Inside "L": Some Thoughts on the Office of the Legal Adviser

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I have helped scour a foreign capital hours before a closing to assemble the twenty-one owners of a property we wanted to buy. I have litigated a million dollar case on my own. I have learned what “hak pakai” and “hak guna bangunan” are.¹ I have seen China’s Great Wall, Cambodia’s Angkor Wat, and Cape Town’s townships (and I am one of the least well-traveled people in the building). I have had an ambassador swing an armadillo at me. For all that, I am still in my first rotation in the Office of the Legal Adviser (or “L,” as it is denominated in government-speak) at the State Department.

Needless to say, this job has been full of surprises. I made a decision to work for the State Department, rather than for a law firm, by buying into a cliché: go to the government if you want significant responsibility as a young lawyer. What has been surprising from my (admittedly amateur) vantage point is not the amount of responsibility we are given—to which the aforementioned experiences attest—but rather the ever-expanding range of entities, agencies, individuals, and governments with which L regularly deals. I should not have been surprised, in a decade in which everything is interconnecting at an exponential rate, that the executive agency with the lead role in international affairs has had to deal with more numerous and complex issues every year. What I did not expect, though, was the diversity of those issues, and the concomitant interaction between the Office of the Legal Adviser and private attorneys, industry, non-governmental organizations, attorneys from other agencies, and private citizens—as clients, as constituents, as consultants, and as challengers.²

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1. These are two different types of land titles in Indonesia.
2. As Judge Wood recently noted in these pages, “[p]lainly [international law] is no longer limited to Brierly’s idea of the law of nations. Too many obligations now run between nation-states and individuals for that to be true. Individuals and companies are also more or less third-party beneficiaries of treaties governing international trade, the environment, the law of the sea, and world health.” Diane P. Wood, Diffusion and Focus in International Law Scholarship, 1 Chi J Int’l L 141, 147 (2000).
This essay briefly sets out the structure of the Office of the Legal Adviser, then turns to the work of specific offices to illustrate the above-mentioned interactions. The essay concludes with a look at the work I have done in my first rotation, in the section of L that advises on the acquisition and disposition of real property overseas.

I. THE STRUCTURE OF THE OFFICE OF THE LEGAL ADVISER

The Legal Adviser’s Office is divided into twenty-three specialized offices and employs about 160 attorneys. Some of these offices advise regional bureaus, while other offices serve as advisers on functional issues. For example, the L office that handles European affairs (“L/EUR”) as a regional office, advises State policy offices like the Bureau of European Affairs on issues relating to North Atlantic Treaty Organization (“NATO”) and the EU, conflicts and institution-building in the Balkans, and democratization in the Newly Independent States, while the L office that handles political-military affairs (“L/PM”), as a functional office, offers advice on issues like the law of war, export controls, and foreign assistance programs. The interaction between the regional and functional offices can be conceived of as a kind of grid, whereby the work of the regional offices extends across several functional areas and the work of the functional offices extends across each of the regional areas.

While the bread and butter of L’s work is public international law, including work that generally would not be performed by a private law firm, a fair number of functional L offices do work that is similar to work law firms perform for their clients. Offices within L give advice in the areas of employment law, real estate, litigation, contracts, administrative law, and international arbitration. Before working for a government agency, I had never considered that an agency needs legal advice both to serve its own in-house management functions and to serve its needs as an executive agency with a policy mission. Because L has a rotation system, many attorneys there have passed through each kind of office and, in the process, have learned about the cogs that make a government agency—that great beast—rumble forward.

Another unexpected (and tricky) aspect of practicing law in L is the occasional lack of a clearly defined client, and, in other instances, the presence of multiple clients, each with a different agenda. At a firm, a lawyer gets involved in a situation at the request of his client, who has made a conscious decision to seek the assistance of that lawyer. At the State Department, the lawyers wear a number of hats, sometimes at the request of the client and sometimes not. The hats include adviser, drafter, negotiator, facilitator, consensus-builder, and policeman. At a firm, the lawyer is expected to find a way—within the bounds of legality—for a client to do what he

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wishes. In the government, a lawyer has an obligation to consider a number of factors, including what international law says about an issue, what the concerned policy offices hope to achieve, what the past practice of the State Department has been, and what other agencies hope to accomplish. A firm has the leeway to take a position for one client that might appear inconsistent with a position it has taken for another client. The State Department faces more public scrutiny as to whether it is acting consistently in and across practice areas.

