Introduction

"L" – that is the enigmatic name by which the State Department Legal Adviser is known throughout the U.S. Government. It is also the name of his office, which includes more than 170 Attorney-Advisers stationed in Washington, DC, and abroad. While L may be little known outside government circles, the importance of the office is considerable: virtually no foreign policy decision can be made without first receiving clearance from L, and no delegation can be sent to an international negotiation or international organization without a representative of L. Just as the Solicitor General is the government's point man for constitutional questions, the Legal Adviser is the government's principal expert in international legal affairs. And just as the Solicitor General argues cases for the government before the U.S. Supreme Court, L argues on behalf of the United States at the International Court of Justice and other international tribunals.

Through the years, numerous scholars and practitioners have grappled with the question of the role of international law in shaping foreign policy. Unfortunately, what John Chipman Gray wrote in 1927 remains true today: "On no subject of human interest, except theology, has there been so much loose writing and nebulous speculation as on International Law."[1] In an age in which a growing number of academicians and even high-level government officials have opined that international law "is just politics," an understanding of the role that L and international law have

played in shaping contemporary American foreign policy is more important now than ever before.

The inability of scholars and practitioners to precisely articulate the role of international law stems from four factors. First, many authors approach the question as an argument, asserting from the early pages of their work that international law matters, does not matter, should matter, or should not matter. Second, many of the best international legal scholars are positivists and thus are simply concerned not with the "role" of law but rather with the content of international law. Third, few members of the legal profession actually practice public international law. For instance, although the U.S. State Department employs more than 11,500 foreign service officers and specialists, they employ only 170 lawyers. In many small states, there is a single Foreign Ministry Legal Adviser who may hold the position for decades. The lawyers who practice regularly before the International Court of Justice number, at most, a few dozen. Fourth, the application of international law to the formulation of foreign policy nearly always occurs within the closed – and classified – confines of foreign ministries and other government agencies. This so-called black box is difficult for legal scholars and social scientists to penetrate to the degree necessary for sound analysis.[2]

In order to contribute to the development of an understanding of the role played by international law in shaping foreign policy, we determined that, given our background as former Attorney-Advisers in the U.S. Department of State, our best value added would be to penetrate the black box by bringing together former Legal Advisers and querying them about their experiences with the relationship between international law and the formulation of foreign policy.[3] Although this is a modest contribution, it is unique in that never before have all the living U.S. Department of State Legal Advisers been brought together in a structured conversation about the role of international law in shaping foreign policy. Admittedly, the approach is United States–focused because that is the black box to which we have access. We have sought to set the platform for a wider discussion by those with access to other foreign ministries

by including a colloquy among former British, Russian, Chinese, Indian, and Ethiopian Legal Advisers, which we arranged in cooperation with the American Society of International Law (ASIL).

To contribute to the illumination of the role played by international law in shaping foreign policy, we undertook six major activities. These six activities sought to explore the contours of the relationship between international law and foreign policy, as well as the unique and challenging role of the Legal Adviser in maintaining the balance between the proper application of international law and protection of his government's national interest.

First, we met with a small number of former Department of State and Foreign Ministry Legal Advisers to identify the themes to be addressed throughout the structured conversation. Together with these Legal Advisers, we developed five questions to guide the conversation:

> Whether the Legal Advisers perceived international law to be binding law, such that it should be able to constrain the options available to the U.S. Government when dealing with a crisis central to its national security?
>
> Whether the international legal rules relevant to a particular situation or crisis were clear enough to significantly shape the policy options available to the U.S. government?
>
> Whether the Legal Adviser believed he had a duty to oppose policies or proposed actions that conflicted with international law, in those situations in which such conflict was objectively manifest?
>
> Whether the position taken by the Legal Adviser was seen as influential in cases in which he advised against a course of action on the grounds that it violated international law?
>
> And, whether the Legal Advisers perceived international law to hinder or promote their government's interests in times of crisis?

It was also agreed that it would be useful to use the unique opportunity created by this project to elicit answers to questions such as how the Legal Advisers acceded to their positions, how international law played

a role in resolving the foreign policy crises that occurred during their tenure, and how the legal interpretations of these policy crises and issues have evolved since their time in office.

