

**SUBMISSION IN RESPONSE TO THE CONSULTATION ON THE ROLE OF  
THE ATTORNEY GENERAL (CM 7192)**

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1. The Consultation Paper (Cm 7192) invites submissions on the role of the Attorney General, including (but not limited to) the options for change set out in its paragraphs 3.3 onwards. The present submission focuses on the arrangements for furnishing the Government with advice on questions involving public international law ('international law'), and consequently responds only to Questions 1, 2 and 3 in the Consultation Paper. It is offered in the belief that the Attorney General's role in the international field has already become and will increasingly be a significant component of his or her functions.
2. We speak with the accumulated experience of some 14 years as the principal Legal Adviser to the Foreign & Commonwealth Office (1991-2006),<sup>1</sup> and thus as having carried through that period the main responsibility within government at Departmental level on questions of international law – including, of course, the responsibility for putting such questions to the Attorney General for advice, receiving the advice when given, and then implementing it. We speak, moreover, on the basis of a life-long concentration on international law as our specialised field.
3. We are particularly encouraged to make this submission in view of the fact that, while the whole thrust of the Consultation Paper is plainly influenced to a significant extent by the Attorney General's role in respect of questions of international law, and the particular sensitivity and consequences of that, the

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<sup>1</sup> This submission was originally conceived in discussion with Sir Arthur Watts KCMG QC, our predecessor as FCO Legal Adviser (1987-1991), who in addition had direct experience within the Legal Secretariat to the Law Officers. To our great sadness, Arthur Watts became ill and died while the drafting was in progress.

Paper itself says little about the practical arrangements that have evolved for the fulfilment of this role, or how they have served their purpose.

4. It may be helpful if we begin with a few observations on the nature of international law itself. In a word, international law is different. It is different in the nature of the entities whose conduct it seeks to regulate, primarily States and Governments, and international organizations. If it nowadays bears directly on individuals as well, as it certainly does, that is very often in those aspects of their affairs which centre around their contact with foreign States. International law is notably different also in its sources, which are neither statutory nor based on a corpus of binding case-law; it derives essentially from customary law and from treaty. This has the important consequence (even before it comes to questions of interpretation or application) that the very ascertainment of the current international law on a given question is not simple or straightforward: custom, on the one hand, requires knowledge and assessment of the practice of a wide variety of States, and of international attitudes; and treaties, on the other, are often drafted in lapidary terms, and typically present demanding questions as to the nature of the obligation they create, and how far it extends in the particular case, in the light of subsequent practice in the treaty's implementation. By definition, moreover, any question difficult or important enough to warrant submission to the Attorney General is precisely the sort of question that is prone to raise problems of the kind just mentioned. And, partly as a result of these special features, and partly because there is no court of general jurisdiction at the international level before which the actions of governments can be legally challenged, the consequences of a breach of international law are significantly different from those which follow a breach of domestic law. All this places a special responsibility on those tasked with advising the Government in this field.
5. There is a final point of some considerable importance. This is that the actions of the Government internationally, and the statements the Government makes on questions of international law, are themselves capable of having an effect on the

law as it develops. In some of its aspects this phenomenon may appear wholly benign, as part of the process of moving towards the ultimate achievement of long-term policy objectives. In others, though, it may conceal a more insidious process, under which legal justifications or arguments that appear to be expedient on the issue of the moment, can later be quite justifiably cited against the British interest on separate but related issues.

6. These factors, taken together, place a considerable premium on the quality and reliability of the advice available to the Government on questions of international law. And above all they serve to emphasise how important it is that such advice should be able to be advanced firmly and convincingly in high-level policy discussion.
7. The organizational arrangements and practices within Government for handling questions of this kind, as they have developed over the past 150 years or so, reflect the special features described above. They owe their shape, first, to the demise of the old office of Queen's Advocate, in effect a third Law Officer specifically expert in international (including maritime) matters, who would usually give advice jointly with the other Law Officers; and secondly to the salutary shock administered by the consequences that followed from the gap exposed by the handling of the papers relating to the Confederate raider *Alabama* during the American Civil War. The creation of the office of Legal Adviser to the Foreign Office (now Foreign & Commonwealth Office: FCO) was consciously designed to foster the development of a reservoir of specialist legal experience at a high level within the public service in support of the day-to-day work of the Foreign Office, but which would be able to function in support also of the constitutional role of the Attorney General as the principal legal adviser to the Government. The essential thought in that latter respect was that the Attorney General would be able to rely, in preparing his Opinions on questions of international law, on a thorough and detailed case for advice worked up for his benefit by an acknowledged specialist in the field, who would in addition be able

to draw on the Foreign Office's accumulated experience of international State practice.

