Loyola University Chicago International Law Review

Volume 3
Issue 2 *Spring/Summer 2006*

Article 2

2006

On Being an International Lawyer

Richard B. Bilder
Foley & Lardner

ON BEING AN INTERNATIONAL LAWYER

Richard B. Bilder†

Just last month the American Society of International Law—formed in 1906 by then Secretary of State Elihu Root and other distinguished Americans—celebrated the commencement of its centennial year. Since our Republic's founding, international law has played a significant and respected role in its history—particularly in our nation's early years when it served as a bulwark against foreign interference. Yet rarely in our history has our nation's commitment to international law been so questioned as at present. Today there is a widespread perception—by Americans as well as other nations and peoples—that our government has little regard for international law or treaty obligations and that the present administration considers these as simply "options" rather than "obligations." For example:

- Controversy continues about the international legality of the U.S. invasion and occupation of Iraq; our indefinite detention of so-called "enemy combatants" at Guatanamo and perhaps other secret locations; our use of cruel, inhumane and degrading interrogation methods at Abu Ghraib and elsewhere; our "extraordinary rendition" of alleged terrorists to countries that we know engage in torture; our arrest and sentencing to death of aliens without having informed their consulates as required by the Vienna Convention on Consular Relations—and the list goes on!
- Again, our current U.S. Attorney General has called the Geneva Conventions "obsolete," the present U.S. Ambassador to the UN has repeatedly expressed his disdain for both the UN and the binding nature of our international obligations; the President recently appointed to a U.S. Court of Appeals the government legal counsel who signed one of the infamous "torture memos," and past and present leading administration officials have publicly defended the position that the President, in the exercise of supposedly "inherent" war powers, need not comply with U.S. treaty or other international law obligations—or indeed, even Congressionally enacted statutes—if executive branch officials think they conflict with such presidential powers.
- The Administration has withdrawn from the anti-ballistic missile treaty and refused to participate in important and widely-accepted new international treaties such as the Kyoto Protocol and the Statute of the International Criminal Court; indeed, it has gone to extraordinary

† Foley & Lardner - Bascom Emeritus Professor of Law, University of Wisconsin Law School. This paper was presented as the 2006 Wing-Tat Lee Lecture in International and Comparative Law, Loyola University Chicago School of Law, February 8, 2006. I thank several colleagues, particularly John R. Crook and Professor Frederic L. Kirgis, for helpful comments during my preparation of this lecture.

lengths to try to limit the effectiveness of the International Criminal Court.

- Recently, some prominent judges, legislators, and others have objected to references to "foreign law"—which some appear to conflate with "international law"—in U.S. judicial opinions interpreting provisions of the United States Constitution, and legislation has been introduced in Congress to bar resort to such material.

Nor is there solace on the professional and academic front. "Realist" international relations scholars continue to accord international law short shrift, maintaining that it is "epiphenomenal" and largely irrelevant to significant foreign policy decisions. And even from within the law schools, an attack has emerged by "revisionist," "rational choice," and other academics broadly challenging not only the binding nature and relevance of international law to U.S. foreign policy-making, but also such long-established doctrines as the incorporation of customary international law—and particularly the emerging law of human rights—into U.S. law.

Finally, it remains unclear whether the U.S. public itself really believes in international law. I sometimes show my students an old *New Yorker* cartoon.[1] It portrays a pompous-looking elderly gentleman sitting in a fancy office behind a large desk—he is apparently a U.S. Congressman or government official since one can see the U.S. Capitol through the window behind his desk—who is handing a large sheaf of papers to a deferential assistant to whom he is saying, the caption reads, "Put in more references to international law." We discuss why the *New Yorker* editors think that the cartoon is funny. Most of the students think that the joke is in the official's apparent hypocrisy; the *New Yorker*'s editors presumably assume that its sophisticated readers believe, as the editors seem to do, that international law is only a pretense and "window dressing" for *realpolitik*-based policies and not to be taken seriously.

Curiously, this recent debunking and devaluing of the importance of international law—at least when it appears to constrain policies a current U.S. administration wishes to pursue—comes at a time when the global problems that we and other peoples face could hardly be greater and the need for international cooperation to cope with them more urgent. Consider, for example, the threats and challenges of terrorism, nuclear proliferation, global warming, AIDS and Avian Flu pandemics, ethnic and religious strife, widespread government repression, human rights abuses, human trafficking, and economic dislocations from globalization.

