FOREIGN POLICY AND THE GOVERNMENT LEGAL ADVISER

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It has been my privilege, both in our consultations privately and in public debate on legal issues, to see the government legal advisers of the United States in action. The differences and similarities are an interesting subject of study, and I would like therefore, in giving my personal views today, to speak of a few particular aspects of these differences and similarities in the light of the general theme which has been given for this meeting.

If, in the course of this, I must venture on some description of American lawyers and American institutions, I hope that I will be heard a little charitably by those present who, whether because they come from the United States or not, know the United States better than I do.

In concentrating thus more specifically on Anglo-American divergences in this field, I could put the matter in a form of a question: Does the government legal adviser in this country, or representing this country abroad, play a different role or act differently than he would in or for the United States?

The first difference which I would like to identify derives from the differing role of the lawyer in the United States and in the United Kingdom. Mr. Fawcett has interestingly already commented on this as a subject relevant to our discussion tonight. It is my impression that in the United States the lawyers penetrate much more deeply into the fabric of the remainder of the society. They have a role of leadership, which was referred to in the meeting this morning. Perhaps this is because at the time when that community developed itself, there were no competing hereditary, or military, or land-owning elites who could contest the leadership with them in a society which was forming itself. By contrast, in this country the lawyers, particularly the judges and the members of the Bar in the English sense, form a rather separate group. In the United States the members of Congress, both Senators and Representatives, are many of them lawyers, and perhaps even more strikingly their personal staffs seem from my experience to consist largely of extremely vigorous lawyers. Historically, in the United Kingdom, Parliament is not sympathetic by and large to legal speakers, and lawyers have not by any means had the same effect in politics. In the United States there is a written

Constitution which is constantly under interpretation. In this country half our constitution is not written. In the United States the public debate in political circles on foreign affairs issues is much more open. The hearings in the Congress occur frequently and involve detailed examination of legal issues which relatively rarely occurs here.

Picking up something that Professor Schwebel has said, I recall a meeting of a committee of both Houses of Congress which was considering the sea-bed, at an earlier stage in the development of the international discussion of that matter, where the opening statement was made by the Under Secretary of the State Department, Mr. Elliot Richardson. But the difficult questions were fielded by the Legal Adviser to the State Department, Mr. John Stevenson, who clearly spoke with an absolute authority on behalf of the Executive at that hearing.

Although I must confess to having had some anxious moments in the box for officials in the House of Commons when certain legal issues were being debated, I do not believe that the examination in the House of Commons of issues of international law is on the whole so far-reaching as it is in the United States. One certainly meets this occasionally. I recall the discussion in connection with the Simonstown Agreement[1] for the sale of arms to South Africa; and I recall lengthy discussions in past Rhodesia debates of issues of international law. But I do not have the impression that the Parliamentary interest in this is so continuous and pervasive as it is in the United States. Perhaps as a reflection of this difference, the Foreign Office Legal Advisers appear less in public. In the United States the American Society of International Law, and the International Law Section of the American Bar Association, provide an active, public, but unofficial forum for discussion. Here, the Foreign and Commonwealth Office Legal Advisers are personally in close contact with the academic community of international lawyers. But this contact does not appear in formal public fields of activity such as those which are much in evidence in the United States.

Miss Gutteridge has already dealt from the English point of view, and Professor Schwebel, from the American point of view, with the question how far the government legal advisers in fact influence policy. I venture to think that in the two countries the position is not so very different, even if the machinery differs to some degree. All governments in deciding on their policy have to take into consideration the relevant rules of

[1]Exchange of Letters Constituting an Agreement on Defence Matters Between the United Kingdom and South Africa, June 30, 1955, 248 U.N.T.S. 191.

international law; and a government has to know how defensible in public in terms of international law a given course of policy or action is. The government legal adviser, in the same way as a private legal adviser, is sometimes judge and sometimes advocate. He must be judge to assess the view of the law for which his political colleague asks; and he must be advocate when he represents his country in a legal group.

Turning now to the way in which the two countries present an argument in public, I was wondering—thinking over my own experience—how far the United States in arguing points of international law differs in its presentation from the United Kingdom. Naturally there are some specific points on which our position in international law differs. The obvious example is in connection with the recognition of states; and these differences of substantive view are sometimes interestingly reflected in differences of underlying concept. Thus I have always thought that the phrase "unrecognized state" means something conceptually quite different to the United States lawyer from what, if it has any meaning, it means to those British lawyers who support the doctrines initially presented most clearly by Professor Hersch Lauterpacht and which the United Kingdom Government has supported for many years.

It is my view, however, that on the whole the style of presentation of argument (the important difference of language apart) is much the same between the two countries, and the logical structure and the analysis are markedly similar.

