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THE ROLE OF THE LAWYER IN SHAPING RESPONSES TO THE SECURITY IMPERATIVE

Hans Corell

1. Introduction

The purpose of this chapter is to examine the specific role of the lawyer in shaping legal and non-legal responses to the security imperative which adhere to the rule of law, whether at the governmental or international institutional level. The focus is on the role of the legal adviser at these two levels.

It is, however, recognized from the outset that this is only one aspect of the role of lawyers. Other categories of lawyers fulfil indispensable functions in relation to the fight against terrorism. At the national level lawyers are found in the judiciary, as prosecutors, as chief police commissioners, as defence lawyers, in the military, in local government, and in non-governmental organizations. At the international level lawyers are performing a wide variety of tasks, mainly determined by the field of responsibility of the organization in which they serve. It goes without saying that it would be impossible to address in a meaningful way the functions of these different categories of lawyers within the constraints of the current contribution.

However, although this chapter focuses on a specific role of legal advisers, the important issues considered here are believed to be of wider relevance and applicability to lawyers in other functions when viewed through the prism that applies to their specific counter-terrorism functions and roles. The chapter could also be read in a broader perspective than the fight against terrorism. Most of what is said actually applies in all situations where a legal adviser is involved and not only to matters concerning terrorism. In other words, what is said here is relevant in a more general sense also.

At the outset, reference is made to all of the material presented elsewhere in this publication that has been elaborated at the international level with respect to fighting terrorism while at the same time respecting the rule of law, human rights,

refugee law, and humanitarian law.[1] The damage that the misnomer 'war on terrorism' has caused at both the national and international levels is manifest. In addition, the argument that terrorist acts cause 'unprecedented' and 'extraordinary' situations has been advanced in support of the introduction of hasty and ill conceived amendments to criminal justice systems that basically functioned reasonably well.

It is therefore suggested that lawyers, and in particular legal advisers in governmental and intergovernmental settings, have an increasingly important role to play in this context. The following reflections are based on the author's personal experiences over many years in serving as chief legal adviser in the Ministry of Justice and the Ministry for Foreign Affairs, and as the Legal Counsel of the United Nations (UN).

A very sad event—the murder of a prominent personality in Sweden many years ago—forms a point of departure for these reflections. In the ensuing investigation the argument was constantly made that this was an 'unprecedented' and 'extraordinary' event, and that ordinary rules applying to police investigations could not be applied throughout. It is the current author's firm conviction that the deviations from those rules that were made caused irreparable damage to the investigation, with the consequence that the author promised himself never to accept these kinds of arguments if ever confronted with them. It is when events of an extraordinary nature happen that one should stick scrupulously to the rules. This is actually when existing rules are needed the most.

It is a different matter that existing legislation has to be constantly reviewed and that, if a genuine need for reform is identified, such reform should be introduced. Another given point of departure of the security imperative is the duty of the state to protect its citizens from all kinds of dangers, notably terrorist acts.

In order to be able to give advice on these matters it is crucial that the lawyers concerned familiarize themselves fully with the material now available on the topic. In particular, it is important to look at the elements that generate acts of terrorism, among them prolonged and unresolved conflicts. An analysis of such conflicts leads to the conclusion that there is a common denominator among them. The root causes are the same: no democracy and no rule of law. These two elements are indispensable for international peace and security.[2]

[1] Particular reference in this context is made to 'The United Nations Global Counter-Terrorism Strategy' UNGA Res 60/288 (20 September 2006) UN Doc A/RES/60/288 (UN CT Strategy); UNGA, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (2009) UN Doc A/64/211; and to the International Commission of Jurists Report, 'Assessing Damage: Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights' (2009) (ICJ Report) <http://ejp.icj.org/IMG/EJP-Report.pdf> accessed 5 December 2010.

[2] H Corell, 'Prospects for the Rule of Law among Nations' (Address at the UN Office in Vienna 2004) <http://untreaty.un.org/ola/media/info_from_lc/Vienna_24_2_04final.doc> accessed 5 December 2010.

Against this background it is imperative to make specific reference to the many commitments to the importance of the rule of law that have been made by the Member States of the UN, be it in the General Assembly or in the Security Council. Suffice it in this context to quote the following two passages from the UN Global Counter-Terrorism Strategy (UN CT Strategy):

> We resolve to undertake the following measures, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism: . . .
>
> 2. To reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law. . . .
>
> 5. To reaffirm the United Nations system's important role in strengthening the international legal architecture by promoting the rule of law, respect for human rights, and effective criminal justice systems, which constitute the fundamental basis for our common fight against terrorism.[3]

It is extremely important to keep affirmations of this nature in mind when arguments relating to the security imperative are advanced in the discussion. Indeed, it is the responsibility of lawyers to remind decision-makers that commitments of this nature must be respected and taken seriously, lest they be regarded as lip service with little relevance.