Nor should it be thought that the issue of United States failure to respect international law is confined to the present administration or to Republican rather than Democratic presidents—witness the criticism and controversies concerning the legality of earlier U.S. interventions in Vietnam, Nicaragua, Grenada, and Panama; our nation's repeated delinquency in paying UN dues; our withdrawal from the so-called "compulsory jurisdiction" of the International Court of Justice in the wake of the Court's adverse judgment in the *Nicaragua* case; continuing charges of non-compliance with our obligations under international trade agree-

[1] THE NEW YORKER, Aug. 25, 1986, at 90 (cartoon by Ed Fischer).

ments; and the long-standing and embarrassing United States refusal to commit our country to important and almost universally accepted human rights agreements such as the women's, children's, and economic, social and cultural rights conventions.[2]

Not surprisingly, I believe that this recent devaluing of our commitment to international law is both ill-conceived and very much contrary to our national interest. Consequently, I would like here to suggest: first, why it is important that our government comply with international law; second, why, therefore, it is important that the U.S. government have lawyers involved in foreign relations matters who are in a position to ensure that international law considerations are taken into account in decisions concerning our foreign affairs; and finally, some of the qualities we should look for in government international lawyers if they are to adequately perform these important responsibilities.

I

Let me begin with the relevance of international law to U.S. foreign policy. Are our UN Ambassador, the government lawyers responsible for the "torture memos," the "realist" international relations scholars, and the "revisionist" and "rational choice" law professors correct that, when law confronts the realities of political power, it has little to say? Indeed, is there any reason why the United States—the world's only superpower—should not feel free to ignore or play fast-and-loose with international norms whenever it finds them inconvenient?

The case for international law has been well presented elsewhere,[3] so I will be brief.

First, to most diplomats, lawyers and others involved in international relations, the reality and pervasive role of international norms, arrangements, and institutions is so obvious as to require little comment. Some 200 nations and peoples, coexisting under conditions of interdependence, simply cannot effectively conduct their increasingly complex and interdependent affairs without some measure of predictability and reliable expectations—conditions that only normative arrangements and institutions can provide. It is inconceivable that our present complex international system could function in the absence of the tens of thousands of international agreements and other less-formal arrangements currently in effect. These arrangements govern and facilitate not only the relations and interactions of states but also make possible the myriad transnational commercial, travel, and other dealings of individuals, businesses, and nongovernmental organizations. Moreover, it is a fact that these norms are generally respected and observed. As Professor Lou Henkin has written: "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[4] Indeed, it is hard to believe that governments and diplomats do not take international law seriously when they devote so much time and

[2] *See generally* JOHN F. MURPHY, THE UNITED STATES AND THE ROLE OF LAW IN INTERNATIONAL AFFAIRS (2004).

[3] *See, e.g.*, LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (2d ed. 1979).

[4] HENKIN, *supra* note 3, at 47.

effort to deciding whether to commit themselves to international agreements and to trying to justify the international legitimacy of their actions; for example, the U.S. Senate would be unlikely to spend so much time debating whether to ratify treaties if it didn't think they mattered.

But, equally important, critics fail to recognize that the United States has a vital national interest in promoting respect for international law and institutions—that law and power are not necessarily opposed and, indeed, that compliance with law will often complement and enhance power rather than constraining it. There are, of course, strong moral reasons why the United States should keep its promises and comply with its international obligations. But there are also very practical self-interested and "hardheaded" reasons why we should do so. For example:

- Since the United States and its citizens have wide-ranging international interests, we have a particular need for a stable and predictable structure of international rules, as well as for effective institutions and procedures through which international cooperation can be achieved, international disputes adjusted, and our own important national interests—such as preventing the spread of nuclear weapons—protected. Despite claims of "American exceptionalism," our government cannot hope that others will continue to respect and maintain an effective international order unless we also "play by the rules."
- Due to the size and power of the United States and its great influence on the international norm-creating process, on significant issues our international legal obligations will almost always embody only those rules that our government officials at that time determined reflect and crystallize our long-term national interests. Like all nations, the United States becomes bound by international law only through its consent—which we give expressly by accepting the provisions of international agreements, or impliedly through our active or tacit participation in the process of establishing rules of customary international law. Our elected and appointed representatives would presumably not have agreed to rules that they did not believe were useful and furthered our aims and objectives. Consequently, even if it seems to a current U.S. administration that it can gain a momentary advantage by flouting or ignoring international law on a particular occasion, it should remember that responsible past government officials accepted the rule as law only because they thought it made long-term sense for our country.
- The "Golden Rule" applies in international affairs as well as in our personal lives. If the United States wants other nations to keep their treaty commitments and meet their international obligations—including those that protect our troops and citizens abroad—we ourselves must do so. We cannot legitimately complain of conduct by other countries that simply mirrors our own.

