

THE INTERNATIONAL LAWYER IN GOVERNMENT SERVICE: ONTOLOGY AND DEONTOLOGY

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I. ONTOLOGY

To find the Aristotelian *essence* of the international lawyer in government service, we should first identify the relevant *genus* (lawyer), the relevant *species* (international lawyer), and the particular *variety* (in government service). In this way, a basis may be established for comparing and contrasting the ontological and deontological status of the international lawyer in government service with that of lawyers in general, other specialized lawyers, the international lawyer in non-governmental employment, the international lawyer in private practice, and the academic international lawyer.

A. ROLES AND ARENAS

The international lawyer in government service performs a remarkable variety of roles on many stages and in many games and forums and arenas –

(1) *The internal diplomacy* of national government, especially in forming and applying governmental policies, national and international, and explaining and defending governmental policies publicly and before other constitutional institutions;

(2) *National legislative diplomacy*, the complex process of drafting, explaining and defending proposed legislation, in fields as various as are the matters that are regulated internationally or that have international implications;

(3) *Bilateral international diplomacy* of a traditional kind, including advice on current inter-state issues and disputes, participating in meetings and negotiations with foreign missions, drafting diplomatic correspondence;

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(4) *International parliamentary diplomacy*, especially the negotiation of multilateral treaties having the character of international legislation, including the preparation of instructions for the national delegation in consultation with other government departments, the management of the negotiation from the national capital, and the conduct of the negotiation itself in the international forum;

(5) *International government*, especially in the intergovernmental decision-making processes of intergovernmental organisations;

(6) *Courts and tribunals* (national, transnational, international), including the creation and organisation of courts and tribunals, the acceptance of jurisdiction in general and in particular cases, the assertion or waiver of immunities, the preparation and conduct of legal proceedings;

(7) *Forum internum*, including research and writing with a view to participating in all the above roles and arenas or as a contribution to public and scholarly debate.

B. SKILLS

It follows that the international lawyer in government service must be the master of many trades.

Speaking. Diplomacy is, above all, an art and a science of communication in which every word spoken or written may have significant public consequences, including consequences of great magnitude. Precision of expression and sensitivity to the effect of communicated speech are necessary skills. Command of one or more of the languages most commonly used in international intercourse is an especially valuable skill.

Negotiating. For better or for worse, diplomacy is a stylised ritual in which so-called national interests, often of a crudely material kind, are pursued in highly conventionalised symbolic forms of which the *treaty* is only the most tangible example. The analogy with team-games is especially apt, but with this difference, that, unless the result is a breakdown of a negotiation or war, the outcome should be seen as satisfactory by all parties and, ideally, should be capable of being represented as more than satisfactory to the party served by a given international lawyer in government service.

Drafting. Skill in drafting written texts of all kinds is an essential skill of practicing lawyers of all kinds. An exceptional capacity to draft texts is a significant advantage. In general, international texts are poorly drafted, not least because of the obscurity of the intentions of the parties, which the parties themselves may not understand, and the linguistic and professional inequalities of the parties. Treaties, in particular, are reminiscent of national legislation of the worst kind, in which compromises are enacted in formulas that are known to be, and may be intended to be, ambiguous or even meaningless. It follows that to excel in such a dissolute drafting process requires a very special kind of skill. Writing speeches for government ministers, ambassadors, or heads of delegation is an especially creative, if sometimes disreputable, art-form. It is a skill shared *mutatis mutandis* with all other lawyers in government service.

Leadership. Like all practising lawyers, the international lawyer in government service is deemed to be in possession of special skills that non-lawyers cannot rightly judge but must rely upon. It follows that, in the roles and arenas identified above, the international lawyer in government service is liable to be seen as holding a position of special trust calling for an ability to take exceptional responsibility, and even a leadership role, in decision-making and in negotiation. The scale of that responsibility is a function of the scale of the matters in issue which, in the limiting case, may affect the survival and prosperity of a nation or of many nations.

