



**INTERNATIONAL LAW AS A
LANGUAGE FOR
INTERNATIONAL RELATIONS**



**LE DROIT INTERNATIONAL
COMME LANGAGE DES
RELATIONS INTERNATIONALES**



**EL DERECHO INTERNACIONAL
COMO LENGUAJE DE LAS
RELACIONES INTERNACIONALES**



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EDITORIAL NOTE

Pursuant to General Assembly resolutions 48/30 of 9 December 1993 and 49/50 of 9 December 1994, the United Nations Congress on Public International Law was held at United Nations Headquarters in New York from 13 to 17 March 1995, during the year of the celebration of the Organization's fiftieth anniversary, under the general theme: "Towards the Twenty-first Century: International Law as a Language for International Relations".

The Congress was organized within the framework of the United Nations Decade of International Law (1990-1999) proclaimed by the General Assembly in resolution 44/23 of 17 November 1989. Consequently, the four aims of the Decade were reflected in four of the five sub-themes that were chosen for the plenary meetings of the Congress.

The proceedings of the Congress are being published in one volume consisting of two parts. Part One covers the 10 plenary meetings. Two plenary meetings were devoted to each of the five sub-themes discussed during the Congress. The presentations made at each plenary meeting were reproduced in the language of delivery. They are followed by a summary of the ensuing open-floor discussions.

Part Two covers the 11 round-table discussions which took place during the Congress. In each case, the introductory statement by the moderator is followed by a summary of the ensuing discussion. The material appears in the language in which the moderator conducted the proceedings. The presentation of the material conforms to the wishes of each moderator.

A list of participants is contained in the Annex.

Participants attended the Congress in their private capacity and their statements reflect their personal views.

SECRETARIAT OF THE CONGRESS

Mr. Hans Corell, Under-Secretary-General for Legal Affairs, Legal Counsel of the United Nations

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FOREWORD

This work is an event in itself.

For the first time in the history of the United Nations, jurists from all over the world gathered in New York for the United Nations Congress on Public International Law and undertook, during the space of one week, a veritable review of modern public international law. I should like to thank all who took part in this event and who contributed to its success.

This publication gives an account of the work done and demonstrates the quality of the reports submitted and the wealth of the debates to which these reports gave rise.

This—as we all are well aware—is a particularly fruitful way of celebrating both the United Nations Decade of International Law and the fiftieth anniversary of the world Organization.

But this Congress was much more than that.

First of all, it was a unique attempt, carried out at the global level, to consider post-cold-war international law as a whole, at a time when the international community is having more than a few doubts about its own structures and when States have not yet worked out the concepts and rules needed to govern an increasingly globalized and, at the same time, increasingly fragmented society.

This volume underscores the meaning of the famous words of the Statute of the International Court of Justice regarding the “teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. For the role of the teachings—and the records of this Congress make this abundantly clear—is not only to theorize about the often empirical practices of States and international organizations, but also to point to areas in which the law is deficient or inconsistent and to suggest new ways to serve the great ideals of the Charter of the United Nations.

Finally, this meeting of professors and practitioners of law, held in the great Hall of the United Nations General Assembly, has reminded us forcefully that, next to the society of States, there is an international scientific community that desires to establish international law as the language of international relations.



Boutros Boutros-Ghali

AVANT-PROPOS

Cet ouvrage constitue, en lui-même, un événement.

Pour la première fois dans l'histoire de l'Organisation des Nations Unies, des juristes venus à New York du monde entier afin de participer au Congrès des Nations Unies sur le droit international public ont procédé, durant une semaine, à un véritable inventaire du droit international public contemporain. Et je veux remercier toutes celles et tous ceux qui ont participé à cette manifestation et contribué à sa réussite.

Cette publication rend compte du travail accompli et témoigne de la qualité des rapports présentés et de la richesse des débats qu'ils ont suscités.

Il s'agit là — chacun en est bien conscient — d'une manière particulièrement féconde de célébrer tout à la fois la Décennie des Nations Unies pour le droit international et le cinquantième anniversaire de l'Organisation mondiale.

Mais ce Congrès représente, aussi, bien plus que cela.

Il s'agit, tout d'abord, d'une tentative unique, conduite à l'échelle universelle, pour penser le droit international de l'après-guerre froide, dans son ensemble, à un moment où la communauté internationale doute souvent de ses propres structures et où les États n'ont pas encore fait surgir les concepts et les règles permettant de régir une société qui, dans le même temps, se mondialise et se fragmente.

Ce volume donne donc tout son sens à la célèbre formule du Statut de la Cour internationale de Justice énonçant « la doctrine des publicistes les plus qualifiés des différentes nations, comme moyen auxiliaire de détermination des règles de droit ». Car le rôle de la doctrine — et les Actes de ce Congrès le montrent bien — est non seulement de théoriser la pratique souvent empirique des États et des organisations internationales, mais aussi de dénoncer les lacunes ou les incohérences du droit, et de suggérer de nouvelles voies au service des grands idéaux de la Charte des Nations Unies.

Enfin, cette réunion d'universitaires et de praticiens du droit, dans le vaste amphithéâtre de l'Assemblée générale de l'Organisation des Nations Unies, a fortement rappelé l'existence, à côté de la société des États, d'une communauté scientifique mondiale, désireuse d'instituer « le droit international, comme langage des relations internationales ».

Boutros Boutros Ghali

Boutros Boutros-Ghali

PRÓLOGO

Esta obra es de por sí todo un acontecimiento.

Por primera vez en la historia de las Naciones Unidas, juristas de todo el mundo, reunidos en Nueva York con ocasión del Congreso de las Naciones Unidas sobre Derecho Internacional Público, llevaron a cabo, durante una semana, un verdadero inventario del derecho internacional público contemporáneo. Deseo expresar mi agradecimiento a todos los que participaron en la reunión y contribuyeron a su éxito.

Esta publicación, en la que se presenta la labor realizada durante el Congreso, da fe de la calidad de los informes presentados y la importancia de los debates que suscitaron.

Todos sabemos que este es un modo especialmente provechoso de celebrar tanto el Decenio de las Naciones Unidas para el Derecho Internacional como el cincuentenario de la Organización mundial.

Ahora bien, este Congreso tiene una significación mucho más trascendente.

En primer lugar, se trata de un intento único, a escala universal, de pasar revista al derecho internacional en su conjunto después de la guerra fría, en una época en que la comunidad internacional duda, a menudo, de sus propias estructuras y en que los Estados no han establecido todavía los conceptos y reglas que permitan regir una sociedad que se mundializa y se fragmenta al mismo tiempo.

Así pues, este volumen refleja fielmente la célebre fórmula del Estatuto de la Corte Internacional de Justicia sobre “las doctrinas de los publicistas de mayor competencia de las distintas naciones, como medio auxiliar para la determinación de las reglas de derecho”. En efecto, la función de las doctrinas — las Actas de este Congreso dan buen testimonio de ello — no consiste exclusivamente en teorizar acerca de la práctica a menudo empírica de los Estados y las organizaciones internacionales, sino también en poner de manifiesto las lagunas e incoherencias del derecho y proponer nuevos caminos para servir a los elevados ideales de la Carta de las Naciones Unidas.

Por último, esta reunión de universitarios y juristas, celebrada en el vasto anfiteatro de la Asamblea General de las Naciones Unidas, ha recordado claramente que, junto a la sociedad de los Estados, existe una comunidad científica mundial, deseosa de establecer el derecho internacional como lengua de las relaciones internacionales.



Boutros Boutros-Ghali

OPENING STATEMENT

*Hans Corell**

On behalf of the Secretary-General, I should like to extend to you a warm welcome to United Nations Headquarters and to this Congress.

I feel truly honoured and privileged to signal the start of an event which is without precedent in the history of the United Nations. It brings together in this, the year of the fiftieth anniversary of the Organization, some 600 participants from over 125 countries, lawyers of all ages, coming from all regions of the world and representing a wide range of cultures and professional specializations, but united by a common language, the language which the title of this Congress describes as “a language for international relations”, the language of international law.

It is a great joy to see in this General Assembly Hall a very unusual gathering, an extraordinary array of legal practitioners and representatives of the academic world, including university professors, lecturers and fellows, members of prestigious learned societies and research centres and institutes. It may, for many of them, be a “once in a lifetime” opportunity to occupy seats usually reserved for statesmen, politicians, diplomats and experts from the United Nations system.

But while I rejoice to sense in this Hall the thrill and excitement of the newcomers, I am equally happy to welcome those for whom these walls are very familiar and who, too, have wanted to honour the Congress with their presence. Let me therefore salute the President of the International Court of Justice, other prominent international judges, members of the International Law Commission and all the parliamentarians, ambassadors, including Permanent Representatives to the United Nations, legal advisers, members of permanent missions and colleagues from the international civil service who are among us today.

* Under-Secretary-General for Legal Affairs, Legal Counsel of the United Nations.

In the course of this week, you will be exchanging views on the codification, progressive development and implementation of public international law, both in theory and in practice, as well as on its teaching and dissemination. The focus will be on the general theme of the Congress, which is doubly challenging since it invites us to look towards the future and to test international law as a language for international relations.

The responsibility for organizing the Congress falls upon the Secretariat of the United Nations. In practice, this means that the work has been performed by members of the staff of the Office of Legal Affairs and, in particular, the Director of the Codification Division, Ms. Jacqueline Dauchy.

It should, however, be noted that in preparing the Congress, the Secretariat has followed the guidance provided by the General Assembly and has kept Member States informed, on a regular basis, of the state of preparations. The Programme of the Congress is therefore the fruit of a joint effort by the Secretariat and representatives of States Members of the United Nations.

Organizing an event like this is not an easy task. It is even more difficult when everything must be done, and I quote the instructions of the General Assembly, "within existing resources". I hope you will bear with us if the arrangements sometimes seem to you to be on the Spartan side. We did the best we could with the limited means at our disposal.

One of the most difficult tasks in working out the Programme of the Congress has been to select the moderators and main speakers from a large number of top-quality international lawyers. In making sometimes excruciatingly painful choices, the Secretariat has been guided by the need to ensure the representation of all major legal systems and all geographical regions, to give adequate coverage to each of the five sub-themes of the Congress and to strike an appropriate balance between the various segments of the international legal profession. Throughout the selection process, the Secretariat has consulted with the regional groups of the General Assembly and heeded their advice.

We are now happy to greet as moderators and main speakers so many eminent lawyers and we look forward to an interesting exchange of views. At the same time, we regret that it has not been possible for us to accommodate, within the Programme for plenary meetings, many of the renowned international lawyers who have expressed an interest in addressing the Congress. We trust, however, that they will participate in the open-floor discussions on each topic and share their views with us. Some of them will also conduct round-table discussions before and after the plenary meetings of the Congress. A wide participation in these discussions is encouraged.

Allow me now to make a few remarks from the perspective of the Legal Counsel of the United Nations, also a concerned citizen of the world community.

The twentieth century has been a revolutionary one in many respects. It has witnessed more progress in a few decades than had been witnessed by mankind in all the rest of its history. This is, of course, particularly obvious in the scientific and technological fields, but it is also true in the field of international law.

Is it not amazing to think that the basic principles on which today's law of nations firmly rests—the prohibition of the use of force, the principle of peaceful settlement of disputes, respect for human rights and the right of peoples to self-determination—all grew into objective rules in the course of the present century? And is it not equally remarkable that two consequential and far-reaching developments should have in a few decades radically altered the classical, century-old concepts of international law? I refer to the growing readiness of States to accept limitations on their sovereignty in the interest of achieving common goals and to the emergence of the rights of peoples and individuals at the international level.

This dynamic process of concretization of basic principles has been accompanied, particularly after the Second World War, by impressive achievements in the field of the codification and progressive development of international law. From its previous state of amorphousness and imprecision, the law of nations has grown into a highly organized system of rules.

Other factors are contributing to the enhancement of the role of international law in today's international relations. First and foremost should be noted the growing realization that the effective application of the rules and principles of international law is the surest way towards peace and harmony among nations. But the profound changes that the world has witnessed in recent years should also be mentioned. The fading-out of ideological frontiers, the enlargement of the international community and the admission of a large number of new States to the United Nations, the liberalization of economic regimes: all these phenomena contribute to the intensification of international relations and enhance the need for an effective application of the rules and principles of international law.

It is reassuring that today a great number of activities in many different fields are successfully governed by international law. International cooperation is thriving in fields such as trade, communications, travel, including tourism, and cultural and scientific interchange. Efforts are being made to protect common interests, in particular the environment. But the fact that public international law governs successfully so many different fields is hardly noticed by the general public; it is taken for granted.

What is noticed by the general public are the instances where international efforts to prevent or solve conflicts have proven less successful, or even failed. What is noticed are the difficulties that States experience in coordinat-

ing their efforts to curb emerging or ongoing conflicts. What is noticed are the sometimes open rifts between States that try to intervene to restore peace and security to war-torn regions. What is noticed, above all, are the televised testimonies of the most flagrant violations of international law, human rights and humanitarian law. The images from the former Yugoslavia, from Somalia, from Rwanda and from so many other places are etched on our retinas.

What we witness in these instances are situations where international law is not respected.

In some cases, conflicts have emerged in the wake of the cold war. The question is: How many more potential conflicts smoulder under oppression elsewhere? How many of these conflicts will erupt? How long will it take until oppression finally yields to the aspirations of democracy? And how long will it take until there is general and genuine acceptance that law must govern the relations between States and peoples—that force is not a means by which disputes can be settled in a durable way?

To us who are gathered here, it is evident that the relations between States and peoples must be governed by law. We are privileged in the sense that we were given the opportunity to study international law and the interrelation between law and politics. But this also means that we have a special responsibility to highlight the important role that law plays in creating harmonious interrelations between States and peoples.

The importance of a system subject to the rule of law can easily be demonstrated by reference to the national level. No perfect system of government exists; there will never be one. Our destiny is to struggle with the question of the form of government for as long as we inhabit this earth. But two elements have emerged as determining factors in the creation of societies which allow men to live under reasonable conditions: democracy and the rule of law. This should apply also at the international level. What merit is there in priding oneself in a national system under the rule of law if one is not, at the same time, prepared to accept fully that law must rule also at the international level?

I mentioned our special responsibility as international lawyers. This responsibility may be different depending on our functions. The broad spectrum of specializations as reflected in the list of participants in this Congress leads me to the following:

- Ours is the responsibility to deepen our knowledge and understanding of international law.
- Ours is the responsibility to analyse existing international law and to participate in its codification and progressive development, so that it can respond effectively to new challenges.

- Ours is the responsibility to teach international law and inspire coming generations of lawyers, those who take over where we leave off.
- Ours is the responsibility to help spread the knowledge of international law outside our own circles also, not least to the general public and, in particular, to those who represent it.
- Ours is the responsibility to resolve the disputes that are referred to us for settlement.
- Ours is the responsibility to give advice on matters of international law to those who ultimately make the decisions at the political level.

In the latter context, I direct myself, in particular, to the many legal advisers from capitals and Permanent Missions to the United Nations who participate in the Congress. I urge the legal advisers of the Ministries of Foreign Affairs to continue their cooperation, both formal and informal, in order to strengthen their network and to develop a common way of thinking among the persons who advise those who make decisions in foreign policy matters.

There is no concluding document to be produced by this Congress. Different ideas will be ventilated. On many questions we will agree; on others the discussion will demonstrate that problems could be analysed and looked upon in different ways. The purpose of the Congress is to promote the role of law in international relations, thereby assisting the international community and, in particular, the legal profession to meet the challenges of the present-day world in its projection towards the future.

But this moment is too precious to be devoted solely to an exercise for lawyers. International law is not an exclusive interest for a few specialists; it is an important ingredient in day-to-day decision-making at the national level. Our achievements will be of limited value if those who ultimately make the decisions do not fully assume their responsibilities.

This is a unique occasion. As I said earlier, never before has such a multinational congregation of international lawyers assembled under the auspices of the United Nations. Even if views may differ on certain issues, we are all bound together by the same conviction that law should govern the relations between States and peoples.

Therefore, let this Congress also be a resounding appeal to those who ultimately make the decisions that affect our destiny. To them, our message should be:

- Yours is the responsibility to ensure that international law is applied and that legal advice is sought before important decisions are made in foreign policy matters.
- Yours is the responsibility to make sure that your actions stay within the boundaries of international law as it emerges in custom, treaty or juris-

prudence—in essence, to bow to the dictates of the laws which you yourselves or your predecessors have adopted.

- Yours is the responsibility to see to it that ratifications of international treaties are not empty gestures but reflect a genuine determination to comply and to refrain from reservations which negate the object and purpose of the treaties, lest treaty law fall into disrepute.
- Yours is the responsibility to act with prudence and avoid, also in the heat of the political debate, the sparking of emotions which later may prove difficult to control; human rights and fundamental freedoms are for all without distinction as to race, sex, language or religion.
- And, if disputes occur, yours is the responsibility to refrain from the use of force and to make sure that those disputes are resolved by peaceful means.

These responsibilities can altogether be translated into one single word: statesmanship!

Yes, we know that statesmanship is not always immediately rewarded. Yes, we also know that a statesman, man or woman, may not always be recognized by his contemporaries. But the recognition is certain; just as the sailor recognizes the true helmsman by observing the ship's wake, so will coming generations look back and be certain to know the statesman by his mark on history.

“Towards the Twenty-first Century: International Law as a Language for International Relations”—the general theme of the Congress—prompts me to quote from the Charter of the United Nations:

“We the peoples of the United Nations determined to save succeeding generations from the scourge of war . . .”

The majestic Preamble to the Charter rings with the same force today, 50 years later. The obvious conclusion is: If we are to achieve this goal, arms must cede to the law and, ultimately, to the judge's robe.

**PART ONE
PLENARY MEETINGS**

**PREMIÈRE PARTIE
SÉANCES PLÉNIÈRES**

**PRIMERA PARTE
REUNIONES PLENARIAS**

MONDAY, 13 MARCH 1995

**THE PRINCIPLES OF INTERNATIONAL LAW:
THEORETICAL AND PRACTICAL ASPECTS
OF THEIR PROMOTION AND
IMPLEMENTATION**

PRESENTATION OF THE TOPIC

*Javad Zarif**

I wish to begin by expressing appreciation to the Legal Counsel of the United Nations and his colleagues in the Secretariat for their efforts in organizing this important gathering. The United Nations Congress on Public International Law, which is the first of its kind in the history of the United Nations, is convened in our common endeavour to address one of the most pressing challenges that continues to confront the international community 50 years after the establishment of the Organization. Comparing today's reality with the aspiration exhibited by the main theme chosen by the General Assembly for this Congress—that is, “Towards the Twenty-first Century: International Law as a Language for International Relations”—would clearly illustrate the magnitude of this challenge as we enter the next millennium.

Clearly, the imperative for the rule of law in international relations has more than ever come to the forefront. The proclamation of the period 1990-1999 as the United Nations Decade of International Law, upon the initiative of the non-aligned countries, is indicative of the growing conviction among States, international institutions and world public opinion that in a highly interdependent world, everyone's interest is best served by a more principled and orderly system based on law. It further reflects the common aspiration that in the post-cold war atmosphere, the international community, spared from bloc rivalries, would move towards a new era of inter-State relations, in which the purposes and principles of the Charter of the United Nations could be realized, including, *inter alia*, the principles of justice and human dignity, universal commitment to and full respect for international law, international cooperation, respect for sovereignty, sovereign equality, territorial integrity and political independence of States, non-use of force in international relations and non-interference in the internal affairs of others. It also

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illustrates that our achievements so far in this regard have not been satisfactory and that much work needs to be done in this respect.

The initiative of my country in 1992 to propose the convening of the United Nations Congress on Public International Law was based on a conviction that participation in the programme of activities of the United Nations Decade of International Law should not be limited to government representatives and should involve pertinent institutions, academicians and interested individuals. This would not only contribute immensely to the international promotion of the lofty objectives of the Decade, but would also significantly enrich the content of its programme of activities. It is a source of encouragement to witness the participation in this Congress of so many highly distinguished individuals from the various sectors involved in public international law.

This Congress is indeed a unique event as well as a unique opportunity. It aims to promote the objectives of the United Nations Decade of International Law with the ultimate goal of strengthening the rule of law in relations among nations, which is an essential factor in the preservation of peace and security in the world. It is also one of the substantive activities leading to the commemoration of the fiftieth anniversary of the United Nations. I submit that every effort should be made to take maximum advantage of this rare opportunity to introduce, consider and evaluate innovative ways and means for worldwide promotion and implementation of the objectives of the Decade and this Congress—that is, international law as a language for international relations in the twenty-first century. This directly brings us to the subject under discussion today, namely, “The principles of international law: theoretical and practical aspects of their promotion and implementation”.

Let me now make a few preliminary comments on today’s topic with the hope that a stimulating, constructive and fruitful debate on these and other related issues will follow in the course of the day.

First: It is evident that in our contemporary world, States do not enjoy absolute sovereignty. The old theory of absolute sovereignty fitted in with the actual conditions of international society during a certain period in the past. Today the circumstances are totally different. In place of an “anarchy of sovereignties”, we have a society of interdependent States, bound by international law. They are not only bound by freely accepted obligations, but also by the generally accepted principles of international law.

It should be underlined that sovereignty creates international law, and that law recognizes sovereignty as its foundation and a basic principle. In other words, the law of nations is not one enacted by some higher authority and superimposed upon States; it arises directly out of their consent. It is a law not of subordination but of coordination.

However, it does not depend on the discretionary will of States to determine whether or not they should abide by the rules of international law. Once a State undertakes certain obligations through treaties or agreements, it is bound to fulfil them.

Let me stress that upholding the supremacy of international law in international relations is instrumental in, and indeed an indispensable prerequisite for, the preservation of world peace and security. The programme of activities of the Decade calls upon all States to act in accordance with international law and the Charter of the United Nations. The same applies to groupings of States, particularly international organizations, whose behaviour and decisions must be governed by and be compatible with norms and principles of international law as well as their pertinent constitutional instruments. International organizations have been encouraged, in the programme of the Decade, to promote acceptance of and respect for the principles of international law. In my view, this is an important and pertinent recommendation, which must be kept fully in perspective, both in words and programmes, but, what is more important, in deeds and decisions.

While on the subject of sovereignty and supremacy of law, I should like to mention an issue of direct relevance to our discussion today, which is also currently on the agenda of the International Law Commission, namely, unilateral reaction or countermeasures in response to an internationally wrongful act.

It is clear that in a well-organized world system based on the rule of law, decentralized reaction to breaches of principles of international law cannot be permissible, since in that case each State would take the law into its own hands and be the judge of its own conduct. Obviously, the very nature of these unilateral measures, especially those of a punitive character, seems to be detrimental to the cause of promotion of and respect for the principles of international law. Let me simply observe that, in the light of prohibition of the use of force in international relations, as well as the emergence of new opportunities for more effective use of existing mechanisms and procedures for peaceful settlement of international disputes, avenues for permissible countermeasures have been strictly narrowed down.

Second: As we all know, international public opinion is a determining factor in enforcement and implementation of accepted norms of international law. Clearly, mass media have a significant role and responsibility in fostering confidence in and respect for international law among the world public.

However, the collective behaviour of States and other influential actors in observing these norms and in reacting to their violations would go much further in convincing the international public of the utility and relevance of

international law and in overcoming the predominant scepticism about the actual role of law in inter-State relations. Thus, an effective, appropriate and non-discriminatory reaction of States, international organizations and relevant institutions against breaches and violations of universally accepted norms of international law would bring about confidence and predictability and hence promote, enormously, acceptance of and respect for the principles of international law. On the other hand, lack of proper response to illegal behaviour would encourage further violations, thus undermining and eroding the very relevance, authority and applicability of the violated rule and of international law in general. It would also exacerbate the existing dichotomy between legality and political reality.

Two contemporary examples come to mind. In one, lack of effective reaction by the relevant international body in dealing with an act of aggression encouraged the perpetrator to commit another aggression in one decade. In the second case, indecisiveness and a selective approach in dealing with aggression and genocide against the Republic of Bosnia and Herzegovina are at least partially to blame for the persistence and prolongation of the tragedy and certainly for the loss of many people's faith in the mechanisms of international legality.

Thus, the commission of an act of aggression, genocide or other grave breaches of international law cannot and should not be tolerated for any reason or political consideration, regardless of relations with the victims or the culprits. Lack of political will to cope with the perpetrators of such inhuman crimes or with the violators of the basic norms that govern relations among nations definitely undermines the faith and confidence of people around the world in the ability of international law to protect them, a belief that is detrimental to the objective of promoting the rule of law in the world community.

Third: Our world is increasingly confronted with a variety of old and emerging hard-core issues, such as poverty, starvation, underdevelopment, accumulation of arms in different regions of the world, the threat posed by the existence and proliferation of weapons of mass destruction, environmental degradation, etc. They threaten the very lives of millions of human beings. The international community is required, therefore, to move in the direction of overcoming these difficulties and finding practical and equitable solutions for them.

The progressive development of pertinent and universally acceptable norms of international law, as required by the circumstances, would contribute to fostering the necessary confidence and reasonable predictability which are required for overcoming the existing impasses, often caused, *inter alia*, by uncertainty about the future.

It should be noted here that meeting the legal commitments undertaken to address some of these emerging and mostly complex challenges, such as protection of the environment, often requires resources, particularly financial and technological ones, which should be made available. Therefore, stress must be placed on balanced and mutual fulfilment of commitments and undertakings by all sides.

Fourth: In developing applicable rules to meet the new challenges, the international community must pay due attention to diversities of backgrounds and conditions in the social, political, economic and cultural fields. It should ensure that the major legal systems play their proper role in law-making and keep the interest of all in perspective. Common prosperity is an objective that should be pursued in our endeavour to make a safe and peaceful world. It is self-evident that appropriate attention to these fundamental considerations in the future development of international law would strengthen and enrich its norms, broaden their participatory base and thus their legitimacy, make them more universally applicable and thus promote respect for and acceptance of them across the globe. Thus, to use the concepts of the just-concluded World Summit for Social Development, "inclusion, empowerment and participation" should also apply to international law-making.

Examining the experiences of 50 years of law-making in the United Nations, one comes to the conclusion that the contribution of the developing world to this process has not followed a steady pattern. We in the third world have proven capable of influencing and indeed giving direction to the process, when we have exerted a unified and concerted effort in achieving our objectives. For instance, rapid and near-total decolonization confirmed self-determination as an established principle, which was successfully included in various international instruments. Likewise, our dedication to the struggle against apartheid and our determination to make it a generally accepted norm have borne fruit.

At the same time, however, our other objectives regarding other hard-core issues facing the world, and in particular the developing countries, have yet to be realized. One must confess that overcoming those difficulties, particularly owing to the political nature of the law-making process, is not an easy task. But this should not prevent us from mobilizing the necessary expertise in order to participate actively and effectively in the law-making process and ensure, ourselves, that our needs and interests are taken into account.

JUSTICE AND STABILITY IN THE INTERNATIONAL ORDER

*Hisashi Owada**

I. INTRODUCTION

The world is going through a period of great transformation. This may be a truism, but we are clearly entering a new chapter in the history of international relations in the modern era. This implies that the whole structure of the modern international system, together with the traditional tools that we employ for managing the system, such as international law, may have to be re-examined and reconstrued in the new light of this novel situation. International law, as we have known it as a body of norms governing the international system established since the Treaty of Westphalia, is no exception.

Let me begin by a brief examination of the nature of the changes that are sweeping the whole world.

What I regard as the most fundamental aspects of the changes in the international system, which can affect the legal order of the present-day international system, are twofold. One is the rapidly growing social reality of interdependence within international society, which has come to create an increasing contradiction between this reality of social interdependence gradually permeating every corner of international society and the basic institutional framework of the present-day international system, based on the principles of the Westphalian legal order.

The other is the increasing awareness of people who have come to assert the primacy of human dignity of individuals and the growing relevance of individuals representing pluralistic values to the international system, which has traditionally been based on the atomistic notion of sovereign States as the essential elements constituting the system.

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Today, I wish to touch upon only a few of the manifestations of this transformation in the international system and reflect upon their implications for the international legal order. My main theme for today is that the transformation within the international system, as manifested by these two new developments, has produced a new situation in which the concept of justice, as a key concept for the international legal order, is going through a trial and challenge in three different dimensions. They are:

- (a) The concept of justice in the context of pluralistic values in society;
- (b) Tension between justice and stability in the international order;
- (c) Dichotomy between justice in the context of international society and justice in the context of global society.

I am going to touch upon each of the dimensions, one by one, though inevitably in a somewhat summary fashion.

II. THE CONCEPT OF JUSTICE IN THE CONTEXT OF PLURALISTIC VALUES IN SOCIETY

While the developments that I have described have come to light only in the course of recent years and only in relation to some specific parts of the world, it goes without saying that these ostensibly new developments are neither novel in time nor unique to a specific region of the world. In this respect, what has been developing in the socio-economic life of the international community is truly revealing of the nature of this evolution in the international system.

Let me take up the case of the international economic system to illustrate the point. The traditional approach of the General Agreement on Tariffs and Trade (GATT)—to promote the principle of free trade as a public good of international society, through a mechanism based on international discipline at the inter-State level and applicable only to trade in goods—is bound to be jeopardized in the face of an overwhelming reality of economic interdependence, where various factors of production and other economic activities, including capital, service and people, are moving across national borders.

No one can question that this system of multilateralism for free trade on a non-discriminatory basis among nations, as established within the Bretton Woods system, based as it was on the Ricardian philosophy of comparative advantage, has largely been instrumental in the spectacular growth of world trade of the postwar period. However, the Ricardian theory of comparative advantage is founded on one basic premise: that it can function properly in

relation to international trade in goods across the national borders of sovereign States, under the condition *ceteris paribus*. In other words, it assumes the existence of a static international order in which the nation-States are in control of their respective domestic conditions for free competition across their national border and in which the operation of the principle of free competition is not, at least in principle, perturbed by the free movement of the factors of production, such as capital, equipment and labour, across national borders. What is being challenged in recent years is precisely this premise.

The single most significant factor behind this change is that the world today suffers from the dichotomy that has come to exist between the fast-growing socio-economic reality that entrepreneurs as individuals engage in activities on a global basis and the equally stark reality that the competence to regulate these activities is still compartmentalized by nation-States, within the system based on the Westphalian legal order.

In this novel situation, the reality of economic interdependence has developed to such an extent that it is no longer possible for any single State to control economic activities that extend beyond its national borders in a sufficiently effective way in accordance with the societal values that it wants to preserve. In this sense, economic activities in the present-day world have become truly transnational, and not just multinational.

What I should like to emphasize today is that the implications of this new development would seem to go beyond the realm of political economy. They have some serious implications relevant to the international legal order as it relates to the maintenance of world public order.

In any sufficiently organized society, law is the instrument which endows this organized body with a basic framework for order *qua* society. As the Romans put it, *ubi societas ibi ius*. However, for this order to prevail and serve as the societal framework for stability, it has to be based on the system of law which represents justice in that society. The complication arises when one realizes that justice, like fairness, is a concept which in its abstract form may represent an eternal and universal value in society but which, when translated into a practical form susceptible of concrete application, will have to acquire its concrete contents as an embodiment of this abstract justice as accepted by the society in question.

Thus, while the concept of justice as it manifests itself in the form of concrete embodiment must reflect the elements that represent the inherent universal value, the concrete contents of justice as it is manifested in a norm may not be totally free from the idiosyncrasies of a particular society conditioned by time and space. Thus a concrete legal norm that is regarded as an embodiment of the sense of justice prevailing in a society may not always be accepted in a different society as a norm of the same universal value.

In my submission, it is precisely on this point that this new development taking place in the international economic system comes to present a new implication to the international legal order. It is quite possible that the different normative systems prevailing in two different domestic societies, reflecting the sense of values and of justice prevailing in the two societies, come into conflict with each other in this situation of interaction between two societies through transnational socio-economic activities.

Let me illustrate this problem by reference to one of the more complex legal problems that exist in the field of economic activities in any society, namely, the problem of unfair competition. Almost by definition, any society that is concerned with the problem of unfair competition in the conduct of economic activities will condemn unfair competition as being contrary to its sense of social justice and its public order. However, when it comes to determining what concrete action constitutes an act of unfair competition to be made the subject of sanction by society in the form of normative rules, the question becomes much more complex. I suspect that there will be a fairly broad range of peripheral norms in this field to which some societies will take an extremely puritanical and rigorous position, while others will display a much greater degree of leniency, if not positive approval, at least to the extent that such activities in those societies are not punishable by law.

Such issues and many others of a similar character would not be a serious problem to the international legal order, if we lived in the classical world of the Westphalian international system. Each nation-State, as a sovereign in harmonious coexistence with other nation-States, based on the principles of sovereign equality and non-intervention in domestic affairs, would insist on its self-contained system as a completely closed circuit. Within that closed circuit of society, each sovereign Government would insist that its sense of justice in society, as reflected in its legal order, should prevail. However, in the brave new world that we are now entering, where socio-economic activities across the national border—rather than activities solely confined within the national border of one country—are the rule and not the exception, the question of how to determine and apply what constitutes justice and fairness in a concrete case becomes much more complex, particularly in the present transitional phase where we have not yet succeeded in reorganizing ourselves into an international community in its institutional aspect.

III. TENSION BETWEEN JUSTICE AND STABILITY IN THE INTERNATIONAL ORDER

It may be a truism that the function of the law is to maintain a delicate equilibrium between justice and stability in society. Under normal circumstances,

the two will go hand in hand together, to the extent that the element of justice is expected to be inherent in the concept of law and order which ensures stability in society in a sustainable manner. Thus, in the context of international law, the Charter of the United Nations provides as follows in Article 2, paragraph 3:

“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”. (Emphasis added)

Nevertheless, at a moment of turbulence in any society, and in international society in particular, there can arise a situation in which this harmonious balance between justice and stability—or peace in the international context—is disturbed, with the result that the two essential elements of order come into mutual tension and conflict. This tension between justice and stability tends to surface in the form of a dichotomy to confront the practitioner of the management of international relations with a painful choice. As is the case with domestic society, this dichotomy becomes particularly acute in a situation of social disturbance and conflict.

I submit that this tension between justice and stability in the international legal order has now become even more acute and real in the face of new factors which are affecting the international relations of today, precisely because we are now living through a period of major societal evolution in the international system. In this sense, the end of the cold war would signify the final demise of “the good old days” when things were simpler and more clear-cut in terms of values to be defended and the context of confrontation between the West and the East vying for totally opposing value systems in various respects.

In contrast to these past years, the international reality of the present-day world is much more complex, with the tension between upholding justice and safeguarding peace in a given situation becoming much more acute and harder to harmonize.

To illustrate the nature of the problem, let me take up the controversy surrounding the problem of an arms embargo in the former Yugoslavia. In resolution 713 (1991) of 25 September 1991, as it applies to the two warring parties in Bosnia and Herzegovina, the Security Council stipulated as follows:

“*Decides*, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Council decides otherwise following consul-

tation between the Secretary-General and the Government of Yugoslavia". (Emphasis added)

The intent of this arms embargo is unequivocally stated in the resolution in question as being "for the purpose of establishing peace and stability" in the region. However, a fierce opposition to this arms embargo has come to be advanced by one of the warring parties, i.e., the Government of the Republic of Bosnia and Herzegovina. The essence of this argument would seem to be that the principle of justice involved in the concrete situation that exists is being trampled in favour of the consideration of stability and peace, setting aside the consideration of the justice or otherwise of the peace in question. As stated by one most forceful advocate for the lifting of the arms embargo, representing the Government of Bosnia and Herzegovina in the General Assembly:

" . . . it is [the Muslim Bosnians'] inferiority in quality and quantity of weapons that has allowed this aggression [by Serbians] to be continued . . . We [the Muslim Bosnians] do expect our right to self-defence to be honoured and our desire to control our own fate to be respected, once and for all".¹

In other words, according to this contention, the primary concern of the international community as represented by the Security Council was to give priority to stability in the situation, which hopefully would lead to the restoration of peace within the area, whereas the Government of Bosnia and Herzegovina was crying out that the imposition of an arms embargo was an act of gross injustice, inasmuch as the arms embargo would be in effect tantamount to denying the Bosnian Muslims their inherent right of self-defence.

Without passing judgement on the merits of the case on both sides, I submit that this is not a unique case in which the pursuit of justice and that of stability come into tension and even into conflict with each other in international relations. Particularly when a matter of this nature comes before a political organ of the United Nations, each State member of that organ will be required to make a choice in this regard from a politico-juridical point of view.

The question is not new. The whole mechanism of peaceful settlement of international disputes under Chapter VI of the Charter, in spite of the caveat in Article 2, paragraph 3, thereof, presupposes the existence of this tension, while hoping that a harmonious equilibrium will be maintained in the process of reaching peaceful settlement. The situation would essentially be

¹ *Official Records of the General Assembly, Forty-ninth Session, Plenary Meetings*, 50th meeting, p. 3.

the same with respect to the peace-keeping operations of the United Nations, at any rate to the extent that the operations are based on faithful adherence to the principle of impartiality, within the confines of Chapter VI of the Charter.

This state of affairs should be intrinsically distinguished from the situation under Chapter VII of the Charter. The determination of the existence of a threat to the peace, breach of the peace or act of aggression by the Security Council under Article 39 should be in its nature a determination that fundamental justice is endangered or infringed and that the collective decision of the Security Council as the executive organ of the international community in this regard is to make justice prevail.

That the reality is not so simple has been illustrated by the example of the former Yugoslavia that I have just quoted. Also at the time of the Gulf crisis of 1990, where a blatant act of aggression took place against the territorial integrity and political independence of a Member of the United Nations by another fellow Member, one could discern, among the membership of the Security Council and of the United Nations at large, a degree of ambivalence on the part of some Members, which stemmed from this tension between the requirement that justice should prevail and the desire that stability be safeguarded as a matter of priority.

The dichotomy is not an easy one to solve in practice. Obviously, there cannot be a complete solution to this state of affairs as long as the international community is not equipped with an organ endowed with an effective centralized power to execute a decision of the international community. Given the evolving trend in the international community to prevent States from individually taking justice into their own hands, this dichotomy between justice and stability will be likely to grow, unless this trend is matched and buttressed by an international effort to strengthen a collective mechanism to ensure a harmonious equilibrium between justice and stability in international society.

IV. JUSTICE IN THE CONTEXT OF INTERNATIONAL AND GLOBAL SOCIETIES

The third area which requires our attention in relation to the new development in international society is the growing dichotomy, if not divergence, between the concept of justice in human terms in the context of global society and the concept of justice in sovereign terms in the context of international society.

Justice in society is a concept which has its relevance in relation to the socio-judicial status of the constituent members of that society. Thus, when slaves

were not regarded as legitimate component elements of society, the problem of social justice in relation to the slaves was not on the conscience of the people. By the same token, when the policy of apartheid was practised in the Republic of South Africa, the injustice being done to the coloured population in that country was ignored by the officialdom of that country.

In the context of international society this would mean that the concept of justice could vary, depending upon whether one was thinking primarily of justice in relation to sovereign States as constituent members of the community of nations or in relation to the individuals or groups of individuals as component elements of this society. In the traditional context of the Westphalian legal order, where sovereign States are the basic constituent units of society, the realization of justice as the ultimate objective of the international legal order has always been conceived of primarily in relation to the sovereign States.

The problem is again one of divergence between the conception of an emerging global community with human beings as its essential components in the societal sense and the conception of the existing international community with sovereign States as its basic components. This divergence can, and already often does, create a tension between the two, to the extent that the values in society, including the aspect of justice involved, can be divergent, depending upon whether one looks at the situation from the viewpoint of sovereign States or of the people involved.

It is submitted that a typical case which arises in this dilemma is the one related to the principle of self-determination. The principle of self-determination, in its historical origin, was born in the early part of this century in Europe, as a legal response to the rising tide of nationalism, in the wake of the dissolution of three empires—the Ottoman, the Austro-Hungarian and the German empires. Based on the traditional principle of nation-States, but reflecting the aspiration of the peoples involved, an attempt was made to give legitimacy to the expressed or implicit will of those peoples to establish themselves as nations and therefore as sovereign members of the international community.

Nevertheless, already in this process, the potential tension between the two, which was intrinsic in the principle of self-determination, was visible from the beginning in the form of a dichotomy between the principle of territorial integrity—or what Professor Thomas Franck calls the principle of *uti possidetis*—and the principle of self-determination.²

The second wave of the movement for the principle of self-determination came in the aftermath of the Second World War. In the process of

² Thomas M. Franck, "Fairness in the international legal and institutional system", *Recueil des Cours*, vol. 240 (1993), pp. 136 and 137.

decolonization which followed the collapse of the colonial empires of many European States, the principle of self-determination was given the status of an almost sacrosanct principle—at any rate as far as the ex-colonial Territories aspiring to achieve independence as sovereign States were concerned.

However, here again, the kind of tension that has been mentioned above is already visible in the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960 (resolution 1524 (XV)), which states as follows:

“Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”.

This viewpoint was repeated, word for word, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the Assembly in 1970 (resolution 2625 (XXV)).

What these two declarations do is to try to find a middle ground solution to the dilemma, by reconciling the principle of self-determination of peoples with the principle of territorial integrity through restricting the sphere of application of the principle of self-determination to cases linked to the right of a nation to become a sovereign member of the community of nations.

It is interesting to note in this connection that the International Covenant on Civil and Political Rights, adopted by the General Assembly in 1966 (resolution 2200 (XXI)), provides as follows in article 1:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

Precisely the same provision appears in article 1 of the International Covenant on Economic, Social and Cultural Rights.

On this score, one can clearly detect the tension in operation at the present time between the consideration of justice and that of stability in the international legal order. With clear awareness of this tension, the International Court of Justice, in its Judgment of the Chamber, in the case *Burkina Faso v. Mali*, observed:

“At first sight this principle [of territorial integrity] conflicts outright with another one, the right of peoples to self-determination.

In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields has induced African States judiciously to commit to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples".³

It is noteworthy that in this passage in the Judgment, the International Court of Justice put its finger on the dichotomy or at least the tension that exists between the two factors and referred to "the essential requirement of stability", emphasizing the decisive relevance of the element of stability in the legal order in this particular setting. The critical question under such circumstances—setting aside the concrete factors involved in this case, on which I have no intention of passing a judgement here—is whether one should be thinking about this problem primarily in terms of the legitimate interest and justice of a sovereign State or rather in terms of the legitimate interest and justice of a group of individuals to decide upon their own destiny, or both in harmony.

If one looks at the situation, not from the viewpoint of justice in relation to nations entitled to become sovereign members of international society, but from the viewpoint of justice in relation to individuals or people as members of global society, it will be seen that the conception of justice involved in the principle of self-determination could be a much broader one, extending to the case of the freedom of groups of individuals as communities to choose their own self-government. This naturally would not mean that a secessionist movement from an existing sovereign entity by a local community claiming independence is always justified. It would not mean either, at the same time, that the principle of self-determination is a principle which is applicable only to the process of decolonization and disintegration of a colonial empire and has therefore ceased to apply to the post-decolonization world of today.

A somewhat similar situation can be observed, although for very different reasons and against a very different background, when one looks at the political geography of Western Europe and other industrial parts of the world.

On the one hand, European nation-States would appear to be inevitably moving towards a fuller integration of Europe as a whole. On the other hand, one paradoxical consequence of this development would appear to be that the nation-States as traditional units of the international system are losing

³ *I.C.J. Reports 1986*, p. 554, para. 25.

relevance not only in relation to the supranational authority which is increasingly replacing the functions of sovereign States, but also in relation to the individuals who are growingly assuming the role of the central actors in the system. Thus, paradoxically, as the process of "social integration" progresses at the level of the European community of nations, what I might describe as the process of "societal disintegration" at the level of nation-States is also in progress, in tandem with the process of "social integration" at the community level, calling into question the relevance of nation-States as the basic unit of international society. One can discover the impact of the same trend appearing in many parts of Europe, such as Belgium, the United Kingdom of Great Britain and Northern Ireland, Spain, France and in many other European States. In fact, this trend is not confined to the members of the European Union. Countries in Central Europe, such as the former Czechoslovakia, or Canada in the Western hemisphere are also being affected by essentially the same movement. Throughout all these cases, what is discernible is that smaller local communities, with much more tangible and more easily identifiable community interests, are beginning to voice their claim for legitimacy over autonomy/independence, as against the claim of existing nation-States for the supremacy of sovereignty and territorial integrity.

In this situation of dichotomy⁴ which pervades our society all over the world, a harmonious equilibrium would appear to be required between the conception of justice in society as seen from the viewpoint of sovereign States in the international setting and the conception of justice in society as seen from the viewpoint of individuals in the global setting. It is suggested that this would be possible, provided that good governance in the respective societies of nations is secured to reflect the legitimate aspirations of those groups of people in the process of government and that a degree of autonomy is ensured to meet the request of self-determination of these groups of people.

It is my humble submission by way of a conclusion that it is through such a process of harmonization that the concept of justice as defined in terms of international society, on the one hand, and the concept of justice as defined in terms of global society, on the other hand, should and indeed could be brought together as a harmonious unity to form the key concept to govern the new international legal order.

⁴ See Franck, *op. cit.*

THE UNIVERSALITY OF INTERNATIONAL LAW: CONCEPTS AND LIMITS

*Dumitra Popescu**

*We have it in our power to build
international law as a language
for all of humanity.*

1. WHAT DOES THE UNIVERSALITY OF INTERNATIONAL LAW REALLY MEAN?

Does it refer to the field to be regulated (universal problems) or to the sphere of its subjects and their behaviour (all have to comply with the law or with the nature of its norms), the process of law-making and the tools of expressing the norms, or to all such items and beyond?

To answer such questions and others which might highlight the concept of the universality of international law, I explore in greater depth the necessity to legislate universally and the nature of such norms, the place and role of international organizations, as well as a case-study.

2. THE NECESSITY OF UNIVERSAL NORMS, COMPULSORY FOR ALL STATES

Generally speaking, the common feature of sources of international law, especially treaties, general principles and custom, consists in that they are engendered by the consent of the States and are opposable to them, as far as they have freely expressed their will to comply with them. Therefore, the problem refers to the nature of the norms of international law, their creation and their opposability. Under the circumstances characterizing the present, international society, consisting of almost 200 States with their large

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diversity,¹ is confronted with global issues such as environmental protection and avoiding environmental risk and the control of the use of nuclear power in economic activities. Acts of international terrorism, the perpetration of international crimes (e.g., genocide, war crimes, hijacking) and the danger of using nuclear weapons raise similar global problems.

Such features of the international community should determine a new approach to the question of the sources of international law, by establishing new compulsory rules for all subjects of international law, regardless of any State's disposition.²

Non-recognition or non-acceptance of those norms may jeopardize the entire international community.

Undoubtedly, it may be questioned that such an approach to the universality of international law would infringe upon the principle of sovereignty and autonomy of States.³

The principle of sovereignty and autonomy continues, of course, to be valid as an expression of the equal sovereignty of States, regardless of their large diversity. Sovereign equality was provided for in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)).

In another opinion it was considered that the complete autonomy of the State could not be accepted at the present stage of international society. The destructive character of some activities would make a full autonomy not only uncommendable, but even potentially catastrophic.⁴

At the same time, however, some international law scholars admit that a State which does not want to be bound by an international norm may raise objections against it and may be exempted from its enforcement.⁵

It is also said that the world is likely to remain heterogeneous and brutal for centuries and that the painfully accumulated store of knowledge about how to ensure at least minimal regulation of the relations between competing sovereigns will serve decision makers for a long time to come.⁶

¹ Mircea Malita and others, *Statele lumii, mica enciclopedie* (The World States, the Small Encyclopedia), published by Romby House, Bucharest, 5th ed. (1993), pp. 407-412.

² Jonathan Charney, "Universal international law", *American Journal of International Law*, No. 4 (1993), p. 530.

³ Al. Bolintineanu and D. Popescu, "New trends in public international law in a changing world", No. 1 (1994), pp. 29 and 30.

⁴ Charney, op. cit., p. 530.

⁵ Louis Henkin, "International law: politics, values and functions", 216 *Recueil des Cours*, 9, 45, 46, 130 (1989, IV); Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff Publisher (1991), pp. 35-37.

⁶ Anne-Marie Slaughter Burley, "International law and international relations theory: a dual agenda", *American Journal of International Law*, No. 2 (1993), p. 238.

Such an analysis leads to the problem of the function of consent in international law-making through the various above-mentioned sources.

3. TREATIES

Pursuant to the Statute of the International Court of Justice (Article 38, para. 1 a), States are bound by treaties establishing rules they expressly recognized. Third States cannot be obliged to comply with the provisions of a treaty if they have not given their consent to it (articles 34 to 38 of the Vienna Convention on the Law of Treaties). Ratification of and accession to treaties are optional. On the other hand, *jus cogens* (article 53 of the Vienna Convention on the Law of Treaties) forbids States to assume obligations and specifically rights which would be contrary to the norms with such an imperative character. In this context, the opinion has been expressed that rather than consent, the real source of treaty obligations is the international law norm of *pacta sunt servanda*.⁷ It seems to me that such an opinion cannot be accepted. The principle of *pacta sunt servanda* does not apply to the making of the treaty, but to the performance after its conclusion by the consent of the States.

Therefore, a State is bound to carry out the duties established by a treaty only after the State has become a party to that treaty.

4. GENERAL PRINCIPLES

As is generally accepted, such principles are considered to have their roots in domestic law systems. However, adopting the assumption that these are in fact rules of natural law, there is no evidence that all States have consented to each rule of natural law contained in the general principles of law.⁸

In the absence of that proof, consent has no role in the application of the principles which appear as independent from it. This assessment seems relevant.⁹

Another opinion holds that the usage of a principle which is contained in all the main legal systems is similar to the practice of States and necessary for international customary law-making.¹⁰

⁷ Charney, *op. cit.*, pp. 534 and 535.

⁸ See, for instance, the Judgment of the International Court of Justice concerning South-West Africa, second phase, *I.C.J. Reports*, 6, 18 July 1966, p. 296.

⁹ Charney, *op. cit.*, p. 535.

¹⁰ Henkin, *op. cit.*, pp. 61 and 62.

In fact, the uniform domestic practice does not imply State consent, this practice having no link to international law. When the International Court of Justice, like its predecessor, the Permanent Court of International Justice, refers to general principles of law, it does not denominate the rules as such, nor does it require any evidence for their existence.¹¹

5. CUSTOMARY LAW

As is generally recognized, a customary norm exists if States behave in accordance with it and the international community accepts this norm as binding as a result of the practice of States and *opinio juris*. It has been submitted that its acceptance is required only from the international community, but not by all States individually.¹² However, this opinion, taking into account the role of the international community as a subject of international law, leaves less opportunity for individual States. The acceptance of a customary rule may also be established by acquiescence.¹³

The evidence usually used in order to establish the existence of international law rules is, in general, of a nature which would not require that all States should expressly or tacitly consent to all the new rules of customary international law. Such an assumption could speak to the consideration that many States do not know that the law is being made and thus have not formed an opinion.

In this context, the International Court of Justice, in the case of the *North Sea Continental Shelf* (1969), expressed the opinion that a representative majority of States is sufficient to establish a custom.¹⁴ To hold the view that custom has a consentaneous character would mean that new States could not be bound by a custom which came into existence prior to the obtaining of their independence. There would thus exist a material impossibility to prove that all States have consented to the customary rule. However, international practice has not confirmed this point of view.¹⁵

It may be mentioned that, usually, the International Court of Justice either declares that the rules applicable to a case represent positive rules, or else it bases them on evidence deriving from resolutions of international organizations and multilateral treaties and not on evidence of State practice regarding the existence of the specific customary law.

¹¹ See, for instance, the case of *Chorzow Factory* judged by the Permanent Court of International Justice, Series A, No. 17 (1928), pp. 27-29.

¹² K. Brierly, "The basis of obligation in international law", in *Other Papers* (1958), p. 13.

¹³ Henkin, *op. cit.*, p. 59.

¹⁴ *I.C.J. Reports*, 20 February 1969.

¹⁵ D. Carreau, *Droit international*, 2^e ed., Paris (1988), p. 244.

However, it seems to be hazardous to assert that traditionally customary law has been made by a few interested States, for all States.¹⁶

6. THE PLACE AND ROLE OF INTERNATIONAL ORGANIZATIONS IN THE PROCESS OF INTERNATIONAL LAW-MAKING

The necessity of using new mechanisms for law-making of universal character, alongside the traditional ones, is illustrated by the following two considerations: (a) the world is a multipolar one; and (b) the international community has as one of its missions to establish a certain uniformity of behaviour in the interest of all its members.

As a matter of fact, this process began after the Second World War with the establishment of the United Nations, whose role in the organization and initiation of the law-making process should be enhanced, attention being paid especially to the General Assembly and the Security Council.

Such forms, including also ad hoc multilateral diplomatic conferences and especially the conferences for the codification of international law by drafting and adopting multilateral treaties, as well as international organizations devoted to specialized subjects, should also be taken into consideration.¹⁷

According to some opinions, the formulation of international law rules within international organizations and conferences for codification and progressive development are considered as leading to a result equivalent to custom, as an expression of State practice and *opinio juris*.¹⁸

Nevertheless, such opinions do not take into account that, in the making of custom, a certain duration of a practice is necessary. Therefore, as a result of this new mechanism for international law-making, consisting of international organizations, the denomination of general international law is to be preferred, a formulation also used in many cases by the International Court of Justice.¹⁹

The activity of international law-making within international organizations is sometimes compared with the domestic legislative process, conferring upon the General Assembly the exercise of such a power when it adopts resolutions called declarations of international law.

¹⁶ Charney, *op. cit.*, pp. 537 and 538.

¹⁷ Louis Sohn, "International law implications of the 1994 Agreement", *American Journal of International Law*, No. 4 (1994), pp. 700 and 701.

¹⁸ Rosalyn Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in International Law and International System* (1987), p. 21.

¹⁹ About 40 such cases are mentioned (Charney, *op. cit.*, pp. 646 and 647).

Pursuant to a different opinion, the resolutions of international organizations, in general, are considered not binding, because the representatives of the States have no power to adopt resolutions having such a value.²⁰

It seems, however, that though the General Assembly does not exercise a legislative authority when it adopts any category of resolutions, it contributes to the general process of crystallization and formation of international law and this applies also to international case-law. Among a number of examples, one could mention those which have been cited in the field of the law of the sea, such as the rapid acceptance of the exclusive economic zone of 200 miles, supported in international jurisprudence and sanctioned by the United Nations Convention on the Law of the Sea of 1982, and the principles adopted by the United Nations Conference on the Human Environment in 1972.

In current Romanian teachings on international law, it is underlined that General Assembly declarations have a normative significance, reference being made, *inter alia*, to the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (resolution 1514 (XV)) and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted on 24 October 1970, the twenty-fifth anniversary of the United Nations (resolution 2625 (XXV)).²¹

The opinion has also been expressed that, because of the use of various multilateral forums, significant problems having a strong potential would have to pass through one or several processes before rules concerning them might become international law. This process would replace the traditional source of custom in international law.²²

A most recent study succinctly underlines that the flexibility of rules for drafting and putting into force some agreements reveals certain limits and that States have the freedom to adapt these rules, as long as basic rules of international law, so-called *jus cogens*, are not violated. In this context, it is said that the law of the international community need no longer be discovered by searching through archives for State practice. "Instead, there is a new dynamic mechanism, allowing the international community to create new law directly by all nations gathering around a conference table, and by patient

²⁰ See Ion Diaconu, *Curs de drept internațional* (Textbook of Public International Law) (1993), p. 52.

²¹ Gh. Moca, *Dreptul internațional public* (Public International Law), Bucharest (1992), pp. 63-66; D. Popescu, A. Nastase and F. Coman, *Drept internațional public* (Public International Law), Bucharest (1994), pp. 42 and 43, who consider that the General Assembly resolutions contribute to the customary law-making process.

²² Charney, *op. cit.*, p. 549.

negotiations, quiet consultations and long public debate to agree on what the law should be".²³

Describing the way the consultation group for the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea functioned, the point is made that an agreement reached in such a way truly represents the opinion of mankind and that it is likely to be approved by the General Assembly by a unanimous vote.²⁴

However, on 28 July 1994, the vote on resolution 48/263 was 121 in favour, none against, with 7 abstentions, but in July 1994 there were 184 States Members of the United Nations. This means that 56 States Members—30.43 per cent of the total membership of the organization—have not expressed themselves at all so far, regardless of the voting rules. If reference is made to the total number of States, the figure would be about 35 per cent. Under such circumstances, it seems to me that beyond the attractiveness of such dynamic vehicles of law-making, the flexibility and, furthermore, the speed of the process might imperil the accuracy of the product and its legally formulated subtleties and especially the formation of the State's consensus by way of concessions and compromises, taking all legitimate interests equitably into account in order to find a proper solution.

Having this in mind and without minimizing the significance of such a fascinating new idea which is very much attached to the vitality and viability of this new law-making process, it may be questioned whether this process would be preferable for "soft" law-making, rather than for a "hard" law-creating process. Or is there room for certain limits also?

7. CASE-STUDY: THE 1994 AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982

In July 1990, the Secretary-General of the United Nations initiated informal consultations to attempt to meet the objections of the industrialized States and so achieve universal participation in the Convention on the Law of the Sea.²⁵

Between 1990 and 1994, 15 meetings were held. After preliminary agreement was reached between some especially interested developed and developing States, the consultations were opened in 1992 to all States Members

²³ Sohn, *op. cit.*, p. 700.

²⁴ *Idem*, p. 701.

²⁵ *Idem*, p. 696.

of the United Nations and between 75 and 90 States became involved in the remaining meetings.

A tentative draft of the instrument was prepared and, after several revisions, it became a document embodying a proposed General Assembly resolution and an implementation agreement, with a substantive annex.

On 28 July 1994, the General Assembly adopted, by 121 votes to none, with 7 abstentions, resolution 48/263,²⁶ by which it approved the Agreement and the proposed procedure and authorized the Secretary-General to make the necessary arrangements. The Agreement was opened for signature on 29 July and was promptly signed by 50 States. It will enter into force when 40 States establish their consent to be bound by it, subject to the condition that this group must include at least 7 States representing "pioneer investors" and that at least 5 of these States must be developed States (i.e., States willing to pay a large share of the expenses of the new Authority).

The Agreement is meant to be applied provisionally. In the light of the General Assembly resolution and the Agreement, the whole procedure is predicated on the desire of the international community to achieve universal participation in the Convention, with the hope that the Agreement, by removing obstacles to the ratification of the Convention, will expedite such universalization.²⁷

8. CONCLUDING REMARKS

The drawing-up of a universal international law, applicable to all States, without the distinctions which existed when international society was bipolar, could more efficiently contribute to the resolution of problems affecting the interests of all States and peoples.

According to the concept examined in my presentation, it was submitted that treaties would not be adequate tools for universal international law-making, the procedure for their conclusion being difficult and complicated and accession not attaining universal participation. For such reasons, one should resort to the increasing role of multilateral forums in the drawing up and promotion of general international law.²⁸

As a consequence, it is maintained that the classical sources of international law would be enhanced with a kind of a quasi-legislative process. Such an opinion raises two questions:

²⁶ The draft resolution (A/48/L. 60 and Add. 1) was proposed by Fiji and a long list of sponsors, including the United States of America, on 22 June 1994.

²⁷ Sohn, *op. cit.*, p. 698.

²⁸ Charney, *op. cit.*, p. 551.

- (a) Whether States would be willing to recognize vehicles for international law-making which would not be in accordance with their sovereignty and autonomy;
- (b) Whether States would accept the use of proceedings which may have a supranational character, similar, to a certain extent, to European community law.

Obviously, the sovereignty of today is not the sovereignty of 50 or even 25 years ago, nor will it be the sovereignty of tomorrow, though its “black box” has become transparent.²⁹ However, this living concept has accompanied international society for centuries.³⁰

At the same time, it appears that statehood, as a fulcrum of international law, will continue to dominate the international arena, with its territorial and jurisdictional sovereignty, equality of rights and so on, no matter how we qualify the States concerned, as liberal or non-liberal States.

In this context, what has to be emphasized is the need for a new impetus towards a growing role, within the international community, for international organizations and structures, including trends to integration.

Such developments are also mirrored in the American teachings of international law, the doctrine which puts emphasis on institutional processes, investigating the way in which international organizations could act as a broader process of international “governance”, facilitating cooperation among States in the pursuit of their own interests.

However, the diversity of States, their stage of development, their needs should be taken into consideration.

As someone said, referring to the experience of the European Union, the States members of that organization are relatively homogeneous and the substance of that homogeneity is, *inter alia*, a particular set of political and economic beliefs.³¹

To my mind, we have to rethink or even reconceptualize a number of existing concepts in international law, such as sovereignty, statehood, international organizations, international crimes (i.e., terrorism, genocide), *jus cogens*, mankind and international “governance”, to name a few of them.

The establishment of a delimitation between fields which should be regulated by a certain category of norms and other fields, between norms of *jus cogens* and regular norms, as well as the establishment of certain limits somewhat similar to standards in environmental law would trace the parameters

²⁹ Slaughter Burley, *op. cit.*, p. 226.

³⁰ Theodor Meron, “The authority to make treaties in the late Middle Ages”, *American Journal of International Law*, No. 1 (1995), pp. 3 and 14-19.

³¹ Slaughter Burley, *op. cit.*, p. 234.

for State behaviour and would contribute to the drive to discover new concepts and norms. Let us hope that such concepts and limits may serve as key devices in framing the foundation for a twenty-first century international law as a language for all of humanity.

OPEN-FLOOR DISCUSSION

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. HISASHI OWADA

Ms. Ramaswamy Iyer* wondered whether Mr. Owada had any suggestions for bringing transboundary entrepreneurial activities, and in particular the activities of multinational corporations, within the ambit of international law to reflect the realities of global economic and environmental interdependence and to ensure continued justice and stability within the international order.

Mr. Ajomo** asked whether, in view of the failure of efforts to formulate a code of conduct for transnational corporations, it was not time to elevate them to the status of subjects rather than objects of international law so as to make them directly answerable for their nefarious activities, especially in developing countries. He further asked whether it might be possible to formulate a theory whereby self-determination, which had been elevated to the status of *jus cogens* during the lifetime of the United Nations and had been most salutary in helping States to emerge from tutelage to independence, could be used to reorder affairs within States in order to prevent internal conflicts that posed a threat to international peace and security.

Mr. Nanda*** stated that self-determination and humanitarian intervention were ambiguous concepts. Despite the great utility of the principle of self-determination in the past, especially in colonial times, the question of how one should refashion that concept for implementation in the current international arena was an important issue for international lawyers, given the anarchy reigning in many parts of the world. The same was true of international humanitarian intervention. The time had come, he felt, for interna-

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tional lawyers to recognize that the ambiguity of those concepts was causing considerable confusion and to find ways to resolve the conflicts between norms such as justice and stability or territorial integrity and self-determination. International law associations and the United Nations might make concrete suggestions, perhaps involving a special working group to deal with some of those concepts. Mechanisms should be created to enable the international community to review specific claims to self-determination or humanitarian intervention.

Mr. Choi,* commenting on Mr. Owada's statement that, owing to the great interdependency of international economic relations, no single nation could control those relations, wished to know Mr. Owada's personal view regarding the application of that thinking to the ongoing trade friction between Japan and the United States of America.

Mr. Przetacznik** felt that applying the terms "soft" or "hard", borrowed from computer language, to international law was improper. International law, he said, was either "valid" or "invalid".

Mr. Owada (reply) said that his intention had been simply to offer a conceptual framework for the discussion of problems related to justice and stability in the international legal order. The concrete applications mentioned by the participants, on the other hand, involved both the problem of political reality versus legal theory and that of constructive analysis of problems from a legal point of view, which would lead to concrete solutions.

On the question of the regulation of multinational corporations, the need for which certainly existed, one was forced to work within the institutional framework created in the context of what he had described as the Westphalian legal order, which involved compartmentalization of the competence for dealing with such issues and was clearly not satisfactory for that purpose. Various theoretical possibilities included unifying the regulatory regime on a global basis—an ideal but unrealistic solution; harmonizing regulations in each national jurisdiction so as to produce a universally applicable result; or leaving to individual countries the competence for dealing with such issues. The last-mentioned solution, however, would require the application of national legislation beyond national borders, which would violate the territorial competence of another State and was therefore not practical.

Regarding self-determination, it was important not to confine that concept to its historical legacy, which meant the right to attain sovereignty. It was

* Representative, International Law Association, Revere, MA, United States of America.

** Administrative Law Judge, New York, NY, United States of America.

rather a question of creating an environment that would allow the people involved to exercise the freedom to govern themselves; hence the concept ranged from the establishment of independence as a sovereign State to the most rudimentary form of local autonomy. The concept of self-determination must be re-examined in that broader and more fundamental context, rather than being dealt with from an institutional point of view. The same considerations applied to humanitarian intervention to the extent that human dignity was a value that could be accepted by the global community. However, the classic concept of humanitarian intervention, aimed at the protection of one's own nationals, had already been discarded under the Charter system, while the newer concept related to the question of whether to intervene out of humanitarian motives to save human values and human lives in the context of a collapse of governance in a particular territorial entity. While the motive was admirable, the means needed to be carefully worked out so as to reflect the sense of justice of the international community as a whole.

He felt it was not the appropriate time or place to express his personal views regarding Mr. Choi's question, but invited Mr. Choi to discuss them with him privately.

His intention, he said, had been simply to draw attention to the delicate nature of the problems facing the current international legal system, and in particular the contradiction between the legacy of the past, which still remained the basic framework for dealing with issues, and the political and socio-economic reality of the times, which had already gone beyond that antiquated framework.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION BY MS. DUMITRA POPESCU

Ms. Szafarz* said it was meaningful, when speaking of universal international law, to mention regional international law as well. One could speak of a pan-European international law *in statu nascendi*. The contemporary international law of Europe had its origins in treaties adopted since the 1950s. A total of 222 treaties relating specifically to Europe had been concluded within the framework of the Council of Europe, the Economic Commission for Europe or the Conference on Security and Cooperation in Europe (CSCE) (which had become the Organization for Security and Cooperation in

* Head of the Group on International Law, Institute of Law Studies of the Polish Academy of Sciences, Warsaw, Poland.

Europe (OSCE)) as well as independently of those institutions. The particular international law currently being developed in Europe might be referred to as the international law of Europe of the second generation and differed from that of the first generation, which had been developing since the seventeenth century and had given rise to general international law. Such second-generation law was being established side by side with general international law and would continue to be particular law. The international law of Europe was not in derogation of, but rather complementary to, general international law and formed only part of the current European legal space.

Mr. Sohn* said that the fact that approximately a third of the Members of the United Nations had not participated in the preparation of the Agreement concluded in 1994 relating to the implementation of Part XI of the Convention on the Law of the Sea in no way detracted from the validity of that document. It had been adopted by the General Assembly sitting in session, to which all Members had been invited, just as they had been invited to the consultations that had preceded the session. They were therefore bound by the Agreement even if they had chosen to remain absent or not to vote, for, in the General Assembly as in the Security Council, neither abstention nor absence constituted a veto.

It had become a general principle in the United Nations that the General Assembly could contribute to the crystallization of international law and was actually the ideal body for that process, since most of the States of the world were represented in it. The United Nations, through the General Assembly, had come to represent the conscience of mankind. If it took a decision by unanimity or near-unanimity, then that was international law.

Mr. Noll** referred to the need, alluded to by Ms. Popescu, for an increasing role for multilateral forums and international organizations in the drafting and promotion of general international law. He felt that, in the future, a more detailed study of the law-making work already being done by international organizations would be beneficial. Attention should be paid not only to abstract concepts of general international law, but also to the international rules that complemented the law. He mentioned the role played for many decades by the International Telecommunication Union (ITU) in developing multilateral forums in which telecommunications administrations and persons directly affected by rules and standards in the field of telecommunications worked out, on an ongoing basis, rules to facilitate smooth

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** Legal Adviser, International Telecommunication Union, Geneva, Switzerland.

operation and development that supplemented the basic principles established in the ITU treaties. He wished to know whether Ms. Popescu had in mind multilateral forums of that kind and, if not, what other forums she envisaged.

Ms. Popescu (reply), referring to the question of international forums, said that both the more universal organizations and those dealing with special subjects participated in the process of crystallization of international law, though in different ways. Regional organizations should be created in accordance with the Charter of the United Nations and should operate in agreement with the more general international organizations, such as the United Nations. Technical organizations such as ITU, through the regulations they established, did indeed play an important role in the creation of international law.

The term “soft international law”, in contrast to “hard international law”, had come into being in connection with resolutions of international organizations having more the character of recommendations than of law, since their adoption did not involve all the steps taken in the conclusion of treaties, namely, negotiation, signature and ratification. She felt that they were useful terms.

COMMENTS AND SUGGESTIONS OF A GENERAL NATURE

Mr. Nasser* said that various aspects of the legal system must be called into question. The balance between deterrence and dispute settlement, for example, had shifted greatly towards the latter. Owing to the weakness of the mechanisms of dispute settlement, by the time many disputes became ripe for third-party resolution, the parties had already become too entrenched in their positions. It was significant that treaties had numerous signatories but few adherents. It was high time, therefore, that the international community took steps to forestall such a situation, making provision for dispute settlement a prerequisite for signing.

Equally important was the distinction between prevention and cure, both terms being applicable to disputes. An ethos of prevention, something that international law in particular needed to cultivate, could create a fundamentally different environment and only the establishment of effective channels of communication could permit such an approach. One suggestion was

* Senator, Parliament of Jordan, Amman, Jordan.

to create a United Nations-based community of specialized delegates charged with receiving and responding to a defined catalogue of complaints from their counterparts. A level of obligation should be incorporated into such a framework, as there must be a mandatory aspect to any workable system. The absence of a centralized structure for discussion as opposed to policy formation had cost the world community dearly.

Regarding the capacity of communities or peoples seeking the right of self-determination to represent themselves as international actors, it was time to recognize the proper criterion for representation. Discrimination against them seemed to outweigh their historic credentials. Such discrimination made it more difficult for States to invoke national sovereignty as a shield against outside interference. An overview of international law led to disillusionment and a lack of spirit, endeavour or understanding. A grass-roots transformation of the system was essential if any part of it, including dispute settlement, was to be improved. Strategies of self-interest must be limited and the view that a cooperative, far-sighted world community was basic to individual prosperity must be developed. What was needed was a revolution in individual thought patterns.

His country, Jordan, had paid heavily the price of lack of communication. The fact that the country's resources were limited had been completely ignored by the world community when Jordan accommodated the Palestinian refugees at great expense, complying with international law and the principles of human rights, and again when it received many refugees as a result of the Gulf war.

Mr. Haj Ali* pointed out that in addition to international law, which was created by human beings, there also existed divine law. If a particular people chose to apply its religious law and incorporate it into its local law to govern behaviour within the State, certain questions arose, in view of the appeal for global and compulsory application of international law. First, was there not a pressing need for the principles and concepts of religious law to be included among the sources of international law? And had the time not come to study the bases of the discrepancy between international law and religious law, especially in the area of international instruments on human rights, with a view to harmonizing them and to protecting the right of worship, which was no less important than other human rights?

Also, there existed a perceptible trend towards subjecting the sovereignty of States to international law. Such a tendency might be disturbing to certain developing States: it would have to apply to all States, both large and small,

* Chief Justice, Khartoum, Sudan.

strong and weak, but what was the mechanism that would guarantee the equality of all States before international law?

Mr. Djokić* commented that in recent years there had been an increasing number of violations of the principles of the Charter of the United Nations and of international law by States, regional organizations and even organs of the United Nations. Proper procedures were being ignored and principles of international law were not taken into account when decisions were taken on vital questions. Such a trend weakened cooperation among States and called into question the role of international law in regulating international relations. Examples of such violations in the case of the crisis in the former Yugoslavia were the breach of the principle of inviolability of international borders by premature recognition of the secessionist former Yugoslav republics, whereby priority had been accorded to internal administrative borders over the internationally recognized borders; the granting of the right of self-determination not to the peoples, but to the constituent republics of the former Yugoslavia, so that secession was recognized without prior political settlement; the unilateral denunciation of bilateral treaties against the Federal Republic of Yugoslavia without any legal foundation; the adoption by the General Assembly on 22 September 1992 of resolution 47/1 concerning the non-participation of the Federal Republic of Yugoslavia in the work of the General Assembly, an unprecedented and legally unfounded decision; the exclusion of the Federal Republic of Yugoslavia from a number of meetings of the States parties to the international human rights treaties, despite the fact that resolution 47/1 did not affect the status of the Federal Republic of Yugoslavia as a party to treaties; the Security Council's adoption of resolutions concerning sanctions against the Federal Republic of Yugoslavia without taking into account the factual situation and legal grounds; and the establishment by the Security Council of the ad hoc International Criminal Tribunal for the Former Yugoslavia, a grave precedent in international law, when the prevailing opinion in the international community was that an international criminal court should be established on the basis of consent by States, in other words by multilateral treaties, and could not be a subsidiary body of the Security Council. For the sake of a just and stable international order, the principles of international law and of the Charter of the United Nations should be fully respected and, in cases of violation of them, affected States should be allowed to appeal to an international judicial organ such as the International Court of Justice to obtain a legal interpretation of the decisions or measures in question.

* Ambassador Extraordinary and Plenipotentiary, Permanent Mission of Yugoslavia to the United Nations, New York, NY, United States of America.

Mr. Jammo,* referring to the contradictions mentioned by Mr. Owada between territorial integrity and self-determination, between justice and peace and between peace and stability, stated that what was currently taking place in Bosnia and Herzegovina, in Africa and in the Chechen Republic made one wonder whether international law was not an obstacle to the preservation of small peoples from domination and destruction by the major Powers on the pretext of preservation of territorial integrity. No demand was being made for proof of the right of an aggressor State to consider as part of its territory the land of the people against which it waged its aggression. The question, for example, of when and how the Caucasus, including the Chechen Republic, had been annexed to Russia went unanswered. Thus the world stood by as crimes were committed against the Chechen people, a people that had more than once been the victims of killing, banishment, war and the most horrible atrocities. If it was international law that stood between the Security Council and the cessation of aggression against small peoples, why was there no call for the establishment of unshakeable rules that would bring justice to all the peoples of the earth and peace to humanity, so that international law would not simply implement the will of the strong?

* Representative, Parliament of Jordan, Amman, Jordan.

PERSPECTIVAS REGIONALES ANTE EL DERECHO INTERNACIONAL: REFLEXIONES ACERCA DE LAS TENDENCIAS ACTUALES

*María Teresa Infante Caffi**

I. PRESENTACIÓN

Uno de los objetivos fundamentales de esta reunión es el examen del derecho internacional como un lenguaje en las relaciones internacionales, enfoque que orientará nuestra presentación relativa a las perspectivas regionales en la creación y vigencia de nuevos principios en las relaciones entre los Estados y si se observan conexiones con tendencias más universales.

La contribución hecha por la Organización de las Naciones Unidas a la creación y puesta en práctica de principios e instituciones jurídicas que cumplan con requisitos de legitimidad y eficacia en una sociedad internacional heterogénea¹ hace más propicia la introducción de nuestro propio análisis para celebrar de esta manera sus 50 años.

Compartiremos con ustedes algunas reflexiones generales acerca de determinados signos que se observan en la perspectiva regional latinoamericana y de las Américas en relación con las características y contenidos del derecho internacional. Observaremos en esta presentación la existencia de tendencias que tienden a configurar nuevas aproximaciones a los principios de carácter general, así como redefiniciones de planteamientos acerca de la relación entre la soberanía del Estado y el derecho internacional.

En una visión histórica que permita situar adecuadamente estas ideas, las posiciones regionales en las Américas se han expresado formalmente en dos planos interrelacionados y mutuamente fecundos. Por una parte, se ha desa-

¹ J. A. Carillo Salcedo, *El Derecho internacional en un mundo en cambio*, Madrid, Tecnos (1985), pp. 25-40.

* Presidente de la Sociedad Chilena de Derecho Internacional, Santiago, Chile.

rrollado un debate acerca de la existencia de un ordenamiento jurídico regional o subregional, específicamente hispanoamericano, dotado de cierta autonomía frente al ordenamiento general y cuya efectividad derivaría de la adhesión de todos los Estados que participan de este sistema específico².

Por otra parte, se han planteado determinadas posiciones regionales a nivel doctrinal y diplomático, sustentando las estrategias jurídicas de los Estados hispano- o latinoamericanos tendientes a ampliar sus márgenes de autonomía en el plano externo y para compensar o superar desigualdades de hecho con otros Estados. La características que definen al sistema internacional e interamericano del siglo XIX y en el presente siglo sirven de marco a estos enfoques, los cuales exponen con claridad las situaciones que afectan a la plena aplicación de nuevos principios o que buscan dar un sentido más igualitario al derecho clásico. La discusión acerca de los principios básicos que rigen las relaciones entre los Estados se confunde con temas de gran interés político, como más tarde se ha repetido en el propio debate de esta Organización.

Respecto de la primera aproximación mencionada, recordemos la amplitud y fuerza de la tesis de la existencia de un derecho internacional americano, definido en su expresión más extrema como un ordenamiento jurídico correlacionado con el derecho internacional general más que subordinado a éste³. La teoría acerca de la existencia de particularismos jurídicos⁴ ha estado también vinculada a la necesidad de explicar fenómenos jurídicos que tienen existencia a nivel regional o local, cuya eficacia entre los Estados participantes no puede ponerse en duda, pero cuya oponibilidad frente a terceros plantea puntos críticos.

Conocemos que una expresión máxima de este debate se suscitó en el asunto del Asilo Diplomático (Colombia y Perú)⁵ hace algunas décadas, el cual forma parte de la discusión ya clásica acerca de la teoría de la costumbre como fuente del derecho internacional y de las condiciones de existencia de una costumbre regional o local derogatoria de principios generales.

Recordemos que en el enfoque desarrollado por la Corte Internacional de Justicia en 1950 se profundizó en torno a una visión voluntarista de la costumbre cuando ésta modifica las normas generales, exigiendo su prueba mediante precedentes que no son igualmente necesarios para demostrar el reconocimiento generalizado de la vigencia de otras normas. Esta institución, la

² A. Álvarez, *Le droit international américain*, Paris, 1910, p. 259; J.-M. Yepes, "La contribution de l'Amérique latine au développement du droit international public et privé", *Recueil des Cours*, vol. 32 (1930, III), pp. 788-790; 1912; J.-M. Yepes, *Les problèmes fondamentaux du droit des gens en Amérique*", *Recueil des Cours*, vol. 47 (1934), I, pp. 5-16. La expresión fue definida por el Instituto Americano de Derecho Internacional en 1924. Citado en Yepes, "La contribution de l'Amérique latine . . .", págs. 788 y 789.

³ Opinión disidente del juez A. Álvarez, "Asunto del asilo", *C.I.J. Recueil 1950*, p. 294.

⁴ R. Díaz Albónico, "Contribution à l'étude du fait illicite en droit international : le particularisme latino-américain", *Estrasburgo* (1974), p. 362. Tesis no publicada.

⁵ "Asunto del asilo", *C.I.J. Recueil 1950*, p. 276.

del asilo diplomático, continúa estando presente en la región latinoamericana, planteando permanentemente las interrogantes acerca de su vinculación con normas de carácter más general que permitirían extenderla a terceros Estados.

En igual sentido, otros principios invocados en Hispanoamérica como el *uti possidetis iuris*, las limitaciones y proscripciones al uso de la fuerza y la condena a la intervención han tenido aceptación de parte de la comunidad internacional después de largas décadas de debate en torno a su validez jurídica. La naturaleza auténticamente jurídica o regional de algunos conceptos jurídicos empleados en la práctica latinoamericana aparece replanteada en estudios recientes⁶ en especial, cuando su origen se encuentra en fuentes meramente convencionales. Sin embargo, esto no desmerece la importancia que tuvo en su época el debate en el cual esos conceptos fueron expuestos, especialmente en controversias sometidas a arbitrajes y en las primeras etapas de la codificación.

Por otra parte, es de interés tener en cuenta que la política jurídica de los Estados latinoamericanos a lo largo de este siglo ha estado relacionada con la búsqueda de la consagración de determinados principios a nivel general o universal que refuercen la igualdad soberana, lo cual es uno de los orígenes más importantes del principio de no intervención como una obligación entre los Estados y que tiene importantes expresiones en el plano convencional y de los principios generales del derecho internacional.

Otra área que aparece estrechamente ligada a esta perspectiva innovadora ha sido la responsabilidad internacional que puede surgir en el marco de las relaciones entre los Estados y personas extranjeras, la definición restrictiva del ilícito de denegación de justicia, y las reglas sobre trato a extranjeros en el plano interno vinculadas a la institución de la protección diplomática, entre otros puntos, como lo muestran los enfoques que dominaron los primeros trabajos sobre la materia en la Sociedad de las Naciones y en la Comisión de Derecho Internacional de las Naciones Unidas⁷.

Finalmente, los análisis acerca de los orígenes de la gran reforma del derecho del mar que conduce a la hoy día vigente Convención de las Naciones Unidas sobre el Derecho del Mar (1982) tienen en cuenta las evidencias de esta estrategia que dió origen a este fenómeno regionalista expresado mediante posiciones que sostuvieron determinados países latinoamericanos en sus legislaciones internas, acuerdos internacionales y planteamientos políticos concerta-

⁶ J. Barberis, "Les règles spécifiques du droit international en Amérique latine, *Recueil des Cours*, vol. 235 (1992), pp. 223-227.

⁷ "Draft articles on the responsibility of the State for injuries caused in its territory to the person or property of aliens", *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, by F. V. García Amador, L. Sohn and R. R. Baxter (Oceana Publications, Inc., New York, 1974), pp. 1-132.

dos. Evidencias de este fenómeno se plantean en las actuales negociaciones sobre especies transzonales y altamente migratorias en el marco de esta Organización, pero de manera más fragmentada y dentro de alianzas más amplias con terceros⁸.

En el presente sistema internacional, cuyas características en cuanto a la interconexión de los fenómenos y problemas a través de las fronteras de los Estados ofrecen mayores complejidades para la creación del derecho internacional y la precisión de sus funciones, las reflexiones acerca de la vigencia de los enfoques regionales presentan algunos signos de variación respecto de las posiciones del pasado.

En este sistema reconocemos como desafíos básicos para un rol activo del derecho internacional, tres grandes cuestiones que se manifiestan particularmente a nivel multilateral:

- a) La definición del contenido de la paz y seguridad internacionales y de los fenómenos que constituyen una amenaza o un quebrantamiento de esos valores, incluyendo la perspectiva de las normas aplicables a los conflictos armados, las acciones que comprende el mantenimiento y restablecimiento de la paz y la vigencia de mecanismos que hagan efectiva la noción de crímenes internacionales;
- b) La introducción de enfoques globales a problemas definidos tradicionalmente de una manera más próxima a los intereses nacionales y al plano interno y reservado de los Estados, como lo plantea de manera evidente la cuestión de la protección del medio ambiente;
- c) La dinámica relación entre universalidad y diversidad en la definición de enfoques de protección de la persona humana, grupos vulnerables, derechos económicos y sociales, y otros temas conexos.

Estos desafíos impactan no sólo la determinación del contenido de las normas, sino que además acentúan la naturaleza cambiante de la estructura de coexistencia y cooperación en el derecho internacional como la calificara W. Friedmann⁹ hace tres décadas. Esto desafíos encuentran al derecho internacional operando en un doble plano, tanto como garante de la preservación y profundización de determinados valores fundamentales del orden internacional, así como un agente transformador de las relaciones internacionales.

El ejemplo más claro en este último caso es la naturaleza de los nuevos compromisos que adquieren los Estados en virtud de los convenios ambien-

⁸ E. Rey Caro, "La conservación de los recursos vivos en la alta mar y las nuevas tendencias de la legislación en América Latina", Anteproyecto de ponencia, XVIII Congreso, Instituto Hispano-luso-americano de Derecho Internacional, Chile, 4-10 de septiembre de 1994, en prensa.

⁹ La nueva estructura del derecho internacional, Editorial F. Trillas, Mexico (1967), pp. 86-94.

tales referidos a la biodiversidad, cambio climático y capa de ozono, así como la tarea de precisar los principios que involucra la noción del desarrollo sostenible consagrada en el Programa 21 adoptado en 1992¹⁰. Una expresión práctica de los problemas que enfrenta el derecho internacional en esta materia ha sido identificada a través de la relación entre el medio ambiente y el comercio internacional y la capacidad de las normas internacionales para operar en un marco de mutua complementación y apoyo cuando sus objetivos no son coincidentes y pueden incluso anularse recíprocamente¹¹.

En esta perspectiva, encontramos antecedentes significativos para reflexionar acerca de la vigencia de enfoques regionales en dos áreas principales de las relaciones internacionales contemporáneas, las cuales, debe constatar-se, superan una visión estrictamente latinoamericana. Empleamos el término de regional en el sentido de agrupación de Estados que no representan al conjunto de la comunidad internacional y que tienen vinculaciones geográficas y de vecindad más estrechas entre ellos, aunque no son de igual nivel de desarrollo.

Se trata del replanteamiento de la democracia a nivel hemisférico y sus consecuencias en el plano jurídico, así como de los enfoques alternativos de la antigua posición en materia de trato a las inversiones extranjeras, que tuviera como expresión máxima la vigencia de la doctrina Calvo en las relaciones económicas externas de los países latinoamericanos.

II. LA SOBERANÍA EN SUS NUEVAS DIMENSIONES

El tema de la democracia no ha sido ajeno a la agenda de las relaciones hemisféricas por largas décadas. En la práctica, el sistema que tiene como su eje la Carta de la Organización de los Estados Americanos (OEA) — 1948 y ulteriores reformas — ha incorporado la mención de la democracia representativa en instrumentos vinculantes y otros de naturaleza más bien política. La generación de mecanismos regionales de protección de la persona humana que tiene su expresión más clara en la creación de la Comisión Interamericana de Derechos Humanos en 1959 y la Convención Americana de 1969 ha estado también vinculada con esta materia, aunque preferentemente para reconocer la vinculación entre protección de derechos fundamentales que

¹⁰ *Informe de la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo, Río de Janeiro, 3 a 14 de junio de 1992* (publicación de las Naciones Unidas, No. de venta: S.93.I.8, y correcciones), vol. I: *Resoluciones aprobadas por la Conferencia*, resolución 1, anexo II.

¹¹ N. Shaw and A. Cosby, "GATT, the WTO and Sustainable Development. Positioning the work program on trade and environment", International Institute for Sustainable Development, Canada (1994).

tienen una naturaleza obligatoria y el régimen político que presta una garantía específica o es condición de su vigencia.

Ella plantea desde el punto de vista jurídico dos preguntas básicas, cuyas respuestas deberían ser objeto de algún debate en este Congreso:

1. ¿De qué manera establecer lineamientos jurídicos para precisar la superioridad o compatibilidad del valor de la preservación o restauración democrática y la legitimidad de los procedimientos para conseguirlo, con el principio de no intervención?

2. ¿Cuál es la naturaleza de la acción o respuesta colectiva frente a una ruptura o amenaza de ruptura del orden democrático compatible con un orden jurídico internacional?

En el enfoque que ha prevalecido a nivel hemisférico, expresado en el Compromiso de Santiago con la democracia y con la renovación del Sistema Interamericano (1991) así como en la resolución 1080 sobre democracia representativa (1991), adoptadas por la Asamblea de la OEA en su vigésimo primer período de sesiones, la democracia aparece vinculada a ciertos elementos fundamentales. Estos son: la promoción de los derechos humanos y la prevención de sus transgresiones, para lo cual deberán existir instrumentos y procedimientos regulares y en pleno funcionamiento; la naturaleza complementaria de las medidas que promueven o facilitan al funcionamiento de la democracia, incluyendo aspectos económicos, la superación de la pobreza (principio f, art. 3, Carta de la OEA) y otros como las implicancias del tráfico de drogas y la corrupción pública, que pueden afectar la vigencia o eficacia de las instituciones democráticas; así como las respuestas frente a un quiebre de la democracia a través de los mecanismos multilaterales. Este tipo de tema ha puesto de manifiesto una vez más la relación entre competencias de las Naciones Unidas y el sistema regional en materia de mantenimiento de la paz y la seguridad internacionales y la aplicación de sanciones¹².

Junto con definir estos elementos de la relación hemisférica, se han creado mecanismos que comprenden la reunión ad hoc de ministros de relaciones exteriores o un período extraordinario de sesiones de la Asamblea General para analizar colectivamente los hechos y adoptar las decisiones que estime

¹² J. L. Ramírez León, "La OEA, los países latinoamericanos y la democracia en el hemisferio", p. 46. Monografía presentada al seminario El apoyo a la democracia en América latina: España y los Estados Unidos en el Cono Sur, Marbella, Chile, 8-9 de septiembre de 1994, en prensa. En general, E. Jiménez de Aréchaga, "La coordination des systèmes de l'ONU et de l'Organisation des États Américains pour le règlement pacifique des différends et la sécurité collective", *Recueil des Cours*, vol. 111 (1964), pp. 423-526; también "Évolution récente du régionalisme interaméricain, Régionalisme et universalisme dans le droit international contemporain, Société française pour le droit international, Éditions A. Pedone, Paris (1977), pp. 45-60.

apropiadas conforme a la Carta de la OEA y al derecho internacional (resolución 1080 de 1991). Un nuevo artículo 9 de la Carta de la OEA, incorporado en 1992, establece que un miembro de la OEA cuyo gobierno democráticamente constituido sea derrocado por la fuerza podrá ser suspendido del ejercicio de su derecho de participación, cuando hayan sido infructuosas las gestiones diplomáticas que la organización hubiera emprendido con el objeto de propiciar el restablecimiento de la democracia representativa en el Estado miembro afectado. Por otra parte, esta suspensión no paraliza la capacidad de la OEA para emprender nuevas gestiones diplomáticas tendientes a coadyuvar al restablecimiento de la democracia representativa en ese Estado. Se observa la transición desde los enfoques que consideraban esta materia como una cuestión que afectaba principalmente las doctrinas sobre el reconocimiento de Gobiernos, como mecanismo de aprobación o reprobación para favorecer consideraciones más cercanas al funcionamiento de un esquema colectivo basado en fundamentos jurídicos. El Comité Jurídico Interamericano ha comenzado a ocuparse de este tema en años recientes.

Estos principios y mecanismos, expuestos someramente, pueden ser mirados en conjunto con los enfoques que otros esquemas regionales, en especial la Conferencia de Seguridad y Cooperación Europea¹³, y el sistema europeo de derechos humanos, así como el propio sistema de las Naciones Unidas, han comenzado a promover o diseñar más abiertamente en los últimos años. Una comprensión más abierta de la tendencia a nivel de diversos instrumentos y organismos internacionales permitiría situar la cuestión de la democracia en un panorama en plena evolución, cuyas opciones no están plenamente decantadas, reconociendo que todas ellas se vinculan a ciertos ámbitos fundamentales de la cooperación política multilateral. Doctrinalmente, el tema también está siendo debatido, con enfoques que plantean la emergencia o la vigencia de un derecho a la democracia¹⁴ o la mayor relevancia de la teoría jurídica de los derechos humanos para evaluar la legalidad internacional del régimen político¹⁵, con enfoques que hacen prácticamente desaparecer el ámbito interno de la jurisdicción de los Estados.

Teóricamente el tema se relaciona con las discusiones más recientes sobre la responsabilidad internacional, la naturaleza de las obligaciones del Estado

¹³ Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, 21 November 1990. Conference on Security and Cooperation in Europe, *International Legal Materials*, 30 (1991), p. 190. También, Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 June 1990. Conference on Security and Cooperation in Europe, *International Legal Materials*, vol. 20, p. 1305.

¹⁴ Th. M. Franck, "The emerging right to democratic governance", *American Journal of International Law*, vol. 86 (1992), pp. 46-91; H. Muñoz, "El derecho a la democracia en las Américas", *Estudios Internacionales* (1995), p. 109, en prensa.

¹⁵ M. Reisman, "Sovereignty and human rights in contemporary international law", *American Journal of International Law*, vol. 84 (1990), 4, pp. 874-876.

de respetar los derechos humanos fundamentales y las consecuencias jurídicas de su transgresión, como lo ha planteado el Institut de droit international¹⁶. En especial, entre las opciones que fundamentarían una preocupación colectiva se trataría de avanzar en las vinculaciones entre los instrumentos existentes en materia de derechos humanos, como es el caso del Pacto Internacional de Derechos Civiles y Políticos (1966), la Convención Americana de Derechos Humanos (1969) y otras convenciones sobre materias vinculadas al mismo problema. Esta preocupación también aparece relacionada con el concepto comprensivo del mantenimiento de la paz, si bien éste último requiere de condiciones de conflicto que no necesariamente están presentes en toda ruptura o debilidad de un régimen democrático y que en consecuencia operan como una limitación a la legitimidad de la acción multilateral. Un instrumento puesto en práctica en las Naciones Unidas, cual es la creación de mecanismos de observación electoral que operan mediante acuerdo con los sectores comprometidos, constituye otro signo de la variedad de aspectos y problemas que envuelve la consideración jurídica de la democracia.

Finalmente, para completar este panorama, debemos señalar que esta tendencia implica una tarea más directa de las jurisdicciones y tribunales internos en materia de aplicación del derecho internacional. La respuesta que ellos dan a estas cuestiones no resulta fácil si no existen normas acerca de la jerarquía de las fuentes del derecho que señalen la primacía clara del orden internacional sobre el interno o de determinadas convenciones por sobre las normas de origen interno. Por otra parte, tratándose de materias en las cuales muchas veces las normas no son "*self-executing*" sino que entregan a cada Estado la determinación de la forma de su ejecución, puede también suscitarse el problema de que se recurra a los tribunales domésticos ante un vacío de la legislación interna creando nuevamente la necesidad de reenviar la solución al derecho internacional.

En otro ámbito en el cual se percibe una adopción de posiciones más flexibles frente al rol que puede cumplir el derecho internacional y la armonización de doctrinas económicas con sus consecuencias jurídicas, se está observando en materia de tratamiento a las inversiones extranjeras, así como en el régimen de protección de inversiones y de solución de controversias en torno a ellas. Recordemos que esta materia ha ocupado la atención tradicional de las posiciones de los Gobiernos y juristas latinoamericanos, fundamentando una reacción contra abusos cometidos por potencias extranjeras en materia de interferencia con decisiones y políticas adoptadas a nivel nacional sobre materias económicas.

¹⁶ Resolución de 1989 sobre "La protección de los derechos humanos y el principio de no intervención en los asuntos internos de los Estados".

La posición latinoamericana¹⁷ se definió como la reacción a políticas de intervención expresándose principalmente en la doctrina Drago, respecto de la ilicitud del cobro compulsivo de las deudas y la doctrina Calvo. Según esta última, es ilegítima la protección diplomática y el inversionista extranjero, en igualdad de status que el nacional, sólo contaría con los recursos judiciales internos y el derecho a ejercer los recursos de orden interno previstos en el Estado donde sitúa sus actividades.

En esta perspectiva, la posición ha tenido tres pilares básicos: la igualdad de trato entre nacionales y extranjeros, la aplicación estricta de la regla del agotamiento previo de los recursos internos, y la renuncia a la protección diplomática mediante una cláusula expresa contenida en los contratos correspondientes que remiten las futuras controversias a los tribunales internos del Estado receptor.

Los extranjeros que se establecen en un país pueden reclamar los mismos derechos de protección de los nacionales, pero no pueden pretender una mayor protección que aquéllos. Esta es la proposición latinoamericana endosada como un principio de derecho internacional americano e incorporada en la Convención sobre Derechos y Deberes de los Estados de 1933 (art. 9, según la cual “los extranjeros no podrán pretender derechos diferentes, no más extensos que los de los nacionales”), la Convención sobre el Estatuto de los Extranjeros de 1928 (art. 5) y el Código de Bustamante de Derecho Internacional Privado, de 1928.

Esencialmente, esta doctrina afirma que la jurisdicción de los Estados dentro de sus límites territoriales se aplica igualmente a todos los habitantes. Nacionales y extranjeros están bajo la misma protección del derecho y de las autoridades nacionales, y los extranjeros no pueden reclamar otra protección más extensiva que la de los nacionales. Este punto también se refiere a la aplicación del derecho nacional del Estado parte en la controversia como fuente principal o exclusiva para resolverla.

El concepto de denegación de justicia opera como una excepción a la rigidez de la regla enunciada, por cuanto se estima admisible una reclamación internacional formulada por los canales diplomáticos cuando ha habido una manifiesta denegación de justicia o un retardo injustificado en el ejercicio de la justicia, o una decisión que viola flagrantemente el derecho internacional, en aquellos casos en que el concepto de denegación no cubre las otras hipótesis.

La violación del derecho internacional por los órganos judiciales internos no aparece permanentemente en las definiciones que se proponen respecto de

¹⁷ E. Jiménez de Aréchaga, “La protección del inversor en el derecho internacional”, *Temas de Derecho Internacional*, ed. R. Vinuesa, Fundación del Centro de Estudios Internacionales, Buenos Aires (1989), p. 54.

este delito internacional, que es siempre interpretado de manera de favorecer la soberanía del Estado en el cual se ha generado la controversia correspondiente. La posición que expresa el conjunto de naciones americanas en 1933 es ejemplo de esta posición crítica frente a la protección diplomática, a menos que los extranjeros agoten todos los medios legales establecidos por el derecho interno del Estado correspondiente y haya habido una manifiesta denegación de la justicia.

De esta postura se infiere la posibilidad de pactar mecanismos que suspendan el derecho a ejercer la protección diplomática o impliquen su renuncia permanente. La denominada cláusula Calvo sin embargo ha operado más bien como una renuncia a solicitar esa protección del Estado de la nacionalidad de un extranjero afectado por la violación del derecho, de manera que ese Estado se encuentre inhibido de presentar una reclamación internacional. La jurisprudencia arbitral vastamente conocida del North American Dredging Company (1926)¹⁸ examinó la validez jurídica de esta cláusula en cuanto no constituye una renuncia a invocar la denegación de justicia como fundamento para el ejercicio de la protección diplomática y la reclamación internacional.

Esta llamada doctrina latinoamericana tuvo su expresión máxima en las disputas sobre reclamaciones de responsabilidad por daños ocasionados a extranjeros, y en el período de nacimiento y desarrollo de los conceptos de un nuevo orden económico internacional, en los asuntos vinculados a expropiaciones y nacionalizaciones, sin acuerdo respecto del pago o monto de la compensación debida. La marginación hispanoamericana de la participación en la Convención de Washington de 1965 sobre arreglo de diferencias relativas a inversiones fue la consecuencia más clara de esta posición.

Respecto de este fenómeno es que se advierte en los años más recientes una tendencia a revisar la doctrina oficial¹⁹ y a favorecer la participación en ese instrumento o la adopción de fórmulas que preservan la doctrina Calvo en cuanto a la renuncia al derecho a ejercer la protección diplomática de parte de los Estados que participan en este convenio o en otros basados en un esquema análogo (art. 27, Convención de Washington de 1965). La tendencia al cambio se inicia con la participación en mecanismos de garantía multilateral de inversiones, propiciado por la Convención del Banco Mundial de 1985, que crea un organismo internacional con ese fin. El derecho a ejercer la protección subsiste sólo para el caso en que el Estado contra el cual se reclama se niegue a cumplir el laudo arbitral que hubiera sido dictado en su

¹⁸ Opinions of Commissioners under the Convention concluded 8 September 1923 between the United States and Mexico, 4 February 1926 to 23 July 1927, U.S. Government Printing Office, Washington, D.C. (1927), pp. 31-33, citado en García Amador, op. cit., págs. 75 y 76.

¹⁹ Un examen de desarrollos recientes para generar principios internacionales guías en materia de inversiones en P. Juillard, "Investissements", *Annuaire français de droit international* (1992), pp. 779-807.

contra. Conforme a este instrumento se consolida la igualdad entre nacionales y extranjeros, pero se establecen cambios fundamentales en la exigencia de la regla del agotamiento de los recursos internos.

A este respecto, la Convención establece una opción para el Estado de manera que puede indicar que como condición previa al consentimiento a someterse al arbitraje del Centro que se establece, se hayan agotado los recursos domésticos, administrativos o judiciales. Esta reserva puede ser expresada al hacerse parte de la Convención o en un acuerdo específico con la persona extranjera concluido sobre la materia a que aquélla se refiere.

Acentuando esta posición, se advierte que en una serie de acuerdos celebrados recientemente por países latinoamericanos, ya sea entre ellos o con países extraregionales, se incorpora una cláusula de opción para el inversionista de la otra parte. La opción consiste en que si la controversia no hubiera podido ser solucionada en el término de un plazo determinado (en general seis meses), a partir del momento en que hubiera sido planteada por una u otra de las partes, será sometida a elección del inversionista a la jurisdicción nacional de la parte contratante implicada en la controversia, o bien al arbitraje internacional de acuerdo con las reglas que se indican²⁰. Normalmente se incorpora una mención al arbitraje de conformidad con el Convenio de Washington antes citado, que crea un Centro Internacional de Arreglo de Diferencias relativas a Inversiones (CIADI), si los Estados son partes en ese tratado, o se creará un tribunal de arbitraje ad hoc de acuerdo con las reglas de arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI).

Una variante de esta fórmula está contenida en otros modelos que no se refieren a la opción entre la jurisdicción de los tribunales internos y el arbitraje internacional, sino que establecen el derecho a recurrir al arbitraje de manera directa (Convenio Suiza-Chile de 1991), o la alternativa de abandonar los recursos internos que están siendo utilizados, en el caso de que los tribunales del Estado en cuyo territorio se efectuó la inversión no dictaren una resolución sobre el fondo del asunto dentro de 18 meses, o cuando una de las partes entienda que la resolución infringe disposiciones del tratado pertinente. Esta fórmula ha encontrado objeciones constitucionales en diversos países y tiende a ser revisada (Chile-Alemania). Este tipo de tratados está siendo concluido por diversos países latinoamericanos, incluyendo miembros del Pacto Andino y Mercosur. Finalmente, se aplica el principio de subrogación del Estado de origen que hubiera otorgado una garantía al inversionista que sufre el riesgo no comercial en el territorio de la otra parte.

²⁰ Fórmula empleada en el Acuerdo para la Protección y Fomento Recíproco de las Inversiones y su Protocolo Anexo, entre España y Chile, de 1991, vigente desde 1994, Diario Oficial, N° 34.850, 27 de abril de 1994. También Acuerdo celebrado entre Ecuador y Chile, 1993.

Conjuntamente merece anotarse la evolución en la forma como estos países abordan una delicada cuestión objeto de innumerables controversias en el pasado²¹ y que marcan una tendencia más amistosa hacia las inversiones extranjeras. Se trata de la incorporación de cláusulas expresas relativas a las condiciones de validez de las medidas de expropiación o nacionalización o medidas que tengan efecto equivalente. Especialmente, se establece que debe tratarse de medidas adoptadas por razones de utilidad pública o interés nacional, sobre una base no discriminatoria y en virtud del debido proceso legal. En cuanto a la compensación, se emplean los términos de pronta, efectiva y adecuada, o de una indemnización adecuada, en moneda de libre convertibilidad, lo cual acerca el nuevo modelo más bien a la doctrina tradicionalmente sostenida por países exportadores de capital. Cabe tener en cuenta que se está produciendo un fenómeno similar entre ciertos países latinoamericanos, lo cual requiere de un reenfoque del antiguo esquema con que se analizaba la posición de estos países, que se simbolizó en las reglas adoptadas por el Pacto Andino (decisión 24 y conexas) en 1970 y 1987²², revisadas en 1991. Tal vez uno de los signos más claros de esta nueva posición se advierta en las normas contenidas en el Tratado de Libre Comercio de América del Norte, del cual es parte México, que explicita las condiciones de validez de las expropiaciones y señala los requisitos que debe cumplir la indemnización (art. 1100).

III. CONSIDERACIONES FINALES

Para concluir, proponemos dos ideas básicas que sintetizan la presentación expuesta:

- La comprensión del fenómeno jurídico regional debe tener en cuenta su contexto histórico y la posibilidad de su evolución conforme se relaciona con otros procesos formadores del derecho internacional, particularmente las negociaciones multilaterales amplias que son la característica de la época presente. En este sentido, parece significativa la tendencia a adherir a mecanismos de solución de controversias en materia de inversiones que modifican las posiciones doctrinales y estrategias jurídicas tradicionales en

²¹ F. Orrego Vicuña, "Some international law problems posed by the nationalization of the copper industry by Chile", *American Journal of International Law*, vol. 67, No. 4 (1973), pp. 711-727.

²² Decisión 220, *Gaceta Oficial del Acuerdo de Cartagena*, IV, 18 de mayo de 1987, 20, reproducida en *Integración Latinoamericana*, 128, 12 (1987), pp. 65-70. En materia de solución de controversias, la decisión 220 reenvía a la legislación de cada país.

América Latina, sin dejar de mencionar la cuestión de los principios aplicables en materia de indemnización.

La importancia que ha tenido la expresión de posiciones jurídicas de origen local o regional en Hispanoamérica y América Latina, en la expansión del derecho internacional a nivel universal, en proporcionarle mayor eficacia e incluso en favorecer la evolución de reglas pretendidamente universales, pero carentes de aceptación amplia. Ejemplos de esto se encuentran en el derecho del mar, la responsabilidad internacional y el principio de no intervención. El caso de los nuevos enfoques y tendencias sobre la democracia merece ser examinado bajo esta perspectiva, en la medida en que se explica como un desarrollo de la teoría de los derechos humanos y los fundamentos de la acción multilateral en la materia.

L'ÉVOLUTION DU RÔLE DES NATIONS UNIES DANS LE MAINTIEN DE LA PAIX ET DE LA SÉCURITÉ INTERNATIONALES

*Brigitte Stern**

Souvent, l'homme ou la femme qui atteint la cinquantaine se retourne vers son passé, vers ses 20 ans, pour y chercher une flamme . . . une nostalgie . . . ou le sens de sa vie.

En psychoanalyse, on remonte encore plus loin, puisque tout est joué, dit-on, dans les deux ou trois premières années. Face à des difficultés existentielles, le retour aux sources permet parfois de comprendre les difficultés rencontrées et de prendre un nouveau départ.

L'Organisation des Nations Unies a 50 ans, les premières missions d'observation de l'Organisation presque autant, la première force de maintien de la paix un peu moins. C'est l'heure des bilans. Les opérations de maintien de la paix sont — sans aucun doute — dans une phase de remise en cause.

Face à cette crise des 50 ans, cette « *mid-life crisis* », il m'a paru intéressant de me pencher sur les jeunes années de l'ONU et des opérations de maintien de la paix.

Une première remarque que je voudrais faire, c'est qu'on a parfois l'impression d'être aujourd'hui devant des problèmes tout à fait inédits posés par les opérations de maintien de la paix. En réalité, je me demande si ceux-ci ne sont pas plus ou moins récurrents, même s'ils ne se sont pas toujours posés en termes parfaitement identiques.

En témoigne cet extrait de l'*Annuaire français* de droit international de 1965, qui célébrait les 20 ans de l'ONU avec notamment un article sur les opérations de maintien de la paix, que je cite :

« Le nombre même de ces opérations, l'importance de certaines d'entre elles, la façon dont elles ont été engagées, les responsabilités

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dont elles se sont trouvées investies, les charges financières qu'elles occasionnent devaient inévitablement conduire à des difficultés politiques et juridiques et aussi à une impasse financière. La grande crise qu'a connue l'ONU en 1964-1965 n'a pas d'autre origine »¹.

Remplaçons le « 6 » par un « 9 », par une habile manœuvre de renversement, et ces propos pourraient parfaitement illustrer la crise des années 1994-1995.

Le Conseil de sécurité aujourd'hui est devenu tout puissant. Ce nouvel activisme du Conseil, depuis toujours investi par la Charte des Nations Unies de la responsabilité principale du maintien de la paix et de la sécurité internationales, peut se décliner en trois dimensions :

- a) Une *multiplication* des cas dans lesquels le Conseil de sécurité va utiliser le Chapitre VII pour décider des actions coercitives et lancer des opérations d'imposition de la paix;
- b) Une *extension* considérable des tâches confiées aux opérations de maintien de la paix du Chapitre VI ou si l'on préfère VI *bis*;
- c) Une *transgression* à volonté de la limite entre le Chapitre VI et le Chapitre VII, entre les opérations de maintien de la paix et l'utilisation de la force armée.

Multiplication, extension, transgression, rien ne peut arrêter le Conseil de sécurité, pas même, semble-t-il, la Cour internationale de Justice.

Le paradigme de l'opération de maintien de la paix semble de plus en plus difficile à cerner. Certains parlent d'opérations de maintien de la paix de la seconde génération, puis de la troisième génération²; d'autres encore parlent d'opérations de la seconde génération, puis de « quelque chose d'indéfinissable, où se mêlent la guerre et l'humanitaire, l'interventionnisme et la passivité »³.

Peut-on déceler ainsi trois générations d'opérations de maintien de la paix, la différence entre les opérations de la première et de la seconde génération touchant à leur mission (il n'y aurait, dans ce cas, qu'un saut quantitatif), la distinction entre celles-ci et les opérations de la troisième génération touchant à leurs pouvoirs (il y aurait là un saut qualitatif) ?

Qu'en est-il de cette analyse : rend-elle véritablement compte des évolutions récentes et/ou prévisibles ?

¹ Maurice Flory, « L'Organisation des Nations Unies et les opérations de maintien de la paix », *Annuaire français de droit international* (1965), p. 448.

² C'est l'ONU elle-même qui parle d'opérations de maintien de la paix de la troisième génération, voir *L'ONU et le maintien de la paix*. Département de l'information du Secrétariat de l'Organisation des Nations Unies (septembre 1993), p. 11 : « En fait l'ONUSOM II pourrait bien préfigurer en raison de l'aspect coercitif de son mandat, une troisième génération d'opérations de maintien de la paix ».

³ Marie-Claude Smouts (sous la dir), *L'ONU et la guerre. La diplomatie en khaki*, Paris, Éd. complexe (1994), p. 27.

Ce bref exposé sera centré sur la dernière question concernant la frontière entre les opérations de maintien de la paix et les actions coercitives d'imposition de la paix. Quelques rapides remarques peuvent néanmoins être faites sur les autres aspects des changements récents dans l'approche onusienne des questions de paix et de sécurité internationales.

Depuis la fin de la guerre froide, on constate, en effet, une multiplication des cas dans lesquels le Conseil de sécurité utilise le Chapitre VII, pour décider de mesures coercitives, impliquant ou n'impliquant pas l'usage de la force.

Le Conseil de sécurité peut agir de façon coercitive, dès lors qu'il constate qu'il y a une menace à la paix, une rupture de la paix ou un acte d'agression. N'ayant aucun autre titre à intervenir⁴, on conçoit que, dès lors qu'il souhaite agir, il analyse les événements motivant son intervention, comme menaçant la paix internationale.

La chose est presque trop connue pour être rappelée : aujourd'hui, il est clair que le Conseil de sécurité s'arroge de plus en plus le droit d'intervenir dans des situations mettant en cause les droits de l'homme ou le droit humanitaire. En réalité, une violation, même massive, des droits de l'homme, strictement interne, n'a jamais, jusqu'à ce jour, été pris en considération par le Conseil de sécurité pour actionner le Chapitre VII; si le droit humanitaire est l'ensemble des règles protégeant les droits de l'homme en période de conflit armé interne ou international, on doit constater que ce sont surtout des violations du droit humanitaire qui ont récemment motivé une intervention du Conseil de sécurité (Somalie, ex-Yugoslavie, Rwanda). Cette évolution s'est faite par petites touches, pas à pas, prudemment, comme si le Conseil, craignant sa propre audace, comme les réactions des souverainetés, avançait masqué, accumulant les précédents spécifiques. Mais, au terme de cette évolution, une logique interne semble les relier, dessinant les contours d'une nouvelle pratique, dont on ne sait s'il est prématuré ou non de dire qu'elle a acquis valeur coutumière.

De même, on constate, depuis la fin de la guerre froide, une extrême diversification des tâches des opérations de maintien de la paix.

L'appellation, de plus en plus trompeuse, de maintien de la paix recouvre désormais tout un éventail d'actions.

L'« Agenda pour la paix » (A/47/277-S/24111) explicite, dans une progression extrêmement logique, les différentes procédures garantissant la paix :

⁴ On sait qu'en vertu du Chapitre VII, le Conseil de sécurité n'est pas investi d'une mission générale de contrôle de la légalité internationale des actes des États, mais que sa tâche est exclusivement de faire respecter la paix et la sécurité internationales. Selon la formulation de Gérard Cohen-Jonathan dans son commentaire de l'Article 39 de la Charte, « le Conseil, organe politique, n'est pas chargé de rendre la justice internationale ni de faire la loi et encore moins de transformer la société », *La Charte des Nations Unies*, Cot et Pellet, *Economica*, 2^e éd. (1991), p. 665 et 666.

- La diplomatie préventive, ce serait une sorte de Chapitre VI moins le quart, impliquant toutes les mesures tendant à éviter les différends;
- Le rétablissement de la paix ou « *peacemaking* » renvoie, lui, à toutes les procédures de règlement pacifique des différends prévue par le Chapitre VI;
- Le maintien de la paix ou « *peace-keeping* » renvoie à ce que l'on a appelé le Chapitre VI *bis*, puisqu'il va au-delà des mesures purement verbales du Chapitre VI, mais reste en-deçà des actions militaires coercitives du Chapitre VII;
- La consolidation de la paix ou « *peace-building* » pourrait être considérée comme relevant d'un Chapitre VI *ter*, puisque les mesures adoptées vont certes dans le sens du règlement des différends, mais utilisent des procédures et des actions nettement plus interventionnistes et volontaristes que celles qui sont prévues dans les étapes antérieures.

Cependant la vie ne respecte pas toujours la rigueur théorique des schémas explicatifs ou des plans d'actions, et ces distinctions ne sont pas toujours claires en cours d'opération.

Toujours est-il que l'on constate effectivement une extension à la fois temporelle et fonctionnelle des opérations de maintien de la paix.

Extension temporelle, les opérations de maintien de la paix n'étant plus confinées dans le laps de temps s'écoulant entre le cessez-le-feu et le règlement politique, mais intervenant également avant le cessez-le-feu, ou même avant le conflit — opérations de maintien de la paix préventives — et après le règlement politique — opérations de consolidation de la paix.

Extension fonctionnelle aussi. On sait notamment que ces opérations, outre leur fonction classique, assument de plus en plus des missions humanitaires. Par ailleurs, depuis la chute du mur de Berlin, l'instauration de la démocratie apparaît comme l'un des nouveaux horizons de l'ONU⁵. C'est ce qu'exprimait M. Boutros Boutros-Ghali, par exemple dans son rapport annuel de 1993, où il soulignait « l'ampleur de l'élan populaire en faveur d'une participation accrue aux processus politiques ».

Un bon résumé de la variété des fonctions assumées par les différentes opérations de maintien de la paix est donné par l'énumération à la Prévert que l'on trouve dans le Supplément du 3 janvier 1995 à l'« Agenda pour la paix » :

⁵ En effet, on ne compte plus les opérations dans lesquelles l'ONU a supervisé ou organisé des élections démocratiques. Le degré d'implication de l'ONU dans la tenue d'élections démocratiques est extrêmement variable : simple observation des élections par la Mission de vérification des Nations Unies en Angola (UNAVEM) I, le contrôle étant exercé par des structures composées de façon paritaire entre l'União Nacional para a Independência Total de Angola (UNITA) et le Movimento Popular para a Libertação de Angola (MPLA); contrôle des élections par la Mission d'observation des Nations Unies en El Salvador (ONUSAL) par le biais d'observateurs envoyés sur le terrain; organisation d'un référendum au Sahara occidental dans le cas de la Mission des Nations Unies pour l'organisation d'un référendum au Sahara occidental (MINURSO); organisation des élections allant jusqu'à l'élaboration des lois électorales dans le cas de l'Autorité provisoire des Nations Unies au Cambodge (APRONUC), etc.

« . . . l'ONU a été appelée à entreprendre des tâches d'une diversité sans précédent : contrôle du cessez-le-feu, regroupement et démobilisation de forces, réinsertion des combattants dans la vie civile et destruction de leurs armes; mise au point et exécution de programmes de déminage; repatriement des réfugiés et des personnes déplacées; octroi d'une assistance humanitaire; supervision des structures administratives existantes; mise en place de nouvelles forces de police; vérification du respect des droits de l'homme; mise au point et supervision de réformes constitutionnelles, judiciaires et électorales; observation, supervision, voire organisation et contrôle d'élections; et coordination de l'appui destiné au redressement économique et à la reconstruction » (A/50/60-S/1995/1, par. 21).

Une typologie des différentes fonctions est impossible, chaque opération ayant ses exigences spécifiques : indiquons simplement que quel que soit le stade auquel elles interviennent — prévention, maintien, consolidation — deux grandes préoccupations consensuelles semblent aujourd'hui déterminer les tâches qui sont confiées aux opérations de maintien de la paix : la préoccupation humanitaire et la préoccupation démocratique.

On entend partout, on lit partout, que la grande différence entre les opérations de maintien de la paix traditionnelles et ce que l'on appelle maintenant les opérations de la seconde génération, c'est que les premières intervenaient dans les conflits inter-étatiques, ce qui leur donnait une fonction claire d'interposition, tandis que les nouvelles opérations de maintien de la paix interviennent dans des conflits intra-étatiques où les États sont « davantage en guerre avec eux-mêmes qu'avec des États étrangers »⁶, et où existent de multiples fronts, ce qui entraîne une diversification nécessaire des fonctions des opérations de maintien de la paix.

L'apparente opposition manichéenne entre les opérations de la première génération n'intervenant que dans les litiges entre États et les opérations de la seconde génération n'intervenant que dans les litiges internes paraît cependant largement exagérée. S'il est incontestable que les fonctions des opérations de maintien de la paix se sont diversifiées, comme cela a été indiqué, il est moins certain que ce phénomène résulte exclusivement de la nature du conflit : d'une part, parce que bien des opérations antérieures à la guerre froide avaient une dimension interne importante, sinon quasi exclusive; d'autre part parce que la diversification des tâches s'explique à notre avis aussi par d'autres facteurs.

Les mandats donnés aux opérations de maintien de la paix au Congo, à Chypre, au Liban avaient incontestablement une dimension interne, difficile à occulter. Ce point est suffisamment connu pour ne pas mériter de longs développements.

⁶ « Participation de la France aux opérations de maintien de la paix, Rapport au Premier Ministre, François Trucy, Sénateur » (février 1994), p. 6, document miméographié.

De même, l'assistance humanitaire a toujours fait partie des missions des opérations de maintien de la paix : c'était vrai au Congo, c'était vrai au Sud-Liban, par exemple, ces activités étant financées par des contributions volontaires, comme c'est souvent le cas aujourd'hui.

Il est certain qu'à l'heure actuelle l'assistance humanitaire devient parfois le mandat principal de l'opération de maintien de la paix et non pas une sorte d'aide accessoire au maintien de la paix, comme par le passé.

Cette situation résulte de ce que l'ONU s'est de plus en plus souvent retrouvée au sein d'un conflit ouvert. Deux situations cependant peuvent être distinguées.

La première, celle où l'ONU est intervenue dans un conflit ouvert, précisément parce qu'il s'agissait d'un conflit ouvert, qui faisait naître des situations humanitaires dramatiques auxquelles l'ONU souhaitait répondre, souvent sous la pression des médias. Les préoccupations humanitaires sont ainsi à la base des interventions en Somalie, en Bosnie ou au Rwanda.

La seconde, celle où l'ONU assumait sa mission traditionnelle d'interposition, après un cessez-le-feu, mais où la paix était si fragile que l'ONU n'a pas été capable de la maintenir : c'est l'exemple du premier déploiement de la Force de protection des Nations Unies (FORPRONU) en Croatie ou de la Mission de vérification des Nations Unies en Angola (UNAVEM I) en Angola.

Dans ce cas, l'opération de maintien de la paix s'est trouvée *volens nolens* engagée au cœur d'un conflit ouvert, sans avoir les moyens militaires d'un protagoniste crédible, tandis que du fait du conflit apparaissaient là encore des préoccupations humanitaires.

La difficulté est encore plus grande, évidemment, lorsque les problèmes humanitaires ne sont pas simplement une des conséquences du conflit, mais en forment si l'on peut dire l'objet même, comme il en va de la politique de « nettoyage ethnique » en ex-Yougoslavie.

Si la préoccupation humanitaire n'était pas absente des opérations de maintien de la paix antérieures à la chute du mur, il en va de toute évidence différemment de la préoccupation démocratique. La diversification des tâches assumées par l'ONU pour traduire cette préoccupation dans la réalité s'explique en fait par l'émergence d'un nouveau consensus, inexistant auparavant du fait de la guerre froide, sur ce l'on pourrait qualifier d'*ordre public international*, que la communauté internationale est habilitée à faire respecter, si besoin par la force, comme il en va dans les ordres internes. Tant que n'existait pas ce consensus minimal sur la solution à adopter et la société humaine souhaitable, les actions de l'ONU ne pouvaient être que des actions neutres, d'interposition et de maintien du *statu quo*⁷.

⁷ Certes, on ne peut que se réjouir de l'acceptation universelle de principes démocratiques, à une nuance près : la nouvelle légitimité internationale semble parfois faire peu de cas de l'égalité souveraine des États, et de leur droit de choisir librement leur système politique économique et social, et ne prend peut-être pas suffisamment en compte ce que Mohammed Bennouna appelle « le droit à l'erreur » des États, qui après tout fait partie de leur liberté et de leur souveraineté.

Si leur ampleur est différente, les opérations de maintien de la paix dites de la deuxième génération — dont le prototype pourrait être l'Autorité provisoire des Nations Unies au Cambodge (APRONUC) — ne se distinguent pourtant pas des opérations classiques du point de vue de leur nature juridique. Il pourrait en aller différemment de ce que l'on commence à appeler les opérations de la troisième génération, opérations qui ont été habilitées, de façon plus ou moins extensive, à utiliser la force armée.

Composées, au moins en partie, de militaires, les opérations de maintien de la paix ne doivent en principe pas mener d'action militaire : certains ont parlé de fonctions « semimilitaires »⁸. Comme le souligne le rapport Trucy :

« Les opérations sont donc marquées d'emblée par une *ambiguïté fondamentale* : militaires dans leurs structures et leurs organisations, les forces de maintien de la paix ne peuvent l'être ni dans leur comportement, ni dans leur mission qui est, d'abord, *de ne pas combattre* »⁹.

Mais de même que tout homme qui a du pouvoir est tenté d'en abuser, tout militaire qui a une arme est tenté de l'utiliser. Si cela semble de plus en plus se vérifier dans les opérations récentes, cette ambiguïté était présente dès l'origine.

I. LES DERNIÈRES ANNÉES : LE CONCEPT D'OPÉRATIONS DE MAINTIEN DE LA PAIX SE DILUE DE PLUS EN PLUS

Devant un tel Congrès, il est inutile de revenir longuement sur la genèse des opérations de maintien de la paix, qui pourtant en explique les traits principaux¹⁰:

⁸ P. R. Baehr et L. Gordenker, *The United Nations: Reality and Ideal* (1984), p. 79.

⁹ Trucy, *op.cit.*, p. 4.

¹⁰ Créée par l'Assemblée générale, en dehors du Chapitre VII, la Force d'urgence des Nations Unies (FONU) I cumulait deux caractéristiques dont les conséquences ont perdu même lorsque l'opération était initiée par le Conseil de sécurité : une absence de force juridique, une absence de force militaire :

- L'absence combinée de force militaire et de force juridique qui fait qu'il ne peut s'agir d'une « mesure de coercition prévue au Chapitre VII », entraîne la nécessité de respecter l'Article 2, paragraphe 7, de la Charte qui interdit l'intervention de l'ONU dans les affaires qui relèvent essentiellement de la compétence nationale des États : il en résulte que la force ne peut chercher à imposer une solution plutôt qu'une autre, mais qu'elle ne peut être qu'une force d'interposition respectant le principe de neutralité.
- L'absence de force juridique a eu pour conséquence la nécessité du consentement de tous les États concernés : consentement des États contributeurs bien sûr, mais aussi et surtout consentement de l'État sur le territoire duquel elle va se déployer. Il y a là la caractéristique fondamentale d'une opération de maintien de la paix.
- L'absence de force militaire explique la troisième caractéristique de cette action qui n'est pas prévue pour imposer militairement la paix à un agresseur, selon laquelle une opération de maintien est fondée sur le principe de non-utilisation de la force armée.

- a) Opération exécutée par les Nations Unies avec des organes intégrés, casques bleus¹¹, voitures blanches . . . ;
- b) Opération de stabilisation, respectant le principe de neutralité;
- c) Opération non coercitive en un double sens :
 - i) Opération nécessitant le consentement de l'État sur le territoire duquel l'opération doit se déployer;
 - ii) Opération fondée sur le principe de non-utilisation de la force armée sauf en cas de légitime défense.

Tel est le descriptif généralement accepté de ce que l'on appelait jusqu'à récemment les opérations de maintien de la paix, et que l'on commence à appeler les opérations de maintien de la paix classiques, par opposition aux opérations de maintien de la paix des générations montantes.

Le problème évidemment vient de ce qu'avant la chute du mur, le Conseil de sécurité ne pouvait faire que des opérations de maintien de la paix non coercitives; maintenant il a retrouvé la capacité politique d'exercer le pouvoir juridique du Chapitre VII, lui permettant d'utiliser la force armée. Ayant ainsi à sa disposition deux modes d'action, pouvant agir d'une façon ou de l'autre, il est clair que le Conseil de sécurité va pouvoir facilement mélanger les genres.

Du temps de la guerre froide, le maintien de la paix c'est tout ce que l'ONU pouvait faire. Maintenant, j'allais dire, l'ONU peut tout faire — ce qui n'est pas sans poser de problèmes.

L'image des opérations de maintien de la paix est de plus en plus brouillée aussi bien dans le grand public, que parmi les spécialistes¹², et apparaît de plus en plus imbriquée avec l'idée de coercition et d'utilisation de la force armée.

¹¹ Les symboles sont également un langage. Les casques bleus sont devenus le symbole de l'ONU. Il est parfois intéressant de chercher l'origine des mythes. C'est M. Liu, ancien Secrétaire général adjoint pour les affaires politiques, qui nous explique : « C'est Hammarskjöld qui a inventé les casques bleus. Il y avait à ce moment-là une énorme quantité de casques de l'armée américaine dans les surplus de la seconde guerre mondiale. Il les obtient des autorités américaines et les fait tremper dans un bain de peinture bleue pour gagner du temps. C'est ainsi que les premières troupes de l'ONU sont arrivées en Égypte avec des casques bleus qui sont devenus la marque distinctive des forces des Nations Unies », dans *Adaptation des structures et méthodes des Nations Unies*, colloque de La Haye, 4-6 novembre 1985, Bardonnnet (éd.), p. 272. Cette belle histoire peut aussi être vue comme une métaphore de ce qu'est véritablement l'ONU : trop souvent, l'Organisation n'est là que pour repeindre aux couleurs de l'ONU une action étatique. Ainsi, il est arrivé à plusieurs reprises que des opérations n'aient reçues l'aval de l'ONU, qu'après avoir été déclenchées par les États.

¹² Ainsi, par exemple, on trouve des auteurs pensant que la FORPRONU est fondée sur le Chapitre VII : Michael Doyle et Nishkala Suntharalingam, « The United Nations in Cambodia: lessons for complex peace-keeping », *International Peace-keeping*, vol. 1, No. 2, p. 117; Christopher Brady and Sam Davis, « UN operations: the political-military interface », *International Peace-keeping*, vol. 1, No. 1, p. 59.

Si l'on tente d'y voir clair, on constate que des relations dialectiques complexes, qui nous semblent lourdes de difficultés, s'établissent aujourd'hui entre les opérations de maintien de la paix et le recours à la force du Chapitre VII.

- *Opération de maintien de la paix créée alors que le Chapitre VII est en vigueur*

C'est l'exemple de la MONUIK, Mission d'observation des Nations Unies pour l'Iraq et le Koweït, qui, créée par le Conseil de sécurité dans sa résolution 687 (1991) du 3 avril 1991, prise en vertu des pouvoirs du Chapitre VII, n'est cependant investie que d'une mission traditionnelle d'interposition et ne peut utiliser la force qu'en cas de légitime défense¹³.

- *Opération de maintien de la paix créée en vertu du Chapitre VI mais dotée du fait de la volonté des parties, de certains pouvoirs coercitifs*

L'APRONUC a été lancée avec une telle configuration possible¹⁴, mais l'interprétation donnée sur le terrain a conduit à ne pas utiliser ces pouvoirs coercitifs, ce qui fait que l'APRONUC se classe aisément sinon dans les opérations de maintien de la paix classiques, du moins dans les opérations de maintien de la paix.

- *Opération de maintien de la paix dotée en cours de déroulement, de pouvoirs coercitifs — pour l'instant limités — résultant du Chapitre VII*

Ces pouvoirs peuvent être limités à certaines tâches ou à certaines zones. Il faut rappeler ici que la FORPRONU a été créée comme une opération de maintien de la paix traditionnelle devant être déployée en Croatie, dont la mission devait être de superviser le cessez-le-feu signé avec les Serbes de Croatie (Krajina).

Déployée dans un second temps en Bosnie-Herzégovine, elle a vu son mandat évoluer au cours des événements. Le représentant spécial du Secrétaire général décrit cette partie de la mission de la façon suivante :

« L'opération des Nations Unies (en Bosnie-Herzégovine) est essentiellement une opération de maintien de la paix pour permettre les activités humanitaires, basée sur le Chapitre VI de la Charte, tandis

¹³ Rapport du Secrétaire général sur l'application du paragraphe 5 de la résolution 687 (1991) du Conseil de sécurité (S/22454), cité par B. Stern, *Guerre du Golfe, le dossier d'une crise internationale, 1990-1992*, Documentation française, Paris (1993), p. 441.

¹⁴ Dans l'annexe I aux Accords de Paris, il est indiqué que l'APRONUC « prendra les dispositions nécessaires concernant le processus de démobilisation par étapes des forces militaires des Parties . . . ».

que l'usage de la force en vertu du Chapitre VII est autorisé dans des circonstances spécifiques »¹⁵.

L'emploi de la force par la FORPRONU a ainsi été autorisé pour protéger la délivrance de l'aide humanitaire, pour faire respecter la zone d'exclusion aérienne, pour faire respecter les zones de sécurité, autour de six villes bosniaques de Srebrenica, Tuzla, Žepa, Goržade et Bihać.

- *Opérations de maintien de la paix dans lesquelles s'insère, pour une durée limitée, une action du Chapitre VII*

Cette « alternance » a déjà été utilisée trois fois : dans l'affaire somalienne avec la séquence Opération des Nations Unies en Somalie (ONUSOM I) — Rendre l'espoir — ONUSOM II; au Rwanda avec la séquence UNAVEM I — Opération turquoise — UNAVEM II; à Haïti enfin, avec la séquence Mission des Nations Unies en Haïti (MINUHA I) — Soutenir la démocratie — et sans doute bientôt MINUHA II¹⁶.

Tout se passe comme si se dessinait une nouvelle division internationale du travail : aux grandes puissances, l'intervention en vertu du Chapitre VII; à l'ONU, les opérations de maintien de la paix¹⁷.

Mais ce voisinage n'est pas innocent et sans conséquence : il semble en effet que la deuxième opération hérite plus ou moins des caractéristiques du Chapitre VII en ce qui concerne le recours à la force.

Si le langage est signe, si le langage c'est nommer les choses, il faut bien dire que l'usage distingue très facilement les deux types d'opérations, les actions coercitives des grandes puissances étant baptisées de noms très symboliques — Rendre l'espoir, Bouclier du désert, Soutenir la démocratie, Opération turquoise, etc. — tandis que les opérations de l'ONU se parent de sigles plus ou moins obscurs.

- *Opérations de maintien de la paix qui se déroulent en coexistence avec des sanctions économiques adoptées en vertu du Chapitre VII*

La FORPRONU, par exemple, a coexisté avec les sanctions initiales à l'égard de toutes les parties, ce qui ne mettait pas vraiment en cause la

¹⁵ Yasushi Akashi, « Peace-making and peace-keeping: lessons from the former Yugoslavia », The Tokyo Symposium on New Dimensions of United Nations Peace-keeping Operations (19 et 20 janvier 1995), p. 2, document mimeographié.

¹⁶ Sur la question haïtienne, voir Yves Daudet, « L'ONU et l'OEA en Haïti et le droit international », *Annuaire français de droit international* (1992).

¹⁷ C'est ce que Michael Bothe appelle « a kind of double track procedure », dans « Peace-keeping and the use of force — back to the Charter or political accident? », *International Peace-keeping*, vol. 1, No. 1, p. 4.

neutralité de l'Organisation, mais aussi avec les sanctions ultérieures à l'égard de la seule ex-République de Yougoslavie (Serbie et Monténégro), ce qui était plus problématique du point de vue de la neutralité (formelle). C'est cette idée d'une coexistence difficile entre « sanctions » du Chapitre VII et opérations de maintien de la paix que souligne, par exemple, M. Boutros Boutros-Ghali, lorsqu'il déclare qu'« aucune mission ne peut, de façon réaliste, utiliser la force dans une partie de la zone de conflit tout en agissant comme une opération humanitaire neutre et un partenaire impartial aux accords dans une autre »¹⁸.

- *Opération de maintien de la paix créée en vertu du Chapitre VII*

C'est ainsi que semble pouvoir être analysée ONUSOM II, qui s'insère dans la succession des opérations en Somalie, ainsi décrite par le Secrétaire général dans son rapport du 19 décembre 1992 :

« . . . le Conseil de sécurité, ayant écouté mon avis et admis que le type habituel d'opération de maintien de la paix n'est pas applicable à la situation en Somalie, et s'autorisant du Chapitre VII de la Charte, a chargé à titre provisoire certains États Membres de créer les conditions de sécurité qui permettront de livrer sans obstacles l'assistance humanitaire » (S/24992, par. 21).

ONUSOM I n'ayant pas rempli sa mission, l'ONU lance la Force d'intervention unifiée (UNITAF), opération coercitive menée par les États-Unis d'Amérique et quelques autres pays. Mais les États-Unis, ne souhaitant mener qu'une action limitée dans le temps, suggèrent que la relève soit assumée par une ONUSOM II, ainsi décrite par le Secrétaire général dans le rapport susmentionné :

« Ils envisageaient que la relève de la Force d'intervention unifiée soit assurée par une nouvelle ONUSOM qui serait placée sous le commandement et le contrôle de l'Organisation des Nations Unies mais dont le mandat, la conception des opérations, le niveau d'armement et les règles d'engagement ne différeraient guère de ceux de la Force d'intervention unifiée elle-même . . . Celle-ci [cette approche] diffère du type traditionnel d'opérations de maintien de la paix . . . Elle repose sur l'idée que la Force d'intervention unifiée n'instaurera pas des conditions de sécurité qui puissent être maintenues par une force de

¹⁸ « Les gardiens de la paix sont assiégés », *The New York Times* (30 octobre 1994), traduction du Centre d'information des Nations Unies.

maintien de la paix dotée du mandat habituel et normalement armée et qu'il faudra par conséquent maintenir sous le commandement de l'ONU une capacité considérable de coercition » (ibid., par. 38 et 44).

Finalement, le 26 mars 1993, la première opération de maintien de la paix ayant des pouvoirs coercitifs du Chapitre VII a été établie par la résolution 814 (1993) du Conseil de sécurité : c'est ONUSOM II. Ces pouvoirs ont été limités par la suite.

Toutes sortes de relations complexes semblent ainsi s'être établies entre les opérations de maintien de la paix et l'utilisation de la force, ces deux modalités d'action se trouvant en relations de succession, d'alternance, de coexistence ou d'interprétation, et même d'identification.

II. LES JEUNES ANNÉES : LE CONCEPT D'OPÉRATIONS DE MAINTIEN DE LA PAIX ÉMERGE DIFFICILEMENT

La difficulté à cerner les contours exacts des opérations de maintien de la paix n'est pas une nouveauté.

- *Opérations de maintien de la paix dans le vocabulaire onusien*

Peut-être n'est-il pas inintéressant de rappeler que cet être juridique, si difficile à définir, semble également à l'origine avoir été difficile à nommer — et nous voici de nouveau au cœur du langage du droit international.

Dans le rapport du Secrétaire général en date du 9 octobre 1958 intitulé « Etude sommaire sur l'expérience tirée de la création et du fonctionnement de la Force » (A/3943), où celui-ci cherche à dégager de l'enseignement de la Force d'urgence des Nations Unies (FUNU I) certains principes directeurs pouvant servir de cadre général à de futures opérations du même type, celles-ci sont désignées de diverses périphrases indiquant bien qu'elles n'avaient pas encore acquis les traits bien établis de ce que l'on a longtemps appelé les opérations de maintien de la paix, et que l'on commence à appeler opérations de maintien de la paix de la première génération. La chrysalide était suffisamment cachée dans son cocon, pour ne pas pouvoir être nommée : aussi, en leur *status nascendi*, les opérations de maintien de la paix étaient-elles désignées comme des « opérations paramilitaires » (ibid., par. 168), des « types d'opérations dont s'occupe ce rapport » (ibid., par. 178 et 180), des « opérations du caractère de celles qui sont discutées dans ce rapport » (ibid., par. 179), des « unités des Nations Unies entrant dans le champ d'application de ce rapport » (ibid., par. 184), des « opérations des Nations Unies impliquant du personnel militaire » (ibid., par. 186 et 193).

Il n'était point question encore d'opérations de maintien de la paix.

C'est la Cour internationale de Justice qui semble¹⁹ les avoir baptisées dans son avis *Certaines dépenses des Nations Unies*, où elle a présenté la fameuse distinction qui va s'imposer entre les opérations coercitives et les opérations de maintien de la paix. Bien qu'il y ait là un certain anachronisme : nous avons parlé d'opérations de maintien de la paix dès l'apparition du phénomène juridique.

Mais trois points méritent d'être soulignés au sujet de cette non-utilisation de la force, car ils montrent que dès l'origine certaines incertitudes existaient, dont les événements les plus récents ne sont que des illustrations.

Tout d'abord, on doit rappeler que dans son second et dernier rapport sur la création de la FUNU, en date du 6 novembre 1956, le Secrétaire général indiquait que lorsqu'une force de maintien de la paix est créée :

« Cela n'exclut pas la possibilité que le Conseil de sécurité puisse utiliser cette force dans les limites plus étendues prévues au Chapitre VII de la Charte des Nations Unies » (A/3302, par. 7).

Ensuite, il est dit que la non-utilisation de la force était posée comme le principe devant régir l'opération dans des conditions normales. Un extrait du même rapport est significatif à cet égard :

« Ce serait plus qu'un corps d'observateurs, mais ce ne serait en aucune façon une force militaire contrôlant temporairement le territoire où elle est stationnée; encore moins devrait-elle avoir des fonctions militaires excédant celles qui seraient nécessaires pour assurer des conditions pacifiques au cas où les parties au conflit prendraient toutes les mesures nécessaires pour donner suite aux recommandations de l'Assemblée générale » (ibid., par. 12).

Il n'était pas dit ce qui se passerait si les parties se montraient soudain récalcitrantes.

Enfin, il est clair que, selon l'interprétation que l'on donne à la légitime défense, la latitude d'utilisation de la force par une opération de maintien de la paix sera plus ou moins grande.

- *Opérations de maintien de la paix dans les discours des États*

La position française à l'égard de ces nouvelles opérations était de distinguer deux types d'opérations de maintien de la paix. D'une part, les opéra-

¹⁹ Dans un article intitulé « Peace-keeping operations during the twenty-first session of the General Assembly: a preliminary study », *Indian Journal of International Law* (1967), p. 469. Edvard Hambro se réfère à un document du 20 avril 1961 qui aurait utilisé ce terme pour la première fois, mais sans autre précision.

tions de maintien de la paix qui sont coercitives ou supposent des décisions ne seraient-ce que financières qui relèvent du Chapitre VII — entrent dans cette catégorie aussi bien l'intervention en Corée que la FUNU, l'Opération des Nations Unies au Congo (ONUC) et la Force des Nations Unies chargée du maintien de la paix à Chypre (UNFICYP). D'autre part, les opérations de maintien de la paix qui sont entreprises sur la base de simples recommandations du Conseil de sécurité et de l'Assemblée générale et qui s'inscrivent dans le cadre des procédures de règlement pacifique des différends du Chapitre VI — n'entrent dans cette catégorie que les missions d'observation ou groupes d'observateurs, tels que l'Organisme des Nations Unies chargé de la surveillance de la trêve en Palestine (ONUST), le Groupe d'observateurs militaires des Nations Unies dans l'Inde et le Pakistan (UNMOGIP) et le Groupe d'observation des Nations Unies au Liban (GONUL). Autrement dit, la France considérait que les opérations de maintien de la paix ne pouvaient relever que du Conseil de sécurité, agissant dans le cadre du Chapitre VII, car elles présentaient divers aspects coercitifs. D'une part, la coercition ne disparaissait pas du fait du consentement de l'État, dans la mesure où l'intervention de l'ONU à l'intérieur d'un État, dans un conflit interne, implique une coercition sur des entités non étatiques — communauté, province, faction. D'autre part, dès qu'il y a des militaires en unités constituées, qui plus est, qui peuvent éventuellement se servir de leurs armes, même de façon limitée (légitime défense, en dernier ressort, dans certaines zones), il y a coercition. Enfin, disait la France, et l'on voit, à la lumière des dérives actuelles, combien cette position était prémonitoire, le mandat de la force risque de se modifier en cours d'exécution, et même s'il n'était pas ou peu coercitif à l'origine, déboucher sur l'emploi de la force.

Serrant de près la Charte, cherchant à rester au plus près de l'équilibre des pouvoirs prévus, la France estimait que même si politiquement les opérations de maintien de la paix requerraient le consentement des parties, juridiquement elles relevaient du Chapitre VII et ne présentaient donc pas de discontinuité fondamentale avec une utilisation de la force armée²⁰.

On sait qu'il y a là une position moyenne, l'Union des Républiques socialistes soviétiques estimant que toutes les opérations de maintien de la paix, y compris les simples missions d'observation, entraient dans la compétence exclusive du Conseil de sécurité, où cet État a un droit de veto; les États-

²⁰ Au départ, face à la Force intérimaire des Nations Unies au Liban (FINUL) et à l'ONUC, la position française était claire et se voulait gardienne de l'orthodoxie constitutionnelle. Dans la mesure où la France refusait la moindre différence entre une force de maintien de la paix et une action militaire coercitive du Chapitre VII, elle estimait fort logiquement que la FUNU était inconstitutionnelle, puisque créée par l'Assemblée générale qui n'avait pas de pouvoirs relevant du Chapitre VII, et que l'ONUC créée elle constitutionnellement pouvait être dotée sans difficulté d'un mandat impliquant l'usage de la force.

