COLLECTION OF ESSAYS
by Legal Advisers of States,
Legal Advisers of International Organizations
and Practitioners in the Field of
INTERNATIONAL LAW

RECUEIL D’ARTICLES
de conseillers juridiques d’Etats,
d’organisations internationales
et de praticiens
du DROIT INTERNATIONAL

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PREFACE

The world has changed radically since 1989, when the General Assembly declared the period from 1990 to 1999 as the United Nations Decade of International Law. Yet the aspirations of the world's peoples remain the same: to live in a world of peace where their rights and freedoms are respected.

This objective cannot be attained without respect for the rule of law. Over the past 10 years, the international community can claim some major achievements in this regard: the adoption of the Comprehensive Nuclear Test Ban Treaty; the entry into force of conventions banning chemical weapons and anti-personnel landmines; and, especially, the adoption of the Rome Statute of the International Criminal Court. At the same time, we must always bear in mind that the rule of law in relations between and among States cannot be limited to law-making alone. Real, good-faith adherence to agreements and commitments must be our yardstick of progress. Respect for international legal obligations is the indispensable core of the just and humane international system for which we strive.

Legal advisers of States and international organizations, as well as practitioners in the field of international law, are among those individuals most committed to promoting respect for international law. However, their knowledge and insights are not always accessible to the general public. In this context, and in accordance with the mandate for the United Nations Decade of International Law, the legal advisers of States and international organizations and a number of practitioners in the field of international law were invited, in their personal capacities, to contribute essays that would provide a practical perspective on international law, as viewed from the standpoint of those involved in its formation, application and administration. This unique compilation, global in nature, is a distinctive addition to the literature on international law and an important contribution to mark the conclusion of the Decade.

Kofi A. Annan

Or cet objectif ne pourra être atteint que dans le respect de la primauté du droit. Les dix années écoulées ont vu à cet égard quelques belles réalisations de la communauté internationale : l'adoption du Traité d'interdiction complète des essais nucléaires, l'entrée en vigueur des conventions d'interdiction des armes chimiques et des mines antipersonnel, et surtout l'adoption du Statut de Rome de la Cour pénale internationale. Nous ne devons jamais oublier pourtant que la primauté du droit dans les relations entre États ne saurait se limiter à l'élaboration d'instruments juridiques. Le progrès se mesure à l'aune du respect authentique, en toute bonne foi, des accords et des engagements. Le respect des obligations légales internationales est le fondement indispensable du système de justice et d'humanité vers lequel tendent nos efforts.

Les conseillers juridiques des États et des organisations internationales, de même que les praticiens du droit international, sont parmi ceux qui se dévouent le plus à la cause du respect du droit international. Mais le grand public n'a pas toujours accès à leurs connaissances et à leurs idées. C'est pour cela que, conformément au mandat de la Décennie des Nations Unies pour le droit international, des conseillers juridiques des États et des organisations internationales, ainsi que des praticiens du droit international, ont été invités à rédiger à titre individuel des articles sur leur discipline envisagée sous l'angle concret, comme la voient ceux qui participent à l'élaboration, à l'application et à l'administration du droit international. D'intérêt mondial par nature, ce recueil unique enrichit considérablement les écrits consacrés au droit international, marquant dignement la fin de la Décennie.

Kofi A. Annan
PROLOGO

El mundo ha cambiado radicalmente desde 1989, año en que la Asamblea General declaró el periodo comprendido entre 1990 y 1999 Decenio de las Naciones Unidas para el Derecho Internacional. Sin embargo, las aspiraciones de los pueblos del mundo no han variado: vivir en un mundo de paz en que se respeten sus derechos y sus libertades.

Para lograr ese objetivo es imprescindible que se respete el Estado de derecho. La comunidad internacional ha alcanzado diversos hitos importantes a ese respecto en los diez últimos años: la adopción del Tratado de prohibición completa de los ensayos nucleares; la entrada en vigor de las convenciones por las que se prohíben las armas químicas y las minas terrestres antipersonal; y, en particular, la aprobación del Estatuto de Roma de la Corte Penal Internacional. A la vez, en todo momento debemos tener presente que, en las relaciones entre los Estados, el Estado de derecho no puede limitarse únicamente a la promulgación de leyes. Sólo habrá progresos si se logra una adhesión de buena fe a los acuerdos suscritos y a los compromisos contraídos. El respeto de las obligaciones jurídicas internacionales es el núcleo indispensable del régimen internacional justo y humano al que aspiramos.

Los asesores jurídicos de los Estados y de las organizaciones internacionales, así como los juristas especializados en derecho internacional, se encuentran entre las personas más dedicadas a la promoción del respeto del derecho internacional. Sin embargo, el público en general no siempre tiene acceso a sus conocimientos y a su perspicacia. En este contexto, y de conformidad con el mandato del Decenio de las Naciones Unidas para el Derecho Internacional, se invitó a los asesores jurídicos de diversos Estados y organizaciones internacionales, así como a juristas especializados en derecho internacional, a que, a título personal, presentaran ensayos en los que ofrecieran una perspectiva práctica del derecho internacional desde el punto de vista de los que participan en su creación, aplicación y administración. Esta singular recopilación, de alcance mundial, es una aportación positiva a la bibliografía del derecho internacional, así como una contribución importante para destacar la conclusión del Decenio.

Kofi A. Annan
THE ROLE OF THE NATIONAL LEGAL ADVISER IN SHAPING THE FOREIGN POLICY OF STATES

LE RÔLE DU CONSEILLER JURIDIQUE NATIONAL DANS LA FORMULATION DE LA POLITIQUE EXTÉRIEURE DES ÉTATS
THE ROLE OF THE LEGAL ADVISER
IN THE CONDUCT OF GHANA'S INTERNATIONAL
RELATIONS FROM INDEPENDENCE TO THE PRESENT

Emmanuel A. Addo*

The Ministry of Foreign Affairs is the organ of government which has responsibility for the conduct of Ghana’s relations with other countries and with international organizations. It assists and advises the Government in the formulation and implementation of Ghana’s foreign policy. The importance of the role of the legal adviser in this process cannot be overemphasized. That role is clear from an examination of the Fourth Republican Constitution of the Republic of Ghana 1992, article 40 of which provides as follows:

"In its dealings with other nations, the Government shall:

(a) Promote and protect the interests of Ghana;

(b) Seek the establishment of a just and equitable international economic and social order;

(c) Promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means;

(d) Adhere to the principles enshrined in or, as the case may be, the aims and ideals of:

(i) The Charter of the United Nations;

(ii) The Charter of the Organization of African

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* Director, Legal and Consular Bureau, Ministry of Foreign Affairs, and Director, International Legal Division, Attorney-General's Department and Ministry of Justice, Ghana.
Unity;

(iii) The Commonwealth;

(iv) The Treaty of the Economic Community of West African States; and

(v) Any other international organization of which Ghana is a member.”

Article 40 is among “The Directive Principles of State Policy” contained in Chapter Six of the Constitution.

Article 73, which appears in Chapter Eight (“The Executive”) under the heading “International Relations”, provides as follows:

“The Government of Ghana shall conduct its international affairs in consonance with the accepted principles of public international law and diplomacy in a manner consistent with the national interest of Ghana.”

It is evident from these two articles that there is a need at all times to have an international legal specialist to advise the Government in the conduct of its international relations and in the formulation of the country’s foreign policy. This is the role of the legal adviser. The legal adviser has the role of ensuring that the political decisions taken by Ghana in the conduct of its international relations conform to accepted principles of public international law and to the country’s treaty obligations.

This is a heavy responsibility, as well as a great privilege. It means that the legal adviser is the custodian and exponent of international law for the Government. The legal adviser must discharge these duties responsibly and with integrity; for the result of what the legal adviser does or says may alter, speed up or delay the course of legal evolution. It is noteworthy in this regard that Ghana’s Constitution makes it an obligation for the legal adviser to encourage the promotion of and respect for international law.

The influence which the legal adviser has in shaping political
decisions on matters of foreign policy depends to a large measure on the legal adviser’s personal reputation, extent of knowledge, soundness of advice, wisdom of judgement and degree of respect enjoyed among professional colleagues.

In order to appreciate the role which the legal adviser plays in influencing the conduct of Ghana’s foreign policy, it is necessary to analyse the structures which have been put in place to support the Government’s international legal advisory services.

As has been indicated above, the Ministry of Foreign Affairs is the organ of government that has responsibility for the conduct of Ghana’s relations with other countries and with international organizations. The Legal Bureau is the Ministry’s advisory arm on matters of law generally and on international law in particular. The usefulness of this service to the Ministry — and, for that matter, to the Government — cannot be stressed too much. Briefly put, the Bureau examines the legal implications of United Nations resolutions, administrative acts, economic activities and other related matters in order that the Ministry may be provided with guidance on such matters in formulating policies on the activities in question.

Among the functions of the Legal Bureau are the following:

- Advising the Minister for Foreign Affairs and the various bureaux within the Ministry on legal matters affecting the Ministry’s work;

- Advising on problems involving international law and on questions arising out of treaties, international agreements and conventions;

- Supervising and participating in the drafting of treaties, international agreements and conventions in the negotiation of which Ghana is a participant;

- Drafting instruments of ratification, accession, acceptance and approval for the signature of the Head of State;

- Attending international conferences as legal advisers or as delegates.

As “in-house counsel” to the Foreign Ministry, the legal adviser
exerts a major influence on the views and policies of the Government of Ghana concerning matters of international law. The legal adviser also plays a significant role with respect to a broad range of domestic law issues involving the international dealings of Ghana and its citizens.

The legal adviser furnishes legal advice to the Minister for Foreign Affairs, the Foreign Ministry generally and diplomatic and consular posts abroad with respect to all legal problems which arise in the course of their work, whether they involve issues of domestic law or international law. The legal adviser’s work, therefore, generally corresponds to that of the general counsel of other agencies of the executive branch. Since the Foreign Ministry has primary responsibility for carrying out the foreign policy and conducting the international relations of Ghana, the bulk of the legal adviser’s work and the work of the bureau which he or she heads relates in some way to international matters, including the increasingly important field of the law of international organizations.

The legal adviser’s first responsibility is to tell the Minister and the entire administration candidly and objectively what the law is and what it requires in any given situation. Every lawyer owes this duty to his or her client. In this regard, it must be noted that, unless the Minister and other policy officials are given competent, objective and honest advice as to the legal consequences of proposed actions and decisions, they cannot make informed and intelligent foreign policy judgements or properly balance the national interests involved. Indeed, the success of a decision or policy may depend on its compliance with international law. The legal adviser should, and often does, provide an objective legal analysis together with concrete suggestions as to how particular policy objectives can be achieved in a manner which is consistent with international law and with Ghana’s obligations and interests.

Traditionally, the Legal Bureau of the Foreign Ministry has been headed by a foreign service officer with a background in law, the rank of A1 Officer and the status of Director. Currently, the Bureau is headed by the present writer, who is an attorney from the Attorney-General’s Department and the Ministry of Justice and whose rank in the Attorney-General’s Department is that of a Director of the International Legal Division of that Department. He is on the payroll of the Attorney-General’s Department, but is on loan to the Foreign Ministry and so is concurrently the Director of the Legal and Consular Bureau of the Foreign Ministry as well as Director of the International Legal Division of the Justice Ministry. This is undeniably a heavy responsibility, as
well as a great privilege.

Assisting the Director of the Bureau in the Foreign Ministry in discharging the Bureau's functions are various foreign service officers belonging to the category A group. They are all lawyers by training and are subject to posting abroad to serve in Ghana's missions. The Consular Section of the Bureau headed by the Legal Adviser deals with the following matters:

- Arrangements for the issue of official passports under the Passport and Travel Decree;

- Arrangements for the issue of visas and entry permits to members of foreign diplomatic missions accredited to the Republic of Ghana;

- Liaison with Ghana's diplomatic missions abroad on consular issues relating to the welfare and repatriation of Ghanaian nationals abroad;

- Liaison with foreign missions in Ghana on welfare matters affecting their nationals in Ghana;

- Liaison with the United Nations Development Programme (UNDP), the Ministry of the Interior and the Ghanaian security agencies on refugee matters;

- Complaints and claims by foreigners against Ghanaians and vice versa;

- Performance of consular functions on behalf of Commonwealth countries not diplomatically represented in Ghana;

- Liaison between Ghana and foreign courts with regard to the service of process out of the jurisdiction and the transmission of judicial and extra-judicial documents or the execution of letters rogatory.

The functions of the International Legal Division of the Attorney-General's Department, which the present writer also heads, are relevant here. The Division was set up by legislative instrument to meet a growing demand arising out of international legal transactions. It
handles, among other things, international arbitrations, international business transactions in which the Government of Ghana is involved and international litigation. The role of the legal adviser in this regard is to defend cases brought against the Republic and to initiate action on the international plane on its behalf. In the discharge of this role, the present writer has recently led a team of Ghanaian attorneys who were acting on behalf of Ghana in an international arbitration, held in Amsterdam, concerning a dispute with a Danish contractor over the rehabilitation of Ghana's second port at Takoradi. The final award, incidentally, was in Ghana's favour.

It must be pointed out that the term "legal adviser" is not used here in a restrictive sense so as to apply only to the legal adviser in the Foreign Ministry. Rather, it is used in a broad manner so as to encompass also the legal adviser in the Justice Ministry, since he or she, too, plays a role in shaping the political decisions of the Government. In particular, the legal adviser plays a major role in guiding governmental initiatives in the field of international investment, as well as in the negotiation and renegotiation of loans with international credit agencies, such as the World Bank, the International Monetary Fund, the European Development Fund and the African Development Bank.

An ever-increasing aspect of the legal adviser's role in Ghana concerns neither litigation nor the resolution of disputes, but rather the shaping and formulation of the policy to be followed concerning relations between the Government and foreign investors.

In the public international sphere, this task increasingly consists in the formulation of economic policies which find their expression through accession to multilateral trade agreements and bilateral treaties. It should be mentioned in this connection that the implications of bilateral or multilateral trade relations are not just economic in nature. The decision, for instance, whether Ghana should accede to a multilateral trade agreement such as the General Agreement on Trade and Tariffs (GATT) or whether it should enter into a bilateral trade agreement with the United Kingdom, the United States or the Russian Federation involves policy considerations of the profoundest political importance.

Similarly, whether to permit a foreign consortium to construct a hydroelectric dam and, if so, whether to give it a monopoly of the supply of power and the possibility of exporting that power within the subregion; whether to keep basic industries and utilities under public
ownership or, for the sake of more rapid development, to grant privileges to foreign private investors; whether to accompany such a policy with special tax incentives or other financial concessions or with modifications of import-export policy – the consideration of these, and a multitude of other questions, which are vital in the life of any developing country, requires a basic understanding of the political and economic issues involved.

In all these questions, the legal adviser plays an important, and often a decisive, part. It is the legal adviser who invariably drafts the requisite legislation or the complex international agreements involved. It is the legal adviser who usually acts as the principal, or one of the principal, representatives of the country in international negotiations of this sort. It is the legal adviser who drafts the applications for loans from international credit agencies, such as the World Bank, or formulates the modalities and conditions of joint business ventures between the Government and a private enterprise, foreign consortium, foreign Government or public international agency.

Ghana was ushered into the international community when it attained statehood and was admitted to membership of the United Nations. The legal advisers of Ghana had the immediate task of preparing all the documents that were necessary for the admission of Ghana to the United Nations. In accordance with the law of State succession, they also worked out the modalities for Ghana to succeed to the treaties which its former colonial master had bequeathed to it. Thus, upon attaining independence on 6 March 1957, Ghana entered into an “inheritance agreement” with the United Kingdom on succession to the international agreements which had been applicable to the Gold Coast and Togoland when they were still under British administration.

A few examples may be apposite.

The first is the declaration of acceptance of the obligations contained in the Charter of the United Nations:¹

No. 3727 GHANA : DECLARATION OF ACCEPTANCE OF THE OBLIGATIONS CONTAINED IN THE CHARTER OF THE UNITED NATIONS.

ACCRA, 1 MARCH 1957

Letter dated 1 March 1957 from the President of Ghana addressed to the Secretary-General of the United Nations

"On behalf of my Government, I have the honour to request you to be good enough to submit for the consideration of the Security Council at its next meeting, the application of Ghana for admission to membership in the United Nations.

"In applying for the admission of Ghana to membership of the United Nations I declare that my Government accepts fully the obligations of the United Nations Charter and undertakes to carry them out.

(Signed) Kwame NKRUMAH
Prime Minister and Minister Responsible for External Affairs


The following agreement is also of interest:

No. 4189. EXCHANGE OF LETTERS CONSTITUTING AN AGREEMENT BETWEEN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE

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2 Ibid., vol. 287, p. 233.
GOVERNMENT OF GHANA RELATIVE TO THE INHERITANCE OF INTERNATIONAL RIGHTS AND OBLIGATIONS BY THE GOVERNMENT OF GHANA.

ACCRA, 25 NOVEMBER 1957

I

Letter dated 25 November 1957 from the High Commissioner for the United Kingdom in Ghana to the Prime Minister of Ghana

"I have the honour to refer to the Ghana Independence Act, 1957, and to state that it is the understanding of the Government of the United Kingdom that the Government of Ghana are in agreement with the following provisions:

(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Ghana, be assumed by the Government of Ghana;

(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to the Gold Coast shall henceforth be enjoyed by the Government of Ghana.

"I shall be grateful for your confirmation of this understanding.

(Signed) I.M.R. MACLENNAN
High Commissioner
II

Letter dated 25 November 1957 from the Prime
Minister of Ghana to the High Commissioner for
the United Kingdom in Ghana

"I have the honour to acknowledge the
receipt of your note of today's date which reads
as follows:

[See letter I]

"I have pleasure in confirming that the
Government of Ghana are in agreement with the
provisions set out in your note of today's date.

(Signed) Kwame NKRUMAH
Prime Minister and Minister for External
Affairs

"Note: Came into force on 25 November 1957 by
the exchange of the said letters."

This Agreement was followed by a series of letters between the
two sides, the purpose of which was to pinpoint which particular
agreements concluded by the United Kingdom on behalf of what was
then the Gold Coast were inherited by Ghana by virtue of the
Agreement. Those letters testify to the difficulty of establishing such a
list.

The following exchange of notes is of interest in this regard:\(^3\)

No. 6348. EXCHANGE OF NOTES CONSTITUTING AN
AGREEMENT

\(^3\) Ibid., vol. 442, p. 175.
BETWEEN THE UNITED STATES OF AMERICA AND
GHANA
RELATING TO THE CONTINUED APPLICATION TO
GHANA OF CERTAIN
TREATIES AND AGREEMENTS CONCLUDED BETWEEN
THE UNITED STATES OF AMERICA AND
THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND.
ACCRA, 4 SEPTEMBER AND 21 DECEMBER 1957 AND 12
FEBRUARY 1958

I

The American Ambassador to the Ghanaian Prime
Minister,
Minister of Defence and External Affairs
EMBASSY OF THE UNITED STATES OF AMERICA

4 September 1957

No. 7

"I have the honour to refer to the
informal statement of Minister Gbedemule and the
Secretary of the External Affairs Department to
the Chargé d'affaires of the American Embassy on
or about 20 February 1957 that the Government of
Ghana would regard treaties and agreements
between the Governments of the United Kingdom of
Great Britain and Northern Ireland and the
United States of America affecting Ghana as
remaining in effect for three months following
6 March 1957, pending the conclusion of more
permanent arrangements. The Minister
responsible for external affairs informed me
orally on 28 June 1957 that the Government of
Ghana considered that this informal undertaking
remained in force.

"In the view of my Government, it would be
desirable to replace the existing informal
agreement by a formal undertaking, which might
be appropriately registered with the United
Nations Organization. Since certain treaties or
agreements between the United Kingdom and the
United States of America may be either
inapplicable or out of date, my Government proposes that consideration be given at this juncture only to continuing in force the following treaties and agreements. I understand that the Chargé of this Embassy transmitted copies of these treaties to the Ministry of External Affairs in April of this year.

[There follows a list of treaties, with references]

"If the foregoing proposal is agreeable to the Government of Ghana, my Government will consider this note and your replying note concurring therein as concluding an agreement between our respective Governments on this subject.

Wilson C. FLAKE
American Ambassador

II

The Ghanaian Permanent Secretary, Ministry of Defence and External Affairs to the American Chargé d'affaires ad interim

MINISTRY OF DEFENCE AND EXTERNAL AFFAIRS
GHANA

Accra, 21 December 1957

BD.172

"I have the honour to refer to His Excellency Wilson C. Flake's letter No. 7 dated 4 September 1957 addressed to the Honourable Prime Minister about the attitude of the Ghana Government towards the treaties and agreements entered into between the Governments of the United Kingdom and Northern Ireland (sic) and the United States of America and applied to the Gold Coast before 6 March 1957. I am sorry it has not been possible to address you on this earlier.
"The Governments of the United Kingdom and Ghana have, by exchange of notes, recently entered into an agreement whereby the international rights and obligations under treaties and agreements entered into between the Government of the United Kingdom and Northern Ireland (sic) on the one hand and any other Government on the other and applied to the Gold Coast have been formally transferred to Ghana with effect from 6 March 1957 in so far as their nature admits of such transfer. The Agreement will shortly be published as a Ghana Government White Paper and registered with the United Nations Organization under Article 102 of the Charter of the United Nations.

"Perhaps I should mention that this agreement does not preclude the possibility of negotiating about the continuing in force of any particular clause or clauses of any existing treaties or of any reservations that either party might wish to raise at some future date. I should be grateful if you would confirm that the procedure outlined above is acceptable to the Government of the United States of America and that the specific treaties mentioned in your letter under reference are considered as covered by the Agreement.

A.L. ADU
Permanent Secretary

III

The American Ambassador to the Ghanaian Prime Minister, Minister of Defence and External Affairs

Accra, 12 February 1958

No. 8
I have the honour to express my Government's appreciation for the Permanent Secretary's note No. BD 172 of 21 December 1957 regarding the Agreement recently concluded between the Governments of the United Kingdom and Ghana whereby the international rights and obligations under treaties and agreements entered into between the Government of the United Kingdom and Northern Ireland (sic) on the one hand and any other Government on the other and applied to the Gold Coast have been formally transferred to Ghana with effect from 6 March 1957, in so far as their nature admits of such transfer.

"I hereby confirm that the procedure outlined in the Permanent Secretary's note of 21 December 1957 is acceptable to the Government of the United States of America and that the agreement as described therein is considered to cover the specific treaty mentioned in my note of 4 September 1957.

Wilson C. FLAKE
American Ambassador

"Note: Came into force on 12 February 1958 by the exchange of the said notes."

I have reproduced this correspondence in order to show the role which was played by the legal advisers of Ghana at the time of the country's independence. The legal advisers who played that role were not based in the Foreign Ministry, but were attorneys of the Attorney-General's Department. The Foreign Ministry was then a small ministry and did not have a legal department of its own. All legal work at the time was done within the Attorney-General's Department.

Ghana's independence derived from a commitment to self-determination, self-rule and the need to establish relevant and appropriate structures and mechanisms for achieving meaningful political and socio-economic development that would improve the lives of its people. The legal advisers of the time rode on the wings of self-determination. As the first black territory south of the Sahara to achieve independence from colonial rule, Ghana naturally assumed the role of
torch-bearer for the decolonization and liberation of the continent. Ghana’s commitment to Africa found eloquent expression in the famous dictum of the first President of Ghana, Dr. Kwame Nkrumah, that Ghana’s independence was meaningless unless it was linked with the total liberation of the whole of Africa.

San Francisco was silent on Africa. When the Charter of the United Nations was adopted, all that was done was to include a brief chapter — Chapter XI — consisting of but two Articles, on the subject of non-self-governing territories. Yet there were at the time only three independent countries in the whole of Africa, namely, Egypt (the United Arab Republic), Ethiopia and Liberia. Ghana’s admission to the United Nations soon changed this state of affairs. Soon after achieving independence, Ghana convened a meeting of eight independent African States in Accra, its capital. At this conference, the eight heads of State took a decision to establish in New York an informal permanent machinery, composed of their permanent representatives, which would serve as a group to discuss matters of common concern to Africa and to present a common front when necessary on issues in the United Nations which affected Africa. This was the genesis of the African Group at the United Nations. It was this group which, for example, first brought the Algerian question to the attention of other delegations at the United Nations.

It can be said that the period of decolonization began with the inclusion of self-determination in the Charter of the United Nations as one of the major purposes of the new world Organization. The Western Powers were, from the beginning, averse to self-determination on the ground that it might be used to facilitate the dismemberment of their empires. It was only the distaste of the United States for European colonialism which prevented the European colonial States from rejecting the idea altogether. The kernel of Ghana’s foreign policy, on the other hand, has, from the very beginning, been the liberation of Africa and the achievement of African unity.

Although the principle of self-determination receives only the briefest of mentions in the Charter — specifically, in Article 1, paragraph 2, and in Article 55 — the General Assembly proceeded on 14 December 1960 to adopt the Declaration on the Granting of Independence to Colonial Countries and Peoples,4 which affirms in its second operative

4 General Assembly resolution 1514 (XV).
paragraph that:

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

Ghana took a very active part in the preparation of the Declaration. As one might expect, the legal advisers of Ghana were on hand to offer their advice, although their input was largely invisible because they worked behind the scenes. The delegation of the Soviet Union placed a draft resolution entitled “Granting of Independence to All Colonial Peoples and Territories” before the General Assembly. A similar resolution, entitled “Africa: A United Nations Programme for Independence”, was tabled by the United States. The African Group, however, felt that it would be in the interests of Africa if we could ourselves work out the text of a resolution, clear it with our friends from the East and then present it to the General Assembly. If we allowed the Russians to put their own resolution to the vote, the United States might oppose it. We immediately set to work, Ghana being a member of the “Committee of Six” which prepared the first draft. The final Declaration was passed without a negative vote and with only nine abstentions, including the United Kingdom, the United States and Portugal.

This was a resounding victory for the African cause. For the first time in the history of the United Nations something concrete and lasting had been done on the matter of the granting of independence to non-self-governing territories and trust territories. Alex Quaison-Sackey, the country’s Permanent Representative at the time, recalls that:

“In the Declaration the main operative paragraph said that immediate steps should be taken to hand over all power to the peoples in the non-self-governing territories, trust territories and all other territories which have not gained independence. Why was the word “immediate” used and not a target date? This was a Ghanaian formula. We put forward the date of 1962; the other countries put forward 1965; others 1961; and as there was no agreement Ghana put forward the idea that immediate steps should be taken to hand over power. In the Declaration we also said that the inadequacy of economic and educational preparedness should not be used as a pretext to
oppose independence. As you know, very often colonial powers say that this or that country is not fit or ripe for independence and they cannot grant them independence. Another important provision is that all armed action or repression against colonial territories and peoples fighting for independence shall cease, referring to Algeria and Angola. This is a very famous Declaration, and I think it is very important to us."

Although, prior to 1945, international law is said not to have known any specific right to self-determination, the present writer is of the view that the international law of the time was Eurocentric in nature. It is also true, that in the Charter the principle of self-determination receives only the briefest of mentions. This, however, is largely explicable by reference to the paucity of Afro-Asian countries at San Francisco. In due course, the Afro-Asian countries found their voice at the United Nations and, thenceforth, matters were never the same again. After the adoption of the epoch-making Declaration on the Granting of Independence to Colonial Countries and Peoples, similar affirmations of the principle of self-determination appeared in other declarations, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The principle also appears in a number of treaties, such as the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966. It is not surprising that the Western European countries vehemently opposed the inclusion of a right of self-determination in these two treaties. This they did on several grounds. First and foremost, they argued that, since self-determination is a principle rather than a right, it would not be proper to include it as a right in the two International Covenants. They argued, further, that the principle of self-determination was too complex to be translated into legal terms. The Afro-Asian countries, which had now gained a strong voice in the General Assembly because of the increase in their numbers, countered these arguments, contending that self-determination was the most fundamental of all human rights and, as such, was a precondition to the enjoyment of all

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6 General Assembly resolution 2625 (XXV), annex.
other rights.

Self-determination has since been mentioned in a number of judicial decisions, in particular, in the advisory opinions of the International Court of Justice in the Namibia9 and Western Sahara cases.10

While some Western writers incline to the view that self-determination is a political or moral principle rather than a legal right, others, such as Brownlie, regard it as a principle of customary international law.11 I incline to the latter view and it is this view which has been held by the legal advisers of Ghana over the years. Self-determination has ascended to such height and prominence that few international lawyers would now deny its predominant position among the principles of customary international law.

As is well known, the principle has been extended beyond the political context to the economic field, thereby creating a right of economic self-determination. The Declaration on Permanent Sovereignty over Natural Resources of 14 December 196212 and the similarly titled resolution of 17 December 197313 serve as evidence of this legal evolution. The Declaration on the Establishment of a New International Economic Order of 1 May 197414 and the Charter of Economic Rights and Duties of States of 12 December 197415 are further examples. Not surprisingly, the principle of self-determination in the economic field is not accepted as a right under international law by most Western countries.

This brings me to the Namibian question, in which my predecessors once more played a significant role. Beginning in 1957, when Ghana joined the United Nations, the Namibian issue was

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10 Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, paras. 54-59.
12 General Assembly resolution 1803 (XVII).
13 General Assembly resolution 3171 (XXVIII).
14 General Assembly resolution 3201 (S-VI).
15 General Assembly resolution 3281 (XXIX).
constantly kept on the agenda of the General Assembly. Before the second conference of independent States of Africa was held in Addis Ababa and anticipating that the Namibian issue would crop up, the Government of Ghana asked its legal advisers to prepare several information papers on the Namibian issue outlining Ghana's position. The questions posed in the documents prepared by the legal advisers became the basis for the contentious proceedings which were initiated by Ethiopia and Liberia and which continued from 1960 to 1966.

In an information paper published on 30 April 1960 the Government of Ghana noted the existence of the following questions:

"(a) Whether the policy of apartheid as applied to South West Africa is in accordance with the terms of the Mandate;
(b) Whether, if it is thought that this system is not in accordance with the terms of the Mandate, members of the Commonwealth have any special responsibility for initiating the termination of this Mandate over and above their responsibility as Members of the United Nations;
(c) Whether the policy of apartheid, as at present applied to the Union of South Africa, is consistent with the Union's continued membership of the Commonwealth."

This information paper was followed by another, issued in New York, which spelled out in detail what the Government of Ghana considered the position to be.

First, it was Ghana’s view that, “following Germany’s renunciation of sovereignty over its former territories, the recital at the commencement of the Mandate for German South West Africa had set out the legal position”, namely, that sovereignty was conferred upon “His Britannic Majesty”. South Africa, therefore, administered the territory only on behalf of “His Britannic Majesty”.

The information paper continued as follows:

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17 Ibid., pp. 7-8.
"So far as the United Kingdom was one of the Principal Allied and Associated Powers, it is in effect the representative of the Commonwealth as it then existed. In 1914, war was declared upon Germany by the United Kingdom and this automatically committed the other Members of the Commonwealth to a declaration of war with Germany. At the Peace Treaty negotiations, the other Commonwealth representatives were treated as members of the Delegation of the British Empire. In the same way, the 'British Empire' and not the United Kingdom was appointed as a permanent member of the Council of the League of Nations. If, therefore, the argument of the Union of South Africa is that the Union is now responsible to the remaining Principal Allied and Associated Powers, one of these powers would appear to be the Commonwealth as a whole and not the United Kingdom."

This line of argument was intended, first, to preempt South Africa's intransigence and, secondly, to reduce the United Kingdom's pre-eminence in the matter and its tacit acceptance of South Africa's legal position. Thirdly, it was intended to lay the basis for Africa's claim, and particularly the claim of the African members of the Commonwealth, to have an interest in the issue of Namibia -- a point which the International Court of Justice used to dismiss the case which was brought before it by Ethiopia and Liberia. It was the feeling among Ghanaian diplomats and Government officials that, even if this reasoning were unacceptable, those two African countries, having been members of the League, certainly had an interest to pursue the matter through contentious proceedings.

With these legal options, Ghana spearheaded the move to have South Africa expelled from the Commonwealth for failure to comply with the principles of the Mandate. Further, it actively promoted the view that a fresh case should be brought by African States against South Africa before the International Court of Justice. Consequently, it was resolved at the second conference of independent African States that Ethiopia and Liberia represent the Organization of African Unity in presenting a legal case against South Africa's occupation of Namibia.

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18 Ibid., pp. 7-8.
Since independence, Ghana has pursued a policy of good neighbourliness, based on the view that the maintenance of peace and stability along its borders is crucial to its socio-economic development.

The present writer was a member of the delegation of Ghana to the Border Demarcation Commission which was set up by the Governments of Ghana and of the Republic of Togo in order to settle border disputes between the two countries which affected the southeastern frontier of Ghana. Through the exchange of several official delegations and the historic visit of President Rawlings in July 1995, Ghana contributed significantly to the improvement of its overall political and security relations with Togo.

Within the framework of the Economic Community of West African States (ECOWAS), Ghana has continued to exploit all possible avenues in order to achieve greater cooperation with other countries in the subregion as a means of ensuring greater stability and so promoting peace and harmony. Ghana has also worked for closer economic cooperation among member States and was very active in preparing the amendment of the ECOWAS Treaty in order to increase that organization's effectiveness.

It must be said that the legal adviser's role is not always "smooth sailing". The following narrative may serve as an illustration.

In 1989, when the late Samuel Doe was President of Liberia, he and his Government insisted that Ghanaians must obtain entry visas before entering Liberia. This was clearly a breach of the ECOWAS Treaty, which had abolished the visa regime for all countries in the subregion. In response, the political desk at the Ministry of Foreign Affairs adopted the position that Ghana should also insist on Liberians obtaining entry visas before entering Ghana. The present writer, who was the legal adviser at the time, saw things differently. He argued that, since Liberia was in breach of its treaty obligations, it would be better for Ghana to call Liberia to order rather than to breach its own treaty obligations on a reciprocal basis. In the final analysis, the legal adviser's view prevailed.

Ghana's active participation in peacekeeping efforts in Liberia

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19 Revised Treaty of the Economic Community of West African States (ECOWAS); International Legal Materials, vol. XXXV, p. 660.
through the Economic Community of West African States Ceasefire Monitoring Group (ECOMOG) helped to bring about a series of accords which have paved the way for a constitutionally elected Government in that country. In the drafting of these accords, the present writer, as the legal adviser of his Government, played a leading role, as he also did by advising on mediation efforts. He also participated in drafting the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court of Human and People's Rights.\textsuperscript{20}

Ghana, as a party to the United Nations Convention on the Law of the Sea of 1982,\textsuperscript{21} continues to participate in the deliberations of the International Seabed Authority. One of its sons is in fact the President of the International Tribunal for the Law of the Sea. It is mostly due to the efforts of the legal advisers that Ghana has enacted a Maritime Zones Delimitation Law\textsuperscript{22} in conformity with the 1982 Convention.

Over the years, Ghana has been a consistent advocate of general and complete disarmament, the elimination of violence in international relations having been a preoccupation of its diplomacy. Even as the major Powers negotiate arms-reduction agreements, the world is confronted with the threat of the spread of weapons of mass destruction and with the prospect of these weapons falling into the hands of terrorists. In the case of nuclear weapons, Ghana has opposed all testing in the atmosphere and underground because of the hazards to health from nuclear fallout. It was, therefore, considered highly provocative when France in 1960 announced its intention to test a nuclear device in the Sahara. To counter France's intransigence, Dr. Kwame Nkrumah, Ghana's first president, decided on a symbolic action to stop that country. He organized a convoy of cars and trucks, manned by a team of international protesters, which left for the Sahara only to be stopped by France in the Upper Volta, now Burkina Faso. The test was carried out as planned by France on 13 February 1960 and was strongly condemned by Nkrumah as a defiance of the conscience of mankind. As a first step in response, he announced that the assets of all French firms in Ghana were to be frozen until such time as the effects of the test on Ghana's population were known.

\textsuperscript{22} Maritime Zones (Delimitation) Law (Provisional National Defence Council Law No. 159), 1986.
In 1962, Nkrumah convened a conference in Accra with the theme “A World Without the Bomb”. This gathering, which became known as the Accra Assembly, was attended by some 130 personalities from all over the world.

With specific reference to nuclear disarmament, the Accra Assembly came out with landmark proposals which, six years later, became the basis of the Treaty on Non-Proliferation of Nuclear Weapons (NPT). The Assembly also proposed the creation of nuclear-weapon-free zones as a step towards general disarmament. Since then, Africa, Latin America, Asia and the South Pacific have been declared nuclear-weapon-free zones. This represents a major contribution to the cause of disarmament and a recognition of the rightness and value of the Accra Assembly’s proposals. In all these events, the legal advisers of Ghana played no small part.

As regards the Non-Proliferation Treaty, the United States led the crusade at the 1995 review conference for the indefinite extension of that treaty, with President Clinton even stating this to be a major foreign policy objective of his administration. The present writer was of the view that, if an indefinite extension was agreed, the super-Powers would relax their efforts towards a comprehensive nuclear-test-ban treaty. He accordingly advised that Ghana argue for a fixed period. However, it is not always the case that the legal adviser’s advice is taken, and, this time round, his views did not prevail, there being other powerful voices that drowned out his. Consequently, Ghana, like all the other States, voted for an indefinite extension. Soon after the NPT’s indefinite extension, the very fears that had led the legal adviser to question the wisdom of such an extension were fulfilled when France resumed nuclear testing in the Pacific. With the gift of hindsight, Ghana’s Foreign Minister, Obed Asamoah, in his statement at the fiftieth session of the General Assembly, had this to say:

“All allow me, Mr. President, to say a few words about last April’s review and extension of the Treaty on Non-Proliferation of Nuclear Weapons (NPT). We note with regret that, so soon after the indefinite extension of the NPT, the very fears which made some of us question the wisdom of an indefinite extension have been fulfilled by the resumption of

nuclear testing in the Pacific. We had argued that indefinite extension would leave the nuclear Powers with no real incentive to make further progress on the arms control agenda. We must condemn in no uncertain terms the breach of the underlying implications of the consensus reached on the indefinite extension of the NPT. Let us hope that lessons will be learned from the almost universal condemnation of the French tests and that there will be movement towards a rapid conclusion of a comprehensive test-ban treaty and action on the other major issues in the area of disarmament.\textsuperscript{24}

In conclusion, the legal adviser plays an essential role in the formulation and execution of the foreign policy of Ghana. The legal advisers who have preceded me have all fulfilled their roles with great dedication and a high degree of professionalism and have variously influenced the decisions and actions that have, together, made up Ghana's practice on the international plane. At the same time, just because the legal adviser's role is important does not mean that it is obvious. Many do not see or even know what role the legal adviser plays. This, though, is hardly surprising. Lawyers, after all, work behind the scenes and do not seek the limelight. The present writer is in a unique position, for he is at the same time both the legal adviser to the Foreign Ministry and the Director of the International Legal Division of the Attorney-General's Department and Ministry of Justice. This makes him the foremost exponent of international law for the Government of Ghana and its guardian and custodian. This is a heavy responsibility, which calls for integrity and a high sense of professionalism.

\textsuperscript{24} Document A/50/PV.26, p. 14.
I. Introduction

As is well known, the role of the legal adviser in the formulation of a State’s foreign policy differs from person to person and from State to State. There is, for example, an obvious difference among advisers in all countries. Some legal advisers tend to focus on professional independence and on the technical character of their task, while others regard international law not as a set of impartial rules to be applied to particular circumstances but as a specific and distinct decision-making process. This difference between theories based on rules and theories based on expediency leads to differing orientations among lawyers. Some international lawyers regard others as rigid and narrow-minded and as contributing little to meeting the needs of contemporary society, while others regard their colleagues as obsessed with politics and unmindful of the legal standards of the jurists. This difference may quite simply be one between different systems. Some always regard lawyers as leaders and politicians, while others focus on their professional ability and skill more than on their political power.¹

Mention of this difference must have brought to the reader’s mind the difference that exists in practice between the position taken by the European countries with respect to the peace process in the Middle East and that taken by the United States of America. The European countries find in international law a set of impartial rules that must be applied to the specific circumstances of that process, while the Americans view it as a political process in which the law to be applied is that on which the parties concerned can reach agreement with the

* Director of the Department of Legal Affairs, Ministry of Foreign Affairs, Doha, Qatar.
assistance of the United States and others.\(^2\)

However that may be, there has emerged in the United States of America since the 1960s a school of thought that maintains that the way States behave towards each other is influenced by the fact of their interdependence more than by impartial rules of conduct formulated by the independent, sovereign nation-State which are, for the most part, incompatible with current reality in the world.\(^3\)

This introduction has been necessary so as to arrive at one basic fact, namely, that the role of the legal adviser in formulating a State’s foreign policy depends on a number of factors, two of which are of major importance. The first is the legal system of the State, and the second is its economic, political and cultural milieu and prevailing customs and traditions. Let us take as an example in this context the international human rights instruments and how they are approached by small, newly independent countries, of which there are a great many in the world today.

II. Human Rights

First of all, it must be stressed that the small, new country places the law above all other considerations given that it is the law that provides the basic guarantee of its existence and of the objectives that it seeks to achieve. We are therefore of the view that the small, new States are those most committed to the United Nations and its Charter and to proceeding in the manner stipulated in the Charter. Since the limits set by the Charter are clear, the view of the legal adviser will not influence the framing of policies but it will ultimately lead to the exclusion of certain options in favour of others.

In its Preamble and in Articles 1, 55, 62, 68 and 76, the Charter of the United Nations urges respect for human rights and the endeavour to promote their observance.

States have implemented these rights on the basis of a


\(^3\) For this theory, see Introduction to Political Science, 4th ed. (New York, McGraw-Hill, 1983), chap. 19.
distinction between the Charter of the United Nations and the 1948 Universal Declaration of Human Rights, on the one hand, and the international instruments defining the rights in question, on the other. The Declaration and the Charter mention only principles, and the commitment of States to these principles is completely independent from the form in which their particulars are embodied. The instruments that embody the particulars derived from these principles include at the same time restrictions, primarily the two qualifications for national security and "public order". The implementation of the rights was made a purely internal matter given that the interpretation of the two qualifications mentioned pertains to each State and, within each State, to its prevailing regime. For example, article 13, paragraph 2, of the Universal Declaration of Human Rights provides that "Everyone has the right to leave any country, including his own, and to return to his country". The International Covenant on Civil and Political Rights affirms this right but does not do so in the same manner. Article 12 of the Covenant provides that "Everyone shall be free to leave any country, including his own" and that this right "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others".

The gist of the matter is that the international legal instruments established human rights but that the exercise of those rights remained, until the last few years, an internal matter for each State and, within each State, for the prevailing regime. In recent years, however, a development has taken place that has led to the removal of human rights from the category of the internal affairs of the State in favour of the concept of international protection. This has been done through the following measures:

1. Preventing a State from formulating any reservations on acceding to international human rights instruments;

2. Authorizing the Office of the United Nations High Commissioner for Human Rights to enter a country in order to observe the manner in which human rights are exercised there;

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4 General Assembly resolution 217 A.
3. Placing the question of the exercise of human rights in a particular country on the agenda for meetings of the Commission on Human Rights and the adoption of unfavourable resolutions concerning that country.

This trend has aroused the apprehension and fear of a large number of countries for one simple reason, namely, that this focus on legal measures leading to the invocation of the human rights instruments has caused the individual, who is the focus of all rights, whether cultural, social or religious, and of the customs and traditions that govern the society in which he or she lives, to be forgotten.

Perhaps this is one of those fundamental problems in the context of which the legal adviser in any foreign ministry in any small, new country sees himself or herself as powerless to influence those who make the decision concerning accession to international human rights instruments. Instead of the focus being on legal measures for the invocation of human rights instruments, it should be on studying cultural, social and religious factors and customs and traditions in the society in question for the purpose of finding a general unifying concept between them and human rights. This can only be achieved gradually.

III. Democracy, Weapons of Mass Destruction and the Environment

What is said of human rights can also be said of democracy, which is pivotal to all rights. Democracy can only be achieved gradually. In this connection, mention must be made of what is being done by His Highness Sheikh Hamad Bin Khalifa Al Thani, Amir of Qatar. He is proceeding with great perseverance and interest, but gradually, towards the exercise of human rights in Qatari society in a manner that does not conflict with the traditions of Islam, the State religion. He is also proceeding towards the creation of a democratic regime, and one of the keystones for this was put in place a short time ago by His Highness the Amir when he promulgated a new election law in which he gave Qatari women the right to stand as candidates for office and to be elected.

It has become clear that some major Powers, and particularly

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6 Law No. 17 of 1998.
the United States, are promoting the elaboration of a new world
collection in order to regulate international cooperation on human
rights, democracy, weapons of mass destruction and the environment.
While certain major Powers see the regulation of such cooperation as
good for humanity as a whole, the overwhelming majority of States
regard such a new order for international cooperation as hegemonistic
and as open interference in their internal affairs, particularly in the areas
of human rights, democracy and weapons of mass destruction. They
therefore oppose such globalization in these fields. With regard to the
environment, there is a readiness on the part of most if not all countries
of the world to work together. Accordingly, although legal advisers
have played a distinguished role in the codification of environmental
cooperation among countries, they continue to face enormous
difficulties in convincing their governments to proceed in the direction
of commitment to laws that govern international cooperation in the
areas of human rights, democracy and weapons of mass destruction.

In conclusion, reference should be made to the fact that wide
areas of public international law do not deal only with war and peace,
human rights and weapons of mass destruction. In actual fact, the legal
adviser in the Foreign Ministry applies rules of international law in his
or her daily practice, particularly with regard to such issues as damage
sustained by citizens of the State abroad, the entry and expulsion of
aliens, the extradition of offenders, nationality issues, the interpretation
of the provisions of the treaties and agreements concluded by the State
in matters of property, trade, civil aviation and other subjects.
LA CONTRIBUTION DU JURISCONSULTE
A LA POLITIQUE DES ETATS
RELATIVE AUX ESPACES MARITIMES

Hüseyin Pazarcı

Introduction

Lorsque les gouvernements des États déterminent leur politique étrangère, ils sont essentiellement préoccupés d'assurer de la meilleure façon leurs intérêts nationaux. Cependant, pour réussir, ils sont obligés de concilier cet objectif avec les intérêts nationaux des autres États qui ont normalement la même préoccupation. C'est pourquoi chaque État, en vue d'établir une politique étrangère généralement acceptée, doit prendre en considération aussi bien l'opinion publique nationale et internationale que la légalité des mesures à prendre.

L'évaluation de cette légalité au niveau des États se fait, comme il est d'usage, par les services de jurisconsulte du Ministère des affaires étrangères. Ce besoin du recours au jurisconsulte du Ministère des affaires étrangères se fait ressentir davantage lorsqu'il s'agit de la détermination d'une politique concernant un sujet qui a beaucoup d'aspects techniques au sens large du terme. Les règles du droit international relatives aux espaces maritimes présentant ces caractéristiques, le rôle du jurisconsulte gagne une importance particulière pour la détermination de la politique des États relative aux espaces maritimes.

* Professeur, Ambassadeur de Turquie en Tunisie et ancien Chef du Département juridique du Ministère des affaires étrangères de la Turquie. Les opinions exprimées ici sont strictement personnelles et n'engagent que l'auteur.


Nous examinerons ainsi tout d'abord le rôle du jurisconsulte en tant que conseiller dans le processus de la prise de décisions et en second lieu son rôle dans la détermination de la politique relative aux espaces maritimes.

I. Le rôle du jurisconsulte en tant que conseiller dans le processus de la prise de décisions

Le jurisconsulte du Ministère des affaires étrangères doit assumer plusieurs rôles dans le cadre de sa fonction. Parmi ces différents rôles celui de conseiller lors de la détermination de la politique étrangère revêt un aspect important de son travail.

A. Les différents rôles du jurisconsulte

Le jurisconsulte du Ministère des affaires étrangères assume normalement plusieurs fonctions dont le nombre et le contenu changent suivant les États. Il accomplit, par exemple, les fonctions juridiques de nature interne telles que la fonction de défense de son Ministère dans les contentieux administratifs comme on voit dans beaucoup d'États3 ou la fonction de donner des avis sur les lois, décrets et règlements nationaux préparés par les autorités nationales4. Mais la fonction d'un jurisconsulte du Ministère des affaires étrangères se trouve essentiellement tournée vers l'extérieur. Il doit ainsi contribuer à la formation et à l'application des règles du droit international aussi bien au niveau international qu'au niveau national.

Les rôles du jurisconsulte d'un Ministère des affaires étrangères en matière de droit international peuvent être classifiés suivant différents critères. On peut ainsi considérer les rôles du jurisconsulte, tel qu'on le fait dans le livre en main, suivant qu'il s'agit de sa contribution lors de la prise de décisions politiques ou de celles relatives à l'application des décisions internationales en droit national, ou encore de celles relatives à l'application du droit international par les tribunaux nationaux ainsi que de sa contribution pour le règlement des différends par les juridictions internationales. On peut encore

4 Voir pour le cas de la Turquie l'article 12/e de la loi du 24 juin 1994, ibidem.
considérer les rôles du jurisconsulte, tel que R. Sabel le fait, suivant que celui-ci agit en tant que conseiller du gouvernement, défenseur de la politique étrangère de son État ou encore rédacteur des instruments internationaux. D'autres classifications basées sur des critères différents paraissent toujours possibles.

Quelle que soit la classification à laquelle on s'attache, la contribution du jurisconsulte à la détermination de la politique étrangère de son État occupe toujours une place importante parmi les rôles remplis par celui-ci. Ce rôle du jurisconsulte se réalise dans le cadre de sa fonction de conseiller de son gouvernement. Il est donc nécessaire d'examiner plus amplement cette fonction du jurisconsulte.

B. Le jurisconsulte en tant que conseiller du gouvernement

Le jurisconsulte du Ministère des affaires étrangères accomplit son devoir de conseiller aussi bien auprès de son Ministère qu'auprès de son gouvernement, et cela généralement à trois différentes occasions. Il est ainsi consulté, en premier lieu, lors de la prise de décision gouvernementale si l'on a besoin de connaître les règles existantes du droit international dans un domaine donné. Le jurisconsulte est consulté, en second lieu, par son Ministère ou son gouvernement s'il est question de l'élaboration des nouvelles règles du droit international généralement dans les forums internationaux. Il est enfin consulté lorsqu'il est question pour son gouvernement d'évaluer et de saisir une instance internationale de règlement pacifique des différends dans un domaine donné. Nous considérerons ces trois points l'un après l'autre.

1. Le rôle de conseiller en ce qui concerne les règles existantes

Examiné sous la lumière des théories classiques, le rapport entre les relations internationales et le droit international paraît s'évaluer selon deux théories principales, à savoir, la théorie de l'interaction et la théorie de l'intégration. D'après la théorie de l'interaction, une norme du droit international ne saurait être prise en considération par les États dans leurs relations internationales que dans la mesure de son utilité ou de sa pertinence pour les intérêts de ces États. La théorie de l'intégration, d'autre part, soutient que les États doivent s'engager dans des processus de coopération et de régulation mutuelle pour assurer la stabilité et la sécurité internationales. Il est donc nécessaire de prendre en compte les deux théories dans la détermination du rôle du jurisconsulte en tant que conseiller du gouvernement.


D. Frei, "International Relations" dans Encyclopedia of Public International Law, op. cit. (voir supra note no. 3), t. 9, p. 207 à 212.
apport positif pour l'équilibre de leurs intérêts nationaux. Quant à la théorie de l'intégration, d'après celle-ci, les normes du droit international constitueraient une partie du système des relations internationales selon le niveau de la cohésion entre les États et celui du consensus existant dans le domaine donné. En fin de compte, les deux théories classiques soulignent bien le rôle important de l'État dans les relations internationales. Quant aux théories récentes sur le rapport entre les relations internationales et le droit international tel que la récente théorie libérale qui met plus l'accent sur le rôle des individus et des sociétés dans l'élaboration de la politique mondiale, elle ne se différencie pas au fond beaucoup des théories classiques puisqu’elles mettent toujours l’accent sur le rôle primordial de l’État en matière d’application des normes du droit international. La différence fondamentale qui apparaît entre les théories classiques et la théorie libérale consiste en ce que, pour cette dernière, ce n’est pas la volonté des États qui est déterminante, mais celle des individus ou des sociétés qui dépendent à leur tour des États; le rôle des États dans ce domaine n’étant que de jouer l’intermédiaire entre les individus et les sociétés.

Il apparaît ainsi clairement qu’au niveau théorique, quel que soit l’effet de l’appareil étatique, direct ou indirect, sur l’élaboration et l’application des règles du droit international dans le cadre des relations internationales, ce sont toujours les États qui interviennent en fin de compte pour la détermination de l’applicabilité des normes du droit international dans les relations internationales. En tout cas, c’est toujours par le truchement des États que les règles du droit international s’élaborent et s’expriment. Dans le cadre de cette fonction, les États doivent donc déterminer leur politique juridique, soit suivant la volonté de leurs citoyens telle que l’exprime la théorie libérale, soit selon leur propre volonté telle qu’elle apparaît davantage dans les théories classiques des relations internationales, en fonction de l’objectif étatique déterminé. L’observation générale sur la pratique relative aux politiques juridiques des États confirme, du moins en l’état actuel des relations internationales, que l’objectif étatique déterminé dans ce domaine n’est autre que “leurs

8 Voir par exemple A. M. Slaughter-Burley, ibid. p. 228 et 236.
intérêts nationaux tels qu’ils les apprécient". Les intérêts nationaux en question ne signifient bien entendu pas uniquement les intérêts matériels, mais aussi les intérêts moraux tels que la sauvegarde ou la promotion de certaines valeurs morales de nature aussi bien nationale qu’universelle.

Quel que soit le motif qui pousse les États à l’élaboration des règles du droit international, cette volonté s’exprime principalement par trois différents modes de production de normes, à savoir : le mode coutumier, le mode conventionnel et le mode unilatéral. Dans ce mécanisme, les règles du droit international se forment sur la base de la volonté des États, elles lient donc chaque État suivant qu’ils se les ont rendues ou non opposables par leurs actes ou leur abstention. Ainsi, comme J. Combacau et S. Sur soulignent, “à la réserve des principes fondamentaux de l’ordre juridique international, qui sont inhérents à l’existence de l’État et auxquels il ne peut se soustraire dès lors qu’il revendique cette qualité, aucune n’est de portée universelle : “le droit international général”, distingué des engagements particuliers entre les États, n’existe que de façon tendancielle. Jamais l’existence d’une règle dans le corpus juridique international ne permet à elle seule d’affirmer son applicabilité dans une affaire concrète mettant en cause deux États déterminés, entre lesquels il faut encore établir qu’elle fait droit”.

Cependant, comme la pratique des États le prouve, il n’est pas sûr que les gouvernements se rendent toujours compte de la nécessité et de l’utilité de consulter leur jurisconsulte lors de la prise de décisions politiques. Il arrive donc que la première tâche du jurisconsulte consiste avant tout de convaincre son Ministre de cette nécessité. A cet égard, le plus grand atout qui joue en faveur de la consultation du

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jurisconsulte est les réactions et les difficultés que le gouvernement rencontrera dans la conduite de sa politique s'il tombe à l'état du violateur du droit international. La réussite du jurisconsulte dans cette tâche dépend de la volonté des gouvernements de tenir compte du droit international dans leurs relations internationales qui varie d'État à État et d'époque à époque.

Si le jurisconsulte est consulté, comme cela est normalement le cas dans les affaires ayant du moins un aspect juridique, sa fonction consiste au fond à faire ressortir les règles existantes du droit international qui sont opposables à son État. Il doit ainsi constater non seulement les règles du "droit international général" dont l'existence, comme J. Combacau et S. Sur qualifient par une heureuse expression, n'est que "tendancielle" et ne lient pas nécessairement les États en cause, mais aussi et surtout celles qui font droit pour son État.

Le jurisconsulte doit constater les règles du "droit international général" pour présenter à son gouvernement l'état général du droit international existant et les règles de ce droit qui sont opposables à son État et qui seront uniquement et effectivement applicables dans le cas concret.

Cette tâche du jurisconsulte relative à la constatation des règles existantes et opposables n'est pas toujours aisée du fait que les sources du droit international sont assez dispersées. Il doit les chercher à travers les traités, la correspondance diplomatique, la pratique des États, la jurisprudence judiciaire et arbitrale aussi bien qu'à travers les opinions doctrinales. C'est là qu'apparaissent les qualités scientifiques et la compétence du jurisconsulte.

Le recours aux règles du droit international ainsi mises en relief par le jurisconsulte variera suivant le rôle qu'on attribue au droit international dans la conduite des États en cause. G. de Lacharrière classifie les diverses fonctions du droit international en trois catégories principales, à savoir, celle de la détermination de la conduite gouvernementale, celle de la justification de sa conduite ou encore celle de l'organisation des relations internationales. Il est ainsi possible de recourir aux règles du droit international afin de déterminer la conduite gouvernementale en se basant sur celles-ci en tant que facteur déterminant de la conduite ou bien en tant qu'un des

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13 G. de Lacharrière, op. cit. (voir supra note n° 9), p. 204 à 206.
éléments intervenant dans le processus de prise de décisions, sans qu'on les considère décisives. Il est par ailleurs possible de recourir aux règles du droit international afin de justifier la conduite gouvernementale qui a comme base d'autres motifs. Il est enfin possible de recourir aux règles du droit international déjà existantes afin de bénéficier de ses institutions et procédures selon la conception qu'on a des relations internationales et de leurs objectifs.

Les fonctions du droit international relatives à la détermination ou à la justification de la conduite gouvernementale concernent bien le rôle du jurisconsulte lors de sa contribution à la prise de décision gouvernementale. Car, normalement, une fois que la constatation des règles existantes du droit international est effectuée par le jurisconsulte, le gouvernement décidera de la politique à suivre en considérant aussi bien ses motifs politiques que l'état de ses obligations juridiques internationales. Il reviendra donc au jurisconsulte d'éclairer le gouvernement des biens-fondés juridiques des diverses politiques possibles et d'élaborer finalement l'argumentation juridique de la politique décidée. Mais, exceptionnellement, il peut même arriver que la décision gouvernementale soit prise antérieurement à l'examen de l'état du droit international pour le motif d'intérêt national vital, le rôle imparti au jurisconsulte ne se cantonnant cette fois-ci qu'à la justification de cette décision. Dans le premier cas le jurisconsulte a la possibilité d'influencer le contenu de la décision gouvernementale, tandis que dans le second cas son influence ne peut porter au plus que sur le langage de cette décision gouvernementale.

Le jurisconsulte exerçant ce rôle de conseiller lors de la prise de la décision gouvernementale peut concevoir son propre rôle de diverses manières. La pratique révèle que certains jurisconsultes se cantonnent strictement aux règles juridiques, tandis que d'autres conçoivent leur rôle comme impliquant aussi le conseil politique14. Il arrive qu'on évalue le rôle de jurisconsulte d'un point de vue moral en estimant que la fonction générale de celui-ci est d'assurer que son gouvernement mène sa politique en accord avec les principes généralement acceptés du droit international15. Enfin, le rôle de conseiller imparti au jurisconsulte est aussi évalué comme devant être

15 Voir par exemple Sir G. Fitzmaurice, op. cit. (voir supra note no.2) p. 73.
réaliste ou objectif. Evaluée du point de vue strictement professionnel, la conception “objective” par le jurisconsulte de son rôle paraîtrait plus conforme à la raison d’être de celui-ci. Car, c’est seulement de cette manière qu’il n’induira pas son gouvernement en erreur irréfléchie. Aussi cette façon de procéder paraît-elle la plus démocratique si on la considère du moins du point de vue de la démocratie formelle, à savoir qu’il revient aux élus de décider et non aux nommés. Cependant, la personnalité du jurisconsulte et ses liens avec le pouvoir ainsi que la conjoncture qui l’entoure permettent qu’il puisse influencer de façon “subjective” la décision gouvernementale. Le bien-fondé moral et politique d’une telle attitude ne saurait s’évaluer que dans la mesure où la décision gouvernementale est historiquement justifiée ou non; ni plus ni moins.

2. Le rôle de conseiller en ce qui concerne l’élaboration de nouvelles règles

Les règles du droit international étant élaborées à travers la conclusion des traités, la formation des coutumes ou l’adoption des principes généraux du droit valables dans la plupart des États, les États déterminent leur position à l’égard de telles sources du droit international chaque fois qu’il est question d’élaborer de nouvelles règles.

La nécessité d’élaboration de nouvelles règles du droit international dépend bien sûr de la volonté des États qui peut différer suivant les États et le sujet à réglementer. Si la majorité des États ne ressentent pas cette nécessité ou bien si les États influents jugent contraire à leurs intérêts et arrivent à réussir d’empêcher l’élaboration de nouvelles règles en question, la convergence de vues ne se réalisera pas et ces matières continueront à rester hors de l’emprise du droit international. En faisant leur évaluation à cet égard les gouvernements font souvent recours à l’avis des juristes et plus spécifiquement à celui du jurisconsulte. Il appartient ainsi, en premier lieu, au jurisconsulte d’aider son gouvernement en ce qui concerne l’apport probable de l’élaboration des nouvelles règles à la politique étatique, qui peut être positif ou négatif.

16 Voir encore Sir G. Fitzmaurice, ibidem.
17 Voir par exemple R. Sabel, (voir supra note n° 5), op. cit., p. 2.
Lorsque la convergence de vues étatiques sur la nécessité d’élaboration de nouvelles règles est obtenue, les États s’efforceront cette fois-ci de rendre autant que possible ces nouvelles règles conformes à leurs intérêts nationaux. S’il s’agit, comme c’est le plus souvent le cas, de la conclusion d’un traité, les États essaieront d’y inclure les nouvelles règles qui leur conviennent. S’il est question de l’élaboration de nouvelles règles par la pratique étatique en tant que coutume, ils essaieront de procéder en sauvegardant leurs intérêts nationaux. Dans ce domaine toute évaluation du point de vue juridique mettra nécessairement en circuit les juristes compétents, dont le jurisconsulte, qui a normalement l’expérience requise en la matière. Mais une fois l’évaluation politico-juridique faite, s’il s’agit de la négociation d’un traité, le jurisconsulte jouera toujours un rôle lorsqu’on cerne les nouvelles notions ou lorsqu’on édicte de nouvelles règles opératoires lors de ces négociations, soit en indiquant à la délégation nommée les notions et règles les plus conformes à la politique étatique soit en y prenant directement part. S’il s’agit de l’élaboration de nouvelles notions et règles par la voie coutumière à travers la pratique étatique, le jurisconsulte sera souvent consulté auparavant sur la pratique administrative ou diplomatique qu’on projette et sur l’édiction des lois nationales projetées.