These competing forces only become harder to juggle in practice. I will now turn to recent work done by four L offices to illustrate both the complexity of L's role and the increasing diversity of parties with whom the L offices deal.

II. A SAMPLING OF WORK IN L

A. CLAIMS AND INVESTMENT DISPUTES ("L/CID")

L/CID is the office responsible for handling claims by foreign governments and citizens against the United States and claims by the United States and US citizens against foreign governments. For example, L/CID, acting in concert with the Department of Justice ("DOJ"), is defending the United States against a suit brought by the families of Kenyan nationals injured or killed in the bombing of the US Embassy in Nairobi in 1998. L/CID played a key role in mediating the $5 billion settlement between the German government, German corporations, and individuals forced to perform labor during the Holocaust. The office also defends the United States against claims brought by Canadian or Mexican companies alleging discriminatory treatment or effective expropriation of their assets under Chapter 11 of the North American Free Trade Agreement ("NAFTA").

By virtue of its litigation-heavy portfolio, L/CID frequently works in concert with DOJ. But by virtue of the subject matter of its work, L/CID also interacts with a large number of private individuals. L/CID is an unusual L office in that it has no client bureau within the Department of State. It instead serves the US Government's interests generally. Serving those interests means encouraging the fair and non-discriminatory treatment of American citizens in international proceedings. For instance, L/CID coordinates the claims of US citizens and companies who have alleged that they suffered personal or economic damages as a result of Iraq's invasion of Kuwait; many of these claims are being heard by the UN Compensation Commission in Geneva. L/CID assembles, forwards, and monitors the claims for the US citizens and corporations, and often must track people down to inform them when their judgments have been paid out.

Of course, it is not always clear how best to promote the interests of private parties while serving larger national interests. For example, certain US citizens and corporations have received judgments against foreign state sponsors of terrorism, such as Cuba, in US courts and want to execute those judgments against blocked foreign
government assets in the United States. Blocked assets of foreign governments, however, provide a critical bargaining chip for dealing with hostile countries. The use of those assets by private parties would reduce the foreign policy tools of the United States, and potentially expose the US Government to liability. L/CID works with the Treasury and Justice Departments in seeking to reconcile these competing interests.

In sum, L/CID’s work evidences a growing trend: individuals seeking to use international law—not simply domestic law—to achieve their ends.¹

B. LAW ENFORCEMENT AND INTELLIGENCE ("L/LEI")

L/LEI’s work further evidences the range of entities that have a stake in the international law process. L/LEI, whose clients include the Bureau of International Narcotics and Law Enforcement Affairs and the Bureau of Intelligence and Research, is responsible for negotiating and concluding mutual legal assistance treaties and extradition treaties for the State Department. In addition, L/LEI provides legal guidance on the application and interpretation of those treaties. The office works closely with DOJ, since DOJ has a strong interest in obtaining assistance from other countries in many of its prosecutions and in having fugitives extradited to the United States. Of course, these obligations are reciprocal and DOJ and L/LEI work to ensure that any American citizen extradited under a treaty will face fair and open legal proceedings in the requesting state.

The office also consults with various US Attorneys and DOJ when criminal proceedings in those offices have foreign policy implications—as when Pavel Borodin, a high-ranking Russian official, was arrested at John F. Kennedy airport after arriving to attend President Bush’s inauguration. L/LEI coordinated the State Department’s response to questions about whether Borodin would benefit from any diplomatic privileges or immunities. In addition, L/LEI helped draft the arguments presented by the Assistant US Attorney handling the case against Borodin’s release on bail. Specifically, L/LEI worked closely with DOJ to develop strong arguments against a number of different bail proposals put forth by Borodin’s counsel that would minimize the diplomatic fallout from the case. Naturally, L/LEI works with its counterparts in foreign governments in the treaty negotiations and in individual criminal cases.