With respect to the role of the legal adviser at the governmental and the intergovernmental—by which is meant international institutional—levels in relation to the security imperative, there are four elements that deserve to be highlighted, and which are the focus of this chapter:

(1) The role of the legal adviser in the national legislative process or in the process of establishing international norms, in particular monitoring that contemplated legislation or norm-setting is in conformity with international standards in the field of human rights and humanitarian law.
(2) The role of the legal adviser in the administrative process, in particular assisting in formulating decisions by the executive (the government) or by different organs of the international organization.
(3) The role of the legal adviser in representing his or her country in international negotiations or assisting committees and conferences in the process of negotiating international treaties.
(4) The role of the legal adviser in relation to the policy-maker.

In addition to the substantive aspects, there is another element that at first glance could be viewed as bureaucratic, but in fact is of fundamental importance, namely

[3] UN CT Strategy (n 1) Section IV.

the way in which the legal adviser's office is organized. Experience shows that a legal office must be well organized and, depending on the resources available, that different functions or topics should be distributed as appropriate. The goal must be to create a team that can act efficiently and with great accuracy. A well organized legal office archive is also essential in order to preserve an effective institutional memory. Such a structure is of particular significance when unexpected events occur and urgent advice is needed. In such situations it is critical that a speedy, systematic, and structured approach is taken by a team already in place. The immediate questions include: Is there a legal issue? Has it been analysed before? If yes, what was said? Does this stand the test of time? If the answer to these questions is no: what is the analysis? Upon which material must the current advice be based? In relation to responding to the security imperative issues, such preparations and procedures are of paramount importance if the legal adviser is to be able to respond speedily and with the greatest of accuracy. Otherwise he or she risks being left behind, and even becoming an obstacle rather than an effective instrument in the ensuing responses.

2. The Role of the Legal Adviser at the Governmental Level

2.1. The Role of the Legal Adviser in the Legislative Process

As a point of departure, a reading of the International Commission of Jurists' Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights 2009, *Assessing Damage, Urging Action* (the ICJ Panel) is recommended. It is sad to note the findings of the Panel that even 'countries with supposedly long established legal traditions have introduced rules significantly deviating from ordinary standards in respect of terrorism cases, yet the legality, necessity and proportionality of the measures are far from self-evident'.[4]

A government legal adviser has a special responsibility to warn against the adoption of rules of this nature. This pertains not only to legislation relevant to counter-terrorism. It should be a general duty of such an adviser to monitor that any contemplated legislation is in conformity with international standards. In the case of fighting terrorism, this applies in particular to international obligations in the fields of human rights and humanitarian law.

Obviously, legal advisory services have to be organized in a manner that reflects the legislative process of the country in question, taking into consideration constitutional and other requirements. By way of example, in the legal department of the Swedish Ministry for Foreign Affairs, there is an officer with the specific assignment of vetting each and every proposal for legislation from a human rights perspective before the

[4] ICJ Report (n 1) 157.

Government makes the decision to forward it to the Parliament. While recognizing the need for addressing the threat of terrorism in an effective manner, it is important that the legal adviser makes a thorough review of any proposals made: whether they really are necessary; whether they are in conformity with international standards; and, if extraordinary measures are proposed, whether the same result could not be reached through the strengthening of the ordinary criminal justice system. Needless to say, rules at a lower constitutional level should be subjected to the same scrutiny. This applies to government decrees, executive orders or similar issuances.

Another important area is the way in which the national intelligence service is organized. Any legislation relating to this service must be reviewed, keeping the standards just mentioned in mind. Experience demonstrates that, because of the nature of this service, there is an obvious risk that fundamental human rights may be violated. A case in point is the right to privacy. Activities have come to light involving interrogation and incarceration that have clearly violated the standards of due process and the prohibition against inhuman and degrading treatment.

The interaction among lawyers serving at different levels to ascertain this consistency is an organizational aspect to be kept in mind. An equally important aspect is that the work of the legal advisers in a government office is well coordinated. Here, the determining factor will be how their offices are structured and how they interact with agencies with special tasks. A common feature would be that there are legal advisers in the different ministries and agencies. Efficient coordination and effective communication among them is obviously needed, in particular if different opinions among them emerge. The overriding objective for these monitoring activities must be that the elements in the UN CT Strategy quoted above are kept in mind and given effect.

To sum up: unless the legal adviser is deeply involved in the legislative process, there is a clear risk that rules may be adopted that do not meet the constitutional and international legal standards that the state is obliged to observe. The policy-maker should see to it that appropriate routines are in place to ensure that the legislative process is properly managed.