Pendant l’élaboration de nouvelles notions et règles juridiques les États peuvent disposer de différentes techniques juridiques dont leur jurisconsulte conseillera probablement l’utilisation suivant qu’ils désirent des règles claires ou ambiguës. G. de Lacharrière qui a été un jurisconsulte compétent, nous révèle que les États qui préfèrent l’ambiguïté recourent à l’adoption simultanée de deux formulations différentes et contradictoires, au choix délibéré d’expressions équivoques, à l’inclusion d’expressions dans un texte d’une manière peu cohérente, à l’absence de définition des concepts et principes fondamentaux, ainsi qu’aux procédés qui laissent ambiguë la force juridique des textes adoptés.

3. Le rôle de conseiller en ce qui concerne l’application des règles

Bien que l’application des règles du droit international relève normalement d’un autre domaine que celui où le rôle de conseiller du jurisconsulte est mis en valeur, il est toujours possible que le

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19 Voir G. de Lacharrière, op. cit. (voir supra note n°. 9), p. 89 à 103.
jurisconsulte bénéficie de son rôle de conseiller afin de contribuer à la prise d'une décision politique à travers le processus d'application de celle-ci. Ce rôle du jurisconsulte se réalise lors de la détermination de la politique étatique à l'égard de l'interprétation des règles applicables du droit international.

Le fait qu'il n'existe au niveau mondial aucune autorité supra-étatique et que la compétence des juridictions internationales est facultative, laissant forçément l'interprétation des règles du droit international aux États, permet à ceux-ci d'interpréter différemment ces règles applicables. Ce qui fait que dans la pratique on parle même de politique des États à l'égard de l'interprétation des règles du droit international20. Or, pour déterminer une politique à cet égard les États doivent encore bénéficier de la compétence des juristes dont le jurisconsulte du Ministère des affaires étrangères. Selon que l'État en cause veuille suivre l'interprétation correcte et non contestée quel que soit l'effet à l'égard de ses intérêts nationaux, ou trouver des interprétations possibles qui confirment sa politique basée sur ses intérêts nationaux, le jurisconsulte se trouve en position de contribuer à cette politique étatique.

4. Le rôle de conseiller en ce qui concerne le règlement pacifique des différends

Il est généralement admis qu'il existe des modes diplomatiques, juridiques et le recours aux organisations internationales pour le règlement des différends internationaux21. Les modes diplomatiques du règlement comprennent, outre la négociation entre les parties, l'intervention des tiers dont les plus connues sont les bons offices, la médiation, l'enquête et la conciliation. Il est question, d'une manière générale, d'attribuer aux tiers un rôle d'assistance prêtee aux gouvernements en leur fournissant des conseils ou des éléments d'appréciation, la décision finale appartenant aux États-mêmes. Par contre, si l'on soumet un différend à une voie juridique ou à une organisation internationale, on habilite les tiers à trancher. Le premier rôle du jurisconsulte devant une telle situation est de conseiller son

20 Par exemple G. de Lacharrière, ibid. p. 105 à 176.
gouvernement au sujet du choix de ces moyens de règlement pacifique des différends.

Les considérations qui influencent le conseil du jurisconsulte varieront. Il y a tout d'abord des considérations politiques qui tiennent à la position internationale des États en cause. Mais le conseil du technicien qui est le jurisconsulte s’influencera davantage par des considérations liées au domaine des différends ainsi qu’au rôle de l’intervention des tiers. Il n’est pas rare de voir qu’en dehors du système contraignant de la Charte des Nations Unies les gouvernements répugnent à confier à des tiers les matières vitales telles que celles touchant à la souveraineté et à la sécurité des États. Le jurisconsulte, tenant compte de la volonté politique, doit donc conseiller si l’on doit soumettre ou non un différend à une voie juridique telle que la juridiction et l’arbitrage internationales ou utiliser les modalités diplomatiques. La soumission d’un différend à la voie judiciaire étant consensuelle, il est reconnu que le rôle du jurisconsulte est considérable dans ce domaine. Cette évaluation du jurisconsulte tiendra compte aussi bien de l’état du droit applicable que du niveau de l’intervention souhaitée des tiers et même de l’identité précise des tiers-décideurs.

S’il est décidé de porter un différend à des tiers, le rôle du jurisconsulte continue cette fois-ci comme un de ceux qui déterminent la stratégie de conduite de son État. Il est ainsi possible que le jurisconsulte évalue la chance de diverses argumentations possibles ainsi que la procédure à suivre, s’il est laissé aux parties la possibilité d’influencer cette dernière. Mais une fois le processus du règlement des différends engagé, le jurisconsulte fait généralement partie de la délégation de la défense de son État devant le(s) tiers et dans la plupart de ces cas agit comme agent ou conseil et avocat devant une juridiction internationale; cette fonction de conseiller du jurisconsulte se combinerait plutôt avec son rôle de défenseur qui reste hors de notre champ d’étude.

II. Le rôle du jurisconsulte lors de la détermination de la politique relative aux espaces maritimes

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22 Voir par exemple G. de Lacharrière, op. cit. (voir supra note n° 9), p. 138 à 139.
Le rôle de conseiller du jurisconsulte qu’on vient de décrire ci-dessus est déployé pleinement dans tous ses aspects lorsqu’il est question de la détermination de la politique relative aux espaces maritimes. Car, bien que dans les questions ayant un fort aspect politique, le gouvernement, soutenu par les évaluations des départements politiques du Ministère des affaires étrangères, peut décider sans nécessairement recourir aux services du jurisconsulte, ceci est pratiquement impossible en matière de politique relative aux espaces maritimes. Ce besoin quasi-absolu de consultation du jurisconsulte résulte du fait que le droit international de la mer, qui nécessite une formation spécialisée, échappe en grande partie à la prise des politiciens et des diplomates.

Le droit international de la mer qui reposait longtemps sur les principes simples et forts anciens, tels que le principe fondamental de la liberté des mers, a témoigné d’une évolution révolutionnaire qu’il ignorait auparavant avec la possibilité de l’exploitation du sol et du sous-sol du lit des mers à partir des années 50. Cette évolution a eu comme résultat la multiplication des espaces maritimes sur lesquels les Etats ont un droit de souveraineté ou des droits souverains spéciaux. L’inégalité des Etats face à la mer et à ces espaces maritimes a fait que les Etats entrent dans une lutte acharnée concernant les notions relatives à ces espaces maritimes aussi bien pour la détermination et la précision de ces notions juridiques que pour l’élaboration de nouvelles notions juridiques dans ce domaine. Ainsi la nécessité de recourir aux services de jurisconsulte du Ministère des affaires étrangères s’est faite plus que jamais ressentir. Le jurisconsulte a donc été dans une position privilégiée de contribuer à la détermination des politiques étatiques relatives aussi bien en matière de précision du contenu des notions juridiques classiques qu’en matière d’élaboration de nouvelles notions et règles concernant les espaces maritimes. Quand il en a résulté des différends entre les Etats le rôle que le jurisconsulte joue normalement dans ce domaine a gagné une importance accrue du fait du nombre croissant de ceux-ci. Nous essaierons dans cette Section II d’illustrer par quelques exemples concrets le rôle du jurisconsulte relatif aux différents

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26 Voir par exemple M. Bennouna, “Le caractère pluridimensionnel du nouveau droit de la mer” dans Traité du nouveau droit de la mer, ibid, p. 7 et 8.
aspects de la détermination de la politique des États en matière d'espaces maritimes.

A. Le rôle du jurisconsulte dans la détermination et la précision des règles

Comme on l’a déjà remarqué plus haut, le jurisconsulte est souvent consulté par son gouvernement au sujet de connaître les règles existantes du droit international qui lieraient l’État en cause. Dans des domaines où les règles établies sont bien connues, il est possible d’outrepasser le service du jurisconsulte. Mais lorsqu’il s’agit du droit international de la mer, il n’est pratiquement plus possible, du moins depuis les années 50, pour les gouvernements d’agir de cette manière. Car, cette branche du droit international, qui est très influencée par l’évolution de la technologie, a déjà eu comme résultat que les règles classiques telles que l’étendue de 3 milles de la mer territoriale et la liberté de la haute mer subissent depuis notamment la fin du dix-neuvième siècle, des changements avec l’élargissement de la mer territoriale et l’admission de la zone contiguë. Mais surtout à partir des années 50 l’admission de nouvelles notions et règles en droit de la mer telles que le plateau continental, la zone économique exclusive et la “zone” n’a pas été non plus sans influence sur le contenu des notions et règles classiques de celui-ci. Toutes ces modifications révolutionnaires du droit international de la mer nécessitant une observation continue de celui-ci ont pratiquement rendu quasi-obligatoire la consultation du jurisconsulte sur les notions et règles existantes en cette matière lors de la détermination de la politique gouvernementale relative aux espaces maritimes.

Lors de la détermination par exemple de la politique relative à la mer territoriale, bien que cet espace maritime soit connu depuis longtemps, le jurisconsulte se voit consulté dans la plupart des États, notamment sur la méthode de calcul des points de départ de la mer territoriale, l’étendue de celle-ci, sa délimitation et le régime de passage des navires de guerre. En effet, en ce qui concerne la méthode de détermination des lignes de base, bien que le principe soit l’admission, comme point de départ, de la ligne de base normale, le recours aux services du jurisconsulte parait pratiquement obligatoire pour chaque cas concret, du fait qu’il soit possible dans certains cas
de recourir à la méthode de ligne de base droite27. Il est surtout consulté lorsqu'il existe une côte profondément échancrée et découpée, un chapelet d'îles le long du rivage ou des baies historiques. La pratique des États offre beaucoup d'exemples de ce genre de problème qui préoccupe les juristes et particulièrement les jurisconsultes28.

En ce qui concerne l'étendue de la mer territoriale, longtemps appliquée comme 3 milles29 et discutée notamment depuis le début du vingtième siècle, elle paraît être fixée par la Convention de 1982 sur le droit de la mer comme une étendue allant en principe jusqu'à 12 milles dans l'article 3 de celle-ci dont les termes sont les suivants : "Tout État a le droit de fixer la largeur de sa mer territoriale; cette largeur ne dépasse pas 12 milles marins mesurés à partir de lignes de base établies conformément à la Convention". Depuis lors, la question de savoir s'il existe ou non une règle internationale générale d'une mer territoriale de 12 milles est évalué différemment par les juristes. Les partisans de l'existence d'une règle générale, se basant aussi sur la pratique des États30, prétendent que la largeur de 12 milles constitue déjà une coutume internationale s'imposant erga omnes, tandis que les opposants avancent le fait que la Convention n'est pas opposable aux États non-parties à celle-ci et que le terme et l'esprit de cette disposition ne constituent pas une règle automatique à appliquer en tant que coutume sans prendre en considération la situation géographique des États et leurs volontés exprimées lors de son adoption. La question de la largeur de la mer territoriale constitue ainsi une matière sur laquelle les jurisconsultes sont souvent consultés par leurs gouvernements respectifs.

La question de la délimitation des mers territoriales respectives des États dont les côtes se font face ou sont adjacentes constitue un

27 Voir par exemple R. J. Dupuy, "La mer sous compétence nationale" dans Traité du nouveau droit de la mer, ibid, p. 233 à 236.
autre problème sur lequel les gouvernements ont recours nécessairement à l’avis des jurisconsultes lors de la détermination de la politique y relative. Bien qu’on ait adopté dans la Convention de Genève de 195831 sur la mer territoriale et la zone contiguë (art. 12) ainsi que dans la Convention de 1982 sur le droit de la mer (art. 15) une disposition prévoyant que, sauf accord contraire entre les États voisins, il sera appliqué une règle dite “équidistances-circonstances spéciales ou titres historiques”, il ne manque pas d’États qui expriment leurs craintes à son égard32. L’opposabilité de cette règle à l’égard des États la critiquant et ne faisant pas partie des dites Conventions est donc une question qui se pose déjà. Mais même si l’on admettait son application erga omnes en tant que coutume internationale générale, le juriste reste toujours confronté à la question de connaître la signification des circonstances spéciales et notamment de la détermination concrète de celles-ci ainsi que celle des titres historiques. Enfin, bien que la doctrine admette qu’entre le principe de l’équidistance et celui des circonstances spéciales il n’y a pas une présomption en faveur du premier et que l’ensemble de cette disposition signifie qu’on doit appliquer les principes équitables, il ne manque pas de vues exprimées en faveur de la subordination de l’élément de circonstances spéciales à celui d’équidistance comme l’équidistance constituait la règle et les circonstances spéciales l’exception33. Les États, lors de la détermination de leur politique relative à la délimitation des mers territoriales respectives, doivent ainsi recourir à l’avis de leurs jurisconsultes sur ces questions.

Quant au régime de passage des navires de guerre à travers la mer territoriale, la question de savoir s’il existe ou non un droit de passage libre pour ces navires a été discutée lors de la Troisième Conférence sur le droit de la mer et n’a pu obtenir une réponse précise. D’après les prises de position des représentants des États lors de la Conférence devant une proposition informelle prévoyant la notification ou l’autorisation pour le passage de ceux-ci34, 33 États ont été en faveur

33 Voir par exemple L. Caffisch, ibid., p. 390.
34 Voir la proposition de la Chine et autres du 20 mars 1980 : Doc. C.2/M1nformal meeting/58.
de la proposition et 26 États contre celle-ci. Finalement une solution intermédiaire prévoyant la compétence des États riverains de prendre les mesures relatives à la sécurité a été admise avec la condition que le Président de la Conférence fasse une déclaration selon laquelle cela ne signifie pas la renonciation des États de leur droit de réglementer dans ce domaine. L’examen de la pratique des États dans les années 80 démontre que 38 États requièrent soit la notification préalable soit l’autorisation pour le passage des navires de guerre à travers leur mer territoriale. Il va de soi que les États en déterminant leur politique relative au régime de passage de leur mer territoriale ont dû consulter leur juristes afin de prendre une position dans l’un ou l’autre sens en cette matière et continuent encore de le faire en observant les développements sur ce sujet.

On peut multiplier les sujets sensibles relevant des notions et règles classiques du droit international qui nécessitent la consultation du juristes lors de la détermination de la politique relative aux espaces maritimes. Nous nous contenterons ici de ne citer que le cas de la mer territoriale.

**B. Le rôle du juristes lors de l’élaboration des nouvelles règles**

Lorsqu’il s’agit de l’élaboration de nouvelles règles en droit international, le rôle du juristes gagne encore davantage d’importance. Son rôle se manifeste, suivant les cas, à partir de la conceptualisation d’une nouvelle notion ou règle jusqu’à la position étatique à prendre devant une évolution menant à la création de nouvelles règles. En ce qui concerne la conceptualisation d’une nouvelle notion et les règles y relatives, la contribution du juristes à celle-ci peut être illustrée par l’exemple de la notion du plateau continental. En effet, lorsque le Président Roosevelt des États-Unis d’Amérique a été saisi par la demande du Secrétaire de l’intérieur Ickes, en date du 5 juin 1943, de trouver le moyen de s’approprier les ressources du plateau continental au sens géologique

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35 Voir Documents officiels de la Troisième Conférence des Nations Unies sur le droit de la mer, t. XV.
adjacent aux États-Unis, le Président l’a communiquée au Secrétaire
d’État Hull le 9 juin 1943 afin qu’on l’étudie. Cela a été fait par un
groupe de travail interministériel dont les services du jurisconsulte
faisaient nécessairement partie et qui a produit la proclamation du
Président Truman du 28 septembre 1945 sur le plateau continental.
C’est ainsi que, comme l’a reconnu la Cour internationale de Justice,
le concept du plateau continental et son régime se sont introduits au
droit international positif.

Un autre exemple d’une nouvelle conceptualisation en droit
international est illustré par la notion de zone économique exclusive.
Lancée la première fois par le délégué du Kenya en janvier 1972 lors
de la session annuelle du Comité juridique consultatif afro-asiatique,
sa conception et son élaboration doivent beaucoup aux juristes et
jurisconsultes africains qui ont soumis une proposition à ce sujet le 7

Quant à l’illustration de la contribution générale des
jurisconsultes lors de l’élaboration de nouvelles notions et règles en
droit international des espaces maritimes, un des meilleurs exemples
est la nouvelle notion d’État archipel et le régime des eaux
archipélagiques. D’un côté la revendication des États ayant des
archipels et d’un autre côté l’inquiétude des États pouvant être
affectés par l’adoption d’un régime archipélagique très étendu ont fait
que la question de l’État archipel ait donné lieu à une grande
confrontation entre les différentes catégories d’États. Un des
problèmes principaux était de savoir quels États bénéficieront de ce
statut, autrement dit, est-ce qu’il sera réservé uniquement aux États
archipélagiques océaniques ou est-ce que les États continentaux
disposant aussi d’archipels en bénéficieront aussi? Les États

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38 J. F. Pulvenis, "Le plateau continental, définition et régime", in R. J. Dupuy et D.
Vignes, Traité du nouveau droit de la mer op. cit. (voir supra note n° 25, p. 285.
s. ainsi que p. 745 et s.
40 Affaire du plateau continental de la Mer du Nord (République fédérale
d’Allemagne/Danemark; République fédérale d’Allemagne/Pays-Bas), C.I.J. Recueil
41 “Working paper on the Exclusive Zone Concept - prepared by the Government of
Kenya as a member of the working group on the Law of the Sea", Report of the Asian
African Legal Consultative Committee of the Thirteenth Session held in Lagos, January
1972, p. 131.
42 Sur l’élaboration de cette notion V. L. Gündling, Die 200 Seemeilen-Wirtschaftszone,
protagonistes ont dû faire de grands efforts, aidés nécessairement par les juristes et leurs jurisconsultes, pour faire pencher la balance en leur faveur. Finalement, ce sont les opposants à une conception très large d’État-archipel qui ont gagné en écartant le bénéfice dudit statut aux États continentaux disposant d’archipels. Le second problème relatif à ce régime était soulevé entre les États partisans de la souveraineté totale sur ces espaces maritimes et ceux qui sont les tenants de la liberté de navigation et de survol. Sur cet aspect de la question le rôle des juristes et jurisconsultes a peut-être encore été plus important. Car le problème étant de sauvegarder les libertés résiduelles dont on bénéficiait auparavant tout en admettant le principe d’un régime de passage archipelagique, les juristes et jurisconsultes ont dû faire beaucoup d’efforts d’imagination.

C. Le rôle du jurisconsulte dans le choix des voies de règlement pacifique des différends relatifs aux espaces maritimes

Le rôle de conseiller du jurisconsulte est encore indispensable lorsqu’il est question pour un gouvernement de soumettre une affaire relative aux espaces maritimes à une voie de règlement pacifique des différends. La première question se posant au sujet de savoir s’il faut porter un différend de ce genre devant des tiers, le jurisconsulte se trouve en face d’un problème très délicat qui dépend aussi bien de la volonté politique que de l’évaluation des données juridiques. A cet égard il est surtout appelé à aider son gouvernement sur la “compatibilité” des modes de règlement avec la matière à traiter. L’absence d’une réglementation internationale suffisante en la matière rendant très difficile la prévision d’une solution juste, il n’est pas rare que le jurisconsulte présente l’état du droit positif et laisse la décision à l’entièr responsabilité de la volonté politique. C’est par exemple le cas lorsqu’il s’agit de la délimitation des espaces maritimes où il faut appliquer les principes équitables dont le contour et le contenu ne paraissent toujours pas bien déterminés.

Une fois que la volonté politique s’exprime en faveur de la soumission d’un différend aux voies de règlement pacifique, le rôle du jurisconsulte devient déterminant, puisqu’il est confronté avec la question de conseiller la voie de règlement pouvant être la plus bénéfique pour les intérêts nationaux ainsi que sa “compatibilité” avec la matière à traiter. Ainsi, d’après les solutions adoptées par la Convention de 1982, certains sujets de différend paraissent convenir
davantage au mode de conciliation qu`à celui de règlement juridictionnel. Par exemple, l`article 297 de ladite Convention dispose de la soumission à la conciliation obligatoire des questions de la recherche scientifique marine sur le plateau continental ou dans la zone économique exclusive ainsi que des questions relatives aux ressources biologiques de la zone économique exclusive. Par contre, le même article prévoit certaines catégories de différends relevant de matières telles que le droit de la navigation, le droit de poser des câbles et des pipelines sous-marins dans la zone économique exclusive, la préservation du milieu marin, etc. comme des matières par excellence à soumettre à la juridiction puisqu`il n`admet pas d`exception en ces matières. Cependant il est bien évident que le jurisconsulte qui est confronté avec les questions de choix du mode de règlement en ce qui concerne les matières susmentionnées, à moins que l`Etat en cause fasse partie de la Convention, ne peut ni ne doit décider automatiquement en faveur du choix adopté dans la Convention de 1982 sans prendre en considération toutes les caractéristiques du différend en question.

La question du choix du mode de règlement qui semble dans la pratique des Etats préoccuper le plus le jurisconsulte concerne la délimitation des espaces maritimes telles que les eaux territoriales, les plateaux continentaux, les zones économiques exclusives et les zones de pêche. La spécificité de la géographie et de la structure géologique de chaque espace maritime en question ainsi que l`imprécision des règles juridiques en matière de délimitation laissant une grande place à l`incertitude, le jurisconsulte est obligé de faire des études très détaillées sur les différentes possibilités afin de ne pas induire son gouvernement en erreur d`évaluation. C`est pourquoi dans le cas des espaces maritimes où la géographie et la géologie ne présentent pas de caractéristiques très particulières et, notamment lorsqu`il s`agit d`Etats riverains des océans, le jurisconsulte paraît se trouver plus à l`aise dans ses conseils à son gouvernement en vue de la soumission du différend à un mode contraignant de règlement. Par contre lorsqu`il s`agit d`une mer semi-fermée présentant une géographie physique et politique complexe, la tâche du jurisconsulte est plus difficile et il est beaucoup plus hésitant à conseiller la soumission du différend à une voie juridictionnelle. Cette prudence du jurisconsulte ne manque pas à son tour de marquer la volonté gouvernementale dans ses choix du mode de règlement des différends.
Le choix du mode de règlement du différend accompli, il reste toujours au jurisconsulte à évaluer les différentes possibilités de la composition de l'organe tiers décideur et de la procédure à suivre, lorsque ces problèmes restent non réglés par le choix du moyen de règlement. Cette question se pose en ce qui concerne la composition et la procédure des commissions d'enquête, de l'organe de conciliation ou d'un organe arbitral. Cependant, bien que la composition de la Cour internationale de Justice soit déterminée par son Statut, le fait qu'on puisse soumettre un différend à une Chambre spéciale ou ad hoc offre la possibilité que le jurisconsulte conseille aussi son gouvernement à cet égard.

Conclusion

Le tour d'horizon qu'on vient de faire suffit, nous semble-t-il, à démontrer que le jurisconsulte du Ministère des affaires étrangères contribue largement à la détermination de la politique des États en ce qui concerne les espaces maritimes. Il n'est pas nécessaire de dire bien entendu que les effets de ce rôle de conseiller du jurisconsulte peuvent changer d'État à État. Mais la personnalité du jurisconsulte et sa compétence scientifique ainsi que son habileté auront toujours un certain effet sur la prise des décisions politiques qui sont oeuvre de l'intelligence collective.
THE ROLE OF THE LEGAL ADVISER IN SHAPING AND APPLYING INTERNATIONAL LAW

LE RÔLE DU CONSEILLER JURIDIQUE DANS L'ÉLABORATION ET L'APPLICATION DU DROIT INTERNATIONAL
THE ROLE OF THE LEGAL ADVISER IN THE TREATY-MAKING PROCESS

Milan Beránek

I. Introduction

International treaties are one of the main sources of international law. The treaty-making process is therefore of primary importance for the creation of a major part of the rights and obligations of States with respect to other States or international organizations. In contrast to the participation of a multiplicity of States in the creation of customary norms of international law, the treaty-making process provides considerably broader room for the direct realization of the specific policy goals of a State.

The preparation and conclusion of treaties have traditionally been subject to regulation by both international law and internal law. The focus of international law and internal law in this respect is obviously different. In the first instance, the two major international instruments concerning the law of treaties, namely the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 concentrate on the international dimension of the treaty-making process. In the second, questions concerning the internal organization of this process within States themselves are governed by the internal law of each State concerned.

The awareness of the importance of treaties has led many States to include basic provisions concerning the conclusion of treaties

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in their constitutions. This question is often addressed in terms of the delimitation of competences. The respective provisions of constitutions are therefore rather laconic. There are, however, examples where the treaty-making process is the subject of detailed regulation by a specific law.

The domestic regulation of the above questions is not a purely internal matter in which other States have no interest. The international relevance of such questions has been recognized in the Vienna Convention on the Law of Treaties, although in the rather exceptional cases concerning the reasons that may be invoked as invalidating a State’s consent to a treaty. Also international treaties themselves quite often refer to procedures set up by internal law. One such example is the rather common treaty provision requiring the completion of procedures concerning its approval provided for by the internal law of the contracting States as a condition for its entry into force.

The details of the treaty-making process are usually regulated by rules that are of a lower degree than laws and the content of which is not widely known. These rules may be unknown even to the other treaty parties. Whatever the differences may be between internal legal systems, the legal service of the Ministry of Foreign Affairs always has an important role to play in this process.

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4 See, for example, Law No. 68 of 15 July 1995 on International Treaties of the Russian Federation.

5 Thus, according to article 46 of the Vienna Convention on the Law of Treaties of 1969 (United Nations, *Treaty Series*, vol. 1155, p. 331), a manifest violation of a provision of internal law regarding competence to conclude treaties is one such reason.

6 The legal adviser is the Director of the Department of International Law. His or her competences are defined as those of a “head of the department”. He or she has no specific status in the administrative hierarchy as compared to heads of other departments of the Ministry of Foreign Affairs. The functions concerning the treaty-making process are *de jure* not “his or her” functions but those of the Department of International Law for which he or she is responsible.
This article attempts to illustrate the role of the legal adviser in the treaty-making process using as an example the practice of the Czech Republic. As a relatively new member of the United Nations, the Czech Republic itself has a rather modest practice in this field. This practice, however, shows that there is a continuity in the approach to treaty-making and, accordingly, a bond with the much longer tradition of Czechoslovakia in this field.

To explain properly the role of the legal adviser in the treaty-making process, as seen from the inside point of view, it is useful to provide at least a short outline of the current regulation of competences and procedures concerning the conclusion of international treaties in the Constitution of the Czech Republic and other relevant provisions mainly of an internal nature.

II. Legislation and Internal Regulation of the Treaty-making Process

The basic provision concerning treaty-making in the Czech legal system is contained in article 63, paragraph 1 (b), of the Constitution according to which the conclusion and ratification of international treaties is one of the prerogatives of the President of the Republic. He or she may transfer the conclusion of international treaties to the Government or, with its consent, to individual members of the Government.

Within the powers conferred on him by this provision of the Constitution, the President of the Republic, by Decision No. 144 of 28

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7 The Czech Republic, as one of the two successor States of Czechoslovakia which dissolved on 31 December 1992, was admitted as a new member of the United Nations on 19 January 1993 by General Assembly resolution 47/221.

8 Since 1 January 1993, the date of its creation, the Czech Republic has concluded about 740 international treaties. In addition, it succeeded to some 2,000 bilateral and 1,000 multilateral treaties of the former Czechoslovakia.

9 This provision incorporates the concept found in the previous Czechoslovak Constitutions from the period after the Second World War. See article 74, paragraph 1, subparagraph 1, of the 1948 Constitution (No. 150/1948, Collection of Laws); article 62, paragraph 1, subparagraph 1, of the 1960 Constitution (No. 100/1960, Collection of Laws); and article 61, paragraph 1(a), of the Constitutional Law on the Czechoslovak Federation (No. 143/1968, Collection of Laws).
April 1993,\textsuperscript{10} transferred:

a) The conclusion and approval of bilateral and multilateral international treaties which do not require approval by the Parliament,\textsuperscript{11} as well as the accession to these treaties or the acceptance thereof, to the Government, and

b) The conclusion and approval of bilateral and multilateral treaties the subject-matter of which falls within the competence of a single ministry or other governmental agency, to the member of the Government who is the head of such ministry or agency.

These matters are further regulated by "The Guidelines for the Conclusion, Approval, Application and Termination of International Treaties"\textsuperscript{12} and "The Instruction of the Minister of Foreign Affairs concerning Conclusion of International Treaties".\textsuperscript{13} This regulation is of paramount importance for ensuring the necessary cooperation of ministries and governmental agencies in the treaty-making process.

The regulation of the treaty-making process in the Czech Republic is based to some extent on the precedents provided by the analogous regulations that were elaborated and applied during the last decades of existence of Czechoslovakia. There are, however, important differences between these regulations due to differences in the organization of the respective States. Czechoslovakia was a federal State, where, except for a very short period before its dissolution, the competence to conclude international treaties belonged to the Federation. The constituent units of the Federation (the Czech Republic and the Slovak Republic), however, had the right to

\textsuperscript{10} No. 144/1993, \textit{Collection of Laws}.

\textsuperscript{11} According to article 49, paragraph 2, of the Constitution, the approval of the Parliament is required for international treaties on human rights and fundamental freedoms, treaties of a political character, economic agreements of a general nature and treaties the implementation of which requires the adoption of a law.

\textsuperscript{12} Approved by the Decision of the Government No. 328 of 16 June 1993.

\textsuperscript{13} Issued on 20 December 1993.
“intervene” in the conclusion of any treaty whose application would concern matters falling, according to the Federal Constitution, within their competence. Certain competences of the Republics to participate in the conclusion of international treaties, including their right to conclude such treaties on their own, was recognized only in 1992.

There is no such provision in the Czech Constitution. The Czech Republic, as a unitary State, has a centralized mechanism for treaty-making. The only authorities involved in the treaty-making process are constitutional organs and central authorities, such as ministries and other governmental agencies which are part of the State administration. No role is reserved for the local (provincial) authorities.

The pivotal role in organizing and coordinating the administrative processes relating to preparation and conclusion of treaties, conferred on the legal service of the Ministry of Foreign Affairs, remains, in principle, unchanged.

III. Coordination of National Participation in the Treaty-making Process

The conclusion of international treaties is an integral part of foreign policy. The Ministry of Foreign Affairs has therefore primary responsibility for ensuring that the conclusion of international treaties is consistent with the interests of the Czech Republic pursued in the international arena and with the principles and norms of the law of treaties. For this purpose the Ministry, through its Department of International Law, in particular:

- Coordinates and oversees the preparation and negotiation of international treaties, and

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14 See, article 137, paragraph (d), of the Constitutional Act No. 143/1968 on the Czechoslovak Federation concerning the approval of international treaties whose implementation was within the jurisdiction of the constituent republics, by their Governments, and article 107, paragraph 1(b), concerning the competence of the two National Councils (legislative bodies of the constituent republics) to approve international treaties whose implementation required an Act of the National Council. For the English text of Act No. 143/1968, as amended by Constitutional Act No. 125/1970, see Bulletin of Czechoslovak Law, vol. 10 (Prague, 1971), pp. 101-148.
Ensures that the procedure for their internal consideration and approval is fully observed.

To enable the Ministry of Foreign Affairs to fulfil these functions, the ministries and other governmental agencies submit annual progress reports concerning the negotiation or conclusion of new treaties and plans for the conclusion of international treaties. These plans are submitted to the Ministry of Foreign Affairs by the end of the year and examined by both the respective political departments and the Department of International Law.

The preparation of the draft treaty and its submission for consideration following the internal procedure is the responsibility of the ministry or the agency whose competence encompasses the major part of the issues which are the object of the treaty. Other ministries or agencies whose competences are also involved are obliged to provide needed assistance and to participate in negotiations. In exceptional cases, such responsible ministry or agency may be chosen by the Government on an ad hoc basis.

The responsibility for the preparation and conclusion of cultural agreements, which cover cooperation in the field of culture, education and science, belongs to the Ministry of Foreign Affairs. To some extent this responsibility is a remnant of the previous practice from the time of the Czechoslovak Federation.¹⁵

Whenever the problem of conflicting competences arises, the Ministry of Foreign Affairs plays its role as the coordinator. Although, in theory, the issue could be settled by the Government itself, the opinion of the legal adviser usually resolves the matter.

The Ministry of Foreign Affairs also monitors the implementation of treaties, in particular from the point of view of the foreign policy interests of the Czech Republic. But this is rather the

¹⁵ As there was no Ministry of Culture on the federal level, but only the Ministries of Culture of the Czech Republic and of the Slovak Republic, then component units of the Federation, treaty making in the field of cultural affairs was, on the international level, within the responsibilities of the Federal Ministry of Foreign Affairs.
function of the political department responsible for the relations with the State or the international organization which is the other treaty party. Whenever the implementation of a treaty poses a problem, however, the International Law Department is immediately involved by means of a request for a legal analysis of the situation. Quite often the Department is also asked to suggest a possible solution of the problem.

IV. The Role of the Legal Adviser in the Preparation and Negotiation of Treaties

The legal adviser and his or her staff are directly involved in a number of negotiations concerning treaties on subjects which are the main responsibility of the Ministry of Foreign Affairs, such as treaties relating to political matters, human rights and the codification and progressive development of international law. The legal adviser may also indirectly influence the negotiation of all other treaties. This indirect influence occurs mainly through the procedure for the approval of instructions for expert negotiations or through consultations at different stages of negotiations (upon the request of the head of the expert delegation). The legal adviser or his or her staff may also participate in the negotiations or in some parts thereof if it is considered necessary due to the political importance or the complexity of the legal issues involved.

The draft instruction for negotiations is, as a rule, prepared by the ministry or agency having the main responsibility for the treaty in question. It includes the political and economic reasoning of the treaty and the estimated impact of the treaty's implementation on the State budget. It always contains, as a minimum, the draft principles of the treaty and the list of experts who will participate in the negotiations. The draft instruction must be submitted to all interested ministers or heads of other governmental agencies involved. This procedure also applies in cases when the expert talks are held in several stages and a new instruction is needed for their continuation.

The Ministry of Foreign Affairs, namely its legal service, is always involved in the procedure for the approval of instructions. This involvement ensures not only the control of the implementation of foreign policy interests, but also provides the necessary guidance on questions of international law that may arise in connection with the
subject-matter concerned. Quite often the Ministry is called to assist even in matters of legal technique. This kind of assistance is appreciated mainly by the ministries or agency whose treaty-making practice is rather limited and whose legal department is not large.

The above remarks are valid for both bilateral negotiations as well as multilateral negotiations conducted under the auspices of an international organization, namely within its competent organ, commission or committee. However, if these negotiations are undertaken within an international organ which has the competence to adopt the treaty or by a diplomatic conference, then the proposal for the conclusion of the treaty requires a higher degree of domestic approval, as discussed below.

V. The Consideration of Proposals for the Conclusion of Treaties

All proposals for the conclusion of a treaty require approval by the Government irrespective of whether it falls within the category of treaties subject to ratification by the President of the Republic or within the category of treaties the conclusion of which the President of the Republic transferred to the Government. The proposal, after its consideration by all interested ministries or agencies, is submitted to the Government by the ministry which has the primary responsibility for the conclusion of the treaty. Unless it has submitted the proposal itself, the Minister of Foreign Affairs should always sign the proposal together with the minister who submits the proposal to the Government.

The signature by the Minister of Foreign Affairs is preceded, as a rule, by the examination of the proposal by the legal adviser. The role of the legal service is to determine whether the proposal satisfies all requirements set up by the Rules. For example, concerning treaties the conclusion of which the President of the Republic transferred to the Government, the submission must include the draft decision of the Government on the matter, the authorization of the plenipotentiary to sign the treaty, the measures necessary for the implementation of the treaty once it enters into force and the organs responsible for the implementation of the treaty.
At this stage, the proposal must already include either the draft treaty as such or its principles which should have emerged from prior expert negotiations. The proposal must also clarify the relationship between the international obligations under the proposed treaty and those deriving for the Czech Republic from general international law or other treaties already in force. In this respect it should be noted that the practice of the Czech Republic is to conclude treaties consistent both with its obligations under other treaties and with those deriving from the general international law, including those of a purely dispositive character (*ius dispositivum*).

The draft instruction is needed whenever the text of the treaty is to be finalized within an international organization.

In the case of treaties subject to ratification by the President of the Republic further requirements have to be observed after such treaties are signed. The proposal to the Government including the suggestion for the submission of the treaty to the Parliament for its approval and the suggestion to the President of the Republic for the ratification of the treaty must accompany the report which contains the political, economic and legal reasoning for the conclusion of the treaty. It must demonstrate how the treaty conforms to the foreign policy goals, how the questions which remain open between the parties may be resolved, how the implementation of the treaty will be ensured and whether the treaty is consistent with existing laws and regulations, or whether their revision or amendment will be needed. In this respect the legal service of the Ministry of Foreign Affairs is expected to have detailed knowledge of internal law, even if, in this respect, it often shares the responsibility with the ministry submitting the proposal. Finally, the proposal must explain on what basis the consent of the Parliament is needed and, in particular, whether new legislation will be required.

In addition, proposals for this category of treaties must be accompanied by, among other things, the special report to the Parliament. As this report becomes part of the official documents of the Parliament and may be invoked for the purpose of interpreting the treaty, the report has to be drafted as a kind of commentary thereto.

One of the sensitive issues in this respect is whether a treaty
has to be considered as a human rights treaty. The qualification of a treaty as such has important consequences. According to article 10 of the Constitution, human rights treaties to which the Czech Republic is a party, once published in the *Collection of Laws*, supersede inconsistent provisions of domestic law and are directly applicable by the courts. Accordingly, unlike other treaties that are subject to approval by the Parliament, a two-thirds majority vote is required for their approval. The determination of whether a treaty qualifies as a human rights treaty is the prerogative of the Parliament. The Government, however, relying on the analysis provided by the legal adviser, makes an appropriate recommendation in this respect to the Parliament. The legal analysis takes into account the circumstances in which the treaty has been elaborated, namely, whether it was considered as being a human rights treaty by the other States participating in the negotiations. Thus, in this particular case, the opinion of the legal adviser is mainly concerned with ensuring consistency in the understanding of the purpose of the treaty on the international and internal levels.

At present, treaties falling within the category of "governmental treaties" represent the majority of treaties concluded by the Czech Republic. Many of them are of a rather technical character. To follow strictly the above procedure for the approval of proposals aimed at concluding this type of treaty would overburden the Government with a huge, rather administrative agenda. To avoid such a situation, the Rules envisage a simplified procedure for the approval of this type of treaty. Thus, for example, the Minister of Industry and Commerce is entitled to approve, on behalf of the Government, proposals for the conclusion of all kinds of protocols attached to commercial or payment agreements, provided that these protocols are aimed at implementing, not revising, the said agreements. Similarly, the Minister of Culture, Education, Youth and Sports may approve, on behalf of the Government, proposals for protocols aimed at implementing agreements on cooperation in the field of culture, education and science or of science and technology. The Minister of the Environment is similarly entitled to approve proposals for the conclusion of instruments concerning the implementation of agreements on cooperation in water management of boundary waters.
These ministers may, however, do so only with the consent of other ministers or heads of governmental agencies interested in the said agreements. Finally, once a year, they have to inform the Government of all instruments they have approved on its behalf in the exercise of this right.

The above situation has to be distinguished from that in which the conclusion of a treaty falls entirely within the competence of the minister or head of a governmental agency. In such a case, the proposal for the conclusion of the treaty is not submitted to the Government and the Government is not necessarily even informed about it. The said minister or the head of the agency approves the proposal with the consent of the Minister of Foreign Affairs. Accordingly, the legal service of the Ministry of Foreign Affairs is involved even in the preparation of this type of treaty.

The above comments relate mainly to the "written stage" of the consideration of proposals for the conclusion of a treaty or the approval of the treaty after its signature. The legal adviser also assists the Minister of Foreign Affairs during the consideration of the treaty in the Government or in the Parliament. The presence of the legal adviser is more often required in meetings of the Parliament's committees than in meetings of the Government.

VI. Technical Functions of the Legal Service in the Treaty-making Process

In addition to its functions in the coordination of the internal part of the treaty-making process, the legal service of the Ministry of Foreign Affairs fulfils under the guidance of the legal adviser a number of other functions of a rather technical character, including in particular:

- Ensuring the publication of treaties, to which the Czech Republic has become a party, in the *Collection of Laws (Official Journal)*,

- Ensuring the registration of treaties with the Secretary-General of the United Nations,
- Keeping the list of treaties to which the Czech Republic is a contracting State, and

- In the event that the Czech Republic is a depositary of a treaty, exercising the functions of such depositary.

Thus, in addition to the staff of about 20 lawyers, there is also a rather small -- but very efficient-- administrative staff.

The originals of nearly all international treaties are kept in the archives of the Ministry of Foreign Affairs, a unit independent from the International Law Department. However, this unit accepts treaties only upon the instruction of the Department.

VII. Participation in the Progressive Development of International Law and Its Codification

The progressive development of international law and its codification, a process usually completed by the adoption of an international convention, must undoubtedly be considered as part of the treaty-making process. Once it becomes clear that the topic which is being considered with a view to its possible codification may be the subject of a treaty, the internal procedure applicable to the preparation of treaties -- or rather participation in their elaboration -- is obviously used. This procedure, however, has primarily been set up for the purpose of the preparation of bilateral treaties. It does not address the special features of the “codification” process. Accordingly, the most substantive part of the State's contribution to this process is not governed by any detailed internal regulation. The management of this process is rather a matter for the good judgement of the legal adviser.

There are very few exceptions for certain treaties which, with the consent of the Ministry of Foreign Affairs, remain in the archives of the Ministry of Defense or the Ministry of Interior.

It is true that the statute of the International Law Commission distinguishes between the progressive development of international law and its codification and considers the form of a convention indispensable only for the former. However, due to the practical impossibility of separating the progressive development of international law from its codification, the opinion has evolved over the years that the form of a convention is the normal form that any successful outcome in this field should be given.
The legal adviser has to decide how to ensure the qualified participation of the State in this process as well as the timing and form of the necessary consultation with other ministries or agencies. The legal adviser also organizes the preparation of responses to all kinds of "questionnaires" emanating from different bodies involved in the progressive development and codification of international law on the international or regional level. In addition, the legal adviser decides questions relating to the preparation of written comments on different draft instruments as well as the participation in relevant debates held in the Sixth Committee of the United Nations General Assembly. In addition, the legal adviser plays an important role in determining the composition of the official delegations that participate in the diplomatic conferences and international meetings at which international law is progressively developed and codified.

VIII. Cooperation with Experts, Scientists and Research Bodies

Another question which is not a matter for formal regulation is that of the involvement in the treaty-making process of experts from research bodies or academic institutions. Here again the initiative and personal contacts of the legal adviser are of primary importance.

Undoubtedly, for the majority of treaties this kind of assistance is not needed. There are, however, fields in which the elaboration of a treaty requires close cooperation between lawyers and experts in different disciplines. Most often these conventions on specialized questions are concluded within the framework of international organizations. Examples of such conventions may be found among instruments in the field of outer space law, the law of the sea, environmental law and the prevention of international terrorism.¹⁸

¹⁸ The Conference convened by the International Civil Aviation Organization (ICAO) in 1991 to conclude the Convention on the Marking of Plastic Explosives for the Purpose of Detection provides one example of the close cooperation between legal and technical experts in such an endeavour. The process leading to the adoption of the above convention was started by the United Kingdom and Czechoslovakia when they jointly initiated the adoption of the resolution of the ICAO General Assembly concerning this issue, following the adoption of Security Council resolution 635/1989.
The broader recourse of States to this kind of expert assistance is evident from the lists of their delegations attending international meetings where multilateral treaties are being prepared. But special expertise may be necessary even for the elaboration of bilateral treaties. The participation of outside experts often constitutes a new challenge for the legal service. Lawyers and technical experts or scientists must create a team capable of finding common language first to understand each other properly and then to complement each other in their effort to elaborate a treaty regulating a highly technical matter. This kind of cooperation usually occurs on an ad hoc basis.

The cooperation with learned institutions in the field of international law has a much broader basis. There is a long-standing tradition of very close contacts and cooperation with international lawyers at the Faculties of Law of Charles University in Prague and Masaryk's University in Brno. These lawyers are usually invited to give their individual opinion on specific issues relating to the bilateral or multilateral treaty which is being negotiated. In exceptional cases, they are included as experts in the delegation. Their contribution concerns mainly questions connected with the progressive development and codification of international law.

IX. Conclusions

The internal regulation of the treaty-making process is an important part of the legal environment in which international treaties are born. In the case of the Czech Republic, the functions that the legal adviser of the Ministry of Foreign Affairs is personally called upon to perform or supervise are of particular importance. They go hand-in-hand with the coordination functions assigned to the Ministry of Foreign Affairs on the basis of the distribution of competences in the treaty-making process.

The legal adviser influences the treaty-making process at an early stage by preparing the draft guidelines regulating the internal aspects of the treaty-making process, approved by the Government, or the draft instruction of the Minister of Foreign Affairs aimed at developing in more detail the procedure to be followed during the
conclusion of treaties and their approval. The legal adviser performs a wide range of functions concerning the coordination and the control of national activities in the treaty-making process as well as in the negotiation, the approval and even the implementation of treaties. The legal adviser may provide opinions which further influence political decisions in treaty matters.

This article was intended to provide information on the practice of the Czech Republic in the internal regulation of the treaty-making process, to share our experience with other colleagues bearing similar responsibilities and to contribute to mutual understanding and confidence—building among the legal services of the Members States of the United Nations and to an open-minded discussion of problems whose solution will hardly ever be considered as final or perfect.

Adriaan Bos*

I. Introduction

I would like to reflect on the relationship between the protection of human rights and the international humanitarian rules in the light of the adoption of the Rome Statute of the International Criminal Court (Rome Statute). The protection of human rights is an obligation imposed on States with respect to individuals who are either within their territory or subject to their jurisdiction. It is for this reason that, as far as international humanitarian law is concerned, this essay focuses on the non-international armed conflicts that take place within the territory of a single State.

Let me start by saying that this relationship is not a new question. After the Second World War, and in particular in the 1960s, there was a growing awareness that international humanitarian law and international human rights law had much in common. It is equally clear that the roots of the two regimes are completely different.

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1 Document PCNICC/1999/INF/3.
II. International Humanitarian Law

International humanitarian rules have their origin in relations between States and their purpose is to limit the suffering resulting from international armed conflicts. In a sense they represent a response to technological developments in warfare. They define *jus in bello* indicating what means and methods of warfare are still acceptable in the eyes of humanity. Military necessity is balanced against humanity. In 1864, the first Geneva Convention was adopted, its aim being to improve the lot of soldiers wounded in the field. It grew from the traditional concern of the International Committee of the Red Cross (ICRC) for casualties of war. This concern has since been expressed in a number of conventions and declarations.

The next important step was the adoption of *jus in bello* by the first and second Hague Peace Conferences of 1899 and 1907. The most important result of the First Hague Peace Conference was the adoption of the Convention on the Laws and Customs of War on Land and the Regulations attached thereto, containing a very elaborate set of rules for warfare on land. The Hague Convention IV of 1907 and the Regulations thereto superseded these instruments in most respects. Many provisions of the latter text still reflect customary law. Their purpose was to protect the military casualties of armed conflicts. In the traditional concept of *jus in bello*, only military forces are involved in armed conflicts. It was not felt necessary to include any rules concerning the protection of civilians. They were assumed not to be affected by armed conflicts.

The Second World War put an end to this illusion. It became clear that civilians too needed to be protected from the atrocities of

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5 *American Journal of International Law*, vol. 1 (1907), Suppl., p. 129.
armed conflicts. This led in 1949 to the adoption of the Geneva Convention on the protection of civilian persons in time of war. Parts of the Hague Conventions were elaborated and expanded in the Geneva Conventions of 1949 and subsequently in the Additional Protocols of 1977. In particular, after the adoption of the Additional Protocols in 1977, these rules contained the totality of the *jus in bello*, with a few exceptions such as the rules with regard to neutrality and economic warfare.

In the light of these developments, the distinction between the *jus in bello*, as laid down in the Hague Conventions and several other international instruments, and the Geneva rules that aimed to protect the victims of armed conflicts was no longer very relevant. The rules contained in the Hague Conventions and other *jus in bello* together with the Geneva Conventions and the Additional Protocols are referred to today as international humanitarian law. They are deemed to constitute an autonomous branch of international law. In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated:

"[the question] whether a particular loss of life through the use of certain weapons in warfare is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

III. Rules on Human Rights

The purpose of human rights is to protect individuals within a State from abuses of their fundamental rights by their Governments. Human rights originally had no place in international law. The demand
for human rights started as a liberal reaction against inhuman treatment
caused by feudalism or monarchism. During the eighteenth and
nineteenth centuries human rights became a very important factor in the
evolution of civilization all over the world. The internationalization of
the human rights concern took place first in the context of bilateral
relations with a State seeking to protect its own citizens abroad from
alleged denials of their rights by the host-State. The concern for the
protection of minorities became another impetus for concluding treaties.
But generally human rights were embedded in national legislation.

Since the Second World War, a growing number of
conventions have been concluded for the protection of human rights to
strengthen the position of ordinary citizens vis-à-vis their own
Government. This process started with the adoption in 1948 of the
Universal Declaration on Human Rights. Its roots lay in the failure of
Governments to respect human rights and the realization that human
rights violations can jeopardize the peace and security of mankind. The
protection of human rights increasingly became an international
concern. Internationally recognized human rights can be found in a
number of international instruments.

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9 A. Eide, "The Laws of war and human rights. Differences and
convergences", Studies and Essays on International humanitarian law and Red Cross
679.

10 General Assembly resolution 217A.

11 International Covenant on Economic, Social and Cultural Rights, United
Nations, Treaty Series, vol. 993, p. 3; International Covenant on Civil and Political
Rights, Ibid., vol. 999, p. 171 and vol. 1057, p. 407. Of all the instruments in the field
of human rights the International Covenant on Economic, Social and Cultural Rights
and the International Covenant on Civil and Political Rights are the most important. The
International Covenant on Civil and Political Rights contains a catalogue of rights, which
to a large extent resembles the Universal Declaration of Human Rights (General
Assembly resolution 217 A (III)) as well as the regional Conventions on Human Rights.
Other international conventions include the International Convention on the Elimination
of All Forms of Racial Discrimination (United Nations, Treaty Series, vol. 660, p. 195),
the Convention on the Elimination of All Forms of Discrimination against Women (Ibid.,
v. 1249, p. 13), the Convention against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment (Ibid., vol. 1465, p. 85), the Convention on the Prevention and
Punishment of the Crime of Genocide (Ibid., vol. 78, p. 277), the Convention relating to
the Status of Refugees (Ibid. vol. 189, p. 137), the Convention on the Rights of the
Child (General Assembly resolution 44/25). Regional conventions include the European
Convention for the Protection of Human Rights and Fundamental Freedoms (United
Nations, Treaty Series, vol. 213, p. 221), the American Convention on Human Rights
(Ibid., vol. 1144, p. 123) and the African Charter on Human and Peoples' Rights (OAU
Doc. CAB/LEG/67/3/Rev.5).

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IV. The Convergence of Humanitarian Law and Human Rights

The view that the two regimes had more in common than previously thought was inspired by the belief that the rules of humanitarian law should extend to a wider circle of beneficiaries, in particular to the civilian population. The civil war in Spain served as an eye-opener, highlighting the suffering of civilians in internal conflicts. This led to the conviction that international rules were needed for internal conflicts as well. The decision to include common article 3 in the Geneva Conventions was a result of this development. The process was accelerated as internal armed conflicts came to outnumber traditional wars between nations. Of 250 conflicts of all sorts since the Second World War, many occurred within the territory of a single State. The human suffering caused by these internal conflicts is no less than that caused by traditional wars.

The International Conference on Human Rights held in Tehran in 1968, which was designated International Human Rights Year in honour of the twentieth anniversary of the adoption of the Universal Declaration, promoted this new trend. The Conference called for new rules to ensure better protection for civilians, prisoners and combatants in all armed conflicts, as well as the prohibition or limitation of certain methods and means of warfare.

In the period following the Conference, the United Nations General Assembly adopted a number of resolutions dealing with respect for human rights during armed conflicts. This was the start of closer cooperation between the ICRC and the United Nations, with the ICRC dealing with international humanitarian law and the United Nations remaining active in the protection of human rights. This has led to a growing awareness that reliance on humanitarian rules can help combat human rights violations in armed conflicts more effectively. The two approaches should go hand in hand. This development also made it clear that the traditional distinction between international law in wartime and peacetime was becoming blurred. The question arose as to whether the rights of the individual were better protected under international humanitarian law or by human rights conventions. Emphasis was placed.

on the similarities between the two sets of rules and their concurrent applicability in armed conflict in order to safeguard and improve the protection of individuals.

V. Common Article 3 of the Geneva Conventions

In common article 3 of the Geneva Conventions, the violation of a number of fundamental humanitarian principles is prohibited in cases of non-international armed conflict. These principles include the prohibition of torture, murder, mutilation, cruel treatment, taking hostages and passing sentence without due process. The wounded and sick must also be collected and cared for.

Internal conflicts take place within the territory of a State. If the State is party to human rights conventions, it is bound to apply these conventions in its territory in both wartime and peacetime. Under these conventions, States may derogate from some of their human rights obligations in the event of a public emergency. Thus, the International Court of Justice has observed that the protection afforded by the International Covenant on Civil and Political Rights does not cease in time of war, except by operation of article 4 of the Covenant whereby certain derogations are permissible in times of emergency. No such derogation is permitted, according to this article, from the articles dealing with the right to life, the prohibition of torture, slavery and servitude, imprisonment on the grounds of inability to fulfil a contractual obligation, nulla poena sine lege, the right to recognition everywhere as a person before the law and the right to freedom of thought, conscience and religion. Governments must respect these rights in relation to all their nationals and all others present in their territory. There are similar provisions, with certain variations, in the European Convention on the Protection of Human Rights, 1951 (article 15) and in the American Convention on Human Rights, 1969 (article 27).

The similarities between the two sets of rules are evident. The Court identified the rules set forth in common article 3 as the fundamental principles of humanitarian law which constitute the minimum applicable in all armed conflicts.\textsuperscript{13} They express "elementary

considerations of humanity”.

The deficiencies of common article 3 are well known. Its applicability is dependent on the interpretation of “armed conflict not of an international character occurring in the territory of one of the Contracting Parties”. What constitutes armed conflict is not defined and depends in the final analysis on the declaration of the parties to the armed conflict that they are willing to apply article 3. The applicability of the four Geneva Conventions is objectively determined by the use of armed forces. The basis of the obligation is the conventional relationship between the parties to the conflict. This clear basis is missing in the case of article 3. A declaration to apply article 3 will not easily be made since it may be seen as some form of recognition of the other party to the conflict. States prefer to take the view that domestic law governs armed conflicts within their territory. Moreover, the State itself may not be eager to commit itself in advance to respecting these rules without knowing whether the other party to the conflict is prepared to do the same. Nevertheless, efforts have been made to elaborate certain objective criteria. An armed conflict presupposes the existence of hostilities between armed forces that are organized to a greater or lesser extent. The intensity of the conflict and the organization of the parties are important factors, as well as the question of whether the Security Council has determined that the situation is a threat to peace and security. If the parties to a conflict fail to acknowledge the existence of that conflict, it remains easy to contend that the criteria for an armed conflict have not been met.

VI. Additional Protocol II

According to the preamble to the second Additional Protocol, its purpose is to ensure better protection for the victims of armed conflicts that are not of an international character, as compared to common article 3 of the four Geneva Conventions. The Protocol attempts to define more objective criteria for determining the existence of an internal conflict. The preamble recognizes expressly for the first time in a humanitarian instrument the concurrent applicability of humanitarian law and human rights law in armed conflicts by stating that “international instruments relating to human rights offer a basic

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protection to the human person”. In addition, the Protocol contains a variety of provisions of international humanitarian law and human rights law. These rights are based on rules of universal validity which are binding on all States, even in the absence of any treaty obligation or any explicit commitment on their part. Following the example of common article 3, Additional Protocol II does not establish any special category of persons, nor does it create any special legal status.

Common article 3 is applicable to armed conflicts occurring in the territory of one of the High Contracting Parties. Additional Protocol II is applicable to armed conflicts which are not covered by article 1 of Additional Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. The threshold for the application of Additional Protocol II is higher in comparison to common article 3. If an armed conflict is not covered by these criteria of Additional Protocol II, common article 3 is still applicable.

VII. The Rome Statute

The substantive rules contained in the Rome Statute for internal conflicts can be found in article 8 paragraph 2 (c) and (e). Article 8, paragraph 2 (c) refers to “serious violations of common article 3”. The fundamental rules of common article 3 are applicable in peacetime as human rights from which no derogation is permitted and as international humanitarian rules applicable in armed conflicts. By their nature, violations of these rules should be considered serious. One may assume that the qualification "serious" serves to indicate that the breach must entail grave consequences for the victims. The content of the

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16 In article 75 of Additional Protocol I an effort is made to prevent adverse effects of this derogation in time of emergency by laying down several minimum rules of protection for the benefit of all those who find themselves in time of armed conflict in the power of a party to the conflict. This is clearly a humanitarian rule serving as a safety net in case a State invokes the derogation of the applicable human rights treaties.
substantive rules contained in paragraph 2 (c) of the Rome Statute does not differ from common article 3.

Article 8 (e) of the Rome Statute refers to “Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law”. The language of this heading is reminiscent of the 1907 Hague Convention. The content of the substantive paragraphs is taken from the Hague Convention, the Geneva Conventions of 1949 and Additional Protocols I and II. An additional threshold for the application of this paragraph is formulated in paragraph (f) of this article. It applies when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups. The latter addition is an improvement. The condition in Additional Protocol II that the armed forces of the Government must always be party to the protracted armed conflict is omitted. Thus, here the threshold is lower to encompass a wider range of internal armed conflicts. Other conditions of Additional Protocol II, such as responsible command and the exercise of control, have been kept. The bottom line is still that a “non-international armed conflict” goes beyond a situation of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

By lowering the threshold in the Statute, it is possible to bridge the gap between cases of emergencies provided for in human rights conventions and the threshold for the application of international humanitarian rules in internal conflicts. This is important in order to limit the cases in which a State is allowed, by invoking a state of emergency that does not meet the definition of an internal conflict, to engage in conduct prohibited in time of peace and in time of internal conflict.

VIII. Crimes against Humanity

The definition of crimes against humanity contained in the Rome Statute raised several problems. The text is more elaborate and more refined in comparison with the definitions contained in the Statute of the International Criminal Tribunal for the former Yugoslavia.
(ICTY)\textsuperscript{17} and of the International Criminal Tribunal for Rwanda (ICTR).\textsuperscript{18} The linkage of this crime with an international armed conflict, as provided for in the Nuremberg Charter\textsuperscript{19} and indeed still in the Statute of the International Criminal Tribunal for the former Yugoslavia, is no longer present. Despite the reference to this linkage in the latter, the Appeals Chamber of the International Criminal Tribunal for Yugoslavia has already indicated in the \textit{Tadic} case that it is by now an established rule of customary law that crimes against humanity do not have to be connected to any conflict at all.\textsuperscript{20}

Individual criminal responsibility for crimes against humanity was first established in the Nuremberg Charter. Before Nuremberg, references to laws of humanity and crimes against humanity were never furnished with a precise legal definition. After the First World War, in particular, such references were couched largely in political and moral terms. They resembled the Martens clause as contained in the preamble of the 1899 Hague Convention.\textsuperscript{21} It was on the grounds of the imprecise legal definition of this crime, for example, that the Netherlands Government refused in 1919 to extradite Kaiser Wilhelm II.

Crimes against humanity, although newly formulated in article 6 (c) of the Nuremberg Charter, were not new offences. It was the first time, however, that an international tribunal had tried cases of crimes against humanity as an international offence. The Tribunal observed: "Nuremberg has only demonstrated how humanity can be defended in Court".

The reason for the inclusion of crimes against humanity in the Nuremberg Charter was to encompass the atrocities committed by the

\begin{itemize}
\item Security Council resolution 955 (1994)*.
\item Agreement for the prosecution and punishment of the major war criminals of the European Axis, with annexed charter of the International Military Tribunal, United Nations, \textit{Treaty Series}, vol. 82, p. 279.
\item Case No. IT-94-1AR72 of 2 October 1995, para. 141.
\item The Preamble of the 1899 Convention (and most subsequent humanitarian instruments) provides as follows:
\begin{quote}
"Until a more complete Code of the laws of war is issued, the HCP think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the law of humanity and the requirements of the public conscience."
\end{quote}
\end{itemize}
Government against its own civilian population before and during the war. In fact it may be seen as an effort to embrace the violations of fundamental human rights in wartime. The formulation of these new crimes in 1945, however, was very restrictive, and it could only apply to acts committed in direct connection with war crimes or crimes against peace.

In the discussions in the International Law Commission (ILC) on the Draft Code of Crimes against the Peace and Security of Mankind, crimes against humanity were included only in the last version of this Code in 1996. The earlier versions referred to "systematic or mass violations of human rights". The reason for the deletion from the Code of systematic or mass violations of human rights and its replacement by crimes against humanity was among others to focus upon a small number of the most serious and least controversial crimes. The preference for keeping the definition as contained in article 6 (c) of the Nuremberg Charter, and as further developed by the 1950 ILC formulation of the Nuremberg principles, was another reason. The essential difference between the two is the removal in the ILC text of the war connection. By this substitution, the article has become implicitly broader. The acts mentioned under this crime are very similar to those mentioned under crimes against humanity in the Rome Statute. Article 7 of the Statute is, however, more extensive. It contains for the first time in a binding legal instrument the offence of "enforced disappearance of persons" and a more extensive definition of the act of sexual violence. In addition, the list of acts mentioned in this article is not exhaustive.

