

Foreign Legal Policy As the Background to Foreign Relations Law?

Revisiting Guy de Lacharrière's La politique juridique extérieure

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The study of foreign relations law has been largely devoted to domestic laws as they affect foreign policy.¹ An element seems to be missing, however, somewhere between domestic and international law that is reducible to neither the constraints of domestic or international law on foreign policy. Although that element may simply be the national interest, the latter seems too crude a variable to explain alone how countries navigate not just their foreign policy generally, but its many legal dimensions specifically.

A more discreet strand of thought has looked at how national policies in relation to international law are formulated. This could be seen as including the quite specific but rich genre of writing on foreign policy legal advice and advisors (which has both a foreign policy law allocation dimension, and a foreign legal policy element)² although what this chapter is interested in is arguably broader and not necessarily as personalised. The key intuition here is

¹ See, for example, Curtis A. Bradley, 'What Is Foreign Relations Law?', in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (New York: Oxford University Press, 2019). On this more conventional conception of foreign relations law and how it has been understood in the context of this chapter's case study, France, see the chapter by Niki Aloupi, 'The Conseil Constitutionnel's Jurisprudence on "Limitations of Sovereignty"'. Whereas the latter 'foreign relations law' *stricto sensu* varies quite significantly from country to country based on constitutional specificities, the attempt to theorise a 'politique juridique étrangère' arguably includes an effort to reach for something which may have local specificities but is also more functionally and universally oriented.

² Stephen M. Schwebel, 'Remarks on the Role of the Legal Advisor of the US State Department' (1991) 2 *EJIL* 131–5; Jesselyn Radack, 'Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism' (2006) 77 *University of Colorado Law Review* 1–48; Lewis Johnman, 'Playing the Role of a Cassandra: Sir Gerald Fitzmaurice, Senior Legal Advisor to the Foreign Office' (1999) 13 *Contemporary British History* 46–63; Robbie Sabel, 'The Role of the Legal Advisor in Diplomacy' (1997) 8 *Diplomacy and Statecraft* 1–9; Andriy Melnyk, 'Master or Servant? International Law in the Foreign Policy Context', in

that a state's foreign policy is reducible neither to compliance with international law (as international law insists), nor to the constraints imposed by domestic law on foreign policy (as foreign relations law sometimes implicitly claims). The elaboration of the law of a state's foreign relations – rather than foreign relations law, strictly speaking – is certainly influenced by international law but is not reducible to compliance with it (even a policy of compliance with international law can be understood as a domestic policy rather than just obedience to international legal diktats). In between domestic and international law, then, lies a vibrant practice of defining what a state's policy towards international law should be that can be understood to be a central part of the definition of the law of foreign relations, albeit not strictly what is conventionally understood as 'foreign relations law'.

France may be an intriguing country to look for clues as to how to conceptualise such policies. Foreign relations law as a discipline is often seen there as a US oddity. Moreover, it is one that is seen as standing in real tension to a commitment to public international law and even as having echoes of earlier denials of its very existence – international law as really only the accumulation of the externally oriented facets of domestic law. This is particularly clear in the French perspective where the emphasis on the primacy of international law is historically combined with a very strong insistence on monism. Georges Scelle even went as far as claiming that the state had no particular pride of place, as international law was, fundamentally, not that different from domestic law.³ Nonetheless, France, perhaps unsurprisingly for a country with a strong republican and Jacobin tradition, has also produced its own approach to the law of foreign relations, if not quite 'foreign relations law'. Rescuing that tradition that has been somewhat neglected in contemporary foreign relations law scholarship can help understand the US approach as less idiosyncratic than it is sometimes presented as being, but also help appreciate how different

Hélène R. Fabri, Emmanuelle Jouanet, Vincent Tomkiewicz (eds.), *Select Proceedings of the European Society of International Law*, 5 vols. (Oxford/Portland: Hart Publishing, 2008), vol. I, pp. 237–78; Kenneth M. Manusama, 'Between a Rock and a Hard Place: Providing Legal Advice on Military Action Against Iraq' (2011) 42 *Netherlands Yearbook of International Law* 95–121; Stephen Bouwhuis, 'The Role of an International Legal Adviser to Government' (2012) 61 *ICLQ* 939–60; Johan G. Lammers, 'The Role of the Legal Adviser of the Ministry of Foreign Affairs: The Dutch Approach and Experience' (2009) 18 *Tulane Journal of International and Comparative Law* 177–205; Fernando G. Nuñez-Mietz, 'Lawyering Compliance with International Law: Legal Advisors and the Legalization of International Politics', PhD thesis, The Ohio State University (2013).

³ Georges Scelle, *Droit international public: manuel élémentaire avec les textes essentiels* (Paris: Domat-Montchrestien, 1944); Patrick Daillier, 'L'héritage de Georges Scelle, une utopie, une théorie ou une doctrine juridique? Les trois à la fois, peut-être' (2018) 34 *Anuario Español de Derecho Internacional* 5–8.

approaches inevitably betray different conceptualisations of the relationship of the state to international law.

Published in 1983, Guy Ladreit de Lacharrière's *La politique juridique extérieure*⁴ was a highly unusual book by the standards of both French international law academia and the French diplomatic service. De Lacharrière was by then a former legal advisor to the Quai d'Orsay, the seat of the foreign ministry. The book was relatively short (around 200 pages), lightly footnoted in a way that at times suggested off-the-cuff remarks rather than a standard academic treatment, but erudite and theoretically provocative. It came with the credibility and aura of de Lacharrière's experience. It seemed to pull the curtain on the making of international law in the twilight of a higher civil servant's career. It can be seen as part of a small but highly distinctive and illustrious tradition of monographs written by international lawyers with intense exposure to the state practice of international law.⁵ Indeed it was praised at the time for seeming to combine in one the qualities of 'Le Sage, le Prince et le Savant'.⁶ In its emphasis on state practices it has been analogised with some of the earlier work of the Russian Grigory Tunkin,⁷ but it also bears mentioning that *La politique juridique extérieure* bears some affinity with Wilhelm Grewe's *Spiel der Kräfte in der Weltpolitik*⁸ published at about the same time.

