for that purpose by policy colleagues in the Ministry. Nevertheless, if the Legal Adviser enters the nonlegal domain, he should at least make clear to his colleagues that he is no longer functioning as a legal adviser.

As I have already noted, the Dutch Constitution requires the Government to promote the international legal order.[29] For a country such as the Netherlands, this is not just a constitutional obligation; it is also in line with a centuries-old tradition that started with Hugo Grotius, often called the father of international law, whose publication *De Mare Liberum* in 1609 about the freedom of the seas will 400 years later be celebrated in The Hague.[30]

The promotion and maintenance of the international legal order is, of course, greatly in the interest of smaller countries like the Netherlands. While some other countries may let "might" prevail over "right," it will usually be in the interest of the Netherlands to let "right" prevail over "might."

For the same reason the Netherlands has also accepted the compulsory jurisdiction of the International Court of Justice under article 36(2) of the Statute of the Court without hardly any reservations.[31] The Netherlands has, in fact, accepted the compulsory jurisdiction of the Court without any special agreement in relation to any other state that has accepted the same obligation in all disputes arising or that may arise or have otherwise arisen since August 1921. In delicate legal matters in which the Netherlands may be involved, an important criterion will

---

29. Memorandum from Johan Lammers to the Minister of Foreign Affairs, *supra* note 13.

30. *See* Biography of Hugo Grotius, http://oregonstate.edu/instruct/ph/302/philosophers/grotius.html; *see also* HUGO GROTIUS, MARE LIBERUM (Richard Hakluyt trans., Liberty Fund 2004) (1609).

31. *See* Letter from E.L.C. Schiff, Acting Permanent Representative to the U.N., Kingdom of the Neth., to the Sec.-Gen. (Aug. 1, 1956), *available at* http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=NL.

always be how the International Court of Justice might look upon the matter and decide the case.

The wide-open window of the Netherlands to international law is not only evidenced by its approach to international law in its relations with other states but also within the Dutch legal order.

In the discussion about the monist or dualist approach of a national legal order, the Netherlands may rightly be called predominantly monist. Namely, the Dutch Constitution provides that provisions of international agreements that have been published and that contain provisions that are fit to be applied by the Dutch courts *must* be applied by the Dutch courts.[32] Such provisions will even prevail over all Dutch legislation, including the Dutch Constitution.[33] The same applies to self-executing provisions of legally binding resolutions of international organizations. Self-executing provisions of customary international law may also directly apply within the Dutch legal order, but they do not prevail over formal acts of the Dutch Parliament or the Dutch Constitution.[34]

The Dutch courts highly value their independence from the Dutch executive and are free to determine whether or not a norm of international law will be directly applicable within the Dutch legal order. As a result, one can imagine that the view possibly taken by the independent judiciary in the Netherlands will also constitute a factor to be taken into account in the legal advice given by the Office of the Legal Adviser. The potential approach taken by the independent Dutch courts may well impress the policy colleagues in the Ministry of Foreign Affairs more than an unlikely case before the International Court of Justice.

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,[35] to which the Netherlands is a party, does not only contain many provisions directly applicable within the Dutch legal order, but also may give rise to actions against the Dutch Government instituted by individual citizens before the European Court

---

32. CONST. OF THE KINGDOM OF THE NETH. [GW.] art. 93 ("Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.").

33. *Id.* art. 94 ("Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.").

34. *See* De Vennootschap naar Zwitsers recht Société Anonyme Maritime et Commerciale/de Staat der Nederlanden, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 6 Maart 1959, NJ 1962, 2 (ann. DJV) (Neth.).

35. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

of Human Rights in Strasbourg.[36] The Court's case law will therefore remain an important factor in any advice given by my Office.

Another factor playing an important role in the work of the Office of the Legal Adviser in the Netherlands is that there are a number of international organizations based in The Hague, such as the Hague Conference on Private International Law, the Organization for the Prohibition of Chemical Weapons, and especially international judicial or arbitral institutions, such as the International Court of Justice, the Yugoslavia Tribunal, the International Criminal Court, the Permanent Court of Arbitration, and the Iran-United States Claims Tribunal.[37] As the host state of these institutions, the Netherlands has special obligations, which are usually laid down in headquarters agreements concluded between the institution concerned and the Netherlands.

Particularly complicated situations arose in connection with special criminal tribunals, such as the Lockerbie Tribunal, the Special Court for Sierra Leone, and the Hariri or Lebanon Tribunal.

Secret negotiations in the United Kingdom Embassy during a holiday in The Hague between U.K., U.S., and Dutch lawyers eventually prepared the way for U.N. S.C. Resolution 1192 of August 27, 1998, adopted under Chapter VII of the U.N. Charter, in which the Security Council welcomed the initiative for the trial before a Scottish court sitting in the Netherlands of the two persons charged with letting Pan Am Air flight 103 explode in the air above Lockerbie, Scotland.[38] In the headquarters agreement between the United Kingdom and the Netherlands, it was agreed that the trial would take place at a former U.S. airbase at Zeist, east of Utrecht, in the Netherlands and that the airbase for the purposes of the trial by a Scottish court would be regarded as if it were Scottish territory.[39]

Complex legal questions also arose in the case of the confidential request of the Special Sierra Leone Court to allow the Court to sit in The Hague to try Charles Taylor, the former president of Liberia, who was at the time enjoying asylum in Nigeria.