In the Rome Statute there is a double threshold. The acts constituting this crime must be committed as "part of a widespread or systematic attack against any civilian population". This formulation is taken from the ICTR Statute. It cannot be just a random act of violence. The 1996 ILC Draft Code referred to the commission of prohibited acts "in a systematic manner or on a large scale". The suggestion to make the


two notions of this threshold cumulative was rejected in Rome. Apart from this "widespread" or "systematic" attack, the attack must be directed against the civilian population, for example, against people who are not taking any active part in an armed conflict. There must be a course of conduct involving the multiple commission of the acts pursuant to or in furtherance of a State or organizational policy. These additional requirements can also be found in comparable terms in the Barbie case and in the Tourvier case. The courts refer in these cases to "persecutions committed in a systematic manner in the name of a State practicing a policy of ideological supremacy". The reference to the State is also an indication of the human rights character of the provision. The individual has to be protected against the State violating fundamental rights. The addition of "organizational policy" includes private individuals with de facto power or organized in criminal gangs or groups. It is evident that it is necessary to have a threshold for this crime as a crime under international law in order to distinguish it from common crimes under domestic law.

IX. Individual Criminal Responsibility

The acceptance of individual criminal responsibility for the crimes as defined in the Statute is one of the most striking features of the Statute. With the adoption of the Geneva Conventions and the Additional Protocols, more emphasis was already being placed on criminal law to combat violations of international norms. The Contracting Parties are obliged to enact legislation to provide effective penal sanctions for persons committing or ordering any of the grave breaches of the four Geneva Conventions or Additional Protocol I. The inclusion in the Rome Statute of individual responsibility for serious violations of the laws of internal armed conflicts is a very meaningful step forward. It obliges States to implement the Statute and to enact legislation to ensure compliance with the rules of internal armed conflicts.

In the Akayesu case the ICTR indicated that the cumulative formulation appeared in the French version of the Statute only and that there were reasons to believe that it was due to an error in the translation. Case No. ICTR-96-4-T, p. 112.

La Cour de cassation, Chambre criminelle, 30 January 1996, Pourvoi No. 94-83.980, arrêt No. 585.

La Cour de cassation, Première Chambre civile, 15 November 1994, Arrêt No. 1498, Rejet, Pourvoi No. 92-10.445.

Loc. cit. (footnote 20 above), p. 110 and 111.
One may hope that the elaborate and carefully negotiated comprehensive criminal regime, as laid down in the Rome Statute, may serve as a model for national legislatures. To date there has been no uniform system for the prosecution and punishment of war criminals. The provisions of the Geneva Conventions requiring that the parties take "all necessary legislative measures to determine penal provisions" led to a very incomplete and unsatisfactory system of national implementation. In general, the Statute, and in particular the principle of complementarity may serve as an additional incentive for States to put their house in order as far as the enforcement of these rules is concerned. Once an effective system of enforcement is established, it may also serve as a better deterrent for potential offenders.

The definition of crimes contained in the Statute is for the sole purpose of the Statute as indicated in articles 6, 7 and 8. This limitation was considered necessary because these definitions are not identical to those found in previous texts. In certain respects, the Statute has changed the definition of the crimes contained in the Geneva Conventions and the Additional Protocols. In the course of the discussions, efforts were made to improve texts negotiated on previous occasions. This applies, for instance, to articles dealing with violations against women and the conscription or enlisting of children into armed conflicts, both typically human rights rules. Article 22, paragraph 3, adds that individual criminal responsibility under the Statute shall not affect the characterization of any conduct as criminal under international law independently of the Statute. These articles are intended to prevent the interpretation and application of individual criminal responsibility outside the scope of the Statute.

In discussing the relationship between international humanitarian law and human rights law, one should also pay due attention to article 21, paragraph 3. It states that the Court's application and interpretation of the law must be consistent with internationally recognized human rights, without any adverse distinction founded on grounds such as gender, age, race, color etc. This is important since it confirms the universal character of human rights. Insofar as human rights instruments are universally recognized as part of international customary law, the Court must respect them in the proceedings before

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28 M. Bothe, "The role of national law in the implementation of international humanitarian law", Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet, C. Swinarski, ed. (The Hague, M. Nijhoff, 1984).
the Court. This provides, for instance, a very important and far-reaching additional form of protection for suspects and offenders involved in criminal proceedings before the International Criminal Court. But it may also have an impact on the applicability of international rules in internal armed conflicts. The major obstacle to applying the relevant international rules to internal armed conflicts is the status under international law of the insurgent party. How can the insurgent party be held responsible for violating the rules of internal armed conflicts? As we have seen, these rules are fundamental human rights laid down in common article 3 as a minimum safeguard. Parties to an internal armed conflict may go beyond this minimum and mutually consent to accept the rules of Additional Protocol II. The Court may consider this article to be an additional indication of the applicability of fundamental human rights in internal armed conflicts and of the fact that violations of these rules by the parties (including the insurgents) to the internal armed conflict may be dealt with as crimes under international law.

En France, l’activité du Directeur des affaires juridiques s’inscrit dans le contexte d’une hiérarchie des normes qui accorde aux textes internationaux une place privilégiée dont bénéficient au premier chef les engagements qui ont été souscrits dans le cadre des Communautés européennes, de l’Union européenne et du Conseil de l’Europe. De ce fait, la relation entre droit international et droit interne connaît une évolution très rapide. La Direction des affaires juridiques du Ministère des affaires étrangères facilite, accompagne, explique et gère certaines des conséquences de cette transformation. C’est ce rôle nouveau à la frontière mouvante entre droit interne et droit externe qui sera ici évoqué sans préjudice d’activités traditionnelles en matière de droit public international qui se poursuivent en parallèle.

La Constitution française appartient à la famille des régimes monistes puisqu’elle reconnaît dans son article 55 aux traités ou accords régulièrement ratifiés ou approuvés une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l’autre partie.

Cette situation confère aux engagements internationaux souscrits par la France une autorité immédiate, puisque, si les textes le prévoient et qu’ils sont suffisamment clairs et précis ils peuvent être directement applicables aux individus. L’avis du Ministère des affaires étrangères n’a plus à être sollicité dans la plupart des cas depuis l’arrêt GISTI du Conseil d’Etat de 1990 pour interpréter la portée des engagements internationaux pris par la France. Les personnes peuvent évoquer beaucoup d’entre eux devant les juridictions françaises et, le cas échéant, contester les décisions de ces juridictions devant les juridictions internationales qui ont été créées. Ils le font de façon de plus en plus fréquente.

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Dès 1950, la Convention européenne des droits de l'homme (CEDH) proclamait dans son préambule que : "le but du Conseil de l'Europe est de réaliser une union plus étroite entre ses membres... l'un des moyens d'atteindre ce but est la sauvegarde et le développement des droits de l'homme et des libertés fondamentales". Ratifiée en 1974, la Convention a vu son effet considérablement accru quand la France a accepté le recours individuel devant la Commission et la Cour européennes des droits de l'homme le 2 octobre 1981.  

Cette Convention confère aux individus et aux personnes morales un ensemble de droits qui sont directement applicables dans l'ordre juridique français. Elle leur permet de mettre en cause les décisions définitives des juridictions suprêmes françaises pour violation des dispositions de la Convention devant la Commission et la Cour européennes des droits de l'homme.

Parallèlement le Traité de Rome a en 1957 engagé un processus d'intégration et mis en place un ensemble d'institutions au nombre desquelles figure la Cour de Justice des Communautés européennes. Celle-ci n'a pas manqué de rappeler dans son arrêt Van Gend en Loos que le Traité "constitue plus qu'un accord qui ne créérerait que des obligations mutuelles entre États contractants", puisqu'il "crée des charges dans le chef des particuliers et engendre des droits qui entrent dans leur patrimoine juridique". L'activité des institutions communautaires a secrété une masse importante de "droit dérivé" qui embrasse aujourd'hui l'ensemble des domaines de l'activité économique, sociale et monétaire sans que les individus prennent toujours la mesure de cette influence au niveau de leur vie quotidienne.

Les deux systèmes juridiques sont proches sur le plan des principes puisque les articles F et J1 du Traité sur l'Union européenne modifiés par le Traité d'Amsterdam soumettent l'activité des institutions communautaires au respect des droits de l'homme et des libertés fondamentales tels qu'ils sont garantis par la Convention

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6 International Legal Materials, vol XXXVII, n° 1 (1998), p. 56 à 142
européenne des droits de l'homme et des libertés fondamentales, confirmant ainsi une jurisprudence constante développée par la Cour de Justice dans le cadre de la notion des droits fondamentaux.

La prise en compte de ces normes externes par l'ordre juridique interne, exige du temps et suppose un travail en profondeur qui n'exclut pas certaines frictions. Les ajustements dans les textes, les pratiques et les mentalités qu'exige cette prise en compte touchent en effet à presque tous les aspects de l'activité des autorités publiques. Le processus engagé est loin d'être achevé et il est appelé à se poursuivre au fur et à mesure que de nouveaux textes interviendront et que les conséquences de l'intégration des normes vives de la Convention européenne des droits de l'homme et du droit communautaire dans le droit français se feront sentir plus en profondeur.

Il revient aux juristes du Ministère des affaires étrangères d'agir tout au long de ce processus qui associe chaque jour plus étroitement les normes d'origine européenne et le droit interne. Ils sont appelés à intervenir en amont, au moment de définir les instructions de la délégation française dans les négociations, puis tout au long de la négociation. Il leur appartient ensuite, une fois que les textes ont été adoptés, de conseiller les administrations sur la façon de les transposer en droit interne et sur les conséquences qu'il convient d'en tirer. A tout moment ils sont appelés à mieux les faire connaître et à les expliquer.

Enfin chaque fois qu'une procédure contentieuse est engagée sur la base de ces textes, il leur appartient de défendre les intérêts français devant les juridictions compétentes, en tant qu'agents du gouvernement français devant ces juridictions.

Ce rôle d'ensemble est différent selon qu'il porte sur le champ couvert par la Convention européenne des droits de l'homme (I) ou sur celui du droit communautaire (II).

I. Le Conseil de l'Europe, la Convention européenne des droits de l'homme et leur suivi

Désormais composé de plus de quarante membres, le Conseil de l'Europe est le moteur du rapprochement des sociétés européennes en matière d'état de droit et de respect des droits individuels et
collectifs. Presque tous ses membres ont souscrit à la Convention européenne des droits de l’homme, mais l’institution travaille de façon permanente pour approfondir ces droits dans des domaines nouveaux (bioéthique, cyberespace ...) en négociant des textes de convention ou de protocoles additionnels qui sont ouverts à la signature des États.

La façon dont la Convention européenne des droits de l’homme a été peu à peu prise en compte illustre bien le caractère progressif de l’assimilation des normes européennes dans le droit interne. Le législateur français est tenu de respecter les prescriptions de la Convention et a clairement manifesté le cas qu’il en faisait au moment de l’adoption d’un nouveau code pénal et l’adaptation du code de procédure pénale qui est entré en vigueur le 1er mars 1994. D’autres évolutions dans le domaine judiciaire reflètent l’influence de la Convention comme par exemple les dispositions prévoyant l’intervention de l’avocat pendant la garde à vue au-delà de la vingtième heure, celles qui concernent certaines limitations apportées à la détention provisoire, les mesures prises pour accélérer le cours de la procédure pénale par les lois du 4 janvier et du 24 août 1993. De même dans l’ordre administratif, la loi de 1993, portant modification de l’ordonnance de 1945, dans son article 27 bis, relatif à l’éloignement, cite explicitement l’article 3 de la CEDH.

L’impact de la Convention a commencé à se faire sentir dans la société française à partir du moment où la France a admis le recours individuel devant la Commission et la Cour. Les individus et les professionnels du droit ont en effet choisi de se prévaloir devant les juridictions françaises des dispositions de la Convention. Les juridictions leur ont reconnu de plus en plus un effet direct. Ainsi dès 1975, la Chambre criminelle de la Cour de cassation a-t-elle considéré que les articles 5 et 6 de la Convention étaient d’applicabilité directe.

Les tribunaux judiciaires et administratifs ont alors été amenés à répondre aux moyens soulevés par les requérants et s’intéresser de plus près à la jurisprudence des institutions de Strasbourg. Il n’est plus rare que les tribunaux français soient saisis de moyens se référant exclusivement à la CEDH, en particulier dans le domaine du droit des étrangers où les articles 3 et 8 de la CEDH sont fréquemment mis en avant. Les arrêts de la Cour concluant à une violation de la Convention se traduisent par des inflexions de la jurisprudence.
des tribunaux français. Ainsi l’arrêt Beldjoudi de 1992⁷ a facilité l’acceptation par les juridictions internes des moyens tirés de l’article 8 de la CEDH. Dans l’arrêt Maubleu,⁸ le Conseil d’État a pris les devants par rapport à la Cour en estimant qu’une procédure disciplinaire rentrait dans le champ de l’article 6 de la Convention.

Le nombre des plaintes adressées à ces institutions par des justiciables devant les juridictions françaises, celui des affaires reconnues comme recevables et examinées par la Commission et celui des affaires portées devant la Cour a cru de façon très rapide. En 1997 il a atteint pour ces différentes catégories respectivement les chiffres de 1500 environ, 350 et 14, au point que la France est un des États le plus souvent mis en cause.

Il convient de mettre l’accent sur la dimension évolution de la jurisprudence de la Cour européenne des droits de l’homme qui, au fil des affaires qui lui sont soumises, ne cesse de s’affiner, précisant et interprétant en permanence les dispositions de la Convention. Le système européen de protection des droits de l’homme se trouve ainsi en évolution constante obligeant les autorités et les juridictions nationales à intégrer sans tarder les infléchissements nouveaux. Ceci est particulièrement sensible au niveau des garanties que doit comporter un procès équitable en application de l’article 6 paragraphe 1 de la Convention. Son champ ne cesse de s’étendre et porte désormais sur le contentieux de la fonction publique dès lors qu’un aspect patrimonial est reconnu.

Le Directeur des affaires juridiques et son équipe doivent, en liaison avec le Ministère de la justice, contribuer à faire connaître et comprendre les conventions du Conseil de l’Europe, les protocoles qui les accompagnent et la jurisprudence issue des décisions de la Cour. Cette diffusion emprunte le canal de circulaires du Ministre de la justice ou celui de publications de la Cour de cassation. Surtout le Directeur des affaires juridiques et son équipe défendent les intérêts du gouvernement en tant qu’agents de l’État, fonction dont ils ont l’exclusivité, quand des recours pour violation de la Convention sont engagés contre des jugements rendus par des tribunaux français. En

règle générale il s'agit de jugements intervenus à l'issue de l'épuisement des voies de recours internes, c'est-à-dire des arrêts rendus par les Cours suprêmes de l'ordre administratif (Conseil d'État) et de l'ordre judiciaire (Cour de cassation). Principale exception à cette règle, le contentieux tiré de la longueur des procédures, qui peut être déclaré recevable alors même qu'une procédure est toujours en cours.

L'équipe des affaires juridiques reçoit dans sa tâche le soutien de tous les Ministères concernés et bien souvent des Cours suprêmes elles-mêmes pour l'aider à expliciter les jugements rendus. La charge de la préparation des mémoires et des plaidoiries est lourde compte tenu des enjeux. Elle implique que les agents parviennent à présenter, à justifier et surtout à faire comprendre, devant la Commission et la Cour les spécificités de la législation et du système juridique français, tels qu'ils se manifestent dans chaque affaire. À ce titre ils contribuent à la définition d'une jurisprudence qui s'applique à tous les pays membres du Conseil de l'Europe.

Les affaires liées à la notion de droit à un procès équitable (article 6 de la Convention) constituent plus des deux tiers des questions portées devant la Cour. Les décisions de celle-ci sont à l'origine d'évolutions substantielles dans la législation, les procédures et les pratiques des autorités et des juges français. Ainsi la loi sur les écoutes téléphoniques de 1991 en matière d'écoutes téléphoniques a-t-elle tiré toutes les conséquences des arrêts Huvig et Kruslin9 de la Cour. Des résistances subsistent parfois, comme des inquiétudes à l'égard des décisions d'une Cour qui comprend des représentants de systèmes juridiques distincts des traditions du droit civil romain-germanique pratiqué en France.

Les juges comme les autorités françaises sont très attachés à leurs traditions juridiques. Ils souhaitent en voir reconnaitre le bien fondé par la juridiction du Conseil de l'Europe et les faire partager à d'autres partenaires. Il est donc important que, par la qualité de leur travail, les agents du gouvernement français parviennent à convaincre les juges de Strasbourg d'orienter leur décisions dans un sens aussi favorable que possible à la tradition juridique française. S'ils y

parviennent, ils contribuent au processus d'harmonisation lente et méthodique des normes et des pratiques existant en Europe en matière de droits de l'homme qui sont destinés à s'imposer tant aux personnes qu'aux institutions et aux juridictions.

II. Le droit communautaire

L'intégration progressive entre membres de la Communauté puis de l'Union européenne qui se limitait initialement aux questions économiques et sociales a vu son champ s'élargir progressivement jusqu'à embrasser l'ensemble des domaines de la vie quotidienne tandis que la coopération intergouvernementale se développe dans les domaines douanier, judiciaire, policier et de politique étrangère. Le processus législatif européen est dès lors d'une intensité exceptionnelle. Plusieurs grands traités ont successivement été adoptés au cours des dix dernières années, l'Acte unique, le Traité de Maastricht, le Traité d'Amsterdam. À l'initiative de la Commission, le Conseil adopte en collaboration avec le Parlement européen de façon continue, un important volume de textes normatifs (règlements, directives, décisions). Ce droit dérivé touche parfois jusqu'au détail de l'exercice de très nombreuses activités dans chaque État membre et il lui est reconnu le plus souvent un effet direct dont les citoyens et les opérateurs économiques peuvent se prévaloir devant le juge national.

L'activité des juristes de la Direction des affaires juridiques s'exerce à tous les niveaux du processus législatif communautaires ou bien des procédures judiciaires conduites devant les juridictions propres à l'ordre juridique communautaire : la Cour de Justice des Communautés européennes et le Tribunal de première instance qui lui est adjoint.

La négociation des normes juridiques dans le cadre communautaire est une tâche ardue et exigeante qui mobilise des experts et des décideurs d'origine très diverse, dans un cadre de concertation interministérielle permanente, mais comporte toujours une importante dimension juridique. Il est, dès lors, souhaitable que tous ceux qui participent à ce processus de mise au point des positions

10 Voir note de bas de page n°. 6 ci-dessus.
11 Voir note de bas de page n°. 7 ci-dessus.
nationales puis de négociation aient une bonne connaissance du droit communautaire. Les agents de la direction juridique sont conduits à jouer un rôle spécifique dans le cadre des réunions interministérielles de préparation, ce qui les entraine dans certains cas à participer aux négociations elles-mêmes.

Certaines des normes adoptées à Bruxelles (directives) doivent ensuite être transcrites dans l'ordre juridique interne. La direction des affaires juridiques fournit en tant que de besoin son expertise dans le cadre de ce processus grâce à sa connaissance des pratiques communautaires et de la jurisprudence de la Cour de Justice. Ainsi, le droit communautaire qu'il soit issu directement du droit primaire (traités) ou du droit dérivé (textes normatifs postérieurs), devient une composante essentielle de l'ordre juridique interne. Il est pris en compte par les juridictions nationales qui l’appliquent au même titre que le droit national.

La Direction des affaires juridiques est l’avocat du contentieux international de la France, ce qui conduit le Directeur des affaires juridiques et ses collaborateurs à être les agents du gouvernement français devant la Cour de Justice des Communautés européennes. Dans ce cadre, ils assurent le suivi des affaires contentieuses portées devant la juridiction suprême de bout en bout, qu’il s’agisse de la phase écrite, de la plaidoirie ou des réponses aux questions posées par la Cour. Le rôle qu’ils jouent est variable selon la fonction que remplit la Cour dans le recours à l’occasion duquel ils sont amenés à intervenir. La Cour peut en effet remplir des fonctions qui s’apparentent à la justice constitutionnelle, à la justice internationale, à la justice administrative ou à une justice régulatrice.

Les traités ont défini un équilibre institutionnel global, en confiant aux États membres et aux institutions de la Communauté des pouvoirs de décision dans des domaines précis de compétences, dont la Cour de Justice est la gardienne. La Cour saisie par un État ou une des institutions, peut être ainsi invitée à sanctionner la violation des compétences respectives des uns ou des autres. Cette tâche est exercée par le biais du recours en annulation ou, de façon exceptionnelle, du recours en carence voire à travers les avis que la Cour de Justice des Communautés européennes peut être amenée à donner conformément à l'article 228 du Traité instituant les
Communautés européennes (Traité CE). De même chaque État membre dispose, en vertu de l'article 170 du Traité, de la possibilité de faire trancher par la Cour les différends qui l'opposent à ses partenaires à propos de l'application ou de l'interprétation du droit communautaire. Toutefois l'utilisation de cette procédure est, dans la pratique, exceptionnelle, les États membres préférant inciter la Commission à instruire une procédure en manquement qu'agir directement contre un de leurs partenaires.

Quand elle est saisie de ce type de contentieux, ce qui est peu fréquent mais pas exceptionnel, l'action de la Cour s'apparente à celle d'un juge constitutionnel ou d'un juge international et le rôle du service juridique est assez proche de celui qu'il joue devant la Cour internationale de Justice. Les instruments et le contenu du débat sont proches de ceux dont se nourrit le droit international public et les enjeux sont comparables. Le débat est d'autant plus délicat quand la Commission, gardienne des Traités poursuit un État pour manquement à ses obligations communautaires sur la base de l'article 169 du Traité CE, ce qui est fréquent, que celle-ci peut depuis l'entrée en vigueur des nouvelles dispositions de l'article 171 demander à la Cour de prononcer une condamnation financière se traduisant notamment par des astreintes journalières d'un niveau conséquent (de 70000 F à 4,17 MF pour la France, par exemple, selon la gravité de l'infraction). Dans ce cas le Directeur et ses collaborateurs doivent s'efforcer de démontrer que l'ordre juridique interne est en fait conforme à celui qui est issu de la volonté du législateur européen et leur rôle s'apparente à celui d'un Cabinet d'avocats internationaux spécialisé en droit comparé.

La Cour a également pour fonction de protéger les divers sujets de droit et plus particulièrement les opérateurs économiques, contre les agissements illégaux ou dommageables des institutions communautaires ou des États membres. Cette fonction s'apparente beaucoup à celle du juge administratif en France qui l'a inspirée comme en témoigne la liste des moyens qui peuvent être invoqués à l'appui d'un recours en annulation. L'agent peut, dans ce genre d'affaire, se trouver aussi bien en position de partie requérante, qu'en position de partie défenderesse, lorsque la France intervient au soutien du Conseil, de la Commission ou d'un autre État membre. Les affaires

12 Voir note de bas de page n°. 4 ci-dessus.
en cause sont très variées mais revêtent le plus souvent un caractère très concret et lié à des activités économiques ou à des questions portant sur les droits des personnes.

Il convient de souligner que chaque gouvernement d’un État membre peut choisir d’intervenir dans une affaire portée devant la Cour afin de faire valoir son point de vue sur des questions de droit ou de fait qui lui paraissent importantes. Un tel choix vise essentiellement à pouvoir influencer la jurisprudence de la Cour dans un sens conforme à ses vues même si des intérêts matériels nationaux ne sont pas directement en cause dans l’affaire où il intervient. Le droit communautaire se prête à ce dialogue devant le juge car les normes communautaires présentent souvent certaines marges d’imprécision qui reflètent les difficultés de la mise au point de la norme juridique en cause au sein du Conseil, notamment lorsque l’unanimité des Etats membres devait être réunie lors de la négociation. En outre l’adaptation de celle-ci à la situation concrète de chaque État membre peut poser des réelles difficultés qui ont été estimées par le législateur communautaire. Il revient donc assez souvent au juge de procéder à des ajustements ou à des clarifications qui le placent parfois dans la situation de législateur secondaire. Dans un tel contexte le rôle de l’agent d’un gouvernement est indispensable afin de faire valoir le système de droit qu’il défend ou tout simplement les intérêts nationaux de l’État qu’il représente.

Il en est de même quand la Cour est amenée à remplir la fonction d’un juge régulateur chargé de garantir l’interprétation uniforme du droit communautaire par le jeu du renvoi préjudiciel à l’initiative d’un tribunal national en application de l’article 177 du Traité C.E. En pratique, il s’agit d’un mécanisme original de collaboration de juge à juge qui consiste pour un juge national, confronté, à l’occasion d’un litige dont il est saisi, à une difficulté d’interprétation d’une disposition communautaire, d’interroger la Cour par la voie d’une question préjudicielle sur l’interprétation qu’il convient de donner à cette disposition ainsi que, le cas échéant, sur sa validité. Il revient alors à la Cour de donner l’interprétation du droit communautaire qui doit prévaloir dans l’ensemble des États membres après avoir entendu les représentants des parties et tous les États qui ont souhaité s’exprimer. Ce type de recours se développe sans cesse du fait de l’applicabilité directe de nombreuses normes communautaires et de l’étendue du champ couvert par la législation communautaire. Les deux tiers des affaires dans lesquelles les agents
français sont présents soit environ 150 sur 220 affaires par an portent sur des questions préjudicielles.

Ces agents interviennent chaque fois qu'une question est posée par un tribunal français puisque le droit interne où une pratique administrative sont en cause, cependant une "veille juridique" est assurée à l'égard de l'ensemble des questions posées par les tribunaux des autres États membres. En effet, la possibilité d'intervenir dans le débat ouvert sur l'interprétation de telle ou telle disposition de droit communautaire peut fournir l'occasion de reprendre les discussions qui s'étaient déroulées au moment de l'adoption de la mesure au sein du Conseil dans un contexte bien différent et souvent plus concret. A cette occasion ils peuvent faire valoir leur propre interprétation des dispositions en cause voire suggérer que la question soit reformulée pour faire trancher un point de droit important sinon même conduire la Cour à annuler la norme mise en cause. Cela suppose que les autres administrations aient été auparavant convaincues de l'utilité d'intervenir sur telle ou telle affaire et surtout que des arguments substantiels aient été trouvés afin de convaincre les juges. Ceci conduit la France à être très présente devant la Cour de Justice des Communautés européennes où elle est l'État qui s'exprime le plus souvent après la Commission, qui intervient systématiquement dans tous les contentieux.

L'agent du gouvernement français peut donc se trouver un jour en position de défendre les droits des producteurs de foie gras ou bien de champagne mais aussi un autre jour ceux des travailleurs frontaliers en matière de remboursement des montures de lunettes ou de pension de retraite. C'est dire qu'il se trouvera dans la situation d'un avocat intervenant dans des matières techniques voire, parfois particulières, d'un avocat d'affaires. Ainsi dans les dossiers d'aides d'état ou de concurrence, défendus devant le Tribunal de première instance, il est amené à intervenir sur des dossiers concernant de grandes entreprises, en liaison avec les cabinets d'avocat de celles-ci, sur des aspects financiers ou fiscaux souvent complexes.

On voit que le rôle de conseil des administrations et d'intervenant au contentieux sont étroitement liés en matière communautaire où normes et décisions sont exposées en permanence à un examen détaillé du juge. L'influence qu'un État membre peut exercer sur les normes communautaires qui lui sont applicables dépend, à l'évidence, du savoir-faire de ses négociateurs mais aussi de
la rigueur et de la pugnacité dont ses juristes sont susceptibles ensuite de faire preuve. L'ordre juridique communautaire est le produit de ce patient travail qui associe négociation et interprétation. Chaque État de l'Union européenne a adopté son propre mode d'organisation juridique pour participer à ce travail; le dispositif français qui associe étroitement conseil et monopole de l'action contentieuse devant les juridictions internationales présente l'avantage de confier aux mêmes agents les affaires de bout en bout et il a fait ses preuves. Le Directeur des affaires juridiques a ainsi la responsabilité d'animer deux équipes engagées dans des tâches juridiques européennes distinctes mais proches dans l'esprit qui les anime.

Les systèmes européens ont-ils valeur d'exemple et de précédent pour les autres régions voire pour des régimes universels dans le cadre des Nations Unies? Les responsables des affaires juridiques sont-ils promis à s'engager eux aussi dans un travail complexe d'intégration de sources de droit externe dans leur droit national et d'influence patiente sur la constitution de ce droit externe ?

Il est difficile d'extrapoler des expériences nées dans un contexte particulier. Force est cependant de constater que les mécanismes prévus dans le cadre de la Cour européenne des droits de l'homme et des traités communautaires ne sont pas sans parallèles dans le domaine des conventions conclues dans le cadre des Nations Unies. Ainsi les grands textes des Nations Unies en matière de droits de l'homme (Pacte international relatif aux droits civils et politiques, Convention contre la torture, Convention internationale sur l'élimination de toutes les formes de discrimination raciale) sont-ils sensés inspirer la législation nationale des signataires et prévoient-ils l'intervention possible d'un organe international une fois les voies de recours nationales épuisées.
I. Introduction

On the occasion of the fortieth anniversary of the Asian-African Legal Consultative Committee (AALCC), I have been asked to contribute an article relating to the meetings of legal advisers which have been held in connection with the work of the Sixth (Legal) Committee of the United Nations General Assembly since 1990, and of which I was one of the initiators. Although in my present capacity I have no other function in relation to these meetings than to make certain that the necessary practical arrangements are made, I accepted the invitation and agreed to offer also some reflections on the role the legal adviser based on my personal experiences as legal adviser in my own country.

It should be emphasized that the role of the legal adviser is multifaceted and that there may be different opinions on how to serve in this capacity in the most competent and efficient manner. Needless to say, my years in the judiciary and the Ministry of Justice before I joined the Ministry of Foreign Affairs in 1984 have also influenced my thoughts as well as the fact that my experience is rooted in a particular legal system. I am, however, convinced that the differences between legal systems are often exaggerated, especially if you focus on one of the core elements of what is commonly referred to as the rule of law: "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". The common

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2 The invitation to the first meeting in 1990 was signed by Hans Corell (Sweden), Edward G. Lee (Canada), Janusz Mickiewicz (Poland), Prakash Shah (India) and Alberto Székely (Mexico). In Canada the initiative has been taken over by Barry Mawhinney and later by Phillipe Kirsch, in India by P. S. Rao, in Mexico by Miguel Angel González Félix, in Poland by Janusz Stanczyk and in Sweden by Lars Magnuson.

3 Article 1, paragraph 3, of the Charter of the United Nations.
denominators of the different legal systems should therefore be emphasized rather than the differences, in particular in the instances where those denominators can be identified in international law.

It should also be noted at the outset that the term “legal adviser” in this context has the same meaning as was indicated in the invitation to the meetings, namely, “the person who is responsible for international legal matters within the Ministry of Foreign Affairs and for formulating instructions to the representatives of his or her country in the Sixth Committee of the General Assembly or for supervising this activity”.

II. The Legal Advisers’ Meetings

The first meeting of legal advisers in connection with the work of the Sixth Committee of the United Nations General Assembly was held on 29 and 30 October 1990. The initiative sprung from a common concern among certain colleagues that the working methods of the Sixth Committee in dealing with the report of the International Law Commission (ILC) were not appropriate. The question was how to improve these working methods in such a way that the Committee could assume its proper role: to provide clear policy guidance to the ILC and not, as was often the case, to discuss draft articles piecemeal. It was also felt that the legal advisers of the Ministries of Foreign Affairs around the world should have many interests in common and that meetings among them could be fruitful. It was noted at the time that such meetings often took place at the regional level (Council of Europe, North Atlantic Treaty Organization (NATO), European Union and AALCC).

The initiative to convene the first meeting was taken by the legal advisers of the Ministries of Foreign Affairs of Canada, India, Mexico, Poland and Sweden, and it was organized with the assistance of the then Legal Counsel of the United Nations, Under-Secretary-General Carl August Fleischhauer. Subsequently, eight additional meetings have been held in the period from 1991 to 1998. The tenth meeting is planned for November 1999. Short reports of the meetings have been circulated among colleagues, and also appear in an abbreviated form in international legal journals.3

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The meetings have been well attended. As many as 40 to 50 legal advisers or their deputies have been present, in addition to many lawyers from the permanent missions in New York. The meetings have been held in conference room 5 which has been filled to the last seat, at least during the first afternoon (see below).

Many topics have been discussed. During the first meetings, the focus was on the role of the legal adviser. Other topics discussed were: the future work of the ILC; legal aspects of the increased role of the Security Council in matters of peace and security; other areas of international law and practice, such as international environmental law and international humanitarian law; the draft statute for the international criminal court proposed by the ILC; Security Council resolutions on sanctions; and the desirability of the proposed third Hague Peace Conference in 1999.

Particular focus was given to the role of legal advisers in relation to the Sixth Committee and the ILC. It was agreed that the meetings of the legal advisers should certainly not compete with the debate in the Sixth Committee. On the contrary, it was agreed that the legal advisers form part of that Committee as and when they participate in their national delegations to the Committee. It was considered important that the meetings of the legal advisers remain informal with no fixed agenda and that decisions on what matters should be discussed are made at the beginning of each meeting. No delegation is excluded from the meetings which are announced in the Journal of the United Nations under the title: "Informal Consultations on Legal Matters pending before the ... session of the General Assembly". It was also considered important that the dates of the legal advisers' meetings always coincide with the target date fixed for the beginning of the debate on the report of the ILC, which date appears in one of the last paragraphs of the General Assembly resolution on this agenda item.

The legal advisers' meeting normally takes place in the afternoons of the first and second days of that debate.

In some cases the discussion has led to a recommendation that an initiative should be taken. For example, it has been suggested that the growing powers of the Security Council, translated into resolutions with national legislative implications, have created more legal and administrative work for legal advisers. It has been further suggested that it would be very useful to produce a comparative compilation of national measures relating to the implementation of Security Council resolutions. It remains to be seen whether such a compilation will be made. Of particular concern in this context is the fact that many Governments have not yet taken the necessary legislative action to implement the resolutions establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda.

The overall impression of the meetings is that they have been successful. It is recognized that there is a value per se of meeting with colleagues with similar responsibilities. Furthermore, legal advisers often work in a certain solitude and might feel the need to share common concerns with someone in a similar position. The meetings also provide opportunities for legal advisers to resolve bilateral issues.

In this context, I should like to concentrate on one particular topic which was discussed during the first three meetings: the role of the legal adviser.

III. The Discussions on the Role of the Legal Adviser Held in 1990-1992

The first three meetings, and in particular the second and third meetings, of the legal advisers in 1990-1992, were devoted to a discussion on the role of the legal adviser. This topic had been discussed in other fora earlier and there were also those who had contributed writings on the topic. In this context, it is of particular

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interest to note that the AALCC made an analytical study of the topic for discussion in 1973. The discussion took place on two occasions, the latest being in 1978. There is now an established practice for legal advisers of members of the AALCC to meet in New York during the General Assembly.

Between the second and third meetings, a questionnaire was circulated and the discussion centred on some of the replies to that questionnaire. During the discussion, it was noted that legal advisers could assume an “active” or “passive” role. Those who participated in the debate agreed that a legal adviser must play an active role and should be involved in a matter as early as possible, which means that the legal adviser should be present when important political issues are discussed within the Ministry of Foreign Affairs or in higher level fora. In this way, he or she is in a better position to assess whether there are any legal problems that need attention. The interaction with policymakers was stressed. It was also noted that the legal adviser could be seen as a law maker in the instances in which he or she formulated advice where the law was unclear and there was little precedent. It was said that the legal adviser’s function is also part of the policy-formulation process. Therefore, it is necessary that the legal adviser participates actively and continuously in this process. The right of direct

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access to the Minister of Foreign Affairs was stressed by many, both during the discussions and in the answers to the questionnaire. Almost all legal advisers who participated in the discussions and replied to the questionnaire appeared to have such direct access. Because of the sensitivity of the role of the legal adviser, the issue of the personalities of the Minister and the legal adviser was also mentioned. The legal adviser must have the confidence of the Minister and also the opportunity of working closely with the Minister and other senior functionaries of the Ministry of Foreign Affairs and the Government at large.

One conclusion drawn from the discussion (which was not always evident from the answers to the questionnaire) was that it is necessary to maintain an institution, with sufficient personnel and other support, within the Ministry of Foreign Affairs charged with the functions of a Legal Department. The functions of such a department were described as monitoring international meetings, performing work related to the codification and progressive development of international law, providing legal advice and advocacy, engaging in treaty negotiation and administration, and organizing the settlement of international disputes.

Other matters discussed in relation to the role of the legal adviser included their role in relation to the United Nations Decade of International Law; enhancing the role of the legal adviser; supporting new regional cooperation; providing technical assistance to colleagues in new States and in some developing countries; initiating or encouraging development aid to fund university courses for legal officers from developing countries; and exchanging legal officers between legal departments.

Many examples were given of regional cooperation among legal advisers. Participants from areas where such regional cooperation did not occur expressed interest in organizing or participating in such cooperation.

Of particular importance was the fact that many colleagues from developing countries and newly independent States had the opportunity to share their experiences with the other participants. These colleagues made it clear that they often worked under great difficulties: no proper legal office, too small a staff, unexpected events upsetting work schedules, insufficient library facilities, etc. In this context it was
mentioned that a "pocket library" for legal advisers was being contemplated (see the "Basic Library" below).

During the 1992 meeting, the future meetings of legal advisers were discussed. It was pointed out by the initiators that there were two prerequisites for such meetings to be successful. First, the meetings should be informal and the participants should primarily be the legal advisers from capitals. Secondly, the underlying motive for these meetings should be not only to provide a forum where legal advisers can meet and exchange views, but also an incentive for legal advisers to come to New York to participate in the debate of the Sixth Committee.

IV. Reflections on the Role of the Legal Adviser

As was shown in the previous section, the role of the legal adviser on public international law has been the subject of an interesting discussion for some time. Comprehensive studies have been made, and some colleagues have contributed ideas on the topic based on their own experience. In this connection, I wish to share with you some thoughts which have come to my mind, partly as a result of the many interesting discussions which I have had with colleagues from all around the world.

At the outset, it is important to note that the tasks of the legal advisers of Ministries of Foreign Affairs differ from State to State. In many instances, the legal adviser is precisely that -- an adviser. In other cases, he or she is also the head of the Legal Department or similar entity within the Ministry. In this latter capacity, the legal adviser also performs an executive/administrative function similar to the one performed by other high-level officers in the Government. He or she has to apply regulations and rules and make a number of decisions, often final decisions, but perhaps subject to judicial appeal. The tasks may also include the preparation of decisions to be taken at a higher level, in particular at the Cabinet level. The legal adviser's role as head of department naturally differs depending on the legal system of the country in question, but basically the function is very much the same.

If a legal adviser is entrusted with the function just mentioned, he or she is also automatically charged with the administrative duties which fall upon every head of department. In short, the legal adviser is also a "manager", even if many colleagues might not like to identify themselves as such. The workload, of course, depends on the size of the office or department in question. Experience shows that the administrative functions, in which I also include the planning and
monitoring of the work of the office or department, may be quite substantial, which might detract from the legal adviser's ability to engage in detail in the substantive work of the department. However, "management" has become an integral part of the responsibilities of any higher official, and today a person to be appointed head of department in any major organization -- public or private -- must certainly demonstrate ability in this field.

Another feature of the role of the legal adviser relates to representing his or her country before national or international bodies. In this capacity the adviser is, just like any representative, subject to the directions which he or she may be given by the Government. Of particular interest here is the role which the legal adviser may play before institutions, such as the International Court of Justice, other international courts and the control mechanisms established by certain international conventions, such as the committees provided for in the International Covenant on Civil and Political Rights of 1966, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. In many instances, the legal adviser is appointed as the head of the delegation to the Sixth Committee of the United Nations General Assembly, or to an international diplomatic conference or an entity established within an international organization or other arrangement. Also here, the legal adviser is acting upon instructions from his or her Government and is requested to report to the Minister or some other superior within the Ministry, although it can be assumed that the adviser may be authorized to act rather independently, in particular in the legal-technical field.

The functions indicated above are similar to functions which can be assigned to other government officials. The adviser acts in such capacity independently or under instructions from the Government. Certainly, the adviser's background and experience, as well as the legal tradition on of the country in question will determine to what extent his

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8 In this context, it is interesting to note that the Conference on Security and Cooperation in Europe set up the 1975 Helsinki Final Act. European Yearbook, 1975, (The Hague, Martinus Nijhoff, 1977), vol. XXIII, p. 211. In spite of the fact that the name of the conference has been changed to the Organization for Security and Cooperation in Europe (OSCE), the Organization is still a political process rather than a legal entity under international law. The OSCE is considered to be a "regional arrangement" under Chapter VIII of the Charter of the United Nations and has engaged in substantial legal work, including the elaboration of the European Convention on Peaceful Settlement of Disputes, United Nations, Treaty Series, vol. 320, p. 243.
or her services will be used for such tasks. In many cases, all these tasks will be common to legal advisers, but not in all cases.

Common to all colleagues is the role of the legal adviser as counsel. This function was also the focus of our discussions during the first meetings of legal advisers in New York. Of particular interest was the discussion on how the legal adviser to the Ministry of Foreign Affairs should be able to fulfil his or her function. The most important conclusions that I draw from that discussion are that the adviser should:

- Be present when important political issues are discussed within the Ministry;
- Be asked at an appropriate time to give advice and be able to give timely and constructive advice;
- Play an active role and take initiatives as necessary;
- Focus on significant issues;
- Have direct access to and the confidence of the Minister for Foreign Affairs and be given the opportunity to work closely with the Minister and other senior officials of the Ministry and the Government.

One particular aspect which became clear during the meetings of legal advisers is that many colleagues in developing countries do not have access to a sufficiently modern library to support them in their work. This led to an initiative which is presently being pursued by the International Law Association (ILA) with financial support from one of the Member States of the United Nations: a “Basic Library” for legal advisers. A Selection Committee within the ILA has drawn up a list of books which will be used as the basis for the purchase of a small standard library (in English and French) to be distributed free of charge to colleagues most in need of such support. The list has been approved in principle by the Executive Council of the ILA and negotiations are under way with publishers to obtain multiple copies for distribution at a reasonable discount. Once the list has been finalized it will be given

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9 The Selection Committee consisted of Judges Ranjeva and Shahabuddeen of the International Court of Justice, Professor Catherine Kessedjian (French Branch), Professor Peter Malanczuk (Dutch Branch) and Professor Georg Resse (German Branch), with the Director of Studies, Professor James Crawford, as Convenor.

10 Correspondence about the Basic Library project should be addressed to
broad publicity, including those on the legal advisers list (see below). Colleagues who are not eligible for a Basic Library might nonetheless find the list of literature useful. The Legal Department of the International Committee of the Red Cross will donate a set of books on the Geneva Conventions and related subjects to the same recipients.\footnote{American Journal of International Law, vol. 87, No. 2 (1993), p. 325.}

An important aspect of the role of the legal adviser is his or her duty to follow attentively the development of public international law. This development takes place in many forums and it is not always easy to get a full picture of the state of affairs in a particular field, and to some extent there are overlaps. A special problem emerges from the fact that there are many organizations that are active at the international level and that Governments are represented in these organizations by officials from different ministries or branches of the Government. This may be due to the fact that substantive responsibility for the subject matter in question may rest with a ministry other than the Ministry of Foreign Affairs. As a matter of fact, in many, perhaps most countries, the substantive responsibility for matters subject to international negotiations and treaty making rests not with the Ministry of Foreign Affairs, but with another branch of the Government (although, often officials from the Ministry of Foreign Affairs participate in the work at the international level because of their international experience). This means that there is a great need for coordination between different ministries or other entities in order to achieve a coherent policy -- to speak with one voice at the international level. In this context, the legal adviser of the Ministry of Foreign Affairs could play a coordinating role by bringing important aspects of a common character to the attention of colleagues or other appropriate interlocutors in other ministries.

Of particular interest is the clear link between the work of the Sixth Committee of the United Nations General Assembly -- mostly followed by representatives from Ministries of Foreign Affairs -- and the substantive responsibility of other ministries at the national level, in particular Ministries of Justice. This has led to the trend that delegations of Member States to the Sixth Committee and its subcommittees may also include representatives from other ministries. But this is a “luxury” that not all Member States can afford. In these instances, it is all the more important that the legal adviser of the Ministry of Foreign Affairs keeps his or her counterparts in other ministries abreast of

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developments. The adoption of an international instrument may ultimately lead to incorporation or transformation at the national level and it may be a body other than the Ministry of Foreign Affairs that must prepare the necessary proposals for the national diet for the purpose of ratification or accession. In my view, the legal adviser of the Ministry of Foreign Affairs can act as an important link between the work at the international level and the work within the different branches of the Government at the national level.

A related issue concerns the monitoring of already existing obligations under international law. Let me take human rights as an example. By now, an extensive body of international law exists in this field, which is based on the Universal Declaration of Human Rights\textsuperscript{12} and the International Covenant on Civil and Political Rights. Corresponding obligations also flow from instruments elaborated at the regional level.\textsuperscript{13} These instruments are widely accepted, which means that the States Members of the United Nations are, more often than not, bound by international obligations in this field. A common feature of these instruments is that they are dynamic in the sense that they have to be applied in the light of recent developments, in particular emerging features in the relations between peoples and their Governments, technical developments, etc. Another common feature is that the application of these instruments is monitored by bodies -- courts, commissions or committees -- established by the instruments themselves. This has resulted in the development of a growing case law which serves as a complementary factor in the interpretation of the instruments.

As a consequence, legislative work at the national level has become increasingly complex. Not only is it necessary for the national legislator to ascertain that the legislation contemplated is within the bounds established by the national constitution, it is also necessary to confirm that it is in conformity with international obligations flowing from treaties and the case law of the bodies established to monitor them. In this intersection of national and international law, the legal adviser of the Ministry of Foreign Affairs can play an important role, \textit{inter alia}, by assisting in the preparation of the draft national legislation or in reviewing such drafts or, as the case may be, drawing attention to

\textsuperscript{12} General Assembly resolution 217A (III).

particular international commitments which may limit the freedom of action of the national legislator. It is true that such assistance can sometimes be seen by others as “causing legal complications”. But if States take their international commitments seriously, they should avoid getting into situations where discrepancies are discovered at a later stage and where the damage may already have occurred.

The same observation could, of course, be made with respect to other fields of international law. However, in cases other than those involving human rights, knowledge concerning international obligations is probably better in the substantive ministries. The field of human rights, with its clear links to constitutional law, is different and requires more of an overview and general understanding of how national and international law interact. The legal adviser of the Ministry of Foreign Affairs has an important role to play here.

In this context, it should also be mentioned that many international conventions in the field of human rights require that States parties submit periodic reports for review by a committee established by the convention in question. The preparation of such reports is often a major undertaking, involving many ministries or branches of the Government. Also here, the legal adviser of the Ministry of Foreign Affairs should play an important role as adviser and coordinator. Experience shows that it may not always be easy to extract the necessary contributions from those involved, who may have other priorities in their busy schedules. The legal adviser should impress upon those participating the importance of timely reporting, and he or she could also appear before the committee to explain details of the report and respond to questions. It should be noted that the comments by the committee may also entail additional work at the national level, including the preparation of new legislation.

One feature of the role of the legal adviser of the Ministry of Foreign Affairs which was briefly touched upon in the discussions is the question whether he or she should be “active” or “passive”. In my view, the adviser should be active, take initiatives and alert the Minister of Foreign Affairs to matters which may create problems if they are not attended to properly and in a timely manner. However, this is a delicate matter, in particular since advice may entail drawing attention to international commitments which in one way or another may limit the Government’s or the Minister’s freedom of action; and, by definition, Heads of Government and Ministers do not favour being advised that they cannot do as they please in a particular situation.
Therefore, this element of the function of the legal adviser requires special experience and tact. This is also why, in the discussions among the legal advisers in October 1992, the view was expressed that the legal adviser must have the confidence of the Minister of Foreign Affairs and that he or she must also have direct access to the Minister. An adviser who lacks both of these elements or even one of them will have great difficulties in performing his or her functions properly. The adviser should also have the ability of making his or her point in no uncertain terms. A Government or a Minister is ill served by an adviser who acts meekly or expresses opportunistic views. But at the same time, the adviser must never forget that he or she is precisely an adviser. The decision always rests — and should always rest — with the Government and/or the Minister. When that decision is taken, it must be fully respected and loyally executed. I disregard here a situation which hopefully should not occur, namely, that the decision taken is in clear violation of obligations under international law and where the matter is so serious that the legal adviser might have to reconsider rendering further services to the Government.

A related question is at what stage in the decision-making process legal advice should be sought. In some instances it might be tempting to the Minister, faced with a problem, to turn to the legal adviser and ask him or her to present a suitable solution. This may be appropriate, if the problem is of a purely legal nature. However, more often than not, the question is likely to have many aspects, not the least of which political aspects. In such situations, the legal adviser should not be asked to provide the solution. Rather, he or she should be approached when there is an understanding at the political level of how the problem should be solved: “This is what we have in mind. Is it possible to go ahead from a legal point of view?” If the solution is in accordance with the law, the legal adviser should say so and leave the matter as it is. If not, the legal adviser should attempt to find a solution along the lines contemplated but acceptable from a legal point of view. A simple negative reply always risks creating the impression that the legal adviser is a person who tends to find problems and is, in general, not very helpful; as a consequence, this may lead to a tendency not to involve him or her in the decision making. It is therefore important for the legal adviser to make a positive contribution to the policy-formation process by suggesting alternative approaches by which a particular policy objective can be reached. In this regard, the legal adviser should provide continuity and demonstrate creativity.
It is sometimes said that the role of the legal adviser should always be to find a legal justification for whatever action the Government intends to take. Some suggest that international law is often vague and allows great leeway for government actions. To this it could be added that it is true that international law is not always clear and that the scope of the international commitment is not always readily apparent. On the other hand, in many concrete cases -- in particular in the field of human rights and humanitarian law -- the meaning of the law is very clear indeed. Consequently, whatever the reason for a request from the Government to justify actions that are dubious or in violation of these important elements of international law, the legal adviser should not lend him/herself to legal hair-splitting, but make a clear distinction between what is permitted and what is not. There is, of course, sometimes room for different views as to the meaning of the law and, no doubt, it is possible to find also among colleagues different opinions on one and the same question. But, in the situations referred to in this particular context, the distinction ought to be quite clear. It is also important to remember that the decision ultimately taken must stand the test of international scrutiny, in particular the scrutiny of a growing community of international lawyers who follow State actions with great attention and who may also influence their own Governments to take action against States who are perceived as violating international law.

A particularly difficult situation occurs when the decision taken by the Government is contrary to the advice of the legal adviser. He or she might not be in a position to disclose the contents of the advice, and in many cases the advice should not be disclosed. No doubt, there are colleagues who observe with regret the way in which their Governments sometimes act. In such cases, it is not fair to direct criticism against the legal adviser; as we have just concluded, he or she is not the decision maker. Furthermore, a demonstration on the part of the legal adviser, e.g. a resignation, may not be feasible or even desirable from a legal point of view; the likelihood is that the replacement may be someone who shows more "flexibility">

The role of the legal adviser can sometimes be very difficult and one should be careful not to draw too hasty conclusions about the way in which colleagues render their important services to their respective Governments.

V. Future Challenges -- Closer Cooperation
Public international law has undergone a dramatic development during the last few decades. Ever larger portions of this law have been codified either under the auspices of the United Nations or in other forums. This development has been described very expressively by Brian Urquhart and the late Erskine Childers:

"International law, only yesterday a seemingly quiet backwater in human affairs, is reaching into hitherto unimagined fields. The nations of the world have acceded to an unprecedented number of agreements in virtually all branches of human activity — from the ocean floor to the planet's climate to outer space — in only the last forty years. There has been a truly astonishing growth of public international law which will accelerate into the coming century. The pressing need for an international system based on law has never been so evident."

In addition, the tensions between the two major political blocks have ceased and given room to a growing realization that relations between States (as well as between States and peoples) must be governed by law and that the disputes that inevitably occur must be settled by peaceful means. Therefore, among the many challenges that he ahead for the international community is the establishment of a more prominent legal regime at the international level, a regime accepted and defended by the many actors that appear at this level, and in particular by sovereign States. Imagine if the international law that exists today was really observed by all States!

In this context, it is interesting to note the recent developments in the field of international criminal law with the establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993 and for Rwanda in 1994, the completion of the draft Code of Crimes against the Peace and Security of Mankind in 1996 and the adoption of the Rome Statute of the International Criminal Court in 1998. Another effort to strengthen the rule of law at the international level is the adoption of the United Nations Convention on the Law of the Sea and the establishment of the International Tribunal for the Law of the Sea.

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These are examples of efforts to not only create international legal obligations for States and other entities concerned, but also to establish international mechanisms to make certain that these obligations are respected.

Against this background, it is fair to assume that international law will be an increasingly important element in the decision-making process of Governments in the future. Correspondingly, it is fair to assume that the role of the legal adviser will gradually grow in importance. Legal services will be more in demand in bilateral matters, in particular with respect to dispute settlement. With the likelihood that disputes might be settled by judicial means or by arbitration, States must act with more prudence so as not to risk being on the losing side if a dispute should occur. But also the growing multilateral interaction between States will mean that there is an increased need to cover the legal aspects of this activity. Furthermore, the growing tendency of States to accept international control over their application of treaties in the field of human rights will require a higher level of legal preparedness at the national level. Another element is the rising awareness of the necessity to define the rights of minorities and to provide for their protection. Migration and environmental issues will require close legal observation. A growing number of active non-governmental organizations, often very well informed and with great expertise in international law, will demand and must be given more attention. In short, there is a very important role for the legal adviser in the future. With some hesitation, I decided to attach a tentative description of a legal adviser's responsibilities (see annex).

In many States with a well-developed tradition in this area, the future will probably mean that the function of the legal adviser will be consolidated and, when necessary, strengthened. For newly independent States and developing countries, the situation may require more determined action. As already mentioned, many colleagues in those countries work under very difficult circumstances and with scarce resources. Therefore, they need all the support they can get. Direct support is, of course, difficult to arrange other than through allocation of the necessary resources at the national level, which is a matter for the national authorities. However, support can also be given in other forms.

One such form of support is the cooperation between legal advisers at the international level. It is against this background that the legal advisers' meetings held in conjunction with those of the Sixth Committee of the United Nations should be seen. One of the main
purposes of these meetings is to provide an informal forum in which colleagues from all over the world can meet and exchange views on matters of common interest. Whether and in what form these meetings will continue in the future is for the legal advisers themselves to decide. Unfortunately, the resources available for this kind of cooperation vary greatly in different countries. Of particular concern is that too many colleagues from newly independent States and developing countries lack the necessary financial resources to participate as well as to attend the meetings of the Sixth Committee during the debate under the agenda item entitled "Report of the International Law Commission".

In order to facilitate cooperation among legal advisers, the Legal Counsel of the United Nations, on a personal basis, now maintains a list of names and addresses of legal advisers worldwide. The list is updated and disseminated at the legal advisers' meetings in New York and also circulated shortly thereafter via the permanent missions to the United Nations in New York. It is appreciated if changes to the list are communicated promptly.

Irrespective of how the cooperation between the legal advisers will be organized in the future, it is important to note that such cooperation is of great importance and will greatly enhance the common understanding of the special demands that fall upon those who are responsible for the function at the national level. Therefore, it is to be hoped that there will be more opportunities for colleagues, and in particular colleagues from newly independent States and developing countries, to participate more actively. It may be that the States that the legal advisers serve have different interests at times, and certainly the legal advisers will be called upon to represent their countries in disputes with other States. But this is no reason why legal advisers should not cooperate as professionals. Moreover, it should be to the advantage of States to be served by legal advisers who communicate on the same wavelength and who serve with competence and integrity.

The idea of promoting cooperation between legal advisers on matters of public international law can very well be summarized by quoting a few lines from a letter sent by the initiators of the 1991 meeting in New York to their colleagues:

"As initiators of the Legal Advisers' meeting, we think that the exercise in which we are engaged at present is of great importance. In a changing world where the Cold War is over and where law will have
an increasing importance in the relations between States, the responsibilities of the Legal Departments of the Ministries of Foreign Affairs will have an even more significant role to play -- directly or in a coordinating capacity. We should prepare ourselves for this.

We should also bear in mind that there are constant changes in our circle. Colleagues are retiring or taking up other posts -- others succeed them. It is therefore important that we achieve something together which can be passed on to assist our successors. We therefore hope that as many of you as possible will contribute to our common endeavour; by ... participating in our discussion or otherwise. In this way we can learn from each other and -- to quote one of the participants -- develop our professional integrity as lawyers. We should not underestimate the importance of Legal Departments all around the world, led by persons with a common understanding about their role and with a feeling of collegiality.16

Finally, as mentioned above, one important function that a legal adviser should perform is to provide continuity with respect to decision making in matters that concern international law. Another aspect of this continuity should be to inform successors about the international cooperation among legal advisers and the results of our common efforts. Therefore, whenever a legal adviser leaves his or her position, he or she should hand over to the successor all the information gained through his or her cooperation with other legal advisers worldwide.

A Tentative Description of a Legal Adviser's Responsibilities

As has been pointed out at the outset, the role of the legal adviser is multifaceted. There may be different opinions on how to serve in this capacity in the most competent and efficient manner. It was therefore with some hesitation that I embarked upon the present description. Its purpose is certainly not to suggest that the legal adviser must necessarily engage in all of the matters on the list. On the other hand, I am convinced that there are colleagues who would provide a different and more extensive description if they were asked to prepare one. Nonetheless, there might be colleagues who will find the description useful. Therefore, the description should be seen as "food for thought" rather than as a model.

1. Providing legal advice to the Minister of Foreign Affairs and to the Ministry:
   a) Participate in intra-ministerial meetings,
   b) Follow the development of international law,
   c) Follow international political developments on a day-to-day basis,
   d) Prepare oral or written advice as appropriate,
   e) Alert the Minister to important legal issues and
   f) Coordinate with appropriate officers in the Ministry of Foreign Affairs and other Ministries.

2. Codification and progressive development of international law:
   a) Coordinate with other Ministries in determining the position of the Government in negotiations in different international fora,
   b) Review texts of draft international conventions and other legal instruments,
   c) Formulate instructions for delegates participating in international negotiations and
   d) Participate as appropriate in such negotiations.

3. Treaty negotiations and administration:
   a) Provide advice to functional Ministries and departments on treaty law,
   b) Negotiate treaties that fall within the substantive responsibility of the Department of Legal Affairs and
c) Register treaties for national treaty collection and supervise the submission of bilateral treaties to the United Nations Secretariat for registration (Article 102 of the Charter).

4. Participation in international meetings:
   a) Act as head or member of delegations to organs of the United Nations General Assembly or other international bodies,
   b) Provide advice on United Nations law and practice,
   c) Participate, as appropriate, in meetings of regional organizations or arrangements and
   d) Provide advice concerning the competence of such organizations or arrangements.

5. Human rights:
   a) Provide advice on human rights requirements for the national legislative process,
   b) Prepare or coordinate the preparation of periodic reports under international conventions,
   c) Appear before committees established under such conventions,
   d) Appear before courts of human rights and
   e) Provide advice on how reports and judgments from such committees and courts should be executed.

6. Humanitarian law:
   a) Provide advice on the interpretation of conventions on humanitarian law and
   b) Assist the appropriate authorities in educating the military in humanitarian law (article 47 of the First, article 48 of the Second, article 127 of the Third, and article 144 of the Fourth Geneva Convention of 12 August 1949; and article 83, paragraph 1, of Additional Protocol I of 8 June 1977).17

7. Participation in the national legislative process:
a) Review draft legislation and
b) Assist colleagues in functional ministries in defining obligations under international law, in particular in the field of human rights.

8. Diplomatic and consular privileges and immunities:
a) Provide advice on the interpretation of the 1961 and 1963 Vienna Conventions and

9. Consular affairs:
a) Provide for protection of nationals abroad (functional duty or in an advisory function),
b) Provide advice on matters concerning the granting or refusal of passports and
c) Provide advice on other matters concerning assistance to nationals abroad.

10. Settlement of international disputes:
a) Provide advice on the legal ramifications of the dispute in question,
b) If requested, negotiate with a view to settling the dispute,
c) Make practical arrangements for establishing a panel of arbitrators or litigation,
d) Appear before the International Court of Justice and other international courts and


e) Appear before bodies established by human rights conventions (see above).

11. Investment protection:
   a) Negotiate agreements concerning investment protection and
   b) Assist nationals in the application of such agreements; jus protectionis.

12. Law of the sea:
   a) Provide advice on the implementation of the United Nations Convention on the Law of the Sea,
   b) Provide assistance in matters concerning maritime delimitation and
   c) Provide substantial support in relation to the International Tribunal for the Law of the Sea, the International Seabed Authority and the Commission on the Continental Shelf.

13. Boundaries:
   a) Provide advice on the application of treaties on boundary issues and
   b) Assist in revision of boundaries, in particular in recurring revisions required by bilateral treaties.

14. Environmental law:
   Provide advice on the interpretation of pollution conventions and other international rules on protection of the environment.

15. International legal assistance:
   Provide advice and practical assistance in matters concerning international legal cooperation (extradition, hearing of witnesses, etc.).

16. Assistance to national courts:
   a) Answer requests from national courts in cases concerning litigation between private parties and
   b) If necessary, issue certificates on matters where the Ministry of Foreign Affairs has a special expertise (whether a person is entitled to diplomatic status; extent of national jurisdiction in another country, etc.).
17. Head of a Legal Department (if this is the case):
   a) Manage and supervise the department,
   b) Interact with other heads of department in the Ministry of Foreign Affairs,
   c) Prepare budget requests and monitor expenditures and
   d) Provide for recruitment and promotion.
I. Introduction

Programmatic political documents have long been adopted not only in the form of treaties, but also as non-treaty arrangements. States want these arrangements to be taken seriously, even if they are done in a general language. 1 Karl Strupp suggested as early as 1934 that greater attention should be devoted to this field. 2 Since 1963 Wengler has several times considered the subject in depth. 3 As recently as 1995 he wrote: “what is involved in such agreements cannot be ascertained today from statements by the foreign office lawyers, nor has it really been explained in the literature”. 4 There is a study of a British legal adviser on this topic. 5 In Sinclair’s opinion it is a “challenging subject”, 6 because it takes us beyond the safe bounds of the legal sources canonized in Article 38 of the Statute of the International Court of Justice and leads us into difficult, highly controversial dogmatic terrain.

There is quite clearly an area in which States enter into commitments without concluding a formal treaty under international law. For these arrangements, which cover a broad area, I will use the working title “non-treaty agreements”, although I find the term “soft law” (attributed to [it is said to come from] McNair) very revealing precisely because it is a contradiction in terms.

