

BOOK REVIEWS

M.P. SCHARF; P.R. WILLIAMS, *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser*, Cambridge University Press, Cambridge 2010, xxiv + 305 pp., UK£18.99/US\$30.99, ISBN 978-0-521-16770-3 (paperback); UK£50/US\$85, ISBN 978-0-521-76680-7 (hardback).

doi:10.1017/S0165070X11100054

As a former Legal Adviser of a ministry of foreign affairs, it will come as no surprise that I have read with particular interest this book on the role of international law and the US State Department Legal Adviser. After a brief history of 'L', as the Office of the Legal Adviser is known in the US State Department, the book relates the experiences of all the living former Legal Advisers of the State Department starting with Herbert J. Hansell during the Carter Administration (1977-1979) up until John B. Bellinger III as the last Legal Adviser at the time of the George W. Bush Administration (2005-2009). The present Legal Adviser in the Obama Administration, Harold Hongju Koh, has written an insightful foreword entitled 'America's Conscience on International Law'. A roundtable discussion among the former US Legal Advisers, as well as among former foreign ministry Legal Advisers from the United Kingdom, Russia, China, India and Ethiopia is also included in the book.

Each of the interviewed Legal Advisers gives fascinating inside information about his role as the Legal Adviser and the role of international law during the period of his tenure, such as the 'one China recognition', the Egyptian-Israeli Peace Treaty, the Panama Canal Treaties negotiations, the Iranian Hostage Crisis, the military action in Grenada, the mining of the harbours of Nicaragua, the confrontation with the Soviet Union during the Reagan Administration, the Iran-Contra affair, terrorist acts involving the hijacking of TWA flight 847, the seizure of the *Achille Lauro* and the blowing up of Pan Am flight 103 over Lockerbie, Scotland, the intervention in Panama, the Persian Gulf War, the dissolution of the Soviet Union, the NATO intervention in Kosovo, the use of force against Afghanistan and the treatment of detainees during the George W. Bush Administration.

As would be expected, none of the Legal Advisers agreed with the extreme position once declared by John Bolton, the US Ambassador to the United Nations during the George W. Bush Administration, that 'International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law'. All the Legal Advisers firmly believed in the importance of international law in the foreign relations of the United States and that when a state ignored or reinterpreted an existing international rule according to its own short-term interests, it ran the risk of being unable to invoke the rule in the future to its detriment. The Legal Advisers, however, also recognized that international legal rules are often quite vague and that consequently there is ample room for the interplay between law and politics. Yet, that vagueness could not be relied upon as a basis for

simply disregarding international law. All Legal Advisers believed that the position of the Legal Advisers of the State Department is different from that of the corporate lawyer and that they have a special or higher professional responsibility to provide a disinterested assessment of the law. As one of the Legal Advisers noted: 'He [the Legal Adviser] has a duty to give honest legal advice and not to change it based on what the client may expect or desire' or in the words of the present Legal Adviser: 'Ideally, the Legal Adviser should act not just as a counselor but also as a conscience to the U.S. Government with respect to international law.' The Legal Advisers, however, also recognized their dual role in both presenting an accurate legal analysis of the state's international law obligations and then defending policy makers' decisions to the best of their ability.

The Legal Advisers agree that generally speaking the US President and Secretary of State and other policy makers tended to accord substantial weight to their legal opinions. Only in a handful of cases was the State Department Office of the Legal Adviser deliberately cut out of the decision-making process. Notable cases were the 1980 mining of the Nicaraguan harbours and the armed support of the 'contras', and the 1990 kidnapping of Dr. Alvarez-Machain from Mexico. The Office was also during the George W. Bush Administration and its 'war on terrorism' only marginally involved in or even deliberately excluded from the legal work during the decision-making process in the question of the application of the Geneva Conventions and the treatment of 'unlawful enemy combatants' detained in the aftermath of 9/11, *inter alia*, involving a distortion of the meaning and intent of the anti-torture laws and the Convention against Torture. It was only after the Supreme Court ruled that the detainees must be treated in accordance with the Geneva Conventions and customary international law that the Office was brought back into the process and ended up playing a significant role in formulating new policies and procedures related to the treatment of detainees. In this connection it is noteworthy to recall a statement made by the former UK Legal Adviser, Sir Franklin Berman, during the roundtable discussion with the foreign Legal Advisers:

'It is considered a cardinal sin within the UK Foreign Office to put up a policy submission that did not clearly recite that the Legal Adviser or his staff had been consulted, or which did not include an analysis of the legal questions which were relevant to the decision. If the submission did not contain this, then any legitimate senior official or minister would send it back for a complete analysis to know what the law stated.'

Indeed, there is no doubt that the lawyers need to participate from the beginning of a take-off in policy and not just in a crash landing whenever things go wrong.

It is remarkable to see that the role and function of the State Department Legal Advisers and the recruitment of the lawyers of their Office show in many respects a considerable resemblance with those of the Legal Adviser of the Netherlands Ministry of Foreign Affairs and his Office with regard to the interpretation and application of international law, even though the US Legal Advisers are appointed by the President, by and with the advice and consent of the Senate and hold the position of Assistant Secretary of State.

The book under review is to be commended because of the excellent insight it provides into the role played in practice by international law in one of the most powerful states of the world and in the moral and professional attitude of those who are in a unique position to advise their government on international law. Those readers, who are also interested in the role and experience of the Dutch Legal Adviser and his Office, may also wish to consult my article in 18 *Tulane Journal of International and Comparative Law* (2009) pp. 177-205 or 22 *Hague Yearbook of International Law* (2009) pp. 33-56.

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A. DE ZAYAS, *Völkermord als Staatsgeheimnis: Vom Wissen über die 'Endlösung der Judenfrage' im Dritten Reich*, Olzog Verlag, Munich 2011, 208 pp., € 26.90 (hardback). ISBN 978-3-7892-8329-1.

doi:10.1017/S0165070X11100066

The author of this important book is a retired UN lawyer, a former Chief of Petitions with the Office of the UN High Commissioner for Human Rights and Secretary of the Human Rights Committee. He is an expert on war crimes, crimes against humanity and genocide, and has published pertinent scholarly books and articles, including the 2009 handbook *United Nations Human Rights Committee Case-Law 1977-2008* (Kehl, N.P. Engel) a 2010 legal opinion on *The Genocide against the Armenians and the Relevance of the Genocide Convention* (Beirut, Haigazian University Press), and a study on ethnic cleansing and the remedies available to victims *Heimatrecht ist Menschenrecht* (Munich, Universitas 2001). He is also a noted historian, with a doctorate from the University of Göttingen and book publications on Nuremberg, minorities, refugees, forced population transfers, etc., including *Nemesis at Potsdam* (London, Routledge 1979) and *A Terrible Revenge* (New York, Palgrave Macmillan 2006). *Völkermord* was written originally in German and the author is currently preparing an English-language version. At present de Zayas teaches public international law at the Geneva School of Diplomacy and offers, *inter alia*, a master's seminar on 'history, genocide and law', which gives contour to this well-organized and challenging book.

The subject-matter is troubling: the Third Reich's genocidal 'final solution' to the Jewish question. Millions of innocent human beings persecuted and murdered under the cover of the war. Why this insanity? Which were the mechanisms of destruction? How many Germans and non-Germans participated in the murder campaign? How many knew about the *Endlösung*? De Zayas started tackling these questions when he wrote his ground-breaking *Wehrmacht War Crimes Bureau* (Lincoln, NE, University of Nebraska Press 1989), a study of the specialized bureau in the legal division of the *Wehrmacht* that investigated the violations of the Hague and Geneva Conventions during World War II,