2.2. The Role of the Legal Adviser in the Administrative Process

An obligation of the same nature as just described for the legal adviser to act also exists in the administrative process. Depending on the constitutional system, the conditions can be very different from country to country. In some systems, the government (the Cabinet) may make decisions that affect individuals, for example, decisions on extradition or expulsion. In such situations, there is a clear risk that international human rights standards might be violated. A thorough legal review of such decisions before they are made is therefore necessary. In situations where these kinds of decisions are made at a lower constitutional level, similar scrutiny has to be performed by lawyers serving at that level, still applying the same standards.

Another example is decisions relating to the organization of agencies responsible for fighting terrorism at the national level and the way these agencies interact. Even if these issues are mainly of a purely administrative nature, they very often entail intricate legal considerations. One case in point is the powers vested in the national intelligence service and the way this service interacts with other agencies.

This brings to the forefront another and very important aspect, namely the fact that many states are in need of assistance in order to be able to fight terrorism effectively. This is just one aspect of a much broader question that is relevant to the legal field, namely that there is a great need for legal technical assistance in many states. Specifically, with respect to counter-terrorism, the need for capacity-building was recognized in the UN CT Strategy: 'We recognize that capacity-building in all States is a core element of the global counter-terrorism effort, and resolve to undertake the following measures to develop State capacity to prevent and combat terrorism and enhance coordination and coherence within the United Nations system in promoting international cooperation in countering terrorism'.[5]

This also means that the UN CT Strategy gives support to the practical work of the UN Counter-Terrorism Implementation Task Force, established by the Secretary-General in July 2005 to ensure overall coordination and coherence in the counter-terrorism efforts of the UN system.[6] Among the projects and initiatives of this Task Force is the UN Integrated Assistance for Countering Terrorism (I-ACT). One of its aims is to help interested Member States, upon their request and in a user-friendly way, to implement the UN Strategy in an integrated manner.[7] A governmental legal adviser in a state that is in need of assistance of this kind has an important role to play in identifying the kind of resources he or she needs. Even if it may be difficult to distinguish this particular aspect from the general need for legal technical assistance, it is essential that appropriate contacts are established with the I-ACT.

With respect to legal technical assistance of a general nature, many governments, intergovernmental organizations, and non-governmental organizations (NGOs) offer assistance in many ways, for example in elaborating legislation, in the establishment of agencies necessary to administer the law, in the form of electoral assistance, and by educating officials at various levels in human rights and the rule of law.[8]

[5] UN CT Strategy (n 1) Section III, Introduction. This statement is then followed by a list of 13 items.

[6] See 'Coordinating counter-terrorism actions within and beyond the UN system' <http://www.un.org/terrorism/cttaskforce.shtml> accessed 5 December 2010.

[7] See 'Integrated Assistance for Countering Terrorism (I-ACT)' <http://www.un.org/terrorism/i-act.shtml> accessed 5 December 2010.

[8] Information about who the actors are in the NGO community can be offered by the Hague Institute for the Internationalisation of Law, which administers the Hague Rule of Law Network. See <http://www.hiil.org/> accessed 5 December 2010.

To sum up: a prominent feature of the administrative process is that decisions are made that affect individuals in concrete cases. The decision-maker can be a lawyer, or another official, or a body of officials, most prominently ministers forming a cabinet. In such situations it is crucial that the legal adviser is consulted before decisions are made. This applies in particular when the decisions may have serious consequences for individual persons or entities. An important element is to assess whether there is sufficient capacity to perform these functions and, if there is a need for capacity-building, to seek assistance as appropriate.

2.3. The Role of the Legal Adviser in Representing His or Her Country in International Negotiations

An obvious case in point where legal advisers have a special role to play is when they, or persons under their authority, represent their country in international negotiations. This applies in particular to negotiations for the current purposes, where the focus is on the areas of international criminal law, human rights, humanitarian law, and refugee law. The point of departure must be that such a representative is obliged to act under instructions from his or her government. But the formulation of such instructions is similar to the way in which legislation is drafted or decisions of an administrative nature are formulated. The natural procedure would therefore be that the legal adviser is deeply involved in the formulation of the necessary instructions. Any requirements related to the security imperative would have to be addressed in this process.

Once adopted, it is obvious that the representative must follow the instructions loyally. However, at the negotiation table issues constantly arise where a decision may have to be taken instantly. Similarly, points can be made by other delegates that require an immediate response on the part of delegates who may disagree. In these situations the obvious lodestar must be to be truthful to obligations that follow from treaties of a fundamental nature relating to the substance negotiated or relating to more overriding principles of customary international law, and obligations under treaties in the field of human rights and humanitarian law.