1 Professor Dr. Hartmut Hillgenberg, until 1998 Legal Adviser of the Ministry of Foreign Affairs, Germany. The article contains personal views only.
II. Definition

This field should be differentiated from true gentlemen's agreements. These are personal pledges by officials, made, as it were, on pain of their reputation, but they are not binding on the officials' own States or, indeed, even on their successors in office. They concern personal, not government action. The literature makes reference to an early example of such an agreement, where Lord Salisbury accepts the Russian occupation of Georgia "à titre personnel". Rotter mentions the 1954 Moscow Memorandum on the Austrian State Treaty, at least as far as the pledge of the Austrian side is concerned. Heads of government still make such pledges today. However, the concept of pledging one's own reputation, one's honour, cannot simply be transferred to relations between States. The oral London gentlemen's agreement of 1946 on the regional distribution of seats in the Security Council, the 1956 agreement on the same issue in the United Nations International Law Commission (ILC) and the so-called Luxembourg compromise of 1966 on voting procedures in the European Economic Community (EEC) Council of Ministers would not constitute gentlemen's agreements in this sense. Similarly, a distinction should probably be drawn between them and "inter-agency agreements", which are expressly intended to be binding not on the States, but only on the governments or on specific ministries or authorities, in so far as that is at all possible.

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10 Reuter, Droit International Public, 5th ed. (1976), p. 103; the term "gentlemen's agreement" is used in the broader sense, for example, by Eisemann, Journal de Droit International, vol. 170 (1976), pp. 326 et seq.; however, the agreement of 1949 was called "an oral agreement ... known as a gentlemen's agreement ... by word of honour" by the United Nations General Assembly, c.f. Repertory of the United Nations Practice, vol. II (1955), p. 8, para. 16.
We should also differentiate between the non-treaty agreements we shall be considering here and arrangements in the form of treaties which contain — either in whole or in part — obligations which cannot be implemented owing to their lack of specificity and which some people therefore also term “soft law”. According to Lauterpacht, they are “provisions ... void and inapplicable on account of uncertainty and unresolved discrepancy”. “Precise or imprecise?” is not, however, an appropriate criterion by which to establish whether an agreement is binding or not. Thus, the commitment in article 5 of the NATO Treaty of 4 April 1949 to the effect that each party will take “such action as it deems necessary” does not mean that it is not a genuine treaty obligation to assist. Treaties remain treaties even if the possibilities for responding to infringements are reduced to a minimum or if the justification for non-fulfilment or withdrawal from the treaty is largely left to the discretion of the obligated State. Admittedly, such treaties pose particular problems. Their fulfilment is largely subject to good faith. This may ultimately approximate them to non-treaty agreements.

III. Why Non-treaty Agreements?

The reasons for avoiding the form of a treaty are many and various. To mention a few:

The need for mutual confidence-building;

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16 Cf., for example, art. 10 of the NATO-Treaty.

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The creation of a preliminary, flexible regime facilitating adaptation to changes;\(^9\)

The need to stimulate developments which are still in progress or to react to proposals from Non-Governmental Organizations (NGOs);

Impetus for national legislation;

Concern that international relations will be overburdened by a “hard” treaty with the risk of failure and a deterioration in relations;

Simpler finalization procedures (e.g., consensus rather than a treaty conference);

Greater confidentiality. Drawing on his experience as a British legal adviser, Sinclair places the main emphasis on this aspect.\(^2\) This seems to have something to do with practices in the Commonwealth;\(^2\) I cannot confirm it from my own experience;

Avoidance of cumbersome domestic approval procedures and their repetition in case of amendments;

Specific national problems, e.g., the limited competence of Germany’s Länder to conclude treaties pursuant to article 32, paragraph 2, of the Basic Law and, up until German unification, the need for a Berlin clause in treaties in accordance with a cabinet decision of 6 October 1954.

It may be necessary to conclude a non-treaty agreement simply to reach an agreement at all.\(^2\) Such agreements bridge a gap between the need for rules and the rules that exist with regard to basic general

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interests.\textsuperscript{23} The wholesale criticism that international law is thus being "softened" does not seem to me to be justified.\textsuperscript{24} The danger of elusive results is equally great in the case of both treaties and non-treaty agreements. In fact, it frequently turns out that something which has been laid down at conferences merely as a non-treaty binding standard gradually becomes, as awareness increases, a binding and possibly a "hard" obligation which can be enforced.\textsuperscript{25} I also believe Schwarzenberger's concerns about a "proliferation of a para-international law with negative implications for the credibility of international law as a whole" to be somewhat exaggerated.\textsuperscript{26}

The fact that, when the situation is assessed realistically, the difference between a treaty and the binding "political" effect of a non-treaty agreement is not as great to a politician as is often thought may also play a role in the decision to opt for a non-treaty form of agreement.\textsuperscript{27} Even treaties, if they are not simply to exist on paper, are dependent on continuing cooperation between States and are generally enforced neither in court nor through reprisals -- owing to the expected costs and political consequences -- when the willingness to cooperate dwindles, even if such possibilities do exist from a legal point of view. Rotter has posited some interesting ideas on the strategic reasons that cause States to conclude non-treaty agreements.\textsuperscript{28} In line with the "prisoner's dilemma", the behaviour of those involved will be made predictable for the joint (minimum) benefit even without enforceable rules.\textsuperscript{29} The extent to which either non-treaty agreements or treaties are complied with is largely the same.\textsuperscript{30}

\textsuperscript{27} Wengler, Juristenzeitung (1976), p. 197; and Delbrück, op. cit., (footnote 19 above), p. 372.
\textsuperscript{28} Rotter, "Die Abgrenzung zwischen völkerrechtlichem Vertrag und ausserrechtlicher zwischenstaatlicher Abmachung", Festschrift Verdross (1971), pp. 419 et seq.
\textsuperscript{29} Similar Delbrück, op. cit., (footnote 19 above), pp. 356 et seq. with more quotations.
\textsuperscript{30} Hensel, op. cit., (footnote 17 above), p. 306.
IV. Are Agreements Binding Only in the Form of a Treaty?

In terms of legal dogma there now arises the question: is there, in the field of agreements intended by those involved to be normative, merely a choice between international treaties on the one hand and exclusively "political" or moral commitments on the other? Is there a clear distinction between treaties and other commitments or is there an intermediate area covering agreements which are non-treaty but binding and which entail certain repercussions under international law which are less extensive than those incurred under treaties?

The subject is not new. It has been considered by Wengler (1963), as well as Fritz Münch (1968, 1984), Viralli (1970 and 1983) and Rotter (1971). It enjoyed a renaissance in the 1970s in relation to the Conference on Security and Cooperation in Europe (CSCE), resolutions of the United Nations General Assembly and the United Nations International Covenant on Economic, Social and Cultural Rights. In 1984 Thürer held his inaugural lecture at the University of Zurich on the subject. Another impetus for such considerations came from the 1992 Rio summit with further developments in international environmental law, of both a treaty and a non-treaty nature. Detailed studies by Hensel (University of Mainz, doctoral thesis) and Klabbers (University of Amsterdam, doctoral thesis) appeared in 1991 and 1996 respectively. In 1996, a conference in Kiel, Germany, dealt with new questions of international legislation and also with "soft law".

It is not my intention here to discuss the question of whether agreements produce political or moral obligations for States, apart from their binding effect under international law. Assessing this is not the job of the legal adviser. Thus the International Court of Justice

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31 Schweissfurth, p. 306.
said in its 1950 advisory opinion on the *International Status of South West Africa* that it was not the Court's business "to pronounce on political or moral duties". What we are concerned with is the legal force of such agreements.

First, it must be clarified what influence the Vienna Convention on the Law of Treaties of 1969\(^{38}\) has on the legal status of non-treaty agreements. For the Convention to be applied, the agreements in question must be treaties, with "treaty" meaning in particular that it is an "international agreement concluded between States ... and governed by international law" (article 2, paragraph (1) (a), of the Vienna Convention). With others I am of the opinion that the history of the negotiations supports the view that the qualification "governed by international law" is intended to distinguish between treaties under international law and those under domestic law.\(^{39}\) Whether non-treaty agreements are excluded from the application of international law cannot be ascertained from the Convention. If the parties expressly or implicitly do not want a treaty, the provisions of the Vienna Convention do not apply. However, this does not necessarily mean that all non-treaty agreements only follow "political" or moral rules. There is no provision of international law which prohibits such agreements as source of law, unless -- obviously -- they violate *ius cogens*.$^{40}$

V. Excursus: Constitutional Law

Naturally, the legal adviser has to give attention to constitutional aspects. If agreements are of legal relevance only in the form of treaties, then the question of the need for parliamentary approval laid down in article 59, paragraph 2, of the German Basic Law does not arise for any other agreements. Agreements entered into by the Länder in accordance with article 32, paragraph 3, of the Basic Law would require the approval of the Federal Government only if they took the form of a treaty governed by international law. If, however, there were agreements with certain legal consequences below treaty level, the application of said provisions to these non-
treaty agreements would not be ruled out in principle.\textsuperscript{41} In practice, however, this conclusion is rejected -- and rightly so, in my view. The Federal Constitutional Court\textsuperscript{42} allows the Federal Government's non-treaty dealings in international law to be unaffected by article 59, paragraph 2, sentence 1.\textsuperscript{43} The court was dealing with the Western European Union-St. Petersburg-Declaration which provides a useful illustration for our topic. In the United States it is common practice to conclude a non-binding agreement in order to avoid involving the Senate. One example is the United States-Soviet agreement to continue to adhere to the Interim Strategic Arms Limitation Talks (SALT) Agreement which expired in 1977.\textsuperscript{44} The possibility of avoiding the need to obtain parliamentary approval by concluding non-treaty agreements also arises for international agreements made by the German Länder\textsuperscript{45} (cf., for example, Joint Declaration of Intent on the New System of German Spelling, Vienna, 1 July 1996, and accompanying rules).

**VI. Intention to be Bound by and Freedom to Choose the Form of Agreements**

Let us go back to the intention of participants to be bound by agreements: it is recognized that States are free to design the agreements they enter into. Can they conclude an agreement, then, with the same degree of obligation as international treaties, in other words with consequences such as compensation and reprisals, but on the understanding that it is not an international treaty, but merely a "political" agreement? This would seem impossible because the fact that the agreement supposedly lacks the force of a treaty contradicts the full intention to be bound by it.\textsuperscript{46} In terms of constitutional law, this could be an abuse of legal form in order to circumvent article 59, paragraph 2, or article 32, paragraph 3, of the German Basic Law, which is not permissible.

\begin{itemize}
\item[41] Cf. Klabbers, op. cit., (footnote 8 above), p. 160, who is exaggerating, however.
\item[44] Restatement (Third) of US Foreign Relations Law, para. 301, Reporter’s Note.
\end{itemize}
Non-treaty agreements are concluded, however, because the States involved do not want a full-fledged treaty resulting in a breach of international law if it is not fulfilled. This must be the assumption when the parties speak of a gentlemen’s agreement (in the broad sense), a declaration of intent or a declaration of principle, and often even of a joint declaration or a memorandum of understanding. One indication of the lack of treaty force is if the parties expressly exclude registration in accordance with Article 102 of the Charter of the United Nations, as was the case with the very prominent example of the 1975 CSCE Final Act and with the 1997 Founding Act on Mutual Relations, Cooperation and Security between the North Atlantic Treaty Organization (NATO) and the Russian Federation. The result is irrespective of whether the content of an agreement is of great significance for international relations. Thus the Atlantic Charter of 1941, the Cairo, Yalta and Potsdam Agreements, the 1948 Universal Declaration of Human Rights, which has in the meantime acquired the force of customary international law, and the 1982 Bonn Declaration on hijacking are not binding international treaties. There is much literature on the question of delineation between treaties and non-treaty documents. An agreement is contractually binding only if the parties want it to be. International law does not seem to contain a general assumption that agreements are always of a treaty nature.

I do not wish to dwell further on these delineations, nor to consider what happens if there is a dispute between the parties involved about whether their agreement amounts to a treaty or not; I would rather pursue this question: what is the legal significance of such non-treaty but bindingly agreed rules governing the interaction of States? Is it not premature to conclude that, in the absence of a treaty, there can be only an extra-legal or — to put it positively — only


a political or moral commitment, which is of interest to jurists at most as a fact, but not as a source of obligation? In 1976 Wengler wrote: "the question arises as to whether the strict legal/non-legal division applied in international law in analogy to domestic law could be outdated or wrong". In the interest of clear rules for practical application, I would prefer to proceed from the assumption that a division must be possible.

The problem of appropriate legal treatment of the agreements discussed here can be approached from two angles: either "subjectively", from the standpoint of the parties' intention to be bound by their commitments or of their concurrent intentions, or "objectively", in the sense of an actual interdependence created by the parties' actions and other elements, from which certain legal conclusions must be drawn in the light of the overall situation. In the first case, obligations arise from the moment agreement is reached, the agreement being the source. In the second case, we are dealing with rules to be applied to the events in question which originate not from the parties' desire but directly from customary international law or general legal principles. In this case the commitment may not come into being until much later than the actual time at which agreement was reached.

The traditional approach, particularly in the case of non-treaty agreements, is the "objective" one. In addition to good faith, the relevant legal concepts are prohibition of *venire contra factum proprium* or -- from the field of common law -- estoppel.

If one looks at the consequences of a (non-treaty) agreement by the parties, these legal concepts, with the exception of the very general principle of good faith, are less appropriate. They aim at the limits on the exercise of rights rather than at their origin. For this reason it is difficult to apply them even to unilaterally binding declarations. Such declarations are generally recognized to be legal commitments on the basis of good faith; they reckon with both the

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sovereign will of the declaring State to enter into a commitment and with the need — evolving over time and depending on the circumstances — to protect the justified expectations of the recipient of the declaration (detrimental reliance). Given this uncertainty about the source of the obligation, the legal consequences, too, are unclear (e.g., rules of interpretation, revocation).

Since we are concerned with the question of whether non-treaty agreements can be sources of law, I can first leave aside the aspect of "objective" protection under customary law of justified expectations and concentrate on the legal consequences of a (limited) intention to be bound by a commitment. Both treaties and non-treaty agreements are based on a coincidence of intentions. Since the decisive factor in international law, and especially in the field of international agreements, is the intention of the States, there appears — at least at first glance — to be no reason why States should be denied the possibility to take on a commitment with lesser legal consequences than a treaty would have. Since their desire is constitutive, it could be decisive in answering not only the question — as is generally recognized — of whether a treaty exists or not, but also the question of whether legally relevant commitments below treaty level originate. The pre-condition is, however, that international law permits such kind of commitment.

VII. On the Content of Non-treaty Agreements

One can assume that the partners in a non-treaty agreement are aware that, if they do not conclude a treaty, they thus also exclude certain legal consequences of a treaty. This primarily concerns consequences relating to non-fulfilment, in other words compensation and the possibility of enforcing the agreement through dispute

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settlement procedures and reprisals. Whether the parties' ideas go much further than this may frequently be in doubt. Usually the negotiations concentrate on the substance of what the two parties want, leaving aside concomitant rules on validity, interpretation, implementation, consequences of non-fulfilment or preconditions for termination of the agreement.

A legal adviser must provide assistance here. First of all, he or she must advise against language which implies that a treaty under international law is being concluded. He or she will also urge precision in questions of substance. His or her experience in the field of international treaties will be of use in this regard. But the legal adviser will also question him/herself about the rules that should be valid for the relationships between the parties and, to the extent possible, promote their clarification. This is useful, independent from the question whether the relationships are considered as legal or "only" political.

The content of the agreements may range from a simple promise of a one-off future action to a complex system of regulated cooperation. This does not distinguish the field of non-treaty agreements from treaties. The agreements can be independent; they can also supplement or flesh out treaties. There are many bilateral and multilateral non-treaty agreements which are just as complete as a well-formulated international treaty. Such agreements contain rules on, for instance, the relationship of individual obligations to one another, procedures for identifying breach of commitment or for revising the agreement in the light of changed circumstances, and even denunciation.

Where such precise details are agreed, they are permissible in substance, independent of the legal nature of the agreement, in so far as they are in keeping with ius cogens. The question is: to what extent can supplementary rules governing the relationship between the

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parties be introduced without the agreement being regarded as a treaty under international law (which the parties expressly do not want).

VIII. Excursus: Non-binding Declarations of Intent

Obviously, an agreement will not have any binding force if those involved have clearly proceeded from the assumption that their statements in no way represent a commitment, but are solely intended to express shared values, interests, or desires and uncertain hopes. For this means that the participants exclude not only the *pacta sunt servanda* principle, but also the validity of any other supplementary rules, and that they assume that their freedom of action will in no way be restricted. Joint communiqués or summit declarations and even declarations of the summits of the group of leading industrial nations (G7/G8) may lack binding force. Such declarations, whatever they are called, would in reality be parallel declarations of intent by the respective governments, and their political significance would be that they document a coincidence of intention.

IX. Degree of Non-treaty Commitments

However, as soon as a document links the participants’ future action, we must assume that a greater degree of commitment is intended. Objections have rightly been raised to a sliding scale of increasing legal commitment, according to which a genuine treaty, with all the consequences of the Vienna Convention on the Law of Treaties and, if the treaty is infringed, of State responsibility, is only the highest degree of commitment, on the grounds that there is a difference of principle and not only of degree between a treaty and a non-treaty. The understanding that there can be no sliding scale of legal commitment must apply to the non-treaty field, too: either an agreement is binding under international law or it is not. It is certainly not my intention here to advocate a sociological approach of

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65 The form of a joint communiqué or a joint press declaration does of course not exclude the existence of an agreement under international law, *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports* 1978, p. 39. It depends on the content and the circumstances.
66 Hensel, op. cit., (footnote 17 above), pp. 287 et seq.; also Vitzthum, *Völkerrecht* (1997), p. 97, para. 155, is of the opinion that there are no "stronger" or "weaker" norms; just as Thürer, op. cit., (footnote 23 above), p. 441.
"legal realism" or the "New Haven approach". 67 Thürer has rightly emphasized that the States themselves, as the originators of laws, attach the greatest importance to this and take the greatest care to make this distinction. 68 If, however, one denies the States any possibility to introduce rules regulating their behaviour below treaty level, the outcome will be too rigid to take account of the various forms of international cooperation. 69 This rigidity is compounded if the same tough rules are, as it were, mechanically applied to all failures to fulfil obligations under international law. (It is precisely in order to avoid such rigidity that the Federal Government's statement on the ILC draft on rules governing the responsibility of States expresses doubt about whether it is right to stipulate that all breaches, including of obligations of information, negotiation, cooperation or dispute settlement, should lead to compensation or possible reprisals.)

To demonstrate the need for a certain degree of flexibility in the application of rules to agreements: clearly, even treaties can entail not only contractual obligations to perform or abstain, but also concomitant duties which will not have such strict consequences if they are infringed. This is the case with the obligation not to defeat the object and purpose of a treaty prior to its entry into force (article 18 of the Vienna Convention on the Law of Treaties) or when provisional application of a treaty pending its entry into force is agreed (article 25 of the Vienna Convention).

Even in our extremely standardized German civil law there is a difference between the legally codified impairment of performance and the impairment of performance regulated by customary law with less sharp, but therefore flexible parameters. Admitting the existence of such concomitant obligations also in international law opens up the possibility to regard a treaty as a complex and differentiated whole. It seems clear to me, particularly from the judgement of 25 September 1997 in the Gabčíkovo-Nagymaros case, 70 that the International Court of Justice is moving away from mechanical application of the rules on

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68 Thürer, op. cit., (footnote 23 above), p. 442, with regards to Viralli.
69 For a greater flexibility see also Hailbronner, New Trends in International Lawmaking (Kiel, W. Schickering Institut, 1997) vol. 127, pp. 133-134.
treaty breaches to a more complex view of relations between the parties. Clearly, the majority of the judges rejected the possibility of deciding the dispute under the rules of treaty cancellation and compensation in favour of forward-looking obligations for the future development of the damaged cooperative relationship. The judgement and its outcome met with broad approval. The resulting obligations -- to cooperate in the development of meaningful cooperation -- were neither contained in the treaty nor could they be enforced by the usual means of treaty law or tort law.\textsuperscript{71} In the view of the Court, however, they are of a legal and not just of a political nature. Should they fail to have the desired effect, the matter would have to be brought before the Court again.

What was just said shows that international law can endow obligations with greater or lesser possibilities for enforcement. To this extent, therefore, without watering-down the distinction between what is binding under international law and what is not, one could speak of a graduated strength of the means provided by international law to enforce agreements between States.\textsuperscript{72} Theoretically, this could open the door, beyond the sphere of international treaties, for agreements under international law with lesser consequences, i.e., limited protection under international law on which especially the rules about impairment of performance cannot be applied, but obligations in the sense of a cooperation-relationship that are established by the agreement. That relationship would have a restricted, but still a protection under international law.

X. Differentiation Between the Legal Levels

This is the furthest point to which a positive evaluation of non-treaty agreements can lead. Doubts, however, remain in view of the urgent warnings of prominent practitioners and academics against admitting new categories alongside the sources listed in Article 38 of the Statute of the International Court of Justice. Legal advisers in particular must endeavour to keep their tools intact and in keeping with international law as it is. Thus I shall first try to bring a certain order into the subject by making clearer distinctions between various levels of rules in order to possibly remove the concerns about a

\textsuperscript{72} Cf. indications at Hensel, op. cit. (footnote 17 above), p. 28, notes 54 and 287.
differentiation of the legal consequences of an agreement according to its character.

Firstly, there is the matter the States have agreed upon in their agreement -- multifarious substantive details which do not need to be discussed here. I shall content myself with referring merely to the frequent case where the parties agree pursuant to article 25, paragraph 1, of the Vienna Convention on the Law of Treaties, but without a treaty, on the provisional application of a treaty which has yet to enter into force, possibly a provisional partial application excluding those provisions which require parliamentary approval.

Secondly, at a higher level, there is the question of what rules the participants want to apply to what has been agreed. We may call this set of rules a "self-contained regime". The rules applicable to this regime or system cannot be found in the Vienna Convention on the Law of Treaties or in corresponding customary treaty law, because the participants have excluded this possibility. In so far as they are not implied in the agreement itself, they must be developed afresh, within the system of each individual agreement, and be consistent. Since this task involves the ascertaining of rules, it is not so very different from questions concerning treaties and can best be performed by a specialist in international law (and not by a political scientist). Specialists in international law are not unfamiliar with the idea of a "self-contained regime", which follows only rules inherent in the system. They can draw analogously on rules of international treaty law in so far as they do not contradict the lack of desire to enter into a treaty, and -- where appropriate -- they may take account of general principles of law. The aim is a sensible interpretation of and supplement to what the parties want and not -- to emphasize the point again -- the application of a pre-existing system of rules of international law to the agreement. This is not always remembered when dealing with "political" agreements, but is the decisive point in distinguishing between pledges under international treaty law and non-treaty agreements.

Thirdly, there is the question of what role the agreement plays in the system of international law. We are here no longer talking

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72 Klabbers, op. cit., (footnote 8 above), p. 19: "Normative, i.e., aimed at influencing future behaviour, but ... deliberately left outside the realm of law".
about the rules inherent in the agreed system, but about the place the
regime or system occupies in the overarching system of international
law created by the community of States which the parties, by deciding
not to conclude a treaty, have opted not to amend. It has been
maintained that a special system of rules separate from international
law exists to deal with non-treaty agreements, in the form of
“courtoisie”.\(^7\) Owing to their special character, however, and
particularly in view of the understanding that the rules of “courtoisie”
are implemented on a voluntary basis, they are not appropriate in the
context of the type of agreement we are considering here.\(^7\)

I should now like to give a somewhat more detailed yet
necessarily brief picture of the rules of the last two levels.

XI. The “Rules of the Game” applicable to the Partners
in a Non-treaty Agreement

As regards the “self-contained regime”, we must consider rules
relating to the elaboration, interpretation and a later amendment of
agreements.

In the absence of a system developed in international practice
and codified in a multilateral treaty, as it exists for treaties, one will
have to have recourse largely to the will of the parties alone.
Unfortunately, academia gives us little to go on. Münch is right when
he writes: “Although authors generally admit that the phenomenon
exists, much about it remains to be explained and delimited, not least
the concomitant rules which govern it.”\(^7\)

1. Elaboration

As far as conclusion of the agreement is concerned, full powers
are not generally requested, particularly since the problem does not
arise at a high political level. The rules about the apparent authority
are not transferable. If there was no authorisation to conclude the
agreement, one may be able to assume the existence of a gentlemen’s
agreement in the narrow sense. For the conclusion of multilateral
agreements, a single-stage consensus procedure, which usually but not

\(^7\) Schweissfurth, op. cit., (footnote 31 above), p. 17.
always excludes reservations, is customary.\textsuperscript{77} The agreements, like a treaty, can be open to accession by other States.\textsuperscript{78} The content of the agreements is often drawn up in the usual treaty language, if only to emphasize the importance of what is being agreed. By applying article 3\textit{1 et seq.} of the Vienna Convention on the Law of Treaties \textit{mutatis mutandis}, the content may be established by interpreting the parties' will and applying the principle of good faith as well as the history of negotiations and subsequent practice.\textsuperscript{79}

2. Extent of Inherent Commitment

The agreements do not alter either treaties or other international law governing the relations between the parties. It is particularly difficult to give a legal description of the nature of the commitment. Since treaty law is excluded, it is -- as I outlined above -- not possible to apply the principle of \textit{pacta sunt servanda} (article 26 of the Vienna Convention on the Law of Treaties).\textsuperscript{80} The pledges cannot be enforced the same way treaties can.\textsuperscript{81} A breach of a pledge is not a delict in international law.\textsuperscript{82} Pledges will not be regarded by a court or arbitral authority as treaty obligations.\textsuperscript{83} However, States can also submit disputes arising out of non-treaty agreements to a settlement procedure,\textsuperscript{84} as is demonstrated by the Convention of 15 December 1992 on Conciliation and Arbitration within the CSCE.\textsuperscript{85} States can also exert pressure through action short of reprisals. The political pressure to keep one's pledges may be great, and the consequences of non-fulfilment considerable.\textsuperscript{86}

\textsuperscript{77} Cf. the recommendations of the Council of Europe for the protection of the private life with the possibility of reservations and therefore a different commitment of the parties concerned mentioned by Rudolf at the Conference in Kiel, op. cit., (footnote 25 above), p. 218.
\textsuperscript{78} Hensel, op. cit., (footnote 17 above), p. 271.
\textsuperscript{80} Schachter, loc. cit., (footnote 1 above), p. 301.
\textsuperscript{81} Restatement, (footnote 44 above); Schachter, loc. cit. (footnote 1 above), p. 289.
\textsuperscript{82} Rotter, op. cit., (footnote 9 above), p. 419.
\textsuperscript{83} Wengler, \textit{Juristenzeitung} (1976), p. 194.
\textsuperscript{84} Aust, loc. cit., (footnote 18 above), p. 791.
In any event, pledges are to be fulfilled in good faith. Henry Kissinger is supposed to have said about non-treaty binding sections of the Sinai Disengagement Agreements of 1975: "While some of the undertakings are non-binding they are important statements of diplomatic policy and engage the good faith of the United States as long as the circumstances that gave rise to them continue." Thus what has been agreed cannot be represented by one side to the other as having not been intended or as unlawful from the outset without such behaviour having repercussions for the agreement as a whole. Nor may one side make whatever has been agreed impossible without incurring similar consequences. This could be derived either from mutatis mutandis application of article 18 of the Vienna Convention on the Law of Treaties or from the general principle of law recognized by the Permanent Court of International Justice in the Chorzów case. Furthermore, actions performed in keeping with the agreement cannot be claimed back as an unjustified enrichment of the beneficiary. An election held on the basis of a non-treaty agreement on the regional distribution of seats in international bodies cannot be challenged by participants as being irregular. The general opinion is that this result, as in the case of binding unilateral declarations, is obtained by applying the principles of estoppel, non venire contra factum proprium and acquiescence. However, from a continental viewpoint at least, it appears more plausible to recognize the underlying non-treaty agreement as "causa" and thus to deny the existence of unjustified results.

3. Disruption, Termination

Subsequent changes to the regime may result from the following in particular:

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89 The Factory at Chorzów (Claim for Indemnity), Judgment, Permanent Court of International Justice, Series A, No. 9, p. 31.
Mutual dependence of the intended actions;

Change of circumstances;

One party’s withdrawal from the agreement.

Analogous application of the grounds for termination contained in treaty law is ruled out. This does not mean, however, that the parties are free to act as if there were no agreement at all.

Consequences of non-adherence to pledges may arise within the regime or system of cooperation, with recourse to the principle of good faith. Minor infringements will be able to be dealt with in good faith without any far-reaching disruption to the system. If major pledges are not fulfilled, then it is not a delict in international law but a mutual dependence of actions and thus the applicability of the general principle of law inadimplenti non est adimplendum comes into play. Mutual dependence of certain pledges can thus lead to practically the same result as the synallagma in a reciprocal international treaty. An example is the justification for exceeding the SALT II ceilings by the United States, which cited Russian infringement of the treaty as a justification, although SALT II had not been ratified.

One particularly good example of mutual dependence are the so-called standstill agreements (e.g., within the framework of the Organization for Economic Cooperation and Development (OECD) not to introduce new restrictions unilaterally). If the Czech or the German side does not keep the promise made under article IV of the Czech-German declaration of 21 January 1997 that it “will not put weight on their relationship with political and legal questions arising from the past”, this promise will not make claims impossible under public international law. However, such claims would open the

95 Wengler, loc. cit., (footnote 83 above), p. 195 with indications to the Austrian-Italian calendar of operation for the settlement of the question of South Tyrol.
internal door for the other side to raise demands, without fearing the reproach of breach of agreement.

4. Multilateral Non-treaty Agreements

It is, as ever, harder to judge the issues when one is concerned not with bilateral, but with multilateral agreements. We can find here agreements based on reciprocity (do ut des), too, but also those intended to attain a joint objective. The most prominent agreements in the latter category are the Helsinki Final Act, agreements in the field of arms control and verification, and General Agreement Tariffs and Trade (GATT) arrangements. In the end, however, it must be left up to individual participants to decide whether they regard the lack of participation of one or several parties as removing the basis for their own participation, or whether they prefer to continue their cooperation with those States still willing to be involved. A motive therefore in the fields of environment and human rights could be to proceed faster with several partners and, together with them, try to pull up the remaining ones. Also the imminent exclusion of a State from the normative traffic could be an effective means of exerting pressure.97

As far as subsequent withdrawal from bilateral or multilateral non-treaty agreements irrespective of the inadimplenti non est adimplendum principle is concerned, one will have to assume that withdrawal is not subject to the narrow rules of treaty law’s clausula rebus sic stantibus, but certainly to the principle of good faith. This makes possible a flexible approach to the nature of the agreement. The possibility of arbitrary withdrawal would contradict the participants’ limited intent to be bound by the agreement in question.98 If such a possibility were agreed, one would have to assume non-binding declarations in the absence of an intent to be bound.99 Schachter thinks differently: of non-treaty agreements he says it is enough that “they last while they last” (with reference to a remark by de Gaulle on treaties).100 As was already mentioned, non-treaty

agreements can contain termination clauses. In such cases, one will have to attach particular emphasis to the principle of good faith over premature termination.

XII. Role of Non-treaty Agreements in the General System of International Law

Allow me to turn in some more detail to what are, not “rules of the game” agreed between the participants, but rules developed by the community of States for international relations in general. We have seen that the parties to a non-treaty agreement exclude both the application of international treaty law, particularly its central *pacta sunt servanda* principle, and also the legal consequences arising from non-fulfilment of this key commitment. The agreements are insofar not to be “governed” (as article 2, paragraph 1 (a), of the Vienna Convention on the Law of Treaties puts it) by international law. If the participants reduce the intended consequences of their agreement that far, their agreement cannot be considered as a source of law effective beyond the inherent rules which I have discussed, as long as international law does not provide a set of rules applicable to agreements intended to have lesser legal consequences than treaties.

I can only touch upon the possible consequences international law attaches to non-treaty agreements not as a source but as a fact. Such agreements can be “subsequent practice” as defined in article 31, paragraph 3 (b), of the Vienna Convention on the Law of Treaties, to be taken into account in interpreting a treaty. Thus, Riedel considers the 1992 Rio Declaration an aid in interpreting vague but binding commitments in the environmental field.\(^{102}\) If such an agreement runs counter to a treaty obligation existing between the same States, it cannot alter the earlier treaty. However, in exceptional cases, it may be that the State against which the claim is made objects to enforcement measures on the grounds that enforcement of the claim made under the treaty is in bad faith (estoppel). It may even be that the relationship prohibits a State claimed against from invoking the lack of an international treaty. Since the parties have expressly excluded *pacta sunt servanda*, however, only additional factors can lead to such an unusual result. Similarly, invocation of customary

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international law may be inadmissible. Thus, even if there are no treaty commitments, non-treaty pledges may exclude invocation of the principle of non-interference in a State's internal affairs.\textsuperscript{103} In particular, non-interference may not be invoked against application of CSCE Final Act and its further developments.

Indisputably, the agreement cannot directly produce customary international law, but it can contribute to its creation at least via the practice of States as an emerging \textit{opinio juris}.\textsuperscript{104} Infringements of the agreement do not, as I have demonstrated, constitute violations of international law; they are not \textit{delicts}. They are, however, unfriendly acts which can be responded to not only with countermeasures inherent in the system, but also with retaliation — in other words, with other unfriendly acts.

XIII. Conclusion

I summarize:

- States do not regard non-treaty agreements as substitutes for treaties, but as a valuable tool to regulate their behaviour in cases where, for various possible reasons, a treaty is not an option.

- Non-treaty agreements are possible at all levels of international relations. They can be rudimentary or complex; they can stand independently or flesh out treaty law.

- Such agreements, by the parties' will, are not subject to international treaty law, and particularly not to its fundamental principle of \textit{pacta sunt servanda}. Nor is there, up to now, any other set of rules in international law into which they fit, which regulates and supplements them.

- On the other hand, these agreements are not indifferent in legal terms. If they contain rules


\textsuperscript{104} Vitzthum, op. cit., (footnote 66 above), para. 153.
governing relations between the participants, they are a source of a self-contained regime subject to legal thinking.

- Such rules of behaviour must be ascertained on a case-by-case basis from the parties' will or be developed from it, in some aspects along the lines of treaty law.

- States shaping their relations in a way that excludes the application of the system of rules provided for by treaty law waive the possibility of integrating such agreements into international law. Non-treaty agreements, as long as they are not recognized in international law as a source of legal obligations and are not provided with a set of rules regulating their coming into existence, functioning and effects, remain “closed”.

- Outside the regime created by the non-treaty agreement rules of international law are applicable which take account of such agreements mainly as a factor not as a source.

XIV. Further Questions

It has not been possible here to consider questions of soft law created by organs of international or supranational organizations. Comprehensive literature is available on this topic, particularly on the resolutions of the United Nations General Assembly. This area is different from the subject I have discussed in that the Member States of the Organization create soft law, for instance, in the form of recommendations by organs of the Organization, deriving not directly from the primary freedom of the States themselves to shape international law, but from the tasks and powers transferred to the organs by the statutes. The significance of such soft law as a source of law depends in the first instance on the importance attached to these acts by the statute or the founding treaty, as well as the practice of each organization.
Cases of succession of States are, of course, hardly something new. Neither are the questions which arise out of such events in respect of bilateral treaties. What is new, perhaps, is the sheer magnitude and the significance of the work which has been connected with recent cases of State succession, particularly those which have taken place since the fall of the Berlin wall.

The rules regulating succession of States in respect of treaties were not adequately developed in customary international law. However, with the sudden appearance of a large number of newly independent States in the early 1960s as a result of the process of decolonization, it became necessary to elaborate and undertake the progressive codification of this aspect of public international law.\(^1\) The International Law Commission played an extremely important role in this complex process, preparing two sets of draft articles, each of which, after much modification, served as the basis of a convention adopted at a diplomatic conference: namely, the Convention on Succession of States in respect of Treaties, done at Vienna on 23 August 1978,\(^2\) and the Convention on Succession of States in respect of State Property, Archives and Debts, done at Vienna on 8 April 1983.\(^3\) By the time that work on these two conventions was complete and they were open for signature, the process of decolonization had, by and large, come to an end. There was, accordingly, no longer any immediate practical reason for States to proceed to adhere to those instruments. Notwithstanding their legal and technical merits, both conventions have attracted relatively few ratifications and accessions and only one of them has

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\(^1\) See the first and third preambular paragraphs of the Convention on Succession of States in respect of Treaties, loc. cit. below (footnote 2).


\(^3\) Document A/CONF.117/14.
entered into force -- and that only recently. It took quite a number of years and the occurrence on the international scene of a series of quite unexpected major events -- in particular, the unification of the two German States and the disintegration of the Soviet Union, of Czechoslovakia and of Yugoslavia -- to reawaken the interest of Governments in the two texts.

Almost overnight, the law relating to succession of States in respect of treaties ceased to be a matter of academic interest only and assumed the greatest practical importance. If the subject of the succession of States in respect of State property, archives and debts may largely be considered an "internal" matter -- that is, an issue which falls to be settled among the directly interested parties themselves -- the succession of States in respect of treaties concerns the whole international community. Thus, all the countries of the world had to review their bilateral agreements with the States that had undergone radical territorial, political, social and economic changes in order to determine which of those agreements might continue to be applied. Similarly, international organizations had to undertake the examination of several hundred multilateral conventions and treaties and assess their applicability to the newly emerged entities, particularly those treaties which regulated membership in the organizations themselves.

The largest share of the work, of course, fell to the successor States themselves. While an average country had to review the 10, 50 or 100 bilateral agreements which it had earlier concluded with the relevant predecessor State and assess their applicability to the new subjects of international law which had recently come into being, the successor States had to review their entire international legal heritage. On a quick assessment, the figures involved range from some 15,000 to 16,000 bilateral treaties and 600 multilateral conventions in the case of each of the successor States of the former USSR, through 2,500 bilateral treaties and more than 700 multilateral treaties in the cases of the Czech Republic and Slovakia to approximately 3,500 bilateral treaties and 300

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4 As is remarked below, the Convention on Succession of States in respect of Treaties finally secured the 15 adhesions necessary for its entry into force in late 1996. To date, the Convention on Succession of States in respect of State Property, Archives and Debts has secured only five of the 15 adhesions which are needed for it to enter into force.

5 This was the number of bilateral treaties which were in force immediately prior to the disintegration of the Socialist Federal Republic of Yugoslavia. Altogether, Yugoslavia and its predecessor States -- the Federal People's Republic of Yugoslavia, the
multilateral conventions for Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia (Serbia and Montenegro), the former Yugoslav Republic of Macedonia, and Slovenia. If it is borne in mind that most of these countries lacked the administrative structure, the qualified personnel and the experience required for such a task, one can readily appreciate the formidable challenge with which they were -- and still are -- faced. The work which is involved is painstaking, has to be performed with meticulous attention to detail and will probably take years to complete. The individual who has to organize, coordinate and supervise this work and ensure that it is carried out to the necessary high legal standard is the legal adviser. He or she will certainly need to rely upon the assistance of colleagues from the department for international law; but, at the same time, it is probably the case that the team which he or she puts together will have to be quite small.

The international legal framework within which this work falls to be done is relatively limited in its extent, but is, nonetheless, modern and broad-minded in its overall orientation.

The first basic text is the Vienna Convention on the Law of Treaties of 1969. The 85 articles of this instrument regulate in a comprehensive manner nearly all of the most important questions of modern treaty law and practice. However, less than five lines are dedicated to the issue of succession of States in respect of treaties. Thus, article 73 of the Convention simply provides that:

"The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the

Democratic Federal Yugoslavia, the Kingdom of Yugoslavia, the Kingdom of the Serbs, Croats and Slovenes, the State of the Slovenes, Croats and Serbs and, in some exceptional cases involving the continuity of certain very old treaties (for example, the Consular Convention of 1881 with the United States of America), the Kingdom of Serbia and even the Principality of Serbia -- had concluded some 9,000 treaties.

Wishing to expedite the performance of the immense and highly complex task with which it was faced, the Ministry of Foreign Affairs of Croatia initially assigned several teams to the job. It very soon became clear, however, that each team was applying its own individual methods, criteria and standards. The legal adviser consequently decided that it was he himself who should continue the work on the subject, with the assistance of the custodian of treaties and just one counsellor.

outbreak of hostilities between States."

The Vienna Convention on Succession of States in respect of Treaties of 1978 is the other basic document in this area. This Convention bears the stamp of the situation which arose out of the process of decolonization and reflects the politico-legal needs of the newly independent States to which that process gave birth. That, at least, is the interpretation to which the first two paragraphs of the preamble of the Convention lend themselves:

"Considering the profound transformation of the international community brought about by the decolonization process,

"Considering also that other factors may lead to cases of succession of States in the future".

By way of "other factors", the Convention itself mentions two possibilities: a "uniting of States" and the "separation of parts of a State". The dissolution or disintegration of a State is not explicitly foreseen. Nevertheless, it could be claimed, with justification, that in such a case article 34 entitled "Succession of States in cases of separation of parts of a State" applies. Thus, the chapeau of paragraph 1 of that article reads:

"When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist ..."  

Article 24 of the Convention is of considerable practical importance in so far as bilateral treaties are concerned. That article provides that a bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is to be considered in force between a newly independent State and the other State party to that treaty when they expressly so agree or when, by reason of their conduct, they are to be considered as having so

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8 Cf. also the chapeau of article 35. It is interesting to note that the Convention on Succession of States in respect of State Property, Archives and Debts, which was concluded but five years later, in 1983, contains three articles -- articles 18, 31 and 41 -- which are dedicated to the case of the dissolution of a State, as distinct from the separation of part or parts of its territory -- that is, secession.
agreed. The same article goes on to stipulate that the treaty applies from the date on which the succession of States occurs, unless the parties agree otherwise or their intention to the contrary is in some way apparent from their conduct.

The Vienna Convention of 1978 came into force on 6 November 1996, 30 days after the former Yugoslav Republic of Macedonia deposited a notification of succession to the Convention. As far as the States which have emerged from the Socialist Federal Republic of Yugoslavia are concerned, the provisions of the Convention had some relevance even before its entry into force. At the time that they were still federal republics of that State, they had all given their express approval of the Convention prior to that State’s ratification of the Convention in April 1980. Although, prior to its entry into force, the Convention did not, as such, have any legal effect vis-à-vis third countries, this consensus among the Yugoslav republics could be deemed sufficient ground for the application of the principles of the Convention to the legal situation in which they found themselves on achieving statehood. In any event, the Convention is largely a codification of existing norms of general customary international law or at least of its general principles.

An important source of international law in the case of the succession of the former Yugoslav republics is opinions of the Arbitration Commission which was set up within the framework of the Conference on Yugoslavia and which operated under the presidency of the former chairman of the French Conseil Constitutionnel, Robert Badinter – the so-called “Badinter Commission”. On several occasions, this Commission expressed its opinion on issues relating to the cases of State succession which occurred in respect of the territory of the former Federation, including issues of succession with respect to treaties.

The Commission’s Opinion No. 1, dated 29 November 1991, contains the statement that the Socialist Federal Republic of Yugoslavia was then “in the process of dissolution”. The situation in that State could not, therefore, be considered to involve the simple secession of its constituent republics. The Commission went on to state that such problems as might arise from the dissolution of the Socialist Federal Republic should be resolved by its constituent republics in accordance
with the principles and rules of international law.\(^9\)

Opinion No. 5, dated 11 January 1992, established that Croatia fulfilled the conditions necessary for its international recognition.\(^{10}\)

Opinion No. 8, dated 4 July 1992, affirmed that the process of the dissolution of the Socialist Federal Republic of Yugoslavia was by then complete.\(^{11}\)

In its Opinion No. 9, also dated 4 July 1992, the Commission affirmed that the successor States of the Socialist Federal Republic were bound to resolve the problems arising out of the succession by application of rules of general international law and the principles contained in the texts of the two Vienna Conventions of 1978 and 1983 on succession of States.\(^2\)

Of particular interest is Opinion No. 10, again dated 4 July 1992. In this opinion, the Commission affirmed that the Federal Republic of Yugoslavia (Serbia and Montenegro) was a new State. Consequently, no State, including the Federal Republic, might claim continuity with the Socialist Federal Republic of Yugoslavia, which had ceased to exist.\(^3\)

Finally, Opinion No. 11, dated 16 July 1993, determined the dates on which the successions of States took place in respect of each of the States which came into existence on the territory of the Socialist Federal Republic of Yugoslavia: namely, 8 October 1991 for Croatia and for Slovenia, 17 November 1991 for the former Yugoslav Republic of Macedonia, 6 March 1992 for Bosnia and Herzegovina and 27 April 1992 for the Federal Republic of Yugoslavia (Serbia and Montenegro).\(^4\)

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\(^{10}\) Ibid., p. 1503, para. 3 (iii).
\(^{11}\) Ibid., p. 1521, para. 4.
\(^{12}\) Ibid., p. 1523, para. 4. As of the date of this Opinion, neither of the two conventions had yet come into force.
\(^{13}\) Ibid., p. 1525, para. 5. This same position is evinced in three significant resolutions of United Nations bodies: namely, Security Council resolutions 757 of 30 May 1992 and 777 of 19 September 1992 and General Assembly resolution 47/1 of 22 September 1992. It was also averred in the draft agreement on succession which was proposed to all of the successor States of the Socialist Federal Republic of Yugoslavia by the International Conference on the Former Yugoslavia.
L Practice of the Republic of Croatia
Regarding Succession in Respect of Bilateral Treaties

On 25 June 1991, the Sabor (Parliament) of the Republic of Croatia adopted its Constitutional Decision on the sovereignty and independence of the Republic of Croatia. Point III of this Decision confirmed the status of Croatia as a successor in respect of the treaties which had been concluded by its predecessor State:

"International treaties concluded or acceded to by the Socialist Federal Republic of Yugoslavia which are not in contradiction with the Constitution and legal order of the Republic of Croatia shall be applied in the Republic of Croatia on the basis of norms of international law on the succession of States in respect of treaties."

The Croatian Ministry of Foreign Affairs proceeded as early as the beginning of 1992 to establish its succession in respect of both bilateral and multilateral agreements. The simplest and most efficient way to do this was to establish its general succession in respect of those agreements: that is, its general acceptance of the continuation in force in respect of all the agreements that were in force for the Socialist Federal Republic of Yugoslavia at the moment of Croatia's accession to independence. Accordingly, a note was sent to all countries which had established diplomatic relations with Croatia or which had recognized its existence expressing the readiness of Croatia to respect and to implement the treaties which it had inherited from the Socialist Federal Republic.

In the case of a number of States, the general succession of Croatia in respect of the bilateral treaties of the Socialist Federal Republic of Yugoslavia was settled by the introduction of a specific clause into the agreement by which they recognized or established diplomatic relations with Croatia. These clauses are generally standard in their form and typically read as follows:

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15 Succession in respect of multilateral treaties has been effected swiftly and successfully by means of the making of a written notification - as a general rule, a letter sent by the Minister of Foreign Affairs to the depositary of the particular convention or treaty concerned.
"The Parties [designation of agreement] have ... agreed that, pending the conclusion of new agreements, the bilateral agreements concluded between the former Socialist Federal Republic of Yugoslavia and [name of State] shall remain applicable between the Republic of Croatia and [name of State]."\textsuperscript{16}

Notwithstanding this general approach, it is quite obvious that, among the large number of treaties which were in force at the time of Croatia’s accession to independence, a good number were not susceptible of application by the Republic of Croatia, either because of their nature or because of the new circumstances that had come into being with Croatia’s independence. Such, for example, were those agreements which provided for the establishment of foreign missions in cities in other republics of the former Yugoslav Federation; likewise, those treaties which regulated border traffic with countries which do not have any common frontier with Croatia: namely, Albania, Austria, Bulgaria, Greece, Romania and, for most practical purposes, Italy, with which Croatia has only a common maritime boundary.

The other category excluded from the general succession was determined by the Constitutional Decision of 1991: namely, those treaties which were inconsistent with the Constitution and legal order of the Republic of Croatia. It should be mentioned, however, that, in the course of the last six years, not a single agreement has been singled out for exclusion on these grounds. It can accordingly be concluded that this reservation was inserted in the Constitutional Decision more for general political reasons -- particularly, reasons of internal politics -- than because of considerations of international law.

Most countries accepted the resolution of the issue by means of the establishment and recognition of the principle of the general succession of Croatia in respect of the agreements of the Socialist Federal Republic of Yugoslavia -- though, in the case of a large number of countries, recognition of that principle has gradually been superseded by detailed arrangements determining precisely which of the treaties of the Socialist Federal Republic remain in force in their relations with

\textsuperscript{16} See, for example, the Protocol on the Establishment of Diplomatic Relations between the Republic of Croatia and the Republic of Turkey, done at London on 26 August 1992 (the text of which has not yet been published).
A few States, however, did not wish to accept any such solution. Some of them rejected the very possibility of succession in respect of treaties, invoking the principle of the tabula rasa — the so-called "clean slate" principle. On this view, the disappearance of a State necessarily extinguishes all of its rights and obligations and its successor State or States must construct for themselves their own international legal relations by concluding their own agreements de novo, as, when and with whom they consider it appropriate. This approach is now almost universally rejected. Even its advocates rarely are ready and willing to follow it to its logical conclusion — as, for example, by renouncing any possibility of claiming from a successor State the repayment of the predecessor State's debts. Nevertheless, it may occasionally be advanced by a State, usually for very specific legal or political reasons.\footnote{In the case of Croatia, the "clean slate" approach was adopted by Austria, Australia, Norway and, to some extent, Germany. In each of these cases, the State concerned has subsequently agreed to the succession of Croatia in respect of a number of bilateral treaties which it had inherited from the Socialist Federal Republic of Yugoslavia.}

Other countries did not oppose in principle the succession of Croatia in respect of the agreements of the Socialist Federal Republic of Yugoslavia. However, they failed to display any interest in keeping any of those agreements alive.\footnote{Malaysia and Ireland, for example, adopted such an approach.}

A third group of States wished to continue the implementation of only a very limited number of treaties and, in some cases, a single treaty alone.

Croatia has been quite successful in resisting these attempts by relying upon the following well-founded arguments.

First, the principle of succession in respect of treaties is almost universally accepted in international law. The Vienna Convention on Succession of States in respect of Treaties reflected the dominant understanding of the state of customary law even before that Convention entered into force in 1996. At the very least, it reflected the opinion both of the International Law Commission and of a very broad
range of distinguished international lawyers: that is, "the teachings of the most highly qualified publicists of the various nations". Whatever the case, then, it might be used as a "subsidiary means for the determination of rules of law", in the manner envisaged by Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

Secondly, the Republic of Croatia is one of the successor States of the Socialist Federal Republic of Yugoslavia, as has been confirmed by the opinions of the Badinter Commission as well as by the resolutions of the Security Council and the General Assembly.

Thirdly, the Constitutional Decision of 25 June 1991 by the Croatian Sabor clearly demonstrates the intention of the new State to respect and to fulfil its inherited contractual commitments.

Fourthly, succession in respect of treaties is indispensable in order to avoid a successor State finding itself in a legal vacuum in so far as its relations with third States are concerned. Were such a vacuum to be created, it might persist for many years, until such time as the newly established administration might be able to ensure that all the vital needs of the State were met by the conclusion of new agreements. In the meantime, all of the State's international relations would suffer from a lack of regulation, as would many individuals and corporations whose interests so often nowadays depend on the existence and implementation of treaties.

A fifth consideration is that for a successor State to succeed to the treaty relations of its predecessor State is an incomparably more economical means for it to regularize its affairs than for it to embark on the conclusion of new treaties on the same subject-matter.

Lastly, establishing the succession of Croatia in respect of the treaties of the Socialist Federal Republic of Yugoslavia serves -- together with the precedents and the pattern of solution of the problems relating to succession in respect of the property, assets, liabilities, debts and archives of the Socialist Federal Republic -- to defeat the pretensions of the Federal Republic of Yugoslavia (Serbia and Montenegro) to be the sole and automatic successor to, or the continuation of, the Socialist Federal Republic, contrary to what was maintained by the Badinter Commission in its Opinion No. 10.

II. Methods of Work
The legal adviser played a paramount role in the process which has been described. He developed the concept of the country's political approach to the subject, conceived the presentation of that approach, prepared the legal strategy and its tactical implementation, organized the international legal department in the Ministry of Foreign Affairs so that it might be able to handle this enormous job, established and maintained personal contacts with third countries and led the negotiations which took place in Zagreb and abroad. He had to overcome the misconceptions of many, both within the Ministry of Foreign Affairs and in other ministries, of the very purpose of establishing the country's succession in respect of the treaties of the Socialist Federal Republic of Yugoslavia ("We don't need the old agreements because we are now an independent country ... "). He also organized a number of consultations with the legal officers of all of the Republic's various ministries and governmental offices, coordinated the establishment of principles, uniform standards and criteria, prepared the method of concluding the arrangements with third countries agreeing upon Croatia's succession in respect of the treaties of the Socialist Federal Republic and so on.

There are several clearly discernible stages in this work.

1. Establishing a List of the Treaties in Force

The very first step must necessarily be the establishment of a list of all of the treaties in force between the predecessor State and the third State concerned at the time that the succession of States took place. This exercise is not always as simple as one might think. It quite often occurs that the records of the successor State and the third State diverge quite considerably. This may be because one of them counts all bilateral agreements regardless of their designation in accordance with the Vienna Convention on the Law of Treaties, while the other does not include various administrative agreements, protocols, declarations, memoranda, reports, procès-verbaux, additional arrangements and so on. Alternatively, the discrepancy may occur because one of the States

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19 Article 2, paragraph 1 (a), of the Vienna Convention stipulates that for the purposes of that Convention:

"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (emphasis added).
considers that a particular agreement has expired or has been terminated by virtue of the conclusion and entry into force of another more recent instrument on the same subject-matter.

2. Consulting Relevant Ministries and Government Departments

Once a consolidated list has been drawn up of all of the treaties in force at the time of the succession of States, both States concerned will typically submit each treaty to the governmental body or agency which is responsible for the subject-matter of that agreement. So, for example, trade agreements and treaties for the promotion and protection of investments will be examined by the ministry responsible for foreign trade or economic affairs; air, road and maritime transport agreements will be reviewed by the Ministry of Transport and Communications; extradition treaties and agreements on mutual legal assistance will be

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20 While the principle *lex posterior derogat legi anteriori* generally applies in such situations, it is by no means necessarily the case that the conclusion of a new treaty automatically and completely terminates every previous treaty which relates to the same subject-matter. It may very well occur, for example, that the parties decide expressly to preserve all or part of an earlier treaty if it is of particular significance or importance. Cf. article 59 of the Vienna Convention on the Law of Treaties.
scrutinized by the Ministry of Justice; social security conventions by the Ministry of Social Welfare or of Health; agreements for the avoidance of double taxation and instruments relating to financial matters by the Treasury or Ministry of Finance; consular conventions, visa-abolition agreements and treaties on border traffic by the Ministry of the Interior or the consular office of the Ministry of Foreign Affairs; and so on.

The department concerned typically has a decisive voice in determining whether the country should maintain its succession in respect of a specific agreement or, alternatively, suggest its termination. Nevertheless, the legal adviser has a role to play, even at this stage. He or she should warn the department concerned of any possible political dimensions of a treaty which might, at first glance, appear perfectly "innocent", draw its attention to an article or part of the treaty which may be of special interest and merit retention, even if the rest of the text is completely obsolete, and ensure the maintenance of a balanced and principled attitude that harmonizes with the general policy adopted by other ministries and the country as a whole. Very often, he or she must go back to a department and suggest that its advice be modified or changed, particularly if that department shows excessive eagerness to discard an old treaty. The occasion of a succession of States is an excellent opportunity — perhaps a unique one — to put the legal household in order and to get rid of outdated, executed or obsolete instruments. At the same time, however, great care must be taken so that "the baby is not thrown out with the bath water". The wiser position, if in doubt, is to maintain a treaty in force: it can always be amended, modified or terminated later. If, on the other hand, it is extinguished, it is lost forever; and very often the changed circumstances will not permit the conclusion of a new treaty of a similar character.

3. Consulting the Contractual Partner

A very large number of countries have accepted, without hesitation, the principle of the general succession of Croatia in respect of the treaties of the Socialist Federal Republic of Yugoslavia. It is with certain of these States that the work of detailed selection began: that is, the review, one by one, of all of the treaties which Croatia inherited from the Socialist Federal Republic, with a view to the selection of those which both States wished to maintain in force and the elimination of those others which were not thought to correspond to contemporary
Croatia decided to initiate this process with certain friendly States which, though they had concluded a significant number of treaties with the Socialist Federal Republic of Yugoslavia, were not its most important treaty partners. It was presumed that the resolution of succession issues with such countries as Austria, Bulgaria, Germany, Hungary, Italy, Romania, the former Soviet Union and the United States, with each of which the Socialist Federal Republic had concluded approximately 100 bilateral treaties, might pose a number of technical, legal and even political problems. It was felt that it would be better to start with a few “easier” files and to acquire some experience in handling succession issues first, before proceeding to tackle the most difficult cases, notwithstanding that they were of greater practical importance. Accordingly, the first group of States with which issues of succession in respect of treaties were resolved at the detailed level comprised such States as Canada, China, the Czech Republic, Finland, France, Greece, Japan, Poland, Slovakia and Switzerland.

Once the ministry in charge of each treaty has given its advice regarding the desirability or otherwise of maintaining that treaty in force, it is time to get in contact with the relevant service of the other State party to that treaty. Usually, that will be the international legal department of its Ministry of Foreign Affairs. In some countries, however, it may be the relevant political division which has charge of bilateral relations with Croatia, as is the case, for example, with Portugal and Turkey. Sometimes, if the number of treaties between the two countries is very small and they do not present any particular legal or political problems, agreement on issues of succession can be reached by correspondence or even by telephone, especially if the two legal advisers know each other well, have already had the opportunity to discuss the subject and have already reached an understanding in principle. Otherwise, it is normal that they should meet and examine the matter, probably with the assistance of certain of their collaborators. If the number of treaties is very large, some of them are delicate or a more complex procedure needs to be followed in one of the States concerned, then one meeting of legal advisers may not be sufficient.

Legal advisers, or other negotiators in their stead, have to agree

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21 The agreement of both States is essential in order to maintain a treaty in force by virtue of succession. If either State opposes the maintenance of a treaty in force, that treaty must be considered terminated, as from the day of the entry into force of the succession agreement between the two States.
on a list of the treaties which are to be maintained in force. In principle, one such list should be adequate. By a contrario interpretation, all other treaties which are not included in that list should be considered terminated. Some countries, though, prefer to make express stipulation to this effect by drawing up another list specifying the treaties which are to be terminated. This solution, however, may have serious disadvantages. If a treaty is overlooked and subsequently comes to light, it will figure neither in the list of treaties which remain in force nor in the list of those which are terminated and its status will consequently be in doubt. To add further complexity to this picture, some countries like to create a distinction between treaties which remain in force and those which are to remain in force temporarily, usually until such time as new treaties are concluded on the same subject-matter. This differentiation does not seem to be necessary: all treaties, whether succession takes place in respect of them or they are newly concluded, are in force temporarily, until such time as they might be superseded by a later treaty. Another complicated legal structure which has been suggested by one country involves the making of a distinction between "treaties", which are said to be "in force", and "arrangements", which are said to be "in effect". Yet other countries have suggested the drawing-up of a special list of treaties which are recommended for amendment or revision. There is little doubt that many treaties in respect of which succession occurs may need updating. However, that is not, strictly speaking, part of the work of resolving issues of succession in respect of treaties. The succession of a State in respect of a treaty has to be confirmed; then that treaty can be amended if and as much as the two parties desire.

The last point on which the legal advisers have to agree is the form of the succession settlement itself. The simplest and the quickest form which the settlement might take is that of an exchange of notes. This form is preferred by a large number of countries, including Croatia. Sometimes, such an exchange can even be effected on the spot and the entire transaction simplified to the very minimum. Nearly as simple and equally efficacious is an exchange of ministerial letters. Such a transaction cannot, of course, be effected there and then. It also takes a little more time to complete, since the minister of each State must participate in its execution. Much more complicated is the more formal procedure of the conclusion of a protocol. Signature of such an instrument will usually have to be postponed until such time as a member of the Government of one of the parties makes an appropriate State visit to the capital of the other, which may delay matters for
several months. Almost invariably, it will then be necessary for Parliament or the Government to give its approval, entailing a yet further delay. The most formal device which might be used -- also the most complicated and by far the slowest to effect -- is a special treaty on the matter of succession in respect of treaties. Without doubt, there is no necessity that such an instrument be used in the current context, since those treaties in respect of which succession is recognized or confirmed are already in force and do not stand in need of "revalidation" by some other treaty. Nonetheless, some countries prefer to proceed in this manner. Certainly, such a practice is not inconsistent with international law, since any matter can be the subject of a treaty. However, the process involved is both extremely slow and complicated, it being necessary to issue and exhibit full powers, arrange and make official visits, draw up and exchange instruments of ratification and so on.

It might be added, by way of a final remark, that, from the point of view of international law, there is absolutely no difference between any of these methods in terms of their validity or their efficacy. The sole distinction which can be made between them is in terms of their acceptability from the point of view of the internal legal system of the States concerned.

If the list of treaties that two States have agreed are to remain in force is very short -- comprising, say, but 10 agreements -- it may very well be included in the text of the note, ministerial letter or protocol. If, on the other hand, it comprises a larger number of treaties, or if the two sides decide to establish two or more lists, the better solution would seem to be to attach it or them to the note or protocol as an annex or annexes. In any such list, treaties should always appear in chronological order, according to the date of their signature. Normally, such lists contain the full title of each agreement, together with the date and place of its signature. If the parties so wish, a reference to the official gazette or other work in which the agreement has been published may also appear.

The constitutional or legal systems of most countries require the domestic approval, or "ratification", of these succession arrangements. In Croatia, however, it is not necessary. Nonetheless, publication in the Official Gazette, Narodne Novine, is mandatory. Such publication is effected promptly and in simplified form. It is desirable that the succession agreement itself be published in such a place in order that governmental bodies, public officials, the judiciary,
practising lawyers, interested firms and individuals may be informed of the applicable legal situation.