- Despite our unique power, failure to respect our international obligations may conceivably result in damaging retaliatory or unfriendly actions against the United States or American citizens. We are learning, rather painfully, that there are limits to our use of power and that sanctions—or even bombs—may not prevent other nations or people from refusing to help us or working against our interests.
- Our reputation as a law-abiding nation is an important national asset, which can strongly affect our international influence and leadership. Unless our foreign policy is perceived both by our own citizens and other nations and peoples as legitimate and in compliance with international legal and moral standards, it may fail to gain domestic and international support. For example, there can be little doubt that our invasion of Iraq, detention policies at Guantanamo, and abuse of prisoners at Abu Ghraib and elsewhere have seriously damaged our country's international standing. Greater respect for international law—as well as our traditional values—would have better served our national interest.
- If the American people let our government officials think that we do not care about their ignoring or playing "fast-and-loose" with international law and solemn treaty obligations, these officials may come to believe that we also do not expect them to take seriously their obligations to respect our own constitutional and national law. For example, it is noteworthy that some officials and others most dismissive of our international legal obligations are among those arguing most strongly that, whenever the President deems it necessary in conducting the "war on terror," he has "inherent" authority to override not only our treaty and international law obligations but also Congressionally-enacted law, including statutes barring warrantless electronic surveillance of U.S. citizens—claims that I personally consider legally unsupportable and alien to our history, traditions and values.
- Finally, a commitment to the rule of law and widely-held moral principles is in itself a cherished part of our American heritage and values. The American people expect their government to keep its promises, to treat other nations and peoples as we ourselves wish to be treated, and to act in ways that we can all be proud of and enable us to "stand tall" in the international community. It is interesting that, despite the *New Yorker* editors' apparent cynical view of Americans' attitudes about international law, recent surveys by the Chicago Council on Foreign Relations and the Program on International Policy Attitudes at the University of Maryland suggest broad public support for United States observance of our international obligations, and indeed, for U.S. support of the UN. Moreover, institutionalist and constructivist international relations scholars are coming to recognize that norms and ideas of legitimacy can and do play a significant role in international affairs.

Obviously, legal considerations are not the only factors which policy-makers should, or do, weigh in making foreign policy decisions. Certainly, circum-

stances may occur where they believe other considerations must take precedence. But unless policy-makers take into account the possible consequences, both short and long term, of violating international law, they may seriously discount or misjudge our long-term national interests—and it is future administrations and future Americans who will bear the costs.

II

Since international law is so important to the achievement of our national goals, it is essential that we have institutions and procedures in our government—including lawyers, if you will—to ensure that our nation can participate effectively in the international legal system and that legal considerations are given appropriate weight in the formulation of our foreign policy. This responsibility has traditionally fallen, to a considerable extent, on the State Department's Office of the Legal Adviser, in which I worked for some years. However, it is also shared by attorneys in other government departments, such as Justice, Defense, Commerce, the CIA, and the National Security Council; attorneys working for Congressional Committees; and judges and their staffs working on cases involving international law issues.

The formal functions and responsibilities of these attorneys—particularly those in the State Department's Office of the Legal Adviser—have been described elsewhere.[5] Certainly, these attorneys well-perform the routine and quotidian tasks of every foreign office legal staff—for example, dealing with international claims and matters involving diplomatic and sovereign immunity,

[5] *See* Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962), *reprinted in* THE AM. SOC'Y OF INT'L LAW, INTERNATIONAL LAW IN THE TWENTIETH CENTURY at 785 (Leo Gross ed., 1969); Michael Young, *The Role of the Attorney-Adviser in the U.S. Department of State: Institutional Arrangements and Structural Imperatives*, 61 L. & CONTEMP. PROBS. 133 (1998); John R. Crook, *Practising International Law for the United States*, 6 J. TRANSNAT'L L. & POL'Y 1 (1996); Miriam Sapiro, *Advising the United States Government on International Law*, 27 N.Y.U.J. INT'L L. & POL. 619 (1995); Stephen Schwebel, *Remarks on the Role of Legal Adviser of the U.S. State Department*, 2 EUR. J. INT'L L. 131 (1991).

