AN OUTSIDER LOOKS AT THE FOREIGN OFFICE CULTURE

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Dick Bilder was having a distinguished career in the U.S. Department of State when we first met. Quite soon afterwards, he left the Department and embarked on a more distinguished – in any event, more professionally visible – career as an educator. The unifying link between these two phases of Dick's life is his abiding dedication to the possibility of the rule of law in relations between nations.

But the underpinning unity of that life should not obscure the remarkable grace with which Bilder made the mid-life transition from his career in the Department of State to quite another in academia. That should not go unremarked.

The late Polish jurist and President of the International Court of Justice Manfred Lachs once told my students "everyone who studies international law must decide, preferably early in his or her career, whether to be an insider or an outsider." What Judge Lachs meant was that there were important roles to be played by international lawyers in influencing public policy, but that, to play the role well, it is necessary to decide, early in life, whether to do it from within government as lawyer for the political establishment or from outside as a critic of government lawyering.

Dick Bilder, despite Manfred Lachs' admonition, has managed to do both. With notable distinction, he transited from the role of lawyer in the Department of State to another in which he became lawyer to the friendly but persistent critics of aspects of government policy. The latter role he has filled, spiritedly, from the excellent outsiders' perch of the University of Wisconsin. But Bilder's dual careers are not evidence against Lachs' corollary, for he did not try to bridge the two careers but lived them consecutively, one after another. Once he had left the hallowed halls of Foggy Bottom, he had left them, never to return.

I do not believe that this was a matter of profound regret to Dick, nor even of superficial nostalgia. Unlike a few of my colleagues who came to the cubicles of academe from the corridors

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of power, Bilder never seemed to pine for that energizing knock on the door from the Assistant Secretary. He had made a transition, and that was that. It seemed to me an admirable way to live one's life: *seriatim*, one career at a time.

But, then, I rather would admire that, wouldn't I? After all, I surely qualify as the quintessential outsider in the international legal profession.

In my half century in international law, I have never once been asked to do anything, as a lawyer, for my government. Of course, there are quite few international lawyers who can make that statement, and I do not consider myself in any way uniquely deprived— or deprived at all.

Actually, I have never been asked to do anything in international law for either of my governments. I have been summoned quite frequently to advise various foreign governments but, of course, always as an outsider

Still, in a way, this outsider-dom feels a bit odd and, just because it does, it arouses my interest as a scholar. Mostly, my nose for research is activated when there is a whiff of mystery, my hunting instinct is triggered by a realization that something is slightly amiss, a tech counterintuitive, enticingly odd. Oddity, after all, is the mother of hypothesis, which, in turn, begets research.

So, how odd? As the bearer of dual nationality in the U.S. and Canada and having lived an active life in both countries, it has been my privilege to know, and to have much beneficial contact with, friends and former students in the foreign offices of both countries. Perhaps, by itself, that duality sufficiently, and quite logically, accounts for my never having been asked to advise either one, but I don't think so. Rather, I suspect, quite early in my life I must have opted, at some level of consciousness, for the outsider's role, or been co-opted by it.

In any event, even if it was not a fully conscious choice, it was a lasting one. I have never regretted it, but neither do I celebrate it, let alone proselytize for it. It just happened. Perhaps the foreign services of both my countries realized earlier and more fully than I that I wasn't made of the stuff of the company man.

Let me not further personalize the matter. I mention it here solely to establish my credentials as a true outsider, whose views of the insider's role, values and ethos have as much, or as little,

credibility as comes from close, but always non-participant, observation of an interesting phenomenon. But the oddity justifies rumination by one whose professional calling is to ruminate. What, I am curious to discover, *is* the stuff of the company man, when the company is the legal service of the foreign office? Dick Bilder, who has had successful tours of duty both as an insider and an outsider may be the one of us best suited to enlighten us. But neither he nor I are the only ones to have given the question some thought.