The very last thing for the legal adviser to do is to inform the diplomatic mission of his or her State in the other State concerned of the conclusion of the succession agreement and, of course, to transmit its text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter.
III

THE ROLE OF THE LEGAL ADVISER IN IMPLEMENTING INTERNATIONAL LAW IN NATIONAL LEGAL SYSTEMS

LE RÔLE DU CONSEILLER JURIDIQUE DANS L'INCORPORATION DU DROIT INTERNATIONAL DANS LES SYSTÈMES JURIDIQUES NATIONAUX
L' HABILITATION LEGISLATIVE : UN MOYEN COMMODE POUR L'EXECUTION RAPIDE DES RESOLUTIONS DU CONSEIL DE SECURITE PRISES DANS LE CADRE DE LA SECURITE COLLECTIVE

Constantin P. Economidès

I. Caractère obligatoire

Les résolutions du Conseil de sécurité, en particulier celles qui concernent la sécurité collective (Chapitre VII de la Charte des Nations Unies), sont obligatoires pour les États membres, ainsi que pour les autres États, et doivent être exécutées dans les ordres juridiques internes. De plus, ces résolutions, imposant des sanctions le plus souvent de caractère économique, doivent, pour atteindre leur objectif, être appliquées immédiatement ou, du moins, très rapidement.

II. Le mutisme de la Constitution

Mais comment mettre en œuvre ces résolutions dans l'ordre juridique hellénique? Comment y seront-elles introduites et quelle sera leur force juridique? La Constitution de la Grèce comme, d'ailleurs, celles d'un grand nombre de pays, reste muette sur ce point. Pourtant, elle règle expressément la question de l'introduction, de la force et de l'application, à l'intérieur de l'État, des traités internationaux qu'il conclut. Ces traités, une fois approuvés par le Parlement et mis en vigueur, font partie intégrante du droit interne et ont une valeur supérieure à toutes les lois, tant antérieures que postérieures. Ils ont donc une valeur suprême législative. De même, selon la Constitution, "les règles du droit international généralement reconnues", formule qui, en raison de sa généralité couvre aussi bien les coutumes internationales

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1 Voir, notamment, l'article 25 de la Charte et les dispositions de son chapitre VII.
2 Voir article 28 paragraphe 1 de la Constitution qui dispose que "... les conventions internationales dès leur approbation par la loi et leur entrée en vigueur conformément aux dispositions de chacune d'elles font partie intégrante du droit hellénique interne et priment toute disposition de loi contraire".
que les principes généraux de droit,\(^3\) font également partie intégrante du droit hellénique et même de façon automatique -- la procédure d’approbation parlementaire et de ratification étant, en l’occurrence inutile -- et prévalent sur toutes les lois par rapport auxquelles elles ont également une valeur supérieure.\(^4\)

Il y a donc une lacune importante dans la Constitution hellénique, puisque, à la différence de ce qui se passe pour le droit conventionnel et le droit coutumier (y compris les principes généraux de droit), le droit institutionnel international, c’est-à-dire les décisions des organisations intergouvernementales, catégorie à laquelle appartiennent les résolutions précitées du Conseil de sécurité, n’y est point pris en compte.

**III. Les inconvénients des actions ad hoc**

Par ailleurs, la Charte des Nations Unies ne réglement pas elle-même cette question,\(^5\) pas plus que ne le fait la loi d’approbation de cette Charte par la Grèce,\(^6\) il est dès lors nécessaire que les résolutions du Conseil de sécurité, pour être exécutées, soient obligatoirement incorporées dans un acte interne qui sera publié au journal officiel, afin que les autorités et les particuliers en prennent connaissance et s’y conforment. Cet acte peut être de caractère administratif (décret, décision du Conseil des Ministres ou simple décision ministérielle), mais, en règle générale, il sera nécessaire de faire voter une loi par le Parlement, en raison de l’importance des résolutions du Conseil de sécurité prises en vertu du Chapitre VII de la Charte, et, en particulier de leur contenu (énoncé d’interdictions devant être assorties, sur le plan interne, de sanctions de caractère pénal). Par conséquent, pour la Grèce, comme pour les autres États, en général, l’exécution de ces résolutions

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\(^3\) Article 38 paragraphe 1 al. b et c du Statut de la Cour internationale de Justice.

\(^4\) L’article 28 paragraphe 1 de la Constitution dit encore que : "les règles du droit international généralement reconnues ... font partie intégrante du droit hellénique interne et priment toute disposition de loi contraire".

\(^5\) A la différence, par exemple, des traités constitutifs des communautés européennes, qui prévoient que leurs actes ne sont pas seulement obligatoires mais encore qu’ils sont immédiatement exécutoires dans les ordres juridiques internes des États membres.

\(^6\) Voir loi de nécessité n° 585 de 1945.
ne peut être opérée que par l’entremise des gouvernements qui les intègrent dans leurs droits nationaux.\textsuperscript{7}

Ainsi, la Grèce, pour appliquer les décisions du Conseil de sécurité relevant du Chapitre VII de la Charte, a dû, dans le passé, recourir à cette solution. Nous citerons, comme exemples, l’acte du Conseil des Ministres n° 630 du 30 juin 1948 se rapportant à la prise des mesures pour l’application des résolutions du Conseil de sécurité des Nations Unies concernant l’armistice en Palestine;\textsuperscript{8} la loi 2317 de 1953 interdisant l’exécution de certains transports par des navires helléniques,\textsuperscript{9} qui a été modifié et complétée par le décret - loi 2398 de 1953,\textsuperscript{10} ainsi que par la loi de nécessité 95 de 1967 interdisant les transactions avec la Rhodesie du Sud, elle-même modifiée et complétée par la loi de nécessité 540 de 1968.\textsuperscript{11} Il est évident que le recours, pour chaque cas particulier, à la procédure, notamment législative, avait l’inconvénient d’être très lent,\textsuperscript{12} alors que l’exécution des résolutions du Conseil de sécurité doit être extrêmement rapide.\textsuperscript{13} D’autre part, cette pratique risquait d’aboutir à des solutions différentes, notamment en ce qui concerne les sanctions infligées.

IV. La loi de nécessité 92 de 1967

C’est pour ces raisons, essentiellement, qu’il a été demandé en 1965 au Département juridique du Ministère des affaires étrangères d’examiner cette question pour essayer de trouver une solution permettant au Gouvernement d’agir vite et, autant que possible, de façon homogène.\textsuperscript{14} Le Département juridique a élaboré un projet de loi-

\textsuperscript{7} Ce système ressemble donc à celui des traités internationaux, avec toutefois la différence notable que, puisqu’il s’agit d’actes institutionnels obligatoires, les États ne disposent pas de moyen analogue à celui de la ratification et ne peuvent pas, par conséquent, refuser l’introduction de ces actes dans leurs ordres juridiques. Un tel refus constituerait une violation manifeste de la Charte des Nations Unies.

\textsuperscript{8} Journal officiel 171/1948.

\textsuperscript{9} Journal officiel 61/1953.

\textsuperscript{10} Journal officiel 118/1953.

\textsuperscript{11} Journal officiel 203/1968.

\textsuperscript{12} Il faut souvent plus d’un an pour qu’une loi puisse être votée par le Parlement.

\textsuperscript{13} L’effet de ces résolutions est, en principe, immédiat.

\textsuperscript{14} Ce travail a été accompli par l’auteur de cet article sous la direction du second conseiller juridique du Ministère des affaires étrangères, Constantin Pappas, juriste attentif, fin et disposant d’une grande expérience.
cadre fondé sur le principe de l'habilitation législative,15 projet qui, sans changement, est devenu, peu après, la loi de nécessité 92 de 1967 "sur l'application des résolutions du Conseil de sécurité des Nations Unies et sur l'approbation et l'application des recommandations du Conseil de sécurité et de l'Assemblée générale".16

Cette loi s'applique, en premier lieu, aux résolutions du Conseil de sécurité qui sont prises en application de l'article 41 de la Charte -- mesures en faveur de la paix n'impliquant pas l'emploi de la force armée, telles, par exemple, que l'interruption complète ou partielle des relations économiques avec un pays,17 et qui sont obligatoires conformément à l'article 25. Elle peut également s'appliquer à des recommandations de ce même Conseil et de l'Assemblée générale des Nations Unies se rapportant à des questions analogues, que la Grèce pourrait vouloir accepter et exécuter, bien qu'elles ne soient pas obligatoires. Il est évident que, dans ce cas, puisqu'il ne s'agit pas d'actes juridiques contraignants, l'État doit préalablement accepter ces recommandations avant d'en ordonner l'application sur le plan interne.18

Par cette loi-cadre, la voie législative est abandonnée et le pouvoir exécutif est désormais législativement habilité à appliquer par voie administrative -- beaucoup plus rapide -- les actes précités et notamment les résolutions obligatoires du Conseil de sécurité. La procédure se divise en deux phases :


15 Ce département a été, dans une certaine mesure, inspiré par une loi hellénique similaire qui avait été établie à l'époque de la Société des Nations : la loi de nécessité du 2 novembre 1935 (Journal officiel 520) "sur l'application des sanctions économiques de l'article 16 du Pacte de la Société des Nations".
17 Il peut s'agir également de l'interruption complète ou partielle des communications ferroviaires, maritimes, aériennes, postales, télégraphiques, radiodélectriques et des autres moyens de communication, ainsi que de la rupture des relations diplomatiques.
18 Il convient de relever que la loi de nécessité 92/1967 ne détermine pas expressément la façon et la procédure par lesquelles les recommandations précitées du Conseil de sécurité et de l'Assemblée générale des Nations Unies seront approuvées par l'État grec. Mais il semble qu'il faut admettre, par voie interprétative, que cette acceptation pourra également se faire par décret.
b. Ces textes sont ensuite appliqués dans l’ordre juridique interne par des décrets qui sont émis sur proposition du Ministre des affaires étrangères et d’autres Ministres éventuellement concernés, notamment le Ministre de l’économie nationale. Signalons ici, qu’en Grèce, les décrets sont obligatoirement examinés par le Conseil d’État, ce qui est une garantie importante en ce qui concerne la qualité, sur le plan du droit, des textes adoptés selon cette procédure. Le gouvernement peut, d’après cette loi d’habilitation, expliciter les interdictions qui sont contenues dans les actes institutionnels du Conseil de sécurité et de l’Assemblée générale et prendre toutes mesures nécessaires, de caractère commercial, financier ou économique pour leur exécution.

Cette loi prévoit également expressément que le gouvernement peut, par la même procédure (édiction de décrets), lever ou suspendre complètement ou en partie les interdictions qui avaient été imposées par les actes des Nations Unies.

Elle prévoit, en outre, que ceux qui contreviennent aux dispositions des décrets édictés pour appliquer les actes précités des Nations Unies seront punis d’une peine d’emprisonnement allant jusqu’à cinq ans ou d’une amende pouvant s’élèver à un million de drachmes métalliques ou de ces deux peines à la fois. La poursuite pénale est exercée d’office.

En 1993, un amendement a été apporté à la loi de nécessité 92/1967 pour compléter la liste des sanctions. Ainsi, aux sanctions pénales et pécuniaires contre les personnes qui violent les interdictions énoncées, s’est ajoutée celle de la confiscation des moyens de transport et des biens transportés. Dorénavant, en vertu de l’article 39 de la loi 2145/1993, les produits et marchandises importés en Grèce ou transitant à travers son territoire en violation des décrets émis pour appliquer les résolutions des Nations Unies, ainsi que les moyens de transport doivent, à condition que la violation ait été connue par les personnes concernées, être confisqués en application des procédures décrites dans l’article 2 de la loi précitée.19

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19 Cet amendement prévoit également des dispositions pour l’indemnisation du propriétaire en cas de restitution des biens ci-dessus mentionnés.
Les personnes qui peuvent encourir ces peines sont visées dans les textes des décrets. En tout état de cause, "sont des contrevenants toutes les personnes qui, de quelque manière que ce soit, sont liées aux transactions ou activités interdites". 20

V. Applications récentes


20 Article 2 paragraphe 3 de la loi de nécessité 92 (1967), amendée par l'article 39 de la loi 2145 de 1993.


Il résulte de cette première application de la loi précitée, que lorsque les résolutions du Conseil de sécurité peuvent être appliquées facilement par le gouvernement, elles sont simplement publiées au Journal officiel pour que les autorités et les particuliers en prennent connaissance et s'y conforment, alors que lorsqu'elles contiennent des interdictions qui nécessitent, pour leur exécution, la prise de mesures de caractère pénal, elles doivent nécessairement faire l'objet d'un décret présidentiel, ce dernier cas étant la règle généralement suivie.


27 Je saisit cette occasion pour remercier Madame J. Stavridi qui, au sein du Département juridique, s'est essentiellement chargée de ces tâches, avec zèle et efficacité.

VI. La contribution du Département juridique

La contribution du Département juridique est, en l’occurrence, très importante. C’est lui qui a conçu et, en réalité, mis en œuvre ce système fondé sur l’habilitation législative, qui a permis, d’une part, la Grèce d’appliquer les résolutions du Conseil de sécurité avec célérité et, d’autre part, d’unifier le régime de leur application, notamment en ce qui concerne les peines à infliger aux contrevenants.

30 Journal officiel 143/1933.
34 Décret présidentiel No 68, Journal officiel 57/1996.
37 Journal officiel 117/1996.
Mais le Département juridique joue également un rôle très important en ce qui concerne l’application de la loi-cadre 92/1967. Il intervient essentiellement à trois niveaux :

1) Il examine d’abord les résolutions du Conseil de sécurité pour identifier le traitement qu’il faut leur réserver : aucune action interne, simple publication au Journal officiel, ou publication au Journal officiel et édition d’un décret présidentiel.

2) Chaque fois que cela est nécessaire, il traduit en grec le texte de la résolution du Conseil de sécurité, travail qui nécessite une attention toute particulière. Il ne faut pas oublier, en effet, que le texte de la résolution sera appliqué par l’administration, les particuliers et éventuellement par les tribunaux. Il faut donc que la traduction soit d’une très grande exactitude.

3) Il prépare le projet de décret présidentiel pour l’exécution de la résolution du Conseil de sécurité dans l’ordre juridique hellénique, projet qui sera, par la suite, arrêté par les représentants des Ministères compétents et examiné par le Conseil d’Etat avant sa publication au Journal officiel.

VII. Conclusion

Nous avons cité le cas de la loi-cadre d’habilitation 92/1967 comme un exemple d’une action réussie du Département juridique du Ministère des affaires étrangères de Grèce. Sans doute aurions-nous pu citer plusieurs autres actions, faits ou initiatives réussis que la Grèce doit à ses conseillers juridiques, dont les devoirs, comme ceux d’ailleurs de tous les autres conseillers juridiques pour les affaires internationales sont à la fois nombreux, variés et importants. En fait, nous avons choisi la loi-cadre précitée car la question de l’application des résolutions du Conseil de sécurité prises en vertu du Chapitre VII de la Charte des Nations Unies dans les ordres juridiques internes est très actuelle et parce que cette loi peu connue pourrait, par ailleurs, être éventuellement utile à d’autres pays qui souhaiteraient agir plus rapidement pour exécuter cette catégorie importante de résolutions qui concernent la paix et la sécurité internationales.

Mais il n’y a pas de doute que cette loi, qui a permis à la Grèce de tenir honorablement ses obligations internationales découlant du
Chapitre VII de la Charte, a maintenant plus de trente ans et qu'elle devrait, à notre avis, être sérieusement revue par les autorités compétentes sur la base de l'expérience acquise. Il faudrait, en particulier pouvoir agir encore plus vite. D'autre part, cette loi qui, dans la pratique, a été appliquée d'une façon plutôt extensive, devrait couvrir toutes les dispositions du Chapitre VII de la Charte et non pas seulement celles de l'article 41. Enfin, les dispositions de cette loi se rapportant une éventuelle exécution des recommandations provenant du Conseil de sécurité et de l'Assemblée générale n'ont jamais été appliquées jusqu'au présent et nous pensons qu'elles pourraient être supprimées en cas d'adoption d'une nouvelle loi.

Nous terminerons ce bref article en rappelant la recommandation de la Commission de Venise pour la démocratie par le droit qui dit que les États, pour l'application des actes contraignants des organisations internationales devraient adopter "des lois-cadres qui pourraient aisément, au moyen de dispositions d'habilitation appropriées, prévoir des solutions ad hoc, détaillées, d'une application rapide et facile, et surtout adaptées aux besoins de chaque organisation internationale".  

40 La Commission européenne pour la démocratie par le droit (Commission de Venise) fut établie le 10 mai 1990 à Strasbourg par un accord partiel du Comité des Ministres du Conseil de l'Europe.

41 Voir Recommandation 5.5. b dans C. Economides, Les rapports entre le droit international et le droit interne, science et technique de la démocratie, Conseil de l'Europe 1993. Cette étude, suivie de recommandations, que j'ai eu l'honneur de rédiger pour la Commission de Venise a été adoptée par cette dernière.
THE ROLE OF AND PROBLEMS CONFRONTED BY THE LEGAL ADVISER IN IMPLEMENTING INTERNATIONAL TREATIES AND DECISIONS UNDER NATIONAL LAWS: A CASE STUDY OF PAKISTAN

Jamshed A. Hamid

An international decision may take one of many forms. It could be the decision of one of the principal or subsidiary organs of the United Nations. It could be in the form of a resolution of the General Assembly or the Security Council. It could be in the form of a multilateral convention adopted by the General Assembly, as has been the case in recent times, or adopted by a conference of plenipotentiaries convened under the auspices of the United Nations or any other international body. Such decisions may also be the result of bilateral agreements concluded between States. The decision could also be in the form of a judgment of the International Court of Justice or it may take the form of an award by an arbitral tribunal. Whatever the nature of the international decision, its implementation within the State depends on the domestic laws. It also depends on the international body which took the decision and the nature of the decision, namely, whether the decision was taken by a non-governmental organization or an international intergovernmental organization and whether the decision resulted in the adoption of a treaty or merely a non-binding declaration.

In a number of countries the State organs which deal with international relations are identified and the mode of implementation of the State’s international obligations are also specified in its constitution. Implementation of treaties in the United States is part of its Constitution and its treaty obligations take precedence over the national law once a treaty is submitted to the Senate for advice and its consent is obtained. This is just one example by way of illustration. However, the main emphasis in this article will be to identify the provisions which, under the Constitution of the Islamic Republic of Pakistan, assign the functions of international relations to a particular organ of the State and

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1 Legal Adviser, Additional Secretary of the Ministry of Foreign Affairs, Pakistan.
establish the modalities for the implementation of international treaties and decisions.

Under the 1973 Constitution of the Islamic Republic of Pakistan, the conduct of international relations has been assigned to the executive organ of the State. Article 97, which deals with the extent of the executive authority of the Federation, provides:

"Subject to the Constitution, the executive authority of the Federal shall extend to the matters with respect to which [Majlis-e-Shoora] Parliament has power to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan".2

The Constitution of Pakistan is federal in nature. The executive functions are distributed between the Federation and provinces on the basis of legislative powers given to each of them by the Constitution. Consequently, the executive power follows the legislative power. The distribution of legislative functions between the Federation and the provinces is contained in the Fourth Legislative List which enumerates the subjects assigned to the federal Government (Federal Legislative List) and those subjects over which both the federal as well as the provincial governments have concurrent jurisdiction (the Concurrent List). All those subjects not contained in the two lists fall within the exclusive domain of the provincial governments. Item 3 of the Federal Legislative List which relates to the conduct of foreign relations states as follows:

"3. External Affairs: the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries, extradition, including the surrender of criminals and accused persons to Governments outside Pakistan."3

It is clear from the provisions of article 97 and item 3 of the fourth schedule that implementation of treaties and agreements is the concern of the federal Government. But every agreement concluded

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2 Ibid., p. 1056.
the federal Government or any treaty to which the State is a party is not self-executing within Pakistan. Much would depend on the nature of the treaty and the laws of Pakistan which govern the subject-matter.

According to the Rules of Business, the procedure in Pakistan is that before negotiating a treaty or an agreement with another State the Ministry of Foreign Affairs is invariably consulted since this is the arm of the federal Government which is ultimately responsible for all matters which affect the foreign policy of Pakistan or the conduct of its foreign relations. In the Foreign Office itself the political directorates examine the desirability of concluding the treaty from the political angle. It is then referred to the Legal Adviser’s Office for examination from the point of view of the legal obligations to be incurred thereunder and their compatibility or otherwise with the laws of Pakistan. This examination is important for the ultimate implementation and enforcement of the treaty in Pakistan. Consequently, the legal adviser’s advice is important in determining whether or not to ratify or accede to a multilateral treaty or to conclude a particular bilateral agreement with another State.

The Constitution of Pakistan clearly demarcates the areas of the executive power and the legislative power. In most cases the executive power follows the legislative power. It is unimaginable that the executive would incur obligations under a treaty or an agreement which will flout the will of the legislature. The legislature, which is the supreme body, enacts laws on a particular subject, which the executive is duty-bound to follow. Consequently, the first thing the legal adviser in the Foreign Office has to do when a draft of a treaty is referred to him or her for examination and advice is to see whether or not it can be implemented in Pakistan, bearing in mind the legislative instruments. While examining this aspect, three elements have to be kept in mind, namely:

1. Whether the treaty in question would require a legal cover for its enforcement in Pakistan because of its conflict with domestic law;

2. If apparently there is no such conflict, whether the existing laws contain provisions which would enable the Government to implement the treaties in question without giving any legal cover; and
3. Whether a treaty is enforceable where there is no law either prohibiting or enabling the Government to implement the treaty in question. In such cases, the attitude of Pakistani courts on international customary law becomes relevant.

When a treaty is referred to the Legal and Treaties Division of the Foreign Office, the Legal Adviser has first of all to determine which category the treaty belongs since different approaches would be required for their implementation. It would be pertinent to begin consideration of the cases falling in the first of the three categories mentioned above.

The first category consists of those cases where the international treaty or decision conflicts with a provision of the domestic law. Such treaties or decisions cannot be implemented in Pakistan without a legislative cover. There is a surfeit of case law on this principle. In the recent case of **Messrs Najab Zarab Ltd. v. Government of Pakistan**, the High Court of Sindh stated:

"The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction, provided they do not run into conflict with acts of Parliament."  

There is no inherent power vested in the executive to implement any international obligation under a treaty if the Government is not vested with law. "National courts, being organs of the national State and not organs of international law, must perforce apply national law if international law conflicts with it." As law is the sole source of governmental power, the existence or non-existence of any power to implement a treaty obligation is a matter of law and must be determined by reference to some enactment. Consequently, the legal adviser must be satisfied, while advising the Government regarding the ratification of a treaty, that its implementation would not come into conflict with the domestic laws. In case of any conflict, the legal adviser has to recommend that either necessary legislative cover should be accorded or Pakistan should refrain from becoming a party if, for any reason, the

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5 Ibid., pp. 98-99.
is not possible.

For example, any multilateral treaty or bilateral agreement which ousts the jurisdiction of the local courts over individuals for the time being in Pakistan cannot be entered into without a legislative cover since it would come into conflict with both the Constitution and other laws which provide that every person "for the time being" within Pakistan is subject to the laws of the country and would be treated in accordance with the laws of Pakistan. It is for this reason that the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963, to name only a few, had to be given legal cover as the diplomatic agents who are "for the time being" in Pakistan were extended inviolability and placed outside the jurisdiction of our courts in criminal and civil matters.

It is evident that the legal adviser in such cases has a difficult choice, namely, whether to advise non-adherence to the treaty in question or to propose its ratification or accession by giving it legal cover. Sometimes, in view of the sensitivity of some treaties, the legal adviser is confronted with a difficult choice as reference to the legislature for legal cover may generate national controversies, particularly for those treaties which tend to limit the sovereignty of the State.

However, except in cases where there is a prima facie conflict between a treaty and domestic laws, the courts have held that, as members of the community of nations while interpreting the law, the court must interpret it in a manner that is consistent with customary rules of international law. In M.A. Qureshi v. the USSR, the Supreme Court stated:

"The Law of Pakistan is that 'every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law.'" 9

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Again, in *Messrs Najab Zarab Ltd. v. Government of Pakistan* the court was of the following opinion:

"We are of the view that nations must march with the international community and the municipal law must respect the rules of international law, just as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction, provided they do not run into conflict with acts of Parliament."  

This creates greater problems for the legal adviser as it is difficult to determine which treaty that does not have legislative sanction will be upheld by the court if it is challenged in a court of law. In such cases, extreme caution has to be exercised before making a recommendation. The safer course adopted has been to give it legal cover whenever possible.

The second category of cases includes those treaties where there are provisions in the existing laws enabling the Government to implement treaties without the need to give covering legislation. Provisions in any treaty which provides, for example, for freedom of movement within the States parties or non-registration of officials do not need legal cover since the Foreigner’s Act of 1946\(^\text{10}\) gives the power to the federal Government to make orders with respect to foreigners regulating their presence or continued presence in Pakistan and to lay down terms and conditions for their stay. By an executive order, the Government can exempt persons from those obligations if so required by treaty. This power vests with the Ministry of Interior. Similarly, exemption from duties and taxes can be extended through an executive order by the Central Board of Revenue which has this power under the Finance Act. However, before undertaking such obligations the legal adviser has to consult the concerned ministries and secure their concurrence before advising the Government about the ratification of otherwise of the treaty.

In the third category of cases, we come across treaties unde

\(^{10}\) Pakistan Legal Decisions (1993), Karachi, p. 93.  
\(^{11}\) Foreigner’s Act of 1946, Act XXXI, Section 3 (2).
which the obligations incurred are neither prohibited nor permitted by the laws. According to the decisions of the superior courts, in such cases the courts will endorse international law provided that it does not conflict with the national laws. Again, to cite the recent case of Messrs Najib Zarab Ltd. v. the Government of Pakistan, the Sindh High Court stated that:

"We are of the view that Nations must march with the international community and the municipal law must respect rules of international law, even as Nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction, provided they do not run into conflict with acts of Parliament."

This is perhaps the most difficult matter to determine. What type of treaties fall in this category? It is always safe to ratify a treaty which is in conformity with the well-established principles of customary international law without being at variance with domestic law provisions. However, in this category one element that is difficult to determine is whether or not the treaty comes into conflict with the Islamic injunctions. It is the primary responsibility of the legal adviser in Pakistan’s Foreign Office to consider whether the treaty is in conformity with the Islamic principles as enjoined in the Holy Quran and Sunna. The Constitution gives primacy to Islamic law. The preamble of the Constitution makes the “Objective Resolution” a substantive part of the Constitution and lays down that Pakistan shall be an Islamic State:

"Wherein the Muslims shall be enabled to order their lives in their individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunna."

Part IX of the Constitution further elaborates the Islamic provisions relating to the injunctions of the Holy Quran and Sunna.

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13 Constitutions of Nations, p. 1053.
Article 227, paragraph 1, lays down that:

"All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunna, in this part referred to as the injunctions of Islam, and no law shall be enacted which is repugnant to such injunctions."\(^{14}\)

The responsibility to examine and to decide whether any law is in conformity with the Islamic injunctions has been assigned to the Federal Shariat Court. Article 203 D, paragraph 1, which deals with the powers, jurisdiction and functions of the Court provides:

"The court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunna of the Holy Prophet ..."\(^{15}\)

Almost all the laws have been examined by the Federal Shariat Court and, wherever inconsistency with the injunctions of the Holy Quran and Sunna was detected, the law was amended accordingly. Consequently, the legal adviser faces no problems in recommending adherence or otherwise to the treaty where the law is clear. However, it is in the area of uncertainty where the Islamic laws are silent with regard to a certain provision of a treaty that the legal adviser has to ensure that the provisions of the treaty do not conflict with the injunctions of the Holy Quran and Sunna. There are decisions of the superior courts which have recognized the primacy of the injunctions of the Holy Quran and Sunna in the legal system of Pakistan. In the case of *M.A. Qureshi v. the USSR*, Justice Nasir Hasan Shah stated:

"When the law gives discretion to the court and it can be exercised in more than one way, it would be exercised so as to advance justice and fair play as

\(^{14}\) Ibid.; B. 1879;
\(^{15}\) Ibid.; B. 1874;
understood in Islam. Rules of prudence, propriety and abundant caution and similar other considerations would be applied only in consonance with Islamic standards. Present law when required to be applied to a new situation would be followed and applied so as to advance Islamic principles. All doubts in interpretation of laws and appreciation of evidence would be resolved in a manner consistent with Islamic principles and jurisprudence in preference to any other contrary norm.\textsuperscript{16}

In view of the observations of the superior courts, the role of the legal adviser becomes even more difficult. Not only the laws, but also those uncodified injunctions of the Quran and the Sunna of the Prophet which deal with moral conduct and which prescribe the prohibited and permitted acts have to be taken into account when it comes to the implementation of the treaties or decisions of international organizations. These moral codes have equal force as every injunction of the Quran is binding on the Muslims. Consequently, when examining the implementation of treaties and decisions in Pakistan, the binding force of those injunctions cannot be ignored. For these reasons, when ratifying or acceding to some treaties that had religious implications Pakistan was constrained to attach reservations to the effect that the provisions of the treaty shall be interpreted in the light of the principles of Islamic laws and values.

Another difficulty that the legal adviser is confronted with relates to the constitutional framework of Pakistan. Pakistan is a federal State with a clear demarcation of the competences of the federal Government and the provinces. As such, an appreciable number of treaties and decisions would fall within the domain of the provinces for their implementation. Consequently, before incurring any obligations under a treaty of this nature, all the provinces have to be taken into confidence and their express concurrence obtained to avoid any problems in implementation.

Conclusion

It is evident from the foregoing discussion that the Legal

\textsuperscript{16} Pakistan Legal Decisions (1981), Supreme Court, p. 377.
Adviser in Pakistan’s Foreign Office has to perform multifarious functions. Normally he or she tenders legal advice on international law, including the interpretation of international treaties and agreements, to different sections of the Ministry of Foreign Affairs and Pakistan’s diplomatic missions abroad. In cases where the Foreign Office initiates the conclusion of a treaty or where a multilateral treaty is being negotiated, the legal adviser has to prepare the draft treaty or the brief for the delegation, as the case may be, keeping in mind Pakistan’s national laws, and to make recommendations so that the said treaty may be implementable in Pakistan without inordinate difficulty. Once the treaty is concluded, the legal adviser has to take the follow-up action regarding Pakistan’s succession, accession or ratification. The legal adviser has to examine whether, in view of our laws and Islamic injunctions, the treaty can be implemented with or without a legal cover or executive orders. If legal cover or executive orders are necessary, the legal adviser is required to draft the necessary legislation, executive orders and declarations in consultation with the ministry directly concerned with the implementation.

If the implementation of a treaty or decision falls within the jurisdiction of different ministries, the legal adviser acts as the coordinator. Similarly, where the implementation requires the cooperation of the federating units, the legal adviser has to coordinate with the provinces either directly or through the concerned federal ministry or division. These delicate functions impose onerous responsibilities on the legal adviser in the discharge of these duties in implementing international treaties and decisions.
THE ROLE OF THE LEGAL ADVISER
IN THE INTERNAL APPLICATION
OF INTERNATIONAL CUSTOMARY AND TREATY LAW

Bharat Patel

I. Introduction

It is a truism that the application and observance of international law by any State necessitates the active participation not only of the Executive, but also of the Legislature and the Judiciary. The involvement of the various branches of Government is engaged whenever rules of international law are brought to bear on the domestic arena and require some form of recognition or implementation within that arena. In any event, the burden of observing and applying international norms in many States is borne largely by the Executive, with relatively marginal contribution to State practice by the Legislature and perhaps even less by the courts.¹

In Zimbabwe, as is probably the case in most other jurisdictions, the Executive is structured along sectoral lines and the administration of international matters is divided in accordance with sectoral interests and responsibilities. Nevertheless, the task of ensuring the due application and observance of international law at the formal level is one that is centralized and assumed primarily by the law officers in the Attorney-General’s Office. The supervisory role assigned to the law officers embraces the entire gamut of international relations and includes general advisory functions as well as the examination and approval of treaties and attendant domestic instruments.

It is intended within the scope of this essay to provide a general overview of the work of the law officers in the sphere of international law and to survey some of their more important contributions to the application of international law in Zimbabwe.

II. Historical Background

¹ Director of Legal Advice, Attorney-General’s Office, Zimbabwe.
A proper appreciation of the Zimbabwean approach to international law -- particularly as regards the inheritance of treaties -- necessitates some comment on the international status of the country before the attainment of independence in 1980.

1. Southern Rhodesia qua Colony

The method by which Rhodesia is to be regarded as having been brought and retained under the imperial yoke -- whether by conquest, occupation, settlement, annexation or any combination of these methods -- is not without controversy and various conflicting arguments have been propounded in that respect. Be that as it may, after the territory was formally annexed as a Crown colony in 1923, it enjoyed a very large degree of internal self-government. By a process of gradual evolution thereafter, it also came to be endowed with a liberal measure of external capacity delegated by Britain. This autonomy, although subject to prior consultation with the British Government extended to the conclusion of trade agreements and regional representational agreements, membership of international technical organizations and representation at Commonwealth conferences.

2. The Federal Period

The creation of the Federation of Rhodesia and Nyasaland in 1953 witnessed even further delegations of authority as regards the conduct of foreign affairs. Apart from the exclusive right to legislate for the implementation of treaties affecting it or any of its constituent territories, the Federation was in 1957 entrusted with responsibility for external affairs to the fullest extent possible consonant with Britain's metropolitan responsibility. This included greater representational capacity within the Commonwealth as well as an extension of the classes of international agreements that the Federation might conclude -- albeit subject to Britain's potential intermediacy in and ultimate responsibility for the Federation's external relations.

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3 Ibid., p. 749.
3. Post-Federation

Both before and after the dissolution of the Federation at the end of 1963, Southern Rhodesia enjoyed a uniquely expansive range of legislative powers, including the power to enact laws with extraterritorial effect. On the external front, the executive powers of the moribund Federation were devolved to Southern Rhodesia, which inherited most of the Federation's treaties as well as its organizational memberships and representational arrangements. Nevertheless, on the international plane, despite Britain's ambivalence regarding the status of the territory, Southern Rhodesia continued without full personality and remained within the fold of British responsibility.

4. From Illegitimacy to Independence

In November 1965, the Rhodesian Government, by its so-called Unilateral Declaration of Independence (UDI), purported to rupture the country's subordination to British suzerainty and to assume internal as well as external sovereignty. Within the domestic sphere, the assertion of de facto territorial occupation and control was proffered as the basis for a transition to de jure sovereign status. In any event, whatever the merits of the argument for internal sovereignty, there is little doubt that the absence of meaningful international recognition effectively denied the acquisition of international personality and statehood by the territory before its accession to full independent status. During this interregnum of fifteen years, the external relations of the country were appreciably attenuated, being confined to the two States that were prepared to accord recognition for certain limited purposes.

III. Modes of Reception

The mode of reception of international law is determined in most instances by the prevailing constitutional structures and practices of States and will vary accordingly. The range of options available

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7 Ibid., pp. 42-43.
9 Ibid., pp. 716, 724, 728-730.
11 Portugal and South Africa.
straddles two extremes, viz. the position where all rules of international law are binding on all public agents without any mediation versus the position where no international law rule may be applied by any public agent in the absence of prior municipal authority or action enabling such application.\textsuperscript{12}

1. The British Commonwealth

The approach to international law in most countries of the Commonwealth, by dint of legal affinity and continuity, is relatively uniform but without the fetters of hidebound inflexibility.\textsuperscript{13} Generally speaking, the universally accepted rules of customary international law are regarded as having been incorporated within the domestic law unless ousted or modified by statute. Conversely, the rules and requirements of treaties cannot be applied within the domestic sphere without legislative intervention in the shape of a statute transforming those provisions into rules of municipal law. As for the principles of international comity, their fate within the domestic arena will depend upon the extent to which the public agent concerned is prepared to recognize and apply those principles as a matter of public policy.

2. The Position in Zimbabwe

In Zimbabwe, the question has never been specifically mooted before the courts and there is therefore no definitive judicial pronouncement on the subject.\textsuperscript{14} Nevertheless, the approach adopted by the law officers hitherto has been largely in keeping with that obtaining in other Commonwealth jurisdictions and has come to be accepted as executive practice. And in the absence of any demurrer before the courts and the legislature, this approach must also be regarded as being

\textsuperscript{12} Fawcett, \textit{The British Commonwealth} ..., pp. 17-18.
\textsuperscript{14} In Barker McCormac (Pty) Ltd. v. Government of Kenya, \textit{Zimbabwe Law Reports}, vol. 2 (1983), p. 72 at p. 77, the Supreme Court observed that international law formed part of the law of Zimbabwe except to the extent that it was in conflict with statute or prior judicial precedent. The principal issue before the Court concerned the propriety of applying the restrictive doctrine of sovereign immunity. The reception of international law was not fully argued or analysed and the court's observation in that regard must accordingly be treated as being somewhat \textit{obiter}.
the prevailing State practice.\textsuperscript{15}

IV. International Customary Law

1. Cases before the Courts

By and large, the municipal courts in Zimbabwe have very rarely been called upon to determine issues of international law and there is a relative paucity of case law on the subject. This dearth is consequently reflected in cases engaging the intervention of the law officers. The issues canvassed in such cases have included expropriatory powers in situations of belligerency,\textsuperscript{16} extraterritorial criminal jurisdiction\textsuperscript{17} and the creation and recognition of statehood.\textsuperscript{18} A number of cases have concerned the application of international human rights standards as regards inhuman punishment,\textsuperscript{19} freedom of residence\textsuperscript{20} and the right to a passport.\textsuperscript{21} In most if not all of these cases, the function of counsel for the State has been to invoke and advocate the application of international law in favour of the State and as against individual rights. Given the adversarial nature of the litigation process in Zimbabwe, this counter-position of public and private interests is virtually inevitable, and the possibility of the law officers being called upon to act as \emph{amici curiae} is correspondingly diminished.

2. Interpretation of Statutes

In contrast, the law officers are able to assume a significantly more objective role in the interpretation of statutes \textit{vis-à-vis} the application of international law. The reasons for this position of impartiality are manifold. To a large extent, it is attributable to the very

\textsuperscript{15} Insofar as concerns the reception of treaties, the position has now been codified in section 111B of the Constitution of Zimbabwe. See Albert P. Blaustein and Gisbert H. Fanz, eds., \emph{Constitutions of the Countries of the World, Republic of Zimbabwe Supplement}, (Dobbs Ferry, Oceana Publications, 1994), pp. 111 and 121.


\textsuperscript{20} \emph{Principal Immigration Officer and Another v. O’Hara and Another}, \emph{Zimbabwe Law Reports}, vol. 1 (1993), p. 69.

nature of the law officers' advisory role which is primarily geared towards applying the law rather than simply adopting a pro-statal posture. The need to safeguard the State's interests is of course not entirely disregarded nor is the prospect of non-compliance with the advice given. However, notwithstanding these factors, the avowed aim in addressing the interrelationship between international and domestic law is to interpret municipal statutes in conformity with the established principles of international customary law.22

3. Legal Opinions

In the sphere of customary international law, the principal contribution of the law officers is extra-curial and mainly consists of legal advice tendered in the form of written opinions to State departments and agencies. The issues opined upon in recent years have been greatly varied and have canvassed, *inter alia*, the scope of sovereign and diplomatic immunity23 and State succession to treaty rights and obligations.24 Generally speaking, the degree of analysis and authoritativeness of a given opinion will depend upon the context in and purpose for which it is requested. And to the extent that it is relied upon and applied by the domestic authorities and agencies, it may properly be regarded as having internalized the relevant rule of international custom qua State practice.

V. Succession to Treaties

1. Succession on Independence

Any discussion as to the internal application of treaty rights and obligations presupposes, obviously enough, that the treaties in question are binding upon or otherwise applicable to the State concerned. As regards newly independent entities, they must perforce

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22 Except where the statute in question is patently irreconcilable with the relevant rule of international law.

23 Immunity of mission property against jurisdiction and execution, both locally and abroad; immunity of diplomatic agents from various incidents of the local law; tax exemptions and other privileges and immunities for nationals employed by international organizations.

24 Succession to pre-independence multilateral treaties; continuation of treaties with the former German Democratic Republic upon unification with the Federal Republic of Germany; succession of the Russian Federation to the Soviet Union's permanent seat on the Security Council.
contend with the problem of succession to treaties extended to them by their erstwhile metropolitan sovereigns. Notwithstanding the superabundance of doctrinal literature on the subject and the attempt to comprehensively codify the applicable rules, international practice has evinced a marked reluctance to succumb to the demands of coherence and uniformity.

2. Continuity versus Chaos

The traditional reliance on categorizing treaties as being so-called “personal”, “local”, “dispositive” or “law-making” does not always serve to rationalize the process and must often yield to the pragmatic approach of assessing each treaty on its own terms and with due regard to the economic and political context in which it was intended to operate. Of course, there may be considerable justification for adopting the political expedient of rejecting the entire baggage of imperial rule. Nevertheless, the existence of an autonomous administration in the non-metropolitan territory coupled with the consent of that administration to the specific application of the treaties in question tends to militate against rejection and in favour of legal continuity after independence.

3. Commonwealth Colonies

The practice adopted by Britain and its former colonies upon the attainment of independence was essentially twofold. In most cases, a list of the treaties applied before independence was compiled and continuity was effected by means of a devolution agreement between Britain and the emergent State. The alternative course, adopted in fewer instances, was for the newly independent State to issue a formal declaration maintaining treaty relationships on the basis of reciprocity for a specified period, pending a determination by that State as to which treaties would be continued on an indefinite basis.


27 Ibid., pp. 23-26.

28 Ibid., pp. 18-19.

29 Ibid., p. 19; Roberts-Wray, Commonwealth and Colonial Law, p. 279.
4. United Nations Practice

As a rule, the practice of the United Nations Secretariat, qua depositary, has been to accept the attitude of new States as to the treaties that they wish to affirm or repudiate. However, this acceptance appears to be contradicted by the failure to reflect that position in the United Nations compilation of treaties unless the States concerned have deposited some formal document specifically identifying the relevant treaties. Where no such documents have been deposited, the resultant inconsistency tends inevitably to generate a welter of confusion as to the parties to those treaties.

5. The Zimbabwean Declaration

Soon after independence in 1980, the Government of Zimbabwe transmitted a formal declaration to the United Nations. The declaration was subsequently circulated by the Secretary-General to all Members States of the United Nations. In keeping with the principle of continuity, the effect of the declaration was to continue in force all treaties validly concluded or recognized by the United Kingdom in respect of Southern Rhodesia. As regards bilateral treaties, these were to remain operative for a period of three years from independence and would thereupon terminate unless continued or modified by agreement during the intervening period. Conversely, multilateral treaties were to be reviewed during a period of six years from independence and at the end of that period, unless specifically denounced, would continue fully in force as if they had been concluded by Zimbabwe.

6. Subsequent Practice

In the years following the 1981 declaration, the law officers were tasked to carry out a fairly comprehensive review of pre-independence treaties. In conformity with their advice, virtually all

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31 Status of Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997, document ST/LEG/SER.E/16.
33 On 24 February 1981.
34 By notification dated 25 March 1981.
35 This period was extended to five years after independence by subsequent declarations.
bilateral treaties were allowed to lapse, while most multilateral treaties were treated as having continued in force. The approach adopted by the law officers thereafter, when advising on the operation or application of these treaties, has been entirely consistent with this position and is reflected by and large in internal administrative practice. Moreover, subject to the problem addressed below, this position also appears to have been accepted outside the domestic domain in the attitude of other States and international organizations.

7. Treaties Deposited with the United Nations

The assumption that pre-independence multilateral treaties had continued in force by virtue of the 1981 declaration was severely shaken as a result of a communication from the Secretary-General in November 1995. While acknowledging the receipt and subsequent circulation of that declaration, the Secretary-General took the view that a general declaration of succession per se did not suffice and that a further "formal notification of succession with precise and explicit reference to a treaty (or treaties)" was necessary for that purpose. Admittedly, this caution is understandable to the extent that it accords with the ordinary requirement of an express consent to be bound by treaty obligations. Nevertheless, it fails to account for the extraordinary circumstances of State succession and the imperatives of legal continuity. In the event, it has become necessary, at the insistence of the law officers, to seek clarification from the Secretary-General before taking the requisite action to seal off the hiatus that appears to have been created.

VI. Zimbabwe Treaties List

Since the attainment of independence in 1980, Zimbabwe has entered into a veritable legion of treaties covering a very broad spectrum of inter-State relations. Given the nature of global relations and their impact on intra-State activities, the significance of these treaties is not confined to the international sphere, but also inevitably extends and

36 Save for four International Labour Organisation conventions, which were denounced in 1986, either by reason of obsolescence or because of conflicting municipal law.


38 At the time of writing, the position has yet to be resolved.
intrudes into the domestic realm. Many of the players within that realm, whether nationals or foreigners, may at some stage be affected by the operation of these treaties. And the availability of accurate information on the existence and status of such treaties may be of crucial importance to their transactions. In this context, a comprehensive treaties list is often an essential tool not only for lawyers, but also for laypersons.

The need for a Zimbabwean treaties list was for some time recognised as a very pressing and urgent one. The only extant list was one that had been prepared in 1965, with respect to treaties in force before the Unilateral Declaration of Independence, and which was republished without change after independence in 1980. There was no equivalent list for the period after independence and this lacuna was exacerbated by the somewhat haphazard nature of the prevailing records and information retrieval systems.

Consequently, an inter-ministerial committee, comprising officials from several key departments, was established in 1993. The committee was chaired by the Attorney-General’s Office and was mandated to compile a readily accessible and comprehensive list of all the treaties applicable to Zimbabwe, including those concluded on behalf of or extended to Southern Rhodesia by Britain. After the initial stages of collating and tabulating the relevant material, the law officers assumed the final and most arduous phase of revising and editing the final draft list. The list, which was published in 1996, covers the period up to the end of 1994. The task of updating the list to incorporate the treaties concluded after 1994 is currently underway in the hands of the law officers.

VII. Conclusion and Implementation of Treaties

In Zimbabwe, as is no doubt the position in other municipal systems, the modalities and mechanisms involved in the treaty-making process have evolved in tandem with prevailing constitutional requirements and conventions. In this context, the law officers play a pivotal role not only as active participants in the conclusion of treaties, but also in formulating the procedures governing the adoption of treaties.

In 1993, the enactment of a constitutional amendment relative to the adoption of treaties necessitated the revision of the procedures previously applied. These procedures were then redrafted by the law
officers and issued in the form of a cabinet circular. In the light of subsequent practice, which was somewhat erratic in complying with the stipulated procedures, the cabinet circular was further revised and streamlined to secure uniform and regular adherence. In order to facilitate the process, the law officers have also taken the initiative to prepare and circulate specimen draft documents for use by administrators at the various stages of treaty adoption.

As regards the conclusion of treaties, the governing procedures require the intervention of the law officers at every formal stage — beginning with the negotiation and examination of treaties through the preparation of cabinet papers and instruments of ratification or accession. Thereafter, the law officers will be called upon to advise on the legal or legislative measures necessary for implementing treaty provisions and, once the appropriate policy decisions have been taken, to draft the requisite instrument or legislation transforming those provisions into rules of municipal law. At each stage, the quality of the legal input provided may be critical in delimiting the scope of the rights and obligations acquired or assumed by the State. It will also determine the extent to which such rights and obligations are internally executable and duly implemented within the municipal sphere.

VIII. Statutory Incorporation of Treaties


As already intimated earlier, the Constitution of Zimbabwe was amended in 1993 in two significant respects relative to the municipal reception of treaties. Firstly, subject to a limited number of exceptions, all treaties concluded after the coming into operation of the amendment were subjected to the requirement of parliamentary resolution.
approval. Secondly, it was expressly provided that no treaty would form part of the domestic law unless it had been incorporated into the law by or under an act of Parliament. The latter requirement was in effect no more than a restatement of the pre-existing common law but was specifically introduced at the initiative of the Attorney-General's Office in order to codify and clarify the law.

2. Modalities for Transformation

The mode of transforming treaty provisions into rules of municipal law inevitably depends upon the nature of the treaty rights and obligations in question and the extent to which they can be appropriately accommodated within the corpus of statutory law. In Zimbabwean legislative practice, a variety of options have been applied at one time or another. Thus, the enabling statute may simply refer to the treaty or append some or all of its provisions in the form of a schedule. Alternatively, the treaty’s substantive provisions might be translated into statutory terms specially tailored for domestic application. Again, it may prove expedient for the Legislature to delegate this transformative function to the Executive by empowering the latter to frame regulations designed to implement specific treaty rules. In certain instances, however, particularly where administrative flexibility is the paramount criterion, the legislative option may be eschewed in favour of published administrative codes or rules.

3. Technical and Administrative Issues

The task of selecting the most apposite mode and instrument of treaty transformation is a matter that almost invariably falls to be determined by the law officers. However, what may be equally critical but often overlooked is the need for expert guidance both as to the technical requirements of a given treaty as well as the administrative mechanisms necessary for its successful implementation. It may happen that the requisite input is lacking or is not made available in a timely manner. In either event, the end product is likely to be somewhat formalistic and incapable of effective execution in practice. In the Zimbabwean context, this problem is not without significance but has usually been circumvented by recourse to precedents from other jurisdictions coupled with a general appreciation of local conditions.

4. Treaties Incorporated by Statute

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Given the common law and constitutional imperatives for transformation, the statutory law of Zimbabwe inevitably abounds with a vast and variegated array of treaty rights and obligations. Some of the more significant areas of treaty law embodied or reflected in domestic legislation include the following:

- Trade and investment,
- International arbitration,
- Intellectual property rights,
- Extradition agreements,
- Diplomatic and consular relations,
- International financial institutions,
- International aviation,
- International sanitary regulations,
- Status of refugees.

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44 Section 16 (9b) of the Constitution (property rights); Zimbabwe Investment Centre Act [Chapter 24:16] (foreign investment); Parts VIII and IX of the Customs and Excise Act [Chapter 23:02] (safeguard measures and trade agreements); section 91 of the Income Tax Act [Chapter 23:06] (double taxation agreements).


46 Copyright Act [Chapter 26:01]; Industrial Designs Act [Chapter 26:02]; Patents Act [Chapter 26:03]; Trade Marks Act [Chapter 26:04].

7 Extradition Act [Chapter 9:06].


35 Limitation of Liability (Passengers in State Aircraft) Act [Chapter 8:06]; Aircraft (Offences) Act [Chapter 9:01]; Aviation Act [Chapter 13:03]; Carriage by Air Act [Chapter 13:04].


• Humanitarian law\textsuperscript{53} and
• Human rights and labour standards\textsuperscript{54}.

5. Inconsistencies and Omissions

While many of the treaties to which Zimbabwe is a party have been appropriately integrated within the municipal system, either statutorily or by administrative arrangement, there remain several treaty stipulations that are either wholly unrecognized in or inconsistent with the domestic law. Notable instances include some trade and investment treaties\textsuperscript{55} that require further legislative action in order to secure their due domestic application. Similar lacunae obtain regarding the implementation of various environmental treaties\textsuperscript{56} avidly adopted during the global wave of environmental zeal. There are several other spheres, apart from those discussed in this essay, where internal rules collide with or disregard international requirements. In many of these cases, the law officers have not been wanting in addressing the relevant mischief and proffering remedial measures, including, where appropriate, the preparation of draft legislation. However, for a variety of reasons ranging from political expediency to official lethargy, their advice has been repudiated or ignored.\textsuperscript{57} Fortunately, such instances

\textsuperscript{53} Geneva Conventions Act (Chapter 11:06) Geneva Convention Amendment

\textsuperscript{54} Discussed in greater detail below.


\textsuperscript{56} Relating, inter alia, to ozone depletion, river basin management, desertification and World Heritage sites.

\textsuperscript{57} An outstanding example was the Executive's refusal a few years ago to countenance legislation providing for the internal enforcement of Security Council measures under Article 41 of the United Nations Charter. Conversely, the Executive has continued since 1993 to maintain de facto membership of the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), together with the
have been rare and have not operated to undermine the case for legal congruity.

IX. Human Rights and Labour Standards

It is now widely accepted, though not invariably conceded, that the practical application of human rights transcends the conceptual barriers between international and national law. The vindication of individual as well as collective rights cannot be confined exclusively to the domestic domain. Moreover, their juridical evolution within the national system must perforce be informed and guided by their treatment at the international level. Conversely, international law must unavoidably draw inspiration from the municipal development of human rights. In this process of continual interchange and cross-fertilisation, the legal adviser is eminently well placed to influence the internal application of human rights and thereby secure the appropriate harmonization of international and domestic standards.

In the Zimbabwean context, the law officers play a pivotal role at various stages in the human rights arena. As explained earlier, they are administratively enjoined to examine and approve all treaties in order to ensure their compatibility with domestic laws and procedures. Thereafter, following approval, they are called upon to prepare the requisite instruments of ratification or accession.

The law officers are also fully involved in the work of an inter-ministerial committee on human rights, which was established in 1993 and comprises officials from several ministries and departments whose functions impinge upon human rights. This committee has assumed the task of recommending key human rights instruments and international labour conventions for adoption as well as measures for their incorporation and implementation. The committee is also responsible for preparing the national reports required under various human rights conventions. Other aspects of the committee’s work include the sourcing of training and the dissemination of information on human rights.

correlative statutory provisions, without having ratified the COMESA treaty (a unique position, to say the least) -- despite persistent advice to formally regularize this relationship, (International Legal Materials, vol. XXXIII (1994), p. 1072).
Insofar as concerns the incorporation of human rights, the Declaration of Rights\textsuperscript{58} embodies most of the traditionally recognized civil and political rights enshrined in the international instruments to which Zimbabwe is a party.\textsuperscript{59} This area warrants minimal interference and the role of the law officers is confined to tendering advice on questions of conformity with international standards. In other areas, however, the scope for intervention is considerably greater, occasionally because the domestic law is at variance with international norms,\textsuperscript{60} but more frequently because the latter are inadequately reflected or simply not recognized within the national system.\textsuperscript{61}

There are, of course, some instances where the discrepancy between international norms and the municipal law is quite deliberate. Such incongruence is inevitable given the essentially political nature of human rights and the vagaries of Executive appreciation in this field. In recent years, there have been at least two cases where the advice tendered or legislation formulated by the law officers has either been overruled or reservedly received by the Executive. These cases concerned the removal of the right to citizenship for alien wives,\textsuperscript{62} and draft legislation enacting specific measures to combat discrimination.\textsuperscript{63} At the time in question, these issues were highly sensitive and tended to evoke emotive rather than rational responses. The passage of time will

\textsuperscript{58} Contained in Chapter III of the Constitution of Zimbabwe.


\textsuperscript{60} Notably, the requirements of the Convention on the Elimination of all Forms of Discrimination against Women, 1979, United Nations, \textit{Treaty Series}, vol. 1249, p. 13. The possibility of conflict has been significantly obviated following the recent amendment of section 23 of the Zimbabwe Constitution by Act No. 14 of 1996. The broad effect of this amendment is to prohibit statutory or administrative discrimination on the grounds of gender.


\textsuperscript{62} Contrary to the requirements of the Convention on the Nationality of Married Women, 1957 (see footnote 37 above).

no doubt avail opportune moments for reconciling the domestic law with international requirements. ⁶⁴

X. Problems and Prospects

1. Apathy, Ineptitude and Inaction

One of principal deficiencies experienced in the internal implementation of treaties stems from the absence of clearly defined procedures for guiding administrative practice after treaties have been concluded. Much is left to the discretion of policy makers and administrators who, more often than not, are reluctant to tread upon supposedly sacrosanct legal ground. This reluctance is largely a problem of functional indisposition or indecision. The responsible ministry or agency may either be unaware of the implications of a given treaty undertaking or, having identified them, may choose to ignore the need to internalize the obligations flowing therefrom. Again, as pointed out earlier, the tendency towards inaction may occasionally be attributed to the lack of technical expertise or administrative capacity in the subject matter of the treaty concerned.

2. Bureaucracy and Protocol

An equally debilitating force is the bane influence of bureaucracy and protocol in the conduct of international relations. In Zimbabwe, as is no doubt the case in other countries, ritualistic reliance on diplomatic channels of communication not infrequently results in documentation being misplaced or belatedly delivered to the intended recipients. This has often operated to frustrate the work of the law officers in international matters, particularly in those cases where time is of the essence.

3. Matters of Policy

The legal adviser’s favourite plea in mitigation is that he or she is not responsible for making policy and therefore cannot be held accountable for indefensible policy decisions. Coupled with this plea is the point that the adviser’s function is essentially reactive rather than

⁶⁴ In the latter instance, the Prevention of Discrimination Bill was very recently passed by Parliament (on 5 November 1998) and is presently being processed for promulgation.
proactive. Although these arguments might smack of professional abdication, they are not without merit and, as demonstrated in the preceding pages, there are a number of instances where the imperatives of national policy are invoked to override the dictates of international law. In such instances, whatever weapons of persuasion the legal adviser might carry in his or her armoury are rendered futile and must be withdrawn pending the arrival of more congenial circumstances.

4. Political Commitment

The above plaints highlight the major impediments experienced by the law officers in exercising their international portfolio within the present administrative framework. Many of these obstacles are obviously surmountable and quite susceptible to reform. The marshalling of greater official discipline and improved channels of communication are objectives that can be achieved with a modicum of administrative will and direction. Again, at the risk only of being temporarily rebuffed, there is nothing to prevent the legal adviser from assuming a more proactive role by initiating the requisite measures rather than awaiting the fiat of officialdom. Ultimately, however, much depends upon the Executive’s appreciation of its international undertakings and the prevailing political commitment towards effectuating those undertakings within the domestic sphere. In this respect, the prospects for successfully applying international law do not differ significantly from those obtaining on the international plane.
TREATY NEGOTIATION AND THE NATIONAL IMPLEMENTATION OF INTERNATIONAL TREATY OBLIGATIONS: ROLE OF THE LEGAL ADVISER IN A CHANGING POLITICAL AND ECONOMIC ENVIRONMENT

Amrith Rohan Perera

I. Introduction

In accordance with well-established practice, the function of negotiation and conclusion of international treaties is allocated to the Minister of Foreign Affairs, under the Constitution of Sri Lanka. Consequently, the Office of the Legal Adviser of the Ministry of Foreign Affairs is the repository of the Government's treaty commitments and the legal adviser is consulted on a regular basis in the negotiation, drafting, implementation and interpretation of international treaties and agreements. This involves the legal adviser's direct participation, to the extent possible, in bilateral and multilateral treaty negotiations as well as in the reviewing of draft negotiating texts under discussion in various negotiating fora.

As in the case of States with common law legal systems, an international treaty subscribed to by Sri Lanka does not directly form part of the law of the land, unless specifically adopted by statute and thereby incorporated into the municipal law. In such jurisdictions, in particular, it is incumbent on the legal adviser to play a critical role in bringing about a sense of balance between often contending considerations, while functioning within two distinct legal systems, that of international law and municipal law. As pertinently observed in a study on the role of the legal adviser, unlike most other lawyers, the legal adviser operates within the framework of two separate legal systems. Consequently, the advice tendered by the legal adviser and the actions of the Government based on such advice, have consequences both in the national legal system, as well as in the international legal

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* Legal Adviser, Ministry of Foreign Affairs of Sri Lanka.
system. It is these attributes which gives the office of the legal adviser "a distinctive character and a unique role."\textsuperscript{2}

In Sri Lanka's experience, the subject matter of bilateral treaties on which the advice of the legal adviser is sought, covers a wide range and includes foreign trade and investment, technical cooperation and development assistance, civil aviation and shipping, as well as constituent instruments of international organisations of which Sri Lanka is a party, whether they be set up in Sri Lanka or in a foreign country. Given the current emphasis on the economic dimensions of foreign policy, it has been Sri Lanka's recent experience that the Foreign Ministry legal adviser is increasingly concerned in the field of treaties relating to economic cooperation, either in directly negotiating with foreign States or other entities or in reviewing the draft negotiating texts referred to the legal adviser by the concerned subject Ministries or Departments. For instance, in the case of bilateral treaties for the promotion and protection of investment, the legal adviser directly conducts the negotiations, while in the case of other agreements, such as trade agreements and development assistance agreements, the negotiating text is vetted by the legal adviser and, where necessary, he is associated as a member of the negotiating team. In other instances, such as in the case of treaties for the avoidance of double taxation, the legal adviser is consulted when issues involving international legal implications arise in the course of negotiations, as well as in the adoption of domestic measures to give effect to such treaties.

At the multilateral level, the Foreign Ministry legal adviser has, over the years, been closely associated with initiatives which have been taken by the international community for the progressive development and codification of international law, such as the Law of Diplomatic Immunities and Privileges, Law of Treaties, Law of the Sea, Human Rights and Humanitarian Law. The legal adviser is required to be fully conversant with developments in the field of public international law and to provide the necessary advice for the formulation of national laws and policies to enable the Government to adopt necessary measures of implementation of its treaty obligations.

However, the specialist role of the legal adviser in the multilateral arena, hitherto confined to the traditional domain of public international law, is currently undergoing radical change with the increasing emphasis being placed on the economic aspects of the conduct of foreign policy. With the current globalization of the world economy and the growing trend to bring all aspects of international trade relations within a common multilateral system, new and complex challenges confront the Foreign Ministry legal adviser, particularly those of the developing countries. This in turn require a re-evaluation of the role and responsibility of the legal adviser, in treaty negotiations and the implementation of international treaty obligations.

This article will examine, in particular, the primary role and responsibility of the legal adviser in the background of a rapidly changing political and economic environment, in ensuring that international obligations devolving on a State are given effect to at the national level in a manner consistent with international law, while paying due regard to national legal imperatives. It will underscore the degree of specialization required of the legal adviser, in spheres which have hitherto remained outside the traditional public international law domain, if the role of the legal adviser is to be of continuing relevance to national decision-making in the contemporary political and economic milieu. The Article makes the concluding observation that emerging "tensions" in treaty relations, particularly in the light of developments in international trade relations, require the legal adviser to play an activist role which may constitute a departure from the "traditional" role of the past.

II. Traditional Functions and Responsibilities of the Legal Adviser

The growing inter-disciplinary nature of the international treaty making process makes it imperative that the legal adviser of the Ministry of Foreign Affairs perform an active role, both within the formally structured Inter-Ministerial Committees, as well as at the informal level, interacting with the relevant subject Ministries and Departments. The traditional functions and responsibilities of the legal adviser in Inter-Ministerial Committees dealing with treaty commitments of a State have been directed towards the achievement of the following objectives:
(i) Harmonization of national legislative measures with international treaty obligations undertaken by the State, and,
(ii) Ensuring inter-agency coordination so as to achieve the aims and objectives of an international treaty.