Charm. The politics of decision-making in every kind of arena calls for interpersonal skills which may, rightly or wrongly, have a significant influence on outcomes. Diplomacy, except in cases where raw inequality of material power mainly determines outcomes, is an art and a science of persuasion, especially where the diplomat speaks from a position of relative material weakness. Eloquence is not enough and may be counter-productive. Traditional techniques of seduction may not come naturally to lawyers in general, at least in their professional capacity, but may be of great value to the international lawyer in government service who should ideally develop a particular sensitivity to the mentalities and the behavioural expectations of people from different cultures and traditions.

C. THE ESSENCE

It follows from all the above that the crucial distinguishing features of the role of the international lawyer in government service are the following:

- A significant influence over ultimate public power – the ultimate power in question being the totality of internal national power within the external co-existence of all national powers;
- A shared public responsibility with the holders of ultimate power – the shared responsibility being a function of, and in proportion to, the exercise of influence;
- A unique public responsibility – the uniqueness being a reflection of the esoteric and hermetic character of law, national and international, and of the special role of law in public decision-making, national and international.

KING HENRY. And God forbid, my dear and faithful lord,
 That you should fashion, wrest, or bow your reading, Or
 nicely charge your understanding soul
 With opening titles miscreate, whose right
 Suits not in native colours with the truth;
 For God doth know how many, now in health,
 Shall drop their blood in approbation
 Of what your reverence shall incite us to.

 Under this conjuration, speak, my lord;
 And we will hear, note, and believe in heart,
 And what you speak is in your conscience wash'd,
 As pure as sin with baptism.¹

¹ WILLIAM SHAKESPEARE, *KING HENRY THE FIFTH* Rule 15.8(c)(4) act 1, sc. 2 (Charles & Mary Cowden Clarke eds., Bickers & Son 1874) (1600) Rule 15.4(a)(111). The English King is asking the Archbishop of Canterbury for a legal opinion about his claim to the crown of France before an invasion of France that will lead to the particularly gruesome Battle of Agincourt (1415). The Archbishop gives a legal opinion that is a characteristic Shakespearean mixture of the tragic and the comic, of realism and parody, of mumbo-jumbo and cynicism. It is the dramatised archetype of the rhetorical casuistry that forms part of the *casus* of every war.

II. DEONTOLOGY

The very idea of a professional ethical system contains a tension between the special conditions of a particular profession and the general conditions of morality. This tension may be expressed as a liminal choice between two ideas of virtue – on the one hand, Aristotelian virtue (which itself contains a distinction between a good will in relation to a particular act and a good character in general, with the nature of the ‘good’ being determined in some other way) and, on the other hand, Machiavellian *virtú* (the capacity to be successful in the use of social power, with the nature of ‘success’ being left to be determined contingently).

In the case of the international lawyer in government service, being ‘good at one’s job’ must be determined in the light of all aspects of the complex ontology of that status.

The logic of that ontology suggests the following schematic deontology.

A. UNVIRTUES

A general submission to the rule of *pragmatism* is liable to reduce the effectiveness of an international lawyer in government service. To trim one’s sails to every change of political direction, and to say only what one presumes that those one advises want to hear said, is to risk three things in particular: (a) an undermining of the authority of the law in general, an effect for which one’s own government may pay a high price on other occasions and in other circumstances; (b) an undermining of the international lawyer’s capacity to identify and to present different horizons of national interest, including long-term horizons in terms of which an immediately convenient course of action may be a bad course of action in the long run; and (c) an undermining of the international lawyer’s distinctive character, role and authority, and of his or her potential contribution to public decision-making.

If the law comes to be seen merely as *politics by other means* then public decision-making is impoverished. International law, like all other forms of law, is vulnerable to the corrupting effect

of political power. If the international lawyer in government service behaves as if there were no distinction between political purposes and legal purposes, political values and legal values, political judgment and legal judgment, then public decision-making is deprived of a dimension that is otherwise liable to improve its quality, efficiency and even its effectiveness. An international lawyer in the service of one government may earn the respect of other governments causing those other governments to attach particular authority to his or her opinions, a form of influence that may be of great value to the employing government.

Given the nature of customary international law, an international lawyer in government service has a special responsibility in relation to the development of international law, not least because international law must be deemed, like all law, to be in the common interest, an interest that includes the interest of the nation that the international lawyer is paid to serve. A government's actions may contribute to the development of international law if it is possible to rationalise that action in terms of a potential legal principle. Mere politics and crude pragmatism cannot be rationalised as legal principle.