Because this has been so much a theme for earlier speakers, it may be worth inquiring whether on that crucial distinction between policy and law one finds any difference of presentation in public statements by the United States and United Kingdom representatives. It is again my impression that the presentation is the same. The United States legal positions have not in general reflected what for convenience I may call the Yale school of law. Indeed, it should be recalled of course that the school of law so brilliantly represented at this meeting deriving, if one must name a particular name, from Professor McDougal, is not the sole United States view. For example, many of the arguments of Professor Richard Baxter at Harvard are in precisely the same style that we would be entirely familiar with in this country. And Professor Baxter is by no means alone. Several of those who know the American international law community better than I do during this meeting told to me half-a-dozen people of similar distinction who could be named as equally representative of United States legal thinking and substantially similar in their philosophy to the viewpoint held in this country and other countries.

The main difficulty also in attempting to apply the Yale line of thinking to international foreign policy from a practical point of view of a government representative seems to be that, as between its different exponents, while the principle has something in common, the result is notably different.

Now, I would be very reluctant, in the face of this distinguished audience, to comment on Professor McDougal's theses in substance, or equally on Professor Falk's theses. And to compare the two would defeat my powers even more completely. Fortunately on this occasion I can have recourse to the assessment of the distinguished lawyer to whom we are indebted largely for this meeting: namely, Dr. Higgins. I would like therefore to quote a very short passage from her article entitled "Policy and Impartiality," where she expresses a view after close study of this distinction:

> Though these differences [*i.e.*, the differences between the views of Professor McDougal and Professor Falk which she had set out earlier] are—usefully and properly—intellectualised, they represent a fairly simple situation: McDougal and Falk are of different political dispositions and, operating within a legal framework in which policy is an important consideration, find themselves with opposing views. Falk believes that McDougal is preoccupied with cold-war confrontation to the neglect of the aspirations and needs of the newer nations, and that in this confrontation he is partisan rather than objective and impartial.[2]

This clearly would make it difficult to present very persuasively a legal position based on such a line of thinking when it is so manifestly dependent on politics. Indeed, one remembers that in the early days of equity, it was suggested that before the rules of equity crystallized, equity depended on the length of the Chancellor's foot. I am tempted to say that the conclusions of the school of law of the neo-natural lawyers depend entirely on whether the Chancellor is left-handed or right-handed. The distinction between law and politics (and this is the reason why we are not troubled with that dialectic in international discussions) seems to be substantially similar throughout the thinking of the members of the General Assembly in general.

The Soviet Union, while recognizing on Marxist principles that law rests on a political position (the class war, or what you will), does not in fact confuse the two in presenting argument. The new nations cer-

[2]Higgins, *Policy and Impartiality: The Uneasy Relationship in International Law*, 23 INT'L ORGANIZATION 914, 921 (1969).

tainly assert new rules of law, but they do not assert that policy as such is the law. They do not say, "This is the right policy, therefore it is the law." They say, "This is the law, and therefore the world must make it the policy."

Thus, for example, the right of self-determination as a legal right has been pressed very vigorously, and even though it is very difficult to fit into the traditional system of international law, so strongly is it believed in by the newer nations, that it has been accepted both in the Covenants on Human Rights[3] (where a better case can be made for it) and also in the Declaration adopted by the Assembly on the Principles of International Law concerning Friendly Relations and Co-operation among States, Resolution 2625 (XXV).[4] Thus, we hear very much more of the law of decolonization, and the famous Resolution 1514(XV), the Declaration on the Granting of Independence to Colonial Peoples,[5] is spoken of as the law—not because it is the policy and the right policy, but because it is claimed to be the law.

In the same way we are beginning to hear and may hear more of a law of development—that the rich countries are obliged to support the economic efforts of the poor countries. But as I have said, in presenting these arguments with vigor in a legal language, they do not base them on the view that, because a particular line of behavior (I was going to say "rule," but I should not say that clearly) is good policy, it is therefore the law. They do in fact have an easy basis for arguing that it is the law as such in that the Charter is available to them, and particularly its Purposes and Principles in articles 1 and 2. Therefore they are much more likely to rest these new rules of law which they are asserting on interpretation of the vague clauses of the Charter.

Here one cannot help noticing a striking similarity between the kind of lines of argument which have been used by United States constitutional lawyers to develop whole, massive new fields of law, for instance in the area of "due process," on the basis of very few words in that extraordinary, short document, the Constitution of the United States.

But in general I do not believe that the field of international law study as a whole does permit one to say that the view of the distinction favored by the Yale school of law has been widely accepted. Certainly it has not been found useful or helpful to base arguments on this line of thought,

[3]G.A. Res. 2200, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966).
[4]25 U.N. GAOR Supp. 28, at 121, U.N. Doc. A/8028 (1970).
[5]15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

whether falling from the lips of United States respresentatives or United Kingdom representatives.

Thus, I reach the conclusion that there is not a fundamental divergence in the views of policy and law as represented in, as far as I have seen it, the private work—and certainly the public work—of the government legal advisers of the United States and the United Kingdom.