For a professional committee report discussing the role of the legal advisor, *see* JOINT COMMITTEE OF THE ASIL & AMERICAN BRANCH OF THE ILA, *The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association, in* 85 AM. J. INT'L L. 358 (1991); *see also* Richard B. Bilder, *International Law and U.S. Foreign Policy: Some Reflections on the ASIL/ILA Report on the Role of the Legal Adviser*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 201 (1991) (giving background on the Report and appending the Report); Richard B. Bilder, *The Role of International Law in U.S. Foreign Policymaking*, Panel Discussion at the Annual Meeting of the American Society of International Law (Apr. 2, 1992), *in* 85 AM. SOC. INT'L L. PROCEEDINGS 434, 436 (1991).

For other broader discussions on the role of international lawyers, *see, e.g.*, R. ST. J. MACDONALD, THE ROLE OF LEGAL ADVISER OF MINISTRIES OF FOREIGN AFFAIRS 377-482 (Hague Academy of International Law, 1980); AMERICAN SOCIETY OF INTERNATIONAL LAW, LEGAL ADVISERS AND FOREIGN AFFAIRS (H.C.L. Merillat, ed., 1964); AMERICAN SOCIETY OF INTERNATIONAL LAW, LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS (H.C.L. Merillat ed., 1966); Gerald Fitzmaurice, *Legal Advisers and Foreign Affairs*, 59 AM. J. INT'L L. 72 (1965) (book review). An updated list of these writings, compiled by Hans Corell, former Legal Counsel of the United Nations, can be found online at http://www.un.org/law/counsel/litlist.htm.

Additional articles have studied the topic of international lawyers more generally. *See* C. Wilfred Jenks, *Craftsmanship in International Law*, 50 AM. J. INT'L L. 32 (1956); Detlev F. Vagts, *Are There No International Lawyers Anymore?*, 75 AM. J. INT'L L. 134 (1981).

negotiating and providing for the conclusion and implementation of agreements, handling international disputes, and so on. But when confronted with an apparent clash between law and "*realpolitik*," when "push comes to shove," do they really "speak law to power?" Or, as the *New Yorker* cartoon suggests, do they serve simply as legal apologists or "hired guns"—providing trumped-up "legalistic" rationales for legally and morally unjustifiable decisions?

This question was recently addressed at a symposium on *Speaking Law to Power: International Law and Foreign Policy*, held in March 2004 at the University of Wisconsin Law School.[6] Professor Tom Franck—one of the most eminent and highly-regarded members of our own profession—led off the discussion rather provocatively by taking a skeptical view of the government attorney's impulse or ability to "speak law to power."[7] In his opinion, factors such as the State Department's or other agencies' bureaucratic decision-making processes; a government attorney's desire to avoid isolation and preserve good relations and effectiveness with policy-making colleagues by being seen as a "can-do" or "yes" lawyer rather than a "no" lawyer; an attorney's careerist interest in not making trouble or "rocking the boat," and more broadly, a government attorney's submersion and marginalization in what Professor Franck termed an "in-house" culture of "reticence," "complaisance," and "complicity," were in practice likely to inhibit a government attorney's raising strong objections to significant policy decisions.[8] Some consequences, in his view, were that

- A foreign office lawyer will be consulted, not as to what to do but only as to how to get it done with a plausible legal cover;
- A foreign office lawyer should never tell a high policy-making official that he or she may not legally do that which is about to be done;
- The task of the foreign office lawyer is to provide a legal justification that is plausible, not necessarily one that is convincing;
- If the lawyer does choose to give advice that does not conform to the preferences of high policy-making officials, the lawyer should on no account give that advice in writing.

Professor Franck concluded, rather pessimistically, that one could not count on "insider" government attorneys to do the job of "speaking law to power;" at best only "outsiders," such as academics, were likely to perform this function.