Unis, ayant, quant à eux, tenté de transférer, par le biais de la résolution Acheson, toutes les compétences — y compris dans le domaine des mesures coercitives — à l'Assemblée générale, où ils disposaient d'une majorité automatique.

- *Opérations de maintien de la paix dans le langage de la doctrine*

Vers le milieu des années 60, alors même qu'avaient déjà été lancées plusieurs opérations de ce type, l'approche doctrinale n'en restait pas moins multiforme et incertaine.

Il suffit de se plonger — avec délices — dans la littérature juridique du milieu des années 60, au moment de la grande crise que traversait l'ONU pour ses 20 ans, justement à propos de cette nouvelle catégorie des opérations de maintien de la paix qui était née de la pratique onusienne : FUNU I, ONUC, UNFICYP.

A y regarder de plus près, il semble que se dessinait un clivage — qui existe plus ou moins encore aujourd'hui — entre la doctrine française et la doctrine anglo-saxonne.

Le terme d'opération de maintien de la paix était alors largement employé. La *summa divisio* était toujours liée à l'idée de coercition, mais le contenu même donné à ce que constituait une action coercitive rendait la frontière mouvante.

La position du Gouvernement français au cours de la crise déclenchée par les opérations de maintien de la paix se retrouve dans la plupart des contributions doctrinales françaises. Une bonne illustration de cette approche se trouve dans l'article du professeur Maurice Flory paru dans l'*Annuaire français de droit international* de 1965²¹.

Le point de départ, comme indiqué, est un concept extrêmement englobant de l'opération de maintien de la paix. Selon cet auteur :

« Les opérations de maintien de la paix, ce sont toutes les opérations militaires et paramilitaires qui sont organisées sous la pression de la nécessité, faute de pouvoir mettre en œuvre les mécanismes de l'Article 43 et parfois faute de pouvoir s'appuyer sur les décisions du Conseil de sécurité »²².

²¹ « L'Organisation des Nations Unies et les opérations de maintien de la paix », *Annuaire français de droit international* (1965), p. 446. Cf. également p. 460 : « Il apparaît donc que le seul lien véritable entre l'ensemble des opérations de maintien de la paix est négatif : ces opérations ne sont pas celles de l'Article 43 ».

²² Ibid., p. 459.

Les opérations de maintien de la paix relèveraient donc tantôt du Chapitre VI, tantôt du Chapitre VII, selon qu'elles présentent ou non des éléments de coercition; la coercition semblant entendue tantôt comme la coercition juridique ou caractère obligatoire de la décision, tantôt la coercition matérielle ou utilisation de la force armée²³.

Les mêmes conclusions se retrouvent dans un article de Guy de Lacharrière intitulé « La polémique sur les opérations de maintien de la paix », paru en 1966, même si la démarche est différente²⁴.

Guy de Lacharrière part de l'hypothèse de la définition la plus exhaustive possible de l'opération de maintien de la paix²⁵.

De cet ensemble émergent deux sous-catégories simples : les actions coercitives qui relèvent exclusivement du Chapitre VII, et les missions d'observation qui peuvent aussi être décidées par l'Assemblée générale, donc en vertu du Chapitre VI.

Ce qui est plus complexe, c'est « l'entre-deux ». Il porte sur certaines opérations militaires qui impliquent l'emploi d'une « force » des Nations Unies²⁶. Après un analyse reprenant les débats bien connus, Guy de Lacharrière conclut que toutes ces opérations relèvent en définitive de la compétence du Conseil de sécurité, car elles entrent dans ce que l'on doit appeler une action coercitive.

L'ensemble « opération de maintien de la paix » est cerné et découpé différemment dans la littérature juridique anglo-saxonne, et suit, là aussi, très largement la position américaine.

Un exemple permettra d'illustrer la différence d'approche, qui se caractérise à la fois par son pragmatisme — et cela n'est pas pour nous surprendre — et la détermination d'une catégorie unique d'opérations de maintien de la paix ne relevant pas du Chapitre VII. Edvard Hambro²⁷, rappelant que le terme d'opérations de maintien de la paix n'existe pas dans la Charte, se demande s'il est nécessaire d'en rechercher une définition. Sa réponse est négative :

« Il n'est sans doute pas très utile d'essayer de donner une définition formelle de ce que l'on entend par opération de maintien de la paix. Il suffit de dire que de nombreuses activités de type international

²³ Ibid., p. 459 et 460.

²⁴ *Politique étrangère* (1966), p. 319.

²⁵ « L'expression engloberait un ensemble très vaste d'opérations. A une extrémité figureraient les opérations décidées par le Conseil de sécurité, pour réprimer une agression et « décidées » au sens technique du mot, c'est-à-dire dont la mise en œuvre serait obligatoire pour les États. Puis, à l'autre extrémité, cela désignerait tous les modes pacifiques de règlement, conciliation et médiation. Au milieu, il y aura l'enquête, l'observation sur place », *Politique étrangère* (1966), p. 321.

²⁶ Ibid., p. 322.

²⁷ « Peace-keeping operations during the twenty-first session of the General Assembly: a preliminary status », *Indian Journal of International Law* (1967), p. 469.

sont plus efficaces lorsqu'elles sont entreprises par des groupes organisés sous l'autorité des Nations Unies. Les opérations de maintien de la paix peuvent être utilisées pour superviser un cessez-le-feu, pour observer des endroits troublés, pour patrouiller des territoires temporairement sous mandat de l'ONU, pour contrôler des mesures de désarmement, etc. . . . Certains de ces groupes peuvent être relativement petits et certains peuvent comporter des centaines de soldats. Certains sont entièrement civils, d'autres consistent en personnel militaire entraîné et organisé en unités. La seule chose que tous ces groupes — tous sans aucune exception — ont en commun, c'est d'être basés sur le consentement des États en question, et de ne pas être des contingents dotés de pouvoirs coercitifs dans le but de mettre fin à une agression dans le cadre du Chapitre VII de la Charte »²⁸.

Deux points méritent d'être soulignés : le caractère descriptif de l'approche et, la mise en évidence d'une caractéristique commune de toutes les opérations de maintien de la paix, qui est de ne pas relever du Chapitre VII.

Dans la suite de son article, Edvard Hambro précise encore ce dernier point, s'il en était besoin :

« Le premier élément des opérations de maintien de la paix — et de ce point de vue il n'y a aucune raison de distinguer entre les missions d'observation et les forces de maintien de la paix — c'est que ces opérations n'ont pas pour objet de mobiliser la force irrésistible de la communauté internationale organisée contre un agresseur²⁹. »

Si dans la doctrine initiale les opérations de maintien de la paix n'émergeaient que difficilement de l'action coercitive, une certaine confusion des genres que l'on constate également aujourd'hui existait aussi sur le terrain.

- *Opérations de maintien de la paix dans le langage des faits*

La dérive actuelle n'est en effet pas sans précédent. A titre d'exemple, on oublie, en effet, trop souvent qu'en réalité à deux reprises différentes dans l'affaire du Congo, le Conseil de sécurité a autorisé l'usage de la force : une première fois au début de 1961, à la suite du décès de Patrice Lumumba, pour éviter la guerre civile; et une seconde fois à la fin de 1961, pour mettre fin à la sécession du Katanga, en expulsant les mercenaires étrangers.

²⁸ *Idem*, p. 470, notre traduction.

²⁹ *Idem*, p. 471.

Les termes des résolutions pertinentes sont très clairs. Dans sa résolution 143 (1960) du 14 juillet 1960, le Conseil de sécurité a décidé « d'autoriser le Secrétaire général à prendre, en consultation avec le Gouvernement de la République du Congo, les mesures nécessaires en vue de fournir à ce gouvernement l'assistance militaire dont il a besoin, et ce jusqu'au moment où les forces nationales de sécurité, grâce aux efforts du Gouvernement congolais et avec l'assistance technique de l'Organisation des Nations Unies, seront à même, de l'opinion de ce gouvernement, de remplir entièrement leurs tâches ».

Dans la résolution 169 (1961) du Conseil de sécurité, en date du 24 novembre 1961, le Secrétaire général était autorisé « à entreprendre une action vigoureuse, y compris, le cas échéant, l'emploi de la force dans la mesure requise, pour faire immédiatement appréhender . . . ou expulser tous les personnels militaires et paramilitaires . . . ainsi que les mercenaires ».

À la suite de tous ces débats, semblait, peu à peu, s'être dégagée une opinion majoritaire dans le monde, qui admettait que la ligne de partage ne se faisait pas au coeur des opérations de maintien de la paix, mais qu'elle séparait d'un côté toutes les opérations de maintien de la paix, de l'autre l'emploi coercitif de la force armée, et l'on utilisait alternativement la référence au Chapitre VI ou au Chapitre VII pour distinguer les deux types d'opérations.

Et puisque ce colloque envisage le droit international comme un langage pour les relations internationales, qu'il nous soit permis ici de faire quelques remarques sémantiques. On sait que dans la Charte, le Chapitre VI, face à un danger relatif à la paix internationale, dotait l'ONU de pouvoirs de persuasion, exigeant la collaboration des parties; tandis qu'en cas de danger grave pour la paix, l'ONU avaient des pouvoirs coercitifs énoncés au Chapitre VII, qui culminaient dans des pouvoirs de contrainte militaire.

Or, la démarche s'est pour ainsi dire inversée.

La référence au Chapitre VI ou au Chapitre VII ne dépend plus au danger plus ou moins sérieux que court la paix — un différend dont la prolongation est susceptible de menacer la paix entraînant la mise en action du Chapitre VI, une menace à la paix, une rupture de la paix ou un acte d'agression entraînant l'utilisation du Chapitre VII.

La référence au Chapitre VI ou au Chapitre VII est devenue une sorte d'invocation rituelle, de code linguistique, qui est là pour signifier *urbi et orbis*, dans un premier cas que l'on utilisera des pouvoirs de persuasion et que le consentement de l'État sera nécessaire, dans le second cas que l'on utilisera des pouvoirs de contrainte et que l'on se passera du consentement de l'État.

L'opération de maintien de la paix, opération du Chapitre VI ou VI *bis*, semblait irréductible à cette autre action en vue du maintien de la paix que pouvait entreprendre l'ONU, à savoir une action coercitive du Chapitre VII.

L'équilibre politique a fait que ces opérations de maintien de la paix sont restées plus ou moins, sauf au tout début, dans le cadre qui leur était assigné. Mais celui-ci a changé, et l'évolution politique qui a suivi la fin de la guerre froide a permis au système de fonctionner dans des conditions proches des conditions initialement prévues, même si bien des paramètres ont évolué depuis 1945.

Rien d'étonnant donc à ce que les opérations de maintien de la paix, qui peu à peu étaient sorties de la gangue des actions coercitives impossibles, pour tenir compte des réalités politiques, semblent pour ainsi dire opérer une sorte de retour aux sources, et flirter à nouveau, qu'on le déplore ou qu'on s'en réjouisse, avec les pouvoirs coercitifs du Chapitre VII.

Tout se passe comme si la boucle était bouclée, les opérations de maintien de la paix initiales, encore enchâssées dans le système de la Charte, ne paraissaient pas absolument dissociées de l'éventuel emploi de la force armée : les opérations contemporaines, libérées des contraintes politiques, en viennent à rejoindre à l'institution qu'elles étaient, faute de mieux, destinées à remplacer, à savoir l'action coercitive.

III. L'AVENIR : UNE NÉCESSAIRE DISTINCTION OU UNE COMPLÉMENTARITÉ SOUHAITABLE ?

- *La position des acteurs internationaux sur les opérations de maintien de la paix*

L'opinion du Secrétaire général lui-même semble avoir évolué sur cette délicate question, face aux « changements dramatiques » qui se sont produits dans les opérations de maintien de la paix depuis trois ans.

On se souvient que l'« Agenda pour la paix » ouvrait la voie à des opérations de maintien de la paix non fondées sur le consentement des États.

Le Supplément à l'« Agenda pour la paix », lancé le 3 janvier 1995, au tout début de l'année du cinquantenaire de l'Organisation des Nations Unies, se voulait une première contribution aux nombreux débats qui ne manqueront pas d'émailler cette année, et ce Congrès en fournit un excellent forum.

M. Boutros Boutros-Ghali, dans ce document, indique que l'utilisation de la force, lorsqu'elle a eu lieu dans le cadre des opérations de maintien de la paix, n'avait pas le même objectif que lorsque sont prises des mesures coercitives :

« . . . sont apparues, en Bosnie-Herzégovine et en Somalie, des opérations de maintien de la paix d'une catégorie nouvelle. L'emploi de la force est autorisé en vertu du Chapitre VII de la Charte, mais l'ONU reste neutre et impartiale entre les parties en présence, et n'a pas pour mandat d'arrêter l'agresseur (si celui-ci peut être identifié) ni d'imposer la cessation des hostilités » (A/50/60-S/1995/1, par. 19).

Cependant, même ainsi limité, à la protection des missions de l'opération, l'usage de la force ne lui semble pas souhaitable à l'avenir dans le cadre des opérations de maintien de la paix futures³⁰. Son point de vue est exprimé avec une extrême fermeté³¹ :

« En réalité, rien n'est plus dangereux pour une opération de maintien de la paix que de devoir user de la force lorsqu'elle n'est pas en mesure de le faire en raison même de sa composition, de son armement, de son soutien logistique et de son déploiement. La logique du maintien de la paix procède de prémisses politiques et militaires totalement différentes de celles des mesures de coercition; de surcroît, dans ce dernier cas, la dynamique est incompatible avec le processus politique que l'opération de maintien de la paix est censée faciliter. Si la distinction entre les deux est floue, la viabilité de la mission et la sécurité de son personnel risquent d'en souffrir » (ibid., par. 35).

Les choses sont donc très claires pour le Secrétariat de l'ONU :

« Le maintien de la paix et l'emploi de la force (sauf en cas de légitime défense) doivent être considérés comme des solutions de rechange et non pas comme des éléments voisins d'un continuum permettant de passer aisément de l'un à l'autre » (ibid., par. 36).

³⁰ Pour un point de vue analogue, voir F. T. Liu, « The use of force in UN peace-keeping operations: a historical perspective », *The Tokyo Symposium*, op. cit., p. 4: « when a peace-keeping operation uses force against one of the contending parties as enforcement action, it ceases to be impartial and this may make it part of the problem rather than part of the solution. Therefore the United Nations must choose between peace-keeping and peace enforcement ».

³¹ Cette idée semble lui tenir à cœur, puisqu'il la martèle au cours de ses diverses interventions. Ainsi dans un entretien accordé au *Trimestre du Monde*, il déclare : « Les opérations de maintien de la paix déjà en cours ont été prolongées par des mandats supplémentaires autorisant notamment le recours à la force. Et cela est totalement incompatible avec les mandats initiaux qui demandaient, quant à eux, le consentement des parties, l'impartialité des Casques bleus et le non-recours à la force sauf en cas de légitime défense. Il est donc indispensable que les Casques bleus disposent d'un mandat clair et cohérent !

En second lieu, ces nouveaux mandats ne prévoyaient pas, pour autant, l'octroi de forces militaires supplémentaires. Ce fut notamment le cas en Yougoslavie. Or, rien n'est plus dangereux que de créer une opération de maintien de la paix susceptible d'utiliser la force, alors que rien n'est prévu pour cela. Il faut donc donner aux Casques bleus les moyens matériels de remplir la mission qui leur est assignée !

Je veux, enfin, souligner de la façon la plus nette que la logique des opérations de maintien de la paix et la logique du recours à la force armée ne sont pas conciliables. Confondre ou entremêler les deux peut entraîner l'échec de toute intervention. Cela risque de compromettre toute l'opération et de mettre en cause la vie des contingents. Les opérations de maintien de la paix et l'utilisation de la force devraient être considérées comme deux branches d'une alternative, et non pas comme des mesures cumulatives. Le Conseil de sécurité doit donc choisir la politique qu'il veut mener ! » Premier trimestre (1995), op. cit., p. 12. C'est nous qui soulignons.

Et il va même plus loin, en déclarant que les échecs des opérations de maintien de la paix s'expliquaient parce qu'elles avaient trahis leurs principes de base :

« . . . les quelques dernières années ont confirmé que le succès de cette démarche dépendait du respect de certains principes fondamentaux, dont trois sont particulièrement importants : consentement des parties, impartialité et non-usage de la force, sauf en cas de légitime défense. Si l'on examine les succès et les échecs récents, on constate qu'à chaque fois qu'une opération a réussi, ces principes avaient été respectés et que, dans la plupart des autres cas, l'un ou l'autre ne l'avait pas été » (ibid., par. 33).

Pour certains États, dont la France, les choses semblent cependant moins claires, l'essentiel étant la liberté d'action que doit conserver le Conseil de sécurité, à tout instant du déroulement d'une opération de maintien de la paix. La doctrine officielle française, quoique non encore définitivement arrêtée, semble s'orienter vers une sorte de trilogie.

Trois grands types d'opérations devraient être envisagées :

- a) *Les opérations de maintien de la paix*, dans le cadre du Chapitre VI bis, pour maintenir la paix avec le consentement des parties, après la cessation des hostilités : ces opérations, caractérisées par leur fondement juridique, engloberaient aussi bien les opérations de maintien de la paix d'interposition de la première génération que les opérations de maintien de la paix dites de la deuxième génération — de prévention ou de consolidation de la paix;
- b) *Les opérations de restauration de la paix*, qui seraient des opérations effectuées alors qu'un conflit est en cours, dans un pays en guerre civile, où se commettent de graves violations des droits de l'homme, où la force serait utilisée pour établir la paix, non contre un agresseur, et qui mêleraient étroitement persuasion et coercition;
- c) *Les opérations d'imposition de la paix*, opérations du Chapitre VII, dirigées contre un agresseur.

Pour la France, aujourd'hui comme hier, il n'y a pas de spécificité des opérations de maintien de la paix, ou plus exactement, il y a un continuum possible entre le maintien de la paix et l'imposition de la paix.

- *Les moyens des opérations de maintien de la paix*

Quels sont ou seront les moyens d'action de l'ONU pour le maintien de la paix ?

Dans l' « Agenda pour la paix », le Secrétaire général envisage différents types de forces militaires utilisables par l'ONU³² :

- Les forces de coercition prévues à l'Article 43, pour lesquelles il recommande que soient enfin relancées les négociations avec les États;
- Les forces de maintien de la paix, pour lesquels il demande aux États ce qu'ils seraient prêts à mettre à la disposition de l'ONU : c'est l'idée des forces en attente, des « *stand-by forces* »;
- Des unités d'imposition de la paix, qui seraient des forces répondant à un objectif spécifique : l'utilisation de la force non contre un agresseur, mais dans le cadre d'une opération de maintien de la paix, c'est-à-dire pour remplir certains objectifs respectant la neutralité de l'opération — protection de l'aide humanitaire, protection des populations civiles.

Le Supplément à l' « Agenda pour la paix » indique une certaine évolution :

- a) En ce qui concerne les forces de coercition de l'Article 43, tout en rappelant qu'il serait « souhaitable à long terme que l'ONU se dote d'une telle capacité » (A/50/60-S/1995/1, par. 77), le Secrétaire général semble avoir perdu l'illusion que les accords de l'Article 43 puissent être rapidement négociés. Et semble, par conséquent, se résoudre, à ce que les actions coercitives soient menées par les « États Membres, agissant à titre national ou dans le cadre d'arrangements régionaux » (ibid., par. 79);
- b) Parallèlement, et selon la même logique, l'idée des unités d'imposition de la paix est abandonnée;
- c) Pour ce qui est des forces de maintien de la paix, il semblerait, au contraire, y avoir une tendance au renforcement, puisque les forces en attente devraient même comporter une *force de réaction rapide* : il y a là l'idée d'une mobilisation potentielle rapide de forces de maintien de la paix, de la constitution de ce que le Secrétaire général appelle « la réserve stratégique du Conseil de sécurité » (ibid., par. 44). Cette force est aussi décrite :

« Elle pourrait se composer d'unités équivalant à des bataillons, en provenance de plusieurs pays, qui recevraient la même instruction, opéreraient selon les mêmes procédures, seraient équipées de matériel de transmissions intégré et participeraient régulièrement à des

³² Selon David Ruzié dans la *Lettre de l'UNIDIR*, *Maintien, construction et imposition de la paix* — Une perspective juridique, n° 24 (décembre 1993), p. 73. Les trois types de force « ne correspondent pas à trois types de missions différentes ».

manœuvres communes. Elles seraient stationnées dans leur pays d'origine tout en étant prêtes à intervenir à tout moment. L'intérêt de ce dispositif serait bien entendu fonction de la mesure dans laquelle le Conseil de sécurité pourrait effectivement compter sur cette force en cas d'urgence » (ibid., par. 44).

- *L'avenir des opérations de maintien de la paix*

Nous aurions tendance à penser qu'il convient de garder un clivage clair entre les opérations utilisant la force et les opérations ne l'utilisant pas, pour toutes sortes de raisons, aussi bien théoriques que pratiques.

La distinction des deux types d'action me semble absolument nécessaire. Les points de vue sur cette question ne sont évidemment pas unanimes.

Bien entendu, sur le plan strictement juridique, le Conseil de sécurité peut, lorsqu'il y a une menace à la paix, une rupture de la paix ou un acte d'agression, décider d'une utilisation coercitive de la force armée.

Cependant, se pose un problème — même sur le plan juridique — dans la mesure où une opération de maintien de la paix pénètre avec le consentement de celui-ci, et un certain mandat : n'y aurait-il pas une sorte de théorie de l'*estoppel*, qui interdirait, alors que la force est sur le territoire, de brutalement rompre l'accord initial et opérer une mutation totale des objectifs — imposer la paix et non pas seulement la faciliter — et des moyens — utiliser la force armée, et pas seulement la négociation et la persuasion ?

Cependant, là n'est pas le problème essentiel, car on ne peut toujours admettre que les pouvoirs du Chapitre VII permettent ce qu'il n'est pas possible de faire normalement, comme par exemple d'intervenir dans les affaires intérieures, ou d'employer la force malgré un accord de ne pas l'employer.

Même s'il n'y a pas utilisation de la force armée, mais seulement utilisation du Chapitre VII, pour imposer les mesures économiques, les deux logiques cohabitent difficilement : l'opération de maintien de la paix est fondée sur le principe de maintien d'une stricte neutralité entre les parties; l'action coercitive au contraire est nécessairement dirigée contre un État qui est ainsi désigné comme celui qui trouble la paix. Cette incompatibilité a été si bien perçue au Cambodge, que lorsque l'ONU a souhaité prendre des « sanctions » économiques du Chapitre VII contre les Khmers rouges, elles les a qualifiées de « mesures de préservation des ressources naturelles ».

Mais le problème essentiel se pose sur le plan opérationnel, et vient de ce que les deux types d'opérations ne répondent absolument pas aux mêmes exigences opérationnelles sur le plan militaire. Une opération de maintien de la paix n'a besoin que d'un dispositif défensif relativement léger, une opération d'imposition de la paix exige un dispositif offensif, et des moyens sans

commune mesure avec ceux qui sont nécessités par une opération de maintien de la paix. Le passage d'un type d'opération à l'autre, s'il se fait sans tenir compte de ces évidences, risque de mettre en danger la sécurité des soldats, et en cause la crédibilité de l'Organisation.

Le rapport Trucy a bien perçu cela : puisqu'on peut y lire que la tâche de maintien de la paix et la tâche d'imposition de la paix sont « deux tâches bien distinctes et qui ne peuvent être mélangées sans susciter de graves mécomptes. Des contingents équipés pour le maintien de la paix et l'aide humanitaire ne peuvent, sans que leur sécurité soit compromise, être transformés, du jour au lendemain, par une simple résolution du Conseil de sécurité en troupes appelées à se battre »³³.

L'existence d'une paix, même fragile, est différente de la situation de conflit ouvert, et un outil adapté à l'une ne l'est pas nécessairement à l'autre, comme les expériences récentes l'ont malheureusement prouvé. On ne peut faire une véritable opération de maintien de la paix, s'il n'y a aucune paix à maintenir³⁴.

Peut-être est-ce faute d'oser nommer les choses par leur nom que l'on finit par tout confondre dans un même brouillard onusien, et par méconnaître les durs impératifs de la réalité. Et puisque le sous-titre de ce Congrès est « Le droit international comme langage des relations internationales », qu'il me soit permis, encore une fois, de faire quelques remarques linguistiques.

Selon une formule lumineuse du général Sanderson, « l'action coercitive, après tout, c'est la guerre sous un autre nom » (« *Enforcement is, after all, war by another name* »).

Et la guerre est impardonnable.

Peut-être cette vérité mérite-t-elle d'être méditée, surtout si l'on constate qu'elle semble totalement refoulée.

Le langage onusien utilisé pour désigner l'emploi coercitif de la force militaire est pour le moins édulcoré et évite toute allusion à cet aspect violent des choses. Ne reprenons que quelques exemples qui montrent bien que l'innommable est là, et qu'en réalité l'utilisation de la force est d'autant plus facile, que son refus ou sa négation transparait dans le discours.

Que de non-dits !

Résolution 83 (1950) du Conseil de sécurité, en date du 27 juin 1950 : « Toute l'aide nécessaire pour repousser les assaillants ».

Résolution 498 (V) de l'Assemblée générale, en date du 1^{er} février 1951 : « L'Assemblée générale « invite tous les États et toutes les autorités à continuer

³³ P. 16 et 17, souligné par l'auteur.

³⁴ Rosalyn Higgins a souligné ce point avec force dans un article sur les nouvelles Nations Unies et l'ancienne Yougoslavie, dans *International Affairs* (juillet 1993), note, p. 469.

de soutenir, en apportant toute l'assistance possible, l'action des Nations Unies en Corée ».

Résolution 794 (1992) du Conseil de sécurité, en date du 3 décembre 1992 : « employer tous les moyens nécessaires pour instaurer aussitôt que possible des conditions de sécurité pour les opérations de secours humanitaire ».

Résolution 814 (1993) du Conseil de sécurité, en date du 26 mars 1993 : le Conseil investit ONUSOM II de la mission de « consolider, d'étendre et de maintenir la sécurité dans l'ensemble de la Somalie, compte tenu des circonstances propres à chaque localité, en agissant promptement »³⁵.

Résolution 929 (1994) du Conseil de sécurité, en date du 22 juin 1994 : « la mise en place d'une opération temporaire, placée sous commandement et contrôle nationaux »³⁶.

En d'autres termes, l'ONU a du mal à assumer qu'étant une organisation établie pour maintenir la paix, elle doit, parfois, recourir à la force armée. Une telle nécessité est cependant inhérente à toute société. Mais il convient de savoir ce que l'on fait, et de ne pas mélanger la guerre et la paix.

Peut-être au terme de cette analyse conviendrait-il de parler d'opérations de paix pour désigner toutes les opérations non coercitives de l'ONU, ayant pour finalité l'installation d'une paix durable, donc, entre autres, l'établissement des conditions d'une paix durable ? Sans doute, le terme n'est-il pas encore largement utilisé dans les enceintes internationales, mais peut-être ce Congrès peut-il être le vecteur d'une suggestion en ce domaine, d'un renouvellement du langage ? Car nous sommes convaincus que, s'il est vrai que ce qui se conçoit bien s'énonce clairement, l'inverse, moins souvent invoqué, n'en est pas moins vrai : ce qui s'énonce clairement se conçoit bien.

Les opérations de paix de l'ONU, pour pleinement remplir leur mission, devraient donc clairement être conçues comme des opérations de paix, excluant le recours à la force.

Si celui-ci paraît nécessaire, ce n'est plus d'une opération de paix dont il est besoin, mais d'un emploi de la force par l'ONU.

Les choix sont nécessaires : le Conseil de sécurité doit prendre ses responsabilités, c'est-à-dire que les grandes puissances doivent assumer leurs responsabilités.

Lorsqu'il n'y a ni paix (ex-Yougoslavie), ni État capable d'assumer un minimum de « *law and order* » (Somalie), une opération de paix est suicidaire, et seul le recours — assumé — à la force, dès l'origine, a quelque chance de succès.

³⁵ « Dabbling in war. The dilemma of the use of force in United Nations intervention », The Tokyo Symposium, op. cit., p. 7.

³⁶ Si l'on ne veut parler d'utilisation de la force armée, on veut encore moins nommer la puissance qui l'utilise, lorsque celle-ci se substitue à l'ONU pour des opérations de l'Article 42, comme ce fut les cas dans les utilisations récentes. Voir, par exemple, pour la Somalie, résolution 794 (1994) du Conseil de sécurité : *Notant* l'offre faite par des États Membres . . .

C'est ce que rappelle Yasushi Akashi :

« Comme vous le savez, les troupes de maintien de la paix de l'ONU ne sont ni entraînées, ni équipées, ni configurées, ni commandées pour être engagées dans une vraie guerre »³⁷.

Les militaires en particulier sont en principe hostiles à la modification du mandat en cours d'opérations, c'est ce qu'expliquait le général Morillon, lors d'une interview au Haut Commissariat des Nations Unies pour les réfugiés³⁸, parlant de son expérience en ex-Yougoslavie. Un point de vue très voisin a été exprimé par le général Rose au moment où il a quitté la Bosnie : dans une déclaration à l'*International Herald Tribune*, il a dit : « Il y a une distinction très claire dans mon esprit entre le maintien de la paix (« *peace-keeping* ») et les opérations de guerre (« *war-making* ») »³⁹.

Si l'ONU devient partie prenante du conflit, et il ne peut en aller autrement si les procédures du Chapitre VII sont activées contre l'une des parties au conflit, alors les missions humanitaires de l'opération vont être extrêmement difficiles à remplir : toutes les agences humanitaires — même sans doute les organisations non gouvernementales — risquent d'être perçues comme des protagonistes du conflit. Comment expliquer autrement que l'armée bosniaque serbe ait retenu en otage à plusieurs reprises — notamment en février et avril 1994 — des membres du Haut Commissariat des Nations Unies pour les réfugiés ?

Il pourrait ainsi y avoir deux grandes catégories génériques d'opérations de l'ONU :

- a) *Les opérations de paix*. Celles-ci engloberaient toutes sortes d'opérations ayant des finalités différentes, mais seraient toujours fondées sur le consentement des parties. Elles comprendraient :
 - i) Les opérations préventives, avant le conflit;
 - ii) Les opérations d'interposition classiques, après un cessez-le-feu;
 - iii) Les opérations de consolidation de la paix, après un règlement.

Leur point commun, outre la nécessité du consentement, serait d'être engagées seulement lorsqu'il n'y pas de conflit ouvert.

³⁷ The Tokyo Symposium, op. cit., note, p. 7, notre traduction.

³⁸ « Je suis d'accord avec les spécialistes des organisations non gouvernementales, les spécialistes de l'aide humanitaire, qui disent que le mélange des genres n'est pas acceptable » (16 novembre 1994), document mimeographié, fourni par le Haut Commissariat des Nations Unies pour les réfugiés. Interview conduite par Stephen Wolson.

³⁹ *International Herald Tribune* (23 janvier 1995), dans un article intitulé « General Rose leaves Bosnia after a turbulent year ».

- b) *Les opérations coercitives*. Celles-ci pourraient également avoir des finalités différentes, mais elles seraient toutes fondées sur le Chapitre VII de la Charte. Elles engloberaient :
- i) Les opérations de restauration de la paix, où la force serait utilisée de façon impartiale contre tous ceux qui entravent les missions humanitaires ou autres de l'ONU;
 - ii) Les opérations d'imposition de la paix, où la force serait utilisée contre un agresseur.

La caractéristique de ces opérations serait d'être engagées, alors qu'il y a un conflit interne ou international.

Il a été dit, lors du dernier colloque de la Société française du droit international en 1994, que la « pratique des opérations de maintien de la paix . . . n'a pas réussi à se doter d'une théorie et d'une doctrine précises »⁴⁰.

Ces quelques réflexions tentent d'apporter quelques éléments dans cette direction.

⁴⁰ P. Daillier, « L'action de l'ONU : Élargissement et diversification de l'intervention des Nations Unies », p. 2, document mimeographié.

THE IMPLEMENTATION AND PROMOTION OF INTERNATIONAL LAW THROUGH NATIONAL COURTS

*Jochen A. Frowein**

I. INTRODUCTION

In September 1993, the prestigious Institut de droit international adopted a resolution in Milan, stating, in article 1:

“National courts should be empowered by their domestic legal order to interpret and apply international law with full independence”.

The resolution thereby stressed the role of national courts in the implementation of international law and rejected the practice known in several jurisdictions, though hopefully on the decline, according to which courts have to abide by statements of the executive, of the political government, when deciding issues of international law.

Although the well-known discussion on monism and dualism seems to be somewhat outdated at the close of the twentieth century, it is clear that the international legal order and the many national legal systems remain separate, based on separate *Grundnormen* in the sense of Hans Kelsen.

However, what is completely different at the end of the century, compared with the reality at its beginning, is the interdependence of these legal orders, according to the rules existing in both orders, probably even more in

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the day-to-day practice of international as well as of State organs, including national courts.

It is a banality that international law depends heavily on its implementation and respect by national courts. But this phenomenon is of much greater importance at a time when so many rules of international law—unlike the situation in 1900—are of such a nature that they can be applied by national courts. The provisions of the many human rights treaties in force, the treaties concerning economic relations or the rules of regional systems of integration such as the European Union are good examples of that tendency. All those rules of international law must be applied by the national judge in the case at hand, unless they remain a dead letter in the area for which they have been designed. We have to take into account, and we will come back to the problem, that there may be different reasons why such an application is subject to certain conditions, but this does not detract from the main principle.

What is also much more visible in 1995 than in 1905 is the dependency of national law upon international law. In a world that has become interdependent, but, what is more important, is based on common values and principles, national legal systems are no longer watertight systems, even if it is still possible that national law forces State organs to act in violation of international law. But national law that does not in general respect the basic principles of the international legal order will not be respected by other legal orders, national and international. This non-respect may be expressed in different ways with important legal consequences which will be discussed later.

I should like to stress that our topic should also be seen in the context of the dramatic change that has taken place in the international legal order in and after 1989. The falling Berlin Wall is the symbol of the disappearance of this ideological rift separating two schools of international law. It cannot be overlooked that a fundamental disagreement over the basic values of international law was present in the dialogue between the two main systems, if one can speak of a dialogue. This disagreement has disappeared. Respect for international law, including respect for human rights, is no longer a matter where the same words mean completely different things. This has not solved the problems concerning respect for international law, but it has opened the way for important changes. One may even say that a certain homogeneity as to the constitutional systems based on international law is no longer a fiction.

I shall now discuss in more detail the implementation of international law by national courts, starting with treaties and customary law, then deal with human rights and some other issues before coming to some remarks on promotion of international law through national courts.

II. IMPLEMENTATION OF INTERNATIONAL LAW THROUGH NATIONAL COURTS

A. Treaties

It is a matter of great satisfaction for those working in the field of international law that constitutional rules granting treaties superior rank over municipal statutes have become much more numerous in recent years. While for a long time only the constitutions of the Netherlands and of France contained such a rule—which has been taken seriously in both countries only in recent years—the new constitutions drafted in the 1970s in Spain and Portugal and many of the new constitutions in Eastern Europe contain an express rule of that sort. This is to be welcomed.

However, the existence of the rule does not guarantee its application, as we have seen in several cases. And there are many important countries like the United States of America, the United Kingdom of Great Britain and Northern Ireland and Germany which do not know such a rule for the conflict between treaties and subsequent municipal statutes. Even without a rule giving superiority to treaties, courts may and should apply a principle of interpretation according to which a later statute should be interpreted in conformity with an earlier treaty, because it must be assumed that the legislature did not want to cause the State to be responsible, under international law, for breach of treaty. Courts in many countries have accepted such a rule of interpretation.

Probably more important than the question of rank is the notion of the applicability or of the self-executing character of the treaty. Although developed in earlier times with a view to justifying the possibilities of applying a treaty in the municipal sphere, it can easily be used to block such applicability if it is used in a restrictive manner. That seems to be the situation in many jurisdictions today. One may detect a growing hesitation of Governments to interpret treaties as self-executing and directly applicable. The German Government has informed the Parliament in several memoranda attached to treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the Convention on the Rights of the Child, that they are not directly applicable by national courts. The Federal Diet of Germany will normally not contradict such an interpretation which may easily influence courts later, although it is clear that it is not binding for courts. Courts may and should, in my view, be more courageous in disregarding the view of the Governments in these matters. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, prohibiting expulsion or extradition to countries where the

person is threatened by torture, will become a meaningful rule only when controlled by national courts.

Courts are almost powerless where the legislature, when adopting the statute concerning the treaty, as practised in the great majority of countries, formally and with binding force as part of the law declares that the provisions are not directly applicable by courts. Even in such a case, courts may use the treaty when interpreting national law, but that can be of limited value only. Where constitutional provisions make such a procedure dubious, it should be tested before the competent courts whether this may not in fact be a violation of the system of separation of powers. Must it not be left to the courts to decide which provisions in a treaty are or are not directly applicable?

It seems that the enormous growth of treaty law has caused a certain hesitation on the part of several Governments, parliaments and sometimes even courts as to the proper approach for its application in the national legal sphere. It is much easier to avoid a hard test case concerning compatibility of national law with treaty obligations if the treaty is not directly applicable by courts and does not create individual rights. Particularly with human rights treaties, which will hardly ever become a matter of bilateral dispute among States, non-applicability will almost certainly mean that one can forget about a real and meaningful application. The Government will continue to claim that the legislation is in conformity with the treaty and that is the end of the matter. It may well be that this device is used particularly where the provisions of the treaty might contain obligations to amend the legislation in particularly sensitive areas.

It should also be recognized that the growth of treaty law has certainly curtailed the freedom of politically motivated maneuvering which Governments and parliaments used to enjoy. Where the compatibility of national legislation with these treaties can be controlled by courts the political power of courts is clearly enhanced. When the French Conseil d'État decided that the procedure of binding interpretation of treaties by the Ministry of Foreign Affairs was in violation of the European Convention on Human Rights—later confirmed by the European Court of Human Rights in the case of *Beaumont*—it changed the balance of power existing until then. First, it showed the Government of France that it had completely misunderstood the European Convention on Human Rights and, second, it gained an important new international jurisdiction concerning the interpretation of treaties.

While one may certainly accept that judges also may like to increase their powers, this cannot be a key to the answer. The answer should be that States decide first whether they enter into treaty obligations. If they wish to do so, they should give their courts the jurisdiction to apply these treaties. What should be avoided is an ambivalent attitude: The State creates the im-

pression that it has concluded a treaty, but does not wish to be controlled by its courts as to the implementation.

Where the treaty has established organs which may interpret the treaty and come to a binding decision, national courts may enter into a dialogue with these jurisdictions and apply the treaty in the way an international organ has indicated. The European Convention on Human Rights is a very telling example. This regional bill of rights interpreted and applied by the European Commission and Court of Human Rights has influenced national legal orders considerably, not only through judgements concerning particular countries, but also through the courts, which in many, unfortunately not all, countries do apply the principles developed in the decisions of the European Commission and Court of Human Rights faithfully, even where a case did not concern their own country. This dialectic interplay of national courts with international courts or similar organs, which can also be studied in the law of the European Community, is of the utmost importance to the strengthening of international legal order.

For this fruitful dialogue and interplay to function, it would be most helpful if centres of information and education for national judges existed and were used. The fact that the Supreme Court of the United States with its enormous prestige did not fully grasp the international legal situation of abduction from foreign territory is—although the case was apparently very badly pleaded—an example of the need for information.

B. Customary International Law

Although traditionally very much in the centre of the discussion about the implementation of international law, decisions by national courts concerning rules of customary international law are mostly limited to a few very specific areas—for instance, State and diplomatic immunity, protection of property in international law and a few others. Rules of customary international law are less easy for a national judge to identify than treaties. Information by the Government may be quite important in that context but, as in the case of a treaty, such information should in no way be binding for the courts.

The Anglo-Saxon countries have clarified the area of State immunity for their courts through legislation. The different acts of sovereign immunity have been interpreted by the courts in an important number of cases. In principle, this clarification through statute should certainly be welcomed. However, a difficulty arises where courts completely forget that the statutes are meant to implement rules of public international law and do not operate in a legal vacuum. When a United States Court of Appeals refused State immunity on a literal interpretation of the United States statute in a case concerning an act of war by Argentina, it violated a clear rule of public

international law. No one had ever argued that the restrictive notion developed for the principle of State immunity after 1950 had reached the area of *acta jure imperii* in the most elementary sense—i.e., acts of war. The United States Supreme Court remedied the situation, but it should be noted that it is dangerous if courts are not able to look behind the technicalities of a statute to the rules of public international law which a statute wants to implement.

While it is rather rare that in applying treaties courts are asked to control actions of other States, it happens more often in the area of general international law. In particular, the rules concerning the expropriation of foreign property have been applied by courts under different conditions, frequently after property has been found in the forum State. It is true that in this situation some jurisdictions apply the act of State rule to avoid difficulties with the foreign Government concerned. This will mean that the compatibility of the foreign act of State with international law will not be looked into. Today there is no longer any dispute that this rule is not one prescribed by public international law but one laid down or indicated by national law—in the United States, by the principle of separation of powers. It seems very doubtful whether the reasons advanced for this practice are really convincing. The Institut de droit international adopted a clear rule in article 3 of its resolution of September 1993:

“1. National courts, when called upon to apply a foreign law, should recognize themselves as competent to pronounce upon the compatibility of such law with international law. They should decline to give effect to foreign public acts that violate international law.

“2. No rule of international law prevents national courts from acting as here above indicated.”

One may admit that a certain tension exists between the rule of sovereign immunity and the principle just stated. One could argue that the rule of State immunity should give way to the latter principle and that international law should be disregarded where violations, or at least grave violations, of international law are at stake. However, one should be careful before drawing such a conclusion. It is quite a different matter where in a case between private parties the compatibility of a foreign act of State with international law is controlled or where a case is brought directly against a foreign State. In the latter situation, orderly conduct of foreign affairs among sovereign States is made very difficult by court procedures. The rule of State immunity concerning *acta jure imperii* should be seen as a fundamental principle of public international law.

C. Human Rights

Protection of the individual through rules of international law is one of the great achievements of this century. National courts can be quite active in implementing these rules. It has already been mentioned that the case-law of several supreme courts in European countries has had a particular role in implementing the decisions of the European Commission and Court of Human Rights in national law.

But also, as far as other States are concerned, such a control can be quite important. One example is the matter of extradition, where the argument that torture will be practised against the person to be extradited or expelled raises a clear legal issue both under the European Convention on Human Rights and under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is, of course, not always easy for courts to get the necessary information to come to a conclusion on the violation of human rights in a foreign country, but this problem should not discourage courts at the outset.

Famous cases decided by United States courts have shown that human rights provisions in international law may also be used to establish the responsibility of people who have, as agents of foreign States, acted in violation of human rights. This will be a rare occurrence and such a trial must not become an unfair and one-sided procedure.

German courts have recently used provisions of the International Covenant on Civil and Political Rights to establish the responsibility of the German Democratic Republic border guards for killing people trying to flee from Eastern Germany to the West. It seems doubtful whether this is a correct application of rules of international law. In the German Democratic Republic, the Covenant was not made applicable as internal law and it is not easy to see how one could deduce a general right to leave a country illegally when the law of that country is not in conformity with the right guaranteed in the Covenant as to the freedom to leave one's country. It is not correct to read into the Covenant a general right to resistance to whatever in the national law is not compatible with the Covenant. In addition, it would seem difficult to accept that the rights created against the State may be used to establish retroactively obligations for the border guards. This does not exclude the possibility that these border guards may be criminally liable where they used their firearms in a way completely disproportionate to the aim they had to reach. But the use of firearms when people illegally cross a border is, unfortunately, still behaviour which is not as such in violation of international law.

There is one area where courts should be willing to implement international law more readily than is customary today. I have already mentioned

the *Alvárez Machaín* decision by the United States Supreme Court concerning a forced abduction of a person from Mexico. It is clear that the practice of police abduction from foreign territory has become a real problem in international law in recent years. In the documents published in connection with the *Alvárez Machaín* decision, it has become clear that the case is not unique in that respect and I regret to say that it has been established in several cases that Germany has acted the same way as the United States in this case. National courts will normally be satisfied with the so-called *male captus bene detentus* rule.

The *Stocké* case before the European Commission and Court of Human Rights has shown that a violation of international human rights norms can be established in such a case where the facts are sufficiently proven. National courts should support the same line where they can establish the violation of the right to personal liberty, included in a human rights treaty, by the organs of the State acting outside the territorial jurisdiction of that State. It is beyond doubt that abduction from foreign territory by State organs is a violation of the right to personal liberty, since only the organs of the foreign State can lawfully deprive the person of his or her liberty. As soon as national courts were willing to enforce these rules of international law by drawing the only possible consequence, namely, to liberate the person, the practice of State-organized abduction would become less attractive. The present situation must be seen as an encouragement for those likely to act in violation of international law.

In the field of human rights, national courts have a great responsibility to uphold the standards developed by international law in the national legal sphere.

III. PROMOTION OF INTERNATIONAL LAW THROUGH NATIONAL COURTS

Let me, in my concluding part, try to find out what the role of national courts should be to promote international law. Of course, implementation has also the effect of promotion, but we will now turn to the more active side of what may be called promotion, namely, strengthening progressively and developing international law, thereby contributing to what is sometimes called the international "*ordre public*".

A. Strengthening the Role of International Law

National courts have an immense possibility to influence the legal community and even the public at large by educating them as to the role of international law. The slogan "international law forms part of the law of the land",

first used by British judges very early on, has certainly had an enormous impact on the general attitude of lawyers in the countries which have adopted the rule, practically the whole world of the common law. Let us hope that this conference, as so many other activities of the United Nations, can contribute to the better understanding of this educative role of national courts.

B. Promotion As Active Contribution to Development

One must admit that, in the area of international law, national courts lack the mandate they need for developing national law. Their decision, even those by supreme courts, do not necessarily lead to a clarification of international law, which certainly indicates a greater reluctance of national courts in the area of international law.

However, national courts may play a very important role of promotion where international law is clear, but the gap between law and reality is great. Courts may help to change reality and influence society. Of course, where severe violations of international law by a government are brought before a court the embarrassment will be great. There have been practically no important cases where national courts have found against their own government concerning military or police action in a foreign country except after the fall of the regime concerned. However, it should not be excluded that courts may be able to control the executive also on the basis of international law. It has become a very widespread rule now that State organs, including the Government, are under the control of constitutional courts. It should also be the role of the competent courts to review the decisions of the Government on the basis of international law. The resolution of the Institut de droit international correctly states, in article 2:

“National courts when called upon to adjudicate a question related to the exercise of executive power should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law”.

C. “*Ordre Public*” International

When applying foreign law, courts are aware of the restriction of *ordre public* or public policy. May they apply a similar rule controlling national legislation on the basis of an international *ordre public*? We have already discussed the constitutional rules existing in many countries. It should be accepted that national courts have a role to play promoting the international *ordre public*.

DIFFICULTIES OF GLOBAL NEGOTIATIONS: THE DILEMMA OF MARITIME DELIMITATION

*Kari Hakapää**

At the Third United Nations Conference on the Law of the Sea, maritime delimitation emerged as one of the “hard-core” issues of the negotiations. In the discussions, the notion of a legal principle—notably, a principle of international law—played a central role.

A number of delegations found a viable solution in the principle of equity: the delimitation of the exclusive economic zone or the continental shelf between States with opposite or adjacent coasts was to be effected “in accordance with equitable principles”. In this context, reference could also be made to the 1969 Judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, employing the same expression.

A number of other delegations preferred to speak of another principle—the principle of using the median or equidistance line as the basis of delimitation. Their proposal, while sharing the goal of a just solution, was seen as being free of the vagueness of the abstract notion of equitable principles.

From an academic point of view, the first question to be answered here relates to the recognition of a principle of international law: how to identify such principles? Obviously, the term may be used in various senses. It may denote a principle agreed upon by the parties to a convention; it may denote a principle of customary law; or it may denote the kind of general principle of law recognized by civilized nations, referred to in Article 38 of the Statute of the International Court of Justice.

Nevertheless, irrespective of its legal basis, a principle usually implies a rather general rule to be followed in a particular context. Likewise, it may be assumed that the objective of the delegations at the Third United Nations Conference on the Law of the Sea, determined to include a provision on maritime delimitation in the United Nations Convention on the Law of the Sea,

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was to produce general guidelines for any delimitation to be effected on the merits of its particular geographical characteristics. In a global framework, it was quite impractical to attempt a detailed regulation of whatever delimitation situations there might be. Rather, the search was only for a general rule to provide a solid basis for both future delimitation agreements and for future settlement of delimitation disputes. The search was for a principle—a rather general principle—of delimitation.

In this enterprise, it soon proved evident that no clear-cut principle of delimitation existed which everybody accepted. Previous delimitation agreements had, to be sure, favoured the equidistance rule, but in judicial practice a trend towards equitable solutions was emerging. If the principle was there, it was not easy to identify; if there was no valid principle, it also seemed very difficult to elaborate one.

As a result, in the final versions of articles 74 and 83 of the Convention dealing with the delimitation of the exclusive economic zone and the continental shelf, the concept of a principle does not at all appear. There is no reference to the delimitation to be effected “in accordance with equitable principles”, so persistently advanced by the “equity group” all through the negotiations. Neither is there any reference to a general principle of employing the median or equidistance line, considered quite crucial by the “equidistance group”. In fact, in the final text, there is no express reference to the median or equidistance line at all.

For normative purposes, it would seem that the price for such a compromise was a very high one: what suffered most was the idea of applicable law. An effort to identify or elaborate a principle of delimitation ultimately provided virtually no guidance as to the existence of such principles.

At the same time, it would be inaccurate to claim that the Conference did not confirm any principles of delimitation. Quite the contrary, the provisions finally adopted seem to refer to whatever principles of delimitation there might be in the realm of international law. According to articles 74 and 83 of the Convention:

“The delimitation of the exclusive economic zone or continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”.

In other words, in the process of delimitation, all sources of international law shall be taken into account. Any principle applicable to the act of delimitation may have potential relevance, providing it contributes to an equitable solution.

In terms of legal drafting, the end result of the laborious and time-consuming negotiations was discouraging. The final text—in itself a skilful compromise produced by the President of the Conference at its eleventh hour—is simply devoid of substance. It is hardly to be foreseen that delimitation disputes may actually be solved with reference to the provision, unless by “reference to the provision” we mean the extremely vague objective of reaching an equitable solution.

For an international lawyer, the regime of delimitation adopted by the Convention borders on a misnomer. The question readily presents itself whether it was worth years of negotiations to produce something in substance considerably less—for better or worse—than the corresponding provisions in the 1958 Convention on the Continental Shelf. Inasmuch as it is our goal to promote and implement the principles of international law, this result of the negotiations may give occasion to some observations.

My first observation relates to the very nature of global negotiations. It may be submitted that questions of an essentially local nature should not be introduced into multilateral treaty-making. Each case of delimitation takes on its own local character. Although not actually argued before the Conference, the various delimitation disputes pending in different parts of the world dominated the Conference discussions on the subject. For instance, it soon proved inevitable that no agreement could be reached on any kind of list enumerating the various factors to be taken into account to secure an equitable delimitation. No list could be exhaustive enough to meet the concerns of all the parties involved.

None the less, the issue also had an obvious global connection. The predictability of the settlement of delimitation disputes would be well served by generally accepted principles offering a regulatory umbrella for the elaboration of various local situations. The product of the global negotiations might decisively promote the maintenance of international peace and security in the local context. For this purpose, in particular, I think it was worth while taking the pains to try to identify principles applicable to all delimitation situations.

My second observation relates to the economy and credibility of global negotiations for the identification or elaboration of principles of international law. From the very start of the United Nations Conference on the Law of the Sea, the delimitation issue was considered an extremely difficult one. One alternative, reflected in the discussions, was not to include anything on such a controversial issue in the Convention. By doing so, time and energy could be saved for other—more promising—efforts to address the Conference agenda.

Again, however, other arguments may sanction the procedure adopted. No doubt, in a convention dealing with all aspects of the law of the sea, it would seem imperative that the delimitation of the maritime zones identified in the document should be provided for. At the same time, it is to be admitted that such a conclusion may reflect a scholarly wish for systematic completeness rather than a recognized need for a global principle of delimitation. Admittedly, the ambitions of a professor may often be different from those of a politician. And, certainly, the realm of international law today is more difficult for us to mould than it was for Grotius and his contemporaries. Still, I submit, the effort was worth making: A political difficulty should not prevent the legal mind from seeking a just solution even if, in the end, its normative value remains but modest.

This may, however, lead us to the further question of whether the legal community has had a tendency to overplay efforts at codification. Obviously not all conventions can be equally successful in practical application. It is only understandable that some of them may gain more support in the international community than others. Still, there are examples of conventions, the result of recognized expertise and hard work, which have not even attracted the minimum recognition required for their entry into force. The Convention on the Law of the Sea is not in this category. Today, after the adoption of the recent Agreement implementing Part XI thereof, the Convention would seem to have good chances for securing truly universal application. The substance of its delimitation provisions, nevertheless, hardly corresponds to the energy and time devoted to their elaboration in the course of the treaty-making process.

My third observation relates to what I find to be the most disappointing element in the elaboration of the delimitation principles at the Conference on the Law of the Sea—that is, the watering down of a search for a legal principle to a statement of evident platitudes. The element most crucial to the final compromise was the reference to international law: The core message of the relevant articles is that delimitation shall be effected on the basis of international law. Fair enough, but, of course, this is of very little help in solving a delimitation dispute. Also, the reference, in the provisions, to Article 38 of the Statute of the International Court of Justice only opens the door to using whatever principles there may be—or whatever principles the parties to delimitation disputes may wish to invoke—provided they facilitate an equitable solution.

I have not been surprised that, when speaking about these formulations with my students, they have had much difficulty in giving the international negotiating process the credit it generally deserves. In this case, however,

intensive negotiation did not clarify old principles or elaborate new ones: It simply verified the inability of the participants to agree on a viable regime of delimitation.

On the other hand, in looking for the causes of the failure, no delegation or group of delegations should be singled out. Rather, the reasons are to be found in the very nature of the subject-matter. The overwhelming political and economic interests involved and the countless geographical situations to be dealt with seemed to preclude any chance of perceiving a truly effective rule of law acceptable to all parties.

In the final text, one may also recognize language typical of United Nations practices. In the absence of an agreement on the applicable rules and principles, the lowest common denominator has been found in a general reference to international law. In a serious effort at treaty-making, it is submitted that such understatements are not conducive to the promotion of international law. Arguably, one should not invoke a principle without saying what it is. A meaningless reference to international law may undermine rather than strengthen its normative function.

The language of the past, however, need not be the language of the future. One may express the hope that the international community would today be better prepared to call matters by their proper names than it has been in the past. That we should act in accordance with international law is a postulate inherent in any activities of the international community. If confronting a specific problem in the definition of the contents of international law, we should admit the dilemma, not hide it. In the case of the delimitation provisions of the Convention on the Law of the Sea, this may have suggested the deletion of any self-evident and non-substantive reference to international law and simply setting an equitable solution as the goal to be reached in mutual agreement.

An answer to the dilemma may, however, also be sought elsewhere. Notwithstanding the difficulties in the codification of delimitation provisions, delimitation disputes have been successfully brought to judicial settlement. Notably, the case-law of the International Court of Justice bears evidence of a promotion of delimitation principles, which has been more productive than were the efforts of the Conference on the Law of the Sea to state the applicable law.

The need for codification and development of international law through a traditional treaty-making procedure remains to be recognized, but the need to provide solutions viable in each particular case and satisfactory to the parties of a dispute also underlines the role of the judiciary. While the Conference on the Law of the Sea experienced its difficulties in this respect as well, the spirit of its provisions on dispute settlement has already been reflected in

State practice. Perhaps the case of maritime delimitation may suggest a certain shift of emphasis from traditional and complex codification procedures to more direct application of general principles to particular situations. Not so seldom, the interests of individual parties may be better guarded before the courts than amidst the politics of international “legislation”.

OPEN-FLOOR DISCUSSION

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MS. MARÍA TERESA INFANTE CAFFI

Mr. Reyes* said that the Calvo clause was used and indeed abused in his country, being part of Mexico's constitutional system, and any company established there was required to make an express waiver of the protection of its Government. In practice, however, the doctrine had never gained full acceptance in international tribunals, including courts of arbitration, on the grounds that, though natural persons might have waived such protection, the countries to which they belonged had not waived the protection of their nationals.

Mr. Ben Achour** considered that the notion of "regional international law", though recognized by doctrine and even by the International Court of Justice, jeopardized the consistency of general international law and should therefore be limited to the greatest possible extent, for otherwise one would be compelled to admit the existence of an "international law" for every region or subregion of the world. The notion could not be entirely ruled out, however. In fact, the reason for its recognition was that, not infrequently, particular geographic communities found it difficult to identify with the supposedly general rules of international law precisely because that law was an embodiment of a specific regional international law.

Mr. Salinas,*** speaking of the recent tendency, at the international level, to assign a positive value to democracy, pointed out that one of the classic principles of international law had been the internal sovereignty of States,

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which implied the right of each State to choose the form of government that it deemed appropriate. The new tendency, however, implied that international law had lost its neutrality regarding forms of government. He would like to hear Ms. Infante Caffi's remarks on that subject.

Ms. Infante Caffi (reply) said that the Calvo doctrine and its formal expression, the Calvo clause, which related to agreements for promoting and protecting investments, appeared in some respects to be modified by new trends in international economic law in Latin America. Naturally, one of the questions involved was whether a State could agree, in cases where foreigners formulated claims against it, to the exemption of those claims from the requirement to exhaust internal remedies.

Regarding the consistency between regional international law and universal international law, the reasons for the existence of regional law were generally similar to the reasons for the relative effects of treaties. Consequently, one must exercise caution in studying regional international law, as a set of juridical doctrines that supported political decisions and acts of States in the area of negotiations, and postulate that there were principles of regional value that constituted derogations from general law. In the case of such derogations, such as that of diplomatic asylum, the problem was to determine to which State a special juridical regime applied whose validity was not universal and was recognized as such by the parties.

On the question of the reserved domain of Governments and of democracy as a concept having a juridical foundation, the debate was beginning, but a number of elements had yet to be worked out. Sovereignty was limited by the obligations assumed by States, by custom or by international treaties and for many decades the question of human rights had also constituted a limitation on the total freedom of States. Democracy was a related issue, but it involved not merely the reserved domain of the State with respect to international law or to an organ that was the custodian of certain values, but also the right to participate in international political decisions, for which certain requirements had to be met.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION BY MS. BRIGITTE STERN

Mr. Ferencz,* commenting on Ms. Stern's remark that nothing could stop the Security Council, not even the International Court of Justice, questioned

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whether the action of the Security Council in respect of peace-keeping operations under Chapter VII of the Charter reflected an evolution of international law or the application of selective political power. In the latter case, it was incumbent on international lawyers to suggest a better way of advancing peace and the rule of law, calling upon nations to honour the Charter, specifically its provisions on disarmament, and calling for the creation of a United Nations military force and a reform of the Security Council so that it reflected the interests of all nations rather than a select few.

Mr. McWhinney* mentioned that countries that had traditionally been supporters of peace-keeping under Chapter VI of the Charter were showing increasing reluctance to enter into new ventures and even to maintain troops already committed. The reason, he agreed, was that peace-keeping mandates were often not clearly defined at the outset. In particular, the distinction between the legal and the political mandate was not clear. Moreover, a shift sometimes took place from a Chapter VI operation to a Chapter VII operation, with the development of political goals that had not been clearly made known to the participants in advance. Unless legal sanctions of the sort suggested by Mr. Ferencz were developed, political sanctions would take over. Furthermore, traditional sources of peace-keeping forces would disappear, as countries committed to operations precisely defined in advance became disaffected.

Mr. Tshiyembe** said that the United Nations concept of international peace and security was inappropriate to international society at the end of the twentieth century, for it pertained exclusively to peace among States, rejecting *ipso facto* peace among peoples. Every State Member of the United Nations was presumed to be a maker of international peace and security so long as it did not commit any aggression against another State Member of the United Nations. But events had shown that a State could conduct forced displacement of its population, widespread torture, killings, massacres and genocide of peoples placed under its protection without such crimes being considered a threat to international peace and security, thanks to the principle of non-interference in the internal affairs of States. Unless it was clearly established that any State which thus constituted a threat to peace and harmony within its own borders also represented a threat to international peace and security, the international law being discussed was in danger of remaining nothing more than a pious wish with regard to a vital dimension: progress towards respect for human rights and the rights of peoples.

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The confusion between peace-keeping and peacemaking had dire consequences and had made it impossible for the United Nations to know for which purpose and in what manner forces should be employed. In Somalia, for example, despite the enormous forces used, national reconciliation and the settlement of differences had not been achieved. Rather than attempt to maintain a peace that did not exist, it would have been better to adopt the peace-making approach, which implied the presence of forces having the obligation to wage war against the militias, with provisional United Nations administration of Somalia, as had been done in the case of Namibia, with a view to leading the country to elections and an internationally recognized government.

Ms. Stern (reply), on the question whether the activity of the Security Council reflected an evolution of international law or the use of selective political power, said she believed that both aspects were involved, inasmuch as that evolution depended partly on the evolution of international power relations. She agreed that international jurists should both stress the application of the Charter and reflect on the possible development of other areas, such as a reform of the Security Council. The question of such a reform or a reform of the United Nations in general, however, was another debate. Within the existing framework, it was important to distinguish clearly between peace-keeping and peace-making operations. The absence of a clear, consistent mandate posed both juridical and operational problems. When a State consented to an operation in which no force was used and there was subsequently a shift to the use of force, the situation was not normal. Nevertheless, it might be argued that the Security Council had the right to change the mandate in the light of new developments, just as it had the right to intervene in internal affairs in the case of a threat to peace. Thus the juridical question was perhaps not the most important. At the operational level, however, the problem was more serious, for a traditional peace-keeping operation was not armed and was not deployed for offensive, but for defensive, purposes and one could not use the same means for peace-keeping and for situations in which peace did not exist.

She did not fully agree with the comment regarding the inappropriateness of the concept of international peace, since the notion of a threat to the peace had in fact evolved considerably. Whereas in 1945 the term had meant war between States, more recently a certain number of internal situations (Iraq) or international causes (Libya) had been considered threats to the peace because of their international repercussions and many situations involving violations of human rights in the case of conflicts had been considered as authorizing recourse to Chapter VII. While purely internal violations

of human rights were not yet considered threats to the peace, the concept was evolving and would no doubt continue to do so.

Regarding the question of peace-keeping and peacemaking, she suggested the use of a new term, United Nations *peace operations*, to designate operations based strictly on consent and not involving any use of force and, on the other hand, enforcement operations of two types: either classic Chapter VII operations against an aggressor or operations not against an aggressor, but for the purpose of achieving a particular objective, as in the case of the United Nations Protection Force (UNPROFOR).

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. JOCHEN A. FROWEIN

Mr. Alioua* said that to the old debate between the predominance of domestic sovereignty and the recognition of international law, there had been added an important new element: the globalization of trade, capital flows, patterns of economic behaviour and certain cultural values, including human rights. Could globalization produce norms enforceable against States with a force of law that acted directly on domestic law? Would such a phenomenon involve a restriction of the eclectic behaviour of States, particularly in respect of the contradiction that existed in Western countries between concern with the liberalization of the flow of goods and capital and internal restrictions imposed on migratory movements?

Mr. Partan** wondered whether courts should have the final word on the self-execution of treaties. Where a State's constitutional law provided different procedures for the enactment of legislation and for the adoption of treaties, internal law or policy considerations might lead treaty-makers to leave to legislators the power to enact internal measures for the implementation of a treaty. In such a case, why should a court substitute its views on self-execution for those already expressed by the treaty-makers?

Mr. Mendelson*** noted that Mr. Frowein had stressed the importance of retaining State immunity, particularly in sensitive areas, but had also expressed the hope that the act of State doctrine would eventually disappear. He

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wished to know how Mr. Frowein would reconcile those two statements, inasmuch as the considerations involved were similar. He did not agree with all the related decisions of national tribunals or with the reasons given by them: separation of powers, improper forum, inadequate expertise or embarrassment for Governments. Yet he felt that the act of State doctrine could not be dispensed with entirely and wished to know Mr. Frowein's views on the subject.

Mr. Tsikhinya* said that the Republic of Belarus offered an excellent example of the role of international law in transforming and improving legislation in individual States, for it acknowledged the primacy of the established principles of international law and had incorporated them into its national legislation. The recognition of human rights, he said, was one of the most important issues for the new States being set up in the former Union of Soviet Socialist Republics. In Belarus, priority was being accorded to the recently established constitutional court, whose first decisions demonstrated its excellent performance of its task of protecting those rights.

Mr. Rezek** referred to Mr. Frowein's view that in a case of international abduction, respect for international law would require national courts to favour the return of the person. He pointed out that courts of various countries had ruled that a judge could not abstain from judging a person accused of a serious crime due to the fact that his capture had violated a rule, not of criminal law or of criminal procedure, but of international law, especially if the international issue had already been decided by some arrangement between the States concerned. He wondered, therefore, how a criminal court might refrain from completing a trial and release a person accused of a serious crime, so that he might be returned to the State from which he had been abducted, if one could not even point to a violation of a rule of international law relating to human rights and to the need for a regular arrest and detention warrant for the accused person's capture. In such a case, it seemed that the only irregularity was the violation of the territorial sovereignty of the State where the abduction had taken place. Thus, the accused person himself would not have any right to liberation, unless one considered that there already existed in positive international law a rule on which to base such a right.

Mr. Frowein (reply), on the question of the impact of globalization on international law, agreed that it was at least theoretically possible that such globalization might have reflections in positive international law, as indicated

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** Justice of the Federal Supreme Court, Rio de Janeiro, Brazil.

by certain cases involving treaties. While he could not see how the question of migration might thus be resolved, an extension of the fields in which such globalization might affect law was not to be excluded.

On Mr. Partan's question pertaining to the self-execution of treaties, he felt that the main issue was whether the States that had concluded a treaty already had the clear intention that it should not be self-executing and could not be invoked before national courts. Such cases, he thought, were very rare, the usual situation being one of ambivalence, in which case the national organs had a freedom that was questionable at least.

He fully agreed with Mr. Mendelson that the reasons underlying State immunity, which he deemed to be a clear rule of public international law, and the act of State doctrine, which was not a rule of international law, were similar in nature. He admitted, therefore, that in matters where the act of State doctrine had been applied, one might examine the *forum conveniens* or other rules to ascertain whether it was really the national court that should decide the matter. His point was that one should not automatically jump from disregard of the act of State doctrine to disregard for a rule which, to his mind, was still a clear rule of public international law, namely, the rule of State immunity.

The remarks relating to Belarus confirmed the view that, in the newly constitutionalized States of Eastern Europe, international law was being given a prominent place in national law.

Regarding the rule *male captus bene detentus*, in cases where treaties on the protection of human rights were in force for the State, there did exist a positive rule of public international law that was violated by the abduction. In other words, there was not merely a violation of the territorial sovereignty of the other State and that fact was of capital importance.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION BY MR. KARI HAKAPÄÄ

Ms. Beer-Gabel* pointed out that in nearly a quarter of the 139 existing maritime delimitation agreements, the object of the delimitation—continental shelf, economic zone or fishing zone—was unclear. Moreover, nearly half the agreements made no mention of the applicable principles. It was noteworthy that “equitable principles” had been applied in only 5 cases, while “equidistance” had been applied in 34 cases, particularly in the more recent agreements, and 93 agreements had resulted in median or near-median lines.

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An analysis of the 139 agreements showed that single maritime frontiers valid for several maritime spaces, which many authors considered to be a trend in the law of delimitation, were not in fact numerous: Only a third of the agreements concluded since 1942 established them. Thus there was no generalization of practice in that direction, the most recent agreements relating only to a single object. One could conclude that States, in their negotiations, sought chiefly to preserve their sovereignty: hence the absence of any object. Furthermore, no principles of law were invoked, but the median line was, if not a custom in the law of delimitation, at least a practice so widespread that one felt compelled to inquire into its meaning.

Mr. Hakapää (reply) observed that treaty practice had favoured the principle of equidistance for the purposes of delimitation, while judicial practice had shown a trend towards the “equitable principles” concept. That was the problem which the Conference on the Law of the Sea had faced and it still existed. He hoped that his statement, despite its critical tone, was not viewed as negative, for he was certainly for, not against, international law.

COMMENTS AND SUGGESTIONS OF A GENERAL NATURE

Mr. Austin* wished to know how one might give concrete form to the insights provided by the papers presented on the relationship between regional and global international law, the evolving United Nations role in peace-keeping and the implementation and promotion of international law through the national courts. How could the understanding of those issues be advanced during the Decade of International Law? Could the model of the United Nations Decade for Human Rights Education be of use and might the possibilities of continuing legal education be addressed in that connection?

Ms. Stern** commented that one of the ways to improve such understanding was to call things by their rightful name. To be sure, education was important; but often operations were referred to without being clearly defined. The wording of resolutions often reflected an apparent repression by the United Nations of the very idea of the use of force and the term “force” itself was avoided. A more forthright approach might enable one to know what type of operation was actually involved. Clearly, conceptualization led to clear statements, but the converse was also true.

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TUESDAY, 14 MARCH 1995

MEANS OF PEACEFUL SETTLEMENT OF
DISPUTES BETWEEN STATES, INCLUDING
RESORT TO AND FULL RESPECT FOR THE
INTERNATIONAL COURT OF JUSTICE

2

PRESENTATION OF THE TOPIC

*Rosalyn Higgins**

I have thought that what I could most usefully do in my introductory remarks is to signal some of the elements I perceive within our subject, some of the trends that are emerging and some of the tendencies that are manifesting themselves. I hope that in so doing I may perform the dual function of providing a backdrop for the addresses of our speakers and of suggesting themes that could usefully be included in the open-floor discussions.

Article 33, paragraph 1, of the Charter of the United Nations requires that:

“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.

This obligation of peaceful settlement, for those disputes falling in the category of potentially endangering the maintenance of international peace and security, has given rise to interesting practice. There is also an enormous literature. There has been some controversy about the precise obligations incumbent on a State that finds itself in the position envisaged under Article 33, paragraph 1, and also about the reach of the powers of the United Nations organs under that provision. Recently, the material scope of the obligation in Article 33, paragraph 1, has begun to attract academic attention too.

There is now a considerable feeling, resting on quite discrete norms of international law and upon good common sense, that even disputes whose continuance cannot be said to endanger international peace should be settled

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as harmoniously as possible. And the constantly developing institutions and methodologies for peaceful settlement have in fact been directed to both these types of disputes. The distinction between a situation and a dispute has had some importance for the application of Article 33 and other Articles of the Charter. And certain requirements have to be met before a controversy will be deemed a dispute that can be made the subject of litigation at the International Court of Justice.

There are many ways in which our topic may be, and has been, addressed.

One way has been the discussion of whether there are enough methods of peaceful settlement, whether they are imaginative and appealing enough. There has been a search to provide techniques, institutions, procedures that might be sufficiently attractive to States to encourage them to resolve their disputes peacefully. This presupposes, of course, that the desire to avoid conflict is there and that it will be facilitated if more and yet more ways can be presented for resolving the dispute. This has led to an extraordinary and almost endless range of possibilities at the disposal of States for dealing with their disputes. What has perhaps been less evident is a comparable weight of research on why it might be that a State finds one method more acceptable than another and whether this relates simply to the strength of its position in the particular case or to a more generalized reason. What is the relationship between the political will to resolve a dispute, and to resolve it peacefully, and the availability of a wide range of options for doing so? Do we really still need to continue the construct further and better dispute settlement methods? I feel our knowledge is still impressionistic.

The United Nations has a long and honourable history in seeking to facilitate the peaceful settlement of disputes. The Manila Declaration on the Peaceful Settlement of International Disputes, adopted by the General Assembly in 1982 (resolution 37/10, annex) and the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in This Field, adopted by the General Assembly in 1988 (resolution 43/51, annex) are but examples of a vast field of activity, which, of course, goes considerably beyond the adoption of resolutions. The *Handbook on the Peaceful Settlement of Disputes between States* gives some sense of the relentless search for more and more ways and techniques and institutions by which to persuade States not to resort to force.

The starting-point, of course, has always been negotiation. The importance of continued exchanges and consultations even after a dispute has emerged has long been appreciated. It is a requirement built into many multilateral treaties. For example, the Antarctic Treaty of 1959 and the United Nations Convention on the Law of the Sea of 1982 oblige States to consult,

or exchange views, whenever a controversy arises under the Treaty. Further, such renewed contacts and exchanges are sometimes made a condition precedent to recourse to third-party means of settlement.

In recent years, it seems to me, we have begun to see a related, but new, phenomenon. The application of the general duty to settle disputes peacefully in particular areas of somewhat indeterminate law has led to a rapidly developing procedural law of cooperation. Further, in evolving areas of law where it has proved exceptionally difficult to formulate norms with precision, the obligation to communicate and discuss with the other party has become essentially part of the substantive norms. This is nowhere better exemplified than in the work of the International Law Commission on international watercourses. The substantive law consists largely of principles, sometimes competing, that fall to be applied in particular cases. The original texts on these are now supplemented by a plethora of international obligations—not obligations of substance, but obligations relating to a duty to inform, on the one hand, and to consult, on the other. Information-sharing and consultation are not only the methods designated for addressing disputes, but they have become an element in compliance with the substantive norms themselves.

Regional agencies or arrangements have an interesting double role under the Charter. Article 33, paragraph 1, refers to them as one of the possible means that States should turn to to resolve disputes whose continuance is likely to endanger the maintenance of peace and security. And, of course, Article 52 encourages regional arrangements or agencies to deal with matters relating to the maintenance of international peace and security; and Article 53 authorizes the Security Council to utilize such regional agencies for enforcement action.

Regional bodies have always had a significant contribution to make in local dispute resolution. The history of the Organization of American States, the Organization of African Unity and the League of Arab States is an important one in this context. There has in recent years been a burgeoning of such bodies—we could mention the Economic Community of West African States, the Gulf Cooperation Council and the Organization for Security and Cooperation in Europe, among others. Each has its own programme and within it is the promotion of the peaceful settlement of disputes. These have sometimes entailed a heavy superstructure of institutional arrangements. The practice to date seems mixed. Sometimes the very strength of the regional system has been a weakness in peaceful settlement. The very familiarity of those who sit on the regional institutions with the problem at hand has often meant that their positions are already fixed. The regional organs can do no more than reflect the often divergent views of the States of the region on a dispute between two of their members. Regional agencies often reflect the divisions within the region more successfully than they can point to solutions

acceptable to both parties. The inability to find regional solutions to the Iraq-Kuwait dispute, or to Somalia or Angola, or to Cambodia illustrates the point. And that is why, in territorial and other disputes that relate to a very specific region, it is still often necessary and useful for parties to come on from regional attempts to allow the International Court of Justice to cast a more distant and dispassionate eye on the controversy.

Since the end of the cold war, and more particularly since the "Agenda for Peace" of the Secretary-General, classical peace-keeping has been increasingly restructured to become a new technique for the peaceful settlement of disputes that threaten international peace. Without in terms rejecting the old distinction between "enforcement" and "peace-keeping", the talk has now become of peacemaking, peace-building, and even peace enforcement. By this last has been meant an enforcement element *within* peace-keeping operations—and it is here that a revived and active role for regional agencies has been sought. In other words—and the role of the North Atlantic Treaty Organization (NATO) and the Western European Union in relation to the United Nations Protection Force (UNPROFOR) in the former Yugoslavia is the key example—the suggestion is that major conflict can be resolved, through means other than enforcement action, through a combination of the provision of humanitarian assistance, potential military tasks assigned to regional arrangements and diplomatic activity. The hope of "An Agenda for Peace" was that this would represent "a new complementarity". It is my belief that the inherent tensions between these different functions make this amalgam—and in particular the role of regional agencies—doomed to failure. But of course others may have different views. The problem is not the relationship of the regional agencies with the United Nations—that may well be very mutually supportive. But if they are given tasks in which their particular interests necessarily diverge, then we have stalemate rather than complementarity.

There are ever more inventive ways of seeking to provide consent to judicial or arbitral resolution of disputes. If a treaty on a given topic provides for obligatory judicial settlement of any dispute on the application or interpretation of the treaty, then a State party has at least the sense of the potential subject-matter that may be litigated, though not the potential opponent. In accepting the Optional Clause of the Statute of the International Court of Justice, a State (unless it has made relevant reservations) will know neither the opponent who will invoke its provisions, nor in respect of what subject-matter. The use of the Optional Clause has fallen away in comparative terms, but the phenomenon of forward consent that it represents is in fact now finding favour in other instruments. These instruments are characterized by a permeability and intermingling of dispute settlement possibilities. The dispute settlement provisions in bilateral investment treaties—of which there

are now over 700—represent interesting examples. In some of these treaties there are provisions expressly consenting to arbitration under the International Convention on the Settlement of Investment Disputes. In yet other agreements to arbitrate under that Convention are combined with consent to arbitrate under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). There are complicated provisions to allow International Centre on the Settlement of Investment Disputes (ICSID) and UNCITRAL arbitration of disputes under the North American Free Trade Agreement (NAFTA)—though neither Canada nor Mexico is a contracting party to the Convention. The same phenomenon is present in the European Energy Charter Treaty (1994).

So what we see is that, as we provide more and more alternative options for States to entice them to settle their disputes peacefully, they begin to “mix and match” them in a remarkable way. On the one hand, there is more and more provision made—often by States themselves, through the vehicle of treaties—for more and more diverse types of dispute settlement. And, on the other hand, there is an increasing tendency to want to conflate these options into umbrella provisions.

This seems to me a tendency that goes beyond dispute settlement. I see in it parallels to the actions by States to establish very many human rights treaty bodies under diverse instruments. In addition to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, there has been established the Convention on the Political Rights of Women, the Convention against All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. States apparently wanted separate treaty bodies. But, having deliberately gone down this route, they now address their energies to responding to them as if they were the single body that they could have had in the first place.

What we may certainly say is that we appear to be in the presence of a tendency in international adjudication for consent to be given increasingly in a rather general way, so that it is a consent of principle rather than consent in relation to a particular dispute with a particular opponent.

And yet: in terms of the actual litigation coming before the International Court of Justice, it is striking that in recent years the *ad hoc* agreed reference has become vastly more important than heretofore. States from the various corners of the world now increasingly agree to come before the International Court to resolve intractable disputes. Their willingness to do so marks a triumph, not of form in judicial settlement, but of confidence in the substance of the international law which will be applied, and in the fairness of

the bench of the Court. We must not forget that one of the most important elements in the judicial resolution of disputes is, quite simply, a well-articulated and constantly evolving body of international law. We can elaborate endless variations on the principle of consent, endless ways in which judicial or arbitral bodies might compose themselves, but, unless there is well-founded confidence in international law, that will avail us naught. There is understandably a considerable confidence felt, across the different groupings of States, in the International Court of Justice, not only as an institution of great competence and impartiality, but also as one perceived as capable of ensuring that its application of international law is at once predictable and responsive to diverse legitimate needs.

The International Court of Justice is, of course, a principal organ of the United Nations and its principal judicial organ. A dispute may contain subject-matter that is a matter of legitimate competence for a particular organ of the United Nations and—if the matter is referred by the parties or within the context of an advisory opinion—for the Court, too. It is obviously an oversimplification to say that the Court deals only with law and the United Nations organs only with politics. The Court is well aware that legal issues have their policy overtones. And the Security Council is well aware that in its political decisions it must sometimes involve legal norms. The General Assembly, of course, has been very active in the formulation and invocation of legal principles. The respective and complementary roles of these bodies in the peaceful settlement of disputes, or in the handling of peace and security issues, are, of course, of great importance.

Should the judicial function be centralized? There are, of course, already well-established human rights courts and tribunals exercising a special subject-matter jurisdiction under their respective treaties. While nothing is set in stone, the existence of specialist tribunals in human rights seems to work rather satisfactorily. The new International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia has been established since 1991. It was decided that this was preferable to giving a new criminal jurisdiction to the International Court of Justice to deal with such matters. There is likely soon to be a tribunal in Hamburg to deal with law of the sea matters arising under the new United Nations Convention on the Law of the Sea, though the International Court of Justice has vast experience in law of the sea questions and a potential jurisdiction over disputes arising under treaties. How do we know when to centralize functions and when to decentralize them? On what basis are these decisions made and what is the implication for the peaceful settlement of disputes? This, too, it seems to me, should receive some attention in our discussions today.

LES RESSOURCES OFFERTES PAR LA FONCTION CONSULTATIVE DE LA COUR INTERNATIONALE DE JUSTICE : BILAN ET PERSPECTIVES*

*Mohammed Bedjaoui***

I. LA COUR DANS LE SYSTÈME DE RÈGLEMENT PACIFIQUE DES DIFFÉRENDS ET DE MAINTIEN DE LA PAIX INSTAURÉ PAR LA CHARTE

La Cour occupe une place unique dans l'édifice organique et fonctionnel érigé par la Charte des Nations Unies. En effet, l'Article 7 de la Charte fait de la Cour un organe principal de l'Organisation et l'Article 92 en fait l'organe judiciaire principal. Par ailleurs, l'Article 33 de la Charte mentionne expressément le « règlement judiciaire » parmi les moyens de solution pacifique auxquels les parties à un différend dont la prolongation est susceptible de menacer le maintien de la paix et de la sécurité internationales doivent « avant tout » avoir recours; et le paragraphe 3 de l'Article 36 stipule expressément que, lorsque le Conseil de sécurité procède aux recommandations prévues à cet Article, il

« . . . doit aussi tenir compte du fait que, d'une manière générale, les différends d'ordre juridique devraient être soumis . . . à la Cour internationale de Justice conformément aux dispositions du Statut de la Cour ».

* L'auteur est particulièrement reconnaissant à M. Philippe Couvreur, Secrétaire juridique principal de la Cour, pour sa contribution et ses recherches minutieuses, sans lesquelles la présente communication n'aurait pu être faite.

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Aucune disposition de la Charte ni du Statut de la Cour ne limite au demeurant l'action de celle-ci dans l'exercice des fonctions que ces instruments lui attribuent. En particulier, aucune disposition analogue à l'Article 12 de la Charte n'obligerait *a priori* la Cour à s'abstenir de se prononcer sur une question concernant laquelle le Conseil de sécurité ou tout autre organe ou institution exercerait des fonctions déterminées.

Pleinement intégrée à l'Organisation et nourrie des préoccupations et des objectifs de celle-ci, la Cour apparaît ainsi comme ayant la « responsabilité principale » du règlement des différends d'ordre juridique; à ce titre, elle constitue un rouage essentiel du système général de maintien de la paix et de la sécurité internationales instauré par la Charte. Or assurer la paix par le droit signifie avant tout pacifier les relations entre les différents acteurs de la vie internationale en leur disant le droit. Une telle action pacificatrice peut globalement être menée soit dans le cadre d'un litige déterminé, à la demande de l'une ou l'autre des parties audit litige, soit hors de tout cadre litigieux, à la demande de n'importe lequel de ces acteurs agissant, en quelque sorte, dans l'intérêt de tous. A chacune des branches de cette alternative correspond, en principe, l'une des deux fonctions primaires de la Cour : sa fonction contentieuse et sa fonction consultative.

Lorsque l'on évoque la contribution de la Cour au règlement pacifique des différends et au maintien de la paix, on songe tout naturellement à l'exercice, par la Cour, de sa fonction contentieuse. Et l'on peut dire à cet égard, compte tenu des tendances qui se sont affirmées au cours du passé récent, que les perspectives d'avenir paraissent assez encourageantes. D'un point de vue strictement « quantitatif », il est de fait que la Cour n'a jamais eu, à son rôle, autant d'affaires; parallèlement, sa juridiction n'a cessé de s'étendre, tant en termes de nombre de déclarations souscrites qu'en termes de clauses compromissoires insérées dans des traités ou en termes de retraits de réserves à de telles clauses. Et d'un point de vue plus « qualitatif », force est de reconnaître qu'à maintes reprises les décisions de la Cour (au fond comme dans des procédures incidentes), voire la seule saisine de celle-ci, ont apporté une contribution décisive non seulement au règlement de différends de nature très diverse, mais aussi, directement, au maintien ou au rétablissement de la paix entre les parties. Même dans les cas, à vrai dire rares, dans lesquels une partie a rejeté une décision de la Cour, cette décision n'en a pas moins fini par peser d'un poids non négligeable dans la solution heureuse, hors du prétoire, du différend considéré.

Bien sûr, pour encourageantes qu'elles soient, ces données ne doivent pas masquer les limites imposées à l'activité contentieuse de la Cour par certains facteurs de nature « objective » ou plus « subjective ». Parmi les premiers, on rappellera d'abord le caractère essentiellement consensuel de la compétence

de la Cour, exigé par la configuration même de la communauté internationale contemporaine, qui demeure fondée sur une « juxtaposition de souverainetés », selon l'expression chère à Paul Reuter; on ajoutera l'absence d'accès à la Cour, au contentieux, d'entités tant supra-étatiques (organisations internationales), qu'infra-étatiques (composantes territoriales d'un État, belligérants, mouvements de libération, etc.) qui s'affirment de plus en plus, sur la scène internationale, comme des interlocuteurs incontournables dans des situations, certes très diversifiées, mais qui présentent au moins un trait commun : celui de menacer la paix tout en échappant aux paramètres classiques du contrôle étatique. Pour ce qui est des facteurs plus subjectifs, on peut en particulier citer la résistance persistante au règlement judiciaire qu'alimentent certaines composantes, d'origine ancienne, de la « psychologie des États » : il existe apparemment encore, chez nombre d'entre eux, une tendance à percevoir ce mode de règlement des différends comme plutôt extraordinaire, voire marginal, et à nourrir à son endroit des sentiments confus à la fois de crainte, parfois même de méfiance, et d'incrédulité.

Il est en revanche beaucoup moins fréquemment fait référence à la fonction consultative de la Cour lorsque l'on examine la contribution de celle-ci au règlement pacifique des différends et au maintien de la paix. Point n'est besoin de s'en étonner, puisque tel n'est pas l'objet immédiat des avis de la Cour. Une requête pour avis consultatif vise en principe seulement à l'obtention, par une organisation internationale, d'une « réponse » à une « question juridique » à laquelle elle se trouve confrontée. Mais la notion même de « question juridique » est suffisamment large pour s'accommoder d'un contenu matériel variable, pratiquement, à l'infini. Une telle « question », si elle sera généralement posée comme suite à l'apparition, au sein de l'organisation requérante, de certaines divergences de vues, peut être plus ou moins abstraite ou concrète. La soumission à la Cour peut tendre à prévenir la cristallisation d'un différend hypothétique comme elle peut viser à assister l'organisation concernée dans la solution d'un différend déjà né et concernant son fonctionnement interne, au sens strict ou large (y compris, par conséquent, un différend entre États Membres), voire ses relations avec des tiers (ou des États Membres considérés comme tels pour la circonstance).

En dépit des apparences, les avis de la Cour semblent donc susceptibles de déployer des effets « pacificateurs », directement, dans un contexte conflictuel, ou indirectement, en dehors d'un tel contexte, ne serait-ce que par leur apport considérable au bon fonctionnement des organisations universelles ainsi qu'au développement du droit et de la science juridique. La procédure consultative apparaît ainsi au moins comme un instrument de « diplomatie préventive », un moyen privilégié pour la Cour de désamorcer les tensions et de prévenir les conflits en disant le droit. On tentera ci-après un bref bilan

de l'impact qu'a pu avoir, en matière de règlement pacifique des différends, la fonction consultative de la Cour permanente de justice internationale, puis de la Cour internationale de Justice.

II. LES RESSOURCES OFFERTES PAR LA FONCTION CONSULTATIVE DE LA COUR EN MATIÈRE DE RÈGLEMENT PACIFIQUE DES DIFFÉRENDS : HISTORIQUE ET BILAN

A. La Cour permanente de justice internationale

1. *Les textes*

L'Article 14 du Pacte de la Société des Nations, qui chargeait le Conseil de préparer un projet de Cour permanente, définissait en ces termes les fonctions de la future Cour :

« Cette Cour connaîtra de tous différends d'un caractère international que les Parties lui soumettront. Elle donnera aussi des avis consultatifs sur tout différend ou tout point, dont la saisira le Conseil ou l'Assemblée ». (C'est moi qui souligne)

La première phrase, qui visait la *procédure contentieuse*, était rédigée en termes assez larges : aucune précision n'était en particulier donnée quant au sens exact que les rédacteurs avaient entendu conférer au mot « Parties » (États ou organisations internationales).

La seconde phrase, relative à la *procédure consultative*, trouve son origine immédiate dans une proposition française et une proposition britannique analogue. La première stipulait que la future Cour se prononcerait notamment sur « toute question qui lui serait soumise par le corps des délégués ou le Conseil exécutif » et la seconde sur « any issue referred to it by the Executive Council or Body of Delegates ». Pour le Gouvernement des États-Unis d'Amérique, ces propositions n'étaient pas acceptables dans la mesure où elles supposaient en réalité l'incorporation dans le Pacte du principe de la compétence obligatoire de la Cour. Eu égard aux craintes que cela eût pu inspirer, il fut décidé d'amender la proposition britannique de façon à donner compétence à la future Cour « to advise upon any legal questions referred to it by the Executive Council or by the Body of Delegates » (c'est moi qui souligne), c'est-à-dire à lui octroyer une fonction clairement consultative. Ce texte fut à son tour modifié pour éviter de donner l'impression que la Cour serait « le juriconsulte du Conseil et de l'Assemblée ». Il devint la seconde phrase de l'Article 14 du Pacte. Les mots « elle *donnera* . . . des avis consultatifs » furent

expressément retenus pour marquer le caractère judiciaire de la fonction consultative. Une note de la délégation britannique souligna par ailleurs que cette fonction serait indispensable pour la solution de certains différends mais que les avis de la Cour seraient sans effet s'ils n'étaient pas confirmés par le Conseil et l'Assemblée¹.

Le Comité consultatif de juristes de 1920, chargé de rédiger un avant-projet de Statut de la future Cour permanente de justice internationale, interpréta le mot « international », figurant à l'Article 14 du Pacte, comme signifiant qu'en matière contentieuse la Cour ne devait être accessible qu'aux États, seuls sujets de droit international.

Le Comité de juristes s'interrogea aussi sur les mesures qu'il y avait lieu de prendre pour donner effet à la seconde phrase de l'Article 14 du Pacte concernant les avis consultatifs. Il fut d'emblée relevé que, dans ce cadre, la Cour ne serait pas appelée à juger mais seulement à donner une consultation. On reconnut cependant qu'en pratique, les « décisions consultatives » et les « décisions délibératives », obtenues par arrêt, pourraient avoir la même force dans la mesure où, d'une part, les parties à un litige étaient, conformément à l'Article 12 du Pacte, obligées d'en saisir le Conseil de la Société des Nations à défaut d'accord pour le soumettre à l'arbitrage et où, d'autre part, le Conseil pouvait lui-même s'en dessaisir en demandant un avis consultatif à la Cour².

Il fut en conséquence estimé qu'il y avait lieu de distinguer entre les cas où, selon la terminologie utilisée à l'Article 14 du Pacte, la Cour donnerait un avis sur un « différend » — défini comme un « conflit actuel » — et les cas où elle donnerait un avis sur un « point » — défini comme une « question théorique ». On expliqua que si un « point » pouvait être examiné par un nombre restreint de juges, en revanche, un différend devait l'être « selon une procédure qui se rapproche de celle qui doit être suivie pour un jugement »³. Enfin, à un membre du comité qui s'élevait « contre le droit qu'aurait la Cour de donner des avis consultatifs à l'occasion d'un conflit actuellement né »⁴, il fut répondu que le Conseil avait le droit de renvoyer à la Cour « un conflit qui lui a été soumis, mais qui aurait dû être tranché judiciairement », ainsi que l'envisageait l'Article 13 du Pacte; et l'on insista « sur la nécessité pour la Cour de procéder, dans ces circonstances, comme s'il s'agissait d'un véritable jugement »⁵.

L'Article 36 du projet du Comité consultatif de juristes était en conséquence libellé comme suit :

¹ Voir *Statut et Règlement de la Cour permanente de Justice internationale. Éléments d'interprétation*, Berlin (1934), p. 453 et 454.

² Voir *Procès-Verbaux des séances du Comité*, p. 225 (Lapradelle).

³ *Idem*, p. 584 (Lapradelle).

⁴ *Ibid.* (Root).

⁵ *Idem*, p. 585 (Lapradelle).

« Article 36

La Cour donne son avis sur tout point ou tout différend d'ordre international qui lui est soumis par le Conseil ou par l'Assemblée.

Lorsque la Cour donne son avis sur un point d'ordre international indépendamment de tout différend actuellement né, elle constitue une Commission spéciale de 3 à 5 membres.

Lorsqu'elle donne son avis sur une question qui fait l'objet d'un différend actuellement né, elle statue dans les mêmes conditions que s'il s'agissait d'un litige porté devant elle. »

Dans le rapport final du Comité, cette disposition était accompagnée d'un commentaire particulièrement utile pour mieux comprendre l'esprit dans lequel la Cour permanente allait plus tard exercer sa fonction consultative. On en citera ci-après l'extrait le plus significatif :

« Compétente pour statuer à la demande des États entre lesquels il existe un différend, la Cour l'est encore, hors du cadre de sa compétence judiciaire, pour donner des avis consultatifs sur tout point, ou tout différend, dont la saisit le Conseil et l'Assemblée. Il est clair que ce différend ne peut être que d'ordre international : c'est la disposition formelle de l'Article 14 du Pacte.

Dans les deux cas, la Cour, saisie, soit par le Conseil, soit par l'Assemblée, ne donne qu'un avis consultatif dont ensuite il appartient, soit au Conseil, soit à l'Assemblée, de s'approprier les termes et de déduire les conséquences. Tandis que la décision de la Cour, dûment saisie par la partie, a caractère obligatoire et force de chose jugée, il n'en est pas de même de la décision qu'elle donne sur renvoi du Conseil ou de l'Assemblée : ici elle ne juge plus, elle consulte.

Cette consultation se présente-t-elle en dehors de tout différend actuellement né ? Alors, comme la question est ensuite susceptible d'être judiciairement posée devant la Cour, . . . il importe que la Cour se forme de telle manière que la solution donnée *in abstracto* sur la question théorique ne restreigne pas son libre pouvoir de statuer, lorsque le problème reviendra devant elle . . . dans une espèce concrète . . . Pour éviter de mettre la Cour dans l'obligation de se contredire ou de se répéter, il importe de la constituer d'une manière différente, et, pour cela, de la réduire, pour l'exercice de cette attribution consultative, à quelques-uns seulement de ses membres, 3 à 5, suivant l'estimation de son règlement intérieur.

Mais il peut arriver que le différend renvoyé, soit par le Conseil, soit par l'Assemblée, ait le caractère d'un véritable litige, parce qu'il s'agit d'un différend actuellement né. Ce différend n'est pas soumis par les parties à l'arbitrage, soit de la Cour, soit de tout autre mode de justice internationale, mais, cependant, il présente un caractère tel que sa solution par la voie judiciaire internationale est, incontestablement, la meilleure. Il se peut même qu'il s'agisse d'une affaire qui présente, de sa nature, le caractère d'ordre juridique qui détermine le recours à l'arbitrage, mais que les parties, d'un commun accord, s'entendent pour [la] transférer de la procédure judiciaire qui, naturellement, lui convient, à la procédure conciliatrice . . . Dans ce cas, il importe que le Conseil puisse lui restituer sa véritable nature, en [la] renvoyant à la Cour. Sans doute celle-ci ne peut être judiciairement saisie que par les parties, non par le Conseil ni l'Assemblée. Mais, si les parties ont décidé de saisir le Conseil ou l'Assemblée, elles n'ont pas à s'étonner que la Cour puisse connaître de l'affaire sur renvoi du Conseil ou de l'Assemblée. Cela ne donnera pas à l'avis de la Cour force de chose jugée obligatoire entre les deux parties. Mais la décision de la Cour n'en aura pas moins la valeur morale qui s'attache à tous ses arrêts et, si le Conseil ou l'Assemblée se l'approprient, elle aura sur l'opinion publique le même heureux effet. Dès l'instant qu'il s'agit d'un différend actuellement né, la Cour devra donc statuer de la même manière que s'il s'agissait d'un litige porté devant elle, c'est-à-dire en laissant monter, à la demande des parties, un juge de leur nationalité sur le siège, et en permettant aux parties de faire valoir les preuves et moyens de la même manière que dans une affaire portée directement devant elle par les plaideurs »⁶.

La Troisième Commission de l'Assemblée de la Société des Nations fut d'avis, comme le Comité consultatif de juristes, que le droit d'*ester en justice* devant la Cour devait être reconnu aux seuls États.

En revanche, pour ce qui est de la procédure consultative, la Sous-Commission de la Troisième Commission décida de rejeter un amendement de l'Argentine tendant à autoriser tous les « Gouvernements des États formant la Société des Nations » à demander des avis consultatifs à la Cour. Il fut notamment observé que cet amendement « aurait pour effet d'introduire par un chemin détourné la juridiction obligatoire sur citation unilatérale »⁷. La

⁶ Ibid., p. 730 et 731.

⁷ Voir *Documents relatifs aux mesures prises par le Conseil de la Société des Nations, aux termes de l'Article 14 du Pacte, et à l'adoption par l'Assemblée du Statut de la Cour permanente*, p. 68, 146 et 156 (sir Cecil Hurst).

Sous-Commission écarta en outre un amendement du Bureau international du Travail visant à permettre au Conseil d'administration du Bureau et à la Conférence générale du Travail de solliciter de tels avis⁸. La Sous-Commission expliqua dans son rapport à l'Assemblée que ces amendements, s'ils étaient acceptés, « impliqueraient une extension sensible des devoirs des membres de la Cour et pourraient entraîner des conséquences d'une portée difficile à calculer d'avance »⁹.

Par ailleurs, on s'interrogea, au sein de la Sous-Commission, sur la possibilité, dans la pratique, d'opérer la distinction entre « points » et « différends » sur lesquels un avis consultatif pourrait être demandé à la Cour; et l'on fit remarquer qu'en tout état de cause « le point de droit dans la question soumise à la Cour ne serait jamais identiquement de même nature que le différend soumis au Conseil, mais aurait un caractère plus théorique et plus général »¹⁰. Dans son rapport, la Sous-Commission releva que cette distinction paraissait « peu nette » et était susceptible de « donner lieu à des difficultés pratiques ». Elle souligna aussi que tous les avis, quel que soit leur objet, devaient « être donnés avec le même quorum » que celui requis en matière contentieuse. Estimant au demeurant que le projet « entrerait à cet égard dans des détails qui concernaient plutôt le règlement intérieur de la Cour », la Sous-Commission proposa de supprimer l'Article 36 du Comité consultatif de juristes¹¹. C'est ainsi que le Statut de la Cour permanente de justice internationale adopté en 1920 ne comprenait aucune disposition relative aux avis consultatifs.

Dès 1922, la Cour s'interrogea donc sur la manière dont il convenait qu'elle donne effet, le cas échéant, à l'Article 14 du Pacte dans son Règlement. Elle fut d'avis que le Règlement devait se contenter d'organiser la procédure en matière consultative, tout en évitant d'interpréter le Pacte sur des questions de fond telle que celle de savoir si la Cour pouvait refuser de donner un avis; pareille question appelait, selon la Cour, une réponse qui, dans chaque cas, dépendrait de toutes les circonstances pertinentes¹². Le Règlement originel, adopté en 1922, comportait quatre articles relatifs à la procédure consultative (Articles 71 à 74); l'Article 71 précisait notamment que les avis seraient émis « après délibération par la Cour en séance plénière ».

En 1926 il fut suggéré de consigner dans le Règlement la pratique suivie jusque-là par la Cour et consistant à assimiler autant que possible la procédure consultative à la procédure contentieuse¹³. Il fut rappelé, à cette occasion, qu'une demande d'avis pouvait avoir trait à un différend actuellement

⁸ *Idem*, p. 79 et 156.

⁹ *Ibid.*, p. 211.

¹⁰ *Ibid.*, p. 146 (M. Ricci Busatti).

¹¹ *Ibid.*, p. 211.

¹² Voir Cour permanente de Justice internationale (CPJI), série D, n° 2, p. 98 et 161.

¹³ Voir CPJI, série D, n° 2, Addendum, p. 315 et 316, projet d'Article 73, paragraphe 3.

né. Toutefois, tout en reconnaissant que le projet présenté codifiait fidèlement la pratique, la Cour n'estima pas opportun de le retenir¹⁴. En 1927, la Cour révisa l'Article 71 de son Règlement aux fins de permettre l'application de l'Article 31 de son Statut — afférent à la désignation de juges ad hoc — aux cas où un avis serait demandé « sur une question relative à un différend actuellement né entre deux ou plusieurs États ou Membres de la Société des Nations ». Dans son rapport de septembre 1927, le Comité de trois juges qui avait été chargé d'étudier la question alla très loin dans l'assimilation de la procédure consultative à la procédure contentieuse; il s'exprima notamment comme suit :

« Le Statut ne mentionne pas les avis consultatifs, mais laisse à la Cour le soin de régler entièrement sa procédure en cette matière. La Cour, dans l'exercice de ses pouvoirs, a délibérément et intentionnellement assimilé la procédure consultative à la procédure contentieuse; et les résultats obtenus ont abondamment justifié cette attitude. Le prestige dont peut jouir la Cour actuellement, en tant que tribunal judiciaire, est dans une large mesure dû à l'importance de son activité consultative et à la façon judiciaire dont elle a réglé cette activité. En réalité, lorsqu'en fait il se trouve des parties en présence, il n'y a qu'une différence purement nominale entre les affaires contentieuses et les affaires consultatives. La différence principale réside dans la façon dont l'affaire est introduite devant la Cour, et même cette différence peut virtuellement disparaître, comme ce fut le cas dans l'affaire des décrets de naturalisation en Tunisie et au Maroc. De la sorte, l'opinion selon laquelle les avis consultatifs n'ont pas force obligatoire est plutôt théorique que réelle »¹⁵.

Enfin, si l'accès à la procédure consultative organisé par le Pacte était assez restrictif, en revanche, le Règlement, à partir de 1926, ouvrit largement la participation à la procédure *stricto sensu* aux États, aux Membres de la Société des Nations et aux « organisations internationales », en leur permettant de présenter des exposés écrits et/ou oraux (Article 73).

Eu égard à leur importance, les dispositions réglementaires concernant la procédure consultative furent transférées en substance dans le Statut révisé de la Cour permanente, entré en vigueur en 1936. L'Article 68 de ce Statut consacrait entre autres le principe selon lequel la Cour « s'inspirerait », dans l'exercice de ses attributions consultatives, des dispositions organisant la procédure contentieuse « dans la mesure où elle les reconnaîtrait applicables. »

¹⁴ Ibid., p. 225 à 228.

¹⁵ CPJI, série E, n° 4, p. 72.

Parallèlement fut introduit dans le Règlement révisé de 1936 un nouvel Article 82 aux termes duquel la Cour devait s'inspirer des dispositions de ce Règlement relatives à la procédure contentieuse « dans la mesure où elle les reconnaît applicables, selon que l'avis consultatif demandé à la Cour porte sur un « différend » ou un « point », aux termes de l'Article 14 du Pacte de la Société des Nations ». Le nouvel Article 83 du Règlement révisé traitait pour sa part, en des termes légèrement amendés, de l'application de l'Article 31 du Statut (juges ad hoc) aux éventualités dans lesquelles une procédure consultative eût concerné « un différend actuellement né entre deux ou plusieurs Membres de la Société des Nations, ou États ».

2. *La pratique*

La Cour permanente de justice internationale a eu une activité consultative particulièrement féconde : en 19 ans, entre 1922 et 1940, elle a donné pas moins de 27 avis consultatifs. Nombre d'entre eux ont eu un impact direct et décisif sur la solution de différends actuellement nés. Il est vrai que les textes auxquels on vient de se référer visaient expressément une telle éventualité et apparaissaient, tant dans leur lettre que dans leur esprit, comme porteurs de tels « effets pacificateurs ». Il convient également de ne pas perdre de vue que ces textes s'inscrivaient eux-mêmes dans un contexte tout à fait original : celui des responsabilités spécifiques confiées à la future Cour par les traités de paix, dans le cadre du règlement global intervenu à l'issue de la première guerre mondiale.

L'État est demeuré le protagoniste essentiel des procédures engagées devant la Cour permanente, et la procédure consultative ne fait pas exception à cette constatation. Les 28 requêtes pour avis consultatifs dont la Cour a été saisie ont toutes émané du Conseil de la Société des Nations (aucune de l'Assemblée). Bien plus, si un certain nombre de ces requêtes, quoiqu'intéressant directement des États, ont été considérées comme trouvant « leur origine à proprement parler dans le Conseil même »¹⁶, un nombre plus important encore d'entre elles ont été reconnues comme « présentées à l'instigation ou à la demande d'un État ou d'un organisme international »¹⁷. S'agissant des requêtes présentées à la demande d'un « organisme international », il y a lieu de préciser en outre que seul l'un de ces « organismes » était une véritable organisation internationale — l'Organisation internationale du Travail (OIT), les trois autres étant la conférence des ambassadeurs et deux commissions mixtes (la commission mixte gréco-turque pour l'échange des populations

¹⁶ Le dernier rapport annuel de la Cour permanente en recense 12; voir CPJI, série E, n° 16, p. 51 et 52.

¹⁷ Seize, d'après le même rapport, *ibid.*

grecques et turques et la commission gréco-bulgare d'émigration). Or, des six requêtes présentées par le Conseil à la demande de l'OIT, deux le furent en réalité à la demande expresse d'un État Membre (la France)¹⁸; par ailleurs, les requêtes présentées à la demande des commissions mixtes précitées le furent avec l'accord formel des États concernés¹⁹. La requête pour avis consultatif afférente à la *Compétence de la Commission européenne du Danube* fut présentée par le Conseil de la Société des Nations à la demande de différents États siégeant à la Commission (France, Grande-Bretagne, Italie et Roumanie).

Si des États déterminés ont donc, dans la plupart des cas, directement été, comme tels, à l'origine des demandes d'avis consultatifs soumises à la Cour permanente, il importe aussi de souligner qu'un peu plus des deux tiers des avis donnés par cette Cour ont concerné des différends actuellement nés, et que la grande majorité d'entre eux avaient trait à un différend entre États.

Le Conseil de la Société des Nations, organe requérant, a invariablement accepté l'avis donné par la Cour, généralement au terme d'un bref débat, soit en l'« adoptant » (avis sollicité par le Conseil *proprio motu*), soit en « prenant acte » et/ou en le « communiquant » à l'entité directement intéressée (avis sollicité par le Conseil à la demande d'un État ou d'un « organisme international »). Il est fréquemment arrivé que la résolution pertinente exprime la haute valeur attribuée par le Conseil à l'avis de la Cour²⁰, voire la reconnaissance par le Conseil de son effet décisif au regard de la question posée²¹. À de nombreuses reprises, le Conseil a en outre indiqué aux intéressés les mesures s'imposant à la suite de l'avis²², ou a constaté « avec satisfaction » que ces mesures étaient en voie d'être prises ou l'avaient déjà été²³. Dans un seul cas, celui des *Décrets de nationalité promulgués en Tunisie et au Maroc*, le Conseil n'a pas réagi à la réception de l'avis de la Cour : mais en l'espèce les deux États concernés (la France et la Grande-Bretagne) avaient pris l'engagement, sous les auspices du Conseil lui-même, de donner suite à l'avis qui serait émis²⁴.

Les avis consultatifs de la Cour permanente ont en outre, dans la toute grande majorité des cas, été immédiatement acceptés par les États intéressés.

¹⁸ Voir *Compétence de l'OIT pour la réglementation internationale des conditions du travail des personnes employées dans l'agriculture et Compétence de l'OIT pour l'examen de propositions tendant à organiser et à développer les moyens de production agricole*.

¹⁹ Voir *Interprétation de l'accord gréco-turc du 1^{er} décembre 1926 (protocole final, article IV) et « Communautés » gréco-bulgares*.

²⁰ Voir, par exemple, « Échange des populations grecques et turques », Société des Nations, *Journal officiel* (1925), p. 441.

²¹ Voir, par exemple, « Accès et stationnement des navires de guerre polonais dans le port de Dantzig », Société des Nations, *Journal officiel* (1932), p. 489.

²² Voir, par exemple, « Colons allemands en Pologne », Société des Nations, *Journal officiel* (1923), p. 1333.

²³ Voir, par exemple, « Compatibilité de certains décrets-lois dantzikois avec la constitution de la Ville libre », Société des Nations, *Journal officiel* (1936), p. 124.

²⁴ Voir résolution du 4 octobre 1922, CPJI, série B, n° 4, p. 8.

Cette acceptation s'est manifestée de différentes manières, selon les circonstances (de façon implicite ou expresse, par la voie d'une ou de plusieurs déclarations séparées ou conjointes, faites avant même ou après l'adoption de l'avis par le Conseil, dans le cadre d'un débat ou hors débat, etc.); elle a néanmoins toujours été l'expression de la valeur éminente que les États comme le Conseil de la Société des Nations reconnaissaient aux prononcés de la Cour. Dans une seule circonstance l'avis de la Cour a suscité l'opposition formelle d'un État directement concerné : la Turquie a rejeté l'avis donné par la Cour dans l'affaire de l'*Interprétation de l'article 3, paragraphe 2, du traité de Lausanne* (affaire dite de « Mossoul »); cet État, qui s'était élevé, dès l'origine, contre la demande d'avis, estimait en outre ne pas avoir pu exposer ses thèses sur pied d'égalité avec l'autre État intéressé (la Grande-Bretagne)²⁵. Dans quelques autres cas, l'avis de la Cour, sans provoquer d'opposition véritable d'un État, a néanmoins appelé certaines réserves de sa part²⁶; il est également arrivé que des États, tout en acceptant l'avis de la Cour, soient en désaccord sur l'interprétation à donner à certains de ses motifs²⁷. Mais dans aucune des situations susmentionnées (pas même dans celle de l'avis sur la question de « Mossoul »), l'autorité du prononcé de la Cour en tant que déclaration objective du droit n'a été mise en cause; bien plus, dans tous les cas, l'avis a pesé sur la solution finalement intervenue. On rappellera aussi que, dans certaines circonstances, des États se sont engagés par avance, au cours des délibérations du Conseil précédant l'adoption de la requête²⁸, ou ultérieurement²⁹, à accepter l'avis de la Cour. Les États concernés tinrent parole.

Enfin, il convient d'ajouter que les avis consultatifs concernant l'OIT ont été adoptés par l'organisation.

3. Bilan

Les auteurs du Pacte de la Société des Nations, en autorisant la Cour permanente de justice internationale à donner un avis sur tout « différend » ou tout « point », à la requête du Conseil ou de l'Assemblée de la Société, avaient entendu aider ces organes dans l'accomplissement de leur tâche en leur permettant, le cas échéant, de demander à la Cour qu'elle se prononce sur certains

²⁵ Voir Société des Nations, *Journal officiel* (1926), p. 121 et suiv.

²⁶ Voir *Colons allemands en Pologne* : refus du représentant polonais d'engager son Gouvernement en acceptant l'avis de la Cour lors de l'examen de celui-ci par le Conseil; *Acquisition de la nationalité polonaise* : abstention du représentant polonais lors du vote, par le Conseil, de la résolution adoptant l'avis; *Compétence de la Commission européenne du Danube* : refus de la Roumanie de considérer l'avis comme destiné à résoudre directement le différend.

²⁷ Voir, par exemple, « Service postal polonais à Dantzig », Société des Nations, *Journal officiel* (1925), p. 884 à 887 et 1371 à 1377.

²⁸ Voir *Décrets de nationalité promulgués en Tunisie et au Maroc*, ci-dessus, par. 11.

²⁹ Voir *Compétence des tribunaux de Dantzig*.

problèmes juridiques se posant soit dans le cadre de différends spécifiques qui leur seraient soumis, soit dans tout autre cadre. La fonction consultative de la Cour permanente apparaît avoir pleinement répondu aux attentes : non seulement elle a grandement facilité le travail du Conseil de la Société des Nations et le fonctionnement d'autres institutions, mais elle s'est avérée être, comme telle, un instrument particulièrement efficace de règlement pacifique des différends. Ainsi que le notait un éminent auteur, devenu plus tard membre de la Cour :

« En regard des appréhensions qu'a soulevées la fonction consultative, il faut placer les services considérables qu'elle a rendus jusqu'à présent à la solution des différends internationaux. L'avis éclaire le Conseil sur les aspects juridiques du différend; il a ce précieux avantage de permettre d'isoler très opportunément les aspects juridiques d'un différend de ses aspects politiques. Ce travail de clarification a été utile tout à la fois au Conseil demandeur à la requête d'avis et aux États qui s'y trouvaient intéressés. Le prestige considérable de la Cour a permis au Conseil d'asseoir le plus souvent ses recommandations sur la base d'une opinion dont l'autorité juridique s'impose à tous »³⁰.

L'exercice, par la Cour permanente, de sa fonction consultative, lui a aussi permis, en dépit du caractère souvent ponctuel et concret des questions qui lui étaient posées, d'apporter une contribution exemplaire au développement du droit international de l'entre-deux-guerres et de parfaire ainsi son œuvre « pacificatrice ». Qu'il suffise ici de rappeler, parmi bien d'autres exemples, les importants *dicta* de la Cour en matière d'interprétation des traités³¹, de compétence nationale³², de statut de certaines entités quasi-étatiques (Dantzig) ou encore de droit des organisations internationales. La Cour permanente elle-même s'est d'ailleurs fréquemment référée à ses avis dans des décisions ultérieures, y compris des arrêts.

Enfin, dans ses avis, la Cour permanente a également eu l'occasion de dégager un certain nombre de règles fondamentales au regard de l'exercice de sa fonction consultative : caractère judiciaire de cette fonction³³; droit pour

³⁰ Ch. De Visscher, « Les avis consultatifs de la Cour permanente de Justice internationale », *RCADI* (1929), I, p. 61.

³¹ Voir, par exemple, *Acquisition de la nationalité polonaise*, CPJI, série B, n° 7, p. 20; *Service postal polonais à Dantzig*, CPJI, série B, n° 11, p. 39.

³² Voir, par exemple, *Décrets de nationalité promulgués en Tunisie et au Maroc*, CPJI, série B, n° 4, p. 23 à 26.

³³ Voir, par exemple, *Compétence de l'OIT pour réglementer accessoirement le travail personnel du patron*, CPJI, série B, n° 13, p. 23.

la Cour de refuser de donner un avis³⁴; compétence de la Cour et accès à la procédure consultative³⁵; interprétation de la requête pour avis consultatif³⁶; procédure consultative et administration des preuves³⁷, etc.

B. La Cour internationale de Justice

1. *Les textes*

Il y a tout d'abord lieu de rappeler que les rédacteurs du Statut de la présente Cour ont globalement entendu s'en tenir, en ce qui concerne l'accès à celle-ci, à l'approche classique adoptée en 1920 : seuls les États, sujets traditionnels de l'ordre juridique international, devaient avoir pleine capacité sur le plan procédural et, par conséquent, être admis à participer à une procédure contentieuse devant la Cour comme parties originaires ou comme intervenants³⁸. Si quelques propositions tendant à donner compétence à la Cour pour connaître au contentieux de différends auxquels des organisations eussent été parties ont ainsi été écartées, l'émergence progressive des organisations internationales comme sujets de droit international leur valut néanmoins de se voir attribuer une faculté de participation indirecte à la procédure contentieuse entre États dans certaines circonstances³⁹.

Parallèlement, et en dépit du bilan très positif de la procédure consultative dans l'entre-deux-guerres, on commença par s'interroger sur l'opportunité de son maintien dans le cadre du nouveau Statut. Cette question fut en effet d'emblée soulevée au sein du Comité interallié officieux réuni à Londres, en 1943. Certains membres du Comité estimaient que la compétence consultative n'était pas compatible avec la fonction judiciaire qui consistait exclusivement à trancher des différends; ils craignaient qu'une telle compétence n'amène la Cour à se pencher sur des questions essentiellement politiques et ne soit utilisée pour éviter le règlement définitif de certains litiges. D'autres membres au contraire étaient d'avis, à la lumière des services éminents que la procédure consultative avait rendus à l'époque de la Cour permanente, que cette procédure devait être non seulement maintenue, mais même élargie : elle leur paraissait essentielle aussi bien du point de vue du bon fonctionnement de la future organisation internationale générale que de

³⁴ Voir *Statut de la Carélie orientale*, CPJI, série B, n° 5, p. 27 et 28.

³⁵ Voir, par exemple, *Interprétation de l'Accord gréco-bulgare du 9 décembre 1927*, CPJI, série A/B, n° 45, p. 86 et 87.

³⁶ Voir, par exemple, *Interprétation de l'Accord gréco-turc du 1er décembre 1926 (protocole final, article IV)*, CPJI, série B, n° 16, p. 14.

³⁷ Voir, par exemple, *Statut de la Carélie orientale*, loc. cit.; *Compétence de la Commission européenne du Danube*, CPJI, série B, n° 14, p. 46.

³⁸ Voir le paragraphe 1 de l'Article 34 ainsi que les Articles 62 et 63 du Statut.

³⁹ Voir les paragraphes 2 et 3 de l'Article 34 du Statut.

celui de la prévention ou du règlement « amical » des différends. Cette dernière tendance, finalement, l'emporta. Sur cette base, le Comité proposa que l'accès à la procédure consultative soit ouvert non seulement aux organes de la future organisation générale, mais aussi à d'autres « associations d'États », telles l'OIT ou l'Union postale universelle (UPU), et même aux États — vu l'immense avantage que ceux-ci pourraient en retirer dans leurs relations mutuelles — pourvu qu'ils agissent de concert. Le Comité soulignait à cet égard qu'il convenait d'exclure toute requête individuelle d'un État qui lui permettrait, vu l'autorité des prononcés de la Cour, d'imposer au reste du monde une sorte de compétence obligatoire⁴⁰.

Les propositions relatives à l'établissement d'une organisation internationale générale, publiées à Dumbarton Oaks en octobre 1944, prévoyaient cependant seulement, quant à elles, le droit pour le Conseil de sécurité de saisir la future Cour de demandes d'avis portant sur des questions juridiques relatives à des différends qui n'auraient pas été soumis à la Cour, au contentieux, par les États directement intéressés. La fonction consultative semblait ainsi devoir se limiter à être utilisée dans le contexte spécifique des mesures prises pour assurer le maintien de la paix et de la sécurité internationales⁴¹.

Le Comité de juristes de Washington estima qu'il appartenait à la Charte de déterminer les organes qui devaient être autorisés à adresser à la Cour des requêtes pour avis consultatif; il suggéra toutefois que tel soit le cas, non seulement du Conseil de sécurité, mais aussi de l'Assemblée générale, tout en rejetant l'idée d'un accès à cette procédure pour d'autres organisations internationales ou, *a fortiori*, pour des États⁴². Diverses propositions avaient en effet été faites en vue d'élargir l'accès à la procédure consultative aux organisations intergouvernementales et, dans une certaine mesure, aux États. Il convient de mentionner en particulier, à cet égard, les propositions faites par le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, qui reprenaient en substance celles du Comité interallié officieux de Londres⁴³. Il faut rappeler également les propositions faites par le Venezuela, qui prévoyaient par ailleurs que « on pertinent points arising in political conflicts, provision should be made to make obligatory the procedure of petitioning the opinion of the Court » et qui insistaient sur la nécessité « to extend the opportunity for petitioning and for giving advisory opinions in that sphere of action in

⁴⁰ Voir *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice* (1944), par. 65 à 74.

⁴¹ Voir le texte des propositions dans Ruth B. Russell, *A History of the United Nations Charter: the Role of the United States, 1940-1945*, Washington, D.C. (1958), spéc. p. 1023 et 1024.

⁴² Voir United Nations Conference on International Organization, vol. 14, p. 884.

⁴³ *Ibid.*, p. 319.

which the judicial activity of the Court is the smallest »⁴⁴. Ces propositions furent défendues par leurs auteurs au cours de la discussion. Elles furent notamment combattues par le membre soviétique qui, s'agissant d'un éventuel accès des États à la procédure consultative, souligna :

« If such a rule were established, there would be danger that the Court would be overloaded by individual applications and would scatter its efforts on minor matters. The function of the Court is not to play the part of a general advisor. The possibility of applying to the Court through the General Assembly would be open to individual States. If they were permitted to apply directly to the Court on important matters, the procedure for dealing with international disputes outlined in Chapter VIII of the Dumbarton Oaks proposals might be endangered and the whole of the Security Council and the General Assembly hampered »⁴⁵.

Le membre grec indiqua pour sa part que si les États étaient exclus de la procédure consultative, les organisations internationales devaient l'être aussi, expliquant que :

« The Court's advisory opinions were in effect judgments anyway, since they had always been carried out, and hence the jurisdiction to render them should be restricted »⁴⁶.

Quant au Président, il fit observer, après que divers membres du Comité eussent plaidé en faveur d'un accès à la procédure consultative des futures institutions spécialisées, que l'on ignorait encore quelles organisations seraient créées; et il insista sur le contraste qu'il y aurait entre « the orderly procedure of going through the Assembly » et « the confusion and crowding of dockets which might result from direct requests to the Court »⁴⁷. Finalement, un vote formel intervint sur la seule question des organisations internationales, qui furent exclues de la procédure consultative par 16 voix contre 4.

À San Francisco, le Comité IV/1 reprit l'idée de conférer à l'Assemblée générale et au Conseil de sécurité le droit de présenter des demandes d'avis à la Cour, sur « toute question juridique »⁴⁸. Pour ce qui est des organisations tierces, le Comité se montra finalement plus ouvert que le Comité de juristes,

⁴⁴ Ibid., p. 373.

⁴⁵ Ibid., p. 181.

⁴⁶ Ibid., p. 182.

⁴⁷ Ibid., p. 183.

⁴⁸ Voir United Nations Conference on International Organization, vol. 13, p. 243 et 420; p. 430, art. 68.

mais néanmoins réticent à leur octroyer un accès général à la procédure consultative. Il décida d'une part d'insérer à l'Article 65 du Statut une disposition qui renverrait à la Charte pour ce qui est de la détermination des « organes ou institutions » autorisés à saisir la Cour d'une demande d'avis⁴⁹ et suggéra, d'autre part, en s'inspirant d'une proposition faite par le Royaume-Uni, « que la Charte habilite l'Assemblée générale à autoriser les organes de l'Organisation et les organismes spécialisés reliés à cette dernière à demander des avis consultatifs sur les questions juridiques qui pourraient se poser dans le domaine de leurs activités »⁵⁰. On ajoutera que le Comité IV/1 avait au demeurant rejeté une nouvelle proposition tendant à octroyer à « deux ou plusieurs États agissant en commun » le pouvoir de demander des avis à la Cour⁵¹.

C'est ainsi que l'Article 96 de la Charte dispose :

« Article 96

1. L'Assemblée générale ou le Conseil de sécurité peut demander à la Cour internationale de Justice un avis consultatif sur toute question juridique.

2. Tous autres organes de l'Organisation et institutions spécialisées qui peuvent, à un moment quelconque, recevoir de l'Assemblée générale une autorisation à cet effet ont également le droit de demander à la Cour des avis consultatifs sur des questions juridiques qui se poseraient dans le cadre de leur activité. »

Par ailleurs, le paragraphe 1^{er} de l'Article 65 du Statut se lit comme suit :

« Article 65

1. La Cour peut donner un avis consultatif sur toute question juridique, à la demande de tout organe ou institution qui aura été autorisé par la Charte des Nations Unies, ou conformément à ses dispositions, à demander cet avis ».

La comparaison de ces textes avec ceux qui régissaient l'activité consultative de la Cour permanente appellent quelques remarques. *Ratione personae*, il apparaît que l'accès à la procédure consultative est, sous l'empire de la Charte, plus largement ouvert que sous celui du Pacte de la Société des Nations, puisque tous les organes de l'Organisation et toutes les organisations du système des Nations Unies ont désormais vocation à pouvoir demander des

⁴⁹ Ibid., p. 244 et 447.

⁵⁰ Ibid., p. 303 et 420; cf. p. 430, art. 68.

⁵¹ Ibid., p. 238.

avis à la Cour : pour y être effectivement admis, il suffit d'une autorisation de l'Assemblée générale et la pratique semble avoir montré qu'une telle autorisation, lorsque formellement sollicitée, n'a jamais été refusée. La comparaison doit toutefois être quelque peu relativisée eu égard au nombre restreint d'organes que comptait la Société des Nations, ainsi qu'au nombre limité d'organisations internationales — et plus encore d'organisations « universelles » — qui existaient en 1920. La formule du Pacte ne semble guère, en réalité, avoir privé d'accès à la procédure consultative beaucoup d'organes ou institutions susceptibles, à l'époque, de profiter utilement de l'avis de la Cour permanente (à l'exception, peut-être, de l'OIT); bien plus, comme on l'a vu, le Conseil de la Société des Nations a invariablement soumis à la Cour les questions que des organisations non autorisées à le faire souhaitaient lui poser. Il convient au demeurant de constater que la définition retenue par la Charte exclut elle-même, potentiellement, certaines organisations qui pourraient aujourd'hui éprouver le besoin de consulter la Cour — en particulier les organisations régionales, auxquelles la Charte reconnaît un rôle important en matière de maintien de la paix; mais ici non plus, on ne peut perdre de vue que rares sont celles de ces organisations qui avaient une existence effective en 1945. Enfin, il y a lieu d'ajouter que, comme cela avait déjà été le cas du temps de la Cour permanente, le Statut de la Cour internationale de Justice a largement ouvert la participation à la procédure *stricto sensu* aux États et aux « organisations internationales », en leur permettant de présenter des exposés écrits et/ou oraux (Article 66); le Règlement révisé de 1978 précise désormais plus avant les conditions dans lesquelles des observations sur lesdits exposés peuvent être reçues (Article 105).

Ratione materiae, l'Article 96 de la Charte et l'Article 65 du Statut de la Cour internationale de Justice définissent de façon à la fois large et unique l'objet des demandes d'avis qui peuvent être adressées à la Cour : lesdites demandes doivent porter sur des « question(s) juridique(s) » (« toute question juridique » s'agissant du Conseil de sécurité et de l'Assemblée générale, dont la compétence est générale et, logiquement, « des questions juridiques qui se poseraient dans le cadre de leur activité » s'agissant des organes et institutions plus « spécialisés »). Ces textes n'ont pas maintenu la distinction opérée à l'Article 14 du Pacte entre « tout différend » et « tout point »; mais l'équivalence globale des deux formules ne paraît pas devoir faire de doute. S'il ne semble pas que cette différence de formulation ait retenu l'attention des rédacteurs de la Charte et du Statut, il est en revanche indéniable que, dès les travaux du Comité interallié officieux, la fonction consultative a été considérée comme un instrument efficace de prévention et de solution des différends. Il faut tenir pour acquis qu'une « question juridique » peut être posée à la Cour internationale de Justice concernant un différend non encore ou

déjà cristallisé, qu'il oppose des États entre eux ou des États à des organisations internationales. Les Articles 68 du Statut et 102 du Règlement de la Cour le confirment : en vertu de ces dispositions, la Cour actuelle est tenue, comme sa devancière, de s'inspirer, dans l'exercice de ses fonctions consultatives, des dispositions du Statut et du Règlement en matière contentieuse « dans la mesure où elle les reconnaît applicables »; par ailleurs, le paragraphe 2 de l'Article 102 du Règlement lui fait obligation de rechercher « avant tout si la demande d'avis consultatif a trait ou non à une question juridique actuellement pendante entre deux ou plusieurs États », tandis que le paragraphe 3 du même article confirme l'applicabilité de l'Article 31 du Statut, relatif aux juges ad hoc, en pareille éventualité.

On signalera enfin qu'à différents égards, les versions successives du Règlement de la Cour internationale de Justice ont fait œuvre d'innovation en codifiant la pratique et en précisant ainsi progressivement les conditions dans lesquelles la Cour doit exercer son activité consultative : on se référera, par exemple, aux dispositions concernant la procédure accélérée (Règlement de 1946, Article 82; Règlement de 1972, Article 87; Règlement de 1978, Article 103), les documents à fournir par l'organe ou institution requérante (Règlement de 1972, Article 88; Règlement de 1978, Article 104), les « observations » sur les « exposés » (Règlement de 1978, Article 105), la mise à la disposition du public du texte des exposés écrits et documents y annexés (Règlement de 1978, Article 106), ou encore le contenu des avis (Règlement de 1978, Article 107).

2. *La pratique*

L'Assemblée générale a assez largement fait usage des pouvoirs qui lui ont été conférés par le paragraphe 2 de l'Article 96 de la Charte. Les organes et institutions qui peuvent actuellement demander un avis consultatif à la Cour sont au nombre de 22. Outre l'Assemblée générale et le Conseil de sécurité, quatre autres organes des Nations Unies ont été autorisés à la faire par des résolutions de l'Assemblée. Par ailleurs, 16 institutions spécialisées ou assimilées sont à ce jour habilitées à présenter des requêtes pour avis consultatif en vertu d'accords concernant leurs relations avec l'ONU : les résolutions de l'Assemblée générale portant approbation des accords de liaison confèrent simultanément l'autorisation visée à l'Article 96 de la Charte. Force est cependant de constater que cette extension « potentielle » de la « compétence consultative » de la Cour n'a pas trouvé d'écho dans les faits. En près d'un demi-siècle, la Cour internationale de Justice n'a en effet donné que 21 avis consultatifs, deux nouvelles demandes étant actuellement pendantes devant elle.

L'activité consultative de la Cour actuelle a donc sans aucun doute été, à ce jour, beaucoup moins intense que celle de sa devancière. Mais la compa-

raison est difficile, tant ses termes sont différents. Comme il a déjà été rappelé, la Cour permanente s'était vu confier des responsabilités particulières aux termes des Traités de paix de 1919-1920. Au demeurant, la société internationale de 1945 n'était pas celle de 1920 et le contexte historique dans lequel chacune d'elles a eu à s'organiser était très différent; il en est résulté des institutions dont la composition, les buts, les compétences, les moyens et les procédures divergeaient profondément. A côté de ces éléments « objectifs » il est également des facteurs « psychologiques » qui peuvent expliquer, dans une certaine mesure, le recours moins fréquent à la procédure consultative après 1945. Les mêmes éléments et facteurs expliquent sans doute aussi pourquoi, globalement, la contribution de la Cour permanente au règlement pacifique des différends par l'exercice de sa fonction consultative apparaît plus « nettement ».

Près des deux tiers des requêtes pour avis soumises à la Cour internationale de Justice ont émané de l'Assemblée générale; trois requêtes ont émané du Comité de réformation de jugements du Tribunal administratif des Nations Unies, organe subsidiaire de l'Assemblée⁵²; une seule requête a émané du Conseil de sécurité⁵³ et une seule du Conseil économique et social⁵⁴; et seules quatre requêtes pour avis consultatif ont émané d'institutions spécialisées : deux de l'Organisation mondiale de la santé (OMS)⁵⁵, une de l'Organisation des Nations Unies pour l'éducation, la science et la culture (UNESCO)⁵⁶ et une de l'Organisation maritime internationale (OMI)⁵⁷.

Si toute requête pour avis consultatif trouve en définitive son origine dans la démarche d'un ou de plusieurs États, presque toujours elle-même motivée par une divergence de vues entre eux sur un point quelconque, il ne paraît en règle générale pas possible, eu égard à la complexité tant structurelle que fonctionnelle des organes et institutions admis à demander des avis en application des dispositions de l'Article 96 de la Charte, d'isoler les États qui auraient été les véritables « demandeurs » et « bénéficiaires » des avis de la Cour internationale de Justice, comme on peut le faire s'agissant des requêtes soumises à la Cour permanente de Justice internationale. En raison des com-

⁵² Voir *Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies; Demande de réformation du jugement n° 273 du Tribunal administratif des Nations Unies, C.I.J. Recueil 1982; et Demande de réformation du jugement n° 333 du Tribunal administratif des Nations Unies, C.I.J. Recueil 1987.*

⁵³ Voir *Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, C.I.J. Recueil 1991.*

⁵⁴ Voir *Applicabilité de la section 22 de l'article VI de la Convention sur les privilèges et immunités des Nations Unies.*

⁵⁵ Voir *Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Égypte et Licéité de l'utilisation d'armes nucléaires par un État dans un conflit armé.*

⁵⁶ Voir *Jugements du Tribunal administratif de l'OIT sur requêtes contre l'UNESCO.*

⁵⁷ Voir *Composition du Comité de la sécurité maritime de l'Organisation intergouvernementale consultative de la navigation maritime.*

pétences particulièrement vastes et globales de l'Organisation des Nations Unies (notamment dans le domaine du règlement pacifique des différends et du maintien de la paix), il est de même beaucoup moins aisé, dans le cas de la Cour internationale de Justice, d'identifier les demandes d'avis qui auraient eu trait à un différend entre États et de les distinguer des demandes de nature « constitutionnelle ». En effet, il appert que, dans la réalité, nombreuses sont les demandes adressées à la Cour actuelle qui avaient un rapport direct avec un différend concret impliquant un ou plusieurs États, tout en revêtant un caractère « constitutionnel » indéniable. Dans certaines hypothèses, le différend en question opposait des États Membres⁵⁸; dans d'autres, il opposait l'Organisation à un État Membre dans la « sphère interne »⁵⁹ ou dans la « sphère externe »⁶⁰ des activités de celle-ci; dans d'autres encore, il opposait l'Organisation à un État tiers⁶¹. Inversement, il est arrivé que des demandes d'avis présentant un net caractère « constitutionnel » aient eu pour moteur une réelle controverse entre États Membres, qui n'était pas exclusivement de nature institutionnelle⁶². Seule la demande afférente à l'*interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie* paraît en définitive avoir concerné un différend interétatique en dehors de toute préoccupation majeure d'ordre « constitutionnel »; et, à l'autre extrême, seules les *demandes de réformation de jugements de tribunaux administratifs* semblent avoir été formulées indépendamment de toute controverse impliquant directement des États.

Comme cela avait été le cas du Conseil de la Société des Nations, les organes et institutions ayant sollicité un avis de la présente Cour l'ont pleinement adopté, dès son prononcé. Dans certains cas, cette adoption, tout en étant certaine, a été implicite⁶³; la plupart du temps, toutefois, elle a été explicite. Fréquemment, l'adoption de l'avis a été accompagnée de l'indication

⁵⁸ Voir *Sahara occidental, C.I.J. Recueil 1975*.

⁵⁹ Voir les demandes afférentes au *Sud-Ouest africain*.

⁶⁰ Voir *Interprétation de l'Accord du 25 mars 1951 entre l'OMS et l'Égypte; Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'Accord du 26 juin 1947 relatif au siège de l'Organisation des Nations Unies; et Applicabilité de la section 22 de l'article VI de la Convention sur les privilèges et immunités des Nations Unies*.

⁶¹ Voir *Réparation des dommages subis au service des Nations Unies*.

⁶² Voir, par exemple, *Conditions de l'admission d'un État comme Membre des Nations Unies* (Article 4 de la Charte) et *Certaines dépenses des Nations Unies* (Article 17, paragraphe 2, de la Charte).

⁶³ Voir, par exemple, *Conditions de l'admission d'un État comme Membre des Nations Unies* (Article 4 de la Charte), résolution 197 A (III) de l'Assemblée générale, en date du 8 décembre 1948; *Réparation des dommages subis au service des Nations Unies*, résolution 365 (IV) de l'Assemblée générale, en date du 1^{er} décembre 1949; et *Compétence de l'Assemblée générale pour l'admission d'un État aux Nations Unies*, résolution 495 (V) de l'Assemblée générale, en date du 4 décembre 1950.

de mesures spécifiques propres à lui donner effet⁶⁴; et/ou d'un appel formel à en respecter les termes⁶⁵; il est même arrivé que l'organe requérant condamne expressément le refus par certains gouvernements de remplir leurs obligations telles que confirmées par l'avis de la Cour⁶⁶.

Bien qu'adoptés par les organes et institutions requérants, les avis de la Cour internationale de Justice, contrairement à ceux de sa devancière, n'ont pas toujours échappé à la critique, même lorsqu'ils ont été suivis d'effets immédiats⁶⁷. Dans certaines affaires, où les enjeux « politiques » étaient particulièrement sensibles, les avis donnés se sont même heurtés à l'opposition déterminée d'un ou de plusieurs États directement concernés⁶⁸ ou ont fait de la part de ceux-ci l'objet d'interprétations divergentes⁶⁹ : dans un cas comme dans l'autre, il en est résulté que les avis de la Cour n'ont pas eu, au moins à court terme, les effets escomptés, même si, en raison de leur autorité juridique et morale, ils ont contribué à apaiser la situation à l'origine de la demande, voire à en prévenir sa dégradation, et s'ils ont toujours, en définitive, pesé d'un poids non négligeable sur les solutions intervenues à plus long terme. Les avis plus « techniques » paraissent quant à eux avoir été d'emblée bien accueillis et avoir été décisifs au regard du règlement des questions posées⁷⁰; cela est vrai, *a fortiori*, des avis donnés dans le cadre de procédures de réformation de jugements de tribunaux administratifs, qui, en vertu de disposi-

⁶⁴ Voir, par exemple, *Conditions de l'admission d'un État comme Membre des Nations Unies*, résolutions 197 A et B de l'Assemblée générale, en date du 8 décembre 1948; *Réparation des dommages subis au service des Nations Unies*, résolution 365(IV) de l'Assemblée générale, en date du 1^{er} décembre 1949; *Réserves à la Convention pour la prévention et la répression du crime de génocide*, résolution 598 (VI) de l'Assemblée générale, en date du 12 janvier 1952; *Composition du Comité de sécurité maritime de l'Organisation intergouvernementale consultative de la navigation maritime*, résolution AOMCI A.21 (II) du 6 avril 1961.

⁶⁵ Voir, par exemple, *Statut international du Sud-Ouest africain*, résolution 449 (V) de l'Assemblée générale, en date du 13 décembre 1950; *Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*; résolution 301 (1971) du Conseil de sécurité en date du 20 octobre 1971 et résolution 2871 (XXVI) de l'Assemblée générale, en date du 20 décembre 1971; *Interprétation de l'Accord du 25 mars 1951 entre l'OMS et l'Égypte*, résolution AOMS WHA 34.11 du 18 mai 1981; et *Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'Accord du 26 juin 1947 relatif au Siège de l'Organisation des Nations Unies*, résolution 42/232 de l'Assemblée générale, en date du 13 mai 1988.

⁶⁶ Voir *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie*, résolution 385 (V) de l'Assemblée générale, en date du 3 novembre 1950.

⁶⁷ Voir, par exemple, *Réparation des dommages subis au service des Nations Unies*.

⁶⁸ Voir, par exemple, *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie*; avis afférents au Sud-Ouest africain; et *Certaines dépenses des Nations Unies* (Article 17, paragraphe 2, de la Charte); cf. *Applicabilité de l'obligation d'arbitrage en vertu de la section 21 de l'Accord du 26 juin 1947 relatif au Siège de l'Organisation des Nations Unies*.

⁶⁹ Voir *Sahara occidental*.

⁷⁰ Voir, par exemple, *Composition du Comité de la sécurité maritime de l'Organisation intergouvernementale consultative de la navigation maritime et Interprétation de l'Accord du 25 mars 1951 entre l'OMS et l'Égypte*.

tions particulières du statut de ces tribunaux⁷¹, sont considérés comme « obligatoires ».

3. *Bilan*

Les rédacteurs de la Charte et du Statut de la Cour n'ont pas entendu modifier la nature de la fonction consultative qui avait été exercée par la Cour permanente de justice internationale. Par ses avis, la Cour internationale de Justice, comme sa devancière, a facilité le travail des organes et institutions requérants en disant et en clarifiant le droit, et elle a apporté sa contribution spécifique à la solution pacifique de certains différends. Certes, les résultats de son activité consultative paraissent moins « indiscutables » que ceux de l'activité consultative de la Cour permanente. Mais, comme il a déjà été souligné, on ne peut établir un bilan objectif de l'œuvre de la Cour qu'en tenant dûment compte du contexte tant relationnel qu'institutionnel dans lequel celle-ci a été appelée à opérer. Or, il ne fait pas de doute que la société internationale au service de laquelle elle a été placée était beaucoup plus hétérogène que la société internationale de l'entre-deux-guerres, façonnée par les Traités de paix de 1919-1920 et largement dominée par l'Europe; bien plus, cette hétérogénéité s'est trouvée exacerbée par des phénomènes de crise aiguë et de mutations radicales sans précédents : il n'est guère nécessaire d'insister sur l'impact considérable qu'ont eu, sur le fonctionnement de l'Organisation des Nations Unies et sur l'action de la Cour, les profondes divisions du monde contemporain, stigmatisé d'abord par la guerre froide, puis par les tensions Nord-Sud. Il convient d'ajouter notamment à cela que le Conseil de la Société des Nations, qui s'employait toujours à rechercher l'accord unanime de ses membres pour solliciter un avis de la Cour permanente, était l'organe exécutif d'une organisation à maints égards assez « legaliste »; le mécanisme de prise de décisions au sein de l'ONU, marqué du sceau de la majorité, est infiniment plus complexe et l'emprise du politique, en particulier dans le domaine du règlement pacifique des différends et du maintien de la paix, s'y est d'emblée avérée beaucoup plus déterminante. Pour celui qui garde ces facteurs à l'esprit, et qui prend vis-à-vis des avatars de chaque procédure consultative les distances qui s'imposaient, le bilan de l'activité consultative de la Cour internationale de Justice, vu dans une perspective historique, n'apparaît pas aussi négatif qu'on a parfois pu le dire.

Au demeurant, comme sa devancière, la Cour actuelle a eu l'occasion, à travers son activité consultative, d'apporter une contribution substantielle à l'affirmation du rôle du droit dans les relations internationales, à la clarifica-

⁷¹ Voir statut du Tribunal administratif de l'Organisation internationale du Travail, article XII; statut du Tribunal administratif des Nations Unies, article 11.

tion de ce droit et à son évolution; elle a ainsi apporté un concours supplémentaire, certes discret, mais durable, au maintien de la paix et au développement des relations amicales entre les États. Il suffira à cet effet de rappeler notamment les importants *dicta* que la Cour a formulés dans des matières aussi diverses que le droit des traités⁷², le droit des organisations internationales⁷³, le droit de la décolonisation⁷⁴, le droit territorial⁷⁵ ou encore le droit de la fonction publique internationale⁷⁶. La Cour internationale de Justice, comme la Cour permanente de justice internationale, s'est d'ailleurs elle-même, à maintes reprises, référée à ses avis dans des décisions ultérieures (avis ou arrêts).