The Sierra Leone Court believed that it would not have been safe to try Charles Taylor, who had been accused of violations of international

---

36. *See* Jolien Schukking, *The Netherlands Before the European Court of Human Rights*, *in* THE NETHERLANDS IN COURT: ESSAYS IN HONOUR OF JOHAN G. LAMMERS 141 *passim* (Niels Blokker et al. eds., 2006) (case law involving the Netherlands).

37. *See generally* THE HAGUE: LEGAL CAPITAL OF THE WORLD 127, 181, 241, 278, 345, 483, 517 (Peter J. van Krieken & David McKay eds., 2005) (list of institutions).

38. S.C. Res. 1192, ¶¶ 2-10, U.N. Doc. S/RES/1192 (Apr. 27, 1998).

39. *See* Agreement Concerning a Scottish Trial in the Netherlands, Neth.-U.K., Sept. 18, 1998, Trb. 1998, 237.

humanitarian law and crimes against humanity, in Freetown in Sierra Leone, the ordinary seat of the Court, once Taylor would have become available to the Court.

As the Netherlands was not a party to the Sierra Leone Court Agreement concluded between the United Nations and Sierra Leone,[40] and the Court did not have its ordinary seat in the Netherlands, special legal problems arose. It was thought by the Registry of the Court that the elected Liberian President, Ms. Ellen Johnson-Sirleaf, could at any moment ask the President of Nigeria to surrender Charles Taylor via Liberia to the Court and that he would thereafter have to be transferred immediately to the Netherlands. Hence, no time was to be lost.

However, no headquarters agreement existed between the Netherlands and the Sierra Leone Court which, inter alia, would deal with the detention of Charles Taylor in the Netherlands and exclude any appeal that Taylor might possibly make to the Dutch courts disputing his detention in the Netherlands. The preparation and conclusion of such a headquarters agreement and the necessary approval to be given by the Netherlands Parliament would certainly take a number of months. Moreover, the preparation could not be kept secret and would alarm Taylor, who probably would have left his comfortable villa in Nigeria to disappear to an unknown destination. To cope with this predicament, the Netherlands, together with the United Kingdom and the United States, decided to prepare a draft S.C. resolution secretly, which could be presented to the Security Council for adoption immediately on Charles Taylor's surrender to the Sierra Leone Court.

A legally binding S.C. resolution adopted under Chapter VII of the U.N. Charter and containing provisions with direct effect in the Netherlands and prevailing over Dutch legislation, as well as the European Convention on Human Rights and Fundamental Freedoms, was to provide a provisional solution for the legal problems in the Netherlands. After the adoption of the resolution, there would be time to draft a headquarters agreement with the Sierra Leone Court and to obtain the approval of the Dutch Parliament.

On March 29, 2006, my Office was informed that Charles Taylor had disappeared from his villa in Nigeria. We were very disappointed because, above all, Charles Taylor seemed to escape the trial before the Sierra Leona Court, but also because of the enormous amount of work my Office had already spent on the case. Fortunately, later that same

---

40. *See* Agreement on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, *available at* http://www.unhcr.org/refworld/docid/3fbdda8e4.html.

evening, a message reached us that Taylor had been captured at the Nigeria-Cameroon border with two 110-pound sacks filled with U.S. and European currency. The next day, a Nigerian plane brought Taylor to Liberia, where the new President, Ms. Ellen Johnson-Sirleaf, did not want to keep him, fearing that his presence in Liberia could destabilize her fragile country. After arrival in Liberia, Taylor was immediately taken by a U.N. helicopter to Sierra Leone.[41]

It still took, however, more than two months before the Security Council was able to adopt S.C. Resolution 1688 on June 16, 2006, concerning the trial of Charles Taylor in the Netherlands.[42] Acting under Chapter VII of the U.N. Charter, the Security Council decided that the Special Sierra Leone Court "shall retain exclusive jurisdiction over former President Taylor during his transfer to and presence in the Netherlands . . . and that the Netherlands shall not exercise its jurisdiction over former President Taylor except by express agreement with the Special Court."[43] Further obligations were imposed on the Netherlands, such as, inter alia, the obligation to cooperate with the Sierra Leone Court "under the same conditions and according to the same procedures as applicable to the International Criminal Tribunal for the former Yugoslavia."[44]

The time lag between the arrest of Taylor and the adoption of the S.C. resolution, which was prepared by my Office in close cooperation with U.S. and U.K. lawyers in New York and with the full support of John Bellinger, the U.S. State Department Legal Adviser, was mainly due to the fact that it took a long time before a condition set by the Dutch Government—that is, that Taylor, after his trial and when convicted, should be imprisoned in another country, or in case of his acquittal, should be admitted in another country—was fulfilled. Difficult negotiations with other countries involving not only me but also John Bellinger and U.N. Secretary General Kofi Annan initially had no success. In the end, the United Kingdom appeared ready to admit Taylor after his trial in the Netherlands and, after some hesitation on the part of the Russian Federation (which had a problem with adopting an S.C. resolution dealing with only one person), the S.C. resolution was finally

41. *See* U.N. Flies Warlord Taylor To Face Tribunal, Former Liberian Leader Taken to Sierra Leone on War Crimes Charges, http://www.msnbc.msn.com/id/12061353/ (last visited Sept. 22, 2009).

42. *See* S.C. Res. 1688, ¶¶ 7-8, U.N. Doc. S/RES/1688 (June 16, 2006).