Ultimately, the manner in which the representative acts is very much a question of judgement, based on the relationship with his or her principal, knowledge of the policies of the government, and an assessment of the likelihood that the outcome of the negotiations will be accepted at the national level, notably by the parliament, if a ratification by the legislature is required.

To sum up: the legal adviser should be involved in formulating the instructions that are given to those who represent their country in international negotiations. Loyalty to this instruction and good judgement are vital.

2.4. The Role of the Legal Adviser in Relation to the Policy-Maker

The role of the lawyer in relation to the policy-maker is perhaps the most delicate matter to discuss, in particular in a situation where the security imperative is at issue. The point of departure here must be that it is the policy-maker who makes the decisions, in particular if he or she is at the level of Cabinet Minister or similar. But it is equally important that decisions taken are based on sound legal analysis.

Of the utmost importance here is the personal relationship between the policy-maker and the legal adviser. First, it is critical that the legal adviser understands and is sensitive to the pressure under which the policy-maker works. In matters of counter-terrorism, there will obviously be a demand from the general public that forceful action is taken and that decisions are made that prove effective and efficient in response to the threat. Arguments made on the basis of the 'unprecedented' and 'extraordinary' nature of the events will be made.

An additional aspect is that the situation that must be addressed may be used by unscrupulous political opponents, who see a chance of scoring points at the expense of those presently in power. It is in this situation that the relationship between the principal and the legal adviser is put to the test. A determining factor for the principal will surely be the legal adviser's past record and demonstrated ability to give sound advice in politically sensitive situations.

It is in this complex and perhaps tense situation where it is especially important that the policy-maker is given legal advice, based on a sound analysis of existing norms, in particular in the field of criminal and criminal procedural law, coupled to standards that must be upheld on the basis of existing obligations under human rights law and humanitarian law. Equally important is that the policy-maker is informed of conclusions drawn from lessons learned both at home and in other countries. In particular, the need for sound and convincing arguments for any deviation in contemplated new legislation from existing law should be emphasized.

The policy-maker should be aware that he or she is best served by a legal adviser who scrupulously observes the moral and ethical elements of the profession. The advice should be based solely on an analysis of legal rules and principles. That said, the legal adviser can of course participate in a policy discussion, in particular if he or she is a member of a group in which policy matters are discussed. Nevertheless, it is extremely important that the legal adviser is clear about the nature of his or her contribution in such discussions. Is the intervention by the legal adviser based solely on policy considerations, or is it based on legal considerations?

For this reason, it is critical that the legal adviser acts with prudence in this kind of discussion. It is preferable that the policy-maker suggests a possible way of action and then asks the question whether the contemplated action is in conformity with the constitution and international law. If the answer is negative, it is vital that the legal adviser is constructive. Maybe there is a different way of addressing the question?

Is it possible to make certain amendments to the proposed action? If so, the legal situation may be different.

In order to be able to perform this task, the legal adviser must be involved as early in the process as is possible and be constantly kept informed, for example by having access to relevant cable or e-mail traffic or other relevant correspondence. If there is reason, the legal adviser must intervene immediately to assist the process. In a discussion among legal advisers from countries all over the world some years ago at the UN Headquarters in New York, it was concluded that legal advisers must also have direct access to the highest level (in this particular case, the Ministers for Foreign Affairs) in order to be able to perform their duties fully.[9]

The argument is sometimes made that lawyers tend to identify problems and may not be inclined to endorse expedient solutions suggested by others. The policy-maker should then realize that he or she is best served by a constructively critical legal adviser. Ultimately, a decision has to be made. That decision is made by—and must be made by—the policy-maker based on a number of considerations, among them the legal advice given. It is therefore important that this advice is accurate and that it does not trespass in the area where the final considerations by the policy-maker come into play. By this is meant that the legal adviser should stick to the law here and not allow the analysis to be influenced by policy factors that fall within the responsibility of the policy-maker.

To sum up: decision-making must be based on sound legal analysis and advice. In this context the quality of the personal relationship between the legal adviser and the policy-maker comes to the forefront. The policy-maker should be aware that he or she is best served by a legal adviser who scrupulously observes the moral and ethical elements of the profession. The legal adviser should realize the pressure under which the policy-maker works and therefore make sure that advice is provided in a critical and constructive manner. It is therefore important that the legal adviser is closely involved in the process as early as possible, and that he or she has direct access to the policy-maker.