Enfin la Cour, à l'instar de sa devancière, a également eu l'occasion, dans ses avis, de développer le droit propre à sa fonction consultative : caractères et effets des avis⁷⁷; compétence de la Cour pour donner un avis et opportunité de le faire⁷⁸; composition de la Cour⁷⁹; questions de procédure⁸⁰; etc.

⁷² Voir, par exemple, *Conditions de l'admission d'un État comme Membre des Nations Unies* (Article 4 de la Charte), C.I.J. Recueil 1948, p. 63; *Compétence de l'Assemblée générale pour l'admission d'un État aux Nations Unies*, C.I.J. Recueil 1950, p. 8; et *Reserves à la Convention pour la prévention et la répression du crime de génocide*, C.I.J. Recueil 1951, p. 21 et 22.

⁷³ Voir, par exemple, *Réparation des dommages subis au service des Nations Unies*, C.I.J. Recueil 1949, p. 178 à 183 et *Certaines dépenses des Nations Unies*, C.I.J. Recueil 1962, p. 167 et 168.

⁷⁴ Voir, par exemple, *Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*, C.I.J. Recueil 1971, p. 31; et *Sahara occidental*, C.I.J. Recueil 1975, p. 31 à 33.

⁷⁵ *Sahara occidental*, C.I.J. Recueil 1975, p. 38 à 40 et 42 à 49.

⁷⁶ Voir, par exemple, *Effets de jugements du Tribunal administratif des Nations Unies accordant indemnité*, C.I.J. Recueil 1954, p. 51 à 56; *Demande de réformation du jugement n° 273 du Tribunal administratif des Nations Unies*, C.I.J. Recueil 1982, p. 359 à 360, 363 et 364; et *Demande de réformation du jugement n° 333 du Tribunal administratif des Nations Unies*, C.I.J. Recueil 1987, p. 63.

⁷⁷ Voir, par exemple, *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie*, C.I.J. Recueil 1950, p. 71; *Jugements du Tribunal administratif de l'O.I.T. sur requêtes contre l'UNESCO*, C.I.J. Recueil 1956, p. 84; *Certaines dépenses des Nations Unies* (Article 17, paragraphe 2, de la Charte), C.I.J. Recueil 1962, p. 155; et *Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Égypte*, C.I.J. Recueil 1980, p. 88; cf. *Sud-Ouest africain, except. prélim.*, C.I.J. Recueil 1962, p. 337.

⁷⁸ Voir, par exemple, *Conditions de l'admission d'un État comme Membre des Nations Unies* (Article 4 de la Charte), C.I.J. Recueil 1947-48, p. 61; *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie*, C.I.J. Recueil 1950, p. 71 et 72; *Reserves à la Convention pour la prévention et la répression du crime de génocide*, C.I.J. Recueil 1951, p. 19 et 20; *Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*, C.I.J. Recueil 1971, p. 22 à 27; *Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies*, C.I.J. Recueil 1973, p. 171 à 183; *Sahara occidental*, C.I.J. Recueil 1975, p. 18 à 31; *Demande de réformation du jugement n° 273 du Tribunal administratif des Nations Unies*, C.I.J. Recueil 1982, p. 331 à 348; et *Applicabilité de la section 22 de l'article VI de la Convention sur les privilèges et immunités des Nations Unies*, C.I.J. Recueil 1989, p. 187 à 192.

⁷⁹ Voir, par exemple, *Conséquences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*, C.I.J. Recueil 1971, p. 24 à 27; et *Sahara occidental*, C.I.J. Recueil 1975, p. 17 et 18.

⁸⁰ Voir, par exemple, *Sahara occidental*, C.I.J. Recueil 1975, p. 17 (organisation d'une phase préliminaire); et *Demande de réformation du jugement n° 273 du Tribunal administratif des Nations Unies*, C.I.J. Recueil 1982, p. 338 à 340 (égalité des parties).

III. LES RESSOURCES OFFERTES PAR LA FONCTION CONSULTATIVE DE LA COUR EN MATIÈRE DE RÈGLEMENT PACIFIQUE DES DIFFÉRENDS : PERSPECTIVES

Il semble ainsi que l'on puisse conclure, en dépit de certaines apparences, à un bilan globalement positif de la fonction consultative de la Cour, y compris dans le domaine du règlement pacifique des différends. Sur cette base, les perspectives d'avenir apparaissent d'autant plus encourageantes qu'un certain nombre de facteurs qui avaient empêché la procédure consultative de donner toute sa mesure après 1945 ont aujourd'hui disparu : les séquelles de la guerre froide sont désormais gommées et l'attitude maintenant favorable à la Cour des anciens pays du « bloc de l'Est » devrait contribuer non seulement à relancer l'activité de celle-ci, tant en matière contentieuse que consultative, mais aussi à en renforcer l'efficacité. Le gain en homogénéité que la communauté internationale des années 90 a de la sorte enregistré peut toutefois ne pas s'avérer suffisant. Comme on le soulignait ci-dessus, même s'il existe à présent une bienveillance assez largement partagée des principaux acteurs de la vie internationale à l'égard de la Cour, des résistances à la fonction judiciaire demeurent, qui trouvent leur ancrage dans un « donné psychologique » déjà cinquantenaire. Le développement de la fonction consultative et son affirmation comme auxiliaire privilégié de certains mécanismes de solution pacifique des différends passent inévitablement, comme ceux de la fonction contentieuse, par la mise en question de « comportements acquis » toujours persistants. Une telle mise en question, qui suppose avant tout la volonté politique de porter sur la Cour un regard neuf, libéré de préjugés, aurait sans aucun doute des effets bénéfiques — tant quantitatifs que qualitatifs — sur l'activité consultative de la Cour, sans nécessiter aucun aménagement institutionnel.

D'autres actions pourraient être prises *de lege lata* pour promouvoir la fonction « pacificatrice » de la procédure consultative. On pourrait tout d'abord songer, tant que les organisations internationales — désormais sujets pléniers et effectifs de l'ordre juridique international — n'ont pas accès à la procédure contentieuse devant la Cour, à élargir le nombre de clauses compromissoires prévoyant qu'en cas de différend entre un État et une organisation, un avis sera demandé à la Cour, dont les parties conviennent qu'il aura un effet décisif (avis consultatifs « obligatoires »); de telles clauses, qui avaient connu un certain succès dans les années 40⁸¹ semblent en effet avoir été, par la suite, quelque peu délaissées, malgré leur intérêt croissant⁸².

⁸¹ Voir, par exemple, Convention sur les privilèges et immunités des Nations Unies, sect. 30.

⁸² Voir cependant Convention de Vienne de 1986 sur le droit des traités entre États et organisations internationales ou entre organisations internationales, article 66.

On pourrait aussi imaginer que l'Assemblée générale élargisse le nombre d'« organes de l'Organisation » qui, conformément au paragraphe 2 de l'Article 96 de la Charte, sont susceptibles d'être autorisés à demander des avis consultatifs.

Depuis quelques années, la question d'un accès du Secrétaire général à la procédure consultative est à nouveau à l'ordre du jour : elle a été posée à plusieurs reprises et dans des cadres divers. On se contentera ici d'évoquer en termes très larges les deux ordres de problèmes que cette question soulève. Le premier est essentiellement de principe : si le Secrétariat est le seul organe principal de l'Organisation à ne pas avoir aujourd'hui accès à la procédure consultative devant la Cour, c'est aussi le seul à ne pas être composé d'États; certains craignent dès lors à la fois l'absence d'un contrôle comparable à celui qui s'exerce au sein des organismes intergouvernementaux quant à la décision de saisir la Cour et à la formulation de la question à lui poser, et l'absence d'un soutien politique comparable à celui dont peuvent bénéficier les demandes présentées à l'issue d'un vote majoritaire. Le second ordre de problèmes qui se posent a trait à la mise en œuvre concrète de l'autorisation de principe que pourrait recevoir le Secrétaire général de requérir des avis consultatifs : cette autorisation devra-t-elle être permanente, devra-t-elle couvrir tout le champ d'activités du Secrétaire général, sa mise en œuvre devra-t-elle être soumise à l'accord des parties en cas de demande relative à un différend en voie de cristallisation ou déjà cristallisé, etc.? Les avantages d'une telle autorisation seraient bien entendu de faciliter considérablement la saisine de la Cour en la rendant à la fois plus flexible et, en cas de besoin, plus rapide, le Secrétaire général n'ayant plus à s'adresser à des organes tiers; dans certains cas, cette autorisation permettrait aussi d'éviter les écueils de situations politiques particulièrement pesantes, voire paralysantes. Des solutions pourraient certainement être trouvées pour permettre à la communauté internationale de bénéficier des bienfaits d'une telle ouverture tout en limitant les risques.

On pourrait encore songer à l'octroi, à divers autres « organes de l'Organisation », de l'autorisation de saisir directement la Cour de requêtes pour avis consultatif, compte tenu soit du volume et de la complexité de leurs activités (ex. : Haut Commissariat des Nations Unies pour les réfugiés, Programme des Nations Unies pour le développement, Programme des Nations Unies pour l'environnement, Fonds des Nations Unies pour l'enfance, Office de Secours et de travaux des Nations Unies pour les réfugiés de Palestine dans le Proche-Orient), soit de la nature spécifique de celles-ci (ex. : Tribunal pour les crimes de guerre commis en ex-Yougoslavie).

Enfin, *de lege ferenda*, les raisons qui avaient justifié, en 1945, le rejet de certaines propositions tendant à admettre les États au bénéfice de la procédure consultative, semblent toujours aujourd'hui prévaloir, au vu du degré

encore insuffisant d'intégration de la communauté internationale. En revanche, on pourrait concevoir un élargissement du groupe des organisations internationales autorisées à solliciter des avis, à diverses organisations qui ne rentrent pas dans le champ actuel de définition de la Charte mais dont l'accès à la procédure consultative pourrait s'avérer très profitable, soit dans le cadre de leurs relations extérieures, soit dans celui de leur fonctionnement interne, que ces organisations soient ou non dépourvues de système judiciaire propre (il pourrait ainsi être très utile pour un tribunal « interne » à une organisation de pouvoir, par exemple, poser à la Cour des questions préjudicielles sous la forme de demandes d'avis consultatifs). Il s'agirait aussi bien d'organisations à vocation plus ou moins universelle, qui peuvent d'ailleurs entretenir avec les Nations Unies des liens privilégiés (ex. : la nouvelle Organisation mondiale du commerce [OMC] ou la nouvelle Organisation pour l'interdiction des armes chimiques [OIAC]), que d'organisations à vocation régionale. Les craintes que les rédacteurs de la Charte et du Statut avaient éprouvées de voir la Cour encombrée de demandes de telles organisations ne paraissent pas, à la lumière de la pratique, être réellement fondées; en tout état de cause, le pouvoir discrétionnaire dont la Cour dispose pour répondre à une demande d'avis⁸³ constitue un garde-fou solide contre d'éventuels abus.

⁸³ Voir le paragraphe 1 de l'Article 65 du Statut, tel que constamment interprété par la Cour elle-même.

LA FUNCIÓN DE LA CORTE INTERNACIONAL DE JUSTICIA EN EL SISTEMA DE LA CARTA DE LAS NACIONES UNIDAS

*Santiago Torres-Bernárdez**

La función que desempeña la Corte Internacional de Justicia difiere en aspectos importantes de la que tenía su predecesora: la Corte Permanente de Justicia Internacional.

En el régimen del Pacto de la Sociedad de las Naciones, el recurso al arreglo judicial tenía una doble función: su función por así decir natural de facilitar el arreglo por la Corte de la controversia y una función de orden marcadamente político relacionada con el control de la legalidad del recurso a la guerra por los Estados. Esto incidió negativamente en la definición de la base competencial reconocida a la Corte en el Estatuto de 1920.

Los miembros del Consejo y otros Estados temieron que una jurisdicción de la Corte de base exclusivamente estatutaria pudiese mermar las competencias del propio Consejo, y eventualmente de la Asamblea, concernientes al mantenimiento de la paz en general y del orden establecido por los tratados de paz.

Esta preocupación determinó también que se tratase de limitar el área de las actuaciones de los medios judiciales de arreglo distinguiendo las controversias llamadas de orden jurídico de las demás controversias, propiciándose así una polémica, tan duradera como inútil, sobre la naturaleza de las controversias susceptibles de ser resueltas mediante recurso a la Corte.

Por otra parte, es igualmente cierto que la historia de la Sociedad de las Naciones demuestra que una judicialización excesiva de lo esencialmente político puede conducir a que los órganos políticos se inhiban de ejercer sus propias responsabilidades con grave detrimento para la paz y la seguridad internacionales. Las actuaciones judiciales internacionales, por sí solas, no son

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un elemento disuasorio suficiente frente a un Estado decidido a recurrir a la fuerza.

La función dual que desempeñaba el arreglo judicial en el Pacto de la Sociedad de las Naciones no se transfirió al sistema de mantenimiento de la paz y la seguridad internacionales en la Carta de las Naciones Unidas.

El recurso a la Corte no es en la Carta un medio de control de legalidad de la amenaza o del empleo de la fuerza por los Estados. En el sistema de la Carta, los Estados no están autorizados a amenazar con la fuerza o a emplear la fuerza ni antes, ni durante, ni después de recurrir a la Corte. Este cambio normativo fundamental permite a la Carta de las Naciones Unidas disociar la reglamentación de las actuaciones de sus órganos políticos de las de su órgano judicial.

El sistema de las Naciones Unidas asume sin tapujos la naturaleza primordialmente política de mantener la paz y la seguridad internacionales y deduce de este hecho la conclusión que se impone, a saber que los órganos políticos, y en particular el Consejo de Seguridad, son los instrumentos de la Organización a quienes corresponde en primer lugar velar de una manera permanente y continuada por el mantenimiento de la paz y la seguridad internacionales, tanto en relación con la adopción de las “medidas colectivas eficaces” que requiera la seguridad colectiva como en lo que respecta al “ajuste o arreglo pacífico” de controversias o situaciones internacionales susceptibles de conducir a quebrantamientos de la paz.

El régimen de la Carta supone, por lo tanto, una superación de la judicialización de lo político que se arrastraba desde las Conferencias de Paz de La Haya de 1899 y 1907 y que la Sociedad de las Naciones no había erradicado completamente. Ciertamente, el “gobierno de los jueces” no es un principio de la Carta.

Por ejemplo, el hecho de haber recurrido o no a la Corte es indiferente, a los efectos de las determinaciones que el Consejo de Seguridad pueda hacer de conformidad con el Artículo 39 de la Carta.

Pero la justicia y el derecho, ingredientes imprescindibles para asegurar la cohesión y la estabilidad de todo orden social, no fueron olvidados en la Conferencia de San Francisco. La Carta los recoge en relación con una de las dos grandes áreas en que se divide su sistema de mantenimiento de la paz y la seguridad internacionales: el ámbito del arreglo pacífico. Consecuente con este enfoque, la Carta enmarca de manera general la función de su órgano judicial principal, la Corte Internacional de Justicia, en lo que constituye la *sedes materiae* de su Capítulo VI.

En el ámbito del “arreglo pacífico”, la Carta involucra, por lo tanto, tanto a los órganos políticos de la Organización como a la Corte, pero no confunde las actuaciones de los unos con las de la otra. Para la Carta se trata de

actuaciones paralelas encaminadas al logro de un propósito determinado de las Naciones Unidas (definido en el Art. 1, párr. 1, de la Carta).

Con esto no queremos decir que para la Carta órganos como el Consejo de Seguridad o la Corte Internacional de Justicia deban o puedan ignorar sus actuaciones o decisiones respectivas. En el caso de la Corte, es obvio que ésta tendrá en cuenta aquellas decisiones del Consejo que hayan podido haber modificado la relación jurídica entre las partes en lo que sea relevante para el caso de que se trate.

Por lo que respecta al Consejo de Seguridad, la Carta le impone, cuando actúa en el ámbito del “arreglo pacífico”, proceder de conformidad con los principios de la justicia y del derecho internacional. El Consejo no tiene facultades en virtud del Capítulo VI de la Carta que le autoricen a modificar un fallo de la Corte, ni a desconocer los derechos y obligaciones que los Estados tienen directamente de la Carta en virtud de lo dispuesto en su Artículo 94. Lo que puede el Consejo de Seguridad es abstenerse de actuar para hacer cumplir un fallo de la Corte, que es algo muy distinto y que no altera los derechos y obligaciones que los Estados partes puedan tener *inter se* en virtud de un fallo de la Corte o directamente de la Carta.

También conviene precisar que el hecho de que en el sistema de la Carta el recurso a la Corte no sea un medio de control de legalidad de la amenaza o el empleo de la fuerza por los Estados no significa, en modo alguno, que la Corte deba abstenerse de entender y juzgar un asunto por el hecho de que le sean aplicables disposiciones de la Carta y/o normas del derecho internacional general reguladoras de la prohibición del recurso a la fuerza en las relaciones internacionales. La Corte puede perfectamente hacerlo para los fines de su propia función, que es la de administrar la justicia internacional entre los Estados partes en el caso de que se trate.

Las actuaciones de los órganos políticos y del órgano judicial de la Organización son pues para la Carta complementarias y no mutuamente excluyentes. Esto debe respetarse y auspiciarse. Nosotros apostamos decididamente por dicha complementariedad y no por la confusión, ni por la rivalidad entre los órganos de “arreglo pacífico” de las Naciones Unidas.

En el sistema de la Carta hay pues un área, la del “arreglo pacífico”, donde concurren las funciones políticas atribuidas al Consejo de Seguridad y a la Asamblea General y la función judicial de la Corte. Pero también aquí, las grandes líneas de la reglamentación de la Carta nos parecen suficientemente precisas como para que una confusión, tan indeseable en este campo como en otros, esté justificada.

Las funciones del Consejo de Seguridad y de la Asamblea General en el ámbito del “arreglo pacífico” son también más extensas que las de la Corte (por ejemplo, ésta solamente entiende en “controversias” entre Estados partes

determinados y no en “situaciones”), pero menos decisorias jurídicamente que la de la Corte en términos de arreglo de la controversia misma.

La intervención en este ámbito del Consejo o de la Asamblea tiene como finalidad primordial la gestión de la crisis provocada por la controversia o la situación, evitando la extensión y/o el agravamiento de la misma, en interés del mantenimiento general de la paz y la seguridad internacionales. La solución de la controversia como tal viene en segundo lugar para los órganos políticos de la Organización.

De ahí que los poderes del propio Consejo de Seguridad, y no sólo de la Asamblea General, sean en el marco del Capítulo VI de la Carta de carácter recomendatorio y conciernan la recomendación de procedimientos o métodos de ajuste apropiados y no, salvo si lo solicitan todas las partes, recomendaciones relativas a los términos mismos de arreglo de la controversia de que se trate.

En cambio, cuando una controversia es sometida a arreglo judicial, la Corte Internacional de Justicia, cuando es competente en el asunto, decide el fondo de la controversia mediante una decisión judicial de obligado cumplimiento para las partes respecto del caso que ha sido decidido (Art. 94 de la Carta y Art. 59 del Estatuto de la Corte).

La Corte no cumple su función mediante recomendaciones, o reenviando a las partes a otro procedimiento de arreglo. Como dice el Artículo 39, párrafo 1, del Estatuto, parte integrante de la Carta de las Naciones Unidas, la función de la Corte es decidir conforme al derecho internacional las controversias que le sean sometidas.

La Corte es un tribunal de justicia, un universo donde se adoptan decisiones y fallos judiciales. Estos últimos son actos jurisdiccionales definitivos e inapelables y están investidos, por lo tanto, no sólo de la autoridad sino también de la fuerza de la cosa juzgada. No hay doble instancia, sin perjuicio de la interpretación y/o revisión de los fallos, en las condiciones estipuladas en los Artículos 60 y 61 del Estatuto de la Corte.

El principio de la Carta (Art. 33) y del derecho internacional general de la libre elección de los medios de arreglo por las partes limita en efecto la función y los poderes del Consejo de Seguridad y de la Asamblea General en materia de arreglo pacífico, sin perjuicio de la obligación residual que tienen estas últimas de acudir al Consejo de Seguridad si no logran arreglar la controversia (Art. 37 de la Carta).

En el caso de la Corte, el mencionado principio interviene también en el actual sistema de la Carta, pero de otra manera y a otro nivel: a los efectos de la determinación *in casu* de la competencia de la Corte y de la admisibilidad del acto de incoación de la instancia. Establecida la competencia y la admisibilidad, los poderes de la Corte son, como hemos dicho, decisorios.

Órgano principal de la Organización, la Corte no está subordinada a ningún otro órgano de la misma, sea éste principal o subsidiario, ni puede ser objeto de intervención en el ejercicio de sus competencias judiciales por ningún otro órgano. El ejercicio de la función que la Carta y el Estatuto atribuyen a la Corte tampoco está limitado por el hecho de que el Consejo de Seguridad y/o la Asamblea General hayan actuado, estén actuando o vayan a actuar en relación con una controversia referida a la Corte. No existe ninguna limitación como las establecidas a propósito de la Asamblea General en los Artículos 11 y 12 de la Carta y la doctrina conocida como litispendencia u objeción de litispendencia no está incorporada al derecho de las Naciones Unidas como un principio jurídico de orden general.

Se confirma así la "autonomía" que tiene para la Carta la función judicial que desempeña la Corte respecto de las que desempeñan los órganos políticos en el ámbito del arreglo pacífico y viceversa.

Debe subrayarse, igualmente, que la jurisdicción contenciosa de la Corte no se agota en en arreglo judicial de controversias susceptibles de convertirse en graves o peligrosas para el mantenimiento de la paz y seguridad internacionales. La función de la Corte no está, por tanto, circunscrita por los límites externos del "arreglo pacífico" subsumido en el concepto de "mantenimiento de la paz y la seguridad internacionales" de la Carta. Desborda ampliamente dichos límites.

Numerosos casos ante la Corte son completamente ajenos a toda idea de gravedad, peligrosidad o crisis internacional y se desarrollan entre Estados partes que entretienen relaciones normales o amistosas o que son, incluso, aliados.

Tampoco cabe excluir, en esos como en otros supuestos, que la incoación de la instancia ante la Corte sea hecha por solicitud unilateral y no mediante la notificación de un compromiso (Art. 40 del Estatuto).

El recurso a la Corte no es un acto inamistoso en derecho internacional ni en la Carta de las Naciones Unidas. Así lo reconoce expresamente la Declaración de Manila de 1982. Tampoco es, por supuesto, incompatible con la igualdad soberana de los Estados el recurrir a los órganos de una organización como las Naciones Unidas, sean políticos o judiciales, ni se da tal efecto en el derecho internacional general.

Como el arreglo judicial es un medio de arreglo de controversias internacionales sobre la base del derecho internacional, conviene también recordar que en la actualidad varios capítulos del derecho internacional han sido codificados y desarrollados progresivamente, en una u otra forma, bajo los auspicios de las Naciones Unidas, con participación de la inmensa mayoría de los Estados.

Las decisiones de la Corte procuran a los Estados un grado de certeza, seguridad y finalidad sobre sus derechos y obligaciones que no pueden obte-

ner recurriendo a órganos políticos. Hay toda una serie de litigios o controversias internacionales que se pueden solucionar mejor y/o con carácter más definitivo recurriendo a la Corte.

Se trata, en último término, de identificar estas últimas controversias. Aquéllas en las que esté en juego la interpretación o la aplicación de un tratado, la determinación de un título territorial o la delimitación de una frontera, la constatación de una responsabilidad internacional, la naturaleza y extensión de una reparación debida o cualquier otra cuestión de derecho internacional encabezan la lista de controversias que suelen enumerarse como idóneas por su naturaleza misma para arreglo judicial. Pero, para someterla a la Corte, una controversia no tiene por qué ser “exclusivamente” jurídica.

No se da tal grado de pureza en las relaciones entre entidades políticas soberanas. En último término, es la manera en que los Estados partes en el litigio presenten la controversia y quieran que se solucione lo que constituye, a nuestro juicio, el factor más determinante al respecto. Las condiciones en que se desarrolla el “proceso” y la forma de “conclusiones” en que las partes deben formular sus pretensiones respectivas en el arreglo judicial determinan, en efecto, que se produzca una especie de mutación de la controversia, con independencia de cual haya podido ser la naturaleza intrínseca original de la misma.

Una controversia en que las partes disputan en términos de “un derecho recíproco” se prestaría perfectamente para el “arreglo judicial” con independencia del origen de la controversia o de su naturaleza intrínseca. También lo sería cualquier otra controversia en que exista una voluntad de las partes para solucionarla sobre la base del derecho internacional o recurriendo a la Corte para que ésta decida en derecho (o *ex aequo et bono* si las partes así lo convinieren) mediante un fallo judicial adoptado al término de un procedimiento contradictorio que tiene en cuenta: los hechos alegados, la prueba administrada, las circunstancias particulares del caso y las reglas que le sean aplicables.

El Estatuto no excluye, por otra parte, que la Corte pronuncie fallos meramente “declarativos”.

La “jurisdicción consultiva” — que el Artículo 96 de la Carta y el Artículo 65 del Estatuto confieren a la Corte Internacional de Justicia en términos más amplios que los del Artículo 14 del Pacto de la Sociedad de las Naciones — confirma que la función de la Corte no se limita, como hemos dicho, al arreglo pacífico de controversias graves o peligrosas para el mantenimiento de la paz y la seguridad internacionales. Va incluso más allá del concepto mismo de “arreglo pacífico”, puesto que la Corte es también, en virtud de esta jurisdicción adicional, un “órgano consultivo” en cuestiones jurídicas de la Asamblea General, del Consejo de Seguridad y de otros órganos de la

Organización y organismos especializados autorizados a tal efecto por la Asamblea General.

Como el Presidente de la Corte Internacional de Justicia acaba de hacer una exposición magistral sobre la función consultiva de la Corte, nosotros nos abstendremos aquí de volver sobre el tema. Nos limitaremos a hacer tres observaciones generales solamente. La primera es que se trata de una función de gran plasticidad, que permite la consecución de una gran variedad de fines tanto en el orden interno como externo a las organizaciones. La segunda es que la solicitud de “opiniones consultivas” — que están motivadas como los fallos — ha permitido notables contribuciones de la Corte al imperio de la regla de derecho (*rule of law*) en el seno de las organizaciones y al desarrollo progresivo del derecho internacional auspiciado por las Naciones Unidas. Finalmente, la tercera es que la vía consultiva puede utilizarse como procedimiento al servicio del propio “arreglo pacífico” de litigios internacionales o de interés internacional.

Como prevé el propio Reglamento de la Corte (Art. 102, párrs. 2 y 3), se puede solicitar una “opinión consultiva” que concierna, en realidad, a una cuestión jurídica actualmente pendiente entre dos o más Estados. Por otra parte, la Declaración de la Asamblea General de 1988 sobre la prevención y la eliminación de controversias y de situaciones que puedan amenazar la paz y la seguridad internacionales y sobre el papel de las Naciones Unidas en esa esfera ha reconocido la utilidad que puede tener la “jurisdicción consultiva” de la Corte como instrumento al servicio de la “diplomacia preventiva” y, por lo tanto, como medio para encontrar una solución a controversias o situaciones amenazadoras para la paz y la seguridad internacionales.

Estos desarrollos no deben, sin embargo, interpretarse como si la vía consultiva fuese la única susceptible de servir la causa de la “diplomacia preventiva”. Al contrario, para servir dicha causa, la vía contenciosa, si está abierta y se utiliza a su debido tiempo, es un procedimiento superior y más eficaz para luchar contra la potencial peligrosidad de las controversias internacionales.

Lo que venimos diciendo confirma, una vez más, que la Carta de las Naciones Unidas establece un sistema armónico y bien afinado. Ya habíamos visto que para dicho sistema las actuaciones de sus órganos políticos y de su órgano judicial en materia de “arreglo pacífico” se complementan y no son mutuamente excluyentes. Ahora sabemos también, en lo que concierne a la propia Corte, que su “jurisdicción contenciosa” y su “jurisdicción consultiva” tienen la potencialidad de complementarse o apoyarse mutuamente.

En resumen, la Corte Internacional de Justicia es un órgano principal de las Naciones Unidas, integrado en el sistema de mantenimiento de la paz y la seguridad internacionales de la Carta, que ejerce una función de arreglo judicial de controversias entre Estados. Esta función la ejerce la Corte con

independencia del grado de gravedad o peligrosidad social del caso concreto que se le haya sometido. Además, la Corte tiene, a solicitud de órganos de las Naciones Unidas y organismos autorizados, la función consultiva en cuestiones jurídicas a la que acabamos de referirnos.

Estas potencialidades de la Corte no han sido plenamente utilizadas, por una diversidad de razones en las que no vamos a entrar. Se ha experimentado una mejoría notable en las dos últimas décadas. Hay un nuevo interés y confianza en la Corte y sus procedimientos. Pero la situación no es todavía del todo satisfactoria, a pesar de la necesidad en que se encuentra la Organización de hacer frente, con recursos limitados, a controversias heredadas del pasado y a las nuevas que van surgiendo.

Todos los instrumentos y recursos disponibles deberían ser utilizados por la Organización. El Consejo de Seguridad, por ejemplo, debería hacer un uso más decidido y pleno de la facultad de recomendación de que goza en virtud del Artículo 36, párrafo 3, de la Carta. Debe evitarse tener que terminar por crear "operaciones de mantenimiento de la paz" que, sin menoscabo de su utilidad y eficacia contrastadas, conllevan altos costos y tienden a perpetuarse en detrimento de una pronta solución de la controversia o situación. Por otra parte, el recurso al Capítulo VII no siempre es posible o recomendable, además de ser un recurso con efectos políticos traumáticos.

En estas condiciones, la Corte podría ser de gran utilidad, prestar servicios todavía mayores al sistema, pero para ello tendría que estar más presente en la conciencia y en las decisiones de las cancillerías de los Estados y de los órganos políticos de arreglo pacífico de las Naciones Unidas.

El recurso a la Corte aliviaría la carga que pesa sobre los órganos políticos de la Organización. Reflejos provenientes del pasado no tienen mayor justificación. El recurso a la Corte es menos lento — diga lo que se diga — que otros procedimientos, ofrece mayores garantías de soluciones objetivas, garantiza la igualdad de las partes en el proceso, es superior a otros en cuanto a la finalidad de poner término al diferendo y, en cuanto al costo, hoy existe el Fondo Especial de ayuda creado en 1989. Son consideraciones que deben sopesarse por los Estados, en particular por aquéllos que no tengan la consideración de gran potencia.

Debería pues facilitarse el ejercicio de la función de la Corte Internacional de Justicia. Al respecto, el obstáculo principal sigue siendo la cuestión de la competencia de la Corte en asuntos contenciosos. En las presentaciones que se hacen de este tema se suele insistir *ad nauseam* en el carácter consensual de la justicia internacional.

Se trata de una simplificación que no explica ni justifica nada, dado que la competencia de todo órgano internacional es por definición consensual, independientemente del carácter político o judicial del órgano. La especifici-

dad del caso de la Corte no está en el principio de consensualidad, sino en la exigencia de dónde, cuando y cómo los consentimientos necesarios de las partes en litigio deben manifestarse.

En el caso de la Corte, se exige que el consentimiento se exprese en dos tiempos, en dos etapas sucesivas, mientras que para los órganos políticos es suficiente el consentimiento expresado por los Estados al convertirse en Miembros de las Naciones Unidas, es decir al ser partes en la Carta.

¿Debería modificarse el consentimiento a dos niveles que se requiere actualmente en el caso de la Corte? Ciertamente, ello no conllevaría para los órganos políticos de la Organización los riesgos que temió en su día el Consejo de la Sociedad de las Naciones debido a las características generales del sistema del Pacto. La revisión podría, por otra parte, ser general o parcial, incluso sectorial como un complemento al presente sistema del Artículo 36 del Estatuto. Sin embargo para que un cambio fuese posible debería existir un consenso general y un estado de ánimo, un fervor, que no vemos por ninguna parte. Estadísticamente, parecería incluso haberse retrocedido, en términos relativos, respecto de lo expresado por la mayoría de los Estados en 1920 y 1945, tanto con respecto a una jurisdicción contenciosa de la Corte de base exclusivamente estatutaria como en lo que concierne al desarrollo del sistema de la llamada "cláusula facultativa" (Art. 36, párr. 2, del Estatuto de la Corte).

Así las cosas, pensamos que de este Congreso debería salir un impulso a fin de desarrollar más y más, de una manera mucho más firme y decidida que en el pasado, la competencia de la Corte, promoviendo todos los procedimientos previstos en los párrafos 1 y 2 del Artículo 36 del Estatuto, que no son incompatibles entre sí. Es decir, se trataría de adoptar como punto de partida el enfoque de la Declaración de Manila, pero ampliando sus recomendaciones concretas y adoptando medidas que favorezcan su conocimiento, seguimiento y aplicación. La Asamblea General, el Consejo de Seguridad y la diplomacia deberían participar en la empresa, como se hizo en 1928 cuando se adoptó el Pacto Briand-Kellogg de renuncia a la guerra y el Acta General para la solución pacífica de controversias internacionales.

Debería promoverse la conclusión de compromisos y acuerdos atribuyendo a la Corte jurisdicción ad hoc en controversias determinadas, y de convenciones, tratados o cláusulas compromisorias que prevean el recurso a la Corte cuando surja una controversia, así como fomentar que los Estados partes en el Estatuto hagan la declaración prevista en el Artículo 36, párrafo 2, del Estatuto. La Secretaría de las Naciones Unidas podría ayudar en esta tarea. Por ejemplo, la Secretaría podría preparar un estudio para consideración de la Asamblea General relativo a las cláusulas finales de las convenciones concluidas bajo los auspicios de las Naciones Unidas en las que, como consecuencia de las condiciones existentes en la época de la guerra fría, no fue

posible incluir el recurso a la Corte. Quizás podría hoy remediarse, en algunos casos, esta carencia mediante la adopción de un protocolo de enmienda o de otra forma.

Por último, en el campo de la jurisdicción consultiva de la Corte Internacional de Justicia, debería ser posible encontrar una fórmula mediante la cual la Asamblea General autorizase al Secretario General a solicitar “opiniones consultivas”, así como también a organizaciones intergubernamentales (por ejemplo, regionales) mediante una interpretación liberal de la expresión “organismos especializados” en el contexto del Artículo 96, párrafo 2, de la Carta.

OPEN-FLOOR DISCUSSION

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. MOHAMMED BEDJAOUÏ

Mr. Mosler* said he agreed with Mr. Bedjaoui that the practice of asking the International Court of Justice for advisory opinions should be extended. Such advisory jurisdiction might contribute to the prevention of disputes, help to clarify the respective competences of the various organs of the United Nations and of international organizations and enhance the role of the Court in general. He shared the view that the Secretary-General should have the power to request advisory opinions from the Court. He would like to hear Mr. Bedjaoui's opinion on the Court's role as a court of appeals from the United Nations Administrative Tribunal—a role he considered unsuitable, provided that some other approach could be found. Finally, as the procedure of the plenary Court was cumbersome, albeit somewhat less so in the case of advisory opinions, he wondered what the consequences would be for the Court if it should become overloaded with requests for such opinions in addition to new contentious matters and whether it would not be advisable to find more flexible procedures, such as the introduction of a rapporteur, a group of rapporteurs or some other mechanism to facilitate the handling of advisory opinions as well as other cases.

Mr. Lehmann** wished to know whether Mr. Bedjaoui could foresee a role for the International Court of Justice as a mediator between parties in contentious cases. While the Court did not currently have that power, he believed it might sometimes be helpful to the parties, perhaps after a first round of written pleadings, to be able to consult with the Court on the possibility of a friendly settlement out of court.

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Mr. Sohn* pointed out that judgements of national courts, even supreme courts, were often in violation of international law. Such a situation, which easily gave rise to international disputes, might be avoided if national courts, in order to decide an issue of international law, could apply to the International Court of Justice for an advisory opinion. Such an approach had been proposed several times, but had always been rejected on the ground that it would require an amendment of the Statute of the Court. It had been proposed that, as in the case of the United Nations Administrative Tribunal, the General Assembly might establish a committee of jurists to determine whether a particular issue merited examination by the International Court of Justice. It might be deemed that such an issue involved friendly relations among nations under Article 14 of the Charter and should therefore be submitted to the Court for an advisory opinion. A similar procedure had been adopted by the European Court of Justice, which gave advice on issues of international law arising in domestic courts in connection with European conventions. In the case under discussion, the scope would be slightly broader, but might be limited, for example, to questions relating to treaties, the interpretation of which had become an important issue in domestic courts. A uniform interpretation of the Warsaw Convention, for example, which was being construed differently in different countries, would be useful.

Mr. Hilaire** noted that no mention had been made of the frequency of use of the special chamber of the Court. He wished Mr. Bedjaoui would comment on the continuation of that use and wondered whether it would marginalize or undermine the future role and function of the Court in post-cold war dispute settlement.

Mr. Bedjaoui (reply), concerning Mr. Mosler's questions, suggested that, though the dream that compulsory jurisdiction of the International Court of Justice might one day prevail in the world was perhaps unrealizable, the desired result might possibly be achieved through the Court's advisory function. He thought a concerted effort might be made to encourage that function, which was like the judicial counterpart of preventive diplomacy and would, he thoroughly agreed, strengthen the role of the Court. The advisory function answered the intimately interrelated demands of both international organizations and individual States.

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As to the Court's role in appeals against judgements of the United Nations Administrative Tribunal, that procedure had always been considered tortuous and ill-designed and placed the International Court of Justice in a position of appellate jurisdiction that was not in keeping with its real purpose.

One of the advantages of the Court's advisory function was precisely that it was less cumbersome than in the case of contentious matters. Though the Court was not currently oversaturated, in the event of an increase in requests for advisory opinions it would have to contemplate, together with the United Nations, changes in its operation. As for the institution of the rapporteur, the Court had always felt it was not in keeping with the Court's fundamental nature. Indeed, the Security Council and the General Assembly, in electing the 15 Judges of the Court, intended that they should constitute a universal court encompassing all juridical sensibilities and capable of settling disputes between States, which wished to be judged by a complete Areopagus of 15 Judges, not by a single rapporteur. Still, it was clear that, when the Court had begun to create chambers made up of only a few Judges, the question had already arisen. In any event, the matter deserved thought.

Regarding Mr. Lehmann's question as to a possible future for the Court as a mediator, the Court had already played such a role informally in a number of cases, in which it had shown respect for the prerogatives and sovereignty of the States involved. It had not sought to impose itself on them, but had simply taken steps to bring the parties closer together before proceeding further, so as to help them to find the solution themselves.

He agreed with Mr. Sohn that national tribunals might have occasion to request advisory opinions from the Court on questions of international law, especially with regard to treaties, which should be uniformly interpreted by the courts of all the States concerned. However, as those courts had no international status, the States to which they belonged must be given the right to seek advisory opinions directly from the Court, a prospect which should not be feared, inasmuch as it had been contemplated even in the days of the League of Nations.

Responding to Mr. Hilaire's question, he acknowledged that the creation of ad hoc chambers on the suggestion of States not wishing to be judged by all 15 Judges was not without interest, though problems had arisen due to the mistaken belief of certain States that they could choose the members of the chamber. Such chambers might better enable the Court to handle a large number of issues than a single rapporteur, subject to certain arrangements, especially regarding the Court's exclusive right to elect their members. The ad hoc chambers previously created had dealt solely with contentious matters, but the transposition to advisory opinions could be made.

The question of access by the Secretary-General to the advisory procedure presented, first of all, a problem of principle: all the other main organs created by the Charter had access to that procedure, but they were composed of States. There was some fear of the absence, in the case of the Secretary-General, both of a control comparable to that exercised within intergovernmental organizations, regarding the decision to seize the Court and the formulation of the question to be submitted to it, and of the political support enjoyed by requests submitted upon a majority vote within such an organization. Another problem related to the nature of the authorization in principle to be granted to the Secretary-General for requesting advisory opinions. Should such an authorization be permanent? Should it cover the entire range of activities of the Secretary-General? Should its implementation be subject to the agreement of the parties concerned in the case of requests relating to a potential or existing dispute? The advantages of such an authorization would be to facilitate the seizing of the Court, the Secretary-General no longer being required to address himself to third parties, but acting directly. It would also be useful in difficult political situations, enabling the international community to benefit from the related openness without engaging States or the Organization.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. SANTIAGO TORRES-BERNÁRDEZ

Ms. Gowlland-Debbas* pointed out that originally, the power of the Security Council to make recommendations under Chapter VI of the Charter, which were non-obligatory, had been clearly demarcated from its enforcement powers under Chapter VII. More recently, however, the Council had taken mandatory measures under Chapter VII which, it seemed, not only were intended to restore peace or secure the cessation of illegal behaviour of a State, but also demanded unconditional acceptance of proposed terms of settlement, such as the recognition of disputed boundaries or of disputed entities. Such action was neither enforcement of a judgment of the International Court of Justice under Article 94, paragraph 2, of the Charter, nor the recommendation of a political settlement under Chapter VI. She wished to know whether Mr. Torres-Bernárdez saw in that a tendency towards the blurring of the clear distinction between political methods of dispute settlement and enforcement action.

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Mr. Jonkman* said that the Permanent Court of Arbitration, having common goals and strong ties with the United Nations, in which it had permanent observer status, was best qualified to complement the functions of the International Court of Justice, being its sister organization. It was capable of administering four of the dispute settlement methods mentioned in Article 33 of the Charter, namely, inquiry, mediation, conciliation and arbitration, and of conducting arbitrations not only between States, but also between international organizations or States and private parties. It could deal with disputes involving a large number of claims or highly technical issues. Article 4 of the Statute of the International Court of Justice conferred on the national groups in the Permanent Court of Arbitration the right to nominate candidates for the International Court of Justice. The Secretary-General of the Permanent Court of Arbitration, moreover, had been entrusted by the United Nations Commission on International Trade Law (UNCITRAL) with the appointment of authorities. The Permanent Court was a financially independent and cost-effective organization that would not tap the financial resources of the United Nations, should cooperation between the two organizations become closer. The Permanent Court could even offer developing countries financial assistance to cover the costs of dispute settlement under its auspices. He urged the participants of the Congress to encourage all States Members of the United Nations to avail themselves of the wide range of dispute settlement services offered by the Permanent Court of Arbitration.

Mr. Ameli** remarked that full respect for the International Court of Justice might have entailed asking the specialized agencies of the United Nations system to bring their cases involving States to the Court for arbitration, rather than to an ad hoc arbitration tribunal, which would be in the interests of both economy and more consistent interpretation. That could be done under the current Rules of Court, which allowed for modification by the parties, though a limited amendment of the Statute might be required. The question could be examined more closely if the participants in the Congress were interested.

Mr. Torres-Bernárdez (reply) said that he felt Ms. Gowlland-Debbas's question was extremely important. In respect of an organ like the Security Council, there were indeed situations that might straddle Chapters VI and

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VII of the Charter. Whereas during the cold war, owing to the paralysis of Chapter VII, the use of Chapter VI had been extended, in the current situation the trend was reversed. Under certain circumstances, the Security Council might have the power under Chapter VII to adopt resolutions such as those to which Ms. Gowlland-Debbas was referring, especially when they followed a prior determination by the Council under Article 39 of the Charter that aggression or a breach of or threat to the peace was involved. Even the Vienna Convention on the Law of Treaties contained a general reservation regarding aggressor States. Thus the Council might consider that maintaining peace required, for example, that a frontier should pass through a particular point. One of the tasks of international law in the twenty-first century would be to find a substitute for the old peace treaties. Indeed, the problem for the Security Council, in juridical terms, was how to obtain the agreement of the parties and end a situation that involved the legitimate use of armed force, such as the Gulf war, inasmuch as the Council was not an organ that could, or should, conclude peace agreements. In such a situation, there came into play a Chapter VII dynamic whose end-point was still unclear. Thus the Council was perhaps feeling its way.

On the comment relating to the Permanent Court of Arbitration, he considered that the free choice of means of settlement, a fundamental principle of the Charter, continued to be of great importance. There should exist various means and a sufficient number already existed, but they should not be mixed. The Permanent Court of Arbitration, an institution to which much was owed by all, had up-to-date regulations and means to enable it to continue to contribute to international arbitration.

In the area of disputes between specialized agencies and States, those relating to certain agreements, such as headquarters agreements, might be resolved by the Court in an advisory proceeding. Such agreements generally contained a clause stating that the opinion of the Court was binding on the parties, which would apply even in the case of an advisory proceeding. The use of that type of clause should be developed. Contentious proceedings, however, were not currently accessible to organizations, as only States had *locus standi*.

Mr. Ryssdal* said that the Universal Declaration of Human Rights had been intended as a first step towards the adoption of legally binding instruments for the protection of the fundamental rights and freedoms of the individual and the creation of the machinery for enforcing them. Though in many parts of the world that process had met with problems, Europe, for rea-

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sons stemming from its recent history, had pursued it vigorously. By 1950 the States members of the Council of Europe had, in a miraculously short time, drafted and opened for signature the European Convention on Human Rights. The Convention recognized individuals as having justiciable rights and freedoms under international law, including a right that lay at the very heart of the European Convention system: that of proceeding against a contracting State for an alleged breach of the Convention. The Convention also allowed a State to bring an action against another State even for a violation committed against the latter State's own nationals and had set up enforcement machinery that included the possibility of adjudication by a judicial body. Those features explained the impact of the Convention on international law and its relevance to the question of the peaceful settlement of disputes.

Underlying the Convention and other related instruments was the profound belief that the best way of securing peace was to guarantee basic human rights. Indeed, the European Convention system had played a significant role in the preservation of peace within the community of the European Convention States over the previous 40 years, due to the opportunity afforded to States for peaceful settlement of potential disputes and, in particular, the preventive character of the system.

At the centre of the European system, he said, was the European Court of Human Rights, whose judgements were final and binding. The obligation to put an end to a violation of the Convention and erase its consequences had been consistently complied with. Often, it had led to changes in national legal practice and case-law and in some cases even Members States other than the respondent State had amended their legislation in the light of a Judgment of the Court.

Similar systems were in force under the American Convention on Human Rights and the African Charter on Human and Peoples' Rights. Strengthening such systems and creating them where they did not yet exist were imperative.

As a result of the awareness of the need to consolidate and reinforce the European machinery for the protection of rights, the European system was currently being reformed. It had become clear that the role of the instruments for the protection of human rights as a means of preventing and peacefully settling disputes within the international community would become of even greater importance in the continuing climate of political instability that confronted the world. He agreed, finally, with Mr. Frowein's remarks concerning the promotion and implementation of international law through national courts. Indeed, recourse to international courts was only subsidiary: the primary protection of human rights and fundamental freedoms had to be secured by national courts.

DIPLOMACY AND RESOLUTION OF INTERNATIONAL DISPUTES

*B. S. Murthy**

A major concern of the international community, as it is of any community, next only to controlling unauthorized violence, is to have speedy resolution of disputes that arise among its members. If the parties in dispute relentlessly press their claims, employing the different instruments of policy at their disposal, diplomatic, ideological, economic and military tensions are generated, escalate and might result in an outbreak of violence. Speedy settlement of disputes saves the community from such a danger. By *diplomacy* is meant what follows the process of communication between the officials or authorized representatives of the members of the international community, with a view to having an exchange of information, developing, to the extent possible, mutual understanding, eliminating differences and evolving collaborative arrangements.

Disputes arise for a variety of reasons, such as conflicting claims to territories or territorial resources, or to extraterritorial resources, i.e., of the sea, airspace and outer space; conflicting claims relating to the treatment of people—one's own nationals, ethnic groups or individuals; or conflicting responses to internecine struggles between groups within a State. The particular dangers to which the international community is currently exposed were brought to the attention of all by the Secretary-General in his report entitled "An Agenda for Peace", submitted in 1992. He cautioned about the "fierce new assertions of nationalism and sovereignty", "brutal ethnic, religious, social, cultural or linguistic strife", and "new assertions of discrimination and exclusion" (A/47/277-S/24111, para. 11).

From the dawn of history until recent times, two instruments have served as means for the settlement of disputes: diplomacy and recourse to the

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use of violence. Diplomats of the disputing parties negotiated and, when they failed to arrive at an agreement, the matter was handed over to military generals. After a few battles were fought, each side looked at the loss it had sustained and diplomats were recalled to work out an agreement in the light of the new situation. Peace treaties did not always bring permanent settlements. When the vanquished recovered from their losses, the issues were reopened in the same or in a modified form.

From the time of the establishment of the United Nations, and indeed in a way from the time of the League of Nations, a change occurred from the diplomacy-war alternating structure. Control of the recourse to the use of force and dispute settlement became two parallel, though much interconnected, procedures. Dispute settlement procedures may help to avoid an outbreak of violence; bring about a cease-fire if violence breaks out; maintain stable peace-keeping; and restore normalcy. Preventing an outbreak of violence, bringing about a cease-fire if violence has broken out and stable peace-keeping might pave the way for resolution of the dispute with the aid of the parallel dispute-resolving procedures. Some disputes might not get resolved with these two parallel processes, but they might get at least encapsulated¹ so that the chances of an outbreak of violence are minimized.

The peaceful procedures of settlement of disputes might be broadly divided into two groups: diplomatic and adjudicative. The latter includes arbitration and judicial settlement. Arbitration is a time-honoured institution which has become a fairly prominent international procedure since the second part of the past century. The institution of judicial settlement has grown from the days of the League of Nations. The chief feature that distinguishes the diplomatic from the adjudicative method is that, whereas the decision given by the third party in the latter is conclusive regarding the settlement of the dispute, the aim in the diplomatic method is to influence the parties to reach an agreement that settles the dispute.

The diplomatic methods currently in vogue may be classified for the present purpose as: classical, triadic and parliamentary.² The classical pattern is the one which has developed in the post-medieval times. It is mostly interpersonal communication behind closed doors between the authorized representatives of the parties. The objective of the communication is mutually to inform one another about one's intentions, capabilities and demands; to bargain so as to get the maximum that is possible from the other party, surrendering the minimum that is inescapable; and to formalize the agreement

¹ "Encapsulation" is a concept discussed in Amitai Etzioni, *The Active Society* (The Free Press, New York, 1968), p. 586.

² For a more detailed statement, see B. S. Murthy, *The International Law of Diplomacy* (New Haven Press, New Haven, Martinus Nijhoff, Dordrecht, 1989), p. 48.

so reached to the degree considered expedient. By the use of this method a large number of disputes are resolved everyday without their ever coming to the attention of the public.

From different points of view, negotiation is the most preferable method of settlement of disputes. First, since the resolution of the dispute is by mutual consent, reached after free bargaining, there is a high degree of probability of both the parties carrying out the agreement faithfully. Second, if the spirit of democracy is government by consent, bilateral diplomacy is nearest to that spirit. Third, arbitration and judicial settlement are, in game-theoretic terms, zero-sum games. One party's gain is the other party's loss and the total pay-off is zero. By contrast, in bilateral diplomacy, it can be worked out so that each party gets something it desires and the total pay-off of both is a variable sum, with scope for maximizing it. And fourth, any imposed solution to a dispute is very likely to be reopened by the party who felt compelled to accept it at the time of settlement and thus there may be no real settlement at all.

Negotiations can succeed, however, only when there is a disposition on each side to accommodate, at least partially, the demands of the other side. When both the parties stick to their demands relentlessly, there can be no scope for agreement. One comes across instances when a party asserts, "this is my vital interest", "it is not negotiable", and if the other party also makes a similar assertion, there will be little scope for agreement. However, as time elapses the perceptions of a party might change and what were once considered "vital interests" might not be so regarded.³ It is also possible that a party might yield on what it considers a "vital interest" if it gets compensatory values as against what it gives up.⁴

The obligation to negotiate, where it exists, does not include an obligation to reach an agreement. The obligation to negotiate does indeed exist as one of the options required to be chosen under Article 33 of the Charter of the United Nations for peaceful settlement of disputes, in compliance with the basic obligation under Article 2, paragraph 3. Where the obligation exists, it is not enough for the party under obligation to assert its claim and leave it at that. The International Court of Justice pointed out in the *North Sea Continental Shelf*⁵ cases that negotiation, to be in conformity with the obligation to negotiate, should be meaningful, be a genuine endeavour at bargaining, and not a mere affirmation of one's claims without ever contemplating the meeting of the adversary's claim.

³ Sir James Headlam-Moreley, *Studies in Diplomatic History* (Alfred H. King, Inc., New York, 1930), p. 45.

⁴ Murthy, *op. cit.*, p. 96.

⁵ *I. C. J. Reports, 1969*, vol. 3, pp. 47 and 48.

In contrast to the classical pattern of diplomacy, in which communication is bilateral or multilateral (when authorized representatives meet at a conference or congress and negotiate about their respective interests and demands), there is the pattern in which an intermediary gets involved, offering his good offices, mediation or conciliation. Or he may undertake to make an inquiry to clarify issues of fact or law to the parties. This pattern I have referred to above as "triadic", qualitatively different from the classical diplomacy in which communication is "diadic" or "polyadic". The intermediary communicates with both the disputing parties with a view to influencing them to agree to any particular solution he has been able to evolve by interacting with them. The intermediary's role is rarely to serve simply as a medium of communication. He exercises his choices on what to communicate, to whom to communicate, at what time and in what manner. He may in some cases offer some advantage to the party that agrees to the solution put forward by him.

Classical diplomacy is by and large persuasive, but may, in some contexts, depending upon the techniques of negotiation and tactics employed, be coercive.⁶ When employed along with other instruments of policy—military, economic or ideological—it can be definitely coercive in varying degrees. The party who comes to feel the coercive effects has the choice of withdrawing from the diplomatic process and trying to protect his interests by other available means. "Triadic" diplomacy may also be mostly persuasive, but, depending upon the techniques and tactics adopted by the intermediary of, and the recourse he has to other instruments of policy to some degree or other along with the diplomatic, it can also be coercive.

Though triadic diplomacy is of considerable antiquity, in the past century it was not considered correct for a State to enter as an intermediary in a dispute between others unless the disputing parties consented to the entry. In the Hague Convention No. 1 of 1899, and that of 1907, a modest step was taken towards legitimizing the third-party entry. The parties having serious disagreement or conflict were required, before having recourse to arms, to resort to good offices or mediation or conciliation "as far as circumstances allow". The contracting parties deemed it expedient and desirable that third parties should offer, and had indeed a right to offer, their good offices, mediation or conciliation "as far as circumstances allow". The third parties were declared to have the right to offer their good offices even during hostilities. The exercise of this right was not to be regarded by either party to the conflict as an "unfriendly" act. Under Article 33 of the Charter, a party to a dispute is not bound to accept a third party's good offices, mediation or

⁶ For a detailed statement, see Murthy, *op. cit.*, p. 15.

conciliation, provided it fulfils its obligation under that Article by accepting any other of the methods specified therein.

There is currently a trend towards compulsory acceptance by the parties in dispute of the third-party offer of good offices and so forth. For instance, the Council of the Conference on Security and Cooperation in Europe (i.e., the Helsinki Conference Council) evolved in 1989 a procedure whereby the acceptance of the third-party offer of conciliation was made mandatory.⁷ Either party to a dispute was authorized to invoke the intervention of a neutral third party to decide the procedure to be adopted for resolving the dispute. At the request of either party, the intermediary was authorized to conciliate the dispute. This procedure is known as the "Valletta Mechanism". In 1992, the Council took a decision which empowered it to direct the parties to proceed to conciliation irrespective of their consent. A mechanism similar to the Optional Clause system of the International Court of Justice was created for the members of the Conference to declare in advance their acceptance of conciliation. The Council also adopted a treaty which would, if it came into force, establish a tribunal that would function as a conciliation-cum-arbitration tribunal. It might be noted that the Conference, now the Organization for Security and Cooperation in Europe, represents a fairly homogeneous group of States and the Council reaches decisions by unanimity. When a group of States has some integrating factors, it may not be difficult to evolve a compulsory conciliation system and for the disputing parties to regard some members of the group as "neutral" enough to conduct the conciliation process fairly. It might take considerable time to develop such a system worldwide.

It may be that in the decades to come, with increasing international trade and other links, small and closely connected groups of States will emerge, the members of which will be more receptive to compulsory third-party good offices and so forth. These groups need not be regional; they could be, in the words of a renowned scholar, "a messy global institutional structure, feeding into equally messy regional ones".⁸ In such groups the disputing parties might not find it difficult to choose a "neutral" to function as an intermediary to their satisfaction. A compulsory system of this type is a stage intermediate between negotiation *simpliciter* and international adjudication. International adjudication, too, is by and large a "triadic" interaction, highly formalized with respect to communication and depoliticized, with a

⁷ For a short account of the developments in this regard, see M. Sapiro, "Dispute resolution: general methods and CSCE mechanisms", *American Society of International Law Newsletter* (September-October 1994).

⁸ E. Haas, *The Obsolescence of Regional Integration Theory* (University of California, Berkeley, CA, 1975), p. 91.

firm commitment on the part of the disputing parties to accept the solution given by the intermediary.

The parliamentary pattern of diplomacy has emerged as international conferences of an ad hoc type and international organizations with organs that meet periodically for discussion of issues of common concern have become a prominent feature of the relations between States. The noteworthy features of the parliamentary pattern of diplomacy are now well known. First, the issues are discussed or debated in an open forum fully exposed to the mass media of public information. Second, these discussions or debates in the open forum are supplemented by discussions in small groups in private. Third, the participants in the conference or the meeting of the organ view the issue from a perspective broader than the particular issue that comes up for consideration, a perspective that transcends the immediate concerns of the parties in dispute. Fourth, if the issue is before an organ of an international organization, it is likely to be regarded as a matter of continuing concern and kept on the agenda to be taken up at successive sessions of the organ. Fifth, the discussion or debate concludes with some formal resolution adopted on the subject. The resolution may not provide a solution to the conflict and may only call upon the parties politely not to cause any aggravation of the conflict. It is possible that, as a result of discussions in the open forum and persuasions and pressures exerted on the parties in the small group discussions held in private and the public opinion formed and aired around the world, the parties might reach an agreement to resolve their dispute. In international organizations dealing with matters of a technical character, resolution of the dispute is more likely because there is a chance of the recalcitrant party losing the benefit of the cooperative system provided by the organization. Some disputes might remain merely encapsulated with reduced chances of erupting in violence. All international conferences and organs of international organizations that provide an open forum for discussion and debate are now venues for parliamentary diplomacy.

Reference was made earlier to the parallel processes of controlling the incidence of violence and settling disputes. These two processes may most conveniently be pursued in the parliamentary diplomatic arena of the Security Council and in the General Assembly also. However, it is necessary to note that the Security Council cannot directly go far enough towards settling a dispute. Article 33 requires the Security Council, when it deems necessary, to call upon the parties to settle their dispute by the peaceful methods specified in that Article, i.e., negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of the parties' choice. The dispute must indeed be of such a gravity as is likely to endanger the maintenance of international peace

and security. Article 34 gives the Council the power to investigate to decide whether the dispute requires its attention. Article 35 provides for third parties to the dispute bringing the dispute to the attention of the Security Council or the General Assembly. Article 36 gives the Council power to recommend appropriate procedures or methods of adjustment. Under Article 37 the Council has power to recommend such terms of settlement as it may consider appropriate. Article 38 applies when the parties so request and the Council has power to make recommendations with a view to a peaceful settlement of the dispute. These provisions are sufficiently indicative of the fact that the Security Council has no power directly to impose a solution on the parties, though the measures which the Council takes in maintaining peace and security might lead the parties to agree to some solution.

Though there is scope for settlement of disputes by recourse to parliamentary diplomacy, statistical studies have shown that this method has not been made much use of.⁹ There are two reasons which may account for this: first, if it is assumed that the parliamentary organ is not divided on any pre-set lines of division, it is difficult for the parties to the dispute to foresee how the different members would respond to their respective claims. This would dissuade them from having recourse to parliamentary diplomacy. If there is a division on pre-set lines, either might feel that taking the issue to the organ would be to get it politicized to a high degree. One might not be quite sure of getting the requisite support in the organ.¹⁰ For these reasons, in general, there would be a disposition to take only issues of general common concern to the parliamentary diplomatic arena, with a view to getting affirmation of any particular preferred view, and not to take disputes of concern to the parties alone unless peace and security issues also are involved.

There is considerable hope about the role which the Security Council might be able to play in the decades to come, springing from the disappearance of the intense East-West rivalry. However, any issue of a considerable degree of specificity and immediacy is likely to be a matter of concern for the permanent members, who would weigh the pros and cons of any particular alternative. They have to arrive at a consensus on the issue and, if once they arrive at it, they are unlikely to find it difficult to get the additional votes necessary to obtain the required majority. In such a context, the parties to a dispute, unless confronted by the immediate danger of being victims of the

⁹ K. J. Holsti, "Resolving international conflicts: a taxonomy of behaviour and some figures on procedures", *Journal of Conflict Resolution*, vol. 10 (1966), p. 272; also J. G. Hadwen and J. Kaufmann, *How United Nations Decisions Are Made* (Sijthoff, Leyden, 1962), p. 61.

¹⁰ It should be remembered that when the General Assembly adopted the "Uniting for Peace" resolution (377 (V)) on 3 November 1950, the West had sufficient strength to secure a two-thirds majority at any time, and that situation changed as the membership expanded.

use of force, will probably be disinclined to bring the dispute before the Security Council.

With a view to enhancing the role of the United Nations in maintaining international peace and security, the Secretary-General, in his report entitled "An Agenda for Peace" (A/47/277-S/24111, para. 34), put forward several suggestions. He stated that conflicts had gone unresolved in the past not because techniques for peaceful settlement were unknown, but because, first, the parties had no political will to resolve their differences as suggested in Chapter VI of the Charter and, second, there was a lack of leverage at the disposal of a third party to influence the parties to agree to a settlement. This may not be quite accurate. A better way of stating the reason might be that each party sought a better solution than what it had been called upon to accept. A third party might not find a reason to use the leverage it has for the settlement of the particular dispute. All disputes need not get resolved to a pre-set time schedule. It is true that, apart from the danger of eruption of violence because of an unresolved dispute, an unresolved conflict relating to resources might stand in the way of exploitation of the resources for the benefit of the community; or if the dispute related to a territory inhabited by people, or concerned the treatment accorded to people, non-resolution of the dispute would place the people in a condition of uncertainty or prolong their alleged ill-treatment. However, in a world in which, in the Secretary-General's words, "the importance and indispensability of the sovereign State as the fundamental entity of the international community" (*ibid.*, para. 10) are affirmed and reaffirmed, the perceptions of Governments of the interests of their respective States are bound to rank in precedence over the exploitation of resources for the benefit of the world community or the uncertainties and hardships suffered by some people. This is not to understate the importance of human rights in any way.

The Secretary-General also suggested mobilization of resources for ameliorative purposes and for use as leverage for peaceful resolution of conflicts (*ibid.*, para. 23). Some conflicts can indeed be resolved if the party that is asked to give up a particular claim is offered satisfactory compensation. The question that may be raised is: Is it possible now for the United Nations to raise resources required for amelioration and compensation which would help resolution of all the disputes in the world? Maybe a day will come when the United Nations would be able to mobilize resources which are comparable to those possessed by a modern, developed welfare state and one may look forward to that time.

A proposal has been recently discussed in the International Law Commission which links the legality of countermeasures (i.e., reprisals) to

peaceful settlement of conflicts.¹¹ The proposal leaves untouched countermeasures involving the use or threat of force whose permissibility will have to be decided in accordance with the principles and procedures provided by the Charter. As regards non-violent countermeasures, a requirement is sought to be introduced that, before a countermeasure is taken, there should be a demand for cessation of the wrong and redress of the injury. This requirement is to be welcomed since it helps to initiate negotiations or to keep the negotiations already in progress continuing. Reprisals, according to the proposal, are unlawful unless the parties complied with the general obligations for pacific settlement of disputes prescribed by Articles 2, paragraph 3, and 33 of the Charter. These obligations at the very minimum include an obligation to negotiate in a meaningful manner, as stated already, in a genuine endeavour to reach an amicable solution.

In conclusion, it may be stated that diplomacy is, and will continue to be, a very important means of settling disputes. There are different diplomatic methods and each might be more suitable in a particular context than others. The methods might be refined and improved to meet the necessities to resolve conflicts as they arise in future. These necessities will vary with the character of the conflicts that might arise and the line of evolution which international relations will take in the coming century. That evolution, it may be hoped, will promote to the utmost extent inclusive interests that uphold, and oppose the triumph of exclusive special interests that militate against, the values of human dignity.

¹¹ For a short note on these discussions, see Oscar Schachter, "Dispute settlement and countermeasures in the International Law Commission", *American Journal of International Law*, vol. 88 (1994), p. 471.

ENHANCING THE ROLE OF REGIONAL ARRANGEMENTS OR AGENCIES IN THE PEACEFUL SETTLEMENT OF DISPUTES

*Oleg N. Khlestov**

The theme of this Congress is “Towards the Twenty-first Century”. What are the prospects for the development of individual areas of international law over the next 20 to 25 years so as more effectively to protect the interests of all the peoples of the international community as a whole, maintain peace and create conditions which contribute to the development of good-neighbourly relations among all States?

War as a means of resolving disputes and conducting foreign policy is legally prohibited. The objective is to achieve this in practice. The scientific and technical revolution is creating new possibilities for the activity of States in areas not previously covered and engendering new possibilities for mankind. Communications are being expanded. This will lead to an increase in the number of disputes and, since war is prohibited as a means of resolving them, the role of peaceful means for the settlement of disputes must inevitably grow. States therefore have the task of promoting the further development and enhancement of the international legal norms which regulate the system for the use of peaceful means to resolve disputes and, above all, of applying them in practice.

World trends in recent years show that the role of the United Nations and all its components—the Security Council, the General Assembly, the International Court of Justice and the Secretariat—is growing. The role of such means for the peaceful settlement of disputes as bilateral and multilateral negotiations, good offices, mediation, conciliation commissions and fact-finding commissions, which States themselves use, is also growing. A great many

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examples could be given of the successful solution of disputes in various parts of the world. One such example is the settlement through bilateral negotiations of the dispute regarding the demarcation of the border between Russia and China. This was a painful dispute which led to an exacerbation of relations, confrontations and clashes.

When considering the application of peaceful means for resolving disputes, what is usually meant is their application by States and the United Nations. In seeking ways of improving the use of peaceful means, it is worth paying attention also to enhancing the role of regional mechanisms for the peaceful settlement of disputes. Why? There are a number of reasons, including the following:

- Frequently, the countries of a region have closer economic relations, a psychological, religious, ethnic and linguistic commonality and closer links in the most varied spheres. This creates additional possibilities which facilitate efforts for the peaceful settlement of disputes in the region concerned.
- The United Nations and its mechanisms are becoming increasingly overburdened. The volume of its work is growing and will continue to grow. A more active participation of regional organizations in resolving disputes would make it possible for the entire existing system of international mechanisms to resolve disputes more rapidly and effectively. This might also lead to a reduction in the financial burden of the United Nations.
- There are a great many interesting aspects in the operation of regional mechanisms for the peaceful settlement of disputes. Of course, they are all based on means whose application is envisaged in Chapter VI of the Charter of the United Nations and, in particular, Article 33. At the same time, if the work of regional organizations is analysed, many nuances can be found which are sometimes fairly significant. As is well known, all regional organizations have their own systems and very different bodies for the peaceful solution of disputes and they make use of them. That is true of European organizations, in particular the Organization for Security and Cooperation in Europe (OSCE), the League of Arab States, the Organization of American States, the Organization of African Unity and others. It can be determined that disputes by their nature are divided into various categories. There are the more serious disputes, concerning, for example, the territorial integrity of a State, and the less serious ones and the procedures for their consideration vary, as does the nature of the decisions made about them (particularly in the case of the League of Arab States). In the Commonwealth of Independent States,

formed in the territory of the former Union of Soviet Socialist Republics, a process is under way of establishing mechanisms for the consideration of disputes and the supreme body of the Commonwealth—the Council of Heads of State—has been accorded certain rights for the settlement of disputes, in particular, recommending that the parties should apply a particular procedure or method to resolve a dispute.

There are many other examples, such as how to react to the refusal of a party to a dispute to apply the procedure for the settlement of the dispute proposed to it by a regional body or how to apply various types of decisions by conciliation commissions or fact-finding commissions which, in some cases, take the form of recommendations and, in others, are binding in nature.

In other words, if we were to make an inventory the experience accumulated by international regional organizations and examine the various mechanisms and means available to them for resolving disputes, we would note many interesting and subtle differences. At the same time, the experience gained in one region would undoubtedly prove useful in other regions of the world.

Mention should also be made of the topic of regional law and its correlation with universal law in the light of the question raised during this Congress: the view was expressed—and this overlaps somewhat with the subject-matter under consideration—that the creation of regional systems might result in particular systems that differ in some way from universal international law, thereby undermining it, and this would of course give rise to a certain degree of concern. In the light of contemporary international law, I do not think that such a situation—namely, the existence of regional systems with certain elements differing slightly from universal norms—should give cause for alarm. An analysis of the structure of contemporary international law makes it clear that regional law should correspond to universal international law, at least its principles, and the principles of contemporary international law are *jus cogens*, any deviation from which is impossible. Furthermore, Article 103 of the Charter of the United Nations states clearly that, in the event of a conflict between obligations under the Charter and other obligations, the former will prevail. This may also be illustrated by the Vienna Convention on the Law of Treaties, which embodies the principle of *jus cogens*. Thus the branches which are codified by the norms of international law—for example, diplomatic or consular relations, space law or the law of the sea—all establish certain rules of conduct which are regarded as universal. But those rules may be built upon, a case in point being the 1963 Vienna Convention on Consular Relations, which states that the privileges and immunities contained in the Convention constitute a minimum basis. And it is well known

that hundreds of bilateral consular conventions have been concluded which provide for more extensive rights than does the 1963 Convention.

Such a situation exists with respect to regional law as well, because regional mechanisms can build on existing norms depending on the specific features of the region concerned. However, with respect to fundamental issues, such as Article 53 of the Charter, it is obvious that no regional mechanisms could take enforcement action without the authority of the Security Council. Therefore regional norms can exist, but they should supplement the norms of universal international law and should not conflict with them. And they provide a wealth of additional possibilities for dealing with regional disputes and any particular problems, taking into account the specific nature of the relations between the States concerned.

Another remark I would like to make in connection with regionalism is that while Chapter VIII of the Charter talks about the "region", there is a tendency to define a region not only on the basis of a geographical criterion, but also on a functional basis. For example, OSCE includes Canada and the United States, which, geographically, obviously do not belong to Europe while the League of Arab States includes Arab States in both Africa and Asia. This is quite a normal approach in the current circumstances.

Also to be considered are the kinds of disputes which are being settled and might in the future be settled through regional arrangements. In the past we tended to have inter-State disputes, but now the trend, a rather dangerous one, is towards an increase in the number of conflicts occurring in the territory of a single State. Thus, according to a very recent document prepared by the Secretary-General for the fiftieth session of the General Assembly (A/50/60-S/1995/1, para. 11), the United Nations conducted, in 1988, five peace-keeping operations, four of which involved inter-State conflicts, with only one involving a non-inter-State conflict. Between 1988 and the present, on the other hand, 21 peace-keeping operations have been conducted, of which 8 involved inter-State conflicts and 13 non-inter-State conflicts. The report thus indicated that, while in 1988 only 20 per cent of peace-keeping operations related to non-inter-State disputes, this figure has since then risen to 62 per cent, and it unfortunately appears that the international community is encountering and will continue to encounter, to an even greater degree, non-inter-State, non-international conflicts. This is a sad development, inasmuch as statistics have shown that non-international conflicts cause suffering, first and foremost, to the civilian population (90 per cent of those who die in military operations are civilians); they also destroy the economy of the country, in addition to having numerous other dire consequences. Therefore, the international community and the United Nations, and indeed mankind as a whole, must devote attention to this matter and

seek, in particular, ways and means of resolving conflicts of this nature. It should also be pointed out that there are examples of regional machinery starting to participate in the settlement of non-international conflicts, that is, internal conflicts. By way of illustration, let me mention the participation of the League of Arab States in the crisis in Lebanon in 1989, where a special group was set up which helped to resolve an internal conflict by promoting the convening of the Lebanese Parliament in order to effect political reforms, hold presidential elections and form a Government of national unity.

Another example is that of Nicaragua, where certain steps were taken for the demobilization, repatriation or relocation of those who participated in the events there.

Thus the trend is obvious and quite clearly types of actions which were covered by Chapter VI of the Charter are now moving towards Chapter VII. It may be recalled in this connection that Dag Hammarskjöld once said that peace-keeping operations fell in fact between Chapters VI and VII of the Charter, under what he called "Chapter 6½".

Thus, the trend towards disputes turning into conflicts is becoming more and more dangerous and regional mechanisms and the entire United Nations system are accordingly paying more and more attention to such matters. In this context it should be kept in mind that violations of the principle of non-intervention in the internal affairs of States and also of the principle enshrined in Article 2, paragraph 7, of the Charter are unacceptable.

In conclusion, I wish to stress that the role of regional mechanisms and arrangements should be strengthened. This should not, however, result in any competition between the United Nations and regional organizations, which should rather complement each other. In practical terms, it would be advantageous if a number of States or the Secretary-General were to propose the inclusion in the agenda, for example, of the fifty-first session of the General Assembly of an item dealing with the role of regional organizations in the peaceful settlement of disputes. The preparation of material on the subject would also be useful: for example, a study on how the role of regional organizations has been envisaged in certain specific resolutions.

There is a need to make it known to the public how the existing machinery is actually being used. Recourse might be had to the Department of Public Information of the Secretariat. In the case of human rights or disarmament, for example, bulletins are being published. The ways in which peaceful means of resolving disputes are being utilized should be reported and publicized to the maximum extent possible, as a way of exerting a salutary influence, at the political and moral levels, on leaders of States: the obligation to settle disputes peacefully exists, but, in practice, many heads of State and Government have a rather dubious attitude in this area. What is

needed therefore is propaganda work, in the good sense of the term, and the participation of all mass information media. This would have a very important and constructive effect.

DESARROLLO Y TENDENCIAS ACTUALES DE LA SOLUCIÓN PACÍFICA DE CONTROVERSIAS EN EL ÁMBITO DEL DERECHO INTERNACIONAL

*Miguel Ángel González Félix**

Cuando la Carta de las Naciones Unidas consagró en su Artículo 1° al mantenimiento de la paz y la seguridad internacionales como uno de los objetivos primordiales de la Organización y prohibió a los Estados el uso de la fuerza, confirió a la solución pacífica de controversias un lugar especial dentro de las actividades que habría de desempeñar la nueva entidad y definió la conducta que en el futuro deberían de seguir sus Miembros en la conducción de sus relaciones mutuas.

Aunque la suscripción de la Carta marcó el inicio de una nueva etapa en las relaciones internacionales, la idea de preservar la paz a través de la solución pacífica de controversias había estado presente en la mente de los hombres desde tiempos remotos. La historia da cuenta de una gran cantidad de instrumentos que preveían, varios siglos antes de Cristo, el recurso a medios pacíficos para dirimir diferendos.

A lo largo de la historia, la búsqueda y el perfeccionamiento de mecanismos que contribuyeran al mantenimiento de la paz a través de la solución de disputas ha sido una de las grandes tareas de la comunidad internacional. Las Conferencias de Paz de La Haya de 1899 y 1907 y el régimen que posteriormente adoptarían tanto la Sociedad de las Naciones como algunos tratados internacionales que establecieron de manera específica mecanismos a los que las partes debían acudir para remediar sus controversias son ejemplos de esa búsqueda de la paz a través de la conciliación de intereses. Muchos de los mecanismos establecidos durante esa época se han perfeccionado con el paso de tiempo y han contribuido a mejorar la convivencia internacional.

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Evolución del Principio de Solución de Controversias a partir de la Carta

La Carta de las Naciones Unidas representó un progreso considerable respecto de las disposiciones existentes relativas al recurso a la guerra. No se limitó a condenar a la guerra, sino que prohibió el uso de la fuerza, estableció un mecanismo de acción colectiva para restablecer la paz en caso de ruptura y prestó atención especial a la solución pacífica de controversias.

A pesar de este avance, la redacción de los Artículos de la Carta relacionados con la solución pacífica de controversias (Arts. 1, párr. 2, y 2, párr. 3, y todo el Cap. VI) dejaba dudas sobre el alcance de la obligación impuesta a los Estados en este rubro. El énfasis puesto en las controversias o situaciones susceptibles de poner en peligro la paz y la seguridad internacionales llevó a algunos a sostener que las disposiciones de la Carta sólo obligaban a los Estados a solucionar por medios pacíficos aquellas diferencias que pudieran poner en peligro la paz. Hoy, gracias a la suscripción de otros instrumentos internacionales en la materia, a las declaraciones emitidas como resultado de las actividades de organismos internacionales y a la práctica de los Estados, no cabe duda de que la solución pacífica de controversias constituye una norma general de observancia obligatoria para todos los miembros de la comunidad internacional.

Sin importar la magnitud de la diferencia o sus efectos en la paz internacional, e independientemente de la acción que los órganos de las Naciones Unidas puedan adoptar frente a una determinada situación, el principio de la solución pacífica de controversias es una norma imperativa de derecho internacional.

El Artículo 33 de la Carta y la Evolución de los Medios de Solución Pacífica

Aunque los mecanismos de solución pacífica de controversias son parte de la práctica diplomática tradicional, deben adaptarse y de hecho se adaptan de manera continua a las nuevas condiciones de la vida internacional. No todas las diferencias son iguales ni pueden seguir los mismos patrones de solución. Reconociendo la importancia de la voluntad política de las partes como elemento fundamental dentro de todo proceso de solución y la mecánica distinta de cada controversia, el Artículo 33 de la Carta de las Naciones Unidas consagra el principio de la libre elección de medios y se limita a enunciar algunos de los mecanismos a los que las partes en una diferencia podrían acudir para solucionarla.

La razón de la enunciación no limitativa contenida en el Artículo 33 de la Carta radica en la intención de facilitar la solución pacífica de conflictos sin buscar privilegiar alguna vía en especial. Se deja a la imaginación de los Estados en conflicto encontrar la forma más apropiada de solucionar su dife-

rencia. De esta manera, podrán apegarse a un método, combinarlo con otro, o incluso inventar mecanismos de solución. La única obligación de las partes radicarán en solucionar su diferencia de manera pacífica.

A lo largo de los años, los Estados han privilegiado algunos procedimientos sobre otros. Así, por ejemplo, la Corte Permanente de Arbitraje Internacional, que conoció durante las primeras décadas de su establecimiento un número considerable de asuntos, ha visto durante los últimos años una disminución importante de su volumen de trabajo. Al mismo tiempo, como consecuencia de la intensificación de los intercambios comerciales entre los Estados y la puesta en marcha de ambiciosos procesos de integración regional, nuevas formas de arbitraje han aparecido en la vida internacional.

Ante lo limitado del tiempo, haré referencia a la evolución que han presentado tres mecanismos específicos de solución de diferencias: la negociación, la mediación a través del Secretario General de las Naciones Unidas y la vía contenciosa por conducto de la Corte Internacional de Justicia. Asimismo, por incidir de manera directa en el rubro que nos ocupa y tratarse de una reciente experiencia mexicana, haré especial mención a los capítulos de solución de controversias contenidos en el Tratado de Libre Comercio de América del Norte.

La Negociación

Al hablar de los medios de solución pacífica de controversias, especial mención debe hacerse a uno de los más antiguos: la negociación. A lo largo de la historia, los contactos directos entre Estados han sido vistos como la forma más sencilla, confiable y efectiva de resolver las diferencias que pudieran presentarse en el curso de sus relaciones y han otorgado un lugar especial dentro de sus preferencias a la negociación. El carácter fundamental de la negociación, aunado a su flexibilidad y eficacia, la han convertido en el mecanismo por excelencia de solución de diferencias. Todos los Estados acuden a ella en primer lugar y la mayoría de los tratados internacionales la contemplan como requisito previo para recurrir a cualquier otro medio de arreglo pacífico.

Sin embargo, a pesar de ser el mecanismo al que los Estados han acudido desde tiempos inmemoriales, la negociación ha sufrido ciertas transformaciones. Nuevas variedades de negociación, entre los que podemos mencionar a las consultas y a los intercambios de opiniones, han sido incorporadas a la práctica internacional y se les regula de distintas maneras en los instrumentos internacionales. Así, por ejemplo, a fin de no eternizar los conflictos a la espera de un resultado de los contactos directos, los Estados han establecido tiempos límite e impuesto ciertas formalidades a la celebración de negociaciones. En la actualidad, se ha señalado que las negociaciones, las consultas o los intercambios de opiniones no deben ser meras formalidades, sino que

deben ser significativos y si en un período determinado de tiempo no se ha llegado a un arreglo, podrá acudirse a otro tipo de mecanismo. Cabe destacar, sin embargo, que aún cuando se acuda a otro mecanismo, nada impedirá a las partes en un conflicto regresar a las negociaciones o bien, continuar celebrándolas de manera paralela.

El Papel del Secretario General de las Naciones Unidas en la Solución de Conflictos

El incremento de los contactos entre Estados ha dado lugar a un escenario internacional de interdependencia en el que se han multiplicado tanto los focos de conflicto como la labor de los organismos internacionales para prevenir rupturas de la paz. El papel de los organismos internacionales en la solución de controversias se ha intensificado durante la última década. Para ilustrar lo anterior y por la importancia que han adquirido sus funciones en la esfera del mantenimiento de la paz, haré referencia al papel del Secretario General de las Naciones Unidas en la solución de conflictos internacionales.

Aunque desde la suscripción de la Carta de San Francisco el Secretario General de las Naciones Unidas, con base en las disposiciones contenidas en los Artículos 98 y 99 de dicho documento, había venido desempeñando ciertas funciones en el mantenimiento de la paz y la solución de conflictos, la tendencia a ampliar su papel en esta esfera ha sido particularmente visible desde el inicio de la década de los 80. Importantes instrumentos internacionales en la materia, entre los que puede señalarse a la Declaración de Manila de 1982 sobre el Arreglo Pacífico de Controversias Internacionales y la Declaración de 1988 sobre la prevención y la eliminación de controversias y de situaciones que puedan amenazar la paz y la seguridad internacionales y, sobre el papel de las Naciones Unidas en esa esfera, dedican espacios a la función del Secretario General y, de hecho, lo instan a hacer pleno uso de las disposiciones de la Carta relativas a las funciones que tiene encomendadas.

El Secretario General, por su parte, ha asumido con seriedad sus atribuciones en la materia. Los informes que periódicamente presenta a la Organización sobre su labor han dedicado capítulos especiales a la solución de conflictos y formulado recomendaciones concretas para mejorar las funciones de la Organización en este rubro. El énfasis otorgado en dichos informes a la diplomacia preventiva y al establecimiento, mantenimiento y consolidación de la paz, áreas en las que la atención temprana de conflictos tiene un lugar especial, deja ver la importancia que el Secretario General otorga a los mecanismos de solución de controversias para el cumplimiento de los objetivos de las Naciones Unidas.

Las funciones que el Artículo 99 de la Carta encomienda al Secretario General, en el sentido de llamar la atención del Consejo de Seguridad hacia

cualquier asunto que en su opinión pueda poner en peligro el mantenimiento de la paz y la seguridad internacionales, han tenido impacto en el arreglo pacífico de controversias. El Secretario General ha realizado actividades concretas para impedir que una determinada situación empeore y ponga en riesgo la paz. El hecho de que pueda llamar la atención del Consejo, le ha otorgado un amplio margen de maniobra en el manejo de situaciones de tensión entre Estados y le ha permitido impulsar la solución pacífica de conflictos. Cabe hacer referencia, en este punto, a la conformación de los "Grupos de Amigos del Secretario General" que, como en los casos de El Salvador y Guatemala, han desempeñado un importante papel en el arreglo de controversias.

Tras este breve análisis de la función del Secretario General, en el que queda de manifiesto la importancia que día con día adquiere su figura en la esfera de la solución de conflictos, valdría la pena hacer mención a la iniciativa que hace algunos años fue presentada ante las Naciones Unidas, en el sentido de conferir al Secretario General la facultad de solicitar de manera directa y sin necesidad de acudir previamente a la Asamblea General, opiniones consultivas a la Corte Internacional de Justicia. Cabe recordar que a la fecha, la Carta sólo faculta a la Asamblea General y al Consejo de Seguridad a solicitar opiniones consultivas de la Corte. Los otros órganos de las Naciones Unidas y los organismos especializados deben obtener una autorización de la Asamblea General para acudir en la vía consultiva a la Corte. El hecho de tener que recurrir a la Asamblea y esperar una autorización, que podría o no emitirse, priva al Secretario General de la oportunidad de contar, en menor tiempo, con mayores elementos para incidir en la solución de una diferencia. Es evidente que otorgar tal facultad al Secretario General, por las ventajas y desventajas que podría conllevar, amerita un mayor estudio de los Miembros de las Naciones Unidas. Como el desarrollo del derecho internacional se vería también favorecido por una decisión en ese sentido, resultaría sumamente reconfortante que el quincuagésimo aniversario de la Organización pudiera constituir el marco propicio para retomar este interesante proyecto.

La Corte Internacional de Justicia

La certeza que proporciona la aplicación del derecho ha llevado a los Estados a través de la historia a preocuparse por establecer órganos encargados de administrar justicia. El establecimiento de la Corte Permanente de Justicia Internacional y de su sucesora, la actual Corte Internacional de Justicia, ha sido, sin duda, un gran paso en la evolución de la comunidad internacional hacia un régimen de derecho.

Aunque el Estatuto de la Corte Internacional de Justicia se ha mantenido sin cambios desde su suscripción, su Reglamento fue objeto de modificaciones en 1972 y sustituido por uno nuevo en 1978, para lograr una mayor

celeridad procesal y hacer de la Corte un instrumento más accesible y atractivo a los Estados. A pesar de la inexistencia de cambios en su estructura, la Corte ha ido adaptándose poco a poco a las realidades internacionales. Durante los últimos años se ha apreciado que el número de asuntos sometidos a su consideración ha ido en aumento, lo que podría ser un indicador de la confianza que los Estados van adquiriendo en los medios judiciales para la solución de controversias.

Sin embargo, a pesar de sus ventajas, la vía contenciosa ha sido poco aprovechada por los Estados. Aunque la Corte ha contribuido a la solución de importantes diferencias, sería exagerado afirmar que es un instrumento relevante en el mantenimiento de la paz y la seguridad internacionales. Lamentablemente, no se han sabido aprovechar las bondades de la justicia internacional, se ha investido a la Corte de una jurisdicción limitada y se ha acudido, en términos generales, con poca frecuencia a ella.

Una de las más grandes garantías para mantener la paz dentro de la comunidad internacional radica en el establecimiento de un tribunal con jurisdicción obligatoria para todos los Estados. Aunque este se convierte en un ideal cuya consecución requiere de tiempo, el nuevo escenario internacional, en el que la rivalidad Este-Oeste ha desaparecido y los Estados tienden a integrarse en esquemas cada vez más interdependientes, proporciona una gran oportunidad para renovar el papel de la Corte en la solución pacífica de controversias.

Un voto de confianza y de solidaridad para la Corte sería la aceptación de su jurisdicción obligatoria. La recomendación del Secretario General contenida en el informe titulado "Un programa de paz", para que los Estados retiren a más tardar en el año 2000 sus reservas a la cláusula facultativa de jurisdicción obligatoria contenida en el Artículo 36 del Estatuto de la Corte Internacional de Justicia, amerita una seria reflexión por parte de todos los miembros de la comunidad internacional.

Mientras se avanza en esta idea, el marco que proporciona el Decenio de las Naciones Unidas para el Derecho Internacional podría ser aprovechado para promover al interior de la Organización el fortalecimiento de los vínculos con la Corte y el mejor conocimiento de sus trabajos.

El Tratado de Libre Comercio de América del Norte

El Tratado de Libre Comercio de América del Norte fue suscrito el 17 de diciembre de 1992 y se encuentra en vigor desde el 1° de enero de 1994. Inserto en el marco del Acuerdo General sobre Aranceles Aduaneros y Comercio (GATT), el Tratado tiene por objeto eliminar barreras al comercio, promover condiciones para una competencia justa, incrementar las oportunidades de

inversión y proporcionar protección adecuada a los derechos de propiedad intelectual.

El establecimiento de procedimientos efectivos para la aplicación del Tratado y para resolver las diferencias que pudieran presentarse como resultado de su desempeño ocupan un lugar importante dentro de su estructura. En el caso de la solución de controversias, tres capítulos del Tratado, el XI relativo a inversiones, el XIX relativo a diferencias en materia de *antidumping* y cuotas compensatorias, y el XX relativo a diferencias en general, así como otras disposiciones a lo largo del mismo, son dedicados a este rubro.

Durante la elaboración del Tratado de Libre Comercio de América del Norte, se tuvo muy en cuenta las disposiciones del Acuerdo de Libre Comercio suscrito entre el Canadá y los Estados Unidos de América. Sin embargo, varios esquemas, incluyendo el relativo a mecanismos para la solución de diferencias, adquirieron características novedosas. Así, aunque los mecanismos previstos en el Tratado incorporen a los medios clásicos de solución de diferencias, su combinación da origen a un sistema *sui generis* en el que se responde tanto al status soberano de las partes como a la necesidad de poner fin a una diferencia.

El sistema del Tratado se inspira en primer término en el principio de la libre concertación. Las partes deben procurar un acuerdo sobre la interpretación y aplicación del Tratado y, mediante cooperación y consultas, alcanzar una solución mutuamente satisfactoria. Para ello, prevé el agotamiento de distintas instancias de solución. De las consultas, se pasa a los buenos oficios, la conciliación o la mediación de la Comisión de Libre Comercio, órgano máximo institucional del Tratado, y de ahí, al establecimiento de paneles arbitrales de expertos.

Las consultas se inician en diversos plazos, según la materia, mediante la presentación de una solicitud, cuando cualquiera de las partes estime que una medida adoptada por otra afecta el funcionamiento del Tratado. De no llegar a una solución satisfactoria en un plazo determinado (por lo general de 30 a 45 días) podrá acudir a la Comisión de Libre Comercio.

La Comisión de Libre Comercio se encuentra integrada por representantes de cada parte a nivel ministerial, y puede intervenir en vía de buenos oficios, conciliación o mediación, para solucionar una diferencia. Las resoluciones de la Comisión son de naturaleza recomendatoria.

Si la Comisión no logra avenir a las partes en el plazo determinado para ello, podrá solicitarse la intervención de un panel arbitral de expertos. Dentro de los 90 días siguientes a su constitución, el panel presentará un informe preliminar sobre la controversia, con recomendaciones para su solución. Posteriormente, emitirá su informe final. Los paneles no dictan resoluciones obligatorias, sino recomendaciones. Son las partes involucradas en la contro-

versia las que deciden en definitiva, y a partir de los elementos técnico-jurídicos que les proporcione el informe final del panel, los términos de la solución.

De no alcanzarse un acuerdo e indicar el informe final del panel que la medida en cuestión es incompatible con las obligaciones del Tratado, la parte reclamante podrá suspender la obligación de beneficios de efecto equivalente a la parte demandada, hasta que se alcance un acuerdo.

Los mecanismos de solución previstos en el Tratado no impiden a las partes acudir, sujetas a ciertas particularidades a otros medios alternativos. Así, por ejemplo, si la controversia tiene relación con la aplicación de las disposiciones del GATT, podrá acudirse a los mecanismos de solución previstos en dicho instrumento.

Recientemente, se han iniciado los primeros procedimientos para resolver diferencias en el marco del Tratado. Se han instalado cuatro paneles arbitrales para revisar medidas adoptadas tanto por México como por los Estados Unidos en cuestiones relacionadas con prácticas desleales de comercio.

Por otra parte, en el transcurso del mes de marzo del presente año, los Estados Unidos y el Canadá celebran consultas respecto de ciertos productos, en las que también participa México, aunque no como parte involucrada.

Balance

Hemos visto, a lo largo del presente, como han evolucionado tanto el principio de la solución pacífica de controversias como los mecanismos a los que pueden acudir los Estados para cumplir con las obligaciones en que este rubro les impone el derecho internacional. Hemos visto, además, cómo han surgido nuevas formas de instrumentar los mecanismos de solución previstos en la Carta de las Naciones Unidas. Sólo me gustaría, para finalizar esta breve reseña, hacer una pequeña reflexión sobre la importancia que día con día adquiere la solución pacífica de conflictos para el mantenimiento de la paz. En esta época, en la que los contactos entre Estados adquieren magnitudes importantes y la interdependencia va reduciendo los espacios del poder político, los mecanismos de solución de diferencias se convierten en los pilares de la paz. Basta mencionar únicamente que de la voluntad política de los Estados para acudir efectivamente a ellos y de la creatividad de la comunidad internacional para adaptarlos a las nuevas necesidades internacionales, dependerá la consolidación de un mundo regido por el derecho.

PEACEFUL MANAGEMENT OF TRANSBOUNDARY NATURAL RESOURCES

*Achol Deng**

I. INTRODUCTION

At the national, as well as the international, level, differences abound over the allocation of natural resources.¹ Resources may be plentiful but the methods of distribution may be unsatisfactory.² With the advance in technology³ whereby new methods for the exploitation of resources could augment out-

¹ See generally Michel Virally, "Vers un droit international du développement", *Annuaire français de droit international*, tome XI, 1965 (1-12); Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1993) (chap. 8: Natural Resources and International Norms, pp. 129-145); Oscar Schachter, *Sharing the World's Resources* (Columbia University Press, New York, 1977); Kamal Hussain, ed., *Legal Aspects of a New International Law* (Frances Pinter, London, 1980); M. Bedjaoui, *Towards a New International Economic Order* (UNESCO, Paris, 1979); I. Brownlie, "Legal status of natural resources in international law: some aspects", *Recueil des Cours*, vol. 162 (1979-I), pp. 249-317; P. M. Dupuy, *Droit international public* (2^e éd.); Pars Dalloz, 1993 (chap. 3: L'utilisation des espaces d'usage international et la gestion des ressources de l'humanité); James N. Hyde, "Permanent sovereignty over natural wealth and resources", *American Journal of International Law*, vol. 50 (1956), pp. 854-867; Guy Ladriet de Lacharrière, "L'influence de l'inégalité de développement des États sur le droit international", *Recueil des Cours*, vol. 139 (1973-II), pp. 227-269; M. Flory, *Droit international du développement* (Presses universitaires de France, Paris, 1977); A. Pellet, *Le droit international du développement, Que sais-je* (Presses universitaires de France, Paris, 1978); A. Deng, "Natural resources: heritage of nation and mankind", in Grahl-Madsen and Toman, *The Spirit of Uppsala* (Walter de Gruyter, Berlin, 1984, p. 308). A more comprehensive and up-to-date treatment of the subject is in Nico Schriver, "Sovereignty Over Natural Resources: Balancing Rights and Duties", which the author kindly showed me in draft form and which will hopefully be published soon by Cambridge University Press.

² Indeed the thesis of the renowned economist Amartya Sen is that, while we do not have a crisis of resources, the problem we have is one of their uneven distribution.

³ According to *World Population Prospects: The 1994 Revision* (United Nations publication, Sales No. E.95.XIII.16), the world population was 2.5 billion in 1950 and 4.8 billion in 1985. See also *Our Common Future* (Oxford University Press, 1987).

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put, it might seem that competition over natural resources could be eased. This has not come to pass as sharp rises in pollution increase demand for limited resources with a resulting exacerbation of competition over those resources in both quantitative and qualitative terms. Pollutants may affect the quality of water of international rivers or lakes or the quality of petroleum deposits.

In this presentation, we shall examine how two natural resources (water, oil/gas) that cross or straddle international boundaries could be peacefully managed within the meaning of Article 33 of the Charter of the United Nations⁴ and in line with Article 38 of the Statute of the International Court of Justice⁵. (Owing to time and space constraints, we have left out the management of fish resources, which seems relevant to our subject.) As we shall see, international law approaches the management of these resources in different ways; each of these disparate approaches will be examined against the background of State practice embodied in treaties, judicial decisions and the deliberations of learned international bodies. We shall also be examining the evolving norms in the field, particularly those embodied in article 3 of the 1974 Charter of Economic Rights and Duties of States⁶ and the United Nations Environment Programme (UNEP) Principles of Conduct in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States.⁷ We shall conclude by underlining these different approaches and yet make an attempt to contribute to a more comprehensive settlement of disputes over natural resources as we approach the next millennium.

II. MANAGEMENT OF WATER RESOURCES

Water is fundamental to life and is pivotal to sustainable development. Since the dawn of human history, international rivers have been used for domestic and agricultural purposes and as "thoroughfares of communication and

⁴ Article 33, paragraph 1, of the Charter reads: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

⁵ Under Article 38 of the Statute, the International Court of Justice has to apply international conventions, international custom, general principles of law and the teachings of highly qualified publicists in its resolution of disputes submitted to it.

⁶ General Assembly resolution 3281 (XXIX) of 12 December 1974. See M. Virally, "Notes de lecture sur le Charte des droits et des devoirs économiques des États", *Annuaire français de droit international* (1974), pp. 57-77; Jorge Castañeda, "La Charte des droits et des devoirs économiques des États", *Annuaire français de droit international* (1974), pp. 31-56; Robin C. A. White, "A New International Economic Order", *International and Comparative Law Quarterly*, vol. 24 (1975), pp. 542-552.

⁷ *International Legal Materials*, vol. 17 (1978), p. 1091. For an authoritative commentary, see A. O. Adele, "Utilization of shared natural resources towards a code of conduct", *Environmental Policy and Law*, vol. 5 (1979), pp. 66-76.

commerce".⁸ Modern technological innovations have opened up new vistas for harnessing international watercourses for generating hydroelectric power and for improved, indeed, more productive methods of irrigation.

However, riparian (watercourse) States that have legal claim to the use of the same watercourse have always been at odds. Their claims vary according to how they are situated on the river (watercourse). We are all too familiar with the earlier claims and counter-claims by watercourse States and the resultant theories: absolute territorial sovereignty⁹ and the absolute integrity¹⁰ of the river on which they were based, as well as the compromise formula, the limited sovereignty theory.¹⁰

A. Treaties as Practice of States

The starting-point, however, in the event of a dispute over the uses of water resources is for the parties to attempt to sort out their differences through negotiations. This has resulted in a number of bilateral and multilateral treaties relating to the particular watercourses in question. These treaties differ one from another as each river has its own special characteristics.¹¹ Nevertheless, a careful examination of these treaties may reveal the recurrence of some common unifying themes.

It is worth noting that in the resolution of the Rio Grande dispute between Mexico and the United States of America, which had given rise to the Harmon Doctrine, the preamble of the 1906 Rio Grande Convention states that the United States and Mexico, "being desirous to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto, and being moved by considerations of international comity, have resolved to conclude a convention for these purposes . . .".¹²

⁸ L. A. Teclaff, *Water Law in Historical Perspective* (Buffalo, New York, 1985), 617 pp. For general and illustrative works on international watercourses, see H. A. Smith, *The Economic Uses of International Rivers* (P. S. King and Son, 1931); F. J. Berber, *Rivers International Law* (London, 1956), 296 pp.; Dante Coponera, *Principles of Water Law and Administration* (A. Bulkeema, Rotterdam, 1992); L. Calfish, "Règles générales du droit des cours d'eau internationaux", *Recueil des Cours*, 1989, pp. vii, 13-225.

⁹ This theory, based on the opinion of United States Attorney General Harmon, had it that a State enjoys absolute sovereignty over its territory and is not constrained by international law to do otherwise than as it pleases within its borders, *21 Op Attorney General* 274, pp. 281-282 (1895). It was later taken to extremes. See discussion in Thomas Naff and Ruth Matson (eds.), *Water in the Middle East: Conflict or Co-operation* (London, 1984), pp. 164 and 165.

¹⁰ *Ibid.*, pp. 164 and 165.

¹¹ This is a point that has been underlined by many authorities who strongly believe that such treaties should be used cautiously in drawing conclusions of a general nature.

¹² The Convention concerning the Equitable Distribution of the Waters of the Rio-Grande for Irrigation Purposes, signed in Washington on 26 May 1906, C. Parry (ed.), *The Consolidated Treaty Series*, vol. 201 (1978), p. 45.

In article VI of the Treaty between the United States and Great Britain relating to the Boundary Waters and Questions concerning the Boundary between the United States and Canada, signed in Washington, D.C., on 11 January 1909, the contracting parties agreed that "the St. Mary and Milk Rivers and their tributaries . . . are to be treated as one stream for the purpose of irrigation and power and that the waters thereof shall be apportioned equally between the two countries, but in making such equal apportionment, more than half may be taken from one river and less than half from the other, by either country so as to afford a more beneficial use to each."¹³

It may also be instructive to examine the Treaty between the United States and Canada relating to the Cooperative Development of the Waters of the Columbia River Basin of 17 January 1965.¹⁴ This treaty had its genesis in the proposal by the United States to construct Liddy Dam on the Kootenay River in the State of Montana. Whereas the United States was prepared to compensate Canada for the 68 kilometres of Canadian territory that would be submerged by the raised water level close to its international boundary, it was not prepared to share the power benefits of the project. Canada, for its part, claimed a share in downstream benefits. If its interest was not satisfied, Canada indicated that it would make an inter-basin diversion of the Kootenay (where it returns to Canada) into the Columbia River, which would then flow into the United States. The two parties eventually reached an agreement by which the resources of the Columbia River would be developed in accordance with a comprehensive and integrated plan¹⁴ and Canada did partake of downstream benefits.

The idea of equitable sharing also inspired the Indus Waters Treaty of 19 September 1961,¹⁵ which was negotiated between India and Pakistan under the auspices of the International Bank for Reconstruction and Development (IBRD). In the settlement, Pakistan was allocated the use of the waters of the western rivers of the Indus Basin (the Indus, the Jhelum and the Cherab) while India was assigned the use of the waters of the eastern rivers (the Sutlej, the Beas and the Ravi).

Similar trends may also be discerned in African water treaties. The Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters of 8 November 1959,¹⁶ much as

¹³ United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Purposes Other than Navigation*, No. 79, p. 260.

¹⁴ This Treaty has been thoroughly analyzed by Johnson, "The Columbia Basin" in Garetson, Hayton and Olmstead, *The Law of International Drainage Basins* (Dobbs Ferry, Oceana Publications, 1967).

¹⁵ This Treaty was signed at Karachi on 19 September 1960; United Nations, *Treaty Series*, No. 419, p. 126.

¹⁶ United Nations, *Treaty Series*, vol. 453, p. 51.

it confirmed the doctrine of acquired rights on which the 1929 Nile Waters Agreement¹⁷ was based, stipulated equitable sharing of the benefits that would accrue from new projects. Thus, article II outlines these projects and spells out how these benefits would be divided between the two countries. Article III addresses the issue of "Projects for the exploitation of waters lost in the Upper Nile Basin" and stipulates that the benefit from these water projects and their total cost of construction be shared between the two countries (article III, para. 2). The two parties have also agreed to consider jointly any claims by other riparian States to a share of the waters of the Nile. In the event of the acceptance of any of these claims, the accepted amounts shall be deducted from the shares of the two republics measured at Aswan (article V, para. 2). This led one commentator to observe that the 1959 Agreement "confirms the idea that the parties drifted further towards the acceptance of equitable shares".¹⁸ Any future agreements involving other important water-course States like Ethiopia should apply the principle of equitable utilization.

The Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, signed at Harare on 28 May 1987,¹⁹ is predicated on cooperation, as is evident from its title. Its third preambular paragraph aims at developing regional cooperation on environmentally sound water-resource management of the Common Zambezi River System and strengthening regional cooperation for sustainable development.

Reference to equitable sharing, the obligation to cooperate and the need for an integrated approach to the development of a river basin may be found in many other treaties.

B. Judicial Settlement

Whenever States have failed to resolve their water disputes through negotiations, it has been open to them to have recourse to third-party intervention by way of mediation, conciliation and adjudication.²⁰ In this section, we

¹⁷ See Exchange of Notes between H.M.'s Government in the United Kingdom and the Egyptian Government in regard to the use of the waters of the River Nile for irrigation purposes, Cairo, 7 May 1929, United Nations *Legislative Texts*, pp. 100-107.

¹⁸ Sayed Hosni, "The Nile Regime", *Revue égyptienne de droit international*, vol. 17 (1961), p. 97.

¹⁹ Text in Iowna Rummel Bulska and Seth Osaka, eds., *Selected Multilateral Treaties in the Field of the Environment*, vol. 2 (Grotious, Cambridge, 1991), p. 389.

²⁰ See generally C. B. Bourne, "Mediation, conciliation, and adjudication in the settlement of international drainage basin disputes", *Canadian Yearbook of International Law*, 9 (1971), pp. 114-158; B. R. Chaubani, *Settlement of International Water Law Disputes in International Drainage Basins*, Berlin, 1981.

shall examine the possible contribution of judicial decisions towards the peaceful management of water resource disputes.

It is instructive to examine the decisions rendered by federal courts, particularly those of the Supreme Court of the United States of America, regarding the allocation of the water resources contested by the States of the Federal Union.²¹ To be sure, the equitable utilization principle applied by federal States cannot, *prima facie*, qualify as a general principle of law since it is employed within the context of domestic disputes. But when these federal courts lack specific stipulations on the contested issues, they resort by analogy to the international law principle of equitable utilization.

Decisions of arbitral tribunals and the International Court of Justice are much more indicative of equitable utilization as a principle of customary international law. An early judicial examination of international fluvial law was in the *Case concerning the Territorial Jurisdiction of the International Commission of the River Oder*.²² In that case, the Permanent Court of International Justice was asked whether, in accordance with article 331 of the Treaty of Versailles,²³ the jurisdiction of the Commission should extend to the Netze and Warthe, two navigable tributaries of the River Oder situated in Poland.

Whereas Poland contended that the jurisdiction of the Commission ended where the Oder crossed into Poland, the other Commission members maintained that jurisdiction extended to where each of the tributaries ceased to be navigable. Though the issue was the interpretation of navigation rights in accordance with the Treaty of Versailles, the Permanent Court of International Justice, however, undertook an examination of the principles "governing international fluvial law in general" and concluded that the law of navigable rivers is founded on "the existence of community of interest of riparian States". The Court conceded that the "desire to provide the upstream States with the possibility of free access to the sea played a considerable part in the formation of the principles of the freedom of navigation on the so-called "international rivers". It went on to observe that, nevertheless,

“. . . when consideration is given to the manner in which States have regarded the concrete situations arising from the fact that a single waterway traverses or separates the territory of more than one State and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at

²¹ A sample could include *Kansas v. Colorado*, 206 US 46, 117 (1907); *Wyoming v. Colorado*, 259 US 419, 462 (1922); *Connecticut v. Massachusetts*, 282 US 660, pp. 670-671 (1931); *New Jersey v. New York*, 286 US 494, 504 (1932).

²² Permanent Court of International Justice, Series A, No. 23.

²³ According to article 331 of the Treaty of Versailles, all navigable parts of the river system with access to the sea were international in character.

once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States but in the community of riparian States. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all the riparians in the use of the whole course of the river and the exclusion of any preferential privilege of any riparian State in relation to others".²⁴

Another earlier case concerning a waterway is the *Diversion of the Water from the Meuse Case*.²⁵ This case related to the interpretation of an 1869 Treaty between Belgium and the Netherlands regarding the diversion of the waters of the Meuse not covered by the Treaty and wholly located in Belgian or Netherlands territory. The Permanent Court of International Justice observed that, "as regards such canals, each of the two parties is at liberty in its own territory to modify them, to enlarge them, to transform them provided that the diversion of the water at the Treaty feeder and the volume of the water to be discharged therefrom to maintain the normal level and flow . . . (in the canal) is not affected". The implication is that, irrespective of treaty obligation, the supply of water to canals below Maastricht in the Netherlands could not be legally impaired by Belgium.

There is general agreement that the award in the *Lake Lanoux Arbitration*²⁶ is the most important one in the field.²⁷ The case centred on a proposal by France to divert some of the waters of the Lake Lanoux Basin into a basin in its own territory. France undertook to return an equivalent amount of water to the Lake Lanoux Basin through an underground tunnel that would flow from the Ariège (a tributary of the Garonne River in France) to the Carol River and thence to Spain. Spain objected. Actually both parties had different views as to whether, under the 1866 Treaty of Bayonne and the Additional Act, such diversion could be carried out without the proper agreement of both parties. The parties then agreed to refer the question to arbitration.

The award underlined the importance of negotiations and of attaining compromise in resolving disputes of this nature. In the Tribunal's view, under the Treaty of Bayonne and the Additional Act and under customary international law, France was bound to inform Spain of its plans and was to have a genuine consultation with Spain. In the Tribunal's view, the obligation to

²⁴ PCIJ, Series A, No. 23, p. 26. Also reproduced in Briggs, *The Law of Nations*, p. 272.

²⁵ PCIJ, Series AB, No. 70, p. 10.

²⁶ See *Revue général de droit international public*, vol. 24 (1961), p. 161.

²⁷ A. E. Boyle views it as "the most important judicial precedent". See Boyle, "The principle of cooperation: the environment", in Vaughan Lowe and Colin Warbrick, *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (London, 1994).

negotiate was not merely a question of going through the motions, but one to be pursued in good faith with a view to arriving at an agreement. The Tribunal reached the conclusion that France had actually fulfilled its obligation towards Spain. The Tribunal further concluded that a watercourse State does not have a veto and that consent is not required for waterworks to proceed. The Lake Lanoux Award, as is well known, has inspired the work of the International Law Commission on the non-navigational uses of international watercourses.²⁸

The International Court of Justice may have occasion to break new ground when it pronounces itself on the dispute between Slovakia and Hungary concerning the construction of the Gabčíkovo and the Nagymaros dams.²⁹ The case concerns a dispute over the dams on the Danube that were planned for hydropower in accordance with a 1977 agreement between Hungary and Czechoslovakia. When Hungary in 1989 failed to comply with the terms of the agreement because of perceived environmental hazards, Czechoslovakia (to be shortly succeeded by Slovakia thereafter) put in place a "provisional solution" which effectively diverted the course of the Danube and reduced the normal flow of the river. Though the parties are presenting the case as one concerning the interpretation of obligations under the 1977 Treaty, the International Court of Justice may end up determining the application of equitable utilization. This is all the more so as the dispute encompasses component elements of equitable utilization, harnessing the river for hydropower, access to navigation, the effect of pollution on the quality of water for domestic use.

A similar opportunity may be available to the International Court of Justice when it decides on the dispute over the demarcation of the common border (Sakiti Island) between Botswana and Namibia which the parties have now presented for adjudication.

C. Work of Learned Bodies

Three highly reputable international bodies have been in the forefront in the development of the law of international watercourses. They are the Institut de droit international, the International Law Association and the International Law Commission of the United Nations. Through preparing draft rules largely based on the practice of States, these bodies have formulated, *inter alia*, the principle of equitable utilization of water resources, the duty

²⁸ "Draft articles on the non-navigational uses of international watercourses: draft report of the International Law Commission" (A/CN.4/L.463/Add. 4), 1991.

²⁹ Paul Williams, "International environmental dispute resolutions: the dispute between Slovakia and Hungary concerning the construction of the Gabčíkovo and Nagymaros Dams", *Columbia Journal of International Environmental Law*, vol. 19, No. 1.

of watercourse States to cooperate among themselves and the requirement for an integrated management of watercourses.

In its commendable work on international watercourses dating back to its 1883 Munich session, the Institut de droit international is best remembered in the field for two important resolutions: the 1961 Salzburg Resolution on the Use of Non-Maritime Water³⁰ and the 1979 Athens Resolution on the Pollution of Rivers and Lakes in International Law.³¹

According to the 1961 Salzburg Resolution, the right of a State to utilize a share of the waters is a function of "the right of use by the other States concerned with the same river and watershed" and in the event of a dispute the parties should have recourse to the principles of equity. The settlement "would have to take into consideration the respective needs of the States as well as any other circumstances relevant to any particular case". The Salzburg Resolution also provides for prior notice of planned uses and the requirement that the watercourse States in question enter into negotiations whenever these uses are contested.

The Athens Resolution enjoins the riparian States not to cause pollution "in the waters of international rivers and lakes beyond their boundaries". The Resolution also contains articles on exchange of information, prior notification and the establishment of international agencies to combat pollution.

The work of the International Law Association (ILA) on the subject goes back to the Forty-sixth Edinburgh Conference on the Diversion of Waters of International Rivers.³² The ILA is to be credited with having moved forward the development of many aspects of the law in this field. However, its best known contribution is embodied in the 1966 Helsinki Rules on the Uses of the Waters of International Rivers.³³ According to the ILA, the principle of equitable utilization has primacy over all other principles and it is "the foundation on which the Helsinki Rules are built".³⁴ Thus, the ILA subordinated the no-harm rule³⁵ to the equitable sharing in beneficial uses of watercourses and made it a factor³⁵ to be taken into consideration in effecting the equitable apportionment of water resources.

The International Law Commission (ILC), after 20 years, provisionally adopted at the end of its 1991 session 32 draft articles on the law of the non-

³⁰ *Annuaire de l'Institut de droit international* (1961), vol. 49.

³¹ *Ibid.* (1979).

³² ILA Report of the Forty-sixth Session (Edinburgh).

³³ ILA Report of the Fifty-second Session (Helsinki).

³⁴ The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association (ILA) in 1966; see ILA, Report of the Fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 486, 487 and 499.

³⁵ *Ibid.*, pp. 488-491 and 496-499.

navigational uses of international watercourses.³⁶ The efforts of the Commission, which has covered wide ground on the subject, are commendable.³⁷ For the purposes of this presentation, it is fitting to examine the ILC's formulation of the principle of equitable utilization and participation (art. 5),³⁸ the obligation not to cause appreciable harm to other watercourse States (art. 7), the duty to exchange hydrologic data and information (art. 9) and the provisions of article 26 on joint management. The last two draft articles (9 and 26) confirm an important State practice in the management of shared natural resources between States.

The 1991 ILC draft rules indicate a marked shift towards the primacy of the no-harm rule.³⁹ This, unfortunately, is a retrogressive development. The ILC should not have departed from the path so ably paved by both the Institut de droit international and the International Law Association. The Commission would have made progress if it tried to determine the exact content of "beneficial uses",⁴⁰ instead of introducing the imprecise concept of "appreciable", "important", "significant" and "substantial harm". In the view of one authority, "the starting point has to be to decide what is beneficial use before moving into the more difficult question of the equitable share in the beneficial use".⁴¹ It is to be hoped that the International Law Commission in its subsequent session will correct its position on the primacy of the no-harm rule. Indeed, as has been aptly pointed out by one authority, "the no appreciable harm principle prohibits any meaningful use by any upper-riparian State, turning the principle into merely a variant of the absolute integrity claim".⁴²

Another authority distinguished the three cases⁴³ on whose judgements the no-harm rule was based and reached the conclusion that draft article 7 "resurrects the discredited doctrine of prior appropriation; it entrenches the rights of those who first utilize the waters of an international watercourse".⁴⁴

³⁶ *Yearbook of the International Law Commission*, 1991, vol. II (Part Two), sects. D.1 and D.2, pp. 66-78.

³⁷ *Ibid.*, pp. 63-78.

³⁸ *Ibid.*, pp. 67 and 72.

³⁹ *Ibid.*, pp. 67 and 68, especially articles 5-7 and 21.

⁴⁰ *Ibid.*, p. 68. See, in particular, article 21, para. 2; see also The Helsinki Rules, p. 487.

⁴¹ Rosalyn Higgins, *Problems and Process* (1993), p. 134.

⁴² Joseph W. Dellapena, "Treaties as instruments for managing internationally shared water resources: restricted sovereignty vs. community of property", *Case Western Reserve Journal of International Law*, vol. 26, Winter 1994.

⁴³ Charles B. Bourne, "International Law Commission's draft articles on the Law of International Watercourses: Principles and Planned Measures", *Colorado Journal of International Environmental Law and Policy*, vol. 3, November, Winter 1992, pp. 85-87. The cases are *The Corfu Channel Case*, *The Trail Smelter Arbitration* and the *Lake Lanoux Arbitration*.

⁴⁴ Bourne, *op. cit.*, p. 92.

III. MANAGEMENT OF PETROLEUM RESOURCES

An important physical characteristic of petroleum, whether liquid or gas, is that it cannot resist stress. As it is migratory in nature, it tends to move in such a way as to find its right level. The migratory nature of petroleum raises problems related to title as well as those regarding its optimal exploitation among licensees within States and between States sharing a continental shelf. Indeed, unnecessary drilling in one petroleum reservoir could have a negative impact in an adjoining one.

The exploitation of petroleum resources at the international level has mirrored developments at the national level. The experience of the United States oil industry is particularly instructive. In the United States, title to petroleum in any reservoir was reposed in the owner of the land. As licensees of adjacent petroleum reservoirs began to compete for the same resource, a "rule of capture" was developed. According to this rule, the party that produces the petroleum, even from a shared deposit, has title to it. This competitiveness resulted in hasty and inefficient exploitation of the petroleum resource. It was only to be expected that petroleum-producing States would introduce legislation to regulate the industry by ensuring cooperation among the licensees.

A. Unitization Agreements

An acceptable method for the cooperative exploitation of a common petroleum reservoir is unitization. This is an arrangement whereby all the parties holding exploitation rights to overlapping, straddling or proximate reservoirs agree, before development operations begin, to exploit them in an integrated manner. This is, therefore, a contractual arrangement which determines the rights and obligations of the parties.

If cooperative exploitation of a common petroleum resource is essential within States, it is at least as important for petroleum resources shared between States.⁴⁵ It is all the more so as the presence of petroleum in an international area which has not as yet been demarcated could affect the delimitation of that boundary. Indeed, as has been aptly observed, "it can

⁴⁵ On the exploitation of petroleum resources, see generally Bernard Taverne, *An Introduction to the Regulation of the Petroleum Industry's Laws, Contracts and Conventions* (Graham and Trotman and Field, London, 1994); Frère Cholmeley Bischoff, *Natural Resources and International Dispute Settlement: A Conference Review*, February 1994; Lovell, White and Durant, *Transboundary Petroleum Reservoirs, Legal Issues and Solutions*; William T. Onorato, "Apportionment of an international common petroleum deposit", *International and Comparative Law Quarterly*, vol. 17 (1968), p. 85; William T. Onorato, "Apportionment of an international common petroleum deposit", *ibid.*, vol. 26 (1977), pp. 324-337; J. C. Woodliffe, "International unitisation of an offshore gas field", *ibid.*, pp. 338-353; British Institute of International and Comparative Law, *Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* (1989) and vol. 2, revised version (1990).

accelerate or delay delimitation. It can influence the position of the boundary. It can cause States to abandon attempts at delimitation (temporarily at least) and pursue a strategy of joint development”.⁴⁶

The move towards cooperative arrangements in this field has also been given impetus by the evolving norms relating to the “apportionment of international common natural resources having physical properties analogous to those of petroleum”. Indeed, article 3 of the 1974 Charter of Economic Rights and Duties of States does furnish such impetus in that it requires States sharing a natural resource to “cooperate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others”.

In the remaining part of this section, we shall briefly examine inter-State unitization agreements (e.g., the 1976 Field Reservoir Agreement⁴⁷ between the United Kingdom and Norway and the somewhat moribund 1974 Agreement between the Sudan and Saudi Arabia relating to the Joint Exploitation of the Natural Resources of the Seabed and Subsoil of the Red Sea in the Common Zone,⁴⁸ and the inter-State agreements creating joint development zones in contest areas (e.g., the 1989 Timor Gap Agreement between Australia and Indonesia).⁴⁹

B. Inter-State Unitization Agreements

Joint development of petroleum reservoirs straddling an adjoining continental shelf can be undertaken on the basis of an agreement. For optimal exploitation of the petroleum resources, the States concerned normally incorporate arrangements for joint exploration and exploitation in their delimitation agreements. One such early delimitation arrangement is the 1965 Agreement between the United Kingdom and Norway, whose article 4 provides:

“if any single geological petroleum structure or petroleum field or any geological structure or field or any other mineral deposit, including sand and gravel, extends across the dividing line and the parts of such a structure or field which is situated in one side of the dividing line is exploitable, in whole or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner

⁴⁶ Lovell, White and Durrant, *Transboundary Petroleum Reservoirs: Legal Issues and Solutions*.

⁴⁷ United Kingdom, *Treaty Series* (1977), p. 113.

⁴⁸ For text, see *New Directions in the Law of the Sea*, vol. V (Dobbs Ferry, Oceana Publications, 1977), p. 393.

⁴⁹ Nikki Tait, “Oil muddies claims to Timor Sea”, *Financial Times* (30 January 1995).

in which the structure or field shall be most effectively exploited and the manner in which the proceeds derived therefrom shall be apportioned”.

This obligation to cooperate was triggered off when in May 1972 it became evident that a gas reservoir was straddling the continental shelf of Norway and the United Kingdom. In line with article 4 of the 1965 Agreement, and after consultation with the licensees, the two countries signed the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the Exploitation of the Frigg Field Reservoir and the Transmission of the Gas thereof to the United Kingdom. An important provision in the Agreement is that the gas in the Frigg Reservoir and the resultant hydrocarbons had to be exploited as a single unit in accordance with a plan approved by both parties. The Agreement also coordinates the activities of the licensees of the two States. A Frigg's Field Consultative Commission was established under article 27 to facilitate the implementation of the Agreement. Under article 28, a mechanism for resolution of disputes was created. Disputes would first be submitted to the Commission or to negotiation between the parties. Failing that, the dispute could be submitted to binding arbitration at the request of one of the parties. Similar principles were applied in the 1979 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the Exploitation of the Stratfjord Field Reservoirs and the offtake of petroleum therefrom. A major difference between the two agreements is that, whereas the Frigg's Agreement requires gas to be transmitted to the United Kingdom through pipelines, the Stratfjord Agreement leaves the mode of transport for oil and associated gas open.

C. Inter-State Agreements Establishing Joint Development Zones in Contested Areas

In section B, we dealt with unitization in relation to the delimitation of a maritime boundary before the presence of petroleum resources in the area was established. If the area where petroleum deposits are located has not been subject to delimitation, a way out could be through the creation of a zone where the contesting parties exercise joint control. This is consistent with the purport of article 83, paragraph 3, of the 1982 United Nations Convention on the Law of the Sea, which stipulates that, pending a delimitation agreement, “the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the

reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation”.

An example of such an arrangement is the 1989 Agreement between Australia and the Republic of Indonesia on the creating of the Timor Gap Zone of Cooperation. The Treaty divides the zone of 62,000 square kilometres into three areas, of which Areas B and C fall under the respective jurisdictions of Indonesia and Australia. The largest part, Area A, has been earmarked for joint administration. Under the Treaty the rights and responsibilities pertaining to exploration and exploitation of petroleum resources in this area are exercised by a joint Ministerial Council, which supervises and directs a Joint Authority. It is worth noting that the joint management of Area A is predicated on the equal sharing of the benefits of exploitation. In the event of a dispute between the parties, there should be recourse to consultation and negotiation. Indeed disputes concerning production-sharing contracts under the auspices of the Joint Authority must be referred to binding commercial arbitration.

How far the Timor Gap Treaty will operate in fact is a function of what the International Court of Justice, which is currently seized with the case lodged by Portugal against Australia, will decide on matters not directly related to the provisions of the Treaty.

IV. CONCLUSION

In our examination of the management of the two selected natural resources, we found that their analogous characteristics, the one being fugitive and the other migratory, would lead to the conclusion that they could be subject to the same treatment. Indeed, the principles of equitable sharing, the obligation to cooperate and the need for joint management that appear to be taking root in the management of water resources could be recommended for application in the management of petroleum resources.

However, this recommendation has to be taken with a nuance. It would seem that the exploitation of the petroleum resource at the international level is still governed by the rule of capture. This rule plays havoc with the idea of applying the principle of equitable utilization, particularly as it is not easy to discern adverse use in an adjoining petroleum field. In the case of rivers, the adverse effects of use by upper riparians on the lower riparians is clearer.

As mentioned earlier, the unfortunate retrogressive attitude of the International Law Commission (in an otherwise commendable work) on subordinating equitable utilization to the no-harm rule needs to be corrected.

Indeed, it would be desirable if the traditional methods of dispute settlement were to apply. There may, however, be a case for taking advantage of

the experience that is being gained in other fields.⁵⁰ There could be a case, for example, for applying the conciliatory non-compliance regime of the Montreal Protocol to the settlement of natural resource problems if the traditional methods are found to be too confrontational.

As we approach the new millennium in a more interdependent world with increasing interaction in our international relations, we need to perfect our dispute settlement mechanisms or methods, particularly those related to sharing the resources that cross or straddle our international boundaries. It is only in this way that tension, indeed conflict, among nations can be averted.

⁵⁰ Frère Cholmeley Bischoff, *Natural Resources and International Disputes Settlement: A Conference Review* (February 1994).

OPEN-FLOOR DISCUSSION

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. B. S. MURTHY

Mr. Kolodkin* mentioned that in 1993, at the Conference of members of the Permanent Court of Arbitration, a resolution had been adopted regarding the possibility of convening a third peace conference. He wondered whether the speakers thought it was possible simply to improve the 1899 Convention for the Pacific Settlement of International Disputes or whether a new draft convention should be elaborated to permit the introduction of new elements based on the experience of the previous 100 years.

In view of the widespread interest in the legal situation in the Russian Federation, he mentioned that the Russian Federation had withdrawn a number of reservations regarding the jurisdiction of the International Court of Justice, especially in the field of human rights. In addition, the Russian Constitution of 1993 provided that, in the event of any difference between a treaty to which the Russian Federation was a party and national law, the provisions of the international treaty would prevail. That would also affect the peaceful settlement of disputes, because the provisions of the Convention for the Pacific Settlement of International Disputes would apply to the territory of the Russian Federation, even without a law being passed to that effect.

Mr. McNeill** mentioned the elaboration of arms-control treaties and agreements regulating military activities, arrived at through negotiation, as an important means of avoiding international disputes and armed conflict. Such agreements allowed participating States to avoid those risks, while strengthening their security relationships. Three such agreements, for example, existed between the United States and the Russian Federation. Also important was

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** Senior Deputy General Counsel, United States Department of Defense, Washington, D.C., United States of America.

the vast and growing body of multilateral and bilateral arms-control agreements and the significant practice resulting from their application.

Mr. Murthy (reply) said that the provisions of the Charter were broad enough to cover everything contained in The Hague Conventions, so that a new convention was probably not necessary. Moreover, if two States were in a situation in which armed conflict might be feared, it would be useful if they entered into agreements similar to those mentioned by Mr. McNeill.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. OLEG N. KHLESTOV

Mr. Buteiko* pointed out that a good legal basis for dispute settlement had been established within the arrangements of the Community of Independent States (CIS),¹ but that, owing to a lack of resources and to political and ethnic reasons, that mechanism had proved ineffectual in resolving certain conflicts, including armed conflicts, in the territory of the former Union of Soviet Socialist Republics. Moreover, despite the existence of the two Vienna Conventions on succession of States and an agreement on succession concluded by the CIS countries, which, except in respect of a few points, recognized all the republics of the former USSR as equal successors, the property of the former USSR had not been divided in accordance with the CIS arrangements because of a lack of political will to do so. The main reason was the thesis that the Russian Federation was the "continuator", a new term used in contradistinction to "successor", of the USSR. That thesis had been applied even in respect of the Black Sea Fleet: the navy of the former USSR had been divided on the basis of its deployment; yet, though the Black Sea Fleet had been deployed mainly in the territory of Ukraine, its division had suddenly also become a subject for negotiation. He would like to know Mr. Khlestov's opinion as to whether there was still potential for the CIS arrangements to arrive at a final and fairer solution, based on law, to the problem of succession of States in respect of the property of the former USSR or whether in his view recourse should be had to other means of peaceful settlement of that issue.

¹ Referred to by CIS States other than Ukraine as the Commonwealth of Independent States.

* Member of Parliament, Kiev, Ukraine.

Mr. Tang* said that it was important to enhance the role of regional arrangements or agencies in the peaceful settlement of disputes. Yet there might be some misgivings regarding hidden side-effects of that role relating to the possible compulsory jurisdiction of such arrangements or the danger of their encroaching on the function of the United Nations. He would like to know, therefore, how the mediation of such arrangements could be harmonized with the requirement of the consent of the countries or parties concerned.

Mr. Khlestov (reply) pointed out that the misgivings to which Mr. Tang had alluded—that regional arrangements, for example, might attempt enforcement action—were offset by the right of the Security Council under Article 53 of the Charter of the United Nations to monitor such action and react if it had not been authorized by the Council. An active discussion, however, was currently in progress about whether “second-generation” peace-keeping operations, in which force might be used, constituted enforcement activity or not. The answer of any given State depended in particular on whether such action was being carried out within its territory. In any event, if the State in question consented, such action would not be considered enforcement.

Regarding Mr. Buteiko’s question, from the point of view of international law, issues such as that of property between successor States and the continuator State were resolved on the basis of agreement. The convention on treaties had in fact not yet come into force. The issue of the Black Sea Fleet was no longer a regional problem, but a problem between the two or three States concerned, though in fact the entire fleet had been set up by the Union of Soviet Socialist Republics out of the overall Federal budget. Thus the question arose of how to take into account, for example, the share of Uzbekistan or Kazakstan in the creation of that fleet. The mechanisms for dispute settlement existing within the CIS, as well as bilateral talks and mediation, might bring about the resolution of all such matters.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. MIGUEL ÁNGEL GONZÁLEZ FÉLIX

Mr. Tshiyembe** said that, as the trend in world conflict had reversed, with an increase in internal, as opposed to inter-State, conflicts, one must ask what lessons might be drawn from that reversal from the standpoint of public

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** Directeur, Institut panafricain de géopolitique, Nancy, France.

international law, apart from the fact that public international law ignored internal conflicts in the name of the principle of non-interference in the internal affairs of States. It was urgent to define such conflicts legally so as to enhance the capacity of the traditional instruments for the peaceful settlement of disputes. Indeed, the term "internal conflicts" was unclear, including conflicts of different types, some of which came under the right of peoples to self-determination: they might be conflicts between a people and a State, connected with the right of peoples to create their own State or to choose freely their system of government or their projects for a democratic society, or conflicts between peoples.

Mr. Uwaidah* said he agreed with Mr. González Félix that a major problem was achieving conviction regarding the binding nature of international law, to which all must be subject, strong and weak alike. Many States and peoples had suffered from the inability of the international community to apply international law to solve struggles in a just manner that would help to eliminate centres of tension in the world. Even more grave was the use of a double standard in applying the concept of international legitimacy, to the detriment of countries such as Palestine and Iraq. The issues of human rights and democracy had often been used to justify interference in the affairs of certain States, yet the international community stood by while those very same principles were attacked in North Africa, Bosnia, Chechnya and elsewhere. He hoped efforts could be made to separate international law from the whims of the powerful States and ensure commitment to it on the part of the international community, for, while legal experts might discuss and ponder, the powerful were not judged by any law. That was a matter that deserved the attention of the Congress, which should issue an appeal for such a commitment—an appeal that should be part of the efforts made in their respective countries by all those present at the Congress.

Mr. González Félix (reply) agreed with Mr. Tshiyembe that the concept of internal conflicts needed defining. The number of such conflicts had increased, presenting a novel situation, so that in the United Nations environment there was lack of precision regarding the meaning of the term. In that regard, the remarks made by Mr. Uwaidah had been very telling. Although in the areas of democracy and human rights, for example, there had been highly specific formulations, there was no consensus regarding participation or international legitimacy or whether or not such questions were internal matters. The definition of internal conflicts, in the light of the changes that

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had taken place, and the question of the standard by which to determine the limits of international action were among the most important current questions facing the United Nations.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. ACHOL DENG

Mr. Dellapenna* stressed the importance of the topics addressed by Mr. Deng, especially the working out of equitable arrangements for the sharing of transboundary waters, an area in which numerous controversies existed throughout the world. There had been, he said, a contradiction in the initial version of the draft articles on the law of the non-navigational uses of international watercourses prepared by the International Law Commission, article 7 (current article 5) of which had provided that every riparian State of an international watercourse was entitled to an equitable share, while article 9 (current article 7) had prohibited activities “causing appreciable harm” to other States. Owing to that contradiction, the Commission, at its 1994 session, had retreated from the no-harm rule, reducing it to an obligation to use due diligence to avoid harm, thus making it clear that equitable utilization was, in the Commission’s view, the rule of international law. Particularly those interested in the environment, who tended to speak in absolutist terms, should consider those developments, because a careful examination of the equitable-utilization rule might suggest to them that a less absolutist approach was advisable.

Ms. Brunnée** remarked that underlying most disputes over shared natural resources were questions related to environmental degradation and scarcity. It seemed, therefore, that peaceful management of such resources and avoidance of conflict could succeed, in the long run, only if environmental concerns were effectively addressed. She wished to know how important environmental protection principles such as sustainable development or the precautionary principle were in the context of the management of shared water resources; whether they should be injected into, or at least supplement, use-focused doctrines such as that of equitable utilization; and whether they might contribute to the prevention of disputes, shifting emphasis towards

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common environmental interests and away from competing sovereign interests relating to use.

Mr. de Yturriaga* said that one of the greatest merits of the Convention on the Law of the Sea was that it had put an end to the situation of uncertainty stemming from the failure of the Second United Nations Conference on the Law of the Sea, held in 1960. At the Third Conference, a compromise solution had been found, for which all sides had yielded on some points. Among those that had given up the most were the fishing States, whose historical rights had been denied and their interests ignored. Their operating space was increasingly restricted, even on the high seas. The countries which had benefited the most from the Convention were obviously those that had a wide continental shelf or coastal frontage. Hardly had the ink dried on their signatures when those same countries had begun their manoeuvres to reopen the question of the inclusion of article 73, paragraph 2, in the Convention, thereby creating an artificial state of uncertainty. They had brought the issue before the United Nations Conference on Environment and Development in 1992 and had instigated the convening of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks in an attempt to undo the consensus on article 73, paragraph 2.

The proposals put forward by those States were incompatible with the Convention. The most notorious case in point was Canada's modification of its Coastal Fisheries Protection Act on 10 May 1994, extending the normative and executive competence of its authorities beyond its exclusive economic zone. At the same time, patently indicating that its legal conscience was not clear, Canada had decided to denounce its acceptance of the binding jurisdiction of the International Court of Justice, *inter alia*, for purposes of disputes arising with regard to measures taken in Canada concerning fishing boats in the area of the Northwest Atlantic Fisheries Organization as defined in the 1978 Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries and the application of such measures. In conclusion, he hoped for a peaceful settlement to the dispute over the Spanish fishing boat recently detained by Canadian officials.

Mr. Deng (reply) said he wholeheartedly agreed with Ms. Brunnée regarding the importance of including environmental protection principles. As he had noted, experience being gained in other fields might be used to advantage for dispute settlement. For example, the conciliatory non-

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compliance regime of the Montreal Protocol might be applied in the settlement of disputes relating to natural resources if the traditional methods were found to be too confrontational.

With regard to the contradiction between articles 5 and 7 of the draft articles on the law of non-navigational uses of international watercourses, he appreciated the comments of Mr. Dellapenna, who was the expert he had quoted in his presentation as saying that “the ‘no appreciable harm’ principle prohibits any meaningful use by any upper-riparian State, turning the principle into merely a variant of the absolute integrity claim”. On the basis of the reports of the most recent session of the International Law Commission, it seemed to him that, although there did indeed appear to have been some retreating, the obligation of due diligence, which remained a variant of the absolute integrity claim, was difficult to operationalize. Beyond that, he agreed with Mr. Dellapenna’s remarks.

WEDNESDAY, 15 MARCH 1995

CONCEPTUAL AND PRACTICAL ASPECTS OF
THE CODIFICATION AND PROGRESSIVE
DEVELOPMENT OF INTERNATIONAL LAW:
NEW DEVELOPMENTS AND PRIORITIES

3

PRESENTATION OF THE TOPIC

*Emilio Cárdenas**

El tema al que hoy dedicaremos nuestra atención, es el referido al instituto de codificación.

No estamos, por cierto, frente a una cuestión nueva. En rigor, como sabemos, para las Naciones Unidas ella deriva de un mandato expreso de la Carta, que en su Artículo 13, párrafo 1 *a*, precisamente, instruye a la Asamblea General para que ésta inicie estudios y formule recomendaciones, con el propósito de promover la cooperación internacional en el campo político y aliente el desarrollo progresivo del derecho internacional y su codificación.

Es mucho lo que ya hemos transitado en el cumplimiento del referido mandato, dentro del marco institucional así generado. En seguida nos referiremos, específicamente, a ello.

Previamente, sin embargo, queremos formular algunas reflexiones, de carácter general, sobre las circunstancias particulares en las que se enmarca el esfuerzo de nuestra Organización, en materia de codificación.

La comunidad internacional se encuentra — desde la finalización misma de la guerra fría — en un claro momento de transición, en el que está procurando forjar, para el mundo, una identidad que se adecúe a una realidad tan nueva como diferente, la que — a su vez — evoluciona aceleradamente.

Hoy actúan, por una parte, fuerzas — predominantemente del sector privado — que, con el concurso verdaderamente asombroso de la tecnología, nos impulsan, fuertemente, hacia la globalización en muchos frentes.

Hay así actividades financieras, cambiarias, de comunicación o información y hasta culturales, que se desarrollan en un escenario abierto, en el que las fronteras han, sustancialmente, perdido su trascendencia tradicional.

Existe también plena conciencia que algunas cuestiones, como por ejemplo las que hacen a la regulación del mar y sus fondos, o a la defensa del

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medio ambiente, requieren de soluciones que deben, necesariamente, ser cooperativas.

Por la otra, las instituciones políticas y jurídicas tradicionales — particularmente las nacionales — deben todavía adaptarse a una realidad que, por dinámica, ni se detiene, ni las espera.

Para ello, es preciso comenzar por comprenderse cuál es la nueva realidad. Y ello no es fácil, ni puede lograrse, de la noche a la mañana.

La posibilidad reciente de haber podido tener la oportunidad de observar la reacción del Congreso de los Estados Unidos de América frente a la crisis financiera mexicana, nos permite sospechar que hay todavía mucho que hacer frente a este desafío.

Por lo menos, para que, en el plano doméstico de los Estados, se adquiera conciencia de cómo funciona realmente la globalización, en aquellos ámbitos en los que ha adquirido carta de ciudadanía.

Esto supone comprender lo que significa pasar de lo que, hasta ayer, era quizás interdependencia, a lo que hoy es, en cambio, globalización. Y ha quedado, reitero, demostrado que ello no es simple.

En el plano de la política, si bien es cierto que en el mundo hay importantes esfuerzos regionales integradores en marcha, también es evidente que hay una proliferación de conflictos que — alimentados por la intolerancia, los resentimientos o, peor, por el fanatismo — rechazan la diversidad, como si ella fuera un mal, y apuntan, por consiguiente, hacia la fragmentación, transformándola en un peligroso ideal.

Mientras tanto, la influencia real de las naciones, hasta ayer más poderosas, ha dejado de ser hegemónica.

En un mundo que, de pronto, se ha achicado, la búsqueda del consenso como mecánica sobre la que se sustenta el andar común se ha transformado, en consecuencia, en un instrumento central del progreso conjunto.

El camino, en este caso, no es otro que el del diálogo, la coordinación y la consulta. De ellos deriva la cooperación que, a su vez, debe estructurarse, con frecuencia, sobre normas o reglamentaciones que expliciten reglas de juego comunes, a ser respetadas por todos.

En este escenario, la importancia de las distintas técnicas y modalidades de codificación aparece no sólo renovada, sino también tonificada en extremo.

La disminución correlativa de la capacidad reguladora individual del Estado en las áreas afectadas por la globalización está haciendo crecer rápidamente el papel integrador de los organismos internacionales o regionales, así como su significación y, más que todo, su importancia funcional.

Se trata, por cierto, de organizar y sostener ejercicios de pluralismo práctico, más que todavía pretensiones de universalidad.

La regulación de la aviación civil o las comunicaciones, la protección de los derechos humanos, el manejo del clima, la atención de los refugiados y desplazados, la protección de los recursos, el tratamiento de las enfermedades epidémicas, la prevención y castigo del crimen del genocidio, la no proliferación de las armas de destrucción masiva, el tráfico de drogas, y la lucha contra el flagelo del terrorismo, son solo algunos — muy diversos — ejemplos, en los que queda claro que la estabilidad general no es hoy función del poder hegemónico, sino, más bien, de la posibilidad de poder alcanzar y mantener consensos o coordinar las conductas.

En el centro mismo de este proceso — respecto del que Roberto Ago nos advirtiera que tiene progresión geométrica — sigue estando el Estado.

Pero ya no solo, sino acompañado por organismos y agencias internacionales especializadas y hasta por nuevas instituciones sociales, que operan también con el mundo como escenario.

El impacto de esta transición es tal, que puede sostenerse que está transformando ideologías, estructuras, y hasta valores.

De este modo, con frecuencia, el ejercicio de la soberanía en la realidad se canaliza, entonces, a través de mecanismos cooperativos. Ellos devienen la fórmula reiterada de un andar conjunto, que parece inexorablemente — y paso a paso — ir sumando capítulos a su actividad.

Lo antedicho se extiende también, en buena medida, al plano del derecho internacional público, en cuyo ámbito la tarea a cargo de las Naciones Unidas, en lo que toca a desarrollo progresivo y codificación, ha ido creciendo en extensión e importancia.

Originalmente, la noción de codificación — recordamos — era sinónimo de una reseña integradora del derecho consuetudinario en cada caso existente.

Como diría Julio Barberis: se entendía que se trataba tan solo de condensar, en tratados internacionales, el resultado del proceso de formación de la costumbre.

Éste era, por ejemplo, el criterio prevaleciente en el siglo XIX. La verdad, sin embargo, es que las mismas reglas que adoptara el Congreso de Viena, en 1815, se escapaban de esta definición estrecha.

A partir de la década de los años 30, creció la interpretación que relaciona codificación con innovación, e incluye la renovación y modernización de las normas en cada momento prevalecientes.

Desde 1945, ella fue reemplazada por la propia Carta. Tiene sentido, porque hoy sabemos que, al codificar, deben llenarse “lagunas”, así como precisarse y perfeccionarse los contenidos normativos.