43. *Id.* ¶ 7.

44. *Id.* ¶ 8(c).

adopted and Taylor was soon thereafter transported to the Netherlands in a U.N. airplane.

The Netherlands agreed to host the Special Tribunal for Lebanon in August 2007, which was established on the basis of an agreement between the United Nations and Lebanon in January and February 2007 and entered into force in June 2007 by virtue of S.C. Resolution 1757 of May 30, 2007, adopted under Chapter VII of the U.N. Charter.[45] The "hybrid" international tribunal is mandated to try those suspected of the terrorist act that killed former Lebanese Prime Minister Hariri in February 2005. The Tribunal will have its seat in Leidschendam, a village close to The Hague. Here again a key condition of the Netherlands was that another country would volunteer in advance to imprison anyone convicted of killing former Prime Minister Hariri or would admit him in its territory after acquittal by the Tribunal.[46]

III. REPRESENTING THE NETHERLANDS ABROAD IN INTERNATIONAL LEGAL AFFAIRS

The Legal Adviser of the Ministry of Foreign Affairs acts in two different frameworks, the domestic and the international. While his most important function at home will be to give advice on international legal matters, his other function is to represent his Government abroad in those affairs, either in relation to other countries or at international fora.

Thus, I have participated in regular meetings of legal advisers of other countries. I met my colleagues of the European Union (EU) (now consisting of twenty-seven member states) at least four times a year in the Justus Lipsius building in Brussels for the EU Working Group on Public International Law. This Working Group, also called COJUR, provides a forum for discussing all current international legal affairs.

A regular point on the agenda is the discussion of reservations made to treaties. Such reservations, including those made by the EU member states themselves, are judged based on their compatibility with the object and purpose of the treaty concerned, as well as on the law of treaties in general. The exchange of opinions often leads to a common approach with regard to certain reservations and whether they are accepted or rejected. Reservations that are regularly objected to include those that provide that the national constitution or Shari'a law will prevail, for

45. S.C. Res. 1757, ¶ 1, U.N. Doc. S/RES/1757 (May 30, 2007).

46. *See* Mark Leon Goldberg, Netherlands Close To Agreeing To Host the Hariri Tribunal (Aug. 16, 2007), http://undispatch.com/archives/2007/08/netherlands_clo.php.

example. Also, the practice of the Office of the U.N. Legal Counsel regarding its treatment of reservations has in the past been scrutinized.

Another recurring topic is the discussion of the work of the International Law Commission (ILC). The Commission, consisting of thirty-four eminent international lawyers elected by the U.N. General Assembly, but functioning in their personal capacity, is mandated with the codification or progressive development of international law.[47] Its draft restatements of international law with the accompanying comments are submitted to states for their comments, which are either expressed in writing or orally during sessions of the Sixth (Legal) Committee of the U.N. General Assembly.[48]

The regular COJUR meetings in Brussels provide an opportunity to discuss, and possibly harmonize, the views of the EU colleagues on current codification projects of the International Law Commission. I recall, for instance, the important discussion that took place regarding the draft articles of the ILC on the immunity of states and their property—a project that had lingered for many years, mainly due to an important difference of view of what was to be understood by a "commercial transaction" in respect of which no state immunity would exist. Among the EU colleagues were proponents of the so-called "nature of the act" test (objective test) and others of the so-called "purpose of the act" test (subjective test) to decide whether an act of the state was to be considered a commercial transaction.[49] Thanks to the discussion and cooperative work within the COJUR could be a compromise achieved that ultimately appeared acceptable at the broader international level and that led to the adoption of the Convention on the Jurisdictional Immunities of States and Their Property by the U.N. General Assembly in December 2004.[50]

In November 2006, the COJUR was also the forum for a discussion between the EU legal advisers and the Legal Adviser of the U.S. State Department, John B. Bellinger, on principles of international law relevant to counter-terrorism and the legal views held by the United States on various aspects of international humanitarian law. These included the concept of "illegal combatants," their treatment at Guantanamo Bay, the concept and admissibility of torture or other inhuman and cruel

---

47. *See* G.A. Res. 174 (II), U.N. Doc. A/519 (Nov. 21, 1947); *see also* Int'l L. Comm'n, United Nations http://www.un.org/law/ilc/ (last visited Oct. 24, 2009).

48. *See* United Nations General Assembly, Legal—Sixth Committee, http://www.un.org/ga/sixth (last visited Oct. 24, 2009).

49. *See* AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 118-21 (Peter Malanczuk ed., Routledge 1997) (1970).

50. G.A. Res. 59/38, U.N. Doc. A/59/508 (Dec. 2, 2004).

treatment, and the practice of rendition of persons to other countries without the safeguards normally applicable to extradition. This meeting, which was prepared well in advance by the EU legal advisers, led to what diplomats call a useful, open, and frank discussion. A similar meeting of EU legal advisers with John Bellinger took place later in New York in the margin of a session of the Sixth (Legal) Committee of the U.N. General Assembly.

While the COJUR provides a forum for the exchange of views and possible coordination or harmonization of legal views, there is no practice of making legally binding decisions by simple or qualified majority vote. The COJUR further provides the EU legal advisers with an opportunity to inform each other about developments of international legal interest that have taken place in their respective countries, such as court proceedings against (former) heads of state or claims presented by the Ukraine or Georgia to public property of the former Soviet Union (now held by the Russian Federation). It also provides an opportunity to test new legal ideas at the EU level before they are presented at a broader international level.