At the same time, the book remains somewhat obscure and a little heretical. It has never been republished since 1983 and is increasingly hard to locate outside specialised libraries. It is little known outside France, where its place is sometimes hard to gauge, and even harder to situate in a global context.⁹ It has of late become the object of renewed interest, at least in francophone

⁴ Guy de Lacharrière, *La politique juridique extérieure* (Paris: Economica, 1983).

⁵ Martti Koskenniemi was director of the Division of International Law in the Finnish foreign ministry. Philip Allott was a legal adviser in the British Foreign and Commonwealth Office from 1960 to 1973. Wilhelm Grewe was involved throughout a distinguished career in the German foreign service in a variety of positions which involved international law. It is somewhat more common for US international law scholars to have worked for the State Department in some legal capacity (José Alvarez, Dan Bodansky, Anne Marie Slaughter, Lori Damrosch, etc.). See André Oraison, 'La place des juriconsultes internationaux au sein de "la doctrine des publicistes les plus qualifiés des différentes nations"' (1998) 11 *Hague Yearbook of International Law/Annuaire de la Haye de droit international* 43–65.

⁶ Alain Pellet, 'Le Sage, le Prince et le Savant (A propos de "La politique juridique extérieure" de Guy de Lacharrière)' (1985) 112 *Journal du droit international* 407–14.

⁷ Michel Virally, 'Réflexions sur la politique juridique des Etats' in *Guy Ladreit de Lacharrière et la politique juridique extérieure de la France* (Paris: Masson, 1989), p. 394.

⁸ Wilhelm G. Grewe, *Spiel der Kräfte in der Weltpolitik. Theorie und Praxis der internationalen Beziehungen* (Frankfurt am Main: Ullstein Taschenbuchverlag, 1981).

⁹ Kolb suggests a lineage between Guy de Lacharrière and 'critical legal studies' notably in the form of the work of David Kennedy and Martti Koskenniemi but this lineage is tenuous.

academic circles.¹⁰ Although Guy de Lacharrière was described recently as ‘l’un des plus grands jurisconsultes français du XXe siècle’,¹¹ this was, perhaps tellingly, in the *Annuaire français de relations internationales* rather than the *Annuaire français de droit international*, and by two young French public international lawyers but associated with the Centre Thucydide, which is devoted to the study of international relations. For all these reasons, de Lacharrière’s book deserves a broader recognition for its contribution to our knowledge of international law ‘from the inside’, even as one must speculate about his relative lack of influence.

De Lacharrière had had a prestigious career by the time the book was published. He had graduated first of the concours of the Ministry of Foreign Affairs. He spoke Russian fluently and one of his first postings was in the French embassy in Moscow (1946–8). A significant part of his career was devoted to France’s relationship to international organisations, including the UN and UNESCO. However, he is most keenly remembered as the legal adviser to the foreign ministry from 1969 to 1979. His most significant exposure to the trade of international law arose when he represented France at the 3rd UN Conference on the Law of the Sea that gave rise to UNCLOS, from 1979 to 1982. He had earlier on also been involved in the creation of the UNCTAD and the GATT. Subsequently, he would become a judge at the International Court of Justice and even the court’s vice-president.¹²

De Lacharrière was, revealingly, never a legal academic; rather, he was a career civil servant and diplomat who sought to theorise a certain praxis of international law. Contra an international lawyers’ international law (‘les commentateurs’), he opposed, fundamentally, a domestic civil servant’s international law (‘les décideurs’).¹³ This chapter will re-examine this contribution in a contemporary light, weighing it against the monist and universalist assumptions of French foreign legal policy. Within the broader field of foreign relations law, the work of Guy de Lacharrière is hard to categorise. Rather than

Koskenniemi cites the book only once in *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006), p. 632.

¹⁰ Julien Cazala, ‘Retour sur un classique : Guy de Lacharrière, La politique juridique extérieure’ (2013) 117 *Revue générale de droit international public* 411–16; Pellet, ‘Le Sage, le Prince et le Savant’; Virally, ‘Réflexions sur la politique juridique des Etats’; Robert Kolb, *Réflexions sur les politiques juridiques extérieures* (Paris: Editions A. Pedone, 2015).

¹¹ Julian Fernandez and Nicolas Haupais, ‘Introduction’ (2012) XIII *Annuaire français de relations internationales* 553.

¹² Julien Cazala, ‘Guy Ladreit de Lacharrière (1919–1987)’, Société française pour le droit international, www.sfdi.org/internationalistes/lacharriere-guy-ladreit-de/, accessed 30 September 2020.

¹³ de Lacharrière, *La politique juridique extérieure*, p. 215.

seeing foreign relations as constrained by the domestic law framework or, for that matter, international law itself, de Lacharrière saw it as being above all determined by what he described as a state's 'foreign legal policy'.

I THE PRIMACY OF FOREIGN LEGAL POLICY

La politique juridique extérieure insisted on the centrality of the relationship between the state and its 'exterior', and argued for a voluntaristic and strategic legal foreign policy. In particular, it suggested, that if international law was international law it was because states had a 'legal foreign policy' – international law's law-ness was not immanent or metaphysical but embedded in states' defence of the national interest, opportunistic as it might be. In de Lacharrière's view, foreign legal policy towards international law was not itself entirely or even particularly determined by domestic law, as much as by concern with the national interest.¹⁴

His contribution to foreign relations law was therefore much less notable than his work on states' *politics* of international law. If anything, he tended to see foreign policy lawyers as involved in strategising about international law itself, anticipating its changes, trying to soften contradictions between positions adopted by their state over time, and understanding how evolutions in international law might affect them. In other words, the crucible of foreign relations law lied in the encounter between the national interest and the particular proclivities of the international legal order, a space that was dominated neither entirely by international law (as some academic international lawyers might imprudently presuppose) nor the national interest (as realists were too quick to conclude).