Others at the symposium strongly contested Professor Franck's assessment. For example, a former Assistant Secretary of State and a former staff member of the President's National Security Council argued that, in their experience, government lawyers could and often did play significant roles in the structuring of policy decisions—citing, as an example, their important role in the 1962 Cuban missile crisis. And speakers who had served as legal advisers in the foreign of-

---

[6] Symposium, *Speaking Law to Power: International Law and Foreign Policy*, 23 WIS. INT'L L.J. 1 (2005).

[7] *See* Thomas M. Franck, *An Outsider Looks at the Foreign Office Culture*, 23 WIS. INT'L L.J. 1, 4-5 (2005).

[8] *Id.* at 5.

fices of other countries described their more encouraging experience in dealing with matters of policy. There was agreement, at least, that the government attorney could perform a useful function by reminding policy makers of the need to think in terms of longer rather than short-term time horizons, and, in particular, of the significance of precedential considerations for a nation's long term policy and goals.

My own experience as a State Department attorney—admittedly some time ago—was more encouraging than Professor Franck's assessment suggests. For example, I cannot recall ever feeling inhibited from expressing my legal advice or being pressured to produce a legal opinion in which I did not believe. And I like to believe that my advice generally was taken and did make a difference. However, I think that when our foreign service officer clients did take our office attorneys' advice, it was not simply because we were "speaking law to power." I hope that it was also because they respected our judgment, found our analytic skills useful, and knew that we were really trying to help them achieve their objectives. Moreover, since our office attorneys were usually permanently based in Washington, with specific functional or geographic responsibilities, whereas foreign service officers were normally periodically rotated through assignments, our office attorneys would often accumulate useful substantive knowledge about specific policy issues arising in the areas on which they advised.

However, I must confess that the Secretary of State never asked me whether we should bomb Cambodia, invade Grenada or Panama, or overthrow Allende. Certainly, it would not be realistic to believe that, in matters of this kind, policy makers will automatically defer to their attorney's opinions. Everyone—certainly every international lawyer—knows that international law is only one among many factors in the policy-making process. But, as suggested, international law is an important factor in that process—one that government lawyers should make certain is heard. Law must at least *speak* to power, even if power does not always choose to give it determinative weight. Despite the circumstances and factors that Professor Franck astutely points out, I like to believe that career government international lawyers—at least, unless they are deliberately excluded from the policy-making process—can—and usually do—fulfill these responsibilities.

III

So what should we expect of attorneys advising the U.S. government on matters of international law? Certainly, they should be technically skilled, knowledgeable, and hard-working. But what else should we ask of international lawyers in public service—including those appointed to senior legal policy positions? Let me briefly suggest some qualities I think we should require:

Respect for the Role of International Law

I have tried above to suggest why respect for international law and our international commitments is in our national interest. Imperfect though international rules, institutions, and other normative arrangements may be, they are the pri-

mary tools we have to try to forge the cooperative and collaborative arrangements essential to meeting the threats which confront us in an increasingly dangerous world. Consequently, it is important that the lawyers responsible for advising our government on matters involving foreign affairs fulfill their responsibility to ensure that our international legal obligations are brought to the attention of policy-making officials and taken into account in the foreign policy process. They should make sure that they conscientiously and competently perform this function despite the views of others, inside or outside of government, who, like the official in the *New Yorker* cartoon, are ideologically skeptical of or do not really understand, appreciate, and take seriously the relevance of international law considerations to an effective and respected U.S. foreign policy. It was heartening to hear the current U.S. Department of State Legal Adviser recently affirm that:

> Strengthening the rule of law internationally and promoting the development of international law has been and remains a fundamental objective of the United States.[9]

Later in the same speech he emphasized that: "[B]oth Secretary Rice and I want to state clearly that the United States is committed to honoring its international obligations and to ensuring respect for the rule of law."[10]

An Awareness of the Limits of International Law

But the government attorney should also recognize that we should not expect more of international law than it can do. I sometimes show my students a definition from a British journal, *The Structural Engineer* which reads:

> Structural engineering is the science and art of designing and making, with economy and elegance, buildings, bridges, frameworks and other similar structures so that they can safely resist the forces to which they are subjected.[11]