3. The Role of the Legal Adviser at the International Level

3.1. The Role of the International Legal Adviser in the Process of Establishing Norms

At the international level, there may be situations where norms are adopted in a similar manner as at the national level. For example, when the UN governed the provinces of Kosovo and East Timor, it was necessary for the UN to issue legislation

[9] H Corell, 'Legal Advisers Meet at U.N. Headquarters in New York' (1991) 85 AJIL 371, 371–3.

(regulations) in the same manner as done at the national level by the state organs. Even if the UN is not formally bound by international treaties in the field of human rights and humanitarian law, it is unthinkable that the UN should issue rules that violate standards laid down in relevant conventions. A procedure for vetting this legislation, similar to that described above in Section 2.1, was therefore introduced in the UN Secretariat. Another area is the transformation of norms in the field of humanitarian law for application to UN peacekeeping missions. This task was performed with a rigorous attention to the obligations following from the relevant Geneva Conventions.[10]

A most striking feature in later years has been the tendency of the UN Security Council to establish norms of different kinds. The most prominent cases are the establishment of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). Even though the statutes of those tribunals, both containing penal provisions also relevant to terrorism, were based on conventions and customary international law, the decisions were nevertheless from a normative point of view similar to legislative acts at the national level.[11] In this context the UN Office of Legal Affairs was involved to a certain extent, in particular with respect to the creation of the ICTY. In other situations, the Council has relied mainly on legal advice provided either by its own lawyers in the UN Missions in New York, or by the Legal Advisers of its Ministries for Foreign Affairs.[12]

By way of example, it should be noted that as the UN Legal Counsel, the current author was not asked to give a legal opinion on the system for the listing of terrorist suspects implemented under Security Council Resolution 1267 (1999).[13] Had this been the case, robust advice would have been given—based on many years of experience at the national level—that adopting a system of this kind without offering those affected access to a judicial institution as a last instance would violate international human rights standards.[14] As a consequence, this system was criticized by the European Court of Justice for not offering persons and entities associated with

[10] See 'Observance by United Nations forces of international humanitarian law' (1999) UN Doc ST/SGB/1999/13 <http://www.un.org/peace/st_sgb_1999_13.pdf> accessed 5 December 2010.

[11] See UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (ICTY); and UNSC Res 995 (8 November 1994) UN Doc S/RES/995 (ICTR).

[12] An explanation to this fact is found in M Wood, 'Legal Advisers' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (online edn OUP, Oxford 2008) <http://www.mpepil.com> accessed 5 December 2010.

[13] UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267.

[14] H Corell, 'Reflections on the Security Council and Its Mandate to Maintain International Peace and Security' in O Engdahl and P Wrange (eds), *Law at War: The Law as it was and the Law as it Should Be* (Brill, Leiden 2008) 68–72, <http://www.havc.se/res/SelectedMaterial/20080901corellonunsecuritycouncil.pdf> accessed 5 December 2010.

Osama bin Laden, the al Qaeda network, and the Taliban sufficient remedies when certain specific restrictive measures had been directed against them.[15]

One must hope that the Council takes seriously the criticism voiced against the present system. There is no way that the system can be regarded as in conformity with human rights obligations unless there is a judicial body at the end of the road. Attempts have been made, for example, by establishing an Ombudsperson function.[16] However, in the view of the current author such measures still fall short of the requirement under international human rights law that in the determination of an individual's civil rights and obligations he or she is entitled to a fair and public hearing by an independent and impartial tribunal established by law.

Questions relating to formulation of norms may also arise in other international organizations at the global or regional level. Specifically, this may happen in organizations that are entrusted with a peacekeeping mandate by the UN Security Council, such as the present NATO operation in Afghanistan.[17]

Irrespective of how and when such tasks must be undertaken, it is just as important to monitor that contemplated rules and regulations are in conformity with international standards, specifically in the field of human rights and humanitarian law. To what extent the security imperative presents itself here is difficult to say. The Security Council was certainly under pressure after 9/11, which is reflected in some of the actions taken. However, as it appears, the role of the legal advisers of the Members of the Council is here more prominent than the role of the advisers of the UN. This may be the case also in other intergovernmental bodies.

To sum up: in situations where an international organization adopts norms in a manner similar to the process at the national level, the same standards must be applied at the international level. Even if the international organization may not be formally bound by international agreements in the field of human rights and humanitarian law, the standards prescribed in these agreements must nevertheless be upheld. This applies in particular if the norms relate to civil rights and obligations of individuals.

[15] See Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union* [2008] ECR I-6351. See further A Rosas, 'Counter-Terrorism Responses and Obligations under Asylum and Refugee Law', Chapter 4 of this volume.

[16] UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904 paras 20–1. See further, K Prost, 'Fair Process and the Security Council: A Case for the Office of the Ombudsperson', Chapter 16 of this volume.