A considerable advantage of the COJUR meetings is that the EU legal advisers get to know one another personally within a friendly, professional atmosphere. This greatly facilitates subsequent bilateral contacts between the legal advisers when certain problems arise and must be solved between their countries.

Finally, it should be noted that a special subgroup of the COJUR has been established for experts of international criminal law dealing specifically with the now-existing international criminal tribunals, in particular the International Criminal Court and the Yugoslavia Tribunal.

Regular meetings with other legal advisers are also taking place in the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI), which now numbers forty-seven member states.[51] With the twenty-seven EU states also being members of the Council of Europe, the EU legal advisers now play a dominant role in the CAHDI. However, the meetings remain useful because they allow professional contacts with the legal advisers of non-European Union countries, such as the Russian Federation, the Ukraine, Georgia, and Azerbaijan. There are also legal advisers with observer status from the United States, Canada, Japan, Mexico, and Israel.

---

51. *See* Human Rts. & Legal Affairs, Council of Eur., http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law (last visited Oct. 24, 2009).

The CAHDI is also, like the EU COJUR, a forum for exchanging views and scrutinizing reservations to treaties made by states. CAHDI also has promoted collective projects leading to publications of the practice of member states with regard to state immunity,[52] consent to be bound by a treaty,[53] and, most interestingly, the field of state succession to treaties.[54] After the decolonization period the latter topic seemed for a long time to be of no practical importance. Developments within Europe have, however, taught that this was a misunderstanding. The topic of state succession once again came high on the international legal agenda as a consequence of the German Unification and the dissolution of the Soviet Union, the Federal Socialist Republic of Yugoslavia, and Czechoslovakia.

Finally, a regular opportunity to meet with colleague legal advisers, and this time at a global level, takes place in the autumn of each year within the framework of the Sixth (Legal) Committee of the U.N. General Assembly, especially during the period when the work of the International Law Commission is on the agenda. In that period, informal meetings of legal advisers are organized, during which time an exchange of views takes place on current international legal problems.[55]

Apart from these regular meetings with colleagues of member states of the EU, the Council of Europe, or the United Nations, the Legal Adviser of the Ministry of Foreign Affairs or members of his Office may take part in many other bilateral or multilateral meetings, often involving negotiations for an international agreement.

---

52. *See* COMM. OF LEGAL ADVISERS ON PUB. INT'L LAW, STATE PRACTICE REGARDING STATE IMMUNITIES (Council of Europe et al. eds., 2006).

53. *See generally* TREATY MAKING—EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY (Council of Europe et al. eds., 2001).

54. *See generally* STATE PRACTICE REGARDING STATE SUCCESSION AND ISSUES OF RECOGNITION: THE PILOT PROJECT OF THE COUNCIL OF EUROPE (Jan Klabbers et al. eds., 1999).

55. *See, e.g.*, Hans Corell, *Legal Advisers Meet at UN Headquarters in New York*, 85 AM. J. INT'L L. 371, 373 (1991); Hans Corell, *Second Legal Advisers' Meeting at UN Headquarters in New York*, 61/62 NORDIC J. INT'L L. 3, 3 (1992-1993); Hans Corell, *Third Legal Advisers' Meeting at UN Headquarters in New York*, 87 AM. J. INT'L L. 323, 324 (1993); Hans Corell, *Co-operation Among Legal Advisers on Public International Law*, *in* ESSAYS ON INTERNATIONAL LAW, ASIAN-AFRICAN CONSULTATIVE COMMITTEE, FORTIETH ANNIVERSARY COMMEMORATIVE VOLUME (1997); Barry Mawhinney & Kim Girtel, *Fourth Legal Advisers' Meeting at UN Headquarters in New York*, 88 AM. J. INT'L L. 379, 379 (1994); Miguel Angel González Félix, *Fifth Legal Advisers' Meeting at UN Headquarters in New York*, 89 AM. J. INT'L L. 644, 644 (1995); P. Sreenivasa Rao, *Sixth Meeting of Legal Advisers of the UN Member States*, 36 INDIAN J. INT'L L. 75, 75 (1996); Lars Magnuson, *Seventh Meeting of Legal Advisers of UN Member States*, 66 NORDIC J. INT'L L. 393, 393 (1997); *see also* Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, United Nations, http://www.un.org/law/counsel/meetings.htm (last visited Sept. 22, 2009) for informal meetings of legal advisers of ministries of foreign affairs.

My predecessor, Dr. Adriaan Bos, was, for example, heavily involved in the negotiations for the 1982 U.N. Convention on the Law of the Sea[56] and the 1998 Statute of the International Criminal Court.[57] I was involved in the negotiations of many international environmental agreements, such as the 1985 Vienna Convention on the Protection of the Ozone Layer[58] with its 1987 Montreal Protocol;[59] the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;[60] the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty[61] and its 2005 Liability Annex;[62] the 1992 Biodiversity Convention;[63] the 1997 U.N. Watercourses Convention[64] on the revision of the Vienna,[65] Paris,[66] and Brussels Nuclear Liability Conventions[67] after the Chernobyl catastrophe; and the 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage.[68] Other topics concerned the 1986 Vienna Convention on Treaties Between States and International Organizations or Between International Organizations,[69] the legal aspects of the use of outer space within the framework of the U.N. Committee for the Peaceful Uses of Outer Space (U.N. COPUOS),[70] or consultations with the Czech Republic or Poland about the interpretation of bilateral investment protection treaties, or about the lateral maritime boundary between the Netherlands

---

56. U.N. Convention on the Law of the Sea, *supra* note 29.

57. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, 1002.