I have discussed the matter with many friends, in various foreign offices. It is a subject about which they seem to like to talk and, perhaps, some of them can be induced to do so, here. I must confess to a certain surprise at the remarkable uniformity in their answers. Inevitably, the first component of the culture reportedly prevailing in the chambers of foreign office legal advisers is a high regard for the craft of lawyering. A lawyer's competence, of course, is always cited as the primary indicator of how counsel will be regarded by the client and others in the firm. How good a lawyer is he? Does he know, or can she access, the relevant sources? Can she parse the issues? Does he "think like a lawyer"? This is true in government, as well as in private legal service. But these questions simplify and obscure the underlying indicators of legal competence, which are defined by the culture of the profession. Not THE legal profession, but its many satrapies, each with its own culture, its measures of excellence. The competence of the foreign office legal adviser is quite distinct from that of the legal counsel of General Motors or Nokia, although I think there is much in common between the legal competence defined by, say, the Quai d'Orsay and Foggy Bottom—but more of this later.

Legal competence may well be the lawyer's inescapably necessary professional qualification, but, standing alone, the phrase is not a sufficient description of a lawyer's professional excellence in private practice or a nation's foreign office. There are equally, if not more, important things to be said. If, and when, these other indicators are brought to light one might, perhaps, begin to understand that very specific professional culture and its rules, within which the lawyer's excellence will be measured by clients and peers.

Would that be useful to know? Yes, not in order to stereotype a subset of the legal profession within which there is infinite room for variety and, it must be said, even idiosyncrasy but for the purpose of providing guidance to those who are in the crucial process of choosing a career. They deserve perceptive counseling as to what to expect if they choose to enter a very specific professional-cultural environment.

Perhaps even more important, a plausible description of the professional culture of the legal adviser's office would facilitate an objective look at whether the indicators of that culture really serve the best interests of the client. This second question is complicated because, while in private practice clientage is usually identifiable, the lawyer in a foreign office has as his client the minister, the president, and, ultimately, the nation. Then, too, the foreign office counsel, in common with the lawyer in private practice, also has responsibilities to the law itself. While all lawyers have some degree of responsibility to the law, the foreign office lawyer's lines of responsibility are likely to resemble those of other such lawyers in other governments, but not those of lawyers for great corporations, let alone private clients.

Another difference is that foreign office lawyers, while sometimes calling the shots for their client, the ministry or the government, for the most part find themselves somewhere submerged in the middle of a large and complex decision-making process which they neither initiate nor finalize.

So, the culture of the foreign office lawyer is not simply an analog of the legal cultures prevailing elsewhere. I know that legal advisers of various nations have their informal get-togethers, where they compare notes and commiserate. But the task of defining the professional culture that makes them, as lawyers, unique from all other, is delicate and, well, interesting.

I begin by recalling what, so far, I have been told by friends who have spent their lives as insiders. According to my informants, the culture of the foreign office lawyer requires conformity with certain cultural norms not readily apparent to outsiders, but well-known to every insider:

1. The lawyer is expected not to provide advice unless specifically asked;

2. When asked for advice, the lawyer should first seek to ascertain what advice the minister actually wants to receive;
3. When giving advice, the lawyer should seek, as much as possible, to demonstrate the indubitable legality of doing whatever the minister wishes to do. The lawyer is being consulted not as to what to do, but how to get it done with plausible legal cover;
4. If the lawyer believes that what the minister wishes to do is illegal, the advice given must indicate how the same purpose can be achieved lawfully by changing the rhetoric, rather than by changing the policy. No foreign office lawyer should tell the minister that he may not legally do that which is about to be done;
5. If the lawyer does choose to give advice that does not fully conform to the policy preferences of the minister, on no account should that advice be given in writing;
6. For the foreign office lawyer, certitude is an essential tool of the trade. The more doubtful the proposition of law being advanced, the more emphatically must it be stated; and
7. The task of the foreign officer is to enunciate a legal justification that is plausible, not necessarily one that is convincing.