However, the opposite of mere politics and mere pragmatism is not *legalism and formalism*, in the derogatory sense of those words. It is not in the interest of the employing government, or of international society in general, for an international lawyer in government service to emit advice and opinions that have a real or spurious aura of legal authority but do not respond to the utter particularity of a given situation. That privilege belongs by right to the lawyer who practises international law in the academy.

B. DILEMMAS

For the morally sensitive soul, diplomacy is a slough of despondence in which painful moral dilemmas flourish. Although legal judgments are very different from moral judgments, a lawyer's training is also a training in the making of judgments. Every legislative enactment, every case decided in the courts, is a particular resolution of conflicting values and interests. In the law, there is no right answer to the exclusion of all other possible right answers.

Dishonesty and discretion. In diplomacy's parallel moral universe, honesty is a more or less random concordance between what is said and what is true. So-called international relations are conducted in an extreme form of metaphysical realism (the state, power, interests), symbolic artificiality (sovereignty, independence, equality), and semiotic idiosyncrasy (state A *recognises* state B, is in *friendly relations* with state B, must perform its treaty obligations in *good faith*, unless *necessity* prevents it from so doing). In diplomatic double-speak the effect is the meaning.

An ambiance of secrecy is a temptation to conspiracy. For those familiar with the ambiance of a liberal democracy, it is strange, but not unpleasant, to find oneself in a situation where there is a professional duty of absolute discretion, where the principle of need-to-know must be applied even to the people of the nation one serves and their elected representatives, and where the righteous suppression of the true may have to be the more or less righteous suggestion of the false. Righteous unrighteousness is the epitome of moral ambiguity.

It follows that the international lawyer in government service is using the ontological skills of that status within a distinctive and sometimes sinister sub-culture to which concessions have to be made and within which one must find not only one's own legal compass but also one's own moral compass.

Chiaroscuro. It is accordingly not surprising that, within the sub-culture of so-called international relations, one particular professional skill tends to be overdeveloped. It is necessary to be able both to speak obscurely while appearing to speak clearly and to speak clearly within a fog of obscurity. Hidden meanings may conceal or convey hidden intentions for those who can or cannot decode the message. International decisions regularly emerge from clouds of misinformation and misunderstanding.

The *fine fleur* of these special arts is the drafting of the instrument known as a treaty, in which disagreements and misunderstandings and concealed intentions are gathered together in verbal formulas upon which all contracting parties are said to 'have agreed.' It is an exquisite pleasure, for the intellectually sensitive soul, to bring about agreement on a form of words whose likely effect only you can foresee. But - *habent sua fata foedera*. The treaty, once agreed upon, takes on its own life.

Sooner or later, it may produce a settled situation or it may produce war, or else it may be forgotten. Those who draft a treaty are not masters of its fate.

Consistency and contingency. Lawyers in general government service and lawyers in the service of a great corporation share with international lawyers in government service a special relationship to the past. Their employer has a past which it is the job of the lawyer to know. Since it is the central structural function of the law to carry a society's past through its present into its future, the lawyer has a special responsibility to reconcile the heritage of the past with the possibilities of the future in the light of the demands of the present. Nowhere is this task of reconciliation more difficult than in the service of a whole nation in its relations with other nations.

It is the daring ambition of international law to provide some stillness within the turning world, within the desperate turmoil of the co-existence of nations. Governments are like children in their tendency to invoke the consensus of wrongdoing – 'but everybody does it' – or the elementary notion of reciprocal justice – 'why should we respect their rights when they don't respect ours?' Governments also resist the argument from precedent - 'that is what we have always done' or 'that is something we never do.'

The international lawyer in government service may tell governments about a consensus of right-doing and invite them to look beyond the justice of crude reciprocity to the justice of ultimate ends. But governments, not least in the most advanced liberal democracies, live in a continuous present, a permanent now, in relation to which the past and the longer-term future are abstractions. For the international lawyer in government service, the past and the future of the nation are an integral part of its present. But the inescapable dilemma is that he or she is paid to help the government to do the best for the nation today.

BUSIRIS. The Senate asked for a legal opinion; that I have given.

HECTOR. What I want is an interpretation. That is even more legal.