According to one of *La politique juridique extérieure*'s most recognisable and paradoxical formulas: 'before international law, there are national policies towards international law',¹⁵ this is reminiscent of the chicken-and-egg debate on the primacy of sovereignty or international law or of practice over *opinio juris*. But how can there be a politics of international law before international law itself? What Guy de Lacharrière rejected above all was a vision of the priority and primacy of international law, one in which law 'serait reconnu comme étant d'une nature sacrée qui le voue au respect des gouvernements et le met au-dessus des manipulations politiques. Considéré sous l'angle d'une telle dévotion, il ne pourrait faire l'objet de politiques gouvernementales'.¹⁶

¹⁴ de Lacharrière, *La politique juridique extérieure*, ch. I.

¹⁵ de Lacharrière, *La politique juridique extérieure*, p. 5.

¹⁶ de Lacharrière, *La politique juridique extérieure*, p. 9.

This is what might be understood as the ‘immanent’ conception of international law, and it is of course quite widespread.¹⁷ It would tend to view the idea of a ‘foreign legal policy’ as ‘sacrilegious’.¹⁸ At the opposite extreme is a particular extreme form of the realist critique, one that would be so dismissive of international law as to find futile any notion that states have a policy towards it. As de Lacharrière puts it, ‘le droit ne mériterait pas l’honneur qu’on lui ferait en ayant une politique à son égard’.¹⁹

Guy de Lacharrière doubted that either school reflected the practice of statecraft (as opposed, perhaps, to the scholarship of international lawyers) or was seriously entertained by those actually entrusted with safeguarding states’ foreign policy legal interests. Rather than each position being represented in its pure form, however, either might taint the foreign legal policy of given states at any given moment based on its interest. This is a striking notion: the idea that views about international law are themselves influenced by a sort of *jeu de masques* that leads states to adopt the views that they need under the guise of interpreting international law. Even the insistence on respect for international law, in that context, could be understood as a foreign policy option, associated with an a priori in favour of the status quo. By the same token, too blatant an instrumentalisation of the law would be self-defeating: even realists know that if they play the international law game, they need to play it at least half-heartedly, or expose the mediocrity of their arguments.²⁰

At any rate, foreign legal policy did not exist in a void and was not autonomous; it existed at the discretion and in relation to a broader national interest. The power of states was an evident element in the determination of their foreign legal policy. All other things being equal, weak states were likely to consider that an international rule of law was more advantageous; by contrast, powerful states would have a great ability to resist or withstand a finding that they had violated international law.²¹ Another factor was, quite simply, the psychology and even training of those deciding in any given country and whether they were convinced of the usefulness of international law or not (although de Lacharrière noted that Nixon was a lawyer and Eisenhower a military man).²² This is not necessarily a rejection of ‘foreign relations law’, but in its conspicuous ignorance of domestic law, it is an implicit

¹⁷ de Lacharrière, *La politique juridique extérieure*, p. 9.

¹⁸ de Lacharrière, *La politique juridique extérieure*, p. 9.

¹⁹ de Lacharrière, *La politique juridique extérieure*, p. 9.

²⁰ de Lacharrière, *La politique juridique extérieure*, ch. V.

²¹ de Lacharrière, *La politique juridique extérieure*, pp. 138–9.

²² de Lacharrière, *La politique juridique extérieure*, p. 212.

claim that runs throughout the book about a certain exceptionality of foreign policy when it comes to domestic law.

For Guy de Lacharrière, domestic factors were quite key in explaining national variations between states.²³ The continuity of governments or something as trivial as the availability of archives were key in evaluating the risk of incoherence in foreign legal policy-making and dealing with it.²⁴ Perhaps more importantly, the place of law within national legal institutions stood out as relevant. For some states, the rule of law was highly important, and this was bound to have an impact: a state that despises law domestically is unlikely to embrace it internationally, for example.²⁵

The constitutional framework did matter of course but only indirectly and because of its potential to shape foreign legal policy. Although foreign policy in France was a prerogative of the president, treaties stood to be adopted by the *Assemblée nationale* and to become law as soon as ratified. For monist states, the exact content of a treaty mattered all the more given the lack of an opportunity to subsequently adapt it into domestic law. At the same time, the absence of common law style judicial review meant that it was unlikely that France's treaty obligations would, having satisfied an a priori *contrôle de constitutionnalité*, be contested by domestic courts. This is, in turn, in contrast to common law states that are often wary of implementing their treaty obligations in domestic law lest the treaties be challenged before ordinary courts. However, de Lacharrière was well aware that in both monist and dualist countries the force of international law was not such that its violations were typically treated on a par with domestic law violations. If anything, violations of international law took importance because they were seen as also violations of domestic law.²⁶

In short, the domestic element in foreign legal policy was not absent (for example, the book mentions the fact that new revolutionary governments sought to distance themselves from previous governments),²⁷ but it was not particularly causal from a social scientific point of view. This may be because de Lacharrière understood, rightly as it turns out in most states, that aside from procedures of ratification, much of the legal national interest stood to be defended and even defined by the executive. Treaties were negotiated by

²³ The interest in such variations is, in fact, what has prompted the field of foreign relations law – understood initially as mostly a US paradigm – to increasingly effect a shift to *comparative* foreign relations law. Bradley, *Comparative Foreign Relations Law*.

²⁴ de Lacharrière, *La politique juridique extérieure*, p. 188.

²⁵ de Lacharrière, *La politique juridique extérieure*, pp. 208–12.

²⁶ de Lacharrière, *La politique juridique extérieure*, pp. 208–9.

²⁷ de Lacharrière, *La politique juridique extérieure*, p. 210.

diplomats; the decision to use force was made in the highest reaches of the state; the day-to-day conduct of relations with other states and international organisations was entirely in the hands of foreign ministries. If anything, it was the international environment that shaped the conduct of foreign legal policy, an environment that was significantly more political than legal. This was of course nowhere truer than in Fifth Republic France and de Lacharrière may have been guilty of universalising on the basis of what was in the end a fairly atypical constitutional environment. That evaluation would also stand to be relativised since the publication of *La politique juridique extérieure*, in an era marked by increasing efforts to coordinate foreign policy at the European level, parliamentary scrutiny and civil society monitoring.