Por esto, hoy prevalece la interpretación que el “desarrollo progresivo del derecho internacional” y la “codificación” son, en verdad, procesos interdependientes e íntimamente relacionados.

Hoy la “codificación” se verifica y alimenta a nivel de nuestra Organización, en un proceso abierto, al que todos los Estados Miembros tienen, en definitiva, acceso. Sigue entonces siendo, como apunta el Profesor Movchou, una actividad fundamentalmente interestatal.

A diferencia de lo que ocurriera en tiempos de la Sociedad de las Naciones, cuando los esfuerzos codificadores de La Haya, en 1930, cayeran, de alguna manera, en saco roto, la actividad de las Naciones Unidas en esta materia ha mantenido su impulso, se ha diversificado y, en rigor, hasta se ha profundizado en el tiempo, cuantitativa — y cualitativamente.

Cabe recordar que, a fin de cumplimentar con lo dispuesto por la Carta, la Asamblea General durante la segunda parte de su primera sesión estableció el Comité de Desarrollo Progresivo del Derecho Internacional y Su Codificación, que fuera, en su momento, conocido como el “Comité de los 17”. Dicho Comité fue quien recomendó, en su momento, el establecimiento de la “Comisión de Derecho Internacional”.

Basada en el informe del referido “Comité de los 17”, la Asamblea General de nuestra Organización estableció, en su momento, la Comisión de Derecho Internacional y adoptó su estatuto, el que fundamentalmente fuera luego reformado en su composición, para ampliar el número de sus miembros.

Dicha Comisión tiene por objeto, precisamente, la promoción y el desarrollo del derecho internacional y su codificación.

Si bien se concentra en las cuestiones del derecho internacional público, no está excluida de poder ocuparse de aquellas que pertenecen, en cambio, a la esfera del derecho internacional privado.

Cabe recordar que la Comisión, que asegura la representación de los distintos sistemas legales, está compuesta por expertos, que se desempeñan en ella en su capacidad personal. Ellos actúan en estrecho contacto con la Asamblea General, a la que — cada año — someten un informe pormenorizado de las tareas realizadas en su último período de sesiones.

Los logros de la Comisión son tan importantes, como conocidos. Incluyen nada menos que 14 convenciones internacionales, lo que habla, por sí mismo, de la eficacia y calidad de su trabajo.

Recordamos lo realizado en materia de apatridía, relaciones diplomáticas y consulares, misiones especiales, tratados, prevención y sanción de crímenes contra personas internacionalmente protegidas, representación de los Estados en sus relaciones con las organizaciones internacionales de carácter universal, sucesión de Estados respecto de los tratados o propiedad estatal, deudas o archivos o el derecho de los tratados.

La tarea en curso incluye un importante proyecto sobre los crímenes contra la paz y la seguridad de la humanidad.

Por su parte, en el 49° período de sesiones de la Asamblea General, se incluyeron como temas seleccionados para la Comisión: “La ley y la práctica en materia de reservas a los tratados” y “La sucesión de Estados y sus efectos sobre la nacionalidad de las personas naturales y jurídicas”.

En su último período de labores, la Comisión, a su vez, completó dos proyectos de significación: El relativo a la corte penal permanente internacional y el referido a los usos de los cursos de agua internacionales para fines distintos de la navegación.

Si bien ella es — por cierto — el instituto que concentra las principales iniciativas de las Naciones Unidas en materia de desarrollo progresivo y codificación del derecho internacional, algunos esfuerzos de importancia, realizados en otros ámbitos de la Organización, no pueden dejar de mencionarse.

Recordamos así la experiencia a la que Pastor Ridruejo, en doctrina, denominara “la más importante conferencia codificadora que ha tenido lugar, hasta ahora, en la historia del derecho internacional”. Nos referimos a la Conferencia de las Naciones Unidas sobre el Derecho del Mar, que hoy ya es una realidad. Un esfuerzo de muy particular relevancia, muestra de tesón e inteligencia puestos al servicio del perfeccionamiento del derecho internacional.

Nos referimos también a la incansable labor especializada de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional y, destacamos, a la propia tarea de la Sexta Comisión de la Asamblea General.

En este sentido, queremos recordar la reciente labor que culminara con el proyecto de Convención sobre la Seguridad del Personal de las Naciones Unidas y el Personal Asociado. Ella viene a llenar un vacío lamentable y a atender una necesidad impostergable, en momentos en que en el seno de algunos de los conflictos contemporáneos, los ataques contra ese personal, así como contra la población civil, parecieran sugerir que hay quienes han desandado, y continúan desandando, el camino de la civilización.

Por último, sin pretender agotar las posibles menciones, cabe referirse a la labor que se está realizando en materia de pesca, particularmente en lo que hace a especies transzonales y altamente migratorias, la que, se espera, culminará este año con un instrumento complementario a la Convención de las Naciones Unidas sobre el Derecho del Mar, de 1982.

Algunas de estas cuestiones relativas a una tarea que tiene (como nos lo advirtiera Carl-August Fleischhauer, en un trabajo sobre codificación publicado en 1985, en el *Indian Journal of International Law*) un “largo y brillante futuro”, serán abordadas, con mayor detalle, por los distinguidos oradores que nos iluminarán en la labor prevista para hoy.

A lo de Fleischhauer cabe, respetuosamente, agregar un nuevo factor: La urgencia impuesta por el dinamismo de una transición, que nos ubica en la puerta de un futuro en cuyo diseño hay mucho que hacer.

DÉVELOPPEMENT PROGRESSIF ET CODIFICATION DU DROIT INTERNATIONAL : LE RÔLE DE L'ASSEMBLÉE GÉNÉRALE REVISITÉ

*Eric Suy**

« La codification appartient à l'histoire ».
— René Jean Dupuy

L'Article 13 de la Charte des Nations Unies constitue le fondement d'une entreprise unique dans l'évolution du droit international public. Dans cet Article, l'Assemblée générale reçoit pour mission d'encourager le développement progressif du droit international et sa codification. A cette fin, la Charte instruit l'Assemblée de provoquer des études et de faire des recommandations. Les expressions « encourager », « provoquer », « études » et « recommandations » indiquent très clairement que les auteurs de la Charte ne voulaient en aucune manière accorder à l'Assemblée générale un pouvoir législatif.

Un demi siècle plus tard, il convient de réfléchir sur ce qu'est devenue cette mission et de dresser l'inventaire des réalisations mais aussi des défaillances, et de s'interroger sur l'avenir de cette entreprise si nécessaire pour le maintien de la paix.

LES RÉALISATIONS

La manière dont l'Assemblée générale s'est acquittée de la tâche que lui confère l'Article 13 est suffisamment connue pour qu'on s'y attarde. Il convient cependant de souligner que le développement progressif du droit internatio-

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nal et sa codification ne sont pas seulement réalisés à travers les activités de la Commission du droit international, organe subsidiaire créé en 1947. Certes, la Commission joue un rôle prépondérant dans toute l'œuvre de la codification, mais l'Assemblée générale se sert d'autres instruments afin de remplir sa mission sous l'Article 13. Elle crée en effet d'autres organes subsidiaires sous la forme de comités permanents ou de comités ad hoc généralement composés de représentants d'États. Leur mandat est de procéder à l'élaboration de conventions ou d'autres textes sur des thèmes actuels qui relèvent plutôt du développement progressif et au sujet duquel le droit international coutumier est généralement silencieux. L'Assemblée peut même avoir recours à un groupe de travail qui sera chargé de la préparation d'un texte. Certains textes importants ont même été élaborés directement au sein de l'Assemblée, notamment par sa Sixième Commission. Tel fut le cas pour la Convention pour la prévention et la répression du crime de génocide.

Cet aperçu des réalisations serait incomplet sans faire référence aux travaux de la Commission des Nations Unies pour le droit commercial international (CNUDCI) et surtout les réalisations importantes en matière du droit de l'espace qui sont l'œuvre du Comité des utilisations pacifiques de l'espace extra-atmosphérique et de son Sous-Comité juridique. Le nouveau droit de la mer a été élaboré en ayant recours à une autre procédure, c'est-à-dire la convocation d'une Conférence des Nations Unies sur le droit de la mer, décidée en 1973, mais tenue en plusieurs sessions, selon sa propre dynamique et sur la base de ses règles de procédure, pour aboutir à la session finale en 1982.

Il est vrai que l'élaboration de textes très importants en matière des droits de l'homme et du droit de l'environnement peut également être attribuée à l'Assemblée générale, qui les a, soit directement, soit indirectement, adoptés. Mais ceci reviendrait à minimiser le rôle proéminent du Conseil économique et social et de sa Commission des droits de l'homme ainsi que celui du Programme des Nations Unies pour l'environnement (PNUE) dans l'élaboration des conventions multiples, innovatrices et indispensables dans tous ces domaines. On pourrait en dire autant des textes élaborés au sein d'autres organes ayant été créés par l'Assemblée générale, tels la Conférence des Nations Unies sur le commerce et le développement (CNUCED) et le Haut Commissariat des Nations Unies pour les réfugiés.

On ne saurait conclure sans ajouter l'ensemble impressionnant de résolutions de l'Assemblée générale déclaratoires de principes gouvernant les relations interétatiques et qui, adoptées à l'unanimité, sans vote ou par consensus, reflètent l'*opinio juris* de la communauté internationale.

On aura aperçu que ces réalisations n'ont pas résumé de façon exhaustive ce que l'Organisation des Nations Unies a fait en matière de développement

progressif et de codification du droit international — ce qui est bien connu par tous — dont on a voulu ressortir avant tout les modalités et les procédures. L'Assemblée générale reste ainsi le maître de l'ouvrage, soit en donnant des directives, voire même des instructions précises, à ses organes subsidiaires, soit en se chargeant elle-même d'entreprendre directement l'œuvre de l'élaboration du droit international.

REMARQUES CRITIQUES

On n'a cessé de répéter que la codification — en droit interne comme en droit international — devient nécessaire et se produit chaque fois que la société subit des mutations importantes sur le plan social et politique. Les auteurs de la Charte ont estimé — à juste titre d'ailleurs — qu'un ordre mondial offrant plus de sécurité impliquait également plus de sécurité juridique, et qu'il fallait « créer les conditions nécessaires au maintien de la justice et du respect des obligations nées des traités et autres sources du droit international » (Charte des Nations Unies, Préambule). Dans les années 50 et 60 ces changements devinrent encore plus importants par le processus de décolonisation. Ce processus entraîna un accroissement considérable des membres de la communauté internationale. Ceux-ci firent leur apparition sur une scène où régnait encore un ordre juridique à l'élaboration duquel ils n'avaient pas participé et apporté leur contribution et vis-à-vis duquel ils manifestèrent une méfiance.

Pour la troisième fois en 50 ans, le monde se trouve à nouveau en pleine mutation, et on nous a annoncé un nouvel ordre mondial dont on connaît les raisons, mais dont on ignore encore les contours exacts. C'est dans ces circonstances que l'on s'interroge aujourd'hui sur l'opportunité de la codification du droit international.

L'adaptation indispensable du droit international à toutes ces transformations revient à poser la question de savoir si la technique ou la procédure suivie depuis 45 ans répond encore aux besoins de la communauté internationale. La codification par l'élaboration de grandes conventions n'a-t-elle pas tendance à trop figer le droit international face à toutes ces mutations ?

L'histoire de la codification du droit de la mer est un bon exemple de l'adaptation des procédures aux nouvelles réalités. Quatorze années après l'adoption des quatre conventions de Genève de 1958, la communauté internationale décidait de procéder à une révision entraînant en 1982 l'adoption d'une convention globale qui ne devait cependant entrer en vigueur que 12 ans plus tard dans des conditions que nous évoquerons plus loin. Il suffit de relever ici que l'adaptation des textes de 1958 ne fut pas directement confiée à la Commission du droit international. L'Assemblée générale décida de con-

voquer une conférence à laquelle fut confié tout le travail tant préparatoire que final.

Un autre exemple de la fixation des règles « codifiées » sont les deux conventions sur la succession d'États. Au moment d'élaborer les projets d'articles sur la succession d'États, la Commission du droit international avait essentiellement en vue les questions de succession afférentes à la décolonisation. Or, celle-ci et les questions juridiques de succession qu'elle avait suscitées étaient réglées depuis longtemps, soit par des accords bilatéraux de dévolution, soit par des engagements unilatéraux. Les deux conventions sur la succession d'États ne furent pas suivies du nombre suffisant de ratifications pour entrer en vigueur.

Les auteurs qui se sont penchés sur le manque de ratifications des conventions codificatrices ont examiné avant tout la question de la valeur d'une convention de codification pour les États n'ayant pas ratifié la convention. La réponse à cette question est presque unanime : les dispositions de ladite convention qui codifient le droit coutumier existant lient ces États, alors que les dispositions innovatrices, c'est-à-dire appartenant au « développement progressif », ne les lieraient pas. Cette réponse, probablement correcte, n'est cependant pas tout à fait satisfaisante. Tout d'abord, elle en soulève une autre à laquelle il est bien plus difficile de répondre, à savoir comment faire la distinction entre ces différentes dispositions. En outre, elle n'envisage pas la situation créée par une non-ratification massive, soit par la plupart des États, soit par les États dont la ratification est indispensable au bon fonctionnement du droit ou du régime établi par la convention.

Dans la première hypothèse, il est à craindre que la non-ratification affaiblira à la longue l'efficacité des dispositions de la convention, y compris celles reflétant le droit coutumier existant, même si la convention est le résultat d'un travail minutieusement préparé qui faisait l'accord au sein de la Commission du droit international. Le professeur et Juge Richard Baxter écrivait à ce sujet :

« Excessively ambitious and defectively conceived schemes for the codification and progressive development of international law are almost inevitably doomed to fail. Their failure can leave customary international law in a worse state — less certain, more controversial, and less honored — than it was before codification was attempted. In such case, codification can be law-destroying rather than a stimulus and guide to ordered conduct by nations¹ ».

¹ « The effects of ill-conceived codification and development of international law », dans *Mélanges Paul Guggenheim* (1968), p. 146.

Il est à noter cependant que Richard Baxter se référait non pas à un manque de ratifications d'un traité, mais à un texte adopté par la Commission du droit international en 1950 affirmant les Principes du droit international reconnus dans la Charte du Tribunal de Nuremberg et dans le jugement de ce Tribunal.

La deuxième hypothèse est celle notamment de la Convention de Montego Bay de 1982 donc les dispositions innovatrices à propos du régime des fonds marins étaient inacceptables pour les pays industrialisés. Or, sans la coopération de ceux-ci le régime ne pouvait pas fonctionner. Comme l'entrée en vigueur de la Convention au 16 novembre 1994 risquait par conséquent de rester lettre morte, la partie XI de la Convention fut renégociée et, lors de sa quarante-huitième session, l'Assemblée générale adopta un Accord relatif à l'application de la partie XI de la Convention de 1982. D'autres auront l'occasion d'analyser en détail la signification de cette renégociation et de la procédure utilisée. Malgré les formules floues utilisées, il n'échappe à personne que l'Assemblée générale, utilisant le subterfuge de la participation universelle à la Convention de 1982, a fait œuvre de législateur en adoptant l'Accord qui constitue, en fait, un amendement de la partie XI.

Cet épisode prouve la flexibilité de l'Assemblée générale dans la recherche d'une plus grande efficacité. Il confirme en même temps qu'il n'y a pas de panacée ou de méthode idéale pour la codification.

La querelle concernant la meilleure méthode ou procédure de codification du droit international et de son développement progressif reste d'une grande actualité. A ceux qui prônaient la méthode d'une codification normative par la conclusion de grandes conventions s'opposaient ceux qui estimaient qu'un *restatement* sous la forme d'une déclaration solennelle de principes pouvait être tout aussi efficace. La pratique semble avoir donné raison à la méthode conventionnelle : la sécurité juridique préconiserait que les normes codifiées lient les États d'une manière contraignante. Ceci pouvait être une approche valable à une époque où les résolutions de l'Assemblée générale étaient considérées comme étant dépourvues de tout caractère juridiquement contraignant. Or, il y a eu une évolution très considérable en la matière : les déclarations de l'Assemblée générale affirmant des principes juridiques se sont multipliées et peuvent être considérées comme ayant l'autorité non seulement de confirmer le droit international existant mais également d'affirmer des normes nouvelles. Lorsqu'elles sont adoptées à l'unanimité, par consensus ou sans vote, ces résolutions ne sauraient être considérées comme étant dépourvues de caractère normatif. Ceci vaut même pour les dispositions qui seraient innovatrices et appartiendraient donc au développement progressif. A la veille du cinquantième anniversaire de l'ONU, il est incontesté et incontestable que l'Assemblée générale a l'autorité

nécessaire pour participer directement au développement progressif du droit international et à sa codification par le biais de déclarations de principes. Rappelons à ce sujet le passage suivant de la résolution adoptée par l'Institut de droit international à sa session du Caire en 1987 intitulée « L'élaboration des grandes conventions multilatérales et des instruments conventionnels à fonction ou à vocation normative » et, plus particulièrement, sur les résolutions de l'Assemblée générale :

« Bien que la Charte des Nations Unies ne lui confère pas le pouvoir d'arrêter des règles qui lient les États dans leurs relations mutuelles, l'Assemblée générale peut faire des recommandations contribuant au développement progressif du droit international, à sa consolidation et à sa codification. Cette possibilité se réalise au moyen de divers types de résolutions ».

Mais un rôle accru de l'Assemblée générale dans cette procédure de codification au sens le plus large tient également à des facteurs et des considérations d'ordre plutôt matériel. Par le passé, les grandes conventions de codification ont été élaborées et mises au point au cours de conférences diplomatiques convoquées par l'Assemblée générale sur invitation d'États Membres tout disposés à fournir une importante contribution matérielle à la réussite de la phase finale du processus de codification. Ainsi, l'Autriche et sa capitale Vienne resteront intimement liées à l'œuvre de codification de l'Organisation des Nations Unies puisque toutes les conventions de codification adoptées depuis 1961 — sauf la Convention de Montego Bay de 1982 — sont le fruit de conférences tenues à Vienne sur invitation du Gouvernement autrichien.

Mais déjà à cette étape déterminante de la codification, la participation aux conférences diplomatiques ne reflétait pas exactement la composition de la communauté internationale, et ceci était dû non pas à un manque d'intérêt mais plutôt à une carence de moyens matériels et financiers. De nos jours, une large participation d'États à une conférence diplomatique de codification serait compromise par des difficultés essentiellement matérielles. Dès lors, les États absents de cette conférence n'auraient aucun intérêt à adhérer aux dispositions établies sans eux. Par ailleurs, en raison du nombre croissant d'États membres de la communauté internationale, les ratifications requises pour l'entrée en vigueur d'une nouvelle convention de codification devraient logiquement augmenter, retardant ainsi la valeur normative de la codification.

Parmi les difficultés matérielles auxquelles il a été fait allusion, il faut ajouter le manque d'experts dans beaucoup de chancelleries où le service juridique est déjà débordé par les problèmes quotidiens.

Il y a deux autres éléments que l'on ne saurait négliger dans l'évaluation des méthodes de la codification. Il s'agit, d'une part, de l'épuisement des thèmes ou sujets mûrs pour la codification et, d'autre part, de la réticence manifestée par les États à ce que certaines matières fassent l'objet d'engagements juridiques contraignants. Ces deux éléments sont étroitement liés.

Lorsque l'œuvre de la codification en était à ses débuts aux Nations Unies, les thèmes classiques ne manquaient pas : le droit de la mer, les relations diplomatiques et consulaires, le droit des traités, la responsabilité internationale des États et la succession d'États. Vinrent ensuite des matières plus controversées ou plus novatrices dont il n'était pas évident qu'elles étaient prêtes pour être codifiées. On peut citer, sans doute, les questions relatives à l'utilisation des cours d'eau à des fins autres que la navigation, la responsabilité des États pour des actes non contraires au droit international, l'immunité des États et les crimes contre la paix et l'humanité.

Les thèmes classiques du droit international ont fait l'objet d'une codification aboutissant à des conventions internationales largement ratifiées et donc acceptées par la communauté internationale dans son ensemble. Mais il y a des exceptions notoires, à savoir les deux conventions sur la succession d'États. Ces exceptions ainsi que la crise actuelle de la codification s'expliquent par le désintérêt dont font preuve les États à voir leurs droits et devoirs clairement définis. Aux deux exemples cités, on peut ajouter pratiquement tous les sujets qui sont actuellement à l'ordre du jour de la Commission du droit international.

Sans vouloir entrer dans tous les détails, on peut se demander pourquoi la Commission du droit international devait en priorité élaborer un statut pour une cour internationale pénale. Comme en témoignent les décisions du Conseil de sécurité établissant les tribunaux internationaux compétents pour juger les violations du droit humanitaire en ex-Yougoslavie et au Rwanda, ceci ne fait pas partie d'un travail de codification normal. Rappelons que c'est le Secrétariat qui a élaboré le statut de ces deux juridictions sur la base de projets présentés par quelques États Membres. L'Assemblée générale aurait pu se dispenser du recours à la Commission du droit international pour établir un projet de statut pour une cour pénale internationale et demander au Secrétariat de faire le travail préparatoire. Il va sans dire que la création et le statut de cette cour devront faire l'objet d'un traité international.

Pour ce qui est du droit concernant l'immunité des États, en pleine mutation depuis un siècle, on peut se demander pourquoi il est nécessaire de le figer *ne varietur* dans une convention. Et quel peut être l'intérêt pour les États d'apposer leur signature sur un texte stipulant les détails de leur responsabilité internationale, que ce soit pour des actes illicites ou pour des actes non contraires au droit international ? En ce qui concerne le droit relatif aux

utilisations des cours d'eau internationaux à des fins autres que la navigation, la Commission du droit international a recommandé, lors de sa quarante-sixième session, l'élaboration d'une convention « par l'Assemblée générale ou par une conférence internationale de plénipotentiaires »². L'examen de ce projet révèle clairement qu'il s'agit d'un ensemble de règles procédurales concernant les étapes à suivre en vue de prévenir des conflits ou de les résoudre, et que la codification des règles de fond se limite à l'énoncé des principes généraux dans les articles 5 à 10. Cette « codification » n'exige nullement l'organisation d'une grande conférence. Il n'est même pas certain que la forme conventionnelle soit la méthode appropriée pour la codification de cette matière. Comme les projets émanant de la Commission du droit international sont généralement minutieusement préparés et discutés, tant au niveau des experts qu'à celui des représentants gouvernementaux, l'Assemblée générale pourrait fort bien adopter ce projet sous la forme d'une déclaration de principes.

CONCLUSIONS

Dans le premier discours prononcé lors de l'ouverture des cérémonies du cinquantenaire de l'Organisation des Nations Unies, le Secrétaire général, M. Boutros-Ghali, disait notamment que près de 300 traités internationaux ont été conclus sous les auspices de l'Organisation. C'est un palmarès impressionnant. Mais si on se limite aux traités qui sont le fruit de la codification proprement dite, ils ne dépassent guère la dizaine.

Les quatre conventions sur le droit de la mer de 1958 sont sur le point d'être remplacées par la Convention de Montego Bay. Les deux conventions sur la succession d'États ne semblent pas recueillir l'assentiment nécessaire de la communauté internationale. Reste le noyau dur des quatre conventions classiques, à savoir celles sur les relations diplomatiques et consulaires et les deux conventions sur le droit des traités. Vu sous cet angle, le résultat de l'œuvre de codification n'est pas satisfaisant. Il serait utile si l'Assemblée générale pouvait, dans un débat approfondi, se pencher sur l'avenir de la codification, sur ses thèmes et ses méthodes.

En ce qui concerne les traités et conventions conclus sous les auspices de l'Organisation des Nations Unies qui ne sont pas encore en vigueur ou pour lesquels le nombre de ratifications est insatisfaisant, l'Assemblée générale pourrait, de temps en temps, exhorter les États à les ratifier ou à y adhérer. Depuis plus de 20 ans, l'Assemblée générale adopte régulièrement des réso-

² *Documents officiels de l'Assemblée générale, quarante-neuvième session, Supplément n° 10 (A/49/10), par. 219.*

lutions dans lesquelles elle demande aux États qui ne l'ont pas encore fait de devenir partie aux Conventions de Genève de 1949 et aux Protocoles additionnels de 1977. Pourquoi ne pourrait-elle pas prendre une initiative analogue pour les traités et conventions élaborés sous les auspices des Nations Unies ?

Enfin, les méthodes d'élaboration de ces traités devraient également faire l'objet d'une étude sérieuse. La technique d'un groupe de travail restreint à composition équilibrée mais qui s'étendrait au fur et à mesure que les travaux progressent, mériterait sans doute d'être examinée de plus près.

DOES CODIFICATION LEAD TO WIDER ACCEPTANCE?

*Karl Zemanek**

A. ASSUMPTIONS AND QUESTIONS

Before attempting to answer the question put in the title, I propose to describe the generally accepted assumptions which underlie it and to raise a few questions of my own.

First, what is meant by *wider* acceptance? The words seem to imply that the acceptance of international custom leaves much to be desired and that this deplorable state may be remedied by codifying custom in treaty form. Although that assumption has never been empirically verified, two grounds are usually cited in support of its plausibility:

- (a) One being, and this further assumed, that new States in particular—and in the past 50 years the number of States has nearly tripled—may be reluctant to accept customary rules in the development of which they have not participated and which may, moreover, appear detrimental to their interests. Involvement in the codification process, so the argument runs, would provide them with the opportunity to articulate those interests and progressive development, which is inherent in the codification process, would offer the mechanism to accommodate them. It is thus argued that participation in the codification process will lead to wider acceptance of the rules concerned.
- (b) A second line of supportive arguments relies on the easier accessibility of written treaty provisions, as against the laborious determination of customary rules that may quite easily produce uncertain results if State practice is not virtually uniform, which it rarely is. This argument sug-

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gests that clearly defined treaty rights and obligations, instead of muddled custom, will lead to wider acceptance.

A second notion that needs to be clarified is *acceptance* itself. How is acceptance to be measured? By the number of parties to a codification convention? Or should one also count States which, though not parties to the convention, apply one, several or all rules embodied therein in their external relations? And, finally, is acceptance to be understood in the formal sense of becoming a party to a treaty or should it include implementation and application?

B. THE RECORD

After these preliminary remarks I shall now turn to the question asked in the title and look at the record of existing codification conventions.

Beginning with the Vienna Convention on Diplomatic Relations of 1961, nine codification conventions have been adopted under the auspices of the United Nations. Five of them are in force: the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), the Vienna Convention on the Law of Treaties (1969), the Convention on Special Missions (1969) and the United Nations Convention on the Law of the Sea (1982). Only two of them, the Convention on Diplomatic Relations with 174 parties and the Convention on Consular Relations with 151, may claim a near-universal acceptance. Middle-ranking are the Convention on the Law of Treaties with 76 and the Convention on the Law of the Sea with 67 parties. The Convention on Special Missions with 30 parties is at the tail-end.

Of the conventions not yet in force, two appear as stillborn. These are the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character of 1975, which has, in the 20 years of its existence, only attracted 30 of the 35 parties it needs to enter into force; and the Vienna Convention on Succession of States in respect of Property, Archives and Debts of 1983, which needs 15 parties to enter into force, but has as yet only 4, possibly 5. Some optimism may still be entertained for the Vienna Convention on Succession of States in respect of Treaties of 1978, which has 13 of the 15 parties required for it to enter into force, although 17 years seem a long time even for States to make up their mind. Even more optimism may be due in the case of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which has, in the 9 years since it was adopted in 1986, attracted 24 of the 35 parties it needs for entry into

force. In this respect, the 11 years which its parent Convention on the Law of Treaties needed for its coming into force provide reason for hope.

C. WHAT DOES THE RECORD TELL US?

Having regard to the assumptions and questions outlined in the beginning, the record suggests the following observations:

1. Conventions dealing with the conduct rather than with the substance of inter-State relations seem to fare best. This is indicated by the success of the diplomatic, consular and treaty conventions when compared with the dragging performance of the Convention on the Law of the Sea and the failure of the conventions on State succession.
2. Drafts dealing with matters in which material reciprocity exists—which means that most States can actually envisage themselves as claimant as well as respondent, as for instance in bilateral diplomatic or treaty relations—achieve apparently a more balanced result in the codification process and that, in turn, seems to increase their acceptability. The point may be illustrated by the contrasting example of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The burden of granting privileges and immunities to representatives of other Member States rested, in fact, with the host States of international organizations, which were only a small minority in the codification conference. The majority consisted of sending States which did not consider the possibility of hosting an international organization and were thus unrestrained in raising privileges and immunities of representatives above an acceptable level. The unfortunate result of such a configuration is made evident by the state of the convention.
3. The record does not support the assumption that participation in the codification process leads to wider acceptance. The number of States participating in codification conferences and thus involved in the formulation and adoption of the conventions has remained relatively stable over the entire period under consideration, fluctuating between 81 and 110, with the exception of the Third United Nations Conference on the Law of the Sea, which, because of the varying attendance at its many sessions, had an overall attendance of 164. No connection between attendance and acceptance can be established: the 1961 Convention on Diplomatic Relations has 174 parties and the Convention on the Representation of States in Their Relations with International Organizations

of a Universal Character has only 30, but both conferences were attended by 81 States.

4. However, another, and in view of the assumptions referred to at the beginning of this presentation, surprising element may have a significant influence on the acceptability of a codification convention. This element is the proportion of codified custom to progressively developed rules in a convention. The conventions on diplomatic and consular relations or on the law of treaties are fairly conservative instruments, but have the largest number of parties. The two conventions on State succession, on the other hand—probably the most ambitious exercises in progressive development—are not yet in force. This should not come as a surprise. The most recent cases in State succession, the dissolution of the Union of Soviet Socialist Republics and of the Socialist Federal Republic of Yugoslavia, tend to reconfirm that only a few customary rules of international law governing State succession do exist and these few rules relate mainly to multilateral treaties. Nearly all other succession problems, including those involving bilateral treaties, have been settled in negotiations of the States concerned or through special mechanisms like the Paris Club for rescheduling public debt. From these proceedings some general principles may be inferred but no definite, precise rules can be established. Considering these and similar instances leads to the tentative conclusion that it is less the involvement in the codification process which increases the acceptability of rules of customary law alleged to have hitherto not been accepted but, conversely, the amount of adjusted customary law which has been received in the text of a convention that determines acceptance. This does not imply that progressive development used for adjusting customary rules to modern requirements is a deterrent, but the evidence strongly suggests that law-inventing for ideological or dogmatic reasons is.
5. Quite a different matter is the question whether provisions in codification conventions, because of their ready availability, are relied upon by non-parties in their relations with parties or even among themselves, thereby leading to their wider acceptance. Experience tends to support that contention and one may recall instances, in particular in respect of diplomatic relations and the law of treaties. But they are difficult to measure accurately as long as they do not lead to a formal acceptance of the respective conventions once the State discovers that it is already applying them in fact.
6. Another point that cannot be verified through examining the record is the supposed attraction of written rules as opposed to custom, since it concerns a motive for accepting a codification convention which is not

normally made public. The diplomatic and consular conventions and the Convention on the Law of Treaties cover subjects that foreign office legal advisers deal with frequently, a fact that may induce them to prefer the written form. The success of these conventions may point in that direction, but the indication is not strong enough for forming a considered opinion.

7. To sum up: the record permits the tentative conclusion that codification does not necessarily but may lead to wider acceptance, provided certain precautions are observed and certain conditions met.

D. WHAT CONCLUSIONS SHOULD BE DRAWN FROM THE RECORD?

Does the record suggest any of these precautions or conditions? In this respect the following observations come to mind.

Firstly, subjects for codification should be chosen on the basis of practical needs and suitability. Only if they answer practical needs will they rally support in national administrations, support that will later be necessary for steering the convention through the national adoption process. Information about practical needs should therefore systematically be sought from foreign office legal advisers, who will also have a feeling for what is feasible. Academic interest or political highlights are not the best guidance. Lacunae in the system of international law may be attractive challenges, but only the practitioners will know whether they need closing and can be closed.

Secondly, should a subject be chosen which is not yet supported by a firm body of custom, the way in which codification is approached should be given some thought. If a substantive amount of new rules needs to be invented so that, in reality, one is embarking on a process of law-making under the title of progressive development, preparatory stages should be considered with a view to first building up a corresponding *opinio juris* among States. When a codification conference is convened, participating States should no longer view the draft as alien. A more open and more frequent dialogue between the International Law Commission and States should therefore be developed.

Thirdly, if the preparatory work of the International Law Commission does not eliminate deep-rooted differences of opinion among States, these differences should be addressed in pre-conference procedures because a large body with a time-limit set for its conclusion is a clumsy instrument for handling delicate negotiations. A result produced by a chance majority at the conference should be as much avoided as a consensus devoid of any meaning. When a chosen subject shows its unsuitability only at a late stage, it appears wiser to abandon or shelve it for the time being than to produce another still-

born convention. Even a codification convention with only a very limited number of parties creates problems: far from replacing previous customary rules, it creates a dual standard of behaviour and complicates the relations between parties and non-parties.

This brings me to my final point, a word of caution. In the modern information society, international law is part of the political process and no longer the province of an elitist circle of experts. It features in the media world and is already afflicted with the image of high-sounding promises which are not fulfilled when put to the test. It does not seem wise to add to the predicament by announcing new additions to the body of international law that do not become reality. A realistic view of what international law can or cannot do is by far preferable to Potemkin's sham villages.

STRENGTHENING THE PROCESS OF CODIFICATION AND DEVELOPMENT OF INTERNATIONAL LAW: THE EVOLVING FUNCTIONS OF THE INTERNATIONAL LAW COMMISSION AND INCREASING THE COMMITMENTS OF STATES

*Alexander Yankov**

I. INTRODUCTION

The present topic is of direct relevance to the objectives and functions of the International Law Commission (ILC) set forth in its statute, namely, "the promotion of the progressive development of international law and its codification" (art. 1, para. 1).

The ILC is the first permanent and part-time subsidiary body established by the General Assembly, already at its second session, by resolution 174 (II) of 21 November 1947. The other permanent subsidiary body of the same age is the Commission on Human Rights, set up by the Economic and Social Council.

This coincidence is an omen of the priority attributed by the United Nations to the promotion of international law and respect for human rights, the two fundamental conditions for the maintenance of international peace, security and promotion of cooperation among nations.

Considering the ways and means of strengthening the process of codification and progressive development of international law, I wish to emphasize two issues: firstly, the need to adjust the functions of the ILC to the requisites of the changing international reality with its economic, social, technological

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and political implications; and secondly, the need to indicate that the constant commitment of States is of paramount importance for the efficiency of the law-making process of the work of the Commission.

Before proceeding to the examination of these interrelated aspects of the process of codification and progressive development of international law, it might be appropriate to highlight the main features of the work of the ILC, its achievements and deficiencies.

II. BRIEF ANALYTICAL OVERVIEW OF THE WORK OF THE ILC

By the time the ILC held its first meeting on 21 April 1949, it already occupied a central part in the law-making process within the United Nations system. Since then the Commission's output has comprised 25 topics on which specific drafts have been submitted, including 14 multilateral conventions in the fields of the law of the sea, diplomatic and consular law, the law of treaties, prevention and punishment of crimes against internationally protected persons including diplomatic agents, succession of States, jurisdictional immunities of States and the law of international watercourses, to mention some of the most important among them.¹ Out of these 25 drafts, 10 conventions have entered into force;² some of the others still depend upon further ratifications or accessions,³ while the rest of them have been under consideration by the Sixth Committee in the form of draft treaty articles without final decision by the General Assembly on their future status.⁴ At present, five topics are on the agenda of the ILC, namely, "State responsibility", "Draft Code of Crimes against the Peace and Security of Mankind", "International liability for injurious consequences arising out of acts not prohibited by international law", the two new topics on the law and practice relating to reservations to treaties, and State succession and its impact on the nationality of natural and legal persons, which the Commission adopted for consideration at its forty-seventh session.⁵

¹ See *The Work of the International Law Commission*, 4th ed. (United Nations publication, Sales No. E.88.V.1), pp. 25-89.

² *Ibid.*, pp. 164-395.

³ We have in mind the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Unilateral Character, of 14 March 1975, the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 8 April 1983.

⁴ In this group fall the draft articles on the most-favoured-nation clause, status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, jurisdictional immunities of States and their property, the law of non-navigational uses of international watercourses, and the draft Statute of the International Criminal Court.

⁵ See *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10)*.

It has been widely recognized that the main source of the remarkable contribution of the ILC has been the area of prevailing customary rules.⁶ The overwhelming majority of the topics that have been taken up by the Commission so far have been within the realm of the "traditional" or "classic" international law, such as diplomatic and consular law, law of the sea, treaty law, State succession, rights and duties of States, nationality, including statelessness, and arbitration. Of course, the programme of work of the Commission has listed some topics which reflect the emerging new problems of international relations concerning liability for risk, environmental impact assessment and prevention of environmental damage and the law of confined international groundwaters.

This brief overview of the work of the ILC during the past nearly five decades raises many pertinent problems relating to legal policy and practical propositions concerning the method of work and operation of the Commission in the pursuit of its objectives and the discharge of its functions. There have been serious critical observations on the role of the Commission, expressing reservations over its competence and even questioning the value of its work in the future.⁷

Many of the critical observations and suggestions were well founded and constructive, while some evaluations, conclusions and proposals might provoke reasonable doubts.

It is not our task to enter into detailed examination of the merits of what has been said about the ILC. Perhaps having in mind the approaching fiftieth anniversary of the Commission, it might be beneficial to take advantage of the present important gathering of international lawyers from various walks of theory and practice of international law in order to explore the conceptual

⁶ See Oscar Schachter, "United Nations law", *American Journal of International Law*, vol. 88 (1994), pp. 4 and 5; also "Recent trends in international law-making", *The Australian Yearbook of International Law*, vol. 12 (1988-1989), pp. 3 ff.; José Sette-Camara, "The International Law Commission: Discourse and Method in International Law at the Time of Its Codification", *Essays in Honour of Roberto Ago*, Milano, Dott. A. Giuffrè Editore, 1987, pp. 468 ff.; S. Rosenne, *The International Law Commission, 1949-1959*, 36, *The British Yearbook of International Law*, vol. 36 (1960), p. 104 ff.; H. Briggs, *The International Law Commission*, 1965, The Hague; I. Sinclair, *The International Law Commission, 1987; Strengthening the Role of the International Law Commission during the Decade of International Law: Report of an Experts' Round Table*. Panel: Speaker: Professor B. Graefrath, Chair: Professor Louis Henkin, 29 May 1992, United Nations.

⁷ See *The International Law Commission: The Need for a New Direction*, by Mohamed El Baradei, Thomas Franck and Robert Trachtenberg, UNITAR Policy and Efficacy Studies No. 1, United Nations publication, Sales No. E.81.XV.PE/1 (1981) (hereinafter referred to as UNITAR Study); B. Ramcharan, *The International Law Commission—Its Approach to the Codification and Progressive Development of International Law* (1977); B. Graefrath, "The International Law Commission tomorrow: Improving its organization and methods of work", *American Journal of International Law*, vol. 85 (1991), pp. 595 ff.; Franck and Trachtenberg on the UNITAR Study, *American Journal of International Law*, vol. 76 (1982), p. 638.

and practical remedies for enhancing the efficiency of the Commission in the process of progressive development of international law and its codification.

Among the multitude of questions which a scrutiny of this kind may require, there are two main problem areas to be examined. First, the general legal policy issues facing the ILC in the determination of its future role in the law-making process within the United Nations system. There seem to exist two trends or schools of thought. One of them considers that since the Commission declined to assert its competence over newly emerging problems, such as outer space, the legal aspects of global environmental issues, new problems of the law of the sea, international economic law, some legal aspects of technological development, and so forth, this policy of the Commission "set the stage for proliferation of more ad hoc bodies".⁸ It is assumed that the Commission should, as in its early years, play the central part in the law-making process within the United Nations system. This would mean that the ILC should be a kind of a monopolistic omnibus group of experts that will feel competent to prepare drafts for legal instruments in all areas of international law.

The other policy option might be to admit that the proliferation of various bodies involved in the law-making process should be considered as a normal phenomenon in the present and future world order where "there is a proliferation of international rules and standards, whatever their precise legal status. They extend to virtually every field of human activity that transcends natural boundaries."⁹ In this situation the existence of a plurality of agents involved in the law-making process should not be qualified as a negative result deriving from the "ILC declining to assert its competence".¹⁰

In any case these policy matters deserve proper examination.

The legal policy problem area should comprise also the examination of the criteria for the selection of topics, their priorities and the end-product of the work of the ILC. The past experience in treaty-making has provided convincing evidence that as far as the selection of topics is concerned, the ILC, as a body of legal experts, should try to avoid topics which are not ripe for elaboration of legal rules or which are overcharged with opposing political considerations. It is advisable that such matters be taken up by organs of representatives of States. Issues of this kind usually require negotiations and political decisions regarding the end-product, and legally binding instruments, such as conventions and other multilateral treaties or guidelines, model rules, codes of conduct and the like.

⁸ See *American Journal of International Law*, vol. 76 (1982), p. 632.

⁹ Oscar Schachter, "Recent trends in international law-making", *Australian Yearbook of International Law*, vol. 12, p. 1.

¹⁰ UNITAR Study.

The second category includes problems relating to the methods and techniques of work of the Commission. It should be pointed out that the ILC, though not a legislative body, should always have in mind how the end-product of its activity might adequately serve the final stage of the law-making process by submitting drafts that will meet the requirements of stability and innovation, satisfy a feasibility assessment and take into account the expected practical effects of the implementation of the rules proposed.

The examination of these two problem areas may give rise to many questions about the future role of the ILC and its *modus operandi*. How to accelerate the elaboration of draft articles without upsetting their quality? How to respond to the new developments in the absence of customary rules and coherent State practice and precedents? How to ensure active and permanent cooperation with States and competent international organizations?

These and other related questions have been raised on many occasions in the Sixth Committee, in the sessions of the Commission and in other forums. There is hardly a simple answer to these queries. Perhaps the fiftieth anniversary of the International Law Commission in 1999, which will coincide with the closing stage of the United Nations Decade of International Law, might provide an opportunity to consider an analytical study of the work of the Commission. The deliberations of the present Congress certainly may offer a valuable contribution to such a review on the part of the ILC in the progressive development of international law and its codification during the past five decades.

III. THE EVOLVING FUNCTIONS OF THE ILC IN THE CONTEXT OF THE INTERPLAY BETWEEN CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND THE DILEMMA OF FIRM LAW—SOFT LAW

The formula “progressive development of international law and its codification” goes back to the phrase used in the recommendations of The Hague Advisory Committee of Jurists to the Council of the League of Nations in 1920.¹¹ Since then this formula has been embodied in Article 13, paragraph 1*a*, of the Charter of the United Nations, followed by articles 1 and 15 to 17 of the statute of ILC.

Article 13, paragraph 1*a* of the Charter states:

“1. The General Assembly shall initiate studies and make recommendations for the purpose of:

¹¹ See “Historical survey of development of international law and its codification by international conferences. Memorandum prepared by the Secretariat”, 29 April 1947 (A/AC.10/5); also, *The Work of the International Law Commission*, pp. 1-5; Sette-Camara, op. cit.; Briggs, op. cit.

- a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification”.

The expression “progressive development of international law and its codification” was embodied in the most important provisions of the statute of the ILC, defining its object and functions. Article 1, paragraph 1, of the statute stipulates:

“1. The International Law Commission shall have for its object promotion of the progressive development of international law and codification”.

The distinction between the two components of the functions of the ILC, namely, progressive development of international law and its codification, is embodied in article 15 of the statute, which specifies that:

“ In the following articles the expression ‘progressive development of international law’ is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression ‘codification of international law’ is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine”.

Articles 16 and 17 of the statute deal with the procedural rules and techniques to be followed by the Commission as methods of work when considering proposals and draft multilateral conventions. Though these two articles are under the heading “Progressive development of international law”, in article 17, paragraph 1, when dealing with the procedure for the consideration of proposals and draft treaty articles submitted to the ILC by Members of the United Nations, its “principal organs . . . other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement”, the expression “progressive development of international law and its codification” is employed. This fact is another affirmation of the explicit qualification in article 15 that the distinction between “progressive development” and “codification” is used for convenience.¹²

Furthermore, the ILC already in 1956 reiterated its understanding that:

¹² See the same interpretation of José Sette-Camara, *op. cit.*

“ . . . the distribution established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already ‘sufficiently developed in practice’, but also several of the provisions adopted by the Commission based on a ‘recognized principle of international law’ have been framed in such a way as to place them in the ‘progressive development category’. Although it tried at first to specify which articles fall into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either”.¹³

The work of the Commission during the following years provided further grounds for the consolidated method and techniques in law-making, whereby “codification” and “progressive development of international law” were integrated into one coherent approach. In the view of Dr. R. Cordoba, expressed as early as in 1956, “there is general agreement that codification without the possibility of suggesting new law is an endeavour condemned to sterility”.¹⁴

Certainly, custom and State practice have the advantage of providing a reliable and firm basis for the promotion of rules of international law. However, in a dynamic development which has taken place, custom may often remain behind the challenges of emerging new fields of international relations requiring adequate new rules. Consequently, the functions of the ILC in the future should be adjusted accordingly in order to respond to the basic purpose of the ILC, namely, “the promotion of the progressive development of international law and its codification”.

In addition, we have witnessed the continual shrinking of the area of the so-called “traditional” or “classic” international law and the number of topics therein which might be feasible for codification.¹⁵ There is no simple answer and easy solution to this problem.

However, it is obvious that State practice will inevitably follow new developments and will stimulate the emergence of precedents. The developments in the field of outer space, atomic energy, modern communications, informatics, protection of the environment and other human activities with international dimensions have offered new opportunities for standard-setting

¹³ *Yearbook of the International Law Commission*, 1956, vol. II (A/3159), paras. 25-27; and A/35/312/Add.2, p. 8.

¹⁴ See Dr. R. Cordoba, in *United Nations: Ten Years Legal Progress. Collection of Essays*, The Hague, 1956, p. 45.

¹⁵ See statement by Professor B. Graefrath in *Report of an Experts' Roundtable*, supra note 7, p. 232. However, in our view this phenomenon and its implications should not be overemphasized. Compare the statement of Professor Oscar Schachter in the same report, p. 3.

and enforcement, needing, as they do, regulatory frameworks and mechanisms. General principles and rules of international law, deriving from custom, are needed to provide the stability of rules governing the relations between States and other entities with legal personality recognized by international law.

The consolidated method and integrated approach to the law-making process will make available new opportunities for a variety of international instruments and innovative techniques. While multilateral conventions should remain the main end-product of the work of the ILC, there is a need to look for other options. This should be considered as a new trend in the evolving functions of the ILC. The consolidated method and techniques of the work of the ILC and its integrated approach to law-making bring to mind the interplay between firm law and soft law. As Oscar Schachter has pointed out, "The choice between treaty and non-treaty codes cannot be determined in abstract. Which is preferable or feasible depends on the subject in the light of needs and attitudes. Both processes will continue to be utilized and we can safely anticipate that, in one form or another, 'progressive codification' will continue".¹⁶

The ILC, following the advice of the Sixth Committee or the relevant resolutions of the General Assembly, as the case may be, should be open to any appropriate model—binding multilateral conventions or framework conventions, declarations of principles, codes of conduct, guidelines, model rules and any other type of international instrument acceptable to States.

The main feature of soft law is, first of all, a common agreement about the legal nature of the instrument, entailing shared motives and respect of its object. The parties to a non-legally binding arrangement are, nevertheless, under a moral and political obligation to observe their undertakings. From a procedural point of view, a non-treaty instrument should meet the normal rules of decision-making. The language of the instrument depends on its purpose and on the significance attributed to it by the parties.¹⁷

Of course, the legally non-binding instrument should meet all requirements for adequate expression of the common intent formulated in clear provisions, applying the same standards of draftsmanship as the ones applied to multilateral legally binding instruments. The non-observance of such essential requisites may defeat the significance and credibility of such instruments, as has been rightly pointed out by some writers on this subject.¹⁸

¹⁶ Schachter, *Australian Yearbook of International Law*, vol. 12, p. 7.

¹⁷ For more details about the concept, components and significance of a soft-law instrument, see Franck and Trachtenberg, *American Journal of International Law*, vol. 76 (1982), p. 443.

¹⁸ See Schachter, *Australian Yearbook of International Law*, vol. 12, p. 14.

When the ILC is involved in the elaboration of drafts for non-binding instruments, it should apply the same standards and care for credibility as would be applied with respect to draft treaty articles. The exercise of new legal techniques will be a test for the Commission to adjust its functions to the needs of modern law-making. It might be a way to promote further the progressive development of international law and its codification. Soft law may serve as a catalyst for its transformation into hard law. It suffices to mention that a number of General Assembly resolutions and declarations triggered the process of the adoption of such important conventions as the International Covenants on Human Rights and other multilateral conventions in the field of human rights, outer space, protection of the environment and many other areas of contemporary international law.

IV. ENHANCING THE COMMITMENT OF STATES IN THE PROCESS OF PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION

The methods and techniques of work of the ILC have been the subject of regular review since its establishment. Proposals concerning the organization and operation of the ILC have been made both within and outside the Commission itself. The proposals advanced as a result of these reviews and analytical studies cover a wide range of topical issues relating to rethinking of the treaty-making consolidated methods, periodic considerations of the programme of work, the selection of priority topics and many related matters.

We shall confine this presentation to one crucial problem, namely, the relations of the Commission with States with a view to enhancing their commitment in the law-making process. The relations of the ILC with the Sixth Committee and legal advisers of Governments are of crucial importance.

The commitment of States in the process of progressive development of international law and its codification may be considered in three working stages:

- Firstly, the selection of topics to be included in the work programme of ILC and the determination of their order of consideration and priority;
- Secondly, interaction between the ILC and the Sixth Committee and competent governmental offices, in particular legal advisers and their staff, in the process of elaboration of the drafts by the Commission;
- Thirdly, the role of the ILC and the Sixth Committee in the process of ratification, accession and implementation of the instruments adopted under the auspices of the United Nations.

The selection of appropriate topics to be included in the long-term and current programme of work of the ILC is an essential part of the whole process of law-making. The main criteria for selection should be the assessment of the pressing needs of the international community, identifying topics designed to provide practical responses to key issues of legal policy in various areas of international life and selection of topics fairly manageable with regard to their requirements. These guidelines were adopted by the ILC at its forty-second session in 1990. The interaction between the ILC and the Sixth Committee has to be continued with periodic reviews and adjustments. The Commission should submit its suggestions to the Sixth Committee and seek instructions from it. In general, the initiative for the establishment of a list of topics and their priority should be taken by the Sixth Committee. Consultations about the feasibility of a topic already included in the programme of work may be reconsidered by the Sixth Committee. It has been an unfortunate practice that the viability of a topic assigned by a General Assembly resolution for consideration by the ILC has been questioned after the Commission had completed its consideration (on second reading) 10 or more years after the date of the assignment. Regular consultations and timely instructions would avoid such an abnormal situation, which causes an unwarranted waste of human and financial resources. Therefore, States are requested through the Sixth Committee to determine their position and interest in the proposed draft articles.¹⁹

The interaction between the ILC and the Sixth Committee should provide a clear indication of the needs and ripeness of the proposed topic in the form of a proposal formulated by the Sixth Committee. On its part, the ILC should suggest well-elaborated answers and clear suggestions. Direct contact with legal advisers is most desirable at this stage of the law-making process.

With regard to the third stage—ratification, accession and implementation of multilateral conventions—there are many serious problems. First of all, undue delays have been one of the most disturbing drawbacks, causing serious concern already in the League of Nations. A special report was submitted in 1930 which contained suggestions for expediting the process of ratifications. The late Judge Roberto Ago, in his capacity as a member of the ILC, had prepared a special memorandum entitled “The final stages of codification of international law”, considered by the ILC in 1968.²⁰ States were requested to report on the reasons for delayed ratifications. Unfortunately, the Sixth Committee did not take action on the memorandum. The programme

¹⁹ See B. Graefrath, “The International Law Commission tomorrow: improving its organization and methods of work”, *American Journal of International Law*, vol. 85 (1991), p. 600.

²⁰ See *Yearbook of the International Law Commission 1968* (A/CN.4/205/Rev. 1), vol. II, pp. 171-177.

of the United Nations Decade of International Law contains a special item on the promotion of the acceptance of multilateral treaties—an item picked up in the replies received from Governments. Unfortunately, this part of the annual reports of the Secretary-General has been very modest, if not disappointing. Perhaps the reasons for delays in ratification vary from one State to another and from one multilateral treaty to another. However, the summary result is the same. It might be appropriate to undertake a specific examination and discussion of this problem. The United Nations Decade of International Law might provide an opportunity for such an initiative.

V. CONCLUSIONS

In the analytical and critical scrutiny of the work of the ILC, the United Nations Institute for Training and Research (UNITAR) Study pointed out that:

“The Commission is also the only legal body of the United Nations which has the mandate to consider any area in the field of international law. It therefore comprises a pivotal place in the United Nations law-making system”.²¹

The ILC could fulfil its mission if it were able to adapt its functions to the new realities. The Commission is called to reassess its organization and programme of work and to improve further its consolidated and integrated method and techniques. The fiftieth anniversary of the Commission should mark a new stage in its endeavours to accomplish its mission for the promotion of international law.

²¹ UNITAR Study, p. 3.

OPEN-FLOOR DISCUSSION

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. ERIC SUY

Mr. Ferencz* pointed out that it had been 75 years since the League of Nations had called for the progressive development of international law. But if more progress was to be made in that field, which dealt in particular with new priorities, some new thinking was required. Mr. Suy had indicated that the creation of a permanent international criminal court must take place via the treaty route. However, as early as 1945, the United States, for example, had insisted on the conclusion of a convention on genocide; yet 40 years had elapsed before it had ratified that convention, subject to numerous reservations that had virtually rendered it ineffective. On the other hand, the Security Council had recently managed to create an ad hoc international criminal tribunal for the former Yugoslavia in a matter of weeks, with the help of the Secretariat and the approval of the General Assembly, which had to fund the tribunal. That tribunal was about to function, as was the tribunal for Rwanda. If the treaty approach were followed, it was inconceivable, he said, that in his lifetime he would see a permanent court to deal with urgent priorities such as aggression, genocide and other atrocities. He therefore appealed to the international legal community to accord the subject due respect, using its creative imagination and following the precedents it had itself created, precedents which showed that rapid action was possible where the will existed. The matters in question represented threats to the peace and the Security Council was authorized to eliminate such threats.

Mr. Falomo** referred to Mr. Suy's remark regarding the effects of the failure of States to ratify treaties codifying their customs. Given the fact that the two Vienna Conventions on succession of States had been ratified by an

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insufficient number of States and that there was relatively little enthusiasm with regard to them, he would like to know whether one could still consider those two conventions, in particular the Vienna Convention on Succession of States in respect of Treaties, as codifying existing custom, or whether one must consider that the absence of participation in those conventions was an indication not only that they did not codify custom, but that the supposedly customary norms they contained were in fact threatened, due to the absence of participation, with becoming obsolete.

Mr. Salinas* referred to the change that the procedure followed by the Security Council in the establishment of the international criminal tribunals for the former Yugoslavia and Rwanda was effecting in the process of formation of international norms. He wondered to what extent the convention approach to the creation of the juridical branch was going to be replaced, owing to the slowness of the creation of international treaties, by the adoption of resolutions by the Security Council.

Mr. Suy (reply) pointed out that he had stated in his presentation that the convention method would have to be followed for the creation of the permanent international criminal tribunal because it was the only approach that might win the participation of States. The method of handling the tribunals for the former Yugoslavia and Rwanda had in fact been criticized on the grounds that the creation of a tribunal was not a matter for the Security Council. The argument in favour of that method was that it was expeditious, whereas the treaty approach, one could not deny, would have taken years. The Security Council had based its decision on the view that the situation involved a threat to international peace and security.

Regarding Mr. Ferencz's comment, the Security Council, in order to be able to create a permanent court, would first have to determine that there was a threat to the peace. Such an approach might be adopted in a specific case, such as that of Yugoslavia, Rwanda or others, but not for the creation of a permanent court, which had not, as yet, any application. Nor could such a court function without a code of international crimes, but that too, in his opinion, would have to be established by a convention, for it could not be created by a simple declaration of principles.

He thought he had answered Mr. Falomo's question by citing Judge Baxter, with whom he agreed that the absence, after many years, of sufficient ratification of the two conventions on succession of States would weaken them

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and divest of effectiveness any norms codified in them. A recent textbook case in the succession of States had been settled almost perfectly by a bilateral treaty, the last one concluded by the German Democratic Republic. The treaty between the two Germanys was an extremely detailed document that governed virtually every problem of succession, totally disregarding codified rules. The difference between the negotiated text of the treaty and the content of the two conventions was enormous: the bilateral convention was practical and realistic, while the two codification conventions stated general principles that were not highly applicable in practice.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. KARL ZEMANEK

Mr. Ress* welcomed Mr. Zemanek's cautious remarks regarding the ability to codify customary international law. He wondered to what extent the fear of double regimes influenced the behaviour of States in the process of ratification. He would also like to know what the validity was, in Mr. Zemanek's view, of clauses in international treaties which tended to be *erga omnes* treaties, such as those in chapter XI of the Convention on the Law of the Sea, which purported to be an exclusive codification of international law in a field that was very dynamic and creative. Might not such clauses perhaps be counterproductive?

He was also interested to know what kind of treaties were codified, a question addressed also to Mr. Yankov, who had discussed the possibility of codification based on non-binding treaties. Indeed, there was a tendency among States to have recourse to such instruments because of the difficulty of obtaining parliamentary approval for the ratification of binding international treaties. He recalled the Helsinki Final Act and related rules and wondered whether that was the kind of codification that should be envisaged and what binding element was to be found in it. Yet in order to create a commitment of the State on substantial matters, was approval not required, at least in most States, not only by Governments but also by the democratic organs of the State? Social scientists might of course say that social and moral norms also had a binding character and that there was not a profound difference between them and legally binding norms. He therefore wished to ask Mr. Zemanek and particularly Mr. Yankov whether one could really speak of codification of law if States had ever-increasing recourse to non-binding instruments and, if so, what its value was.

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Ms. Brown Weiss* said that the rapid change that characterized modern society, especially in the area of science, entailed the need for rapid response and progressive development of international law, which could not always wait for custom. Sometimes it took the form of binding agreements and, other times, non-binding agreements, which were easier to negotiate, precisely because they did not need approval by national legislative bodies, and might be easier to update when necessary. She wondered whether, even in the absence of codification in a particular area, there might not be a broader role for the International Law Commission in educating States and international and non-governmental organizations regarding both new and pending issues so that, in time, one could have a considered response and a proper evaluation of international law in the handling of new issues and problems.

Mr. Tshiyembe** remarked that Mr. Zemanek had concluded that codification and ratification were hindered by the political nature of public international law, whereas ratification was facilitated in the case of codified international custom. In view of the upheaval of international society, he wondered whether there was not an advantage in having public international law relate closely to the facts, or, in other words, take into account existing power relations, including competing national and worldwide issues, which would make it alive, or must one content oneself with dealing with areas already regulated by codified customary practice, in which there were no real issues. In other words, were those two aspects of international law not, as he believed, complimentary, rather than contradictory or paradoxical?

Mr. Treves*** said that he disagreed on certain points with Mr. Zemanek's analysis. Recent experience has shown that many unratified or even so-called "stillborn" conventions exerted an influence. For instance, when the question of the Mission of the Palestine Liberation Organization to the United Nations had arisen, the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, cited as a prime example of a "stillborn" convention, had been used as if it had been law. Moreover, the Convention on the Law of the Sea, for which there were currently 73, not 67, ratifications, had been cited many times by the International Court of Justice and other tribunals, not only before it had entered into force, but even before being opened for signature.

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Participation in the codification process was very important. As Ms. Brown Weiss had said, it meant education and, for new States, it also meant trying to influence not only codified results, but also custom. As frequently stressed by the late Roberto Ago, codification had performed, over the previous three decades, the enormous task of involving new States in the old international law.

Mr. Zemanek (reply) noted that all the questions addressed to him, apart from that of Mr. Treves, had to do with what one understood by international law: in other words, whether one was satisfied with exhortations or was looking for something applied and implemented. As he had mentioned in his speech, in cases of new law involving controversy, it was necessary to build up *opinio juris*. One should state explicitly, however, that one was building *opinio juris*, but not yet pronouncing law.

With regard to the question addressed to Mr. Suy on the tribunals in Bosnia and Rwanda, it was not obvious that the tribunals worked. Indeed, it was extremely difficult for States that adhered to the rule of law to implement their decisions and in extradition cases it was necessary to convince the courts to extradite. It had been possible to create the tribunals in question because of enormous pressure of public opinion, but in cases where that was not true, he doubted that a resolution could be implemented. Moreover, only when he had seen the cases against not just minor criminals but the true war criminals would he be convinced that the tribunals worked.

Turning to Mr. Treves's question, he had stated that he realized stillborn conventions might have an influence. Moreover, he was well aware that the Vienna Convention of 1975 had been cited. It was the privilege of the International Court of Justice to do so, but one was also allowed to disagree with the Court. As far as the early application of the Convention on the Law of the Sea was concerned, Mr. Treves had overstated his case, because customary rules of international law regarding, for instance, the exclusive economic zone had been created long before the treaty's entry into force. Thus he and Mr. Treves were not convinced by each other's arguments.

Mr. Yankov* (reply) said that he agreed with Mr. Ress's reasoning regarding the possibility of non-binding treaties qualifying as codification. Indeed, if one stayed within classic bounds, an instrument that was not legally binding could not be deemed the end-product of codification. However, codification should not be viewed solely as the technical means of producing

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a convention, but rather in a broader way, as a dynamic process. Mr. Treves's point about the Convention on the Law of the Sea being cited even before it was called a "draft convention" was a clear example. Parliaments, bilateral and multilateral treaties and the International Court of Justice referred to such instruments. Though the conventions on succession, for example, did not constitute codification *stricto sensu*, they had exerted an impact on the lawmaking process, as in the case of the Badinter (Arbitration) Commission on the former Yugoslavia, where they had been cited as if ratified by all the members of the Commission. Mr. Ress had also mentioned the Helsinki Final Act, which, though not a treaty proper, had exerted much greater influence than many ratified conventions. Consequently *opinio juris* was not the only criterion for an international instrument that had all the qualifications for affecting the conduct of States other than responsibility for non-performance of obligations. Moreover, State responsibility might one day be considered as going beyond the traditional concepts.

He agreed with Ms. Brown Weiss that the International Law Commission should exercise an educational function. In addition to the seminars that had been held for many years for young lawyers and young diplomats, the lectures and seminars on various topics, including the agenda of the General Assembly and the Gilberto Amado Memorial Lectures, to which persons from the international law community were invited, more could and should be done. The decision of the International Law Commission to produce, on the occasion of the United Nations Decade of International Law, a book of contributions by members of the International Law Commission might also come under the heading of education, broadly speaking.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION BY MR. ALEXANDER YANKOV

Mr. Villagrán Kramer* pointed out that codification and progressive development were topics that needed some clarification, in view of the widespread uneasiness regarding them. If codified rules existed independently of any treaty, he wondered why there should be a treaty, since he could not understand the reason, from a purely juridical point of view, for the existence of a convention that was a written testimony of existing rules. The International Court of Justice itself had frequently said precisely that, with regard, for

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example, to the articles of the Convention on the Law of Treaties pertaining to interpretation and termination. The declaratory approach was perhaps more effective and would solve many existing problems. The work on topics such as the diplomatic courier and jurisdictional immunities of States represented clear examples of efforts of the Commission that were unable to move forward.

He also asked Mr. Yankov to consider at what point the International Law Commission might be authorized to become a pre-negotiating organ in the case of rules representing progressive development of international law. Despite the efforts of Commission members to seek common denominators, the subjects being developed made negotiation indispensable, but the statute of the Commission did not authorize such negotiation. His question, he felt, was somewhat audacious.

Mr. Pellet* said he believed the proliferation of bodies for the elaboration of juridical instruments within the United Nations was healthy and showed the vitality of international juridical activity and the need for law in the international community. It also showed that the International Law Commission did not and could not have a monopoly on the elaboration of law within the United Nations. The Commission, being made up of independent experts, could not impose on States drafts relating to politically charged topics over which the international community was deeply divided. However, one must not confuse politically charged topics with controversial subjects, which might very well be taken up by the Commission, provided that it objectively presented the different possible approaches and remained attentive to the reactions of States, expressed either in the Sixth Committee of the General Assembly or in commentaries on draft articles. Nor was the Commission equipped to deal with subjects entailing sophisticated technical, economic or environmental studies. Finally, though the addition of progressive development to codification *stricto sensu* imparted a certain flexibility to the Commission's approach, the Commission was not a political organ of negotiation and must always rely on existing law, developing it as necessary.

In the light of those considerations, it seemed excessive to reproach the International Law Commission with plunging into risky topics. If it had been wrong in the past regarding the suitability of certain topics for codification, it was not alone, for its topics had been approved by the General Assembly after in-depth discussions. On the contrary, the five topics on its agenda seemed reasonable. They related to law that was fairly classic and

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were perfectly well suited for codification, including a reasonable proportion of progressive development. The only risk might be an attempt to use the draft on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law to codify all international law on the environment. He strongly hoped the Commission would continue to resist that temptation.

He felt the time had come for the International Law Commission to conduct a serious review of its working methods with a more open mind than in the past and regretted that Mr. Yankov had not mentioned the need for such a review.

Mr. Bankobeza* wondered whether Mr. Yankov had any views on the criticisms levelled against the International Law Commission to the effect that in the past it had taken the Commission too long to examine certain topics referred to it for consideration by the General Assembly and to finalize the related legal instruments.

Mr. Mendelson** observed that some existing customary international law or State practice was ripe for codification, while some, for political or other reasons, was not. There existed theoretical problems of customary international law, at least some of which he hoped the International Committee of the International Law Association might help to resolve. One major practical problem was the difficulty of ascertaining what the practice of States actually was. The United Nations Legislative Series was a useful contribution in that area. It might also be helpful if the International Law Commission, in addition to creating legal instruments, collected, classified and compared examples of State practice, preferably without expressing any view *ex cathedra* as to its normative character. In the International Court of Justice, the Court and counsel often had relative leisure to gather and examine the practice in question. For a legal adviser, practitioner, academic or tribunal that did not have that leisure, such a collection would be most useful.

Mr. Yankov (reply) pointed out that the advantage of a formal convention, in answer to Mr. Villagrán Kramer's question, was that it created greater clarity, precision and stability in ascertaining rights and obligations than did resolutions or unwritten customary rules, especially in highly technical fields.

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As to the question when the International Law Commission would take up negotiation, the Commission was a body of experts, not a legislative body. Having no legislative power, it could not embark on negotiations to bind States. However, as Mr. Villagrán Kramer was well aware, the Drafting Committee of the International Law Commission, being the focus of the Commission's action, did engage in negotiation, albeit in a personal capacity.

He thoroughly agreed with Mr. Pellet that the Commission should continue to adhere to its serious approach to the elaboration of legal instruments, avoiding involvement in areas where the conditions were not yet sufficiently met for proper law-making or issues that were overcharged with opposing political considerations, however interesting such issues might appear.

He felt that, although the criticism regarding the lengthy periods required by the Commission to arrive at its end-product, mentioned by Mr. Bankobeza, was correct, patience had been very largely responsible for the Commission's positive results. That did not mean that its working methods should not be improved. In that regard he agreed with Mr. Pellet's remarks and his paper in fact included a reference to the need for such improvement, which he had omitted in reading in order to save time.

He was not prepared to reply to Mr. Mendelson's remarks regarding the collection of information on practice, which were very interesting and should be considered by the Commission. Such work might also be done by the Secretariat or by others, but he saw no reason why the Commission should not undertake it.

COMMENTS AND SUGGESTIONS OF A GENERAL NATURE

Mr. Cárdenas,* replying to Mr. Forbes, stated that cooperation between organizations such as the International Bar Association and the United Nations was possible in so far as it did not interfere with the Organization's inter-State work proper. Outside that sphere, he was sure there were abundant areas for such cooperation.

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DEMOCRATIZATION OF INTERNATIONAL RELATIONS AND ITS IMPLICATIONS FOR THE DEVELOPMENT AND APPLICATION OF INTERNATIONAL LAW

*Christopher W. Pinto**

My purpose is to share with you some thoughts on whether “democracy”, a form of governance which evolved within a community of human beings, may be applied in the quite different context of a collectivity of States. In so doing, I shall refer to the context in which the call for “democratization of international relations” has been presented; mention the elements of principle which, I think, combined at a particular time in the post-colonial period to inspire this trend; explore the extent to which some aspects of democracy have, in fact, been transposed from the human level to that of the collectivity of States, with implications for treaty-making under the auspices of the United Nations, and for the functioning of international institutions; and suggest some areas in which the process of democratization, with limited goals, may continue in future.

I. THE CALL FOR “DEMOCRATIZATION OF INTERNATIONAL RELATIONS”

For most of us, the term “democracy” brings to mind the counting of votes, the aggregation of preferences for the purpose of deciding an issue, or election to public office, by sheer weight of numbers. It means the right of all persons of a prescribed age of maturity who are not affected by some disability prescribed by law to participate in that decision or election. Of course,

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democracy does imply that the votes of a majority will prevail, but it also means a great deal more: it means, for example, the fair representation of interests in a legislative assembly; it means that in a representative democracy the people retain power over decisions that affect them through holding regular elections to representative office; it means constitutional protection of minority positions; and it means a separation of governmental functions to provide “checks and balances”, ultimate authority being vested in an independent judiciary with power to determine whether governmental action accords with the constitution or fundamental law.¹

But it was a vision of democracy as the triumph of numbers—of the views, and thus the projects, of the great majority of the world’s peoples—that inspired the developing countries and the non-aligned to call for the “democratization of international relations”, and continues to do so today. Thus, at the first meeting of the United Nations Conference on Trade and Development (UNCTAD) in 1964, the Group of 77 insisted that the Trade and Development Board take decisions by a two-thirds majority, since they attached:

“cardinal importance to democratic procedures which afford no position of privilege in the economic and financial, no less than in the political spheres.”

“Democratization of international relations” has been a stated goal of the Movement of Non-aligned Countries at least from the time of its Lusaka

¹ The following passage from a work by Charles Beitz captures admirably the essence of the democratic process:

“. . . the central virtue of democratic forms is that, in the presence of a suitable social background, they provide the most reliable means of reaching substantively just political outcomes consistently with the public recognition of the equal worth or status of each citizen. Democratic forms succeed in achieving this aim . . . less because they aggregate existing preferences efficiently than because they foster a process of public reflection in which citizens can form political views in full awareness of the grounds as well as the content of the [possibly competing] concerns of others . . . we must understand [democracy] as a deliberative mechanism that frames the formation and revision of individual political judgments in a way likely to elicit outcomes that treat everyone’s interests equitably”. (*Political Equality: An Essay in Democratic Theory*, Princeton University Press, 1989, p. 113).

For a survey of aspects of the attractiveness and viability of modern democracy, see Professor Dunn’s masterly concluding essay in John Dunn (ed.), *Democracy, the Unfinished Journey, 508 B.C. to A.D. 1993* (Oxford University Press, 1993, pp. 239 ff.).

meeting in 1970,² and was reiterated forcefully in its Jakarta Message in September 1992.³ The idea that democracy should prevail “within the family of nations” received endorsement from the Secretary-General of the United Nations in his report entitled “An Agenda for Peace” in 1992 (A/47/277-S/24111, paras. 19 and 82), while “expanding democracy in relations among States and at all levels of the international system” is suggested as an aspect of a fifth “dimension of development” in the Secretary-General’s report entitled “An Agenda for Development”, issued in 1994 (see A/48/935, paras. 118-138, especially para. 131).

It is important to bear in mind that democracy evolved as a form of governance among natural persons, human beings within a discrete legal and political unit. We may search in vain for any suggestion that “democracy” prevailed or should be adopted as the constitutive principle in the world of States before the decade of the 1960s, in retrospect, the decade of decolonization. The term is not used in such a context—or, for that matter, in any context—in the Charter of the United Nations or the Statute of the International Court of Justice, nor until recently was it used in the constituent instrument of an international organization or, for that matter, in any multilateral convention. No treaty seeks to secure for States the equivalent of the right of the citizen described in article 25 of the International Covenant on Civil and Political Rights. It would thus seem impossible to derive the prevalence of an “inter-State” democracy from the practice of States.

II. ORIGINS IN PRINCIPLE

However, four elements of such a concept did exist unsynthesized at the inter-State level. Thus, the doctrine of *sovereignty*, developed among European thinkers from the fifteenth century on, would eventually strengthen units of the Holy Roman Empire in the exercise of their rights, recognized by the Treaty of Westphalia, to form alliances with “foreign” Powers or to make war. A second doctrine, that of the *equality of States*, had its roots in Christian theology. It held that, as human beings were equal before God and were entitled

² “The democratization of international relations is therefore an imperative necessity of our times” (UNITAR/DS/1, p. 196, Lusaka Declaration on Peace, Independence, Development, Cooperation and Democratization of International Relations, para. 7).

³ A/47/675-S/24816, annex, The Jakarta Message: A Call for Collective Action and the Democratization of International Relations, para. 5.

to be treated as equal, so, by analogy, were States.⁴ Apparently resting on metaphysical foundations, it generated what might be called an “anthropomorphic” view of the State—the State in the image of man. By the middle of the nineteenth century, the doctrine had gained such currency that Chief Justice Marshall could declare:

“No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights”.⁵

The doctrines of “sovereignty” and “the equality . . . of nations large and small”—later to be mentioned separately or run together in the Charter of the United Nations, which also refers to “the sovereign equality of all its Members”—were not sufficient, however, to generate the idea of transposing democracy to the inter-State level. Notions of sovereignty and equality in 1815 gave no State the right to attend the Congress of Vienna, nor did any State enjoy such a right of representation, much less of participation, at any of the great, essentially European, conferences of the nineteenth century. Attendance then was by invitation only; and whether an invited State would be asked for its views, or merely requested to ratify a decision, was a matter

⁴ “Since men are naturally equal, and a perfect equality prevails in their rights and obligations . . . Nations composed of men . . . are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom” (Vattel, *The Law of Nations*, translated by Joseph Chitty, London, 1834 para. 18). *The Declaration on the New International Economic Order* (1974) recalls the Charter principle of the “sovereign equality of States” and urges: “Full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries”.

Given the perceived levelling potential of the “oil weapon”, the step from juridical equality to participatory equality seemed a short one. A sister resolution (3281 (XXIX)) adopted by the General Assembly in the same year, the Charter of Economic Rights and Duties of States, declared, in article 10: “All States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making process . . .”

On the relationship between “equality” and “participation” in this context, see the Analytical Study by UNITAR annexed to a report of the Secretary-General entitled “Progressive development of the principles and norms of international law relating to the new international economic order”, in which it is observed: “There are two aspects to the question of participation: access, or taking part in the process of decision-making, and weight or the actual part taken in this process . . . Obviously, equality applies to access. But neither instrument [Declaration on the New International Economic Order, Charter of Economic Rights and Duties of States] specifies the modalities of ‘full and effective participation’, i.e., whether it necessarily implies ‘equal participation’ in the sense of equal weight in the decision-making process” (A/39/504/Add. 1, annex III, paras. 107-108).

⁵ *The Antelope*, 10 Wheaton (U.S. Supreme Court), Reports 66, p. 122.

determined by a dominant group of "Great Powers".⁶ Although the unanimous consent of all States was required for the adoption of a proposal, the intent and effect of the rule was to enable a small minority of great Powers to protect their interests. The dissent of a small State then, as now, was of little consequence.⁷ Democracy in its modern form had first to be adopted more widely within each State before thought of its application to the collectivity of States could emerge. Moreover, the number of recognized States was relatively small and interacted according to a strict hierarchy, notwithstanding formal acknowledgement of a principle of equality.

So it was that the effects of another principle had to be felt before the demand for democratization of international relations could gather momentum: the principle of *equal rights and self-determination of peoples*. Elevated from the political to the legal plane not without controversy and gathering support inspired by President Wilson's Fourteen Points,⁸ this principle too found a place in the Charter of the United Nations. Under its influence the world's "population" of States swelled to unimagined proportions.

But the doctrines of sovereignty and equality, acting upon the large number of States emerging in the decades following the Second World War in the era of decolonization, could still not provide the critical mass of principle needed to generate the demand for democracy in international relations. The final additive was the principle of "distributive justice" that inspired those emerging countries. In it were subsumed such ideas as the general duty of States to cooperate to "correct inequalities and redress existing injustices" and "preferential and non-reciprocal treatment for developing countries". Many of the so-called new States had been led to independence by politicians who had absorbed Marxist philosophy in the universities of colonial capitals. Active in the international arena, they called for compensation for the exploitation of their countries by the former imperial Powers.

⁶ As one commentator has observed:

"... the Congress of Vienna as a Congress of all Europe was never constituted. It remained a Congress of the Great Powers, who for their convenience had summoned the smaller Powers of Europe to meet them. The idea of a constituent assembly, imagined by some, ... was found to be impossible. The large number of small States made such an assembly impracticable in any case. But the wishes of the masters of Europe were from the first clear and unbending on this point. They considered themselves as 'Europe', and at the Congress they asserted successfully the ascendancy of the Great Powers. The smaller States were only to be admitted at such times and on such terms as suited those who had great resources and armies at their command" (C. K. Webster, *The Congress of Vienna, 1814-1815* (Oxford University Press, 1919, p. 77).

⁷ As one authority puts it, "Unanimity was possible only by the majority giving way to the minority" (James Lorimer, *The Institutes of the Law of Nations*, London, 1883, vol. I, p. 47).

⁸ Lenin, too, advocated the principle of self-determination, but for quite different reasons.

Their vision of a future world order could be expressed succinctly through one of the central tenets of Marxism, which also carried substantial moral, if not religious, authority: “from each according to his ability, to each according to his needs”.⁹

III. DEMOCRACY AND THE COLLECTIVITY OF STATES

When the representatives of States call for the “democratization of international relations”, they are likely to do so influenced by the “anthropomorphic” view that the State is a person in a community composed of other such “State-persons”. On that view, such State-persons are the repositories of “democratic” rights and duties, rather than the natural persons (the true *dem- os*) of which the State-persons are composed. The method of choice for the systematic codification of international law today is the plenipotentiary conference of these “State-persons”. Such a conference, at which legal rules will be proposed, deliberated, and adopted or rejected, does bear a superficial resemblance to a national legislature. Most often convened today under the auspices of the United Nations, the conference is likely to have before it as a basic text draft articles formulated by a broadly representative group of agreed composition: the International Law Commission, for example, or an intergovernmental negotiating committee. What in 1815 might have been the privilege of being represented at the invitation of a great Power and of approving some predetermined result has evolved, at least since the Vienna Declaration on Universal Participation (1969), into a full right of participation by every State-person in the “legislative” process, subsuming the right to be represented, to have access to information, to be heard on the issues, to cast a vote equal in weight or value with the vote of every other State-person and to have the views of the majority prevail (one State—one vote majority rule).

The modern “legislative” conference has other “democratic” features aimed at ensuring that proposals are discussed fairly and openly, that every effort is made to reach consensus, and, when a decision must be taken by a vote, that procedural and substantive rules agreed to in advance will deter-

⁹ Although it is impossible to assess the scope of the impact of this epigram from Marx’s *Critique of the Gotha Programme*, there can be little doubt that it produced a resonance in the minds of intellectuals around the world. For Marx, true communism was incompatible with any form of exchange and what distinguished communist society from others attempting redistribution of wealth, goods and power was the complete disappearance of exchange-value that would occur in the final stages of communism when the State itself would have no function and “wither away”. The epigram has affinities with the basic tenets of all of the world’s religions and exercised a similar mass appeal notwithstanding its utopian character, particularly in countries subject to colonial rule or other exploitative regimes.

mine the outcome. In general, votes on procedural issues are to be decided by a simple majority, while votes on substantive issues might be decided by unanimity, consensus or prescribed majorities, depending upon the level of their importance. At least since the 1969 Convention on the Law of Treaties (article 9), a two-thirds majority of those present and voting would be required unless, by the same majority, a different rule were to be adopted. All such rules are aimed, in general, at safeguarding minority positions. Protection of minority positions is also the purpose of providing for "cooling-off" periods to be used for consultations aimed at reconciling conflicting views.¹⁰

While the foregoing procedural features of a treaty-making conference may to some extent mirror those of a national legislature in their democratic flavour, the resemblance is superficial, and many other features of the international legislative process find no domestic parallel. To begin with, the representatives in a national legislature are elected directly by the people (the true *demos*) or by the people through a system of intermediate steps known and accepted by them in advance. By contrast, the representative of a State at a plenipotentiary conference will have been appointed by some organ of a State (a minister or a president). The connection between conference representative and people could well be remote, if it were to exist at all, notwithstanding the elected status of the appointing authority. Moreover, the legislative process lacks a system: there is no regular assembly and no legislative programme, except possibly the work schedule of the International Law Commission and the Sixth Committee's annual observations on priorities. Conferences are convened at the initiative of one or more States motivated essentially by their own policy imperatives.

Within a democracy of natural persons the votes of the majority are likely to be decisive as to the enactment of a law and the organized forces of the State acting in accordance with the law of the land will begin to supplement

¹⁰ See, in general, the rules of procedure of the Third United Nations Conference on the Law of the Sea (A/CONF.62/30/Rev.3 (1974), chap. VI); and of the United Nations Conference on Environment and Development (A/CONF.151/2 (1992), chap. VII). The decision-making bodies of international organizations adopt similar procedures. See, for example, article 161, paragraph 8, of the United Nations Convention on the Law of the Sea, relating to the Council of the International Seabed Authority; and article 7 of the United Nations Framework Convention on Climate Change concerning the Conference of the Parties. Compare articles 15 and 16 of the latter concerning amendment of the Convention and its annexes.

As the UNITAR analytical study referred to above concedes, "It cannot be gainsaid . . . that the spirit of the majority system, especially on the international level and between sovereign States, is against the complete disregard of the right of the minority or its exclusion from the process of decision-making altogether as if it did not exist. The spirit of the majority system rather favours the debating of issues of common interest and trying to find generally acceptable solutions and different ways and means of accommodating the interests of all the segments present, so that the majority votes for "railroading" or imposing a decision are only used as a last resort when a deadlock is reached and there is no other way of breaking it" (A/39/504/Add. 1, annex III, para. 14).

traditional social control in securing immediate compliance with it. At a plenipotentiary conference, the votes of representatives, in effect, bind only the conference, as the initial step in the lengthy process of deliberation required before it could become binding on participating States. A collectivity of sovereign and equal State-persons, of widely disparate capabilities and levels of political influence and lacking an effective overarching “law of the land”, offers a context infinitely more tolerant of arbitrary behaviour than does the collectivity of natural persons. For the efficient implementation of treaties, the resources of the powerful—always a very small minority—are often essential. Safeguards for minority positions at the legislative stage become of critical importance and the weight of majorities less significant. Minority safeguards in treaty-making—permission to “opt out” of certain obligations, to make reservations, to withdraw from a treaty and, above all, to remain outside the ambit of a treaty by refraining from ratifying or approving it—recognized liberties of State-persons—are not among the attributes of natural persons within a democratically organized society, who are at all times subject to the law of the land and have little scope for avoiding or modifying their legal obligations unilaterally.

Thus, while the democratic one State—one vote majority rule now appears entrenched as a constitutive principle of the international legislative process, minority safeguards ensure that its effects are not felt beyond the conference stage and there is little that would compel compliance with the outcome—the text of the treaty adopted by the conference—unless and until specific democratically motivated procedures are voluntarily initiated at the national legislative level. And here we may note two apparent contradictions in connection with democratization, viewed in relation to the treaty-making aspect of international relations: (a) the principle of sovereign equality, which was a powerful factor in winning for all States the democratic right to participate in treaty-making, is also the basis of the right of every State to reject the very treaty it may have helped to formulate; and (b) while democratic forms, observed at the inter-State level, may produce a treaty text acceptable to the generality of States, democracy operating at the national level may result in rejection of the treaty by individual States whose participation in the treaty is of critical significance to its successful implementation. The importance of these observations is that they highlight an area upon which efforts at democratization of international relations might usefully be focused: effective articulation of democracy at the inter-State level, with democracy at the national level.

These contradictions are of particular relevance in connection with the efficacy of treaties which, concluded in accordance with “democratic” procedures, nevertheless establish organizations in which some Member States are

accorded preferential rights. These organizations have in common that they are charged, at least in part, with managing the transfer of resources from a small minority of affluent industrialized countries (perhaps 10 in a State-person "population" of 185, or less than 5 per cent), for what may be called "community purposes", primarily: first, the maintenance of international peace and security, and second, raising the living standards of the poor countries. Thus, organs like the Security Council of the United Nations and the executive directors of the World Bank and the International Monetary Fund must adopt decisions with regard to resource transfers that are to take effect immediately or without renewal or confirmation of consent in each case by the transferors' national legislatures. Accordingly, the parent treaty in each case provides the transferor's representatives with safeguards: representation is assured on decision-making bodies of limited composition, otherwise reconstituted through periodic elections; and they are granted preferential voting rights such as the right to forbid or veto a decision, and voting strength according to level of contribution. To the transferor State, its national resources—whether in the form of funds, technology, expertise or units of its armed forces—are assets as much under its permanent sovereignty as its natural resources. If substantial transfers are to occur without recourse to the national legislature—we might refer to them as "automatic transfers"—the latter would require, as a condition of the State's joining the treaty, that its minority position be granted appropriate constitutional safeguards. To those State-persons whose resources are to be so transferred, democracy at both national and inter-State levels seems to require provision for such constitutional safeguards. To the potential recipients of resources, however, such measures, by suspending the operation of the one State—one vote majority rule, appear to distort, if not to pervert, democratic forms and moreover to reflect and perpetuate the inequality of States, rather than their equality.

On the other hand, the texts which created organs like the Security Council or the executive directors of the World Bank and the International Monetary Fund were adopted at conferences which by contemporary standards were based on universal participation and the one State—one vote majority rule, so that their "democratic" origins could scarcely be questioned. There can be little doubt that, at such conferences, and in the subsequent ratification or accession procedures, the representatives of the majority, the less developed countries, made a choice, viz. that, in the circumstances, cooperation in which some aspects of "equality" might appear to be sacrificed was preferable to no cooperation at all. Nor would it appear that such a choice is inconsistent with the freedom that characterizes democracy. In any event, in this very General Assembly Hall last year, the overwhelming number of States present voted to convert the voting system of an organ

created by treaty—the Council of the International Seabed Authority—from one based on equality to one that conferred preferential voting rights on some industrialized countries. This safeguard was offered so that national democracies of the latter, which had hitherto exercised their right to remain outside the treaty, would then be persuaded to join. Once again the prospect that the industrialized countries might withhold valued support was sufficient to persuade the majority to accord them the minority safeguards requested. If this interaction was inconsistent with democratic principles, it certainly did not appear so from the tone or content of statements welcoming the amendment which was adopted.

In what may be the first treaty ever to prescribe, in terms, the application of “democracy” in inter-State relations, the 1992 Rio de Janeiro Convention on Biological Diversity requires that the financial mechanism foreseen in article 21 “shall operate within a *democratic* and transparent system of governance”. A sister Convention on Climate Change, perhaps less ambitiously, provides that its financial mechanism “shall have an equitable and balanced representation of all Parties within a transparent system of governance”.¹¹ The constitution of the financial mechanism of the Convention on Biological Diversity would be the first attempt to produce an authentic interpretation of what democracy means in its application to inter-State relations.

IV. EXPANSION OF DEMOCRATIZATION

It is evident, then, that many aspects of the participatory element of democracy have already been transposed from the human to the State level. Fundamental differences between a society or community of human beings and the collectivity of States make it extremely unlikely that an important feature of that system—the one State—one vote majority rule—could ever be comprehensively applied among States. However, there are other areas in which the process of democratizing international relations could make substantial progress. The broad objective of such efforts should be to allow the wishes of the human community—the true *demos*—behind the apparatus of the State more effectively to influence decision-making at the international level.

To that end, the current practice among many States whereby the effective leadership of a delegation to a treaty-making conference is left to

¹¹ United Nations Framework Convention on Climate Change, article 11, paragraph 2, and article 21, paragraph 3.

appointed¹² diplomatic or technically qualified persons, rather than the elected representatives of the people, should be examined. Consideration should be given to early and comprehensive (rather than merely formal) involvement in the treaty-making process of members of the national legislature familiar with the subject-matter of the treaty, reflecting, where possible, a multi-party approach. We may even look to a time when treaty-making might have become so institutionalized that a State would hold special elections to determine who should represent the *demos* at a conference. Of particular importance would be the routine inclusion, in treaty-making procedures, of formal commitment by States concerning timely national consideration and action upon treaty texts that have been adopted, coupled with institutional monitoring and reporting requirements regarding action or lack of action on the matter.¹³ Such measures could promote the better articulation, now needed, between democracy at the inter-State level and democracy at the level of the national legislature.

With the aim of reaching the people—the true *demos*—and mobilizing opinion, democratic features related to the availability of information should be maintained. This would apply to all forums where decisions are to be taken, such as treaty-making conferences or the work of established organs, but would be of special relevance to the work of organs of limited membership. Such democratic features would include “transparency”, “openness” and “accountability”, given effect to *inter alia* through the availability of records of debates in as much detail and in as timely a manner as possible, subject to the demands of economy. Video-conferencing facilities and interpretation services have developed to an extent that makes it feasible to hold at least some phases of multilingual conferences without the expense and other resource-related inconveniences of overseas travel.

The aim of presenting the sense of public opinion as distinct from governmental policy on issues could also be served by incorporating into the treaty-making process, at both the national and international level, procedures for consulting non-State entities, in particular, legal persons such as commercial corporations, as well as other bodies generally referred to as non-governmental organizations.

¹² Lorimer long ago observed: “. . . the leading objection to treaties as a source of the law of nations, as well as the chief cause of their untrustworthiness as separate transactions, consists in the necessity which exists, or is supposed to exist, for their being negotiated and even ratified by the executive independently of the legislative factor in national affairs, and the consequent risk of their failing to represent the national will . . . the international effect of this supposed necessity is to reduce treaties negotiated by constitutional States very nearly to the level of those negotiated by despotic States” (Lorimer, *op. cit.*, pp. 42 and 43).

¹³ Distinguished precedents exist: see the procedures for dealing with Conventions adopted by the International Labour Conference, *Constitution of the International Labour Organisation*, articles 19, 22 and 30.

“Regional representation” or representation on a geographical basis, incorporated in the Charter itself as an article of faith, should be reconsidered in the light of some inherent weaknesses and, to the extent possible, refined. The extent of differentiation of constituencies to be represented, such as sub-regions, which now varies greatly depending on the region, should be generalized. Greater differentiation of constituencies would also make more effective the prevailing practice of “rotation” of representative capacity. If, on the other hand, some States were to find representation on a regional basis less than satisfactory, representation of a group that crosses geographical lines should be recognized.

Permanent membership and preferential voting rights conferred on representatives in organs charged with managing the “automatic transfer” of resources from their States are now among the safeguards of minority positions inherent in democracy as it prevails among State-persons. Additional categories of criteria for permanent membership may need to be recognized, such as size of population and size or future potential of an economy. Where effective regional integration exists among States at the national level, as within the European Union, the basis on which permanent membership of the group as such could be admitted should be studied, with a view to its more generalized application. Expansion of permanent membership and, where appropriate, conferment of preferential voting rights should, however, be balanced by a proportionate increase in the numbers of non-permanent or periodically elected members in order to maintain undiminished the scope and variety of participation in the work of the organ concerned.

V. AN INDEPENDENT JUDICIARY

One of the major achievements of the international community in the twentieth century, and a landmark in progress toward democratization of international relations, has been the establishment by treaty of the Permanent Court of International Justice and its successor, the International Court of Justice. Although the International Court of Justice is an integral part of the United Nations and its budget is within the control of the General Assembly (Statute, Articles 32 and 33), the Court is conceived along the lines of an independent judiciary in a democratic system of governance: many provisions of the Charter and the Statute seek to make the Court “separate” in the exercise of its powers and not subject to control by the electors who place the judges in office—the representatives of the State-persons members of the General Assembly and the Security Council. Moreover, the seat of the Court is The Hague, physically removed from the Headquarters of its parent institution, New York, and its politically charged atmosphere.

Neither the Charter nor the Statute of the Court expressly contemplates procedures for the purpose of having the Court declare whether or not the actions of an organ of the United Nations are in conformity with the Charter.¹⁴ On the other hand, its position as “the principal judicial organ of the United Nations” (Article 92 of the Charter); its general jurisdiction under Article 36, paragraph 1, of its Statute to deal with “all cases which the parties refer to it”; the scope of the advisory jurisdiction granted to it pursuant to Article 65, whereby it may address “any legal question at the request of whatever body may be authorized . . . to make such a request”; and some of the Court’s own pronouncements (notably in the *Namibia*, *Lockerbie* and *Bosnia (Provisional Measures)* cases, in all of which decisions of the Security Council were discussed) may indicate that the Court would not be precluded from reviewing action taken by an organ of the United Nations in the light of the Charter, provided there were valid jurisdictional grounds for doing so.¹⁵

It may be expected that a process of democratization should lead to consideration of the composition of the Court itself. Its Statute contains no indication of the “main forms of civilization” or the “principal legal systems” which, by Article 9, are to be “represented” on the Court, nor would it seem feasible for it to have done so. However, if “civilizations” or “legal systems” are related to religious origins, as is frequently the case, it is obvious that important civilizations and legal systems are either not represented or are disproportionately represented in the Court as it is composed at present.

Thrown back upon the more readily applicable principles of equity and geography as the practical means of giving effect to Article 9, it would seem difficult to maintain that a membership of 15 judges, thought to be adequately “representative” in 1921 when the League’s membership was less than 30, should still be considered adequately representative of a United Nations membership of nearly double that number in 1946 and more than six times that number today. Moreover, if on the International Law Commission a membership of no less than 34 is currently considered necessary for representation of “civilizations” and “legal systems”, it is difficult to see how a membership of 15 is sufficient for the same purpose on the Court. By

¹⁴ A proposal at the San Francisco Peace Conference to confer on the Court a general power to resolve disputes concerning interpretations of the Charter could not be adopted. Conference on International Organization Documents, vol. 3, p. 633.

¹⁵ For a review and analysis of the arguments for and against recognition of a power of judicial review in the International Court of Justice, see Lucius Caflisch, “Is the International Court entitled to review Security Council resolutions adopted under Chapter VII of the United Nations Charter?”, a paper presented at the Qatar International Law Conference, 22 February-5 March 1994. See also a paper presented at the same Conference by Thomas M. Franck, “The political and judicial empires: must there be a conflict over conflict-resolution?”; and G. R. Watson, “Constitutionalism, judicial review, and the World Court”, *Harvard International Law Journal*, vol. 34 (1993), pp. 1-46.

contrast, the International Tribunal for the Law of the Sea is to be composed of 21 judges, while in at least 2 regional courts, viz. the European Court of Justice and the European Court of Human Rights, each member State may appoint a judge.

A process of democratization would seem to indicate the desirability of a modest expansion of the Court's membership from 15 to perhaps 23, in order to make it more "representative" of the expanded membership of the United Nations. Although not an ideal solution,¹⁶ such a course may be needed *inter alia* in order to balance the prospective increase in the number of permanent members of the Security Council, which will probably mean a corresponding increase in the number of informally "reserved" seats on the Court, reducing still further the number of places to which the generality of States could be elected. In addition, a new "gentlemen's agreement" should seek to promote opportunities for all States to have their qualified candidates elected to the Court and abandonment of practices that restricted those opportunities in the past. Thus, States could agree to show restraint in the matter of successive candidacies of sitting judges, or of candidacies of their other nationals to succeed them; and a State could agree not to "claim" for one of its nationals the remainder of a term of a judge of its nationality who had died in office (a practice that seems inconsistent with the letter and spirit of the Statute), if one of its nationals had in the past completed a full nine-year term.

¹⁶ There is considerable weight in arguments against such an increase, including that of operational inefficiency. However, it is difficult to avoid the conclusion that such an expansion would help to maintain the Court's representational character, since pressure for informal "reservation" of seats is not likely to diminish. It would, of course, be necessary to convince current and future permanent members of the Security Council of the fairness implicit in expansion.

CODIFICATION DU DROIT DE LA MER : PERSPECTIVES ET NOUVEAUX DÉVELOPPEMENTS

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La célébration du cinquantenaire des Nations Unies devance de quelques mois l'entrée en vigueur de la Convention sur le droit de la mer élaborée par la troisième Conférence patronnée par l'Organisation demicentenaire en vue de la codification de ce même droit. Elle précède en revanche la mise en vigueur définitive de l'Accord du 28 juillet 1994 adopté par l'Assemblée générale (résolution 48/263, annexe) relatif à l'application de la partie XI de la même Convention. S'agissant, donc, de la codification dans le programme du Congrès, il paraît convenable de susciter des commentaires sur ce thème par rapport au droit de la mer, en tenant compte des perspectives que l'on y pourrait envisager pour l'avenir.

Au cours de son existence, l'Organisation des Nations Unies a convoqué trois conférences de plénipotentiaires afin d'encourager le développement progressif et la codification du droit de la mer, conférences qui ont produit d'importantes conventions en la matière, dont celles de Genève de 1958 et principalement celle ouverte à la signature le 10 décembre 1982. Le dernier traité a la portée d'une constitution pour les océans, élaborée par plus de 150 pays, représentant les plus différentes régions, systèmes politiques, degrés de développement et configurations géographiques.

Résultat de la plus complexe et exhaustive négociation de l'histoire, la Convention de Montego Bay a reçu l'appui explicite de 119 États dès le premier jour où elle était ouverte à la signature. Il s'agit, comme la Cour internationale de Justice l'a souligné, d'une « écrasante majorité » et, pour cela, la

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Convention « revêt une importance majeure »¹. Le 16 novembre 1993, 60 instruments de ratification ou d'adhésion ont été déposés, condition nécessaire pour l'entrée en vigueur de la Convention 12 mois plus tard. Comportant 320 articles et 9 annexes régissant tout ce qui a trait aux espaces marins, la Convention n'est pas seulement une codification des règles de droit coutumier mais aussi un développement du droit international. Elle ne reste pas encadrée dans un cadre normatif, puisqu'elle a aussi une portée institutionnelle. En effet, la Convention contient en elle-même les textes constitutifs d'une nouvelle organisation intergouvernementale — l'Autorité internationale des fonds marins — de même qu'un nouvel organe international, le Tribunal international du droit de la mer.

Comme il est bien connu, la Charte des Nations Unies confère à l'Assemblée générale la tâche de faire des recommandations en vue d'encourager « le développement progressif du droit international et sa codification » (Art. 13, par. 1a). Le 21 novembre 1947, l'Assemblée générale créa la Commission du droit international, qui a fait inclure dans la première liste des matières dont la codification était jugée nécessaire et faisable, le régime de la haute mer. La Commission a encore admis, au cours de sa deuxième session, un autre sujet appartenant au droit de la mer : le régime des eaux territoriales. Elle s'employa dès 1950 à 1956 à l'étude des problèmes concernant ce droit, et adopta, lors de sa huitième session (1956), le rapport final respectif. Elle a reconnu dès lors qu'il est difficile de séparer, en s'agissant du droit de la mer, les dispositions relevant de la simple codification de celles qui traduisent un développement progressif du droit international. La Commission était donc d'avis que l'Assemblée générale devait convoquer une conférence de plénipotentiaires pour parachever l'œuvre de la codification. On sait que la première Conférence sur le droit de la mer, tenue à Genève du 24 février au 29 avril 1958, n'a eu qu'une réussite partielle. Elle a approuvé, outre le Protocole facultatif sur le règlement obligatoire de controverses, quatre conventions concernant, respectivement : la mer territoriale et la zone contigüe, la haute mer, le plateau continental, et la conservation des ressources biologiques de la haute mer. Mais d'autres questions restèrent sans solution, ce qui amena à la convocation de la deuxième Conférence, dont l'ordre du jour était l'examen de la question de la largeur de la mer territoriale et des limites des zones de pêche. Toutefois, les efforts de la nouvelle Conférence, qui dura du 17 au 27 mars 1960, n'ont pas réussi. Aucun traité ne fut alors signé. Le désenchantement à l'égard des résultats des deux conférences s'accrut encore en vertu soit de l'apparition croissante de nouveaux États, soit de l'avancement technologique marqué dans le secteur maritime.

¹ *C.I.J. Recueil 1985*, p. 30, par. 27.

Quelques années après la deuxième Conférence, on commença effectivement la tâche de préparation de la Convention actuelle. En 1967, l'Assemblée générale discuta pour la première fois de la notion du patrimoine commun de l'humanité dans le contexte de la question de la réservation du fond des mers et des océans à des fins exclusivement pacifiques. Il est à noter que les débats à cet égard eurent pour cadre la Première Commission. L'Assemblée créa, le 18 décembre de la même année, par sa résolution 2340 (XXII), le Comité spécial chargé d'étudier les utilisations pacifiques du lit des mers et des océans au-delà des limites de la juridiction nationale et mit sur pied une année plus tard un organe permanent, le Comité des utilisations pacifiques du fond des mers et des océans au-delà des limites de la juridiction nationale, commis à formuler et préciser les concepts et les normes du nouveau régime international. C'est à ce Comité que l'Assemblée générale demanda, à la fin de 1970, l'élaboration des projets d'articles de traité portant sur le régime international applicable à la Zone et aux ressources des fonds de mer et des océans. La compétence *ratione materiae* du Comité fut ensuite étendue puisque l'Assemblée décida que la nouvelle conférence devrait régler les sujets et questions touchant tous les espaces marins. Pour ce qui concerne l'organe préparatoire, on constate que l'Assemblée générale a donné la préférence, non plus à un comité d'experts comme la Commission du droit international, mais à un organe intergouvernemental.

La Conférence a débuté par une session tenue à New York au mois de décembre 1973, où l'on discuta sur la procédure à suivre. Dix autres sessions ont eu lieu. Après avoir estimé, le 22 avril 1982, que tous les efforts en vue d'aboutir à un consensus avaient été épuisés, la Conférence, ayant dû recourir au vote, adopta, huit jours plus tard, l'ensemble du texte global sur le droit de la mer par 130 voix contre 4, avec 17 abstentions. Elle a aussi adopté, le même jour, quatre résolutions, dont les deux premières ont une importance particulière pour l'institutionnalisation de la Convention : la résolution I, portant sur la création de la Commission préparatoire de l'Autorité internationale des fonds marins et du Tribunal international du droit de la mer; et la résolution II, concernant les investissements préparatoires dans des activités préliminaires relatives aux nodules polymétalliques. On sait que la Commission — composée des représentants des États qui ont signé la Convention ou y ont adhéré — demeurera en fonction jusqu'à la fin de la première session de l'Assemblée de l'Autorité.

Puisque le droit de la mer touche à des questions essentielles, les États ont voulu retenir, même au stade préparatoire, leur pouvoir de recommander et de décider. Il est compréhensible que, pour cette même raison, ils aient remplacé, dès le stade du Comité spécial, les règles traditionnelles de vote par celles du consensus. Le recours au consensus, qui s'explique aussi par la nécessité

de concilier des intérêts extrêmement divergents sur des questions d'importance capitale, fut inclus dans les règles de procédure soit du Comité des fonds marins, soit de la Conférence elle-même, soit encore de la Commission préparatoire de l'Autorité internationale des fonds marins et du Tribunal international du droit de la mer. Le consensus est aussi mentionné dans la Convention de Montego Bay, à propos de la prise de décision par la Conférence d'amendement (art. 312, par. 2) et par le Conseil (art. 161, par. 8, *e, f, g, et i*). Le récent Accord relatif à l'application de la partie XI de la Convention des Nations Unies sur le droit de la mer du 10 décembre 1982, adopté par l'Assemblée générale dans sa résolution 48/263 du 28 juillet 1994, va dans un sens contraire. Il ne reproduit pas d'autres dispositions de la Convention où la référence au consensus est faite : article 155, paragraphe 3, à propos de la révision des dispositions de la partie XI et des annexes qui s'y rapportent; et l'article 11, paragraphe 31*c*, de l'annexe IV de la Convention, concernant l'adoption des mesures par l'Assemblée de l'Autorité au sujet du manque des contributions des États parties à l'Entreprise.

Il est à noter que la portée de la troisième Conférence doit être appréciée non seulement par le contenu de la Convention de Montego Bay mais aussi par le succès de la méthode spéciale de travail utilisée au cours des sessions successives. La règle du consensus s'exprimait dans la déclaration reprenant le *gentlemen's agreement*, qui fut annexé au règlement intérieur de la Conférence. Son application entraîna un certain retard dans la marche des travaux, ce qui explique la longue durée de la Conférence. Les méthodes de travail ont porté d'autres innovations, parmi lesquelles on relève celle du *package deal*, lié à la reconnaissance de l'enchaînement étroit entre toutes les dispositions de la Convention. On mentionne aussi, parmi ces méthodes, l'autorisation accordée au président des commissions de la Conférence de rédiger le projet d'articles concernant les matières débattues dans le cadre de sa propre commission; la formation des groupes de travail constitués sur la base de l'intérêt qui suscitait telle ou telle question; et l'informalité des négociations, qui a permis une plus grande flexibilité et des résultats positifs dans la recherche de solution de compromis.

L'Accord adopté par l'Assemblée générale en juillet 1994 prévoit son application provisoire pour une période de quatre ans à partir du 16 novembre 1994. Il est dû à l'initiative prise au mois de juillet 1990 par le Secrétaire général des Nations Unies, ayant en vue soit l'opposition de certains États industrialisés au régime de l'exploitation des ressources minières établi dans la partie XI de la Convention, soit encore des modifications économiques et politiques intervenues récemment dans la conjoncture mondiale, qui ont apporté des conséquences sur ce même régime. La réussite de ces conversations s'explique ainsi par le propos de rendre effective l'exploitation des ressources

des hauts-fonds marins de même que la participation universelle à la Convention. C'est un exemple significatif du rôle joué par le Secrétariat dans l'œuvre commune de la codification.

Le principe de patrimoine commun de l'humanité n'est pas mis en question. Il est au contraire réaffirmé dans le préambule de la résolution 48/263 de l'Assemblée générale, en date du 28 juillet 1994. Contenu dans la résolution 2749 (XXV) de l'Assemblée, en date du 17 décembre 1970, et dans l'article 136 de la Convention de Montego Bay, ce principe a trouvé sa formulation plus précise et opérationnelle dans le contenu de l'article 137 de la même Convention. D'après le paragraphe 6 de l'article 311 de ce traité, les États parties conviennent qu'aucune modification ne peut lui être apportée.

Comme il est bien connu, la récente codification du droit de la mer embrasse tous les espaces marins. Pour les espaces que les conférences de Genève avaient essayé de régler, la nouvelle Convention apporte des précisions. En outre, d'importants compromis ont été obtenus à l'égard du statut de la Zone économique exclusive et du régime de passage dans les détroits utilisés pour la navigation internationale, ainsi que dans les voies de circulation archipélagiques. On a fait des progrès dans le domaine de la recherche scientifique et de la protection et préservation du milieu marin. La Convention a aussi mis en place un système particulier et nouveau de règlement des différends. En s'agissant de litiges portant sur des activités menées dans la Zone, la Chambre pour le règlement des différends relatifs aux fonds marins a une compétence obligatoire. Quant aux autres litiges, l'État est libre de choisir un ou plusieurs des quatre moyens de règlement énoncés par la Convention (art. 287, par. 1); mais il est obligé, en tout cas, de soumettre le différend à un de ces moyens; et si les parties n'ont pas accepté la même procédure, le litige ne peut être soumis qu'à l'arbitrage.

D'après ce que nous venons de dire, la Convention de Montego Bay n'est pas seulement la codification d'une coutume préexistante mais aussi davantage la cristallisation d'une coutume émergente. Nonobstant sa mise en vigueur récente, la Convention peut être encore envisagée comme génératrice de nouvelles coutumes.

On peut avoir des doutes sur le rôle joué par l'équité dans l'œuvre de la codification. Il est certain que le mot équité n'a pas un sens univoque. On sait qu'à propos de la Zone économique exclusive et du plateau continental, la Convention fait mention « à une solution équitable » à laquelle doivent aboutir les États dont les côtes sont adjacentes ou se font face (art. 74, par. 1; art. 83, par. 1). On sait aussi que, comme a été mentionné par le Président de la Conférence à la session finale, dans quatre domaines au moins la Convention a explicité un propos d'équité, à savoir : a) dans le partage des bénéfices retirés de l'exploitation des ressources des grands fonds marins; b) dans

le partage des revenus tirés du plateau continental au-delà de la limite des 200 milles; c) dans la possibilité accordée aux États sans littoral et géographiquement désavantagés d'avoir accès aux ressources biologiques de la zone économique de leurs voisins; et enfin, d) dans la structuration des rapports entre les pêcheurs côtiers et les pêcheurs hauturiers. Les quatre domaines témoignent de la présence de cette force vitale de l'équité dans l'œuvre de la codification, force qui peut certes avoir la même nature que celle de l'application de la loi faite par le juge à un cas concret, mais qui, dans le cas de la troisième Conférence sur le droit de la mer, a acquis une portée législative universelle.

Je m'explique. En effet, le juge peut faire appel à l'équité *infra legem*, c'est-à-dire une équité qui ne signifie pas une entière conformité avec la lettre et la généralité de la loi mais qui signifie tout au moins une harmonisation avec l'esprit de la loi et avec son application à un cas concret. « Ce qui cause notre embarras » — nous expliquait Aristote à l'origine de la civilisation² « c'est ce qui est équitable, tout en étant juste, ne l'est pas conformément à la loi; c'est une amélioration de ce qui est juste selon la loi ». Le juge peut aussi appliquer l'équité *praeter legem*, laquelle répondait, dès le droit romain, à une exigence de la création du droit, et, en même temps, à son interprétation et transformation. Dans l'arrêt de 1969 sur la délimitation du plateau continental, où, comme l'on a signalé, la notion d'équité a fait une irruption brutale et inattendue, la Cour internationale de Justice a beaucoup contribué à la formation des règles pertinentes de la Convention des Nations Unies sur le droit de la mer. Après la signature de cette Convention, la Cour a rappelé — dans son arrêt du 24 février 1982 — que « l'adjectif *équitable* signifie à la fois le résultat à atteindre et les moyens à employer pour y parvenir, en soulignant que c'est le but — le résultat équitable — et non le moyen utilisé pour l'atteindre, qui doit constituer l'élément principal de cette double qualification »³. Quelques années plus tard, la Cour a déclaré, dans son arrêt du 3 juin 1985, que « la méthode de l'équidistance peut, dans bien des situations, produire un résultat équitable »⁴. Il n'y aurait donc pas une contradiction absolue entre les critères de l'équidistance et de l'équité.

Tout en poursuivant l'accomplissement et l'effectivité de l'équité, la troisième Conférence a dépassé, bien sûr, les limites de la fonction judiciaire, ayant le pouvoir — que les États lui ont accordé, même *contra legem* — de créer le nouveau droit de la mer. Evidemment ce pouvoir n'est jamais absolu, comme il n'est pas non plus le pouvoir individuel d'un État ou celui d'un groupe d'États. Les restrictions à ce pouvoir découlent du *jus cogens* auquel

² *Éthique à Nicomaque*, Livre V, X, par. 3.

³ *C.I.J. Recueil 1982*, p. 32, par. 45.

⁴ *Ibid.*, p. 60, par. 71.

font rémission les articles 53 et 64 de la Convention de Vienne sur le droit des traités. Après l'entrée en vigueur de la Convention des Nations Unies sur le droit de la mer, ces limitations proviennent aussi de la règle du paragraphe 6 de l'article 311 de la même Convention, qui nous renvoie au principe fondamental concernant le patrimoine commun de l'humanité.

Contribution importante au maintien de la paix, à la justice et au progrès de tous les peuples du monde, la Convention de Montego Bay ne restera pas limitée à ses propres normes et principes. Elle sera la source d'inspiration pour la mise en œuvre de tout projet qui, dans l'avenir, aura pour but de contribuer à l'effectivité de la justice et de servir la même humanité.

NEW DIRECTIONS IN INTERNATIONAL ENVIRONMENTAL LAW

*Edith Brown Weiss**

In the more than two decades since the United Nations Conference on the Human Environment at Stockholm, we have seen extraordinary change. In 1972 there were only about three dozen multilateral treaties concerned with the environment. Today over 900 legal instruments are fully concerned with environmental protection or contain important environmental provisions. The agreements have expanded in scope and become increasingly detailed. In 1972 environment was a new subject in international law. Today it is more mainstream and integrally linked with international economic law through the concept of sustainable development.

How we make, implement and comply with international environmental law has been changing. The traditional model centres on States, relies on legal instruments to provide fixed solutions to clearly defined problems in a world that changes slowly and assumes that States comply with most of their obligations most of the time. The line between international and national law is sharply drawn and there is a strong preference for binding agreements. But the world is moving to a dynamic, more open, porous and complex system. In this system, States are still key actors, but other actors are also important; international and national law are dynamically joined; non-binding or incompletely binding legal instruments are attractive; and compliance is not assumed.

The new system is a network of States, intergovernmental organizations, international non-governmental organizations (NGOs), transnational corporations and industry associations, national and local NGOs, transnational expert communities and ad hoc associations that are intricately connected

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through binding and non-binding or incompletely binding international legal instruments and associated institutions. While this development can readily be seen in international environmental law, it is also apparent in other areas of international law. It has important implications for the transformation of sovereignty.

Several global developments contribute to this transition: the linkage of environmental protection with economic competitiveness, the blurring of the clear distinction between international and local occurrences, the rise of non-State actors (such as environmental organizations and industry associations), advances in information technology and the increasingly rapid rate of change in many aspects of society, especially in our scientific understanding of environmental issues.

Six new directions in international environmental law-making merit further discussion here.

I. THE NEW ACTORS

In the new model, NGOs of various kinds and industry associations have increasingly important roles in negotiating, implementing, monitoring and enforcing international environmental agreements. Such NGOs, while far more numerous in industrialized Western countries, are increasingly potent worldwide. Some NGOs are international, others are nationally or locally based. In some countries NGOs emerge for a specific issue and then disappear when the issue does.

Interactions among NGOs, Governments and intergovernmental organizations are complicated, as each uses the other to convey information and to influence outcomes. NGOs try to influence national Governments directly and indirectly through increased public awareness and pressure on national parliaments. Governments sometimes use NGOs to convey their positions to the public. Ministries or agencies within Governments may use NGOs to strengthen their views in relation to other parts of the bureaucracy. NGOs provide intergovernmental organizations with important, independent communication links with national Governments and they rely on intergovernmental organizations to provide information and insights that are useful in influencing national Governments. In a few instances, such as the World Heritage Convention and the Convention on International Trade in Endangered Species, NGOs have been integrated into the international institutional structure for implementing and monitoring compliance with agreements. NGOs are routinely present at intergovernmental negotiations and hold forums that precede large intergovernmental meetings, such as in Rio de Janeiro and this month in Copenhagen.

Information technology is critical in the new model. New technologies empower groups other than States to participate in developing and implementing international law. They empower publics to participate in the process of governance. But the new information technologies also enlarge the gaps between those who have the technology and know how to use it and those who do not. Those who do not have the technology also need to participate effectively in the international system and to have confidence in the information generated and disseminated by others.

We now have access to an increasingly wide array of information. But the potential danger is that people can increasingly choose to be exposed only to certain kinds of information and views and to avoid random exposure to different opinions. The irony is that as democracy opens up access to information and as technology enhances the variety of information available, technology also may make it easier to narrow the range of exposure. This in turn has implications for global governance and for the development of international environmental law.

II. THE NEW TERRAIN: THE POTENTIAL FOR TREATY CONGESTION

Since 1970 the international community has become very skilled at negotiating international environmental agreements and non-hierarchic legal instruments. Countries now conclude complicated agreements in less than two years: the United Nations Framework Convention on Climate Change, the Environmental Protocol to the Antarctic Treaty (with four detailed annexes), the Convention on Biological Diversity and the protocols of the Economic Commission for Europe on industrial accidents, volatile organic compounds and, last year, sulfur dioxide. (It still usually takes more than two years for them to go into effect.)

The number and variety of environmental agreements have reached the point that some critics ask whether they may not severely strain the physical and organizational capacity of the countries to handle them. There are signs of treaty congestion, in the sense of separate negotiating forums, separate secretariats and funding mechanisms, overlapping provisions or inconsistencies between agreements and severe demands on local capacity to participate in negotiations, meetings of parties and associated activities.¹ This affects the international community as a whole, since there will always be limited resources to address difficult issues and some countries may suffer particular inequities in their ability to participate effectively in the new regimes. This

¹ Edith Brown Weiss, "International environmental law: contemporary issues and the emergence of a new world order", *Georgetown Law Journal*, vol. 81 (1993), pp. 675 and 684-702.

does not mean that we should refrain from concluding new international legal instruments only that the highway for them needs to be smooth and more efficient.

With such a large number of international agreements, there is great potential for overlapping provisions in agreements, inconsistencies in obligations, significant gaps in coverage and duplication of goals and responsibilities. This issue was recognized during the parallel negotiations for the Framework Convention on Climate Change, the Convention on Biological Diversity and the Non-binding Forest Principles, all of which may affect forest management. The Convention on Biological Diversity includes a separate article on "Relationship with other international conventions".²

Some issues require analysis of the intersection between provisions of different agreements, such as those in the London Convention of 1972 with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, or those in the Convention on the Law of the Sea with the London Convention of 1972 or the Antarctic Treaty. Reconciling provisions in different agreements is likely to become a more frequent issue. Moreover, different international dispute settlement bodies may give different answers, which suggests a need to coordinate in this area as well.

International environmental law has developed in a piecemeal, almost random, manner. In contrast to other fields such as trade, there is no comprehensive agreement on the environment. The legal experts for the World Commission on Environment and Development suggested that an international agreement on the environment be concluded. The World Conservation Union (IUCN) Commission on Environmental Law has recently produced such a draft agreement.³ Some scholars have suggested that a code on the environment be negotiated to provide parity with the comprehensive framework provided by the General Agreement on Tariffs and Trade and the

² Article 22, Convention on Biological Diversity, 5 June 1992, 31 *International Legal Materials*, vol. 31, p. 818. This article provides that the Convention does not affect the rights and obligations of States parties to other international agreements, "except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity". The article further provides that the Convention is to be implemented consistently with the Convention on the Law of the Sea. *Id.* The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal addresses the relationship of the global convention to regional and bilateral agreements. Article 11 stipulates that parties may enter into these agreements provided that the provisions are "not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries" (Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, *International Legal Materials*, vol. 28, p. 657).

³ Draft International Covenant on Environment and Development, February 1995 (IUCN Commission on Environmental Law in cooperation with the International Council of Environmental Law).

new World Trade Organization Agreement into which it is incorporated. It is now timely to address whether such an agreement or code is needed.

Treaty congestion also contributes to significant inefficiencies in implementing international agreements. There are usually separate secretariats, monitoring processes, scientific councils, financing mechanisms, technical assistance programmes and dispute resolution procedures. In the future, it may be possible to induce more efficiency by using information technology and by such measures as regular meetings of the secretariats for related treaties, as the United Nations Environment Programme is now initiating. Information technology can facilitate gathering, analysis and dissemination of data and make communications easier and less costly.

Possibly it is time to consider developing the environmental counterpart to the World Intellectual Property Organization, which consolidated the administration of separate intellectual property conventions. While transferring existing agreements to a new jurisdictional umbrella would be difficult, it might be possible to consolidate new international environmental agreements in a central home or to develop a coordinating mechanism to encourage efficiency.

Finally, treaty congestion leads to overload at the national level in negotiating and implementing the agreements. Today a large number of international environmental institutions and treaty regimes have some claim on the administrative capacity of national States. Even industrialized States with well-developed regulatory mechanisms and bureaucracies show signs of being overwhelmed. As attention shifts to the need to comply with existing agreements, the burden on the administrative capacity of States will become more acute. Attention must be given to developing local capacity to implement and comply with international environmental agreements effectively and efficiently.

III. THE NEW FOCUS: COMPLIANCE

The traditional model pays little attention to compliance with international legal instruments. States assume that other States will have the capacity to comply with treaty obligations and do not consider that a treaty's primary purpose may be to build the local capacity of member States to comply or to encourage non-governmental participation in discharging international obligations. In this approach compliance can be measured in a snapshot. Compliance is regarded hierarchically: Governments join treaties and adopt national implementing legislation or regulations, with which domestic units comply.

In the new model, agreements evolve over time and, most importantly, compliance by countries changes over time. States do not necessarily comply widely with their obligations. This suggests redirecting our attention from mainly negotiating new agreements, a politically attractive strategy, to building compliance with them, for which there may be little political gain. Focusing on compliance requires, among other things, that we acknowledge the essential link between national and international law, the importance of non-State actors, the need for adequate administrative capacity in Governments, the central role of monitoring and information flows and the value of reporting, primarily as an educational tool.

It is useful to distinguish between implementation, compliance and effectiveness.⁴ Parties implement international agreements when they take measures to make them effective in their domestic law. They comply with them when they adhere to implementing measures and when the targeted actors change their behaviour. International agreements contain a variety of specific obligations, some procedural, such as reporting requirements, and others substantive, such as phasing out certain chemicals by a targeted date. Effectiveness differs from compliance in that even if a country complies with a treaty, the agreement may be ineffective in achieving its stated purposes.

Compliance involves a dynamic process between Governments, secretariats, international organizations, NGOs, subnational units and actors whose behaviour is targeted by the agreement. Compliance changes over time, both within countries and among countries parties to the agreement. The preliminary results from an international study of five environmental and natural resource agreements in nine countries suggest that, in general, there is a secular trend towards improved implementation and compliance.⁵ There appear to be many reasons for this, but one of the most important is international momentum, which means the collective force of States, secretariats, intergovernmental organizations, NGOs and individuals, as it is brought to bear upon the behaviour of a State party to the agreement.

IV. NEW ACCORDS IN THE PRIVATE SECTOR

The most important development for the next century may be the emerging interaction of international intergovernmental environmental law with transnational environmental law developed primarily by the private sector and non-governmental institutions. Concerns about competitiveness cause both

⁴ Harold Jacobson and Edith Brown Weiss, "Strengthening compliance with international environmental agreements", International Political Science Association Annual Meeting, Berlin, August 1994, pp. 4-6.

⁵ *Idem*, p. 17.

Governments and non-governmental actors to focus on environmental standards and practices in different countries and compliance with them. The European Union has long been concerned with differences in environmental standards among Member States.

Increasingly, industrial associations, multinational companies and coalitions of business and environmental interests are the most important driving forces behind the new focus on developing common transnational environmental standards and environmentally sound business practices.⁶

Within the past few years, industry associations have begun to formulate common environmental standards across industries. The most prominent of these organizations is the International Standards Organization (ISO), a hybrid governmental/private group with 97 member countries, 176 technical committees, and 2,698 subcommittees and working groups. While historically ISO has been concerned with developing technical and manufacturing standards for products, in 1979 it began to develop global quality standards, which in January 1993 became mandatory for any company manufacturing or exporting products to the European Union. As environmental concern grew, ISO formed the Strategic Advisory Group on the Environment (SAGE) to consider the need for standard environmental-management practices in five areas: management systems; audits, life-cycle assessments to determine environmental impacts; environmental performance evaluations; and labelling.

The development of transnational standards in the private sector can have important influences on governmental control of business behaviour. It may set standards for practices that Governments never address; it may set standards that precede government action or provide greater specificity; or it may set standards that are inconsistent with particular national standards. Within countries, the standards could be used by federal and State authorities to determine appropriate responses to non-compliance with governmental standards, including criminal actions, or to assess the standard of care in common law damage claims.

Some efforts to develop common standards or processes outside the intergovernmental framework take place informally. Before the Rio de Janeiro Conference, the International Chamber of Commerce (ICC) drafted a Business Charter for Sustainable Development that contained 16 principles of environment management. The World Industry Council for the Environment (WICE), a group of more than 90 international companies, targeted

⁶ See *Beyond Compliance: A New Industry View of the Environment* (Bruce Smart, ed., 1992) (describing a grass-roots environmental consciousness); Stephen Schmidheiny, *Changing Course: A Global Business Perspective on Development and the Environment* (1992) (prepared in connection with the 1992 United Nations Conference on Environment and Development).

the development of self-regulatory guidelines and an inventory of life-cycle analyses.

As large companies in the private sector increasingly regulate themselves to project corporate good citizenship, to ensure a level-playing field and to pre-empt or modify governmental regulation, countries must face the question of accountability by the private sector to the public. This involves both questions of direct participation in formulating the standards and indirect influence from the market-place through consumer preferences. In the next decade, Governments and the private sector need to work together to ensure accountability.

V. NEW INTEGRATION OF ENVIRONMENT AND ECONOMIC LAW

Traditionally, international environmental protection and international economic law have been treated separately. The focus has been on controlling specific pollutants or conserving particular species as ends in themselves. In the new model, the focus is on ecosystems conservation, pollution prevention and a precautionary approach, not only as environmental goods, but as essential to sustainable development.

In the quest for sustainable development, the focus will likely be on considering environmental concerns at the front end of the industrializing process, so as to prevent pollution, minimize environmental degradation and use resources more efficiently. This should mean increasing concern with making the entire production system environmentally sound. International environmental law will need to reflect this emphasis by focusing on performance standards to prevent pollution and minimize degradation, rather than focusing primarily on liability for damage, and on providing incentives to companies to use environmentally sound processes. Environment and trade issues will be increasingly joined.

VI. NEW QUEST FOR ENVIRONMENTAL EQUITY

While there has always been a quest for equity among countries in using and caring for the environment, there is a growing realization that environmental equity extends to future generations⁷ and speaks to poor communities within

⁷ See Judgement of 30 June 1993 (*Juan Antonio Oposo et al. v. the Honourable Fulgencio Factoran, Secretary of the Department of Environment and Natural Resources, et al.*), Supreme Court of the Philippines, G.R. No. 101083 (granting standing to children as representatives of themselves and future generations to challenge timber leases); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, 14 June 1993 (Separate Opinion of Judge Weeramantry, pp. 83 and 84).

countries. The poor are often disproportionately exposed to toxic chemicals and contaminated waste sites; they breathe dirty air, drink polluted water, and are forced by poverty to exploit soils, forests and other resources in an unsustainable manner. The benefits of industrialization accrue disproportionately to the wealthy, especially if there is little social mobility. It is thus poor people within countries who should be major champions of sustainable development.

Many States may regard international consideration of the distribution of environmental burdens within States as intrusive. But the challenge will grow. NGOs and others may become active champions of environmental justice within their own countries and across borders. In the United States there is a growing movement for environmental justice, which is targeted against environmental contamination of poor neighbourhoods.⁸ International law can provide a normative framework for ensuring that economic development does not take place on the environmental backs of the poor. This may be an important legal issue in the future, as poor people claim a right to non-discriminatory bearing of environmental burdens.

As indicated at the outset, international environmental law is in transition. While it is expanding rapidly in scope and coverage, we are none the less still developing the intellectual framework and defining the contours of the subject. We have made enormous progress in the past two decades. Concern with international environmental issues has brought new openness to the international legal system, fostered new actors and new constituencies and tightly linked national and international law. In many ways the new directions of international environmental law reflect broad changes that are taking place in the international legal system. How we manage these directions will have important implications not only for sustainable development and the robustness of the human environment, but for the international legal order in the decades to come.

⁸ See "Federal Actions to Address Environmental Justice and Minority Populations in Low-income Populations", Executive Order No. 12898, 11 February 1994, which calls on federal agencies to develop strategies to prevent disproportionate effects on poor populations.

OPEN-FLOOR DISCUSSION

COMMENTS AND QUESTIONS OF A GENERAL NATURE

Mr. Kazazi* said that in the context of progressive development of international law, mention should be made of the United Nations Compensation Commission (UNCC), created at Geneva in 1991 pursuant to Security Council resolution 687 (1991) for the purpose of deciding claims arising from the 1990 invasion of Kuwait. It operated as a subsidiary organ of the Security Council and itself had three main organs: a Governing Council, composed at any given time of representatives of the current 15 members of the Security Council; panels of commissioners to decide groups of claims; and a secretariat, comprising an Executive Secretary and a group of international lawyers. Over 100 Governments and international organizations had filed some 2.6 million claims, estimated at a total value of \$165 billion. Most of them were small claims by individuals, but there were also several thousand large corporate and governmental claims covering a wide range of issues. For the first time at the international level, the claims were being processed by computerized methods. Over 200,000 individual claims had either been decided by the commissioners and approved by the Governing Council or were at the final stage of processing, and a few had already been paid. The innovative nature of the Compensation Commission and the circumstances under which it had been created made it a special forum that was bound to have an impact on international law, especially in the field of dispute settlement.

Mr. Consani** said that a grave problem, he felt, was that a twofold message was abroad in international society: General Assembly resolutions and political declarations of States spoke of respect for international law, yet the commitment of States with regard to the International Court of Justice,

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one of the principal organs of the United Nations, as well as to the International Law Commission, was weak. It was most revealing that except in respect of cases of maritime delimitation and a few others, nearly all of the Security Council's five permanent members had refused to agree to the Court's binding jurisdiction. Moreover, what was happening in the former Yugoslavia and in Rwanda, where horrors were taking place that one had believed banned from the face of the earth after the Second World War, was far from respect for international law and the norms that everyone basically wanted. His remarks were addressed, therefore, not only to Mr. Villagrán Kramer and Mr. Yankov, but to all those present at the Congress, who he hoped would reflect on the enormous contradiction on the part of many States between formal talk of progress of international law and practice that disregarded it. He warmly thanked the organizers of the Congress, for it represented an important step in an international society that had, in fact, little respect for international law.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. CHRISTOPHER W. PINTO

Mr. Riesenfeld,* who had attended the 1945 United Nations Conference on International Organization in San Francisco, noted that in most States there existed parliamentary participation in treaty-making and other aspects of the conduct of foreign relations. Under the Maastricht Treaty, certain European States had actually had to make constitutional changes in their parliamentary procedure to enable their local parliaments to keep abreast of developments at the European Community or European Union level. He wished to know Mr. Pinto's view of the feasibility and desirability of establishing direct channels of communication between the General Assembly or its Main Committees and the committees of parliaments, according to the constitutional systems in the respective Member States, and in particular the Congress of the United States of America.

Mr. Maniruzzaman** said that he sensed that Mr. Pinto was suggesting that in the process of democratization, the consent theory could be replaced by the consensus theory in the formulation of international law. However,

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the consent theory did not actually remove the democratization element, in that it permitted a State to think twice before committing itself to any set of international obligations, an opportunity it should in fact have. Indeed, the State represented the collective interests of its people, and it was advantageous for the people to avoid any comment for which it was not prepared. For the formulation of international law, the persistent objection theory should be maintained, for otherwise the democratization process in international law would be denied. He wished to hear what Mr. Pinto had to say to such a "counter-opinion".

Mr. Bankobeza,* referring to Mr. Pinto's statement that the application of democracy in inter-State relations had begun with the 1992 Rio Convention on Biological Diversity, pointed out that in an even earlier text, namely, the 1990 London Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, the terms of reference of the Interim Multilateral Fund had provided for the establishment of an executive committee of 14 members, 7 from developed and 7 from developing countries. Though the word "democracy" was not directly mentioned in the terms of reference, the parties to the Montreal Protocol had been bent on applying democratic procedures in the approval of projects to phase out ozone-depleting substances. In the subsequent negotiations to set up a permanent multilateral fund, developing countries parties to the Protocol had in fact resisted attempts to merge its Multilateral Fund with the Global Environment Facility, then thought to be less democratic.

Mr. Pinto (reply), referring to Mr. Riesenfeld's question, remarked that though his own comments had been confined to participation of parliamentarians in the treaty-making process, direct contact between parliamentarians of any country and the General Assembly would facilitate the much-needed articulation of democracy between the national and international levels. He was unable to think of a structure to institutionalize such a process, but perhaps it could be done through the countries members of the General Assembly including more members of their legislatures in their delegations to the Assembly. In the treaty-making process, however, he felt it would be very useful for parliamentarians of any country to become involved at an early stage, not only formally but in a direct and comprehensive manner.

Regarding Mr. Maniruzzaman's remark, he thought there might be a slight misunderstanding. He had not intended that the consent of States

* Legal Officer, United Nations Environment Programme, Ozone Secretariat, Nairobi, Kenya.

should be replaced by consensus in the adoption or implementation of treaties. Rather, he had meant that, although the one State—one vote majority rule should prevail, it had also to be balanced by the protection of the rights of minorities, which in the related debates were usually the affluent countries. The protection of their interests was required, not excluded, by democracy.

He was grateful to Mr. Bankobeza for pointing out an antecedent to the Convention on Biological Diversity. His intention in his presentation had been to say that the word and concept of “democracy” had been used in that Convention for the first time. The antecedent mentioned by Mr. Bankobeza might in fact have led to the proposal to use the word “democratic” in the Convention on Biological Diversity, which had for the first time actually given institutionalized effect to that concept in the inter-State context.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION BY MR. VICENTE MAROTTA RANGEL

Mr. Sohn* noted that mention had been made several times of framework conventions, but that one must not forget that there was a second step, namely, the adoption of various rules, regulations and standards. The Convention on the Law of the Sea clearly provided that generally accepted rules, regulations and standards adopted by other international organizations would be binding on the parties to the Convention. Over the previous years, such rules and regulations had been adopted, for example, within the framework of maritime conventions or the International Maritime Organization.

On the issue of a majority prevailing over a minority, there were various possible solutions. The United Nations Conference on Trade and Development (UNCTAD) had originally adopted, in its commodity agreement, the rule that every decision had to be made by a majority of developed countries and a majority of the other countries, or producers and importers, for example, depending on the case. With respect to the Global Environment Facility, too, a similar provision had recently been adopted. In each case, action required the vote of both groups. That was a procedure that might be developed more generally.

Like Mr. Riesenfeld, he had also been present at San Francisco in 1945, where one of the questions discussed, at least in the corridors, had been parliamentary participation. Recently, there had been proposals that a second parliamentary assembly should be established, as a consultative body, by the

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United Nations. The Organization for Security and Cooperation in Europe (OSCE) had established such a body, in which members of legislative organs of various countries, including the United States, participated. The General Assembly might decide to create a similar body within the United Nations. Thus, during the general debate at the next session of the General Assembly, there might be a parallel general debate in such a body composed of members of parliament of the various participating countries, in which voting could be weighted according to the size of the country, as was currently done in other similar bodies. Certainly, if one wished to be more democratic internationally, as Mr. Pinto had urged, such a step would bring at least the parliamentary bodies—which, it was hoped, represented democracy in their countries—into cooperation with the United Nations.

Mr. Pazarci* said that he agreed in general with Mr. Marotta Rangel's description of the preparation of the Convention on the Law of the Sea, though he found it difficult to share his views on the interpretation of the Convention and certain effects he attributed to it, particularly when he stated that the Convention was already an expression of international law, without making any distinction between its various provisions. He wondered, therefore, whether he had understood Mr. Marotta Rangel properly and, if so, whether it was not necessary to distinguish among the different provisions of the Convention according to whether or not they had acquired *opinio juris* in all States. He also wished to know whether Mr. Marotta Rangel believed that the Convention fairly served both those States situated on oceans and those bordering closed and semi-closed seas.

Mr. Marotta Rangel (reply) commented that Mr. Sohn had offered highly useful considerations regarding new possibilities in the process of development of international law. He agreed that not merely the Convention, but also rules, regulations and standards, formed part of the law of the sea. Mr. Sohn had also mentioned certain rules of procedure. Indeed, the Conference on the Law of the Sea must be viewed in terms not only of its decisions concerning substantive issues, but also of questions of procedure. For that reason, in his presentation he had mentioned consensus, the "package deal" and other aspects. He felt that what Mr. Sohn suggested merited reflection, for one always had to seek new decision-making formulas.

As for the question of parliamentary groups, one must indeed consider not only the traditional participation of the executive power of the State, but also that of other internal organs that had decision-making power and repre-

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sented the will of the State. Such considerations also related to the issue of adaptation to a new situation, mentioned by several speakers. Mr. Pazarcic had referred to the problem of the relations between coastal States and geographically disadvantaged States. He had no particular knowledge regarding decisions taken on that specific point, but trusted that at the judicial interpretation level, all the questions peculiar to each case would be taken into consideration.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MS. EDITH BROWN WEISS

Mr. Sun* mentioned that the United Nations Environment Programme (UNEP) administered a comprehensive environmental law programme that had a significant impact on the development and codification of international environmental law and, consequently, international law in general. The Montreal Protocol on Substances That Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Convention on Biological Diversity were among the instruments that had been elaborated under UNEP auspices.

The Commission on Sustainable Development, at its second session, had requested UNEP to study further the concepts, requirements and implications of sustainable development in relation to international law. Sustainable development would, for example, require the complementary development of environmental law and trade law, a close link between environmental law and human rights law and further development of the liability regime to meet the requirements of environmental law. Another concept, that of common concerns of humankind, was increasingly making its way into international and environmental instruments and might also contribute to the development of fundamental principles of international law, such as that of State sovereignty. Still another example of the close link between the development of international environmental law and international law in general was to be found in the partnership concept: partnership arrangements appeared in environmental law instruments as innovative mechanisms for the implementation of compliance. The UNEP Environmental Law and Institutions/Programme Activity Centre looked forward to the enhanced efforts of international lawyers to promote the further development of international environmental law in meeting the challenges of sustainable development.

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Mr. Hassan* observed that no part of international law had witnessed more significant development in the past quarter of a century or promised a more exciting future than international environmental law. At the time of the founding of the United Nations, most principles of international law had been questioned as reflecting the interests of the developed West, while the third world had remained outside its participative processes. After decolonization, international environmental law had perhaps been the first area of international law to develop under the new sovereign equality between North and South. At the United Nations Conference on the Human Environment, held at Stockholm in 1972, a development in international law had for the first time in recent decades owed its origins to universal concern, rather than the interests of the developed nations alone. Against that background, he commended Ms. Brown Weiss on her vision of the future of international environmental law. The South looked to the promised transfer of financial resources and technology, the alleviation of poverty, equitable trade practices and more sustainable consumption patterns as the new pillars of the environmental order. He wondered whether Ms. Brown Weiss did not feel the time had come to concretize the declaratory content of international environmental law in a binding covenant on environment and development. He was pleased that she had acknowledged the draft covenant on the environment and development recently prepared with UNEP assistance by the World Conservation Union and the International Council of Environmental Law.

Mr. Hannikainen** noted that in recent years the international community had recognized the basic right of indigenous peoples to preserve their cultures, livelihoods and environments. Indeed, indigenous peoples had been recognized as legitimate actors in the international arena. He wished to ask Ms. Brown Weiss what kind of role she foresaw for indigenous peoples in the new environmental law, as she had not mentioned them among the new actors. Was it that she thought they were too weak to have any meaningful role?

Mr. Corona Aguilar*** pointed out that while human beings had been contributing to the deterioration of the environment, environmental questions constituted a priority for those same human beings. For that reason it was important to find formulas for stable, sustainable economic development that was also equitable. He felt that the declaration of zones as the common patrimony of mankind was a positive response of the human

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conscience, but that those zones were still inadequate. It was necessary, therefore, not only to promote their expansion but also to promote consciousness of the fact that there was only one Earth and to declare the planet Earth part of the common patrimony, and its preservation the responsibility, of humanity.

Mr. Doumbe-Bille* said he wondered to what degree the new directions presented by Ms. Brown Weiss, with whom he agreed in substance, were likely to raise difficulties in international law, especially with regard to the progressive development of international environmental law as presented by Mr. Sohn. His question, therefore, was whether one could consider the new directions in international environmental law as reflecting an evolution of general international law. Indeed, the relationship between international law and environmental protection was far from clear. It had often been stated that, owing to the newness and complexity of environmental protection rules, the international juridical framework had proven, at least at the outset, relatively ill-prepared to frame the questions posed by the environmental revolution. What then might the precise impact of that revolution be and might the evolution described modify fundamental aspects of general international law? How much was the proposed draft convention likely to strengthen the positivity of international law? And to what extent did Ms. Brown Weiss think the action of the Environmental Chamber just instituted in the International Court of Justice would strengthen that positivity?

Mr. de Yturriaga** said he was somewhat sceptical about the idea of a global convention on environmental protection, which might even be a somewhat dangerous formula. The norms of environmental law were currently contained primarily in the Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration), as "soft law", and became incorporated into other international instruments. The United Nations Convention on the Law of the Sea, for example, had included some of the Stockholm principles as binding juridical norms. If, however, one started the process of codifying the fundamental principles of environmental law in a convention, there was a risk that some of those principles might be weakened if the agreement reached at Stockholm and subsequently at Rio was not reproduced and if countries did not accede to the convention, once elaborated. He wished to know, therefore, what Ms. Brown Weiss's basis

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** Representante Permanente de España ante los Organismos Internacionales en Viena, Austria.

was for suggesting that a general convention on the environment should be elaborated.

Mr. McNeill* referred to Ms. Brown Weiss's remarks that non-binding instruments could be advantageous and that compliance—not in the strict sense of legal compliance, but rather of actions consistent with such non-binding arrangements—changed over time. In the environmental field, he said, value was placed on transparency, public reporting and education to enhance accountability. Notwithstanding, several non-binding instruments in the area of arms-export control, dealing, for example, with exports of nuclear technology or with ballistic-missile technology, had enjoyed a high degree of consistent action, despite a discouragement of transparency. In view of those somewhat different experiences, he invited Ms. Brown Weiss to comment on whether she saw transparency as a critical factor in the evolution of soft-law standards to hard law, in areas where such evolution was desired.

Dr. Nagy** said he wondered whether Ms. Brown Weiss could envisage the concept of intergenerational equity, which might mature into a principle, ever being used by an arbitration tribunal or other court in a decision on the allocation of natural resources.

Mr. Bankobeza*** noted that Ms. Brown Weiss, in referring to the potential for "treaty congestion", had rightly pointed to the absence of any comprehensive agreement on environmental law and the need to coordinate the related treaties. Yet he wondered what her thoughts were on the role of the unpredictability of certain environmental problems in causing the proliferation of treaties, which were often drafted within a short period and on an ad hoc basis. Many such treaties had been negotiated to address sector-specific problems, which, once overcome, deprived them of current significance. If, for example, current scientific findings were reliable, the ozone layer would be restored to its pre-industrial state by the next century, at which point the Montreal Protocol would have accomplished its task. Owing to the unpredictability of the problems to be addressed, a similar process was likely to continue for some time to come.