58. Mar. 22, 1985, 1513 U.N.T.S. 29.

59. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3.

60. Mar. 22, 1989, 28 I.L.M. 657.

61. Oct. 4, 1991, 30 I.L.M. 1461.

62. Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty, Liability Arising from Environmental Emergencies, June 17, 2005, 45 I.L.M. 5.

63. U.N. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 822.

64. Convention on the Law of the Non-Navigational Uses of International Watercourses, G.A. Res. 51/229, U.N. Doc. A/RES/51/229 (May 21, 1997).

65. Protocol To Amend the Vienna Convention on Civil Liability for Nuclear Damage, Sept. 12, 1997, 36 I.L.M. 1462.

66. Protocol To Amend the Convention on Third Party Liability in the Field of Nuclear Energy, Feb. 12, 2004, *available at* http://www.nea.fr/html/law/paris_Convention.pdf.

67. Protocol To Amend the Brussels Supplementary Convention on Third Party Liability, Feb. 12, 2004, *available at* http://www.nea/fr/html/law/brussels-supplementary-convention-protocol.pdf.

68. *See* Convention on Supplementary Compensation for Nuclear Damage, Sept. 12, 1997, 36 I.L.M. 1473.

69. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, U.N. Doc. A/CONF.129/15 (Mar. 20, 1986).

70. U.N. Committee on the Peaceful Uses of Outer Space, Report, U.N. Doc. A/56/20 (June 6-15, 2001).

and Germany beyond the Eems-Dollard estuary, which could not yet be determined as a result of a longtime dispute about the exact boundary in the Eems-Dollard estuary.

Especially in the negotiations concerning the many environmental agreements, the Legal Adviser of the Ministry of Foreign Affairs or the members of his Office have acted as *trait d'union*. The policy experts of other ministries, such as the Ministry of the Environment; the Ministry of Agriculture, Nature and Food Quality; the Ministry of Transport, Public Works and Water Management; or the Ministry of Justice are usually only involved in the negotiation of a particular international agreement falling within their domain of mandate or expertise. The Legal Adviser of the Ministry of Foreign Affairs and the members of his Office, however, have knowledge and experience with the negotiation and drafting of a whole range of international agreements.

This knowledge and expertise relate, inter alia, to international law, legal drafting skills, institutional provisions, peaceful settlement arrangements, and final clauses of international agreements. In the case of environmental agreements or other agreements of a so-called mixed nature—agreements to which not only member states of the EU but also the European Community, because of its competence in the field, has to become a party—special drafting problems arise that will also be adequately covered by the lawyers of the Office of the Legal Adviser of the Ministry of Foreign Affairs.

IV. REPRESENTING THE NETHERLANDS IN INTERNATIONAL LEGAL PROCEEDINGS

While this may be exceptionally different in other countries, it is the Legal Adviser of the Ministry of Foreign Affairs and the members of his Office in the Netherlands who are entitled to represent the Netherlands in international legal proceedings.

Thus, the Legal Adviser of the Ministry of Foreign Affairs will act as Agent of his Government in proceedings before the International Court of Justice in contentious cases to which the Netherlands is a party. This does not happen very often. In fact, after the Second World War the Netherlands has been a party to a contentious case before the ICJ in only four instances.

Two of these cases were of relatively minor importance. For example, a case decided in November 1958 between the Netherlands and Sweden concerned the interpretation of the 1902 Convention Governing the Guardianship of Infants. At issue was whether an infant of Dutch nationality living in Sweden, whose mother had died, would be subject to

Swedish child protection legislation.[71] The other case, between the Netherlands and Belgium, decided by the ICJ shortly thereafter in June 1959, concerned the question of whether some small pieces of land located north of the Dutch-Belgian border were or were not to be considered Belgian enclaves within Dutch territory.[72] The Netherlands lost in both cases.

From an international law point of view, the so-called *North Sea Continental Shelf Cases* were much more important and interesting. These cases were brought by the Netherlands, Germany, and Denmark before the ICJ and concerned the principles and rules of international law applicable to the lateral delimitation of the respective continental shelves between the Netherlands, Germany, and Denmark. In a single judgment in February 1969, the Court found that the boundary lines in question were to be drawn by agreement between the parties and "in accordance with equitable principles" and certain factors indicated by the Court. The parties were instructed to negotiate and reach agreement on the exact delimitation line on the basis of such principles and factors. The Netherlands also lost in this case. It had maintained that according to general international law, in the absence of an agreement between the Netherlands and Germany or special circumstances, the equidistance method should govern the delimitation between their respective continental shelves, a position that was very disadvantageous for Germany due to the concave configuration of the German North Sea coast.[73] The Court's judgment became an important standard for future delimitations of continental shelf areas elsewhere in the world.

It was again in 1999 that the Netherlands became involved, and this time against its wish, in a contentious case before the ICJ, in which I acted as Agent for the Netherlands.

The case was initiated by the Federal Republic of Yugoslavia against the Netherlands and nine other NATO countries claiming the unlawful use of force in Kosovo by the NATO countries. At first, Yugoslavia asked the Court to enjoin, by way of a provisional measure, the Netherlands and the other NATO countries to immediately cease the bombing attacks.[74] The Court, in a decision of June 2, 1999, refused to indicate the

---

71. Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.), 1958 I.C.J. 55, 57 (Nov. 28).