Second, we convened a closed-door historic meeting of all the living former State Department Legal Advisers at the Carnegie Endowment for International Peace in Washington, DC. The conversation centered on the five primary questions. Fortunately, the group has enjoyed exceptionally good health and longevity, and we were able to assemble contributions from ten former Legal Advisers covering the administrations of Jimmy Carter (Herbert Hansell and Roberts Owen), Ronald Reagan (Davis Robinson and Abraham Sofaer), George H. W. Bush (Edwin Williamson and Michael Matheson), Bill Clinton (Conrad Harper and David Andrews), and George W. Bush (William Taft IV and John Bellinger III).

Over the course of the gathering and subsequent exchanges, each Legal Adviser was asked to recount the role that his office and international law played in responding to the three most important international crises occurring during his tenure. Each presentation was followed by a series of questions and comments posed by the other Legal Advisers, as well as ourselves (who have served as Attorney-Advisers in L).

Third, we arranged with the ASIL to convene the Legal Advisers for an open roundtable discussion at the ASIL annual meeting. The topics for this roundtable were identified as the impact of each Legal Adviser's previous legal and political background on how he approaches the role of international law; who the Legal Advisers see as their primary client (the President, the Secretary of State, the American people, international law writ large, or their own conscience?); instances in which international law constrained U.S. policy directives, and areas in which it failed to do so; the role of other agencies with a legal mandate in the formulation of foreign policy; and a detailed examination of the case of humanitarian intervention.

Fourth, we again arranged with the ASIL to convene a panel of former Foreign Ministry Legal Advisers from the United Kingdom

(Frank Berman), Russia (Leonid Skotnikov), China (Xue Hanqin), India (P. S. Rao), and Ethiopia (Seifeselassie Lemma). The panel was structured around the same five questions presented to the former U.S. Legal Advisers.

Fifth, we examined the efforts of the U.S. Government to develop a response to the terrorist attacks of 9/11 and to conduct the war on terror within the parameters of international law. In particular, the legal to-and-fro between the Department of State, Department of Justice, and the White House over the legality of certain coercive measures applied to detainees and the operation of the Guantánamo Bay detention center provides a rich text for further illuminating the role of international law and U.S. Legal Advisers in shaping the U.S. Government's approach. The release of the so-called Torture Memos, the publication of memoires written by their authors, and the findings of a bipartisan investigation have provided a rare glimpse into the black box, which so often obfuscates the understanding of the role of international law, and we have tried to synthesize the information into an accessible and brief case study.

Sixth, to ensure this work is accessible to a wide range of audiences, we prepared a succinct introductory review of the scholarly debate regarding compliance with international law. Although the question of the role of international law in shaping foreign policy is much broader than the question of compliance, there is no doubt that compliance is a key component, and thus we thought it necessary to include this brief review of both the historical and contemporary compliance debate. To promote accessibility, we have also included a comprehensive glossary, which provides historic background to the events, treaties, institutions, cases, concepts, and terms mentioned in the book.

Throughout this book, we have chosen to keep the material as close as possible to the format of the original narratives for three reasons: First, we wanted the Legal Advisers to speak directly to the reader, without the filter of editors whose own preconceptions or agendas might unconsciously alter the meaning. Second, we wanted the Legal Adviser's

views to be presented in context, so that the reader might fully grasp the nuances of their positions. Third, we wanted this book to be accessible to as wide a readership as possible, rather than being of interest and use only to scholars versed in the sometimes arcane language of the law or international relations theory.

Although the narratives contained within this book provide a unique perspective into the question of how international law, as interpreted and applied by the Legal Adviser, shapes the development of foreign policy in times of crises, certain limits must be recognized regarding the value of our approach. For example, because the accounts of the Legal Advisers are not contemporaneous with the events that they describe, there is the potential for memory lapses and revisionism. In addition, due to reasonable time constraints, the narrative of each Legal Adviser is limited to highlights, providing a somewhat perfunctory account of the internal interplay of normative and institutional factors. Moreover, although L plays a uniquely important role with respect to the U.S. Government's interpretation and application of international law, there are other legal officers within the bureaucracy (such as at the White House, the National Security Council, the Department of Defense, the Department of Justice, and the Commerce Department) whose influence relative to L's rises and falls depending on the type of international issue or political factors. Thus, the focus on L tells only part of the story within a disaggregated government. As discussed in Chapter 15, this is often not, in fact, the case with the formulation of foreign policy in other states.