8. Subsequent developments have moved in parallel with the expansion of the range and scope of the Attorney General's duties and the growth of the Attorney's own legal staff. In particular they have led: at the administrative level, to a standing practice under which the Attorney General has seconded to his or her office an experienced FCO lawyer in mid-career; and at the policy level, to the regular attendance of the Attorney General at Cabinet or its Committees when the subjects for discussion include substantial questions of international law.
9. The effect of these arrangements can be summarized as follows:-
  - a) When questions of international law arise in the ordinary course of government business, there is a core of experienced specialist international lawyers within the FCO to which they can be referred.
  - b) The FCO Legal Adviser carries authority in this field both within the FCO and in Whitehall more widely.
  - c) The FCO Legal Adviser routinely has direct access to the Attorney General, in the sense that, if he or she considers that a question ought to be referred to the Attorney General, that will happen.
  - d) The Attorney General is able to rely on the fact that, when questions of international law are referred for advice, they will be backed by a comprehensive reference covering the established and developing law and the relevant international practice.

- e) The Attorney General's own staff will moreover contain an experienced official competent to absorb and explain the reference, or able to seek further explanation where necessary.
- f) The Attorney General is further able to rely on the knowledge that his or her advice on questions of international law will be fed back into the policy-making process by experienced Departmental lawyers who fully understand its scope and impact.
- g) When high-level policy decisions, including at Cabinet level, involve questions of international law, not only will the Attorney General's advice as the normal rule be available in advance, but the Attorney will usually be present in person to explain that advice Minister-to-Minister, and subsequently to provide any further advice that may be needed arising out of the discussion.

10. These arrangements have proved to be very effective in melding together a substantial body of specialised expertise in international law with the extra weight of the Attorney General's broader experience, and his or her standing as a Member of the Government. Taken together, they ensure that the importance of complying with international law is fully taken into account, not least under circumstances of intense political pressure. It lends resilience to the independence and objectivity of even the most junior Legal Advisers in the FCO, advising as they do on the application of legal rules that are often controversial or in flux, to know that their advice can be passed up the line, if need be, and end up with the Attorney General for final endorsement and support (or otherwise). It strengthens the ability of the FCO Legal Adviser to insist on proper attention being paid in policy-making to a proper assessment of the United Kingdom's legal rights and obligations if he is able to ensure that important issues are referred to the Attorney General in accordance with the Ministerial Code. It strengthens the Foreign Secretary's hand in dealing with Ministerial colleagues,

and his confidence in dealing with foreign partners, if he knows that his Departmental legal advice on essential questions has been endorsed by a Ministerial colleague able to approach the matter with both sympathy and objectivity. It enhances the quality of inter-Ministerial discussion if there is a mechanism for resolving diverging legal views that may emerge between Government Departments. And the Attorney General's status as a Minister gives him or her a greater possibility than could be secured by any other arrangement of ensuring that the legal considerations are not misunderstood (or even brushed aside) in high-level decision-making on foreign affairs.

11. Finally – an important element not to be overlooked – the current arrangements also ensure that there is direct Parliamentary accountability in respect of the legal positions which the Government adopts in this vital area. The accountability is of course of a special kind, not identical with that which applies to policy decisions. It has to reflect, amongst other things, the confidentiality that necessarily attaches to advice given by a lawyer to the client, a factor that may be particularly acute when the issue under consideration is a matter of dispute internationally, or may become the subject of judicial proceedings nationally or internationally. All the same, the fact that the Attorney General is a Minister and sits in Parliament at least enables a direct and authoritative explanation to be given of the Government's legal views, allows for Parliamentary Questions to be posed and answered, and may in appropriate cases also allow for such issues to be knowledgeably debated.