72. Sovereignty over Certain Frontier Land (Belg. v. Neth.), 1959 I.C.J. 209, 230 (June 20).

73. North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 53-55 (Feb. 20).

74. Legality of Use of Force (Yugo. v. Neth.), 1999 I.C.J. 542, 548 (Provisional Measures of June 2).

provisional measure requested by Yugoslavia because it found that "it had no prima facie jurisdiction to entertain" the case, but left the door open for further proceedings on the question of the jurisdiction of the Court to deal with the merits of the case.[75] It was more than five years later, in December 2004, after fairly bizarre proceedings concerning objections raised by the Netherlands against the competence of the Court to deal with the merits of the case, that the Court unanimously decided that it had no jurisdiction.[76] The judgment was received with relief by the Netherlands. My impression is that if the case had gone to the merits, it would not have been an easy one and that in the absence of a U.N. S.C. resolution authorizing the NATO bombings in Kosovo, the Netherlands (and the other NATO countries before the Court) might not have won the case because the defense that the action was based on humanitarian grounds found in international law is a very dubious one.[77]

According to the Statute of the Court, member states of the United Nations are entitled to present their views when an advisory opinion from the Court is requested.[78] The Netherlands has occasionally made use of that right.[79]

In December 1994, the U.N. General Assembly requested that the Court give an advisory opinion on the question whether "the threat or use of nuclear weapons in any circumstance [would be] permitted under international law."[80] Recognizing that the Court was entitled, but not obliged, to give an answer to the request, the Netherlands tried to convince the Court to abstain from giving an answer, considering that an Opinion of the Court declaring the threat or use of nuclear weapons illegal might jeopardize the operation of the Nuclear Non-Proliferation Treaty.[81] The Netherlands statement also dealt with the merits of the question, stating that, in its view, it could not be maintained that the

---

75. *Id.* at 557.

76. Legality of Use of Force (Serb. & Mont. v. Neth.), 2004 I.C.J. 1011, 1060 (Preliminary Objections of December 15); *see also* Niels Blokker, *From a Dispute About the Use of Force to a Non-Dispute About Jurisdiction: The Case Concerning Legality of Use of Force (*Yugoslavia v. Netherlands*) Before the International Court of Justice*, *in* THE NETHERLANDS IN COURT, ESSAYS IN HONOUR OF JOHAN G. LAMMERS, *supra* note 36, at 19, 34.

77. *See, e.g.*, Lyal Sunga, Is Humanitarian Intervention Legal? (Oct. 13, 2008), http://www.e-ir.info/?p=573.

78. Statute of the International Court of Justice, art. 66, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (last visited Oct. 31, 2009).

79. *See* Letter from the Minister of Foreign Affairs of the Neth. to the I.C.J. (June 16, 1995), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=1.

80. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 228 (July 8).

81. *See* Letter from the Minister of Foreign Affairs of the Neth. to the I.C.J., *supra* note 79, para. 15.

threat or use of nuclear weapons would *always* be unlawful.[82] A similar statement was made with respect to a similar request of the World Health Organization (WHO) for an advisory opinion of the Court, but in that case the Netherlands stated that the WHO was not competent to request an advisory opinion on the legality of the use of nuclear weapons.[83]

The second instance where the Netherlands made a statement regarding a request for an advisory opinion concerned the request of the U.N. General Assembly in July 2004 for an advisory opinion on the "legal consequences of the construction of a wall [being built by Israel] in the Occupied Palestinian Territory."[84] In a brief written statement, the Netherlands again asked the Court to abstain from giving an opinion because it believed that giving the opinion would endanger the political dialogue between Israel and Palestine and the establishment of a Palestinian state living side by side with Israel in peace and security.[85] The Netherlands indicated, however, that it was "convinced that the construction of the wall in the Occupied Palestinian Territory . . . in departure of the Armistice Line of 1949, is in contradiction to relevant provisions of international law."[86]

As Agent of the Netherlands, I also defended the legal position of the Netherlands in two cases before the Permanent Court of Arbitration (PCA). One case, against France, the Rhine Chlorides Arbitration Concerning the Auditing of Accounts, leading to an award in March 2004, involved the reimbursement of a certain portion of the funds transferred to France for the storage of waste salts by the French Alsace Potassium Mines during the period 1991-1998 in order to prevent those waste salts from being discharged into the Rhine river, which was to the detriment of the use of Rhine water for drinking water or market gardening purposes in the Netherlands.[87] The other case, between the

---

82. *Id.* para. 16.

83. Letter from the Minister of Foreign Affairs of the Neth. to the I.C.J. 6-7 (June 6, 1994), *available at* http://www.icj-cij.org/docket/files/93/13407.pdf.

84. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

85. *See* Letter from the Minister of Foreign Affairs of the Neth. to the I.C.J., paras. 4-5 (Jan. 30, 2004), http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=1.

86. *Id.* para. 9.

87. Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1976, (Neth. v. Fr.), 25 R. Int'l Arb. Awards 267 (Perm. Ct. Arb. 2008) [hereinafter Auditing of Accounts]; *see also* Laurence Boisson de Chazournes, *The Rhine Chlorides Arbitration Concerning the Auditing of Accounts: Its Contribution to International Law*, *in* THE RHINE CHLORIDES ARBITRATION CONCERNING THE AUDITING OF ACCOUNTS 1, 7-8 (2008).