[17] See UNSC Res 1386 (20 December 2001) UN Doc S/RES/1386; and UNSC Res 1510 (13 October 2003) UN Doc S/RES/1510.

3.2. The Role of the International Legal Adviser in the Administrative Process of the Organization

Whether matters relating to terrorism and the security imperative arise in the administrative process of an international organization depends on the nature of its mandate. Taking as an example the review process in cases where persons complain of being listed as terrorists within the Security Council Resolution 1267 system, it is obvious that questions of a similar kind to those suggested in Section 2.2 might also present themselves at the international level.

What is said about the process at the national level is by and large applicable also at the international level. Therefore, a legal adviser at this level has good reason to follow such matters with a keen interest. There is certainly a wide variety of decisions that fall within this category, although most of them fall outside the scope of the present chapter. This applies in particular to decisions relating to the hiring of staff and matters relating to the employees of the organization.

3.3. The Role of the International Legal Adviser in Assisting Committees and Conferences in the Process of Negotiating International Treaties

The role of the legal adviser in the treaty-making process mirrors the corresponding role of the legal adviser at the national level. The difference is that international legal advisers are not really part of the negotiation process; instead they must abide by the objectivity and impartiality that international civil servants are obliged to observe. However, this does not mean that these advisers are prohibited from raising questions in the negotiation process. As a matter of fact, it is often expected that the secretariat will provide assistance to the negotiating bodies by elaborating texts and giving advice relating to provisions under discussion. This is certainly a prominent feature if the services are extended to a diplomatic conference or to work performed, for example, by sub-committees or working groups established by the Sixth (Legal) Committee of the UN General Assembly. It was through this kind of work that, for example, the conventions against terrorist bombings[18] and terrorist financing[19] were produced in the 1990s.

Due to the nature of the treaty-making process, the security imperative may not play such a prominent part here, unless of course the two treaties just mentioned—the Suppression of Terrorist Bombings Convention 1997 and Suppression of Terrorist Financing Convention 1999—are seen as an outflow of this imperative. But it must be kept in mind, in particular when it comes to the interpretation of treaties of this nature. If pressure rises at the national level because of the security

[18] UNGA, International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256.

[19] UNGA, International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

imperative, this may also reflect on the way states act at the international level, including in treaty-making. The two treaties referred to are examples of processes where treaties have been negotiated within a very limited time-frame.

Should the security imperative present itself in a particular negotiation process, and should it in the course of this process be determined that a course of action is contemplated that might lead to infringement of existing and well established norms in the fields of human rights and humanitarian law, the legal adviser at the international level must react. The best way is probably to alert other international institutions that may be entrusted with the substantive responsibility for these norms to the situation and suggest that they engage in the process. The substantive institutions could then alert the national representatives on their decision-making bodies to the situation, suggesting that they intervene back home to achieve a better coordination at the national level when instructions are given to the delegations representing the states in the negotiations in question. By way of example, delegates representing states on the Third Committee of the UN General Assembly or the Human Rights Council might be able to convince their countrymen participating in the negotiations that they are on the wrong track.

To sum up: international legal advisers should raise questions in the negotiation process if they discover that contemplated provisions risk violating international legal standards, in particular in the fields of human rights and international humanitarian law. If the international legal adviser is asked to engage in the drafting process, such standards must be upheld as a matter of principle.

3.4. The Role of the International Legal Adviser in Relation to the Policy-Maker

If the role of the legal adviser in relation to the policy-maker at the national level is a delicate matter, it is even more so at the international level. First, it is more complex to determine who is the policy-maker at this level. In most international organizations there is an assembly of states parties that is its highest policy-maker. In some organizations there are multiple organs of this nature with a specific relationship, such as that existing between the UN General Assembly and the UN Security Council. There could also be organs established by such bodies. A case in point is the UN Counter-Terrorism Committee (CTC) established by the Security Council in 2001.[20] This Committee is in turn assisted by an Executive Directorate (CTED), which carries out the policy decisions of the Committee, and which has a considerable team of legal experts of its own.

[20] The UNCTC was established by UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 para 6.

To what extent the legal adviser is called upon to give advice to bodies of this nature depends very much on the customs of the organization in question and on the subject matter. In this author's experience there was a close relation between the President of the General Assembly and the UN Office of Legal Affairs, but mainly relating to procedural matters. Substantive questions are normally dealt with in the committees under the Assembly where legal advice is provided as necessary at the request of the individual committee. The elaboration of the Suppression of Terrorist Bombings Convention 1997 and Suppression of Terrorist Financing Convention 1999 are cases in point.