Let us briefly examine these informal rules, before considering whether they serve well those whose professional culture is defined by adherence to them. I have grouped the seven norms of cultural conformity into three broad categories: the Culture of Reticence; Culture of Complaisance; and Culture of Complicity.

1. The Culture of Reticence

Within any "in-house" culture there is a prevailing rule that determines when the lawyers are brought into the decision-making process by top management. The foreign offices are no exception. In many foreign offices, the lawyers are consulted after, not before policy is made. While this may reflect, all too clearly, the low estate to which international law has sunk in the eyes of those who govern, it also mirrors a reciprocal self-perception of the lawyers that borders on self-abnegation. The aura of the modest aspirations palpably permeates counsels' chambers, in part because lawyers are perceived by the client to have, at most

modest aspirations when it comes to influencing, let alone fighting for policy outcomes, but also in part because the lawyers have too much acceded to that perception. One might say that they have conspired with their detractors.

This is not wholly a matter of lack of professional courage and self-regard. International lawyers in government are a small pocket of unelected professionals, within a larger subset of unelected bureaucrats (the foreign office) who, at least in presidential systems, work for an unelected cabinet minister, who works for the President, the only person with a popular mandate to take decisions, and the only one responsible to the public for their consequences. The foreign office lawyer may be unsupported by anyone higher up the chain of policymaking who can claim either to have expertise in the law or legitimate political power.

While legal advisers tucked away in foreign offices may harbor the illusion of being at the heart of the interstate action, their strategic posting at the heart of foreign policymaking is purchased at the price of isolation from the center of the law's gravitational pull within governance. In the internal jockeying for control of a policy, it may not be reasonable to expect a legal adviser of assistant secretary rank, let alone his or her subordinates, to take a firm position for the law in opposition to a nonlawyer who is his superior, or his superior's superior, let alone an elected president with a mandate and appetite to act. But there remains the nagging question whether the president would have chosen to act as he did had he, timely, been given direct access to the forcefully expressed views of those who could have warned of the legal implications and costs of a proposed course of action.

That, alas, is unlikely to happen. The culture of the foreign office legal counsel is one of reticence and deference, even to those who know nothing of the law. Speaking softly, it is true, can be the concomitant of carrying a big stick, or of practicing one's profession in deeply carpeted, hushed chambers. These do not seem apt explanations for the reticence of foreign office lawyers. Rather, the tactic of reticence is imposed by the professional architecture of the foreign relations decision-making process, where it is only by fortuitous happenstance that the voice of international law will make itself heard at the top levels of the process.

2. The Culture of Complaisance

Within the foreign office, with its overwhelming cadres of policy experts, economists, military planners, political scientists and other bureaucrats, the international lawyer is likely to be regarded as, at best, the specialist in a mildly relevant aspect of statecraft and, at worst, as a Cassandra-like purveyor of hypothetical long-term negative consequences that usually operate to the detriment of plans to seize imminent opportunities for advancing the national interest.

To avoid the spread of that perception, which, if allowed to become endemic, could be tantamount to their internal professional exile, foreign office (F.O.) international lawyers are tempted to cultivate a reputation for being more-real-politik-than-thou. They sometimes are tempted to speak among themselves and, especially, to their non-legal peers, with a cynical jocularity, if not contempt, for the law's strictures that are intended to mark them as every bit as can-do, if not derring-do, as everyone else. Surrounded by strategic thinkers, the temptation may be irresistible to think strategically. Surrounded by denigrators of the law, there is a strong temptation to join in the denigration.