Netherlands and Belgium, the Iron Rhine (*IJzeren Rijn*) Arbitration, leading to an award in May 2005, concerned the question of whether the Netherlands was entitled to compel Belgium to pay for the cost of, inter alia, a tunnel under a nature reserve in the Netherlands for a reactivated railway connection through Dutch territory to the German Ruhr area exclusively for the benefit of Belgium.[88] This case was premised on a Belgian right of passage agreed in the Treaty of Separation concluded in 1839 between the two countries.[89]

While cases before the ICJ or PCA involving the Netherlands are fairly rare, that is certainly not true of cases before the European Court of Human Rights in Strasbourg. Individuals are entitled to file a complaint against the Netherlands in that Court if after having exhausted all legal remedies in the Netherlands, they still believe that one of their human rights under the European Convention or related protocols has been violated by the Netherlands.[90]

For instance, in the period 1999-2005, "2,320 applications were submitted to the Court alleging violations by the Netherlands, of which 1,735 were declared inadmissible. In relation to this group of applications, fifty-two judgments were delivered, in twenty-nine of which the Court held that the Convention had been violated" by the Netherlands, amounting to an average of about four judgments against the Netherlands per year.[91]

While in the period before 1999 the complaints often involved criminal law, including complaints that the "reasonable time" limit had been exceeded with respect to violations of article 5 (the right to liberty and security) and article 6 (the right to a fair trial), in the period thereafter the emphasis shifted to aliens law, for example, involving complaints that an expulsion would be in conflict with article 3 (the prohibition of torture) or article 8 (the right to respect for private life and family life).[92]

---

88. Iron Rhine ("IJzeren Rijn") Railway (Belg. v. Neth.), 27 R. Int'l Arb. Awards 35 (Perm. Ct. Arb. 2005); *see also* Ineke van Bladel, Iron Rhine *Case and the Art of Treaty Interpretation: The Application of Nineteenth Century Obligations in the Twenty-First Century*, *in* THE NETHERLANDS IN COURT: ESSAYS IN HONOUR OF JOHAN G. LAMMERS, *supra* note 36, at 1.

89. Treaty Between the Kingdom of the Netherlands and the Kingdom of Belgium Relative to the Separation of Their Respective Territories, Neth.-Belg., Apr. 19, 1839, 88 Consol. T.S. 427.

90. *See* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, art. 35, Nov. 5, 1994, Europ. T.S. 155, *available at* http://conventions.coe.int/Treaty/Commun/QueVoulez Vous.asp?NT=155&CM=2&DF=25/08/2009&CL=ENG.

91. *See* Schukking, *supra* note 36, at 154.

92. *Id.* at 148-49.

The cases before the European Court of Human Rights in Strasbourg are dealt with by lawyers of the Office of the Legal Adviser acting as agents for the Netherlands. They also represent the Netherlands in proceedings involving individual complaints before U.N. treaty bodies[93] pursuant to the 1966 International Covenant on Civil and Political Rights with Optional Protocol,[94] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[95] and/or the 1966 International Convention on the Elimination of All Forms of Racial Discrimination,[96] the supervisory committees of which all reside in Geneva, as well as the 1979 Convention on the Elimination of All Forms of Discrimination Against Women[97] with the 2000 Optional Protocol,[98] the supervisory committee of which resides in New York.

"Individual complaints have in fact been brought against the Netherlands under all of those treaties."[99] Taking account of "the fact that the Netherlands has—decades ago or very recently—accepted all available individual complaint mechanisms," only in a fairly limited number of cases against the Netherlands has a human rights violation been found in the period up to 2006.[100] "In a total of ten cases a treaty body found one or more violations," only three of which concerned torture, racial discrimination, or discrimination against women.[101]

The Netherlands is not immune before its own domestic courts and has from time to time been sued in cases involving important issues of international law. For instance, in January 2003, seventeen Iraqi citizens residing in Iraq and the Dutch Association of Anti-Fascist Former Combatants started summary proceedings before the District Court of Amsterdam against, inter alia, the State of the Netherlands, requesting that the court enjoin the Netherlands from giving any form of political, diplomatic, or military support for the use of force against Iraq as long as

---

93. Protocol No. 11, *supra* note 90.

94. G.A. Res. 2200A (XXI), U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (Dec. 16, 1966).

95. G.A. Res. 39/46, Annex, U.N. Doc. A/39/51 (Dec. 10, 1984).

96. G.A. Res. 2106-A (XX), U.N. Doc. A/6014 (Dec. 21, 1965).

97. G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979).

98. Optimal Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Annex, G.A. Res. 54/4, U.N. Doc. A/54/49 (Dec. 22, 2000).

99. *See* Roeland Böcker, *Feeling the Heat in Geneva and New York: The Netherlands Before the UN Treaty Bodies in Individual Complaints Procedures*, *in* THE NETHERLANDS IN COURT: ESSAYS IN HONOUR OF JOHAN G. LAMMERS, *supra* note 36, at 129.

100. *Id.* at 139.