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Ms. Brown Weiss (reply), taking up the question on the place of indigenous peoples in international environmental law, pointed out that it was important to recognize that those peoples had profound knowledge of the operation of the natural system and the relationships of humankind with it. Like everyone else, they had the right to enjoy and benefit from that system and the right to cultural integrity.

Regarding the desirability of a binding general convention on international environmental law, she felt it was time to consider the question, inasmuch as a similar instrument existed, for example, in the field of trade. Considering the issue meant closely examining the desired goals, the content of such a document and the process of elaborating it, account being taken of the many actors involved. It also meant examining the process for developing transnational environmental standards.

On the subject of non-binding instruments and transparency, such instruments might be desirable in the international environmental field because they were potentially more flexible than agreements and easier to negotiate and they might lead to binding agreements in the future. Furthermore, it was conceivable that they were complied with no less fully than binding agreements. Indeed, transparency was considered in the international environmental field as tending to promote compliance; yet it sometimes also worked against compliance, either leading to distortions of what was made transparent or preventing certain things from being put in writing. It did not seem likely, however, that a non-binding agreement combined with a lack of transparency would lead to a binding agreement.

To know whether a principle such as intergenerational equity could ever be invoked in court, she said, one must first define the term. In any case, the concept added a temporal dimension and, once defined, would become like any other principle that guided behaviour.

Regarding potential treaty congestion, she considered quite valid the point that environmental problems were difficult to predict and that agreements might therefore continue to proliferate. More comprehensive agreements, however, might be able to accommodate new developments, for such agreements evolved in time and often included procedures that permitted amendments without the need for a new ratification.

As for the way in which international environmental law and its new directions related to international law in general, those new directions were in part a reflection of developments taking place in an emerging new model of the international legal order.

THURSDAY, 16 MARCH 1995

NEW APPROACHES TO RESEARCH,
EDUCATION AND TRAINING IN THE
FIELD OF INTERNATIONAL LAW
AND ITS WIDER APPRECIATION

4

PRESENTATION OF THE TOPIC

*Edward Arthur Laing**

I. INTRODUCTION

As we approach the twenty-first century, it is remarkable that, in some countries, international law is not high on the national agenda. Foreign ministers sometimes skirt the legal rules. Parliamentary bodies adopt legislation which is antithetical to some of the basic tenets of international law. Contributions to the United Nations and other international organs are unpaid, in violation of binding norms. Institutions often offer little training in international law. One therefore appreciates the title of this week's proceedings, "International Law as a Language for International Relations". At the end of the twentieth century, we have still not reached the level of discourse where the question to be asked is whether international law can now become the main language for international relations, which can probably be regarded as the target of a panel on research and learning international law, with participants as distinguished as our panellists. That is the point of departure of this moderator's presentation.

I have divided the paper into three sections: (a) some formal aspects of the acquisition and transmission of knowledge about international law; (b) the United Nations and the pedagogy of international law; and (c) international law in the twenty-first century, dealing with aspects of global communications, ideology and ethnicity in a non-polar era. In general, my focus is on the United Nations.

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II. TEACHING INTERNATIONAL LAW: FORMAL ASPECTS

A. Traditional Considerations

Traditionally, the audiences targeted by the international law teaching community have been lawyers and, to a lesser extent, diplomats and other specialists in international relations. In countries where law has been taught in faculties which offer instruction in subjects other than juridical sciences to prospective legal and non-legal professionals, the audiences have tended to be substantially wider than in those countries in which only prospective lawyers are trained in law faculties. I am uncertain how much these divisions of labour have affected the approach to such formal questions as the selection of materials illustrative of international law and management of the volume of materials. However, I doubt that the approaches have been significantly different. I sense, too, that this has been the approach to two formal matters which I will discuss: sources of international law and the authoritativeness of purported international law norms.

1. *Sources of International Law*

Since the birth of the League of Nations, multilateral treaties have had considerable normative significance.¹ This is underscored by the acuity with which the United Nations has prepared and adopted such treaties as the 1982 Convention on the Law of the Sea, the recent environmental conventions and the 1994 Convention on the Safety of United Nations and Associated Personnel (General Assembly resolution 49/59, annex). However, I do not share the position that, with the slow growth of custom and the paucity of general principles, codification and progressive development through formal consensual instruments are the near-exclusive method of law-making. Instead, I believe that law-making is equally served by sophisticated specialized law-making processes of the specialized agencies of the United Nations system.² It is also served, in the United Nations family, by at least some non-

¹ See the vitally important contents of Judge Manley Hudson's monumental *International Legislation* series. Some of the contents of that series are discussed in the author's forthcoming article "Equal access/non-discrimination and legitimate discrimination in international economic law". Since the establishment of the United Nations, the volume of multilateral treaties has grown immensely.

² See Frederic L. Kirgis, Jr., "Specialized law-making processes", in Oscar Schachter and Christopher C. Joyner, *United National Legal Order* (1995), pp. 109-168.

binding guidelines and codes,³ General Assembly resolutions and certain conference documents.

The wide range of views about the normative significance of resolutions is well known.⁴ Recently, I have been able to observe the system somewhat and have been impressed by the elaborateness of the ritual of negotiation. One cannot fail to note the care with which the language of resolutions is crafted. All representatives seem to regard the process as one of the gravest import. The frequently scrupulous regard to precedents would warm the heart of any pedant. Perhaps only the foolhardy will casually deviate from previously agreed language. Furthermore, as we approach the fiftieth anniversary of the United Nations and the twenty-first century, the copiousness of preambular references to previous resolutions has led to the suggestion that each delegation should have at its desk a computer terminal providing instant access to such precedents.

I think that United Nations resolutions have great normative significance at present, certainly as providing authoritative interpretations of the Charter of the United Nations,⁵ as engaging a State's good faith, consistency and probity and as tangible evidence of State practice, or even as a discreet indication of *opinio juris*. This conclusion is fortified by the reality that, in a world without meaningful polarities, power is not an effective index of legitimacy. Hence consensus resolutions should increasingly rise to the level of autonomous or autochthonous international legislation or be a way to skirt difficult domestic hurdles to the adoption of treaties or to stimulate judicial legislation.

Almost as pervasive are various formal emanations of United Nations conferences. I especially include declarations and programmes of action at such summits as the 1992 United Nations Conference on Environment and Development at Rio de Janeiro and the 1995 World Summit for Social Development at Copenhagen. The diplomacy of negotiating such documents much resembles that related to resolutions. Actually, they might be drawn up with greater care. In addition to the gravity of the language and the recitation of precedents in the summit documents, their content suggests that they often may be instinct with normativity.⁶ Certainly, it is difficult to deny the juridical significance of declarations deliberately adopted by the world's heads

³ See Paul C. Szasz, "General law-making processes", in Schachter and Joyner, *op. cit.*, pp. 1-8.

⁴ For some of our views, see Edward A. Laing, "International economic law and public order in the age of equality", *Law and Policy in International Business*, vol. 12, pp. 727 and 751-754.

⁵ See Louis B. Sohn, "Interpreting the Charter", in Schachter and Joyner, *op. cit.*, pp. 169-229.

⁶ Illustrations are the painfully and elaborately negotiated formal sections on "Principles and goals" and "Commitments" in the Declaration of the World Summit for Social Development.

of State and Government at one of their rare meetings, after protracted and meticulous consideration.⁷ The same presumably holds true for declarations adopted by such megaconferences⁸ as the 1994 International Conference on Population and Development at Cairo.⁹ In view of the lesser degree of attention often given to lengthier programmes of action, we would concede that they might have a lesser degree of normativity.

The obvious conclusion for the pedagogy of international law is that, although the normative context of these materials is usually very broad, they need to be given much more weight in educational materials and research and in instruction. Pedagogues should not always be at liberty to fulfil their negative prophecies.

2. *The Authoritativeness of International Law Norms*

Regarding authoritativeness, I have already intimated that the normative significance of consensus resolutions is enhanced by the decline in international relations of the phenomenon of polarities. And, speaking about authority, let me suggest that lawyers should stop pretending that the authority of a legal norm exclusively derives from the stature of the formal or other source. We, the interpreters and applicators, whether in assembly, chancery or secretariat, must own up to being the high priests of the legal order. What we say is the law often comes close to being oracular. Thankfully, we are at the dawning of an era in which electronic communications and changing forensic techniques make instant armchair lawyers of the average citizen. When this trend eventually reaches the international legal system, its inherent democracy will provide the antidote to apparent excesses in my "high priest" proposition.

One condition favouring the enhanced authoritativeness of United Nations resolutions is the increasing approach of universality of membership, in

⁷ See Laing, "International economic law . . .", loc. cit., p. 753, and Edward A. Laing, "The norm of self-determination, 1941-1991", *California Western International Law Journal*, vol. 22, pp. 209 and 294-296, discussing a variety of arguments supporting the thesis in the text. Of course, resolutions and declarations can stimulate domestic law and, in turn, international law. In that connection, see the concluding paragraph of statements by Jacques Santer, President of the European Commission, at the World Summit for Social Development, 12 March 1995: "For its part, the European Commission, with the support of the European Parliament, will propose that the Council translate the Copenhagen Declaration into Community measures forthwith".

⁸ The Cairo Conference was said to be the largest international conference ever. It was held alongside one of the largest ever gatherings of non-governmental organizations, dealing with the same subjects. International media attention was continuously focused on their deliberations.

⁹ Note should be taken of the formal Principles in the *Report of the International Conference on Population and Development*, Cairo, 5-13 September 1994 (United Nations publication, Sales No. E.95.XIII.8), meticulously negotiated by the Friends of the Chairman of the Main Committee.

this dynamic era of democracy¹⁰ and self-determination, ushered in by the Third Point of the Atlantic Charter of 1941¹¹ and underscored by the opening words of the United Nations Charter—"We the peoples", recently stressed by the Secretary-General, commenting on the forthcoming fiftieth anniversary of the Organization.¹² It is therefore crucial that the research objectives and the educational and doctrinal materials on international law should reflect these realities.

Traditionally, such materials have accorded high juridical and, sometimes, normative status to Security Council materials. This is, possibly, a partial result of the practical importance attributed to the Council.¹³ Undoubtedly, much of this is caused by the ascription of mandatory effect to the Council's resolutions by the Charter. Yet, when one looks at most of the more important of the Council's recent resolutions (e.g., the resolutions providing for sanctions against Iraq and Haiti), one is impressed by their generality and judicious obfuscation of the legal basis for enforcement actions.¹⁴ This might be partly due to the difficulty of making comprehensive determinations in exceedingly complex fact patterns rooted in centuries of controversy.

Thus, not surprisingly, the authority of the Security Council is increasingly questioned. This is aggravated by the inherent lack of democracy in the Council's composition, a matter which is being actively discussed by the

¹⁰ For a discussion of the dynamism of democracy in the context of the United Nations, see the statement made in the General Assembly on 7 December 1994 by Edward A. Laing during the debate on agenda item 159, "Support by the United Nations system for the efforts of Governments to promote and consolidate new or restored democracies" (A/49/PV.80, pp. 4 and 5).

¹¹ See Laing, "The norm of self-determination . . .". On the Atlantic Charter generally, see Laing, "The contribution of the Atlantic Charter to human rights law and humanitarian universalism", *Willamette Law Review*, vol. 26 (1989-1990), pp. 114-169.

¹² It is assumed that formal and substantive adherence to the equality of small States within an international organizational and legal system of States of varied sizes, wealth and power will continue and be enhanced. See E. A. Laing, "Independence and islands: the decolonization of the British Caribbean", *New York University Journal of International Law and Politics*, vol. 12 (1979), pp. 282-312. For the prediction that the already considerable numbers of small States will increase in future years, see E. A. Laing's statement of 18 October 1994 in the Special Political and Decolonization Committee (Fourth Committee) on agenda item 74 (Protection and security of small States) (A/C.4/49/SR.7), p. 16.

¹³ The formal work products of the Security Council are thoroughly documented. Careful attention is given to the prompt promulgation of the verbatim and detailed summary records of interventions during Council debates.

¹⁴ See Oscar Schachter, "United Nations law in the Gulf conflict", *American Journal of International Law*, vol. 85, pp. 452-473.

General Assembly.¹⁵ These problems raise serious questions about the normative significance of the Council's work products. Nevertheless, teaching materials and professionals devote a vast amount of space and attention to these products. It is arguable that comparatively more attention should be given to the normativity of the products of the General Assembly and other United Nations bodies, since strengthening the cultural, social, economic, environmental, developmental, technological and humanitarian dimensions is the prophylactic for avoiding the pathology of "peace and security".

B. Contemporary Considerations

Many practitioners of international relations increasingly appreciate the importance of avoidance of that pathology. Yet, one has the impression that many faculties producing specialists in international relations and law have not significantly changed their methodologies.¹⁶ There has been much interpenetration of the world's legal systems, owing to massive migrations, the dynamism of industrial globalism and the world trading system. Yet, in some

¹⁵ For intervention by the author on behalf of his Government, see *A/49/PV.30*. In its current proposals, the Government of Belize has stressed, *inter alia*, the importance of ensuring democracy in the composition of the Security Council, recommending the substitution of the status of permanent membership by "indefinite members", of which there would be two categories. First, there would be two representatives from each of the Organization's five regional groups, democratically elected, for substantial renewable terms (of possibly five years), by the respective regional group. These representatives would eventually include existing permanent members, for whom there would be grandfather provisions, pending their inclusion within the proposed new system. Second, there would be provision for two or three indefinite members based on their contribution of a minimum percentage of the budget of the United Nations and their satisfaction of such criteria as organizational good citizenship, including contribution to peace-keeping. One of these States would be the United States of America. While this aspect of the proposal is facially undemocratic, it acknowledges the primordial importance of financial considerations in the realm of peace and security.

Democracy would also be advanced by two other proposals by Belize: (a) the veto should be abolished, but, in the very likely absence of agreement on this, it should be replaced by a new form of veto requiring a minimum of two or three concurring votes by indefinite members for a purported exercise of the veto to be effective; and (b) States would be at liberty to enjoy the purely voluntary and consensual status of composite or constituency indefinite members or regular members of the Security Council. By this modality of membership, adjacent pairs of States would jointly provide representatives for single Council seats, thus rendering more feasible Council participation by the 80 per cent or more States that have never been members, owing to inability to deploy the huge human and other resources necessary for effective membership. Adjacency would include trans-maritime or trans-aquatic adjacency. Commensurately with the popular notion, enshrined in Chapter VIII of the Charter that peace and security should be an enterprise peculiarly appropriate for regional cooperation, the Belize proposals include the notion that any two States parties to a Chapter VIII agreement or arrangement would be permitted democratically to participate in a composite or constituency arrangement. In such arrangements the veto and vote would be rotated between participants on a monthly basis, in accordance with United Nations practice.

¹⁶ See John King Gambal, *Teaching International Law in the 1990s* (1993). Cf. Grayson Kirk, *The Study of International Relations in Colleges and Universities* (1947), pp. 38 and 39.

significant national jurisdictions, aspirants for law practice are not required to be qualified in international law. Much work needs to be done.

1. *Selecting Materials*

Researchers, students and teachers must be more conscious of the diversity of relevant materials, issues and actors. The new actors are the myriad States that are Members of the United Nations, thousands of non-governmental organizations, constellations of intergovernmental organizations, transnationals and industry associations. They increasingly participate in the work of the United Nations, to which they send masses of materials. I believe that many of these materials help to stimulate the body of legal norms, regardless of the nominal theory about sources. The same must be the case as regards authoritativeness. As to relevance, it is hard not to read a facsimile message on nuclear issues from someone in Ukraine.

2. *Management of Volume of Materials*

This dense volume of materials obviously gives rise to quantitative and evaluative problems of magnitude. Do we give equal weight to Greenpeace, Bella Abzug and our friend from Ukraine? Given the increasing availability, through electronic retrieval systems, of vast volumes of materials which constitute State practice, what selection and limiting criteria should be applied?

3. *Issues of Democracy*

In determining the existence and authoritativeness of these asserted international law norms, it is logical to apply criteria which have a firm basis in democracy, given the importance of this value today. Do we give equal weight to the views and practices of all subregions? What is the significance of active dissent by certain subregions or Member States to negotiating positions arrived at within such non-consensual systems of group discipline as the Movement of Non-Aligned Countries, the Group of 77 or the Alliance of Small Island States (AOSIS)?¹⁷ Serious analysis of these matters is overdue.

¹⁷ AOSIS was established during the Rio de Janeiro Conference. Its members are mainly small island countries, allied to address issues relating to the sustainable development of the ecosystems and habitats of such countries and low-lying mainland coastal areas. The AOSIS countries actively participated in the Global Conference on the Sustainable Development of Small Island Developing States, held in Barbados in 1994. AOSIS is also actively involved in the Global Environment Facility and in the Conference of the Parties to the Conventions on Biological Diversity and Global Warming.

4. *Further Issues of Dynamism*

The three issues mentioned so far are important and dynamic. So are the proliferating intergovernmental relationships within several geographical subregions and regions. In the Caribbean, there are a number of overlapping economic integration and coordination arrangements. Mainland Belize also increasingly participates in arrangements in Central America.

The implications of all of this for international legal research and teaching are self-evident. This is also the case with the interpenetration of national and international law. The most dramatic example is the Marrakesh Agreement adopting the results of the Uruguay Round of General Agreement on Tariffs and Trade (GATT) negotiations.¹⁸ Most of the parties are developing countries without the means to examine the national law implications of the forest of complex and novel agreements and understandings. Yet parties undertake to implement such agreements.¹⁹ It is entirely probable that the new World Trade Organization (WTO) and many of its members will be obliged to consider that these instruments apply in national legal orders regardless of whether there has been compliance with relevant incorporation or transformation provisions of national organic law.

III. THE UNITED NATIONS AND INTERNATIONAL LEGAL PEDAGOGY

As the twenty-first century approaches, the preoccupation of the United Nations with security issues is conjoined with our required interest in the wide variety of non-security matters and the large range of international actors. All of this diverse work of the Organization is within the framework of international law, broadly defined.

A. Structuring the United Nations Documents

1. *Drafting Resolutions and Declarations*

The care with which General Assembly resolutions are prepared has already been noted.²⁰ Yet we must not get ensnared by organizational precedent. I refer

¹⁸ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations—The Legal Texts* (1994).

¹⁹ *Idem*, article XI.

²⁰ See footnote 4.

to the negotiation of the draft resolution adopted by the General Assembly as resolution 48/141 on 20 December 1993, creating the post of United Nations High Commissioner for Human Rights, and of the Principles in the *Report of the International Conference on Population and Development*, Cairo, 5-13 September 1994. The tendency was to state human rights as dichotomous sets, following the labels of the two international covenants of 1966, viz. the International Covenant on Civil and Political Rights, on the one hand, and the International Covenant on Economic, Social and Cultural Rights, on the other hand. However, several delegations wished to stress the coequal importance of the five traditional species of rights—civil, cultural, economic, political and social and their interdependence with the right to development, as articulated in the Declaration on the Right to Development contained in General Assembly resolution 41/128 of 1986. On both occasions, those delegations successfully argued that we should alphabetize the five traditional rights. They urged that stating the rights according to the above dichotomy tended to perpetuate the traditionally inferior nature of the second-mentioned set of rights in several domestic orders and in the conceptions of some jurists. This formula was automatically followed in a major reference in last week's documents of the World Summit for Social Development.

During the drafting of resolutions, we meticulously repeat, as holy writ, language which was previously "agreed". Delegations wishing to update language are strongly opposed. Similarly, there is a "moving train" approach, as we progress through a series of preparatory conferences. Many delegations seek to hold negotiators to language agreed at earlier stages during the negotiations. Often, this is because of the need to maximize negotiational economies, especially during the gap between the last preparatory meeting and the final formal conference or summit. Yet, this could contribute to failure to make provision for the truth.

B. The Department of Public Information as International Law Teacher

In these circumstances, the validity and authoritativeness of proposed norms derivable from United Nations resolutions and documents might also be impaired. This could be aggravated if the Department of Public Information of the Secretariat fails to induce out of the materials it produces or reproduces the maximum normative projection. This loss would be heightened if, despite the normative dynamism of the United Nations, some of the Department's personnel were to become insensitive to the title of this Congress.

C. Managing Conflict: The Security Council and Pedagogy

It has recently been suggested²¹ that, in order to better manage international security, the Security Council should aggressively utilize the international media, preventatively and to complement or substitute for coercive enforcement measures. This could become a remarkable and cost-efficient weapon in the quest for global peace and security. And it would be a vivid example of popular pedagogy in the service of utilizing international law as a language for international relations.

D. The Secretary-General as Master Professor

The Secretary-General is perhaps comparable to the Catholic Pope. He is best equipped to inspire and enlighten the global masses in the quest for peace and justice, also using popular pedagogy. During the general debate at the forty-ninth session of the General Assembly, the Minister for Foreign Affairs and Economic Development of Belize suggested that:

“Above all, the United Nations must learn to speak to . . . the peoples of the world. In the ongoing efforts to rearticulate, reform and reinforce the vision of the Charter’s framers, we can even envisage our Chief Executive going on camera on popular talk shows, teaching new constituencies about what is after all their organization. He should continue to find bully pulpits in the global electronic information meeting-place . . .” (A/49/PV.28, p. 7).

By so doing, the Organization will more effectively communicate, hopefully using the language of international law. Through the rapport and the alliances it thereby develops with informed publics, it might overcome the parsimony of national parliaments in times of budgetary austerity.

IV. INTERNATIONAL LAW IN THE TWENTY-FIRST CENTURY

Everything said so far is related to our shared aspiration for a more effective body of international law as a language of international relations. Finally, some thoughts on that subject.

²¹ See Keith Spicer, “Propaganda for peace”, *The New York Times*, 10 December 1994, Op-Ed page.

A. Spanning and Unifying the Globe

In this new world of cyberspatial communications, it is natural to expect international law and other communication to be increasingly globalized. Already, large libraries are available on-line. This will facilitate individual researchers, practitioners, tertiary and professional institutions and, eventually, teachers at secondary and even primary levels, where it is most necessary that international law be immediately taught. Nevertheless, we will have to examine the issue of democracy, since the benefits of such technologies fail to reach most persons.

Language and democracy are closely related. Yet, there have been suggestions that perhaps a half or less than the six languages of the United Nations should be used for certain exercises, e.g., a conference of the parties to a technical treaty. These suggestions have been energetically rejected by adversely affected Members. Nevertheless, financial austerity is unavoidable. Hence we will have to study this question, along with all other cost-cutting ideas.

B. Ideology and Ethnicity in a Non-polar World

Here I wish to mention several additional consequences, in the present context, of the non-polarity of the post-cold war world.

1. *A New Paradigm of Rights*

First, I want to describe a few of the components of that new paradigm of human and related rights which I have elsewhere described as “humanitarian universalism”.²² Despite the fact that it is now deemed less than successful, the United Nations involvement in the intervention in Somalia squarely highlights arguments in favour of humanitarian intervention in rare types of cases. The now well-developed monitoring and reporting system of rapporteurs and treaty committees is another component. So is the growing appreciation of the status of rights and entitlements to a clean environment, health care, shelter and national self-determination.

These are closely related to the right to development (see General Assembly resolution 41/128, annex), a composite individual and collective right. Many of these extend a trail, first blazed in the Fourth Freedom and the Atlantic Charter’s Freedom from Want, which has now taken vital form and substance in the Declaration and Programme of Action of the World

²² See Laing, “The contribution of the Atlantic Charter to human rights law and humanitarian universalism”, loc. cit.

Summit for Social Development. All these rights and accompanying obligations are now acknowledged to be integrally related.

There have been various initiatives for strengthening human rights. These include the Declaration and Programme of Action of the 1993 World Conference on Human Rights at Vienna. Finally, the High Commissioner for Human Rights is a mechanism that, in time, might be utilized as a discreet method of ensuring accountability. However, much work still needs to be done to ensure that the paradigm, as practised, is transparent, fair and non-selective.

2. Ideology and Ethnicity

Non-polarity suggests that international law in the coming years will not be as ideologically charged as during this century. In fact, the recent decline of the ideological dimension has started to unshackle international society from the incubus of the doctrine of sovereignty. More than any other factor, this has been responsible for the emergence of the new paradigm of rights. Somewhat surprisingly, this poses extraordinary challenges, especially for large States. It also offers vast and beneficial opportunities for all. Legal scholars must now devise new methods of pedagogy and research.

However, the de-emphasis of ideology has been accompanied by the re-emergence of the baneful phenomenon of ethnicity and related rivalries, prejudices and hatred fueled by perceptions of distinctions between peoples. There are signs of these maladies in otherwise enlightened chanceries, academies and agencies for funding research. This, sadly, perpetuates ethnocentric perspectives of international relations in the media, public perception and elsewhere. Clearly, international legal scholars must ceaselessly search, humbly and honestly, for ways of improving our pedagogy to bring to all peoples the harmony, satisfaction and peace to which, as living beings, we are entitled.

LA PROMOTION DU DROIT INTERNATIONAL PAR LA VOIE DE LA RECHERCHE ET DES NOUVELLES MÉTHODES D'ENSEIGNEMENT

*Mohamed Bennani**

Depuis 1945, le droit international connaît des transformations importantes. Celles-ci sont dues en grande partie aux mutations que connaît la société spécifique que ce droit est censé régir, à savoir la société internationale.

Ces transformations sont aussi importantes parce qu'elles touchent tant à la qualité de ses destinataires qu'à son domaine d'application et à sa sphère d'intervention.

En effet, le nombre d'États membres de la société internationale n'a pas cessé d'augmenter, mais aussi de se diversifier et de subir des mutations.

La société internationale qui donne naissance au début du siècle aux organisations internationales a vu celles-ci renforcer leur place et prendre de l'ampleur en accroissant leurs activités.

Mieux encore, l'ordre juridique international laisse de plus en plus place à de nouvelles entités promues progressivement au rang de sujets ou de destinataires du droit international.

Par ailleurs, le domaine d'intervention du droit international s'est aussi considérablement développé. Celui-ci s'est, en effet, étendu d'abord à des problèmes qui relèvent du travail, de la santé, de la culture ou des droits de l'homme; mais il touche, comme on le sait, à des secteurs qui relèvent à la fois de l'environnement ou de la météorologie, du désarmement ou du développement, de l'économie ou des finances, de l'investissement et du commerce — pour ne citer que ces domaines.

Devant ces transformations importantes, comment doit réagir le juriste à l'aube du XXI^e siècle ? Comment doit réagir le juriste et, en particulier,

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celui qui a pour mission de transmettre les connaissances ? Comment devra réagir celui qui doit veiller à l'affermissement des principes fondamentaux du droit international, celui qui doit veiller aussi au développement et à la promotion de la recherche, pour que le droit international soit à la veille du XXI^e siècle l'idiome, c'est-à-dire le langage des relations internationales ?

Devant la complexité des problèmes qu'affronte le pédagogue ou le chercheur, la mission devient de plus en plus difficile, dans la mesure où il y a lieu de répondre à une série d'interrogations :

- Faut-il rompre avec les méthodes d'approche classiques du droit international, c'est-à-dire celles qui mettent en exergue le rôle de l'État souverain ?
- Faut-il proposer d'autres méthodes d'approche, qui tiennent davantage compte des nouvelles transformations de la société internationale et du droit qui la régit ?
- Faut-il concevoir que l'enseignement des principes de base du droit international, l'initiation à la réflexion, la critique et la recherche soient inculquées à différents stades de l'éducation ou de la formation ?

Nous pensons, pour répondre à ces interrogations, que toute méthode d'approche saine est celle qui ne sera ni statique, ni descriptive ou positiviste, mais qui se veut réaliste, tenant compte de l'adéquation qui doit exister entre la norme et la réalité.

Partant de ces considérations, nous nous proposons de nous demander, comment on peut envisager une promotion du droit international en considérant comme fondement :

- D'une part, le caractère de plus en plus diversifié de ses destinataires, ouvrant par là même de nouvelles voies pour la recherche; et
- D'autre part, l'extension du domaine d'application de celui-ci à de nouvelles catégories juridiques, ce qui permet d'arguer avec de nouvelles pistes pour la réflexion sur le devenir du droit international.

I. L'APPROCHE FONDÉE SUR LE CARACTÈRE DIVERSIFIÉ DES DESTINATAIRES DU DROIT INTERNATIONAL

Toute nouvelle analyse de la société internationale actuelle devrait nous permettre de rompre avec les méthodes d'approche classiques et orienter les recherches vers de nouveaux objectifs.

Cette démarche se justifie par le fait que dans la société internationale d'aujourd'hui l'État n'est plus à même d'être le sujet exclusif, car à côté de lui de nouvelles entités émergent.

Mieux encore, cette démarche se justifie par le fait que, en tant que sujet originaire, l'État a pu subir des transformations, cependant que le caractère de plus en plus complexe de ces nouvelles entités rejaillissait sur toute démarche dans le domaine de la recherche.

La promotion du droit du fait des transformations de la notion d'État

Pendant longtemps, l'État est considéré comme le sujet exclusif du droit international. Existait sous sa forme moderne depuis le XVI^e siècle, l'État a vu ses éléments constitutifs se renforcer au fil de l'évolution, sur la base des différentes approches de la souveraineté¹.

Soumis pendant longtemps en raison de leur caractère homogène à l'unicité de droit applicable, les États ont vu, sous l'impulsion de certains facteurs, leur nombre augmenter et leurs qualités se transformer en différentes catégories.

En effet la prolifération des États est — sans nul doute — l'un des phénomènes les plus marquants de ces 50 dernières années. Existait en nombre limité au début du siècle (lors des conférences de la paix de La Haye, notamment en 1889 et 1907), ils ne sont qu'au nombre de 51 en 1945, lors de l'adoption de la Charte de San Francisco, de 80 au lendemain des années 60 avec la décolonisation pour atteindre 160 vers la fin de la décennie 70, et 185 États Membres de l'ONU en 1994.

Cette prolifération, qui a eu cours durant les dernières décennies autour du concept d'État-nation, s'oriente aujourd'hui vers une double direction.

En effet, alors que l'État-nation qui fût à la base de la société interétatique et du droit international du XIX^e siècle tend à disparaître en Occident et à se fondre dans un cadre beaucoup plus large qui est celui de l'État fédéral, ou d'ensembles économiques ayant un caractère supranational², il n'en est pas de même ailleurs.

C'est ainsi qu'avec la dislocation du bloc Est, les ensembles plurinationaux comme l'ex-URSS et multicommunautaires comme l'ancienne Yougoslavie ou l'ex-Tchécoslovaquie éclatent en États-nations³.

Dans les pays en développement et États nouvellement indépendants, bien que le concept d'États-nations ait pu être au centre de leurs revendications indépendantes, c'est le plus souvent vers une sorte « d'implosion » de

¹ R. J. Dupuy, « La crise du droit international », *Le monde actuel, Collectif 1970*, p. 150 à 168; A. Truyol Serra, « Souveraineté et philosophie du droit », *Archives* (1990), p. 313 à 326; M. Virally, « Avatars et pérennité de l'idée de souveraineté », *Les relations internationales dans un monde en mutation*, IUMEI Sijthoff (1979), p. 179 à 195.

² D. Carreau, *Droit international*, Pedone, Paris (1994), p. 30 et suiv.

³ G. Guillaume, *Les grandes crises internationales et le droit*, éditions Points Essais (1994).

l'intérieur, ou une forme de « balkanisations », sous l'effet du tribalisme ou des ethnies, que se destine le sort de nombreux États nouveaux⁴.

Le nombre d'États ayant ainsi augmenté depuis 1960 avec le mouvement de décolonisation et depuis 1990 avec la dislocation du bloc Est, le droit international ne doit-il pas s'adapter au caractère hétérogène de la société internationale actuelle ? Il doit en tout cas tenir compte des différentes aspirations des États et groupements d'États et s'atteler à résoudre les problèmes nouveaux que la société internationale pose. En cela, il y a certainement une promotion du droit international et un nouveau champ d'orientation de la recherche.

Jusqu'au début du XX^e siècle, l'unicité et l'homogénéité des États étaient des traits dominants, alors que le droit international classique ne comptait qu'avec un nombre limité d'États, ayant un fond civilisationnel commun et exceptionnellement avec des entités considérées comme semi-civilisées⁵.

Depuis la révolution d'octobre 1917, une remise en cause de cette unicité s'opère, et plus tard au lendemain de 1945 et avec le mouvement de décolonisation le caractère hétérogène de la société internationale va dominer.

Il ressort de cette approche, et c'est là un nouveau champ pour la recherche, trois conceptions différentes de la notion d'État, bien qu'aucune remise en cause des fondements classiques de celui-ci (nécessité d'un territoire, une population et organisation politique indépendante) n'ait pu être enregistrée. Il s'agit de l'État national, l'État socialiste et celui en développement.

Malgré tout, le droit international actuel se trouve être confronté à trois catégories de problèmes tant au niveau politique, idéologique ou économique.

Une nouvelle approche s'impose ainsi dans ces trois directions.

Au plan politique, la souveraineté d'une catégorie d'États apparaît davantage comme un mythe que comme une réalité.

Cela est apparent pour les États nouveaux, ayant des assises nonchalantes à cause des frontières nationales mal définies ou contestées, à cause du manque d'unité de la population souvent écartelée entre plusieurs territoires, ou des administrations exerçant un contrôle plus théorique que nominal. L'histoire récente, pour ne citer que les exemples du Rwanda ou de la Somalie, le montre bien aisément.

Ainsi depuis 1945, divers types de conflits armés de caractère inter-étatique, sous forme de guerre civile, d'indépendance ou de secession, ont vu le jour⁶.

⁴ Pierre Biarnes, *L'Afrique aux Africains*, A. Colin (1980).

⁵ M. Bedjaoui, *Le droit international : bilan et perspectives*, Collectif UNESCO, Pedone (1991), notamment l'introduction générale, p. 1 à 18.

⁶ Carreau, op. cit., et Biarnes, op. cit., p. 75 à 91.

Le caractère hétérogène s'est aussi amplifié par le fait que les États adoptent des régimes politiques relevant de conceptions et de philosophies le plus souvent opposées.

Au conservatisme ou libéralisme du XIX^e siècle ont succédé des conceptions révolutionnaires cherchant à repandre les systèmes nouvellement établis, ou mettant en exergue certaines philosophies ou conceptions de caractère extrémiste⁷.

Il y a ainsi une interaction entre le système politique interne et la société internationale, le droit international devant s'accommoder de toute situation nouvelle, donnant par exemple naissance durant la période de la guerre froide à « un droit de la coexistence pacifique » et depuis quelque temps à toutes les nouvelles approches fondées sur les notions d'ingérence, d'intervention humanitaire ou autre⁸.

Faisant irruption sur la scène internationale, certaines idéologies tentent de remettre en cause les valeurs développées au XIX^e siècle; de nouvelles approches cherchent à redonner de l'importance aux philosophies fondées sur un système de valeurs religieuses⁹, alors que d'autres tentent de remettre en cause les fondements de certaines conceptions économiques.

Au plan économique des oppositions majeures ont secoué fortement le monde contemporain et ont souvent donné lieu à des nouvelles approches du droit international.

Outre l'opposition classique qui a dominé la période de la guerre froide, engendrant une concurrence marquée sur l'organisation sociale et économique de l'État, c'est surtout le clivage qui oppose le monde depuis la Conférence de Bandung, et qui semble répartir les États entre riches et pauvres, qui pose le plus de problèmes.

En effet, l'écart grandissant entre pays industrialisés et pays en développement a fait que l'on a pu s'accommoder, durant la décennie 70, de revendications fondées sur la notion de nouvel ordre économique international.

Ces oppositions, ayant leur prolongement dans les organes d'organisations internationales, ont fait aussi, qu'un débat important se soit instauré. Celui-ci touchait à la question de la distribution des richesses à l'échelle mondiale certes, mais aussi à celle de la remise en cause du droit international classique. Celui-ci doit en effet, et c'est là encore le terrain d'élection d'une nouvelle approche, se transformer pour devenir selon certains un droit international économique et, selon d'autres, un droit international du développement¹⁰.

⁷ Notamment à l'exemple des crises qui ont secoué le continent africain, asiatique et latino-américain durant les 30 dernières années.

⁸ Biarnes, op. cit.

⁹ Carreau, op. cit.

¹⁰ Carreau, op. cit.

Malgré tout, les États restent de plus en plus dépendants, du fait de la croissance considérable du commerce international, de la dépendance à l'égard des échanges internationaux, ou de l'accroissement marqué des investissements privés internationaux¹¹.

Cette situation n'a pas manqué d'accroître l'intégration économique internationale. Elle a amené en tous cas les États dépendants à appuyer, au sein des organisations internationales, davantage l'élaboration des règles du droit international dans le domaine économique¹².

La promotion du droit du fait de l'émergence de nouvelles catégories de destinataires

Face donc à la promotion du droit international du fait des transformations affectant la notion d'État, celui-ci subit d'autres mutations en raison de l'émergence de nouvelles catégories d'entités.

Ainsi organisations intergouvernementales et organisations nongouvernementales, organismes publics et personnes privées, sont autant de catégories ayant pris place par devant la scène internationale. Elles tentent avec succès pour les unes, et difficulté pour les autres, d'être hissées au rang de sujet de la société internationale.

Si les organisations interétatiques sont le fait des États, parce que créées en vertu de leur volonté, en vue de régler des activités qui relèvent de l'intérêt commun, les organisations non-gouvernementales sont des entités qui échappent quant à leur création à la volonté de ces derniers¹³.

Certes les organisations internationales constituent le premier sujet dérivé de la société internationale. En effet, elles ont été instituées à l'origine par les États à travers l'exemple des premières commissions fluviales du XIX^e siècle, ou par les unions administratives qui suivirent, et le processus de leur création s'est renforcé durant l'entre-deux-guerres et s'est accéléré depuis 1945.

Étant directement le fait des États, mais aussi de manière indirecte le fait d'organisations mères¹⁴, ces entités sont actuellement un phénomène universel mais aussi régional.

¹¹ P. B. Maurau, « La participation du tiers monde à l'élaboration du droit international », *LGDJ* (1983), p. 87 et suiv.

¹² Ph. M. Defarges, « Les relations internationales dans le monde d'aujourd'hui entre globalisations et fragmentations », éditions STH (1992), notamment le chapitre III relatif à l'explosion du Sud.

¹³ J. M. Dufour, « Les organisations intergouvernementales et organisations nongouvernementales : réflexion sur l'avenir », *L'avenir des organisations internationales, Collectif*, publication de l'INEDIR, *Economica* (1984).

¹⁴ Ph. Bretton, « La transformation de l'ONUDI en institution spécialisée des Nations Unies », *Annuaire français de droit international* (1979), p. 567 à 578.

En effet, si autour des Nations Unies gravite le réseau le plus organisé des relations internationales, avec l'ensemble des institutions spécialisées, au plan régional « pullulent » de nombreuses organisations de caractère politique technique, économique, culturel ou social, alors que dans certains continents les unes ont une vocation intégrationniste, cependant que les autres s'accommodent tant bien que mal de la souplesse de leur catégorie originaire.

Il existe aujourd'hui près de 360 organisations internationales, avec les dernières en date, à savoir l'Organisation mondiale du commerce et l'Organisation pour l'interdiction des armes chimiques.

Hissée au rang de sujet de la société internationale, cette nouvelle catégorie de sujet de droit international couvre le spectre de toutes les activités humaines¹⁵.

Cette catégorie d'entités présente en tout cas un intérêt considérable pour le droit international et sa promotion. Car, créées pour gérer des « services publics » internationaux, ou pour réglementer des activités « d'intérêt commun », elles ont progressivement acquis une personnalité juridique propre, et deviennent indépendantes des États à raison de leurs propres ressources. Elles se détachent par là même des entités qui les créent en acquérant leur propre autonomie.

Du fait de cette évolution, les organisations intergouvernementales deviennent elles-mêmes — et c'est là un autre axe pour la recherche et la réflexion — « source autonome du droit ». Dans cette mesure, elles contribuent à travers leurs activités à un développement considérable de celui-ci.

En effet, à travers leur pouvoir qualifié parfois de « quasi-législatif », elles sont parties prenantes à la promotion du droit international actuel. Mais, comme les organisations non-gouvernementales, elles demeurent soumises à celui-ci, donc à une part de la volonté des États¹⁶.

Les organisations non-gouvernementales, quant à elles, ont pu acquérir, à leur tour, une place importante dans la société internationale actuelle.

Les définitions données pour les approcher sont souvent trop générales, car par leur dimension, structure et influence, elles embrassent des activités variables. Celles-ci vont du sport aux problèmes humanitaires, en passant par les questions culturelles ou religieuses, voire les problèmes de l'environnement¹⁷.

¹⁵ M. Bettati et P. M. Dupuy, « Les organisations et le droit international », *Economica*, Paris, 1986; SFDI, *Les organisations internationales contemporaines : crise, mutations, développement*, Colloque de Strasbourg, Pedone (1988).

¹⁶ A. Plantley, « Principes et développement du processus international de décisions », Collectif de l'INEDIR, op. cit., p. 25 à 49.

¹⁷ Bettati et Dupuy, op. cit.; M. O. Wiedvekher, « La Convention européenne pour la reconnaissance de la personnalité juridique des organisations nongouvernementales », *Annuaire français de droit international* (1987), p. 749 à 761.

Elles constituent donc davantage des « groupes de pression » de caractère international, des « forces transnationales », plutôt que des sujets de droit international. Elles ont en tout cas des préoccupations qui répondent le plus souvent à la notion « d'opinion publique internationale ».

Les États prennent souvent acte de leur existence avec des positions différentes selon les domaines d'activités. Ils affichent ainsi une méfiance à leur égard, lorsque cette nouvelle catégorie « d'intervenant » empiète sur des activités considérées comme relevant de la politique exclusive de l'État.

Soumises au droit national, non appréhendées directement par le droit international classique, ce sont les organisations intergouvernementales qui leur réservent un début « d'officialisation ». Ainsi avec la qualité d'observateur qui leur est accordée par certaines d'entre elles, les organisations non-gouvernementales accèdent à l'ordre juridique international de manière « parcellaire ».

Ceci est d'autant plus important pour la promotion du droit international, que certaines institutions du genre peuvent selon une certaine approche du droit international disposer du domaine professionnel d'un « droit normatif »¹⁸.

Les organismes publics et les personnes privées sont aussi des entités juridiques qui tentent de bénéficier de l'extension du domaine d'action du droit international.

Concernant la première catégorie on relève de plus en plus que sur le plan interne de nombreux établissements publics nationaux peuvent entretenir des « relations » de caractère international.

Il en est ainsi de certains organismes économiques et commerciaux, de certaines collectivités locales décentralisées relevant du fédéralisme, voire de certaines villes, appelés tous à adopter des conventions, des accords ou des ententes¹⁹.

Les destinataires du droit international de cette nouvelle catégorie, ou ces nouveaux acteurs, posent des problèmes pour le droit international, car ces entités n'ont jamais été considérées par celui-ci comme « sujets possibles », alors qu'aujourd'hui une nouvelle approche tendrait à les hisser au rang d'entités ayant « compétence spécialisée »²⁰.

N'est-ce pas là, encore une fois, un domaine pouvant faire l'objet de recherches comme cela est le cas pour les établissements publics internationaux ?

En effet, les organismes publics internationaux peuvent être appréhendés quant à eux comme étant des « sujets dérivés » du droit international. Ces

¹⁸ A. Plantley, *ibid.*, et des cas de l'IATA.

¹⁹ P. Weil, « Problèmes relatifs aux contrats passés entre États et particuliers », *RCADI* (1976), vol. III, p. 150 à 174.

²⁰ F. Attar, *Le droit international public, ordre et chaos* (1994), p. 55 et suiv.

organismes voient en effet le jour par la volonté des États, suite à la conclusion d'un « accord constitutif ».

Il en est ainsi parce que ces entités gèrent des « intérêts communs » à plusieurs États, reprenant par là même la notion de « service public » transposée du droit interne²¹.

Aujourd'hui, la formule connaît un large succès parce que le statut de ces établissements est encore discuté. Car si pour les uns leur domaine d'activité relève essentiellement du droit international, pour d'autres il releverait pour partie de l'ordre juridique interne²². Voilà donc là encore un domaine pouvant faire objet de recherche, malgré le fait que ces organismes constituent, quant à leur régime juridique, des acteurs de la société internationale, ou du moins des « sujets partiels » contribuant ainsi à la promotion du droit international.

Quant aux personnes privées, alors que le droit des gens leur fait traditionnellement place, le droit international classique les a souvent ignoré, parce que hostile à l'individu considéré comme un objet du droit.

Avec l'évolution cependant, et à travers le cas des « minorités protégées », une brèche est ouverte, dans la mesure où certains individus accèdent à la scène internationale des lendemains de 1919²³, avec le droit à se faire prévaloir devant les États nationaux ou certaines juridictions spécialisées.

Cette tendance qui va en s'affermissant dans le cadre de la protection des travailleurs, dans certains de leurs droits, à travers les conventions de l'Organisation internationale du Travail, sera encore plus développée, au lendemain de 1945, dans le cadre d'organismes régionaux. Il s'agit de ceux établis pour la protection des droits de l'homme en Europe, par exemple²⁴.

Aujourd'hui, on s'intéresse davantage à tous les aspects de la vie de l'individu, tant à travers la protection de ses droits civils et politiques, culturels et sociaux, qu'à travers sa santé, son travail, sa culture, ses loisirs, son environnement ou sa vieillesse.

Bien que cette approche ait pu développer des éléments en faveur de la promotion du droit international, les développements les plus spectaculaires seront le fait de la pression des puissances économiques que sont les sociétés multinationales.

Celles-ci vont en effet devenir de manière progressive des acteurs essentiels de la société internationale actuelle. Elles concourent à leur tour à la promotion du droit international, dans la mesure où elles sont appelées à passer

²¹ H. T. Adam, « Les établissements publics internationaux », *LGDJ* (1990).

²² *Ibid.*

²³ Carreau, *op. cit.*, p. 30.

²⁴ Kopelmanas, « L'application du droit international aux sociétés multinationales », *RCADI* (1976), vol. 150, p. 114.

avec les États des actes, pour régler certains échanges internationaux, qui malgré leur forme de « contrat » n'en relèvent pas moins l'aspect d'accords interétatiques²⁵.

Ceci étant, vu le volume de leur activité et son caractère diversifié, États et organisations furent appelés à régler leur action à travers l'élaboration de « codes de conduite »²⁶.

II. L'APPROCHE FONDÉE SUR LE CARACTÈRE EXTENSIF DU DOMAINE D'APPLICATION DU DROIT INTERNATIONAL

Alors que le droit international classique ne se préoccupait que des questions relatives à la paix ou à la guerre, au règlement des différends ou aux alliances, aux privilèges et immunités diplomatiques . . . , le droit actuel s'est étendu à de nombreux domaines nouveaux, tant par leur nature que par leur technicité.

Ce développement considérable amène à son tour à de nouvelles méthodes d'approche de la matière appréhendée. Nous nous limiterons d'ailleurs à deux domaines précis, il s'agit d'une part du domaine de l'environnement et, d'autre part, du statut de certains espaces nouvellement ouverts à l'activité des États.

A. La promotion du droit international du fait de son extension à l'environnement

L'environnement est devenu une véritable branche du droit international. Il se caractérise par la jeunesse de ses règles et principes, par la rapidité de son évolution, de même que par le caractère spécifique de son contenu.

Les règles internationales touchant au domaine de l'environnement sont de formation récente. Peu de traités ont été conclus avant la seconde guerre mondiale²⁷, et ce n'est qu'à la fin des années 50 qu'un véritable droit international de l'environnement commence à se développer.

La décennie 60 sera consacrée à la définition des régimes de responsabilité à l'égard des risques nouveaux, tels que ceux découlant des activités nucléaires²⁸

²⁵ A. Fatourous, « Le projet de code de conduite des sociétés multinationales », *JDI*, p. 5 à 47.

²⁶ M. Bennani, « Le code de conduite des multinationales : aspects juridiques », *Éthiques et entreprises, perspectives maghrébines*, sous la direction de Driss Alaoui Lemdaghri, Ouallada Casablanca (1991), p. 209 à 240.

²⁷ Dupuy, « La crise du droit international », loc. cit.

²⁸ A. Kiss, *Le droit international de l'environnement*, Pedone (1989).

ou ceux relatifs au transport d'hydrocarbures en mer²⁹. Ceci était fait à l'initiative d'organisations internationales spécialisées.

L'accélération ultérieure de ce nouveau domaine du droit correspond ainsi à une prise de conscience progressive des menaces encourues par la biosphère, souvent à la suite de catastrophes écologiques³⁰ et des fléaux que subit la terre, comme l'amincissement de la couche d'ozone, l'effet de serre, la déforestation de l'Amazonie, la désertification de l'Afrique, l'immersion des déchets toxiques et nucléaires dans les pays en développement.

Le droit de l'environnement a par la suite avancé à pas de géant depuis les années 70. Le nombre d'instruments dépasse mille textes, alors qu'un ensemble de recommandations, déclarations de principes, programmes d'actions émanent d'organismes internationaux spécialisés. Toute cette activité fait qu'un contenu important vient promouvoir le droit international dans ce domaine.

C'est à travers l'action des organisations internationales que sera mis en exergue le contenu du droit de l'environnement. Celles-ci jouent un rôle capital et ont contribué, comme c'est le cas à travers la Conférence de Stockholm en 1972, ou celle de Rio de Janeiro en 1992, à la formulation de principes nouveaux qui seront dans les instruments conventionnels.

Ces déclarations, à savoir celles de 1972 portant sur « l'environnement humain » et celle de 1992 portant sur « l'environnement et le développement », constituent des documents politiques majeurs en raison de leur influence sur le développement ultérieur de ce nouveau domaine du droit international.

C'est ainsi que certains principes énoncés dans ces deux instruments ont été repris dans des conventions internationales relatives à la protection de l'environnement, alors que d'autres ont été considérés comme relevant quant à leur portée du droit coutumier.

L'un des apports essentiels, de ce nouveau domaine du droit international, demeure le principe de la conciliation entre les impératifs de protection de l'environnement et les exigences du développement. C'est ainsi que, depuis la Conférence de Rio de 1992, la protection de l'environnement et le développement des pays pauvres sont étroitement liés. En effet, cette conférence a mis en exergue et a dû reconnaître officiellement le concept de « développement durable ».

Selon ce concept — et voilà encore un nouvel axe de réflexion ou d'initiation à la recherche dans le domaine de l'environnement — la protection de l'environnement ne saurait constituer un obstacle pour le développement,

²⁹ Conventions de Paris du 27 juillet 1960, de Bruxelles du 31 octobre 1963 et de Vienne de 21 mai 1963.

³⁰ Ibid.

mais le développement ne peut-être durable, sans prise en compte de l'environnement dans l'élaboration de ses politiques. Ainsi la fusion entre protection de l'environnement et développement devient largement admise.

B. La promotion du droit international du fait de son extension à certains espaces de caractère particulier

La promotion du droit international s'est aussi réalisée à partir des années 60 par le développement de règles nouvelles applicables à des zones qui échappent désormais à toute prétention étatique.

Le droit international qui s'est ainsi étendu à l'Antarctique, à l'espace atmosphérique et extra-atmosphérique, puis au fond des mers et des océans, ainsi que leur sous-sol, a permis à partir du développement de nouvelles approches de mettre en exergue une série de concepts nouveaux, tant à travers la nature juridique de ces espaces, qu'à travers le régime juridique applicable.

Le débat sur la nature juridique des espaces en question, engagé suite aux progrès réalisés par les sciences et les techniques d'explorations et d'exploitations, a permis de dégager une notion nouvelle. Il s'agit du concept « d'humanité » ignoré jusque là par le droit international, qui ne connaissait que l'individu selon le droit des gens et les nations, États et peuples selon la Charte des Nations Unies.

C'est ainsi que le Traité de Washington sur l'Antarctique en « figeant » les revendications des États « possessionnaires », faisait, dès 1959, référence dans son préambule à « l'intérêt de l'humanité toute entière » pour cette zone³¹.

Les résolutions portant déclarations de principes qui allaient suivre, de même que les conventions relatives à la réglementation des activités des États dans l'espace atmosphérique, extra-atmosphérique, la lune et autres corps célestes, ont fait état de la même préoccupation³².

Il en est de même aussi des premières résolutions issues des travaux du Comité des utilisations pacifiques du fond des mers et des océans au-delà des limites de la juridiction nationale, des discussions qui ont suivi ou précédé l'adoption de la Convention des Nations Unies sur le droit de la mer³³. Celles-ci font toutes état de cette position pour la zone internationale du fond des mers, des océans et leur sous-sol.

³¹ Accords de Bruxelles du 29 novembre 1969 et du 18 décembre 1971.

³² Traité de l'Antarctique de décembre 1959, notamment le préambule.

³³ Traité sur les principes régissant les activités des États en matière d'exploration et d'utilisation de l'espace extra-atmosphérique, y compris la Lune et les autres corps célestes du 27 janvier 1967 (résolution 2222 (XXI) de l'Assemblée générale, annexe), Traité de Washington de 1959 sur l'Antarctique et Accord sur le sauvetage des astronautes, le retour des astronautes et la restitution des objets lancés dans l'espace extra-atmosphérique du 22 avril 1968 (résolution 2345 (XXII) de l'Assemblée générale, annexe).

Comme on peut l'affirmer, la mise en exergue du concept d'humanité répondrait dès 1959 à un double objectif. Il s'agissait d'éviter, tout d'abord, qu'une course à l'occupation ou à la proclamation de souveraineté sur des espaces soustraits jusque là aux activités des États ne s'installe, à la manière de ce qui s'était passé au XIX^e siècle au lendemain des grandes découvertes et plus tard.

Il s'agissait ensuite de soustraire ces zones à toute activité de nature militaire dangereuse, comme celles fondées sur l'utilisation des armes de destruction massive, car comme on le rappelle, le contrôle de tout ou partie de ces zones pouvait affecter l'équilibre établi dans le cadre du concept de stratégie de dissuasion nucléaire.

De ce fait, l'espace atmosphérique et la zone du fond des mers et des océans vont, comme c'est le cas pour l'Antarctique, échapper selon la Convention de 1967 et textes qui vont suivre pour l'un et la Convention sur le droit de la mer de 1982 pour l'autre, à toute velléité d'appropriation pour être affectés, dans le cadre d'un système de dénucléarisation fonctionnelle, à des fins exclusivement pacifiques (en particulier les résolutions adoptées en 1970).

Soustraits donc à la compétition des États, soumis à la règle de la « neutralisation », les espaces ainsi affectés à l'humanité toute entière sont par conséquent soumis quant aux activités d'exploration et d'exploitation à un régime d'internationalisation. Ce système comprend pour les trois espaces les éléments qui vont suivre.

Ces zones sont d'abord soumises au principe de la libre utilisation égale de tous les États, mais aussi à d'autres entités pouvant mener des activités sous le contrôle du pavillon de l'État.

L'activité dans ces zones obéit au principe de la coopération entre États, à travers notamment la divulgation et transfert des connaissances et l'aide et assistance au personnel en péril ou en détresse³⁴.

Dans le cadre du principe de l'internationalisation, des mécanismes internationaux appropriés sont aussi envisagés par les nouvelles règles internationales. C'est le cas de la Commission pour l'exploitation commune des ressources minérales proposée par le Traité de Wellington³⁵ ou de divers réseaux mis en place pour l'exploitation de l'espace par satellite³⁶. C'est aussi le

³⁴ P. Boniface, « Les sources du désarmement », *Economica* (1989); M. Bennani, « La dé-militarisation du fond des mers et des océans et leur sous-sol ». Thèse, juin 1975, série *Thèses et Mémoires*, Université Hassan II, Casablanca.

³⁵ Mercial, « La démilitarisation du fond des mers », *Revue générale de droit international public*, Paris (1984).

³⁶ Cf. article 143 de la partie XI de la Convention de Montego Bay de 1982, article 2 du Traité de Washington de 1959 sur l'Antarctique et Accord sur le sauvetage des astronautes dans l'espace du 22 avril 1968.

cas de l'engagement entrepris par les États, dans le cadre de la Convention de 1979 sur le régime de la lune, d'établir « un régime international et des procédures appropriées pour l'exploitation des ressources naturelles » de celle-ci.

Enfin, la Zone internationale du fond des mers et des océans n'a pas échappé à cette tendance, vu les dispositions figurant dans la partie XI de la Convention de Montego Bay. Celles-ci touchent, comme on le sait, au statut et aux règles de fonctionnement de l'Autorité internationale des fonds marins, à laquelle sera confiée la gestion des ressources de la Zone considérée comme « un patrimoine de l'humanité »³⁷.

De ces mécanismes internationaux appropriés on relève un élément nouveau dans la promotion du droit international pouvant faire l'objet de recherche et de réflexion. À travers, en effet, l'exemple de l'Autorité internationale des fonds marins, va-t-on assister à l'avènement de la première organisation internationale flanquée d'un territoire ?

Comme on l'a perçu à travers les développements qui ont précédé, le droit international actuel s'est complètement transformé par rapport à sa situation du XIX^e et début du XX^e siècle.

De nombreuses règles nouvelles ont été établies pour régir les nouvelles données de la société internationale actuelle et pour assurer par là même une promotion du droit international.

Le juriste, l'enseignant ou le chercheur a encore un terrain favorable, un champ propice à l'investigation, la réflexion et les constructions doctrinales.

Parmi les questions qui continueront à faire l'objet d'une large préoccupation, deux demeurent pendantes :

- Ces règles nouvelles issues la plupart du temps du développement progressif du droit international et des méthodes d'encouragement de la promotion de celui-ci, tel que cela figure dans le texte de l'Article 13 de la Charte, auront-elles les caractéristiques de normes « quasi-législatives . . . », en raison de la procédure d'élaboration à laquelle elles obéissent ?
- Faudra-t-il chaque fois attendre démesurément que soient remplies les conditions traditionnelles de la mise en application des règles internationales, chose qui ne cadre plus avec l'évolution rapide de la société internationale, donc avec la promotion du droit international ?

Par ailleurs, à travers son ouverture à des entités autres que les États, le droit international, d'origine essentiellement interétatique, est-il en mesure de se transformer en droit transnational pour suivre cette évolution rapide de la société qu'il est censé régir au XXI^e siècle ?

³⁷ Ph. Kahn, « L'exploitation commerciale de l'espace », LITEC (1992).

Ce serait là, la seule approche susceptible d'intégrer les nouvelles catégories d'entités que le droit international interétatique appréhende depuis peu, alors que cette tendance ira en s'accélégrant avec le concept dit de « mondialisation »³⁸.

³⁸ R. J. Dupuy, « La notion de patrimoine commun de l'humanité appliquée aux fonds marins », *Mélanges Colliard* (1984), p. 197 à 205.

UNIVERSAL APPROACH TO THE TEACHING OF INTERNATIONAL LAW

*Wang Tieya**

Fifty-five years of teaching lead me to a conclusion that the primary task of an international law teacher is to propagate a universal international law. Universal international law is not yet a reality, but it is a goal which is approaching realization and it has to be realized. Efforts have to be made in the teaching of international law to make international law really universal.

It is commonly admitted that modern international law has its origin in Western European Christian civilization during the sixteenth and seventeenth centuries. The Peace of Westphalia of 1648, when nation-States emerged, can be marked as the beginning of modern international law, though there were before it some teachings and practices which implied some ideas of international law. It is, however, after 1648 that the so-called family of Western Europe was formed and international law grew up among the old Christian States of Western Europe, a law sometimes called "European public law".

The fact that Western Europe was the cradle of modern international law does not exclude, however, the possibility of finding some traces of international law in other parts of the world. Even in antiquity, they have been recorded in history. In China, for instance, during the periods of Spring and Autumn (722-476BC) and Warring States (476-221BC), when the King became weak while vassal states (or principalities) became more and more independent, mutual relations among those vassal states flourished and practices and usages emerged in response to their need to conduct intercourse concerning establishment of diplomatic relations, interchange of embassies, conclusion of treaties, convening of conferences, waging of wars and so forth. These have been said to be analogous to international law.

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It has been said that it is China, India, Egypt and other ancient Eastern States which should be considered the birthplace of international law. This view is too extreme. So far as China is concerned, it should be said that as the periods of Spring and Autumn and Warring States came to an end in 221 BC, when the whole country was unified under the rule of the Qin Emperor, there was no longer room for the former interstate practices and usages. There could be no connections between these practices and usages and modern international law. Generally speaking, no legacy of international law was bequeathed to us from other parts in the ancient world. The international law we know today does not discernibly derive from any precepts that originated in those practices and usages.

This does not mean that the study of the so-called historical types of international law is of no significance. The study would bring a considerable body of knowledge which should tend to broaden intellectual horizons of international lawyers and, if a part of teaching could be devoted to it, international lawyers would know how to accommodate international law in a multicultural setting and it would stimulate the spirit of universalism in the present-day teaching of international law.

From the sixteenth and seventeenth centuries, when modern international law came into existence, Eurocentrism dominated for nearly three centuries. However, international law was created in the soil of western Europe, where an exclusive club of Christian States was formed. It is international only in that it governed the relations among the members of the club, which considered themselves "civilized", whereas it did not apply to those States which were outside the club and which were stigmatized as "barbarous" or "uncivilized". Practically, the law is designed simply for the use and benefits of its founders. It is international in a limited sense but is in no way universal.

Such international law did, however, make some progress during the three centuries after 1648. With the achievements in commerce, religion, communications and intellectual development, States in western Europe had more contacts with States in other parts of the world. The extension of these contacts gave rise to the geographical expansion of the European system of international law to include former colonies of European States in America, Africa and Asia and also to include some non-Christian States. What it recognized and affirmed was a right of domination. It was rightly called a colonialist and imperialist law.

Turkey appeared to be an exception when the Treaty of Paris of 1856 expressly admitted it "to participate in the advantages of the public law and system of Europe". But Turkey remained under the regime of capitulations and was obliged to accept the restrictions on its sovereignty. Under the guise of

treaties, a normal institution of international law, capitulations and other unequal treaties which sanctioned the right of conquest and colonial rule constituted a legal order of subordination, forcing the victims of such rights to surrender and obey.

Again, take China as an example: the translation of Wheaton's *Elements of International Law* by an American missionary, A. P. Martin, and its publication under the auspices of Tsungli Yamen, the Foreign Minister in the early 1860s, marked the beginning of the formal and systematic introduction of modern international law into China after China was opened by the Western Powers. China was forced to engage in five disastrous wars, and hundreds of unequal treaties have been concluded by means of actual force or the threat of the use of force. Thus, the traditional Chinese world order was not displaced by the establishment of an international legal order of equality but by an unequal treaty regime. The regime, which has been the object of resentment and protests, was only fatally wrecked during the Second World War, when new treaties were concluded, abolishing all special rights and privileges that Western Powers had enjoyed in the past. It is understandable that in China, in spite of the fact that international law is adapted as a whole in both theory and practice, distrust of Western elements still lingers on. As Professor Jerome Cohen, an eminent expert in Chinese law, has mentioned: "We are still living with the consequences of the unequal treaties".

The Second World War brought radical changes in international relations which affect modern international law. Though changes already began to appear even before the Second World War, the geographical scope of international law being gradually expanded and the influence of non-European States being increasingly felt, the most significant changes occurred when the United Nations was established in 1945. A large number of former dependent peoples and States attained independence and became Members of this world Organization. The rapid progress of science and technology, making the present world one of intensive transnational communication, business cooperation and cultural exchange, has a great impact on contemporary international law. In a world of interdependence, an international law is evolving which tends to be universal, the exclusive centric systems of law being gradually eradicated. Problems like the environment, terrorism and international trade, to mention only a few, are global problems which cannot be solved by any one State or group of States, but only by the participation of all States.

In this world, the differences of historical and cultural heritage and of social and political systems do challenge the universality of international law. But, both in theory and practice, such differences do not necessarily produce an unbridgeable gap between the Western and non-Western attitudes

towards international law. On the contrary, I believe that the differences, well accommodated, can yield even more fruitful results. International law is developing from subordination to coordination and then to cooperation.

Article 9 of the Statute of the International Court of Justice provides that “in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured”. A similar provision appears in the statute of the International Law Commission. The implementation of the aforementioned provision makes the Court a real world court. In the same sense, when international law itself represents the main forms of civilization and of the principal legal systems of the world, it becomes universal. Thus, the work of the world Court and of the International Law Commission should be one of main parts of the teaching of international law.

The late Judge Manfred Lachs wrote an excellent book, *The Teacher in International Law* (1982), a work of great distinction. We are most grateful to him for giving us, with a wealth of materials and deep analysis, a brilliant survey of what he called “the world of thought” in international law. Apparently he tried to convey the picture to us as comprehensively as possible. But, as he himself pointed out, the survey is entirely dependent on his personal experience, so that the picture cannot be complete and universal. Thus it can be seen that the universal approach to the teaching of international law is not an easy task.

More significant is Judge Mohammed Bedjaoui’s work. He tried to tackle the problem of universality from a different angle, by editing a textbook entitled *International Law: Achievements and Prospects* (1991), written by some 50 authors “selected on the basis of broad geographical coverage”. It is a truly impressive work, which would facilitate the universal approach to the teaching of international law. It has, as the general editor professes, an international thrust and one of its distinctive features is its international, multi-cultural and “polyphonic” nature. The national approach is to be discarded and ethnocentrism in the teaching of international law, as Professor Jerome Cohen mentioned in his very ably argued article, is to be countered. Judge Bedjaoui is to be congratulated and this work can certainly be considered one of the main contributions of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to the United Nations Decade of International Law.

For furthering the purpose of the book, I would make two suggestions: first, use of the book as a textbook or main reference book should be encouraged and it should, in particular, be translated into languages other than English and French, so that it can be widely used in all parts of the world, especially in the developing countries; and second, teachers’ groups should

be organized in different parts of the world, especially in developing countries, to assess the use of the book in the teaching of international law. If experience gained from teaching warrants it, a new edition could be considered. These suggestions, if implemented, would certainly, in years to come, promote a universal approach to the teaching of international law.

In conclusion, I should like to repeat what I said in my lecture at The Hague Academy of International Law in 1990:

“The goal is to establish an effective universal international law. The process may be hard and long. For the present, the task of international lawyers is to take account of different histories and cultures of various countries and to find out principles of law and justice which are common to all.”

LA ENSEÑANZA DEL DERECHO INTERNACIONAL Y LOS RECIENTES CAMBIOS EN LAS REALIDADES INTERNACIONALES

*Héctor Gros Espiell**

I

La enseñanza del derecho internacional público, como la de toda asignatura o materia jurídica, debe ser hecha atendiendo a la consideración pedagógica de que se está presentando una temática jurídica, que debe ser comprendida y aprendida como tal¹.

En el caso del derecho internacional, por sus especiales características y por el muy acelerado proceso de evolución a que está sometido en nuestros días², es preciso enseñar dejando perspectivas abiertas para estimular la reflexión del estudiante, para hacerle comprender que más importante que acumular conocimientos pasados es tener el interés para continuar aprendiendo y la capacidad para captar e integrar en los conocimientos ya adquiridos, los nuevos aportes que resultan del proceso histórico y jurídico. Por eso en la enseñanza de esta rama del derecho, quizás más que en otras, es preciso no sólo

¹ Héctor Gros Espiell, "El problema del método en el derecho constitucional", *Revista de la Facultad de Derecho y Ciencias Sociales*, Año X, N° 3, Montevideo (1960); H. Gros Espiell, "La enseñanza del derecho internacional público en la actual situación de la América Latina", *De Diplomacia e Historia*, Montevideo (1989); "Informe final del Segundo Seminario sobre Enseñanza del Derecho Internacional, Bogotá, 24-28 de septiembre de 1978", Organización de los Estados Americanos (DH/Jeg.D/4, I.II/SEDI); *Anuario Jurídico Interamericano* (1980), OEA, Washington, D.C. (1981), p. 264; Claude Albert Colliard, *Institutions internationales*, 4ª ed., Introduction, págs. 1a 15, Dalloz, Paris (1967); Juan Carlos Puig, "La enseñanza del derecho internacional", *Doctrinas Internacionales y Autonomía Latinoamericana*, Caracas (1980); Manfred Lachs, *The Teacher in International Law: Teachings and Teaching* (1984).

² En su informe titulado "Un programa de paz", el Secretario General ha destacado el fenómeno, al que yo mismo me he referido en muchas ocasiones, del "ritmo acelerado de la historia que caracteriza a esta época" (AJ/47/277-S/24111, párr. 85).

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descubrir y comentar la *lex lata*, sino también las normas en formación que las necesidades de la comunidad internacional han comenzado a bosquejar y modelar³.

La presentación del derecho internacional exige tener en cuenta, entre otras características tipificantes, la consideración que junto a la fuente convencional tradicional hay que considerar los textos que resultan de la actividad de las organizaciones internacionales, de los actos unilaterales de los Estados con proyección externa, de la costumbre internacional, de la jurisprudencia, de los principios generales de derecho y de la doctrina. Y que hoy no puede dejarse de lado la importante significación internacional de las organizaciones no gubernamentales.

La enseñanza del derecho internacional no puede dejar de tener en cuenta la importancia del elemento ético y de la moral internacional. Este elemento ético, que se manifiesta en la idea de justicia, necesariamente presente en el derecho, en el principio de la buena fe y en el reconocimiento de la existencia y de la necesaria aplicación del *jus cogens*, tiene que estar incluido en la formación de los internacionalistas. El derecho internacional de hoy es menos voluntarista, menos neutro y menos formalista que el que nació en Westfalia⁴.

Hoy es importante comprender que la cuestión de la interpretación del derecho internacional ha de ser expuesta mostrando que, en principio y con ciertas matizaciones, todo instrumento internacional debe ser interpretado y aplicado en el marco del conjunto del sistema jurídico en vigor en el momento en que la interpretación se realiza⁵ y que esta interpretación no puede hacerse en el vacío, sino que es preciso efectuarla en función de las realidades a las que el derecho está destinado a aplicarse⁶.

II

La exposición del derecho internacional público debe referirse siempre a la situación internacional a la que el derecho se aplica y en función de la que ese derecho existe.

Sin relacionar el derecho internacional con la ciencia de las relaciones internacionales, con la política internacional, con la geografía y con la historia,

³ Mohammed Bedjaoui, éd., *Le droit international : bilan et perspectives*, tome I, Introduction, p. xi y xii, UNESCO, Pedone, Paris (1991).

⁴ Juan Antonio Carrillo Salcedo, *El Derecho Internacional en Perspectiva Histórica*, Tecnos, Madrid (1991), pág. 179.

⁵ *C.I.J. Recueil 1971*, Avis consultatif sur la Namibie.

⁶ *Ibid.*, 1980, Avis consultatif, Interpretation de l'Accord du 25 mars 1951 entre l'OMS et l'Égypte.

toda enseñanza, aún aquella que pretenda ser estrictamente jurídica, es incompleta e ineficaz. No se puede comprender el derecho internacional sin conocer la realidad global a la que el derecho se aplica y la interacción, constante y recíproca, del “deber ser” con el “ser”⁷.

III

La enseñanza del derecho internacional no puede ser encarada de una manera estática e invariable ni hecha, en consecuencia, de una manera igual en los diferentes momentos históricos.

El derecho internacional ha sufrido en el curso de su devenir cambios trascendentes y, en especial, en los últimos 50 años, después de la entrada en vigor de la Carta de las Naciones Unidas y del proceso político y jurídico posterior, estos cambios han sido amplios y profundos.

El deber del que enseña y expone el derecho internacional es mostrar, explicar y hacer comprender estos cambios y lo que hay de continuidad, de evolución y ruptura con el pasado, mostrando el derecho de gentes en una perspectiva histórica.

Es decir que es preciso analizar sus caracteres actuales y cuáles son las diferencias con el derecho anterior a la Carta, que podríamos denominar globalmente derecho internacional clásico, aunque reconociendo que este derecho, asimismo, evolucionó profundamente desde el siglo XVI hasta la primera mitad del siglo XX.

Es decir que hay que mostrar lo que es hoy el derecho de gentes, comparándolo con lo que era antes, explicando lo que es la comunidad internacional actual y lo que es la realidad a la que este derecho se aplica.

Sin esta presentación moderna y dinámica del derecho internacional, en función de los principios en la que se sustenta, de los propósitos que busca y de los objetivos en función de los cuales existe (paz, seguridad, justicia, protección de los derechos humanos, desarrollo y solidaridad), el derecho internacional público no sería mostrado en su realidad, olvidando lo que es y, sobre todo, lo que se puede esperar que sea mañana.

⁷ Luciano Tomassini, “Los estudios internacionales en América Latina”, *Mundo Nuevo. Revista de Estudios Latinoamericanos*, Caracas (1980), Año III, N° 8/10; Mario Amadeo, *Política Internacional, Los Principios y los Hechos*, Buenos Aires (1970), págs. 27a 49; Suzanne Bastid, “Histoire des relations internationales et droit international”, *Mélanges*, Pierre Renouvin, Presses universitaires de France, Paris (1966); César Sepúlveda, *El Lugar del Derecho Internacional en el Universo Jurídico*, México (1980).

IV

El derecho internacional público es una rama del derecho que presenta caracteres distintivos frente a todas las demás.

El carácter no centralizado de la actual comunidad internacional, la ausencia de coacción — en el sentido tradicional del concepto, para sancionar la violación del derecho o impedir su quebrantamiento — los elementos que derivan de que es un derecho que regula las obligaciones y derechos de sujetos de diferente naturaleza, pero entre los que predomina uno de ellos: el Estado, que crea en gran parte ese derecho, pero que está, sin embargo, sujeto a él, son, junto a otras muchas, cuestiones que hay que tener en cuenta al enseñar y presentar el derecho internacional público.

Derecho basado en el principio de la igualdad soberana de los Estados y en la proscripción del uso de la fuerza, salvo las excepciones que resultan, directa o indirectamente, de la Carta de las Naciones Unidas, vive en un mundo en el que la desigualdad real de poder entre los Estados es un elemento esencial y en el que el uso de la fuerza constituye una circunstancia no eliminada totalmente, en los hechos, por la normatividad.

La descripción de las operaciones de mantenimiento de la paz por las Naciones Unidas, de la asistencia humanitaria, de la contribución al respeto de los derechos humanos y los esfuerzos para introducir el progreso en el esfuerzo de democratización de la comunidad internacional es un elemento necesario de la enseñanza. De igual modo, la presentación correcta del concepto de soberanía — como ámbito lícito de competencia estatal bajo el derecho internacional — y de la reducción y limitación del dominio reservado, es otro tema que no puede dejarse de lado. La soberanía de los Estados no ha desaparecido. El Estado continúa siendo el actor privilegiado del mundo internacional. Pero su papel se ha relativizado, la noción de soberanía se ha precisado jurídicamente y otros actores son partes de la comunidad internacional.

El mismo hecho que la comunidad internacional haya pasado a tener más de 180 Estados, profundamente diferentes entre sí — y no solamente en tamaño, población y poderío militar y económico — muestra que se ha producido “una renovación de la noción de Estado”, como lo expresó el Secretario General de la Organización de las Naciones Unidas en su informe de 1992 a la Asamblea General sobre la labor de la Organización (A/47/1, párr. 10)⁸.

⁸ Véase también *Société française pour le droit international*, *L'État souverain à l'aube du XXI^e siècle*, Colloque de Nancy, Pedone, Paris (1994); Jean Charpentier, “Le phénomène étatique à travers les grandes mutations politiques contemporaines”, *op. cit.*, págs. 11 a 38.

Si no se presentan correctamente estos extremos, si no se muestran los enormes cambios conceptuales producidos, en lo político y en lo jurídico, y si no se enseña el progreso cumplido por la comunidad internacional⁹, pese a todo lo que falta por recorrer, si no se expone la necesidad de un nuevo orden internacional, al que hay que llegar pese a las dificultades que ello ha de suponer, y si no se hace referencia a la fuerza creciente de la opinión pública internacional, puede obtenerse un resultado absolutamente negativo, y en base al desconocimiento y la errada información, provocando un nefasto pesimismo y una negativa desesperanza. Este puede ser el resultado de la presentación formal, fría, tradicional e inactual del derecho internacional público, en vez de la que puede y debe resultar de una docencia activa, realista, crítica y polémica, que confronte con un sentido de progreso, normatividad y realidad.

Para que estos objetivos puedan ser cumplidos, es siempre necesario hacer el estudio de la normatividad internacional en relación con los criterios de eficacia y de efectividad¹⁰.

Sólo esta confrontación es capaz de hacer del análisis del derecho internacional público un elemento optimista, dinámico y transformador, integrado con un contenido de desarrollo y progreso.

V

En el campo estrictamente pedagógico, la enseñanza del derecho internacional público no debe ser dada exclusivamente en base a exposiciones magistrales del profesor. Aunque la enseñanza magistral tiene un valor formativo innegable, pierde su virtualidad si no va acompañada de elementos participativos, de discusiones, trabajos prácticos, seminarios y debates. Todas estas formas de enseñanza, con un adecuado uso de textos, comentarios de casos, ejercicios de polémica y presentación de temas prácticos, en función de casos concretos, deben integrarse en forma armónica. Sin el uso de estos procedimientos y de la participación activa de los estudiantes en la preparación de la

⁹ Hoy el tan mentado nuevo orden internacional no es más que la nueva situación internacional consecuencia de los cambios profundos producidos en el mundo en lo político y económico (Catherine Kaminsky et Simon Kruk, *Le nouvel ordre international, Que sais-je?*, Presses universitaires de France, Paris).

¹⁰ Charles de Visscher, *Théories et réalités en droit international public*, 3^o éd., Paris (1960), pág. 390; H. Gros Espiell, "La protección internacional de los derechos humanos y la eficacia de las estructuras de protección en el ambiente regional americano", *Estudios de Derechos Humanos*, vol. II, Madrid, 1988, págs. 210 y 211; H. Gros Espiell, "La eficacia del sistema interamericano de protección de los derechos humanos", *Revista de la Facultad de Derecho*, Universidad de Granada, 4 (1985); W. Friedmand, *De l'efficacité des institutions internationales*, Armand Collin, Paris (1976).

asignatura, es muy poco lo que puede lograrse en cuanto a la enseñanza del derecho internacional público de hoy.

Este tipo de enseñanza requiere no sólo la lectura de libros de texto que sirvan de base al curso — del que deberán desterrarse los malditos apuntes de clase que transforman al estudiante en un autómatas transcriptor de lo que el profesor dice — sino el contacto con bibliografía extranjera, con monografías y recopilaciones documentales. Esto es fácil o relativamente fácil, en las facultades de derecho en los países de desarrollo medio y muy difícil o imposible en países empobrecidos, con bibliotecas paupérrimas, sin producción doctrinaria propia, con carencia de material didáctico y con dificultades para el acceso a las fuentes bibliográficas extranjeras. La verdad es que hoy no se puede aprender el derecho internacional sin estos recursos y sin la posesión, además del idioma propio, del inglés y del francés.

La expansión temática del derecho internacional público ha sido tan espectacular en los últimos años que ha roto todos los límites tradicionales de la asignatura. Materias nuevas son de ineludible tratamiento, por ejemplo, entre otros muchos casos, la cuestión de los derechos humanos, el derecho de las organizaciones internacionales, el desarme, el derecho ambiental, el derecho internacional económico, el derecho del espacio ultraterrestre, el derecho de las comunicaciones, el derecho aéreo, el derecho administrativo internacional, el derecho penal internacional, el derecho humanitario, el derecho de los refugiados y los temas vinculados con el desarrollo en relación con el medio ambiente y con los problemas demográficos. Pero la brevedad de la enseñanza universitaria del derecho internacional público, que no excede en general de un año y en muchos casos de un semestre, hace que sea imposible dar una información adecuada y directa de todo el contenido de la asignatura.

Por eso es que lo esencial es enseñar los principios y criterios esenciales, con un planteamiento abierto y dinámico que permita la integración posterior de otros conocimientos. Hay que enseñar a aprender, a saber cómo conocer y a evaluar activamente la adquisición de nuevos conocimientos. Los cursos, generalmente a nivel de licenciatura, deben ser completados con cursos de doctorado y postgrado, que permitan mejorar la información y completar la enseñanza para aquellos que piensan especializarse o proseguir el trabajo en actividades que requieran una utilización específica del derecho internacional público.

VI

¿Cuáles son los recientes cambios en las realidades internacionales que inciden necesariamente en la enseñanza del derecho internacional?

Hay que comenzar señalando que estos cambios, aunque recientes, no son sólo los del pasado inmediato, sino los que aunque existentes desde hace

algunos años, mantienen su incidencia en la configuración de la realidad actual.

La caída del Muro de Berlín, el fin de la Unión Soviética y la modificación total de la situación política en Europa Central y Oriental significaron sin duda una alteración radical del panorama internacional¹¹. El término de la confrontación Este-Oeste — con el fin de las “certidumbres” que habían imperado durante 45 años — hizo posible un renacimiento del papel del Consejo de Seguridad y la posibilidad de la aplicación del Capítulo VII de la Carta. Esta circunstancia positiva, equilibrada por elementos de signo contrario, ha incidido e incide en todo el derecho internacional, entre otros, los temas relativos al desarme y a los derechos humanos que han sufrido el impacto de las nuevas realidades.

Todo lo que ha ocurrido en la ex Yugoslavia, en Somalia, en Chechenia, en Haití, en Rwanda y en Iraq, para no citar sino algunos ejemplos, muestra las posibilidades abiertas, pero al mismo tiempo las limitaciones de la acción de las Naciones Unidas ante la nueva realidad internacional.

La situación en la ex Yugoslavia señaló las ineludibles condicionantes históricas y étnicas de las realidades políticas, las dificultades de la acción internacional, los problemas no resueltos de las minorías y las carencias de ciertas operaciones de las Naciones Unidas. Pero al mismo tiempo ha hecho posible un adelanto histórico en el derecho penal internacional, con la constitución de un tribunal internacional que, por primera vez en la historia, no es la obra de los vencedores para juzgar a los vencidos. Este precedente histórico está llamado a marcar una línea de desarrollo y de progreso del derecho internacional.

La cuestión de Somalia permitió comprobar cuán precaria es aún en ciertos casos, la posibilidad de acción internacional, cuán complejos son los problemas que se dan cuando esta acción, aunque cubierta y autorizada por las Naciones Unidas, se lleva a cabo, aunque sea inicialmente, por una superpotencia, miembro permanente del Consejo de Seguridad, que es la primer y única gran potencia militar del mundo. A esto se une el hecho de la existencia de situaciones en las que deben actuar las Naciones Unidas, frente a la irrealidad del Estado y a la desaparición de todo gobierno que ejerza una actividad real y legítima. Este caso de Somalia, como el de Haití y el de Rwanda, sin embargo, ha tenido de positivo el mostrar la necesidad de configurar jurídicamente un derecho a la asistencia humanitaria; que genere el correlativo deber de prestarla y de prevenir las situaciones críticas, esencialmente di-

¹¹ C. Zorgbibi, *L'après-guerre froide dans le monde, Que sais-je?* Presses Universitaires de France, Paris.

ferente de toda intervención o ingerencia ilegítima, y que debe ejercerse estrictamente en el marco del derecho internacional¹².

El caso de Iraq hizo posible utilizar la fuerza, autorizada por el Consejo de Seguridad, para repeler una agresión. A este extremo positivo se suma, sin embargo, la comprobación de lo lejos que se está de una adecuada aplicación de los Artículos 42 a 49 de la Carta y de una verdadera acción internacional.

La situación en Chechenia ha mostrado una vez más la tensión, siempre existente, entre la integridad territorial y el derecho a la libre determinación¹³. Pero cualquiera sea la posición jurídica que al respecto se tenga, ha puesto de manifiesto la necesidad imperiosa de asegurar en esos conflictos el respeto de los derechos humanos y de los Convenios de Ginebra de 1949 y los Protocolos de 1977, es decir del derecho internacional humanitario.

El proceso de paz en el Cercano Oriente, necesario y esencial para la seguridad internacional, complejo y difícil, todavía en estado embrionario, pero que la comunidad internacional mira con esperanza, ha presentado nuevos problemas, vinculados con la noción misma del Estado, de la autonomía, de la solución pacífica de controversias, de la aplicación del derecho internacional humanitario y del derecho a la libre determinación de los pueblos, que constituyen un desafío para los políticos y los juristas internacionales.

VII

No tiene sentido continuar enunciando casos y situaciones en relación con los cambios recientes acaecidos en la realidad internacional. Es preciso intentar arribar a conclusiones más o menos generales.

Entre otras muchas conclusiones a extraer, hay que comenzar por decir que toda esta realidad contribuye a desdibujar el límite entre el derecho internacional público y el derecho interno. Estos dos ámbitos normativos hoy se superponen y se entremezcan. El derecho internacional ya no es más un derecho que regula sólo las relaciones de paz y de guerra entre los Estados soberanos. Muchas partes del derecho internacional existen ahora para regir directamente en el derecho interno y aplicarse en el interior de los Estados. El derecho comunitario agrega una nueva dimensión.

Novedosos fenómenos, de carácter indudablemente universal, condicionan y relativizan los conceptos tradicionales de frontera y de límite.

¹² Véase H. Gros Espiell, "Intervención humanitaria y derecho a la asistencia humanitaria", *El derecho internacional en un mundo en transformación: Liber Amicorum en homenaje al Profesor Eduardo Jiménez de Aréchaga*, obra dirigida por Manuel Rama-Montaldo, Fundación de Cultura Universitaria, Montevideo, vol. I (1994), pág. 299 y siguientes.

¹³ H. Gros Espiell, "Aplicación de las Naciones Unidas sobre el derecho a la libre determinación de los pueblos", Naciones Unidas, Nueva York (1979); H. Gros Espiell, "Self-determination and *ius cogens*", *UN Fundamental Rights*, edited by Antonio Cassese, Sijthoff, Leyden (1979).

Tal es el caso, entre otros, de las cuestiones ambientales y ecológicas que deben ser encaradas por el derecho interno y por el derecho internacional simultáneamente. A este respecto debo señalar la necesidad de la codificación internacional del derecho ambiental, que el Gobierno del Uruguay apoya y promueve sin reservas. Tal es el caso, también, de la protección, interna o internacional, de los derechos hermanos. Es asimismo, la situación que resulta del terrorismo y del tráfico de drogas, fenómenos que hoy inciden con particular intensidad y hondas proyecciones, en el derecho interno y en el derecho internacional.

¿Y como no recordar que la tradicional división entre conflictos bélicos internos e internacionales no puede tener ya la separación y distinción tajante que antes tenía?

Las Naciones Unidas se enfrentan a la necesidad de actuar ante secesiones, particiones, enfrentamientos étnicos, a realidades tribales, a la acción de bandas armadas de la más diversa naturaleza, muchas veces sin control gubernamental, en unas palabras a conflictos que no son interestáticos y en los que las principales víctimas son los civiles. Este nuevo panorama, complejo y totalmente distinto al que presentaba el mundo internacional clásico, debe ser mostrado y explicado, porque si no se hace eso no se puede comprender lo que es hoy el derecho internacional.

VIII

Creo que puede afirmarse que en los próximos años la reflexión jurídica tendrá uno de sus centros en la afirmación y profundización, conceptual y real, del derecho a la paz¹⁴ y del derecho al desarrollo¹⁵ en relación con la situación del mundo actual y del que ya se vislumbra entre las sombras del mañana.

El desarrollo está necesariamente ligado a la paz.

El asunto merece una nueva reflexión en función de la realidad actual. En la época de la guerra fría y de la bipolaridad, la eventualidad de una guerra global, de la confrontación bélica de las dos superpotencias y del mantenimiento de la paz basada en el equilibrio del terror dependía en gran medida de otros factores políticos e ideológicos. Hoy, en cambio, las guerras perifé-

¹⁴ H. Gros Espiell, "El derecho a la paz", *Congreso Internacional sobre la Paz*, Universidad Nacional Autónoma de México, tomo I (1987); H. Gros Espiell, *El Derecho a la Paz y el Desarrollo*, OPANAL, México (1995).

¹⁵ H. Gros Espiell, "Derecho internacional del desarrollo", *Cuadernos de la Cátedra J. B. Scott*, Universidad de Valladolid (1975); "El derecho al desarrollo como un derecho de la personal humana", *Revista de Estudios Internacionales* (1980), N° 1, Madrid; "El derecho al desarrollo veinte años después", *Balance y Perspectivas*, Universidad de Valladolid (1994).

ricas, los conflictos regionales, las crisis bélicas internas y, sobre todo, el choque de las civilizaciones y los movimientos migratorios masivos unidos además el fenómeno del radicalismo integrista y la intolerancia religiosa, están directamente vinculados con las diferencias en los niveles de desarrollo y todas las consecuencias que de ello derivan. De tal modo el desarrollo ha adquirido, hoy, una nueva y mayor importancia en su relación con la preservación y el mantenimiento de la paz.

El desarrollo está asimismo vinculado con la cuestión del medio ambiente.

Esta relación fue el centro del debate de la Conferencia de Río de Janeiro de 1992 sobre el Medio Ambiente y el Desarrollo. La idea del desarrollo sostenible y durable, que está en el núcleo de las discusiones de Río, significa reconocer que el derecho al desarrollo no implica el derecho a destruir el sistema ecológico en nombre del progreso material. Desarrollo y protección del medio ambiente se intercondicionan y sustentan recíprocamente. No son términos antinómicos, sino elementos de una misma concepción política. Es el derecho a la vida, o mejor aún el derecho a vivir plena y dignamente lo que está en el fundamento común del derecho al desarrollo y del derecho a un medio ambiente sano y ecológicamente equilibrado.

El derecho al desarrollo no se comprende como algo separado y diferente de la promoción y protección de los derechos humanos.

No sólo porque el derecho al desarrollo, en su vertiente individual, es un derecho humano, sino porque sin un desarrollo que asegure las condiciones materiales, políticas y culturales necesarias, los derechos humanos no pueden llegar a ser una verdad real y vital.

El desarrollo ha de ser también considerado hoy en relación con los problemas demográficos. La Conferencia de El Cairo, celebrado en septiembre de 1994, retiene en su título "Población y Desarrollo", la ligazón entre ambos conceptos, y se ubica paralelamente al enfoque de la Conferencia de Río de Janeiro de 1992 sobre el Medio Ambiente y el Desarrollo.

El subdesarrollo es, además de factor provocador de males sociales, políticos, culturales y humanos, un elemento destabilizante desde el punto de vista internacional. Provoca confrontaciones, impulsa el camino hacia la violencia y promueve conflictos bélicos; no sólo conflictos bélicos tradicionales, sino también confrontaciones internas de diversa naturaleza pero de proyección internacional y, así como movimientos poblacionales y migraciones, los que, unidos a factores culturales y religiosos, pueden generar choques de civilizaciones capaces de llegar a ser, en el futuro, la forma predominante de los conflictos bélicos del mañana.

Sin paz no puede haber desarrollo.

Sin desarrollo no es posible la paz.

IX

La evolución reciente de la situación internacional y de la acción de las Naciones Unidas, en su proyección sobre la enseñanza del derecho internacional público, destaca dos aspectos que no pueden olvidarse.

Primero: el papel determinante y activo que juega el Consejo de Seguridad. Pero este papel, necesario en sí mismo, y que está determinado por la actual situación internacional, para que pueda tener un efecto positivo a mediano y a largo plazo, debe estar enmarcado por el derecho internacional y no debe ejercerse arbitrariamente, sino en beneficio de la comunidad internacional en su conjunto. Esto lleva a pensar en que procedimientos de control de legalidad podrían llegar a establecerse a su respecto.

Segundo: el papel esencial de la solución pacífica de controversias, de la diplomacia y de la acción preventiva respecto de los conflictos y de las situaciones críticas. La diplomacia preventiva reposa en la acción del propio Consejo de Seguridad, del Secretario General de las Naciones Unidas¹⁶ y de los organismos regionales, de acuerdo con lo dispuesto en el Capítulo VIII de la Carta.

X

Como ha dicho el Secretario General de las Naciones Unidas en su artículo escrito con motivo del 50º aniversario de la Organización¹⁷, la actual comunidad internacional se mundializa y se fragmenta, al mismo tiempo, en un complejo proceso hacia adelante, de surgimiento y afirmación de una sociedad global, y de retroceso, con un retorno a las más diversas formas de micronacionalismo.

De tal modo las Naciones Unidas están hoy llamadas a resolver simultáneamente los innumerables conflictos que nacen en todas partes y a acompañar los grandes cambios que se producen a nivel mundial. Las Naciones Unidas ante esta inédita y compleja realidad deben actuar presionadas por la urgencia, pero sin perder el sentido de la permanencia y la continuidad.

En la urgencia, las Naciones Unidas deben organizar las operaciones de mantenimiento de la paz decididas por el Consejo de Seguridad. En cuatro o cinco años se han lanzado más operaciones de este tipo que en los precedentes 45 años. Pero la urgencia no puede hacer perder de vista los principios y los propósitos de la Carta y la necesidad de la planeación, a mediano y a

¹⁶ Véase "Un programa de paz" (A/47/277-S/24111), párrs. 23 a 33.

¹⁷ Boutros Boutros-Ghali, "Cinquantième anniversaire des Nations Unies", *Le Figaro*, Paris, 7/8 janvier 1995.

largo plazo, utilizando siempre que sea posible la prevención, para acentuar la progresiva construcción de un verdadero orden internacional.

XI

La tensión entre los progresos de la cooperación y la solidaridad internacionales y las frustraciones ante fracasos circunstanciales, entre los logros y los fracasos de las Naciones Unidas — resultado muchas veces de la impotencia por falta de medios y de la dispersión de las actividades de mantenimiento de la paz, resueltas con la presión de la urgencia — constituye en último análisis la proyección de la complejidad del mundo en que vivimos y de las contradicciones de todo tipo que lo desgarran. Pero también de la realidad un mundo que — en cierta forma por primera vez — es uno, con conciencia de su universalidad, de la globalidad de sus problemas y de la necesidad de fórmulas y acciones internacionales cada día más profundas e intensas.

Es a este mundo, único y múltiple, complejo y difícil — en el que se resquebrajan muchas de las formas políticas tradicionales, pero sin que sea posible discernir aún qué es lo que las ha de sustituir o hasta donde ha de llegar el proceso de transformación — que se ha de aplicar el derecho internacional. Y es para este mundo, para la humanidad — que es un todo y al mismo tiempo una suma de seres humanos con la dignidad propia y los derechos inalienables de cada uno de ellos — que el derecho internacional debe continuar progresando.

El derecho ha intentado siempre, con diferentes y relativos resultados, prevenir los conflictos, limitar sus consecuencias y encontrarles solución. Lo importante es la voluntad, el objetivo y el impulso a dar, para que continúe y se acelere, al lento progreso que se ha ido cumpliendo. Hoy ningún Estado se burla del derecho y todos declaran respetarlo y servirlo, aunque “a veces, este homenaje, se parece al que el vicio rinde a la virtud”¹⁸. Pero aunque ésto sea así, mirando la cuestión en una amplia perspectiva histórica, todo autoriza a tener la esperanza que el derecho jugará un papel cada vez más importante y más positivo en el imperio de la paz y la justicia internacionales.

El derecho internacional es hoy la rama más dinámica, más cambiante y más renovadora del derecho.

Hay que enseñarlo mostrándolo así, con el optimismo que da la fe en el destino de la humanidad, en este amanecer del siglo XXI.

¹⁸ Gilbert Guillaume, *Les grandes crises internationales et le droit*, éditions du Seuil, Paris (1994), págs. 7 y 8.

OPEN-FLOOR DISCUSSION

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. MOHAMED BENNANI

Mr. Vignes* said that he agreed that non-governmental organizations were playing a growing role in international life, but only partially so, at least as far as their relations with intergovernmental organizations were concerned. One classic type of non-governmental organization had the role of making technical contributions to the activities of the main organization, with which it usually had an official relationship, and that role had not changed. Organizations of another, similar, type contributed to project execution and were indeed participating more and more in projects set up by international organizations. Their role was justified by their flexibility and their lower operating costs. Moreover, their participation permitted Governments to act more discreetly. Apart from those "classic" types, a second category of non-governmental organization might be qualified as "political" and in fact consisted of pressure groups. That category had undergone extraordinary development in recent years, playing a major role in the decision-making of the constitutional bodies of international organizations. Moreover, numerous resolutions were actually discussed and negotiated with such non-governmental organizations, for adoption by consensus.

Ms. Infante Caffi** stressed the importance of relating the teaching of international law to the concept of law operative within each State, the manner in which law in general was taught there and the way in which the juridical culture of that State viewed the domain of international law. Indeed, in some developing countries there had been less receptivity to the penetration of international law into the organs of the State than in others. She would like to hear Mr. Bennani's views on the teaching of international law in such a way as to permit such penetration within the domestic context.

* Legal Counsel, World Health Organization, Geneva, Switzerland.

** Presidente de la Sociedad Chilena de Derecho Internacional, Santiago, Chile.

Mr. Bennani (reply) said that non-governmental organizations, as Mr. Vignes had stated, played an important role owing to their growing number. But he had also mentioned in his presentation that they had not yet acquired the capacity of subjects that governmental organizations had enjoyed in the past. They were entities that contributed, in particular, to the shaping of international public opinion. Mr. Vignes was right in observing that technical-type non-governmental organizations played a far greater role, some of them even a normative role, as he had pointed out in his comments.

Replying to Ms. Infante Caffi's question, he observed that in order to establish certain principles of international law domestically, it would be useful to begin to teach it in primary schools, with emphasis on topics such as the United Nations and the rights of the child, so as to prepare citizens for a better understanding of the scope and impact of rules that affected them directly within their State. Within national bodies and organizations a considerable place was often reserved for the principles of international law. One need think only of the work of the International Labour Organisation or the World Health Organization: there was always interaction between domestic law and international law. Internal structures were quite open to the rules of international law and did indeed propagate international law.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION BY MR. WANG TIEYA

Mr. Maniruzzaman* pointed out that Article 38 of the Statute of the International Court of Justice listed among the sources of international law "the general principles of law recognized by civilized nations". The epithet "civilized" was subject to interpretation. Moreover, the concept had been introduced during or in the wake of the period of colonialism. Yet still the concept was maintained. When speaking of universal international law, however, one was justified in objecting to that epithet. An expression such as "recognized in representative and developed legal systems" might be employed in lieu of "recognized by civilized nations". He wished to know whether Mr. Wang felt that the provision should still be maintained in the same form or replaced by a more acceptable and more universal concept.

Ms. Popescu,** commenting on both Mr. Bennani's and Mr. Wang's presentations, said that the current proliferation of subjects of international

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law was in keeping with the democratization of international relations, which had implications for international law. In its advisory opinion of 1949 concerning reparation for injuries suffered in the service of the United Nations, the International Court of Justice had expressed the opinion that “the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights”. As a subject of international law, an entity acquired rights but also obligations, which meant responsibility, and the question might arise whether all such new subjects would also be prepared to assume international responsibility. In the light of the much-discussed issue of State responsibility, she wondered what the situation of those new subjects would be.

Mr. Wang (reply) said he appreciated the question relating to Article 38 of the Statute of the International Court of Justice, which referred to “the general principles of law recognized by civilized nations”. The question had been raised many times by students in his classes and he himself had objected to the qualification “civilized” because it had stemmed from old colonialist views that States were divided into two categories: civilized and uncivilized. Moreover, States with long histories of civilizations had been classified as uncivilized. He felt, however, that the expression had lost its meaning and that no modern international lawyer would insist that some States were civilized while others were not. To his mind, so-called “civilized” States meant all the States of the modern world, and surely one could not say there were “uncivilized” States in the United Nations! Therefore it was unnecessary to revise the Statute because of that word alone.

He felt it was not his place to answer Ms. Popescu’s question, as it did not relate to his presentation. In any case, subjects of international law meant entities having rights and duties under that law, either all rights and duties or certain rights and duties. Normally, those subjects were States, but in the 1949 case mentioned by Mme. Popescu, the United Nations had been referred to as such because of certain rights and duties under international law. The question of the nature of such subjects was quite current and even the problem of individuals as subjects of international law was being discussed.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION BY MR. HÉCTOR GROS ESPIELL

Mr. Harhoff* remarked that in earlier days it had been common to separate law from values and to distinguish sharply between objects and subjects. Yet

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law had in fact never been independent of values and ideologies, and a consensus currently existed that law should reflect the values and background ideologies of modern societies. The recent re-emerging emphasis on ethnic, cultural and religious values in international society, however, had confronted legal teaching and legal science with the question of whether one should more clearly include such dimensions in international law, and if so, how. His question was twofold: first, what could be done when one perception of international law was being challenged by another perception based on different values and how in such cases could the tensions between the two perceptions of international law be alleviated? Second, how far should one depart from the notion of a single understanding of international law in the endeavour to include alternative ethnic, cultural and religious values?

Mr. Amable Concha González* noted that together with the thematic expansion of international law there had also been a change in procedure, generating broad areas of intersection between international law and domestic law. He would like to know Mr. Gros Espiell's opinion regarding the opportuneness, with a view to promoting the teaching of the material of that intersection, of creating, under the Sixth Committee of the General Assembly, a school of international juridical practice.

Mr. Tshiyembe** said he fully shared Mr. Gros Espiell's viewpoint concerning the need for teachers of international law to promote new branches relating to dynamic new fields. However, young researchers attracted to such fields, especially in African universities, faced the problems of limited access to international law journals published abroad and scant interest on the part of so-called "classic" jurists in publishing their work, often on the ground that their research was more political than juridical. The latter problem was encountered both in the academic world and in the guidance of legal research generally. Students or young researchers were thus usually forced to turn back to the classic fields of international law to the detriment of new fields. Often, therefore, the difficulties were not outside the university or legal milieu: there was also the internal problem of the *querelle des juristes* right within their own discipline.

Mr. Gros Espiell (reply) stated that it was indispensable, in order to teach the current reality of international law, to study the role being played by non-governmental organizations. He completely agreed with Mr. Vignes

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and felt that his classification was highly useful. He added that in the area of international protection of human rights, for example, the action of those organizations had virtually become the driving force behind the consideration of the related topics by the organs of the United Nations or regional systems that dealt with those topics.

The question of the relationship between law and values was one he considered fundamental: values, including universal values such as justice or dignity, were the nucleus of law. Without them, law had no ethical content. The inclusion of the idea of *jus cogens* in the Vienna Convention on the Law of Treaties constituted precisely an input into law of the ethical and moral idea, which had just begun to be developed, but had, he believed, a great future in international law. He felt it was indispensable to include the question of values in the early stages of teaching, within the concept of international law. It was important to go beyond presenting a voluntarist, formalistic international law: hence the need to unite values with law. The second aspect of the question related to universal versus regional values. The former could be found in the Preamble and Articles 1 and 2 of the Charter of the United Nations, but there were also regional and subregional values that must be considered. For example, recent General Assembly resolution (48/141) referred to the need, even admitting a universal and general conception of human rights, to bear in mind "national and regional particularities". Under the word "particularities" he included the concept of regional values that had to be taken into account, provided that they did not affect or deny universal values.

On the question of thematic expansion, everyone agreed that international law was constantly embracing new areas. Regarding the "intersection" of domestic law with international law, moreover, there were indeed more and more grey areas to which they both applied. That phenomenon was quite different from classic international law and deserved study. It also called for action on the part of specialized training centres.

In a portion of his written text which, for the sake of brevity, he had omitted in reading, he too had referred to the problem of the deficiencies of legal libraries in developing countries, where only the old manuals of international law could be consulted. Without access to the major journals and yearbooks in the various languages, it was impossible to study and follow the process of creation of the new international law. That was a problem related to the gulf between development and underdevelopment that could be addressed only through international cooperation and solidarity to promote libraries and research centres in developing countries.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. EDWARD ARTHUR LAING

Mr. Scharf* pointed out that the first exposure to international law concepts for large numbers of youths in many countries was through popular television programmes such as the one entitled "Star Trek—The Next Generation". It had been reported that many students were more familiar with the structure, laws and affairs of Star Trek's "United Federation of Planets" than with those of the United Nations. Teachers might take advantage of students' existing store of knowledge concerning Star Trek or other popular television series to illustrate points of international law. To facilitate the use of Star Trek in the teaching of international law, he had written an article, recently published in the *University of Toledo Law Review*, that discussed the wide variety of international law issues raised in that television series. The United States representative to the Sixth Committee of the General Assembly had cited the article the previous autumn in her speech on the Decade of International Law. He hoped others would follow his lead in exploring novel and non-traditional approaches to bringing international law to life for contemporary youth.

Ms. Ramaswamy Iyer** said that Mr. Laing's call for a shift in legal thinking was timely and was addressed to the appropriate audience. Judge Manfred Lachs had stated that the law "has to be stretched today beyond Olympian peaks and to particles invisible to the human eye if it is to be the main tool in humanity's response to the challenges before it". In the light of those remarks, she requested Mr. Laing to comment on the emerging issue of environmental security, which linked peace, development and the environment, and wondered whether the idea might eventually be stretched to justify intervention through the use of United Nations sanctions to enforce agreed environmental standards.

Mr. Sohn*** congratulated Mr. Laing on his approach to new sources of international law, because traditional teaching still preferred to look at judicial decisions, of which there were few, rather than at the vast body of quasi-legislation and quasi-decision-making by international organizations.

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A fact one must not lose sight of, he said, was that international law comprised all the elements of domestic law written in larger scale for the international sphere. The law of the United Nations was really the constitutional law of the international community and prevailed over other treaties, just as domestic constitution prevailed over domestic law.

Normative rules were established not only by the General Assembly, but also by the specialized agencies and other public international organizations, the number of which was increasing rapidly. People did not consider that television series such as *Star Trek*, for example, were made possible only because there was an international telecommunications satellite organization. They did not realize how much international law, especially that produced by international organizations, was important to their lives; yet the normative part of international law had increased so enormously that it was no longer possible even to keep abreast of it.

Mr. Gasser* pointed out that the close link between knowledge of the law and compliance with the law implied that such knowledge must exist not only among experts, but in a much larger segment of society. The 1949 Geneva Conventions and their additional protocols had established an explicit obligation for all States parties to those instruments to disseminate the knowledge of humanitarian law, in particular among members of the armed forces, but also among the population at large. That meant that a State in which that law was not being taught to those who needed to know it was violating a positive obligation. His question was how to enforce that obligation to teach. What, in particular, could non-State entities such as the International Committee of the Red Cross (ICRC) do in order to strengthen the will of States to take their commitment to teach humanitarian law seriously in a wide variety of places of learning?

Mr. Laing (reply) said he fully endorsed the ideas expressed by Mr. Scharf about *Star Trek* and other media presentations. He had referred to the statement regarding similar programmes made by his country's Minister for Foreign Affairs and Economic Development during the general debate at the forty-ninth session of the General Assembly.

Ms. Ramaswamy Iyer's idea of environmental security and environmental intervention through United Nations sanctions was very interesting. He envisaged its possibility in common heritage areas such as Antarctica. If a consensus emerged on the relationship between the environment and development, as well as on that form of intervention, there might be some possi-

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bility for it, provided that those countries deemed to be violators of a given environmental norm enjoyed equal and equitable access to economic resources. At the World Summit for Social Development, a new provision pertaining to that interrelationship had been inserted in the preamble to the Copenhagen Declaration on Social Development at the request of one of the larger Powers. The provision, though preambular, had been a subject of great contention and had barely managed to remain in the Declaration.

He remarked that, as usual, one was indebted to Mr. Sohn for his ideas, especially in the area of United Nations law. Mr. Laing mentioned a recent book including articles by Mr. Sohn and others that dealt with the important point made by Mr. Sohn (see note 5 to section 4).

He could think of a number of ways to promote the commitment of States to new approaches to education and training: new, less ponderous General Assembly resolutions with greater popular appeal; committees additional to the Sixth Committee to handle some of the related materials; popularization of international law as a language for international relations by the Department of Public Information of the United Nations Secretariat and especially by lawyers dealing with such issues; conscious efforts of the Secretary-General to propagandize international law—perhaps one of the best ways to sensitize States, for the Secretary-General might quietly prevail on them to take such matters more seriously; and, finally, further dissemination of materials such as the exciting audiovisual presentation prepared by the International Committee of the Red Cross on humanitarian law, which he had seen.

LES ROUAGES DE L'ENSEIGNEMENT DU DROIT INTERNATIONAL

*Luigi Ferrari-Bravo**

Manfred Lachs, grand juriste polonais dont nous regrettons encore la disparition, s'était efforcé, dans son ouvrage sur l'enseignement du droit international, de nous offrir un panorama complet de l'universalité de la science juridique internationale. Cela correspondait d'ailleurs au difficile équilibre que pouvait connaître un Polonais, pourtant indépendant, à l'époque où Lachs écrivait. Mais une lecture attentive de son ouvrage intitulé *The Teacher in International Law* révèle malgré tout que, à quelques exceptions près, concernant notamment la doctrine latino-américaine, tout se jouait dans un dialogue entre juristes européens. Il suffit d'ailleurs de regarder les intitulés même, parmi d'autres, des grands ouvrages de Klüber ou de Heffter (pour ne pas parler, avant eux, de l'abbé de Mably), où le nom de la matière traitée se transforme en « droit de l'Europe ». Oublier ce fait serait faire preuve d'hypocrisie et, comme on le verra, ne servirait à rien.

Admettons donc que le droit international naît en Europe aussitôt que des conditions propices sont réunies, à savoir l'existence d'États indépendants les uns des autres, mais aussi indépendants d'une autorité supérieure, et qu'il s'y développe à mesure que l'Europe devient le centre du monde, c'est-à-dire jusqu'au du XIX^e siècle. Admettons également que dans la première moitié du XIX^e, la partie du monde qui devient indépendante, comme l'hémisphère américain, ou qui entre dans l'histoire des relations internationales, comme la Chine, le Japon, l'Empire ottoman ou l'Égypte, s'y conforme par esprit de modernité.

Doit-on déduire que le droit international d'aujourd'hui est resté européen ? La réponse est clairement non. Mais, pour bien l'articuler et en comprendre les aspects souvent contradictoires, il faut précisément se pencher sur

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l'enseignement du droit international, et sur ses rouages. Nous allons le faire aussi rapidement que possible.

Examinons donc l'évolution de la pratique internationale après l'époque dont nous venons de parler. Petit à petit, l'Europe perd un peu de son influence, ne serait-ce que parce qu'elle doit partager son pouvoir avec d'autres pays dits émergents. Il s'agit notamment des États-Unis d'Amérique, qui mènent souvent une politique contraire à la politique de l'Europe (et surtout de l'Europe continentale), du Japon qui devient rapidement une puissance moderne et qui, à la surprise générale, lutte avec succès contre l'Empire russe. Eh bien, tant à l'occasion de la guerre civile américaine qu'à l'occasion du conflit russo-japonais, on assiste à des évolutions importantes de certains domaines du droit international. Prenons par exemple le droit de la guerre maritime qui se développe à l'occasion de ces deux conflits. Ce droit se développe et se cristallise à la Conférence de La Haye de 1907, puis par la Déclaration de Londres de 1909, ainsi qu'à travers d'autres instruments, même privés, comme les résolutions très écoutées et réputées de l'Institut de droit international. Mais c'est un droit qui est influencé par la nécessité de prendre un peu en considération ce que pensent les pays de nouvelle indépendance, leurs intérêts, leurs oppositions.

D'autre part, l'expérience des États-Unis contribue dans un premier temps à renforcer le rôle des pays d'Amérique latine, qui se trouvent partagés entre l'influence britannique et l'influence américaine toujours croissante. La défense des intérêts de l'État endetté par les États-Unis en 1902 à l'occasion du blocus des côtes vénézuéliennes proclamé par cinq pays occidentaux en raison des dettes du Venezuela, fait partie de l'histoire du droit international car elle donne naissance à des concepts nouveaux en matière d'usages licites ou illicites pour l'apurement de la dette internationale; ce sont donc des intérêts non européens, ou non parfaitement européens, qui finissent par s'imposer.

On constate donc que certaines entités transeuropéennes, comme les États-Unis notamment, deviennent, même involontairement, des protagonistes de l'évolution du droit international et le transforment en quelque chose qui ne représente plus uniquement les intérêts de l'Europe. C'est un facteur dont il faudra tenir compte, surtout en ce qui concerne les États-Unis car ceux-ci vont constamment jouer un rôle négatif dans cette affaire, dont ils se repentiront peut-être par la suite (mais une fois que les choses sont faites, il est difficile de les modifier).

Ce phénomène, dont on a constaté l'existence dans la deuxième moitié du XIX^e siècle, n'a jamais réellement pris fin; il a parfois connu des moments de recul lors de périodes de stagnation, par exemple durant l'entre-deux guerres, mais il a repris avec vigueur lors de l'accession à l'indépendance de nou-

veaux pays — une accession massive car elle coïncidait avec l'effondrement du système colonial. Comme on le sait, la scène politique internationale compte aujourd'hui près de 200 États, sans compter les différentes entités à caractère organisationnel dont la structure est différente de celle des États. A leur tour, ces nouvelles entités, ayant des intérêts spécifiques, ont orienté le droit international vers des horizons nouveaux. Mais compte tenu de l'ampleur du phénomène, cela s'est fait principalement à travers la codification.

Codification qui a eu un double objectif : d'une part, simplifier le droit international préexistant, le rendre plus sûr, plus facile, donc applicable par les pays nouveaux qui ne connaissaient pas de façon approfondie toutes les ficelles du droit international; d'autre part, en assurer le soi-disant développement progressif dont parle l'Article 13 de la Charte des Nations Unies, afin de permettre au droit international de répondre aux exigences des pays nouveaux, des pays en voie de développement.

Ceci étant en même temps accompagné par l'apparition dans toute la planète, mais avec des degrés, des intérêts différents, de nouvelles exigences de réglementation juridique liées au développement toujours plus rapide de la science et de la technologie; ces nouvelles exigences ont parfois, comme dans le cas du droit de l'espace extra-atmosphérique, été telles que le droit international s'est formé avant même la nécessité de son exploitation, de son usage par les intéressés.

Doit-on alors penser que ces codifications sont des codifications éphémères, des codifications qui ne tiennent pas debout ? Je vous invite à une réflexion plus précise et plus poussée sur les réalités qui sont à la base de ce développement : c'est une question que je vous pose aux fins de notre discussion.

Il y a aussi des exigences qui sont apparues à l'occasion de l'accession à l'indépendance de nouveaux États, qui ont semblé vouloir adopter une attitude différente de celle des États anciens et plus développés. Des exemples marquants dans ce domaine sont les deux conventions de Vienne sur la succession d'États, succession en matière de traités d'un côté, succession en matière de biens, archives et propriétés de l'État de l'autre. On constate effectivement là une sorte de partage, de clivage si vous voulez, entre la partie un peu plus classique concernant la codification de l'ancienne succession d'États, et la partie moderne concernant délibérément les États nouvellement indépendants. Ces États nouvellement indépendants ont pu bénéficier dans la codification de leurs propres règles, de règles tout à fait nouvelles et différentes, nettement plus avantageuses pour leurs intérêts. Il y avait là un élément de justice : le fait qu'un pays nouvellement indépendant ne peut, sans être condamné à un développement économique moins poussé, supporter des règles qui imposent le respect d'obligations anciennement contractées par l'État colonisateur et, presque toujours, établies en fonction des intérêts de

l'État colonisateur et non pas du territoire en question dont les richesses naturelles se trouveraient de cette manière confiées totalement aux exploitants étrangers.

Il y a donc eu cette partie du droit de la succession d'États, qui s'est formée pour les États nouvellement indépendants. Mais certains auteurs se sont peut-être précipités pour affirmer que la succession avait maintenant totalement changé d'orientation, qu'il fallait réécrire les anciens ouvrages; en réalité, quand de nouveaux épisodes de succession se manifestent aujourd'hui (par exemple, en raison de la dissolution de l'Union soviétique ou de la dissolution de la Yougoslavie, et même dans les continents où, il y a 30 ans, il y avait des colonies, et qui maintenant remanient leurs frontières), on constate que l'on revient à l'ancien droit. On peut donc dire qu'une parenthèse qui s'était ouverte dans l'ensemble du droit de la succession tend à se refermer et à permettre la résurrection de l'ancien droit.

A ce propos, on peut même dire qu'on assiste, à l'heure actuelle, à une certaine interruption du mouvement de codification. Certes, il existe toujours la Commission du droit international, qui continue de mener des études très approfondies sur différents sujets. Mais la grande percée de la codification, lorsque se suivaient à un an, deux ans d'intervalle les Conférences de Vienne sur la codification des sujets les plus variés du droit international, s'est un peu arrêtée. Qu'est-ce que cela signifie ? Il est difficile de donner une explication exacte d'un phénomène dès qu'il se manifeste, mais il y entre probablement plusieurs choses : en premier lieu, l'effondrement du front communiste, qui était un facteur important de la codification du droit international car les États du bloc socialiste mettaient un point d'honneur à affirmer que le droit international ne devait plus servir à l'exploitation par les pays capitalistes, et refusaient donc toute règle de droit international qu'ils ne puissent accepter par voie de ratification.

Mais il doit y avoir d'autres facteurs : surtout, dirais-je, un certain sentiment d'incertitude, et le fait que les États se soient un peu lassés de codifier, codifier tout et à tout prix. Ce moment de réflexion n'est pas mauvais, il faut le dire. On peut soutenir que, dans un monde qui cherche son orientation, le droit international, en se déposant dans nos consciences, reprend sa place traditionnelle, qui était celle du droit romain, tel qu'il a existé bien au-delà de la chute de l'Empire romain, et qui a constitué la base, le patrimoine commun sur lequel on a bâti le droit international.

C'est un peu ce qui se produit aujourd'hui : alors qu'on se méfie de trop de nouveauté, on essaie de consolider ce qui existe, on essaie de faire en sorte que la plupart des États partagent des valeurs communes sur lesquelles fonder un avenir commun, sur des bases vraiment solides et non pas sur une compétition acharnée, car on ne peut pas considérer qu'il existe encore des pays

capitalistes et des pays en voie de développement, des pays de série A et des pays de série B; il existe un monde qui devient toujours plus petit et dont le sort nous appartient à tous. C'est sur ces bases qu'il faut discuter réellement maintenant de la façon d'enseigner le droit international au sein de nos institutions.

J'ai dit que le droit international occupait la place du droit romain d'antan, un droit qui, quelle que soit sa source, est devenu neutre et qui pourtant peut servir à n'importe quel but. Un droit, donc, qui se présente plutôt comme un langage commun dans les relations internationales, comme l'a très bien dit M. Boutros-Ghali en se livrant à une réflexion sur l'essence même du droit international lors de son discours à l'Institut de droit international à Milan. Qu'il existe ou non, a dit M. Boutros-Ghali, il faut croire au droit international, parce que c'est précisément la langue qu'utilise la diplomatie. Eh bien, on peut, si l'on souhaite, lui donner une orientation plus spécifique, par exemple en accentuant les thèmes de l'environnement, du développement, le volet humanitaire ou des volets commerciaux et autres, selon l'énorme quantité de traités qui existent à l'heure actuelle. Mais le tronc commun, la base de tous ces développements ultérieurs, reste le droit international général tel qu'il est issu de cette longue tradition qui a vu contribuer différentes entités et a, même sans le savoir, filtré les impuretés pour parvenir à quelque chose qui était plus stable et utile.

Quels sont à ce point les problèmes de l'enseignement du droit international? Il n'y a en réalité qu'un seul grand problème, à savoir celui de la localisation des institutions d'enseignement. Que cela nous plaise ou non, elles sont presque toutes situées dans des pays industrialisés, et pour une raison très simple, à savoir que l'on ne peut pas improviser des bibliothèques ou des fonds de recherche, et qu'il convient plutôt de déplacer des étudiants (lorsqu'on a de bons étudiants) : les envoyer en Suisse, en France, en Amérique, aux Pays-Bas, plutôt que de créer de nouveaux fonds disponibles pour l'enseignement. C'est une triste réalité à laquelle on ne peut pas faire face en informatisant les moyens de recherche et d'enseignement, pour une raison très simple : si on peut très bien, théoriquement, multiplier à l'infini ces moyens grâce aux techniques électroniques (on peut imaginer de dispenser l'enseignement par télévision, de fournir des disquettes, des bases de données), toutes choses qui semblent remplacer le vieil usage consistant à se pencher sur les bouquins un peu poussiéreux des bibliothèques d'antan, on finit ainsi et pourtant par manipuler le droit international.

En effet, plus encore que le droit interne, le droit international vit dans la richesse de ses manifestations, dans la richesse de sa phénoménologie. Et vous ne pouvez pas multiplier à l'infini sur l'ordinateur la phénoménologie; vous pouvez créer des sommaires, des extraits, des concentrés, mais, à bien regarder les choses, on constate que l'on dévoile toujours des idées, même

honnêtes, mais qui sont les idées de ceux qui les ont préparées. Il y a donc une certaine manipulation du droit international, qui est inévitable lorsque l'on veut se servir des données de la science moderne.

Ceci, j'en suis persuadé, contribue sans doute, d'un autre côté, à l'uniformisation de la science du droit international et par la suite, les gens circulent, donc recueillent d'autres opinions, d'autres points de vue. Mais à la base, effectivement, la réalité moderne, l'exigence moderne d'enseigner quelques éléments du droit international à un public le plus large possible, est contraire à l'idée d'une spécialisation, d'une différenciation, visant à aider les gens à chercher eux-mêmes ce dont ils ont besoin; cette réalité favorise plutôt l'offre de produits identiques à tous les chercheurs. Et c'est là un point sur lequel on devrait débattre, parce qu'il y a d'un côté des inconvénients, mais aussi, d'un autre côté, des avantages importants quant à l'éducation de base. La perfection n'existe pas, d'ailleurs, dans le monde.

Ceci mis à part, on se retrouve aujourd'hui dans une situation où ont tendance à se former des centres d'excellence qui produisent tous azimuts des poignées d'avocats, une sorte de Barreau fermé, comme le disait le Président Bedjaoui, qui finit par décourager de jeunes talents nationaux. Car ce sont en effet toujours les mêmes personnes, issues des mêmes centres d'excellence — et qui lentement, le plus lentement possible, en cooptent d'autres lorsqu'il y en a vraiment besoin — qui, par leur enseignement oral dispensé soit dans les universités, mais surtout dans les halls des cours de justice, contribuent à faire en sorte que, d'une certaine manière, la doctrine se fige sur certaines catégories de pensée (ce qui est bon), mais n'accepte pas volontiers des nouvelles perspectives qui pourraient se présenter. Ces réflexions, peut-être non coordonnées, devaient être présentées pour expliquer la situation dans laquelle nous nous trouvons aujourd'hui.

Une procédure lente marque donc l'évolution contemporaine du droit international. Elle est menée fermement, comme je le disais, par une petite poignée de juristes qui deviendront ensuite juges, ou de juges qui ont été avocats, de quelques personnes qui font l'opinion publique internationale aujourd'hui. Évidemment, ce n'est pas le seul moyen. Il y a sans doute d'autres occasions de permettre à la science du droit international de se manifester un peu plus librement; par exemple les initiatives prises par l'Organisation des Nations Unies pour l'éducation, la science et la culture en matière de publication de manuels coordonnés par quelqu'un et écrits par plusieurs plumes dont l'orientation diffère. Il existe, sans doute, des organisations savantes, surtout dans les pays industrialisés, qui se donnent pour mission de s'élever au-delà des intérêts contingents. La tribune de l'*American Journal of International Law* en est un exemple très intéressant. Mais enfin, on constate une certaine fermeture qui se manifeste surtout par la mise en

valeur d'idées qui, mieux que d'autres, sont susceptibles de servir les intérêts des forces prépondérantes à un moment déterminé. Tel est le dilemme auquel est confrontée la science du droit international à l'heure actuelle.

TRADITIONAL AND NEW FIELDS FOR THE DEVELOPMENT OF RESEARCH AND EDUCATION IN INTERNATIONAL LAW

*Zdzislaw Galicki**

In his lecture delivered in 1973 to the Academy of International Law in The Hague, my distinguished teacher and compatriot, Professor Manfred Lachs, President of the International Court of Justice, expressed a concluding opinion that "there is hardly a chapter or rule of international law on the development of which 'teachings' and 'teaching' did not have an impact".¹

Furthermore, he added that "the teacher' of today is bound to draw the scheme of his thinking by linking it with the great social, economic and scientific development of his age".²

Although more than 20 years have already elapsed since he made these observations, it seems that they still form principal indications for the role which should be played by the research and educational activities in international law at the turn of the twentieth century.

There are many examples of the influence of doctrine on the formulation, as well as on the progressive development, of international law. We may just recall here that the very concept of subjectivity in international law was based first on doctrinal opinions before it was finally confirmed in the positive law, as reflected by article 3 of the Vienna Convention on the Law of Treaties. Similarly, it is possible to find a significant impact of doctrine on the formulation and final recognition of one of the most important institutions in contemporary international law, namely, the concept of *jus cogens*.

¹ M. Lachs, "Teachings and teaching of international law", *Recueil des Cours de l'Académie de droit international*, vol. 151, III (1976), p. 237.

² *Ibid.*, p. 241.

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The development of international law is inseparably connected with its codification. It is worth stressing again how much the process of codification of international law owes to individual scholars of previous centuries who undertook this uneasy task of stimulating the international community towards more systematic and well-ordered formulation of customary international law. They have started activities which aim both "to fill up gaps on which the law is uncertain or silent, and to give precision to abstract general principles of which the practical application is unsettled".³

In that connection, one cannot overestimate the work done in this field by such scientific bodies as the Institute of International Law (Institut de droit international) or the International Law Association. We may find numerous traces of their positive contribution to the formulation of many rules of international law accepted later by the international community.

This process is now successfully continued by the International Law Commission of the United Nations, which, according to its statute, adopted by the General Assembly in its resolution 174 (II) of 21 November 1947, has for its object "the promotion of the progressive development of international law and its codification". Though the members of this Commission, elected by the General Assembly, are nominated as candidates by States, in fact they are presumed to act in their individual capacity, being simultaneously "out-standing representatives of various contemporary schools of thought".⁴

One of the most explicit descriptions of the traditional role to be played by international writers may be found in connection with the practical application of international law by international courts. The statutes of the Permanent Court of International Justice and of the present International Court of Justice count the teachings of the most highly qualified publicists of various nations as subsidiary means for the determination of rules of law (Article 38).

As already noted, "the analysis of the practice of both Courts indicates that, far from ignoring 'teachings', they have considered them as what they really were intended to be: subsidiary means—to be resorted to only when the main sources were not adequate, or were lacking in clarity".⁵

Besides, there is also another function of text-writers referred to by some authors: where "their writings may help to create opinion which may influence the conduct of States and thus indirectly in the course of time help to modify the actual law".⁶ In this case, however, the text-writers seem to exer-

³ James Leslie Brierly, *The Law of Nations*, 5th ed. (Oxford, 1955), p. 80.

⁴ Lachs, *op. cit.*, p. 225.

⁵ *Ibid.*, p. 218.

⁶ Brierly, *op. cit.*, p. 66.

cise their influence on the development of international law, rather than to provide the evidence of what the law is.

It is true that the contribution of writers was a much more important one in the formative period of international law than it is now or is going to be in the future.⁷ At present, the influence of doctrine on the formation of international law is rather behind the scenes. To disregard it would, however, be unjustified.

Among the functions traditionally performed by the “teachings and teaching of international law”, an almost forgotten one seems to be the transmission of knowledge, especially as it concerns its reflection in the binding norms of international law. It does not mean, of course, that this function is deprived of its real importance because it has not been sufficiently noticed by States.

Fortunately, together with the development of new fields of international relations regulated by international norms, we may observe a notable change of this attitude. In many international instruments which have been adopted by States in recent years, the necessity of dissemination and education in respect of newly formulated rules becomes one of the main matters referred to. International human rights law and international humanitarian law are the fields where this phenomenon may most particularly be found.

Already in 1978 the Committee of Ministers of the Council of Europe adopted resolution 78/41 on the teaching of human rights. This resolution underlined that “the teaching of human rights is a valuable, and indeed necessary, means of ensuring that human rights are protected as effectively as possible”. Furthermore, it has been recommended that the Governments of Member States of the Council of Europe should promote “the teaching of the safeguard of human rights and the relevant protection machinery in an appropriate manner as a part of training for members of the civil and military services”. Within the Council of Europe there is a special body established—the Committee of experts for the promotion of education and information in the field of human rights (commonly known as DH-ED)—which undertakes various initiatives in relation to certain professional groups that are most frequently confronted with human rights situations and problems in the daily accomplishment of their duties.

With respect to international humanitarian law, we may recall the draft recommendations prepared by the Meeting of the Intergovernmental Group of Experts for the Protection of War Victims at Geneva in January 1995, to be adopted at the coming session of the International Conference of the Red Cross and the Red Crescent. Among these recommendations, the most

⁷ D. J. Harris, *Cases and Materials on International Law*, 4th ed. (London, 1991), p. 58.

generally accepted were those concerning ways and means of improving the dissemination of international humanitarian law. They included the preparation of appropriate manuals on the law of armed conflict and their use as an integral part of military training. Moreover, it is going to be recommended that States increase their efforts to train civilian and military instructors in international humanitarian law, as well as to train in that law the members of civilian administrations and various kinds of armed and paramilitary forces. Together with academic institutions involved in public education, specific programmes and teaching materials should be produced, "designed to imbue students of all ages with the principles of international humanitarian law" (Recommendation IV).

It is also worth mentioning that in the Convention on the Safety of United Nations and Associated Personnel, adopted in this General Assembly Hall on 9 December 1994 (resolution 49/59, annex), a specific article was included dealing with dissemination: "The States Parties undertake to disseminate this Convention as widely as possible and, in particular, to include the study thereof, as well as relevant provisions of international humanitarian law, in their programmes of military instruction" (article 19).

Consequently, it seems that the teaching of international law is no longer just a matter of the private interest of teachers concerned, but increasingly is becoming a specific obligation of States deriving from numerous international instruments.

In thinking about new fields for the development of research and education in international law, one should remember certain general factors having a direct or indirect impact on the formation of such fields.

First of all, there is a close relationship between the development of new fields for research and education and the development of new branches of international law. What has been correctly underlined by some authors is "the expanding field"⁸ of international law, which may be observed in historical profile and which, it seems, will be continued in the future. As a result, we may identify an analogically expanding role for research and teaching following such new frontiers of international law.

Similar connections are visible with respect to scientific and technological progress, which creates new spheres of international activities to be governed and regulated by emerging norms of international law. However, it is not so easy to predict now which new discoveries and inventions will in the future cause an objective need for the elaboration of new norms of international law. For instance, it was impossible at the beginning of our century to

⁸ G. Schwarzenberger, *The Frontiers of International Law* (London, 1962), p. 83.

anticipate the rise of the international law of outer space, together with the development of research and teaching in this field.

Meanwhile, we may just focus on those institutions of international law which seem to be the most probable objects of future modifications, together with appropriate changes in the sphere of research and education.

The concept of subjectivity in international law is the one which has a chance for further evolution and transformation. These changes may go simultaneously in two contrasting directions. On the one hand, the development of transnational and supranational entities will, without any doubt, create an objective necessity for more precise formulation of their position as specific subjects of international law, with an important role in this process to be played also by doctrine. On the other hand, it is highly probable that a considerable extension of subjective international rights possessed by individuals may be expected.

Contemporary international law is now becoming not only, as it was for centuries, the law established mainly by States and for States, but more and more a law created for the benefit of individual human beings. It seems that this tendency, deeply humanistic and progressive, will be continued in the future. In that connection the importance of teaching and disseminating of "human-oriented" norms of international law cannot be in any way overestimated.

Individuals, being directly protected by international norms or even obtaining certain subjective rights under international law, should be fully entitled to receive comprehensive information about rights and freedoms they can enjoy in accordance with this law, as well as about formal and practical ways and means to claim these rights and freedoms on a national and international basis. As already mentioned, in such circumstances the teaching and dissemination of relevant international norms become an obligation for States.

The growing tendency towards individuals' obtaining a legal status as *sui generis* subjects of international law is closely connected with the development of a wider conception of what the international protection of human rights requires. The catalogue of human rights and freedoms is constantly growing, now including already three generations of these rights.

There are still, however, serious difficulties hampering universal recognition and acceptance of the principal human rights and fundamental freedoms. Political factors still prevail in this field among States, which frequently cannot jointly and effectively condemn even the most obvious violations of these rights and freedoms. And this seems to be one of the crucial tasks before researchers and teachers in the field of the future development of international human rights law. They should strive simultaneously in two

directions—to promote the extension of the substantial catalogue of human rights and freedoms and to call for universal recognition and application of these rights and freedoms by all States.

Such an attitude seems also to be desirable for the future development of international humanitarian law. The principles and rules of this law require intensive dissemination and education for the purpose of eliminating all drastic examples of their violation.

The above-mentioned expanding field of international law will also require the careful elaboration of a new understanding of the traditional concept of State sovereignty. Teachers and researchers are especially entitled, and even obliged, to start and continue the long-lasting process of changing the conservative mentality of States in the face of a new reality.

International protection of the human environment appears to be another important part of international law which needs to be developed in the future. From the 1960s onwards the international community has gradually come to realize the nature and scale of the threat to our environment and there has been a substantial increase in the number of international measures designed to protect it. In that connection, we may already confirm the positive impact of the doctrine of international law on the formulation of the concept of the human right to an adequate, healthy and sound environment. Researchers and teachers should continue their endeavours to promote and achieve universal recognition of this right.

In this short presentation it is virtually impossible to cover all the problems connected with traditional and new fields for the development of research and education in international law.

To summarize, it may just be said that based on the experience of the past, researchers and teachers in the field of international law should in the future concentrate on the following main objectives:

- (a) To participate in the formulation of new forms of international law, maintaining at the same time a close relationship between teachers and lawmakers;
- (b) To promote a progressive development of international law wherever and whenever it is necessary or desirable for the benefit of the international community or individual human beings;
- (c) To disseminate the norms of international law as widely as possible and to educate the people as the conscious beneficiaries of this law or persons obliged to follow and obey its rules in their official or professional activities.

CREATING WORLD-CLASS CITIZENS: INTERNATIONAL LAW AS AN ESSENTIAL INGREDIENT IN SECONDARY SCHOOL EDUCATION*

*Donald E. Buckingham***

This Congress has as its theme “Towards the Twenty-first Century: International Law as a Language for International Relations”. Peace and security, social well-being and economic development, sustainability and distributive justice in the global village all depend on a wide-scale and general acceptance of the language and principles of international law. Unless this language is known and spoken by an increasing number of people, we will fail to make international law the language of international relations. This must begin with teaching our young people. As Mahatma Ghandi once said, “If we are to reach peace in this world . . . we shall have to begin with our children”.

I want to discuss four points: why, who, what and where. First, *why* the language of international law is largely learned rather than experienced; second, *who* speaks or could learn to speak the language of international law;

* I should like to thank Janet Epp Buckingham, Barrister and Solicitor, London, Ontario; Deborah Chatsis, Legal Officer, Department of Foreign Affairs and International Trade, Ottawa, Ontario; Michael Liepner, Teacher of Law, Thorulea Secondary School, Toronto, Ontario; and Peter Varpio, Ontario Ministry of Education, Sudbury, Ontario, for their insightful comments on earlier drafts of this presentation. As well, I should like to acknowledge the diligent assistance of two University of Western Ontario law student researchers, Michelle Simpson and Lori Sullivan, in helping me to assemble bibliographies of international law teaching materials and in conducting law student surveys documenting the impact of secondary school studies of international law on later interest in the subject. The Ontario Work Study Programme, in part, made their research assistance possible. I would also like to acknowledge the kind assistance of McGraw-Hill Ryerson for the preparation of preview copies of my current work-in-progress entitled “Understanding Law and the Global Community”. I would also like to thank the Vice-President, Academic, Dr. Caldwell, and Dean of Law, The University of Western Ontario, for their financial assistance to attend this Congress.

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third, *what* we, the speakers of the language, must do to teach students the language of international law, particularly in secondary education; and fourth, *where* has Canada gone in teaching international law in secondary schools. I conclude with a call to action to further our efforts to offer international law in secondary schools around the world.

1. Why is the language of international law largely learned rather than experienced?

We are a privileged few in this room who know the language of international law. The great majority of world citizens are not even aware of international law.

For the goals of international relations to be achieved, the language of international law must become, like the rule of law is to domestic legal systems, the notion that individuals, institutions and governments of States submit to the law to govern their affairs.

H.L.A. Hart, in his seminal work, *The Concept of Law*,¹ argues that law works because the persons that make up the society which the legal system is to serve agree to be bound by it. According to Hart, the internalization of the rules engenders respect for them and shapes the way in which the majority of individuals in the society will act² as it better protects everyone's longer-term self-interest, i.e., ultimately the personal safety of individuals and viability of the society. I maintain that this "internalization" occurs through two processes: direct experience and formal education.

By direct experience I mean that one might learn about these rules by directly encountering them. Domestic law and its impact constantly encircles us and we internalize its rules by a process of experiential osmosis.

As there is a State interest in citizens obeying the law, the State often takes a very active role in teaching citizens about its law and legal institutions. Formal instruction in the obligations of citizenship is undertaken through State education programmes such as schooling, citizenship training and licensing.

This process of internalization, whether through direct experience or education, produces three tangible effects: (a) on the part of each individual, compliance with the law; (b) on the part of society in general, an attitude or expectation of compliance with State laws; and (c) a significant societal pressure on individuals, corporations and even Governments to comply with State laws even when it is not in their immediate self-interest to do so.

¹ Oxford, Clarendon Press (1961).

² *Ibid.*, p. 86.

The system of international law cannot function in the same fashion. The participants of international society have largely been recognized as independent States. While this trend is changing,³ international law applies to a very limited number of entities. Furthermore, the language of international law is not spoken or internalized by these entities themselves, but only through their human agents. These human agents change periodically through political changes and often have domestic pressures which may conflict with international obligations.

Because international law cannot be internalized for the vast majority of individuals through direct experience, it appears that we must rely on education.

2. Who speaks and understands the language of international law?

Those who can teach the language of international law will be those who can speak it. There are, in my opinion, four distinct levels of linguistic proficiency at present—fluent speakers, novice speakers, occasional or tourist-class speakers and non-speakers. I wish to explore briefly each category.

Fluent speakers

Even among lawyers, speakers of the language of international law are few. These include lawyers in States' foreign services, immigration and trade departments; lawyers in private firms largely involved in international business transactions, or immigration; corporate counsel in legal departments of transnational corporations; lawyers in intergovernmental organizations and non-governmental organizations; and international legal academics.

This group of international lawyers as a proportion of all society is very small indeed. Measuring fluency in the language of international law is of course difficult. However, one gets some idea of relative numbers by examining how many lawyers express an interest in international law through national law associations and national international law associations. In Canada and the United States, for example, lawyers might manifest their professional interest in international law through the international law section of the

³ This trend has been changed for two reasons: first, the explosion of States in the world—50 States were founding Members of the United Nations as compared to 185 Member States today. Second, international law is reaching further and further into the activities of non-State actors. Several human rights treaties extend rights to individuals which are enforceable by international organizations as against an offending home State. Other international treaties seek to bring individuals responsible for international crimes to justice. Certain international trade agreements (the North American Free Trade Agreement, for example) and dispute settlement treaties (the United States–Iran Claims Tribunal and the International Centre for the Settlement of Investment Disputes) provide rights of action as against States by individuals or corporations.

Canadian Bar Association (CBA) and the American Bar Association (ABA).⁴ Using 1994 data, 4.9 per cent of CBA lawyers and 3.5 per cent of ABA lawyers have an interest in international law. Even if one were to add to these numbers the membership of those lawyers in specialist international law associations—the Canadian Council on International Law (CCIL) and the American Society on International Law (ASIL)⁵—percentages of lawyers who express a professional interest in international law would rise to only 5.8 per cent of lawyers in Canada and only 4.7 per cent in the United States of America.

Although far from being scientifically conclusive, my data suggest that only about 5 per cent of lawyers in North America are fluent in the language of international law. Is this group large enough to study, teach and practise the language of international law in the next century?

Novice speakers

I am an instructor of introductory and advanced courses of international law at the Faculty of Law, the University of Western Ontario. Our student body consists of approximately 500 students more or less evenly divided over the three years of our Bachelors of Law programme. International law is not offered to any first-year students. With respect to upper-year students, less than half the students currently take even one course in international law.⁶ Our faculty is, it appears, quite typical among law schools, especially in the light of Professor Gamble's comprehensive study⁷ of law schools across North America, indicating that on average only 45 per cent of law students take one or more international law courses during their law school career.

Occasional or tourist-class speakers

The size of this class speakers of international law is practically unknowable, but their importance to the promotion of the language of international law

⁴ For 1994, the CBA had 35,000 general members, of whom 1,707 were members of the international law section, while the ABA had 346,673 members, with membership in the international law section numbering 12,142 members.

⁵ Membership in the specialist international law organizations is for the Canadian Council on International Law (343 members) and for the American Society of International Law (4,223 members).

⁶ According to statistics available from our law faculty, during the period 1991-1995, between 20 and 48 per cent of our students took at least one course on international law, depending on the year.

⁷ John Gamble, *Teaching International Law* (American Society of International Law, New York, 1993), pp. 122 and 123. This comprehensive study documented the teaching of international law in North America, as well as some institutions outside of North America. The study was the latest of a number of similar studies dating back some 80 years. Professor Gamble's survey canvassed both law schools and political science departments.

as the language of international relations is absolutely essential. This group is able to “experience” international law largely through media⁸ reports, even if it be second-hand. The interest and understanding that this group manifests may not be systematic, profound or sustained. It is dependent on access to and interest in media reports. However, I believe this group is able to recognize that the language of international law is an important factor in the conduct of international relations. This recognition is the first step to the internalization of international law by a broad group of non-professional speakers.

Non-speakers

This group has little access to, or knowledge of international issues. It is a great challenge even to contemplate educating this huge and diverse group in any systematic way.

3. How are we, as speakers of the language, to teach the language of international law?

We, as international legal academics, researchers and diplomats, recognize our responsibility to push out the frontiers of international law. We research the law, we critique it, we apply it, we codify it and many of us teach it. Through our efforts our audiences will grow in their appreciation of and fluency in the language of international law. The need for more and better teaching of international law at law schools has been documented both in academic journals⁹ and at international symposia¹⁰ for several decades. But how do we get more

⁸ The importance of educating the media with respect to reporting on international legal events is clear but beyond the scope of this presentation.