With respect to the Security Council reference is made to Section 3.1 above. The unfortunate experience with Security Council Resolution 1267 (1999) is a case in point. This could have been avoided if the UN Legal Counsel had been asked to give advice on the matter.

International organizations generally have some form of executive head with a competence defined in its constitutive document, as is the case in the UN. Such officials must definitely be seen as policy-makers within the scope of this competence. Based upon personal experience as the Legal Counsel of the UN, and in particular the task that accompanied this position of chairing the meetings of the legal advisers of the whole UN system,[21] the conclusion of this author is that the nature and effectiveness of the relationship between the head of an international organization and his or her legal adviser is of paramount importance, not least in ensuring compliance with the rule of law.

There is of course a core body of advisers within every international organization. Many fields are represented here: political, social, economic, military/peacekeeping, human rights, humanitarian assistance, refugees, environment, to mention just a few. Those advisers must of course take the lead within their specific areas. Nevertheless, a common denominator is that, irrespective of the matters at issue, there is almost always a legal component present.

Suffice it to say in this brief survey of these issues, that it is important to find the right balance in the policy discussions. The legal adviser should be present in such discussions, not necessarily taking the floor unless a legal issue is identified. Correspondingly, the head of the organization must be sensitive to a possible need for a legal review if this element is missing when the subject matter is presented for a decision. In the current author's experience this happened now and then, but very seldom after the establishment of the Senior Management Group in the UN Secretariat in 1997. The fact that all Under-Secretaries-General, including the Legal Counsel, were present in the weekly meetings of the group contributed greatly to identifying questions that needed to be analysed and coordinated—also from a legal point of view.

[21] See <http://www.unsystem.org/> accessed 5 December 2010.

In short, what has been said previously in Section 2.4 about the need to involve the legal adviser at the national level as early in the process as possible and to constantly keep him or her informed, etc, applies here also. To identify the security imperative among all aspects in this work is a delicate matter. By definition, it would be invoked in the policy-making bodies where states are represented rather than in the administrative sphere. The UN Security Council could be mentioned as an example. Surely one could have hoped that the Security Council would have acted more carefully in establishing some of the elements in the UN counter-terrorism regime. These matters are now being addressed and one must express the hope that the system of the listing of terrorist suspects can be adjusted to avoid the present conflict with existing human rights norms. With respect to the UN Secretariat there was tremendous activity after 9/11, including consultations with the outgoing and incoming Presidents of the General Assembly. But these consultations focused mainly on the manner in which the Secretariat could serve the Assembly under the circumstances rather than on the normative process.

To sum up: the role of the legal adviser in relation to the policy-maker at the international level is a complex and delicate matter depending on the way in which the institution is organized and the customs that have developed. However, with respect to the executive head of the organization, the relationship is very much the same as, for example, the relationship between the head of government and his or her legal adviser at the national level. The legal adviser should be involved in the process as early as possible, should be present when important policy issues are discussed, and must have direct access to the executive head of the organization.

4. Common Elements

As it appears from the foregoing there are many common elements relating to the work as legal adviser at the national and international levels.

A first condition for a proper preparation of a decision at the political level is that *the legal adviser is involved in the process as early as possible*. When a decision, be it of a legislative or administrative nature, is coming nearer to finalization it is crucial that the final legal review does not unnecessarily prolong the process. At this stage, a quick response—and at that a positive one—will be expected at the political level. This will not be possible unless the legal adviser has been put in a position to study the relevant material, to make the necessary research, to contribute to the solutions, and to prepare an opinion. Experience shows that this is of particular importance in the field of counter-terrorism with the looming security imperative. The study of the ICJ Panel also demonstrates that there is a great risk that hasty decisions might undermine standards that humanity has striven for over a long time.

Certainly, a government or an international organization must show determination in combating terrorism. However, the result will be the opposite if the terrorists actually achieve what in many cases is their goal, namely disruption of organized democratic societies under the rule of law. This is certainly not to deny that there are terrorists who also have other motives. From what has just been said, it follows that *the legal adviser must be kept fully informed*. Otherwise he or she will not be in a position to deliver as effectively on these matters.

For the same reason *the legal adviser must intervene immediately* in cases where questions are identified that may lead to the conclusion that the contemplated decision is not possible or advisable from a legal point of view, not least on grounds of potential illegality. If this situation occurs, it is of the utmost importance that the legal adviser participates actively in identifying alternative solutions. A simple 'no' is of little value and will just cause frustration among others involved in the process and, in particular, among those who have the ultimate responsibility at the political level.