Yet foreign legal policy was also not simply the translation of the national interest into an international law policy; rather, it was more broadly a governmental policy *on* international law. An example of such a policy, paradoxically, was that of states that had decided to oppose international law generally, whether newly independent or ideologically radical (the USSR, Iran, etc.).²⁸ In such a case, foreign legal policy could touch upon even the most fundamental aspects of international law, including state succession or the formation of customary international law. In addition, states might have a sectoral foreign legal policy concerned with particular aspects of international law only. It seems Guy de Lacharrière had in mind mostly primary rules of international law, notably the law of economic relations (including nationalisations), the law of the sea or international humanitarian law. Although states wanting to transform international law might stand out, de Lacharrière insisted that states bent on maintaining the status quo had as much of a foreign legal policy as the revolutionaries – simply that it was less visible.²⁹

For Guy de Lacharrière what was striking was that no one had thought of this before and indeed that *La politique juridique extérieure* was not the object of any particular study or, for that matter, a term of art. There were isolated exceptions of course, among which John Foster Dulles³⁰ and Stanley Hoffmann's notion of legal strategy.³¹ But the topic was not taught in universities. De Lacharrière did not designate who was responsible for this lack of interest, but at times it seems quite clear that the culprit was international law itself ('une discipline abstraite'), understood as a system of constraints rather

²⁸ de Lacharrière, *La politique juridique extérieure*, p. 6.

²⁹ de Lacharrière, *La politique juridique extérieure*, p. 6.

³⁰ John F. Dulles, *War or Peace* (New York: Macmillan, 1950).

³¹ de Lacharrière, *La politique juridique extérieure*, p. 9; also, Stanley Hoffmann, 'International Systems and International Law' (1961) 14 *World Politics* 205–37.

than the product of uncoordinated policies that take it seriously but are not reducible to it ('la discipline concrète').³² To de Lacharrière, this would be the equivalent of teaching international relations only without teaching foreign policy, where the study of foreign policy has, in fact, preceded the study of international relations as its own discipline. It is almost as if the study of international law had it the wrong way round: studying the system, before it has even begun to understand its agents' rationalities.

In trying to conceptualise the place of *La politique juridique extérieure* in relation to the paradigm of 'foreign relations law', then, the point might be that international law was much more significant to the conduct of foreign policy than domestic law, only not in the way that most international lawyers understood. International law was not important because it bound states, but because it provided executive branches with sophisticated opportunities to maximise the national interest, opportunities that they would be wise to understand and not ignore. Rather than an alternative to foreign relations law, *La politique juridique extérieure* is better understood as a complement to it or, even better, an inherent part of it and provides opportunities for dynamic reconceptualisation. Foreign legal policy includes both an attention to foreign relations law *stricto sensu* (domestic law) and to international law and, indeed, requires that one keeps an eye on how the gambits one makes on one level may ricochet on the other. Where foreign relations law as it is conventionally understood is at risk of reducing international lawmaking to a domestic *entre soi*, foreign legal policy could be understood as operating more on the interface of the domestic and the international.

II THE ROLE AND FUNCTION OF FOREIGN LEGAL POLICY

For Guy de Lacharrière the strength of having a foreign legal policy was that 'elle tend à substituer un ensemble d'actions préméditées à des comportements qui, autrement, procéderaient de la spontanéité, du réflexe, de l'instinct'.³³ Governments should not adopt positions merely on a reactive and knee-jerk basis; rather, they needed to organise themselves so as to maximise their interest over time by carefully strategising about their legal policy. However, the catch was that for de Lacharrière the national interest included a moral as well as material dimension, both on image grounds but also because, for example, even a bias in favour of the 'règne du droit dans l'ensemble de la société internationale' could turn out to be beneficial for

³² de Lacharrière, *La politique juridique extérieure*, pp. 7–8.

³³ de Lacharrière, *La politique juridique extérieure*, p. 9.

a particular state from the point of view of its own, narrow national interest.³⁴ Of course, this portrayed such commitments in quite a different light than how they portrayed themselves: not some sort of Kantian a priori commitment to the law as an incarnation of reason, but a somewhat interested commitment to the law as a form of protection. Still, the grounding of support for an international rule of law in the national interest made it seem much less utopian.

In that light, states typically sought to both inscribe themselves within international law and push it in a direction that was favourable to them. Guy de Lacharrière could not fail to have been impressed as legal adviser to the French foreign ministry by the vast movement of challenge of international law that had arisen in the two previous decades as a result of the rise of the Third World. He was less inclined than some to describe what they did as 'political' and what Western states did as 'legal'. Instead, he expressed a certain understanding for their aspiration to transform international law from an oligarchic and confiscatory system into a more equal and participatory one.³⁵ Even the Soviet notion of international law as an instrument of class coercion found favour in principle with de Lacharrière (whose own political sensitivities one imagines to have otherwise been quite remote from material determinism), since it had the merit of expressing a clear sense of 'interest' in international law.³⁶

For Guy de Lacharrière, the 'national interest' in international law arose not purely domestically, but in relation to the interests of others. The national interest was a 'preference' for the state's own well-being over the well-being of others. Yet, to be taken seriously, it also had to be enunciated in ways that resonated with the system. In the process, they would seek to pass off their national interest as entirely compatible with the common good.³⁷ This was perhaps a very French way of identifying the national and universal interests as coinciding. But even the most radical turn in international law (such as the one argued for by the Third World in the 1960s) was likely to be justified as consonant with the interest of the international community. The ability to speak the language of the common interest, then, was crucial to states' success in promoting their vision of international law.

At times, though, the incompatibility of one's national interest with the national interest of others would be hard to ignore, in which case one's interest

³⁴ de Lacharrière, *La politique juridique extérieure*, pp. 13–14.

³⁵ de Lacharrière, *La politique juridique extérieure*, p. 14.

³⁶ de Lacharrière, *La politique juridique extérieure*, pp. 14–15.