The first objective, the harmonisation of national legislation with treaty obligations undertaken by a State, constitutes a fundamental duty cast on the legal adviser. The task is a delicate one: that of conforming to legislative drafting techniques and procedures as required by the national law on the one hand, and of ensuring that the draft legislation does not, in substance, detract from the legal obligations undertaken in terms of an international treaty. In practice, this exercise presents particular difficulties since treaty provisions are often the outcome of hard negotiations in multilateral fora and reflect a delicate compromise between conflicting interests. This results in treaty provisions which, in essence, are the common lowest denominator in multilateral negotiations. The legislative draftsman may, understandably, find such provisions a departure from the accepted legislative drafting practice. It is in such instances that close interaction between the legal adviser and the legal draftsman would be important in facilitating the national legal drafting process. Such interaction and coordination would be particularly constructive if the legal adviser has himself directly participated in the multilateral negotiations and therefore is personally familiar with the background in which a particular provision found expression in a treaty.

Sri Lanka has had to deal with such practical issues in the recent past, particularly in the drafting of legislation to implement treaties for the suppression of international crimes and human rights instruments, to which it has subscribed. These treaties contain provisions which require that offences covered under the relevant treaties be established as serious crimes under national law. Translation of such treaty provisions to conform to the requirements of criminal law jurisdictions prevailing within the country is not an easy task. It is essential, for instance, to ensure that the ingredients of a particular crime covered by a treaty meets the high threshold of specificity required by the criminal law of the land. This exercise becomes a particularly complex one, where treaty bodies established under some international legal instruments, particularly in the human rights field, are mandated to examine the sufficiency or otherwise of implementing legislation, in accordance with criteria which may not always be precisely consonant with the legal drafting practice prevailing under national legal systems.
The practice prevailing in Sri Lanka requires the legal adviser to prepare and often to defend the national reports concerning measures of implementation submitted to such treaty bodies. This places a special responsibility on the legal adviser to ensure that implementing legislation conforms in substance to the provisions of a particular treaty. In such situations, the legal adviser has to be particularly conscious of the practice which has emerged from these bodies with regard to the interpretation of particular provisions of the treaty.3

The legal adviser in Sri Lanka was directly engaged in the recent past, in drafting legislation to give effect to the Convention against Torture4 and the legislation to establish a National Human Rights Commission in Sri Lanka. In the latter instance, it involved not only the study of parallel legislation of other countries, but also the practice and experience of similar bodies, particularly those established in the region, and to ensure that the mandate of the proposed Commission met the threshold required by the relevant decisions of the human rights monitoring bodies of the United Nations.

As regards the second objective previously mentioned, that of performing a coordinating role in inter-ministerial bodies, the legal adviser has to bear in mind the need to sensitise national agencies to the obligations devolving upon a State by virtue of its adherence to an international treaty. The importance of consultation and coordination among implementing agencies in giving effect to treaty obligations at the national level is often overlooked and the lack of such coordination becomes one of the major factors leading to shortcomings in the national implementing framework.

In Sri Lanka, the legal adviser is a member of several inter-ministerial committees entrusted with the task of implementing international treaties to which Sri Lanka is a State Party. For instance, the legal adviser chairs the Legislation Sub Committee of the National Dangerous Drugs Control Board entrusted with the task of formulating implementing legislation to give effect to international conventions in the field of drug abuse and drug trafficking. Accordingly, legislation

was recently finalised to implement, *inter alia*, the 1988 United Nations Convention on the Suppression of Illicit Trafficking of Narcotic Drugs and Psychotropic Substances. The Sub Committee was required to formulate guidelines to facilitate the task of the legislative draftsman. As Chairman of the Committee the legal adviser has the responsibility of ensuring not only the compatibility of the draft legislation with the provisions of the international treaties concerned, but also that implementing measures at the administrative level are adopted in a manner that is conducive to inter-agency coordination among the varied agencies concerned, such as the Police, Customs and Health authorities. The balance that is required to be achieved is the effectiveness of implementing measures, on the one hand, and the sensitivity of the implementing agencies with regard to their own spheres of competence, on the other. This becomes particularly critical in the case of Conventions such as those dealing with drug abuse and drug trafficking which require a very high degree of inter-agency consultation and coordination among the implementing agencies, both at the national and at the international level.

### III. Regional Initiatives

Given the growing importance of regionalism as a mechanism for greater political and economic cooperation among States, the role of the legal adviser in the formulation of a legal framework in respect of initiatives undertaken within regional groupings also bears examination in assessing his responsibility in the treaty negotiation process and the implementation of treaty obligations undertaken at the regional level.

In the South Asian region, the establishment of the South Asian Association for Regional Cooperation (SAARC) in 1985, required the legal adviser of the Ministry of Foreign Affairs to undertake new responsibilities which required not only the tendering of advice on the constituent instruments establishing the Organization, but also his close association with key initiatives undertaken within the regional forum.

The founders of SAARC, by limiting "Agreed Areas of Co-operation" to non-contentious, non-political, technical spheres, had sought to insulate the Organisation, at least in its formative years, from

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the political tensions which had dominated the bilateral relations in the South Asian region. This cautious approach and the express provision in the SAARC Charter which excludes bilateral and contentious issues from being discussed within the formal meetings of SAARC, were designed to ensure that the prevailing political tensions, which had hitherto prevented the South Asian countries from coming together in a regional endeavour, would not jeopardise the growth and the effective functioning of the new Organisation. However, one of the early regional initiatives undertaken by SAARC, consequent to a decision taken by the Heads of State or Government at its First Summit in Dhaka, Bangladesh in December 1985, was the study of the question of terrorism as it affects the security and stability of the South Asian Region. With the inclusion of the question of terrorism on its agenda, SAARC thus ventured into one of the most complex political and legal issues of present times.6

This initiative required the active involvement of the legal adviser in negotiations which led to the adoption of regional conventions within SAARC. The legal adviser was entrusted with the responsibility of preparing the negotiating text to give effect to a proposal made by the Government of Sri Lanka to formulate a regional legal framework for the simplification of extradition procedures in respect of offences of a predominantly criminal character to be identified as "terrorist offences" and, in particular, by regarding them as "non-political" offences for purposes of extradition. These efforts culminated in the finalization of a draft text of a Regional Convention on Suppression of Terrorism7 at a Meeting of Legal Experts of the SAARC Member States held in Colombo in August 1987, which had the participation of legal advisers of Foreign Ministries of the SAARC region.

Similar responsibilities devolved upon the legal adviser in preparing the negotiating text for the SAARC Regional Convention on Narcotic Drugs and Psychotropic Substances8; the legal adviser was

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8 Adopted on 23 November 1990.
required to serve as Chairman of the SAARC Group of Legal Experts which finalised the draft convention.

The responsibility of the legal adviser in respect of these regional initiatives has not ceased with the adoption and the entry into force of these two important regional conventions. The legal adviser has a continuing role to play in ensuring the effective implementation of these conventions within their national territories. Increasing emphasis has been placed in respect of both conventions, on practical areas of cooperation such as the exchange of information and expertise among the relevant agencies in the region by way of preventive action against terrorism and drug trafficking. This has resulted in the establishment of Terrorism, and Drug Trafficking Monitoring Desks in Sri Lanka with a view to facilitating the expeditious exchange of information among the agencies in the region, as envisaged in the conventions. This requires the legal adviser to play a supportive role to facilitate the achievement of the objectives of the convention through such mechanisms, although without his direct intervention. Thus the enhancement of regional cooperation in the South Asian Region has resulted in new responsibilities being devolved upon the Foreign Ministry legal adviser.

As explained above, these responsibilities are of a continuing nature with the legal adviser being regularly consulted by the implementing national agencies on aspects of implementation of the regional conventions. The effective discharge of the functions of the legal adviser at the regional level would be greatly facilitated through close interaction with his counterparts in the region. The maintenance of a regular dialogue among legal advisers in the region would, no doubt, considerably help in overcoming practical problems which arise in the implementation of these regional conventions.

IV. New Challenges and Responsibilities

A discussion of the role and responsibility of the legal adviser in the national implementation of international treaty obligations would not be complete without addressing the issue of new challenges and responsibilities the legal adviser has to contend with in a rapidly changing international political and economic environment. The most significant development in the field of international economic relations in present times is the Uruguay Round of Multilateral Trade Negotiations which culminated in the adoption of the Agreement on
establishing the World Trade Organisation (WTO) to provide a "common institutional framework for the conduct of trade relations" among the Member States. The WTO agreement seeks to develop an integrated multilateral trading system, encompassing the General Agreement on Tariffs and Trade (GATT), the results of past trade liberalization efforts and the Uruguay Round of Trade Negotiations. This new institutional framework for international trade relations constitutes, perhaps, the most challenging responsibility devolving upon the Foreign Ministry Legal Adviser, particularly, those of the developing countries.

The innovative feature of the Uruguay Round is the expansion of the regulation of international trade beyond the scope of the traditional sphere of trading in goods. The WTO Agreement which emerged after 7 years of complex negotiations in the Uruguay Round creates, for the first time, legal rights and obligations for States with regard to trade related aspects, covering particularly trade in services. The objective was the creation of a liberal trading regime for trade in services and thereby to address its omission from multilateral trade principles and rules. The Uruguay Round also addressed the question of reducing tariff and non-tariff barriers to goods and extending multilateral disciplines to the agricultural sector and to textiles and clothing. It also addressed the question of protection of intellectual property rights and their effective enforcement through a comprehensive multilateral framework. The legal regime created by the WTO Agreement for the achievement of these objectives comprises a series of agreements and associated legal instruments of wide-ranging scope and complexity, categorised as Multilateral Agreements compulsory in character and Plurilateral Agreements optional in character. These are: a) GATT 1994; b) The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); c) General Agreement on Trade in Services (GATS); d) The Agreement on Trade Related Investment Measures (TRIMS); e) The Agreement on Textile and Clothing; and f) The Agreement on Agriculture.9

These Agreements constitute, collectively, a complex network of legal obligations for Member States which calls for an application of specialized legal skills of a multi-sectoral nature, in making a correct

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assessment of the precise legal implications arising from these agreements and in the drafting of national legislation for the purpose of implementing, at the national level, the wide-ranging obligations undertaken in terms of these Agreements.

Another important area from the legal perspective is the Settlement of Disputes Procedures under these Agreements. A major objective of the Uruguay Round was the strengthening of the multilateral trading system. In furtherance of this objective, Member States of the WTO agreed at these negotiations to address a dispute exclusively through the multilateral dispute settlement procedures established in terms of the WTO Understanding on Rules of Procedure governing the Settlement of Disputes.10

In the context of these developments, and given the emphasis being placed on the economic dimension of foreign policy, the Foreign Ministry legal adviser is being called upon to render advise to subject Ministries and Departments on these emerging areas which traditionally may have been outside the scope of his functions. In Sri Lanka an Inter-Ministerial Co-ordinating Committee on Multilateral and Regional Trade Agreements has been established under the purview of the Ministry of International Commerce with the mandate to assess, on a continuing basis, the implications arising for Sri Lanka from its adherence to the WTO Agreements and also to coordinate efforts to ensure conformity of Sri Lanka’s laws, regulations and administrative procedures with its obligations under the WTO Agreement. This mandate also extends to the obligations arising from its adherence to the South Asian Preferential Trading Agreement (SAPTA) concluded under the auspices of the South Asian Association for Regional Co-operation (SAARC).11

10 Most recently, an interim panel of the WTO ruled that a United States ban on wild shrimp (caught without the so-called “turtle excluder devices” or TEDs) imports violates international trade rules, in particular, GATT article I which establishes the Most Favoured Nation (MFN) principle. The successful applicants before the WTO Panel were India, Pakistan, Thailand and Malaysia.

11 Consequent to a proposal made by Sri Lanka to establish the SAARC Preferential Trading Arrangement for the liberalization of trade in the region through a step by step approach, the Agreement on SAARC Preferential Trading Arrangement was adopted in Dhaka, Bangladesh on 11 April 1993. It provides the institutional framework under which specific measures for trade liberalization among SAARC Member States could be furthered. The Agreement thus recognizes that Contracting States would negotiate tariff preferences, initially, on a product by product basis. It also envisages Contracting Parties undertaking negotiations for further expanding the South Asian
The Coordinating Committee comprises a number of subcommittees which have been formed to deal with specific subject matter such as trade in services, trade related property rights and anti-dumping, subsidies and countervailing duties and safeguard measures falling within the purview of each Agreement. Additional subcommittees on policy matters and on legal, procedural and institutional matters have also been formed.

The legal adviser of the Ministry of Foreign Affairs chairs the Subcommittee on Legal, Procedural and Institutional Matters which is mandated to examine and to identify the legal obligations arising from the WTO Agreements and to recommend appropriate measures to ensure that Sri Lanka’s laws, regulations and administrative procedures are in conformity with such obligations. In practice, the Legal Subcommittee would examine specific proposals made by other Subcommittees concerning the need for domestic implementing measures. Thus at the request of the Subcommittee on Anti-dumping, Subsidies and Countervailing Duties and Safeguard Measures, the Legal Subcommittee is currently examining the need for domestic legislation on anti-dumping with a view to safeguarding of domestic industries. The enactment of such legislation to give effect to the WTO Agreement on Anti-Dumping (The Agreement on Implementation of Article VI of GATT 1994) would be directed towards both the safeguarding of domestic industries from unfair international trading practices, as well as the generation of greater confidence in the process of trade liberalisation among the key groups of the national economy such as industrialists, importers, exporters and agriculturists.

Similarly in consultation with the Subcommittee on GATS, the Legal Subcommittee is required to examine the question of specific commitments undertaken under the Trade in Services Agreement in the financial services, insurance and banking sector, and the compatibility of national legislation with such commitments, which are geared towards the greater liberalisation of these sectors through improved market access.

Preferential Trading Arrangement (SAPTA) and the adoption of additional measures of trade facilitation. The tariff, para-tariff and non-tariff concessions negotiated and exchanged among the Contracting States are to be incorporated in a National Schedule of Concessions.
V. Legal Adviser’s Role in Resolving Emerging Tensions
in Treaty Relations

The current global economic agenda has brought to surface incipient trends which reflect growing tensions between legal regimes created by international treaties in specific fields and the new trade liberalization regime created under the WTO agreements for the liberalization of trade in the post- Uruguay phase.

Some issues which are of immediate relevance, particularly to the developing countries, such as the relationship between international environmental conventions and agreements for the liberalization of trade under WTO, the relationship between trade liberalization and foreign direct investment, and the question of access to technology and its compatibility with intellectual property rights are receiving increasing attention in international negotiating fora.

The study of the compatibility between the objectives of environmental agreements and the doctrine of free trade is currently engaging the attention of the Committee on Trade and Environment established under the WTO. A critical issue which is being addressed in this context is the potential for conflict between environmental agreements containing provisions which are seen as restrictive of free trade and the trade liberalization principles of the General Agreement on Tariffs and Trade (GATT). The potential for conflict assumes even greater dimensions with the adoption of the WTO agreements creating a multilateral framework for international trade, going beyond the scope of the traditional sphere of trade in goods.

From the perspective of environmental conventions, the use of certain types of trade restrictions is a key element in the safeguarding of environmental imperatives. Thus, for instance, the United Nations

12 See paragraph 16 of the Singapore Ministerial Declaration, (WT/MIN (96) DEC/W. of 13 December 1996) which states, *inter alia*, that the Committee will continue to examine the scope and complementarities between trade liberalization, economic development and environmental protection, and that the work of the Committee has underlined the importance of policy coordination at the national level in the area of trade and environment.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) provides for international cooperation "for the protection of certain species of wild fauna and flora against over-exploitation through international trade" and contains provisions in the nature of trade restrictions on protected species of animals and plants listed in the Convention as being threatened with extinction. It further protects species which are deemed endangered, unless trade is strictly regulated. Advocates of free trade view such provisions as militating against the fundamental principles underlying GATT and classify them as "green barriers" which tantamount to non-tariff barriers, disruptive of the liberalization of global trade.¹⁵

In resolving these contradictions between contending legal regimes, the Foreign Ministry legal adviser could play a critical role in ensuring that while States attempt to find ways and means of resolving potential conflict between existing treaty obligations and free trade principles, they do not detract from the paramount considerations relating to the protection of the global commons carefully built upon over the years, in multilateral treaty negotiations.

Another key issue which arises in the context of trade liberalisation is the relationship between trade and investment. A proposal which is currently being examined in this context is the establishment of a multilateral legal framework to facilitate cross border direct foreign investment. One of the principal elements of the proposal is centered around the concept of a right to establish an investment devolving upon a foreign investor. This is an issue of critical concern to developing countries, the traditional recipients of foreign direct investment. At present, the legal regime created through bilateral treaties for the promotion and protection of investment provides a right


¹⁵ A similar "discriminatory" trade provision is found in other important Environmental Conventions, e.g. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (UNEP/IG/80/3,(1989) and United Nations document UNEP/WG.190/4), which provides that a Contracting Party shall not permit hazardous wastes or other wastes to be exported to or imported from a non-party, unless that party enters into a bilateral, multilateral or regional agreement regarding transboundary movement of wastes with the non-party; see also the Montreal Protocol on Substances that Deplete the Ozone Layer (United Nations, Treaty Series, vol. 1522, p. 3), which prohibits the import and export of controlled substances to and from non-parties unless the non-party has demonstrated its full compliance with the control measures under the Protocol.
accruing to host States to regulate the admission of foreign investment into their territory. This would enable the host State to admit foreign investment paying due regard to its laws and regulations, as well as national policies, taking into account, *inter alia*, priority sectors of its development policies e.g. development of under-developed areas through the attraction of foreign investment, potential for employment generation, potential of transfer of technology, etc.

The proposal to confer a right of establishment of an investment on a foreign investor which is before the WTO would substantially reverse this position and would have a critical bearing on the development imperatives, particularly of the developing countries and would be perceived as impairing the ability to adopt their own development strategies. Apart from the economic implications of this proposal, it would also give rise to fundamental issues affecting the sovereignty of States.\(^6\)

Finally, the critical issue of transfer of technology continues to cause concern in the light of new provision on the subject being incorporated in recent treaties. The negotiating history of the regulation of transfer of technology, particularly for the benefit of developing countries has proved to be both complex and controversial. The initiative of the United Nations Conference on Trade and Development (UNCTAD) to formulate a Code of Conduct on the Transfer of Technology, undertaken in the 1970s in the background of ushering in a new international economic order, failed in the light of the strong reservations entertained by the industrialized countries. Although provision of a far-reaching nature was incorporated in the United Nations Convention on the Law of the Sea,\(^17\) including the mandatory

\(^6\) According to a tenuous compromise reached at the Singapore Ministerial Meeting, the WTO and UNCTAD will both undertake an “educative process” on the concept of a Multilateral Investment Guarantee Agreement (MIA), subject to the understanding that the WTO cannot commence any negotiations without an “explicit consensus” to that effect at the next Ministerial Meeting. However, developing country concerns still remain that this process could automatically lead to negotiation on MIA within the WTO.

transfer of technology, this was one of the primary reasons why the developed countries opted out of the Convention. Consequently the Agreement on the Implementation of Part XI of the Law of the Sea Convention\(^\text{18}\) substantially diluted these provisions. The Agreement specifically stipulated that technology transfer "shall be consistent with the effective protection of intellectual property rights", the first instance in which a specific reference to the overriding intellectual property rights regime was incorporated in a multilateral agreement dealing with the global commons and resource management. This was, indeed, consistent with the emerging trends in the Uruguay Round negotiations. In particular, the negotiations on the Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS) and set an important precedent for contemporary treaty negotiations.

The impact of these emerging trends in multilateral treaty negotiations was clearly felt in the negotiations leading to the adoption of an International Convention on Biological Diversity.\(^\text{19}\) Article 16 of the Convention on access to and transfer of technology attempts a delicate balance between the obligation to transfer technology, on the one hand, and the effective protection of the intellectual property rights of the owners of technology, on the other. Article 16 (I) contains a provision of a general nature, which recognizes that both access to and transfer of technology (which includes bio-technology) among Contracting Parties are essential elements for the attainment of the objectives of the Convention. In terms of this provision, the Contracting Parties undertake to provide for and/or facilitate access to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and which do not cause significant damage to the environment. In terms of this article, while developing countries are entitled to access and transfer of technology under "fair and most reasonable terms", this is subject to the condition that in the case of technology, subject to patents and other intellectual property rights, such access and transfer will be subject to terms which recognize and are

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consistent with the "adequate and effective protection of intellectual property rights." Similarly this article in addressing the issue of the needs of developing countries providing genetic resources, stipulates that each Contracting Party will take legislative, administrative or policy measures to provide access to and transfer of technology to developing countries which provide genetic resources. This would include technology protected by patents and other intellectual property rights, subject however to the overriding requirement that such access would be provided "in accordance with international law".

The cumulative effect of these provisions is that the transfer of technology provisions of the Biodiversity Convention incorporates, by reference, the entirety of the intellectual property law regime as prescribed by relevant international conventions in this field - a regime which favours the owners of technology rather than the recipients.

These trends in recent multilateral treaty negotiations underline the need for developing countries to possess the necessary legal and institutional capacity in ensuring that the special needs of the developing countries are not lost sight of in the entrenchment of a legal environment which overwhelmingly favours the owners of technology. This environment has been further strengthened with the adoption of the TRIPS Agreement in the Uruguay Round which has enhanced the global protection of intellectual property rights, containing comprehensive provision, *inter alia*, for the enforcement of trade related intellectual property rights. With the strengthening of the intellectual property rights regime, attempts in industrialized countries to patent material based on traditional methods and knowledge prevailing in developing countries is also on the increase. The task of the legal adviser in this changing legal environment is to ensure, to the extent possible, that the special needs of developing countries are not overlooked by default, either in the treaty negotiation or in the implementation stage.

In the light of these emerging trends, the Foreign Ministry legal adviser can no longer be content with performing a passive role, limiting himself to the pure technicalities of treaty implementation. The potential for conflict which these trends clearly reflect with the attendant negative implications on the stability of international treaty relations, requires the active involvement of the legal adviser in the policy formulation stage, intervening in a timely manner with the concerned subject Ministries and Departments, particularly within inter-ministerial
committees, to ensure that the decisions on key issues of particular concern to developing countries are taken after considered evaluation of legal obligations involved under different treaty regimes. This is the challenge which confronts a Foreign Ministry legal adviser if he or she is to play a meaningful role in the conduct of foreign relations in the present environment, where the economic dimension has assumed such overriding importance.
El estudio del derecho internacional desde una perspectiva estrictamente científico-académica permite un conocimiento algo fragmentario del fundamento de las instituciones del derecho de gentes. Tal orden jurídico, en efecto, está constituido en gran parte por normas que surgen del consenso entre los Estados. En consecuencia, la práctica de los Estados constituye un elemento fundamental del orden jurídico internacional, que no puede soslayarse para un análisis exhaustivo de su interpretación y aplicación.

Desde este plano, la relación entre el derecho internacional y el derecho interno debe ser estudiada desde el punto de vista teórico de la distinción monismo-dualismo y también desde un enfoque dinámico que ponga énfasis en las relaciones recíprocas entre ambos órdenes jurídicos. En efecto, las normas del derecho interno, al condicionar la práctica de los Estados en el derecho internacional, influyen en la formación de sus reglas. El derecho internacional, por su parte, al generar obligaciones a los Estados que, en muchos casos, implica la necesidad de modificar o complementar su derecho interno, influye a su vez sobre este orden jurídico.

Para completar el cuadro, no debe perderse de vista el hecho de que el proceso de creación de normas del derecho internacional por parte de los Estados se ve fuertemente influenciado por la posición asumida por ellos en las cuestiones políticas o económicas reguladas por las normas internacionales. Es sabido que los Estados procuran

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*Consejero Legal del Ministerio de Relaciones Exteriores, Comercio Internacional y Culto de la República Argentina*
que los instrumentos internacionales que se adopten reflejen sus intereses en el orden político o económico.

En este proceso jurídico-político de adopción de decisiones de los Estados se inserta como un elemento relevante la figura del consejero legal. Este funcionario, en su carácter de principal asesor jurídico internacional de su Gobierno, desempeña un papel fundamental en el antedicho proceso. El propósito de este trabajo es, pues, hacer un somero análisis de las funciones que un consejero legal desempeña en una época como la actual, en la que se han dado pasos muy importantes en el desarrollo progresivo del derecho internacional y se ha expandido en forma considerable el ámbito de aplicación de sus normas.

II. El Consejero Legal como Asesor Jurídico Internacional

Cuando se hace referencia a las relaciones derecho internacional-derecho interno, la distinción no es sólo de naturaleza normativa sino además académica y conceptual. En algunas ocasiones, ambos órdenes jurídicos están estrechamente relacionados; en otras coexisten pacíficamente y en otras más están en franco conflicto.

La dualidad de regímenes se puede ver evidenciada en diferentes casos. A modo de ejemplo, pueden citarse los últimos desarrollos del derecho penal internacional. Al respecto, la aparición de nuevos tribunales internacionales para el enjuiciamiento de crímenes de lesa humanidad y crímenes de guerra (por ejemplo, los Tribunales Penales Internacionales para la ex-Yugoslavia y para Rwanda) y el probable establecimiento de una Corte Penal Internacional plantean a la comunidad internacional el desafío de

1 Las limitaciones de este trabajo hacen que no se incluya la importante labor del consejero legal de los organismos internacionales. Sin duda, el desarrollo de este aspecto sería muy interesante en la actualidad, si se tiene en cuenta la creciente importancia que, a partir de 1945, han registrado las organizaciones intergubernamentales, y aún las no gubernamentales.
adecuar las normas imperativas del derecho internacional general a los principios fundamentales de legalidad y debido proceso. Sin embargo, la interpretación de qué se entiende por ambos varía según cuál sea el sistema jurídico de cada Estado. Así, para la Argentina, la admisión de la costumbre como fuente del derecho penal o la institución procesal del guilty plea, propia del derecho anglosajón, podrían resultar contrarias a la Constitución Nacional. No podría, pues, ese país adherirse a un eventual instrumento internacional que contenga disposiciones de tal género.

Más allá de lo que establezcan los diversos ordenamientos constitucionales respecto de la recepción del derecho internacional, resulta frecuente ver que el proceso de incorporación del derecho internacional no está exento de complicaciones, en parte por las diversas prioridades existentes entre la política internacional y la política interna. Asimismo, debe señalarse que las normas de este no tienen necesariamente un amplio grado de difusión entre quienes deben luego aplicarlas (por ejemplo, los miembros del Poder Judicial, autoridades locales, etc.).

En este complejo juego cruzado de normas de ambos órdenes jurídicos, el Consejero Legal, en su carácter de principal asesor jurídico internacional de su Gobierno, desempeña un papel fundamental tanto en la formación del derecho internacional como en su recepción en el derecho interno. En el primer caso, actúa como portavoz de su derecho interno, en particular, de los principios constitucionales de su Estado. En el segundo caso, actúa como impulsor de la aceptación de normas del derecho internacional, incluso en oposición a normas legales o reglamentarias internas contrarias, cuando se estima que las primeras pueden ser beneficiosas para el interés nacional. Sobre el particular, se ha expresado que "... en muchos casos el asesor jurídico es no sólo un asesor. En algunos Estados el cargo implica el poder de toma de decisión, por ejemplo,
respeto del proceso legislativo y la celebración de tratados” [traducción del autor].

En el primer caso, cuando el Estado debe participar en la formación de normas del derecho de gentes, el consejero legal es quien debe verificar la conformidad del instrumento en curso de negociación con sus normas constitucionales y legales y, eventualmente, elaborar las instrucciones pertinentes para que el instrumento internacional guarde coherencia con las normas de su derecho interno. Tal es el caso, por ejemplo, de muchos instrumentos multilaterales celebrados en el ámbito de las Naciones Unidas.

Un capítulo aparte merece la formación de normas internacionales que toman como base la obra de codificación y desarrollo progresivo llevadas a cabo por órganos tales como la Comisión de Derecho Internacional (CDI). En este campo, la labor de los juristas que integran dicho cuerpo se ve normalmente complementada por las observaciones y propuestas formuladas por los Estados en el ámbito de la Sexta Comisión de la Asamblea General o los Comités Especiales constituidos por mandato de ésta. En este ámbito, las Consejerías Legales cumplen una función de suma importancia al procurar ajustar los proyectos elaborados con criterios principalmente científicos, a la realidad y necesidades de los Estados. Es relevante lo manifestado por el Consejero Legal de las Naciones Unidas, en el sentido de que “La experiencia personal de los consejeros legales y, en particular, su conocimiento del sistema jurídico nacional podría ayudar en gran medida a planificar las etapas más tempranas del trabajo en la Sexta Comisión y la Comisión de Derecho Internacional” [traducción del autor].

Debe señalarse a este respecto que el consejero legal cumple, como ya lo ha expresado el actual Presidente de la Corte Internacional...

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3 H. Corell, op. cit., pág. 327.
de Justicia, Profesor Stephen Schwebel, un papel no sólo asesor sino, además, operativo. Sobre este particular, ha manifestado que “El papel 'operacional' del asesor jurídico está particularmente marcado en las arenas expansivas de la organización internacional. En la Sexta (Legal) Comisión de la Asamblea General de las Naciones Unidas, los asesores jurídicos no se sientan usualmente como asesores del delegado sino como delegados. Lo mismo se aplica a las conferencias de plenipotenciarios que ocasionalmente se reúnen para proyectar tratados siguiendo el trabajo de la Comisión de Derecho Internacional o de otros organismos del sistema de la ONU” [traducción del autor].

En este sentido, pueden nuevamente citarse como ejemplo las tendencias existentes en el derecho penal internacional. Resulta claro que, en la visión de la CDI, el Estatuto de la Corte Penal Internacional debía constituir un instrumento de naturaleza esencialmente procesal, quedando reservado el derecho de fondo al futuro Código de Crímenes contra la Paz y la Seguridad de la Humanidad. No obstante, la creciente necesidad evidenciada en la comunidad internacional de un pronto establecimiento del tribunal llevó a los Estados a avanzar en ese sentido, elaborando un Estatuto que incluiría también el derecho penal de fondo. Tal necesidad, unida a las exigencias de los diversos Estados en cuanto a vigencia del principio de legalidad y debido proceso, llevó a que el Comité Preparatorio para el Establecimiento de una Corte Penal Internacional reclara... el proyecto originario de la CDI sobre la base de tales exigencias jurídicas.

Sobre este particular, a manera de ejemplo, resulta relevante detenerse a analizar el papel que en esta cuestión han desempeñado las consejerías legales de los Estados miembros de las Naciones Unidas. Al respecto, cabe recordar que el Comité Preparatorio estuvo presidido por un distinguido jurista y diplomático holandés, el Embajador Adriaan Bos, Consejero Legal de los Países Bajos y que

una parte importante de los delegados eran integrantes de las consejerías legales de sus respectivos Estados. Por su parte, el Embajador Philippe Kirsch, Consejero Legal de Canadá, presidió la Comisión Plenaria de la Conferencia Diplomática que adoptó el Estatuto de la Corte Penal Internacional (Roma, 15 de junio al 17 de julio de 1998).

En adición a lo anterior, debe mencionarse que el grupo de países considerados como “amigos de la Corte”, que bregan por un pronto establecimiento de la misma, está formado por Estados cuyos sistemas jurídicos son tan dispares como la Argentina, Canadá y Australia. La visión práctica de los asesores legales de cada uno de los Estados ha logrado alcanzar soluciones en materia de procedimiento y de prueba que van mucho más allá de las originariamente concebidas por la CDI.

En materia de solución de controversias, las consejerías legales han tenido un papel relevante en los métodos jurídicos y aún, en ciertos casos, en los métodos políticos. En el primer caso, la consejería legal es quien normalmente favorece o desecha, con carácter previo, la elección de un medio determinado (arbitraje, recurso ante la Corte Internacional de Justicia, etc.), analiza las eventuales implicancias jurídicas de tal solución y brinda los lineamientos fundamentales de la actuación del Estado ante el órgano judicial o arbitral. Asimismo, tanto los agentes como los asesores y otros funcionarios provienen, usualmente, de la consejería legal, aún cuando el equipo interviniente en el caso no tenga una relación de dependencia funcional con aquélla.

En el caso argentino, el arreglo jurisdiccional de las diferentes controversias territoriales que debió afrontar la República estuvo tradicionalmente a cargo de funcionarios provenientes de la Consejería Legal y los Agentes fueron, en la gran mayoría de los casos, Consejeros o ex-Consejeros Legales (por ejemplo, en los diferendos entre la República Argentina y la República de Chile los Agentes arbitrales fueron: a) Diferendo sobre el Río Encuentro: Embajador José María Ruda; b) Diferendo sobre el Canal de Beagle: 226
Embajadores Ernesto de la Guardia y Julio Barboza; c) Diferendo sobre Laguna del Desierto, los Embajadores Susana Ruiz Cerutti y Horacio Basabe. El Doctor Julio Barboris integró el Tribunal Arbitral que laudó sobre este asunto).

La actuación de las consejerías legales no se agota, naturalmente, en su intervención en los arreglos arbitrales o judiciales, sino también abarca una intervención activa en muchos arreglos no jurisdiccionales (por ejemplo, negociaciones directas, buenos oficios, mediación, etc.). En efecto, cuando el contenido de la disputa es esencialmente jurídico (por ejemplo, una controversia limítrofe o territorial), la intervención de expertos en derecho internacional se torna necesaria. En efecto, cualquier estrategia de negociación se deberá basar en argumentos o posiciones jurídicas, que no pueden ser ponderadas sino por quienes conocen en profundidad las normas jurídicas aplicables.

En el caso argentino, puede citarse como ejemplo la mediación papal en el diferendo del Canal de Beagle, entre la Argentina y Chile. Dicho procedimiento estuvo a cargo, por la parte argentina, de funcionarios de experiencia en la Consejería Legal. Desde el año 1979 hasta el año 1982, fue responsable por la parte argentina, un ex-Consejero Legal, el Dr. Guillermo R. Moncayo y, desde fines de 1983, fue un diplomático de carrera y ex-Consejero Legal, el Embajador Marcelo E. Delpech.

III. El Derecho Internacional desde la perspectiva de un Consejero Legal

La enseñanza y el enfoque del derecho internacional varían considerablemente de país a país. En este sentido, la relación entre la comunidad académica y los organismos oficiales puede ser más estrecha en algunos Estados que en otros y el intercambio de información puede ser más o menos intenso. De lo que, empero, no cabe ninguna duda es que el análisis y enfoque que los académicos realizan de las instituciones del derecho de gentes suele tener algún grado de diferencia de los realizados por los Estados por intermedio de sus órganos competentes. Esto puede atribuirse a diversos factores,
uno de los cuales podría ser las diversas prioridades que existen para la investigación académica, por un lado, y para el interés de los Estados, por el otro.

Aún en los propios temas de alta prioridad para la política exterior de un Estado, no puede dudarse que el enfoque que se les da a los mismos varía considerablemente, en uno y otro ámbito. Al respecto, es frecuente ver que muchos profesores de muy alto nivel académico se plantean hipótesis de trabajo y proyectos de investigaciones que, normalmente, no han sido consideradas en las prioridades de las Consejerías Legales. En algunos casos, esto se debe a que los académicos tienen una mayor libertad de acción para determinar el objeto de sus investigaciones que los integrantes de las Consejerías Legales y, en otros, a que, no existiendo una relación orgánica, los académicos establecen sus propias prioridades de investigación guiados casi exclusivamente por criterios de interés científico.

A modo de ejemplo, resulta ilustrativo señalar cómo determinadas facetas del derecho internacional resultan más atractivas para los académicos que para los funcionarios especializados (por ejemplo, el desarrollo de la costumbre como fuente del derecho internacional) y otras, a la inversa, son más interesantes para los funcionarios que integran la Consejería Legal (terrorismo, inmunidad de jurisdicción del Estado, etc.).

Al respecto, se ha expresado que el asesor jurídico “tiene a su disposición uno de los dos principales enfoques del derecho internacional. El primero, un enfoque orientado a la norma, concibe al derecho internacional como un sistema de normas. Esta perspectiva... procede del presupuesto de que el derecho puede estar más o menos divorciado de la política ... El segundo enfoque del derecho internacional que tiene a su disposición el asesor jurídico está orientado políticamente y percibe al derecho como un continuo proceso de adopción de decisiones. Acepta el hecho de que hay pocos absolutos en el derecho internacional y que, decidiendo sobre las
normas aplicables, se está tomando una decisión política” [traducción del autor].

En relación con los dos enfoques anteriormente transcriptos, resulta relevante señalar que un consejero legal debe buscar una síntesis entre ambos enfoques. Al respecto, los mismos no deben reputarse como mutuamente excluyentes. En verdad, el enfoque del consejero legal es tan normativista como político.

Un consejero legal debe ser normativista porque el Estado sólo puede conducir su política exterior en consonancia con el derecho internacional y, en este sentido, un consejero legal no puede permitirse análisis teóricos que no se adecúen a las normas vigentes y consolidadas.

Del mismo modo, un consejero legal tiene un enfoque político porque, a diferencia de un doctrinario o analista teórico, debe defender, por medio del derecho internacional, intereses específicos de su Estado.

La combinación de los puntos de vista normativo y político configuran lo que podría llamarse “el criterio del consejero legal” que no puede dejar de ser profundamente realista y práctico, a fin de permitir la adecuada defensa del interés nacional. El “criterio del consejero legal” es claramente distinto del que corresponde a un analista académico.

Si bien es lógico que la diferencia entre ambos enfoques subsista, puesto que el objeto de las investigaciones de los académicos y de los funcionarios de la Consejería Legal es distinto, resulta aconsejable buscar un mutuo enriquecimiento en ambas. En el caso de los académicos, éstos podrán complementar su producción intelectual...
con el conocimiento de la doctrina y práctica observada por el Estado en la interpretación y aplicación del derecho internacional. Para la Consejería Legal, resultaría conveniente que los académicos orienten el objeto de sus investigaciones hacia cuestiones relacionadas con las prioridades del Estado en la formulación de su política exterior. Asimismo, resulta útil que los doctrinarios de un país conozcan la posición asumida por el Estado en los foros o consultas multilaterales y bilaterales sobre cuestiones jurídico-internacionales.

IV. Relaciones con instituciones académicas y profesionales

En el mismo orden de ideas, resulta interesante comprobar que, en el caso argentino, la Consejería Legal siempre ha mantenido relaciones de información y consulta tanto con universidades como con otras instituciones académicas o profesionales. Las referidas relaciones se han visto facilitadas por el hecho de que, generalmente, el consejero legal y, en muchos casos, una parte significativa de sus funcionarios ejercen tareas docentes y participan en las actividades académicas de las mencionadas instituciones.

La interacción entre la Consejería Legal y las instituciones académicas o profesionales contribuye a un recíproco enriquecimiento. En efecto, las actividades, cursos y trabajos de investigación realizados por las mencionadas instituciones contribuye a mejorar la formación de los funcionarios de la Consejería Legal y, a su vez, las clases, conferencias y seminarios que ellos dictan contribuyen a precisar cuál es la práctica observada en la interpretación y aplicación del derecho internacional.

Los referidos intercambios contribuyen de una manera considerable a complementar los enfoques de los funcionarios de la Consejería Legal y de los académicos. Asimismo, los trabajos, sugerencias e inquietudes de los diversos profesores e investigadores
han sido, con frecuencia, de gran utilidad para la tarea de asesoramiento realizada por la Consejería Legal.

Este marco de colaboración ha adquirido un carácter más institucionalizado con motivo del Decenio de las Naciones Unidas para el Derecho Internacional. En relación con tal acontecimiento, el Ministerio de Relaciones Exteriores, Comercio Internacional y Culto ha constituido el Comité Nacional para el Seguimiento del Programa del Decenio de las Naciones Unidas para el Derecho Internacional. Dicho Comité está presidido por el consejero legal e integrado por destacados profesores, académicos y especialistas, tanto en derecho internacional público como en derecho internacional privado. Los miembros o representantes argentinos en los diversos organismos internacionales especializados (comisiones o tribunales internacionales) integran, actualmente, el Comité.

El Comité, de conformidad con la Resolución Nº 1787/92 del Ministro de Relaciones Exteriores, Comercio Internacional y Culto, tiene como función coordinar las actividades realizadas en el marco del decenio, asesorando en tal sentido a las autoridades de la Cancillería. Asimismo, constituye un foro de conversación e intercambio de experiencias no sólo entre el consejero legal y los académicos que lo integran, sino de éstos y las instituciones a que pertenecen. Asimismo, el Comité ha auspiciado la realización de conferencias o seminarios especializados, organizados por alguna de las instituciones que están asociadas a la labor del mismo.⁶

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⁶ Entre otras instituciones adheridas al Comité pueden señalarse la Academia Nacional de Derecho y Ciencias Sociales, el Colegio de Abogados de la Ciudad de Buenos Aires, la Asociación Argentina de Derecho Internacional, la International Law Association/Rama Argentina, el Consejo Argentino para las Relaciones Internacionales, la Asociación Argentina de Derecho Comparado. También está adherido un número muy importante de facultades de derecho, tanto de la ciudad de Buenos Aires como del interior del país. El Colegio de Abogados de la Ciudad de Buenos Aires ha brindado su colaboración y apoyo para la creación del premio de Derecho Internacional “José María Ruda”, que se otorga periódicamente a estudiantes o graduados jóvenes que han presentado una monografía referida a temas de derecho internacional propuestos por el Comité.
V. El Asesoramiento del Consejero Legal en la formulación de la Política Exterior

Es un lugar común, especialmente entre los no juristas, sostener que el derecho internacional es el aspecto jurídico de las relaciones internacionales y de la política exterior de un Estado. Al respecto, se ha expresado que la política exterior "es conducida de acuerdo con principios, prácticas y procesos legales generalmente aceptados" [traducción del autor].

Sin perjuicio de que tal afirmación tiene un fuerte componente de realidad, resulta a todas luces claro que, en numerosas ocasiones, las prioridades políticas pueden no coincidir necesariamente con las limitaciones jurídicas. En este sentido, se ha expresado que el consejero legal debe estar preparado "para encontrar una solución para todas las dificultades, más que ... una dificultad para todas las soluciones" [traducción del autor].

Desde este punto de vista, la tarea del consejero legal asume un grado mayor de complejidad y, de algún modo, encuentra su mayor diferencia con el académico o el juez internacional. En efecto, la tarea del consejero legal no es puramente jurídica sino, principalmente, jurídico-política. En este sentido, lo que la Cancillería le reclama a su consejero legal es asesoramiento para defender o promover, por intermedio de los medios jurídicos idóneos, los intereses nacionales.

Ahora bien, en diversas ocasiones se pueden presentar divergencias de criterio entre el área política o económica, que privilegiará la consecución de un determinado objetivo (por ejemplo, la firma de un acuerdo, la obtención de una preferencia arancelaria,

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etc.) y la Consejería Legal, que podrá eventualmente considerar que uno o más aspectos de la negociación en curso deberían ser reexaminados a la luz del derecho internacional o, inclusive, del derecho interno.

En este orden de ideas, la Consejería Legal ejerce un asesoramiento próximo a cierto control de legalidad de los actos realizados por el Estado. Así, en ocasiones, ello implica la necesidad de modificar una postura negociadora que podría resultar políticamente conveniente, pero que podría ser objetable desde el punto de vista jurídico.

En situaciones como la expresada, la principal labor del consejero legal consistirá en buscar todas las soluciones y opciones que hagan posible avanzar en la consecución de un objetivo político, sin vulnerar las normas jurídicas vigentes. La oposición a una determinada gestión política sólo deberá plantearse cuando, luego de un análisis exhaustivo de la cuestión, en la que se hayan considerado todas las opciones jurídicamente posibles, el acto o negociación resulte manifiestamente contrario al derecho internacional o al orden constitucional del Estado, o afecte la posición asumida o que deberá asumir el Estado en otras cuestiones jurídico-políticas internacionales (por ejemplo, la práctica observada en materia de inversiones: cuestiones limítrofes o territoriales; derecho del mar, etc.).

Asimismo, cabe la posibilidad de que la Consejería Legal, dentro del marco de sus competencias específicas, pueda realizar juicios de conveniencia, a la luz de la posición asumida por el Estado en los diversos foros internacionales. En estos casos, el acuerdo o arreglo propuesto en el marco de una negociación puede ser jurídicamente posible o correcto pero contrario a la posición asumida o que deberá asumir el Estado ante una determinada cuestión internacional. En este caso, es obligación del consejero legal atraer la atención de las autoridades de su Cancillería, a fin de que las mismas tengan un claro panorama de la situación y sus implicancias antes de que se adopte la decisión correspondiente.
Además del asesoramiento institucional que, por intermedio de su oficina, presta el consejero legal a las distintas áreas internas de su Cancillería, que podría denominarse asesoramiento institucional, no debe soslayarse la importancia del asesoramiento directo que dicho funcionario brinda al Ministro de Relaciones Exteriores y otras autoridades de la Cancillería. Tal asesoramiento directo se materializa a través de reuniones periódicas, conversaciones y consultas directas e, inclusive, mediante la participación del consejero legal en reuniones o misiones especiales en un alto nivel. A tal fin, resulta altamente conveniente que la relación existente entre el consejero legal y las autoridades políticas de su Cancillería esté enmarcada en un clima de confianza y ágil relación de trabajo. Al respecto, es importante que se establezca un reciproco respeto por los puntos de vista y criterios respectivos, teniendo en cuenta la diferente naturaleza de sus funciones.

Resulta de interés lo expresado por un distinguido jurista y ex-consejero legal británico en el sentido de que “Lo que los gobiernos quieren es un cuidadoso y ponderado asesoramiento jurídico... y lo quieren de personas cuya función es..., más que la de juzgar, la de promover los fines del gobierno y, más aún, cuya conciencia del contexto y los imponderabilia de la situación les permita brindar su asesoramiento con un conocimiento de todas las implicancias que no tiene un abogado externo... Pero... su primer deber es el de decirle a su gobierno cuáles cursos de acción no puede tomar sin caer en falta (“running foul”) del derecho” [traducción del autor].

Asimismo, desde una perspectiva norteamericana se ha expresado que “... el asesor jurídico debe estar en posición de presentar un análisis objetivo de todas las cuestiones de derecho internacional emergentes de la formulación y conducción de la política exterior de los Estados Unidos, y decirle al Secretario de

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Estado y a otros funcionarios formuladores de política que sus acciones propuestas o políticas pueden violar el derecho internacional" [traducción del autor].

VI. La posición del Consejero Legal en la estructura burocrática de su Cancillería: reseña de la práctica argentina

Las consideraciones anteriormente expresadas llevan necesariamente a reflexionar acerca de la posición que la Consejería Legal debe tener en la estructura burocrática de la Cancillería. Tales reflexiones son, por cierto, personales y reflejan la perspectiva del consejero legal de un Estado de las características de la Argentina, sin que ello implique una afirmación válida erga omnes.

Al respecto, resulta relevante señalar la importancia de que quienes desempeñan la tarea de asesoramiento jurídico-político internacional de un Estado, no sólo deben tener una sólida formación jurídica sino, también, el criterio político necesario para discernir cuáles son las prioridades e intereses de la política exterior del Estado. Por lo expresado, los integrantes de la Consejería Legal no pueden actuar como meros intérpretes neutros de las normas jurídicas sino como colaboradores en la formulación y ejecución de la política exterior.

En un contexto como el antedicho, debe hacerse hincapié en la necesidad de que la Consejería Legal tenga el carácter de órgano de asesoramiento permanente. La tradición argentina ha sido, a este respecto, que dicha asesoría esté integrada en su mayor parte por personal diplomático y, salvo un número muy limitado de casos, el consejero legal siempre ha sido un funcionario diplomático de alta jerarquía (Embajador o Ministro Plenipotenciario). Tal solución resulta particularmente aconsejable al permitir que la Consejería

Legal está conformada por funcionarios que reúnan la práctica y visión diplomática con la especialización jurídica. En este sentido, la capacitación del diplomático resulta particularmente enriquecedora y útil por su profesionalidad y consiguiente continuidad, así como por el carácter permanente que tiene el servicio exterior. Sobre este particular, se ha expresado que “La principal ventaja de integrar al equipo del servicio de asesoramiento jurídico con el servicio exterior está en la combinación de competencias en materias jurídicas y políticas. La gran desventaja, se ha reconocido, es la dificultad para asegurar la continuidad de los servicios jurídicos (...)” [traducción del autor].

En la Argentina, la tradición de diplomáticos-juristas es de larga data: Así, desde los albores del siglo se registran actuaciones relevantes de diplomáticos argentinos en cuestiones jurídicas. Pueden, al respecto, citarse los casos de Luis María Drago, autor de la doctrina sobre no intervención que lleva su nombre, o Luis A. Podestá Costa, Canciller y autor de un clásico del derecho internacional público que aún se estudia en las facultades de derecho. Más recientemente, debe recordarse el caso del Embajador José María Ruda, Consejero Legal, Subsecretario de Relaciones Exteriores y, finalmente, magistrado y presidente de la Corte Internacional de Justicia.

Sobre este particular, se ha expresado que “En muchos países (los asesores jurídicos) son miembros plenamente integrados del servicio exterior y prestan servicios en el exterior, en destinos diplomáticos, como cualquier otro miembro del servicio. ... Como resultado, los servicios exteriores de estos Estados frecuentemente no contienen ningún elemento específico de “asesor jurídico” [traducción del autor].

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Tal categoría, que se ha denominado de "diplomáticos-juristas", no es estrictamente la que se ha seguido en la Cancillería argentina. El sistema argentino tiene la peculiaridad de que sus asesores jurídicos internacionales son tanto diplomáticos como juristas. En efecto, los conocimientos jurídicos de los funcionarios especializados de la Cancillería argentina no excluyen los políticos ni los propios de la *ars diplomatica*, que los califican para un desempeño idóneo al frente de las misiones diplomáticas o para el acceso a los niveles más altos del Ministerio de Relaciones Exteriores. Baste para ello recordar que una de las dos únicas personas que, siendo diplomática de carrera, accedió al cargo de Canciller fue, precisamente, una ex-Consejero Legal.\(^\text{13}\)

Siguiendo tales precedentes, en la Argentina, los consejeros legales han tenido tradicionalmente una sólida formación académica, que se ha visto reflejada en muchos casos por publicaciones, trabajos de investigación y actividades académicas. Aquellos argentinos que, desde hace tiempo, vienen ocupando cargos en órganos judiciales internacionales o de asesoramiento jurídico (Corte Internacional de Justicia, Comisión de Derecho Internacional, Corte Permanente de Arbitraje, Tribunal Internacional de Derecho del Mar) han sido Embajadores que desempeñaron la función de consejeros legales y, frecuentemente, realizaron la mayor parte de su carrera diplomática prestando funciones en la Consejería Legal.\(^\text{14}\) Al respecto, es oportuno


\(^{14}\) A modo de ejemplo, pueden citarse los Embajadores Julio Barboza (Juez del Tribunal Administrativo de las Naciones Unidas y ex-miembro de la CDI, Enrique J. Candioti (miembro de la CDI), José María Ruda (juez y presidente de la Corte Internacional de Justicia). El Dr. Hugo Caminos, ex-Consejero Legal, por su parte, fue electo en 1996 miembro del Tribunal Internacional de Derecho del Mar.
recordar que en la Cancillería argentina, los funcionarios diplomáticos con vocación jurídica ingresan, por lo general, a la Consejería Legal al comienzo de sus carreras y, a través de las mismas, durante su permanencia en la República, prestan funciones en dicha asesoría. Los consejeros legales son, normalmente, designados entre estos funcionarios.

Finalmente, debe señalarse que las funciones de asesoramiento que presta la Consejería Legal en materias relacionadas con el derecho internacional, no sólo incluyen al Canciller y a los Secretarios, Subsecretarios y Directores Generales del Ministerio, sino también a otros organismos del Estado (Ministerios, Secretarías de Estado, etc.). Tales organismos han solicitado y solicitan, en numerosas oportunidades, la opinión de esta Consejería Legal en cuestiones que muchas veces hacen a la posición argentina en materia de política exterior, y particularmente a la relación entre el derecho interno y el derecho internacional.

En adición a lo anteriormente expresado, la Consejería Legal tiene relaciones con los otros poderes del Estado (legislativo y judicial) cuyos miembros, en ciertos casos, realizan consultas acerca de la vigencia y aplicación de normas del derecho internacional, de modo oficial y oficioso.

VII. Observaciones finales

Durante la segunda mitad de este siglo se han venido desarrollando crecientes vínculos de interdependencia entre los Estados, que han incidido en todos los planos (económico, ecológico, demográfico, sanitario, etc.). Los referidos vínculos han dado origen a importantes problemas de incidencia planetaria (“global issues”), cuya solución escapa a la capacidad de acción individual de la mayoría de los Estados (por ejemplo, los movimientos de las finanzas internacionales o el daño transfronterizo al medio ambiente).
Los problemas y cuestiones anteriormente mencionados han tenido como correlato en el marco jurídico la gran expansión de organismos y regímenes internacionales específicos, así como de espacios de integración económica (el ejemplo más característico fueron las Comunidades Europeas después de 1960). Tales organismos y regímenes han ido estableciendo reglas y normas que trascienden el ámbito de los ordenes jurídicos estatales.

A modo de ejemplo de las restricciones que los Estados se han impuesto en materia de ejercicio de sus competencias soberanas, podrían citarse los innumerables regímenes internacionales, tanto multilaterales como regionales, que han venido limitando sus facultades (por ejemplo, los acuerdos constitutivos de la Organización Mundial de Comercio -OMC- obligan a los Estados a no recurrir a sanciones unilaterales en materia comercial y a solucionar sus controversias comerciales en el ámbito de “paneles” –comisiones arbitrales– de la Organización). En el caso de las uniones económicas muy avanzadas como la Unión Europea, las Directivas Comunitarias emanadas de la Comisión Europea deben ser aplicadas por los Estados miembros en sus territorios como si se tratara de derecho interno (por ejemplo, la política agraria, la política arancelaria, etc.).

A pesar de las grandes transformaciones de las relaciones internacionales y de la proliferación de organismos y regímenes internacionales, que modificaron el concepto clásico de “soberanía”, el Estado continúa conservando en lo esencial sus cualidades distintivas y no ha dejado de ser el sujeto originario y principal del derecho internacional.

En otro orden de ideas, cabe tener presente que las relaciones de interdependencia compleja que, en forma creciente, están caracterizando a la moderna comunidad internacional, no desvirtúan la relevancia del derecho internacional. La llamada “globalización”, el alto desarrollo tecnológico y aquellas relaciones de interdependencia le hacen cobrar a dicho orden jurídico una creciente importancia. En efecto, al aumentar el número de cuestiones que interesan a la comunidad internacional en su conjunto, aumenta el ámbito de aplicación de las reglas del derecho de gentes.
En este contexto, el consejero legal aparece como el responsable de asesorar a las autoridades de su Cancillería en campos en los que el ámbito de aplicación del derecho de gentes está en creciente expansión en relación con los ordenamientos jurídicos nacionales. En este orden de ideas, el consejero legal tiene un papel fundamental en la delicada tarea de procurar una adecuada coordinación entre el orden jurídico internacional y el orden jurídico interno.

Bajo esta óptica, el consejero legal es quien, en definitiva, brinda a su Estado el asesoramiento necesario para que su derecho interno se adecúe a las nuevas realidades del derecho internacional moderno, buscando preservar la esencia de las competencias soberanas del Estado y preservando sus principios constitucionales. A la vez, procura que las normas jurídicas internas se adecúen progresivamente a las exigencias del derecho internacional y no lleven a una violación a éstas.

El gran desafío de las consejerías legales del siglo venidero será el de buscar un adecuado equilibrio entre el necesario acompañamiento que el derecho debe realizar de los procesos de integración y globalización, por un lado, y la preservación y resguardo tanto de los intereses como de las competencias soberanas de su Estado, por el otro.
IV

THE ROLE OF THE LEGAL ADVISER IN THE APPLICATION AND DEVELOPMENT OF THE LAW OF INTERNATIONAL ORGANIZATIONS

LE RÔLE DU CONSEILLER JURIDIQUE DANS L'APPLICATION ET LE DÉVELOPPEMENT DU DROIT DES ORGANISATIONS INTERNATIONALES
THE ROLE OF THE LEGAL ADVISER IN CONSIDERING
THE LEGALITY OF DECISIONS OF INTERNATIONAL
ORGANIZATIONS

Rodoljub Etinski

My interest in the subject matter of this essay is inspired by some recent Yugoslav experience. As Legal Adviser of the Federal Ministry for Foreign Affairs of the Federal Republic of Yugoslavia since September 1994, I faced the problem of the legality of some decisions of international organizations. To focus the issue, I shall confine myself to the relevant questions concerning resolution 47/1 adopted by the General Assembly of the United Nations on 22 September 1992. This resolution was adopted on the recommendation of the Security Council made in its resolution 777 (1992) of 19 September 1992. The General Assembly decided that the Federal


1 The relevant part of the resolution reads as follows:

"The General Assembly,

..."

"1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly."

2 The relevant part of the resolution reads as follows:

"The Security Council,

..."

"Considering that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

"Recalling in particular resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',

"1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly."

The draft resolution was sponsored by Belgium, France, Morocco, the
Republic of Yugoslavia “shall not participate in the work of the General Assembly” and that it “should apply for membership in the United Nations”. The General Assembly considered that the Federal Republic of Yugoslavia “cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia.”

The reason for this decision was the assertion that the Socialist Federal Republic of Yugoslavia has allegedly ceased to exist. For that reason, the Federal Republic of Yugoslavia cannot participate in the work of the General Assembly. However, it can participate in the work of other organs of the United Nations. Later, by resolution 47/229, the Federal Republic of Yugoslavia was excluded from the work of the Economic and Social Council.

This subject was considered by the Security Council and the General Assembly. In both organs, the representatives of some Member States raised serious objections as to the legality of the decision. The

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United Kingdom of Great Britain and Northern Ireland and the United States of America.

3 According to the opinions of the Badinter Commission, the Socialist Federal Republic of Yugoslavia dissolved and ceased to exist. The logic of this legal finding is best reflected in Opinion No. 11 of 16 July 1993, *International Legal Materials*, vol. XXXII (1993), p. 1587. By Opinion No. 11, the Badinter Commission answered the question “on what date(s) did State succession occur for the various States that have emerged from the Socialist Federal Republic of Yugoslavia” as follows: 8 October 1991 for Slovenia and Croatia, 17 November 1991 for the former Yugoslav Republic of Macedonia, 6 March 1992 for Bosnia and Herzegovina and 27 April 1992 for Yugoslavia. In the same Opinion, the Badinter Commission stated that the process of dissolution started on 29 November 1991 and ended on 4 July 1992. According to the Opinion of the Commission, three republics -- Croatia, Slovenia and The former Yugoslav Republic of Macedonia -- replaced the Socialist Federal Republic of Yugoslavia regarding the responsibility for international relations before the beginning of the process of dissolution, and that the process of dissolution continued some time after “the last successor, the Federal Republic of Yugoslavia” became independent. Is it legally possible? Paradoxically, the Commission in the same Opinion, referred to articles 18, 31 and 41 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (document A/CONF.117/14). The mentioned articles regulate State succession in related fields in cases of dissolution of a predecessor State. All of them begin as follows: “when a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States ...” A chronological order of events is very clear: a State dissolves and ceases to exist and new States emerge. According to the Badinter Commission: first, three new States emerged, then a process of dissolution started, then two new States emerged and after some time a process of dissolution terminated. The absurdity is complete. Besides, according to the Badinter Commission, the Federal Republic of Yugoslavia “acquired an independence” due to the adoption of “the Constitution of the new entry”.

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objections concerned the question of the legal basis of the decision, the inconsistency of the decision with the previous practice of the Organization, the relationship between the Security Council and the General Assembly concerning the matter, and the effects of the decision on the restoration of peace in the region.

The resolutions are silent "on which ... Articles of the Charter applies or could be applied in the case of the Federal Republic of Yugoslavia, and which would warrant the Security Council’s recommendation or form the basis of action by the General Assembly." They are based "wholly on political considerations." The lack of a legal basis for the decision has been stressed by representatives of many Members. Some of the representatives referred to "the respective mandates of the Charter organs, in this case the unacceptable presumption that the Security Council can make recommendations to the General Assembly on who can participate in its work." The difference appeared on the issue of correspondence of the proposed decisions with the previous practice of the United Nations. According to one position, it was "an unprecedented situation. For the first time, the United Nations is facing the dissolution of one of its members without agreement by the successor States on the status of the original United Nations seat." "The situation is without precedent and was clearly not foreseen by the authors of the Charter." According to the opposed position, "in anticipation of the situation that now faces our Organization, in which a Member State has undergone territorial or constitutional changes, the General Assembly determined in 1947 that as a general rule such a State should not cease to be a Member simply

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5 The representative of the United Republic of Tanzania, document A/47/PV.7, p. 176.
6 The representatives of India and Zimbabwe in the Security Council, document S/PV. 3116, pp. 7, 9, 10. The representatives of Ghana, document A/47/PV.7, p. 158; Zimbabwe, ibid., p. 162; Zambia; ibid., 172; Mexico, ibid., p. 188; Brazil, ibid., p. 189; and Guyana, ibid., p. 194.
8 The representative of the United States of America in the Security Council, ibid., p. 12.
by virtue of such changes."10 "There are many Members ... which are products of the break-up of States. The remaining part has always retained both its seat in this Hall and its name, if it so desired." Very relevant was the view that the proposed decision was "obstructionist to the ongoing peace process on the question of the former Yugoslavia."12 We are not convinced that exclusion from the General Assembly of any of its parties to the conflict in the former Socialist Federal Republic of Yugoslavia will in any way be helpful to the peace efforts currently being undertaken."13

It is evident that a number of Members voiced serious doubts about the legality of the proposed decision. Some of them pointed out that a dangerous precedent would be set. "We therefore deeply regret this lack of consultation on such an important text. We feel that it sets a very bad, indeed, dangerous precedent. We also wish to remind a number of Member States which are under a cloud from the United Nations, and particularly from the permanent members of the Security Council that, by the adoption of the draft resolution before us they are going to be opening a Pandora’s box that will be used liberally against Member States by those who are going to be in charge of defining who should be and who should not be a Member. This in our opinion is a very dangerous precedent."14 In such circumstances, the representative of the United Republic of Tanzania said: "At a time when we are all agreed that the rule of law is a prerequisite for the emerging world order, the status of our Organization would have been greatly enhanced by our referring this matter to the International Court of Justice for an advisory opinion. My delegation believes that a reference to the International Court of Justice could have helped to promote a consensus on this vitally important issue."15 The delegation of Guatemala felt that "it would have been desirable to have had more time, so that it could have had the benefit of a legal opinion from the Office of Legal Affairs

10 The representative of Ghana in the General Assembly, ibid., p. 158-160.
11 The representative of Zimbabwe in the General Assembly, ibid., p. 163. The same view was expounded by representatives of the United Republic of Tanzania, Mexico and Guatemala, ibid., pp. 177, 188 and 191.
12 The representative of Zambia in the General Assembly, ibid., p. 173.
13 The representative of Brazil in the General Assembly, ibid., p. 190. Also the representatives of Ghana, Zimbabwe and Botswana, ibid., pp. 161, 166 and 168.
14 The representative of Zambia in the General Assembly, ibid., p. 172. Also the representatives of Zimbabwe, the United Republic of Tanzania and Jamaica, ibid., pp. 163, 176 and 194.
15 Ibid., p. 177.