12. These are manifold advantages, whose worth has been proved. They could not be secured by a system in which the Attorney General did not have Ministerial rank as a member of the Government. Nor could they be secured if the final arbiter on questions of international law within government was an outside appointee, however eminent. Although it might in theory be possible to consider reviving something equivalent to the old office of Queen's Advocate, the context in which that office used to function has changed fundamentally and irreversibly:

unless a new-style ‘Queen’s Advocate’ ranked equally with the Attorney General (and gave advice jointly with the latter), he or she would simply introduce an unnecessary extra level between the FCO Legal Adviser and the Law Officers; and if the appointment were not at Ministerial level, it is difficult to see what benefit it would bring to the Attorney General in carrying out the role of principal legal adviser to the Government, over and above the faculty Attorneys General already have (and use whenever necessary) to seek an Opinion from leading practitioners at the Bar before formulating their own advice to colleagues. And it would lose entirely the element of Parliamentary accountability just mentioned.

13. We turn now to answer briefly the three Questions set out in the Consultation Paper that are relevant to the Attorney General’s advisory role in the field of international law.

*Q1 Do consultees consider that the role of chief legal adviser to the Government should be separated from that of a political Government Minister? If so, who should exercise the role?*

14. In the light of all that is said above, we are firmly of the view that the public interest is best served by a continuation of the present system, under which the Attorney General is responsible for all areas of legal advice to the Government, has Ministerial rank, and is assisted on questions of international law by experienced specialists from within the public service.

*Q2 What are the consultees’ views on the proposals for change in paragraphs 3.6 to 3.10?*

15. As regards the proposals for change in paragraphs 3.7 and 3.8, we see considerable merit in making clear in the oath of office and/or in legislation that the Attorney General’s duty is to uphold the rule of law (including – and this should perhaps be made explicit, as it has been in the Ministerial Code – international law). It might be all the more appropriate that the Law Officers

should carry this formal duty if they are in the future to be the only Law Ministers in the Government. So far as paragraph 3.6 is concerned, however, we see no great merit in trying to lay down hard and fast rules about which Committees the Attorney General might be a member of or might attend; good sense should always provide an answer. Nor do we accept the premise that – at least so far as international law is concerned – there is any great difficulty in identifying in advance when issues in that area will arise; practical experience does not sustain this.

16. So far as concerns the proposals in paragraphs 3.9 and 3.10, the question of giving ‘a full explanation of the legal basis for any decision to use armed military force’ is best considered in the context of the further Consultation Paper on War Powers and Treaties (Cm 7239), and we express no view on that in this submission. The remaining proposals in these paragraphs do not give rise to particular issues in connection with the giving of advice to the Government on questions of international law.

*Q3 Do consultees consider that legal advice to the Government should be published (and if so in what circumstances), or that the legal basis for key Government decisions should be made publicly available?*

17. We do not believe that the automatic publication of the Attorney General’s advice (whether in full or just the ‘legal basis’) would be the right rule to follow, not least in respect of the often delicate and uncertain questions of international law that are the sole concern of this submission. The reasons why we are convinced that the normal rule of confidentiality (the ‘Law Officers’ convention’, which is reflected in section 35 of the Freedom of Information Act 2000) should be maintained in this area will emerge from what has been said above, in particular at paragraphs 10 and 11. An additional reason of some weight may, however, not be so readily apparent from the outside. This is that international situations, and especially crisis situations, are not static, but develop, often at great speed. When this happens, and legal questions are involved, seeking legal advice is an iterative



process. Frequently, the advice sought may go to tactics as well as substance. This means on the one hand that ‘the legal advice’ may itself be something that develops, until finally a course of action is decided upon in conformity with the best view of the legal position. On the other hand, it means also that to reveal legal advice along the way could be gravely damaging to the Government’s hand in fast-moving international diplomacy.

18. That said, we are also firmly of the view that it is both right and beneficial – not to mention also in accordance with the spirit of the times – that the Government should take positive steps to make public in an appropriate way its views on important questions of international law and the positions it is adopting on particular questions of international controversy or attention. We recall in this connection specifically the point made above (paragraph 5) about the influence that the United Kingdom’s actions and statements may have on the development of customary international law. What methods of publicity would be appropriate would vary according to the case (including the confidentiality considerations referred to in paragraph 17), and it is not possible to lay down any general rule. On some occasions a policy statement might be the most appropriate, on others a statement or Parliamentary Answer by the Attorney General in person. On the great majority of issues, however, the best vehicle will be to put materials on United Kingdom practice in the field of international law regularly into the public domain, and to stimulate informed public discussion about matters of international concern, in the way that the Foreign & Commonwealth Office has been consciously setting out to do for some time now.

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