³⁷ de Lacharrière, *La politique juridique extérieure*, pp. 15–16.

might simply be claimed to be superior. Particularly revolutionary projects in international law had been less prone to underline the consensus, and more ready to highlight the element of struggle involved in international law.³⁸ Imperialism and aggression are, however, always on the other side. And in the end, de Lacharrière entertained little doubt that his fellow practitioners of international law on behalf of states implicitly acknowledged that each of them was championing a national cause, and that there would not be much use in pretending that this was otherwise. Every state tended to see the proclamations of innocence of others as merely self-serving, perhaps only because they subtly knew their own proclamations to be so.

How should one go about – if at all – reconciling opposite national interests? Guy de Lacharrière was sceptical that a formula existed that could easily be relied on. To be sure, chairs in international conferences would not tire of insisting on the importance of ‘equitable and reasonable compromise’.³⁹ But who was to say what such a compromise entailed? How far should individual negotiators go in taking into account the interests of others? What if the opening position of one party had been plainly unreasonable? And how might each convince herself that the interest represented on the other side was as respectable as her own? And if the notion of compromise is so ambiguous, then how much of an obligation to compromise can there be? As de Lacharrière put it, ‘les affirmations d’ouverture au compromis colorent donc de courtoisie l’antagonisme des préférences nationales mais en confirment surtout l’existence sans en régler précisément l’issue’.

Instead, the effect of foreign legal policy was to distribute the advantages and disadvantages of international law. States typically wanted to have their cake and eat it and to hold others to standards that they sought to escape for themselves. A government will be intransigent vis-à-vis the need for a manifestation of its own voluntarism, but adopt a more relaxed attitude when it comes to the consent of other states. It will protest other states’ use of their veto at the Council, but will be very understanding of its own. States will formulate apparently general rules in terms that happen to narrowly suit their own characteristics. The game is a game of passing off one’s interest as the general interest, but it is a ‘game’ nonetheless, with its rules and constraints and, indeed, its risks and dangers. For example, every rule or interpretation thereof that one puts out there is likely to be used by one’s ‘enemies’. Here law can be seen to have a somewhat autonomous effect: rules imply corresponding obligations; obligations are understood to be symmetrical, etc. States must

³⁸ de Lacharrière, *La politique juridique extérieure*, pp. 19–20.

³⁹ de Lacharrière, *La politique juridique extérieure*, p. 21.

constantly bear in mind the risk that pushing a certain abstract position in international law will come back to haunt them.

Rather than the problem of incoherence in international law itself (a non-problem as far as de Lacharrière was concerned), what intrigued was the problem of incoherence within the foreign legal policy of states. Because of the evolving national interest foundation of all foreign legal policy, states might over time be called upon to argue the opposite of what they had previously argued. Indeed, they might occasionally simultaneously adopt opposite positions in different sectors of international legal regulation where their interests differed, or even on the same issue. (De Lacharrière cites the example of the lawyer of a Third World country who simultaneously favoured the equidistance and the equitable principles approaches to maritime delimitation 'depending on which part of their coast'.⁴⁰) Would this doom their policy and expose them to the critique of contradicting themselves?

Although politically possible, legal incoherence could sometimes be paid with a high price. Newly decolonised states who strongly defended the principle of self-determination, for example, were sometimes caught at their own game when they had to insist that it was not available to Katanga or Biafra.⁴¹ Nonetheless, Guy de Lacharrière was sceptical that incoherence would be exposed as such, at least if it was managed well. There are, after all, many ways in which states can rationalise evolutions in their policies and distinguish the facts. They can make sure that they are evasive about why they have adopted certain options and avoid too onerous a judicial scrutiny and the threat of estoppel.⁴² As to other states, although they may temporarily exploit the sin of incoherence, they are likely to be understanding of a practice that they themselves partake in.

III CONSEQUENCES FOR INTERNATIONAL LAW

But what of international law in this context? Was it anything more than the aggregate of foreign legal policies and did that not point to its fundamental instability or even futility? One of the most striking conclusions of Guy de Lacharrière was that states – as opposed to academic international lawyers – had relatively little interest in international law *in general*. They might certainly have strident opinions on certain points of international law or claim a broad commitment to it (as in the recent Franco-German 'Alliance for

⁴⁰ de Lacharrière, *La politique juridique extérieure*, p. 183.

⁴¹ de Lacharrière, *La politique juridique extérieure*, p. 97.

⁴² de Lacharrière, *La politique juridique extérieure*, p. 191.

Multilateralism'), but no state would commit itself to some general concept of what international law stood for (or only in the broadest, most rhetorical terms).⁴³ The challenge for someone working at the intersection of foreign legal policy and international law – as had by then become de Lacharrière's case given his ICJ functions – was to imagine what all this meant for the idea of international law, despite states' best efforts not to do so. The simplest conclusion that de Lacharrière came up with was that the existence of foreign legal policies testified to international law's existence:

Pour que le droit international n'existe pas, alors que les politiques nationales le prennent si constamment pour objet, il faudrait supposer de la part de l'ensemble des gouvernements un singulier pouvoir d'illusion quant aux réalités de la vie internationale et une extraordinaire capacité de s'acharner sur une pure chimère.⁴⁴

This sort of trope has long been quite familiar in discussions of international law and may not be much of a defence of the existence of international law. International law is detected indirectly through one of its effects, but this does not tell us much about whether it has any causal force or what it means to see it only through the eyes of its actors rather than, say, the perspective of the system. Moreover, international law's content and structure are very uncertain even as Guy de Lacharrière never makes the move, conceptually, to an understanding of international law as a practice. He even ponders the possibility that there are 'many international laws' each existing, perhaps, only as a figment of the imagination of a particular participant.

More interestingly, de Lacharrière saw foreign legal policy as not only a passive response to an already existing international law, but as actively involved in shaping it. De Lacharrière could not imagine states that would merely 'apply' international law in good faith, without seeking to influence it. Such a position would be non-sensical precisely because the content of the law stood to be determined by its subjects' deliberations and determinations about it. In international law, 'la distinction entre l'élucidation du droit positif et l'influence sur celui-ci est particulièrement émoussée'.⁴⁵ This is particularly true of treaty-making of course – where no actor pretends that they are just implementing international law since per hypothesis there is no law to implement yet – but it is also clear in relation to customary international law where states could be mindful that what they did might participate in the production

⁴³ de Lacharrière, *La politique juridique extérieure*, p. 195.