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and thus been clear about the legal basis of this decision and its possible
implication in respect of the interpretation of the Charter."16 Also, the
representative of Jamaica remarked that "no authoritative legal opinion
has been sought and obtained from the legal advisers of the United
Nations and made available to the General Assembly for its
consideration of a matter of such fundamental importance."17
Unfortunately, the majority of Members did not respond. Resolution
47/1 was adopted by the General Assembly by a vote of 127 to 6, with
26 abstentions. Yugoslavia voted against it.

The Legal Counsel of the United Nations was not asked to give
an opinion before the vote in the General Assembly. Provoked by a
letter from the Permanent Representatives of Bosnia and Herzegovina
and Croatia, dated 25 September 1992, the Under-Secretary-General for
Legal Affairs, the Legal Counsel, answered some of the dubious
questions and interpreted the decision adopted by the General
Assembly. However, he did that after the vote had taken place, when
he was limited by the decision adopted. He was of the opinion that:

"General Assembly resolution 47/1 deals with a
membership issue which is not foreseen in the Charter of the United
Nations, namely, the consequences for purposes of membership in the
United Nations of disintegration of a Member State on which there is no
agreement among the immediate successors of that State or among the
members of the Organization at large. This explains the fact that
resolution 47/1 was not adopted pursuant to Article 5 (suspension) of
the Charter nor under Article 6 (expulsion). The resolution makes no
reference either to those Articles or to the criteria contained in those
Articles."18

 Construing resolution 47/1, the Legal Counsel said:

"While the General Assembly has stated
unequivocally that the Federal Republic of Yugoslavia (Serbia and
Montenegro) cannot automatically continue the membership of the
former Socialist Federal Republic of Yugoslavia and that the Federal

16 Ibid., p. 191.
17 Ibid., p. 193. Also the representative of Guyana, ibid., p. 196.
18 Letter dated 29 September 1992 from the Under-Secretary-General, the
Legal Counsel, addressed to the Permanent Representatives of Bosnia and Herzegovina
Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

"On the other hand, the resolution neither terminates nor suspends Yugoslavia’s membership in the Organization. Consequently, the seat and nameplates remain as before, but in General Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign ‘Yugoslavia’. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents ... The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1.”

19 Ibid. See also the letter dated 4 December 1997 sent by the Under-Secretary-General for Legal Affairs, the Legal Counsel, to the Executive Secretary of the Climate Change Secretariat on Participation of Yugoslavia in the United Nations Framework Convention on Climate Change, which reads in part as follows:

1. ... You seek information, on behalf of the States Parties, regarding the acceptance by the Secretary-General, acting as depositary of the UNFCCC [the United Nations Framework Convention on Climate Change], of the signature and the instrument of ratification of the Convention by Yugoslavia, as well as regarding the status of Yugoslavia in the United Nations when it signed the Convention on 8 June 1992, and deposited its instrument of ratification on 3 September 1997 ...

2. At the outset, it should be noted that article 20 of the UNFCCC provides in relevant part that the Convention is open for signature ‘... by States Members of the United Nations or of any of its specialised agencies or that are Parties to the Statute of the International Court of Justice...’ ...

3. As to your first two questions, namely, the status of Yugoslavia in the United Nations when it signed the Convention and deposited its instrument of ratification, and the legal basis for the acceptance by the depositary of such actions, I wish to note the following: ...

"(b) ... My predecessor, Mr. Fleischhauer, on 29 September 1992 addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations, setting out the views of the Secretariat regarding the practical consequences of the adoption by the
This means that the Socialist Federal Republic of Yugoslavia ceased to exist, in spite of the fact that Yugoslavia is a Member State of the United Nations, and in spite of the fact that the Federal Republic of Yugoslavia should apply for a new membership. Legal logic has no victorious position in confrontation with politics.

Indeed, Yugoslavia has paid its financial contributions to the United Nations. Yugoslavia has been included among the 185 States Members of the United Nations and marked as an original Member on the lists published in the *Yearbooks of the International Court of Justice* and the publications of the Secretary-General entitled "*Multilateral Treaties Deposited with the Secretary-General*" in the past years.

Quite suddenly, the question of the position of the Federal Republic of Yugoslavia appeared before the International Court of Justice. Bosnia and Herzegovina filed on 20 March 1993 an Application to the Court, instituting proceedings against the Federal Assembly of resolution 47/1 (document A/47/485). In that letter, Mr. Fleischhauer stated, *inter alia*, that 'the resolution neither terminates nor suspends Yugoslavia's membership in the Organization', and that its practical consequence was that representatives of the FRY [Federal Republic of Yugoslavia] 'can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it'. He also noted that 'The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1'. Even though a number of Member States did not agree with the interpretation given by the Secretariat of the practical consequences of General Assembly resolution 47/1, that resolution was recalled by the Security Council, and recalled and reaffirmed by the General Assembly (resolutions 47/229 and 48/88) without any criticism of such interpretation. The interpretation given by Mr. Fleischhauer was confirmed by the Secretary-General in connection with General Assembly resolution 48/88 of 20 December 1993, in paragraph 29 of which the Assembly urged '... the Secretariat ... to end the de facto working status of the Federal Republic of Yugoslavia (Serbia and Montenegro)'.

"(d) As to the acceptance on 3 September 1997 of the deposit by the FRY of an instrument of ratification of the UNFCCC, this was not based on a treaty action taken by the former SFRY [Socialist Federal Republic of Yugoslavia], but rather on the signature of the Convention by a representative of the FRY, as noted above. As General Assembly resolution 47/1, as consistently interpreted by the Secretariat, has not terminated or suspended Yugoslavia's membership in the United Nations, the depositary was not in a position not to accept the deposit of an instrument of ratification pursuant to article 22 of the UNFCCC. ..."
Republic of Yugoslavia. If the Federal Republic of Yugoslavia was not a Member of the United Nations, it could not stand before the Court. The Court was aware of the problem. Having cited resolution 777 (1992) of the Security Council of 19 September 1992, resolution 47/1 of the General Assembly of 22 September 1992 and the opinion of the Under-Secretary-General for Legal Affairs, the Legal Counsel, of the United Nations expounded in his letter of 29 September 1992, the Court said: "... while the solution adopted is not free from legal difficulties, the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings ..." The Court made this statement during the incidental proceedings relating to the indication of provisional measures. The Court has also indicated its reluctance to answer the question in further proceedings. For this reason, the Federal Republic of Yugoslavia has

20 According to Article 35, paragraph 3, of the Statute of the Court, the Court is open to the States parties to the Statute. "When a State which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court."


22 In paragraph 19 of the Order, the Court has opened the door to avoid answering the question in the following way:

"Whereas Article 35 of the Statute, after providing that the Court shall be open to the parties to the Statute, continues:

"2. The condition under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court;"

whereas the Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 (cf. S.S. "Wimbledon", 1923, Permanent Court of International Justice, Series A, No. 1, p. 6); whereas a compromissory clause in a multilateral convention, such as article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, could, in the view of the Court, be regarded prima facie as a special provision contained in a treaty in force; whereas accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide convention, disputes to which article IX applies are in any event prima facie within the jurisdiction ratione personae of the Court ...") Ibid., p. 15.
not insisted on raising the question in further proceedings. But, as indicated above, Yugoslavia appeared in the Yearbook of the Court as an original Member State of the United Nations.

During the meeting of legal advisers of the Member States of the United Nations in New York in 1994, I discussed the issue with a number of my colleagues. And at later events I had the opportunity to exchange views with my colleagues. They advised me not to expect a high level of constitutionality of the Organization. Many of them emphasized the political side of the issue. I felt a sense of dissatisfaction with their views concerning the state of legality of the Organization, which is a disappointing fact at the end of the Decade of International Law.

A few writers presented their views concerning the position of the Federal Republic of Yugoslavia in the United Nations. The first was Professor Yehuda Blum. According to him, “Yugoslavia has been suspended from the General Assembly ... in a manner not foreseen by the Charter and in disregard of its Article 5.” The opinion of Michael Wood on the possibilities for solving the situation deserves full attention.

Professor Yehuda Blum published his opinion on the legality of the quoted decisions in the following way:

“From the legal point of view, the Yugoslav situation closely resembles the India-Pakistan and Pakistan-Bangladesh situations ... In contradiction of the case of Russia, it cannot be reasonably maintained that, as a result of the events that unfolded in Yugoslavia after June 1991, that country ceased to exist as a subject of international law. Following the secession of four of the six constituent republics, the two remaining republics of the old federation have continued to assert the continuity of Yugoslavia, albeit in a shrunken form. On 27 April 1992 this truncated Yugoslavia adopted a new constitution preserving the name of Yugoslavia and its flag (without the red star of the Communist era). The territory of rump Yugoslavia (102,000 square kilometres) comprises 40 percent of the territory of the old Yugoslavia and its population (10.5 million) is 45 percent of that of old Yugoslavia.

Thus, by any objective yardstick -- whether factual or legal -- it is difficult to deny 'the Belgrade authorities' the right to occupy the seat of Yugoslavia at the United Nations ...”, Y. Z. Blum, "United Nations Membership of the 'New' Yugoslavia: Continuity or Break?", American Journal of International Law, vol. 86 (1992), No. 4, pp. 832-833. An interesting discussion between opponents and Prof. Blum followed in the next volumes of the American Journal of International Law.

Mr. Michael Wood, former Legal Adviser of the United Kingdom Mission to the United Nations in New York and now Deputy Legal Adviser of the Foreign and Commonwealth Office of the United Kingdom, published his personal opinion in the following way:

"The effect of the Security Council and General Assembly resolutions on the
Federal Republic of Yugoslavia's position in the United Nations is not self-evident. Whether, at the time of writing, the Federal Republic of Yugoslavia is a Member of the United Nations is a question to which there is no easy answer. Schermers and Blokker may well be right when they say that the resolutions 'did not result in a termination of membership'. The operative provisions of General Assembly resolutions 47/1 of 22 September 1992 and 47/229 of 5 May 1993 decide merely that the Federal Republic of Yugoslavia shall not participate in the work of the General Assembly and ECOSOC. If the Federal Republic of Yugoslavia were not a Member of the United Nations, such a decision would be otiose since, as a non-Member, it could not in any event participate in these two organs, except as an observer. It could, perhaps, be explained on the basis that there is doubt as to whether it is a United Nations Member, and the resolutions make the matter clear. But the first resolution, which dealt only with the General Assembly and left the Federal Republic of Yugoslavia free to participate in ECOSOC, can hardly have been said to have clarified the membership question. Some States had proposed that the Federal Republic of Yugoslavia be excluded from membership in the United Nations, a position hardly consistent with non-membership, but were unable to secure a Council recommendation under Article 6 of the Charter. If the true position is that the former Yugoslavia has been extinguished as a State, then it ceased to be a Member of the United Nations by operation of law. What was needed, in the face of the Federal Republic of Yugoslavia's refusal to accept such extinction, was a determination or instruction to the Secretariat by the relevant United Nations organs that the former Yugoslavia was extinguished and therefore no longer a Member. While there is no express provision in the Charter for such a determination it would be a reasonable implied power, requiring a recommendation of the Security Council and a decision of the Assembly by analogy with those membership decisions expressly provided for in Articles 4 to 6. What in fact we have is something that tends in that direction, but does not go so far. Security Council resolution 777 (1992) contains preambular language:

'Considering that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist'.

This appears clear enough — unlike the Badinter Commission it does not simply say that the Socialist Federal Republic of Yugoslavia has ceased to exist — an undisputed fact — but that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist. But the resolution does not draw the logical conclusion, for it recalls its earlier preambular view that the claim by the Federal Republic of Yugoslavia to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia has not been generally accepted. This leaves open the possibility that in the future it might be generally accepted that the Federal Republic of Yugoslavia could continue the Socialist Federal Republic of Yugoslavia's membership. In operative paragraph 1 of the resolution, the Security Council considers (it did not decide) that the Federal Republic of Yugoslavia cannot continue automatically the Socialist Federal Republic of Yugoslavia's membership and therefore recommends that the Assembly decide that the Federal Republic of Yugoslavia should apply for membership of the Assembly. This rather subtle wording was followed by the letter to the General Assembly in resolution 47/1.
Having in mind this experience, I believe a few general remarks on the subject matter of this essay are appropriate.

The possibilities relating to a judicial review of the legality of decisions of international organizations are limited. The contentious or advisory jurisdiction of the International Court of Justice can be used to review the legality of decisions in cases provided for by the constitutional rules of organizations. A right of a member state to appeal from a decision of the Council of the International Civil Aviation Organization (ICAO), provided by article 84 of the Convention on International Civil Aviation, signed at Chicago on 7 December 1944, is

"The Legal Counsel of the United Nations set out the practical consequences of resolution 47/1 in his letter of 29 September 1992: ‘... the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly ...’"

This letter was disputed by Slovenia and some others, but appears to reflect the general understanding of the members of the Security Council (see, in particular, the statement of the Russian Federation and China in the Council and the United Kingdom in the Assembly) and has been followed by the Secretariat ever since.

"... the Council and Assembly have not tied themselves to any particular resolution of the matter. At some point the political momentum will exist to regularize the Federal Republic of Yugoslavia’s position in the United Nations. There would seem to be essentially two ways of doing this. The Federal Republic of Yugoslavia could apply for membership as the other former Yugoslav States have done. This appears to be what was envisaged by the Council and the Assembly in 1992, and in the Legal Counsel’s letter. Indeed the Federal Republic of Yugoslavia Prime Minister, Milan Panic, addressing the General Assembly on 22 September 1992 said: ‘I hereby formally request membership in the United Nations on behalf of the new Yugoslavia, whose Government I represent.’ In the alternative, the relevant organs might accept continued Federal Republic of Yugoslavia membership without insisting on a formal application, for example by reversing the non-participation decisions of 1992 and 1993. This would probably be explicitly ‘without prejudice to questions of State succession’. It could be done by a decision of the relevant organs as a pragmatic solution to a difficult situation.” Michael C. Wood, “Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties,” Max Planck Yearbook of United Nations Law, J. Frowein and R. Wolfrum, eds. (London, Kluwer Law International, 1997), vol. 1, pp. 247-251.

Questions related to the legality of decisions of the Security Council provoke special interest. See M. Bedjaoui, Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de Sécurité, (Brussels, Bruylant, 1994).

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Some international organizations have opened a door to the International Court of Justice for their members to settle disputes concerning the interpretation and application of their constitutional rules. The question of the possibility of judicial review of a decision of the Security Council of the United Nations related to the

26 This article provides as follows:

"If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council." United Nations, Treaty Series, vol. 15, p. 352.

India filed an appeal against decisions of the ICAO Council assuming jurisdiction in respect of an Application made by Pakistan. The Court decided that the ICAO Council was competent to entertain the Application made by Pakistan and rejected the appeal made by India against the decision of the ICAO Council. See Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 46. In the Aerial Incident of 3 July 1988 the Islamic Republic of Iran requested the Court to adjudge and declare "that the ICAO Council decision is erroneous in that the Government of the United States has violated the Chicago Convention, including the preamble, articles 1, 2, 3 bis and 44 (a) and (h) ..." Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America) I.C.J. Yearbook 1995-1996, p. 162.

27 According to article 37, paragraph 1, of the Constitution of the International Labour Organisation of 9 October 1946, "Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice." United Nations, Treaty Series, vol. 15, p. 100. Article XIV, paragraph 2, of the Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 November 1945 provides as follows: "Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its rules of procedure." United Nations, Treaty Series, vol. 4, p. 292. Article 75 of the Constitution of the World Health Organization of 22 July 1946 said: "Any question or dispute concerning the interpretation or application of the Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement." United Nations, Treaty Series, vol. 14, p. 202. In accordance with article XVII of the Statute of the International Atomic Energy Agency of 29 October 1956, "Any question or dispute concerning the interpretation or application of this Statute which is not settled by negotiation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement." United Nations, Treaty Series, vol. 276, p. 34.

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subject matter of a dispute between two Member States will be tested in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America and United Kingdom).*

The advisory jurisdiction of the Court includes the power to review the legality of a decision of an international organization.

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29 The Court found that it was not able to give the advisory opinion requested by the World Health Organization (WHO) on the following question: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution" (resolution WHA 46.40 adopted by the Assembly on 14 May 1993). Interpreting Article 65, paragraph 1, of its Statute and Article 96, paragraph 2, of the Charter of the United Nations, the Court established that among the three necessary conditions of its advisory jurisdiction is the following one: a question must be one arising within the scope of the activities of the requesting agency. To find the area of competence of the WHO, the Court had to construct the relevant provisions of the WHO Constitution and other relevant rules. The Court stated in a general way that the constituent instruments of international organizations are multilateral treaties to which well-established rules of treaty interpretation apply. But, the Court remarked, they are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties. So, to establish the field of activity of the WHO, the Court focused its attention on 22 subparagraphs of article 2 of the WHO Constitution, listing functions of the organization, on article 1 of the WHO Constitution, defining the object of the organization, and on the preamble of the WHO Constitution. The Court noted that according to the mentioned provisions, the WHO is empowered to deal with the question of effects on health of the use of nuclear weapons, but not with the question of legality of the use of such weapons. Then, the Court referred to the "principle of speciality". International organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", i.e., they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. The Court remarked that the powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. But the necessities of international life, the Court said, may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments. It is generally accepted that international organizations can exercise such powers known as "implied" powers. The Court was of the opinion that to ascribe to the WHO the competence to address the legality of the use of nuclear weapons even in view of their health and environmental effects would be tantamount to disregarding the principle of
Due to the limited possibilities of judicial review of the legality of a decision of an international organization, the other forms of control are more important. Legal advisers of international organizations should have the function of internal guardian of the legality of decisions of an organization. In case of differences among members of an organization on the legality of a proposed decision, the legal adviser should be invited to give a legal opinion. Indeed, the Office of Legal Affairs of the Secretariat of the United Nations has issued a large number of legal opinions. A very important step forward would be made if a practice speciality; for such competence could not be deemed a necessary implication of the Constitution of the organization in the light of the purposes assigned to it by its member States. The WHO is, the Court said, an international organization of a particular kind. As indicated in the preamble and confirmed by article 69 of its Constitution, "the Organization shall be brought into relation with the United Nations as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations". As its Articles 57, 58 and 63 demonstrate, the Charter laid the basis of a "system" designed to organize international cooperation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. If, according to the rules on which that system is based, the Court concluded that the WHO has, by virtue of Article 57 of the Charter, "wide international responsibilities", those responsibilities are necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system. And there is no doubt that the question concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside of that of the specialized agencies. For all these reasons, the Court considered that the question raised in the request for an advisory opinion submitted to it by the WHO does not arise "within the scope of the activities" of that organization as defined by its Constitution. The Court explored the practice of the WHO. None of the reports and resolutions referred to in the preamble to World Health Assembly resolution WHA 46.40, nor the resolution itself, could be taken to express, or to amount on its own to a practice establishing an agreement between the members of the organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinions, I.C.J. Reports 1996, p. 226.

Answering a question submitted by the Assembly of the Inter-Governmental Maritime Consultative Organization, the Court was of the opinion that the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, elected on 15 January 1959, was not constituted in accordance with the Convention for the Establishment of the Organization. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960: I.C.J. Reports 1960, p. 150.

developed so that any proposed decision should refer to its legal basis. The discussion of a proposed decision in the organs of an organization sometimes includes the question of the legal basis of the proposed decision. But it seems that member States do not consider themselves obliged to refer to a constitutional rule or a legal basis of the decision. That is a bad direction for the practice to follow. It opens a door for doubt about the first and undisputed criterion of the legality of the decision of an organ of the organization: observance of the provisions of the constitutional act related to the competencies of organs of the organization. Consistency of application of relevant rules requires references to previous cases of application of the rules. It would be desirable if the discussion before voting on proposals included a comparison of the actual case with former similar cases. Legal advisers could help by providing information on the previous practice concerning the application of the rule. It would be standard procedure if the potentially affected member State had an opportunity to expound its views before voting.

Legal advisers also have an important role in the consideration of the effects of adopted decisions. At their annual meetings in New York, they could consider the general state of legality of acts of the organs of the United Nations.

All of this could be done immediately if there were a little will to strengthen the attitude of legality of the organs of international organizations. Having in mind a possible revision of the Charter of the United Nations, the idea to empower the Secretary-General to apply for an advisory opinion of the International Court of Justice deserves strong support. A higher level of accommodation of relations between a member State and an international organization will be achieved when a member State potentially affected by a decision of an international organization has the right to question the legality of the decision before the Court. But this is a proposal for the twenty-first century, perhaps even the second half of it.
GARDIEN DU PATRIMOINE OU INVENTEUR JURIDIQUE ?

LE RÔLE DU CONSEILLER JURIDIQUE D'UNE ORGANISATION INTERNATIONALE FACE AU CHANGEMENT

Francis Maupain*

Introduction

Même si c'est au risque de passer pour les tenants d'un certain conservatisme, les conseillers juridiques des organisations internationales semblent en général fort bien s'accommoder de l'image de gardiens vigilants du droit et de la loi de leur institution qui est souvent la leur.

Le Conseiller juridique du Bureau international du Travail (BIT) ne fait certainement pas exception à cette image. Compte tenu des particularismes institutionnels et historiques de l'Organisation internationale du Travail (OIT), il pourrait même, à certains égards, en fournir l'archétype. La structure tripartite de l'Organisation, sa vocation essentiellement normative, les complexités de fonctionnement et de procédure qui en découlent ont engendré, au cours de ses huit décennies d'existence et des vicissitudes qu'elle a dû affronter, une pratique juridique d'une ampleur considérable dont le Conseiller juridique est en quelque sorte le "grand prêtre". Ce rôle est du reste consacré dans le Règlement de la Conférence internationale du Travail1. Pendant la durée de la session, le Conseiller juridique n'est plus le Conseiller juridique du BIT, il coiffe alors le chapeau de "Conseiller juridique de la Conférence". Il est appelé en cette qualité à donner des avis de manière autonome sans être assujetti, du moins formellement, au pouvoir hiérarchique du Directeur général. Dans la tradition de l'OIT, cette autonomie a toujours été respectée par les Directeurs généraux successifs. Pour le meilleur et pour le pire, le Conseiller juridique s'est

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L'auteur tient à remercier Dominick Devin, actuel Conseiller juridique, en particulier, pour sa contribution aux développements relatifs au concept "d'invention juridique". Les vues exprimées dans cet article sont cependant exclusivement celles de l'auteur.

ainsi trouvé en première ligne dans certains des débats d'importance politique majeure qui ont jalonné la longue histoire de l'Organisation.

Les mêmes tropismes s'affirment sur le plan des questions juridiques liées au fonctionnement interne. Le BIT, en raison de son ancienneté et de son mandat en matière de relations de travail, s'est de tout temps reconnu une responsabilité particulière dans la sauvegarde et le développement des normes de conduite de la fonction publique internationale. Par voie de conséquence, le rôle du Conseiller juridique ne se limite pas en cette matière à celui de gardien de l'application des règles du Statut du personnel stricto sensu; il s'affirme aussi en matière d'éthique ou de déontologie de la fonction. Cette conception a pu parfois le placer à contre-courant du sentiment général de ses collègues. Pour se limiter à un exemple, le Conseiller juridique du BIT a été, au nom d'une vision un peu spartiate de la mission de ses fonctionnaires sur le terrain, le dernier sinon le seul à soutenir une conception restrictive des privilèges qui devraient être revendiqués au bénéfice de ces fonctionnaires face à la tendance générale qui portait à revendiquer à leur profit le statut diplomatique complet. C'est ainsi qu'en 1967, le Directeur général du BIT, rappelant que l'objectif de ces activités était "to serve the developing countries, not to exploit them (and to) avoid at all costs any appearance of creating a new colonial caste" (au risque d'affaiblir la crédibilité des organisations dans la revendication essentielle qui devrait être d'assurer leur indépendance fonctionnelle complète), exprimait formellement au Programme des Nations Unies pour le développement sa crainte que la trop grande insistance avec laquelle la plupart des organisations cherchaient à obtenir pour leurs agents des privilèges aussi étendus que possible ne donne une image déformée de leur personnel et ne suscite une réaction en retour à l'égard de la défense de l'immunité et de l'indépendance complète dans l'exercice des fonctions qui est pourtant la seule qui compte véritablement.

Ce n'est donc certainement pas un hasard si une très grande continuité s'affirme dans l'occupation de ce poste à l'OIT : en fait, on compte moins de conseillers juridiques que de directeurs généraux alors que la longévité moyenne des directeurs généraux du BIT est déjà au-dessus de la moyenne. Il serait donc particulièrement tentant d'analyser le rôle du Conseiller juridique du BIT sous l'angle de la sauvegarde du "patrimoine juridique". Malgré la spécificité historique de l'OIT, une telle démarche risquerait cependant de ne pas être très originale et de recouper bien des études que l'on trouvera dans ce recueil. Plus encore,
elle risquerait de donner une image incomplète, voire déformée, en omettant le rôle du Conseiller juridique en tant qu'agent de changement et d'adaptation. L'OIT n'est en effet ancienne que parce qu'elle a survécu à diverses crises et, pour survivre, elle a dû profondément se transformer. Dans cette transformation, le droit a eu une place essentielle et, avec lui, le Conseiller juridique. Ce rôle est cependant mal connu à l'extérieur, sauf dans les cas où la pratique de l'OIT s'est suffisamment singularisée pour attirer l'attention (par exemple en ce qui concerne l'exclusion des réserves aux conventions internationales du travail ou la succession "automatique" des États nouvellement indépendants à ces conventions).

Pour remplir ce rôle, le Conseiller juridique n'a pu se contenter de puiser dans le patrimoine juridique existant. Il a dû faire preuve de créativité. Faute de pouvoir passer en revue de manière exhaustive, dans les limites de la présente étude, les manifestations de cette créativité au cours de la longue existence de l'Organisation, il a paru intéressant d'en donner un aperçu en choisissant celles d'entre elles qui peuvent apparaître comme les plus significatives, à la fois du point de vue de la difficulté du problème d'adaptation ou de blocage à résoudre et du point de vue de la qualité inventive de la solution apportée.

Est-il concevable ou présomptueux à cet égard de parler d'invention juridique, ou doit-on se limiter à considérer que ces contributions relèvent du droit inventif ?

On examinera dans une première partie dans quelle mesure ou à quelles conditions de telles contributions pourraient effectivement être qualifiées d'inventions, avant de passer en revue dans la deuxième partie un échantillon des contributions à première vue les plus décisives à la lumière de ces conditions.

I. Utilisation inventive du droit ou invention juridique?

La nécessité de faire preuve de créativité dans l'activité du Conseiller juridique n'a sans doute rien si l'on ose dire d'une grande découverte. C'est une exigence courante de la pratique du droit dans n'importe quel domaine qui peut s'exprimer sous différentes formes ou à différents niveaux, soit celui de l'argumentation, soit celui de "montages" juridiques.
De manière intuitive on perçoit bien cependant que certaines manifestations de cette activité ne relèvent pas de la créativité quotidienne, mais permettent d’opérer une sorte de saut qualitatif dans la recherche d’une solution à un problème. Dans le domaine juridique, la réalité de telles inventions peut, d’une certaine manière, être illustrée par la création des organisations internationales elles-mêmes. A bien des égards, les créations se présentent comme le produit de véritables “inventions” dont le mérite revient aux jurisconsultes nationaux qui les ont imaginées afin de surmonter des problèmes devenus insolubles par le biais des méthodes classiques de coopération inter-étatique.

Tel est le cas en particulier de l’OIT, qui a introduit une véritable révolution juridique à travers le tripartisme. La pratique a pu démontrer que cette structure répondait de manière si étroite à la nature des choses et des réalités dans le domaine social qu’elle a assuré la survie de l’OIT alors que des créations plus classiques, telles que la Société des Nations (SdN), se sont finalement avérées plus fragiles. On peut dire que la création de la Communauté européenne du Charbon et de l’Acier (CECA) a sans doute été, elle aussi, le fruit d’une véritable invention collective des jurisconsultes des pays de l’Europe des Six pour surmonter l’obstacle de la souveraineté et mettre en commun certaines ressources dans l’intérêt de la reconstruction, de la prospérité économique et de la paix, après la seconde guerre mondiale. La création routinière d’organisations internationales sectorielles ou régionales qui suivent plus ou moins le même modèle ne saurait en revanche être considérée sur le même plan.

Si l’on veut aller au-delà de la perception intuitive ou de la simple métaphore, il faut cependant se poser de manière plus rigoureuse la question de savoir si de tels sauts qualitatifs peuvent satisfaire au test de l’invention selon les critères acceptés dans le domaine de la technologie. Aux termes de l’article 33, paragraphe 1, du Traité de coopération en matière de brevets de 1970, l’examen préliminaire aux fins de brevet doit viser à vérifier “les questions de savoir si l’invention dont la protection est demandée semble être nouvelle, impliquer une activité inventive (n’être pas évidente) et être

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2 On peut observer dans cette perspective que le terme “invention” est en effet utilisé bien au-delà des sciences de la nature et de leurs applications technologiques. Un coup d’œil au catalogue des ouvrages récents en matière de sciences sociales révèle des ouvrages ou des thèses sur l’invention de la délinquance, l’invention de l’art ou du théâtre, l’invention de la tradition et même l’invention de la pornographie !
susceptible d’application industrielle". Il n’y a rien dans ces critères qui les limite nécessairement à une discipline ou à une matière déterminée, même s’il est vrai que le droit présente la particularité de mettre en forme les réalités sociales à travers des lois au lieu de chercher à comprendre les lois de la nature pour agir sur cette dernière, et donc d’être beaucoup moins immuable. La transposition de deux de ces critères au domaine juridique ne semble en tout cas pas poser de difficulté particulière.

La signification de la nouveauté est précisée par l’article 33, paragraphe 2, du Traité comme suit : “l’invention dont la protection est demandée est considérée comme nouvelle s’il n’est pas trouvé d’antériorité dans l’état de la technique”. Pour l’application de ce principe, on doit examiner le domaine technique considéré au moment où l’invention a été conçue pour déterminer si une solution technique existait déjà. La recherche doit prendre en compte non seulement les produits ou processus considérés mais aussi les principes à la base de ces solutions pour les comparer à ceux qui sous-tendent la prétendue invention. On peut, à cet égard, se demander si dans le domaine juridique la nouveauté doit être appréciée par rapport à l’ordre juridique considéré, ou si elle doit avoir un caractère plus large. Dans le cas des organisations internationales, et compte tenu du fait que le travail du Conseiller juridique consiste à se tenir au courant des développements pertinents qui peuvent se présenter ailleurs, il est sans doute permis de considérer comme nouvelle une solution qui n’était pas généralement connue des autres conseillers juridiques de ces organisations. Mais il ne suffit pas qu’une prétendue invention soit nouvelle. L’activité inventive doit s’ajouter pour qu’une solution soit considérée comme une invention, c’est-à-dire le franchissement d’une sorte de “saut qualitatif” par rapport aux solutions existantes. Selon l’article 33, paragraphe 3, du même Traité, l’invention, au moment considéré, ne devait pas être “évidente pour un homme du métier”.

A première vue, le fait de se prêter à une application industrielle pose davantage de problèmes; on pourrait même penser que ce critère est tout simplement dépourvu de pertinence dans le contexte juridique. Tel n’est pas le cas, sous réserve bien sûr d’opérer une transposition. Il paraît clair, en effet, qu’une invention devrait pour

8 Ibid.
9 Ibid. p. 285.
mûrifier ce nom, dans le domaine juridique comme dans n'importe quel autre, fournir la base d'une solution durable à une difficulté déterminée et qui jusqu'alors n'avait pas de solution ou une solution malcommode.

Deux précisions complémentaires doivent être apportées à cet égard. D'abord, il n'est pas nécessaire que l'invention ait un caractère fondamental pour être éligible. Comme dans le domaine des inventions pratiques qui peuvent simplement viser à améliorer ou simplifier les conditions de la vie quotidienne, une innovation, même modeste, peut mériter d'être qualifiée d'invention si elle permet de manière concrète et effective de faciliter la mise en œuvre de solutions existantes. Un exemple tiré de l'expérience d'une autre organisation permettra d'illustrer ce point. Dans cette organisation, la perte du droit de vote au cas où les arriérés de contribution atteignent un certain niveau n'était pas automatique. Un vote à la majorité des deux tiers des embres était nécessaire et rendait pratiquement impossible son application. Pour sortir cette disposition de sa léthargie, il a suffi d'introduire un système de résolution à action différée. En différant l'entrée en vigueur de la décision d'une année afin de donner une chance au embré considéré de réduire ses arriérés, cette solution a permis de surmonter l'inhibition psychologique des autres à prendre des mesures coercitives et a permis de rendre toute son efficacité à la disposition constitutionnelle.

Ensuite, le fait qu'une invention n'ait pas besoin d'avoir un caractère fondamental pour se qualifier ne signifie pas qu'elle peut simplement relever de la fantaisie ou de ce que l'on pourrait appeler une astuce juridique destinée à résoudre une difficulté ponctuelle et vouée à rester sans lendemain. Pour illustrer cette distinction, on peut se référer à une controverse concrète au sujet de laquelle le Conseiller juridique du BIT fut appelé à donner un avis qui a connu une certaine notoriété. A la suite du départ des États-Unis de l'OIT en novembre 1977, le Brésil fut choisi pour occuper le siège devenu vacant parmi les dix sièges réservés au Conseil d'administration du BIT à un État d'importance industrielle la plus considérable. Le retour des États-Unis en février 1980 posa inévitablement la question de savoir qui devait leur céder la place. Conformément au Règlement du Conseil d'administration, il fut procédé à un nouveau classement selon des

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critères dont la pondération fut adaptée pour accorder une place accrue à l’importance de la population active par rapport à celle du produit national brut (lui-même se traduisant en termes de contribution au budget)7. Le Canada, sacrifié sur l’autel de cette nouvelle évaluation, s’éleva contre cette conclusion. Pour sortir de l’impasse, on imagina d’utiliser le siège attribué à la Chine mais que cette dernière s’abstenait alors d’occuper conformément à une politique de non-participation active à l’OIT. La constitutionnalité de cet arrangement ayant fait l’objet de contestations, le Conseiller juridique expliqua que la décision prise revenait à un amendement au Règlement du Conseil permettant de faire en sorte que malgré l’absence d’un des dix États d’importance industrielle, la totalité des sièges non électifs fut assurée conformément à ce que demande la Constitution. En droit, cette situation revenait donc, selon lui, à créer un siège de suppléant pour les “dix” sans en identifier le titulaire. Elle ne consistait pas, contrairement aux commentaires ironiques dont elle fit l’objet, à “inventer” un onzième siège non électif virtuel. L’ingéniosité du raisonnement et le bien-fondé incontestable de la solution au regard de la raison d’être de ces sièges non électifs ne pouvaient cependant masquer le fait qu’elle représentait essentiellement une rationalisation ex-post d’une décision éminemment politique et d’application strictement limitée au cas d’espèce8.

Il ne manque cependant pas d’exemples, comme on va le voir maintenant, où le Conseiller juridique a été appelé à exercer son inventivité pour résoudre des problèmes de portée moins éphémère et beaucoup plus fondamentale du point de vue de la capacité de l’Organisation de s’acquitter de son mandat.

II. Quelques exemples de la contribution du Conseiller juridique à l’adaptation de l’organisation aux transformations de son environnement

L’OIT n’aurait sans doute pu voir le jour autrement que dans l’urgence d’une double convulsion, celle de la première guerre mondiale et celle de la révolution bolchevique à laquelle elle était censée proposer une alternative réformiste. La mise en œuvre du mandat de progrès et de justice sociale très ambitieux qu’elle a alors reçu s’est cependant presque immédiatement heurtée aux réalités économiques de la grande

7 Voir Document GB. 213/2/11.
dépression qui, au lieu du progrès espéré, ont engendré la plus grande régression sociale du siècle. A peine cette crise dépassée, l'OIT dut s'employer à survivre à la deuxième guerre mondiale et au naufrage de la SdN. Et, avec la décolonisation et la marche vers l'universalisme, elle a fait face à un véritable défi à ses origines et à ses valeurs en apparence eurocentriques. Le dernier épisode significatif est celui de la fin de la guerre froide qui a permis l'extension du marché, de ses promesses et de ses contraintes à l'univers tout entier. La disparition des régimes issus de la révolution bolchevique représente à cet égard le triomphe de sa méthode réformiste sur celle de la lutte des classes, en même temps qu'aux yeux des plus cyniques la disparition d'un danger qui constituait sa principale raison d'etre.

La nécessité d'une adaptation de l'OIT à cet environnement très mouvant s'est affirmée sur tous les plans : celui de sa structure, celui de l'adaptation de ses moyens juridiques à ses objectifs très ambitieux, celui de l'organisation interne et des conditions d'emploi de ses agents.

Pour tenter d'illustrer le rôle qu'a pu jouer le Conseiller juridique dans cette adaptation, il paraît donc intéressant de choisir dans chacun de ces domaines, un exemple particulièrement significatif de contribution dont il s'est confirmé par la suite qu'elle avait permis de sortir de situations bloquées ou de dépasser des contradictions en apparence insolubles.

A) L'adaptation de la composition de l'organe exécutif aux besoins d'une organisation universelle :

l' "invention" de la notion de représentativité

L'aspiration de l'OIT à l'universalisme représentait un redoutable défi à ses valeurs pluralistes et réformistes dans un monde marqué par des revendications "révolutionnaires" sur le plan international comme sur le plan interne. On aura l'occasion de revenir sur l'étonnante percée de ces valeurs pluralistes qui s'est affirmée à travers la récente Déclaration des droits et principes fondamentaux au travail9. Auparavant, cette marche vers l'universalisme s'est traduite, à partir des années cinquante, par la montée de la contestation de la part

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9 Voir Conférence internationale du Travail, 86 ème Session 1998, Compte rendu provisoire n° 20A.
des nouveaux venus du monde socialiste et du Tiers-Monde. Cette contestation portait essentiellement sur la composition du Conseil d'administration. Pour les pays du Groupe des 77, l'existence des sièges non électifs réservés aux États d'importance industrielle la plus considérable représentait une insulte permanente à la démocratie et à l'égalité souveraine des États. Et pour les pays socialistes, le monopole de fait de représentation des employeurs "capitalistes" au sein du groupe des employeurs du Conseil était une insupportable anomalie. Dès la fin des années soixante, ces deux groupes avaient réuni leurs efforts pour obtenir une représentation fondée sur le principe de l'égalité des Membres. La solution d'une augmentation du nombre des sièges permanents avancée par le professeur Robert Ago, alors membre du Conseil d'administration du BIT, ayant été rejetée comme une simple manoeuvre et les États non électifs refusant de céder leur siège, l'affaire semblait définitivement vouée à l'impasse. La majorité applicable à l'adoption des amendements constitutionnels et les conditions pour leur entrée en vigueur ne permettaient en effet pas à la majorité des gouvernements de faire prévaloir leurs vues. Mais le refus du changement menaçait l'Organisation d'une agitation permanente sinon de paralysie ; la Conférence internationale du Travail, au sein de laquelle la coalition contestataire se trouvait en mesure de former occasionnellement une majorité, manifestant de diverses manières sa défiance à l'égard du Conseil et parfois remettant en cause ses décisions sur des questions politiques importantes.

Pour sortir de cette crise, le Bureau proposa, à travers le groupe des gouvernements d'Asie (qui avait l'avantage de représenter une sorte de microcosme de l'ensemble des intérêts en jeu), une méthode susceptible de dépasser la contradiction apparemment insurmontable entre la revendication égalitaire et le maintien des sièges non électifs : la méthode proposée consista à conserver l'objectif sous-jacent à l'existence de ces sièges qui est de faire en sorte que, malgré sa composition réduite, le Conseil pût représenter une proportion aussi large que possible des intérêts concernés par ses activités tout en le réalisant par une méthode ou plus exactement sur une base différente, c'est-à-dire collective et non plus individuelle, permettant d'éviter de ce fait "les effets de seuil". Concrètement, cela signifiait d'abord que chaque région devait se voir attribuer un nombre de sièges calculé selon sa "représentativité", évaluée en termes de population active, activité économique et nombre d'États. Mais cela signifiait aussi, et peut-être surtout, que chacune de ces régions devait ensuite choisir ses représentants de telle manière que, considérés globalement, les États
désignés par la région pour siéger au Conseil représentaient une fraction suffisamment significative des populations actives et des activités économiques de la région. Ainsi, les "ci-devant" titulaires des sièges non électifs, s’ils n’avaient plus d’assurance juridique de siéger automatiquement au Conseil d’administration, avaient au moins une garantie statistique plus ou moins grande selon leur situation et la région à laquelle ils appartenaient de continuer à en faire partie.

Cette méthode fut effectivement acceptée comme base de la solution à trouver. La solution définitive telle qu’elle apparaît dans l’amendement soumis après de longues négociations aux suffrages de la Conférence internationale du Travail en 1986 s’écarte à vrai dire assez sensiblement de la logique du schéma initial; pour être rendu aussi largement acceptable que possible, il a dû faire une place assez large aux contingences politiques et aux situations acquises incontournables.

L’amendement constitutionnel adopté en 1986 sur cette base à la quasi-unanimité n’a cependant toujours pas reçu le nombre de ratifications requises. On peut donc se demander si l’invention, à supposer qu’elle en soit bien une, ne reste pas de ce fait largement virtuelle. On observera simplement à cet égard que l’adoption de l’amendement a mis un terme à une controverse si aigüe qu’elle menaçait l’existence-même de l’Organisation. D’une part, la fin de la guerre froide et la disparition du groupe des pays socialistes en tant que bloc a, très peu de temps après, modifié totalement les données du problème. D’autre part, cet amendement a tout de même offert par la suite la base rationnelle d’un rééquilibrage dans la représentation des régions et des groupes non-gouvernementaux qu’il est apparu possible de mettre, au moins partiellement, en œuvre, à titre transitoire, sans attendre l’entrée en vigueur de l’amendement constitutionnel, et qui consistait à augmenter le nombre des sièges adjoints du Conseil pour les porter à concurrence du nombre total des sièges attribués conformément à l’amendement.

B) L’adaptation des moyens d’action volontaires aux exigences de l’économie globale : vers l’universalité d’application des droits fondamentaux des travailleurs

La Constitution de l'OIT définit des objectifs généraux de progrès, entre lesquels elle n'établit pas de hiérarchie, et le moyen essentiel qu'elle met à la disposition de l'Organisation pour les atteindre, les conventions internationales du travail qui ont en principe toutes la même valeur juridique. Bien que leur adoption entraîne certains effets juridiques, elles ne peuvent créer des obligations pour les membres que si elles sont ratifiées. Les auteurs de la Constitution ont, à cet égard, dû se résigner à revenir sur les ambitions de leur projet initial qui visait en effet à doter la Conférence internationale du Travail du pouvoir d'adopter une législation directement applicable - sous réserve d'une sorte de clause d'opting out - à l'ensemble des membres de l'Organisation.

Cette limitation a été de manière croissante perçue comme un grave handicap dans une économie devenue globale. L'accès au marché des pays développés de produits fabriqués à des coûts sociaux plus faibles a ravié la question sous-jacente à la création de l'OIT elle-même du lien entre la protection sociale et la libéralisation des échanges (c'est-à-dire de la subordination de la seconde à la première). A telle enseigne que, devant l'incapacité constitutionnelle de l'OIT à imposer l'uniformisation des conditions de travail, certains ont estimé que la seule façon d'éviter la distorsion de la concurrence, au profit des pays à faible coût sociaux, ou même ce qu'ils considéraient comme une forme de "dumping social", était de lier, par des clauses sociales qui voudraient s'insérer dans le système commercial multilatéral, la garantie des "droits des travailleurs internationalement reconnus" à la libéralisation des échanges. Cette tentative n'a pas eu de suite jusqu'ici. Elle a cependant conduit l'OIT à s'interroger sur le moyen de surmonter ce qui apparaissait une contradiction fondamentale entre le caractère de l'acceptation des obligations résultant des conventions internationales du travail et l'objectif d'universalité indispensable à la crédibilité de son action. Cette invention s'est faite en deux étapes.

La première étape fut franchie dans les circonstances exceptionnelles du début de la guerre froide, où l'OIT était contestée par les nouveaux pays socialistes, mais où sa composition interne reflétait encore une majorité réformiste et libérale massive. A la suite d'une

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initiative de la Fédération Syndicale Mondiale en 1947 de créer une commission de la liberté syndicale dans le cadre du Conseil économique et social des Nations Unies\(^\text{12}\), l’OIT s’est trouvée contrainte d’agir très vite pour proposer son propre mécanisme de protection de la liberté syndicale qui pourrait être utilisé même par les pays, encore nombreux à l’époque, qui n’en étaient pas membres. La solution dont la paternité revient en grande partie au Conseiller juridique de l’époque, Wilfred Jenks, fut de proposer la création d’une commission indépendante d’investigation et de conciliation qui serait chargée d’examiner les plaintes éventuelles relatives à la violation des principes de la liberté syndicale. Pour les pays n’ayant pas ratifié les toutes récentes Conventions sur la liberté syndicale (n° 87)\(^\text{13}\) et sur la négociation collective (n° 98)\(^\text{14}\), la commission était censée être subordonnée à l’acceptation de l’État mis en cause. En cas de refus, le Conseil d’administration pouvait cependant prendre “toutes mesures appropriées”. Cette proposition déclencha une vive controverse à la Conférence internationale du Travail en juin 1950. L’Afrique du Sud, sans doute consciente que le raisonnement pouvait être extrapolé à d’autres principes que la liberté syndicale et, en particulier, à la discrimination, prit la tête de l’opposition au nom de l’inconstitutionnalité radicale du mécanisme proposé. Elle récusa l’argument selon lequel la création de cette procédure trouvait son fondement dans le fait que la liberté syndicale faisait partie des objectifs constitutionnels de l’OIT. Selon elle, cet objectif, comme l’ensemble des objectifs de l’OIT, devait être exclusivement poursuivi par les moyens prévus par la Constitution, et la seule forme d’action légitime était donc d’adopter des conventions soumises à la ratification des États concernés. Sans chercher à répondre point par point à cette argumentation, Wilfred Jenks s’appuya essentiellement sur le pouvoir reconnu au Bureau par la Constitution de conduire dans les conditions déterminées par le Conseil et la Conférence des “enquêtes”\(^\text{15}\). Il souligna que les droits des États étaient parfaitement sauvégardés par la nécessité d’obtenir leur consentement préalable pour renvoyer une plainte à la commission, et qu’il fallait établir en ce qui concerne la réalisation des objectifs de la Constitution une distinction nette entre


\(^{13}\) Nations Unies, *Recueil des Traités*, vol. 68, p. 17.

\(^{14}\) Ibid. vol. 96, p. 257.

\(^{15}\) Article 10, paragraphe 1, de la Constitution.
enforcement et promotion. Malgré une opposition persistante, le système fut alors accepté.

On peut certes se demander si l'invention de la commission d'investigation méritait alors le qualificatif, car elle se présentait à première vue comme une solution de caractère éminemment pragmatique et dont l'avenir semblait, à vrai dire, des plus incertains, dès lors que l'intervention de la commission était subordonnée à l'acceptation de l'État. Or, il est vite apparu que cette acceptation serait systématiquement refusée. Cela n'a pas suffi à la rendre inopérante, tout au contraire. Le droit du Conseil d'examiner "toute autre mesure appropriée" à prendre en cas de refus d'accepter l'intervention la commission a en effet permis de développer une procédure parallèle, avec la création d'un comité de la liberté syndicale, dont le rôle initial était d'examiner la recevabilité des plaintes, mais qui s'est rapidement transformé à partir de 1953 en un examen au fond destiné à établir un classement entre les plaintes selon leur degré de gravité. Il est intéressant de relever que, très discrète au départ, la doctrine selon laquelle cette procédure se justifiait par les obligations inhérentes à la qualité de membre compte tenu de la place faite à la liberté syndicale dans la Constitution et la Déclaration de Philadelphie s'est affirmée peu à peu. Elle a ainsi ouvert la voie au développement le plus récent.

Pour faire face au défi de la mondialisation, on a en effet très tôt songé à extrapoler la solution de la liberté syndicale à d'autres domaines et, en particulier, à l'ensemble des droits fondamentaux. La nécessité d'une application universelle de ces droits fondamentaux est apparue comme la réponse la plus raisonnable à la revendication surgie à l'approche de la clôture du cycle de l'Uruguay et qui visait à obtenir l'inclusion, dans les futurs accords qui établiraient l'Organisation mondiale du Commerce (OMC), d'une garantie des droits internationaux reconnus des travailleurs. Dès 1994, le Directeur général

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du BIT avait fait observer dans son rapport à la Conférence internationale du Travail\textsuperscript{18} qu’il était irréaliste de prétendre imposer au niveau universel l’uniformisation du niveau de protection sociale quel que soit le niveau de développement, alors que les organisations dites d’intégration n’y parvenaient pas. La véritable question était donc de fournir aux travailleurs, individuellement, et aux partenaires sociaux, collectivement, les moyens nécessaires pour pouvoir obtenir une contrepartie équitable de leurs efforts. De ce point de vue, la garantie universelle des droits fondamentaux de liberté syndicale et de négociation collective, d’interdiction du travail des enfants et de non-discrimination apparaissent comme la condition de tous les autres ; ils représentent en effet la garantie pour chacun de pouvoir revendiquer librement et avec des chances égales sa part des fruits engendrés par le développement selon les spécificités propres à chaque pays. Ceci étant, il s’agissait simplement de savoir si l’application universelle de ces droits était possible à réaliser en laissant de côté la question d’éventuelles sanctions commerciales qui ne seraient pas nécessairement les plus adaptées à l’objectif recherché.

Dans son rapport soumis en 1997\textsuperscript{19}, le Directeur général, à la lumière de divers développements intervenus entre-temps, poussait la réflexion beaucoup plus loin. Il formulait deux propositions destinées à surmonter l’obstacle de la ratification sur le chemin de l’universalité. La première visait à offrir une récompense concrète à la ratification des conventions fondamentales par le biais d’un “label social global” qui serait lui-même établi par voie d’une convention internationale du travail et pourrait être utilisé, dans des conditions que ladite convention prescrirait, par les pays ayant ratifié le “bloc” des conventions fondamentales et accepteraient en outre de se soumettre à un système additionnel de vérification. Cette proposition suscita une vive controverse. Certains pays lui firent grief de réinventer sous une nouvelle forme une clause sociale à visée protectionniste. Si l’on peut considérer que cette proposition satisfait aux critères de “l’invention”, il est clair en même temps que, pour le moment, cette invention reste totalement virtuelle. La controverse qu’elle a déclenchée a cependant eu peut-être pour résultat de faire, par contraste, paraître la seconde, beaucoup moins subversive.

\textsuperscript{18} Voir Conférence internationale du Travail, 81\textsuperscript{ème} Session 1994, “Des valeurs à défendre, des changements à entreprendre”.
\textsuperscript{19} Voir Conférence internationale du Travail, 83\textsuperscript{ème} Session 1997, “L’action normative de l’OIT à l’heure de la mondialisation”.

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Cette seconde proposition se bornait en effet à suggérer de créer un système de promotion universelle de droits fondamentaux autres que la liberté syndicale, déjà couverte, même à l'égard des pays n'ayant pas ratifié les conventions correspondantes.

Ce système de promotion se distinguait cependant du mécanisme applicable en matière de liberté syndicale, dont l'extrapolation pure et simple se heurtait à deux obstacles à première vue insurmontables : un obstacle juridique, du fait que, contrairement à la liberté syndicale, certains des droits considérés comme fondamentaux ne sont pas mentionnés dans la Constitution ; un obstacle politique, du fait que, instruits par l'expérience, les États, y compris les États occidentaux, après avoir applaudi à la création du mécanisme de la liberté syndicale comme un moyen de pression sur les régimes totalitaires, en particulier ceux d'obéissance soviétique, l'avaient par la suite vu s'exercer à leurs dépens et se refusait énergiquement dans leur ensemble à étendre l'expérience. La nécessité de sortir de cette impasse se faisait en même temps plus évidente compte tenu des attentes externes. D'une part, le Sommet de Copenhague avait, en 1995, souligné l'importance de ces droits ; d'autre part, la déclaration de la première Conférence ministérielle de l'OMC à Singapour en 1996 avait renvoyé à l'OMC la protection de ces droits que certains auraient voulu luioir prendre en charge. C'est dans ce contexte que naquit le projet d'une déclaration sur les droits fondamentaux, assorti d'un mécanisme de suivi qui, de facto, permettrait de promouvoir ces droits fondamentaux, même à l'égard des pays n'ayant pas ratifié les conventions correspondantes. Malgré la forte méfiance d'un assez grand nombre de pays, la crainte qu'en l'absence de solution la question de clauses sociales rebondirait inévitablement à l'OMC a finalement conduit à l'adoption de cette Déclaration. Elle revient à faire reconnaître aux États eux-mêmes que, même lorsqu'ils n'ont pas ratifié, ils doivent, avec l'aide de l'Organisation, se comporter d'une manière conforme aux objectifs qu'ils ont acceptés : d'où le mécanisme de suivi qui n'est pas fondé sur des plaintes mais sur des rapports demandés au titre de dispositions constitutionnelles existantes.

\footnote{Nations Unies, document A/CONF.166/9, p. 5 à 27.}
\footnote{Organisation mondiale du Commerce, document WT/MIN (96)/Dec.}
\footnote{Voir Conférence internationale du Travail, 86ème Session 1998, Rapport VII et Compte rendu provisoire n°. 20.}
Peut-on pour autant parler d'invention? Au point de vue de la nouveauté ou de l'originalité de la solution, on serait évidemment tenté de dire qu'il ne manque pas d'exemples au sein d'autres organisations de principes constitutionnels qui font l'objet d'une certaine forme de suivi, même si, à l'OIT ce suivi ne peut se réclamer d'aucune disposition constitutionnelle relative à l'exclusion pour manquement aux principes fondamentaux de l'appartenance à l'Organisation comme c'est le cas de la Charte des Nations Unies. Il convient en outre et surtout de souligner que, si chacun des éléments de cette solution n'est rien de particulièrement original, leur combinaison permet peut-être de franchir un saut qualitatif. La Déclaration parvient à faire reconnaître expressément aux membres eux-mêmes (alors que jusque là il s'agissait plutôt d'une construction doctrinale, au reste limitée à la liberté syndicale) les obligations inhérentes à la qualité de membre et à faire en sorte que l'opposition de certains ne suffise pas à rendre le dispositif inopérant puisque ce suivi fait appel à des procédures qui auraient pu être utilisées en tout état de cause. De la sorte, l'obstacle constitutionnel qui avait paru s'opposer à une promotion universelle effective, c'est-à-dire vérifiable, paraît enfin surmonté. Seule l'histoire dira cependant si ce mécanisme pourra se développer de manière aussi efficace dans sa voie promotionnelle que celui de la liberté syndicale sur la base d'un système de plaintes.

C) L'élargissement de la maîtrise des moyens:
le extension du pouvoir législatif de la Conférence
à l'abrogation des conventions obsolètes

Cet exemple illustre un paradoxe. L'efficacité de l'action normative de la Conférence internationale du Travail, lorsqu'elle prend la forme de conventions internationales du travail, dépend de l'acceptation par ses membres sous forme de ratifications. Mais cette acceptation lui ôte tout contrôle sur ces instruments, même lorsqu'ils sont devenus inefficaces au regard des objectifs poursuivis. Sans doute n'est-ce pas très original puisque les conventions internationales du travail sont des traités. En tant que tels, leur ratification fait naître des obligations contractuelles entre les États qui les ratifient et il avait été jusqu'ici considéré que ces obligations ne pouvaient disparaître que par l'effet de la volonté de ces derniers sous forme d'un acte de dénonciation. Bien qu'elle soit en effet commune à bien des organisations qui agissent par le biais de conventions, cette situation présente cependant une assez grande originalité à l'OIT. La matière sur laquelle portent ces questions sociales est en effet une matière très vaste
et en constante évolution, au gré des transformations de la réalité économique et technologique et de l'évolution des mentalités et des conceptions. Pour remplir sa tâche, l'OIT doit donc tout à la fois étendre la législation à de nouveaux domaines et revoir constamment la solution dans les domaines où elle a déjà légitéré pour s'assurer de la pertinence des dispositions existantes. C'est pourquoi la question de savoir quel est le pouvoir de la Conférence de modifier les textes adoptés remonte presque aux origines de l'Organisation. Dix ans après la création de l'Organisation, en 1929, elle fit ainsi l'objet de débats très approfondis suscités par les imperfections ou l'insuccès des instruments adoptés au cours des premières années. Si rien n'empêchait la Conférence d'adopter des instruments plus adaptés ou mieux conçus, la question était de savoir dans quelle mesure ces instruments révisés pouvaient se substituer aux instruments originaux. 

Eh donné le silence de la Constitution, le Conseiller juridique de l'époque fut, à son corps défendant, conduit à conclure que "s'il semble légitime de considérer les conventions internationales du travail comme des conventions d'une nature particulière comportant un élément quasi-législatif, il ne paraît pas douteux qu'elles constituent des conventions, c'est-à-dire qu'elles deviennent, par l'effet des ratifications qu'elles reçoivent, de véritables contrats entre les "États". En conséquence, la Conférence ne pouvait pas effacer les obligations nées des ratifications par les États parties. Elle ne pouvait même pas empêcher une convention de faire naître de nouvelles obligations sauf disposition expresse habilitant la Conférence à la fermer à la ratification. C'est pourquoi, à partir de cette époque, les conventions sont pourvues de clauses finales standard qui habilitent la Conférence à fermer par une convention portant révision les conventions existantes, et à prévoir que la ratification portant révision vaut automatiquement dénonciation de la convention révisée.

Si cette solution a permis de clarifier la situation et de parer aux problèmes les plus immédiats, elle a laissé subsister d'importantes lacunes dont les inconvénients cumulatifs ne sont apparus dans toute leur ampleur que depuis les années soixante : impuissance complète à l'égard des conventions antérieures à 1930 et souvent les plus manifestement dépassées; nécessité de superposer les révisions, non seulement pour tenir les instruments à jour, mais pour fermer les

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instruments inadaptés à la ratification; fardeau administratif et juridique résultant pour l’Organisation des rapports et autres obligations constitutionnelles liés au maintien des ratifications pour des conventions révisées et jugées obsolètes. Mais il semblait impossible, dans les limites de la doctrine énoncée en 1929, de remédier à cette solution autrement que par des expédients pratiques (par exemple, l’espacement des rapports dus au titre des conventions ratifiées ou l’omission d’instruments jugés obsolètes des recueils officiels, solution d’une légalité au reste sujette à caution), alors même que l’on était parfaitement conscient que les conséquences de cette impasse étaient vouées à s’accumuler au fil du temps et de l’adoption de nouvelles conventions.

Bien que cette situation fût tacitement tenue pour intangible, le Bureau se demanda cependant, en 199624, s’il n’était pas possible de reprendre le problème à la base. Il fut ainsi conduit à suggérer que la logique de la doctrine antérieure -- qu’il ne proposait nullement de remettre en cause - paraissait tout de même laisser place à deux types de solution : une solution conventionnelle qui consisterait à tarir à la fois la source et les effets des conventions ratifiées par une “convention tueuse”, et une solution constitutionnelle qui consisterait à reconnaître explicitement à la Conférence internationale du Travail un pouvoir législatif d’abroger; il s’agirait du pendant logique de son pouvoir d’adopter que l’on n’avait pas cru pouvoir déduire en 1929 du texte de la Constitution tel qu’il était alors conçu. Sans entrer dans le détail du débat qui se développait au Conseil d’administration à partir de 1996 et à la Conférence internationale du Travail en 199725, on relèvera que c’est la deuxième voie qui fût choisie comme la mieux adaptée aux exigences de l’adaptation constante du corpus normatif de l’OIT. Le Conseil d’administration fut à vrai dire à ce point convaincu de la supériorité de cette voie qu’il refusa même de retenir la possibilité de contracting out que le Bureau avait proposé d’inclure dans l’amendement constitutionnel, et qui aurait permis aux États parties à une convention de demeurer dans ses liens malgré son abrogation. L’amendement constitutionnel tel qu’il fut adopté en juin 1997 par la

24 Voir Document GB. 265/LILS/WP/PRS/2.
Conférence internationale du Travail prévoit donc que, sous réserve de garanties de procédure destinées à assurer que la détermination des conventions obsolètes et la décision de s'en défaire fassent vraiment l'objet d'un consensus, la Conférence internationale du Travail peut procéder à l'abrogation de toute convention devenue obsolète par un acte contraire, c'est-à-dire selon la même procédure et la même majorité que celles requises pour son adoption.

Cet amendement n'est pas encore entré en vigueur malgré le soutien unanime dont il a bénéficié au sein des trois groupes (y compris de manière particulièrement significative de la part du groupe des travailleurs qui s'est pourtant toujours montré le gardien vigilant de l'intégrité de l'œuvre normative de l'OIT). D'ores et déjà, cet amendement a produit certaines conséquences dans la mesure où il a conduit à reconnaître que dans la logique qui le sous-tend, rien n'empêche la Conférence internationale du Travail de "retirer" des recommandations ou des conventions jamais entrées en vigueur. De cette manière, le travail de nettoyage du corpus normatif peut déjà être engagé. Reste cependant à se demander si cet amendement mérite d'être considéré comme une invention. Même s'il a permis d'offrir une sortie à une situation d'impasse et de renforcer la capacité d'adaptation de l'Organisation dans un domaine absolument fondamental de son activité, on peut être tenté de considérer qu'il n'a, après tout, fait rien d'autre que de combler une lacune. Il est significatif, cependant, que l'évidence de cette lacune ne se soit imposée que de manière pour ainsi dire rétrospective, une fois la solution trouvée et que, pendant des années, le problème n'était pas perçu en ces termes. Il a peut-être suffi d'une considération simple pour provoquer le déclencher et remettre en question la conception d'inspiration patrimoniale des conventions : la constatation que, dans la logique constitutionnelle de l'OIT, les conventions internationales du travail ne sont pas une fin en soi mais des instruments au service des objectifs fondamentaux de la Constitution, et qu'un Etat Membre ne pouvait imposer à l'Organisation de continuer à en subir les effets alors que, selon son jugement, ils ont perdu leur raison d'être initiale ou, pour reprendre la formule utilisée dans l'instrument de l'amendement, ils n'apportent plus de contribution utile à l'accomplissement des objectifs de l'Organisation.