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SHAPING FOREIGN POLICY IN TIMES OF CRISIS

1 The Compliance Debate

IN THE FOLLOWING CHAPTERS, FORMER U.S. STATE DEPARTment Legal Advisers discuss a number of crises during which they were called on to provide legal assistance as the government sought to craft an appropriate and effective response. The question of the degree to which States believe they are obligated to follow international law is a key, but not exclusive, element of the role international law will play in shaping foreign policy. As such, the so-called compliance debate factors significantly into a Legal Adviser's approach and is heavily reflected in the structured conversations with the Legal Advisers in the subsequent chapters. Although each of the Legal Advisers, regardless of their nationality or political party, subscribes to the view that law does matter and there is an obligation by States to comply with international legal obligations, their views are quite varied when it comes to which norms and principles constitute binding law, the interpretation of those binding rules, and the Legal Advisers' obligations when they believe that their government is violating international law. Most importantly, and possibly most interesting, is that the Legal Advisers hold a diverse array of perspectives and have differing opinions as to their role in ensuring proper adherence to international law and their individual approaches to fulfilling that role.

To ensure that the reader is able to follow and appreciate the nuanced approaches of the different Legal Advisers, this chapter briefly reviews the scholarly debate regarding State compliance with international law.

Since the decline of the Roman Empire and the attendant weakening of the Roman Legion at the end of the fourth century AD, no sort of constabulary has existed to implement rules of international law. Subsequently, international rules have been subject to sporadic enforcement through protest and condemnation, reciprocal suspension of rights and benefits, unilateral or multilateral economic and political sanctions, and sometimes through individual or collective use of armed force.

Given the lack of a pervasive mechanism to ensure compliance, scholars and policymakers have pondered whether international law is really binding law. The question has been debated since ancient times and remains one of the most contested questions in international relations. As described below, major historic developments, such as the Peace of Westphalia, the conclusion of World War II, the onset of the Cold War, the proliferation of international institutions in the 1970s and 1980s, the collapse of the Soviet Union in 1989, and the terrorist attacks of September 11, 2001, have each rekindled and reshaped this debate.

This chapter begins by examining the development of the major schools of compliance theory in the context of their historic settings and with reference to the relevant interpretive communities. Although scholars writing on this subject often perceive or present themselves as pure scientists examining the question solely in the abstract, the field is more akin to applied science and the conscious or subconscious agendas of those writing in it are comprehensible only in light of the background events and developments at the time of their publications and an understanding of the audience they are seeking to influence. With this in mind, the second part of this chapter focuses on the contemporary debate, while examining the underlying motivations of the major participants and their perceptions of the community that they are trying to influence with their arguments.

Compliance Theory in Historical Context

The modern age of international law is said to have been inaugurated with the 1648 Peace of Westphalia, which ended the Thirty Years

War by acknowledging the sovereign authority of various European Princes.[1] During the next three hundred years, up until World War II, there were four major schools of thought regarding the obligation to comply with international law.[2] The first was "an Austinian positivistic realist strand," which held that nations never obey international law because it is not really law.[3] The second was a "Hobbesian utilitarian, rationalistic strand," which held that nations sometimes follow international law, but only when it serves their self-interest to do so.[4] The third was a "Kantian liberal strand," which held that nations generally obey international law out of a sense of moral and ethical obligation derived from considerations of natural law and justice.[5] The fourth was a Bentham "processed-based strand," which held that nations are induced to obey from the encouragement and prodding of other nations through a discursive legal process.[6] The modern debate has its roots in these four theoretical approaches.

In the aftermath of World War II, the victorious Allies sought to establish a "new world order," replacing the "loose customary web of state-centric rules" with a rules-based system, built on international conventions and international institutions, such as the United Nations Charter, which created the Security Council, the General Assembly, and the International Court of Justice; the Bretton Woods Agreement, which established the World Bank and International Monetary Fund; and the General Agreement on Tariffs and Trade, which ultimately led to the creation of the World Trade Organization (WTO).[7] The new system reflected a view that international rules would promote Western interests, serve as a bulwark against the Soviet Union, and emphasize values to be marshaled against fascist threats.[8]

Yet, the effectiveness of the new system was immediately undercut by the intense bipolarity of the Cold War. In the 1940s, political science departments at U.S. universities received from the German refugee scholars (such as Hans Morgenthau who is credited with founding the field of international relations in the United States), "an image of international law as Weimar law writ large: formalistic, moralistic, and unable to influence the realities of international life."[9] With fear of communist