¹ L/CID is not the only office that interacts with individuals. Other offices, like Western Hemisphere Affairs ("L/WHA"), do too, often in ways that can best be described as "unpredictable." For example, the Guano Islands Act, 48 USC §§ 1411–1419 (1994), permits an individual who has discovered an uninhabited, unclaimed guano “island, rock, or key” to claim an exclusive right to occupy that land to obtain the guano by giving notice to the Secretary of State, 48 USC § 1412 (1994). L/WHA is thus periodically required to opine whether the guano island claimed by the discoverer is actually “in the possession or occupation of any other government or citizens thereof.” Id.
Beyond daily interactions with DOJ and foreign governments, one of L/LEI’s recent treaty negotiations involved the private sector and non-governmental organizations. The Cybercrime Convention ("Convention"), which was negotiated under the aegis of the Council of Europe and which is still being finalized, will standardize the parties’ legal practices in tackling crime on the Internet. The Convention will require each party to criminalize certain computer-based activities, such as illegally accessing computers, interfering with data and computer systems, and distributing child pornography. It will also contain enforcement and mutual assistance provisions, which will require members to establish the procedural tools necessary to investigate such crimes under their own national laws and to provide, in certain circumstances, assistance to other parties seeking to prosecute crimes under the Convention.

Because the US delegation knew that the private sector and privacy groups would be very interested in the Convention’s provisions, it pushed to have the drafts made public. Through DOJ, the delegation invited public comment on the drafts and met on a regular basis with the privacy groups and the private sector, including Internet Service Providers ("ISPs") and content providers. The comments and feedback provided by the private groups were helpful to the US delegation, and, in turn, the private groups, having had a say in the process, will be more likely to support the Convention if it is ever signed and ratified. For example, the ISPs did not want to be held liable under Article 11, the article on attempt and aiding or abetting, simply because they are a conduit for harmful content data or malicious code. Thus, they pressed for language in the Convention’s Explanatory Memorandum that would make clear that an ISP acting without criminal intent could not incur liability under Article 11. Likewise, content providers successfully sought language in the Memorandum affirming that there was no duty to monitor content in order to avoid liability. Since law enforcement is almost exclusively a governmental responsibility, L/LEI does not usually engage corporations or other private groups in the negotiation of law enforcement instruments. Yet it made sense in this instance to seek input from the private sector, given the nature of the Internet and the fact that the US government relies heavily on the assistance of Internet Service Providers in obtaining evidence.

6. Id.
7. Id.
9. Id.
C. UNITED NATIONS AFFAIRS ("L/UNA")

L/UNA plays a more traditional role in L by interacting mostly with governmental entities. Yet even here, the breadth of governmental entities with which L/UNA consults and advises is surprising. L/UNA’s job is to provide legal advice to the Department on its interaction with international organizations, including not only the United Nations, but also such entities as the World Health Organization, the International Whaling Commission, and the international criminal tribunals in The Hague and Arusha. The office is also involved in representing the United States before the International Court of Justice ("ICJ").

One recent case before the ICJ illustrates how the office has to pull together political and legal positions from several governmental entities. In the LaGrand case, Germany filed a claim against the United States before the ICJ, alleging that the United States had violated the Vienna Convention on Consular Relations ("VCCR") by failing to notify two German citizens, Walter and Karl LaGrand, of their right to consular notification after they were arrested in Arizona. L/UNA and Consular Affairs ("L/CA", which has responsibility for the VCCR), in coordination with the Office of Legal Counsel, the Solicitor General’s Office, and the Criminal Division of DOJ; the state of Arizona; and outside legal experts, handled the filings and participated in oral argument before the ICJ. The ICJ handed down its decision in June, holding that the United States had violated the VCCR when it failed to notify the LaGrands of their consular rights. The Court also held that in future cases involving German citizens sentenced to severe penalties, where those citizens had not been informed of their right to consular notification, the United States, “by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights” in the VCCR. In view of this decision, L/UNA and L/CA have been working with each of those offices to determine how the United States should respond to the decision.