⁹ American academics have been quite prolific in this area. A selected offering of academic articles on this subject includes J. Kunz, “A plea for more study of international law in American law schools”, *American Journal of International Law*, vol. 40 (1946), p. 624; C. Franklin, “Needed: more and better courses in international law”, *Journal of Legal Education*, vol. 4 (1952), p. 326; W. Bishop, “International law in American law schools today”, *American Journal of International Law*, vol. 47 (1953), p. 686; “The state of international legal education in the United States”, *Harvard International Law School Journal* (1988), p. 239. For commentary on the teaching of international law in Canadian law schools, see R. St. J. Macdonald, “An historical introduction to the teaching of international law in Canada”, *Canadian Yearbook of International Law*, vol. 12 (1974), p. 67; D. Turp, “The teaching of international law at the Université de Montréal”, *Dalhousie Law Journal*, vol. 11 (1987), p. 325. For a report on Australian international legal education, see “Teaching and research in international law in Australia”, *Australian Yearbook of International Law* (1987), p. 176.

¹⁰ See P. Jessup, “The teaching of international law in law schools”, *American Society of International Law Proceedings* (1947), p. 66; “Promoting training and awareness—The tasks of education in international law”, *American Society of International Law Proceedings* (1981), p. 159; C. Osakwe, “Re-examination of the teaching of international law”, *American Society of International Law Proceedings* (1984), p. 198; and “Roundtable on Teaching International Law”, *American Society of International Law Proceedings* (1991), p. 239.

students interested in taking international law at law school? How do we attract students to become novice speakers of international law?

In a small sample survey of law students currently studying law at The University of Western Ontario,¹¹ about 6 per cent had previously studied some international law at the secondary school level. However, 100 per cent of the students who had previously studied some international law at secondary school also went on to take at least one course during their undergraduate studies (even though their undergraduate majors were as diverse as French, journalism or history) and at least one international law course as part of their legal training.¹² It would appear from this small survey that one way to improve the likelihood of students pursuing international legal training in law school is to introduce them to the subject at the secondary school level.

Secondary school teaching of international law would also impact upon the occasional speakers and non-speakers of the language of international law. The occasional speaker would respond to the messages of the media with understanding. The non-speaker would be empowered to respond to international issues. The need for broad understanding of international issues has been evident for some time.¹³ While a multitude of other strategies may be available to reach this group, one which intuitively presents itself is to reach the group through the common institution through which every generation must pass: our schools.

There are at least two reasons, then, why we should be teaching international law to students in secondary school:¹⁴

- (a) It will increase the likelihood that students will do further studies in international law;
- (b) It will prepare students to identify and understand international legal issues, thereby allowing them to become fully participating members

¹¹ Buckingham and Sullivan, University of Western Ontario, 1995. Sample size: 55 students; number of questions: 7 (unpublished).

¹² Furthermore, when asked how important they considered international law as part of the high school curriculum, this group consistently answered with the highest possible score (5), which corresponded with the criterion "very important". This response can be compared to the average response to this same question by the whole sample, which was 2.4, with (1) being the lowest possible score—"not important"—and (5) being the highest.

¹³ E. Root, "The need of popular understanding of international law", *American Journal of International Law*, vol. 1 (1907), p. 1.

¹⁴ Although this view is not universally shared, I think it is unrealistic to expect that the concepts of international law can be introduced any earlier than secondary school. Elementary students do not have the skills or the underlying knowledge base to appreciate international law. It is not until the secondary school years that the political and geographical awareness of students will increase and crystallize sufficiently to look beyond one's borders to the international community. For a view which implicitly denies this position, see the Centre for Human Rights, *Teaching Human Rights: Practical Activities for Primary and Secondary Schools* (United Nations, New York, 1989).

of international society with a respect for international law as the language of international relations.

4. Where is Canada going with respect to the teaching of international law in secondary schools?

Getting international law into secondary schools requires at least a three-phase process. First, someone must convince teachers or, more likely, ministries of education, that there is a need to have international law taught in our schools. Second, we need to develop international law curricula to provide the basis of instruction in schools. And third, teachers need materials from which to teach.

Efforts to bring international law to Canadian secondary school students have been slow. Education is a matter of exclusive provincial jurisdiction, and only one province¹⁵ has developed a curriculum which includes a systematic examination of international law. Let us look, then, at the case-study of Ontario.

The most recent Canadian statistics suggest that there are approximately 1,220,000 secondary school students in Canada.¹⁶ Of these, 720,000 or 59 per cent attend secondary school in Canada's most populated province of Ontario. The international law portion of the course is available only to those students entering their final year of studies, the Ontario Academic Courses (OAC) level. In 1994, 26,111 students took this course, a group which accounts for approximately 17 per cent of the total OAC enrolment.¹⁷ In Ontario, therefore, almost one in five students graduating from high

¹⁵ Ontario has offered international law at the high school level since 1987. The curriculum for the international law module is found in the annex to this presentation. As well, approximately 9,000 students annually take a law course in Alberta, Canada, containing a module called "Law and the Traveller". Source: McGraw-Hill Ryerson Ltd., Whitby, Ontario. The other eight provinces of Canada, to my knowledge, have no secondary school law curriculum that includes the treatment of international law. I am currently writing a new Grade 11/12 text to be used in any or all provinces of Canada which, by agreement with the publisher, will contain a special issue on international law in each chapter of the book, even though the book is primarily geared to exploring Canada's domestic system of law.

¹⁶ This definition includes, for all provinces other than Quebec and Ontario, the number of students generally in their last four years of secondary school education (grades 9-12). For Ontario, it also includes a fifth year of secondary school, the OAC year, which follows after grade 12 and is required for admission to any Ontario university. For Quebec, these statistics include only grades 9-11, as generally speaking students after grade 11 enter into a junior college called CEGEP. Source: *Statistics Canada, Education in Canada, 1992-93*, Catalogue 81-229 (Ottawa: Statistics Canada, Educational Division 1993). These statistics are for the academic year 1992-1993.

¹⁷ Source: Ontario Ministry of Education, Toronto, Ontario.

school today is likely to have been exposed¹⁸ to the study of international law.¹⁹ How did this happen?

(a) *Recognizing the need for international law in Ontario secondary schools*

In the mid-1980s, the Ontario Ministry of Education undertook an ambitious revamping of a large portion of the Ontario high school curriculum. There was consultation with teachers, administrators and representatives of the Ministry and with university professors and other interested associations. One of the new courses offered was law, but the course had to offer something “new and different” from the then existing grade 11/12 law courses. Four individuals in particular were instrumental in suggesting that international law be included. These individuals, three law teachers²⁰ and one international law professor,²¹ were then approached to write a draft of the guidelines for the international law module of the OAC law curriculum, which was adopted and implemented in 1987 and has since remained unaltered. These guidelines are attached in the annex to this paper.

(b) *The curriculum for international law in Ontario*

By 1987, the Ministry published its new guidelines for the OAC curriculum. The stated rationale for the entire OAC law course was to “provide students

¹⁸ It is possible for instructors to choose not to offer any of the international law portion of the course but concentrate more on other aspects of the curriculum. Without extensive empirical work, it is not possible to know how widespread this practice is. For my purposes, I have assumed that the practice is not widespread. This suspicion has been confirmed only by anecdotal evidence from Ontario OAC law teachers.

¹⁹ This number represents a significant increase in student enrolment in the OAC class over my survey of 1995 graduating law students. The 1994 average of 17 per cent of students taking the OAC law class greatly exceeds the 6 per cent in the 1995 law school class survey group who took international law in high school. This difference can be accounted for by at least four factors. First, international law is only offered at the high school level in two provinces in Canada, Ontario and Alberta. Only 47 of the 55 students sampled completed their high school matriculation in those provinces. Given this factor alone, then nearly 13 per cent of the students who could have taken international law in high school did take it. A second factor is that Ontario students may have taken the OAC law course, but had an instructor who chose not to teach the international law module. Third, international law has only been part of the Ontario curriculum since 1987. Since our survey did not ask the 1995 class their year of high school matriculation, some of them may have passed through the Ontario high school system before they would have had an opportunity to take the OAC course. A fourth factor may be that the OAC course has simply become more popular and students may be becoming more interested and aware of international law and so more are choosing to take the course than when it was first offered. If this is the case, hooray!

²⁰ Michael Liepner, Thornlea Secondary School, Thornhill, Ontario; Steven Spetz, Kingston, Ontario; and Steven Talos, Brantford Collegiate Institute and Vocational School, Brantford, Ontario.

²¹ Professor Sharon Williams, Osgoode Hall Law School, York University, North York, Ontario.

with a sophisticated understanding and broad skills needed for full participation in our complex, modern society".²² The international law module included in the law curriculum—"Law and the World Community"—is given equal weight with the other modules of the curriculum such as human rights and freedoms, law and the economy, legal history, criminal law and current issues in Canadian law.

(c) *Developing materials for use in Ontario classrooms*

When international law was included in the curriculum, no materials existed which systematically introduced students to international law in a language which was understandable by students at this level. Teachers either had to develop their own materials or adopt a patchy Ministry package,²³ but both were far from comprehensive. In 1989, two Canadian texts appeared to fill this gap in educational materials. One was *Understanding the Law*,²⁴ which included a large unit on international law, the other being a free-standing paperback volume called *Law and the World Community*.²⁵

In the past few years the world and the content of international law have significantly changed. But only one new text, a second edition of *Understanding the Law*,²⁶ has been produced since 1989 to record these important changes. I was fortunate to prepare the restructured international legal material for this text. The second edition, which will be available in 1996, contains over 170 pages of text, cases, exercises and questions pertaining to international law since the thawing of the cold war.

These materials are broken down into four chapters. "The nature of international law" examines the evolution of international law, the relationship between international law and domestic law and the sources of international law and focuses on two specific examples of international law: extradition and diplomatic immunity. The chapter entitled "International conflict and collective security" helps the student to understand the structure of the current international system of collective security, compares methods of peaceful resolution of international State-based conflict, outlines the limits on the use of force in international relations, explains the means for coping with individual-generated international conflict and summarizes the international

²² Ontario OAC curriculum guide, "Contemporary Studies—Law", p. 52.

²³ Ministry of Ontario materials, 1989, "Law—Unit Five Law and the World Community", Toronto, Ontario (unpublished).

²⁴ Liepner, Talos and Dickinson, *Understanding the Law* (Scarborough: Mc-Graw Hill Ryerson, 1989). The Unit entitled "Law and the Global Community" consists of 153 pages of text.

²⁵ Daniel Baum, "Law and the World Community", *Thinking About Law: An Issues Approach Series* (Toronto: IPI Publishing Limited, 1989), 214 pp.

²⁶ Dickinson, Liepner, Talos and Buckingham, *Understanding the Law*, 2nd ed. (Scarborough: McGraw-Hill Ryerson, forthcoming). The international law materials consist of 174 pages.

community's response to international criminal activity. The third chapter is devoted to "international human rights". It explores the origin of international protection of human rights, outlines the major international human rights treaties, distinguishes between universal and regional human rights treaties and addresses the issues of special protection granted to women, children and refugees under international law. The final chapter, "International relations", outlines the limits of national jurisdiction with respect to land masses, water, air and species, examines pressing environmental concerns and the international community's attempts to retard international environmental damage and concludes with an examination of the impact of international trading agreements like the World Trade Organization/General Agreement on Tariffs and Trade (GATT). These chapters represent, in my view, a complete introduction to the study of international law and, through the use of the further readings suggested in the chapters, represent a source for greater depth of study as well.²⁷

5. Conclusion—a call for action to create world-class citizens starting in secondary schools

To my knowledge, few countries in the world have developed their educational objectives for secondary school education to include an examination of international law. I am aware of a programme to do so by the New York State Bar, but have found few other examples where our high schools are training students in international law. Furthermore, I could find few, if any, comprehensive introductory texts on international law for high school students outside the ones already mentioned, at least in the English-speaking world.²⁸ Equally distressing was the fact that I could find little literature in learned academic journals of education, law or international law on teaching international law in secondary schools.²⁹

We need to be introducing students to international law earlier than in universities. A more educated and internationally literate public will assist the goal of recognizing international law as the language of international relations. Leaving to chance or to higher education the role of teaching the world about international law is too late. I wish to propose a plan, in five

²⁷ It is my hope to convince my publisher to develop these international law materials as a free-standing volume for school use in English-speaking countries.

²⁸ I would be most grateful if persons might draw any such materials, in any language, to my attention. I did locate some interesting materials which focus on specialized areas of international law, such as Centre for Human Rights, *Teaching Human Rights: Practical Activities for Primary and Secondary Schools* (New York, United Nations, 1989), 56 pp.

²⁹ The exception was Donald W. McNemar. "The task of education: broadening professional training and public awareness", *Proceedings of the American Society of International Law*, vol. 173 (1983), p. 176.

steps, to develop the creation of world-class citizens through the teaching of and appreciation for international law at the secondary school level.

Step 1—Recognizing our obligation to teach the language of international law

We must recognize that we are the ones who currently speak the language of international law and thus have an obligation to teach our language more broadly. It is at international conferences such as this one and also within the national international law organizations, such as CCIL and ASIL, that we can begin the process of encouraging the teaching of international law in secondary schools.

Step 2—Developing an approach to teaching international law in secondary schools

We must become involved in and create groups which:

- (a) Advocate inclusion of international law in high school curricula;
- (b) Develop model curricula for secondary schools that can be presented to ministries of education;
- (c) Write teaching materials directed to high school students.

Step 3—Working with high school teachers

Even with the international law module in the OAC curriculum, teachers of the course are not required to complete all of the modules. Since international law continues to be generally inaccessible to the general public, there are two factors which reduce the likelihood that teachers will venture into the international law module. First, teachers themselves are not familiar with international law and so may not be keen to tackle material which seems foreign to them.³⁰ Second, students are not familiar enough and lack the general exposure to international law to create a demand for teachers to “buy into” international law.

It is up to the academic and practising international legal community to lead the charge to change these attitudes. In time we will be able to rely on a better educated public which truly believes that international law is the language of international relations to assist us in this effort.

³⁰ There are several initiatives that are attempting to remedy this reluctance. For example, each year the Ontario Business Educators Association holds special seminars to attempt to make international law more user-friendly.

Step 4—Securing financial support for international law education efforts

It is clear that not all States will have the financial ability to support the development of an international law curriculum. We must develop funds and international organizational resources to encourage international law teaching in secondary schools around the world.

Step 5—Setting goals to achieve steps 1 to 4

It is important that we set realistic goals to achieve the above objectives, by which we may later measure our achievements. I propose that if international law is to become the language of international relations, it is imperative that targets be set for the teaching of international law in secondary schools around the world: by the year 2000, perhaps we should aim to have 10 States introduce international law into their high school curriculum; by 2005, 20 States; by 2020, 80 States; and one-half century from now, I hope that most nations of the world will have international law taught in their secondary schools.

Only if we act now can we be assured that the leaders of tomorrow will be world-class citizens using the language of international law as the language of international relations.

Annex

Ontario Curriculum

Unit 5. Law and the World Community

Description

In this unit students explore the origins, aims, principles and problems underlying the legal interaction, cooperation and conflict among nations. The institutions and agreements set up to regulate international relations between nation-States are also examined. Students should come to appreciate the scope and limitations of the law as a means of resolving international conflicts and problems. An awareness of the global aspect of law should increase student interest in international legal affairs and enhance their awareness of themselves as "world citizens".

Content

(a) *Sources and uses of international law*

- The United Nations Charter and Organization
- The World Court
- International conventions and treaties
- Territorial disputes, boundaries and international zones
- War crimes and crimes against humanity
- The problem of international terrorism

(b) *Current concerns in international law (select at least three topics)*

- The use of international boycotts and sanctions
- The ownership of world resources
- Cross-border pollution
- Citizenship and immigration
- Terrorism
- Human rights
- The regulation of international trade and investment
- Diplomatic immunity
- Extradition
- Refugees and political asylum

Sample teaching and evaluation strategies

- Have students work in groups to examine such examples of international law and law courts as the *jus gentium*, the Congress of Vienna, the Treaty of Versailles, the League of Nations, the Geneva Convention. Stu-

dents then identify the areas of concern that produce international law.

- Have students investigate and assess the Nuremberg and other post-war tribunals and explore later cases in which the rules developed in these tribunals have or could have been applied.
- Have students analyse the 1982 United Nations Convention on the Law of the Sea for its potential future impact.
- Have the class study voting patterns on issues of major importance for the five permanent members of the United Nations Security Council in order to draw conclusions about the legal interests of each nation. Students then predict how the nations would vote on a series of hypothetical issues.
- Have students debate the following: "National interests are an impediment to the enforcement of international law".
- Have students examine a variety of territorial disputes and evaluate how these have been resolved in the light of international law.
- Have students work in groups to compare arbitration, negotiation, adjudication and force as methods of solving international disputes. One example could be the Falkland Islands war.
- Have students examine specific cases involving refugees and/or war criminals in order to develop criteria for distinguishing between people who should be returned to another country and those who should be permitted to stay.
- Have students research various environmental and economic problems in order to assess the feasibility of legal solutions to the problems.
- Have students contact an agency such as Amnesty International for materials and information. Using this material as a basis for further research, students then analyse the role, methods and effectiveness of the agency and present their findings in the form of a research paper.
- Select a current international legal issue and have students write a paper presenting the arguments for both sides.
- Have the students evaluate the following law-enforcement tactics: sanctions, boycotts, world opinion, force, peace-keeping units. Students then rank the tactics in order of importance and establish and explain the criteria for their evaluation.

OPEN-FLOOR DISCUSSION

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. LUIGI FERRARI-BRAVO

Mr. Maupain* suggested that an increased role for international organizations, and especially their legal departments, might counterbalance the monopoly on training mentioned by Mr. Ferrari-Bravo. Legal departments such as that of the International Labour Office (ILO) received many applications for internships from graduate students throughout the world. Such a spontaneous system, however, involved limitations: the capacity of the ILO to accommodate those students and to provide supervisions was limited, and the applications were limited in geographic origin, due largely to financial considerations. Such a system had advantages both for the organizations, for which it was a source of research assistance and new talent, and for the interns, who thus had an opportunity to gain valuable experience and insight and obtained access to otherwise unavailable documentation. An effort should be made to systematize and universalize such internship possibilities. That would mean creating a system for locating and screening candidates, such as a centralized system at the United Nations level. A system of financing would also have to be set up, perhaps first by means of scholarships and subsequently by the organizations themselves. He thought the Congress was perhaps the proper place to consider the creation of such a centralized internship system for students in international law.

Mr. Bernad** wondered whether, in the discussion of teaching and research, account was duly being taken of the fact that since 1989, public international law had shifted considerably, the international social base had changed and a split was taking place, no longer between Marxism and capitalism, but along socio-cultural lines. He felt the new situation required a

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** Catedrático de Derecho Internacional Público y Derecho Comunitario Europeo, Universidad de Zaragoza, Zaragoza, España.

redoubling of efforts on the part of States and international organizations and would like to know whether Mr. Ferrari-Bravo shared that view. Did he consider that everything possible was being done to contribute actively to the recognition, especially among students, of the need to respect international law? Was one contributing to the improvement of the content of international norms, respecting the vital interests of States and promoting the idea that global challenges needed global responses? Was one of the greatest threats, namely, the wish to regulate everything, being properly combated? Would it not be better for States to regulate internationally only what was necessary? Did Mr. Ferrari-Bravo think compulsory teaching of international law in all universities was a good idea, as a goal to be achieved during the United Nations Decade of International Law? And finally, would it not be fitting, in view of the success of the current Congress, to hold a second Congress at the end of the Decade, in 1999?

Mr. Ferrari-Bravo (reply) said that the internship system envisaged by Mr. Maupain was laudable and agreed that a geographic balance had to be maintained in the selection of candidates. For the sake of greater impartiality, it was preferable to have the related financing administered by international organizations.

He agreed with Mr. Bernard that it was a time of socio-cultural confrontation. The real challenge, however, was not simply to provide rules, but to create patterns of integration. The World Trade Organization (WTO), for example, had to create the conditions of respect for the complicated rules of the WTO accords, which implied a certain degree of similarity among different systems. That was relatively easy in the case of members of the European Union, but not in the case of States in other regions. Perhaps the only approach was to offer model patterns to enable States to create their own rules, within a certain basic uniformity. An example was the work on the principles of international commercial contracts published in 1994 by the International Institute for the Unification of Private Law (UNIDROIT) and translated into several languages. Some might view it as private codification; yet it provided a basis on which States could legislate or companies having joint ventures could operate. That was what he meant in referring to the bridging of the gap between developed and developing countries.

As for the compulsory teaching of international law, he personally hated everything that was compulsory! He preferred the idea of "encouragement teaching". Basic elements, as advocated by Mr. Buckingham, were useful, but only basic elements, so that students graduating from law school would be aware of the existence of the international arena and of some of its applicable rules.

If there was a Congress in 1999 (a question actually addressed to Mr. Corell), he felt it should be completed with a colloquium to assess the current Congress.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. ZDZISLAV GALICKI

Mr. Paszkowski* observed that when one heard about new principles of international law, which were not necessarily expressed in formal instruments, the question arose where to find those norms, how to determine their existence and their content. In that context mention should be made of a recent UNESCO work entitled *International Law: Achievements and Prospects*, prepared under the direction of Mr. Bedjaoui with the cooperation of numerous other researchers and teachers. In fact, the role of teachers had not been replaced by all the bodies that dealt with the codification and progressive development of international law. On the contrary, in view of the multiplicity of the sources of international law, the methodical presentation of its principles, together with the necessary clarifications, took on particular importance at the current juncture.

He was grateful for the fact that the Congress had provided him with relevant and useful answers to some of the questions with which, as a practitioner, he was constantly confronted and to which he desperately sought answers. He had no specific question to ask, but had simply wished to express his thoughts as a representative of UNESCO, an organization that dealt first and foremost with education.

Mr. Qureshi,** addressing his remarks both to Mr. Galicki and to Mr. Corell, said that while there was much talk about the influences as well as the obligations of writers in international law, he had heard no mention of the difficulties writers might face in publishing, in particular those due to the influence of the editorial process: doctrinal bias on the part of editors, composition of editorial boards, nationality requirements for publication, or selection of particular individuals for the recording of State practice. He believed national writers should be free to comment on international law issues and on State practice in their national publications and wondered whether that view was shared. Because of the importance of the editorial process, he

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** Director, Faculty of Law, University of Manchester, Manchester, United Kingdom of Great Britain and Northern Ireland.

wondered whether the United Nations should not examine that area and perhaps consider a code of conduct for editors and editorial practices. He also believed it fitting to assist countries that did not have yearbooks or journals of international law in establishing such journals.

Mr. Galicki (reply) said he agreed with Mr. Paszkowski about the difficulty of finding the norms to be codified and the input of theoreticians, and further work on that problem would be one of the main tasks of teachers and researchers in the future. Much nineteenth-century codification had been private in character, yet had yielded famous codes of international law that still constituted standards for legislation. Though lawyers worked in their individual capacity within the International Law Commission, they still belonged in some way to the United Nations system. The task was to find solutions satisfactory to both States, as the final law-makers, and to theoreticians, who must also play a role in the process.

He agreed with Mr. Qureshi that there were publication problems. There had been political problems, which for Eastern and Central European countries fortunately now appeared to belong to the past; yet there still existed editorial and financial problems. Luckily there were many countries where the author's nationality was not a criterion for publication. International cooperation with respect to research work, certain scientific projects and international publications was also a goal for the future and he hoped that cooperation would be accelerated.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. DONALD E. BUCKINGHAM

Mr. Hilaire* said he strongly endorsed Mr. Buckingham's call for the teaching of international law at the high school and university levels. He himself, a teacher of international law at the undergraduate level, had taken his first course in international law at the university level. There had been a great increase in student enthusiasm for such courses. He took his students to the annual meeting of the American Society of International Law, which they found very exciting, and many of them subsequently specialized in international law. A problem that existed in the United States, particularly in international relations programmes, was that most professors had been required to take courses in international law for their doctorates, had little knowledge

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of or interest in the field and therefore did not make its study a requirement. He recommended that, in future, opportunities should be provided for students to attend events such as the current Congress or meetings of international law societies, inasmuch as such programmes helped students to decide which areas of law they would study.

Mr. Buckingham (reply) expressed his support for Mr. Hilaire's remarks. He himself had that same year for the first time brought some of his international law students to the United Nations for a view of "international law in action", which had proved a most enlightening experience for them. Such an approach should be fostered at the law-school, undergraduate and even secondary school levels.

COMMENTS AND SUGGESTIONS OF A GENERAL NATURE

Mr. Re* pointed out that under the United States judicial system, if an international legal principle was not identified by the judge, it was often because it had not been brought to the court's attention by the lawyers. But if lawyers and judges were to know the principles, they must have studied the subject. He had welcomed Mr. Buckingham's remarks about teaching international law as early as possible, but at least in law school! One way to induce students to take courses in international law was to have bar examiners ask questions on it. He suggested that one should compare more recent United States Supreme Court decisions, in which international legal questions often did not receive proper treatment, with some of the earlier decisions, such as that rendered in the *Paquete Habana* case, in which that Court had ruled that international law was part of domestic law and must be applied.

Ms. Beer-Gabel** observed that computer-assisted analysis, used in private law, was apparently unknown in public international law. It permitted queries involving multiple parameters and also made it possible to follow the evolution of legal provisions in time. Whereas scanning a body of information contained in hundreds of agreements was impossible for the human mind, the results obtained with the computer were quite extraordinary and often called into question traditional analyses. The method showed, for example, the inconsistency between the theoretical stances of States and the solutions that actually prevailed in their international agreements, which might

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** Maître de Conférences à l'Université de Paris-I, Panthéon-Sorbonne, Paris, France.

raise the question whether the theoretical discussions actually had any meaning. Earlier in the Congress she had given examples relating to the field of maritime delimitation. Another example was the possibility of measuring the effectiveness of an international organization by quantifying the interaction of several elements on which that effectiveness depended. She stressed that it was not difficult to learn to use the computer and that students were enthusiastic about the new form of legal research. One could not disregard the contributions of computer technology in international law when it was widely used in all fields, especially research.

Ms. González Lozano* said she considered that the fundamental issue in the teaching of international law had not yet been taken up. Her students asked her, as a teacher of international law, "But what is the point of our studying all this if in the last analysis the strongest wins?", and the same comment could be heard in the corridors of the current Congress. She felt that a greater commitment to injecting ethics into teaching would safeguard international law. Ethics meant speaking truthfully. If the feeling with which one spoke before the Security Council or entered into a treaty was one of truthfulness, one would not end up bound by unwanted obligations. Moreover, that truthfulness in one's actions and in the teaching of students, some of whom would one day become statesmen, would finally be what directed international law. Before seeking methods of sanctioning countries, it would be better to sanction oneself, because the worst punishment for a jurist was a conscience that told him he was acting dishonestly. She therefore proposed that one week every year should be dedicated in the classroom to imbuing students with a sense of the truth and teaching the ethics of international law.

Mr. Meyer** said he felt that the important question of adult education—reaching people who were not in school and did not particularly care to be educated, yet constituted the great mass of human beings responsible for political decisions—had been overlooked. Meetings, learned journals or the preparation of curricula did not provide the kind of outreach needed to inform the general public. It was necessary to inspire the media to give some attention to the subject. Where, he asked, was their coverage of the current Congress? His question, therefore, was how one could reach that public.

* Abogada, México, D.F., México.

** Lawyer, New York, NY, United States of America.

Mr. Ferrari-Bravo* said he shared Ms. Beer-Gabel's enthusiasm for computer-assisted legal analysis, but up to a point. Indeed, it ensured student participation and created a favourable atmosphere for research on international law, but the only fear was that one might see international law becoming fixed. Her example, namely, that the research showed that median lines in agreements did not follow any criterion, was quite plausible, perhaps because different negotiations were involved. But it was also possible that those inconsistencies were in fact tricks, subtle ways of arriving at an agreement. That, he feared, might be lost if one based oneself solely on computer-assisted analysis. Thus, he said "yes" to computer-assisted analysis, provided that it was capped by a teacher's imagination.

He shared the sentiments expressed by Ms. González Lozano regarding the truly important teaching of ethics in international law.

Mr. Buckingham** mentioned that the teachers of the international law programme in Ontario schools, to which he had referred earlier, reported that students were very sensitive to electronic media and that there seemed to be a real need for a technological approach to teaching that included more than the printed text. He had been encouraged to learn that the United Nations Children's Fund (UNICEF), in an innovative use of technology, had put a message on the Internet that had read: "Why are there more poor people than ever before, when for the first time in history everyone's basic needs can be met?", asking students aged up to 15 years to respond.

With respect to Mr. Meyer's comment, he felt it was a formidable challenge to reach the general public. His only suggestion was bombardment by the media. Education of the media seemed to be the only avenue whereby one might still meet that challenge. Some efforts had been made in that direction and those initiatives should continue.

Mr. Galicki*** fully agreed that the human factor and the technological factor were both important and should be carefully balanced in the creation and application as well as the teaching of international law. He wished to add to his earlier remarks on the impact of the development of technology that despite the best computers, there was no substitute for charismatic professors. One remembered them, they were being recalled that very day at the

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** Visiting Assistant Professor, Faculty of Law, University of Western Ontario, London, Ontario, Canada.

*** Director of the Institute of International Law, University of Warsaw, Warsaw, Poland.

Congress and their influence in the teaching process, while it might be assisted by technological inventions, was irreplaceable.

Mr. Corell* said he was encouraged by Mr. Buckingham's approach to the theme of the day. He mentioned by way of information that a proposal that a booklet should be written for schoolchildren was being taken up by the Office of the Special Adviser to the Secretary-General for Public Policy within the framework of the celebration of the Fiftieth Anniversary of the United Nations. He had also learned that a global curriculum for teaching about the United Nations, intended for the medium or higher pre-university levels, was being developed and would be published with the help of UNESCO. It was the hope that a week would be set aside in schools every October to teach about the United Nations.

Regarding Mr. Qureshi's question about boards of editors and the possibility of a code of conduct for editorial practices, he felt that was a step that had to be taken by Member States. His experience was that codes of conduct were usually drafted by the members of a profession for themselves.

Mr. Re had mentioned the failure of counsel to bring the relevance of international law to the attention of the courts. Precisely the same remark had been made during a seminar held in New York a few weeks earlier at which three justices of the Supreme Court of the United States had been present. One of the points discussed had been how to make United States courts aware in the future of the content of international law, with focus on the duty of the bar to ensure that awareness. The same important question might apply to other legal systems as well.

As to the holding of another Congress, he pointed out that the current Congress had been organized by the Secretariat pursuant to a decision of the General Assembly. Consequently, if there was to be another Congress or major event at the end of the United Nations Decade of International Law, it was for the Member States to decide.

In reference to a question asked by Mr. Kolodkin earlier in the Congress, he pointed out that Mr. Jonkman, Secretary-General of the International Bureau of the Permanent Court of Arbitration, was conducting work on the possibility of revising The Hague Conventions. Views of course differed on the feasibility of such a project, yet the endeavour should be mentioned. He himself hoped that Member States would come up with an idea for the celebration of the one hundredth anniversary of the 1899 Convention or the

* Under-Secretary-General for Legal Affairs, Legal Counsel of the United Nations.

end of the Decade of International Law. The topic to be selected was important because such an event, if held, must be a success.

As to whether the Congress came to the knowledge of the public, he could only say that he had tried his best. He had noted that, based on his opening statement, the title of the press release on the opening day read “‘Congress on International Law should make resounding appeal for statesmanship’, says Under-Secretary-General for Legal Affairs”. That, he thought, should be sufficiently provocative to attract at least some attention in the media. In any case, it was important that everyone present should help to spread the message of the Congress outside the walls of the United Nations.

Mr. Laing* said he endorsed Mr. Corell’s remarks. Every year the United Nations received two or three weeks of rapt attention at the beginning of the General Assembly, when the most famous world leaders were present. Apart from that, the attention of the media was spasmodic. All present, however, had associates to whom they could bring the message that emerged during the Congress.

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FRIDAY, 17 MARCH 1995

**TOWARDS THE TWENTY-FIRST CENTURY:
NEW CHALLENGES AND EXPECTATIONS**

5

PRESENTATION OF THE TOPIC

*Danilo Türk**

The title of our topic today suggests an approach which has to be both sceptical and forward-looking. The future of international law is indeed confronted with a variety of challenges, some of which have been discussed at this Congress. On the other hand, there are reasons for expectations resulting from the inherent dynamics and growing authority of international law. Within the United Nations, the processes of creation and application of law have produced a *corpus iuris* of impressive volume and diversity which represents a solid base for further progress.

It is therefore appropriate to accept the challenges with the seriousness they deserve and with the confidence that the existing law already provides. Let me share with you several reflections which come to mind in this context.

In recent decades, the international community has taken a large step from the stage at which it was primarily a community of States to the situation in which international legal regulation addresses an ever-growing number of issues affecting the status and rights of the individual. International instruments in the field of human rights, one of the main achievements of the international legal regulation produced by the United Nations and other international organizations, are of fundamental importance in this context. They represent not only a system of substantive legal norms and procedures which can be invoked by the affected individuals, both within States and internationally, but also an important point of reference for a variety of governmental and non-governmental actors in their effort for political and social change.

The processes of democratic change witnessed in recent years in various parts of the world have been inspired by international standards of human rights, and this has also contributed to the articulation of the ongoing quest

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for change. It is important that the role of international legal standards be upheld and strengthened in the dynamics of social change, a task of considerable complexity which gives rise to a variety of challenges.

Let me refer to two of them. The first challenge relates to the basic question of the universality of human rights. Although the United Nations has repeatedly stressed the universality of human rights defined in the United Nations human rights instruments, the problem of their application in the vastly diverse social reality persists. Universality is not uniformity. The application of international standards cannot be uniform and therefore appropriate legal techniques have to be developed to make the realization of abstract standards meaningful in the actual reality. The notion of the margin of appreciation for the national institutions in the field of implementation of human rights, which has been developed to a high degree of sophistication within the European system of protection of human rights, can provide useful guidance in the search for the appropriate techniques at the level of the United Nations.

Additionally, it is necessary to engage in a serious rethinking of the existing United Nations mechanisms in the field of human rights in order to make them more effective, more objective and more sophisticated. The ending of futile ideological disputes which characterized the cold war, and which had represented a major constraint in United Nations action for human rights, has provided an important opportunity. The question of whether this opportunity will be used represents one of the important challenges for the future development of international law.

The challenges facing the future development of norms and institutions of the international law of human rights relate, essentially, to the issues of implementation and compliance with the accepted international human rights standards. In that sense they belong to a broader problem area of compliance with the international norms, an area which has become extremely diverse. International institutions, including, in particular, the United Nations, have developed a variety of instruments to strengthen compliance with substantive norms of international law and with decisions by the international forums. Let me briefly refer to one of these instruments which has attracted much attention in recent years, the sanctions by the Security Council.

It is necessary to recognize that sanctions are a blunt instrument. However, as the Secretary-General explained in the recent Supplement to "An Agenda for Peace" (A/50/60-S/1995/1), their purpose is not punishment or retribution but an effort to modify the behaviour of the party threatening international peace and security and to ensure compliance with the relevant norms and decisions.

This is an important legal proposition. While it is true that the sanctions have been a necessary instrument to use in several recent situations, it is necessary to think about their future evolution. There is a need for greater precision and sophistication in decision-making in this domain so that the actual effect of future sanctions would correspond more accurately to their objectives. One of the ways towards such refinement would be the consideration, by the Security Council and prior to taking the decision on sanctions, of a carefully prepared impact assessment. In that way the Council would be enabled to make truly informed decisions so that the actual effects of sanctions would enhance the possibilities to ensure compliance in an effective way, while the adverse side-effects would be reduced. It is clear that a mechanism of impact assessments would require an appropriate legal regulation and that legal experts should have a creative role.

Let me say a few more words about the present practices of the Security Council and some of the legal issues involved. As a result of the post-cold war circumstances, the Council has become able to decide on a wide variety of issues. This is welcome and has created a potential for a more effective functioning of the United Nations and for a more complete interpretation and application of the provisions of the Charter of the United Nations related to the maintenance of international peace and security. However, the actual practices which have developed over the past years have also revealed a variety of problems. Chapter VII of the Charter has been invoked frequently and often without precise explanation. This has provided the flexibility needed in many situations. On the other hand, the question of what exactly represents a threat to the peace which created the need for the adoption of measures under Chapter VII, and whether the measures taken correspond to the actual threat, sometimes remains unanswered.

The Security Council needs flexibility and discretion. However, its action must be within the framework of the Charter. It should be kept in mind that Article 24, paragraph 1, requires that the Council act on behalf of all Members of the United Nations and—as Article 1, paragraph 1, of the Charter stipulates—“in conformity with the principles of justice and international law”. These provisions could be an important point of departure for development of additional techniques of review of the Council’s activities, including those based on the duty of the Council to submit reports to the General Assembly, when necessary. It seems that an activist Council could have all the more reason to report to the Assembly more frequently and more substantively.

A related idea in this context concerns the role of legal commentators. Have the jurists offered the necessary analysis and critique of the evolving practices? Some presentations and elements of the debate at this Congress

have shown that a critical discussion by jurists can provide valuable insights and have the potential of contributing to the further evolution of the practices of the Security Council.

One aspect of the recent practice of the Security Council will continue to merit particular attention by jurists. Creation of the ad hoc international criminal tribunals for the prosecution of persons responsible for serious violations of international criminal law represents a major innovation in the United Nations system. A benevolent commentator would certainly welcome the decisions which appear to reflect the will of the international community to act in an effort to uphold some of the most basic and most universally shared values of humanity and to devise a bold and forward-looking interpretation of the Charter in this context.

A more sceptical commentator, however, would not overlook such a prosaic fact as the inability of the Council to muster an effective response to the elements of aggression and genocide and the consequent need to offer something that would resemble effective and resolute international action. The natural scepticism will be removed only if the Tribunal established by the Security Council proves to be effective. The effectiveness test will be simple: the Tribunal must be able to try the major war criminals. Anything less would represent a dangerous departure from the purposes of the Tribunal and would further undermine the credibility of the United Nations.

Hence a new challenge to the Security Council, which should keep in mind that the establishment of the ad hoc Tribunal added to the need to consider justice as a vital aspect of peace in the situations concerned. The Council assumed an important responsibility for the effectiveness of justice in these cases and, indirectly, in all of its efforts for maintenance of international peace and security.

In addition to these "situation-specific issues", a variety of generally relevant questions of international law have gained additional importance as a consequence of the establishment of the above-mentioned ad hoc Tribunal. The work of the International Law Commission on the draft Statute of the International Criminal Court has been accelerated and has resulted in the finalization of that draft. The United Nations is now confronted with the question of whether the Member States are already prepared to accept international criminal jurisdiction of general applicability.

This is a major challenge. Although the support for the International Criminal Court has grown considerably, it is not yet clear whether the expected codification will be successful. Criminal jurisdiction is among the essential aspects of State sovereignty and will probably be among the last to be truly internationalized. Optimism created by the successful conclusion of work of the International Law Commission on the draft Statute should be

measured against the legitimate interests of States to preserve their sovereignty in matters of criminal jurisdiction. The search for a meaningful balance between this concern and the need to develop an adequate international system for prosecution of certain crimes will require not only the necessary "political will" of States but also a serious commitment of members of the legal profession involved in the process of negotiation.

Two days ago this Congress discussed the questions of codification of international law. A variety of opinions was expressed and sceptical views were voiced about certain codifications from the past. In this connection I wish to submit that the codification and progressive development of legal norms, including those belonging to *ius dispositivum*, have a variety of beneficial effects. Although States may be reluctant to ratify some of them—for reasons which may not depend on the inherent quality of the pertinent convention—they, and international forums, may take advantage of them as evidence of the customary law. The fact that the two conventions on State succession have not yet been ratified by a sufficient number of States and that they are therefore not yet in force as treaties has not prevented the Arbitration Commission of the International Conference on the Former Yugoslavia to apply their essential content, as an expression of customary law, in the formulation of the Commission's opinions on various questions of State succession resulting from the dissolution of the former Yugoslavia. This example demonstrates the value of the work of the International Law Commission, notwithstanding the difficulties which characterize the process of codification.

An additional thought in this connection could be that the International Law Commission need not concentrate, in its future work, only on codification in the form of international conventions to be ratified by large numbers of States. While the preparation of such conventions may represent the core of the work of the International Law Commission, much of its future programme could actually consist of carefully prepared analytical reports, recommendations and draft instruments to be finalized and adopted by the General Assembly. A creative dialogue between the Assembly and the Commission is as necessary as ever.

Among important challenges for the future of international law is one relating to the use and management of the growing number of mechanisms for the peaceful settlement of disputes. The growing number and diversity of the available means does not represent a problem *per se*. The mechanisms should be adjusted to the needs of States. In an era of dynamic change, diversity seems natural. Centralization may not be helpful in such circumstances. The idea of choice of the most appropriate means for the settlement of disputes enshrined in Article 33 of the Charter is as viable as before.

In Europe the scope of the recent political and territorial changes almost inevitably created the need for new institutions including, in particular, the creation of the system for the settlement of disputes in the framework of the Organization for Security and Cooperation in Europe. From the perspective of the United Nations this cannot be seen as unwelcome competition. Quite to the contrary, the variety of regional and global choices enhances the prospects for submission of disputes to the appropriate mechanisms in accordance with the choice by States parties. The International Court of Justice, the Permanent Court of Arbitration and other mechanisms at the global level will continue to have their proper roles in the new circumstances. The real challenge seems to be not the need to centralize the functions in this domain, but rather the need to induce States to submit their disputes to the most appropriate forum and to accelerate the process of peaceful settlement.

I wish to refer briefly to a phenomenon which is likely to be of major importance for the future of international law, the phenomenon of globalization. The processes of globalization of financial, technological and trade-related issues have serious effects on the fate of States and human beings. Great expectations are attached to globalization while, on the other hand, such crises as the present financial crisis affecting Mexico represent a stark warning that global management need not always be rational and may lead to new forms of economic and political destabilization.

The implications of the processes of globalization for international law will have to be addressed, and I hope that our debate today will make a contribution in that regard. I wish to make only two fairly general comments.

An awareness of the need for effective international cooperation for sustainable development has become universal. This is reflected, *inter alia*, in the fact that the number of international treaties constituting environmental law has grown rapidly in recent years. The achievements reached in this process increased the importance of measures intended to ensure compliance with the newly concluded international treaties and for the mobilization of the necessary financial and technical resources.

This is a global task and—as the discussions at the recent sessions of the Commission on Sustainable Development have shown—can be accomplished successfully only with the proper global mobilization of resources. Governments, the private sector and the international financial institutions should develop new forms of cooperation to ensure success.

Another different example of the variety of effects of globalization was provided—at a fairly abstract level—less than a week ago at the World Summit for Social Development in Copenhagen. The debate and the preparation of final documents showed that social issues of the world are accepted as a part of the global agenda which has to be addressed by means of international

cooperation. The creation of an enabling economic and legal environment for social development is such a task. International cooperation aiming at the creation of such an enabling environment is likely to create new opportunities for interference in the internal affairs of States and may lead to new threats to their political independence, which continues to be, in its reduced form, an essential pillar of international stability. International law can help in regulating the pertinent processes. It provides the delimitations between the matters which are essentially within the domestic jurisdiction of any State and matters—like internationally protected human rights—which have become internationalized.

The negotiations in Copenhagen also demonstrated the continued importance and practical usefulness of the principles of the Charter: the delegates agreed that international cooperation aimed at the creation of an enabling environment for social development has to be consistent with the provisions of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex).

This reaffirmation of one of the most authoritative statements of the basic principles of international law in today's post-modern and globalized context is encouraging. It demonstrates that the existing international law constitutes a solid basis which continues to be meaningful in the efforts to manage international relations in the era of globalization. The main challenges relate to compliance with and implementation of international law.

THE CHANGING ROLE OF INTERNATIONAL LAW IN WORLD SOCIETY

*Chi Young Pak**

The contributions of the United Nations to the development of international law during the past 50 years are substantial and well known. The Organization has been instrumental in producing multilateral treaties and agreements on a variety of issues related to international law and in providing authoritative interpretation and application of international legal principles. However, many areas of international law still require further work. With the 1990s being designated as the United Nations Decade of International Law, the programme's endeavour to achieve the rule of law in international relations and to highlight the integral role of international law in the peaceful settlement of disputes among States promises to bring further progress to the international legal system.

In recent years, major shifts in the world scene, such as the technological revolution, the rise of global issues, and increasing economic interdependence, have posed new challenges which call for a reorientation of international law. In effect, any efforts to develop universal international law must incorporate a solid assessment of the impact of these changes. Comprehending the meaning and nature of the new developments which have brought about the erosion of traditional international law is needed to envision the future direction of international law.

THE EROSION OF TRADITIONAL INTERNATIONAL LAW

Before discussing the implications of these new developments, I should like briefly to review the history of traditional international law. The international legal system, which has evolved as a by-product of the modern nation-State

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system since the seventeenth century, was originally conceived to regulate the relations of sovereign States in wartime and peacetime. However, international law turned into a kind of self-serving instrument for sovereign States in an international "society" which lacked the means of enforcing international norms and rules. This system, which was designed to recognize the absolute sovereign rights of States, would eventually become the very source of the problem of international law; that is, the misuse of the concept of sovereignty by States in order to preserve absolute power.

The difficulty of weak international law was intensified by the anarchical nature of international society. The proliferation of nation-States resulting from divisions in Europe led to highly unstructured inter-State relations. International society was based on the Hobbesian state of nature and essentially composed of mutually exclusive and isolated States concerned only with issues of war and peace. This situation was to remain essentially unchanged until the end of the Second World War. The founding of the United Nations was a turning-point, and it was during this time that the outlines of a world society first began to appear.

THE EMERGENCE OF A WORLD SOCIETY

The transformation from a decentralized, fragmented international society into a more organized, coherent world society was prompted by a number of major technological, economic and political changes. Moreover, because the magnitude of issues which began to affect mankind in the twentieth century could no longer be left to individual States, multilateral cooperation for collective action became the governing principle of international relations. The deepening interdependence of States, which promoted consensus-building within the global community, helped to lay the foundation for a common value system. Three main issues—human rights, economic welfare and ecological balance—constitute the core interests of the global community.

THE NEW ROLE OF INTERNATIONAL LAW

Managing the problems of human rights, economic development and environment has presented new challenges to the basic structure of international law. In particular, global issues call for universal international law-making and administration in which non-State actors play an expanded role. Considering that the present legal system is still too "State-centric" to accommodate these needs, a transformation in international law to a more globally

oriented system is needed to respond effectively to the changing realities of world society.

International law has already begun to respond to the call of an increasingly interdependent world by including new States and non-State actors as its subjects and dealing with the development of international collaboration in the areas of human rights and social and economic issues. This change may be described as a movement from classical international law to world law. If international law is geared towards the coexistence of States in the age of nationalism, then world law refers to a system for the cooperation of States in the age of globalism. Given that globalism has superseded nationalism as the guiding principle of inter-State relations, the transition that is taking place in legal spheres is inevitable. Indeed, writers have already used the term "world law" or "supranational law" to suggest a new direction for the development of international law.

World law is a human value-oriented system. In this context, human dignity as the key value provides the political and legal framework within which economic well-being and ecological balance are to be promoted. What makes human dignity such a central issue in the international legal system? One argument is that human values form the basis for all the activities of nations, including the global governance of common issues. The concept of human rights is broad enough to cover almost any activities of States which affect human life, such as the right to social and economic development.

One of the fundamental requisites for human dignity is the protection of individual rights. In providing adequate protection of the individual's rights, however, one of the problems is that the individual lacks the procedural capacity to uphold his rights before an appropriate international tribunal. A system must therefore be developed in which the individual is in fact granted this procedural capacity. At the same time, the rights of the individual and those of the State must be balanced out.

While States have assumed the primary responsibility for the actual implementation of human rights law, this is no longer acceptable in the present state of international relations. International protection of the individual's rights cannot be left solely to States, particularly if it is the State which has carried out the oppression and discrimination against the individual.

Accordingly, we need a system that ensures the involvement of the main organs of the United Nations in human rights cases. The Charter of the United Nations amply provides the legal basis for intervention by the Organization. The Secretary-General represents the common interest of the world; the Security Council has the primary responsibility for the maintenance of international peace and security; the General Assembly has the power to discuss any matters within the scope of the Charter; and the Economic and

Social Council is entrusted with the actual responsibility to promote universal respect for, and observance of, human rights and fundamental freedoms. While these organs clearly have the power and mandate to be actively involved in the promotion of human rights, their legal standing before international tribunals should be improved in human rights cases.

As part of the efforts to provide effective international protection of human rights, the establishment of a regional court of human rights may be recommended for regions where such a court is unavailable. The Secretary-General, the General Assembly, the Security Council and the Economic and Social Council should be given special rights and responsibility to present cases involving human rights violations before both a regional court and the International Court of Justice. Secretary-General Boutros Boutros-Ghali has already made some recommendations for the increased use of the International Court of Justice, such as endowing the Secretary-General with the power to utilize the advisory competence of the Court and the withdrawal of States' reservations to the jurisdiction of the Court by the end of this decade.

The protection of human rights appears to have made some progress owing to the conclusion of numerous multilateral agreements which create international obligations for States. International norms and rules of human rights are spread throughout many different documents. The United Nations has helped to produce about 70 instruments of the International Bill of Human Rights, which identify various rights and freedoms of the individual. Even so, the fact that international law provides norms and regulates compliance is not enough.

International law needs to be more forward-looking if it is to remain effective in the changing global environment. World law has to perform a dynamic role as the instrument of social engineering to realize the basic values of the world community—the promotion of human dignity, rendering of distributive justice, and prevention of environmental degradation. These functions involve a process of clarifying and implementing common interests for the equitable allocation of values among the peoples of the world. The result is that the function of international law has changed from a regulatory to a protective and distributive one.

SANCTIONS

The effective enforcement of world law is another critical point. The international law of human rights, which has major implications for global peace and stability, cannot afford to continue as an unpractised and disregarded

system in the global community. Coercive measures are needed to uphold the system.

Sanctions are an essential tool for enhancing the credibility of the United Nations as a champion of individual human rights. Past experiences to impose sanctions have produced a great deal of political frustration. However, the circumstances of the post-cold war era have facilitated the application of sanctions as a concrete measure, particularly if buttressed by the consensus of States.

It is important that sanctions are available at the diplomatic, economic and military levels, as stipulated in Articles 41 and 42 of the Charter. Even so, diplomatic and/or economic sanctions are often effective enough to bring States into compliance with international norms and rules of human rights in an interdependent and economy-oriented world. The current trends of world politics rarely require the use of controversial military sanctions.

In closing, I would like to turn again to the role that individuals have begun to play in replacing States as the focus of the international legal order. The shift from nations to individual citizens is important in view of the fact that human rights issues will most likely be at the fore of future international conflicts. Accordingly, international law must be more responsive and adaptable to the needs of the changing world. Innovative and workable mechanisms are needed to provide protection of individual rights.

MEETING EXPECTATIONS THROUGH PROCESS AND PRACTICE

*Sir Ninian Stephen**

Looking at the title of today's topic, "Towards the Twenty-first Century: New Challenges and Expectations", I was reminded that expectation is nurtured on experience. How one views the future and its challenges must largely depend upon one's own experiences of the past and expectations will be just as various as have been past experiences.

This should mean that, because of our past experiences, our expectations of the twenty-first century, of its challenges and how they should be met, will be different from the expectations of past generations. We live in an age which has fewer illusions than any about the absolute evil of warfare, an evil which in this century has been made more absolute than ever before by the inventive genius of mankind.

But if populations have become increasingly sceptical about the nobility of wartime suffering and sacrifice, those same populations have become increasingly visionary in other directions and this has been reflected in the policies of their nations. Thus the past 50 years have seen a quiet but remarkable revolution among nations regarding their sense of obligation to the world community beyond their own borders. Nor is it by chance that this revolution has been coincidental with the first 50 years of existence of the United Nations. Despite the restraints upon achievement that cold war conditions for so long imposed upon the United Nations, the high ideals expressed in its Charter have nevertheless provided constant inspiration. More than that, its actions have produced real achievements which have added immeasurably to human welfare.

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Today we have grown perfectly accustomed to the prospect of nations around the world assuming obligations and undertaking burdens internationally that would have been unthinkable in the climate of 60 or 70 years ago. The world of the 1920s and 1930s, its politicians and its peoples, could not have imagined today's spending of vast sums from national resources, albeit much less than is needed, on foreign aid, or the achievements of United Nations agencies in so many areas of human welfare, or still less the furnishing of troops and *matériel* in great quantities for peace-keeping missions in distant lands. The spending of treasure and the risking of lives which these and so many other current international activities represent were not so long ago only acceptable if justified by considerations of narrow national self-interest.

Today, and essentially through the agency of the United Nations, we have moved far from that stance. And when the generations now living look to the future, as we are called upon to do today, we do so with minds surely more accustomed to change than those of any earlier generation before us. The task, then, of predicting what challenges lie ahead is more difficult than ever before, if only because the range of possibilities has become so wide. If future challenges are to be at all as astonishing as those which we have encountered in this twentieth century, they are surely very largely unpredictable.

Perhaps the more profitable task is not strictly one of prediction but rather of the expression of reasonable hopes, hopes as to the shapes that developments in international law may take in the new century now so close at hand.

Much of it suggests itself not so much in the form of new law as of improved institutions and of processes that will better achieve outcomes conformable with already established international law.

To think of all the tools of international law as vital parts of one system of preventive diplomacy is, I believe, a useful concept. It is one encouraged by a reading of Article 33 of the Charter of the United Nations, which enjoins nations in dispute to have recourse to the whole range of available dispute resolution processes, from negotiation to judicial settlement and resort to regional agencies or arrangements.

The Secretary-General, in his report entitled "An Agenda for Peace", defined preventive diplomacy as "action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur" (A/47/277-S/24111, para. 20).

The second of these three situations, that of existing disputes having to be resolved before they escalate into open conflict, is, of course, traditional territory for lawyers; for centuries they have applied age-old processes of adjudication and conciliation to mankind's disputes.

But in another of the Secretary-General's three situations, that of the initial prevention of disputes from ever arising, lawyers also have a distinct role to play. The prevention of disputes depends in great measure upon the tacit acceptance by potential disputants of a determinative code of conduct, the acknowledgement that, in the sphere in which they are operating, the rule of law applies and norms of conduct exist. The development of the modern-day multilateral treaty regime, largely a phenomenon of the past 50 years, already has promoted a set of widely accepted norms of international conduct in many areas, necessarily reducing, often eliminating, potential areas of dispute. What were hitherto often areas of extreme uncertainty have been increasingly covered by codes of internationally agreed conduct, whole new areas of international conventional law.

One modest enough hope for the future must surely be that this international law-making process, very much the work of international lawyers, will continue with undiminished vigour. There will, of course, always be areas unsuited to uniformity of regulation but, these apart, in a world drawing ever closer together the need for and the benefits of a common understanding in the major areas of international concern are undoubted.

Merely to create, through multilateral treaties, ever-increasing areas regulated by international law may not, however, be enough. There must also be a common understanding of the effect of that law. It was interesting to hear Professor Sohn suggesting, with this need in mind, that in cases of doubt national courts might, through the intervention of the United Nations filtering process, seek advisory opinions from the International Court of Justice; interesting, too, was President Bedjaoui's response—that States might seek, on behalf of their courts, such advisory opinions. Developments along these lines, with national courts being encouraged to have recourse to international guidance in the understanding of the ever-expanding areas of international law, are then a further hope for the future.

However, it is in the Secretary-General's second area of preventive diplomacy—preventing the escalation of disputes into conflicts—that the institutions of international law can have their greatest effect and it is surely there that we should have the greatest expectations of new developments.

One thing that Article 33 of the Charter makes clear, and that international lawyers can never afford to lose sight of, is that both arbitration and judicial settlement are only two of a number of means for the seeking of a peaceful solution to a dispute between States. Lawyers may have an instinctive preference for litigious processes since they lie at the very heart of their craft, but the importance of the fact-finding, reporting, negotiating and mediation processes of the United Nations and of action on the political and diplomatic plane must never be lost sight of. However, the availability of

legal adjudication plays its part in each of them because, as Sir Robert Jennings said in his address to the General Assembly in November 1991, many cases are settled diplomatically before ever reaching the Court "when the possibility of resort to the Court as an option is brought up in negotiation".¹

In the same address Sir Robert advocated, as had the Secretary-General earlier, much greater use of advisory opinions by the Security Council, the General Assembly and other bodies entitled to invoke the Court's advisory jurisdiction. They had had, he said, even in highly political matters, a valuable role to play complementary to other diplomatic and political means of dispute resolution. President Bedjaoui has, of course, dealt with this both forcefully and convincingly in this Congress.

So one hope for the future is that the International Court of Justice will become increasingly regarded as an integral part of the work of preventive diplomacy pursued within the United Nations. Another, again affecting the Court, is the hope that all Member States accept the general jurisdiction of the Court without any reservation, something that the Secretary-General has urged should occur before the end of this United Nations Decade of International Law.

This may seem optimistic indeed, but we have heard in this Congress of the present trend towards compulsory international conciliation in Europe, the Valetta Mechanism, and of the special significance of regional groupings, in which common interests and characteristics make the acceptance of compulsory jurisdiction within a region easier to accomplish. It may not be far-fetched to contemplate the growth of enough universal common interests to make universal acceptance of the Court's jurisdiction a reality, if not in this century at least in the lifetimes of some of us.

Of course the Court has already experienced a considerably increased flow of cases for decision and a new development, remarked upon in the latest *Yearbook* of the Court, has been the settlement out of court of a number of cases, after the initiation of proceedings, a development encouraged by the Court and representing the beginning of a closer relationship between the Court's adjudicatory role and normal diplomatic negotiation with the Court as a partner in preventive diplomacy rather than as a last-resort alternative.

This need not, and in my view should not, involve any dilution of the Court's judicial function. As Mr. Torres Bernárdez said, and for the reasons he gave, a clear division should be maintained between the judicial and other functions, such as mediation and arbitration. And if increased pressure of work necessitates changes in the Court's procedures in the future, I for one

¹ See *Official Records of the General Assembly, Forty-sixth Session, Plenary Meetings*, 44th meeting.

hope that the virtue of one aspect of the present system—the way in which each Judge individually considers the case before the Court and forms his own conclusion, without the intervention of a rapporteur, will not lightly be sacrificed on any ground of expediency.

We are already seeing specific examples of international legal institutions adapting themselves to the changing world context and the changing needs of their clients. The International Court of Justice has already embarked on this and the Permanent Court of Arbitration, soon to celebrate its centenary, has also recently undertaken a bold initiative. Mr. Hans Jonkman has already spoken of its role and its potentiality. It has now commenced a programme which will result in virtually recreating itself. This programme is aimed at increasing international awareness of the facilities and services it offers, and at modernizing its system of dispute settlement. It has already adopted two new sets of optional procedural rules—one for disputes between States and another for disputes where only one of the parties is a State. It is creating a procedure designed to reduce the cost and inconvenience to parties in distant parts of the world of having to come to The Hague, instead allowing for the resolution of disputes under its aegis to take place wherever the parties find mutually convenient. It has also established a steering committee to consider, among other things, whether The Hague Convention of 1907 needs revising.

The Permanent Court of Arbitration recognizes that it must make itself capable of being more useful to States and other actors in the international sphere. Since of the seven methods of dispute resolution listed in Article 33 of the Charter it offers no less than four—inquiry, mediation, conciliation and arbitration—it can serve as a valuable complement to the International Court of Justice.

Another reasonable hope relates to coordination of effort in the development of international law, important yet not always achieved. Just to give one example, at present there exists a review process aimed at revising and strengthening the international instruments which regulate the use of land mines. It may be tempting to treat such a subject in isolation whereas the topic would seem to have broad implications for international humanitarian law, extending to subjects as varied as the protection of war victims, the repatriation of refugees and displaced persons, and the repression of war crimes. In a review process the interrelationship of all those issues might with advantage be recognized, involving coordination between the relevant international bodies so as to achieve the best results across the board. A reasonable hope is, then, generally for such greater coordination.

Turning from institutions to processes, the role of mediation, of facilitation and of fact-finding has assumed new importance as the United Nations and Member States have become increasingly involved in peace-

keeping measures—and in otherwise dealing with each other in a post-cold war environment. It is in the interests of States to promote the development of expertise in these areas and one can hope for an increased willingness in the future on the part of States to use facilities offered by the United Nations and other institutions, particularly regional ones. States must be prepared to be truly active in the development of new ways of resolving international disputes on the basis of international law.

The Security Council has, of course, since the end of the cold war been very active in measures to prevent conflicts, settle disputes and preserve peace, having increasing resort to its power under Chapter VII of the Charter. For international lawyers, among the most important developments in Security Council practice has been the establishment, in reliance on Chapter VII, of two organs of the Council: the war crimes tribunals for the former Yugoslavia and for Rwanda.

Each is an ad hoc creation, needed to deal with a specific problem. Their setting up required the Security Council, the General Assembly and, above all, the Secretariat to divert much time and many resources to the task. Member States are also being called on to make changes to their domestic laws to ensure that they can comply with their obligations under the statutes of the two tribunals. All this has emphasized once again the need for a permanent international criminal court. Not only would it have avoided the need for the creation of these two tribunals, but it would have avoided confining to only Rwanda and the former Yugoslavia the prosecution of serious breaches of humanitarian law, which, as we know, are occurring elsewhere as well. Of course, the setting up of such a court has been mooted for many years; it has been given new momentum by the General Assembly in the past few years. A major hope for the future must be that in the not-too-distant future we will see the establishment of such a court, to the constitution of which the International Law Commission has very recently devoted such excellent work.

The deterring of acts of gross inhumanity in all its forms during hostilities is one of the greatest immediate challenges that international law faces. We know, from the horrifying evidence of recent times, that it can and does occur anywhere, regardless of context and continent. We know, too, that solemnly to declare such conduct as illegal does not prevent it from occurring. However, the trial of alleged perpetrators and the conviction and punishment of those found guilty, undertaken by international tribunals and with full observance of due process, are calculated to have a significant deterring effect; certainly a failure to prosecute would be a distinct encouragement to potential offenders.

So perhaps my strongest hope for the immediate future, not entirely unconnected, I suppose, with my position as a judge of these tribunals, is that

they achieve their object and are ultimately succeeded by a permanent international criminal court.

Finally, one last hope: that we can successfully undertake some anticipatory work. As one example, I venture the thought that we can anticipate that the spectre of, if not always the actual recourse to, mandatory sanctions will continue to be an important instrument, short of armed intervention, in the resolution of disputes. However, as we all know, sanctions involve problems in their imposition and enforcement. The Secretary-General adverted to this in his report entitled "An Agenda for Peace". Might it not be useful, in anticipation of the need to employ mandatory sanctions in the future, to undertake a study in depth with a view to enhancing their operation to ensure both that they do effectively impact upon those at whom they are aimed and that they do not at the same time injure others? And with a view to ensuring full understanding and cooperation between the Security Council as the architect of sanction regimes and the Member States that are called upon to implement them?

This point rather draws together what I have been trying to say here. A major challenge facing international law on into the next century is the need to maintain and enhance its utility to States, particularly in preventive diplomacy.

There may be relatively little need for new rules or new institutions; the infrastructure is largely there already. There is, however, need for more effective communication between existing international law institutions and their client States and for a commitment on the part of all to ensure that the rules and institutions of international law contribute positively to world peace.

This Congress has provided an invaluable opportunity for all of us to share our experiences and to examine our expectations about international law. I hope that we will all leave this Congress convinced of the need for a continuing dialogue between States and the institutions and practitioners of international law, aimed at ensuring that the processes and practice of that law best meet our expectations.

OPEN-FLOOR DISCUSSION

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. CHI YOUNG PAK

Mr. Camacho Omiste* said that in the new international situation of interdependency, law must replace power politics as the fundamental instrument in the life of States if they were to avoid confrontation and war. Within the existing configuration of law, some actors had sought stability and others, justice, each sometimes achieved at the expense of the other. But stability without justice ultimately led to new instability. Thus, truly peaceful coexistence necessitated the adaptation of juridical norms and international treaties to meet at least some of the requirements of justice.

International law, basically conservative, had provided the international system with a measure of continuity and predictability. But societies were not static: everything underwent transformations and it would be absurd to proclaim that only international law was impervious to change. Some treaties contained errors of justice or errors stemming from situations of the past. The international law of the twenty-first century had to provide effective instruments for correcting those errors, for a system of laws that relied solely on force could not remain viable. How must societies bring international treaties into harmony with the general principles of justice? Could international law become the essential instrument of future international relations? How might peaceful change become an effective juridical instrument of international life? The answers to those questions constituted one of the most important challenges of future international law.

Mr. Bernhardt** said that he was gratified to hear so many remarks on the international protection of human rights. He felt that all human rights issues were a matter of international concern and that the central question

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was simply what means were available. In that regard there were many difficulties, and many distinctions had to be made: humanitarian intervention, for instance, was possible only in exceptional situations and probably only on the basis of an act of an international organization or the community of States. His first question, therefore, was whether there was agreement that human rights no longer belonged to domestic jurisdiction even where no treaty law existed.

He stressed that a wide range of international machinery for the control of human rights violations had come to exist: mechanisms instituted by international organizations without any clear legal basis, as in the case of the United Nations Educational, Scientific and Cultural Organization (UNESCO); international mechanisms based on treaties but not providing for binding decisions, as in the case of the United Nations instruments on civil and political rights or the protection of children; and the human rights courts, an area in which the European experience had been especially encouraging, inasmuch as the control machinery had finally been adopted by all States members of the Council of Europe with the exception of a few recently admitted States.

He had been pleased to hear Mr. Pak advocate the creation of more regional human rights courts, but was slightly sceptical as to whether there was enough political force behind such aspirations. The Inter-American Court of Human Rights played a very important role and there were proposals for the creation of an African human rights court as well. He doubted whether it was useful to establish a connection between national courts, of which there were thousands, and international institutions. If such a connection was created, however, there must be clear procedures.

He was grateful that Mr. Türk had mentioned the notion of "margin of appreciation", developed mainly by the European Court of Human Rights. Indeed, it was extremely important to note that there could not always be the same standard for all States in the area of human rights, notwithstanding the need for uniform standards for the gravest violations of or dangers to human rights. Also important was the fact that, in the case of the European Court of Human Rights, it was international organs that drew the line between the national margin of appreciation and international control.

Mr. Kadiri* said that he had listened with great interest to Mr. Pak's presentation, which implied a new international legal order that went beyond the scope of the nation-State and announced what might be called a supra-

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national vision. It was true that in the 1990s international law had entered a new stage in its evolution. Idyllic globalist visions, however, should not mask reality, in particular the specific regional aspect of certain questions. Thus, the globalization/regionalization dialectic still lay at the heart of the issue. He would like to know Mr. Pak's opinion regarding a possible international law of transition corresponding to the transformation taking place in society.

Mr. Pak (reply) stated that international law must be instrumental in bringing about a peaceful change in the world. In that process, justice operated as a very important principle; nevertheless, it must be considered in connection with stability. In the past, stability had perhaps received greater emphasis in the maintenance of international peace and security, but in order to accommodate new realities of the changing world, one must emphasize justice and equity as a way of facilitating peaceful change for the twenty-first century.

He shared Mr. Bernhardt's view that human rights no longer belonged to the domestic sphere. With globalized societies, if any group suffered from mistreatment, there were bound to be repercussions on other segments of the world's population. As to how to make sovereign nation-States accept the change, he felt that when it came to global issues such as human rights or environment, States had less and less choice but to cooperate with other countries and accept international guidance for the effective management of their national problems. In proposing the creation of regional human rights courts as a future task for the international community in the twenty-first century, he had borne in mind the prospective nature of the topic of the day.

Regarding Mr. Kadiri's observations, he believed that during the current transition from traditional international law to supranational or world law systems, cooperation among States was perhaps needed to ensure a smooth transition. States could not solve their own problems without international cooperation. Consequently, they might have to strive together, since failure to resolve many of their important issues in the twenty-first century might call into question the very existence of the nation-State system.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION BY SIR NINIAN STEPHEN

Mr. Khlestov* said that the growing number of international treaties required norms of international law to strengthen the control and monitoring

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of compliance. He recalled that, during the elaboration of the 1969 Vienna Convention on the Law of Treaties, no reference to monitoring had even been proposed, it being assumed that the States themselves would carry out that function. The previous 25 years, however, had witnessed an increase in the creation of control mechanisms in the elaboration of international treaties, particularly in the areas of disarmament, human rights and the law of the sea. One approach was through "soft law": United Nations resolutions, for example, had called for greater control and monitoring of compliance with international treaties. The primary stress, however, should be on the means: what mechanisms, what norms should be used to strengthen such control? It would be useful, for that purpose, to consider the possibility of an additional protocol to the 1969 Vienna Convention similar, for example, to the protocols to the Geneva Conventions of 1949 on the protection of victims of armed conflicts. He would appreciate hearing Sir Ninian's views on that idea.

Mr. Ameli* said that he supported Sir Ninian's call for further use of the advisory jurisdiction of the International Court of Justice. He stressed, however, that under many bilateral and multilateral treaties whose dispute settlement clauses provided for resort to the Court, States could apply to it for binding interpretations of the terms of the treaty. The relevant clauses usually referred to the interpretation and application of the treaty. In that respect, therefore, a revision of the Statute of the Court, to which Mr. Rosenne had referred at the round-table discussion in which he had acted as moderator, was not necessary. It should also be recalled that the International Law Commission's Special Rapporteur for State responsibility, Professor Arangio-Ruiz, had proposed that a State should not be allowed to resort to countermeasures prior to the exhaustion of the dispute settlement procedures—including recourse to the International Court of Justice—available to that State under any instrument to which it was a party. That had been misunderstood as imposing additional dispute settlement obligations, but on closer examination one realized that Mr. Arangio-Ruiz was referring to existing treaty obligations. Mr. Schachter, furthermore, had clearly pointed out in an article in the *American Journal of International Law* that members of the International Law Commission or independent experts should not be unduly concerned with general acceptability of drafts under elaboration. In fact, as mentioned by Mr. Zemanek earlier in the week, even codification entailed no guarantee of wide acceptance by States. That did not detract from the importance of

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codification based on State practice, case law and general principles of law in the field concerned.

Mr. Grief,* alluding to Sir Ninian's remark that the International Court of Justice should be regarded as an integral part of preventive diplomacy and his appeal for greater use of its advisory function even in highly political matters as well as the stress placed by many other speakers, including Mr. Corell, on the importance of the rule of law, suggested that the recent requests by the World Health Organization and the General Assembly for advisory opinions on the legal status of nuclear weapons offered an opportunity for the Court to make a unique response to one of the greatest challenges to life on the planet by affirming the illegality of such weapons. Not surprisingly, however, some Governments were unwilling to have their freedom of action restricted by the Court in any way, and he believed some had even stated that they would ignore any advisory opinion unacceptable to them. He wished to know, therefore, what the proper role of the World Court was in such a context. Which road should the Court take if it was unable both to uphold the rule of law and to retain the confidence and respect of the nuclear-weapon States? How should those States react if the Court delivered an opinion that was inconsistent with what they regarded as their vital national interests?

Ms. Gowlland-Debbas** said that in recent years there had been a growing trend for States and international organizations to refer to the Court questions relating to fundamental problems, such as the use of force, self-defence, genocide, nuclear weapons or State responsibility in terrorist activities. In a world in flux there was an obvious need for the preservation and reinforcement of a core of norms recognized as protecting the fundamental interests of the international community as a whole. The Court could play a primordial role in the interpretation, clarification and development of such norms. The problem, however, was not so much the reluctance of States and international organizations to bring those questions to the Court, but rather the extent to which the Court's role in meeting their expectations might be limited by the exercise of judicial propriety or judicial restraint and by the Court's institutional structure, which was still centred on the bilateralism characteristic of traditional rules of international law and, as the Court itself had said, did not give the resident in any member of the community the right to take legal action in vindication of a public interest. She would like to hear Sir Ninian's comments on the Court's role in that regard.

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Sir Ninian Stephen (reply) noted that Mr. Khlestov's question paralleled Ms. Brown Weiss's appeal for a new focus on compliance in international environmental law, which suffered from the same absence of concern with the fate of the provisions of treaties or conventions. Once they had been concluded, monitoring and observance of performance were essential. That was acutely, and for many nations embarrassingly, so in the environmental area, and particularly in the whole area of climate change.

Regarding Mr. Ameli's question, he felt that the interpretation of treaties was an ideal area for the advisory function of the Court. Yet he wondered whether a great surge of such activity, such as everyone seemed to be advocating, would not pose problems. How did one conduct proceedings when there were a large number of judges, one was dealing with immensely important topics and one did not want to break the tribunal up into distinct chambers because it was desirable to speak with the voice of all the judges, giving them time to form their individual views? Extensive use of the advisory function would obviously call for a careful examination of that question.

Proper answers to Mr. Grief's three questions would require much consideration. In any event, if the Court was to safeguard its position as the world Court of law, its answer to a request for advice on the use of nuclear weapons must be a truly legal answer based on the current state of the legal criteria. It must, of course, contemplate that future developments might change that answer, but the answer given must be the appropriate legal answer as at the time when it was given. On the question of what the Court should do to uphold the rule of law without alienating nuclear Powers, he hoped (perhaps it was naive) that nuclear Powers would have as much respect for the rule of law as anyone else. If the matter was put to the World Court, and if that Court enjoyed the status and respect he believed it did, then nuclear Powers like other Powers would observe its Judgment. Finally, nuclear States should react to the Judgment the same way that any citizen in a State governed by the rule of law reacted or had to react to a judgement of a court: in other words, they should respect it.

He did not feel capable of responding to Ms. Gowlland-Debbas's question concerning judicial restraint.

COMMENTS AND SUGGESTIONS OF A GENERAL NATURE

Mr. Ferencz* said that he felt that the greatest challenge currently facing international lawyers was to formulate unambiguous legal standards and

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persuade sovereign States to be bound by even the minimum standards of global law. New challenges and expectations required a new way of viewing traditional dogmas such as that of sovereignty—an awareness that in the modern world it was the sovereignty of the individual that deserved protection under international law. One major problem was that the principal declarations, worked out over many years to achieve consensus, were filled with ambiguous clauses that enabled States to interpret them to suit their own purposes. The Charter of the United Nations itself was filled with ambiguities and contradictions: it proclaimed the right of self-determination, yet mandated peaceful means; it called for non-interference in internal affairs, yet recognized the need for humanitarian intervention. Under such conditions one could not talk of “binding international law”.

Many requirements must be satisfied and new organs created before the desired objectives could be attained: one could not protect human rights, for example, in a world engaged in an incessant arms race, owing to the misemployment of resources it entailed. Similarly, if sanctions were directed against innocent victims, not the wrongdoers, and did not halt the latter’s unlawful behaviour, they did not meet the requirements laid down in the Charter. If the system of international law was to satisfy the needs of the twenty-first century, international lawyers must strive to influence their Governments, their students and the public to create the kind of political will referred to by Mr. Bernhardt. Public expectations regarding minimum standards of human dignity, as described by Mr. Pak, could be met only if international law and the United Nations became much more relevant and effective. The burden rested on the experts present at the Congress to lead the way into the twenty-first century under law.

Mr. Przetacznik,* addressing his comments to Mr. Türk, said he considered that sanctions, an important tool for the enforcement of international law, should be divided into two distinct types: one for aggression and another for violations of fundamental human rights. Economic sanctions against aggression had never been very effective: they had not forced the Government of Iraq to withdraw from Kuwait and the United Nations had had to resort to the use of force. It was disturbing that those sanctions were still in force five years after being declared, perhaps due to a lack of proper communication between the two sides. Sanctions did not hurt Governments; they hurt the poor, the elderly, children and women and they might ultimately destroy an economy. If applied too long, they violated the human rights of the peoples of target States and applying States alike. He would suggest, therefore, that if the international community applied sanctions, it

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should specify precisely their objective and duration, and they should not be unduly prolonged.

There were historical precedents for the prosecution and punishment of war criminals, as after the two world wars. The United Nations was working to establish a criminal tribunal, but progress was very slow and he believed one must resort to ad hoc tribunals. As Mr. Türk had mentioned, there was also the problem that jurisdiction was territorial, though there were exceptions, as in the case of piracy, hijacking or kidnapping.

Mr. Kartashkin* said that he agreed that the protection of human rights under international law was one of the greatest achievements of the twentieth century. Yet, despite the progress being made, the machinery for that protection was still inadequate, largely because many of the relevant international agreements dated from a time when the world had been completely different. That was why many scholars and statesmen spoke of a crisis in the United Nations system and the need to reorganize its work on a new basis. What was being proposed, however, was cosmetic. More decisive action must be taken: the effectiveness of existing organs must be enhanced and an international criminal court must be established, as called for by the General Assembly in resolution 49/53 and by the International Law Commission. There was a need for a charter that would bring together all the international agreements in the field of human rights as well as new concrete principles and standards, many of which were already enshrined at the regional level, particularly in Europe. The elaboration and adoption of such a charter would considerably enhance the effectiveness of international cooperation in human rights in the twenty-first century.

Ms. Russow** stressed the significance of the coincidence of the Beijing Conference with the fiftieth anniversary of the United Nations. It gave the global community an opportunity to call upon States to sign what they had not signed, ratify what they had not ratified and enact legislation to ensure compliance with obligations undertaken in international instruments over the previous 50 years. At the current Congress she had realized that there was a commitment on the part of the international legal community to clarify terms, to seek to ensure treaty compliance, to undertake to move towards supranational governance and perhaps to recommend a world Court to which citizens might address complaints relating to non-compliance with international documents. She hoped the members of the Congress would pressure their Governments to fulfil the obligations they had assumed.

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Mr. Re* said that his question related to the application of international legal norms by domestic courts. He noted that under United States law, for example, the immunity of foreign sovereigns was subject to certain exceptions, such as that relating to commercial activities: in other words, a foreign sovereign doing business in the United States was not immune in respect of causes of action based on the conduct of that business in the United States, no matter where the cause of action might have arisen. He wondered, therefore, if an individual entered into a contract in the State of New York with a foreign sovereign doing business there and then went to the territory of that foreign sovereign and was tortured, to what extent it would be proper for United States judges, in construing their domestic law of sovereign immunity, to give effect to treaties or instruments that prohibited torture, such as the Universal Declaration of Human Rights? To what extent could they give effect to the principles of international law referred to as *jus cogens*?

Mr. Türk (reply) said that he considered extremely important Mr. Ferencz's question regarding unambiguous international standards, though the prevailing culture of consensus tended to preclude the precise formulation of standards. However, international human rights instruments had multiplied so greatly that ambiguity could gradually be removed through implementation of the norms they embodied: removal of reservations, ratification of treaties and supervision of compliance could clarify standards considerably. The United Nations could make a major contribution by insisting on that activity. Though it was sometimes difficult to raise within a State an issue expressed solely in terms of human rights violations, such issues often led subsequently to direct threats to international peace and security, and then it was usually too late. The crystallization of standards through compliance with international instruments therefore had an important function in preventive diplomacy. He believed that the current Congress must reaffirm faith in those instruments which could promote that process and thus strengthen preventive action by the United Nations.

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MAKING INTERNATIONAL LAW MORE USER-FRIENDLY

*Louis B. Sohn**

I plan to deal with the following issues: first, international law, the media, and the general public; second, making international law more accessible; and third, the importance of international cooperation and consensus-building.

I. INTERNATIONAL LAW, THE MEDIA, AND THE GENERAL PUBLIC

When I was asked to discuss making international law more user-friendly, the first question that occurred to me was—who are the users of international law? International law is, of course, the law of nations, of the States members of the international community, practically all of whom are now Members of the United Nations. States are, however, legal personalities; they do not act directly, they need intermediaries to communicate with each other and with the general public of their own country, and today—increasingly—with the peoples of the rest of the world. To most persons, nevertheless, international law does not seem to be of interest, with the exception of gross violations of that law which are emphasized by the media and are shown on television screens around the world. In particular, the more horrible a violation is the more likely the news will be televised widely, accompanied by appropriately gruesome pictures.

While little can be done about it as long as such situations continue to occur, other ways may be found to improve international law's image. Mr. Hans Corell, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, pointed out in his introductory statement that “interna-

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tional cooperation is thriving in fields such as: trade, communications, travelling, including tourism, and cultural and scientific interchange. Efforts are being made to protect common interests, in particular the environment. But the fact that public international law governs successfully so many different fields is hardly noticed by the general public; it is taken for granted”.

How can the general public realize that international law is in fact a part of their daily life, that it is an important and influential friend? Perhaps it may be practical to make every person conscious of that fact, if the Governments would allow or even require that the role played by international rules and regulations be pointed out in all the relevant cases. I would like to give you a few examples of what I have in mind.

It might be possible, for instance, for all post offices around the world to stamp on each letter being sent to another country that: “This letter is being delivered across national boundaries in accordance with international regulations enacted pursuant to the Universal Postal Convention binding on all countries of the world”. Alternatively, the Universal Postal Union (UPU) could distribute to all countries stamps containing such a message and the stamp would have to be added to each international letter. As we are discussing this matter at the Headquarters of the United Nations, we might want to suggest that the message might also point out that UPU is a specialized agency of the United Nations system devoted to a speedy delivery of mail across the world.

Similar messages can be prepared for other agencies of the United Nations system. Any person engaged in a transnational telephone conversation should be informed that this is made possible by international agreements made under the auspices of the International Telecommunication Union (ITU), and that television programmes transmitted by satellite instantaneously across the world should be accompanied by a statement making clear that the satellite transmitter is operating under the INTELSAT Agreement, approved by the International Telecommunications Satellite Organization.

All manufacturers of packaged goods and all merchants selling goods by weight or length or other measurements might be obliged to inform the customer that they fully comply with the regulations issued under the various international agreements relating to weights and measures which are now supervised by the International Organization of Legal Metrology. Everybody is already used to checking the origin of a particular item, whether it states “Made in Hong Kong” or whether an orange is a product of Florida, California, Spain or Morocco. They also check the nutritional contents of a food package. It might be possible to teach the general public that most of the important services that people take for granted are available to them because some international convention not only prescribes the rules, but also

establishes an international institution which monitors the compliance with the rules. There should be a way to make people more conscious of the fact that ships that bring to them goods across the oceans and the aeroplanes in which they fly from country to country, and even domestically, are operating under voluminous international regulations that make such travel safe. If there is an unfortunate incident, it is seldom the fault of these regulations but is the result of human error either in making the plane, or servicing it, or flying it. That the travel is usually uneventful is due to the fact that the regulations are constantly updated, scrupulously observed and carefully monitored. It would help to make people everywhere realize that many of their daily comforts depend on observance of thousands of detailed international rules, regulations and standards.

I see here a number of persons who participated in the United Nations Conference on the Law of the Sea. They may still remember that in working on the Convention on the Law of the Sea we became conscious of the fact that in several areas of the law of the sea there were numerous generally accepted international rules, regulations and standards. These rules, and similar rules in other areas, are constantly becoming a part of customary international law which all States are bound to observe. Now that the Convention has come into force, those who want to increase the safety of persons at sea and the protection of the environment have received a powerful ally, especially as the interpretation of most of its provisions is subject to international binding decisions.

II. ACCESSIBILITY OF INTERNATIONAL LAW

The discussions at this Congress have already shown that the best way to make international law user-friendly is to make that law more accessible to those who need to know more about it—not only the lawyers in foreign offices of Governments, but also the lawyers practising law in domestic courts that have to deal increasingly with the issues of international law. These lawyers, both the judges and the lawyers representing the litigants, are often not familiar with the vocabulary of international law, and are even less familiar with the ways of finding the rules relevant to their cases.

There are only haphazard collections of laws in specific areas, issued usually at prohibitive prices, which only a few lawyers in a few countries can afford to buy. In addition, there is no uniform way of presenting these materials and each editor has to create the method for his or her particular field. A lawyer looking for law and precedents has to spend an extraordinary amount of time to find the necessary material.

To make international law user-friendly to judges and practising lawyers requires as a minimum the preparation of a book of international law based on widely accepted treaties, conventions and other law-making instruments. Wilfred Jenks did that for international labour conventions in 1951, but his successors were unfortunately not able to continue his work. He did not attempt to present a code of the kind prevailing in civil law countries, built on the model of the *Code Napoléon*. Such a code requires a group of experts labouring over many years, trying to agree on and present in a systematic and synchronized fashion a set of interrelated rules forming a logical legal system. Jenks was not that ambitious. Instead he collected in each chapter the relevant provisions of more than 100 then existing international labour conventions and arranged those provisions in a logical fashion, without any substantive changes or revisions. To some extent, he followed the practice prevailing in the United States, where both in the federal system and in its 50 States there are codes that take enacted laws, each of which often deals with a variety of topics, and put their provisions separately in relevant volumes or chapters of the code. It is not neat, but it saves the researchers from having to go through many volumes of laws compiled on an annual basis, which are arranged chronologically rather than systematically. I was informed by Mr. Maupain, Legal Adviser of the International Labour Office (ILO), that it has prepared a computerized version of such a code, called ILOLEX, a database containing 174 conventions and the practice of ILO institutions since 1985 with respect to these conventions. In international human rights law it would be similarly useful to provide such a code where, for instance, all the provisions of various conventions on the right to education could be put in one place, rather than having them scattered among various conventions and declarations.

Once the editor collects all provisions on a particular subject in one chapter or section, then he or she can follow Jenks to the next step by providing a short history of the drafting of each of these provisions and also by adding—in a third step—interpretations of the provisions by various monitoring bodies or tribunals. Putting in one place both the texts and the comments by various international monitoring institutions, international and domestic tribunals, and eminent commentators would greatly facilitate research and provide a firmer basis for changing the law should it become obsolete.

The United Nations in its recent Blue Book Series provides documentation on several important cases and issues. Its Secretariat has prepared also special studies on some of the more difficult provisions of the United Nations Convention on the Law of the Sea. There are as well useful repertoires of practice of principal United Nations organs and, separately, on the prac-

tice of the Security Council; in several other areas similar pioneering efforts may be found.

There is another problem that has to be taken into account. The major characteristic of modern times is the increase in the tempo of changes in the law. International law, though originally a very conservative area, has also become subject to accelerating changes. We need to develop a method for keeping in step with these changes, and a Congress like this one where the leaders of the international legal profession are gathered is a good place to start.

There are several hundreds of universities around the world in which eminent professors supervise doctoral and other dissertations in the field of international law. Certain subjects are more popular than others, and one suddenly sees a great proliferation of parallel books and articles on a particular topic, mining the same materials from slightly different points of view, wasting to some extent these scarce intellectual resources. These resources should instead be channelled, at least in part, into a more user-friendly project.

The preliminary arrangements for such a project might be made by a consortium of universities, with the assistance of a group of foundations. For instance, they might agree on the following agenda: a worldwide canvass of universities would be made, and from those that have a combination of senior professors and a group of junior scholars interested in participating in the project, a pioneering group would be selected to prepare the first drafts of several chosen areas.

A group of experts would be chosen to decide on the priority of various topics and how the task would be divided. A list of areas of treaty law that need to be studied would then be prepared, and each chosen university would prepare a chapter of the code in the style of Jenks, based on treaties in that area. If this venture proves successful, other areas would be tackled, while at the same time steps would be taken to collect the legislative history and the interpretative practice in the areas covered by the previous stage. Thus the proposed code would be slowly broadened in the areas covered, and in the depth of the comments. Perhaps by the year 2020, which seems to be generally accepted as the goal year for various agendas, good progress might be made on at least some important parts of this project.

A commercial publisher may agree to publish the first set of volumes and if this arrangement proves to be satisfactory, the publisher may receive a contract for publishing future volumes and for keeping the early volumes up to date.

In the United States it took a long time before the idea of a *United States Code* was realized; it took another big effort to prepare the *United States Code Annotated*, but we have them now, and the legal profession depends on them

very much. Perhaps the friends of international law will find by 2020 that they have given the world a user-friendly set of helpful volumes.

III. CONSENSUS-BUILDING

Another issue that needs to be understood by the general public is that international law is no longer being developed by the traditional adversary process—by trying to win disputes or by imposing the will of one country upon a weaker adversary. As we already noted at this Congress, priority is being given now to consensus-building, to finding common solutions for issues that otherwise may cause trouble.

No longer do negotiators consider each other as enemies who must be defeated so that a victory will be brought triumphantly home. Now they work together against the common enemy—the problem that defies solution. The main goal is to discover the formula that would permit them to establish principles, common standards and rules of law that would provide a framework within which they would be able to act in cooperation. Bilateral and multilateral agreements both on substance and on procedure and structure have become the main means for making international relations more relaxed and more friendly. Joint bilateral and multilateral monitoring systems provide a vehicle for constant consultations that ensure that small problems do not grow into international crises. As far as possible, preventive diplomacy is replacing the much more costly and dangerous method of trying to stop a conflagration that has started destroying large areas, at great cost in lives and properties.

All these common activities result in obtaining consensus on agreements which, though concluded between Governments, have as their purpose to make life easier for individuals—they promote democracy, protect human rights and the environment, establish common labour standards, provide new international air routes between cities deprived of them, facilitate the use of new telecommunications frequencies for novel purposes unknown to previous generations, permit almost instantaneous international exchange of mail through electronic means, or provide warnings about incoming changes in the daily weather patterns.

Practically everything important for modern living depends on, is facilitated by or is protected against interference by some rules of international law administered for our benefit by international institutions. All these user-friendly international activities have too long been neglected by the media and by public opinion. Giving proper recognition to these positive factors of international life is long overdue. A proper balance needs to be restored between information available on current events and making the peoples of the

world informed about the user-friendly rules that are crystallized in a multitude of globe-encircling international agreements, constantly creating generally accepted standards for better user-friendly behaviour of national and international authorities and institutions. For the first time in the three millennia of human history, we have a chance to change for the better the conditions of life on earth. For that we need the support of better informed public opinion. Let us not miss that chance.

PROBLEMS OF SUCCESSION IN CONTEMPORARY INTERNATIONAL LAW

*Olexander O. Chaly**

The subject of my statement, "Problems of succession in contemporary international law", is closely linked with my work as legal adviser to the Ministry of Foreign Affairs of Ukraine. However, there is no doubt that one of the characteristics of the United Nations Congress on Public International Law is that it provides a unique opportunity for a legal adviser to a Ministry of Foreign Affairs to speak in the plenary hall of the United Nations in a personal capacity. I hope that my statement will help "to develop a common way of thinking among the persons who advise those who make decisions in foreign policy matters", as Mr. Corell urged in his opening statement.

The last decade of the twentieth century, unexpectedly for many, has been marked by the emergence on the political map of the world of more than 20 new independent States. The disintegration of the former Union of Soviet Socialist Republics, Yugoslavia and Czechoslovakia (federations constructed on the basis of the national territorial principle), the unification of Germany and the restoration of the sovereignty of the Baltic countries produced a wave of State successions which was powerful in many respects, and unique in its parameters.

One need only note that, for the first time in history, nuclear weapons, permanent membership in the Security Council of the United Nations and the obligations of a super-Power in the area of strategic and conventional weapons have become potential objects of succession. The numerical parameters of the new wave are also impressive. Since the Soviet Union, at the time of its disintegration, had concluded over 10,000 agreements and treaties, it follows that its successor States have to resolve the fate of a total of over 100,000 international treaties and agreements.

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The new wave of successions has confronted the international community with a number of unprecedented problems in the practical operation of one of the oldest institutions of international law and has given powerful momentum to the resumption of applied and scientific research in this area. It has given rise to a great many specific issues in the practice of treaty relations, once again confirming Mr. O'Connell's well-known view that disagreements among States in the area of succession arise not so much in respect of the principle itself, as in respect of its application.

I will refer to two of those disagreements which are of vital significance, the answers to which will determine the development of the institution of succession in the twenty-first century.

- *First question: Do the Vienna conventions on succession reflect the modern practice of States in the area of succession? In other words, are the provisions of these conventions applicable to resolving specific questions of the succession of States?*

I feel that it is possible to respond to this question in the affirmative.

At first glance, this answer may seem unexpected, in view of the extensive criticism and somewhat sceptical approach which has been taken at our Congress to the potential of the Vienna conventions on succession. However, the essence of the matter is that actual treaty practice looks somewhat different.

In 1980 Robert Owen, legal adviser to the United States Department of State, specifically determined that the provisions of the 1978 Vienna Convention were an expression of conventional law recognized by the United States of America. The decisions of the Arbitration Commission of the International Conference on the Former Yugoslavia were taken with direct reference to the provisions of the 1983 Vienna Convention.

The record of negotiations between the delegations of Ukraine and the United States of America of 10 July 1994 specifically indicates that the parties determined that the principle of continuity laid down in article 34 of the 1982 Vienna Convention would be the basis for the consideration of issues of the succession of Ukraine in relation to the treaties of the former Union of Soviet Socialist Republics. The parties to the Treaty on succession to the State debt and assets of the Union of Soviet Socialist Republics also regulated their relations with reference to the principles of international law and the provisions of the Vienna Conventions on succession. Further examples could be given from treaty practice.

For now those are the most authoritative sources for the codification and progressive development of the norms of international law in the area of succession. It is significant that, following their adoption in theory and in

practice, the approach of understanding succession as a process of replacement of one State by another in bearing responsibility for the international relations of a given territory is becoming increasingly established.

Furthermore, there is no doubt that the Vienna Conventions codified a number of generally recognized conventional norms of international law in the area of succession, particularly in respect of the border regime.

It is, of course, the provisions of the Vienna Conventions which aim to develop international law in the area of succession, in particular the provisions of parts III and IV of the 1978 Vienna Convention, which give rise to the most criticism.

The provisions of part III regulate the succession of States which have been freed from colonial dependency (in the terminology of the Conventions, "newly independent States"). It is in the context of the downfall of the colonial system that these provisions have potential significance for resolving issues of succession.

It should be recognized, however, that they have played a certain role and that the "clean slate" rule adopted by the Commission in respect of that category of States reflected the realities of life and legal practice. Evidence of this is that in 1987 this "clean slate" rule was reproduced in the third edition of "Restatement of the Foreign Relations Law of the United States", and this was in an even broader context.

The provisions of part IV of the 1978 Vienna Convention, and in particular articles 31 and 34, regulate the succession of States in cases of the uniting and separation of States.

Some say that these articles have not been able to stand up in practice. Article 31, paragraph 1, and article 34, paragraph 1, establish the presumption of automatic succession to the treaty obligations of the predecessor State. However, it is argued that, in the case of the unification of Germany and the disintegration of the Union of Soviet Socialist Republics, the principle of automatic succession was not confirmed, and that, instead, preference was given to the procedure of negotiations and agreed adjustments and changes to the international obligations of the predecessor State.

This interpretation of articles 31 and 34 of the Vienna Convention is narrow and fails to take into account other provisions of these articles which clearly establish that the presumption of automatic succession is not applicable in treaty relations if the States concerned otherwise agree or if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 31, paragraph 1, and article 34, paragraph 1, are designed to settle only the issues of the actual succession of the successor State to the treaty obligations of the predecessor State.

At the same time, the relevant provisions in the second part of these articles regulate the question of the legal formulation of the consequences of the actual succession, indicating in both cases that the form of such formulation must be agreed upon by the States concerned, i.e., through negotiations.

It is vitally important that the presumption of succession should be at the basis of such negotiations. In this connection the 1978 Vienna Convention does not in any way restrict States from appealing in the course of negotiations, so as to defend their positions on specific treaties in relation to the conventional norms of international law, the principle of *rebus sic stantibus* and the principles of fairness and good faith, and from using other arguments, including non-legal arguments.

In the first year of its independence, Ukraine ratified both the Vienna conventions on succession and, in accordance with the above-mentioned position, on the basis of article 34 of the 1978 Vienna Convention, informed the States of the world in a circular note of 19 January 1994 that it is one of the successor States to the former Union of Soviet Socialist Republics as regards the whole range of consequences of succession, including succession in respect of international treaties concluded by the former Union of Soviet Socialist Republics. In this connection, it declared that the parts of bilateral agreements of the former Union of Soviet Socialist Republics which are applicable to Ukraine will be applied until the States concerned agree otherwise.

- *Second question: Is Russia the continuing State of the Union of Soviet Socialist Republics?*

When the Union of Soviet Socialist Republics ceased to exist, independent States were formed in its territory and each of them, including Russia, declared its full succession to the former Union of Soviet Socialist Republics. There are many confirmations of this in documents of the Commonwealth of Independent States and in the relevant declarations and constitutional instruments of these States.

Ukraine in particular, in determining its approach to the practical solution of the problems of succession, regards itself as a successor to the Union of Soviet Socialist Republics and does not recognize any exceptions from this principle or any privileges in this matter unless there is a duly formulated agreement to that effect among all the successor States to the Union of Soviet Socialist Republics.

This position is based on the generally recognized principles and norms of international law and on the relevant provisions of the Vienna conventions on the succession of States. A similar approach was taken by all the other successor States to the Union of Soviet Socialist Republics with the exception of Russia. That country regards itself as not only a successor State, but also a continuing State of the Union of Soviet Socialist Republics, and believes that it exercises to the full the international rights and obligations which formerly belonged to the Soviet Union.

Considering that, in the constituent documents of the Commonwealth of Independent States, under which Russia's signature also stands, the successor States to the Union of Soviet Socialist Republics declare that the USSR, as a subject of international law and a geopolitical reality, no longer exists, the obvious question arises: is it possible to be a continuer of a legally non-existent State?

It is now quite obvious that the raising of the question of the continuity of the Union of Soviet Socialist Republics has complicated the solution of the problems associated with the consequences of succession to the former Union of Soviet Socialist Republics since in a number of cases they have been resolved outside the sphere of application of the norms of international law.

It is not because Russia claims to be a continuation of the international legal personality of the former Union of Soviet Socialist Republics that complications arise in practice. This institution is known in international law and there are precedents. The difficulty arises because Russia is putting forward claims at the same time to the status of continuer and the status of successor to the former USSR.

As a result, there are lacunae in the legal settlement of this situation. On the basis of what criteria and in the framework of which legal system can it be determined in which cases Russia acts as a continuer of the Union of Soviet Socialist Republics, and in which cases as its successor? Who should resolve these questions, and under what procedure?

Individual cases of recognition of Russia's continuity by the international community of States are often put forward as evidence of Russia's rights to the status of continuing State of the Union of Soviet Socialist Republics, in particular, in respect of the membership of the former Union of Soviet Socialist Republics in the Security Council and other international bodies. There are also other examples. However, all of them, as a rule, take place on the basis of the open or tacit consent of the successor States of the Union of Soviet Socialist Republics.

If there are objections on their part, Russia's continuity is not recognized. An example is the situation which developed with regard to the division of the foreign property of the former Union of Soviet Socialist

Republics. Ukraine's appeal to members of the international community for assistance in preserving the State property of the former Union of Soviet Socialist Republics that was in their territories and also to prevent changes in the legal status of that property until a final solution was found to the question of the division of the former foreign property of the Union of Soviet Socialist Republics was met with understanding in most countries.

In December 1994 Ukraine and the Russian Federation signed an agreement on the settlement of this problem—the so-called “zero” option agreement. In order to enter into force, the agreement requires ratification by the Parliament of Ukraine. It is obvious that until the agreement enters into force, the status of the foreign property of the former Union of Soviet Socialist Republics cannot be changed.

The final answer to the question of whether Russia is a continuer or a successor of the Union of Soviet Socialist Republics will be given by history. It is indisputable, however, that the search for an answer will continue to be crucial to the process for settling the issues of succession arising in connection with the disintegration of the Union of Soviet Socialist Republics. The resolution of such complex problems on a unilateral basis, without taking into account the agreed positions of all the successor States to the USSR, is not in keeping with the principles of stability and succession of treaty obligations.

At the same time the approach that the new States in the territory of the Union of Soviet Socialist Republics are its successors, having identical international legal status and sharing equal responsibility for the fulfilment of the obligations of the predecessor State, unless established otherwise by the generally recognized norms of international law or by joint agreements among them, is the basis for ensuring fulfilment of the obligations of the former USSR to the fullest extent.

In his article entitled “State succession: the once and future law”,¹ Oscar Schachter, referring to the contours of the right of succession in the twenty-first century, writes: “. . . it makes good sense for States to accept *prima facie* continuity as a basic premise, leaving room for adjustment or exceptions when they appear necessary or desirable in a particular case”.

Supporting that conclusion, I should like to stress the following: the Vienna conventions on succession, despite their incompleteness and the shortcomings of individual provisions deriving from the historical conditions of the process of their formulation and adoption, embody the idea of maximum stability and preservation of international obligations, without excluding the possibility of their adaptation to specific circumstances on the basis of negotiations. Therein lies their enormous positive potential.

¹ *Virginia Journal of International Law*, vol. 33, No. 2 (Winter, 1993), p. 260.

The presumption of succession plus negotiations among all the States concerned on the basis of the principle of good faith are the basic imperatives determining the development of international law in the area of succession in the twenty-first century.

UNIVERSALITY AND THE UNITED NATIONS

*Peter D. Maynard**

It has been said that if the United Nations did not exist, it would have to be created. This is so because the United Nations serves a vital and unique role in maintaining international peace and security, upholding the peaceful settlement of disputes, achieving economic, social, cultural and humanitarian development, and promoting justice and international law as the language of international relations.

Similarly, it has been said that all States are indeed Members of the United Nations. Those that have been admitted to the Organization are active Members, while the other States are passive Members. It is auspicious, on the fiftieth anniversary of the United Nations, that Kelsen made this suggestion some 50 years ago.¹

Today it is virtually axiomatic that the United Nations ought to be universal in the sense of including all States. In the recent past, universality of the United Nations emerged as an issue in two contexts: in the contexts of, firstly, the emergence of small States and the proposals made in 1969 and 1970 of a form of associate membership without the right to vote; and secondly, the dissolution and division of other States.

I shall focus primarily on the first context, but shall return briefly to the second context. I shall also comment on conditions of admission and draw some conclusions. This brief and perhaps oversimplified presentation is set out in detail in a 30-page article which is available upon request, courtesy of the Mission of the Bahamas.

¹ H. Kelsen, "Membership in the United Nations", *Columbia Law Review*, vol. 4 (1946), p. 410.

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THE QUESTION OF MINI-STATES

Not long after the admission of the Gambia (pop. 300,000) and Maldives (pop. 90,000) to the United Nations in 1965, the then Secretary-General U Thant drew attention to the issue of mini-States in the introduction to his annual report. He raised the question again in 1967 and 1968. In his view, the United Nations was faced with a serious problem of increasing membership and "the line has to be drawn somewhere".²

This assessment reflected the fears that the United Nations, with some 130 Members in the early 1970s, would be swamped by almost 200 Members by the 1990s, that the voting power of certain States would be diminished and that their international power in general would be reduced. In 1969, three proposals were made to restrict the membership of very small States, and they were placed before a committee of experts of the Security Council.

The French proposal suggested that the Security Council reactivate the Security Council Committee on the Admission of New Members. That Committee had been established under rule 59 of the provisional rules of procedure of the Security Council (S/96/Rev.6), but had long become inactive.

The United States proposed that there be established the status of United Nations associate member. The United Kingdom of Great Britain and Northern Ireland made a proposal in 1970 of an arrangement whereby small States would voluntarily renounce the right of voting and election in United Nations bodies and sign such a declaration upon application for admission.

After some eight meetings of the Committee, the opinion of the Legal Counsel effectively took the wind out of their sails by finding that associate membership was *ultra vires* and contrary to the Charter of the United Nations and would require a Charter amendment.

It was arbitrary then to differentiate among States on the criterion of size. Now, particularly with the benefit of 25 years' hindsight, it is quite evident that the presentation of the question was misconceived, misleading and unbalanced.

The fears have manifestly not withstood the test of time. None of those dire consequences has occurred on the voting, decision-making and functioning of the Organization. Any adverse impact was not attributable to small States. Quite on the contrary, their impact has been quite positive. Where such problems have arisen, there is no evidence that they have occurred as a result of the admission of more small States.

² *Official Records of the General Assembly, Twenty-second Session, Supplement No. 1A (A/6701/Add. 1)*, para. 162.

DISSOLUTION OR DIVISION OF OTHER STATES

In the 1990s, there have been notable instances of representation of separate States by one Member of the United Nations after a political merger or by consent. For example, on 22 May 1990, Yemen and Democratic Yemen merged to form the Republic of Yemen and have been represented as one Member. Also, on 3 October 1990, the German Democratic Republic and the Federal Republic of Germany formed a single State under the name, Federal Republic of Germany.

On 24 December 1991, the President of the Russian Federation informed the Secretary-General that the membership of the Union of Soviet Socialist Republics would be continued by the Russian Federation with the support of the 11 member countries of the Commonwealth of Independent States.

Thus, separation or division of States has also been in evidence, and appears to have contributed to the increase in membership as much as or more than continuing applications for admission by small States.

In the 1990s, some 28 new Members have been admitted, including Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, the Czech Republic, the Democratic People's Republic of Korea, Eritrea, Estonia, Georgia, Kazakstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, the Marshall Islands, Micronesia, Monaco, Namibia, the Republic of Korea, the Republic of Moldova, San Marino, Slovakia, Slovenia, Tajikistan, the former Yugoslav Republic of Macedonia, Turkmenistan and Uzbekistan.³

On 10 December 1992, the Permanent Representative of Czechoslovakia, an original Member of the United Nations, informed the Secretary-General that the Czech and Slovak Federal Republic would cease to exist on 31 December 1992 and that the Czech Republic and the Slovak Republic as separate successor States would apply for membership in the United Nations. They were admitted on 19 January 1993.

Also, the secession from Yugoslavia of Croatia, Bosnia and Herzegovina and Slovenia confronted the United Nations again with the problem it faced in the India-Pakistan situation in 1947. Accordingly, in May 1992, Yugoslavia

³ The dissolution of the USSR and the formation of the Commonwealth of Independent States were related to seven new admissions, as well as Azerbaijan, the Republic of Moldova and the three Baltic States (Estonia, Latvia and Lithuania). Apart from those 12 Members, the former Yugoslavia and the former Czechoslovakia were the sources of four and two new Members, respectively. In addition, the two Koreas, Namibia, Eritrea, four small European States (Andorra, Liechtenstein, Monaco and San Marino) and two small Pacific States (the Marshall Islands and Micronesia) were admitted.

retained its seat, while the other States were admitted to separate seats.⁴ The General Assembly, moreover, decided on 8 April 1993 to admit to membership in the United Nations the State provisionally referred to as "the former Yugoslav Republic of Macedonia" (resolution 47/225).

It should also be recalled, in the context of the applications for admission to the United Nations, that the General Assembly, by resolution 2758 (XXVI) of 25 October 1971, decided "to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it".

CONDITIONS OF ADMISSION

During its first decade, the United Nations was not universal,⁵ and the basis of admission of new States was highly ideological. In this period, it was also claimed that the admission of certain new States would weaken the United Nations and reduce its effectiveness. The criteria of political acceptability, that is, "love of peace" and "willingness to carry out Charter obligations", were used by both the Western and socialist blocs to justify their opposition to admission of candidates belonging to the rival bloc.⁶

In 1948, the International Court of Justice was requested to issue guidelines on the admission of new Members, and to rule whether membership trade-offs or "package deals" were permitted. On 28 May 1948, the Court, in its Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations*,⁷ declared that the criteria in Article 4 of the Charter were exhaustive (see the discussion of Article 4 below). There are only five criteria that must be satisfied for membership which are found in Article 4, paragraph 1, namely, that an applicant must be: (a) a State, (b) peace-loving,

⁴ See Y.Z. Blum, "UN membership of the 'new' Yugoslavia: continuity or break?", *American Journal of International Law*, vol. 86 (1992), p. 830. Also, see response and counter-response, *ibid.*, vol. 87 (1993), p. 240.

⁵ Schwarzenberger makes the distinction between relative and absolute universality, and argues that the United Nations was not obliged to attain absolute universality. Relative universality involves the membership of all "key" States whose aloofness would endanger the achievement of common objectives. G. Schwarzenberger, *Power Politics: A Study of World Society*, 3rd ed., Stevens & Sons Ltd., London (1964). Also, L. Gross, "Progress towards universality of membership of the UN", *American Journal of International Law*, vol. 50 (1956). But see P. Bierzanek, "The principle of universality and its implementation in the United Nations Organization", *German Foreign Policy*, vol. IX (1970), No. 5.

⁶ See, for example, Minutes of the Security Council, Year 1, Series 2, p. 4.

⁷ *I.C.J. Reports*, 28 May 1948.

(c) willing to accept the obligations of the Charter, (d) willing to carry out these obligations and (e) able to carry out these obligations

In 1955, with the admission of 16 new Members, the political solution based on the general admission of all applying States⁸ permitted the United Nations to move away from restricted membership. Later, both super-Powers avidly supported decolonization and developed the practice of approving quite automatically the subsequent membership of bona fide new States. So, since 1955, the procedure of voting for new Members has by and large been a matter of formality.

Universality of membership is a logical consequence of the principle of sovereign equality⁹ of States. The principle of universality is implicit in the Charter's provisions.

For example, Article 2, paragraph 6, of the Charter is a conscious departure from the traditional legal principle according to which treaties establish rights and duties only for the contracting parties. The article promotes the idea of an indivisible peace, which the United Nations is obliged to protect, even when the aggressors are not Members of the United Nations.

It would be unfair, inequitable and illogical if some States are given obligations, while, at the same time, it is made impossible for them to join the Organization.¹⁰ If this were the case, the Organization would be a closed group of States claiming the right to impose obligations on non-Member States. One critic claims that this "cannot have been and was not the intention of the framers of the Charter",¹¹ because it contradicts the principle of equality of all States, a fundamental principle of international law.

Other features of the United Nations system are associated with universality of membership: the importance of recruiting the staff of the United Nations Secretariat on "as wide a geographical basis as possible" (Article 101, paragraph 3); "equitable geographical distribution" as one of the criteria for elections, including the election of non-permanent members of the Security Council (Article 23, paragraph 1); the presence of the main forms of civilization in the composition of the International Court of Justice (Article 9 of the Statute of the Court); the desirability of including the highest possible number of participating States in conferences codifying international law; and the immense importance for all States of issues such as nuclear-free zones and other issues facing the international community in the twenty-first century.

⁸ These admissions embodied much of the "package deal" earlier denied by the International Court of Justice.

⁹ On the subject of sovereign equality, see, for example, P. H. Kooijmets, *The Doctrine of the Legal Equality of States* (A. W. Sijthoff, Leyden, 1964).

¹⁰ Bierzanek, *op. cit.*

¹¹ *Ibid.*

All these are reasons why the peoples of, say, Oceania and the Caribbean, though small in size, should be represented as members in the General Assembly.¹²

In its Advisory Opinion of 3 March 1950,¹³ the International Court of Justice gave its opinion on the question of whether the General Assembly could admit a State on the basis of its decision, even when the Security Council failed to approve admission by a majority or by a veto of a permanent member. The Court ruled that, in all cases, the Security Council recommendation takes priority over the General Assembly decision.

This was the Court's interpretation of Article 4, paragraph 2, of the Charter. Accordingly, in order of priority, the Security Council must first make a recommendation, and then the General Assembly makes a decision on the admission of a new Member.

Universality is also part and parcel of the membership and work of the specialized agencies established under Article 57 of the Charter. For example, article I, paragraph 1, of the Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO) speaks of collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for human rights and fundamental freedoms. "Indeed, only universality can enable UNESCO to fulfil its aims and purposes for the benefit of humanity as a whole."¹⁴

CONCLUSION

In the early 1970s, perceptions were based on a number of false assumptions. First of all, it was assumed that mini-States would significantly alter the "balance" of voting power within the General Assembly. But projections of voting patterns were highly conjectural, and statistical surveys on the matter were, at best, inconclusive.

Second, international organization was seen as a field separate and distinct from the workings of international politics as a whole. Proposals were made within the United Nations to change the conditions of admission, without making any connection with international relations underlying and outside the United Nations context. Hence, certain important problem-solving vehicles were usually left entirely out of the scope of analysis.

¹² An important deviation from universality was the absence of the divided States, such as the two Koreas, which were admitted on 17 September 1991.

¹³ *I. C. J. Reports*, 3 March 1950.

¹⁴ H. Gros Espiell, *The Principle of Universality and the Specialized Agencies of the United Nations* (UNESCO, Paris, 1991). Also, P. A. Hoffer, "Upheaval in the United Nations system: United States withdrawal from UNESCO", *Journal of International Law*, vol. 12 (1986), p. 161.

Interdependence among States and also bilateral or multilateral arrangements give rise to networking and supplemental or alternative relationships on many levels. International politics were and are deeply and intimately involved in the workings of the United Nations. Contrary to common belief at the time, no automatic or voluntary procedure, such as the renunciation of full membership, was a panacea to solve or prevent the ills of the United Nations.

Third, by being universal, the United Nations is better equipped to meet the challenges of the twenty-first century. This is clear in a number of fields.

For example, as small island States have jurisdiction over vast areas of ocean space, their participation is important to the law of the sea. Neither Tonga, Kiribati, Tuvalu nor Nauru has decided to become a Member of the United Nations. Their populations are small, but they cover significant areas of ocean space. Kiribati, for example, has a surface area of 726 square kilometres, while its exclusive economic zone covers an area of 3.5 million square kilometres.

Similarly, as far as the global ecosystem and environmental issues in general are concerned, many small States play a critical role: to save the planet's biological diversity, to use its sustainable assets, to share fairly and equitably the benefits arising from their utilization.¹⁵ Universality is an essential and integral ingredient of the effective role of the United Nations in the emergence of a world of sustainable development. Its role is also important in the context of the World Summit for Social Development, held in Denmark.

Security is no exception. In the post-cold war world, international relations are no longer bipolar. Security is coming to be seen more in terms of the international community and less in terms of individual States. This is illustrated by measures taken by the Security Council concerning weapons monitoring and destruction in Iraq, humanitarian relief in Somalia, and efforts to stop ethnic conflicts in the former Yugoslavia.

Even in the area of peace-keeping, which is long established but increasingly important, small States have served with distinction. Fiji and other small States have assisted in peace-keeping in the past. The success of regional efforts such as the Caribbean Community (CARICOM) multinational peace-keeping force in Haiti suggests that small States will become even more

¹⁵ See the speeches of the Secretary-General and the Executive Director of the United Nations Environment Programme at the first meeting of the Conference of the Parties to the Convention on Biological Diversity, held at Nassau, Bahamas, on 28 November 1994. These issues were thoroughly canvassed at the Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados, 25 April-6 May 1994. See also Peter R. Baehr, *The United Nations in the 1990s*, 2nd ed. (St. Martin's Press, New York, 1994), and Keck Center for International and Strategic Studies, *The United Nations in a New World Order* (Claremont McKenna College, Claremont, CA, 1994).

involved in peace-keeping at the United Nations level. These are all major issues in the twenty-first century.

Despite its shortcomings, the United Nations remains the only available mechanism to mobilize the widest possible support called for in our era of constructive multilateral engagement. Hence, the principle of universality of membership has evolved and been strengthened. It appears to be a given that all States that satisfy the criteria of the Charter may join the United Nations. Their participation is needed to meet the challenges of the twenty-first century.

OPEN-FLOOR DISCUSSION

COMMENTS AND SUGGESTIONS OF A GENERAL NATURE

Mr. Fall* mentioned that Mr. Sohn had raised the question of making the essential elements of international law available through databases. The Centre for Human Rights of the Secretariat, in addition to publishing traditional documents, had put the entire human rights bibliography of the United Nations on CD-ROM and intended to update it yearly. Inasmuch as not everyone had access to such technology, the Secretary-General had also called for the publication, within the framework of the Blue Books Series, of a documentary work on the United Nations and human rights, which was to appear soon.

He subscribed to Mr. Pak's call for access of the principal organs of the United Nations to international and regional human rights courts. Even before that, however, he would like to see the different international instruments on human rights ratified by States. That objective had been set by the Vienna Conference on the Law of Treaties in 1993, and the Secretary-General had called for universal ratification of the Convention on the Rights of the Child and other human rights conventions.

It was also important to strengthen the role of the individual in the protection and promotion of human rights, which meant greater availability of the related norms in a form understandable to the general public. That, precisely, was the objective of the United Nations Decade for Human Rights Education, and in that connection he had circulated a communication entitled "Vers l'émergence d'une culture universelle des droits de l'homme : La décennie pour l'éducation pour les droits de l'homme". There were frequent calls for the creation of human rights tribunals; yet better use of existing mechanisms through their being better known would in itself improve the situation. In that regard, he had circulated a second contribution to the Congress, entitled "La protection des droits de l'homme à l'horizon du XXI^e siècle".

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COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. LOUIS B. SOHN

Mr. Lukashuk* said that he had never dreamed that the last decade of the century would be declared a Decade of International Law. Yet he wondered whether international lawyers were prepared for the twenty-first century. The programme adopted by the General Assembly left much to be desired, and one had the impression that Governments were not prepared to go very far in improving international law. The responsibility therefore lay on the shoulders of theoreticians and jurists. In that light he wished to ask Mr. Sohn, who had witnessed the creation of the United Nations, whether perhaps Governments were not in a position or did not wish to take decisive steps to improve international law. For that purpose, a more authoritative body might need to be created. The establishment of a parliamentary-type organization with consultative functions, which might take far-reaching decisions, had been proposed, but such a body had not been created. The scholarly discussion that had taken place at the Congress was like a fashion show, with the presentation of ideas not necessarily for immediate use in everyday life. Mr. Sohn had always been very practical and had been very clear, but that did not mean that the ideas in question were really embodied in practice.

Again addressing Mr. Sohn, he said there had been talk about sanctions and about monitoring, but if people internalized the convictions and knowledge of international law from infancy and in school, one would have normal international legal relations. He wondered why people were not taught in school to take a civilized approach to other countries and cultures, since the overall future of the world depended on it. Journalists, the media and students at all levels must not only be taught the norms of international law, but also be made to realize that in international life there were different moral or political norms.

Mr. McNeill** commended Mr. Sohn's timely suggestion regarding an all-encompassing compilation of public international law. Despite the daunting scale of such a project, he believed work on it should begin as soon as possible. And not only for the convenience of lawyers: indeed, it seemed clear that Governments, the media and the public at large were not sufficiently educated in the subject. As a result, international law did not have the impact on national policy that it must have if the rule of law was to prevail in inter-

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national affairs. The completion of such a project would enormously improve general access to public international law and thereby enhance its influence. He urged the participants to keep the need identified by Mr. Sohn uppermost in their minds.

Mrs. Jacobsson* said that she wondered whether any views might issue from the Congress regarding the prosecution of gender-specific war crimes before the International War Crimes Tribunal. She would like to know what lobbying was being conducted with Governments for the allocation of additional resources to the Tribunal. She also wondered what the future implications would be for the establishment of a permanent international criminal tribunal if the prosecution of gender-specific war crimes was not taken up in the current context. Many women lawyers were arguing that while there existed provisions dealing with torture, one form of which was rape, historically that specific war crime had never been adequately dealt with in the courts of law. She wished to know what efforts Governments were making for the protection of women's human rights under international law.

Mr. Sohn (reply) said that he was pleased to hear about the CD-ROM containing the human rights bibliography and the forthcoming book on the United Nations and human rights. He would also like to see the human rights documents that were published periodically by the United Nations put on CD-ROM to make it possible to search for any particular topic. Such information might even be made generally available through the Internet or other on-line facilities and would be useful to students and many others. That, however, was an issue that had been disputed for 50 years, for somehow it was believed that a convention was required, with ratification by States and other formalities. In his view that was not so, and there had been precedents to support that view in the handling of petitions from Non-Self-Governing Territories by the United Nations and of petitions from minorities by the League of Nations, which had simply involved the publication of the petition and of any objection by the State concerned, sometimes followed by a hearing. In reality, all that was required was the will to do it.

As to Mr. Lukashuk's comment regarding the lack of readiness of Governments to proceed very far with international law, what was important was for the United Nations to be ready. All that was required was for a group of States to propose something in the General Assembly and push it through to adoption. The Security Council could make binding decisions, but the General Assembly could provide a forum for discussion on a high level. With

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some effort, the media could also be mobilized. There could even be a television channel devoted to the United Nations, and once people saw that fascinating things were happening there, their interest would gradually develop. With regard to the compilation of public international law, Mr. McNeill was right that one should begin. One could start with human rights because some excellent material on that subject had already been compiled. One must simply go one step further and publicize it.

COMMENTS AND QUESTIONS RELATED TO THE PRESENTATION
BY MR. OLEXANDER O. CHALY

Mr. Chernichenko* said that on the question of the succession of States a distinction must be made between the two concepts of continuity and identity of States as subjects of international law. As an example of continuity, the Russian Empire, the Union of Soviet Socialist Republics and the Russian Federation were generally recognized as one and the same subject of international law. Continuity precluded succession: one could not be successor to oneself. Nor could there be partial continuity: it either existed or did not. "Identical" had two meanings: "the same" and "of the same kind, similar". The first of those concepts coincided with continuity, whereas the second did not. Legal succession of States was based on their fully or partially identical nature in accordance with the second meaning of the word. It related to the rights and obligations of one subject of international law *vis-à-vis* another, based primarily on whether the two shared the same characteristics, in particular territory and population. Whether such sharing was partial or total determined the partially or fully identical nature of successor States and their predecessors. In the case of a people that re-established its statehood after losing it through annexation, the new State was identical with the previous one but, as a subject of international law, was not its continuation. Such was the case of the Baltic States: they had not been occupied, but annexed. Annexation did not necessarily follow occupation.

It was difficult to admit that the Federal Republic of Germany had been a continuation of the former Germany, although that view was widespread in German doctrine. In the place of the former Germany, in 1949 two States had emerged, the German Democratic Republic and the Federal Republic of Germany, which could not be its partial continuation. Sometimes one heard about the continuation not of States but of their rights and international obligations. In order to avoid misunderstanding, one should not use the term

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“continuation” in that sense. In such a case it was more correct to speak of “succession” or, in other words, the transfer of some rights and international obligations from one State to another.

Mr. Podea* said that under the Ribbentrop-Molotov Pact and its secret annexes, signed in Moscow in August 1939, the former Union of Soviet Socialist Republics had incorporated by force the Baltic States and parts of Finland, Poland and Romania. The majority of parliaments and European Governments currently considered the Pact with its annexes null and void *ab initio* and were asking for the removal of its political and juridical consequences. Even the Supreme Soviet of the former Union of Soviet Socialist Republics had condemned the Pact on 26 December 1989. Since the Ukrainian State, which had become independent, considered itself the successor of the former USSR, did it consider the Ribbentrop-Molotov Pact of 1939 to be condemned as decided by the Supreme Soviet of the former USSR in 1989? How did Ukraine intend, in its current juridical and political practices, to function with its new neighbours and proceed to the liquidation of the political and juridical consequences of that Pact?

Mr. Zemanek** noted that Mr. Chaly had remarked that the two Vienna conventions on succession of States reflected existing customary international law. He would be interested to know whether Mr. Chaly included in “customary international law” the provisions relating to the public debt contained in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

Mr. Djordjevic*** said that he would like to hear Mr. Chaly’s views on the legal validity of the opinions of the Badinter Commission, which were frequently cited in connection with changes in the former Yugoslavia and had even influenced some United Nations organs. In his own view, the Commission had not been an arbitration commission in the legal sense, but merely a consultative body of the European Communities Conference on the former Yugoslavia. Its opinions could be considered only within the purview of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. As a result of those opinions, the claim of the Federal Republic of Yugoslavia, consisting of Serbia and Montenegro, to continue the interna-

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tional legal personality of Yugoslavia had been rejected, although he found no rules in international law that would warrant such rejection. It had often been said that an agreement between the parties of the former Yugoslavia was necessary, but that was not a condition as far as international law was concerned.

Mr. Kazazi* pointed out that a problem of succession of States might arise when a State newly formed in the territory of a former federal State had to deal with claims filed previously by the federal State with respect to rights of individuals and corporations that had since become nationals of the new States or with claims, for example, in boundary disputes relating to areas that formed part of the territory of a new State. The States involved might not agree on the transfer of the claims or on which State should benefit from the judgement or award, and the nationals concerned might disagree as well. As a result, the international forum handling the claims might experience delays and might receive contradictory views from the States involved. The solution depended on the situation, the ideal naturally being agreement of the States through negotiation. He would be interested to hear Mr. Chaly's comments regarding that problem.

Mr. Antonowicz** said that he basically agreed with Mr. Chaly's remarks on succession, in particular his view that identity and succession, being mutually exclusive concepts, could not both apply in respect of the selfsame State. Yet there were exceptions to that principle, such as, perhaps, the case of Ukraine and Belarus. As far as he knew, there had been no case of membership in the United Nations being the consequence of succession. He wondered what, then, the basis of the membership of Ukraine and Belarus was unless one took into account the fact that they had previously been Members of the United Nations. At the same time, Ukraine, Belarus and others were successors to the Union of Soviet Socialist Republics. Hence the question of the USSR was a complex one, and he agreed that within the meaning of international law, the Russian Federation was identical with the USSR, while that concept did not fully apply to the Baltic countries, since they had been annexed.

Ms. Škrk*** said that in her opinion, the pertinent rules of succession of States were the result of the perception that the international community

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was not static: States might in fact, and in conformity with international law, separate, unite, dissolve and cease to exist.

She stressed that the Arbitration Commission on the Former Yugoslavia (Badinter Commission) had been a judicial body set up by the International Conference on the Former Yugoslavia, reaffirmed by the London Conference in 1992 and accepted by all the participant States. Special tribute must be paid to some basic principles of succession of States formulated by that Commission, namely that: State succession was an institution of and must be governed by international law; in the case of dissolution of a State, all successor States were equal successors and none could claim the position of predecessor State or sole successor State; membership in international organizations, too, must be based on the principle of equal treatment of all successor States (a principle reflected in Security Council resolution 777 (1992) and General Assembly resolution 47/1, which had yet to be fully implemented with regard to the membership of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the United Nations); issues of succession of States must be resolved by agreement between the successor States, and disputes must be settled by peaceful means; human rights, including the acquired rights of natural and legal persons and the rights of minorities, must be fully protected and preserved; the succession of States did not affect boundaries and boundary regimes established by treaties; and the rights of third States must not be altered.

She agreed with Mr. Chaly's evaluation of the Vienna Conventions on succession of States as evidence of customary international law, especially with regard to their practicability in recent cases of succession of States. The International Law Commission, not satisfied with their status as treaties, had considered it appropriate to proceed with its work on succession of States and the related impact on the nationality of juridical and natural persons. In any case, it had received full support for that work at the forty-ninth session of the General Assembly.

Mr. Chaly (reply) said that the problem of the continuer State was complicated by the existence of laws regarding specific obligations: for example, under the Danubian Convention, only States bordering on the Danube River could be members of the Danube Commission. The Russian Federation, from the standpoint of the law of succession, obviously could not be a member, yet was claiming, he believed, as a successor State, to be a member of the Commission. As for continuity, no one was disputing its existence; should anyone do so, the question would have to be solved through peaceful negotiations.

Replying to Mr. Podea, he said that the Ribbentrop-Molotov Pact had in fact not been in force even at the beginning of the Second World War; consequently, there could be neither succession nor continuity in respect of it. The political aspects of its denunciation were currently on the agenda and were being actively dealt with by the neighbouring countries. In any case, the issues of continuity or succession did not affect the regime of borders.

Regarding Mr. Zemanek's question, he wished to clarify that in saying that the Vienna Convention incarnated a number of principles of customary law, he had meant that there were principles that had been clearly set forth in the Convention. As for Mr. Zemanek's specific question, he was not prepared to answer it, for it would require closer examination.

Concerning the question on Yugoslavia, he felt there were contradictions: two different approaches to a very similar situation. In the case of the Union of Soviet Socialist Republics, there was an obvious agreement among the successors with regard to the cessation of the State, something that the international community often failed to recognize; whereas with regard to Yugoslavia there was no agreement on the part of all the States that had been dissolved, but a certain model was being imposed.

PART TWO
ROUND-TABLE DISCUSSIONS

DEUXIÈME PARTIE
TABLES RONDES

SEGUNDA PARTE
MESAS REDONDAS DE DEBATE

I. UNITED NATIONS SANCTIONS AS A TOOL OF PEACEFUL SETTLEMENT OF DISPUTES*

A. INTRODUCTORY STATEMENT BY THE MODERATOR: ADRIAAN BOS**

This Congress provides an appropriate occasion to discuss the issue of the implementation of Security Council resolutions which oblige Member States to introduce economic sanctions under Article 41 of the Charter: First, because so many international lawyers experienced both in practice and in theory are present; and second, because of the frequency with which sanctions have been imposed recently and because of their far-reaching consequences. Of the 10 cases of sanctions, 8 have occurred after August 1990. One may conclude that they have become important tools to contribute to the peaceful settlement of disputes. There are no indications that this trend will be reversed.

Sanctions are intended to change the behaviour of a particular State by inflicting or threatening to inflict economic pain. We focus our discussions on collective sanctions imposed under Chapter VII of the Charter of the United Nations. Under Article 39, the Security Council may determine the existence of a threat to the peace, breach of the peace or act of aggression. The use of sanctions under Article 41 is authorized only as an action pursuant to a determination under Article 39. Under Article 25, the decisions of the Security Council are binding under international law and Member States are bound to implement them in their municipal legal systems. According to Article 2, paragraph 5, of the Charter, all Members shall give the United Nations every assistance in any action it takes in accordance with the Charter and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action. In principle, sanctions are addressed to States or international institutions. How can it be ensured that all persons and all companies comply with them?

* Round-table discussion held on Monday, 13 March 1995.

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It is interesting to exchange views about the question whether sanctions have, in practice, been effective. The effectiveness of sanctions must be measured by how well they achieve the desired change in the behaviour of the target. One may conclude from the record on sanctions that an answer to this question is not the same in all cases. Some sanctions have worked; others have failed in reaching the objectives for which they were imposed. The wide range of situations to which they have been applied indicates that there are fairly broad parameters to the objectives and means of sanctions. The lesson one may draw from this practice is that, as a report on sanctions puts it, they are not "a tool for all seasons". The effectiveness of sanctions depends, among other things, on the modalities selected and the precision with which they can be targeted.

It is clear that the way in which Member States incorporate Security Council decisions in their national legal systems determines the speed but also the effectiveness with which these decisions can be implemented. It is clear that the procedures and methods of transformation into domestic legislation vary widely. Implementation at the national level often requires further legislation in Member States.

One of the questions that needs to be examined is whether the compulsory implementation of economic sanctions can be made easier, smoother and more effective. To answer this question it is extremely useful to know how Member States implement sanctions in practice. There are several sources in this regard. The literature has given attention to this subject. The Office of the Legal Counsel of the United Nations and the United Nations sanctions committees established to monitor the implementation of the various sanctions resolutions are both valuable sources of information and documentation. The Government of the Netherlands, however, felt it useful to collect more information focusing in particular on questions concerning national implementation. For that purpose, it drafted a questionnaire containing questions on national legislation, on national practice of execution, on implementation and interpretation of sanctions resolutions, on special economic problems resulting from the application of sanctions and on other related questions. This questionnaire is to be sent to all missions to the United Nations with a kind request that they answer the questions. The idea is that in collecting more information about the national implementation of sanctions, it may become easier to take account of national problems when deciding upon new sanctions and drafting texts of decisions of the Security Council for that purpose. It will, for instance, be important both for the target State and for Member States to know what the responsibility to implement requires of them. Ambiguity in drafting texts on sanctions should therefore be avoided. In general, the objectives of sanctions are not identical

in all cases. This means that decisions of the Security Council should be tailored to the specific goals and circumstances of each individual case. It will also be important to assess how easily the sanctions could be circumvented in order to help the Security Council impose sanctions that could be realistically implemented. Monitoring the implementation and enforcement of sanctions is, however, very difficult for reasons of State sovereignty and because of the economic interests involved.

The primary responsibility for the interpretation of sanctions rests with States, but the Security Council and its subsidiary bodies, such as the sanctions committees, have "Kompetenz-Kompetenz" for their interpretation. Is it possible and desirable to promote a coordinated if not uniform implementation?

In discussing the problem of sanctions in this Congress devoted to the role of international law, it is useful to recall that we are dealing here with treaty obligations and their implementation under domestic law. It touches upon the relationship between the Charter and domestic law. It will be interesting to learn whether implementation of sanctions sheds further light on the implementation of treaty obligations and, in particular, on the place of the Charter in domestic law or on the relationship between the Charter and treaty or customary international law. Does Article 103 imply that the Charter has an overriding status? Or are there any limitations in this regard?

Sanctions have far-reaching consequences. While they are intended to promote observance of international law, they cannot but override some principles of international law such as freedom of trade, non-discrimination, freedom of navigation and the duty to cooperate. Are there any limits, for example those arising from international humanitarian law, to the resort to collective economic sanctions? Are sanctions an indispensable component of the international legal system? Should they be regulated in the same manner as individualized countermeasures, i.e., preceded by offers for peaceful settlement and qualified by proportionality, conformity with human rights and *jus cogens* norms?

In the 1995 Supplement to "An Agenda for Peace",¹ the question has been raised whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their population. While there will be almost always humanitarian costs when sanctions are imposed, one may discuss whether there is a need for ways and means to minimize harm to innocent members of the society.

¹ A/50/60-S/1995/1.

One should also ponder the fact that sanctions cause special economic problems for neighbouring States, significant trading partners of the target States and private business. The purpose of Article 50 of the Charter is to address the problems of States which suffer from the disruption of trading patterns as a result of sanctions. Such costs may be seen as a serious impediment to the effectiveness of sanctions. Neighbouring States may not implement sanctions because of the devastating consequences on their own economy. Article 50 of the Charter gives injured countries the right to "consult" with the Security Council. The United Nations is not required to provide compensation.

In practice, the Security Council has acknowledged the legitimacy of requests of affected States and called upon other Member States and relevant international institutions to review their programmes of technical and financial assistance. However, in practical terms, the issue of specific compensation has not been developed. Do we have concrete ideas on how to compensate third parties? Is it possible to evaluate claims of damages? If a nation claims damages in excess of what seems reasonable, how can that be determined? If a relief of compensation mechanism were to be developed, should this be channelled to and through States only or to other affected groups or persons directly?

B. SUMMARY OF THE DISCUSSION

Sanctions were widely considered as an important tool for the peaceful settlement of disputes and a preferable alternative to the use of force.

Legal Basis and Preparation of Resolutions on Sanctions

Several participants expressed concerns as to the legal basis of Security Council action and the changing objectives of resolutions on sanctions. The following general problems were raised:

- The interpretation of Articles 25 and 103 of the Charter of the United Nations and whether it is possible to give the Security Council a blank cheque to overrule State obligations. It was noted that Article 103 referred to international agreements only and not to custom and besides was limited by *jus cogens* norms. It was thought, however, that, in certain situations, Security Council resolutions could overrule customary law;
- The question whether Articles 25 and 103 could result in the imposition by the Council of new obligations not rooted in the Charter—for example, recognition of new entities or recognition of the jurisdiction of tribunals;

- In relation to decision-making on the imposition of sanctions, whether parties to a dispute should be allowed to present their arguments to the Council;
- Who would adjudicate in disputes relating to the legality of Council resolutions?
- The existence of a clear relationship between clearly defined objectives and the effectiveness of sanctions;
- The question of the consistency of Article 41 with human rights law and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.²

Purpose of Sanctions

Sanctions are a tool used to restore international peace and security. It was pointed out that one should not approach them negatively, overlooking the fact that they serve to replace armed force and hence reduce both the loss of human life and economic losses. In practice, goals set in Security Council resolutions imposing sanctions are not always achieved. The effects of sanctions are often more seriously felt by the civilian population than by those in power. One should use one set of sanctions only against aggression and use a different set against gross violations of human rights—in other words, diversify the sanctions regimes. Some measures, such as an arms embargo, do not affect vulnerable groups and serve to defuse an explosive situation which may constitute a threat to peace and security.

Implementation at the United Nations Level

Three important issues relating to the operation of the sanctions committees were raised—administrative and functional effectiveness, the appropriateness of their procedures and the question of the legal effects of their decisions:

- Administrative and functional effectiveness requires follow-up monitoring mechanisms, including analysis of the effects of sanctions on the sanctioned State as well as on third States. Unlike the Sanctions Committee on Southern Rhodesia, however, there is no publication of statistics, reporting on sanctions evasions or regular reporting to the Security Council;
- Confidentiality of proceedings could result in arbitrariness. In addition, neither States nor exporters can be made aware of interpretative deci-

² General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

sions of the Committees and advice of the Legal Counsel of the United Nations because such decisions are not published;

- Doubts and varying views were expressed as to the legal status of the decisions of sanctions committees aimed, for example, at clarifying and interpreting Security Council resolutions.

Implementation at the National Level

Several aspects were referred to:

- The effects of sanctions on private contractual relations. Judicial cases have raised the question whether individuals could claim compensation from the State for damage resulting from the implementation of sanctions. The issue is made more complex for some States by the interposition of the European Union as a regional organization;
- The issue of how domestic courts can, in implementing the decisions of the Security Council, control the legality of those decisions. Such competence is not entirely excluded from the jurisdiction of national courts;
- The mechanisms by which States implement the decisions of the Security Council. Speediness is, for example, no problem in Germany which bases implementation of such decisions on external relations law.

Humanitarian Exceptions

The civilian population, in particular vulnerable groups such as women, children, the disabled and the elderly, is often the primary victim of sanctions application. Economic sanctions are not decided in a vacuum but within the international legal order. Hence, they have to take into account humanitarian law, which consists of an elaborate system of rules including those relating to humanitarian relief and different categories of protected persons. The humanitarian exceptions in the resolutions on sanctions raised a number of issues:

- Relation with the International Committee of the Red Cross (ICRC). Whilst the sanctions committees have not so far negatively reacted to requests for clearance, several problems have been encountered, including obstacles in the field and the definition of humanitarian goods such as dual-use products. Lately, with respect to Croatia, the ICRC has been given a general three-month clearance;
- A main problem for the ICRC is access to the civilian population;
- The need to establish minimum standards was recognized.

Special Economic Problems

Sanctions regimes have resulted in economic and financial losses for third States and certain groups of people such as migrant workers. They also infringe on other principles of international law: one example mentioned was the disruption of freedom of navigation on the Danube. New suggestions must be made for improving mechanisms to address these economic problems and provide assistance.

Suggestions Made for Improvement

A number of suggestions were made to improve the sanctions regimes as follows:

- Sanctions must be accompanied by surveys on their effects and economic evaluations;
- Surveys and studies should be conducted on whether States implement or evade sanctions;
- Sanctions committees should regularly report to the Security Council, at least annually. Special problems and problem-areas should be addressed;
- The legal status of the sanctions committees and their functions and powers should be clarified. They should be explicitly mandated to interpret/clarify resolutions on sanctions;
- One single comprehensive sanctions committee to handle all United Nations-imposed sanctions regimes should be established;
- The Security Council should, to the extent possible, codify the sanctions committees' significant interpretative and clarifying statements through subsequent resolutions, and should build on such statements in new sanctions regimes;
- The mechanisms proposed by the Secretary-General in his Supplement to "An Agenda for Peace" should be considered. The question arises, however, whether the United Nations system has the expertise to provide the suggested monitoring before and after the imposition of a particular sanctions regime;
- One should continue and build on the experience of Sanctions Assistance Missions (SAMs) as an important tool in assisting and monitoring the enforcement of sanctions regimes;
- The United Nations should annually publish the decisions of sanctions committees. This would assist Governments in implementing sanctions. The increased transparency thus achieved would also benefit the business community.

II. LES NATIONS UNIES ET LES COMMISSIONS D'ÉTABLISSEMENT DES FAITS*

A. PRÉSENTATION DE L'ANIMATEUR : DJAMCHID MOMTAZ**

Nombreux sont les conflits internationaux qui ont pour origine une divergence sur des points de fait. Pour favoriser les négociations sur une base claire, un examen impartial et consciencieux des aspects pertinents du litige s'avère souvent nécessaire¹. C'est dans cet esprit que la Convention de La Haye de 1907 pour le règlement pacifique des conflits internationaux a mis en place la procédure d'enquête, à l'origine limitée uniquement à la constatation des faits. Mais, très tôt, de par la volonté des parties aux conflits, l'enquête s'est combinée avec la conciliation². Afin de mieux délimiter la fonction étroite de l'enquête sous sa forme originelle, on préfère, depuis une date récente, parler d'établissement des faits. Cette nouvelle expression semble désormais pleinement consacrée, du moins dans le cadre de l'Organisation des Nations Unies.

L'initiative de cette innovation terminologique revient aux Pays-Bas qui ont demandé, le 9 septembre 1963, l'inscription à l'ordre du jour de l'Assemblée générale de la question des méthodes d'établissement des faits. L'accueil extrêmement mitigé que cette proposition reçut, amena l'Assemblée générale [résolution 1967 (XVIII) du 16 décembre 1963] à demander au Secrétaire général de préparer un rapport sur la question³ et aux États de présenter leurs observations. La question resta à l'ordre du jour jusqu'en 1967, date à laquel-

¹ Voir Tabrizi Bensallah, *L'enquête internationale dans le règlement des conflits* (Pédone, 1976) et Edward A. Plunkett, Jr., « U.N. Fact-Finding as a Means of Settling Disputes », *Virginia Journal of International Law*, vol. 9, No. 1 (1968), pp. 154-183.

² Voir Nguyen Quoc Dinh, « Les Commissions de conciliation sont-elles aussi des Commissions d'enquête ? », *Revue générale de droit international public*, vol. LXXI (1967), pp. 565-674.

³ A/5694. Cette étude fut complétée par la suite conformément à la résolution 2104 (XX) de l'Assemblée générale en date du 20 décembre 1965; voir document A/6228.

* Table ronde tenue le lundi 13 mars 1995.