⁴⁴ de Lacharrière, *La politique juridique extérieure*, p. 196.

⁴⁵ de Lacharrière, *La politique juridique extérieure*, p. 198.

of custom. They would, as a result, become *deliberate* customary agents, encouraging or impeding its formation. After all, the very notion of *opinio juris* makes it clear that what states think about a norm is crucial to it becoming a norm, perhaps one of the most striking recognitions, from the point of view of international law, of a form of at least *de facto* foreign legal policy.

In the end, Guy de Lacharrière found that foreign legal policies were efficient, precisely because international law was their product:

[le droit international] n'est donc pas à découvrir comme une science dont on chercherait à élucider les lois, mais à faire ou refaire. Il n'a rien de fatal et n'est donné ni par Dieu ni par la nature. Parfaitement contingent, il ne correspond à aucune nécessité transcendante mais à des convenances appréciées par des gouvernements que l'on peut désigner. C'est une politique qui a réussi, une stratégie qui a triomphé.⁴⁶

In fact, states had a chance to influence not only this or that rule of international law, but also its very function, subject of course to the limits of political reality.

International law might be felt as an imposed law, a constraint, by some states but that was only because it was the willed law of another set of states. This is also the source of one of its weaknesses. If international law was only the manifestation of the preferences of some states generalised to the world, then violating international law should cease to appear so scandalous. Violating international law might just be an instance of 'l'opposition d'une politique à une autre'.⁴⁷ In fact, de Lacharrière noted that most states were not particularly shocked by violations of international law most of the time, and only pressed a point if it happened to conflict with their national interest: 'une certaine non-application des traités bénéficie en fait d'une indulgence très générale comme si chacun comprenait fort bien, même s'il ne juge pas opportune de le dire officiellement, qu'il est imprudent de trop blâmer chez l'autre la recherche d'une liberté que l'on entend bien revendiquer pour soi'.⁴⁸

This notion of treaties as basically a useful technique to predetermine the future was fully compatible with frequent violations. This might seem like a fairly cavalier attitude to international law coming from a juriconsult, but in Guy de Lacharrière's mind it did not make the mechanism of binding treaties useless; it just made it useful in a way different than that commonly understood. States embraced treaties precisely because they saw them as flexible and because they could interpret their obligations in ways that would not

⁴⁶ de Lacharrière, *La politique juridique extérieure*, p. 199.

⁴⁷ de Lacharrière, *La politique juridique extérieure*, p. 200.

⁴⁸ de Lacharrière, *La politique juridique extérieure*, p. 201.

compromise their interest. At the same time, the treaty form remained useful as long as there was a certain ‘taux de concordance’ between treaty provisions and actual behaviour.⁴⁹

In practice, did international law determine state behaviour? Guy de Lacharrière’s concern was not with such systemic questions as such; rather, he was more interested in the foreign legal policy question of how international law might enter into decision-making. At times, it would be a decisive factor (for example when two equally beneficial political outcomes were available), but it could also be one element among others. Even compliance with the law was in the end a strategic element to be taken into account by states strategically. More often than not, international law intervened as a justification of decisions that would most likely have been taken on other grounds, although it might temporarily succeed in making that justification appear as causal.⁵⁰ In short, the international lawyer was often called up after the decision; more rarely before the facts.⁵¹ But even the justification of decisions might ‘retroact’ on the determination of that decision, by at least affecting its modalities of execution.

The strength of de Lacharrière’s analysis of international law is threefold. First, he emphasises the role of the national interest in spurring international law. The national interest is not, as in the typical realist account, a limitation on the ability of states to comply with international law; rather, it is, more productively, an orientation that dictates the kind of international law that states want and can over time seek to obtain. In short, the national interest is productive of international law because it makes international law the sort of law that states can, precisely, live with. Second, the book emphasises the relatively decentralised nature of international law-making and its bottom-up character. Contra a view of states as mere conveyor belts for the injunctions of international law, it sees them as implicated in its production, all be it with their own interest in sight. In that respect, de Lacharrière was less interested in ‘respect’ for or enforcement of international law than in the creation of international law. Third, the book suggests the creativity and a priori undetermined character of international law. States do not know in advance what international law’s exact injunction is, at least until they have thrown their forces in the battle and sought to develop it in a direction that suits them. Contra the focus on adjudication, his emphasis on the living actors of

⁴⁹ de Lacharrière, *La politique juridique extérieure*, p. 201.

⁵⁰ de Lacharrière, *La politique juridique extérieure*, pp. 204–5.

⁵¹ de Lacharrière, *La politique juridique extérieure*, p. 205.

international law – his role as legal adviser far more than his role as ICJ judge – is what makes for compelling reading.

In short, in being a theory of the international legal policy of states, *La politique juridique extérieure* could not avoid also being a theory of international law. Guy de Lacharrière foreshadows, in some ways, Martti Koskenniemi's work on *The Politics of International Law*.⁵² Koskenniemi, in focusing on the more systemic level of international law does not start explicitly from what states' foreign legal policy should be. But as himself a former legal advisor to a foreign ministry, he is keen to construct a theory of international law that understands it as the product – inchoate, contradictory and even circular – of various discursive practices by which international lawyers in a position to do so produce its meaning. Where de Lacharrière's standpoint is one of moderate realism, Koskenniemi's is based on a more systematic critique of international law itself: international law can only be this discursive practice not specifically because states treat it that way (although that is also no doubt true), but because states *could* only treat it that way. In that respect, *La politique juridique extérieure* is aligned and converges with that later and in many ways far more sophisticated body of work in at least one fundamental respect: that of the theoretical (and not just practical) primacy of the experience of the practitioner over a more academic and contemplative approach to international law. Where de Lacharrière innovates 'in advance' of *From Apology to Utopia*⁵³ as it were is in his willingness to share some of the tricks of the trade by which practicing international lawyers, confronted with contradictions of their discipline, act as its sophisticated managers, for the greater good of their state and, quite possibly, of the project of international law itself. There is no place in *La politique juridique extérieure*, however, for envisaging how this exercise might be more fundamentally liberating and open up emancipatory possibilities; only the certainty of how one might go about best serving one's masters.