This effort to emulate the non-lawyers also has its stylistic aspects. One of the infirmities of international law is that it often does not speak very clearly, or very loudly, to power. The culture of the foreign office lawyers tends to enhance this infirmity. Does the government wish to attack a country without having itself first been attacked and without benefit of Security Council approval? The tendency is not to argue against tasking the planners to prepare the contingency plans for such action, but to "get on board" with clever advice on how to accompany the plan's implementation with assertions of its legality, whether it is likely to be credible or not to those to whom the explanations are directed. That this has costs in policy credibility and legitimacy is sometimes not pointed out as forcefully as it might, because to do so might isolate the lawyer from the more tough-minded policy planners.

In all of this, the foreign office lawyer is inhibited not by a lack of courage, but by a fine, culturally enhanced but professionally debilitating sensibility about protecting his or her effectiveness. Concern for preserving one's effectiveness, far more than

cowardliness, is notoriously the principal reason for doing the wrong thing.

3. The Culture of Complicity

International lawyers in foreign offices tend to be the insider's outsiders. They are so perceived by their peers in the foreign office and, to an extent, they so perceive themselves. They tend to be last on the loop, whether of policymaking or memo circulation. Their small internal crises and contretemps are never leaked in the press which avidly chronicles those of the so much sexier political affairs, economic relations and policy planning staffs. This may be in part because of the legal culture's reverence for solicitor-client confidentiality. But it is more likely attributable to the media's assumption that nothing much happens in the foreign office's legal department that could be of interest to the wider public. It must sometimes be galling to the lawyers so to be discounted as the source of juicy stories of policy Donnybrooks. Well, necessity can inspire virtue. If no one recognizes the lawyers as in-fighters in the bureaucratic wars over policy, their low-keyed input can at least be seen as a manifestation of their skilled team-playing and unshakeable loyalty.

Such a perception of the lawyers' unshakeable professional habit of complicity is fostered by strict procedural rules. For example, if any negative advice is given, it must be done off the record, where it leaves no paper trail. Searches of archives, even when accessible, rarely provide evidence of lawyers taking a firm stand against a proposed course of action on legal grounds. This is probably misleading. Such tough advice is sometimes given, but almost never on paper. The practice of protecting the culture of complicity in this way, however, reinforces the general perception of its universality.

Moreover, complicity demands more than just keeping a low profile. In public, the lawyer, vociferously, is expected to defend actions, even ones as to which he or she has doubts. The more nagging those doubts, the more tenacious the attorney must be in avowals of support for the policy. Only three decades after leaving the post of legal adviser did Professor Abe Chayes disclose that the legal justification advanced for precipitating the Cuba missile crises were not credible. At that, he is almost alone

among those to have held the post in the past hundred years to have disowned the advice attributed to him.

This is all the more remarkable since, in fashioning a patina of legality for whatever action the government proposes to initiate, the legal adviser's proper standard appears to be not so much credibility – is the legal argument likely to convince third parties ? – but rather, what, in intelligence circles, is known the much lower standard of "credible deniability": that is, whether the account of the legal basis for a government's action, as crafted by the legal adviser, can meet the standard of minimal coherence. An example is the justification cobbled together by British and American legal advisers of their governments' use of force against Iraq in March 2003. In asserting that this action had been preauthorized by Security Council resolutions 687 and 1441, the legal counsel may be said to have achieved coherence but to have missed credibility by a wide mark.

If there were those who dissented, we are unlikely to learn of it. In Britain, the respected Deputy Legal Adviser resigned, but did so without making public her reasons.

To the outsider, this creates the impression – probably wrong, but rarely disproved – that foreign office lawyers are willing to say almost anything to justify the legally unjustifiable.

4. The Academic Culture

As we have noted, for better or worse, the culture of the foreign office lawyer is not likely to attract much attention beyond that particular pale. The one exception to this principle of benign neglect is the academic specializing in international law. By default, the academic becomes the F.O. lawyer's Boswell. That, inevitably, creates a certain tension between the two legal cultures of academia and the F.O., which, in turn, has some role in coloring their perceptions of each other. Many others have written of the culture of academe, or, more precisely, the culture of legal education. As the foreign office lawyers see it, these academics tend to make their mark by extravagantly decrying the lack of sensitivity to legal considerations in the pursuit of American foreign policy and by subverting the secrecy that protects national security. As viewed from the foreign office, academic international lawyers like to interpret laws as if from Olympus, far above any perspective of national self-interest. They seek the

adulation of the media and lucrative advances from publishing houses.