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le l'Assemblée générale pria le Secrétaire général d'établir une liste d'experts à laquelle les États parties à un conflit ainsi que l'Organisation des Nations Unies pourraient recourir [résolution 2329 (XXII) du 18 décembre 1967]. De nouveau, la question fut abordée par le Comité spécial de la Charte des Nations Unies et du raffermissement du rôle de l'Organisation dans le cadre de la question plus générale du maintien de la paix et de la sécurité internationales. La Déclaration de Manille sur le règlement pacifique des différends internationaux (résolution 37/10 du 15 novembre 1982) ainsi que la Déclaration sur la prévention et l'élimination des différends et des situations qui peuvent menacer la paix et la sécurité internationales et sur le rôle de l'Organisation des Nations Unies dans ce domaine (résolution 43/51 du 9 décembre 1988), toutes deux élaborées par le Comité de la Charte, consacrent plusieurs paragraphes aux activités des organes des Nations Unies dans le domaine de l'établissement des faits. Partant de l'idée que le maintien de la paix et de la sécurité internationales par l'Organisation des Nations Unies dépend dans une large mesure de la connaissance détaillée qu'elle peut acquérir des faits, l'Assemblée générale a reconnu la nécessité d'un examen plus détaillé de la question (résolution 43/170 du 9 décembre 1988). A partir de 1989, le Comité de la Charte s'est attelé à cette tâche et est parvenu à élaborer un projet que la Sixième Commission a soumis à l'Assemblée générale. Le 9 décembre 1991, l'Assemblée a adopté la Déclaration concernant les activités d'établissement des faits de l'Organisation des Nations Unies en vue du maintien de la paix et de la sécurité internationales (résolution 46/59). Cette Déclaration ne porte nullement atteinte aux dispositions de la Charte relatives aux activités d'établissement des faits mais vise plutôt à formuler des directives en vue de favoriser la pleine utilisation et le perfectionnement des moyens d'établissement des faits de l'Organisation des Nations Unies. Les recommandations de l'Assemblée générale dans ce domaine concernent plus particulièrement la conduite des organes de l'Organisation des Nations Unies chargés d'établir les faits, ainsi que la politique que les États devraient adopter en matière d'admission des commissions d'établissement des faits. Il semblerait enfin que la Déclaration penche en faveur de missions dotées d'un mandat limité à la simple constatation des faits.

Les organes de l'Organisation des Nations Unies chargés de l'établissement des faits

Aux termes du paragraphe 7 de la Déclaration : « Les missions d'établissement des faits peuvent être entreprises par le Conseil de sécurité, l'Assemblée générale et le Secrétaire général dans le cadre de leurs compétences respectives en matière de maintien de la paix et de la sécurité internationales conformément à la Charte ». Le paragraphe 15 de la Déclaration suggère que la

conduite de ces missions soit confiée à des organes ad hoc : organe subsidiaire en ce qui concerne les missions décidées par le Conseil de sécurité et l'Assemblée générale et groupe d'experts ou représentant spécial du Secrétaire général dans le cas des missions conduites par ce dernier.

Organes subsidiaires du Conseil de sécurité et de l'Assemblée générale chargés de l'établissement des faits

Organes subsidiaires du Conseil de sécurité. Le Conseil de sécurité est le seul organe de l'Organisation des Nations Unies auquel la Charte confère expressément, en vertu de son Article 34, le pouvoir d'enquêter sur tout différend. A ce jour, le Conseil de sécurité n'a que rarement utilisé la procédure de l'Article 34. En effet, conformément à la Déclaration des Gouvernements invitants de la Conférence de San Francisco, le recours à cette procédure constitue une question de fond impliquant l'accord de tous les membres permanents du Conseil. Pour contourner l'obstacle du veto, inévitable dans les différends touchant aux intérêts de ces derniers, le Conseil a préféré déléguer ses fonctions à des organes subsidiaires mis en place en vertu de l'Article 29 de la Charte. De plus, cette formule a l'avantage de permettre de tenir compte de la variété et de la multiplicité des cas et se prête mieux au dosage que chaque conflit exige.

Organes subsidiaires de l'Assemblée générale. Contrairement au Conseil de sécurité, l'Assemblée générale ne tient de la Charte aucun pouvoir en matière d'établissement des faits. Ce silence fut à l'origine d'une controverse, déclenchée à l'occasion de la création par l'Assemblée générale de la Commission intérimaire [résolution 111 (II) du 13 novembre 1947], à laquelle était confiée une responsabilité telle. L'initiative de l'Assemblée générale se heurta à l'opposition des membres permanents du Conseil de sécurité, qui estimaient qu'une telle délégation n'était pas légale. Cette réserve explique les limitations imposées aux activités de la Commission en matière d'établissement des faits, à savoir : exigence de la majorité des deux tiers pour toute décision d'entreprendre de telles activités et impossibilité de les conduire ailleurs qu'au Siège de l'Organisation des Nations Unies sans le consentement de l'État sur le territoire duquel elles devaient être menées. De même, lors de l'élaboration de la Déclaration de 1988 sur la prévention et l'élimination des différends, ces mêmes États ont estimé que, compte tenu du rôle réduit de l'Assemblée générale dans le domaine de la prévention, il n'était pas nécessaire qu'elle soit dotée d'une telle capacité. C'est sur l'insistance des États membres du Mouvement des pays non alignés, soucieux de mettre en vedette le rôle et l'importance de l'Assemblée générale dans le domaine du maintien de la paix et de la sécurité internationales, que la Déclaration abor-

de le sujet. D'après le paragraphe 12 de cette Déclaration, l'Assemblée générale, conformément à l'Article 11 et sous réserve de l'Article 12 de la Charte, devrait envisager de recommander d'user davantage des facultés d'enquête. La question se pose néanmoins de savoir s'il s'agit de missions devant être menées sous la responsabilité de l'Assemblée générale, ou, sur sa recommandation, par d'autres organes des Nations Unies. Il fallut attendre la Déclaration de 1991 concernant les activités d'établissement des faits pour que cette ambiguïté, ainsi que la limite imposée par l'Article 12 de la Charte, soient levées. Le paragraphe 10 de cette Déclaration est suffisamment explicite : « L'Assemblée générale devrait envisager la possibilité d'entreprendre des activités d'établissement des faits pour s'acquitter efficacement des responsabilités que lui confère la Charte en matière de maintien de la paix et de la sécurité internationales ». Qui plus est, le paragraphe 11 de cette Déclaration précise que « L'Assemblée générale devrait, au besoin, envisager la possibilité de prévoir le recours à des activités d'établissement des faits dans ses résolutions relatives au maintien de la paix et de la sécurité internationales ».

Il est intéressant de noter qu'en dépit de cette controverse, l'Assemblée générale a eu, dans ce domaine, une activité beaucoup plus riche et variée que le Conseil de sécurité. Nombreux sont les organes subsidiaires créés par l'Assemblée générale, conformément à l'Article 22 de la Charte, pour mener à bien des investigations sur les circonstances de la mort de personnalités politiques, sur l'application des droits de l'homme, ou sur des questions liées au processus de décolonisation.

Le rôle du Secrétaire général dans l'établissement des faits⁴

Il convient de distinguer entre les activités d'établissement des faits entreprises par le Secrétaire général en tant qu'organe d'exécution et celles dont il prend lui-même l'initiative.

En tant qu'organe d'exécution, le Secrétaire général est subordonné aux instructions des organes politiques de l'Organisation. Nombreuses sont les résolutions de l'Assemblée générale et du Conseil de sécurité qui lui confient la conduite de missions d'établissement des faits. Le paragraphe 15 de la Déclaration de 1991 recommande, du reste, à ces organes de donner dans ce domaine la préférence au Secrétaire général, ce qui est d'ailleurs conforme à la pratique existante. Pour mener à bien de telles missions, le Secrétaire général

⁴ Voir Christiane Bourloyannis, « Fact-Finding by the Secretary-General of the United Nations », *New York University Journal of International Law and Politics*, vol. 22, No. 4 (1990), pp. 641-669.

désigne généralement un représentant spécial ou un groupe d'experts qui lui feront rapport. Il pourrait faire appel, au même titre que les autres organes de l'Organisation, à la liste d'experts que le paragraphe 14 de la Déclaration lui recommande d'établir et de tenir à jour. Une liste de ce type établie comme suite à la résolution 2329 (XXII) de l'Assemblée générale est tombée en désuétude sans avoir jamais été utilisée. En effet, compte tenu de l'infinie variété des points de fait susceptibles d'être à l'origine d'un conflit, il est pratiquement impossible de choisir d'avance les experts appelés à siéger dans les commissions d'établissement des faits. Limiter le libre choix des organes de l'Organisation des Nations Unies dans ce domaine risque par ailleurs de réduire l'efficacité de ces commissions, laquelle dépend dans une large mesure des qualités des membres qui les composent.

Ces derniers temps, on assiste à une prolifération de missions d'établissement des faits, déclenchée à l'initiative du Secrétaire général. Longtemps contesté par les États socialistes, le pouvoir du Secrétaire général en ce domaine découle implicitement de l'Article 99 de la Charte. Des missions ont été ainsi envoyées dans le cadre du conflit Iran-Irak et de celui du Moyen-Orient, initiatives qui ont reçu *a posteriori* l'appui du Conseil de sécurité. Le paragraphe 13 de la Déclaration de 1991 entérine cette pratique désormais bien établie.

En raison de l'importance de l'établissement des faits en tant qu'instrument au service de la diplomatie préventive, de nouvelles responsabilités ont été confiées au Secrétaire général. Souvent, la simple présence d'une mission d'établissement des faits peut désamorcer un conflit. Le Secrétaire général, grâce au réseau de « systèmes d'alerte rapide » mis en place depuis quelques années par l'Organisation, est le mieux placé pour recueillir et analyser rapidement les informations et agir en conséquence. Une telle responsabilité lui est confiée par le paragraphe 28 de la Déclaration, d'après lequel « Le Secrétaire général devrait suivre régulièrement et systématiquement l'état de la situation mondiale touchant la paix et la sécurité internationales afin de pouvoir donner rapidement l'alerte si des différends ou des situations risquent de menacer la paix et la sécurité internationales ». Une fois recueillies, ces informations peuvent être communiquées au Conseil de sécurité ou à l'Assemblée générale, ainsi que le recommande ce paragraphe, à moins que le Secrétaire général ne préfère, comme le suggère le paragraphe 12 de la Déclaration, les compléter. En effet, ce paragraphe dispose que « Le Secrétaire général devrait veiller particulièrement à ce que les capacités d'établissement des faits de l'Organisation des Nations Unies soient utilisées à un stade précoce, de façon à contribuer à la prévention des différends ou des situations ».

L'admission et le séjour des missions d'établissement des faits sur le territoire des États

La principale activité des missions se déroule évidemment en dehors du Siège de l'Organisation des Nations Unies, sur le territoire des États Membres où les faits contestés se sont produits. Leur réussite est ainsi largement tributaire du consentement de ces États à les admettre sur leur territoire, ainsi que des immunités et facilités qui leur seront offertes tout au long de leur séjour.

Le consentement de l'État d'accueil

En règle générale, l'envoi de missions sur le territoire d'un État, à l'exception de celles entreprises par décision du Conseil de sécurité, exige le consentement préalable de l'État intéressé.

En réalité, dans la plupart des cas, l'État sollicité a tout intérêt à ne pas invoquer ses droits souverains pour rejeter la demande émanant de l'Assemblée générale ou du Secrétaire général. Ce faisant, il risquerait de se discréditer devant l'opinion publique internationale, surtout si son refus ne s'accompagne d'aucune explication ou repose sur des prétextes fallacieux. Par ailleurs, ces organes sont parfaitement libres d'interpréter un tel comportement dans le sens d'une confirmation des soupçons pesant sur l'État en cause et d'en tirer les conséquences qui s'imposent. C'est pourquoi les États, en examinant les demandes dans les meilleurs délais, adoptent généralement une attitude positive et ont pour politique d'admettre les missions d'établissement des faits sur leur territoire. Les paragraphes 19 et 21 de la Déclaration de 1991 les encouragent d'ailleurs à agir dans ce sens.

Pour ce qui est des missions entreprises par le Conseil de sécurité⁵, leur mise en place a suscité une controverse à l'occasion de l'examen de l'Affaire grecque en 1946. En effet, l'URSS contestait avec vigueur l'existence de prérogatives autoritaires du Conseil de sécurité dans le cadre du Chapitre VI. D'après cet État, puisque l'Article 34 figurait dans ce chapitre, le Conseil ne pouvait ordonner une enquête sans avoir au préalable obtenu le consentement des États concernés. A l'opposé, les États-Unis estimaient que la décision du Conseil de sécurité de recourir à une telle procédure impliquait une véritable obligation à la charge de ces États au sens de l'Article 25 de la Charte. Il semble que cette prérogative du Conseil de sécurité de s'informer se situe dans le cadre de la responsabilité plus générale que la Charte lui confère en tant que gardien de la paix et de la sécurité internationales et qu'elle soit

⁵ Voir Ernest L. Kerly, « The Powers of Investigation of the United Nations Security Council », *American Journal of International Law*, vol. 55, No. 4 (1961), pp. 892-918.

destinée à l'aider à s'en acquitter dans les meilleures conditions. En effet, les allégations des parties à un conflit sont souvent contradictoires, et il est tout à fait naturel que le Conseil puisse disposer de ses propres sources d'information. Le Conseil, se fondant sur l'Article 34, a affirmé qu'il « lui incomb[ait] d'enquêter sur toute situation qui pourrait entraîner un désaccord entre nations ou engendrer un différend, afin de déterminer si la prolongation de ce différend ou de cette situation semble devoir menacer la paix et la sécurité internationales ainsi que de constater l'existence d'une menace contre la paix » [résolution 87 (1950) du 29 septembre 1950]. Il se peut aussi que le Conseil, après être parvenu à une telle conclusion et avoir pris des décisions dans le cadre du Chapitre VII, charge des missions d'établissement des faits de s'assurer sur place de leur bonne exécution. C'est dans ce contexte que se situe la mise en place d'une « Commission spéciale », créée en vertu de la résolution 687 (1991) du 3 avril 1991, et chargée de procéder à une inspection sur place des capacités biologiques et chimiques et en missiles de l'Iraq.

Dans tous les cas précités, le pouvoir du Conseil de sécurité d'imposer une mission d'établissement des faits découle des prérogatives plus générales que la Charte lui confère en tant que gardien de la paix et de la sécurité internationales. Sont ainsi exclues les missions chargées par le Conseil de sécurité de prévenir un conflit ou d'empêcher qu'il ne s'aggrave, dont l'envoi devrait être soumis au consentement de l'État d'accueil. C'est dans ce sens qu'il faudrait, semble-t-il, interpréter les dispositions du paragraphe 6 de la Déclaration de 1991 qui précise que « L'envoi d'une mission d'établissement des faits de l'Organisation des Nations Unies dans le territoire d'un État exige le consentement préalable dudit État, sous réserve des dispositions pertinentes de la Charte des Nations Unies ».

Les immunités et facilités offertes aux missions d'établissement des faits

Une fois le consentement accordé, il est dans l'intérêt de l'État d'accueil de coopérer avec la mission d'établissement des faits et de lui accorder l'aide et le concours dont elle a besoin pour s'acquitter dans les meilleures conditions de son mandat. Se pose évidemment la question du libre accès à tout lieu que la mission souhaite visiter pour compléter ses informations et celle de la possibilité de communiquer avec toute personne pouvant l'éclairer sur les événements. Les États offrent généralement ces facilités aux missions qui opèrent sur leur territoire, mais exigent souvent, sensibles qu'ils sont à l'égard du respect de leur souveraineté, la présence de leurs agents à toutes les étapes de la procédure.

Les membres des missions d'établissement des faits envoyées par les organes de l'Organisation des Nations Unies ou ses organes subsidiaires ont le même statut que les experts en mission pour l'Organisation et jouissent

pendant la durée de leur mission des privilèges et immunités prévus par la Convention sur les privilèges et immunités des Nations Unies du 13 février 1946. Il s'agit des privilèges et immunités nécessaires à l'exercice de leurs fonctions en toute indépendance, et plus particulièrement de l'immunité de toute juridiction en ce qui concerne les actes accomplis par eux au cours de leur mission ainsi que de l'inviolabilité de tous papiers et documents en leur possession. On en veut pour preuve non seulement la Déclaration de 1991, dont le paragraphe 23 précise que les membres des missions devraient bénéficier au minimum des privilèges et immunités spécifiés dans cette Convention, mais aussi et surtout de la résolution 712 (1991) du Conseil de sécurité du 19 septembre 1991, qui rappelait que les inspecteurs de la « Commission spéciale » jouissent des privilèges et immunités de la Convention et demandait que l'Iraq leur accorde entière liberté de mouvement et les facilités nécessaires à l'exécution de leur mandat.

Le mandat des missions d'établissement des faits

Dans un assez grand nombre de cas, le mandat des missions d'établissement des faits de l'Organisation des Nations Unies a dépassé le cadre de la vérification des points contestés et a été élargi pour englober le règlement du conflit lui-même. Il semble qu'il existe désormais au sein de l'Organisation une volonté de dissocier clairement les fonctions d'établissement des faits et de conciliation et de revenir ainsi à la conception originelle de l'enquête.

La pratique de l'élargissement de l'enquête par les organes de l'Organisation des Nations Unies

L'élargissement du mandat des missions d'établissement des faits au sein de l'Organisation des Nations Unies tient à diverses raisons. Tout d'abord, il est dans le droit fil de l'évolution de la procédure depuis le début du siècle, dans le sens d'une confusion entre l'enquête et la conciliation. Il répond aussi à un souci de rapidité dans la mesure où la dissociation des deux fonctions retarde la solution définitive du conflit. Il faut enfin reconnaître qu'une telle approche peut s'avérer plus efficace. En effet, la connaissance que les enquêteurs acquièrent des problèmes posés les place souvent dans une meilleure position pour proposer des solutions au conflit.

Pour permettre aux missions d'établissement des faits d'avoir toute latitude dans leur action, les organes des Nations Unies ont préféré ne pas déterminer leur mandat avec précision. Certaines missions établies par le Conseil de sécurité ont été expressément investies de fonctions qui dépassaient la simple constatation des faits. Tel fut le cas de la mission chargée d'élucider les faits survenus à la frontière grecque, à laquelle le Conseil confia aussi le man-

dat de faire toute proposition susceptible d'empêcher le renouvellement de violations de frontière [résolution 15 (1946) du 19 décembre 1946]. Plus récemment, la Commission mise en place par le Conseil de sécurité pour enquêter sur l'origine, les antécédents, et le financement de l'agression menée contre les Seychelles fut aussi chargée d'évaluer les dommages et de présenter un rapport accompagné de recommandations [résolution 496 (1981) du 15 décembre 1981].

Les missions d'établissement des faits créées par l'Assemblée générale n'ont pas été exemptes d'un tel élargissement de leur mandat. On en veut pour preuve les rapports de certains organes subsidiaires chargés d'enquêter sur le comportement des États en matière de décolonisation ou de droits de l'homme, qui s'apparentent à un véritable réquisitoire dénonçant le comportement des États en cause.

Le retour à la conception originelle de l'enquête

Étant parvenus à la conclusion que l'élargissement de l'enquête était la principale cause du déclin de cette procédure, les Pays-Bas suggéraient le retour à la conception originelle de l'enquête, telle qu'elle avait été conçue à la Conférence de La Haye de 1907. Ils prévoyaient de mettre en place, sous l'égide de l'Organisation des Nations Unies, un « Centre international d'enquête », chargé de l'établissement des faits, à l'exclusion de toute intervention sur le fond de l'affaire dont il serait saisi⁶. Cet organe permanent de 15 membres aurait été chargé de l'investigation des faits au nom d'une organisation internationale, en vue de faciliter sa prise de décision. On a comparé à juste titre cette dissociation à celle existant dans l'ordre interne entre les fonctions de la police judiciaire et celles attribuées aux tribunaux. Cet organe aurait pu acquérir avec le temps l'expérience nécessaire dans les activités d'établissement des faits et jouir par là d'une autorité et d'une indépendance certaines. Le projet fut rapidement abandonné faute d'appui suffisant de la part des États. Ce n'est pas tant l'idée de limiter la fonction de l'enquête que la création d'un nouvel organe permanent qui fut à l'origine de son échec⁷. Les États, et plus particulièrement les grands États, craignaient plutôt, face aux pressions d'un tel organe, de se voir contraints de se soumettre à ces procédures d'établissement des faits.

L'idée de dissocier clairement les fonctions d'enquête des fonctions de conciliation réapparut une nouvelle fois à l'occasion des débats du Comité de

⁶ A/AC.119/L. 9.

⁷ Loïc Marion, « Remarques sur l'échec d'un projet de réforme de l'enquête internationale », *Revue belge de droit international*, vol. 11 (1975), pp. 475-524; et J. H. Leurdijk, « Fact-Finding: Its Place in International Law and International Politics », *Netherlands International Law Review*, vol. XIV (1967), pp. 141-161.

la Charte. Bien que la Déclaration de 1991 ne tranche pas nettement en faveur de cette thèse, certains indices permettent néanmoins d'affirmer que les rédacteurs de ce document avaient uniquement en vue l'établissement des faits. On peut se référer à cet égard au préambule de la Déclaration qui met l'accent sur le fait que « la capacité qu'a l'Organisation des Nations Unies de maintenir la paix et la sécurité internationales dépend dans une large mesure de la connaissance détaillée qu'elle peut acquérir des faits ». Par ailleurs, le paragraphe 17 de la Déclaration précise que l'organe compétent « devrait toujours énoncer clairement le mandat de la mission », en ajoutant *in fine* que le rapport de la mission « devrait uniquement contenir des éléments de fait ». Ce paragraphe doit être lu conjointement avec le paragraphe 25 de cette même Déclaration qui oblige les missions à « agir en stricte conformité avec leur mandat ».

En définitive, si le jumelage enquête-conciliation ne soulève guère de difficultés dans le cadre d'enquêtes autonomes où les États parties au conflit restent libres de déterminer le mandat des organes qu'ils constituent, en revanche, dans le cadre des enquêtes intégrées à une organisation internationale, favoriser l'élargissement de l'enquête risque de porter atteinte à l'impartialité des missions et de heurter les susceptibilités des États.

Conclusion

Après la Conférence de La Haye de 1907, Nicolas Politis, grand juriste hellénique, dans un article publié en 1912 dans la *Revue générale de droit international public*, estimait que l'enquête était une « institution parasitaire » qui ne pourrait se maintenir au rang de mode indépendant de règlement des différends et qu'elle était destinée à disparaître. Si cette prédiction ne s'est pas réalisée, il n'en demeure pas moins que les capacités d'établissement des faits ne sont toujours pas utilisées pleinement et qu'un plus grand recours à cette procédure pourrait contribuer à la prévention et à la solution d'un nombre accru de conflits internationaux.

B. RÉSUMÉ DU DÉBAT

Deux thèmes ont principalement retenu l'attention des participants : les raisons de la désaffection relative dont souffre la procédure d'établissement des faits et les inconvénients d'un élargissement de la procédure.

Pour ce qui est du premier point, il a été dit que dans un assez grand nombre de cas, en dépit du fait que les circonstances de l'affaire constituaient un terrain éminemment favorable à la mise en œuvre de la procédure, les organes de l'Organisation des Nations Unies avaient préféré s'abstenir.

Plusieurs raisons sont à l'origine de cette inaction. Ainsi, au cours de la guerre froide, et vu les conflits opposant les deux Grands, la constitution de missions était considérée comme une ingérence intolérable dans leurs zones d'influence. La préférence a donc pu être accordée aux efforts entrepris dans le cadre d'arrangements régionaux. Cette réticence des parties au conflit se manifeste aussi dans un cadre plus général. Souvent, elles craignent qu'une fois les faits établis, elles ne soient tenues de recourir à un mode de règlement et qu'une solution ne leur soit finalement imposée. En d'autres termes, le recours à la procédure n'est possible et souhaitable que s'il y a une volonté de parvenir à une solution. On s'est référé à l'Article 90 du Protocole additionnel I aux Conventions de Genève du 12 août 1949, relatif aux victimes des conflits armés internationaux, qui prévoit la mise en place d'une Commission internationale d'établissement des faits. Cette Commission, qui vient d'être créée après que 20 États parties au Protocole aient accepté sa compétence, est chargée d'enquêter sur tout fait prétendu être une infraction grave aux Conventions de Genève et au Protocole, mais aussi de faciliter, en prêtant ses bons offices, le retour au respect des dispositions de ces instruments. Ainsi, le recours à l'enquête dépend largement des intentions conciliatrices des parties au conflit et ne peut être décidé qu'entre États agissant de bonne foi. C'est peut-être la raison pour laquelle les conflits qui engagent l'honneur et les intérêts essentiels des États échappent généralement à l'enquête.

En ce qui concerne le deuxième point, les conclusions de l'animateur relatives au retour à la conception originelle de l'enquête n'ont pas recueilli l'assentiment de ceux des participants qui avaient contribué à l'élaboration de la Déclaration de 1991. Il est vrai que la question n'a pas fait l'objet de débats approfondis lors des travaux du Comité de la Charte et que les délégations ont préféré ne pas l'aborder. Il a été dit que le paragraphe 17 *in fine* de la Déclaration, qui précise que le rapport de la mission d'établissement des faits devrait contenir uniquement des éléments de fait, ne devait pas être interprété comme reflétant une volonté de privilégier la conception originelle de l'enquête. Il avait plutôt pour objet de préciser que, dans les cas où l'organe mettant en place la mission limite strictement son mandat à l'établissement des faits, le rapport ne pourrait contenir des éléments autres que ceux se rapportant à l'élucidation de points de fait. En d'autres termes, la mission n'est pas libre de proposer une solution au conflit si elle n'a pas été invitée à le faire. D'autres participants se sont prononcés en faveur d'une procédure d'enquête qui déborderait, le cas échéant, le cadre de la simple collecte d'informations. Le jumelage enquête-conciliation présente dans un certain nombre de cas des avantages incontestables. Souvent, le groupe d'enquêteurs est le mieux placé pour faire des propositions concrètes dans le sens du règlement du conflit et il n'y a aucune raison que les parties au conflit soient

privées de tels services. L'inévitable question de la définition de la procédure d'enquête et de son existence en tant qu'institution indépendante n'a pas manqué d'être soulevée. On a fait remarquer à ce propos que les États aimeraient connaître exactement la portée de leurs obligations avant de s'engager en faveur d'un mode précis de règlement des conflits.

III. THE EXPANDING HORIZONS OF INTERNATIONAL HUMANITARIAN LAW*

A. INTRODUCTORY STATEMENT BY THE MODERATOR:
THEODOR MERON**

The central importance of international humanitarian law is now widely recognized, but that has not always been the case. For some years after the adoption of the Charter of the United Nations, which prohibited war as well as any resort to the threat or use of force against the territorial integrity and political independence of States, the justified revulsions against the very concept of war triggered a general reluctance to use the term “the law of war”, and hence, an inclination to use such terms as “law relating to the conduct of hostilities”, “humanitarian law of war” and, under the influence of the human rights movement, “international humanitarian law”. Terminology is, however, less important than substance. What is particularly unfortunate is that, during those “lean years” of international humanitarian law, neither the intergovernmental community nor the scholarly community was ready to address various issues and problems of international humanitarian law which required and merited attention.

To speak of, and try to develop, international humanitarian law does not, of course, give licence to resort to force. *Jus ad bellum* is strictly regulated by the Charter of the United Nations. The greatest merit of international humanitarian law is that it applies equally to all parties to a conflict. It must be so, if, to quote Professor Richard Baxter, international humanitarian law is to perform its proper functions of limiting the scope of hostilities, of protecting the victims of war and of making possible the restoration of peace after the termination of hostilities. After too many years of neglect, international humanitarian law is at the centre of international attention for an obvious reason, namely, the proliferation, even the explosion, of brutal and bloody armed conflicts in all parts of the world, especially at the internal level.

* Round-table discussion held on Tuesday, 14 March 1995.

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Against this background, it is extremely important to ensure that the necessary rules for regulating, restraining and humanizing armed conflicts are in place and are respected. Resolutions of the Security Council have characterized serious violations of international humanitarian law as threats to international peace. The invocation of Chapter VII as a basis for establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda is perhaps the clearest evidence of the revived interest in the law of war which is also attested to by other developments such as the raising of questions of international humanitarian law before the International Court of Justice; the 1993 Geneva Conferences on the Protection of the Victims of War; the call to the International Committee of the Red Cross to prepare a study of customary international humanitarian law applicable in internal and international conflicts; the proposed revisions of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons;¹ the Restatement of the Rules Applicable to Naval Conflicts;² the adoption of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction;³ the possibility of regulating such matters as laser technology; and, most recently, the 1990 Turku Declaration of Minimum Humanitarian Standards,⁴ which has been incorporated into the standard-setting process of the United Nations Commission on Human Rights, following the imprimatur given to that Declaration by the Budapest summit meeting of the Organization for Security and Cooperation in Europe.

With regard to the establishment by the Security Council of the International Criminal Tribunals for the former Yugoslavia⁵ and Rwanda,⁶ the Statute of the Yugoslav Tribunal ranks certain principles of international humanitarian law as customary law, the violation of which gives rise to the individual criminal liability of the perpetrators, including the four Geneva Conventions for the protection of war victims of 1949,⁷ The Hague Con-

¹ United Nations, *Treaty Series*, vol. 1342, p. 137 (No. 22495).

² San Remo Manual on International Law Applicable to Armed Conflicts at Sea, International Institute of Humanitarian Law, 1995.

³ *International Legal Materials*, vol. 32 (1993), p. 800.

⁴ E/CN.4/1995/116.

⁵ Security Council resolution 827 (1993) of 25 May 1993.

⁶ Security Council resolution 955 (1994) of 8 November 1994.

⁷ Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, United Nations, *Treaty Series*, vol. 75, pp. 31, 85, 135 and 287, respectively (Nos. 970-973).

vention No. 4 of 1907 and annexed regulations,⁸ the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Nuremberg Charter which, of course, introduced the concept of crimes against humanity.⁹ The Statute reflects an effort to treat the conflicts in the former Yugoslavia as international armed conflicts, thereby triggering the applicability of international humanitarian law as a whole, including that pertaining to the individual responsibility of the perpetrators of atrocities and crimes.

The Statute for the Rwanda Tribunal is even more ground-breaking. Unlike the Statute of the International Tribunal for the former Yugoslavia, it is predicated on the assumption that the conflict in Rwanda was a non-international armed conflict. The subject-matter jurisdiction of the Tribunal encompasses genocide and crimes against humanity, thereby covering most of the crimes that were actually committed. However, some killings and other violations may fall outside the scope of these two categories of crimes either because of definitional difficulties, or because of a failure to carry the required burden of proof. In those cases, article 4 of the Statute provides a safety net which is the Statute's greatest innovation. This article stipulates that the Tribunal shall have the power to prosecute persons committing or giving orders to commit serious violations of article 3 common to the Geneva Conventions of 1949 and Additional Protocol II thereto of 1977. It therefore confers jurisdiction on the Tribunal under instruments applicable to non-international armed conflicts. In this respect, there is a stark contrast between the statutes of the two tribunals.

Whatever happens in practice, this development is of tremendous normative importance. Until very recently, the accepted view was that neither common article 3 nor Protocol II provided a basis for universal jurisdiction. And the general feeling was that these provisions constituted, at least on the international plane, an uncertain and weak basis for individual criminal responsibility. International criminal law in the context of internal armed conflicts will henceforth be quite different.

B. SUMMARY OF THE DISCUSSION

Judge Bedjaoui* observed that, while the international community could today rely on a body of humanitarian law applicable to international and non-international armed conflicts as well as on enforcement mechanisms, imple-

⁸ *American Journal of International Law*, Supp., vol. 2 (1908), p. 90.

⁹ United Nations, *Treaty Series*, vol. 78, p. 277 (No. 1021).

* President of the International Court of Justice, The Hague, Netherlands.

mentation came across a growing number of obstacles and the deterioration of the international climate increased the tendency to resort to the use of force. A closer look should, therefore, be taken at this trend and at the possible means of reversing it.

Violations of humanitarian law were on the increase as a result of the proliferation not only of regional wars between States, but of internal conflicts, rooted in the weakness and precariousness of newly independent States like Rwanda, faced with the problem of underdevelopment and hosts of political contradictions and socio-economic difficulties. Only by eliminating these causes could one curb the use of force and ensure better observance of humanitarian law. That humanitarian law was increasingly violated was attested to by the casualty distribution in recent conflicts: During the First World War, 95 per cent of casualties were combatants and only 5 per cent civilians; the corresponding figures for the Second World War were 25 per cent and 75 per cent; in some contemporary wars, over 90 per cent of casualties were civilians.

Total war was an alarming novelty in the already tormented world landscape. It involved mobilizing all possible means to achieve ends which were not always clearly defined or were of a purely vindictive nature. It also involved the indiscriminate use of violence and the commission of the worst possible atrocities against civilians. This was perhaps to be expected at a time of violence, of erosion of the family structure, of emergence of centrifugal forces at the national level, of acute conflict in labour relations. Traditional beliefs were shattered; general anxiety was the price to pay for scientific, technological and even medical progress; ethical barriers had broken down; fundamental moral values were questioned; and man was engulfed by waves of fear and insecurity. In one's own conscience, in the family, at school, at work, in the community, in the country and finally in international relations negative forces were at work. The national consensus was being eroded and international consensus seriously undermined.

There were two challenges to be faced. The first was how gradually to reduce intolerance and find a common denominator, even with extremists whose credo obliterated the universality of man. The second was to learn to live in a certain state of chaos. If legal norms were increasingly flouted, it was perhaps partly because they were unclearly formulated, but it was also, more assuredly, because there were different perceptions of the law in the various parts of the world. The consequential loss of respect for the rule of law in general and for the rules of humanitarian law in particular was an alarming present-day phenomenon.

The implementational problem of humanitarian law had three main features. First, it was heavily dependent on the will of States. Second, the com-

plexity and sheer number of its rules led to non-enforcement or incomplete observance. Third, its implementation depended on an increasing number of actors including resistance fighters, partisans and, more recently, guerrilla fighters.

To promote respect for humanitarian law, States should be encouraged to ratify the 1977 Protocols and be reminded that Protocol II in no way challenged State sovereignty; that it only referred to conflicts of high intensity and excluded situations of internal disturbances and tensions; and that it did not grant opponents any legal status or special combatant treatment and was only aimed at protecting civilian populations and rescuing the injured and the sick. In addition, humanitarian principles applicable in armed conflicts should be more simply formulated and norms applicable to internal disturbances and tensions should be developed.

It was important to elaborate a realistic humanitarian strategy. The process of updating humanitarian law undertaken in 1977 with the elaboration of the Additional Protocols showed the limits of what could be achieved in the present international context. It was better, therefore, to promote the implementation of existing norms than to pursue a strategy based on the development of new rules with little chance of universal acceptance.

Ambassador Owada* stated that, as a member of the International Advisory Committee of Experts of the International Committee of the Red Cross, he had become aware of a dilemma as regards the observance of international humanitarian law in the context of United Nations activities related to peace-keeping and peace enforcement. He hoped that those who had heard his presentation on the previous day understood that he was trying to emphasize the importance of human dignity in the global community and that there was a growing contradiction between the socio-economic and political activities of human beings as groups and the tight strait-jacket in which the regulatory side of the international legal order had been conducted on the basis of what he called "the traditional Westphalian legal order". In his view, that contradiction was growing and becoming more and more apparent.

Naturally, everyone would agree that the observance of international humanitarian law was extremely important. There would be no question whatsoever that humanitarian concerns should receive priority at this juncture. However, the basic question was the extent to which primacy could be given to such concerns. While it was easy to say that international humanitarian law should be observed, there were factors which made that difficult. As the

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Secretary-General had pointed out in his "Agenda for Peace" of 1992, cease-fires had often been agreed to, but not complied with, and the United Nations had sometimes been called upon to send forces to restore and maintain a cease-fire. This task could, on occasion, exceed the mandate of peace-keeping forces and their ability to meet expectations. The Secretary-General recommended that, under such circumstances, the Security Council consider the utilization of peace-enforcement units with clearly defined terms of reference, resort to such units constituting a provisional measure under Article 40 of the Charter as distinct from a reaction to outright aggression under Article 43.

In that sense, peace enforcement would clearly be distinguished from peace-keeping which did not involve enforcement, a forceful action directed against a party for the purpose of enforcing law and order even against the will of that party. When, as in Somalia and in the former Yugoslavia, the authority of a Government had completely collapsed and competing factions within the country were engaged in acts of violence, a peace-keeping force might be required to ensure that humanitarian assistance was delivered to those for whom it was intended. Under such circumstances, the concept of peace enforcement, as proposed by the Secretary-General, might be helpful as a way of securing the observance of international humanitarian law and the proper channelling of international humanitarian assistance. It was, however, a totally novel idea in the practice of the United Nations, developed in response to a new situation when peace-keeping activities were increasingly taking place in contexts where order had to be restored and conditions established for the effective channelling of emergency humanitarian assistance to the local population and displaced persons in distress.

With the crossing of the borderline between peace-keeping under Chapter VI and peace enforcement under Chapter VII, the nature of the operation changed. Whereas a traditional peace-keeping operation was neutral in relation to the respective positions of the parties to the conflict, enforcement action under Chapter VII sought to impose certain rules on one of the parties or both. Admittedly, the rules to be enforced might be norms of humanitarian law and prescriptions based on humanitarian considerations unconnected with the merits of the dispute or the roots of the conflict. Nevertheless, resort to an enforcement action could transform the position of the United Nations from that of an impartial third party intervening in the conflict in the name of the international community to that of a party to the conflict itself.

The consequential dilemma for the United Nations and its affiliated agencies engaged in humanitarian assistance seemed obvious. The moment the United Nations itself was regarded as a party to the conflict responsible

for law enforcement, it could no longer be expected to carry out its functions in the humanitarian field effectively as an impartial actor offering humanitarian assistance to the victims of the conflict, standing aloof and neutral to the conflict itself. That dilemma would seem to illustrate the difficulty which one encountered when crossing the border between peace-keeping and peace enforcement, however closely interlinked the two might be in terms of achieving the goal of restoring peace in a situation of conflict. This was not to say, however, that one should remain neutral and refrain from taking sides, particularly in relation to the observance of international humanitarian law. But the dilemma was that insistence on the observance of rules of international humanitarian law might hamper efforts to ensure the observance of those rules by the parties as well as the effective delivery of humanitarian assistance to the people caught in a situation of conflict. The problem arose in fact from the basic structural nature of the present international system where law enforcement and international assistance were in many cases combined in the hands of one and the same agency, with the possible exception of the International Committee of the Red Cross. While the importance of ensuring the observance and promotion of international humanitarian law could not be overestimated, a dilemma existed which was not easy to resolve.

Mr. Cummings* observed that, when referring to international treaty negotiations on weapons, one had in mind nuclear weapons, chemical weapons, biological weapons—weapons on which there was a common view that they should never be used—with the relevant treaties basically aiming at limiting the production or stockpiling of the weapons concerned and encouraging or requiring the destruction thereof. He noted, however, that there were other weapons which the military forces of most nations believed they should have at their disposal, such as land mines. And yet, it was widely recognized that those weapons had devastating effects on the civilian population, not just during an armed conflict, but also after the armed conflict and for many years; they stayed in the ground and remained effective; they could kill people 10 or 20 years after they were laid; they could also prevent people from returning to their homes and cultivating their fields, hamper relief work and generally be a long-term hazard.

According to reports to the Congress of the United States that had been prepared two years earlier, the common estimate was that there were at that time approximately 100 million land mines planted around the world, most of which were planted in the course of the last 15 years, i.e., subsequent to

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the conclusion of a humanitarian law agreement on land mines. At the time the study on the effects of land mines was prepared, it was estimated that the casualties amounted to approximately 150 people a week, mostly civilians. Currently, based on extensive studies, it appeared that close to 500 people per week were injured, with approximately half of the casualties occurring in Africa. Those were devastating statistics. No less grim was the fact that it cost around \$3 to make a cheap mine, but about \$5,000 to treat a victim who survived and some \$1,000 to clear one of those \$3 mines. And what hope could one have to solve the problem internationally when one knew that in 1994, more than 2.5 million land mines might have been planted as against the 80,000 which had been cleared in 1993. And this happened even though humanitarian law made it very clear that one could not, under any circumstances, target civilians.

Some States like the United States and France and some other 12 countries had imposed a virtually total ban on the export of land mines—in the case of the United States, with no exceptions. The United Nations General Assembly had furthermore called for a moratorium on exports and President Clinton, in his address to the United Nations in September 1994, had called for the eventual elimination of all anti-personnel land mines and for the negotiation of a regime outside the context of humanitarian law among producer countries, a regime comparable to the missile control regime whereby producers agreed not to export, except possibly under certain circumstances, not to produce certain kinds of mines, and basically to try to control the flow of millions and millions of land mines towards other countries throughout the world.

As regards developments in the field of humanitarian law, he wished to refer to the Convention on Conventional Weapons of 1980 with its three Protocols that was an offshoot of the negotiation of Additional Protocols I and II of 1977. The Protocols to the Convention dealt, respectively, with fragments that could not be detected by X-ray, with land mines, booby traps and other devices and with air-delivered incendiaries. Some 40 countries only were currently parties to the Convention and another 10 or so had completed ratification procedures, so that approximately 50 countries were expected to be parties by September 1995. It had been decided to review and revise the Protocol dealing with land mines and four expert meetings had been held at Geneva during the past year to do the groundwork; the negotiation was to start in late September 1995 in Vienna.

The Protocol on prohibitions or restrictions on the use of mines, booby traps and other devices, as it stood, was pretty simple: It basically required countries to record the location of minefields and to provide the corresponding information to the ex-enemies at the end of the war for clearance

purposes; there were special rules regarding those mines that could be fired by artillery or dropped by aircraft, the areas which had concentrations of civilians and the prohibition of booby traps. This modest instrument was widely considered as flawed because it had not achieved the expected results, but the problem rather lay in the nature of the conflicts: Almost all of the conflicts which had taken place since 1980, whether in Cambodia, Mozambique, Angola or Somalia, were internal armed conflicts, whereas the Protocol only applied to traditional armed conflicts between States.

What was being attempted in the proposed revision of the Protocol was first of all to expand its scope and make it applicable to internal armed conflicts, following a general trend whereby a weapon system was first regulated at the level of international conflicts before the relevant rules became applicable to internal conflicts. That had happened with chemical weapons: the new Chemical Weapons Treaty prohibited the use of chemical weapons as a method of warfare, without distinction as to whether it was an internal armed conflict or an international one. That was also the net effect of the 1972 Convention on Biological Weapons,¹⁰ bearing in mind that since one could not keep biological weapons for any offensive purposes, the use of such weapons in an internal armed conflict was *ipso facto* ruled out.

Professor Condorelli* agreed that never in the recent history of international relations had international humanitarian law attracted so much attention and occupied so large a place in the diplomatic discourse. International action in the name of humanitarian law was now a frequent occurrence, both for States and international organizations, including the United Nations. Thus, one could really speak of an extraordinary expansion of international humanitarian law.

That expansion, even if many rules had been developed in recent times, did not mainly concern law-making. It was rather in the area of law enforcement and, as Judge Bedjaoui had pointed out, was due to the fact that under the pressure of public opinion and the media, and in the present world situation, a large number of new actors were entering the scene of international humanitarian law.

It was interesting to note that the international humanitarian law in force was practically silent on the role which could be played by international

¹⁰ *International Legal Materials*, vol. 11 (1972), p. 310.

* Head of the Department of Public International Law, University of Geneva, Geneva, Switzerland.

organizations; only vague allusions to this aspect were to be found here and there, for instance in article 89 of Additional Protocol I. Yet the evolution represented by the emergence of new actors was by no means contrary to the existing law. It took place in the framework and within the scope of a central principle of international humanitarian law, namely the principle codified in article 1 common to the Geneva Conventions and repeated in article 1, paragraph 1, of Additional Protocol I according to which States had a duty not only to respect but also to ensure respect for international humanitarian law. That principle meant that States were under an obligation to take care of violations wherever they occurred and to take measures in order to stop such violations. Given the nature of this obligation, it was clear that international organizations did not have the means necessary to give meaning and effect to the principle in question.

It was worth noting that article 1 common to the Geneva Conventions, which was formulated in 1949, had been in the shadow for more than 35 years; only a few authors saw in it something more than a formal clause on an empty formula devoid of any significant effect. It had then gradually acquired a more and more prominent place until it had come to be viewed as embodying a key principle of international humanitarian law on the basis of which one could justify all kinds of collective actions in order to ensure respect for humanitarian law. In his view, the discovery of article 1, without any doubt, was largely owed to the International Court of Justice which, in its 1986 Judgment in the *Nicaragua* case, had very strongly stressed the paramount importance of article 1 and its character as a fundamental principle of general international law.

The main novelty in the development of contemporary international humanitarian law lay in the emergence of new actors which entered the scene of humanitarian law through the door of article 1. The United Nations had fully taken into its hands international humanitarian law and initiated all kinds of measures in the framework of Chapters VI and VII, thereby increasingly involving itself in *jus in bello*. This appeared to be the most important development in international humanitarian law, a development which brought with it many problems including, for example, the intertwining of humanitarian and political actions.

While the United Nations was a vehicle for ensuring respect for humanitarian law, it was impossible for it and, in particular, for the Security Council to play the primary role in ensuring respect for humanitarian law in all kinds of situations. The machinery of the Security Council was too heavy, too cumbersome and too much hampered by political and economic constraints. Thus, interventions of the Security Council, or of the United Nations, were possible only in exceptional situations, as the last resort. In all other cases,

there was no alternative to relying on the provisions of the Geneva Conventions and other instruments.

While the International Committee of the Red Cross could always be counted on to work actively for peace, one had to recognize that the arrangements provided for by the Geneva Conventions and Additional Protocol I had not been very effective. Thus, the International Fact-finding Commission created by the Protocol had not been utilized. As regards the future, the negotiations undertaken within the framework of the 1993 Geneva Conference on the Protection of the Victims of War, with the aim of identifying practical means to ensure respect for humanitarian law and to make proposals for the next conference, were disappointing because they were hampered by the requirement of consensus. The future of international humanitarian law was therefore a source of concern as it proved extremely difficult to respond effectively to the dramatic escalation of the humanitarian problem.

Professor Schindler* viewed non-implementation as one of the crucial problems of humanitarian law at present. This view, which connoted a crisis of humanitarian law, could at first sight appear difficult to reconcile with the theme of the Round Table: "Expanding horizons of international humanitarian law". Yet, there was no contradiction, and in fact those were two closely interconnected phenomena.

He shared the view previously expressed that the practical importance of humanitarian law had greatly increased in the past three decades. In the late 1950s and early 1960s, Governments were not eager to make any particular efforts to promote and develop that branch of international law because few armed conflicts were going on at that time. Since then, the number of armed conflicts, especially conflicts of a non-international character, had increased enormously, mainly as a result of the political instability in many newly independent States. In the past two or three decades there had consistently been, at any given moment, some 30 armed conflicts, mostly internal conflicts, simultaneously going on in the world. The interest in humanitarian law had grown accordingly.

Humanitarian law had also acquired increased relevance as a result of its growing connection with human rights law. After remaining during the early years of the United Nations outside the field of interest of the Organization, it had, starting in the late 1960s, slowly become a companion of, and a complement to, human rights law. In most armed conflicts, both systems of law were simultaneously applicable. United Nations organs, especially the Security Council, the General Assembly and the Commission on Human Rights,

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had concerned themselves with both questions of humanitarian law and human rights law in the context of armed conflicts.

A third factor which had brought humanitarian law to the forefront was the breakdown of government structures in several States in recent years. In such circumstances, human rights which primarily protected individuals against abuses of State authority temporarily lost their practical significance, while humanitarian law remained applicable in so far as it aimed at the protection of, and assistance to, victims of those circumstances. States and international organizations had in such cases been very reluctant to use political and military means to re-establish order in the respected States, preferring to restrict themselves to humanitarian assistance to the victims, with humanitarianism thus becoming a substitute for political solutions. All these developments justified the use of the expression "Expanding horizons of humanitarian law".

It had to be recognized, however, that this expansion went hand in hand with less and less implementation. The more armed conflicts were fought, the more apparent the difficulties of implementation became. One of the problems was that the knowledge of humanitarian law was still restricted to a very small circle of persons. Another was that ensuring respect for humanitarian law was always more complex in non-international conflicts where non-State entities were involved. In such situations, one could fear not only ignorance of the law, but also wilful and open violations of humanitarian law, such as the killing and expelling of civilians, which could even become the primary aim of the parties to the conflict. In past decades, efforts were made to conceal such violations of humanitarian law, but lately they were committed openly.

Account should also be taken of the fact that the rules concerning non-international armed conflicts left much to be desired, since only one article, namely, common article 3 of the four Geneva Conventions of 1949, was applicable in such conflicts, plus Protocol II for the States which were parties to it. All the rest of the existing hundreds of detailed provisions only applied in the context of international conflicts. Widespread disregard for humanitarian law had induced the Swiss Government, as the Depository of the Geneva Conventions and Additional Protocols, to convene in 1993 an international conference on the protection of the victims of war, which had taken place in Geneva and had adopted a declaration urging States to make every effort to improve the situation. The declaration enumerated possible measures to encourage compliance with humanitarian law. Furthermore, an intergovernmental group of experts convened in January 1995 had elaborated recommendations on practical measures of implementation to be submitted to the International Conference of the Red Cross and Red Crescent in December 1995 for decision.

Among the measures aimed at ensuring better implementation of humanitarian law, one could distinguish between measures of prevention which were to be taken in times of peace and measures of repression to be taken in cases of violation of humanitarian law in an armed conflict. As regards prevention, States had the duty, under the Geneva Conventions and Protocols, to enact a wide range of laws and regulations for the implementation of these instruments, including those on penal sanctions, on the use of the emblem, on medical and other personnel, etc. While there was hardly a State which had so far fully complied with all its obligations, many States had adopted legislation on at least some of the more important aspects.

Besides national law-making, dissemination of humanitarian law not only among military personnel but in the population at large was of particular importance. This was not an easy task, since States in times of peace were not eager to concern themselves with the law intended to apply in times of war only and unrelated to any particular national interests. At the meeting of government experts held in January 1995, it had been proposed to establish a reporting system akin to those provided for in human rights treaties whereby States were obligated to submit to a designated international body periodical reports on the laws and regulations they had enacted and the dissemination steps that they had undertaken. This proposal had not been favourably received by the majority of the experts and had, in any event, the drawback of relating to preventive measures only, the impact on State sovereignty being thus very limited. The group of experts had recommended that the International Committee of the Red Cross should strengthen its capacity to provide advisory services to States in their efforts to implement and disseminate humanitarian law, but offers of such services could not have the same effects as would have an obligation to submit periodic reports to an international body.

Another question addressed by the experts concerned the advisability of developing the law applicable to non-international armed conflicts. The consensus view of the experts had been that the time was not ripe for embarking on such an exercise and that it was more important to develop the existing practice and to ascertain the extent to which customary rules had emerged in the course of the past decades, especially with respect to the conduct of hostilities in non-international conflicts. The experts had recommended that the International Committee of the Red Cross prepare a report on the latter aspect and that new conventional rules be elaborated only with regard to specific questions such as the prohibition of the use of certain weapons in non-international, as well as international, armed conflicts.

As regards the measures of repression to be taken in case of violations of humanitarian law, it was essential that all States prosecute such violations in

their national courts in accordance with their obligations under the Geneva Conventions and Protocols and that they cooperate towards the establishment and effective functioning of international criminal tribunals or a future permanent court. Furthermore, article 1 common to the Geneva Conventions imposed on States a duty to ensure respect for humanitarian law not only within their own territory but also by other States. In cases of grave breaches of humanitarian law, States were permitted to take measures short of the use of force, particularly reprisals, against the responsible State. Experience showed, however, that States were seldom ready to react in this way to breaches of humanitarian law by other States, unless their own interests were at stake. As for the International Committee of the Red Cross, it did not possess adequate instruments for the repression of violations. The International Conference of the Red Cross and Red Crescent could also discuss violations and condemn them, but since it was held every four years only and should stay away from political disputes, it could hardly be considered a suitable machinery for ensuring the application of humanitarian law. More promising in that respect was a proposal of government experts that the Depositary of the Geneva Conventions and Additional Protocols organize periodic meetings of the States parties to the Geneva Conventions and to the Protocols to consider general problems regarding the application of humanitarian law. While such meetings of the States parties would not discuss concrete cases of violations of humanitarian law, they could nevertheless encourage compliance with international humanitarian law.

Against this background, the Security Council and the United Nations Commission on Human Rights appeared to bear the main responsibility for responding to grave breaches of humanitarian law which, as made clear by the Council, could constitute a threat to international peace and security and give rise to the use of force to re-establish order in the respective States and to bring humanitarian assistance to the victims. As for the Commission on Human Rights, it could exert considerable pressure on States by investigating violations of human rights and of humanitarian law in particular States.

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A number of participants supported the notion that there was a need to develop rules of humanitarian law applicable to internal conflicts and to impose on all parties to such conflicts an obligation to respect fundamental humanitarian principles. The question was raised whether from the absence of an explicit reference to common article 3 of the Geneva Conventions and Additional Protocol II in the Statute of the International Tribunal for the Former Yugoslavia and the presence of such a reference in the Statute of the International Tribunal for Rwanda, one could infer that non-international

armed conflicts were outside the jurisdiction of the former Tribunal, and whether this presented a general problem for the development of international humanitarian law applicable to non-international armed conflicts. In response, it was pointed out that the Prosecutor in the recent indictments issued by the Yugoslav Tribunal had taken the position that the jurisdiction of the Tribunal encompassed both internal and international matters, a position which was endorsed by the President of the Tribunal. The remark was made, however, that the jurisdiction *ratione temporis* of the Yugoslav Tribunal precluded the Tribunal from dealing with certain more domestic incidents of violations that occurred before 1 January 1991. It was suggested that the explicit reference to internal armed conflicts in the Statute of the Tribunal for Rwanda could only strengthen the position of international tribunals in dealing with other conflict situations which might arise in the future.

The view was also expressed that the legal theory concerning violations of Additional Protocol II was too restrictive. In this connection, it was noted that, while the draft statute of an international criminal court prepared by the International Law Commission excluded violations of Additional Protocol II from the jurisdiction *ratione materiae* of the court on the grounds that Protocol II did not contain clear provisions regarding grave breaches, the list of crimes to be included within the jurisdiction of the court contained in the draft statute was not intended to be exhaustive and, therefore, would not prejudice, in other cases, the argument that Protocol II defined offences *jure gentium* and could serve as a basis for prosecution in various contexts. It was noted, however, that the Security Council in the Statute of the Tribunal for Rwanda had taken a direct and forward-looking approach by stating explicitly that violations both of common article 3 and Protocol II would provide the bases for international criminal responsibility and that, interestingly, no members of the Council have disagreed.

A number of participants referred to the difficulties involved in the application of international humanitarian law. It was pointed out that, while States had the primary responsibility for ensuring the application of international humanitarian law, there were new actors on the scene, such as the United Nations and its peace-keeping forces, whose role in implementing the law had gained importance as they were increasingly involved in armed conflicts around the world. The question was raised, in particular, of the applicability of international humanitarian law to United Nations forces, since the Organization was not party to the Geneva Conventions and the Additional Protocols thereto. There was a view that, as national contingents under the jurisdiction of the sending States, they were bound by rules of international humanitarian law regardless of their status as members of United Nations forces. It was pointed out, however, that, because national contingents oper-

ated under United Nations command, their status *vis-à-vis* the Geneva Conventions and the Additional Protocols was ambiguous. In this context, reference was made to the ongoing exercise undertaken jointly by the International Committee of the Red Cross, the United Nations Office of Legal Affairs and Department of Peace-keeping Operations to clarify the rules of international humanitarian law applicable to United Nations forces.

The suggestion was also made that the rules of international humanitarian law applicable to United Nations forces should be clarified by means of a new protocol. Concern was voiced, however, that this approach could result in a selective application of the rules which would endanger the unity of international humanitarian law as a whole. It was, moreover, noted that the United Nations had consistently taken the position, duly reflected in the agreements on status of forces, that its forces were bound by the principles and spirit of international humanitarian law, a position which established the responsibility of the United Nations as well as of the sending States for ensuring observance of the rules of humanitarian law by United Nations forces. The suggestion was also made that what was not clearly resolved by existing practice could be dealt with in a special manual.

As regards the crucial role to be played by national courts in the implementation of international humanitarian law, the view was expressed that political considerations related in particular to the desirability of bringing armed conflicts to an end had often been a hampering factor. The proposed international criminal court could be helpful in this respect, but its character and functions needed further clarification, for example, with regard to its jurisdiction over breaches of the laws and customs of war, its complementarity to national courts or its relationship with the Security Council.

The point was also made that, as exemplified by the Iraq-Kuwait conflict, the prosecution of war crimes and the implementation of humanitarian law came across many obstacles and that the inability of the international community to cope with the problem posed the greatest threat not only to justice but also to the credibility of the system of international humanitarian law as a whole. The development of an effective international mechanism for the supervision of the application of humanitarian law at the national level was considered to be essential, but also very problematic. Regret was voiced that the proposal referred to earlier for the establishment of a reporting system had not met with a favourable response at the 1993 Geneva Conference and the hope was expressed that Governments, whose determination to work out concrete measures to ensure that the enforcement of humanitarian law was decisive, would become more conscious of the problem.

As regards resort to reprisals as a means of enforcing international humanitarian law, the remark was made that it raised very complex problems

and that Additional Protocol I prohibited reprisals aimed at civilians and civilian objects.

Many participants stressed that the rules of international humanitarian law would be more readily complied with if they were simpler and easier to understand. The need to promote the teaching and dissemination of those rules was also highlighted.

IV. THIRD-PARTY DISPUTE SETTLEMENT
AT THE TURN OF THE CENTURY:
SOME OLD PROBLEMS REVISITED AND
SOME NEW PROBLEMS NOT FORESEEN
AT THE HAGUE IN 1899/1907, OR IN THE
STATUTES OF THE PERMANENT COURT OF
INTERNATIONAL JUSTICE AND THE
INTERNATIONAL COURT OF JUSTICE*

A. INTRODUCTORY STATEMENT BY THE MODERATOR:
SHABTAI ROSENNE**

The Conferences of 1899 and 1907 ushered in the twentieth century and their work and their influence are still with us. Convened at the initiative of the Czar of Russia, closely supported by the President of the United States, the Conferences were dominated by alarm at the oncoming First World War and had two major purposes. One was to find ways of avoiding war by developing methods for the pacific settlement of disputes; the other, at that time related, was to humanize war through the development of humanitarian law so as to spare all belligerents some of the horrors of war in a legal system in which war was a legitimate instrument of foreign policy.

The delegations at those conferences were composed of senior diplomats, of senior officers of the land and sea armed forces and senior international lawyers. It is clear from reminiscences which have since been published that there was a lot of quarrelling within delegations between the military and the civilian elements with compromises being achieved through deals and set-offs just as is done today in modern conference diplomacy, with the

* Round-table discussion held on Tuesday, 14 March 1995.

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difference that The Hague Conferences were not confined to one specific subject but addressed two almost incompatible topics.

The Conventions of 1899 and 1907, which are still in force, outlined dispute settlement means which, although conceived in the context of a legal system in which war was a recognized method for the settlement of disputes, were intended to provide a viable alternative to the use of force as a way of solving disputes. They attempted to meet an international concern which had come into prominence both in Europe and on the American continent during the nineteenth century and reached its apogee in the famous *Alabama* arbitration. It should be recalled that encouragement to the development of international arbitration and, more generally, to the codification of international law to buttress the maintenance of international peace increased after the Franco-Prussian war of 1870, which was closely followed by the establishment of two organizations still in existence and still very active: the Institute of International Law and the International Law Association. While the Institute succeeded in producing, in 1875, the first internationally accepted code of international arbitration procedure, the attempts which were then made to establish a compulsory arbitration court failed on two main grounds: one was the difficulty of agreeing on the composition of a tribunal that would be generally representative but on which great Power representation would be assured; the second was the flat refusal of the great Powers to accept a system in which they could be hauled into court by another dissatisfied Power—a problem which would arise again in 1899, 1907, 1920 and 1945 and has come to be known as the problem of the “unwilling respondent”.

In the framework of the League of Nations, the first difficulty was solved through a system which has now been taken over in the United Nations—namely, double election, in the Security Council and in the General Assembly, but no advance could be made in the area of compulsory jurisdiction despite very strong pressures from small Powers, especially from Latin America.

It should be recalled that the Permanent Court of International Justice was envisaged as having a role in the monitoring and application of the peace settlement of 1919: two articles in its Statute (Articles 35 and 37) were designed to enable litigation with the defeated Powers at a time when they were not members of the League of Nations and therefore had no status in relation to the Permanent Court and those provisions were actually used for that purpose, as illustrated by the *Wimbledon* case. The reorganization of the world in 1945 was handled differently: the establishment of the United Nations and of the International Court of Justice took place while the war was still in progress and had no relation at all to the peace settlement.

The establishment of the present Court as the principal judicial organ has certainly enhanced the status of the institution but, with respect to the

Statute, the San Francisco Conference was conservative. It made no fundamental change in the organization and procedure of the Court's predecessor. The important book published by the President of the Court, Judge Bedjaoui, on the control of the legality of the actions of the Security Council contains a remarkable collection of documents showing carelessness, if not negligence, on the part of the sponsoring Powers of the San Francisco Conference in facing the central question of the Court's place in the general pattern for the pacific settlement of disputes within a legal system in which the use of force was virtually outlawed. Although some recent cases have raised the spectre of a "constitutional crisis" around the mutual relations of the Security Council and the Court, neither organ has so far shown any inclination to place itself in a posture of confrontation with the other.

Against this general background, I would now like to make five points.

First, one should bear in mind, in considering the problems outlined above, that any reform requiring an amendment of the Statute should for the moment be excluded. However, it might be possible and even desirable, subject to the required political green light, to convene an official committee of jurists, similar to the Washington Committee of Jurists of 1945, whose functions would be to review the Statute of the Court and to make recommendations to Governments and to political organs on the basis of preparatory work to be undertaken through the Secretary-General assisted by independent experts and with the involvement of different regional organizations. This review process would bring out the strength of the political feeling and the degree of political controversy on any particular matter or suggestion. It could be conducted bearing in mind the important innovations to be found in the Statute of the new International Tribunal for the Law of the Sea, especially as regards intervention and provisional measures of protection.

A second point concerns the problems of access to the Court. What I have in mind is not access of intergovernmental organizations to the Court's contentious jurisdiction nor access of private persons, physical or legal, to the contentious and advisory jurisdiction of the Court. Nor am I thinking of the possibility of granting non-governmental organizations in a consultative relationship with the United Nations some right of appearance before the Court or of access to the advisory competence of intergovernmental organizations that are not specialized agencies or organs of the United Nations—an issue which has been raised both by the Secretary-General in his original "Agenda for Peace" and by the President of the International Court of Justice in his address to the General Assembly last October. Rather, I am thinking of the question which arises out of the consistent interpretation of Article 34 of the Statute as limiting access to the contentious jurisdiction of the Court to independent States. Decolonization and the possibility

that a population might voluntarily choose a form of semi-independence with some control over its foreign relations as its style of decolonization places a large question mark alongside this interpretation. This issue has been faced for the first time in the participation clause (article 305) of the Montego Bay Convention. At the time of the adoption of the Statute of the Permanent Court in 1920 and of the Statute of the present Court in 1945, the international status of some of the parties was not unambiguously that of an independent State. Mention may be made in the first case of the members of what was then called the British Empire and in the second case of two of the constituent republics of the USSR. Is it necessary and is it desirable to perpetuate the pattern set by the Council of the League of Nations and followed by the Security Council by which only independent States can become parties to the Statute of the Court? Such a restrictive approach has not prevailed in the practice of international arbitration since arbitration has been resorted to from 1919 onwards by semi-independent and even by colonial territories.

A third point relates to the current structure of international litigation which assumes that the case can take place only between two parties, an applicant and a respondent. The exceptional procedure of intervention, which is designed to allow third parties to get into the proceedings, has indeed enabled third parties to make their views and interests known to the Court and to the litigating States but has not enabled them to become directly involved in the mainline litigation, with the consequence of the judgement being binding also on them. It should be added that intervention is virtually unknown in international arbitral procedure and that agreements of arbitration often exclude the possibility of third-party intervention.

Since 1946, substitutes—inadequate substitutes—have been devised for possible multiparty disputes: cases have been joined and cases have been “paired” with unforeseen consequences, not all of which have yet surfaced. In one recent instance, the President of the Court had to recuse himself in one of the two “paired” cases because he was a national of one of the litigant States in the other of the “paired” cases.

The question which requires close examination is whether it is possible and desirable to conceive of properly structured international litigation involving more than two parties, each with claims against all the others. The Drafting Committee of the Third Conference on the Law of the Sea tried to look at this issue in connection with the composition of the conciliation and arbitration commissions provided for in the Convention but it could not make headway in the Statute of the International Tribunal for the Law of the Sea (ITLOS). This is all the more unfortunate as it is in the area of the law of the sea that the problem has come to the forefront: attempts at intervention in the *Libyan continental shelf* cases involving overlapping claims to areas

of continental shelf, or the non-intervention of a third party in the *Gulf of Maine* case led to protracted and complicated litigation which could have been avoided, had it been possible to conceive of properly structured litigation involving more than two parties. The issue is not limited to maritime delimitation disputes. The *Phosphate Lands in Nauru* case, and even more so the out-of-court settlement, provides another illustration of litigation between two parties, when in fact others were also involved. The problem is at present under consideration in the Institute of International Law and controversy has arisen between Judge Schwebel and myself as to the possibility of introducing procedures of the type envisaged in article 177 of the Treaty of Rome establishing the European Economic Community¹ into international practice, probably through an extension of the advisory procedure.

The fourth issue which I wish to raise concerns the relationship between existing institutions such as the International Court of Justice and newly created dispute settlement mechanisms—an issue which has become more pressing with the entry into force of the Montego Bay Convention and the establishment of the ITLOS. Many ask why existing institutions could not be used and point to the risk which a multiplicity of tribunals could pose for the uniformity of jurisprudence. As far as the law of the sea is concerned, for the International Court of Justice to perform some of the tasks assigned by the Convention to its compulsory dispute settlement machinery would require fundamental changes in the Court's practice and procedure, and probably also amendments to the Statute. The ITLOS has a residual compulsory jurisdiction as regards provisional measures of protection and the prompt release of vessels and its functions in these areas cannot be performed by the International Court of Justice as things are today. As for the risk to the uniformity of jurisprudence, it should be borne in mind that international courts and international arbitral tribunals have been existing side by side since 1922 and that there is no serious sign of uniformity of jurisprudence

¹ This article reads as follows:

“The Court of Justice shall be competent to make a preliminary decision concerning:

“(a) The interpretation of this Treaty;

“(b) The validity and interpretation of acts of the institutions of the Community; and

“(c) The interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

“Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

“Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice”.

being harmed in any way. Whenever necessary, diplomatic action has been taken to undo the effects of judicial decisions which were not accepted by the international community, a case in point being the *Lotus* case.

Turning to my fifth point, I wish to recall the famous Latin maxim *Narra mihi facta, narrabo tibi jus*. It seems clear that one of the assumptions underlying the establishment of the Permanent Court and of the present Court, namely, that, in international litigation, the dispute would usually be on the relevance or the weight of facts rather than on what the facts are has not been borne out of experience. The very first contentious case that came before the Court, the *Corfu Channel* case, raised serious issues of fact which the Court was unable to resolve solely on the basis of the evidence before it so that it had to resort to the assistance of a committee of experts. There have been other cases in which the facts have been contested and even contradicted, following intensive questioning of witnesses from the bench but, since the party concerned was not appearing in that phase of the case, the Court based its findings of fact partly on the procedural ground that the witnesses had not been cross-examined and that the party adversely affected must take the consequences of its own non-participation in the case. One is thus led to the conclusion that the Court is not structured as a fact-finding organ: it is only concerned with establishing the facts that it finds necessary for its decision, it has never made use of its power to appoint assessors, it has sparingly used its power to appoint experts, it is not protected by any law of perjury from false witnesses and it has none of the powers of an internal court to obtain evidence through letters rogatory nor powers of subpoena. It may be recalled in this context that, in 1939, the Harvard Law School completed a project on international judicial assistance which contained some long articles on assistance to international tribunals.

B. SUMMARY OF THE DISCUSSION

Mr. Jonkman,* explaining the reasons behind the efforts undertaken during the last few years toward the revitalization and modernization of the Permanent Court of Arbitration, recalled that the establishment of the Court in 1899 had given expression to the then completely novel idea that, in case of failure of the diplomatic process, war was not the only alternative left to the parties to a dispute and that arbitration and mediation—to which conciliation was added at a later stage—could also be resorted to as ways of solving disputes.

* Secretary-General, International Bureau of the Permanent Court of Arbitration, The Hague, Netherlands.

The Permanent Court was at first quite popular and scores of treaties provided for its involvement in the settlement of disputes. But the hopes which had been placed in arbitration as an instrument for the prevention of conflicts were crushed by the First and then the Second World Wars. Two other developments contributed to the slowing down of the activity of the Permanent Court: first, the creation of the Permanent Court of International Justice backed by the League of Nations—later replaced by the International Court of Justice backed by the United Nations—and second, the commercialization of arbitration, conciliation and fact-finding (which, incidentally, had the effect of rendering the procedures in question expensive and slow).

On the other hand, the Permanent Court greatly benefited from the establishment in 1981 of the very important Iran–United States Claims Tribunal, which originally had its seat in the Peace Palace. It also received a new impetus from the United States–United Kingdom Arbitration concerning Heathrow Airport user charges and from the UNCITRAL Arbitration Rules which confer on the Secretary-General of the Permanent Court a role in the appointment of members of arbitral tribunals.

As for the future, the goals were, on the one hand, to increase awareness of the PCA system and promote confidence in its handling of arbitration, conciliation, mediation and inquiry procedures and, second, to modernize the Court's contribution to international thinking on the settlement of disputes.

As regards the first goal, the Permanent Court had improved its facilities in the Peace Palace and adopted new rules of procedure for State/State and State/non-State disputes. It was offering possibilities of arbitration under its aegis outside The Hague and had established a Financial Assistance Fund to enable developing countries to meet, in whole or in part, the costs involved in arbitration. The idea was to bring about a system which, while being cost-efficient, would offer both the advantages of institutional arbitration (in particular, the guarantee of obtaining an award) and the advantages of non-institutional arbitration (including flexibility and party-autonomy). As a result of these efforts, more and more "guest" tribunals came to the Peace Palace to take advantage of the facilities and administrative support of the Permanent Court. The number of requests for assistance under the UNCITRAL Arbitration Rules now averaged 8 to 10 per year.

With respect to the second goal, there was a need to reflect on the increasing delays and costs involved in arbitration and even mediation and conciliation. The Permanent Court of Arbitration could play a useful role in this respect in particular in the framework of its Administrative Council, which met twice a year, and of its Steering Committee which was mandated to make recommendations on whether to revise the 1907 Convention. Possible activities for the future included the elaboration of new rules for arbitration

between international organizations, the adoption of new rules on conciliation, the modernization of the rules for inquiry and the strengthening of the cooperation involving the Permanent Court and the United Nations not only in the interest of the Court, which had everything to gain from the backing of an important organization, but also in the interest of the United Nations for the implementation of Article 33 of its Charter and to supplement the activities of the International Court of Justice.

In conclusion, Mr. Jonkman stressed the positive features of the Permanent Court as an intergovernmental non-profit institution with a long-standing relationship with the United Nations, which offered highly developed facilities and whose new dynamism States and non-State entities should take advantage of to promote the rule of law.

Replying to remarks on the appropriateness of relying on a Committee of Jurists to solve the problems encountered in the functioning of the International Court of Justice, the Moderator recalled that the ground for the meeting of the Washington Committee of Jurists had been prepared in the framework of two informal intergovernmental forums, the Informal Inter-allied Committee, convened under the auspices of the British Government in 1943, whose report was published in the 1945 volume of the *American Journal of International Law*, and the Inter-American Committee of Jurists, which met in the early 1940s and continued until 1945 and whose report was published in the *American Journal of International Law* in 1944. As he had stated in his presentation, a number of prerequisites would have to be met for the work of a Committee of Jurists to be meaningful and likely to receive the required number of ratifications.

Professor Holtzmann* observed that the drafters of the 1899 and 1907 Conventions foresaw that problems would arise and therefore created a remarkably flexible mechanism which had enabled the Permanent Court of Arbitration to meet the changing needs of the time. Unlike the International Court of Justice whose Statute could only be amended through a tremendously difficult and complex process, the Permanent Court could deal with most of the problems it encountered in a very simple fashion. Its Administrative Council, consisting of Ambassadors resident at The Hague, could be convened on three weeks' notice or less. Its Steering Committee also operated in a very flexible way. Mention could be made in this context of the elaboration in 1962 of rules for arbitrating disputes between a State and a non-State

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party (which had since then been modernized) and of the possibility of convening arbitral tribunals consisting of persons who were not members of the national groups. Such adjustments had been made without resorting to the cumbersome mechanism of a diplomatic conference.

The new rules for arbitrating disputes between two States allowed for intervention if the parties agreed to it in a future dispute clause or once the dispute had arisen. Those rules also addressed—as did the rules for arbitrating disputes between States and non-States parties—the question of interim measures of protection: unless the parties otherwise agreed, the arbitral tribunal could, at the request of any of them, take any interim measures it deemed necessary to protect the respective rights of either party. As for international organizations, the flexibility that permitted the Permanent Court of Arbitration to reach out and deal with cases of arbitrating disputes between a State and a non-State party, permitted the creation of rules for dealing with disputes involving international organizations. The question of perjury could be covered by agreements between the parties made in advance or in connection with the submission of the dispute. The two sets of rules were quite satisfactory on such things as discovery, drawing adverse inferences from failure to produce documents requested by the Arbitral Tribunal, witnesses, experts, etc. They were well adapted to a fact-finding tribunal.

Commenting on the Moderator's reference to article 177 of the European Community Treaty, **Professor Bernhardt*** pointed out that, under the provision in question, the Court of the European Community did not give advisory opinions: it decided certain preliminary questions with binding force for the national court which had submitted the questions. Whether it would be useful to give the International Court of Justice competence to make non-binding pronouncements in this area was open to question.

On the possible reform of the Statute of the International Court of Justice, he pointed out that, while exchanges of views on the matter among specialists were worthwhile, much would depend on the extent of relevant treaty commitments. Being bound by a minimum of such commitments, the European Court of Human Rights was able to adapt its practice to evolving needs and make very far-reaching reforms. An example was the 1993 amendment of rule 51 of the Rules of Court. The original text provided that, when a case pending before a Chamber raised one or more serious questions affecting the interpretation of the European Convention on Human Rights, the Chamber could relinquish jurisdiction in favour of the plenary court. This procedure had proved too cumbersome and rule 51 had therefore been amended to the effect of substituting a Grand Chamber for the plenary court

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as the forum in favour of which a Chamber could relinquish jurisdiction. The question thus arose whether it was better to regulate such matters in a formal treaty—which would make adaptations to evolving needs more difficult—or to leave a wider measure of autonomy to the Court.

Professor Treves* pointed out that a growing number of disputes involved more than two parties and that, in developing judicial or arbitral institutions, due account should be taken of this trend towards multilateralization, rooted in particular in the concept of *erga omnes* obligations and the consequential universalization of the status of injured State.

Professor Pellet** observed that the rules of the Conference on Security and Cooperation in Europe (CSCE) Court of conciliation and arbitration, which was to meet for the first time the following month, had been elaborated in a complex framework of expert meetings and official and semi-official meetings. Attempts to give access to the Court to individuals and non-State entities had come across vigorous opposition and reforming the World Court along such lines would be truly revolutionary.

The Stockholm Convention envisaged the possibility that conciliation commissions or arbitral tribunals might have to deal with multilateral disputes and provided a painstakingly negotiated and, on the whole, satisfactory answer to the politically sensitive issue of the relationship between available settlement mechanisms.

On the question of fact-finding, he felt that, in the *Military and Paramilitary Activities in and against Nicaragua* case, there had been cross-examination from the bench in an effort to make up for the absence of one of the parties and he was not sure that cross-examination of witnesses in international proceedings was to be encouraged.

After observing that the distinction between fact-finding and fact-interpretation was not easy to make, he pointed out that resort to experts did not call for any reform of the Court. He, on the other hand, saw a need for the Court to alter its methods of work lest litigants might get discouraged by the slowness of the proceedings.

Mr. Arguëllo Gómez*** agreed with Professor Pellet that there was extensive cross-examination from the bench in the *Military and Paramilitary Activities in and against Nicaragua* case, even though all the relevant facts

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** Professor of International Law at Paris-X University, Paris, France; member of the International Law Commission.

*** Ambassador of Nicaragua to the Netherlands, The Hague, Netherlands.

were undisputed. He added that the long separate opinion appended to the Judgment of the Court had been published immediately, while the memorial and other documents were published 10 years later. With reference to third-party intervention, he stressed that intervention before a chamber of the Court posed special and complex problems.

Professor Szafarz* felt that the Security Council should be empowered to mandatorily direct disputes which were likely to endanger the maintenance of international peace and security to the International Court of Justice. She mentioned in this context the institution of directed conciliation adopted in the CSCE in 1992. Another area worthy to be explored in endeavouring to develop the law concerning the Court related to the obligations of States parties to treaties providing for the jurisdiction of the Court which were not at the same time parties to the Court's Statute. While Article 35, paragraph 2, of the Statute provided for the right of States not bound by the Statute to appear before the Court, the question arose of the exact meaning of the phrase "subject to the special provisions contained in treaties in force". Was it clear enough from the traditional judicial clause included in treaties that States which were not bound by the Court's Statute were nevertheless obliged to accept the Court's procedure and Judgment when sued by the other party to the treaty? If the answer was in the negative, then the spelling out of such obligations in future judicial clauses would serve a useful purpose, although on a limited scale, since almost all States were parties to the Statute of the Court.

A further question was whether the Court's Statute should regulate the conditions under which declarations of acceptance of the compulsory jurisdiction of the Court made for indefinite time could be modified or terminated.

Finally, consideration should be given to the possibility of broadening the competence of the Court by allowing it to answer legal queries put by States parties to the Statute as regards, for instance, the existence and binding force and/or the content and interpretation of at least certain norms of international law including general international law norms and customary norms, on the understanding that States parties to the Statute could submit comments on the queries. The procedure of legal queries and the resulting International Court of Justice opinions could be very useful as a means of settling international disputes, particularly as it could be expected that States generally reluctant to accept judicial settlement and the compulsory jurisdiction of the Court would be less wary of submitting legal queries to the Court.

* Head of the Group on International Law, Institute of Law Studies of the Polish Academy of Sciences, Warsaw, Poland.

Dr. Al Nauimi* pointed out that it was difficult to reconcile Article 59 of the Statute (which characterized the Court's decisions as binding) with Article 94, paragraph 2, of the Charter which left it to the Security Council, where the veto applied, to take action in case of non-compliance by one of the parties with a decision of the Court.

Mr. Torres-Bernárdez,** after pointing out that the Permanent Court of Arbitration and the International Court of Justice, far from being rivals, played complementary roles in the peaceful settlement of disputes, observed that all dispute settlement procedures deserved to be promoted as each offered advantages depending on the nature of the case and the wishes of States.

The reason why States tended to favour ad hoc arbitration over institutionalized arbitration of the type offered by the Permanent Court of Arbitration was to be found in the psychological attitude of legal advisers who were inclined to retain control over third-party proceedings to the maximum extent possible.

On the possibility of improving the functioning of the Court, he cautioned against change for the sake of change and warned that reforms should only be introduced where and when needed and through the right procedures. In his opinion, the only problematic aspect in the functioning of the Court was the issue of jurisdiction, but on this point States were not ready to change and there was otherwise no need for institutional reform.

The implementation of procedural articles on enquiry and gathering of evidence sometimes came across the obstacle of territorial sovereignty. He stressed in this connection that a State party to proceedings before the Court was under an obligation to present the Court with all the relevant information, including by way of visits to its territory, consultations of its archives, etc., failing which the State concerned was morally barred from complaining that the Court had relied on inaccurate information.

In conclusion, he called for objectivity in assessing the merits of individual Judgments of the Court, irrespective of the size, power or status of the States concerned.

Dr. Rao*** stressed that the first requirement for judicial settlement or arbitration to be acceptable and successful was that the law to be applied was

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understood and could be subscribed to by the parties. Customary law, as it had evolved, often ran into contention before the Court because of the changing nature of society, the increase in the number of States, the diversity of the circumstances in which States came into existence and the unsettling problems to be confronted each time a new set of States became part of the international community. The real problem did not lie in the interpretation or application of the law—which was a normal function of the judiciary and naturally involved a certain amount of development of the law—but in the substitution of a totally new set of understandings to which the parties themselves did not subscribe. There was a considerable difference between, as Lauterpacht put it, judicial interpretation and judicial innovation.

On the question of access to the Court, it should be recalled that States, having the highest sense of responsibility to a territory, a people and a set of resources, were still the main players in the international society and could not reasonably be expected to accept to be challenged by other players such as non-governmental organizations in a court of law. Care should also be taken not to overburden the Court through procedural devices to the point of making international litigation ineffective.

Finally, as long as judicial settlement or arbitration rested on consent and on the joint identification of a set of questions to be presented to the Court, the subsidiary question of fact-finding was not that problematic. The few cases involving claims of genocide in which the Court might not have had the relevant facts readily in front of it pertained to the realm of criminal law. Generally speaking, the Statute, as presently drafted, did not allow the Court to go into the type of fact-finding, including hearing and cross-examination of witnesses, which was a feature of criminal law justice but was quite alien to international litigation.

Mr. Lee* felt it useful to analyse the reasons why States were reluctant to make use of the numerous dispute settlement procedures developed over the years and to find ways of encouraging States to resort to such procedures. He noted with satisfaction that the Permanent Court of Arbitration endeavoured to provide technical assistance to potential litigants and recalled in this context that, in 1989, a trust fund had been established in the framework of the United Nations to make it easier for developing countries to go to the Court.

* Principal Officer, Office of the Legal Counsel, Office of Legal Affairs, United Nations Secretariat.

In his concluding remarks, the Moderator noted that there was one provision in the Charter which might prevent States wishing to go to the Court from doing so, namely, Article 102, paragraph 2, under which no party to an unregistered treaty could invoke that treaty before any organ of the United Nations. He further stressed that, faithful to the traditional motto of diplomacy—"toujours négocié"—legal advisers to Governments were unlikely to recommend resort to a third party for dispute settlement until absolutely every avenue of negotiation had been exhausted. Arbitration or judicial settlement could, however, become a political necessity whenever—and he had specific examples in mind—the dispute got so twisted up with domestic politics that the only way to untie the knot was to let some third party do it. The effort made by the Permanent Court of Arbitration to update its methods should also be made by the Court lest it might be left behind as a result of the slowness of its proceedings. Anyone interested in strengthening the Court and its role should beware of complacency and undue optimism. Whereas the Statute of the Permanent Court had been examined closely 20 years after it was drafted, the Statute of the present Court had not been seriously scrutinized in the 50 years since its entry into force and it was high time to subject it to a very thorough, professional, technical and political re-examination.

V. INTERNATIONAL LAW IN THE FIELD OF SUSTAINABLE DEVELOPMENT: INTEGRATING DEVELOPMENT, ENVIRONMENT AND HUMAN RIGHTS*

A. INTRODUCTORY STATEMENT BY THE MODERATOR: PHILIPPE SANDS**

“States and people shall cooperate in good faith and in a spirit of partnership . . . in the further development of international law in the field of sustainable development.”
— Principle 27, Rio Declaration on Environment and Development, June 1992

In June 1992, 176 States and the European Community (EC), meeting at the United Nations Conference on Environment and Development (UNCED), adopted the Rio Declaration on Environment and Development¹ and two other non-binding instruments: Agenda 21² and a Statement of Forest Principles (Forest Principles).³ A substantial majority of them also signed the two conventions which were opened for signature at UNCED: on

¹ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (UNCED Report), vol. I: *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigenda), resolution 1, annex I; *International Legal Materials*, vol. 31 (1992), p. 874.

² UNCED Report, vol. I, resolution 1, annex II.

³ Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, UNCED Report, vol. I, resolution 1, annex III.

* Round-table discussion held on Tuesday, 14 March 1995.

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Biological Diversity (Biodiversity Convention or BC)⁴ and on Climate Change (Climate Change Convention or CCC).⁵

Drawing on earlier political, socio-economic, scientific and legal developments, these UNCED instruments affirm the place of “sustainable development” in international law.⁶ They also provide some guidance on the concept’s meaning and implications, both generally and in relation to specific issues. This affirmation is reflected in other international legal instruments addressing broader economic issues which were adopted shortly prior to UNCED and in its aftermath. The concept of “sustainable development” has been endorsed by regional arrangements in North America⁷ and EC,⁸ and by the Uruguay Round of GATT amendments.⁹ It is also reflected in a limited,

⁴ *International Legal Materials*, vol. 31 (1992), p. 822.

⁵ *Ibid.*, p. 849.

⁶ Agenda 21 contributes to confusion by variously referring to national or international law (or treaties or agreements) “on sustainable development” (paras. 8.25: 39.1(a), (c) and (e) and 39.3(b), “concerning sustainable development” (para. 39.1(f)); “in relation to sustainable development” (paras. 8.21, 39.8, 39.9); “in the field of environment and development” (paras. 8.15 and 8.20); “in the field of environment and sustainable development” (paras. 8.17 and 8.26). (Emphasis added)

⁷ See, e.g., Preamble to the North American Agreement on Environmental Cooperation, recognizing the “essential role of cooperation in . . . achieving sustainable development”, *International Legal Materials*, vol. 32 (1993), p. 1480.

⁸ Amendments to the objectives of the EEC were adopted shortly before UNCED to reflect the EC’s revised task of promoting “a harmonious and balanced development of economic activities, sustainable and non-inflationary growth reflecting the environment”: Treaty on European Union, Maastricht, 7 February 1992, *Official Journal*, 1992, C 191 (29 July 1992), p. 1, art. G(2) (amending art. 2 of the EEC Treaty). See also the Agreement on the European Economic Area, invoking the principle of “sustainable development”, *Official Journal*, 1994, L1 (3 January 1994), p. 3 (Preamble).

⁹ See, e.g., the Preamble to the Agreement Establishing the World Trade Organization (WTO) which emerged from the Uruguay Round of the GATT Multilateral Trade Negotiations, recognizing that relations in the field of trade and economic endeavour should be conducted “in accordance with the objective of sustainable development”, *International Legal Materials*, vol. 33 (1994), p. 1.

but growing, international legal literature,¹⁰ and its implications for domestic law reform and national policy are also being considered.¹¹

The issue of "sustainable development" in its legal context is also arising with increasing frequency in international disputes. Hungary and Slovakia have both invoked the concept in support of their competing arguments in the case currently before the International Court of Justice concerning the Danube Dam (case concerning the Gabčíkovo/Nagyymaros Project), and Canada and Spain will no doubt consider its meaning and application in relation to the dispute over turbot/Greenland halibut fisheries in the North Atlantic.

As an international legal concept, "sustainable development" remains in an early stage of development. Thus, although references to "sustainable development" and international law abound in Agenda 21, none of the formulations apparently follow that endorsed by Principle 27 ("international law in the field of sustainable development"), and there remain occasional references to "international environmental law".¹² Whether the variable terminology arises by accident or design is unclear. Anecdotal evidence suggests that the head of the Brazilian delegation persuaded Working Group III of UNCED's Preparatory Committee to replace every reference in Agenda 21 to "international environmental law" with the term "international law in the field of sustainable development".¹³

¹⁰ See generally P. Birnie and A. Boyle, *International Law and the Environment* ("Birnie and Boyle") (1992), pp. 3-6, 122-4, and P. Sands, *Principles of International Environmental Law* ("Sands") (1995), pp. 1314, 198-208. See also R. D. Munro and J. G. Lammers (eds.), *Environmental Protection and Sustainable Development: Legal Principles of Recommendations* (1987); G. Handl, "Environmental Security and Global Change: The Challenge to International Law", *Yearbook of International Environmental Law*, 1 (1990), p. 3, at pp. 24-8; Shimizu, "Legal Principles and Recommendations on Environmental Protection and Sustainable Development", *Nippon Seikyo Kenkusho-Kiyo*, 14 (1990), p. 13; P. S. Elder, "Sustainability", *McGill Law Journal*, 36 (1991), p. 832; Hunt, Bobeff and Palmer, "Legal Issues Arising from the Principle of Sustainable Development", *Journal of Environment and Natural Resources Law* (1991), p. 193; L. Kimball, "Towards Global Environmental Management: The Institutional Setting", *Yearbook of International Environmental Law*, 3 (1992), p. 18; A. Kiss and S. Doumbe-Bille, "La Conférence des Nations Unies sur l'environnement et le développement", *Annuaire français de droit international*, 38 (1992), p. 823; P. Sands, "UNCED and the Development of International Environmental Law", *Yearbook of International Environmental Law*, 3 (1992), p. 3; "Lessons Learned from UNCED", *Proceedings of the American Society of International Law*, 1993, p. 508; Foundation for International Environmental Law and Development, "Report of a Consultation on Sustainable Development: The Challenge to International Law" ("Field Report"), *Review of European Community and International Environmental Law*, 3 (1994), p. 1; U. Beyerlin, "Rio Konferenz 1992; Beginn einer neuen globalen Umweltrechtsordnung", *Festschrift für ausländisches öffentliches Recht und Völkerrecht*, 44 (1994) p. 148.

¹¹ See, e.g., Canadian Bar Association, Committee Report, *Sustainable Development in Canada: Options for Law Reform* (1990); *Sustainable Development: the United Kingdom Strategy* (Cm 2426, 1994).

¹² See, e.g., loc. cit. above (note 2), para. 39.2.

¹³ The Brazilian diplomat, Pedro Motta Pinto Coelbo, apparently remarked that this change would "keep you lawyers busy well into the twenty-first century"; see P. Sands, op. cit. above (note 10), p. 17.

UNCED was an ambitious exercise, and it is too early to know whether it can succeed in its objectives of halting environmental degradation, alleviating poverty, and redistributing resources on a more equitable basis. It was remarkable in achieving a consensus between States with markedly different social, economic, political and legal priorities and expectations. No State broke with consensus on the three non-binding instruments. Both Conventions drew broad support; they were signed by more than 150 States and EC at Rio, entered into force within two years of their adoption, and have led many developed States to develop action plans to curb future emissions of carbon dioxide and other greenhouse gases.¹⁴ Institutional commitments given in Agenda 21 were generally implemented; the Commission on Sustainable Development (CSD) was established, the Global Environment Facility (GEF) was restructured, a Convention on Drought and Desertification was adopted in June 1994, and conferences were convened on straddling stocks and on the sustainable development of small island States.¹⁵ And by the end of 1993, more than 70 States were reported to have designated institutions to oversee implementation of Agenda 21.¹⁶

Recalling the Brundtland report's view that "international law is being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the ecological basis of development",¹⁷ it is appropriate to consider the general context of UNCED's contribution to international law and institutions by reference to three aspects; its implications for general international law, the emergence of "international law in the field of sustainable development", and the impact on existing specialized areas of international law, notably international environmental law and international economic law. It is in this context that the Round Table addressed those many pertinent issues which remain, and no doubt will remain for some considerable time, outstanding.

UNCED and International Law

The UNCED process, including the convention negotiations, presented significant challenges to international law and institutions. These arose from

¹⁴ The Biodiversity Convention came into force on 29 December 1993 after ratification by 30 States; the Climate Change Convention entered into force on 21 March 1994 following ratification by 50 States. By 1 September 1994, the Conventions had been ratified by 84 and 91 States, respectively.

¹⁵ Global Conference on the Sustainable Development of Small Island Developing States, Bridgetown, Barbados, 25 April-6 May 1994, United Nations document A/CONF.167/4.

¹⁶ Natural Resources Defense Council, *One Year after Rio: Keeping the Earth Summit, A Country by Country Report* (1993).

¹⁷ Report of the World Commission on Environmental Development, *Our Common Future* (1987), pp. 21 and 22.

the explosion in the number of States participating in the negotiation processes, and from the broad range of interests which they brought to the negotiating table. Although the cold war came to an end during preparations for UNCED, other conflicts emerged, largely between developed and developing countries, but also amongst developed countries and developing countries. Several broad conclusions can be drawn. The central role of international law and institutions in addressing these challenges and differences has been confirmed. This occurs as the range of issues to be addressed by the international legal order has been extended, as ever more issues are internationalized. Moreover, the demands on the international legal order have increased as the issues addressed become increasingly complex, largely as a result of technological developments and the realization that States are economically and ecologically interdependent.

Irrespective of one's views as to the merits of the five UNCED instruments, the fact that they could all be negotiated and adopted in a relatively short period of time indicates the extent to which the existing international legal order, in particular the United Nations system, is able to function. At this point, there is no indication that the traditional approach to public international law is considered by States to be inadequate and in need of radical overhaul. Thus, although it has been suggested that the pursuit of "international law in the field of sustainable development" would tend to lead to radical transformation in international relations,¹⁸ the UNCED process indicated that States are not prepared to set in motion a radical transformation of the international legal order. "International law in the field of sustainable development" points to a body of principles and rules drawn from traditional approaches, evolutionary rather than revolutionary, contributing incrementally to the law and legal process.¹⁹

The Emergence of "International Law in the Field of Sustainable Development"

In calling for the "further development" of "international law in the field of sustainable development", Principle 27 of the Rio Declaration suggests that such law already exists. Certainly the concept of "sustainable development" is now established in international law, even if its meaning and effect are uncertain. It is a legal term which refers to processes, principles and objectives, as well as to a large body of international agreements on environment, eco-

¹⁸ Kiss and Doumbe-Bille, loc. cit. above (note 10), p. 841.

¹⁹ See generally P. Sands, "International Law in the Field of Sustainable Development", *1994 British Yearbook of International Law*, 303, at pp. 336-347 (identifying general principles in the field).

nomics and civil and political rights.²⁰ Sustainable development allows a broad range of interpretations, with the objective of integration at various levels: North and South; national and international; economic, environmental and social.

“International law in the field of sustainable development” describes a broad umbrella accommodating the specialized fields of international law which aim at promoting economic development, environmental protection and respect for civil and political rights. It is not an independent and free-standing body of principles and rules, and it is still very much emerging and in need of application to specific circumstances and facts. As such, it is not coherent or comprehensive, nor is it free from ambiguity or inconsistency. As indicated in an article to appear in the 1994 *British Yearbook of International Law*,²¹ the principles and rules which “international law in the field of sustainable development” accommodates generally pre-date UNCED. The significance of the UNCED process is not that it has given rise to new principles, rules or institutional arrangements. Rather, it endorses on behalf of the whole of the international community (States, international institutions, non-governmental actors) an approach requiring existing principles, rules and institutional arrangements to be treated in an integrated manner.

The Impact of UNCED on Other Specialized Areas of Public International Law

UNCED will have significant implications for the development of existing specialized areas of international law, particularly those relating to environmental protection and economic development, including trade and the activities of the multilateral development banks.

Much of the impetus for UNCED came from those wanting to develop further the rules of international environmental law, including States and environmental groups based in the developed countries. Thus, resolution 44/228, adopted by the General Assembly of the United Nations on 22 December 1989, reflects the environment as a dominant theme, and one would have expected that UNCED would reinforce the growing place of environmental protection rules in the international legal order. After UNCED, this seems to be the dominant view,²² although it has been suggested that the decline of international environmental law might now have begun since the new

²⁰ See Field Report, loc. cit. above (note 10), at pp. 15-16; also Kiss and Doumbe-Bille, loc. cit. above (note 10), p. 841, describing “sustainable development” as “une notion fonctionnelle”. See also P. Sands, *supra* note 19.

²¹ P. Sands, *supra* note 19, at Part III.

²² Kiss and Doumbe-Bille, loc. cit. above (note 10), p. 838; P. Sands, op. cit. above (note 10), p. 16.

ideology of sustainable development undermines the autonomy of environmental law as a body of rules and standards designed to restrain and prevent the environmentally destructive effects of certain kinds of economic activity.²³

The latter view seems too pessimistic. UNCED has contributed two new conventions which are primarily concerned with the protection and conservation of natural resources, and Agenda 21 is most detailed and precise when it addresses environmental obligations. To the extent that customary law has been developed, it is in the field of environmental protection and drawing upon principles previously enunciated in international environmental agreements (such as Principle 21/Principle 2 of the Stockholm Declaration, precaution, access to environmental information, etc.). If anything, UNCED signals an end to the marginalization of international environmental law, which has not been merely subsumed into "international law in the field of sustainable development". Most of the international environmental agreements adopted in the past two decades have failed to halt the environmental degradation they were intended to address. They failed to provide the financial and other resources necessary to implement the obligations they established, and they almost wholly failed to recognize and address the underlying economic and social reasons causing the environmental degradation. In adopting an integrated approach to environmental and developmental concerns, there is at least a chance that the root causes of environmental degradation can be attacked. In the context of a system of international law and institutions which is generally weighted towards advancing short-term economic goals over longer-term social and environmental needs, the participation of treasury and commerce departments in the development of international environmental standards marks a minimum first step toward the goal of enhancing these standards.

The impact of integrating environmental and social concerns into international economic law is potentially even more significant. The introduction of provisions on environment and sustainable development in the treaties establishing the European Bank for Reconstruction and Development, EC, and the North American Free Trade Agreement (NAFTA) and the World Trade Organization (which will replace GATT) provides a basis for construing economic obligations in accordance with broader international legal obligations. This, of course, is the approach resisted by the first GATT dispute settlement panel in the tuna dispute between Mexico and the United States in 1991.²⁴ Although a second panel reached the same conclusion in 1994, it

²³ M. Pallemerts, "International Environmental Law from Stockholm to Rio: Back to the Future", *Review of European Community and International Environmental Law*, 1 (1992), p. 245 at p. 264.

²⁴ United States—Restrictions on Imports of Tuna, Report of the GATT Panel (16 August 1991), *International Legal Materials*, vol. 30 (1991), p. 1594.

did so on the basis of an approach which recognized the international community's support for the concept of "sustainable development" and the place of the GATT rules in the context of broader public international law rules.²⁵ The emergence of "international law in the field of sustainable development" could herald the disappearance of the self-contained and compartmentalized worlds of environmental and economic law. The "dilution des frontières traditionnelles entre les disciplines concernées"²⁶ is a welcome introduction to a potentially more integrated and comprehensive approach to addressing current and future needs.

B. SUMMARY OF THE DISCUSSION

In the context of this general overview, the Round Table addressed some critical issues. The discussion focused around five questions identified by the Moderator as raising recurring themes and issues. These were not intended to be exhaustive, but rather illustrated some of the issues which the international community would need to address as it defined, developed and applied international law in the field of sustainable development.

- Is "sustainable development" a term of art in international law? Can we determine what it means, and whether it is an objective, or a process, or a principle, or a means of masking conflict between various tensions (North/South, national/international, development/environment), or all of these?

One point on which participants could agree was that there was no generally accepted understanding of the meaning or consequences of the term "sustainable development" in international law. The term was still at an early stage of development, surrounded by a degree of uncertainty and ambiguity. It had a variety of definitions, was still evolving, and needed to be understood contextually.

For some participants, the definition of sustainable development was likely to remain wide open for some time, and might even be purposely ambiguous. To the extent that a term of art was a term for which there was a

²⁵ United States—Restrictions on Imports of Tuna, Report of the GATT Panel (20 May 1994), *International Legal Materials*, vol. 33 (1994), p. 839, at para. 5.42 (the Panel "noted that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement"). See also paras. 5.19 and 5.10, relying on the 1969 Vienna Convention on the Law of Treaties to interpret GATT.

²⁶ Kiss and Doumbe-Bille, *loc. cit.* above (note 10), p. 842.

broadly agreed meaning, the view was expressed that sustainable development could not yet be considered a term of art in international law.

For other participants, the essential meaning or focus of the concept was clearer. For some the term connoted essentially environmental objectives, but for others it suggested a particular approach to international economic affairs. Under either approach, it reflected a compromise between developed and developing countries.

The ambiguity of the term was not universally criticized. It was pointed out that in some ways sustainable development was like equity or equitable principles in international law: without clear definition but nevertheless capable of application on the facts of a particular case. Several participants identified as the central element of sustainable development its inherent linkage with intergenerational equity.

- Is it possible/desirable to identify any essential elements of “sustainable development in the field of international law” (principles, standards, procedures, institutional aspects)?

The view was widely expressed that sustainable development was essentially about integrating and balancing different societal objectives. The term could be considered as referring to a synthesis of several components, without an agreed overall meaning. Beyond that it might not be necessary to define the term in any great detail. It reflected principles and substantive commitments, as well as processes of international law.

There was a lively exchange of views on the desirability of taking an integrated approach to the various elements of international law which were converging around sustainable development. A minority view asked whether these different fields needed to be integrated, and questioned what would be added to international law by such integration. The concern was also expressed that integration of distinct fields could lead to a watering down of existing elements, especially in the environmental field. This view did not achieve consensus.

- What practical consequences might “sustainable development” have for the behaviour of States, international organizations and other members of the international community?

The participants generally considered that sustainable development could have significant practical implications for States and other international actors. In particular, efforts to require an integrated approach to decision-making

would require economic decisions to take account of environmental and other social objectives, and vice versa.

- How could/should “sustainable development” relate to earlier international legal documents, particularly in the field of economic development, human rights and environmental protection, and what are its implications for these previously discrete areas of public international law?

Participants agreed that the concept of sustainable development was not new. For over a century, in the fisheries area it has meant organizing protection with the aim of obtaining optimum exploitation in the future. In many other areas sustainability had emerged in other ways.

- How could/should “international law in the field of sustainable development” be further developed?

Participants expressed a range of views on the various approaches to development of international law in the field of sustainable development. Whilst most participants accepted that sustainable development had a role to play in international law, a clear view was expressed by a minority that the concept of sustainable development should not be formulated in more detail.

Some favoured a legislative approach, through the adoption of new treaties and by acts of international organizations. Others favoured a judicial approach through the interpretation and application of existing norms, although concern was expressed that courts should not go so far as to create new rules. One participant expressed the view that a legislative approach was preferable since the judicial process might give undue weight to the views of developed States. Others expressed scepticism about both approaches, and suggested that jurists had a role to play in elaborating the concept. Many participants concurred in the view that in any event an interdisciplinary approach was appropriate.

VI. THE CHARTER OF THE UNITED NATIONS AND WORLD POLITICS: THE ROLE OF THE SECURITY COUNCIL AND THE WORLD COURT IN A CHANGING WORLD*

A. INTRODUCTORY STATEMENT BY THE MODERATOR: OVE BRING**

In the last few years we have witnessed how the United Nations Charter has been interpreted in a flexible and dynamic way to accommodate deeply felt political needs in the world community.

This is not a completely new development, even though it has been accentuated after the end of the cold war. The approach of flexible Charter interpretation has mainly been related to the work of the Security Council; once it concerned the role of the General Assembly; and perhaps in the future we will see the role of the International Court of Justice affected as a result of a similar process. The interplay between political demands and legal adaptations, and the scope for innovative solutions, is the background theme for this round-table discussion. The concrete issue which will be discussed is the matter of judicial review in the United Nations system.

In a historical perspective, we are aware of how the Korean War gave rise to a new Charter interpretation. The adoption of Security Council resolutions 82 (1950) of 25 June 1950 and 83 (1950) of 27 June 1950, in the absence of a Soviet representative, was seemingly in contradiction with the wording of Article 27, paragraph 3, requiring "the concurring votes of the permanent members" in order to reach a valid (non-procedural) decision. By 1971, the International Court of Justice had concluded (in its advisory opinion on Namibia) that the practice of abstention in the Security Council had been interpreted by the Council and by Member States as not preventing decisions. China confirmed this interpretation through its abstention on

* Round-table discussion held on Wednesday, 15 March 1995.

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resolution 678 (1990) of 29 November 1990 during the Gulf war, when it was not prepared to challenge the military mandate given to the coalition against Saddam Hussein.

The Charter was also interpreted in an unorthodox way in November 1950 when there was a political need to sidetrack the Security Council, which was then paralysed by the veto. The General Assembly adopted the Uniting for Peace resolution, resolution 377 (V) of 3 November 1950, which extended the competence of the Assembly contrary to the wording of Article 11 of the Charter. The new interpretation was later reversed (when developing countries started to dominate the United Nations), but in November 1950 the Swedish Foreign Minister, Mr. Undén, declared in the General Assembly that the adoption of the Uniting for Peace resolution should be seen as:

“a happy circumstance for our Organization, whose Charter, in common with every other written Constitution, should be developed organically so as not to become a dead letter”.

Another innovation was introduced in 1956 by Secretary-General Dag Hammarskjöld and Lester Pearson of Canada: the peace-keeping operations. But peace-keeping came to stay. Peace-keeping operations were not foreseen under either Chapter VI or Chapter VII of the Charter, they fell somewhere in between, and not surprisingly the unwritten Chapter VI 1/2 has been suggested as their legal basis.

More controversial are the innovations with regard to “*peace enforcement*”, namely: (1) new flexible interpretations of “threat against international peace and security” in Article 39; and (2) a non-formalistic approach to military action under Chapter VII. With regard to the latter aspect, it should be noted that Article 42 presupposes a centralized United Nations handling of military operations. In contrast, resolution 678 (1990) on the Gulf war delegated power to *some* States and authorized *their* use of force. Arguably, the Security Council was relying on an unwritten Article 41 1/2 in the Charter. It could be argued that, as with regard to the practice of peace-keeping, the United Nations managed to respond to a political and legal need for action.

So far, the examples given have indicated that international law and international politics have worked together in a fruitful mix. Not everyone would agree, but many would. It should not be surprising that innovations within the spirit of the Charter—the introduction of new supplementary procedures adapted to current political realities—generally meet with the tacit consent of Member States. At the same time, it has to be realized that the mix between law and politics also gives rise to sour reactions. And, of course, the legal framework of decision-making within the United Nations

can be abused. There is a widespread feeling nowadays that the Security Council sometimes acts as if it were above the law. Or, as one commentator (Graefrath) has put it:

“Many recent activities of the United Nations Security Council have been carried out in the shadow of legal doubts.”¹

One case in point may be the Lockerbie affair. The Security Council adopted what seemed to be a Chapter VI resolution which virtually demanded extradition of two Libyan nationals. Libya instituted proceedings in the International Court of Justice relating to its alleged dispute with the United Kingdom and the United States over the application of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.² The Security Council then adopted a new resolution, resolution 748 (1992) of 31 March 1992, this time clearly under Chapter VII, instituting sanctions against Libya at a time when Libya was seeking protection from the Court in the form of interim measures against external pressure. Resolution 748 (1992) in effect intervened in the ongoing judicial proceedings and influenced the Court's decision in the interim phase. It seems that the timing of resolution 748 (1992) was more linked to what was happening in the Court at the time than it was to any imminent threat against international peace and security.

It has been argued that since resolutions of the Security Council have multiplied in number, and since the content of these resolutions at times is bound to be controversial, there is a need for some kind of judicial review, for the Court to have a check-and-balance effect on the Council. In particular, developing States see a political need to establish such checks and balances, and the way to do this may be to embark upon a new, dynamic interpretation of the Charter. The Charter itself is *silent* on the matter of judicial review.

Article 24, paragraph 2, of the Charter states that the Security Council, in discharging its duties with regard to the maintenance of international peace and security, “shall act in accordance with the Purposes and Principles of the United Nations”. In its advisory opinion on the *Namibia* case (1971), the Court took the view that:

“The only limitations [on the powers of the Council] are the fundamental principles and purposes found in Chapter 1 of the Charter”.³

¹ Bernhard Graefrath, “Leave to the Court What Belongs to the Court—The Libyan Case”, *European Journal of International Law*, vol. 4, No. 2, 1993, p. 184.

² United Nations, *Treaty Series*, vol. 974, pp. 177-248.

³ *I.C.J. Reports 1971*, p. 52, para. 110.

In other words, there would be no limitations under Chapter VII of the Charter. This very restrictive conclusion may be controversial, but this does not apply to Article 39, which introduces Chapter VII. As Judge Weeramantry wrote in his dissenting opinion in the *Lockerbie* case:

“The determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation”.⁴

On the other hand, Judge Fitzmaurice said in his dissenting opinion in the *Namibia* case that:

“limitations on the powers of the Security Council are necessary because of the . . . great ease with which any . . . controversial . . . situation can be represented as involving a latent threat to peace and security, even where it is really too remote . . . to constitute one. Without these limitations the functions of the Security Council could be used for purposes never originally intended”.⁵

This statement was made in 1971 but is even more pertinent today.

There is, of course, a clear division of responsibilities between the Council and the Court. While the Security Council is a *political* organ that basically takes political decisions, the Court, under Article 92 of the Charter, is the principal *judicial* organ of the United Nations. But recently, the Security Council has also taken quasi-judicial decisions—for example, in the field of State responsibility—and it could be argued that this kind of decision should be subject to judicial review. When the Court gave its opinion in the *Certain Expenses* case in 1962, it stated that:

“each organ must, *in the first place* at least, determine its own jurisdiction”. (Italics added)⁶

As Graefrath has pointed out, that leaves room for a *second place*. According to him, the *Libyan* case has been a case where the Council “has not left to the Court what belongs to the Court”.⁷ Some would argue that the Court should be put in a position to give its legal opinion on such matters. Others would

⁴ Ibid., 1992, p. 176.

⁵ Ibid., 1971, p. 294, para. 116.

⁶ Ibid., 1962, p. 168.

⁷ Bernhard Graefrath, op. cit., pp. 184-205.

argue that the Court already is in such a position, that whenever the actions of the Security Council are challenged before the Court, in a matter where the Court has jurisdiction, it should be clear that the Court is competent to decide relevant issues under international law. As the Court observed in the *Hostages* case in 1980:

“It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute.”⁸

About a month ago the Swedish Prime Minister Ingvar Carlsson and the Guyanese statesman Shridath Ramphal presented the report of the Commission on Global Governance (often referred to as the report of the Carlsson Commission). One theme of this report is the “unfilled potential” of international law. The Carlsson Commission recommends a number of measures that would strengthen the position of the Court, one of them being that the Security Council should make greater use of the Court as a source of advisory opinions. The Carlsson Commission also discusses some form of judicial review, stating that:

“it would probably need to be confined to certain issues relating to the ‘constitutionality’ of Security Council actions, to the defence of the Charter itself, and to certain related rule of law issues.”

This would be quite a wide mandate.

Now, an enhanced role for the Court as a “guardian of legality” (as Manfred Lachs put it) does not automatically lead to a weakened position for the Security Council. The Court may in fact legitimize actions of the Council, exactly at a time when the Council needs such legitimization. The result might well be a general boost of confidence in the Council in its relationship with Member States. Thomas Franck, Vera Gowlland-Debbas and others have made this point. Franck has observed that the Court is *the one institution* in the United Nations system that is able to legitimize the new political activism of the Security Council.

Finally, in discussing the matter of judicial review one has to make three distinctions: First, we have the existing *restrictions* in the Charter which apply to the activities of the Security Council: Article 1, paragraph 1, stating that United Nations actions should be “in conformity with the principles of justice and international law”; Article 2 to the effect that certain fundamental principles shall be respected; Article 24, paragraph 2, stating that the Coun-

⁸ *I.C.J. Reports, 1980*, p. 22, para. 40.

cil “shall act in accordance with the Purposes and Principles” of the Organization; Article 25 indicating that decisions of the Council should be taken “in accordance with the present Charter”; and Article 103 with the *a contrario* implication that not all decisions of the Council override all other international obligations. These restrictions, although part of *lex lata*, do not as such amount to a system of judicial review. Second, we might also have some form of *judicial review*. An indirect review could be said to exist *de lege lata* today: Every time the Court has before it a case which touches upon legal interpretations and acts of the Security Council, the Court may comment upon the situation and thereby influence the future. A more formal and direct system of judicial review probably belongs to the sphere of *lex ferenda* (for those who are in favour of such a development). Third, we have to single out the possible effects and *consequences of judicial review*. Indirect effects seem to be part of *lex lata*. Direct effects, having immediate consequences for the Security Council’s handling of a certain matter, belong to a discussion *de lege ferenda*.

Some questions on which participants might wish to reflect include the following:

- What is the situation today *de lege lata* with regard to judicial review?
- Is there a need for a dynamic and evolutionary interpretation of the Charter in this context? The Court itself has a unique possibility here to influence developments.
- Is it a good idea *at all* to have a system of judicial review? One objection may be that a conservative Court may stop legal innovations and stick to a strict interpretation of the Charter, even when a more evolutionary approach is needed.
- Has the Security Council deserved the criticism it has received in the Lockerbie affair? Is the handling of the Lockerbie affair a relevant example of non-confidence in the Council, which, quite understandably, should give rise to demands for judicial review?
- Should the need for confidence in the Security Council’s actions be related at all to the matter of judicial review?

B. SUMMARY OF THE DISCUSSION

Dr. Danelius* observed that the Charter was virtually silent on the issue of judicial review of the acts of the Security Council by the International Court of Justice and noted that a case for such review, possibly based on a close

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reading of Article 92 of the Charter, which identified the Court as “the principal judicial organ of the United Nations”, and Article 24, paragraph 2, which instructed the Council to “act in accordance with the Purposes and Principles of the United Nations”, was not free from objections.

The silence of the Charter on the issue militated in favour of the Court’s powers of judicial review because of the principle *lex superior derogat legi inferiori*, which was, arguably, a general principle of law within the meaning of Article 38 of the Statute of the International Court of Justice. As far as judicial review by the Court was concerned, the principle in question implied, *inter alia*, that whenever a decision by the Security Council, which was of immediate relevance in a case pending before the Court, was inconsistent with the Charter, the Court should give priority to the Charter.

The so-called passive virtues, which underlay the notion of judicial restraint supplementing powers of judicial review granted to some national courts, were even more important for the proper functioning of the International Court of Justice than they were for the functioning of the supreme courts of national and federal legal systems.

Professor Mosler, a former judge of the International Court of Justice, once pointed to the historical correlation between the position of the judiciary within a legal system and the degree of social integration within the system. Partly, this was a wise word of warning to his former colleagues and his successor-judges. The social order of the United Nations was not by far as integrated as that of the United States or that of the European Union. Consequently, the judiciary of the United Nations should be careful not to overplay its hand by copying the judicial activism of the supreme courts successfully working within those systems.

None the less, the Court, in defining the scope of its extensive powers of judicial review which were part and parcel of the identification of the Charter as *lex superior*, might have something to learn from national and federal supreme courts. One possibility for the Court would be to elaborate an international version of the political question doctrine through which the Court could exclude from its powers of judicial review particular issues such as determinations made by the Security Council under Article 39 of the Charter. Perhaps such a doctrine should also make use of the distinction between norms of *jus cogens* and other norms of international law. For this purpose, the reasoning of ad hoc Judge Lauterpacht in the Court’s Order of 13 September 1993 in the *Bosnian* case was interesting.⁹

⁹ *Ibid.*, 1993, pp. 439-442 and 447, paras. 98-107 and 123.

An international version of the political question doctrine was much more attractive than prevailing doctrines, according to which the Court should manage its relations to the Security Council on a case-by-case basis or with reference to the vague notion of functional cooperation. Such a pragmatic approach might indeed appear natural for a political organ like the Security Council. The judicial integrity of the Court, on the other hand, demanded that it should decide its cases and run its relations with reference to legal standards.

Professor Rubin* noted a significant restriction on the authority of the Security Council under Article 24 of the Charter and a significant ambiguity in the English version of Article 25. Under Article 24, paragraph 2, the Security Council was required to “act in accordance with the Purposes and Principles of the United Nations”. The second sentence of this paragraph specifically related that restriction to action under Chapter VII, “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”. He found it very hard to understand how the Security Council’s determination that failure to extradite two Libyan nationals, officials of the Libyan Government, with regard to an atrocity occurring more than three years before, could be considered to pass the threshold of Security Council authority under Chapter VII of “threat to the peace, breach of the peace or act of aggression” in the sense of Article 39 of the Charter. The argument that the Security Council’s discretion was unlimited by the normal reading of legal words of art to “determine the existence of any threat to the peace” under that Article was, in his view, inconsistent with the language of Article 24.

To compound the difficulty, under Article 25, the Members had agreed “to accept and carry out the decisions of the Security Council” only “in accordance with the present Charter”. Whether the phrase “in accordance with the present Charter”, applied to the term “decisions” or to the verb “carry out”, was unclear in English. But, in either case, a limit to the authority of the Security Council was indicated. If the Council’s decisions had to be in accordance with the Charter, then the question was left open as to who was to determine whether the “decision” met that test. If it was “carry out” in accordance with the Charter, then each Member of the United Nations was given discretion to determine its own action’s conformity to the Charter. That interpretation eviscerated the authority of the Security Council to require action by the Members.

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It was also to be noted that, though the United Nations judicial arm did not lack the authority to interpret the Charter definitively as a constitutional document, that fundamental question could not be resolved easily by mere reference to the legal experience of the United States. The American position that the judicial arm of a three-armed governmental structure had undoubtedly authority to make a definitive interpretation of a written constitution traced back to the famous 1803 decision of the American Supreme Court in the case of *Marbury v. Madison*,¹⁰ which nevertheless had not clarified the issue completely. Moreover, the legal experience of the United States was not the legal experience of many other countries, all of them parties to the Charter, especially of those which had joined the Organization later, relying on their own interpretations of the words of the Charter and the interpretations of the early years of the United Nations.

Ms. Gowlland-Debbas* emphasized that the International Court of Justice had never remained isolated from world politics, nor could it ever do so, operating within the United Nations framework of maintenance of international peace and security.

In recent years, the Court had been confronted with cases which were not only explosive, but also had to do with violations of core norms of international law: self-determination, use of force, genocide, State-sponsored terrorism, nuclear weapons, etc. Though the Court, being a judicial body, could not bring solutions to the entirety of the problems raised in those areas, judicial settlement offered to States by the Court was an additional and important instrumental process for the settlement of international disputes affecting international peace and security.

The relationship between the Court and the Security Council, which were both involved in the peaceful settlement of disputes, did not raise insuperable problems, since the functions of the two organs were clearly distinct and the Council had only a recommendatory role in proposing methods or terms of settlement, whilst legal disputes in principle were to be referred to the Court (Article 36, paragraph 3, of the Charter). Problems could, however, arise in situations involving a relationship between the Court and the Security Council with the former exercising its peaceful settlement function and the other resorting to enforcement action on the basis of its powers under Chapter VII of the Charter. The decision in the political organ, by imping-

¹⁰ *Marbury v. Madison*, 5 U.S. 137.

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ing on the legal rights of both sanctioned and implementing States, could even modify the decision in the judicial organ, as the *Lockerbie* case¹¹ clearly showed. That, however, was not only by virtue of the operation of Article 103, the object of which was to dispense implementing States from the performance of their obligations under other instruments should these conflict with their obligations under the Charter, but was inherent in the very notion of a legal sanction consisting in the temporary suspension of the subjective legal rights of the sanctioned State of conventional or customary law origin.

Regarding the question of judicial review in such situations, a distinction could be made between, on the one hand, the factual determination under Article 39, which, being allocated by the Charter to the Security Council thus endowed with a broad "margin of discretion", could with difficulty be subjected to legal review (unless there was a manifest violation of the Charter), and, on the other hand, the determination of the responsibility of a State under international law for its illegal acts, even though the two aspects in recent Security Council practice had become more and more interlinked. Questions relating to State responsibility clearly should fall within the Court's competence, provided, of course, that it had jurisdiction in that particular case, be it a request for an advisory opinion or a contentious case. In those situations, the Court should perform a delicate balancing act: As a principal organ of the Charter, its decisions should not serve to undermine the effectiveness of the operations of another organ, but as a principal judicial organ, the Court could only operate on the basis of international law. It became, therefore, a question of interpreting both the terms of the Charter and international law in such a way that they were compatible.

The question of judicial review raised a number of other issues, however. It was not so much that the Court did not have the competence to pronounce on the illegality and subsequent validity of the acts of United Nations organs, as it had clearly stated on a number of occasions, for example in the *Certain Expenses*¹² and *Namibia* cases.¹³ The problem concerned the question of whether the case was brought to the Court in the first place, of the authoritative nature of its pronouncements in that respect and of the unclear nature of the legal effects of the acts of international organizations. In only one case (*1960 Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization*)¹⁴ had the question of the validity of an act of an international organization been squarely put to the Court and then the outcome had not been nullity *ab initio*, but the voidability of the Assembly decision in question by the political organ itself.

¹¹ *I.C.J. Reports 1992*, pp. 3 and 114.

¹² *Ibid.*, 1962, p. 151.

¹³ *Ibid.*, 1971, pp. 3, 6, 9, 12 and 16.

¹⁴ *Ibid.*, 1960, p. 150.

In any case, it was clear that there were important limits to the acts of the Council, in particular those of *jus cogens* norms, as had been pointed out by Judge Lauterpacht in his separate opinion in the *Application of the Genocide Convention* case,¹⁵ and that any Court pronouncement in that respect could be seen as declaratory of the existing legal situation.

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* *

The ensuing discussion focused on the two major questions raised by the Moderator: What was the situation with regard to judicial review in the United Nations system, especially in relation to the activity of the Security Council, and would it be advisable to have a more stringent judicial review mechanism in that system?

It was suggested that the theme of the Round-table discussion formed part of the general problem of control over acts of international organizations and the relevant role of the international judicial system. The need to develop a proper system of judicial review on the basis of the relevant powers of the International Court of Justice was illustrated, *inter alia*, by the fact that various national courts called upon to apply acts of international organizations within their domestic system had, for instance, to address the issue of the legality of the Security Council's decisions imposing sanctions.

In connection with the new political activism of the Security Council, the question was asked whether the Council, which had stretched the notion of threat to international peace and security to encompass violations of humanitarian law, was, in fact, limited by Chapter I of the Charter. The issue whether the International Court of Justice could question the Council's decisions was also raised.

It was stated that within the Charter system, the existing restrictions concerning the functioning of the Security Council did not relate to the judicial role of the International Court of Justice in such a way that the Court could overrule the decisions of the Council. A view was expressed that such restrictions and their legal consequences should be considered in the light of Articles 25 and 103 and Chapter I of the Charter. In connection with Article 103 of the Charter, it was pointed out that Security Council decisions should be considered as overriding treaty obligations, which could represent at the same time norms of customary law.

Emphasis was placed on the need of a judicial review aimed at avoiding abuse by the Security Council of its authority. It was observed that, on a number of occasions, the Council had dealt with issues which did not normally fall within its competence. Attention was drawn to the absence of precise criteria for the implementation and termination of sanctions imposed by

¹⁵ *Ibid.*, 1993, pp. 439-442 and 447, paras. 98-107 and 123.

the Council, as well as to the lack of precise definitions of the concepts used in addressing such issues as humanitarian law, peace-keeping and the status of Member States in the United Nations, a situation which was not conducive to respect of the principles of international law. Reference was made in this context to the Council's actions regarding the former Yugoslavia. A re-interpretation and reform of the Charter and a fundamental change in the United Nations system were viewed as a prerequisite for the achievement of the Organization's fundamental purposes and for the establishment of a more effective judicial mechanism within the United Nations and the strengthening of the role of international law in a modern world.

The remark was made that the International Court of Justice, being a Court with full jurisdiction, might have to analyse and control decisions by the Council, and to establish the lawfulness of its resolutions as well as of resolutions of other United Nations organs, even though no procedure of appeal against the Council's decisions was envisaged by the Charter. It was noted in this connection that in the *Lockerbie* case,¹⁶ the Court had refrained from characterizing Security Council resolution 748 (1992) as legal or illegal but had preserved the principle that it was entitled to make a finding on this point.

The role played by constitutional courts at the domestic level was viewed as an example to be taken into account when it came to the United Nations constitutional system. In this context, it was recalled that most municipal legal systems operated on the basis of the distinction between illegality of an extreme nature causing nullity of an act and illegality of lesser nature not leading to nullity. The view was expressed that the International Court of Justice should have the power to control at least in extreme cases the legality of the decisions of the Council.

Attention was, however, drawn to the inadmissibility of equating judicial review at the domestic level and judicial review under the Charter, given the specific nature of international power structures. It was also stressed that the Court, of and by itself, could not cure the manifest defects in the United Nations system, which a timely reform of the Security Council and other principal organs would have remedied. Along the same lines, the remark was made that, in the existing imperfect or inchoate state of development of a genuine international society, the Court would function most effectively as an institution operating in full cooperation and complementarity to the other principal organs of the United Nations, the Security Council and the General Assembly, and concern was voiced that the failure to reform the Charter, and the Council in particular, in order to meet the new demands of

¹⁶ *Ibid.*, 1992, pp. 3 and 114.

international society resulted in a growing constitutional imbalance within the United Nations.

In this context, it was observed that tighter rules in the Charter would not guarantee a more peaceful world and that before considering whether it would be advisable to have a mechanism of judicial review *stricto sensu* within the United Nations system, one should take into full account the normative potential of the relevant existing Charter provisions. Reference was made to the possibility for the General Assembly to request an advisory opinion from the Court, under Article 96, as a way of inducing the Security Council to act in accordance with what was generally felt to be acceptable, if not perfectly lawful.

On the other hand, the view was expressed that, for many Member States, the problem with the Council was more one of political legitimacy in terms of its composition and methods of work than one of legality of its activities. Emphasis was placed in this regard on the importance of a recomposition of the Security Council on the basis of proper geographical representation.

A concern was expressed that it was logically inconsistent to urge a dynamic and expansive reading of the Charter aimed at increasing the authority of the Court, while calling for an artificially restrictive reading of the powers of the Security Council. In this context, it was noted that some participants in the Congress had suggested making use of the advisory functions of the Court to resolve, in effect, matters in dispute between States, apparently without first requiring those States to accept the jurisdiction of the Court. At the same time, Article 25 of the Charter was read as imposing limitations on the Security Council, an overly conservative interpretation that appeared to deform the clear intent of the provision. The remark was made that, while the Security Council might be validly criticized for having acted in a politically unwise or operationally ineffective manner in a particular case, the legitimacy of its acts was not at issue.

It was furthermore considered more appropriate to rely on *political* rather than *legal* constraints on Council actions under Article 39 of the Charter, bearing in mind that powerful political factors came into play within as well as without the Council itself and that one should be wary of creating possible legal obstacles to developments which the Council might initiate in the future. As for the claim that the Court's broad judicial powers could be viewed as extending to the Council's actions generally, concern was voiced that it might not be fully correct with respect to peace and security questions, bearing in mind the Council's "primary responsibility", which should be viewed quite broadly. It was suggested that, while the Court should avoid clearly political issues addressed by the Council under Article 39, it could *a posteriori*

give advice on, or provide an abstract interpretation of, the relevant provisions of the Charter. The remark was also made that, since the competence of international tribunals should be interpreted in a restrictive manner, the institution of judicial review within the United Nations system was still a matter *de lege ferenda*.

Approaching the question of this relationship between the Council and the Court from another angle, one participant suggested that the Security Council should be empowered to mandatorily refer disputes which could endanger the maintenance of international peace and security to the Court, thus contributing to conflict prevention. In this context, the institution of "directed conciliation" adopted within the Conference on Security and Cooperation in Europe (CSCE) (now Organization for Security and Cooperation in Europe (OSCE)) in 1992 was mentioned.

VII. ASPECTOS CONCEPTUALES Y PRÁCTICOS DE LA CODIFICACIÓN Y DEL DESARROLLO PROGRESIVO DEL DERECHO INTERNACIONAL: NUEVOS DESARROLLOS Y PRIORIDADES*

A. DECLARACIÓN PRELIMINAR POR LA MODERADORA:
MARÍA DEL LUJÁN FLORES**

El literal a), párrafo 1, del Artículo 13 de la Carta de las Naciones Unidas establece que la Asamblea General promoverá estudios y hará recomendaciones para impulsar el desarrollo progresivo del derecho internacional y su codificación. En San Francisco, a la propuesta original de China concerniente a la codificación se le añadió un elemento innovador, dinámico, susceptible de tener en cuenta las aspiraciones que surgieran con el devenir del tiempo en la comunidad internacional.

Es así que dentro de las facultades de la Asamblea General figuró el adoptar recomendaciones relativas a la codificación y al desarrollo progresivo, sin que ello implicara crear un poder legislativo capaz de imponer normas vinculantes a los Estados miembros. Sin embargo la distinción entre las dos actividades que a primera vista parece fácil de realizar en los hechos se vuelve sumamente compleja. A tal punto que la Comisión de Derecho Internacional, órgano establecido por la Asamblea General para llevar adelante esta doble tarea, puso de relieve al tratar el derecho del mar que fuera objeto de las Convenciones de Ginebra de 1958 la imposibilidad de distinguir las disposiciones relevantes de la simple codificación de aquellas que traducían un desarrollo progresivo del derecho internacional. Esta combinación casi indisoluble entre ambas funciones tiene en cierta medida explicación en la interacción que existe entre las normas consuetudinarias y las convencionales.

Como bien lo señaló el profesor Eduardo Jiménez de Aréchaga, el texto de una convención puede *declarar* una norma consuetudinaria existente con

* Mesa redonda que tuvo lugar el jueves, 16 de marzo de 1995.

** Representante Permanente Adjunta del Uruguay ante las Naciones Unidas, Nueva York, NY, Estados Unidos de América..

anterioridad, enunciarla por escrito, puede *crystalizar* una norma in statu nascenti, una costumbre que no ha alcanzado su plena madurez pues se halla en vías de formación, o, por último, el proceso de codificación y desarrollo progresivo puede tener un efecto *generador o constitutivo*, si la disposición de *legisferenda* de un tratado o una propuesta en una conferencia internacional que logró un amplio apoyo originan una práctica estatal subsiguiente uniforme y general de manera que se transforma en regla consuetudinaria.

El proceso de codificación y desarrollo progresivo del derecho internacional en este siglo se encuentra estrechamente vinculado a la creación de las Naciones Unidas. Ello se debe a la función relevante que han desempeñado sus órganos principales: la Corte Internacional de Justicia, la Asamblea General y su órgano subsidiario, la Comisión de Derecho Internacional, así como también la Sexta Comisión, la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional, la Comisión sobre la Utilización del Espacio Ultraterrestre con Fines Pacíficos, la Comisión de Derechos Humanos, etc.

No obstante el papel crucial que particularmente la Asamblea General y la Comisión de Derecho Internacional tienen en la materia, en los últimos años una considerable proporción de esta labor se desarrolla fuera de su órbita. El centro de la identificación de los nuevos tratados ya no es exclusivamente la Asamblea General de las Naciones Unidas, sus comisiones principales o grupos de trabajo. Gran parte de la tarea de codificación y desarrollo progresivo del derecho internacional tiene lugar en el ámbito de los organismos especializados de las Naciones Unidas y sus distintos órganos. Ellos han llevado a cabo en forma creciente procesos de negociación multilateral de tratados que versan sobre asuntos de su competencia.

A título de ejemplo, a instancias de la Organización de la Aviación Civil Internacional (OACI) se han elaborado numerosos instrumentos dentro de los que se destacan: el Convenio de Tokio de 1963 dirigido a establecer el régimen de los delitos cometidos a bordo de aeronaves, la Convención de La Haya de 1970 sobre represión del apoderamiento ilícito de aeronaves, que recoge el principio *aut dedere aut judicare*, según el cual el Estado de custodia deberá optar entre conceder la extradición o someter el caso a las autoridades competentes a fin de la prosecución de la causa. Asimismo el Convenio de Montreal de 1971 para la Represión de Actos Ilícitos contra la Seguridad de la Aviación Civil, que está dirigido sobre todo a prevenir el sabotaje y otros actos de violencia contra las aeronaves. Posteriormente fue complementado por el Protocolo de 1988 que tiene por objetivo prevenir y reprimir los actos ilícitos de violencia cometidos en los aeropuertos.

Otro foro importante lo constituye la Organización Marítima Internacional (OMI). Bajo su égida se han adoptado más de 30 instrumentos jurídicos multilaterales de dos tipos: los convenios técnicos que tienen por objeto

evitar accidentes de navegación que afecten la seguridad de personas, bienes o contaminen el medio marino, y otros instrumentos jurídicos que se refieren, fundamentalmente, a la responsabilidad del armador hacia terceros. Dentro de los convenios adoptados en fecha más reciente interesa mencionar el Convenio para la represión de actos ilícitos contra la seguridad de la navegación marítima de 1988, el cual contiene disposiciones análogas a las previstas en los Convenios de Montreal, Tokio y La Haya aunque referidas a la navegación marítima. Un protocolo adoptado en la misma fecha hace extensivas las previsiones para los delitos cometidos abordando o contra plataformas fijas emplazadas en la plataforma continental.

También el Organismo Internacional de Energía Atómica (OIEA) constituye ámbito de elaboración de normas tanto de carácter vinculante como no vinculante. Además de los distintos tipos de acuerdos de salvaguardias concertados entre el organismo y más de un centenar de Estados, se han celebrado bajo sus auspicios varias convenciones como la Convención de Viena de 1963 sobre responsabilidad civil por daños nucleares, que entró en vigor en 1977, la cual establece un sistema de compensación en caso de daño nuclear. En 1988 se aprobó un Protocolo común relativo a la aplicación de la Convención de Viena y el Convenio de París de 1969, lo cual significó un avance en el establecimiento de un régimen más amplio de responsabilidad. También se creó un grupo de trabajo encargado de estudiar todos los aspectos de la responsabilidad por daños nucleares, incluyendo el examen de la responsabilidad de los Estados. En 1979 se aprobó la Convención sobre la protección física de los materiales nucleares que fue abierta a la firma en 1980 y entró en vigor el 8 de febrero de 1987. Ella protege el transporte internacional de materiales nucleares y tipifica delitos vinculados al material nuclear con fines pacíficos.

Asimismo en 1986 a raíz del accidente ocurrido en la central nuclear de Chernobyl se elaboró y adoptó cuatro meses después una Convención relativa a la pronta notificación de accidentes nucleares y una Convención sobre asistencia en caso de emergencia. El instrumento más reciente es la Convención sobre seguridad nuclear abierta a la firma en Viena el 20 de septiembre de 1994. A su vez debe señalarse la labor de esta Agencia en lo relativo a la gestión de los desechos radioactivos. En esta área se han desarrollado códigos de práctica que proveen de guías de conducta para los Estados. Son recomendaciones adoptadas con el acuerdo de los Estados, que carecen de fuerza obligatoria. Algunos de los principios contenidos en esos códigos luego son recogidos en convenciones e inclusive los códigos de prácticas pueden llegar a transformarse en convenciones.

En el Programa 21 aprobado por la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo en 1992, el capítulo 22.4.(b) insta

a los Estados en cooperación con las organizaciones internacionales competentes a apoyar los esfuerzos realizados por el OIEA para elaborar y promulgar normas y códigos de práctica sobre desechos radioactivos. Y en el capítulo 22.5.(a) se establece que los Estados en colaboración con las organizaciones internacionales competentes deberían redoblar sus esfuerzos por aplicar el código de práctica sobre movimientos transfronterizos de desechos radioactivos y examinar la cuestión de la conveniencia de formalizar un instrumento vinculante. Por su parte, la Asamblea General aprobó en su último período de sesiones la resolución 49/75 A, cuyo párrafo dispositivo 8 efectúa el mismo pedido al Organismo.

Estos han sido tan solo algunos pocos ejemplos de reciente desarrollo que, como dijimos, tuvieron lugar en ámbitos distintos de la Asamblea General y, por vincularse a nuevos problemas, su regulación constituye en muchos casos un desarrollo progresivo del derecho internacional.

En varios casos un mismo tema es enfocado bajo distintos ángulos. Ello es lo que ocurre con el terrorismo internacional para cuya represión se han adoptado convenios relativos al tráfico aéreo internacional, convenios tendientes a suprimir actos que atentan contra la seguridad de la navegación marítima, convenciones sobre el mercado de explosivos plásticos con el propósito de su detección, etc.

Lo que cabe preguntarnos es cuáles serán las prioridades para un futuro cercano. Un campo que ha centralizado la atención en los últimos tiempos es el del medio ambiente. Hemos sido testigos de la elaboración de centenares de instrumentos jurídicos que se refieren a su conservación y protección. En la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo se obtuvo como logro fundamental la integración de estos dos conceptos, lo que impulsó la noción de desarrollo sostenible. Asimismo en esa oportunidad se abrieron a la firma dos instrumentos negociados paralelamente a la preparación de la reunión, la Convención marco de las Naciones Unidas sobre el cambio climático y el Convenio sobre la diversidad biológica. De acuerdo al Programa 21 adoptado en Río, la Conferencia solicitó que se elaboraran tratados en materias específicas convocándose una conferencia para elaborar una convención internacional de lucha contra la desertificación en los países afectados por sequía graves o desertificación, en particular África, la cual fue abierta a la firma en París en octubre de 1994; la Conferencia de las Naciones Unidas sobre las poblaciones de peces cuyos territorios se encuentran dentro y fuera de las zonas económicas exclusivas y las poblaciones de peces altamente migratorias; y una conferencia sobre seguridad nuclear en el marco del OIEA. También la preocupación por el movimiento transfronterizo de desechos peligrosos motivó la elaboración de convenciones como las de Basilea y Bamako.

Del examen de los múltiples instrumentos elaborados en relación al medio ambiente, que constituye una de las prioridades a considerar en materia de codificación y desarrollo progresivo, surgen las siguientes conclusiones:

- Varios de los instrumentos constituyen convenciones marco, de carácter general, que contienen los principios a partir de los cuales los gobiernos elaborarán protocolos específicos. Es el caso, por ejemplo, del Protocolo sobre reducción de emisiones a la Convención de contaminación atmosférica transfronteriza. Dentro de los intentos por medir la efectividad alcanzada se encuentran las evaluaciones hechas por los Estados partes, las secretarías y los observadores independientes.
- A partir del informe de la Comisión mundial sobre medio ambiente y desarrollo y del enfoque planteado por la Conferencia de las Naciones Unidas sobre el Medio Ambiente y el Desarrollo, el concepto de “desarrollo sostenible” es un común denominador que figura en ellos.
- Si bien tienen presente en sus disposiciones la protección global del medio ambiente, más de la mitad de los mismos tienen un alcance regional o subregional, como ocurre con la protección ecológica de la Antártida, la cooperación amazónica, etc.
- Generalmente abordan las relaciones con países en desarrollo, por ejemplo, la Convención de Lomé de 1989, o buscan establecer un equilibrio entre los intereses norte-sur, acceso a los recursos, compensación por medidas de conservación, etc., como es el caso de la Convención sobre patrimonio mundial 72.
- Cierta número de acuerdos vinculantes admiten la posibilidad de reservas a fin de obtener una más amplia participación, como sucede en varias convenciones sobre conservación de la naturaleza. Ello sin embargo atenta contra la eficacia del régimen de protección global del medio ambiente. La búsqueda del consenso también ha creado instrumentos ambiguos o sumamente generales.
- Un problema planteado es el de la participación de los países en desarrollo en los procesos de negociación y en la integración de los órganos directivos creados por los acuerdos e instrumentos incluyendo programas y grupos de trabajo. Esto ha dado origen a la celebración de acuerdos que crean fondos especiales.

Resulta claro que el número creciente de instrumentos que se elaboran con la consiguiente superposición de previsiones y mecanismos hace necesaria una coordinación, coordinación que debería incluir un nexo con el trabajo que se realiza tanto dentro como fuera del sistema de las Naciones Unidas. Los futuros proyectos de codificación en materia de medio ambiente

deberían tener en cuenta, por ejemplo, los proyectos a estudio de la Comisión de Derecho Internacional sobre responsabilidad de los Estados, responsabilidad internacional por las consecuencias perjudiciales de actos no prohibidos por el derecho internacional, el proyecto de código de crímenes contra la paz y la seguridad de la humanidad y el proyecto relativo al derecho de los cursos de agua internacionales para fines distintos de la navegación.

Es asimismo innegable la conexión que existe entre distintas aéreas que en el pasado se veían como compartimientos estancos: medio ambiente, derechos humanos y desarrollo. Todo lo cual lleva a concluir que es necesaria la adopción de un enfoque integrado en los futuros esfuerzos de codificación que se lleven a cabo.

Por último, un fenómeno que es posible constatar en este y en otros campos es la incidencia cada vez mayor en la escena internacional de nuevos actores como las organizaciones gubernamentales y no gubernamentales. En consecuencia, la determinación de las prioridades ya no quedara librada exclusivamente a la decisión de los gobiernos.

B. RESUMEN DE LA DISCUSIÓN

El señor Valencia Ospina* señaló que en el transcurso del Congreso se habían puesto de relieve el papel de la Comisión de Derecho Internacional en el proceso de codificación que llevan adelante las Naciones Unidas y el método del tratado multilateral de codificación, un método convencional, para plasmar la obra de codificación que prepara la Comisión. Era comprensible que el énfasis haya sido puesto en la Comisión y en el método convencional, porque la Comisión era el instrumento principal, creado por la Asamblea General, en aplicación del Artículo 13 (1) (a) de la Carta, es decir, un órgano subsidiario permanente con competencia general y porque el método convencional se había considerado hasta ahora, el más eficaz en cuanto implica la obligatoriedad, al menos para las partes en el tratado en cuestión, de las normas que se plasman en ese instrumento. Pero, la Comisión no era el único órgano a través del cual la Asamblea lleva delante el proceso de codificación, sino que ésta había creado otros órganos subsidiarios permanentes con una competencia más restringida, como la Comisión para el Derecho Comercial Internacional (UNCITRAL) y esporádicamente, establecía comités especiales o ad hoc, con objetivos precisos, como, por ejemplo, el Comité Especial de los principios de derecho internacional referentes a las relaciones de amistad y a la cooperación entre los Estados o el Comité Especial sobre la cuestión de la definición de la agresión. Tampoco era el instrumento convencional la

* Secretario de la Corte Internacional de Justicia, La Haya, Países Bajos.

única forma en que podía plasmarse la etapa final del proceso de codificación. El Estatuto de la Comisión de Derecho Internacional preveía una convención como una de las posibles formas que podía asumir esta codificación, pero existía al mismo tiempo la posibilidad de presentar un proyecto que la Asamblea pueda adoptar como modelo para que los Estados se guíen por sus preceptos.

Tratándose de aspectos conceptuales de la codificación, el primer y fundamental problema que se planteaba era la definición misma del concepto de codificación. Porque de codificación existía un sentido estricto tal como está definida en el artículo 15 del Estatuto de la Comisión de Derecho Internacional, y un sentido más amplio que cobija el concepto mismo del desarrollo progresivo tal como está definido también en ese mismo artículo. De todas maneras, la distinción entre codificación *stricto sensu* y desarrollo progresivo *stricto sensu*, en la práctica de la Comisión de Derecho Internacional había desaparecido a pesar de que era una distinción de tipo metodológico. En la elaboración de sus proyectos, la Comisión seguía un mismo procedimiento bien se trate de desarrollo progresivo o de codificación y en sus proyectos finales la Comisión introducía elementos tanto de desarrollo progresivo, como de codificación, sin que considere necesario o posible o útil distinguir cuáles son elementos de uno y cuáles son elementos del otro. Sin embargo, la distinción entre la codificación y el desarrollo progresivo era una distinción que estaba basada en el derecho y simplemente se traducía en el hecho de que la codificación implicaba el traspaso al derecho escrito de lo que ha sido derecho no escrito. Y como tal, la codificación del derecho internacional simplemente era una manifestación ampliada a nivel internacional y posterior en el tiempo a los grandes procesos de codificación del derecho interno que tuvieron lugar en el siglo pasado sobre todo en Europa. No cabía duda que la codificación y desarrollo progresivo del derecho internacional constituían uno de los grandes logros de las Naciones Unidas.