D. BUILDINGS AND ACQUISITIONS ("L/BA")

The office in which I work, though considered more of an “in-house” office than the offices discussed above, nevertheless works with a panoply of entities, governmental and otherwise. My job is to provide legal advice on acquisitions and dispositions of real property and buildings used by the overseas missions as embassies,
consulates, annexes, and housing. Most of the work is self-contained; we ensure that the real estate deals comply with our domestic legal authorities and draft or review the documents used to protect our legal rights. But even we work with other executive agencies whose employees work abroad—the USDA, through the Foreign Agricultural Service, and the Department of Commerce, through the Foreign Commercial Service—since the State Department is the “single real property manager” for the United States overseas.

We also work with more than our fair share of foreign governments, since we review real estate transactions in every country in which the US Government has a presence—that is, in almost every country in the world. We interact with foreign governments because it is those governments from which we are acquiring the land, or because those governments have to approve our acquisitions, or because they help us navigate the acquisition, registration, and re-zoning processes. Of course, we deal with private citizens and corporations when they own the land or buildings we hope to acquire. More and more, the client (Overseas Buildings Operations) is facing pressure to build responsibly, within the parameters of environmentally conscious city planning. Thus, we encounter city planners and architects, as well as citizen groups. Navigating these challenges requires the assistance of local counsel.

One of the biggest and slowest deals I have worked on concerns the People’s Republic of China (the “PRC”). We want to acquire a new ten acre site in Beijing on which to build an embassy complex, which will replace a hodgepodge of aging buildings that make up our current embassy. The PRC wants to acquire a new site in Washington, DC, on which it will build a new chancery. Given the intricacies of our relationship with the PRC, we hoped to reduce the number of players involved so that we could streamline the process, but even so, it will probably take five years before each side’s complex is built.

We have tried to reduce the number of entities involved by structuring the deal around government-owned properties. The site we are to acquire in Beijing is in a diplomatic zone established and owned by the PRC. The site the Chinese are to acquire is at the International Chancery Center, a federally-owned forty-eight-acre tract in Northwest Washington. Thus, the site is not subject to DC zoning laws, though it is subject to the planning controls of the National Capital Planning Commission, which will govern what can be built on the site. Additionally, the deal is not subject to the whims of private sellers. Another way we have tried to simplify the deal is to establish a reciprocity of property interests, even though the US system of land ownership is different from the PRC’s. Since the PRC does not permit foreign governments to own land in fee simple in China, we have structured a deal whereby each country will take a 180 year lease, with the possibility of converting to fee simple ownership if and when the property laws in China change.

Once the relatively straightforward land transaction is complete, though, the design and construction of the embassies will involve countless players. For the US side, at least, State Department and private architects and engineers, contracting
officers, the embassy in Beijing, diplomatic security, and construction contractors will, to varying degrees, interact with the PRC’s Ministry of Foreign Affairs and a number of PRC construction, zoning, customs, and urban planning agencies. The PRC will have to interface with a comparable number of entities here. However, if disputes arise as the projects progress, the State Department and the Ministry of Foreign Affairs will once again find themselves across the table from each other, resolving what may partly be lease or contractual disputes using diplomatic channels.

III. CONCLUSION

Hopefully, each of the foregoing examples highlights that there are new players in the international law game. This is not to say that the State Department’s and L’s main focus has been diverted from foreign governments. Interacting with foreign states is, and will remain, State’s livelihood. What the new spectrum of relations means, though, is that the skill set of a lawyer in L has to be quite broad: one needs to understand statutory and constitutional law, treaty law, and customary international law, as well as the political, technical, and economic aspects of problems and situations. As should now be clear, the work of these offices offers significant challenges for lawyers. International law is in a more nascent stage than much of federal law, which means that international law won’t answer all of the questions we ask of it. But people (and governments) are asking new things of international law, and part of L’s work is to navigate these lightly-tread paths.  

14. For those of you still wondering, the armadillo was stuffed. In Bolivia, stuffed armadillos, mounted on sticks, are used as noisemakers. See Max Harris, *Saint Michael and the Sins of the Carnival Virgin: The Roots in Rebellion of a Bolivian Morality Play*, available online at <http://odur.let.rug.nl/~sitm/harris.htm> (visited Sept 30, 2001) (“The [Bolivian] dancers carry rotating ratchet noisemakers – some made from the carapaces of quirquinchos (armadillos) – whose abrasive rhythm recalls ‘the steps of their chained feet’ or ‘the sounds of the cranks turning the wine presses.’”).