I believe that this is suggestive of what we are trying to do with our structures of international governance as well. At any given time, and in any given context, particular nations may be willing to go only so far in terms of relinquishment of their freedom of action or acceptance of international governance; to press them beyond this point may create more problems than it solves. Some suggest that this occurred when the international conferences negotiating the Statute of the International Criminal Court and the Kyoto Protocol to the Climate Change Convention each refused to accept changes which might have made these treaties

---

[9] John B. Bellinger III, United Nations Security Council Resolutions and the Application of International Humanitarian Law, Human Rights, and Refugee Law, Address in San Remo, Italy (Sept. 9, 2005), *reported in Contemporary Practice of the United States Relating to International Law*, 99 AM. J. INT'L L. 891, 891 (John R. Crook ed., 2005).

[10] *Id.*

[11] HENRY PETROSKI, TO ENGINEER IS HUMAN: THE ROLE OF FAILURE IN SUCCESSFUL DESIGN 40 (1992).

acceptable to the United States, thereby arguably seriously limiting the reach and effectiveness of these treaties.

Legal Imagination

New problems of international order may call for innovative legal techniques. Attorneys should be prepared to experiment with pragmatic and functional approaches, seeing international law and arrangements as flexible tools which can be used to forge workable solutions to such problems. For example, the drafters of the 1959 Antarctic Treaty effectively "bypassed" the issue of sharply-conflicting national claims to Antarctic territory—theoretically irresolvable, but as a practical matter irrelevant—by indefinitely "freezing" the parties' claims in Article IV of the treaty. Again, the State Department attorneys who during the 1962 Cuban missile crisis came up with the idea of a "quarantine" may have thereby helped to avert a U.S. air strike and possible nuclear catastrophe. One of my own interests has been exploring the broad array of imaginative legal techniques which can be deployed to manage and overcome the risks involved in international agreements and arrangements, thereby helping countries to achieve trust and mutually advantageous cooperation.[12] Innovative devices such as Framework Treaties, Road Maps, Non-Papers, and various soft law arrangements may help bridge difficulties and open the road to more fruitful dispute settlement or collaboration.

A Commitment to American Principles and Values

It goes without saying that any government lawyer must take seriously and feel deeply his or her obligation to protect the rule of law and defend our constitutional principles and freedoms. This requires more than wearing an American flag in one's lapel. Like the President, every government attorney has a Constitutional duty to "take Care that the Laws are faithfully executed."[13] Consequently, there is reason for concern when some attorneys working for our government argue that cruel, inhumane, and degrading treatment and practices which many believe at least border on torture are legally permissible; that individuals, including American citizens, can be detained indefinitely, without recourse to habeas corpus, judicial process or even an impartial hearing; that, contrary to statute, the government may engage in warrantless secret surveillance of private communications; that the President can change the meaning of a Congressionally enacted statute by simply attaching a "signing statement"; or that the President, when claiming to prosecute the so-called "war on terror", is virtually

[12] *See, e.g.*, RICHARD B. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT (1981); Richard B. Bilder, *Beyond Compliance: Helping Nations Cooperate, in* COMMITMENT AND COMPLIANCE: THE ROLE OF NONBINDING NORMS IN THE INTERNATIONAL SYSTEM 65 (D. Shelton ed., 2000); Richard B. Bilder, *Breach of Treaty and Response Thereto*, Panel Discussion at the Annual Meeting of the American Society of International Law (Apr. 28, 1967), *in* 61 PROC. AM. SOC. INT'L L. 193 (1967); *see also* Richard B. Bilder, *The International Coffee Agreement: A Case History in Negotiation*, 28 LAW & CONTEMP. PROB. 328 (1963).

[13] U.S. CONST. art. II, § 3.

above the law. In 1928, Justice Brandeis, in *Olmstead v. United States*, issued fair warning, of which all Americans should take heed:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the Government becomes a law-breaker, it breeds contempt for law . . . . To declare that . . . the end justifies the means . . . would bring terrible retribution.[14]

Integrity and Courage

Again, it needs no emphasis that any government lawyer must have a deep respect for professional—as well as personal—ethical standards. U.S. government attorneys are, of course, bound by both U.S. law and the ethical rules of the states in which they are licensed to practice. These rules not only require them to provide competent legal advice but prohibit them from knowingly counseling or assisting a client to violate the law. Moreover, they make it clear that a lawyer may appropriately take moral and ethical considerations into account in giving advice.