It is not my task, here, to critique the academic culture. I do want to venture a few more observations, however, *always as an outsider,* about the instrumentalism of the legal culture of the foreign office. Is it good for the country? Is it good for international law? It is my impression that it is neither.

The culture of legal reticence, complaisance and complicity offers the lawyer a hard choice: let yourselves be neutered as professionals in the law, and you may reemerge as virile policy makers. If the lawyers agree, they are expected to tailor their advice to the policy makers in such a way as to conform to the requisites of policy implementation. This may add to their sense of self-worth within the cloistered aura of the foreign office. But, this comes at a steep price. They will have stopped behaving as attorneys and have become policy advocates, a bad deal all around. There is no more reason to think that a lawyer has special policy analyzing skills than that the policy analyst is skilled at legal analysis. Each has an important but distinct role in engaging those who, ultimately, determine policy. Specifically, the policy analyst is expected to predict the crucial short-term costs and benefits likely to accrue from a proposed course of action. The lawyer, on the other hand, is supposed to predict the long-term systemic costs and benefits. In a democracy, the ultimate decision is supposed to be taken by the responsible elected leader after carefully weighing these considerations. If, however, the lawyers fail to perform their designated function, the outcome is likely to be an improvident decision reached by way of inadequate data. The checking and balancing envisioned by the architecture of the process will not have occurred as intended. It is this outsider's impression that, while there is checking and balancing, it is not encouraged by the culture.

I have sought to describe this in terms of a "culture" because I believe the problem to be primarily structural, and thus not amenable to remedy solely with appeals to the personal courage and professional integrity of the foreign office lawyers. From my observations as an outsider, it seems that foreign office legal advisers' ability to influence the policymaking process is circumscribed by architecture, by the fact of being located in the bowels

of the foreign policy establishment. There, the pressure to conform to the professional ethos of the non-lawyers, to fit the law to policy objectives, is particularly stifling.

There is no magic cure for this architectural problem, if that is what it is. Since the problem originates in a structural context, perhaps that, too, is where the remedy is to be found. In some countries, the political decision makers receive international legal advice from the Attorney General or Minister of Justice, not from the foreign office. This seems to me to have some real advantages. In practice, a cabinet level law officer, vested solely with responsibility to stipulate and defend the law, is much better positioned than is any F.O. assistant secretary for legal affairs, to reach the ears of those who make the final decision. The responsibility of the Attorney General, moreover, is to tell the leaders what the law is, not to engage in national interest assessment.

Structurally, putting the international lawyers in the company of the nation's law officers might provide them some relief from the culture of reticence, complaisance and complicity.

More radical structural reconfigurations can be imagined. It may be, for example, that the development of international law and institutions has become sufficiently important to the formation of foreign policy. At the same time, international law has become sufficiently specialized that, as with government regulation of anti-trust and the securities market, good governance mandates establishing a separate, cabinet level office to monitor international legal compliance that is not subordinate to the aggregate interests of the other more operational departments.

To raise these issues, I have not tried to present a balanced view of the F.O. legal advisory services. I am aware of the courage that has been displayed at critical junctures by lawyers working in the foreign offices of the world. My observation, however, is that those international lawyers in foreign office who resist the prevailing culture tend to become quite unpopular and, ultimately, also increasingly ineffective in the policy making world that surrounds them professionally. It is neither in the interest of the nations they serve, nor of the legal system in which they are versed, that this ever should occur, certainly not with such frequency as to be apparent even to a rank outsider.