One common theme that runs through the book is, in that respect, the relative inadequacy of scholarly treatments of international law. Although Guy de Lacharrière was characteristically and typically diplomatic, he knew that his readership would be largely academic and that his views could be seen as a provocation to the French professorate. He noted, for example, that governments and their agents would be surprised to learn that academic international lawyers (such as Georges Scelle) thought of international law

⁵² Martti Koskenniemi, *The Politics of International Law* (Oxford/Portland: Hart Publishing, 2011).

⁵³ Koskenniemi, *From Apology to Utopia*.

as attributing the state certain competencies, where their daily experience was surely that these competencies were very much the state's in the first place and in no need of recognition from outside. He also noted in relation to treaties, for example, that 'les recherches sur le caractère de dogme fondamental du principe *pacta sunt servanda* semblent un peu à côté de la question'.⁵⁴ However, de Lacharrière also saw the kind of distortions introduced by academic international lawyers as relatively minor as long as they were of marginal importance (and in his view no international legal theory ever created a significant obstacle to good foreign legal policy).⁵⁵

Indeed, Guy de Lacharrière did not let these imperfections of international law stand in the way of an overall positive evaluation of its incidence. He was aware that his book might be dispiriting for scholarly observers who had 'the internal model' of law in mind and who thought that international law should promptly be reformed to be something else than it currently was – presumably something more hierarchical and institutionalised.⁵⁶ The truth of the matter, however, is that international law is exactly where states want it to be, and no less useful for it:

le produit livré par les producteurs satisfait les consommateurs, qui sont identiques aux premiers. Les Etats, responsables du droit international, le sont aussi de ses 'faiblesses', de ses 'carences', car ils ne les sentent pas comme telles et les tiennent au contraire pour des caractéristiques précieuses; globalement, il existe une très vaste et très puissante connivence sur l'actuelle société 'anarchique' et sur la place qu'elle réserve au droit.⁵⁷

International law, moreover, cannot improve itself by itself and, as a technique, is neutral as to its destination. If states wanted more jurisdictional control and compulsory jurisdiction, they would create it. Nothing happened by chance and no 'defect' that was intentionally there was about to be remedied. It would have been hypocritical for anyone with governmental experience to claim otherwise.

It remains that the foreign legal policy of some states is not the foreign legal policy of others, and that, for example, a rougher, more primitive international legal order may be to the benefit of a minority. Of course, nothing prevented weaker states, according to Guy de Lacharrière, from at least constituting a more integrated international legal system between themselves, and to thus announce a more cosmopolitan international law.⁵⁸ Moreover, it was

⁵⁴ de Lacharrière, *La politique juridique extérieure*, p. 201.

⁵⁵ de Lacharrière, *La politique juridique extérieure*, p. 203.

⁵⁶ de Lacharrière, *La politique juridique extérieure*, p. 215.

⁵⁷ de Lacharrière, *La politique juridique extérieure*, p. 217.

⁵⁸ de Lacharrière, *La politique juridique extérieure*, p. 218.

not impossible that the concurrence of foreign legal policies would end up upgrading international law indirectly as captured in this ambiguous formula: 'les politiques juridiques extérieures manipulent le droit international, mais du même coup elles s'occupent de lui'.⁵⁹ Still, de Lacharrière may have ended up broadly satisfied with this vision of international law only because he understood it as having served his own political *commanditaires* well. But there was something almost a bit smug about the way in which he saw states as masters of their foreign legal policy, as if all states could equally afford to choose which foreign legal policy path they could adopt (consider, for example, the situation of France's former African colonies).

As Robert Kolb has pointed out, moreover, 'Il n'est sans doute pas innocent que G. de Lacharrière était le ressortissant d'un Etat se voyant traditionnellement comme Grande Puissance'.⁶⁰ His broad-brush, somewhat carefree vision of an instrumental international law worked better for France in the 1970s and 1980s than for others (although arguably he would have been the first to concede this). To this day, the vast majority of states are relatively weak powers who may find more succour in a strong international law than a sense that key powers have mastered the art of crafting the international law that works for them and that they are free to do the same. France itself has evolved somewhat in this direction as its influence declined. Still, it is not actually clear that this need always be the case: witness, for example, the discontent of a number of African states vis-à-vis the International Criminal Court, an institution that is at least relatively strong towards *them*, but on the receiving end of which they are not particularly happy to be and against whom they have waged a quite significant battle. Moreover, a commitment to a 'strong international law' (whatever that may mean), de Lacharrière would no doubt argue, is itself merely a form of foreign legal policy.

IV CONCLUSION

Guy de Lacharrière's *La politique juridique extérieure* was an odd book by French standards and has remained so ever since. It has a cult following of sorts, but is not part of the canon in the teaching of French universities. It is largely unknown beyond the borders of France and does not fit within any simple category. However, it remains a singular and refreshing contribution to the study of foreign policy, one that can be recast in light of an increasingly global interest in foreign relations law. As I have argued in this paper, de

⁵⁹ de Lacharrière, *La politique juridique extérieure*, p. 218.

⁶⁰ Kolb, *Réflexions sur les politiques juridiques extérieures*, p. 9.

Lacharrière was not interested in the conventional sense of that paradigm in that he largely ignored the constraints of domestic law on foreign policy. Partly, one is tempted to say, this is because he could. Under the Fifth Republic, the conduct of foreign policy is a singularly presidential prerogative, and the holders of the post (de Lacharrière served under de Gaulle, Pompidou and Giscard-d'Estaing) intended it to remain that way. A legal adviser in the foreign ministry would entertain few doubts about his position within a larger hierarchy of decision-making that foregrounded a certain *fait du prince*.