Pero había una diferencia entre codificación a nivel interno y codificación a nivel internacional. La codificación a nivel interno era inherentemente obligatoria, dentro del ámbito de la jurisdicción nacional en la cual se aplicaba. Mientras que la codificación internacional sólo lo era, en cuanto esté plasmada en un instrumento convencional, en un tratado multilateral. A nivel internacional, la codificación traspasaba las normas consuetudinarias y las convertía en normas convencionales. Y la obligatoriedad dependía, dentro del sentido voluntarista y formalista que influye la noción del tratado internacional, del hecho de que un Estado sea parte en esa convención. En cambio, en el caso de derecho consuetudinario, un Estado podía estar obligado por una norma resultado de una práctica generalizada y constante y de una opinión *juris* relativa a esa práctica constante, sin que dicho Estado indivi-

dual necesariamente haya hecho un acto de aceptación, obligatoria para sí de esa norma. El valor obligatorio de una norma consuetudinaria era en ese sentido *erga omnes*. La noción de parte, que era fundamental en el derecho de los tratados, no existía en el derecho consuetudinario.

En este contexto y para reforzar esta idea, aludió al hecho de que en el contexto de los tratados, un Estado parte en un tratado podía hacer una reserva al mismo y, de esa manera, exceptuar la obligatoriedad de una disposición, al menos con relación a la parte que no objetaba esa reserva, mientras que no existía la noción de reserva en el derecho consuetudinario y lo más próximo, que sería una actitud contraria del Estado hacia la práctica generalizada y consuetudinaria, había sido considerada por la Corte Internacional de Justicia en el caso de Nicaragua contra los Estados Unidos¹, como una corroboración de la existencia de la norma consuetudinaria.

También señaló que había sido en un fallo de la Corte Internacional de Justicia, el relativo a la plataforma continental del Mar del Norte², donde se identificaron los tres modos en que podía haber una interrelación entre la norma codificada y la norma consuetudinaria. En el primer modo de interrelación, la norma convencional simplemente reafirmaba una norma ya existente de derecho consuetudinario. En ese caso, lo que se planteaba era la simultaneidad de obligatoriedad de una misma norma bajo el derecho consuetudinario y bajo el derecho convencional, pero no significaba que por el hecho de que esté plasmada en un instrumento convencional, la norma consuetudinaria había sido derogada o suplantada por la norma convencional. La Corte había tenido la oportunidad de pronunciarse sobre este aspecto en el caso de Nicaragua contra los Estados Unidos en cuyo fallo sostuvo la obligatoriedad de ciertas normas, inclusive principios fundamentales de la Carta de las Naciones Unidas, considerada como un tratado multilateral, pero no en tanto que obligaciones convencionales de ese tratado fundamental, sino en tanto que normas obligatorias para todos los Estados dentro del derecho consuetudinario.

Con relación a los otros dos modos de interrelación que están indicados en el fallo de la Corte relativo a la plataforma continental del Mar del Norte, la contribución jurisprudencial de la Corte Internacional de Justicia había sido notable. La Corte no sólo determinaba o aplicaba el derecho en el sentido del Artículo 38 de su Estatuto sino que contribuía a su formación, a su creación. Y eran muchos los ejemplos de esa contribución jurisprudencial de

¹ Caso relativo a las actividades militares y paramilitares en Nicaragua y contra Nicaragua (Nicaragua contra los Estados Unidos de América) (Fondo del Asunto), Fallo del 27 de junio de 1986.

² Casos de la Plataforma continental del Mar del norte, Fallo del 20 de febrero de 1969.

la Corte, la cristalización de una norma como norma de derecho consuetudinario o el impulso inicial hacia ese último objetivo.

A modo de conclusión, señaló que en materia de proceso de codificación y desarrollo progresivo del derecho internacional *chi va piano va lontano*, y era preciso dejar al proceso de codificación seguir su ritmo normal. Asimismo era preciso tener en cuenta la nueva vigencia del derecho consuetudinario y la contribución creciente de la Corte Internacional de Justicia a la creación del derecho a través de sus pronunciamientos. Por otra parte, las actividades de la Comisión de Derecho Internacional en materia de codificación y desarrollo progresivo del derecho internacional no necesariamente debían plasmarse en tratados internacionales sino que podían revestir otra serie de formas.

El señor Villagrán Kramer* se refirió a algunos factores que, en su opinión, eran fuente de frustración en el proceso de codificación y de desarrollo progresivo del derecho internacional. El primero de ellos tenía que ver con la aplicación que a veces se hacía de la distinción entre los conceptos de codificación y desarrollo progresivo del derecho internacional tendiente a poner trabas en la elaboración de un proyecto de normas sobre determinado instituto jurídico. Puso como ejemplo el tema de las represalias que juristas de países desarrollados consideraban como de codificación en lo referente a la definición del derecho a aplicar pero de desarrollo progresivo cuando se trataba de determinar las limitaciones y restricciones a su ejercicio.

Otro factor de frustración era, en su opinión, el estancamiento que a veces se producía con los proyectos que la Comisión de Derecho Internacional enviaba a la Sexta Comisión, lo cual llevaba a preguntarse sobre la eficacia del proceso de codificación y desarrollo progresivo del derecho internacional.

A este respecto señaló las dificultades que podrían surgir con los temas seleccionados para iniciar un proceso de codificación y desarrollo progresivo del derecho internacional. A veces un tema perdía actualidad, y si bien fue considerado como de gran importancia cuando la Sexta Comisión lo recomendó a la Comisión de Derecho Internacional, cuando ésta terminaba su proyecto, el tema ya no despertaba tanto interés y la receptividad de la Sexta Comisión disminuía. Por otra parte la aceptabilidad de ciertos temas y la disposición de los Estados a regularlos normativamente variaba con las distintas regiones geográficas así como con el grado de desarrollo de los Estados. Temas como las reservas a los tratados, la protección del medio ambiente y los derechos y deberes económicos de los Estados eran algunos ejemplos en este

* Miembro de la Comisión de Derecho Internacional.

sentido. Señaló la necesidad de que la selección de los temas se buscara un denominador común en los intereses de todos los Estados, a fin de posibilitar un resultado más exitoso del ejercicio emprendido.

El profesor **Armas Barea***, recordando la vinculación que existía entre el fenómeno de la codificación del derecho internacional y la sociología jurídica, subrayó que era imprescindible tener una predisposición favorable hacia dicho fenómeno a todos los niveles en que la codificación funcionaba, es decir al nivel gubernamental, al nivel doctrinario y al nivel jurisprudencial. Lo cual no quería decir que hubiese que codificar por codificar sino que era un fenómeno ínsito en todo ordenamiento jurídico que aspire a perfeccionarse.

En relación con los conceptos de “codificación” y “desarrollo progresivo del derecho internacional”, si bien estricta y terminológicamente podrían ser dos cosas distintas, un concepto iba de la mano del otro. Sabiendo que eso ha sido lo que en la práctica ha sucedido en la Comisión de Derecho Internacional de las Naciones Unidas, era útil no obstante recordar que, esencialmente, si se le daba a la codificación una acepción restringida, de recopilación, era un fenómeno de naturaleza distinta al desarrollo progresivo. Interesaba señalarlo porque si se trataba de un fenómeno de mera codificación, en el sentido de recopilación, el proceso podía acelerarse dejándolo exclusivamente en manos de los técnicos.

Refiriéndose a lo que llamó el aspecto “plurifacético” de la codificación, puso de relieve la variedad cada vez más amplia de temas o de ramas del derecho internacional que estaban siendo objeto de codificación y desarrollo progresivo. En su opinión, esa multiplicidad estaba empezando a ser casi agobiante. Recordando todas las áreas del derecho internacional ya codificadas desde el comienzo del proceso y todos los organismos que habían intervenido en dicho proceso, inclusive las Naciones Unidas, los organismos especializados, los organismos regionales y los procesos de integración, se preguntó si ya no era más lo codificado que lo por codificar. Y esto era importante porque si bien las nuevas temáticas de la codificación eran importantes, también era cierto que dentro de lo mucho que hay codificado, existían cosas que era preciso perfeccionar pues las generalidades le restaban eficacia a las normas codificadas. El proceso de codificación no sólo era aplicable a nuevos temas sino también a muchos temas ya existentes.

En relación con las etapas del proceso de codificación señaló fundamentalmente dos. Una, gestadora, comprendía la elección del tema a codificar y la elaboración principalmente técnica de la forma que se le quería dar a la

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codificación. La segunda era el nacimiento propiamente dicho, es decir, el proceso legislador que le iba a dar vigencia a la norma del derecho internacional. En estas etapas, el papel, el rol a desempeñar por los actores del proceso de codificación era diferente. En la etapa de "nacimiento", los actores eran fundamentalmente los Estados. Por otra parte, en la etapa de "gestación", la elaboración doctrinaria, los institutos científicos y los intereses legítimos privados podían jugar un papel importante, por ejemplo, en la elección de temas, e inclusive en la redacción de determinadas fórmulas de codificación.

Subrayó la necesidad de promocionar lo más posible el proceso de codificación y desarrollo progresivo del derecho internacional y de intensificar, en la etapa de "gestación", el rol de la doctrina, de los intereses privados y de la opinión pública. En este sentido recordó la evidente tendencia actual a una restricción de los conceptos de soberanía estatal decimonónicos. Y que ya en algunos campos como el derecho de la integración y el de la protección internacional de los derechos humanos, así como en el problema de la protección ambiental, cada vez se manifestaba más una necesidad de llegar a normas codificadoras que restrinjan esa competencia estatal.

El Dr. Bernad* recordó la importancia de la distinción conceptual entre "codificación" y "desarrollo progresivo" del derecho internacional tal como se recogía en el Artículo 15 del Estatuto de la Comisión de Derecho Internacional, pero añadió que, en la práctica, se concebía hoy mal una codificación que no fuese progresiva. Expresó su preocupación relativa a otro "progreso" de la codificación, el cuantitativo. Señaló que prescindiendo del hecho de que, en principio, las propuestas de codificación no solían ser neutrales, había un elemento de una excepcional transcendencia que amenazaba gravemente, en el plano interno y en el plano internacional, a saber, el afán desmedido por regularlo todo, afán que se alimentaba a sí mismo y que en Europa estaba extendiéndose de forma ciertamente alarmante.

En derecho internacional este afán desmedido podía llevar a la hipertrofia normativa y a la banalización de la internacionalidad. Recordó que Paul de Visscher había advertido que lo que es excesivo se convierte pronto en insignificante y que René Jean Dupuy había escrito contra el "mito normativo" reflexiones de gran interés. Si ese afán desmedido no era controlado intelectualmente, podría llevar a que la eficacia del derecho internacional se resintiera seriamente y el respeto que merecía en todos los sentidos se redujera. Reclamó que se regule internacionalmente con máxima prudencia y sólo aquello que deba ser regulado a ese nivel, que se cuiden al máximo los vitales

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intereses generales implicados en el proceso y que prevalezca el realismo sobre el voluntarismo acrítico.

El profesor Treves* señaló que deseaba efectuar algunas reflexiones acerca del papel de la Asamblea General de las Naciones Unidas en el proceso de codificación y desarrollo progresivo del derecho internacional. A este respecto hizo notar que en el seno de la Sexta Comisión muy a menudo se encontraban los propios miembros de la Comisión de Derecho Internacional en calidad de representantes de sus respectivos Estados. De ese modo podía afirmarse que existía en la Sexta Comisión una presencia simultánea de representantes "amigos de la Comisión de Derecho Internacional" y de representantes que hacían valer los intereses políticos de sus respectivos Estados. Ello en la práctica y a menudo había funcionado en el sentido de proteger a la Comisión de Derecho Internacional de fracasos. En consecuencia, y en numerosos temas, a través de reuniones diversas, la Sexta Comisión trataba de allanar el camino, eliminando obstáculos a efectos de que la conferencia de codificación llamada a ocuparse del tema de la CDI tuviera éxito. Ejemplos en este sentido podrían ser la Convención de Viena sobre el derecho de los tratados entre Estados y organizaciones internacionales o entre organizaciones internacionales y en el momento actual, el proyecto de estatuto de un tribunal penal internacional.

Por otra parte existían ciertos temas que la Sexta Comisión consideraba como de índole fundamentalmente política y que no estaba dispuesta a enviar a la Comisión de Derecho Internacional. Recordó en este sentido temas como los proyectos de convenciones relativos a los mercenarios o a la toma de rehenes, las declaraciones sobre las relaciones amistosas entre los Estados, sobre el no uso de la fuerza, etc., los cuales habían sido objeto de consideración en otros foros. Por último, existían ciertos temas que la Asamblea General ni siquiera estaba dispuesta a confiar a la Sexta Comisión. Recordó en este sentido los tratados relativos al derecho espacial y la Convención sobre el Derecho del Mar de 1982.

La profesora Infante Caffi** señaló que, teniendo en cuenta los elementos y proposiciones ya expuestos en el curso de la mesa redonda, quería referirse a algunos elementos sobre las interrelaciones y diferencias entre los procesos de codificación y desarrollo progresivo en el derecho internacional. Indicó que los procedimientos que estaba empleando la comunidad internacional para la creación del derecho internacional de carácter general implicaban un proceso continuo de desarrollo progresivo y de codificación.

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Participaban en este proceso de creación jurídica diversos órganos de la comunidad internacional, en particular, la Comisión de Derecho Internacional, los órganos políticos y decisionales de las Naciones Unidas, los organismos especializados, así como organizaciones regionales cuando trataban temas de interés general. También tenían una participación destacada ciertas entidades académicas de representación amplia y que históricamente han contribuido al estudio de los principios generales del derecho internacional, tanto de *lege lata* como de *lege ferenda*.

La tarea de codificación constituía un esfuerzo de sistematización y clarificación de las normas consuetudinarias vigentes, lo cual exigía un grado avanzado de investigación y racionalización acerca de la práctica internacional. Por otra parte, mientras que la codificación exigía un trabajo de expertos y un conocimiento profundo de la práctica y la jurisprudencia, el desarrollo progresivo era un fenómeno que procuraba más bien establecer principios y reglas de amplia aceptación y que puedan promover valores o ciertos objetivos específicos, resolver disputas de intereses o jurídicas, o establecer un régimen internacional sustentado en el derecho. Desde el punto de vista teórico ambos procesos se apoyaban mutuamente, si bien la codificación requería de una aceptación política ulterior que le permitiera superar la etapa de proyecto o propuesta.

El mandato de la Comisión de Derecho Internacional se refería a ambos procesos, y las tareas correspondientes en los dos sentidos debían llevarse adelante como una forma de contribuir al desarrollo de un cierto orden internacional. De particular interés era el trabajo realizado en materia de responsabilidad internacional, así como en materia de crímenes contra el derecho internacional. Por otra parte, la codificación requería de un conjunto amplio y sostenido de precedentes, lo cual tenía utilidad para el conocimiento del derecho internacional en general, y no sólo para fines doctrinarios. Este aspecto, no obstante, constituía una diferencia básica con otras formas de elaboración del derecho internacional escrito basadas en la definición de intereses coincidentes.

Señaló asimismo que el fenómeno de formación de la costumbre no se detenía. En la actualidad existían materias como la protección del medio ambiente, en la cual aparecían cristalizándose nuevos principios y generándose nuevos acuerdos a nivel regional o general, que incidían en la formación de nuevas normas consuetudinarias.

Finalmente indicó que podía ser importante considerar una relación más activa entre la labor de codificación y desarrollo progresivo que llevaban adelante los comités y órganos regionales, con lo que ocurre a nivel general. Esta interrelación debería considerar la posibilidad de evitar la duplicación de trabajos.

El señor Salinas* señaló que la diferencia entre codificación y desarrollo progresivo era muy difícil de establecer en la práctica y, en particular, en los trabajos de la Comisión de Derecho Internacional. Sin perjuicio de ello, esa distinción era posible de efectuar en el plano teórico, siendo ella especialmente útil si se quería efectuar un análisis sobre la efectividad de los trabajos de la Comisión de Derecho Internacional en este ámbito. Al respecto, señaló que si la Comisión, como su práctica lo indicaba, se embarcaba en trabajos de codificación, ello era especialmente útil a fin de precisar y clarificar el derecho consuetudinario. Ahora bien, los problemas se presentaban cuando este órgano subsidiario de la Asamblea General efectuaba labores de desarrollo progresivo. En este campo, la experiencia indicaba la conveniencia de que la Comisión deje que "la costumbre siga su camino" confiando en que ella se vaya poco a poco consolidando en la práctica de los Estados y reflejándose, entre otros medios, en la adopción de resoluciones en organizaciones internacionales tanto universales como regionales. En este último aspecto, particular relevancia debía darse a la práctica de organismos regionales en la formación de la costumbre internacional, como lo indicaban los avances logrados, tanto en el plano interamericano como europeo, en la adopción de la democracia como un valor universal.

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VIII. SPACE LAW: THE ROLE OF THE UNITED NATIONS*

A. INTRODUCTORY STATEMENT BY THE MODERATOR: FRANCIS LYALL**

I first wish to indicate, on behalf of Dr. N. Jasentuliyana, Deputy to the Director-General, United Nations Office at Vienna, and Director of the Office for Outer Space Affairs, who was the initiator of this Round Table, that the focus of this Congress held on the fiftieth anniversary of the United Nations is on the codification, progressive development and implementation of public international law, so that it is fitting that we highlight the development of international space law by the United Nations, one of its greatest successes in this field.

Unlike other areas, such as the law of the sea and aviation law, where international law-making and cooperation were slow to follow the new dimensions of human activity, the very first steps in the exploration of outer space were soon followed by the development of new norms of international law and cooperation, so as to bring the uses of this new technology within the bounds of international law.

The link between law and technology was quickly bridged by an imaginative and innovative effort at international legislation within the United Nations, which has laid down, through the Committee on the Peaceful Uses of Outer Space (COPUOS), a framework of multilateral treaties and sets of principles for the regulation of space activities. A distinctive body of principles and rules governing the exploration and use of outer space has emerged, sufficient for it to be considered a separate branch of international law, just like air law and maritime law.

In recent years, however, this space law-making process has slowed down. The development of various factors has made it a very complex matter. For example, operational areas that now require regulation have become

* Round-table discussion held on Thursday, 16 March 1995.

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technical in nature. Space technology has proliferated, due, in part, to the realization that space exploitation and use benefit not only a small minority of States, but the entire family of nations. There has been a dramatic shift from the emphasis on the use of space for civilian, as opposed to military, uses that has been caused, in part, by the end of the cold war. There has been a tremendous worldwide increase of private entities using space for their own commercial ends. Developing countries are becoming increasingly involved in the use and exploitation of outer space. The resulting overall effect of having a greater number of nations participating in the law-making process of the United Nations—some of whom have to take cognizance of the large financial stakes of their private entities involved in space activities—often on very technical issues—has led to the process of law-making becoming tedious and time-consuming, with long, drawn-out negotiations and debates.

The time has perhaps come to look for new and innovative ways of developing space law to take into account these factors. For instance, the international community might want to begin to earnestly look—with the strong support of scientists and other experts—at the formulation, for subjects of a more technical nature, of easily amendable technical standards and recommended practices for space activities. This will not only allow the law to keep pace with rapidly changing technology, but it will also fill gaps and weaknesses in, and supplement, existing space law treaties and sets of principles. The United Nations, through COPUOS, could follow the example set by international organizations such as the International Civil Aviation Organization (ICAO) and adopt international standards and practices for topics such as space debris, the outer space and Earth environments, safety of space operations, manned space flight and space navigation.

This Round Table was set up to take stock of what the United Nations has achieved in the area of the progressive development of international space law, and to examine how it could continue to further international cooperation in this field. As this concludes the remarks by Dr. Jasentuliyana, I would add that, as was already mentioned, the development of international law by the United Nations takes place by negotiation, consensus and the adoption by the General Assembly, without vote, of resolutions. Space law has provided the model and the test bed for procedures. It is therefore fitting that we consider space law in a separate round table.

The coming of the space age in 1957 was, for most of us, something swift and unexpected. The United Nations, however, promptly rallied and recognized the importance of this new development. The scientific purposes of the space satellite—first proposed in planning for the International Geophysical Year—were quickly realized to be but a part of the potentialities of space. It became clear that principles and laws were required. Within six

weeks of the launch of Sputnik I, the General Assembly included, in its resolution 1148 (XII) of 14 November 1957, the statement that objects sent into outer space should be used for peaceful purposes only. At its subsequent session, the Assembly, by resolution 1348 (XIII) of 13 December 1958, set up the Ad Hoc Committee on the Peaceful Uses of Outer Space with the permanent Committee following a year later. The rest, as the saying goes, is history.

The United Nations has contributed mightily to the development of space law by elaborating relevant principles and the five major space treaties. However, while the United Nations effort in the matter was crucial since it established the context within which all the later developments have occurred, we should also acknowledge that others within the family of United Nations specialized agencies have also played an important role. The International Telecommunication Union, for example, with its responsibilities for radio, is an essential player in the game. Without clear radio contact, a satellite is but an expensive heap of junk tumbling through space. Again other organizations have contributed. For example, the International Law Association and the International Bar Association have devoted time and effort to the law of outer space. And I must mention the International Institute of Space Law, affiliated to the International Astronautical Federation, whose annual Colloquia Proceedings are a store of intriguing and sometimes sensible ideas.

We today, however, are here to celebrate the United Nations achievements in these matters, with perhaps a sideways glance at some less successful elements. And it is a remarkable history of accomplishment. Remember that the ground-breaking Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space of 1963¹ was worked out through a period of considerable international tension, and you have to recognize that the United Nations system functioned at its best. The establishment of the Office of Outer Space Affairs and the continuation of the Committee on the Peaceful Uses of Outer Space demonstrate the United Nations commitment to space. Space has changed our lives. We have international weather watch by satellite. We have the benefits of remote-sensing. We have the more questionable benefit of direct broadcasting from space. And we have the immense development of international telecommunications, of swift news and massive interchange of information, of messages individual and official. These have both a history and a future, but always within the framework of law and principles which the United Nations has developed. But let others explore these matters.

¹ General Assembly resolution 1962 (XVIII) of 13 December 1963.

B. SUMMARY OF THE DISCUSSION

Dr. Galloway* observed that a new era in human history began with the orbiting of Sputnik I on 4 October 1957. Outer space was added as a new environment where space science and technology could be used for peace and war. The alternatives were devastation by weapons of mass destruction or the development of peaceful uses for the benefit of all mankind. The United Nations immediately accepted the challenge with leadership that has extended international law into outer space not only as a distinct spatial area but also for significant functional uses. The legal pattern formulated for outer space activities, which had continued to develop during the past 38 years, was an outstanding achievement of the United Nations during its 50-year history.

United Nations organizations and processes were used to bring about a system of permitted and prohibited practices to strengthen conditions essential to maintaining outer space for peaceful uses. International space cooperation was reinforced by the strong political will to avoid disaster and concentrate on improving communications, weather forecasting, remote-sensing and a variety of space applications.

Prior to the advent of satellites, the United Nations had been working on disarmament proposals which were to result in the 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and under Water.² Outer space matters demanded a new organizational structure. On 13 December 1958, the General Assembly, in its resolution 1348 (XIII), adopted the proposal of 20 nations to establish the Ad Hoc Committee on the Peaceful Uses of Outer Space. The resolution recognized the common interest of mankind in outer space for peaceful purposes and stressed the importance of international cooperation to prevent the extension of national rivalries. Existing organizations with space and space-related functions, both within and outside the United Nations, were identified, and space legal problems were defined as administrative, procedural and regulatory.

Some major policy decisions emerged: that the United Nations Charter was not confined to the Earth and extended into outer space; that official definitions of airspace and outer space were not required before proceeding with the work; and that an international space agency was not needed, particularly because it would be impracticable to withdraw space-related func-

² *International Legal Materials*, vol. II (1963), pp. 883-891.

* Honorary Director, International Institute of Space Law of the International Astronautical Federation, Washington, D.C., United States of America.

tions from the International Telecommunication Union and the World Meteorological Organization. The full Committee membership did not participate in the work because of differences of opinion on whether decisions should be made by majority or unanimous voting.

The permanent Committee on the Peaceful Uses of Outer Space was established by the General Assembly on 12 December 1959 by resolution 1472 (XIV) with 24 members, now expanded to 61. The practice began of sending reports from the Scientific and Technical Subcommittee to the Legal Subcommittee to consider when drafting space law. Working groups could be used to analyse complex problems. For ease in negotiation, the texts of proposals under consideration designated agreed and disagreed viewpoints until final decisions were made. A compromise reached on voting led to full participation by Committee members. The Committee agreed that its decisions and those of its two subcommittees would be made by consensus, it being understood, however, that if voting were required, decisions would be made by majority vote. The consensus process prevailed when the Chairman perceived that a subject was ripe for decision and announced, "If there is no objection, it is so decided", a method that had proved successful in formulating five space treaties.

A permanent professional staff was provided by creating the Outer Space Affairs Division (now the Office for Outer Space Affairs, Vienna), and services were also available from the staff of the Office of Legal Affairs. Methods for coordination were developed for relevant United Nations specialized agencies. Official observers were appointed to represent major international space organizations at the annual sessions of COPUOS and its subcommittees. The role of the Secretary-General was enhanced by treaty provisions requiring exchange of information, and the establishment of a United Nations registry for the launching of objects. Additional management methods included international space conferences, seminars and workshops sponsored by host governments.

Agreement on decision-making led to cooperation in the germination of ideas for space law, taking the form of resolutions adopted by the General Assembly. Noteworthy was the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, whose main provisions were destined for inclusion in the "Magna Carta" 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.³ Provisions in this treaty were expanded in four successive treaties (1968, 1972, 1975 and 1979) to keep pace with advances in space activities and ensure the develop-

³ United Nations, *Treaty Series*, vol. 610, pp. 205-301.

ment of a harmonious body of space law. In addition to treaties, the United Nations adopted resolutions to guide States on the use of artificial Earth satellites for international direct television broadcasting (resolution 37/92 of 10 December 1982), remote-sensing of the Earth from outer space (resolution 41/65 of 3 December 1986) and principles relevant to the use of nuclear power sources in outer space (resolution 47/68 of 14 December 1992).

An outline of the ways and means used by the United Nations to develop space law would be incomplete without identifying the political and psychological elements that influenced the use of the institutional framework to achieve what has become a viable world regime for conducting space activities:

- The international nature of space science and technology created the political will for nations to seek agreement on a legal order to ensure peace;
- The United States and the Soviet Union did not seek to monopolize outer space but strongly favoured and promoted international cooperation;
- Technical imperatives for effective operation of space objects demanded political adjustments which were made because nations were united in sharing the need for improved global communications and weather forecasting—a factor which ensured compliance by nations with regulations in treaties elaborated in the framework of the United Nations;
- Problems whose difficulty could have caused delay, such as defining outer space or creating an international space agency, were not permitted to hold back action on making the United Nations the focal point for international space cooperation. Foresight in identifying some potential problems resulted in treaty provisions to ward off such developments;
- United Nations planning for space law was not confined to exploration but included functional uses of worldwide interest;
- Space programmes, developed as part of the International Geophysical Year (1 July 1957-31 December 1958), created a pool of internationally minded scientists and engineers who provided the factual background for formulating realistic space law;
- Many States passed national space laws with provisions in harmony with United Nations legal concepts;
- The United Nations as the focus for international space activities was recognized by newly created space organizations as well as those with space-related functions;
- Consensus decision-making proved remarkably successful as a process whereby agreement could be reached with patient negotiation and the

will to advance toward accord. This method has not resulted in adoption of least common denominators, as evident from treaty provisions on complex problems of arms control, sovereignty and international responsibility. During the years when space law has been taking shape, COPUOS and its subcommittees have benefited from the outstanding abilities of the distinguished chairmen in conducting sessions aimed at reaching consensus.

Professor Vlasic,* reviewing space law treaties and principles developed through the United Nations, stressed that space law, the newest branch of international law, had the unique distinction of being almost entirely created through the organs of the United Nations. The centre of this codificatory activity had been the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space (COPUOS). All five multilateral treaties (as well as the three major General Assembly resolutions) regulating various space uses were negotiated and drafted in that Subcommittee. It merited special emphasis that all these agreements applied to both civilian and State (military) spacecraft.

By far the most important among the five space law agreements was the Outer Space Treaty of 1967.⁴ It enunciated all the fundamental principles governing the uses of the space environment. Outer space was free for exploration and use by all States (art. I); there should be free access to all areas of celestial bodies (art. I); outer space was not subject to national appropriation by claim of sovereignty, by means of occupation or by any other means (art. II); international law and the Charter of the United Nations applied to activities of States in outer space (art. III); States should not place nuclear weapons and other weapons of mass destruction (chemical, biological and radiological) anywhere in outer space (art. IV); the establishment of military installations, the testing of any kind of weapons and the conduct of military manoeuvres on celestial bodies was prohibited (art. V); States bore international responsibility for national activities in outer space whether carried out by governmental or private entities (art. VI); and States were under an obligation to conduct their activities in space in such a way as to prevent environmental contamination and harmful interference with the lawful activities of other States (art. IX).

The essence of the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space⁵ was

⁴ *Ibid.*

⁵ *Ibid.*, vol. 672, pp. 119-189.

* Professor of International Law, Faculty of Law, McGill University, Montreal, Quebec, Canada.

contained in its preamble, which quoted the Outer Space Treaty's call on States to render "all possible assistance to astronauts in the event of accident, distress or emergency landing" and to promptly and safely return them to the launching authority (also art. 4). Astronauts were designated "envoys of mankind" and were accorded immunity equal to that of ambassadors. The duty to return them was unconditional. In contrast, the return of objects was not automatic: the State on whose territory a foreign space object was found could make conditional its return upon receiving satisfactory identifying data from the launching authority, as well as compensation for the expenses incurred in the recovery and return of the object (art. 5(3) and (5)).

The Convention on International Liability for Damage Caused by Space Objects⁶ elaborated article 7 of the Outer Space Treaty. The Convention had adopted a dual system of liability: for damage caused by a space object on the surface of the Earth or to aircraft in flight, the launching State was "absolutely liable" (art. II); however, if the damage was caused in the airspace or outer space to a spacecraft or persons on board such a spacecraft by a space object of another State, liability would be based on fault (art. III). The Convention defined "damage" as "loss of life, personal injury or the impairment of health; or loss of or damage to property" (art. I(a)). The launching State could be exonerated from absolute liability only if it could be established that the damage had resulted from gross negligence or from an act or omission done with intent to cause damage on the part of the claimant State (art. VI(1)). No limit was placed on a launching State's liability—the claimant State must be restored to the condition that would have existed if the damage had not occurred (art. XII). This Convention was the first multilateral treaty that had imposed the regime of absolute liability directly on States.

The question of spacecraft registration was the object of much interest from the very beginning of the space age resulting eventually in the Convention on Registration of Objects Launched into Outer Space of 1975.⁷ The Convention provided for dual registration of "space objects"—national and international. Each launching State was obliged to maintain a national registry of space objects launched into Earth orbit and beyond (art. II(1)). The Secretary-General of the United Nations was responsible for maintaining a register in which information specified by article IV and furnished by the launching States was recorded (art. III(1)).

The *raison d'être* of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies⁸ could be found in its preamble, which

⁶ *United Nations Juridical Yearbook 1971* (United Nations publication, Sales No. E.73.V.1), pp. 111-117.

⁷ United Nations, *Treaty Series*, vol. 1023, pp. 15-73.

⁸ General Assembly resolution 34/68 of 5 December 1979, annex.

referred to “the benefits which may be derived from the exploitation of the natural resources of the Moon and other celestial bodies”. The spectacular development of space technology achieved by a handful of States, repeated landings on the Moon by astronauts and unmanned devices and the silence of the Outer Space Treaty concerning the legal regime of natural resources on celestial bodies prompted a number of States to seek a treaty which would secure an equitable sharing of those resources. Article 11 of the Agreement attempted to respond to these aspirations by declaring the Moon and its natural resources the “common heritage of mankind”, the first time this now well-established concept of international law appeared in a multilateral treaty. While States were free to appropriate samples of lunar mineral resources (art. 6 (2)), “[n]either the surface nor the subsurface of the Moon . . . or natural resources in place” may become property of any State (art. 11(3)).

Attempts to regulate by treaty direct television broadcasting by satellite, remote-sensing of the Earth from space and the use of nuclear power sources on board space objects had not been successful. Instead, three sets of guiding principles had been drafted by COPUOS and adopted as resolutions of the General Assembly. The 1982 Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting⁹ reflected the conflict between two irreconcilable views: one holding that there should be an uninhibited free flow of information of all kinds regardless of national frontiers; and the other, seeking to enshrine the principle of control of programme content transmitted from abroad. International direct television broadcasting by satellite should be carried out in a manner compatible with “the sovereign rights of States” and with the “rights of everyone to seek, receive and impart information and ideas”. The Principles also required that a State planning to initiate such broadcasting should consult receiving State(s).

The 1986 Principles relating to remote-sensing of the Earth from Outer Space¹⁰ were long delayed due to conflict between the proponents of the “free flow of information” and the proponents of the extension of territorial sovereignty to information about natural resources. The most important principle (XII) provided that when one State acquired data about the territory of another, the sensed State should have access to the data on a non-discriminatory basis and on reasonable cost terms.

The impact on Canadian territory of the Soviet nuclear-powered satellite—Cosmos 954—in January 1978 gave rise to demands by a number of countries for the strict regulation of nuclear devices launched into outer space. In 1992, the Principles Relevant to the Use of Nuclear Power Sources

⁹ General Assembly resolution 37/92 of 10 December 1982, annex.

¹⁰ General Assembly resolution 41/65 of 3 December 1986, annex

in Outer Space¹¹ were adopted. These Principles recognized that the use of nuclear power sources may be essential for some space missions, but systems using such power sources should be designed with redundancy and so as not to go critical before reaching the operating orbit. In case of a malfunction leading to re-entry, the launching State should inform other States and provide assistance to eliminate any harmful effects.

Although not binding, these resolutions, especially when read in conjunction with the Outer Space Treaty, carried considerable moral force and at the very least, in case of a dispute, placed the burden of proof on the State accused of acting in violation of the Principles.

Mr. Telles Ribeiro,* discussing prospects for the future, and the ways in which the United Nations could continue to contribute to the progressive development of international space law, pointed out that one factor that had played a large part in COPUOS success in the elaboration of the treaties and legal principles was the procedure of consensus, by which the Committee and its subsidiary bodies operated. Another factor was the close interaction that existed between its two subsidiary bodies: the Scientific and Technical Subcommittee and the Legal Subcommittee. In a field as affected and influenced by technology as space, technology and law could not exist in isolation from each other. The procedure followed by the Committee allowed Member States to consider, debate and negotiate the technical and political aspects of space law. This not only brought policy issues to the forefront, but also led to an extremely useful exchange of ideas between lawyers, scientists and diplomats, permitting each side to fully understand all the issues involved.

Such interchange of views was of particular importance during the drafting of the Nuclear Power Sources Principles adopted by the General Assembly in 1992.¹² The Principles were to be reopened for revision in 1994, but there was consensus in the Subcommittee and the Committee that the Principles, as they at that time stood, adequately governed existing technology in this field, and hence did not need revision at that stage.

The two other items of substance under active consideration by the Legal Subcommittee concerned the definition of outer space and the geostationary orbit, and outer space benefits. Discussion on the topic of the definition of outer space had remained stagnant in the Legal Subcommittee for many years, with gradual progress being made on the debate on the geo-

¹¹ General Assembly resolution 47/68 of 14 December 1992.

¹² Ibid.

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stationary orbit. In the future, the question of the definition of outer space might need to be resolved, if the so-called aerospace plane was developed. Since the two areas had different legal regimes, the international community would have to decide what legal rules applied to the hybrid craft.

As for outer space benefits, a subject of particular importance to North-South cooperation, the discussions so far had been particularly encouraging. Article I of the Outer Space Treaty of 1967 was the foundation on which was built the draft set of "principles regarding international cooperation in the exploration and utilization of outer space for peaceful purposes", a proposal co-sponsored by 12 States, including Brazil, before the Legal Subcommittee of COPUOS. A wide gap existed in scientific development and access to space science and technology between developed and developing nations. Space technology tended primarily to benefit a small group of States. The co-sponsors of the draft set of principles thought that this gap could be narrowed through the development and application of legal principles relating to international cooperation regarding space activities. The developed countries, on the other hand, were concerned that if international space cooperation were formalized by a set of possibly legally binding principles, this not only would interfere with their right to decide on when, with whom and how they could engage in such cooperation, but could also adversely affect matters such as the transfer of technology.

Space debris posed an increasing hazard to the exploration and utilization of space. After many years of discussions in COPUOS and the Scientific and Technical Subcommittee, the question of space debris was formally placed on the agenda of the thirty-first session of the Scientific and Technical Subcommittee in 1994. Several Member States had recommended that the topic of space debris should also be placed on the agenda of the Legal Subcommittee, but others opposed this idea, feeling the discussion would be premature. It was unlikely, considering the debate in the Scientific and Technical Subcommittee, that the Legal Subcommittee would be asked to begin to draft international regulations to deal with this issue for some time to come. But there was an urgent need for some kind of immediate action to be taken, especially to ensure the reduction in the growth of space debris.

The commercialization of outer space was another important topic. The legal implications of such issues as intellectual property rights, international commercial launch services, the liability aspects of such services, insurance of space launches, technology transfer and product liability insurance could, in the future, be subject to regulation.

In the area of manned space flights, the international community had come to realize that international cooperation was vital. Recent developments with regard to International Space Stations, and the MIR space

station, were cases in point. More ambitious projects, such as flights of exploration to, and settlement on, the Moon and Mars were in the pipeline. Present regulatory aspects with regard to manned space flight might therefore not be completely adequate. This was a theme which could also be investigated by COPUOS.

As for the question of amending the Moon Agreement, it was not likely that the near future would see the exploitation of the resources of the Moon and other celestial bodies become a reality. However, in the future, the international community might wish to modify the provisions of article XI on "the common heritage of mankind" and the "international regime". These controversial provisions had kept the major space Powers from ratifying the Agreement.

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Mr. Noll,* after recalling that in 1995 the International Telecommunication Union (ITU) was celebrating its 130th anniversary, described the role of the Union in the field of human space activities. As a member of the United Nations family of organizations responsible for the international regulation of telecommunications, ITU had, since the inception of those activities, made an important contribution in this regard. The contribution included the creation, as well as constant development and refinement, of the international regulatory mechanisms necessary for the advancement of those activities. This was thus done not in the context of the law of outer space, but rather in the framework of the international telecommunication law, which was complementary to the former and was an indispensable prerequisite for any successful human space activities in outer space. ITU allocated the necessary bands in the radio frequency spectrum for space objects and provided the adequate international management of that part of the spectrum.

The most recent landmark in the ITU work relating to outer space was the World Administrative Radio Conference on the Use of the Geostationary Satellite Orbit and the Planning of the Space Services Utilizing It, the two sessions of which were held in 1985 and 1988. The results of the two sessions were well known and mainly contained in Appendices 30 and 30A of the Radio Regulations which were a part of the Union's codification of international telecommunication law and supplemented the provisions of the Constitution and Convention of the ITU.

In October-November 1995, a World Radiocommunication Conference (WRC-95) was to be held. Pursuant to ITU Council resolution 1065,

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this Conference was called upon to undertake a substantial revision of the Radio Regulations with a view to simplifying them and to prepare another Conference, WRC-97, which would consider the question of revising the above-mentioned Appendices. Both Conferences should be closely followed by all concerned, as they would have implications for the telecommunication regulatory issues related to space activities.

The most recent World Administration Radio Conference, held at Malaga-Torremolinos, Spain, in 1992, discussed a question of global mobile personal communications systems (GMPCS) which used non-geostationary satellites. For those systems, the conference allocated specific bands, in particular in the 1610-1626.5/2483.5-2500 frequency MHz bands. Those systems were also referred to as "Big Leos" (Low Earth Orbiting Satellites Systems) typically consisting of between 12 to 66 satellites in various subgeostationary orbital positions and intended to provide real time voice and data coverage over large portions of the globe. In addition, there were also so-called "Little Leos" operating below 1 GHz, typically using smaller numbers of satellites and providing a variety of data services, and store-and-service messages. The "Little Leos" were likely to be in service before the "Big Leos", and they required urgent domestic and international regulatory and coordination action. Various aspects of this issue were dealt with in a GMPCS report, available from the ITU at request. The emergence of such systems would no doubt lead to regulatory initiatives at future World Radiocommunication Conferences of ITU, and thus to future ITU contributions to the development of international cooperation in the field of human space activities.

Professor Zemanek* recalled that in the early years of the Committee on the Peaceful Uses of Outer Space (COPUOS), the relations between the two subcommittees of the Committee—Scientific and Technical, and Legal—were not very harmonious because they were influenced by various political factors. In particular, documents elaborated by the Legal Subcommittee were not "directly" based on the work of the Scientific and Technical Subcommittee. Similarly, the decisions to assign new tasks to lawyers in the Legal Subcommittee were taken not in the Scientific and Technical Subcommittee, but rather in COPUOS, which made recommendations to that effect for subsequent approval by the General Assembly.

As for the concept of the common heritage of mankind in application to the Moon and its natural resources, it was introduced for the first time in

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the debate in the Legal Subcommittee at one of its sessions held at Geneva. In that year, some countries belonging to the Group of 77 had had to replace the outer space lawyers representing them in the Legal Subcommittee with lawyers from the Conference on the Law of the Sea. At that time the common heritage of mankind concept was already well known in the law of the sea. It was interesting that, although this concept came to outer space law from the law of the sea, space lawyers were nevertheless the first to succeed in incorporating it in a specific treaty—the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.¹³

While the elaboration and adoption of international standards and practices for tackling outer space problems like that of space debris might be a viable option, the adoption of such standards and practices should be preceded, as had been the case in ICAO, by the conclusion of an appropriate intergovernmental agreement on the subject.

Mr. Tuvayanond* pointed to lacunae in the law of outer space and described as unfair the situation in which many developing countries found themselves as to the access to the geostationary orbit (GSO). Currently no guaranteed access to this valuable natural resource existed for many developing countries which had no technical capabilities to launch their own satellites to the orbit. Procedures for registration of orbital slots on the GSO had been conceived in a very vague manner. The criterion of readiness to launch such satellites to the GSO, which was being used on a “first-come, first-served” basis, put those States in a disadvantageous position. There were already 40 satellites on the GSO above Asia, and 14 more were to be launched in the near future. Therefore, one of the tasks before international space law was to correct the situation and to protect the legitimate rights of developing countries to the use of the GSO.

In reply, the Moderator said that, while WARC-ORB 85-88 was an important step in the direction of modifying the current “first-come, first-served” system for the use of the geostationary orbit, a lot remained to be done in order to guarantee equitable access of all States, in particular the developing countries, to this valuable natural resource.

¹³ General Assembly resolution 34/68 of 5 December 1979, annex.

* Deputy Director-General, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs, Bangkok, Thailand.

Mr. Macdonald* referred to the common heritage of mankind concept and inquired about the current status of the idea of establishing an international space authority or organization.

In reply, Mr. Galloway said that at present the proposal to establish an international space agency was not actively considered either in COPUOS or in other United Nations forums, one of the main reasons being perhaps that, historically, a number of specific areas of space activities were already successfully dealt with by existing international organizations (e.g., ITU, WMO), which made it difficult for States to work out the terms of reference of an international space agency.

Mr. Telles Ribeiro observed that outer space activities were global in nature and that, pursuant to article I of the 1967 Outer Space Treaty,¹⁴ the exploration and use of outer space should be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. On that basis, quite a few States had in the past supported the idea of establishing an international space agency which would, *inter alia*, guarantee the implementation of the article in question. However, it proved difficult to reach agreement on the replacement of the existing international machinery for cooperation in outer space by a new universal organization. Efforts were accordingly being made to enhance cooperation through other means.

The Moderator added that if, in the future, the international community were to agree to establish an international space organization, the International Seabed Authority might perhaps serve as a model for that purpose.

Asked if there were plans to renegotiate the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies¹⁵ under article 18 thereof, Mr. Galloway replied that the question of the review of the Moon Agreement had been discussed at the thirty-seventh session of COPUOS in 1994. As a result of this discussion, the Committee had recommended that the General Assembly "should take no further action" at its forty-ninth session on the matter.

Mr. Terekhov** said that, pursuant to article 18 of the Moon Agreement, the question of the review of that instrument was included in the agenda

¹⁴ United Nations, *Treaty Series*, vol. 610, pp. 205-301.

¹⁵ General Assembly resolution 34/68 of 5 December 1979, annex.

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** Senior Legal Officer, General Legal Division, Office of Legal Affairs, United Nations Secretariat.

of the forty-ninth session of the General Assembly in order to consider, in the light of its past application, whether the Agreement required revision. The Assembly, having considered that question, limited itself to noting, in paragraph 42 of its resolution 49/34 of 9 December 1994, the above COPUOS recommendation that "no action" should be taken.

Mr. Cede* recalled that COPUOS, in addition to the five treaties previously referred to, had elaborated three declarations of legal principles which were subsequently adopted by the General Assembly. Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting were adopted by the General Assembly in 1982 by voting. It was noteworthy that those Principles had not acquired an important role in outer space law, and they were not very often referred to.

The 1986 Principles relating to Remote-sensing of the Earth from Outer Space, which were approved without a vote, were used by States as general guidelines for the activities in the area of remote-sensing.

As for the Principles Relevant to the Use of Nuclear Power Sources in Outer Space, which were adopted by the General Assembly in 1992, also by consensus, they embodied detailed scientific and technical guidelines aimed at the safe use of nuclear power sources onboard space objects. They envisaged their review and possible revision, a question currently examined in COPUOS. It would be interesting to analyse the success, or lack of it, of these principles in the light of the results of that review.

Professor Kolosov** supported the idea of elaborating an agreement regulating various questions of manned space flights. Recently, a group of space lawyers from Germany, the Russian Federation and the United States had prepared a draft convention on manned space flights. That work was done within the framework of the International Institute of Space Law of the International Astronautical Federation. The draft constituted a good starting point for commencing the consideration of this important legal issue in COPUOS and should be communicated to the Legal Subcommittee of COPUOS.

Outer space law was becoming more and more closely related to environmental law. The increasing impact of outer space activities upon the environment and the use of outer space technology for monitoring environmental processes on the Earth made it necessary for lawyers to take a closer look at various environmental issues of human activities in outer space.

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** Professor, Moscow State Institute of International Relations of the Ministry of Foreign Affairs, Moscow, Russian Federation.

The space debris issue was perhaps the most urgent problem requiring attention. There was little doubt that environmental issues would soon find their way into the agenda of the Legal Subcommittee of COPUOS.

In connection with the question of outer space "soft law", it should be recalled that identical provisions were to be found in quite a few recent General Assembly resolutions on the peaceful uses of outer space, adopted without a vote. COPUOS could usefully examine whether those provisions could be viewed as emerging new customary rules of international space law.

The Moderator, in his concluding remarks, stressed that while much had been already achieved in space law, particularly through the United Nations, there was still work to be done. The feasibility and possible content of "standards and recommended practices" following the ICAO model deserved further study. The observance and implementation of the various outer space principles required bolstering. And the notion of "common benefit" would continue to provide ground for argument before an amicable agreement could be reached thereon. The consensus process of the development of space law is an example to emulate.

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IX. ENVIRONMENTAL LAW CHALLENGES TO THE LAW OF THE SEA CONVENTION: PROGRESSIVE DEVELOPMENT OF PROGRESSIVE DEVELOPMENT*

A. INTRODUCTORY STATEMENT BY THE MODERATOR: ARTHUR RALPH CARNEGIE**

At the time of the entry into force of the United Nations Convention on the Law of the Sea, international environmental law had acquired a much greater prominence than was the case at the time of its adoption. That instrument encompasses provisions addressing environmental concerns which constituted significant advances on the state of *lex lata* on the date of its conclusion. Many such provisions have achieved universal acceptance even before the entry into force of the Convention, leading to the conclusion that its elaboration has been a successful exercise in progressive development of international law. Nevertheless, the Convention is in some danger of obsolescence because its vision in relation to environmental law is appearing, by current standards, increasingly myopic.

The challenge of protecting the marine environment was met by the framers of the Convention in two different ways. Thus, in relation to the conservation of the living resources of the sea, they elaborated the provisions on the regime of the exclusive economic zone. In relation to pollution, they recast the basic principles of maritime jurisdiction in the context of the subject-matter. This recasting has taken the form of a framework within which future development could take place and which could constitute the setting for harmonizing existing rules. The Convention's prescriptions relating to the marine environment are accordingly in significant measure

* Round-table discussion held on Thursday, 16 March 1995.

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“umbrella” provisions.¹ The Convention thus provides an outline which has to be complemented by reference to other international and regional agreements as well as national legislation. This leads to the conclusion that, in so far as changes in these other instruments remain within the bounds of the Convention’s umbrella, there is scope for progressive development of the Law of the Sea Convention, which itself has been the product of progressive development.

Given the fact that a basic principle of treaty law is that a treaty is binding only on its parties,² the question arises as to the effect of a treaty of broader participation which makes prescriptions by reference to a treaty of more limited participation. This question is relevant with regard to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL),³ to which not all States which have ratified the Law of the Sea Convention are parties, although MARPOL has a greater number of parties overall. One could argue that, to enforce MARPOL standards, both the coastal State and the flag State have to be parties to MARPOL. On the other hand, the argument could be made that a State’s participation in the Law of the Sea Convention evinces sufficient consent to be bound by the international standards to which the Convention refers, even where these standards are not binding on that State by virtue of another agreement as such. According to the latter view, the Convention’s use of prescription by reference provides its own engine of progressive development of its norms.

Since MARPOL’s text preceded that of the Law of the Sea Convention, the latter’s general framework is essentially accommodating, in this regard, already existing detailed provisions. But subsequent to 1982, a considerable number of multilateral and bilateral agreements have been elaborated on the prescriptions of the Law of the Sea Convention, thus taking further this process of progressive development of the progressive development of the law by the Convention itself.

Many of these new agreements deal with the marine environment: even as early as 1989, the Secretary-General of the United Nations identified 53 such instruments,⁴ including the 1983 Cartagena Convention for the Protection and Development of the Marine Environment of the Wider

¹ See “Protection and preservation of the marine environment: Report of the Secretary-General”, United Nations document A/44/461 (1989), para. 7; Myron H. Nordquist *et al.*, *United Nations Convention on the Law of the Sea—1982: A Commentary* (Martinus Nijhoff, Dordrecht), vol. IV (1991), p. 21.

² See, e.g., Ralph Carnegie, “The Vienna Convention on the Law of Treaties and Law of the Sea Lawmaking”, *Anuario Jurídico Interamericano* (1984), pp. 53-94.

³ *National Legislation and Treaties Relating to the Law of the Sea*, United Nations, *Legislative Series* (ST/LEG/SER.B/18), p. 461.

⁴ See “Protection and preservation of the marine environment: Report of the Secretary-General”, *op. cit.*

Caribbean Region⁵ and its Protocol concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region⁶ and Protocol concerning Specially Protected Areas and Wildlife (SPAW Protocol),⁷ the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal,⁸ and the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation, which is to come into force shortly.⁹ Mention has also to be made of the ongoing negotiations regarding the elaboration of an agreement for the implementation of the provisions of the Law of the Sea Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. Moreover, the Law of the Sea Convention has encouraged a process of negotiation of bilateral agreements in various areas, such as fishing access agreements.

However, the importance of the Law of the Sea Convention as the blueprint for the protection of the marine environment has not diminished with the passage of time. This is evident, for example, from the fact that, in the documentation presented to the United Nations Conference on Environment and Development, the Law of the Sea Convention was considered as providing the framework within which to pursue the protection and sustainable development of the marine environment.¹⁰ Indeed, one of the possible trends identifiable with regard to the numerous subsequent negotiations is that of at least implicit deference to the Law of the Sea Convention.¹¹ Thus, article 3, paragraph 3, of the Cartagena Convention expressly states that nothing in its text or in the Protocols thereto shall prejudice any "present or future claims or the legal views of any Contracting Party concerning the nature and extent of maritime jurisdiction". The SPAW Protocol also seems to be carefully deferring to the Law of the Sea Convention, for it provides that the regulation by its Parties of ship activities should be without prejudice to "the rights of innocent passage, transit passage, archipelagic sea lanes passage and freedom of navigation"¹²—the concepts of transit passage and archipelagic sea lanes passage being two of the distinctive contributions of the Law of the Sea Convention to the language of international law. As for article 4, paragraph 12, of the Basel Convention, it states that the Convention shall

⁵ *International Legal Materials*, vol. 22, p. 227.

⁶ *Ibid.*, p. 240.

⁷ Text reproduced in Richard Wallace, *The Marine Mammal Commission Compendium of Selected Treaties, International Agreements, and Other Relevant Documents on Marine Resources, Wildlife, and the Environment*, vol. II, p. 2316.

⁸ *International Legal Materials*, vol. 28, p. 657.

⁹ *Ibid.*, vol. 30, p. 733.

¹⁰ See, e.g., United Nations document A/CONF.151/PC/104.

¹¹ For examples preceding the conclusion of the Law of the Sea Convention, see Nordquist, *op. cit.*, pp. 20 and 21.

¹² Article 5, paragraph 2 (c).

not affect in any way “the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments”.

Turning to the question of civil jurisdiction in relation to environmental protection, I would like to recall that, in accordance with its article 229, the Law of the Sea Convention does not affect “the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment”. However, it seems arguable that, in this context, the term “affected” means “negatively affected”, since the Convention unambiguously provides certain grounds for instituting civil proceedings. Thus, article 235, paragraph 1, provides that States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment and shall be liable in accordance with international law. Since State responsibility is strictly civil responsibility, this article is creating the international law analogue of a civil cause of action. Article 235, paragraph 2, requires States to ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. Accordingly, States are at least required to enable civil proceedings.

Another provision dealing with civil proceedings, outside the specific environmental context, is article 28, which limits the coastal State’s enforcement jurisdiction in civil matters in relation to ships in innocent passage. There is nothing to suggest that such restrictions would not apply equally where the civil proceedings relate to an environmental damage claim. In fact, the Nordquist Commentary treats article 28 as the overriding provision in this respect.¹³ However, these restrictions may have become less acceptable in the present era of aggressive environmentalism, so that there might be an opportunity for further progressive development of the law with respect to this issue.

The above notwithstanding, most of the provisions of the Convention relating to jurisdiction to protect the marine environment are concerned with prescription and enforcement in the context of penal, rather than civil, jurisdiction, as discussed below.

Where activities on board a ship are concerned, the flag State has comprehensive jurisdiction to the extent that in some matters other States might

¹³ Nordquist, *op. cit.*, p. 361.

not even have prescriptive jurisdiction. Thus, articles 58, paragraph 2, and 97, paragraph 1, provide for the exclusive jurisdiction of the flag State or the State of nationality of the master or crew of a ship with respect to an incident of navigation involving the penal or disciplinary responsibility of that person and having occurred in an exclusive economic zone or on the high seas. On the other hand, article 221 safeguards the right of States to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage from pollution or threat of pollution arising from maritime casualties.

The flag State has thus an important role to play as regards the protection of the environment. In this connection, I note that the draft agreement regarding the conservation and management of straddling fish stocks and highly migratory fish stocks calls on flag States to impose a licensing regime for their ships to engage in fishing on the high seas.¹⁴ I would also point out that, in February 1993, France and Italy prohibited ships flying their flags and carrying oil or certain dangerous substances from navigating in the Strait of Bonifacio.¹⁵ This prohibition does not generally apply to ships of other States, notwithstanding the fact that the relevant waters are either French or Italian territorial waters. However, the Assembly of the International Maritime Organization (IMO) has endorsed a voluntary cargo reporting system for such ships using the Strait.¹⁶

The above instances, while illustrating the amplitude of flag State jurisdiction as a matter of international law, also reveal the emergence of a political threat which could potentially pose a challenge to the regime of the Law of the Sea Convention. Indeed, the State which imposes restrictions on activities of vessels flying its flag will face pressure from its nationals to have these restrictions applied to foreign vessels also and will probably attempt to secure an international agreement under which all States would impose such restrictions.

While the State with territorial jurisdiction over the *locus delicti* would always in principle be expected to have jurisdiction, both enforcement and prescriptive, over any environmental offence, the Law of the Sea Convention is notable for its exceptions to this general principle. With regard to straits used for international navigation and in archipelagic waters, for example, the express authority of the coastal State under articles 42, paragraph 1(b), and 54 to adopt laws and regulations in respect of the prevention, reduction and control of pollution is limited by the requirement that such laws give effect to applicable international regulations regarding the discharge of oil, oily

¹⁴ See United Nations document A/CONF.164/22, article 17, paragraph 3.

¹⁵ United Nations, *Law of the Sea Bulletin*, No. 25, pp. 65-68.

¹⁶ Resolution A.766(18) of 4 November 1993.

wastes and other noxious substances in such waters. Moreover, article 23 seems to grant foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances an express right of innocent passage, which could be construed as a limitation on the coastal State's prescriptive jurisdiction over the territorial sea. Some States have difficulty in accepting this interpretation of the Convention,¹⁷ although it appears to be consistent with State practice, as evidenced, for example, by the terms of the 1989 Joint Statement by the Union of Soviet Socialist Republics and the United States on the Uniform Interpretation of Rules of International Law Governing Innocent Passage, which reads: "All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required".¹⁸

The discussion on the right of the coastal State to information on vessel cargoes and its implications on the right of innocent passage and transit passage taking place in IMO indicates that there is reluctance to recognize such right in relation to vessels merely passing through territorial waters without entering a port, although voluntary reporting systems have been instituted.¹⁹ Nevertheless, the growing concern regarding the limits imposed by the Law of the Sea Convention on coastal State regulation offers a potential opportunity for further progressive development.

It is also to be noted that, notwithstanding the Basel Convention's express deference to the Law of the Sea Convention, the inclusion of household waste within the former's scope²⁰ would have to lead to the reconsideration of the latter's sharp distinction between hazardous cargoes—giving rise to a special regime of concern—and other cargoes.

The issue of the carriage of hazardous cargoes is, in particular, a matter of great concern to the members of the Caribbean Community which are opposing the passage of plutonium cargoes through the Caribbean Sea. Prevention by prohibition is not, however, the approach taken on this issue by IMO, which is discussing the question of liability for damage caused by such cargoes, and adopted on 4 November 1993 a Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-level Radioactive Wastes in Flasks on Board Ships.²¹ Again, it could be said that a certain tension is developing between the regime of the Law of the Sea Convention, which in this instance gives priority to freedom of navigation over environmental con-

¹⁷ See the declarations of Egypt, Oman and Yemen made upon ratification of the Convention, *Law of the Sea Bulletin*, No. 25, pp. 13, 17 and 20, respectively.

¹⁸ *International Legal Materials*, vol. 28, p. 1446 (para. 2).

¹⁹ See, e.g., text at note 16 above.

²⁰ See annex II to the Basel Convention.

²¹ Annexed to Assembly resolution A.748(18).

cerns, and the growing importance attributed to the need to protect the marine environment.

As to the prescriptive jurisdiction of the coastal State in environmental matters with regard to the exclusive economic zone and the continental shelf, it is, under the Law of the Sea Convention, comprehensive in relation to the conservation of living resources, but limited in relation to pollution. It appears that the provisions regarding the former aspect have withstood the test of time and that the degree of control conceded by the Convention to the coastal State with respect to pollution is, even with current standards, remarkable. However, the growing dissatisfaction of coastal States with the restrictions on their rights of environmental control in the areas under their sovereignty could not but threaten to also extend to the exclusive economic zone, since pollutants know no artificially drawn legal boundaries.

With regard to the high seas as well as the Area, there is no presumption of jurisdiction for any State. The expectation is accordingly that flag State jurisdiction and jurisdiction under the nationality principle would have to suffice for environmental matters. However, the Law of the Sea Convention recognizes that, in certain limited cases, other States have subsidiary jurisdiction.²²

As far as living resources are concerned, the cooperative conservation regime of 1958 continues to exist,²³ and is being developed through ongoing negotiations on a draft agreement for the implementation of the provisions of the Law of the Sea Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. It appears that a significant encroachment on the freedom of fishing is being considered in this context. Indeed, draft article 8, paragraph 4, provides that only those States that participated in the work of a subregional or regional fisheries management organization or arrangement, or that otherwise cooperated in the application of conservation and management measures established by that organization or arrangement, shall have access to the fishery to which such measures applied.²⁴ Enforcement seems primarily to be the responsibility of flag States, although provision was made, under certain circumstances, for enforcement by other States. In particular, it is contemplated that States participating in fisheries management organizations or arrangements would be required to take certain measures to deter activities by vessels flying the flag of States not members of such organizations, which undermine the effectiveness of regional or subregional conservation and management

²² See articles 218, 221 and 228.

²³ See the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, United Nations, *Treaty Series*, vol. 559, p. 285.

²⁴ A/CONF.164/22.

measures.²⁵ More generally, States parties to the instrument under negotiation would be under the obligation to take similar measures with respect to vessels flying the flag of States not parties to that instrument.²⁶ Ongoing negotiations thus indicate a trend towards the progressive development of the law beyond the provisions of the Law of the Sea Convention.

As to the International Seabed Authority, it also has the obligation to adopt rules, regulations and procedures to ensure the protection of the marine environment from the harmful effects of its activities,²⁷ but it has no enforcement jurisdiction.

In conclusion, I believe that the regime of the Law of the Sea Convention with regard to environmental matters still remains relevant even as environmental concerns have become more urgent. On certain aspects, however, progressive development of the law has occurred since 1982, and there still exist opportunities for further progressive development.

B. SUMMARY OF THE DISCUSSION

During the ensuing discussion, some participants expressed their agreement with the Moderator's view that the Law of the Sea Convention was in danger of obsolescence as regards its provisions relating to the protection of the environment. It was argued, in particular, that the Convention did not address the issue of compliance, as was the case with recent environmental treaties, and that it had taken into account the precautionary principle only marginally and in a general manner.

Other participants felt, however, that the Convention's environmental provisions were forward-looking and that it was possible to build on the Convention's framework to address new concerns. It was remarked that States envisaging ratification of the Convention were not deterred from doing so on the basis of the argument that its environmental provisions were deficient. It was also observed that the precautionary principle was reflected in the definition of the term "pollution of the marine environment" under article 1, paragraph 4, of the Convention, although it was recognized that less consideration had been given to this principle in relation to conservation and management of living resources—a matter which was being addressed by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. It was further pointed out that the issues of straddling fish stocks and of innocent passage had already been controversial at the time of

²⁵ See draft article 32, paragraph 3, *ibid.*

²⁶ See draft article 34, *ibid.*

²⁷ See articles 145 and 209 of the Law of the Sea Convention and article 17, paragraph 1 (b) (xii) and paragraph 2 (f), of annex III to the Convention.

the Convention's adoption and that discussion thereof in light of new developments should lead to new compromise solutions based on the Convention's fundamental provisions.

The question was raised whether, if the Convention's provisions regarding innocent passage and environmental jurisdiction were considered to be the result of progressive development of the law rather than a reflection of customary law, a coastal State could, in this transitional phase where the Convention had entered into force but had not yet achieved universal participation, impose its environmental regulations on a vessel carrying hazardous substances and flying the flag of a State not party to the Convention. It was also wondered whether the final text of the agreement regarding the conservation and management of straddling fish stocks and highly migratory fish stocks would indeed contain provisions regarding the rights and obligations of parties *vis-à-vis* non-parties.

As to the issue of the passage of hazardous wastes through the Caribbean Sea, it was wondered whether it was possible to apply the concept of regional custom with respect to the opposition of Caribbean States to such activity. The view was, however, expressed that, at this stage, those States were not asserting the existence of a legal rule, but rather proposing the adoption of such rule by other States.

Concerning the question of the reference to other international instruments in the Law of the Sea Convention, doubts were expressed regarding the extent to which States parties to the Law of the Sea Convention but not parties to such other instruments were bound by the latter's provisions by virtue of such reference. It was pointed out, however, that at a recent consultative meeting of the Contracting Parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention),²⁸ it had been decided that the reference in the Law of the Sea Convention to global rules and standards regarding dumping covered the rules and standards laid down in the London Dumping Convention, and that therefore States parties to the Law of the Sea Convention were required to apply such rules and standards.

It was observed that the Law of the Sea Convention did not envisage the establishment of a conference of the parties, as was the case for instance with the 1992 Convention on Biological Diversity.²⁹ It was pointed out, however, that the General Assembly has been exercising similar functions *de facto*, and would continue to receive reports of the Secretary-General on developments relating to the law of the sea. It was further remarked that the Convention itself envisaged the development of some of its provisions through other

²⁸ United Nations, *Treaty Series*, vol. 1046, p. 120.

²⁹ *International Legal Materials*, vol. 31, p. 818, article 23.

forums such as international organizations and diplomatic conferences. The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was a case in point.

The point was made that, at the regional level, substantial developments had taken place in the area of the protection of the environment beyond the basic provisions of the Law of the Sea Convention, particularly with regard to compliance. A collective regional legislative process had thus resulted in the adoption of framework conventions supplemented by protocols addressing specific issues. It was noted, in this connection, that, while the original text of the 1976 Convention on the Protection of the Mediterranean Sea against Pollution (Barcelona Convention)³⁰ did not contain a definition of the precautionary principle, it was to be amended shortly to include such definition, together with a definition of another principle that States parties would be required to apply, namely, the polluter pays principle. The concept of elimination of pollution—through the use of new, clean technologies—which was absent from the Law of the Sea Convention, was also to be introduced in the amended version of the Barcelona Convention. It was further mentioned that a protocol to the latter Convention was being elaborated regarding the transboundary movement of hazardous wastes, which would contain very strict rules on the matter.

³⁰ *Ibid.*, vol. 15, p. 290.

X. THE PHYSIOGNOMY OF DISPUTES AND THE APPROPRIATE MEANS TO RESOLVE THEM*

A. INTRODUCTORY STATEMENT BY THE MODERATOR:
GERHARD HAFNER**

The Changes in International Relations

This Round Table on the physiognomy of disputes and the appropriate means to resolve them (the title was borrowed from an article by Shabrai Rosenne) deals with an issue which is considered as being of great importance to international relations of the end of the twentieth as well as of the beginning of the twenty-first century. The United Nations Congress on Public International Law is particularly competent to discuss this topic as it brings together individuals responsible for the development of international law, whose duty is to weigh those changes in international relations which require new approaches to the mechanisms for the peaceful settlement of disputes. Conflicts, and consequently disputes, of the kinds mentioned are mainly of a dysfunctional nature in so far as they impede the achievement of the overall purpose of international law.

Hitherto, the traditional system has been based on the assumption that international disputes—so called legal disputes—resulted from a divergence of views on the application of existing norms of international law. International law has been conceived as a system regulating the bilateral relations between States which were conceived as entities appearing as single legal units. It has been held that such disputes could best be resolved by means dating back to classical Greek and Roman times such as arbitral or judicial decisions. Such procedures where one State institutes proceedings against another State on a purely bilateral basis mostly constitute a binary system and are characterized by a zero-sum situation where the gain of one side is the loss of the other.

* Round-table discussion held on Thursday, 16 March 1995.

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Thus, this system has been developed in a world where

- The actors have been States acting independently as sovereign entities according only to their individual interests,
- No centralized authorities have existed, and
- No need to take into account common interests has arisen.

During this period, the main objective of international law has been to separate and distribute the power of States so that mainly bilateral inter-State relations formed the very subject of rules of international law.

This situation no longer exists and it is necessary to take a fresh look at the adequacy of the traditional patterns and mechanisms for the resolution of international disputes, bearing in mind:

- The transboundary effects of the activities of States and their expanded nature,
- The growing direct and indirect effects of these activities on phenomena of concern to the community of States,
- The greater transparency of State boundaries,
- The increased mobility of people across borders,
- The widening of the types of subjects of international law,
- The increased role of the individuals in international law combined with the waning sovereignty of States.

The Concept of Dispute

Before the consequences of such changes are analysed, the concept of dispute has to be clarified, and the situation which gives rise to a dispute settlement procedure must be distinguished from those situations which are only likely to result in disputes.

The traditional definition of the term "dispute" as found in the jurisprudence of the Permanent Court of International Justice or the International Court of Justice is too wide and too narrow at the same time. It is too wide in so far as, according to international judicial practice, a mere divergence of views or interests as such, without any likelihood of follow-up action by States, is not viewed as sufficient to be submitted to international proceedings. It is too narrow in so far as it is no longer possible to confine international disputes only to those between two or more States disagreeing among themselves.

Consequently, international disputes have to be understood as conflicting and, from the point of view of international law, irreconcilable attitudes of international actors, i.e., subjects of international law, where the actors

involved are unable to pursue their intended line of action as expressed in concrete claims without confrontation.

Despite the fact that even the classical dispute settlement procedures undeniably exercise a certain preventive function prior to the outbreak of a dispute (in particular, where a compulsory jurisdiction had been provided), it is not the task of this Round Table to scrutinize procedures designed to prevent a dispute. Although monitoring or non-compliance procedures are certainly most valuable instruments for reducing the probability of the outbreak of international disputes, they are not included in the dispute settlement procedures in the narrow sense.

The Function of the Settlement of Disputes

Once a dispute occurs, the parties thereto search a procedure which will enable them to re-establish what is considered by them as an equilibrium or a situation in which the actors concerned are precluded from raising further claims. Thus, the function of such a procedure should be to ascertain standards which the actors concerned either accept or are legally bound to accept as governing the issue of the dispute.

Categories of Disputes Susceptible of Settlement

The following criteria for the classification of disputes to be settled can be singled out:

- (i) Parties to the dispute: In accordance with the broadening of the scale of subjects of international law, i.e., of entities being addressed directly by international law, parties to the dispute are no longer only States, but also international organizations, individuals, peoples, minorities or even non-governmental organizations (NGOs). The question could be raised whether the community of States itself should also be entitled to institute proceedings.
- (ii) The traditional view that norms of international law regulate bilateral relations between States is deemed to require certain modifications: Under contemporary conditions, norms of international law could provide three different implementation structures:
 - (a) They could imply a bilateral reciprocal implementation in the traditional sense where the implementation is "due" by one State to another,
 - (b) They could also require an implementation due by one State to the community of States, or

- (c) An implementation owed by one State to individuals under its jurisdiction (such as human rights).

These different implementation structures involve different conflict situation.

In the first case, one State is seen as affected in its sphere of rights and interests by the attitude of another State which is considered not to be in conformity to the applicable standards (rules of international law).

In the second case, the non-compliance with accepted standards by one State is considered to affect so-called common interests and, directly or indirectly, all States in the same manner, so that any one State could have more rights to invoke this non-compliance than any other. In this case, it seems advisable to find ways and means through which the common interests can be represented properly.

In the third case, where the rights and interests of individual persons are at stake, traditional international law is unable to single out the affected State which is entitled to institute proceedings. Such a situation occurs regularly in the case of human rights, and particular instruments have been established to overcome this problem.

It could, however, also happen in the field of environmental law where, in the transboundary context, individuals are affected in the first place and only through them the State itself. In such a situation, the first and original conflict would arise between an individual and a foreign State; in this regard, the law of diplomatic protection is not considered as appropriate to accommodate the needs of the individual. This inadequacy does not only result from the discretion the State enjoys in the exercise of diplomatic protection, but also from the possibility that the individual might be, for instance, a foreigner in the State of residence where the damage has occurred.

- (iii) A further criterion for the classification of disputes could be derived from the degree of political importance attached to the issue by the actors concerned. Thus, States are not inclined to submit certain disputes (national defence, State's territorial integrity, title to territory, claims to other areas) to a third-party settlement procedure except negotiations, such as those reflected in the Valetta formula of the Organization for Security and Cooperation in Europe (OSCE) mechanism. However, it is not possible to draw a precise line between justiciable and non-justiciable disputes. But, at the same time, it cannot be excluded that means may be found to deal even with conflicts considered as non-justiciable or highly political, provided, however, that these instruments do not affect the ideology underlying these matters.

- (iv) Traditionally, a distinction is made as to whether the dispute concerns claims regarding the application of existing norms or their amendment.
- (v) Finally, it could be asked whether cases before national courts could be considered as international disputes if they involve aspects of international law.

The Inadequacy of Dispute Settlement Procedures

In order to achieve its ultimate objective, the international system needs efficient means to deal with all kinds of disputes. However, the actual means and regimes only cope with one particular kind of disputes, namely, those of a reciprocal nature among States. As a principle they do not confer upon international organizations or NGOs the right to participate in contentious proceedings and grant the individuals only a limited right in the framework of particular regional dispute settlement systems concerning human rights.

- (i) With regard to the various possible international actors involved in a dispute, the following questions must be raised whether
 - International organizations should have access to the contentious proceedings before the International Court of Justice,
 - States should be entitled to ask for advisory opinions,
 - NGOs could have certain participatory rights,
 - Individuals or other entities which enjoy certain rights under international agreements (such as minorities) should have a standing before an international institution like an international criminal court,
 - Moreover, the question of who should be entitled to represent the international community should also be raised.
- (ii) As to the different implementation structure of norms, no adequate or generally accepted means exist relating to disputes arising from norms governing relations between a State and individuals (cases of human rights, minorities, peoples). In this respect, devices are needed to cover cases between an individual and a neighbouring State, for instance, in environmental matters.

Even as regards disputes among States, the current regime contains certain lacunae: Thus, if a common interest is at stake in a given case, the question arises whether the State which intends to resort to judicial means meets the conditions of "interested party" as required for this purpose. And if a

State is finally allowed to use this procedure, the judgement exercise has a legal effect only between the parties to the dispute irrespective of the interest of world community in the case. Such an award should then be provided with an *erga omnes* effect; if not, a double regime would be created with detrimental legal effect on interests of the world community. A weak device aiming at protecting these interests could be seen in the use of advisory opinions of the International Court of Justice which can be illustrated by the requests addressed recently to the Court concerning the legality of the use of nuclear weapons.

- (iii) As far as the disputes involving matters of higher political importance are concerned, which the States involved are not inclined to submit to a third-party settlement procedure, instruments should be sought which avoid a total defeat of one side to the dispute, lead to a solution benefiting both sides and do not pose a threat to the basic values or ideologies involved in the case.
- (iv) In international dispute settlement procedures, the line between law ascertaining and law-making is very often blurred. Whereas formerly, these different functions were ascribed to different procedures (e.g., conciliation for political issues and arbitration for legal disputes) and even today practice still distinguishes among political and judicial means, depending on the wish to create new law or to state existing rules, it must be borne in mind that nowadays the various means of settlement do not necessarily correspond to this distinction.
- (v) As to cases before national courts involving aspects of international law, it could be argued that a certain uniform application and interpretation of the invoked norms would be desirable. In this respect, it could be asked whether a State (or its courts) should be given the right to ask for something like a "preliminary ruling" or for some advice from an international body so that a first step towards ensuring the homogeneity of international law could be made. This could even apply to cases where a State wishes an independent body to ascertain the conformity of its activity with international law.

Conclusion

In the light of the fundamental changes the international legal order is facing today, the existing means of peaceful settlement of international disputes need to be altered according to the changes within the international system. These changes have to be analysed in order to see how far existing instru-

ments require a substantial modification or only slight amendments to conform to these needs. It should also be scrutinized how far such structural changes would enhance the willingness of international actors to submit their disputes to international bodies which, in the long run, could serve as means not only to ensure international relations with less likelihood of conflicts but also to stimulate, through a peaceful change, a gradual adaptation of international law to changed circumstances. International disputes could then play a certain positive role in so far as their settlement could substantially contribute to the development of international law.

B. SUMMARY OF THE DISCUSSION

*Opening Remarks by Renate Platzöder**

From the viewpoint of an international lawyer, the twentieth century witnessed unparalleled efforts to strengthen the rule of law in international relations, including the development and codification of dispute settlement mechanisms. The First and Second Peace Conferences at The Hague sought to diminish the evils of warfare by codifying the Law of War and to contribute towards the maintenance of general peace by adopting the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes.¹ Almost 100 years later, and on the eve of the fiftieth anniversary of the Charter of the United Nations, the causes of war and the dangers to peace are not yet fully understood and far from being under control. The world today is suffering from more than 40 armed conflicts, which, in 1994 alone, resulted in 6.5 million dead, 6 million wounded and 18 million refugees.

The record of peacemaking through international litigation was rather modest. Between 1902 and 1932, only 22 cases were decided by the Permanent International Court of Arbitration, which was more or less dormant since. The revitalization of this Court was now one of the objectives pursued during the United Nations Decade of International Law. The Permanent International Court of Justice delivered 22 judgements and 27 advisory opinions between 1922 and 1940. Not long ago, the International Court of Justice was equally an under-used institution.

In the 1970s, several years of discussion in the General Assembly, in the Sixth Committee and among individuals considering themselves as the

¹ *American Journal of International Law*, 1899, Supp. 1:107; League of Nations, *Treaty Series*, vol. 54, p. 435.

* Institute for International Affairs, Ebenhausen, Germany.

Court's supportive environment on the strengthening of its role resulted in amending the Rules of the Court to facilitate recourse to ad hoc chambers and allowing for greater influence of the parties to a dispute on their composition. In 1974, the General Assembly reaffirmed the notion already included in the 1899 Convention that recourse to judicial settlement of disputes should not be considered an unfriendly act between States. However, the recovery of the International Court of Justice was mainly related to the development and codification of the law of the sea. The provisions on extension of sovereignty, rights and jurisdiction of coastal States were fathering hundreds of delimitation problems. In addition, the establishment of the Trust Fund to assist countries unable to afford the costs to bring disputes before the International Court of Justice was quite effective.

Whether one liked it or not, the Third United Nations Conference on the Law of the Sea produced a unique dispute settlement system with the International Tribunal on the Law of the Sea at the centre. These provisions were negotiated in a relatively short period of time (1974-1976), mainly in the Dispute Settlement Group and in other informal meetings, and were kept in a freeze for many years because a number of hard core issues, such as the deep seabed regime, had yet to be resolved. Finally, the United Nations Convention on the Law of the Sea² entered into force on 16 November 1994, and its dispute settlement system was only now to unfold its virtues. It would have to stand the test of time, and might hopefully influence other treaty-making efforts.

In the light of obvious and hidden sensibilities of States concerning compulsory dispute settlement procedures, the negotiations at the Third United Nations Conference on the Law of the Sea did not so much focus on what would be desirable, but on what would be feasible. The first breakthrough was achieved when States found it was in their mutual interest to entrust certain, relatively frequent, incidents at sea caused by private individuals, masters and owners of ships in particular, to special arbitral tribunals consisting solely of experts in the respective field, namely, fisheries, protection and preservation of the marine environment, marine scientific research and navigation.

Another feature of the Convention was the so-called "ladder-approach", which was to prevent a State party from being rushed into compulsory dispute settlement procedures by another State party. To this end, the Convention provided for an obligation to exchange views expeditiously, where a dispute had arisen, followed by conciliation procedures. Compulsory procedures only apply as an ultimate means, and were subject to explicit limitations and optional exceptions excluding most sensitive areas, such as disputes

² *International Legal Materials*, vol. 21 (1982), p. 1261.

concerning exercise of sovereign rights in the Exclusive Economic Zone, sovereignty over land territory, military and law enforcement activities and, last but not least, disputes in respect of which the Security Council was exercising functions assigned to it by the Charter of the United Nations. To make compulsory procedures more acceptable for States, the Convention provided for a choice between the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal and ad hoc special arbitral tribunals. Furthermore, parties to a dispute might avoid compulsory procedures at any time, if they can otherwise agree.

These developments might also relate to the fact that the dispute settlement system of the Convention provided challenging work for a rather large number of experts in the field of the law of the sea and marine affairs. Each State Party to the Convention might nominate four conciliators, four arbitrators and eight special arbitrators. For example, in the case that the Convention would only have 100 States parties, up to 1,600 experts could be nominated to keep themselves available for the settlement of disputes. If such distinguished lawyers and experts would be coordinated and activated, such group might constitute a considerable force to promote the settlement of dispute by peaceful means. The members of the World Court, the arbitrators of the Permanent International Court of Arbitration, the members of the International Tribunal for the Law of the Sea and other courts and tribunals might join such efforts.

Complaints and fears had been expressed over the recent "inflation of international tribunals". Some of these concerns were related to the financial situation of States, tight budget policies and, of course, to the financial situation of the United Nations. At the same time the number of persons and the costs involved in peace-keeping were escalating. In 1994, the United Nations conducted 17 peace-keeping operations, and the number of military personnel involved was over 73,000. The number of civilian police was 2,130, and the number of international civilian personnel was 2,260. Seventy-six countries contributed personnel and the projected total costs for the 1994 peace-keeping missions were estimated to be US\$3.6 billion. For the funds spent on peacemaking and the number of persons involved, figures were not readily available. In 1994, the annual salary for the 15 members of the International Court of Justice amounted to US\$2.17 million. The annual salary for the 21 members of the Tribunal was still under discussion, and, if remunerated as the members of the International Court of Justice, would amount to US\$3.04 million. The estimated costs for the International Criminal Tribunal for the former Yugoslavia were US\$11 million for 1994. The costs for the International Tribunal for Rwanda were not known yet. In any case, the costs for these four courts and tribunals within the United Nations system would

hardly be more than US\$50 million annually. In other words, appropriate funding of peacemaking through judicial means should not be an insurmountable problem, provided that States and individuals became aware that peace-keeping and peacemaking were equally important, and this fact should also be reflected in the financial and human resources provided.

Against this background, it was suggested to discuss the creation of an international forum for the promotion of peacemaking through judicial means. Members and senior officials of courts and tribunals as well as lawyers practising international law should join forces to this end. Existing organizations, like the World Peace Through Law Center, the International Law Association, the World Association of Lawyers, the International Union of Lawyers, the International Association of Judges and the International Bar Association could lend their support. It should not be difficult to include the Secretary-General in a group of active supporters of peacemaking, which he defined as "action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations". In his 1992 "Agenda for Peace",³ already two paragraphs were devoted to peacemaking through judicial means. However, the World Court was not the only source. In this context, it should be noted that the Secretary-General assumed a variety of functions under the United Nations Convention on the Law of the Sea. With respect to dispute settlement, the Secretary-General drew up the lists of conciliators and arbitrators. In the absence of any relevant provision of the Convention, these lists could be buried in files and electronic data of the United Nations Secretariat, but the Convention would not stand in the way, if such persons would be invited to periodic meetings and other appropriate activities. In addition, the Secretary-General appointed conciliators and special arbitrators if parties to a dispute could not agree on the composition of a commission or a tribunal. He also invited the States parties to submit nominations for members of the International Tribunal for the Law of the Sea and convened the meeting of the States parties to elect the first bench and to adopt the first budget of the Tribunal. Other functions were likely to be included in a relationship agreement between the United Nations and the International Tribunal for the Law of the Sea or agreed upon by meetings of the States parties to the Convention.

Looking at the novel features of the dispute settlement system of the Convention, one might come to the conclusion that such achievements were rather modest. Be it as it may, the fact remained that States did not want to be involuntarily judged by judges, and preferred not to lose a case in court. Such assessment was also reflected in the 1982 Manila Declaration on

³ A/47/277-S/24111.

the Peaceful Settlement of International Disputes,⁴ which carefully avoided commitments to compulsory jurisdiction of international courts and tribunals.

However, it should not be overlooked that further achievements were arrived at by the creation of a variety of international organizations and by extending international dispute settlement procedures to entities other than States. Natural and juridical persons were increasingly affected directly by international law and by actions of international organizations. Under certain political and economic conditions, States transferred competences to international institutions, notably in the fields of human rights, trade, commercial transactions, financial investments and claims arising from armed conflicts (i.e., the Islamic Republic of Iran–United States Claims Tribunal and the United Nations Compensation Commission).

Since the creation of GATT some 40 years ago, more than 100 disputes between States were settled by expert panels. The 1993 Understanding on Rules and Procedure Governing the Settlement of Disputes arising from the Multilateral Trade Organization between member States⁵ established a dispute settlement body which was to play a central role providing security and predictability to the multilateral trading system.

The control machinery of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms⁶ reached about 500 judgements and had to be amended in 1994. In 1994, approximately 2,700 applications by individual citizens or groups of citizens and approximately 50 cases were pending. The future European Court of Human Rights would consist of a number of permanent judges equal to that of the Contracting Parties, and would establish commissions of 3, chambers of 7 and a Grand Chamber of 17 judges.

The 1965 Convention for the Settlement of Investment Disputes between States and Nationals of Other States⁷ established under the auspices of the World Bank and the International Centre for Settlement of Investment Disputes. When a State agreed to submit a dispute to conciliation or arbitration, and thereby gave an investor access to the Centre, this State was no longer exposed to other means of pressure or to other recourse, such as domestic courts.

Each and every citizen of the European Union, now approximately 370.5 million, as well as juridical persons, if affected by European Community Law were given access to the European Court of Justice. In 1988, a Court of First Instance was attached to it to share the burden of workload.

⁴ General Assembly resolution 37/10 of 15 November 1982, annex.

⁵ Sales No. GATT/1994-7/ESB N 92-870-0124-3, vol. 31.

⁶ United Nations, *Treaty Series*, vol. 213, p. 221.

⁷ *Ibid.*, *Treaty Series*, vol. 575, p. 169.

The Treaty on European Union⁸ included a declaration on disputes concerning the European Central Bank, the European Monetary Institute and their staff. The Court of First Instance should hear such cases. The acts and omissions of those two central banks of the European Community were subject to review or interpretation by this Court, including disputes between the banks and individual creditors or debtors. In the near future, the Court would also hear cases on interpretation of the 1980 Convention on the Law Applicable to Contractual Obligations.⁹

The latest example for transfer of competences to an international organization was the International Seabed Authority. The system of exploration and exploitation of the deep seabed provided that such activities might be carried out by the Enterprise, the operating arm of the Authority, and in association with the Authority by States and other entities, namely, State enterprises, natural or juridical persons sponsored by States parties. It was specified in the United Nations Convention on the Law of the Sea that disputes on contractual matters should be either settled by the Seabed Disputes Chamber of the Tribunal to which access was granted to all entities mentioned above, or in accordance with arbitration rules, such as the UNCITRAL Arbitration Rules.¹⁰

There was general agreement that international organizations had their own internal legal system, and that employees of international organizations should have access to international administrative tribunals. There were some 15 in existence, and about 20 international organizations joined the International Labour Organization Administrative Tribunal for that purpose.

Already in 1925, it was suggested by Sir Cecil Hurst that an "International Court of Piepowder" was wanted. The expression "piepowder" was a concoction of the French words "pied" and "poudre". In former times, it was common in England that wayfarers and merchants wandering from market to market asked for speedy, effective and cheap justice and did not spend time and efforts to clean their boots. Article 292 of the United Nations Convention on the Law of the Sea was labelled as a modern example of piepowder jurisdiction by David H. Anderson. Indeed, together with the draft Rules of the Tribunal, the provisions of the Convention on prompt release of vessels and crews were designed to save time, money and trouble for users of the sea. If the detaining State of a vessel flying the flag of another State had not released the vessel or its crew promptly upon the posting of a reasonable bond or other financial security, the question of release from detention might be submitted to any court or tribunal agreed upon by the parties or, failing such

⁸ *International Legal Materials*, vol. 31 (1992), p. 247.

⁹ *Ibid.*, vol. 19 (1980), p. 1492.

¹⁰ United Nations document A/31/17 and *International Legal Materials*, vol. 15 (1976), p. 701.

agreement, within 10 days from the time of detention to a court or tribunal accepted by the detaining State under the Convention. The application for release of vessels or crews might be made by the flag State or on behalf of the flag State. It followed from this that the flag State might authorize any entity or person it chose to appear in court as agent for the flag State in question. These provisions would enhance and widen the function of practising lawyers to appear in international courts and tribunals. National legislation might be required to authorize in advance or on short notice institutions like associations of shipowners and labour unions as well as law firms to act on behalf of States. In this context, the establishment of an International Maritime Bar Association attached to the Tribunal was being discussed to ensure that the best available professional service was rendered and the Rules of Ethics would be observed. National and international institutions engaged in education and training of experts in the field of the law of the sea and marine affairs had notified their wish to be part of a network of coordination and communication which might result in the establishment of an international academy for law of the sea and maritime law.

In concluding this comment, it was obvious that not all areas of international law offering new developments for dispute settlement procedures were considered. These remarks might only be seen as an incentive to positive thinking well beyond the end of the United Nations Decade of International Law and the one hundredth anniversary of the First Peace Conference.

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During the ensuing discussion, the participants agreed to a wide extent with the introductory statement and the conclusions contained therein.

As to the political aspects of international disputes, it was stated that a link between the political nature of the case and the specific settlement procedure could be established: There existed a spectrum of procedures reaching from negotiations to judicial settlement marked by a decrease of power of the parties to the dispute over, and of their participation in, the settlement procedure. On the one side of the spectrum, there were the negotiations, being totally under the control of the parties, whereas on the other side, there were judicial procedures which to a certain extent escaped the control of the parties. This ranking was compared with the political importance attached by the parties to a given case and a certain correlation between both was recognized: The greater the political impact of the case, the more the parties wished to exercise control over the procedure. This conclusion was corroborated by the practice as reflected, for instance, in the CSCE Convention on Conciliation and Arbitration.¹¹ In this respect, it was also mentioned that

¹¹ *International Legal Materials*, vol. 32 (1993), p. 551.

with the end of the cold war the rigidity of international relations was replaced by a greater flexibility which improved the prospects for increasing recourse to dispute settlement mechanisms.

As to the question whether international organizations should have access to the contentious proceedings before the International Court of Justice, reference was made to the already existing practice of international organizations to recognize advisory opinions requested by them as binding and to resort to certain other procedures such as arbitration. Thus, there was seen no major obstacle to endow generally international organizations with this right despite certain reluctance transpiring in the Statute of the International Court of Justice or, more recently, in the CSCE Convention on Conciliation and Arbitration.

Concerning the right of States to request advisory opinions, the practice of the European Union was quoted where the institution of the preliminary ruling was extensively used.

However, objections were raised to endowing NGOs with any right to institute proceedings in view of the difficulties to anticipate their line of thinking; it was nevertheless suggested to advise them to make more frequent use of certain participatory rights as *amicus curiae*.

A lengthy discussion arose on the question whether individuals or other entities which enjoyed certain rights under international agreements (such as minorities) should have a standing before an international institution (as claimant or as defendant as in the case of an international criminal court). The view was expressed that the further development of international law would lead to a wider use of institutions to which individuals could resort. It was felt that it was necessary to recognize that individuals were emancipated from the State in an increasing manner.

Dr. Kazazi,* in response to a question by the Moderator on future development of international law of dispute settlement, compared the Islamic Republic of Iran–United States Claims Tribunal, as an important feature of the settlement of disputes in 1980s, with the work of the International Court of Justice and other international tribunals. In this respect, participants referred to the Iran–U.S. Claims Tribunal as an important feature of the settlement of disputes in 1980s. This tribunal was noted for a certain flexibility in so far as, by using the same procedure, it was able to cope with private law and public law cases.

* Deputy Chief, Legal Services, United Nations Compensation Commission, Geneva, Switzerland.

In this context, the United Nations Compensation Commission in Geneva (UNCC) was also mentioned, which has so far processed about 2.6 million claims that had been filed by more than 100 Governments and international organizations.

In explaining different aspects of the work of the UNCC, it was emphasized that States were being allowed to put forward claims on behalf of themselves, corporations registered in their territory, their nationals and residents. On the other hand, stateless persons and individuals in a similar position could file their claims through certain international organizations designated by the UNCC, such as the United Nations Development Programme or the United Nations Relief and Works Agency for Palestine Refugees in the Near East. Exceptionally, corporations registered in a territory the Government of which did not wish to file a claim on their behalf were given the right to file their claims directly after the expiration of the time-limit for filing claims.

Different types of standardized claims for individuals had been identified by the UNCC and claims had been filed by individuals through their Governments. A predetermined lump-sum amount would be awarded by the Commission to each successful claimant.

As far as minorities were concerned, some participants raised certain doubts concerning their right to resort to international dispute settlement mechanisms whereas others considered this right as indispensable.

As to the representation of individuals by their national States through the institution of the diplomatic protection, doubts were raised as to whether this institution was still adequate, since the presentation of the individual's interests was totally dependent on the discretionary decision of the relevant State—a situation which was in opposition to the rising emancipation of the individuals. Additionally, this institution permitted only the presentation of claims of nationals. In this respect, the work of the United Nations Compensation Commission was again quoted where the States were also allowed to present claims on behalf of residents. This was considered as a change in the nationality rule. The view was also expressed that there existed good reasons to believe that the institution of diplomatic protection could generally become subject to such changes.

As to the obfuscated distinction among the functions of the different means of dispute settlement, concern was voiced that the Vienna Convention on the Law of Treaties¹² had led the conciliation procedure, as laid down in its annex, in an "inappropriate" direction: Whereas formerly conciliation had been used to settle political disputes, including the possibility of a peaceful change of law, the Vienna Convention applied this procedure to

¹² United Nations, *Treaty Series*, vol. 1155, p. 331.

typically legal disputes and the subsequent codification conventions followed this example. This development prompted a change in the function of the conciliation in so far as this procedure was no longer aimed at finding a solution primarily being acceptable to the parties, but one which was based on certain standards such as international law. Thus, acceptability within an open system was replaced by standardization within a closed system, reducing the possibility of a "peaceful change" through this procedure.

A general regret was voiced that existing international law did not yet provide any means by which the interests borne by the international community in its entirety could be presented and defended.

With respect to the need to cover cases, for instance in environmental matters arising between an individual and a neighbouring State, some participants referred to the work of the Permanent Court of Arbitration, which only recently had drawn up an instrument to be applied to cases between a State and non-State parties; it was also mentioned that studies were being made on the question of how far this instrument could be applied to environmental disputes between States and individuals. It was also stated that the chamber system of the International Court of Justice could be used to deal with matters requiring different approaches (as was done in relation to environmental matters).

Finally, a major discussion focused on the advantages or disadvantages resulting from the multitude of instruments devoted to international dispute settlement as well as on the need of a further proliferation. At the regional level, there existed several courts and tribunals (such as the European Court of Justice, the European Court of Human Rights, the OSCE system, the American Court of Human Rights and the African Court of Maghreb). These various regional international systems were considered very helpful, necessary and important. But it was doubted whether each time that the international community faced a major dispute, a new machinery should be put in place, as was the case with the international criminal courts. Such a tendency was thought as running the risk of undermining the homogeneity of international law and the importance of the International Court of Justice as the main judicial body of the United Nations or even fostering the disintegration of international law. Certainly, modern information techniques could facilitate the mutual information of the various bodies for the settlement of disputes regarding the awards rendered by them, so that major discrepancies in the application of international law could be avoided. However, at the moment, it seemed that the large number of decisions, such as those rendered by the Islamic Republic of Iran—United States Claims Tribunal, had not yet been processed in a manner sufficient to offer easy access to the main guidelines forming the basis of these decisions.

XI. IMPLICATIONS FOR INTERNATIONAL LAW OF NEW CHALLENGES TO STATE SOVEREIGNTY*

A. INTRODUCTORY STATEMENT BY THE MODERATOR:
OSCAR SCHACHTER**

This group is appropriately representative of the international legal community. It includes renowned legal scholars (and those who someday will be renowned), international judges, government legal advisers and practitioners as well as a diverse group of diplomats. All sections of the world seem to be represented, which is as it should be.

Our topic, a large one, is both old and new. It focuses on the concept of the State in international law—the basic postulate of the system which we have all taken for granted. The title of our round-table discussion suggests that this fundamental concept is now challenged, one might say attacked, in a variety of ways. The challenges arise from contemporary developments. My preliminary note suggests six conditions that have had a notable impact on present international relations and, as shall be further indicated, on the role of the State in the international legal system. These developments may be viewed partly in material terms: technology, communications, production and finance. They may also be seen in terms of human aspirations, perceptions of identity and solidarity, moral and political beliefs. It is not our intention to spend time detailing these conditions. Our aim, rather, is to seek to understand their impact on an essentially legal idea—what may be referred to as “the juridical conception of the State”.

Let me begin, then, with a few words on the juridical conception of the State and follow by drawing attention to six conditions that involve challenges to that conception. The juridical concept of the State holds that an

* Round-table discussion held on Thursday, 16 March 1995.

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entity which meets the objective requirements of statehood, i.e., territory, population, government and capacity to enter into international relations with other States, is considered to have all the rights and duties of a sovereign State under international law. Of course such an entity must conform to international law, and, in that respect, its sovereignty is relative. However, whatever its political system or values, it is entitled under international law to the basic rights of a State: independence, territorial integrity, authority and international personality.

Fundamental to the juridical concept of the State in international law is the notion that if an entity violates international law, it bears responsibility and is subject to counter-measures and sanctions permitted by international law. However, the entity does not forfeit its basic rights as a State. It is this fundamental aspect of the legal conception of the State that is being challenged both in law and in fact. These challenges are diverse and reflect a variety of political attitudes and economic and social factors. The following are examples of the kinds of challenges to the juridical conception of the State to which we refer.

Claims by Sub-State Entities and Peoples to Recognition

International legal norms and views concerning the international status of sub-State entities and peoples and their claims to self-determination are evolving. In addition to upholding the basic tenet that the State is the central legal "person", international law has had to face claims for the recognition of the international personality of entities other than States. This well-known phenomenon includes claims to recognition by indigenous peoples, by minorities or by "nations" other than States. Recent civil and ethnic conflicts and geopolitical transformations have increased the impact of the challenges to State sovereignty posed by such claims.

The Effects of the Global Economy

International law is confronting, whether by means of the establishment or the recognition of legal norms and regimes, the growing globalization of the world economy. At the same time, the proliferation of multinational corporations, the increased autonomy of international markets for capital, currency, goods and services, and the increasing importance placed on free market policies have resulted in a reduction in State authority and in a de-emphasis of national boundaries. In many cases, global economic entities, markets and processes have overridden the political and legal controls that can be exercised by one or more States.

Political and Moral Attitudes

In addition to the factual and social conditions cited in the above examples, a challenge to the juridical notion of the State arises from the political and moral position that individual rights and democratic government should be a condition of recognition of statehood. This position has been put forward on philosophic grounds, but there has also been political demand and support for the concept. The imposition of such a condition on the legitimacy of a State would be, of course, a radical departure from the juridical conception of a State.

The Problem of the “Failed” State

A more limited though no less significant challenge to the juridical conception of the State is the problem of States that fail to provide minimum social order and are unable to meet the basic needs of their peoples. The challenge posed by so-called failed States arises, *inter alia*, from the problems of defining the rights and obligations of other States or international organizations in dealing with the breakdown of the social order or with the unmet needs of the people of the failed State.

The Influence of Transnational “Civil Society”

The demand for recognition on the international level by non-governmental interest groups or organizations (the “people”) poses yet another challenge to the State. Such demands for recognition relate not only to international or transboundary issues but also, in many cases, to a perception of global allegiance, either on the individual level or on the level of transnational finance or commerce.

The Feminist Critique

Another challenge arises from the criticism of States as patriarchal structures that ought to be, or at least could be, superseded or transformed in order to accommodate alternative political-economic structures or social orders.

While these examples are not exhaustive, they provide an assortment of phenomena that raise questions concerning the stability of the traditional State. The questions raised include whether other actors should be given a place or should be recognized in international society and whether the stability of the overall international order is threatened by these and other challenges to the juridical State. Taken together, these challenges affect the position of the State at the foundation of the international legal system and

invite consideration as to whether such challenges ought to be considered a threat or a benefit to the pluralistic conception of the State system. The challenges also require consideration as to whether their positive aspects could be accommodated through international legal developments and whether innovative institutional arrangements could facilitate such accommodation.

Finally, each of the foregoing examples of challenges to the traditional concept of the State in the international legal order presents questions that could be dealt with in specific ways. The challenges could be addressed contextually, that is, by dealing with each problem as it arises or gains widespread recognition (e.g., recognizing the rights of indigenous peoples, imposing a regulatory system on capital movements, etc.). Thus, it is possible to approach such challenges in the framework of practical solutions that would address particular challenges. It is also possible that the international legal system could deal with such challenges more broadly by considering legal norms, institutions and systems which offer alternatives to the primacy of the State.

B. SUMMARY OF THE DISCUSSION*

Theoretical Aspects of Challenges to State Sovereignty

The discussion began with a review of the theoretical aspects of the problem raised by challenges to the juridical State. Professor Sohn** commenced the discussion with the view that the challenges to the traditional concept of the juridical State were coming from both above and below. An example of a challenge from above could be seen in the case of the European Community, to which quite a number of very important States have delegated a significant portion of their sovereignty. Examples of challenges from below could be found even in the United States of America, where one of the major political agendas of the current Congress was to transfer power away from the federal government (i.e., the State in international law) to the several States (i.e., sub-State political entities). Other examples abounded. Recently, there was a meeting of an association of some 200 European regions which regarded themselves to be separate from States for planning and other purposes. Some

* There were many individuals who participated in the round-table discussion. While attempting to fairly portray the views expressed by all who commented, this report only gives credit to those participants whose views were specifically solicited by the Moderator in order to frame the discussion.

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of these regions straddle more than one national territory, but most were contained within one State's territory. Additional examples of challenges from below could be seen in the various movements and demands for democracy, individual human rights and self-determination.

Another issue challenging the traditional conception of the State was the imposition of international sanctions. Sanctions, of course, were employed in order to induce a State to observe international norms. However, a general criticism concerning the imposition of sanctions was that they were not necessarily effective against States, *per se*, or even their governments. Instead, the criticism contended, sanctions caused pain and suffering to the people of the State (who, under many constitutional systems, are considered to be the "sovereign"). Although these people suffer from the imposition of sanctions against their State, they almost always had had little or no say in, and were not typically responsible for, the violations of international norms committed by their rulers. Now, the theory posited that, even given these circumstances, the imposition of sanctions was justified, for such imposition would cause the nation to revolt against the malevolent rulers whose misbehaviour caused the sanctions to be imposed. In practice, however, such rulers often controlled sufficient military resources to prevent or to overcome any such revolt.

Another attack on the traditional conception of the State was the extent to which democratic notions might apply to the legitimacy of States. For example, the qualifications for admission of new members to international organizations often included the requirement that the State adhere to democratic principles. The Council of Europe, for instance, determined that certain Eastern European States, which were not considered to be democratic, could not be admitted. In one case, a State was expelled from the Council because its government was not considered to be sufficiently democratic. To cite another example, one needed only to consider Article 4, paragraph 1, of the Charter of the United Nations, which provided that membership in the United Nations was open to all "peace-loving" States, although this limitation was not defined.

The application of democratic notions to the legitimacy of the State under international law also raised the question of the role of individuals in the international legal order. Indeed, the Charter began with the words, "We the Peoples of the United Nations" and not, "We the States" or "We the United Nations". Additionally, it was noteworthy that a recent report of the Commission on Governance, comprising a group of renowned international scholars and practitioners, concluded that the world should be seen as a neighbourhood with peoples rather than as a system with States at the centre of the international legal order.

Dr. Koskenniemi* was then recognized by Professor Schachter as having contributed to the general debate on challenges to State sovereignty. Dr. Koskenniemi began by noting that the various challenges posed by Professor Schachter at the outset, and perhaps even others, could be viewed together as a general critique of culture and society. Such a critique was one that was broader than a critique that pertained merely to international legal society or the role of the State in the international legal order.

Dr. Koskenniemi indicated that his thesis was that the challenges to State sovereignty, such as those cited above, could be taken together as an attack against modernity. These challenges, in one way or another, flowed from the basic proposition that both the present State system and, indeed, the present conception of the juridical State were *artificial* constructs that emanated from modern philosophical underpinnings. Proceeding, perhaps, from what might be termed either a pre-modern, a post-modern or a deconstructionist viewpoint, the general critique suggested by such challenges was that, being an artificial form, the State was a worthy object of criticism or of outright rejection. It would seem, therefore, that the challenges all proceeded from this general critique, the aim of which was to create a society that was no longer modern in the sense that State sovereignty was the fundamental concept in international law. Consequently, this general critique suggested that international society should be fashioned or transformed into a *natural* order that could respond to the needs and the demands of these challenges.

The question which necessarily arose was whether the basic thesis raised by this general critique (i.e., that the artificial construct of the juridical State ought to be replaced by more natural forms or by an international order that was responsive to the authentic demands and needs of international society and culture) could withstand scrutiny. The logical starting point was an examination of the arguments raised by the general critique. It was noteworthy that the examples of challenges to State sovereignty stated at the outset could be seen as either descriptive or normative arguments posed by the general critique. Thus, some of the challenges posed at the outset were descriptive, in so far as they were concerned with factual developments in global society. For instance, some of the challenges related to the larger discourse regarding the growing interdependence of nations and international society. On the other hand, the other examples of challenges clearly involved normative concepts regarding such matters as human rights, democratic principles and the rights of non-State entities *vis-à-vis* States.

With respect to the descriptive arguments flowing from the general critique of State sovereignty, the various descriptions of our current world as

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being somehow unique or as presenting new challenges to the formal notion of statehood were not particularly novel and, consequently, might not be compelling. It could be recalled that at the end of the eighteenth century, a German international lawyer wrote a treatise on international law. Now, this German lawyer, writing amidst one philosophic milieu, argued forcefully that the sovereign State was at the centre of international order. Some decades later, in the 1820s, the German lawyer's treatise was translated into French. The French translator, then viewing the matter from a different philosophic perspective, inserted a lengthy footnote at this point in the translation of the treatise. In that footnote, the French translator asserted that the German lawyer had been completely out of touch and that his emphasis on the sovereign State was outdated. The translator reasoned that the then prevailing international system, with its ultra-national monetary and economic systems and its tolerance of the widespread freedom of movement of peoples, had rendered the sovereign State an anachronism.

The attitude evinced by this French translator indicated that the concept of the juridical State had been open to challenge before, not just recently. Indeed, it could be argued that the very notion of "international" could be seen historically as having involved a tension between non-State forces, on the one hand, and States as a legal form, on the other. So it was not necessarily the case that the challenges to State sovereignty which were of a descriptive type were new or compelling. Moreover, it did not necessarily follow, as the general critique would seem to posit, that the phenomenon of growing international interdependence and the challenges thereby posed to the juridical State should be uncritically accepted by international society as the basis and rationale for transforming the international legal order.

In comparison to the descriptive arguments posed by the general critique, the normative arguments were far more interesting. These arguments followed from the general critique's position that the notion of the juridical State was based on the paradigm of the modern or liberal State organizing itself through the rule of law (and not on the basis of religion, personality, land ownership or some other irrational basis) and, by doing so, attaining the fundamental status of an international juridical person. The critique viewed this, however, as nothing more than an artificial construct open to challenge. The normative arguments suggested that there were more authentic forms of governance as well as genuine social or cultural considerations that made the sovereign State a false, or at least non-genuine, form upon which the international legal order should be based.

Of course, this begged the question as to what legal form was best suited for replacing the juridical State. Thus, in the case of the first challenge cited above, the normative argument was that claims for self-determination by

sub-State entities and peoples should be both recognized by international society and cognizable under international law. This argument, of course, presumed that there were natural legal forms corresponding to particular indigenous peoples or to certain linguistic, cultural or even religious groups. Such legal forms were more authentic, so the argument goes, than the State. The very authenticity of sub-State entities or peoples as discrete and identifiable groups was somehow far more natural than the artificial character of the boundaries which presently divided the world into some 180 entities. While we could certainly recognize the artificiality of these boundaries and, perhaps, even the entities which they demarcated, this did not answer the question of why such artificial boundaries and entities should be valued any less than the so-called natural forms that would embody these sub-State entities or peoples. In the second challenge posed above, the normative argument was that inherent economic laws and the laws of the market existed and that such laws naturally forced rational economic actors to disregard the artificial frontiers between States. It followed then that the world should be allowed to function in its natural economic condition, that economic unity and interdependence and the play of market forces ought to be allowed to flourish and that the artificial boundaries and entities dividing the world and hampering these natural economic forms and processes should be tossed aside. The third challenge brought up the normative argument that there were natural political and individual rights of an authentic character and quality that was far more compelling than the notion of statehood.

There were, no doubt, other arguments flowing from the general critique that could be derived from the above-cited examples. All of these arguments arrived at the claim that the juridical State was not an authentic form for social ordering. Instead, the juridical State should be replaced by a form that would be more authentic and more responsive to these genuine needs and demands of society. However, none of the arguments appeared to lead us to any understanding of what sort of form it was that should be used to replace the State.

Significantly, however, all of these arguments portrayed the opposition that was central to the general critique of State sovereignty. This opposition was between that which was said to be artificial (namely, the juridical State, that liberal political form of social organization) and that which was said to be authentic (namely, the political, economic or cultural demands and requirements of discrete and identifiable peoples or of natural social processes). This opposition, therefore, involved a tension between modernity and something which was not modernity. Now, modernity was the artificial. It was the idea that history was not merely a stream in which we floated, realizing our destiny as we were swept along by the currents of "natural" forces. Rather, it

was the idea that we struggled to design and to create societies and that we brought meaning to history, in accordance with our desires and needs, through our social constructs.

It was insufficient, of course, to merely portray the tension between modern constructs and so-called natural forces and demands. The general critique of the sovereign State should be answered by defending the juridical State against the various claims for replacing it with something more authentic. At least three arguments could be made by way of such a defence. Each of these three arguments took a normative approach in order to counter the various claims for authenticity and to contend that such claims could not be upheld. The arguments aimed to arrive, out of moral and logical necessity, at an acceptance of the moral priority of the State over claims for the recognition of so-called natural communities, or for the facilitation of unrestricted economic and political processes for the predominance of individual rights, and so on.

The first argument against the general critique of State sovereignty was that the various claims of naturalness were contradictory. The claims could not all be realized at the same time. For example, allowing natural economic and market forces to dictate the method of social ordering would conflict with individual economic and perhaps also social or political rights. In the same way, the preservation of unfettered property rights (leaving aside the question of whether property rights were themselves natural or were, rather, merely a more widely accepted legal construct) conflicted with claims for environmental stewardship to preserve naturalness as well as the public resource considerations that applied to such stewardship. Such conflicts were themselves to be expected, for the perennial problem faced by society (and, indeed, the problem pervading systems of law) was how to resolve such conflicts and contradictions. Nevertheless, it seemed unlikely that there was some natural, unifying social system that automatically resolved these conflicts. Rather, society constructed what might be labelled artificial legal forms and systems so as to provide a means for synthesizing the contradictions or for ameliorating the conflicts. The State and the international legal system premised thereon were surely such societal constructs.

The second argument against the general critique was that claims for authenticity were ultimately indeterminate. As noted previously, the various claims for authenticity decried the artificiality of the State. But the claims did not automatically or even logically lead to the realization of some authentic form that ought to replace the State. By merely asserting that individual or human rights should be recognized did not lead us to any awareness of the natural form of a legal or political system under which such rights could be most effectively realized. Indeed, history showed that there had been much

debate and social struggle over what political or legal system was best suited to provide for such generally formulated rights. Moreover, there should be some decision-making processes that could accommodate competing claims of rights or of resources connected with such rights. Such decision-making processes should be capable of deciding, at various times, what competing rights or which limited resources must be given priority. The indeterminate nature of claims for authenticity provided us with no logical set of decision-making processes or systems within which society could equitably make such choices.

The third argument against the general critique was that, taken to the extreme, each of the various claims of authenticity was oppressive and had the inherent potential of totalitarianism. One needed only to consider how recent claims by sub-State entities or peoples had acquired oppressive overtones. Similarly, unchecked economic forces had the power, as history had shown, to enslave individuals and groups and to upset equally compelling social objectives. Finally, demands for individual rights could be oppressive, if taken to the extreme, to equally valid considerations of public rights and the rights of society as a whole as well as to the rights of other individuals who might lack political power or access to legal resources. Thus, none of the claims for authenticity could really be allowed by society to remain unrestrained. There should be some means, some system or some decision-making processes by which society could balance the claims against one another and mitigate their potentially destructive effects.

Thus, each of these three arguments against the general critique of State sovereignty led us, it could be argued, to the realization that the various claims of authenticity ultimately required some sort of legal or social construct in which the claims could be balanced and ordered. However, none of the claims provided us with an answer as to the appropriate legal forms or constructs for doing this. It had to be recognized that the international society had already developed such a form: the juridical State and the international legal system predicated thereon. International society had yet to develop any other forms or constructs capable of replacing the State system as a capable decision-making process or system for handling the various competing claims. It would be dangerous to accede to the claims of authenticity and dismantle that legal system.

At that moment, Professor Schachter drew the discussion back to a point that had been raised earlier by Professor Sohn. It was noted that although the State was an artificial construct, it was not only being challenged by claims promoting forms or processes that were said to be natural or more authentic. State sovereignty was also being challenged by competing artificial constructs. As noted by Professor Sohn, States in Europe are ceding at least

part of the sovereignty to the European Community, which could hardly be seen as a natural form. Similarly, the European regions, to which Professor Sohn alluded, could be seen as artificial entities that were originally formed for historical or cultural reasons that might no longer be relevant. Both examples raised by Professor Sohn could be viewed as a challenge to the primacy of the sovereign State from something not necessarily claiming its legitimacy on the basis that it possessed or represented some natural or authentic right thereto. So, the question raised is whether the challenges posed at the outset could also be seen in terms of a call for alternative forms, processes or systems other than the juridical State.

Dr. Koskenniemi responded by indicating that by posing the question in this way, the challenges to State sovereignty could permit society to examine whether there were choices to be made among various legal constructs, any of which, alone or in combination, could provide alternative means of ordering international society. Dr. Koskenniemi asserted that such an examination would almost certainly be healthy so long as it was fully understood that the problem was deciding among alternative constructs. Some participants viewed the distinction between *natural* and *artificial* constructs as being less than readily apparent. Ms. Knop* observed, for example, that many claims to authenticity could be viewed as artificial. For example, claims for recognition based on ethnic identification embodied a societal value that ethnic concentration and self-determination were preferable. Such a value could be viewed as nothing more than an artificial construct, for no known natural law posited the preferability of ethnic concentration. Professor Knop further noted, on the other hand, that purely artificial constructs, such as the State in international law, concepts of private property, etc., had assumed a kind of naturalness over time. The problem, however, was not that such choices had to be made. Rather the problem was that the alternatives to the juridical State implicit in the above-cited examples were being presented, perhaps somewhat uncritically, as somehow more authentic and, therefore, more compelling or worthwhile than any other alternatives.

Practical Aspects of Challenges to State Sovereignty

Thanking Dr. Koskenniemi for framing the general issue, Professor Schachter asked the general question as to whether the juridical State and State system constituted the only legal form or formal process for balancing various interests and claims, including those cited above. He then invited a general discussion about the challenges to State sovereignty and invited suggestions of

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alternative forms or processes (whether to coexist with or to replace the State system) which ought to be considered for addressing and balancing these challenges to the international legal order.

The discussion began with a defence of sovereignty from the perspective that the State system had afforded certain peoples or nations, particularly in the case of so-called mini-States, a kind of legitimacy in international society that they might not otherwise have. The State system was said to allow such peoples or nations a bargaining position which they could ill afford to lose.

Thus, one speaker raised the issue of the tension between State sovereignty and protection of the global environment and asserted that State boundaries were being blurred by a number of environmental issues and emerging legal regimes. In contrast to environmental issues that were outside the jurisdiction of States, such as the high seas, Antarctica, the stratosphere and outer space, issues relating to the protection of forests, preservation of biodiversity and prevention of artificial climate change affected the sovereign rights of States. However, notwithstanding the transboundary character of such environmental challenges, it was far from clear that the time was ripe for dispensing with the doctrine of sovereignty. Doing so could almost certainly undermine the equities among States, regions or peoples by depriving elements of international society of a voice in the general debate concerning such environmental challenges. Another speaker rose to defend State sovereignty from the perspective of the mini-State. The sovereignty of these small States was said to be threatened in many ways. Such States had difficulties competing militarily, politically, economically and environmentally with other States and found it hard to compete, on an equal footing, with other States in treaty-based organizations. The point raised by both speakers seemed to be that the general question of challenges to State sovereignty also had to be viewed from the perspective of those States which viewed their sovereignty as a vital means for participation in global society.

Ambassador Türk* then spoke on the question of how political practicalities could be viewed in the general discussion of challenges to State sovereignty. He began by noting that, although the topic bore on questions of law and the appropriate forms for international legal order, the political aspects of the question also required consideration. In international affairs, of course, major events occurred mainly at the political level, which perhaps partly explained why so much is unpredictable. Thus, claims which challenged State sovereignty were typically justified, on the legal plane, on the

* Permanent Representative of Slovenia to the United Nations, New York, NY, United States of America.

basis of whether or not such claims were legitimate. Such claims were directed, accordingly, at something which was said to be illegitimate. On the other hand, the actual success or failure of the claims generally depended not on the convincing nature of the arguments for legitimacy but rather on the political effectiveness of the claim. Effectiveness of State power had long been the core of sovereignty despite the various challenges to the juridical State. This was not to say that the effectiveness of State power could not be challenged or that its effectiveness could not be transformed in some way as a result of such challenges. Ultimately, a balance should be struck between the effectiveness of State power, on the one hand, and the effectiveness of the various claims challenging that power, on the other.

Striking such a balance no doubt would have to involve considerations of legitimacy. But it could and should also involve a political accommodation that was derived from a process of peaceful negotiation. Political instruments existed to promote peaceful change, and these ought to be used to address the various claims and to shape the State system in such a way that it could peacefully coexist with such claims.

Professor Pellet* next took up the problem of claims by sub-State entities and peoples which challenge State sovereignty. That such claims challenge State sovereignty could be readily seen, of course, in the various examples of the break-up of the former Yugoslavia, in the dissolution of the former Union of the Soviet Socialist Republics and even in attempts by Quebec at secession. Most public international lawyers would agree that sub-State entities had no inherent right to sovereign independence. However, this did not answer the central question of how sovereign States could accommodate the challenges posed by sub-State entities. If sub-State entities were denied any right to independence or to some sort of recognition without any recourse in international law, then they would almost certainly be encouraged to do what is necessary under international law to acquire such recognition. Therefore, they would be encouraged to create a factual situation, employing force if necessary to do so, that would be sufficient to meet the objective requirements of statehood under international law. Thus, the development of some sort of middle-ground position for these sub-State entities in international law seemed to be indispensable in order to avoid the dilemma whereby a sub-State entity or a people either had no cognizable rights under international law or might use whatever means were necessary to attain such rights.

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Thus, the time had come to reassess the concept of "people" in international law as well as to both extend and to limit the scope of the rights of such people to international recognition and self-determination. The expansion of rights to recognition and self-determination would proceed from an acknowledgement that all sub-State human entities having strong common values, such as indigenous peoples or minorities, are indeed "people" recognizable under international law. As such, it would have to be conceded that such people have certain rights to self-determination independent of States. At the same time, however, this right to self-determination would have to be limited. This meant putting aside the now traditional anti-colonialist approach that the right to self-determination necessarily embodied a right to complete and independent sovereignty. Indeed, there had been attempts to reassess the right of self-determination in international law. Such attempts had been carried out by way of international conventions, the declarations of international organizations and the opinions of legal commissions. The hope was that these nascent efforts would crystallize so as to create in international law some meaningful right of recognition for sub-State entities while, at the same time, ensuring that the rights of such sub-State entities did not unduly encroach on the existence, the territorial integrity and any other rights enjoyed by the sovereign States with whom these sub-State entities should co-exist.

Another speaker continued the discussion of the challenges to State sovereignty posed by sub-State entities and peoples. One problem which necessarily arose, it was observed, was whether a right to self-determination was actually a right that could be found in international law. Some might point to the Charter of the United Nations as the source for such a right, but this, of course, begged the question of whether the Charter or any other multilateral treaty could create rights which theretofore were not recognized in international law. In this regard, it could be said that some provisions of the Charter were more or less political statements that were simply too imprecise to be regarded as statements of international law giving rise to previously unknown legal rights. This problem would have to be addressed in any effort undertaken to redefine a right to self-determination.

Another problem was that any accommodation of a so-called international right to self-determination required a redefinition of the nature of the juridical State. Perhaps this would entail distinguishing between statehood, as currently conceived in international law, and the concept of nationhood, which was what many claims for self-determination seemed really to be promoting. The difficulty, of course, was finding a distinction that was meaningful and that was mindful of the sometimes competing interests that would be involved in the question of statehood versus nationhood. The problem

would be finding such a distinction that did not then dissolve into a distinction without any real substance.

Another commentator focused on the issue of recognition posed in the case of claims to self-determination by noting that an inverse problem arose both in the case of claims that official tolerance for individual rights and the employment of democratic governance were conditions for legitimate statehood and in the case of the failed State. In these situations, the question was one of de-recognition, that is, of deciding if and when a State no longer possessed those fundamental attributes of sovereignty that gave rise to its recognition as a State in international law. One aspect of this problem involved deciding what criteria would be appropriate for such de-recognition and under what circumstances such criteria would be applied. It could be asked, in this regard, whether the criteria appropriate for de-recognizing a State that had failed would be appropriate, or even relevant, to the de-recognition of a State that had failed to maintain those minimum standards of democratic governance and respect for human rights that some suggested ought to serve as a condition precedent to statehood. It could be asked whether there should be any consideration for the idea that sovereignty should be held in abeyance or otherwise merely lapse until such time as the preconditions required to be met in international law allowed sovereignty to be redeemed. Another perhaps even more challenging aspect to the problem of de-recognition was the problem of what authority would decide both the question of whether the criteria for de-recognition had been met and the question of who or what authority should succeed to the rights and obligations of the de-recognized State. This problem had been recently faced by the United Nations, and its experience demonstrated just how difficult were the questions and problems relating to the issue of de-recognition.

The discussion turned to the challenge to State sovereignty posed by the so-called global or transnational civil society. This civil society was said to be comprised of a wide assortment of groups and individuals including non-governmental organizations, business groups, political or social interest groups and others. However such groups, entities or individuals might be labelled or otherwise regarded, their influence could not be discounted and was being felt by national governments and global society as a whole.

One speaker suggested that, given the increasing role of global civil society, the international State system simply could not ignore the specific values and policies which the global civil society promoted or defended. International law, therefore, in some way had to find a means for recognizing the voices of the global civil society, if for no other reason than because the voices of these groups, entities and individuals contributed to a pluralistic international society in ways that States could not. Of course, it could be

questioned whether the global civil society had a more authentic voice than that of States on any particular issue. But the rationale for recognizing global civil society need not be any claim to authenticity; it could simply be on the basis of efficiency. The voices of States (or public international organizations, for that matter) might be seen, on any given issue, as necessarily being tempered, either by the need to balance political, economic and social interests within that State or by an inability to allocate sufficient resources to an investigation, promotion or defense of such an issue. By contrast, global interest groups that focused their resources on discrete issues could contribute enormously to the general international debate of such issues. Thus, the problem for international law was determining the criteria for recognizing global civil society in international affairs, the limits of the role to be played by the global civil society and the value that the global civil society could bring to the resolution of transnational problems.

C. CONCLUSION

The discussion of the challenges to State sovereignty focused on both the theoretical and the practical aspects and problems posed by such challenges. In the end, perhaps, more questions were raised than solutions. However, it could be said that all of the various challenges to the juridical State related, in one way or another, to problems of recognition in international law. The claims for recognition, of course, varied depending on the nature of the challenge, but the common issue concerned the desirability of having decision-making processes, other than the State, on the international plane. Such alternatives to the State did not need to be seen as replacements to the State. They needed only to be viewed as chosen instruments that could allow international society to address the values, demands and needs being raised by the challenges to State sovereignty.

Whether or not such alternatives would be accepted, the challenges should and almost certainly would have to be faced by international society, whether within the formal international legal system or in the realities of politics and struggle. Thus, for international law, the issue involved adopting the criteria for the recognition of such alternatives, what the extent and meaning of such recognition ought to be and by what process such recognition should occur. Obviously, there would be no single answer to these questions sufficient to address the various claims for recognition being made. However, this could be said to apply equally to the present State system, for it was not obvious that the juridical State and the international order premised thereon was the only order competent to handle the issues posed by these kinds of

challenges. Many commentators seemed to agree that the international legal order would be required, in some respect, to evolve alternative processes, coexistent with States in one way or another, that could peacefully allow international society to deal with the various and sometimes competing claims for legitimacy and political effectiveness posed by these challenges.

CLÔTURE DU CONGRES

DISCOURS DE CLÔTURE DU SECRÉTAIRE GÉNÉRAL DE L'ORGANISATION DES NATIONS UNIES

Boutros Boutros-Ghali

Je suis particulièrement heureux d'être aujourd'hui ici, parmi vous, pour la séance de clôture de votre Congrès de droit international public. Il est, en effet, tout à fait remarquable que des théoriciens et des praticiens du droit, appartenant à plus de 140 nationalités, aient pu ainsi, durant cinq jours, débattre ensemble de l'avenir du droit de la société internationale.

La trentaine d'orateurs qui se sont succédés à cette tribune et qui représentent « les principaux systèmes juridiques du monde » nous ont offert une vision panoramique exceptionnelle, tout à la fois positive et prospective, du droit international sous tous ses aspects.

A cet égard, je voudrais retenir et appuyer la proposition faite ici de permettre au Secrétaire général de l'Organisation des Nations Unies de demander des avis consultatifs à la Cour internationale de Justice, dans les mêmes conditions que l'Assemblée générale ou le Conseil de sécurité. Une telle possibilité m'aiderait grandement à remplir ma mission.

Je me suis également tenu informé des débats qui se sont déroulés dans cette enceinte, ainsi que de la dizaine de tables rondes organisées dans le cadre de votre Congrès.

D'ores et déjà, nous pouvons tirer de cette manifestation une leçon essentielle : si les juristes du monde entier ont pu aussi librement, aussi spontanément, aussi profondément, débattre de l'ensemble des problèmes internationaux du moment, c'est bien parce qu'ils possèdent une langue commune, le droit international, ainsi que l'affirme fortement le titre même de ce Congrès.

Sur le plan personnel, je voudrais dire aussi que le déroulement, dans l'enceinte de l'Organisation des Nations Unies, d'un colloque universitaire réconcilie, en quelque sorte, deux parts importantes de moi-même : les exigences du Professeur de droit international que j'ai été pendant longtemps et les impératifs du Secrétaire général des Nations Unies que je suis aujourd'hui.

Cela est d'autant vrai que nous sommes ici dans une institution — l'Organisation des Nations Unies — où s'entremêlent allègrement le discours politique et le vocabulaire juridique, où s'estompe la frontière entre le discursif et le normatif, où la dialectique entre le droit et la diplomatie est sans cesse à l'œuvre.

Face à cette réalité, ce serait, me semble-t-il, une pauvre attitude que celle de se réfugier dans une position de puriste abstraite et théorique.

Nous savons tous que le droit n'est jamais innocent de la société qui le fait naître. Et c'est ce que veut fortement rappeler le thème choisi pour cette manifestation.

Car tous les juristes sont bien convaincus que le droit international est, pour les États, non seulement un ensemble normatif, mais aussi un langage de communication.

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À la réflexion, que la scène internationale soit d'abord un lieu de discours n'a rien d'étonnant. Les relations internationales, en raison de leur spécificité, ont besoin d'un instrument de communication qui ne peut être que le discours juridique. L'opinion publique internationale a parfois du mal à comprendre cela. À nous d'expliquer que, s'il en est ainsi, c'est parce que le droit international remplit, en bien des points, des fonctions radicalement différentes de celles assignées au droit interne.

En effet, le droit national est secrété par un système de valeurs propres à une société, à une nation, à un peuple qui se reconnaît dans une histoire commune et se projette dans un avenir partagé : il est l'une des dimensions de la solidarité entre les individus qui composent le corps social.

En revanche, la société internationale n'est, dans une large mesure, qu'un lieu d'échange entre monades étatiques juxtaposées, qui ne s'identifient que très partiellement à un fonds commun de valeurs universelles.

L'absence de législateur unique, de gouvernement mondial, de juridiction permanente et obligatoire ou, pour faire bref, d'un organisme supranational n'est que la conséquence — et non la cause, comme on le croit trop souvent — de l'inexistence d'une conscience collective transcendant les frontières.

Peut-être saisit-on mieux ainsi l'importance du discours juridique dans la pratique diplomatique. Et l'Organisation des Nations Unies montre, mieux

qu'aucune autre, la compétition à laquelle se livrent les États pour tenter d'imposer un langage dominant et pour contrôler l'idéologie qu'il exprime.

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Mais le discours juridique, en tant qu'instrument de communication entre les États, est également l'un des facteurs de l'institutionnalisation croissante de la société internationale.

En effet, les relations interétatiques ont besoin d'instances où puisse s'épanouir le discours organisé. La diplomatie multilatérale, telle qu'elle s'exprime notamment au sein de l'Organisation des Nations Unies, illustre parfaitement ce phénomène. Et il faut, aujourd'hui plus que jamais, l'encourager. Car chacun voit bien que les États n'ont pas encore réussi à faire naître les concepts et les normes nécessaires pour régir la période actuelle. La réglementation de l'après-guerre froide reste encore largement à penser.

Nous sentons bien, en effet, aujourd'hui que l'accélération de l'histoire dans laquelle le monde a été brutalement plongé a rendu désuets ou obsolètes un certain nombre de principes sur lesquels se fondait jusqu'alors la société internationale.

Il est donc nécessaire — et je dirais même urgent — de repenser les règles de notre devenir collectif et de tenter d'insuffler, sinon une morale, du moins un minimum de rationalité juridique à la conduite des acteurs de la vie sociale.

Dans cette tâche l'Organisation des Nations Unies ne ménage pas ses efforts. Et c'est précisément au rôle que joue l'Organisation mondiale dans l'émergence des nouvelles règles du droit international que j'aimerais réfléchir devant vous quelques instants, avant que ne se clôtüre cette importante manifestation.

Car nous sommes tous témoins des novations considérables qui affectent aujourd'hui le droit international au plus profond de lui-même et qui concernent tout aussi bien les institutions internationales que les normes juridiques.

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Dans le domaine institutionnel, les organisations internationales se sont trouvées profondément bouleversées par le nouveau contexte dans lequel se déroulent aujourd'hui les relations entre les États, à la suite de l'éclatement de l'Union soviétique, de la fin de la politique des blocs et de l'émergence de nouvelles puissances.

Ces phénomènes ont, à l'heure actuelle, des effets considérables sur l'Organisation des Nations Unies, qui est ainsi amenée à conduire une profonde et permanente réflexion sur elle-même.

Cette réflexion porte tout d'abord sur la représentativité de ses organes et, notamment, sur la composition même du Conseil de sécurité. J'ai eu, l'an dernier, l'occasion de lancer une vaste enquête auprès des États Membres pour recueillir leur sentiment à ce sujet. Chacun semble convenir qu'il faut à la fois que le Conseil demeure un organe restreint pour conserver son efficacité, mais qu'il s'ouvre davantage pour affirmer sa légitimité. Il n'en reste pas moins que les modalités juridiques de cette réforme, le choix des nouveaux membres, le statut qui peut leur être accordé restent des questions encore fort discutées.

Dans le même esprit, les Nations Unies sont aujourd'hui conduites à s'interroger sur les pouvoirs et sur la répartition des compétences entre certains de ses organes principaux. Là encore, la fin des blocages institutionnels nés de la guerre froide a rendu au Conseil de sécurité l'intégralité des fonctions qui lui étaient dévolues par la Charte des Nations Unies.

Mais, par là même, cette forte impulsion donnée à l'action du Conseil a fait naître ou renaître de nouvelles questions juridiques, et notamment celles-ci : le Conseil de sécurité, fort de l'unanimité de ses membres permanents, a-t-il des pouvoirs illimités ? Jusqu'où peut-il étendre ses compétences ? Est-il le seul maître de l'interprétation de ses propres pouvoirs ? Ses actes sont-ils exempts de tout contrôle ? Ce sont là des problèmes fondamentaux qui touchent à l'équilibre entre les organes, aux relations entre l'Organisation et les États Membres, à la fonction politique dont est investie l'ONU et, plus profondément, à la structure même de la Charte.

Je pourrais évoquer bien d'autres domaines où, sur le plan institutionnel, le droit est à repenser. Mais je voudrais aussi mettre l'accent sur l'une des préoccupations les plus graves du nouvel ordre institutionnel à venir et qui concerne le sujet principal du droit international, c'est-à-dire l'État lui-même.

Nous savons tous, plus ou moins implicitement, que l'ordre international à venir devra se poser sur une société qui doute de ses propres structures et, singulièrement, de la première d'entre elles : l'État.

Ici, certains peuples, dans de tragiques balbutiements, cherchent à concilier la rationalité de l'État et les pulsions du « micronationalisme ». Et nous devons aujourd'hui fermement nous demander quelle doit être l'attitude de la communauté internationale à cet égard. On peut respecter les minorités, comprendre les particularismes, accepter la diversité sans pour autant céder à l'émiettement et au fractionnisme. Ce serait là une interprétation fort perverse du droit des peuples à disposer d'eux-mêmes que de considérer que chaque entité sociale ou ethnique qui s'estime différente de son voisin, pour des

raisons souvent ambiguës et parfois condamnables, peut accéder à la reconnaissance internationale. La démocratisation de la société internationale que nous appelons tous de nos vœux est à l'inverse de cette vision du monde.

Ailleurs, c'est la réalité même de l'État qui s'effondre. Certains pays en développement en sont arrivés à un tel degré de déstructuration qu'il leur manque parfois l'un des éléments constitutifs essentiels que les juristes attribuent d'ordinaire au statut de l'État. Cela peut avoir d'incalculables conséquences, car cette déliquescence des institutions risque de faire ressurgir ou renaître des solidarités primitives dont beaucoup sont, hélas, porteuses de fanatisme et d'exclusion. Et, dès lors, se pose à la communauté internationale la question de savoir comment prendre en charge ces États en faillite.

Voilà quelques questions institutionnelles essentielles du droit international d'aujourd'hui. Et je me suis permis de les soumettre ainsi à votre réflexion parce qu'elles font partie quotidiennement des interrogations qui sont les nôtres au sein de l'Organisation des Nations Unies.

Mais, dans le même temps, d'autres champs du droit international contemporain s'offrent à nous. Et notamment tous les nouveaux aspects normatifs dont il doit se saisir.

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Dans le domaine normatif, en effet, des pans entiers de l'ordre juridique subissent de profondes mutations. De nouvelles règles — ou, tout au moins, de nouvelles pratiques — sont en train de naître et qui concernent aussi bien la gestion des espaces que les nouvelles technologies ou la communication ...

Sur toutes ces questions, on sait le rôle que l'Organisation des Nations Unies joue dans la gestation et l'émergence d'un nouveau droit international. Parfois, elle encadre de vastes conférences internationales permettant de faire apparaître de nouvelles règles de droit positif. Ainsi en est-il, par exemple, du droit de la mer. Parfois, elle favorise la codification ou le développement progressif du droit international dans des domaines aussi importants que la responsabilité internationale des États, leurs immunités juridictionnelles, ou même les crimes contre la paix et la sécurité de l'humanité.

L'ONU peut également susciter un droit prospectif dans les domaines les plus pointus et les plus novateurs de la vie économique internationale. Je pense notamment aux règles applicables aux contrats internationaux à l'égard desquels l'Organisation mondiale fait, sans que l'opinion publique en soit toujours consciente, un travail de recension et d'uniformisation remarquable.

Mais il y a plus encore. Au moment où souvent l'opinion publique doute de la capacité de l'Organisation mondiale à remplir sa mission, il est important de porter notre attention sur les voies et moyens mis en œuvre par

les Nations Unies pour assurer la paix, aussi bien sur le plan juridictionnel que sur le plan opérationnel.

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Sur le plan juridictionnel, les procédures de règlement pacifique des différends mises en œuvre dans le cadre de l'Organisation des Nations Unies ont subi, en peu de temps, d'importantes novations.

La Cour internationale de Justice a, on le sait, un rôle déterminant à jouer, non seulement dans l'application du droit international, mais également dans l'interprétation, voire dans le développement, des règles qu'il comporte. Mais la Cour internationale de Justice est aussi beaucoup plus que cela. Dans le cadre des Nations Unies, elle concourt pleinement aux grands objectifs de la paix que nous assigne la Charte.

Dans ce domaine, la Cour internationale de Justice a su montrer qu'elle avait une conception particulièrement exigeante de son rôle. Les différends juridiques qui lui sont soumis ne sont souvent que la traduction normative de conflits politiques plus profonds. Chacun en est bien conscient. Et la résolution de ces différends juridiques par la Cour peut jouer un rôle déterminant dans le règlement politique du conflit sous-jacent. La Cour a eu l'occasion de l'affirmer elle-même et de le souligner fortement. C'est dans cette perspective que j'ai moi aussi, à plusieurs reprises, insisté sur le rôle éminent que doit remplir la Cour internationale de Justice en faveur de la paix et de la sécurité internationale.

Je voudrais dire aussi l'attention particulière que j'attache à la création récente de tribunaux chargés de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire, tant sur le territoire de l'ex-Yougoslavie que, plus récemment, à l'occasion du drame rwandais.

Je considère ces tribunaux comme une avancée du droit. Dans les rapports que j'ai adressés au Conseil de sécurité, j'ai souligné l'importance qu'il y a aujourd'hui à juger les criminels de guerre et à faire en sorte que les Conventions de Genève, la Convention pour la prévention et la répression du crime de génocide et les principes du droit humanitaire international soient ainsi juridictionnellement protégés.

Par ailleurs, j'ai souhaité la création de ces tribunaux sur le fondement du Chapitre VII de la Charte, pour donner une signification nouvelle à l'action judiciaire des Nations Unies en faveur de la paix.

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En effet, sur le plan opérationnel, l'évolution rapide de la société internationale m'a amené, depuis 1992, à réfléchir aux moyens dont dispose l'Organi-

sation pour conduire son action. Dans l'« Agenda pour la paix » que j'ai soumis à l'Assemblée générale et au Conseil de sécurité, et dans le Supplément à cet Agenda que je viens tout récemment de publier, j'ai voulu, en quelque sorte, évaluer les possibilités et les limites de l'Organisation mondiale face à des situations qui affectent la paix et la sécurité internationales.

En l'espace de quatre ou cinq ans, l'Organisation des Nations Unies a mis en œuvre plus d'opérations de maintien de la paix que pendant les 40 années précédentes. Mais l'évolution qui s'est produite n'est pas seulement d'ordre quantitatif, elle est aussi — et surtout — d'ordre qualitatif.

J'ai eu l'occasion d'analyser à maintes reprises ces nouvelles opérations de maintien de la paix, celles que j'ai appelé « les opérations de la deuxième génération », et dont le mandat va bien au-delà de la simple idée d'interposition.

Mais, plus récemment, en Somalie et dans l'ex-Yougoslavie, le Conseil de sécurité a investi les forces de l'ONU d'un nouveau mandat : celui d'utiliser éventuellement la force pour protéger l'action humanitaire. Cela a considérablement modifié le rôle — et même l'image — des Casques bleus.

C'est la raison pour laquelle j'ai voulu attirer l'attention du Conseil de sécurité sur un certain nombre de flottements, voire d'incohérences, qui sont apparus dans la conception même des opérations de l'ONU.

Il y aurait également beaucoup à dire sur les modalités de mise en œuvre des mesures énoncées au Chapitre VII de la Charte, aussi bien les mesures économiques que celles impliquant l'emploi de la force armée. Là encore, je viens de faire connaître mon appréciation de la pratique suivie et j'ai proposé un certain nombre de réformes possibles.

De plus, il faut bien admettre aujourd'hui que l'ONU n'a ni les moyens techniques, ni les moyens financiers, de mener une action militaire d'envergure. Le Conseil de sécurité doit désormais tenir compte de cet état de choses et accepter de déléguer de telles actions soit à une coalition d'États Membres, soit à une organisation régionale.

L'heure du Chapitre VIII semble donc venue. La Charte elle-même a facilité notre tâche en renonçant à donner une définition précise des accords et des organismes régionaux. Il en résulte une souplesse qui permet à des entités diverses de concourir, en liaison avec l'Organisation des Nations Unies, au maintien de la paix et de la sécurité dans un cadre régional.

Sur le plan pratique, j'ai eu l'occasion de dégager les cinq formes que prend actuellement cette coopération et qui sont la consultation, l'appui diplomatique, l'appui opérationnel, le codéploiement et les opérations conjointes.

Sur le plan juridique, une telle diversification ne doit pas altérer la conception initiale de la Charte. C'est l'Article 24 qui confère au Conseil de sécurité la responsabilité principale du maintien de la paix. Il doit en demeurer ainsi.

Dès lors, l'action des organisations régionales doit être menée à la fois avec l'autorisation, sous le contrôle et par délégation du Conseil de sécurité. Car, en aucune manière, l'action des organisations régionales ne doit signifier un désaisissement de l'Organisation mondiale.

Nous avons donc là l'occasion d'affiner les modalités juridiques de cette collaboration. De la coopération à la déconcentration, de la décentralisation à la délégation, l'inventaire des procédures susceptibles d'être mises en œuvre est large. Je suis certain que se développera, dans les années qui viennent, une pratique nouvelle fondée sur le Chapitre VIII de la Charte, et dont les juristes auront à rendre compte.

Bien d'autres domaines juridiques sont aujourd'hui en mutation au sein même de l'Organisation des Nations Unies. Et sans doute aurais-je dû vous parler aussi des transformations du droit international du développement, de l'évolution du droit international de l'environnement, de la naissance d'un nouveau droit international de la démocratie et des droits de l'homme.

Mais le Professeur d'université que je suis resté connaît les limites de ce qu'il peut imposer à tout amphithéâtre, fût-il — comme ici — parmi les plus distingués. Et chacun sait qu'il vaut mieux laisser son auditoire sur un sentiment de frustration que dans un état de saturation.

C'est en espérant néanmoins ne vous avoir infligé ni l'une ni l'autre de ces pénitences que je voudrais, une fois encore, vous remercier d'avoir participé à ce colloque.

La communauté scientifique que vous formez — tout entière tournée vers le triomphe de la règle de droit — est un exemple pour la communauté internationale dans son ensemble. Et les réflexions que vous avez bien voulu ici mettre en commun constituent l'un des plus beaux hommages rendus à l'Organisation des Nations Unies pour célébrer son cinquantième anniversaire.

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