101. *Id.*

the U.N. Security Council had not explicitly permitted such use of force.[102]

After the conquest of Srebrenica—a so-called safe haven to be protected by a Dutch battalion as part of the United Nations Protection Force (UNPROFOR)—in July 1995 by Serbian-Bosnian troops led by General Mladic, more than 7000 predominantly Muslim men and boys were deported from the Dutch-controlled safe haven without any resistance from the Dutch battalion and later murdered.[103] In 2002, proceedings were instituted against the State of the Netherlands by the family of an electrical engineer who had worked for the Dutch battalion and by an interpreter for the Dutch battalion who had lost his mother, father, and brother, on grounds that the Dutch forces had allegedly failed to provide sufficient protection.[104] In June 2007, another proceeding was started against the State of the Netherlands and the United Nations by a foundation on behalf of "the Mothers of Srebrenica."[105]

In these cases, important questions of international law involved, inter alia, whether the Dutch battalion could be held liable for any wrongful conduct or whether it had operated as a contingent of the UNPROFOR mission under the operational command and control of the United Nations so that only the United Nations could be held liable for any wrongful conduct, and whether the United Nations as such could be sued before a Dutch court or was entitled to immunity.[106]

Again, in these proceedings before the Dutch courts, the Netherlands is not represented by the Office of the Legal Adviser of the

---

102. Mubarek/The Netherlands, Rechtbank [Rb.] [District Court], Amsterdam, 28 februari 2003, Kort Geding [KG] 03/284 (Neth.). The Vice-President of the District Court of Amsterdam rejected the request in its Decision in summary proceedings.

103. *See Timeline: Siege of Srebrenica*, BBC NEWS, June 9, 2005, http://news.bbc.co.uk/2/hi/ 675945.stm.

104. *See* District Court Hears *Srebrenica Cases* (June 18, 2008), http://www.haguejustice portal.net/eCache/DEF/9/321.TGFuZz1FTg.html.

105. *See UN and the Netherlands Are Sued over Srebrenica Killings*, N.Y. TIMES, June 4, 2007, http://www.nytimes.com (search "UN and the Netherlands are Sued"; then follow "UN and the Netherlands are Sued over Srebrenica Killings" hyperlink).

106. The District Court of The Hague rejected the claim in the two Srebrenica cases in its Decision of 10 September 2008. Srebrenica: Op Zoek Naar een Effectieve Rechtsgang, http://njblog.nl/2008/09/11/srebrenica-op-zoek-naar-een-effectieve-rechtsgang/ (Sept. 11, 2008, 20:36 CET). In an earlier Decision of 10 July 2008 the District Court of The Hague already declared itself incompetent to deal with the claim against the United Nations. *See* Rechtbank Verklaart zich in Srebrenica—Zaak Onbevoegd tot Behandeling Vorderingen Tegen VN, http://www.rechtennieuws.nl/19575/rechtbank+verklaart+zich+in+srebrenica-zaak+onbevoegd+tot+behandeling+vorderingen+tegen+VN.html (July 10, 2008 16:30 CET). With regard to cases against the Netherlands and its ministers, see also Liesbeth Lijnzaad, *Sending Dutch Troops Abroad, Some Domestic Legal Aspects*, *in* THE NETHERLANDS IN COURT: ESSAYS IN HONOUR OF JOHAN G. LAMMERS, *supra* note 36, at 247, 258-64.

Ministry of Foreign Affairs, but by a private law firm that regularly acts as Advocate of the State (*Landsadvocaat*). The Office will, however, in coordination with lawyers of the Ministry of Defense, provide the Advocate of the State with the necessary international legal arguments.

It also occurs, from time to time, that the Netherlands feels compelled to start proceedings on its own accord or to intervene in proceedings before a Dutch court in order to ensure that certain international obligations incumbent on the Netherlands are complied with by Dutch organs or authorities. Thus, the Netherlands has, for instance, intervened after the District Court in The Hague declared the State of Zaire bankrupt,[107] in a case where the bank account of the embassy of Chile had been attached,[108] when proceedings were started against a foreign ambassador, or when a civil servant of an international organization in The Hague was found to be entitled to immunity.[109]

In these domestic proceedings, the Netherlands is represented by the Advocate of the State. The Advocate will, however, act in close cooperation with the Office of the Legal Adviser of the Ministry of Foreign Affairs, which provides the necessary international legal expertise.

Finally, my Office, when it believes that legal action will be taken against a foreign state, diplomat, international organization, or one of its functionaries, in violation of the immunities to which they are entitled under international law and that must therefore be respected by the Netherlands, will request that the Ministry of Justice issue an injunction to the Dutch bailiff concerned to refrain from any action against the foreign state, diplomat, international organization, or its functionaries.[110]

V. CONCLUSION

I hope I have been able to set forth the unique position that the Legal Adviser of the Ministry of Foreign Affairs and his Office holds in the Netherlands. His job involves an intricate mixture of the elements one would expect to find in a legal scholar, advocate, skilled legal draftsman, and legal diplomat serving in a public function promoting not only the cause of the Government but also of the international legal order.

---

107. *See* Republic of Zaire v. J.C.M. Duclaux, 20 NETH. Y.B. OF INT'L L. 296, 300 (1989).

108. State of the Netherlands v. Azeta B.V., 31 NETH. Y.B. OF INT'L L. 264, 267 (2000).

109. *Id.*

110. Bailiff's Act, art. 3a, Stb. 2001, 318, *in* COUNCIL OF EUROPE, STATE PRACTICE REGARDING STATE IMMUNITIES, *supra* note 52, at 459-60, 464-66.