In a more than 200 page book, Guy de Lacharrière only devotes about 5 to the issue of domestic constraints.⁶¹ To the extent that *La politique juridique extérieure* can be construed as a book on foreign relations law, then, it is one that is largely dismissive of the role of domestic law, emphasising instead domestic politics of the highest order and an almost neo-realist insistence on the place of each state within the international system with deep conservative overtones. This does not mean of course that *La politique juridique extérieure* was, instead, a matter of helping and even coaxing the state to respect its international law commitments. De Lacharrière was too wedded to a model of medium-power politics to think that his role as legal adviser was to 'represent' international law to his government. He would have scoffed at the suggestion that he was primarily an agent of international law within a national setting.

Interestingly, however, even in his role as a legal apologist for the national interest of France, he thought quite highly of international law as something that he understood to transcend that national interest. International law might well be the sum of successful foreign legal policies, but it was at least that. Moreover, one did not, at least not always, win in foreign legal policy through sheer brute force. One needed to persuade, rally, entrench certain forms of legal reasoning, in the hope that they would catch on and would, in turn, become international law. This is an exercise that conventional international lawyers would probably recognise as coming quite close to their lived experience of the making of international law.

Foreign legal relations, then, were certainly not determined by domestic law and was certainly more than the implementation of international law. It involved an intermediary element of legal statecraft, one in which states deliberately thought about their use of international law over time, calculated what they could get away with, were often brazen about adopting contradictory positions, but much less inclined to see this as contradictory or at least problematic than a pious *doctrine* speaking from outside the cenacle of power. This might not seem much of a defence of international law and indeed it is

⁶¹ Notably, de Lacharrière, *La politique juridique extérieure*, pp. 206–10.

one that is very much at odds with how many international lawyers – most of them academics – see its promise. Yet this is no doubt on some level intended and de Lacharrière was certainly out, on some level, for a degree of provocation.

How has the book aged, and what can it tell us today? Guy de Lacharrière's treatment is very much based on his own experience as legal adviser. Although this surely gave him a first-row seat to observe the making of international law, it is also, in its own way, a limited vision for at least three reasons. First, just as de Lacharrière faults scholars of international law for focusing too much on judges, he is guilty of the symmetrical mistake, that of not focusing on judges at all. The same is true of de Lacharrière's discreet dismissal of scholars of international law; as Alain Pellet once noted, it is precisely his presentation of foreign relations as largely determined by idiosyncratic national interest calculations that militates for a strong role for *la doctrine*.⁶² In fact, de Lacharrière's strong emphasis on political voluntarism could only go so far from a theoretical point of view: it helped explain the formation of international law, quite possibly its implementation, but Michel Virally specifically put the former legal adviser to task for failing to explain the very authority and legitimising function of international law, which could not themselves be derived from state will.⁶³

Second, it is true that legal advisors tend to operate in a relative shadow and that his book was thus an irreplaceable testimony on a considerably important but unfairly neglected facet of international lawmaking. But international law is not exclusively a creation of states, and to the extent that it is it is hardly entirely determined by legal advisors. Indeed, in upgrading international lawmaking to a matter of policy, Guy de Lacharrière is always at risk of subtly overestimating the importance of lawyers' calculations, at the expense of general policy development. Indeed, from the point of view of the mainstream of foreign relations law, de Lacharrière's treatment is almost hubristic in its focus on the executive and the foreign ministry. It entirely neglects the role of the legislative and judicial branches in ways that are problematic now in France as in most countries. It also is oblivious to the role that civil society actors have increasingly played. *La politique juridique extérieure* would gain from being reread in light of these developments and understood as henceforth more embedded in domestic practices – precisely the gap that foreign relations law has identified. At any rate, there are greater dangers for the

⁶² Pellet, 'Le Sage, le Prince et le Savant', 407 at 410.

⁶³ Virally, 'Réflexions sur la politique juridique des Etats'.

purposes of human rights or the rule of law, than states not maximising their national interest because of incoherences in their legal discourses.

Third, Guy de Lacharrière also wrote at a time of great change (decolonisation, the law of the sea) but in a context where the Cold War had frozen many options for international law. *La politique juridique extérieure* entirely ignores some areas such as international environmental law, international human rights law and international trade law, not to mention the law of European integration which has arguably such an impact on foreign relations law.⁶⁴ It is as if the conversations that animate these branches of international law did not exist for the once legal adviser to the French foreign ministry. This is in itself a striking contrast to some of his successors who have made a name for themselves as pleader before the European Court of Human Rights (Ronny Abraham) or judge at the International Criminal Court (Perrin de Brichambaud). Although a recent treatment by Robert Kolb takes de Lacharrière's book as his starting point, Kolb is more sanguine about the autonomous existence of international law and its ability, without denying the incidence of foreign legal policy, to retroact on its creators and actors. Kolb goes as far as to suggest that, next to an interest-driven foreign legal policy, is a more objective variant that is geared towards the creation of stable relations and devoted to some of the ideals of an international community.⁶⁵

It is true that the two can at times seem hard to distinguish, as when France famously opposed the war in Iraq, in ways that could be understood to exalt international law and its prudential restraints or, more simply, to coincide with the country's geopolitical interest of the moment. Champions of international law often happen to be champions of their own interest. Certainly, legal advisers in both the UK and the US have been in the spotlight for their willingness to provide excessively supple advice in relation to torture⁶⁶ or the use of force,⁶⁷ in ways that show the limits of a purely instrumental approach to international law especially when, as is increasingly the case, civil society is watching. Indeed, one of the facets of foreign legal policy-making that has changed is the willingness of various groups and individuals to challenge it 'from below'. The days in which foreign policy was a purely regal function insulated from common politics

⁶⁴ See the chapter by Aloupi, 'Limitations of Sovereignty', Section IV.

⁶⁵ Kolb, *Réflexions sur les politiques juridiques extérieures*, p. 10.

⁶⁶ Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008).

⁶⁷ Frédéric Mégret, "'War'? Legal Semantics and the Move to Violence' (2002) 13 *EJIL* 361–99.

and activism seem to be long gone. French foreign policy appears more constrained by its legal environment today and less administratively elitist than it may have appeared to de Lacharrière forty years ago. If not quite the constraint of foreign relations law or the command of international law, then, that is a further significant domestic constraint on foreign policy-making.