Not least because of this, it is imperative that *the legal adviser has direct access to the highest level*, be it the relevant Cabinet Minister or the Secretary-General of an international organization.[22] A confident relationship between these actors cannot be emphasized enough. This requires an understanding on the part of the legal adviser of the conditions under which his or her principal is working. The 'political realities' argument is truly a reality, which requires good judgement on the part of the legal adviser. He or she should make sure that all legal aspects have been examined and that constructive and sound legal advice is given—and then stand the ground.

Correspondingly, the principal must realize that an adviser who is asked to bend the law, or to disregard important international obligations, will simply not be of real service whether in the short or longer term. Ultimately, the decisions made will be put to the test. If found wanting, the criticism will be directed to the person or persons responsible at the political level. Admittedly, the final analysis can sometimes require very delicate deliberations. Nevertheless, if the demands of the security imperative call for action that may be questionable from a legal point of view, the principal is best served not by a flawed opinion, but by a clear analysis so that, when ultimately the decision is to be made, the principal is fully aware of how it relates to a sound legal analysis. In order not to repeat the sad mistakes of recent years the principal may in this situation be wise to step back for a moment and reconsider. There may be an alternative solution to the problem which, seen in the longer perspective, also serves the interest of upholding the rule of law.

[22] Corell (n 9).

5. Conclusions

Seen in a broader perspective, the fight against terrorism is one of the most important elements in our efforts to create a peaceful world—basically to achieve the purposes of the UN Charter. As is evident from the UN CT Strategy, there are many elements that must be taken into consideration: measures to address the conditions conducive to the spread of terrorism; measures to prevent and combat terrorism; the need to build states' capacity to prevent and combat terrorism; the need to strengthen the role of the UN system in this regard; and, in particular in this context, measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.[23]

This latter aspect means that we must view the fight against terrorism in a very broad perspective. In particular, it is important that democracies with established legal traditions lead the way by demonstrating that they adhere to the rule of law and that they scrupulously abide by their international legal commitments. Regrettably, events during the past few years mean that some serious repairing is needed here.

It is interesting to note that the two institutions that organize former heads of state and government have taken a very firm stance on these matters. So, for example, in their Madrid Agenda against Terrorism of 11 March 2005, the Club of Madrid stated: 'The basis for effective co-operation across national borders is trust and respect for the rule of law. Trust is built through shared norms, reciprocity and the practical experience of effective collaboration.'[24] More specifically, the Summit found that: 'Any successful strategy for dealing with terrorism requires terrorists to be isolated. Consequently, the preference must be to treat terrorism as criminal acts to be handled through existing systems of law enforcement and with full respect for human rights and the rule of law.'[25]

Similarly, the InterAction Council of Former Heads of State and Government made the following statement in its Final Communiqué from its 26th Annual Plenary Session in 2008: 'The need for a rule-based international society committed to justice and development is greater than ever before in consideration of the complex challenges facing humankind today. Adherence to international law and trust in multilateral institutions must be restored. Unilateral actions put the world at risk and undermine efforts to uphold international peace and security.'[26] Among the

[23] UN CT Strategy (n 1).

[24] See Club de Madrid, 'The Madrid Agenda' (11 March 2005) <http://summit.clubmadrid.org/agenda/the-madrid-agenda.html> accessed 5 December 2010.

[25] The Madrid Agenda (n 24).

[26] See InterAction Council, Final Communiqué 'Present State of the World Restoring International Law Managing International Financial Markets' (Stockholm, 25–27 June 2008) <http://www.interaction-council.org/final-communiqu-29> accessed 21 July 2011.

recommendations in the same Communiqué is found recognition of the need to '[treat] terrorism as criminal acts to be handled through existing systems of law enforcement and with full respect for human rights and the rule of law'; whilst also '[u]nderlining the importance of an agreed definition of terrorism'.[27]

The obvious conclusion is that the only way forward to maintain international peace and security, and a proper legal order in the world, is a multilateral system based on democracy and the rule of law. This is also the most effective way in which to address the security imperative. The more systematic the effort to shape this multilateral system, the less need there will be to invoke this imperative. That said, in working to strengthen the multilateral rule-based system, there is a need for realism. There is still a long way to go. Additionally, not only are there those who will engage in terrorism with the aim of destroying these efforts. There are also other threats, all too familiar, that will cause tensions among human beings in the future.

It is obvious that lawyers have a special role to play in this work to strengthen the rule of law. This is said not only because the provision of legal advice is the current author's own profession, but also because in this particular context this appears to be the conviction of experienced high-level politicians. Looking to the former heads of state and government, there even seems to be a direct correlation between the strength of this conviction and the level at which these politicians served. In closing, it is sincerely hoped that policy-makers will understand that a trusted legal adviser is an indispensable ingredient in their organizations, and that they are best served by someone with a steady hand on the legal helm.

[27] See InterAction Council Final Communiqué (n 26).