But as many have pointed out, government attorneys involved in international law issues have special responsibilities that go beyond those of private attorneys.[15] Their client is not simply their immediate supervisor but ultimately the U.S. government and American public. Moreover, in practice there is little likelihood of impartial review of government lawyers' advice on international law questions. Consequently, they have a particular duty to formulate such opinions with care, integrity and in good faith. This means, in particular, that there are limits to the legal arguments that government lawyers can ethically offer. Where government lawyers exceed the bounds of honest and responsible argument—functioning purely as apologists or "hired guns"—as some charge was the case with the 2002 "torture memo"—they betray not only their responsibilities but their vocation.

What is also at stake, of course, is the integrity of the international legal system itself. A 1987 Senate Foreign Relations Committee report on the ABM Treaty Interpretation Resolution, in discussing the responsibilities of the State Department's Legal Adviser in that controversy, commented in this regard that:

> The Legal Adviser stands alone among lawyers within our Federal Government. He is the first guardian, and often the last, of the U.S. Government's commitment to the rule of law in two different legal systems—constitutional and international.

---

[14] Olmstead v. U.S., 277 U.S. 438, 468 (1928) (Brandeis, J., dissenting).

[15] *See, e.g.*, Richard B. Bilder & Detlev F. Vagts, Editorial Comment, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 691-92 (2004), *reprinted in* THE TORTURE DEBATE IN AMERICA, 151 (Karen J. Greenberg ed., 2006).

> The Legal Adviser is thus charged with American compliance with—and American efforts to enforce—the most momentous elements of the rule of law: rules of constitutional power, of international commitment, of war and peace. It is the Legal Adviser who, through his own integrity and the integrity of the legal analysis he oversees, must set the highest standards in honoring the law of the Constitution and the law of nations. It is the Legal Adviser who, when asked to "legalize" short-term policy ends over constitutional means, must be prepared to say no. It is the Legal Adviser who, regardless of political pressures, must revere law as the alternative to anarchy.[16]

Professor Franck has elsewhere made these points eloquently, insisting that the proper role for the government lawyer

> is to stand tall for the rule of law. . . . When the policymakers believe it to society's immediate benefit to skirt the law, the lawyer must speak of the longer-term costs. When the politicians seek to bend the law, the lawyers must insist that they have broken it. When a faction tries to use power to subvert the rule of law, the lawyer must defend it even at some risk to personal advancement and safety. When the powerful are tempted to discard the law, the lawyer must ask whether someday, if our omnipotence wanes, we may not need the law.[17]

I am quite proud that attorneys in the two governmental legal offices in which I have been privileged to serve—the State Department's Office of Legal Adviser and the military JAG—strongly objected to the Administration's "torture memo."

A Sense of Vision and Vocation

I have suggested that government international lawyers should have a realistic awareness of the practical limits of what legal rules and institutions can accomplish in the present state of international affairs. But a sense of vision, and at least a whiff of idealism, may help.

Professor Philip Allott has pointed out that international law is "a calling, not merely a profession."[18] The government international lawyer has the unique privilege and responsibility of sharing in the enterprise of helping to bring the rule of law to relations among nations—if only slowly and with difficulty. Hopefully, international lawyers and others are succeeding in moving us gradually towards a better and more peaceful world—one in which law *does* speak to power. Professor Allott, again, has said this well:

---

[16] THE ABM TREATY INTERPRETATION RESOLUTION, S. REP. NO. 100-164, at 65 (1987).

[17] Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 620 (2003); *see also* Hilary Charlesworth, *Saddam Hussein: My Part in His Downfall*, 23 WIS. INT'L L.J. 127, 140 (2005).

[18] Philip Allott, *The International Lawyer in Government Service: Ontology and Deontology*, 23 WIS. INT'L L.J. 13, 21 (2005).

> Like a sailor on dry land, the ideal international lawyer in government service will have in the mind's eye a more distant horizon, the wonderful possibility of human social progress beyond the dreadful reality of human social evil.[19]

I think that this aptly expresses the excitement, satisfaction, and sense of vocation to be found in the high calling of being a U.S. government international lawyer.

[19] *Id.* at 23.