BUSIRIS. It would be against my conscience

HECTOR. Find a truth that will save us If you don't, we will imprison you until the end of the war. . . .

BUSIRIS. Obviously, there are other possible arguments.

HECTOR. I didn't doubt it.²

Ideals. It follows from all the above that the unattainable Machiavellian ideal of the international lawyer in the service of the Prince is threefold.

Public service. Lawyers in government service share in the remarkable phenomenon of the public service ethos, a great achievement of the social self-evolving of the human species. Until philosophers become kings or kings become philosophers the senior ranks of the civil service do what they can to bring rationality and higher purpose to the business of government. The spread of Prussian-style bureaucracy in the nineteenth century and its integration within the disorderly processes of liberal democracy made possible the dramatic advance of capitalism, that voracious consumer of law and public administration. A post-Protestant administration ethic means that high seriousness in the making and application of the law marches alongside the lower seriousness of party politics and business.

It is worth noting the strange fact that there are people who are willing to be employed to serve only the common interest, not their personal interest, and whose reward is not material but merely the sense of a job having been well done, or better done than it might have been. Even more remarkable is the fact that there are lawyers, of all people, who are willing to be so employed – not least, international lawyers, for whom the material rewards in other forms of legal practice can be exceptionally great.

A calling. International law is a calling, not merely a profession. The reason for this is that, in the absence of the immense and subtle constitutional structures that have been found necessary in national societies, an exceptional burden rests on those

² JEAN GIRAUDOUX, LA GUERRE DE TROIE N'AURA PAS LIEU [THE TROJAN WAR WILL NOT TAKE PLACE] act 2 (1935) (author's translation). Busiris, from Syracuse in Sicily, a leading international lawyer, has been asked to advise the Trojans, before they undertake a disastrous war against the besieging Greeks. The source of the legendary history of the Trojan War is *The Iliad*, attributed to Homer (circa 9th century BCE).

whose aim is to make possible the survival and prospering of all human societies collectively, using the wonderful power of law. The idea of law is another great achievement, if not the greatest achievement, of the social self-evolving of the human species. Law is the basis of social statics, providing continuity and relative stability. Law is the basis of social dynamics, enabling and managing continuous social change. International lawyers of all kinds, including even international lawyers in private practice and academic international lawyers, are contributing, consciously or unconsciously, to the stealthy global revolution of international legality.

The contribution of international lawyers in government service to this process of global social transformation is critical. Global social activity is, to an ever-greater extent, dominated by so-called non-state actors, especially industrial and commercial enterprises, but the functioning of global social systems is still dominated by the actions of governments. At least for the time being, it is governments that conclude treaties and the consensus of right-doing which comes to be recognised as international law flows directly from the behaviour of governments. International lawyers in government service are in a strong position to affect that consensus and hence to affect, indirectly, the making of customary international law. Ideally, they may see that responsibility not only as an integral part of their service to the nation that employs them but also as an integral part of their unique and privileged vocation as international lawyers.

Worldview. Government servants are notoriously modest about their power and influence. It is an integral part of their power and influence. Their professional worldview, if any, is an interiorising of some socially constructed worldview. To be fully effective, international lawyers in government service must work in the closest possible proximity to those who rely on their special skills and whose worldview they must share. The everyday respect and trust that they earn as professional colleagues is an essential part of their potential influence.

But lawyers – all lawyers – belong to a surreptitious priesthood whose allegiance is not only to the client, the corporation, or the government that they serve. They have a second allegiance, an ideal allegiance, as servants of the law. Lawyers are special agents of the General Will, confidential ministers of the

social super-ego, guides on the perilous ascent from the State of Nature to the Rule of Law. Theirs is the still small voice of the universal within the cacophony of the particular.

For an international lawyer – any kind of international lawyer – to ignore the big picture of the human world, with all its dazzling light and terrible darkness, would require a perverse and sustained mental effort. For an international lawyer to feel no sense of responsibility for what might be, if not for what is, would be a willful betrayal or an unnecessary surrender.

The Machiavellian and Aristotelian ideals might meet in the ideal international lawyer in government service. 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.

*[A]nd after the earthquake a fire . . . and after the fire a still small voice.*³

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³ 1 Kings 19:12.