D) Un exemple d'adaptation en matière de conditions d'emploi des fonctionnaires : la réacquisition par l'Organisation d'un droit acquis des fonctionnaires
Comme on l’a indiqué en introduction, l’OIT, en raison de l’objet de son mandat, s’est toujours flattée d’une responsabilité particulière vis-à-vis de ses agents. Ce particularisme est activement entretenu par la présence au sein du Conseil d’administration de composition tripartite d’un groupe de travailleurs qui, traditionnellement, prête une oreille attentive aux revendications syndicales internes. C’est en grande partie en raison de cette vocation et de cet intérêt que l’OIT s’est retrouvée investie de la responsabilité de reprendre l’héritage du Tribunal administratif de la Société des Nations, à travers le Tribunal administratif de l’OIT (TAOIT), et d’étendre à l’ensemble des organisations qui le souhaitent un service public de la justice digne de ce nom, c’est-à-dire offrant à travers des magistrats professionnels des plus hautes juridictions toutes les garanties souhaitables d’indépendance.

La marge d’autonomie est cependant devenue très limitée du fait de l’adhésion de l’OIT au “régime commun” des Nations Unies en matière de conditions de service en général, et de son adhésion à la Caisse commune des pensions du personnel des Nations Unies en matière de pensions. Par suite d’un amendement au Statut du personnel sur la portée juridique duquel le Conseil d’administration du BIT n’avait pas été invité à s’interroger, le BIT s’est retrouvé en marge du système des pensions. Cet amendement avait pour effet de reproduire dans le Statut du personnel du BIT la définition de la rémunération soumise à retenue pour pension figurant dans les Statuts de la Caisse, au lieu d’y renvoyer comme c’est le cas du statut du personnel des autres organisations. Cela signifiait que tout changement dans cette définition par la Caisse exigait, pour devenir applicable aux fonctionnaires du BIT, un amendement au Statut du personnel du BIT. De manière tout à fait prévisible, une modification à la baisse de la définition décidée par la Caisse déclencha un contentieux devant le TAOIT contre l’Organisation elle-même au nom de droits acquis. Le TAOIT confirma que la définition en tant que telle faisait partie des conditions d’emploi statutaires relevant bien de sa compétence, alors que le contentieux des pensions relève du Tribunal administratif des Nations Unies (TANU)26. En conséquence, même si l’OIT n’avait qu’un pouvoir lié à cet égard, sa modification à la baisse devait être appréciée selon les règles applicables aux modifications du Statut du BIT en

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26 Jugement N° 832 dans l’affaire Ayoub et consorts, Jugements du Tribunal administratif de l’Organisation internationale du Travail, soixante-deuxième session ordinaire.
tenant compte de la jurisprudence sur les droits acquis propre au TAOIT et relativement plus contraignante que la jurisprudence correspondante du TANU. Bien que, dans un premier temps, le Tribunal ait jugé que la modification en cause n’était pas suffisamment significative pour constituer une atteinte aux droits acquis au sens de sa jurisprudence, cette situation ne pouvait manquer de se produire un jour⁷. Or une autre affaire vint démontrer par ailleurs qu’un court décalage dans le temps des définitions pouvait entraîner des différences considérables sur le plan actuariel⁸. Il était clair que l’OIT ne pouvait vivre sous la menace continue de contentieux alors que le Conseil d’administration s’était par ailleurs déclaré résolument hostile dans sa majorité à assumer sous forme de provisions budgétaires appropriées les conséquences éventuelles d’un particularisme dont il n’avait jamais expressément approuvé le principe. La seule solution était donc de revenir dans le giron de la Caisse en substituant à la définition une simple disposition de renvoi à l’instar des autres organisations affiliées. Une telle modification posait cependant deux problèmes de nature et de difficulté différentes. Sur le plan juridique, le désengagement de l’OIT en ce qui concerne la détermination de la rémunération soumise à retenue pour pension pouvait être considéré comme la modification d’une condition d’emploi déterminante et, donc, courir le risque d’être censurée par le TAOIT comme une violation d’un droit acquis. Ce risque pouvait, de l’avis du Conseiller juridique, être assumé dans la mesure où la rémunération soumise à retenue n’est de toute façon pas immuable et que le seul droit acquis était en définitive celui que de telles modifications puissent faire l’objet d’un contrôle judiciaire; or le désengagement de l’OIT, s’il substituait le contrôle du TANU à celui du TAOIT, ne modifiait pas le principe de ce contrôle. Restait cependant l’impossibilité politique d’opter pour une telle solution juridique, même en étant prêt à en prendre le risque. Une première tentative, pourtant timide, en direction de cette solution avait en effet donné lieu à une grève si musclée, que faute d’interprètes, le Conseil d’administration ne put même pas achever sa session. Pour sortir de l’impasse, la solution fut de proposer aux représentants du personnel la création d’un fonds d’épargne volontaire auquel l’Organisation apporterait une contribution initiale et, ainsi, compenserait en quelque sorte son désengagement d’une responsabilité qu’elle n’avait au demeurant jamais sciemment entendu endosser. Après bien des difficultés, y compris de la part de la

⁷ Jugement N° 986 dans l’affaire Ayoub n° 2 et consorts, ibid. soixante-septième session.
⁸ Jugement N° 990 dans l’affaire Caviller n° 3, ibid. soixante-huitième session.
Commission de la fonction publique internationale qui fut longue à admettre que cette solution n’était pas une nouvelle manifestation de l’incorrigible séparatism du BIT mais, tout au contraire, le prix à payer pour rentrer dans le rang, cette solution fut acceptée et subit par la suite avec succès le test du contentieux devant le Tribunal.

Cet épisode à multiples rebondissements fournit certainement l’exemple d’une solution originale et à vrai dire unique à un problème qui n’était peut-être pas insoluble sur le plan juridique sans le secours du fonds volontaire (comme semble bien le confirmer le jugement ultérieur du Tribunal) mais à laquelle on n’aurait pu parvenir sur le plan pratique sans créer une convulsion très grave sur le plan des relations avec le personnel. Elle n’a cependant pas permis d’empêcher les recours individuels. Le paradoxe – qui répond peut-être à la question de savoir si elle représentait un “saut qualitatif” – est que, par le truchement de ces recours individuels, le Tribunal a été amené à définir de manière relativement plus restrictive le concept de “droits acquis”, alors que les représentants du personnel avaient sans doute espéré, à travers la solution négociée du Fonds volontaire, laisser perdurer un flou propice à leurs revendications ultérieures quant aux limites de ce concept.

E) Un exemple d’innovation inachevée :
l’adaptation de l’action normative de l’OIT à l’invention
de nouvelles formes de relations du travail

Le survol qui précède a laissé de côté, de manière assez significative, l’une des tâches essentielles de l’activité juridique du BIT qui se rapporte à l’activité normative de l’OIT. Sans doute, cela tient-il au fait qu’en matière de normes, le rôle de créateur si ce n’est d’inventeur revient en effet au législateur, c’est-à-dire aux représentants tripartites de l’ensemble des Membres regroupés au sein de la Conférence internationale du travail. Cela ne signifie cependant pas que des situations d’impasse ne puissent également se produire en ce domaine et pour lesquelles le Conseiller juridique se trouve sollicité d’intervenir. La session de la Conférence internationale qui, au moment où ces lignes sont écrites, vient de s’achever en offre un exemple qui, pour n’avoir pas encore abouti, mérite sans doute d’être brièvement mentionné. Il touche en effet à l’aptitude de l’OIT de continuer à

29 Jugement N° 1330 dans l’affaire Bangasser et consorts, ibid. soixante-seizième session.
remplir son mandat qui est, à l'instar des législations nationales du travail qu'elle vise à inspirer, de remédier de manière générale à l'asymétrie qui caractérise la situation respective des employeurs et des travailleurs sur le plan contractuel. Or, les modalités et les formes de cette asymétrie se renouvellent constamment sous l'effet combiné des mutations de la technologie et de la mondialisation et de ce que l'on doit bien appeler “l'inventivité” des acteurs sociaux. Tel est le sens du phénomène que, faute pour le moment de meilleur terme, on a qualifié de “travail en sous-traitance” : il recouvre toute une nébuleuse de situations diverses sur le plan juridique dans lesquelles tantôt le travailleur n'est pas soumis à une relation de travail classique tout en se trouvant dans une situation de subordination à l'égard de son employeur et, tantôt il se trouve formellement soumis au droit du travail, dans une situation “triangulaire” en vertu de laquelle son employeur réel n'est pas son employeur légal. Pour remédier à la précarité qui peut résulter de cet état de choses la Conférence internationale du Travail s'est trouvée saisie d'une question qui devait aboutir à l'adoption de nouvelles normes en 1998. Cette tentative a cependant buté sur l'hétérogénéité du phénomène ainsi que sur la résistance de principe des employeurs à voir l'OIT s'immiscer dans ce qu'ils considèrent comme étant au moins dans certains cas des formes contractuelles commerciales qui échappent à sa compétence. Pour sortir de l'impasse et se montrer à la hauteur de l'inventivité des acteurs sociaux, le Bureau s'est efforcé, à son tour, “d'inventer” une définition susceptible de rétablir l'unité du phénomène sur le plan conceptuel sans pour autant préjuger de la nécessité d'appliquer une solution uniforme à toutes ses manifestations; cette synthèse s'est effectuée autour de l'idée que les travailleurs en question qu'ils aient ou non la qualité de salariés se trouvent dans une situation de subordination semblable à celle d'un salarié mais sans être les salariés de ceux à l'égard desquels ils se trouvent dans une situation de subordination. Cette manière de poser le problème, s'il n'a pas permis de déboucher sur une solution, a au moins eu le mérite de rétablir le dialogue dans un débat qui était devenu un dialogue de sourds, fortement marqué par des considérations d'ordre idéologique. Dans une atmosphère sensiblement rassérénée, la Conférence internationale du Travail a pris une décision tout à fait inédite selon laquelle le sujet devrait, avant de faire l'objet d'adoption de nouveaux instruments inscrits à son ordre du jour, donner lieu à une réflexion et à des travaux beaucoup plus approfondis.

Conclusion

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Le survol qui précède comporte une part d’arbitraire. Pour se limiter à présenter une seule illustration pour chaque aspect de l’adaptation de l’Organisation à son environnement, il a fallu sacrifier d’autres exemples d’innovations juridiques qu’il aurait été également intéressant d’examiner. On peut, à cet égard, évoquer la Déclaration tripartite sur les entreprises multinationales et la politique sociale qui est le premier instrument de soft law universel s’adressant directement aux multinationales en même temps qu’aux gouvernements et aux organisations d’employeurs et de travailleurs et dont l’autre originalité est d’avoir été adoptée non point par l’organe législatif (la Conférence internationale du Travail) mais, sous la pression des circonstances, par le Conseil d’administration du BIT; ou encore la création ex nihilo par la seule OIT du Centre de Turin qui s’affirmait comme une institution dotée d’une personnalité juridique autonome et dont l’originalité particulièrement remarquable à l’époque de sa création, était de n’être composée ni d’Etats, ni d’organisations internationales.

Au terme de cette étude la question reste par ailleurs posée de savoir si les différentes illustrations présentées relèvent bien de la notion d’invention juridique telle qu’elle a été évoquée dans la première partie ou si elles ne devraient pas, de manière plus modeste et prosaïque, être qualifiées d’opérations de dépannage créatif dont on peut retrouver, à des degrés ou selon des accentuations diverses, bien d’autres cas dans l’ensemble des organisations. Le lecteur sera juge de la réponse à apporter. Quelle que soit cette réponse, une chose semble cependant certaine. En raison sans doute de la diversité des intérêts qu’elle met en jeu et qui est naturellement plus grande que dans une organisation non-gouvernementale, de la difficulté de modifier les règles du jeu fondamentales compte-tenu des règles applicables aux amendements à la Constitution, et des transformations profondes de l’environnement dans lequel elle est censée poursuivre des objectifs dont aucun, de par sa nature même, ne saurait jamais être atteint une fois pour toutes, l’OIT offre un défi permanent à la créativité et à l’esprit d’adaptation de tous ceux qui ont occupé le poste de Conseiller juridique. La régularité avec laquelle la nécessité de son existence s’est réaffirmée alors que la transformation de l’environnement international faisait dire à certains secteurs qu’elle avait épuisé sa raison d’être porte témoignage de la force vitale qu’elle tient d’une structure tripartite qui a anticipé sur le

développement du pluralisme social inhérent à des sociétés technologiquement développées. De ce point de vue, il n’est sans doute pas téméraire d’affirmer que non seulement le tripartisme reste le meilleur sinon le seul exemple d’invention juridique dans le contexte de l’OIT, mais que s’il n’existait pas il faudrait l’inventer. Le paradoxe est peut-être que cette invention reste si révolutionnaire que sa réédition serait sans doute, sinon inconcevable, du moins très difficile aujourd’hui.
THE ROLE OF THE LEGAL ADVISER
OF AN INTERGOVERNMENTAL ORGANIZATION

Alfons A. E. Noll

Question 1 - Why does an International Organization need a legal adviser and what are the prerequisites for exercising efficiently this role?

Your question relates directly to the raison d'être of the legal adviser of an international organization or - as we should better and more precisely say: an “Intergovernmental Organization”, as all those forming the United Nations System of Organizations are composed of “Member States” and represented by their respective “Governments”. Is there really a need or even a justification for such a post, within a Legal Service or Office or, as it is called in the International Telecommunications Union (ITU), a “Legal Affairs Unit” (LAU)? After reflection and, at any rate, at the end of this interview — I am sure, you will agree with me — the answer is, without any hesitation, yes! After having worked for more than twenty-six years in this United Nations system, which includes my over eighteen years as the ITU Legal Adviser, there is not the slightest doubt in my mind as to the justified need for such a post!

In a technical organization like the ITU, dating back to 1865 and being thus the eldest of the United Nations system organizations, the legal adviser is even more needed than in other organizations of that system. Speaking quite generally, the law and law-related issues should


1 The author joined, on 15 November 1971, the United Nations Office at Geneva (UNOG) in the Division of Narcotic Drugs, where he became the Chief of the Treaty Implementation and Commission's Secretariat Section, and was thus in charge of all legal matters in this field and served for several years the United Nations Commission on Narcotic Drugs, a functional commission of the United Nations Economic and Social Council (ECOSOC), as Secretary until the Commission’s last session at Geneva in February 1979, prior to the whole international drug control sector’s transfer to Vienna, Austria.

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indeed everywhere be left to professionally trained legal experts and not to any other staff within the organization, no matter how competent or highly ranked. If you sought medical or technical advice, you would very rightly never come to me, but would seek out, as I would myself, a competent medical doctor or an engineer. Legal advisers exist in any enterprise of a certain size in the private as well as in the public sector for very good reasons. The law and law-related issues are simply too delicate, too specialized and too complicated a matter to be left to non-lawyers. "Common sense", so often invoked by non-lawyers with regard to legal problems, is simply not sufficient to solve them and is, amazingly enough, hardly ever used to claim or justify competence in any other professional sector!

After "the need for the legal adviser", let me now come to "the prerequisites for exercising efficiently this role"! What is indispensable are a solid legal university training, if possible not only in one country, but preferably in some more, ideally belonging respectively to the civil law and the common law "orbits", and a thorough professional experience gained over quite a number of years, not too much in the private sector and at one national level only, but rather already at the international one, and, again ideally, starting as a junior and advancing as a lawyer assuming more and more responsibilities in the legal service or office of an intergovernmental organization. There is a further, most important prerequisite, which can, in my considered opinion, not be overemphasized enough. This is the organization's legal adviser's direct responsibility and accountability to the head of the organization himself, i.e. its Secretary-General (like in the ITU or in the United Nations) or its Director-General. This inevitably implies that the legal adviser must, and I repeat must, have direct access to the latter and - "a majore ad minus" - also to the Deputy Secretary-General(s), the Head of Departments of the General-Secretariat as well as to the Directors of the three Bureaus, as in the case of the ITU. As you know, I did and do not only enjoy this direct responsibility and access, the latter, of course, including also the access to all relevant files and documents, but I also realize and appreciate the enormous advantage of this "privileged" situation, which, however, is, of course, not a personal, but an

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2 See the ITU structure, with its somewhat specific features, in the organizational chart contained in Annex 1 hereto.
3 See the current organizational structure of the ITU Secretary-General's office in Annex 2 hereto.
institutional one and is, according to my over eighteen years of professional experience in this post, a necessity or, in other words, a "conditio sine qua non" for the legal adviser efficiently exercising his role.

In this context of, what I called, "the raison d'être of the legal adviser of an intergovernmental organization", there is another point to be stressed here. Where the legal adviser is — hopefully — head of a team of legal collaborators and colleagues of whom he is the supervisor, as in the ITU's LAU, the Legal Service must speak with "one voice". According to my job description, as approved by the ITU Council, I am called upon to give "authoritative legal advice". This can only be achieved, if the legal advice or opinion is given either by myself or by one of the other lawyers working with and under me and reflects the LAU's legal position as a whole; the latter does not mean that there must be consensus on the matter at stake within the LAU, which, as a general rule, will have discussed the issue(s) prior to the legal advice or opinion being given. In case of diverging opinions within the LAU, the legal adviser's one has, of course, to prevail, as he is the sole responsible and accountable. Once the advice or opinion has been given, the whole LAU has to stick to it, as otherwise, in similar cases, the game of "divide et impera" might be played, and exploited by, those disliking the contents of any given legal advice or opinion, as experience has amply shown. Although I did not quite agree - during my early days and years in the United Nations - with this "una-voce" principle, at that time strictly applied by the then and first United Nations Legal Adviser, Mr. Constantine A. Stravopoulos, with whom I had the chance to discuss it at length during a dinner here, I must admit that, with the time passing by and the growing experience I have gained, I had to change mind and am now fully converted to the position he constantly advocated and also imposed on his staff. My conclusion therefrom is: Even the legal adviser has to remain able to learn and must be permitted to change his mind!

Question 2 - Mr. Noll, who are your clients (besides the Administration)? And can anyone come to you for advice?

Let me begin first with the latter part of your question, to which

4 See in Annex 3 the most recent version (dated 6.5.1994) of this job description, the contents of which do indeed not differ, in essence, very much from that which the ITU Council had already adopted in 1978.
the answer is: basically yes! The legal advice which will be given might, however, greatly differ. Let us start with the Union’s staff members: each individual staff member may come to my office for legal advice. If the latter is related to his status as an international civil servant and touches on matters of principle essential to the functioning of the organization itself, it is my duty to advise and even, as the case may be, to take up the matter, ex officio, myself and to follow it through. Let me give you two practical examples in this respect.

The first deals with the Geneva tax law and the exemptions thereto. The Union’s “Headquarter’s” Agreement with the Swiss Confederation provides for any staff member’s exemption from federal, cantonal and communal taxes, as far as his/her salaries, emoluments and indemnities (hereafter “salaries”) from the Union are concerned, all staff members being subjected already to taxation “at the source” in the form of a so-called “staff assessment” being deducted directly by the organization from their monthly salary. Nevertheless, the Geneva authorities had already in the 1930’s, at the time of the League of Nations, introduced in their cantonal tax law the so-called taux global, which actually applied to couples, with one spouse working in an intergovernmental organization and the other in the city, i.e. in the public and private sector respectively. The “international” salary of the first one coming from the organization was taken into account in calculating the taxation of the salary of the second one who, therefore, fell into a higher tax bracket. This was clearly an indirect taxation of the respective international salary. Both the League of Nations and the United Nations system organizations fought against this practice for over forty years. We finally won the battle, at the end of which I myself had to intervene for over three years with the Geneva Fiscal Administration to reach a settlement for the still pending ITU cases. This was in fact done not only for the Union’s individual staff members, but in the interest of the organization as a whole.

The same has to be said in the second case, namely that of the anchorage fee for a staff member’s yacht (bought and owned by him in his home country long before his having been recruited by the ITU and duly imported by him when moving to Switzerland) in the port of a nearby town on the shores of Lake Geneva. The fee had suddenly been fixed 300% higher than for any Swiss citizen or foreign tax payer in the same town, which in fact resulted in a form of taxation. The reason given was that, because of the aforementioned tax exemption, the staff
member did not pay any taxes on his ITU salary to the town itself, which pretended, therefore, to be entitled to request the 300% higher fee. The fight went on for three and a half years and was finally settled only recently — with the help of the Swiss Authorities, in particular the Swiss Mission in Geneva, and the Federal Department of Foreign Affairs in Bern, with which I always enjoyed an excellent relationship, with the result that our staff member is now paying the same fee as any yacht owner in the same town.

Such examples may sound trivial, but are not. They touch upon the privileges and immunities of both the organization and its staff which are accorded to guarantee free and unhindered exercise of their functional activities. They are not given for their private interests, but their non-respect by the Host-Country could threaten or impede the international work to be carried out by our staff for the organization. Admittedly, such a risk, though always existing - as the two examples above have clearly shown - , may be much smaller in Switzerland than in many other countries, if I only think of those in which staff members of the United Nations High Commissioner for Refugees (UNHCR) have frequently to work, for whose legal protection my wife has to work as Senior Legal Adviser of the UNHCR’s Division of Human Resources Management; having just made reference to my wife, I take this opportunity to warn you that I shall continue to speak in the male gender only, as both of us simply do not believe in all this nonsense of “he/she”, “herself/himself” or even “Chairperson” etc, which unfortunately are now also advocated in the ITU, as, for both of us, all this is “cosmetic”, bringing us nowhere in the women’s role in our societies, and as we consider all this from a generic or functional angle only. After this side-remark on the “gender-issue”, let me come back to our main topic: It is in all these cases more than ever justified - and this contrary to a widespread view prevailing in some government representatives’ circles - that the organizations’ competent lawyers, as a matter of their daily work, carefully watch over such protection and the full respect of those privileges and immunities, which are often the only guarantee for enabling the organizations to carry out their work efficiently and without undue interference by the various authorities of the respective “Host-Country”.

5 As provided for, and accorded through, the 1946 and the 1947 Conventions thereon, respectively for the United Nations and its Specialized Agencies, including the ITU, or through the relevant, applicable “Host-Country Agreements”.

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Any staff member of the ITU may also come and ask what his rights are and what procedure should be followed to have such rights protected. Such advice to the staff can and should, in my considered opinion — I know other colleagues think differently! —, always be given by the organization’s legal adviser who should never refuse to reply to such a request.

However, the legal adviser should never take a position on the substantive issues involved, which usually stem from controversies between the staff member and his supervisors or the staff member and the organization’s administration. The legal adviser should, moreover, in the event of such a request, always tell the staff member that, if it comes to a litigation, the legal adviser will ex officio of course, have to defend the organization against the claim made by the staff member.

Such limitations of the legal advice are, in all fairness, justified and to be respected by staff members, who should also never be represented by any LAU officer as counsel in a litigious case.

If, however, the matter submitted for legal advice is, let us say, really and purely one of a private character — such as family, housing or traffic problems — the legal adviser cannot and certainly should not get involved. He is neither recruited nor paid for this by the organization. He should, however, be in a position to advise the staff members concerned how they can find the addresses of competent and experienced professionals in town.

Last but not least, let me add that I have never given any legal advice, and this is important, to staff representative bodies like the ITU Staff Union which, interestingly and wisely enough, has also never asked for my legal advice. The legal adviser should, in the case of staff/management relationships generally, and as a matter of principle, maintain — as much as possible — a neutral role, in particular as, at a later stage, he most probably would have to advise and defend the organization against the staff representation or a staff member supported by the latter. By the way, I can assure you that the legal adviser can, simply because of the position held and his direct access to all members of the top-management and all relevant files — I refer you in this respect to what I told you already earlier in the context of your first question —, and I did, quietly and behind the scene, arrange much more for the staff in general as well as for individual staff members, than is and should be
But now, as to my other "clients", they are manifold and consist of several categories, both inside and outside the organization! Inside the Union, my main clients are the General Secretariat and the three Bureaus of the Union. I mainly advise — with my lawyer colleagues in the LAU, as the case may be — the Secretary-General, the Deputy Secretary-General, the Directors of the three Bureaus (i.e. the elected officials) and the Heads of Departments of the General Secretariat, with its ITU specific “annex”, the so-called “TELECOM Secretariat”, or their respective collaborators.7

In this context, it appears important to me — after so many years of practice — to stress that, although the legal adviser and the LAU form, in the Union’s organizational chart, part of the Office of the Secretary-General and that I, personally, work directly under his administrative direction and supervision, I never was and will never be my "master’s voice", as I advise him — as well as his colleagues, the Directors of the Bureaus and my other colleagues — to the best of my ability and according to my own professional conscience and ethical standards, and never upon any instruction as to the contents of the requested advice, so that my advice retains its value as an independent legal expert advice. This independence is, in my view, one of the most valuable requirements and assets, which each legal adviser of an intergovernmental organization should not only cherish, but eagerly watch so as to never lose it. It is true that this is not always easy and does not always "make friends": One of the highest ranked, elected officials of the Union once tried to "order" me to give a certain "legal advice", the contents of which were, in my legal mind and to my professional conviction, utterly untenable, to a conference after the coffee-break. I refused to do so in my name, but offered him to do so with the following introductory formula: "Upon instruction of …., I am supposed to advise you as follows: ….” - He was not happy at all, but did not insist and - never came back with a similar request! - This independence in giving professional legal advice greatly contributes

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6 In charge of periodically organizing world-wide exhibitions and fora (every fourth year in Geneva) or regional ones in countries whose Governments have extended an invitation to hold such an exhibition with an accompanying forum.

7 See the ITU structure in the Annex 1 hereto.

8 See Annex 2 hereto.
also to the legal adviser's credibility, which he has to acquire and maintain over the years, and for which I might give you later some examples, if your questions allow me to do so.

Outside the General Secretariat and the three Bureaus, the "clients" can be and are, in fact, both Member States of the Union or "Sector Members" admitted to participate in the work of the Union, such as recognized operating agencies or service providers or scientific or industrial organizations or those participating in other specified capacities, including international organizations like the United Nations and its specialized agencies as well as regional telecommunication organizations and, more recently, also intergovernmental organizations operating satellite systems.9

With my collaborators, I also deal in general with requests for legal information and advice coming from sources completely outside the Union. However, here again, it needs to be stressed that the LAU is not a private law firm and does not give legal advice to just anyone requesting it, as the basis of its mandate is to "provide legal advice to the Union", as stated in the 1992 Geneva Convention of the ITU.10

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9 I think it might be good for readers not so familiar with the ITU to explain the term "Sector Members", a rather recent term for a very old ITU institution. Since the Union's inception in 1865, those enumerated above were, under a specific procedure and certain conditions admitted to participate in the various activities of the ITU which, therefore, perhaps as the first intergovernmental organization, had always had "private sector" participants in its work performance, such as "industrial organizations", i.e. those engaged in the design or manufacture of equipment intended for telecommunication services", which in the numerous ITU Study Groups have worked and continue to do so, side by side with government representatives, e.g. in the field of the constant development of new or revised telecommunication standards, still somewhat old-fashioned called "recommendations". Their presence and active involvement in the ITU's activities - via oral and written submissions, especially on their own research and development results related to the elaboration of ITU "standards", whereas the decision-making process up to now remains still in the prerogative of the ITU Member States - explains the fact that the ITU - contrary to the United Nations and the other Specialized Agencies - does not have the so-called "non-governmental organizations" (NGOs).

10 At this stage, it might be appropriate to point out that, again since its inception in 1865, the Union had always (only) a Convention as its basic instrument, since 1932 called "The International Telecommunication Convention" and not a Constitution. Cf. e.g. Noll, A.: "International Telecommunication Union", contribution to the "Encyclopedia of Public International Law" (Rudolph Bernhardt, ed.), North Holland, Amsterdam, 1985, Vol. II (E-I), pages 1379-1385; Noll, A.: "The Institutional Framework of the ITU and its Various Approaches with regard to International Telecommunication Law and Treaty Conferences" in: "The Washington Round" Special
Question 3 - Do you have a role to play within the internal administration of the ITU?

Already in the light of my replies to your preceding questions, the answer has to be in the affirmative. Of course, as the ITU legal adviser, I do not deal directly with the every-day functioning of the "internal administration of the ITU", but the LAU constantly contributes to that administration, our role being that of providing, at all stages of the work, legal advice, which includes the drafting, review and revision of agreements with governments and other organizations, contracts of any kind, memoranda of understanding, the elaboration or review of texts for internal regulations, rules, service orders, as well as advice in, and clearance for, certain field activities, preparation of Conference and Council documents on legal or law related matters, and etc., etc. It is within the present framework simply impossible to even attempt to give concrete or detailed examples of this every-day work going from host-country agreements for ITU representations in many countries or regions of the world, over drafting of new Financial Regulations for the Union, voluminous agreements and contracts concerning technical assistance and cooperation in the field of telecommunications,

Session of the World Telecommunication Forum, Washington, D.C., April 1985; or more recently: Noll. A.: "The International Telecommunication Union (ITU): - Its inception, evolution and innate, constant reform process", issued first, in 1998, at the Geneva Office of Baker & McKenzie as an internal publication of the Law Firm and now being published, with revised and enlarged contents, in English in the German Law Journal "Multimedia and Recht", August 1999 issue. followed up, in the September 1999 issue of the same journal, by the author's article on "Recent developments in the field of, or related to, the international telecommunication law". - It was only since 1989 and, in particular, during its most recent restructuring process that the ITU endowed itself with a "Constitution of the ITU" (hereinafter referred to as "CS"), adopted by the latter's first and only "Additional" Plenipotentiary Conference, held at Geneva in 1992, as the Union's new basic instrument and following thus the example of all the other Specialized Agencies of the United Nations system of organizations. This basic instrument containing the essential, structural principles and provisions of the Union is complemented by the provisions of the 1992 Geneva "Convention of the ITU" (hereinafter referred to as "CV"), equally adopted by the same Conference. Both instruments are currently in force, as slightly amended by the 1994 Kyoto Plenipotentiary Conference of the ITU. - As to the publications by the ITU itself, see the latter's "Catalogue of Publications", current, most recent edition: June 1999, which can be ordered from the ITU Sales and Marketing Service, Place des Nations, CH-121 1 Geneva 20, Switzerland. Fax: +41 22 730 5194; E-mail: sales @itu.int; http://www.itu.int/publications.
elaboration of procurement rules and a review of an outmoded service order for the Union’s Contracts Committee to literally hundreds, if not thousands of legal opinions, analyses and advice in innumerable diversified fields of law. In this manner, my colleagues in the LAU and myself did and do indeed play a non-negligible role in the internal day-to-day administration of the ITU. The funny, but work-wise cumbersome aspect thereof is that the more you assist and advise, the more frequently your colleagues request such help, even in matters, which are only operational and far from any legal connotation, but for which they prefer to get the “visa” or better the “blessing” of the legal adviser, if only to be able to say post factum, if something goes wrong, that the matter has been “seen” or even “approved” by the LAU. Though one might consider this as a professional satisfaction, I consider the attitude behind this approach as not sane and have, consequently, quite frequently not honored such requests for help by returning the file(s) with the remark that there is “no legal issue” involved. In this context, there is another risk involved, i.e. that such abundant internal requests for help and assistance endanger the “priority-setting” by the legal adviser for his team’s work performance, thus one more reason to refuse undue requests and to make it “crystal-clear” to the top-management and to all potential requestors that it remains the sole prerogative of the legal adviser himself to set alone the work priorities for the LAU, as only he “is responsible for the direction, management and operation of the Unit”, according to his job description; consequently it is also exclusively up to him to decide on any flexibility or exception to the rule, if he considers this justified and in the well understood interest of the Union. -- What is, on the other side, indeed satisfying is the almost complete lack of so-called “routine-work” and the overall legal character of my work and that of my colleagues in the LAU: we have to remain solid “generalists” and cannot hide ourselves behind any “specialization”, as quite a number of lawyers in a big legal office or service can. With four professional lawyers all in all in the LAU just prior to my imminent retirement -- please, recall that I started in 1979 “from scratch and as a one-man-show”! -- we simply have to be “specialists in all the legal fields as required” by our so-called “clients”! Over the years, I have tried to ensure a consistent, transparent and thus even predictable legal approach and to anticipate events rather than be overtaken by them. But for deontological, political and other reasons related to the imperative professional confidentiality, as well as for purely practical reasons of constant lack of time, which is symptomatic for the legal adviser of a smaller intergovernmental organization like the
ITU, most of the legal "material" produced by me or my colleagues in the LAU had to remain, even ITU internally only, unpublished, which is neither personally satisfactory nor helpful to the internal administration of the ITU.

Speaking of the latter, I must stress the point that I am convinced that early active involvement of the legal service or office in e.g. negotiations with governments, governmental or non-governmental organizations and companies not only ensures clear legal guidance from the beginning and thus avoids legal problems, inconsistencies and conflicts at a later, more critical and hectic stage, but also helps to avoid the reputation of being a "policeman", which any legal adviser can, to the dismay of his non-lawyer colleagues, easily get and should, of course, not be. It also guarantees the smoother, but firm control and visa function, which any legal adviser of an international organization simply has to exercise. But the question may be asked: How can one get involved early enough? This is indeed not always easy, as there are colleagues who try to prevent this and do not want the legal adviser's involvement and intervention. However, after some time of building up confidence and making them feel the value of the legal help available and by offering the latter, mainly during general or ad hoc meetings, in which new cases, incidents and problems are discussed or even only alluded to, you realize that suddenly and more and more easily formerly closed doors open themselves, and this evolution later facilitates greatly coping with such cases, incidents and problems.

Any such involvement inevitably and frequently brings the legal adviser together with the Finance Department and, in particular, with the Personnel Department. The legal adviser constantly has to work with these departments in respect of briefings, replies, surrejoinders, etc., which are to be submitted, respectively, to the internal Appeals Board or to the Administrative Tribunal of the International Labour Organization (ILO) or that of the United Nations (in pension matters only). It is mainly the legal adviser himself, on behalf of the defending organization, who has to sign and submit briefs to, and, if needed, to defend orally before, these tribunals such cases.

This internal role also includes the legal adviser's membership or chairmanship in ITU internal committees, working groups, etc. In this respect, I have been Chairman of the Contracts Committee for ten years and worked during eight years as a member of the Classification Review
Committee and twice, for several years, as a member of the Building Committee of the ITU. In this latter capacity, we are currently dealing with all legal matters related to the still ongoing construction of the third ITU building, namely the “Montbrillant Building”, for which the LAU had to work out -- in the absence of any usable precedent - one of its biggest (30 million Swiss Francs) construction contracts with over 30 pages of text, annexes not counted, after lengthy, challenging and exciting negotiations with the biggest Swiss General Construction Enterprise, -- a rewarding experience!

Concluding the subject of my involvement in the ITU’s internal administration, let me quote the wise statement of a former colleague legal adviser of an intergovernmental organization who said: “The Legal Adviser should never completely identify himself with the Administration, but should always keep vis-à-vis the latter a somewhat distant, critical and independent position; he should, however, constantly be ready to help in any way which is legally sound, defensible or at least tenable.” It goes without saying that I fully share this view and I never permitted myself to be drawn into any personal or administrative “wheeling and dealing”, from which no Administration is ever completely free.

Question 4 - Mr. Noll, what is your role at the Union’s conferences and meetings?

In most conferences and meetings of the policy-making organs of the Union, as well as in other meetings of a general and not only and exclusively of a purely technical telecommunication nature, the legal adviser has to provide his authoritative legal advice and opinions either in writing or, very often, orally. In the latter respect, it is quite interesting and significant to note that, after a certain number of years at the beginning of my advising ITU conferences and meetings on legal issues, when the latter rather frequently asked for my advice in writing, i.e. in the form of submission of a document containing such advice, such requests more or less suddenly stopped, and almost exclusively only immediate, oral advice is now asked for either by the Chair or from the floor, -- such advice, however, of course being rather fully retained and reflected in the summary records of such conferences and meetings, the provisional version of which I, therefore, have to check most carefully, so as to ensure that the advice or opinion figuring therein is precisely reflected and in substance absolutely correct. At my requests
for the reasons of this change, I was clearly told by delegates and conference officers that they had gained sufficient confidence in my legal advice and opinions, so that they saw no need anymore to request them in writing. This is indeed a quite understandable development and in its outcome, of course, positive, encouraging and rewarding, in particular as it does not prevent me (or is badly received from the rostrum or the floor) from asking for some time for deliberation, let say “until after the coffee-break” or “until tomorrow morning”, in really difficult, delicate or complicated cases requiring some more time for reflection prior to presenting thereon a legal advice or opinion. The latter relate to both substantive and procedural issues and may include other matters of a complex and/or sensitive nature having legal or political-juridical implications, which could also have serious repercussions on the Union and its activities.

This is true for any treaty-making conference of the Union, such as its Plenipotentiary Conferences and the ITU’s world radiocommunication and international telecommunication conferences, as well as for the annual sessions of the Union’s Council. In my experience, this role of the legal adviser is a most fascinating one, which I have enjoyed most thoroughly throughout my career in the United Nations system and, in particular, in the ITU.

Of course, as such conferences and meetings are those of the policy-makers, i.e. the representatives of the Union’s Member States, the role of the legal adviser should always be a less active and a more passive, but constantly attentive and “ready-to-assist” one. Depending on the situation, however, he might also need to speak up before being otherwise requested to present legal clarification or information, namely

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11 The supreme organ of the ITU (comparable to the United Nations General Assembly), but only convened every four years (cf. CS Art.8 and CV Arts 1, 23 and 32 as indicated in footnote 10 above).
12 Separate treaty conferences of the ITU, respectively competent to partially or completely revise the “Radio Regulations” (RR) or the “International Telecommunications Regulations” (ITR), together referred to as the “Administrative Regulations”, which are both treaty instruments, complementing the provisions of the CS and the CV, regulating the use of telecommunications and binding on all ITU Member States (cf. CS Arts 4, 13 and 25 as indicated in footnote 10 above).
13 The governing body of the Union acting, “in the interval between Plenipotentiary Conferences, on behalf of the Plenipotentiary Conference within the limits of the powers delegated to it by the latter” (cf. CS Art.10 and CV Art.4 as indicated in footnote 10 above).
by asking for the floor [sic], if he realizes that the meeting is about to
take a decision, which could be legally critical or dubious or even turn
out to be just untenable. It should not be overlooked that his simple
presence in the meeting room without requesting the floor in such a
situation could easily be interpreted as “silence means consent” with
such a decision: a result clearly to be avoided! - Although I know that
not all my colleague legal advisers in the other organizations will agree
with me on this point, I did frequently request the floor, with visible
insistence even, for giving such clarifications or making such correcting
interventions I considered necessary from the legal point of view. I
made them in most, admittedly not all, cases with success, but certainly
without ever having regretted to have acted in that manner! -

These are situations which are not always easy and comfortable
for the legal adviser, who has — in my conviction — to take what the
French call: les risques du métier, i.e. the professional risks, which
expose him to criticism and attacks, which I have experienced several
times myself. But you will agree with me that the legal adviser, too, or
perhaps better: he especially, is not only paid to have pleasant, but also,
if necessary or required or even only useful, unpleasant experiences! ——

A rather typical and perhaps ITU specific, though in its repetition
tedious, example is that, after I had given my requested legal advice or
opinion to a given conference, one or two, mainly the same delegations
not liking the contents thereof, as not corresponding to what they
wished to hear, objected against my intervention on the ground that only
the ITU Secretary-General himself was supposed to and could give legal
advice to the conference and not the legal adviser. Said delegations
based themselves on the wording of No. 91 in CV Article 5 entitled
“General Secretariat” and listed in 20 subparagraphs of its paragraph 1
all the duties and functions to be carried out by the legal adviser, who
of course, as in any other intergovernmental organization, does so on
behalf of the organization’s head, i.e. the Secretary-General in the ITU
case, who alone simply cannot carry out all these tasks himself. This is
obviously and particularly true for giving legal advice or an opinion, if
the Secretary-General himself is an engineer and not a lawyer.
Therefore and quite reasonably, my job description in Annex 3, as
approved by the Council in 1994 clearly specifies that “The Legal
Affairs Unit: …… at conferences and meeting, provides legal opinions
……” — But it happens that the whole paragraph 1 of CV Article 5
consists of the three introductory words: “The Secretary-General shall:”
and is followed by the said 20 subparagraphs a) to u), out of which subparagraph h) (= CY No. 91, the ITU working in their treaty texts with marginal numbers!) reads: “provide legal advice to the Union”!

Using this literal and narrow and, in my considered opinion, clearly (deliberately or not) mistaken interpretation of this provision, some delegations tried and continue to try to “keep” professional legal advice or opinions “out of the game” (sometimes they indeed even made their interventions before the legal adviser was given the floor, in order to prevent him from even speaking!). However, they very seldom did so successfully, as most Chairmen gave me the floor anyhow — except for one case where the Chairman himself, apparently (and correctly) suspecting that I would give legal advice he himself would not like to hear, first refused to give me the floor and only finally gave it to me, after several delegations had strongly requested him from the floor to do so. — I am sure you will agree that these are thrilling moments in the legal adviser’s professional life!

One of the worst things which can happen to any legal adviser, as it twice happened to me, is when half of the room applauds a legal opinion, while the other half remains silent and grim! Such a situation is embarrassing and counter-productive, and only delegations can help to avoid it!

On the other hand, and I speak again out of experience, if the legal adviser — regardless of the prevailing (economic, political or other) interests, pressures, circumstances etc. — constantly, throughout the years, follows only his own professional and conscientiously clear line and sound, in itself consistent reasoning, his legal advice and independence are eventually recognized and appreciated by delegations (by the way, by them even more than by some of my own colleagues in the ITU Secretariats), who are then ready to accept it or go along with it, without always so nicely admitting this as one head of delegation of an important Member State did during a Council’s session some years ago. After I had given my legal advice, he asked for the floor and stated: “I must admit that my delegation is somewhat disappointed by the legal advice received, which we had hoped to go in the other direction, which we would have preferred. But, Mr. Chairman, we are ready to go along with Mr. Noll’s advice, who has given us in the past always good advice.” — Mind you, such open and, of course, pleasant remarks are not the rule, but the exception; they are, however, from time to time comforting and encouraging, as they indicate that you are on the right
path to be followed "without any wobbling". They also make you forget unpleasant and nasty attacks "below the belt", such as the one, which I had been exposed to during a Plenary Meeting of the 1982 Nairobi Plenipotentiary Conference of the ITU and which prompted, at least, one head of delegation to state from the floor: "I don't envy the legal adviser who has one of the most impossible jobs. Whatever advice or opinion he gives, he simply cannot please every delegation and will be attacked by one at least, without, as a member of the Secretariat, being allowed to defend himself or to find easily somebody to defend him!"—

The need for impartiality and objectivity is of particular importance in cases of so-called political-juridical matters, in which delegations enjoy or are relieved, at least, to kick the ball into the legal adviser's camp by asking for his opinion or advice. If the legal adviser can offer two or more options, the weakest of which is legally, in his considered opinion, still defensible or tenable, then he should present all such options and invite "the policy-and decision-makers" to make their own choice, although they do not like this always, as they see suddenly the ball back in their camp!

However, I have also experienced situations, in which only one solution was legally correct and acceptable, according to my professional analysis, conscience and conviction. In such situations, the legal adviser should say so in all frankness and with the necessary courage, by presenting all his arguments, even if he knows beforehand that the majority might not wish to accept the outcome or conclusion/solution presented. -- Due to lack of space here, I cannot give you a long list of examples, but I refer interested readers to the legal opinion I gave at the above mentioned 1982 ITU Plenipotentiary Conference at Nairobi on the illegality of the requested exclusion of a Member State from participation in the Union's activities.14

Question 5 - Has your legal opinion or advice ever been rejected?

"Rejected" is perhaps too strong a word: one could say that it was not followed precisely and in extenso. There was one interesting case of a procedural matter, in which there was such a

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risk of rejection, as I was heavily attacked for the legal position I had taken. I had advised that a role-call-vote was not possible, because it was requested after a secret ballot had already been agreed upon. Finally, the secret ballot vote was taken, and the decision was quite the opposite to what the previous speakers in the debate had advocated as the only acceptable solution! Through that experience I became a fervent defender of secret ballot voting (and we had a lot of them!) on the hottest substantive or even procedural issues: because only in such a vote do delegates dare to express freely their own, true opinion!

However, at the internal secretariat level, such “rejection” has indeed happened, and I can give you two such examples.

In one case, in my rather early years in the ITU, I had been asked, “as matter of extreme urgency” and on the day before the Christmas break, to review “quickly” a rather voluminous contract for the construction of a satellite earth station in an African country by an outside contractor. I revised the rather badly drafted contract during several hours and returned my revision thereof, of which I retained a photocopy, the same day to the substantive division in the ITU. Two years later, again “urgently” contacted by the same division, because the country concerned complained that the construction work had not even started, whereas the ITU had already made payments to the contractor for almost 300 000 US Dollars. I requested the whole file and compared my photocopied revision with the original contract finally signed and found out that most of my essential revisions had not been incorporated in the signed version. I immediately informed all concerned, including the then Secretary-General, who decided at once that in the future no contract be signed which did not have my initials as okaying visa. So far so good, but it took me many hours of work during more than half a year to get from the Contractor the reimbursement of 80% of the sums unduly received!

In another case, for financing a development project, the project manager absolutely wanted to have a contribution from a Member State’s institution, which was offered under, in my view, unacceptable legal formulas and clauses, including one subjecting the whole contractual arrangement with the Union to that Member State’s national substantive law as well as jurisdiction. Having never accepted any such clauses which, in my considered opinion, are simply incompatible with the status of any intergovernmental organization. I made several
attempts to partly attenuate and partly simply to get rid of these clauses, but the potential donor institution retained its rigid position. I informed and advised the Secretary-General accordingly, namely not to sign the contract. He, desirous to sign the contract nevertheless because of the money involved and, in his view, absolutely needed, released me from any responsibility and signed the contract himself; of course, followed up by me with a note of mine for the LAU’s files -- and a copy thereof sent to the Secretary-General!-

Question 6 - Are your legal opinions binding on Member States or Sector Members of the Union?

Well, the short and very clear-cut answer is a simple and straightforward “no”! My legal advice and opinions like those of any other legal adviser of an intergovernmental organization have never been and should never become, in any future time, binding. Would they become binding, then the role of the legal adviser would automatically cease to exist, and his so-called ruling would make him a judge or even “a supreme judge” (as I was once, of course, critically but jokingly called in a conference), a result which would indeed — legally quite correctly — be unbearable for ITU Member States.

Having made this clear and unequivocal, one must also admit that any good, sound, well-argued and presented legal advice or opinion has a weight of its own and is generally not easily rejected, set aside or passed in silence by the decision-makers in a policy -- or treaty-making organ or body. If the latter, however, decides in non-conformity with the contents of the legal adviser’s opinion, then the latter has, nevertheless, fully accomplished his role as “adviser”, because the organ or body has acted with full knowledge of the legal implications of the case, as seen by the legal adviser, or as the French say: “en pleine connaissance de cause”!

Question 7 - Does the ITU legal adviser have any role to play outside the organization?

Yes, certainly and very much so! Besides my role before the two Administrative Tribunals in personnel matters which I have already mentioned, I have many contacts outside the ITU. First of all, with my colleagues in the other organizations of the United Nations system who quite frequently request information on the Union’s legal structure,
functioning and practice in various respects. This contact is also very important, because there is a need to concert the legal advisers’ actions within the United Nations system on various matters. Once a year in Geneva, a worldwide, very fruitful meeting of the United Nations system legal advisers takes place. We also have meetings of legal advisers of the Geneva-based organizations, as need arises, to determine what common position we should take in a specific case, be it vis-à-vis the Swiss authorities or la France voisine, our almost semi-host country. Indeed, although many of our colleagues live there, France has up to now still not ratified the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, a fact which caused us quite a few problems in the past. France is still in the middle of the ratification procedure and it can only be hoped, in the interest especially of all the Specialized Agencies of the United Nations being based at Geneva, that it will finally ratify this Convention without too many reservations, as this could give rise again to other problems related to the acceptability of such a ratification, i.e. with many reservations rendering it simply meaningless, for the intergovernmental organizations concerned.

There are also direct contacts, from time to time, with the authorities of other countries; in particular, when conferences and meetings are held in those countries at their invitation or when the ITU is implementing telecommunication assistance and development projects on their territory.

Other individual contacts foster relations with a number of academics working in the field of international telecommunications or international law in general, with whom I constantly exchange information or material, which is useful to all of us. The ITU Legal Adviser also represents the ITU in seminars, fora, colloquia, meetings and conferences on specific telecommunication or general legal issues.

**Question 8 - How would you differentiate your “job” from that of a lawyer outside an international organization?**

Here, we need to distinguish between lawyers whose work is more comparable and those whose work is less comparable with that of the legal adviser of an intergovernmental organization.

Let me start with the second category, that of a typical lawyer or attorney at law/“avocat” working in a private law firm or for a private
commercial company. The functions of such a lawyer are often much more determined by commercial interests of his firm or those of his clients, which he has to defend or foster, besides looking after his own professional and personal interests. While the former interests may also exist for a legal adviser of an international organization, they should certainly not play the same role or be of the main importance! -- As far as the "client" is concerned, it is true that, inside the ITU, there is currently a certainly not unjustified trend or call for being more "client"-oriented, without it always being clear who the "client" is. Having already spoken before about the great variety of “my clients”, my main client in my “job” (as you put it) is my employer, i.e. the ITU as a whole, and my functions and responsibilities are, therefore, quite different from those of a private lawyer of a law firm, even if the latter might be of an international character.

On the other hand, we also have the legal advisers of the various governments of the world and, in particular, those of the Ministries of Foreign Affairs of the Union’s Member States. Here the resemblance between my functions and theirs is somewhat closer. This stems from the fact that we have a common denominator, i.e. the application of rules based on international codified and customary law. We are meeting at conferences dealing precisely with matters of interest for States as well as for intergovernmental organizations although, as the ITU Legal Adviser and thus working and acting within a rather specialized field, my meetings and contacts with those national counterparts are most probably less frequent and more sporadic than those of my colleague, the United Nations Legal Counsel, who undoubtedly has them on a continuous basis because of the more general and political nature of the work at New York; this difference is due to, and stems from, the somewhat different nature or orientation of the tasks and thus also the work of the United Nations and the ITU respectively. Between both of us, on the one side, and a national legal adviser, on the other, there is, however, a further, and in my view, big difference, namely in the sense that a national legal adviser, be it of the Government as a whole or of its Ministry of Foreign Affairs, works mainly, if not exclusively in the interest of one client, namely his State or Government, whereas the ITU Legal Adviser has to take the whole ITU membership into account, as the United Nations Legal Counsel takes that of the United Nations as a whole!
Question 9 - What qualifications are, in your view and according to your experience, particularly necessary for an “intergovernmental organization lawyer” in order to fulfil his/her functions and responsibilities?

I appreciate that you, too, change now the word “international” to “intergovernmental”, for the simple reason that, as you know, there are a great number of “international organizations” called so nowadays, even though they are not “intergovernmental”, in accordance with the definition of “international” in the 1969 Vienna Convention on the Law of Treaties. The ITU will most probably and should, at least for the next decade, remain an “intergovernmental organization” and this within the United Nations system, although in times of privatization and globalization changes in this respect cannot be excluded!

To come back to your question, in my opinion and according to my long experience, the qualifications required for an “intergovernmental organization lawyer” are quite manifold, and I am glad about this question of yours, to which I have only very briefly alluded in my reply to your first question, at the beginning of this interview. Sound legal training in as many legal sectors as possible (and not only in public international law!), i.e. contracts, torts, copyright, commercial, administrative and fiscal law — if ever possible on a comparative basis —, a solid practical professional experience — preferably in an international legal outfit prior to joining the organization — and a sound knowledge of, and drafting capability in, both English and French, are indispensable. The latter is equally true for the devotion to, and almost personal identification with, the goals of the organization, which should be looked after and taken care of in all integrity, neutrality, impartiality and professional as well as substantive (of course, not administrative) independence, with certainly one main consideration, namely that the interests of the organization are best served in the long run, if they remain and are exercised within the legal framework and in full respect of the rule of law. The legal adviser should not fear to make the applicable rule of law explicit in detail and understandable to everyone concerned, even at the risk of being criticized as being “too legalistic”. Only in doing so, can he ensure that the law becomes transparent and create confidence based on the soundness of the legal advice and opinions given. The legal adviser must be persuasive and able to convince and motivate and must not fear taking decisions and defending them, if contested. This, of course,
includes the civic courage to say "no, this is legally not possible and thus not advisable", if any given solution sought is quite incompatible with the applicable rule of law. Whether liked or disliked, the legal adviser must always work for the respect of the law and for the latter to be followed in practice, according to the old Roman principle: *Dura lex, sed lex*. It would, for an intergovernmental organization, be disastrous, if its legal adviser were ready to permit or would even advocate that the rule of law be bent for whatever purpose and by whomever.

Summing up and putting it in a nutshell: The legal adviser must be and remain "the legal conscience" of the organization, any laxity in this respect being simply incompatible with his functions and responsibilities! Of course, he is not responsible if the decision-makers decide against the legal advice or opinion given, as I explained to you in more detail above. The legal adviser has also to be flexible enough to adjust — within the framework of what is possible and admissible by way of legal interpretation — legal rules and provisions to new situations, which may never have been envisaged or were simply unforeseeable at the time the respective rule of law was created. If, however, such an interpretation is not possible, he must say so with regard to the case in question and must make every effort in his power and competence to get the rule of law quickly and appropriately changed as quickly as possible, in order to bring in the future any such new situation under a new and proper rule of law.

**Question 10 - Mr. Noll, this interview gave me the impression that you understand your “role as a mission”, almost in the “sacerdotal” sense. Is this correct? If so, what would be your advice for future legal advisers of intergovernmental organizations?**

You "hit the nail on the head"! The impression you got today is quite correct.- I must admit, however, that my “mission”-- understanding was non-existing, when I started my “job” -- a term also used by yourself earlier during this interview -- in 1971 at UNOG. It only slowly developed over the years, especially during the 1980s, after I had gained more and more experience in the role of the legal adviser of an intergovernmental organization and felt deeper the enhanced responsibilities inherent in this post.- Since then, I tried to cultivate and to foster this understanding, which, in my view, is not wrong at all, but has given me a lot of strength, judgment, rigor, decisiveness, civic

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courage and a thick skin, all needed -- at this not easy, but challenging, exciting and most gratifying post -- as well as patience (although, in my case, still not enough!), constant in-job-learning and understanding, listening to arguments of others often very far from my own thinking and reasoning, self-criticism, respect for the work of my colleagues and quite a portion of indulgence towards those to whom the Latin principle applies: “nemo ultra posse obligatur”. -- This now clearly prevailing “mission”-understanding of mine has perhaps strongly been supported and enriched by the wide variety of activities and tasks coupled with overall or all-embracing responsibilities, which made me an “all-round lawyer” or a “general legal expert” rather than a specialized one like, for example, a human rights lawyer or a patent lawyer. Let me add, to avoid any misunderstanding: All of them, of course, find themselves in an equal position of validly living and trying to fully accomplish their respective “missions”!

With regard to your second and -- I assume -- last question, I shall be very brief here. At this stage, I shall not present any “advice” to future legal advisers, whom I simply “invite” to reflect over what they will hopefully have read up to this point and to draw their own conclusions as to whether or not all or at least some parts of my understanding of the role of “The Legal Adviser of an Intergovernmental Organization” coincides with their own aspirations and ongoing experiences. It is so obvious and almost commonplace that every legal adviser, according to his personality and the special environment he has to work in, has eventually to find his own way for exercising best his role. But in such search, experiences made by others might, positively as well as negatively, help to find one’s own way. It is in this sense that the present contribution is made on a subject on which there is surprisingly little comprehensive literature, -- a fact which incited me to write my book thereon and prompted my publisher to accept this idea! - Without intending to disappoint you at the end of this interview, but to keep simply some further suspense, I refer you to this future book of mine, in which I shall certainly not hesitate to also give “advice” on the subject matter, as you had asked for.
Cahier des organigrammes 1997
Annex 3

INTERNATIONAL TELECOMMUNICATION UNION
COUNCIL

Document C94/DT/10-E

6 May 1994

GENEVA - 1994 SESSION -
2-17 MAY
Original: English

COMMITTEE 2

NEW JOB DESCRIPTION

LEGAL ADVISER, HEAD OF THE LEGAL AFFAIRS UNIT

Post No. 255

Description of the ITU's Structure

GENERAL SECRETARIAT:

The General Secretariat, with the assistance of the Coordination Committee, is responsible for strategic planning and all the administrative and financial aspects of the Union's activities, the dissemination of information on telecommunication matters, providing legal advice to the Union, logistic and other support to the Union's activities, including conferences, the coordination of the work of the Union with other international organizations, the dissemination of information to its Members, the press, corporate and individual users of telecommunications and the general public. The General Secretariat is also responsible for the organization of world telecommunication exhibitions and forums.

LEGAL AFFAIRS UNIT:

Within the General Secretariat and as part of the Office of the Secretary-General, the Legal Affairs Unit (LAU) conducts studies and provides legal advice and opinions on various types of documents, including treaties, agreements, contracts etc., to enable the Secretary-General to act as legal representative of the Union in its relations with
the Member States and other international or multinational organizations; carries out the legal functions associated with the Secretary-General's role as depository of the treaties and other agreements concluded by, or under the auspices of the Union; studies, and deals with, general legal matters of all kinds and specific questions submitted to it by the Bureaux, Secretariats and Departments of the Union in connection with the Union's structure, functions and activities; advises on the interpretation of legal instruments (Constitution and Convention and Administrative Regulations of the Union, as well as other treaties and agreements, regulations, resolutions etc.); prepares draft amendments to the Constitution and Convention of the Union, its internal rules and regulations and other legal texts; at conferences and meetings, provides legal opinions and performs secretariat functions, as necessary; represents the Union, in particular regarding legal matters, at conferences and meetings with other organizations; carries out any other tasks associated with the Union's activities and entrusted to it by the Secretary-General.

**DUTIES AND RESPONSIBILITIES:**

Under the direction of the Secretary-General, the Legal Adviser, as Head of the Legal Affairs Unit (LAU), is responsible for the direction, management and operation of the Unit.

1. Provides authoritative legal advice and opinions (in writing or orally) requested by the General Secretariat and the Sectors.

2. Assists the Secretary-General during conferences and before other bodies on substantive and procedural legal issues and matters of a complex and/or sensitive nature having legal or politico-juridical implications, which could also have serious repercussions on the Union and its activities.

3. Is responsible for operations to be carried out by the Unit itself and for ensuring consistency and transparency of the legal practice and interpretation.

4. May be requested by the Secretary-General to deal with representatives, permanent missions and national authorities of Member and Non-Member States, regarding the latter's rights and obligations.

5. Attends to other legal matters, such as privileges and
immunities (and their waiver) of the Union and its staff and tax matters, in particular, in relation with the Union's host country; examines and advises the Personnel Department or, as necessary, the Secretary-General on staff appeals to the internal Appeal Board and the Administrative Tribunals of the ILO and the UN respectively, coordinates and signs, as appropriate, the Union's replies and surrejoinders submitted to those Tribunals, before which he may also appear to defend the Union's case, if required; represents the Union regularly on legal advisers meetings etc. of the UN system.

6. Liaises with his counterparts in other international organizations and advises on the impact of the latter's formal decisions on the Union.

7. Responds, as appropriate, to outside requests for legal information and advice concerning the Union.

8. Approves, and/or gives, if necessary with amendments, clearance for any document or correspondence submitted to the LAU by other ITU services for those purposes, because of its either legal implications or complexity or delicacy; in that context, advises in particular the BDT and the Telecom Secretariat and substantively supervises any jurist working for the latter.

9. Acts within the Union, if so assigned, as Secretary of committees and working groups dealing with legal or law-related matters, and as Chairman or Member appointed by the Secretary-General of internal, standing or temporary committees or boards etc., at the seat of the Union.

QUALIFICATIONS REQUIRED:

1. Advanced university degrees in law.

2. A particular knowledge of contracts, commercial, administrative, public and private, international law.


4. Over 15 years of professional legal experience, 10 years of which acquired in a legal service of an international organisation.
preferably of the UN Common System.

5. A knowledge of public administration and management would be an advantage.

6. Fluency and drafting ability in French or English and a very good knowledge of the other. A knowledge of Spanish would be an advantage.
Ibrahim F. I. Shihata

I. The General Counsel’s Functions

The General Counsel of the World Bank has varied functions, among which the following are the most obvious:

- Management of the Bank’s Legal Department;
- Preparing draft resolutions of the Bank’s Board of Governors and Board of Executive Directors (EDs);
- Assisting the Bank’s Executive Directors in the application and interpretation of the Bank’s Articles of Agreement (the Articles) and advising them on all legal issues;
- Providing advice to the Bank’s senior management (the President, the Managing Directors and the Vice-Presidents) on matters of law and policy, to the Bank’s Inspection Panel (with respect to the Bank’s rights and obligations), as well as to the Chief Executive Officer of the Global Environment Facility (GEF);
- Defending the World Bank Group (IBRD, IDA, IFC (the International Finance Corporation)), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID) before the Bank Group’s Administrative Tribunal, and arranging for their defense before national courts (in all matters for the World Bank, and in personnel matters for other Group institutions); and

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*This paper is based on a presentation given before the American Society of International Law’s Corporate Counsels Briefing, held on 2 April 1977 in Washington, DC. It has previously been published in the Proceedings of the 91st Annual meeting of the American Society of International Law 214-22 (1977).

**As Senior Vice President and General Counsel, World Bank; Secretary-General, International Centre for Settlement of Investment Disputes.

As used here, and in current Bank documents, the term “World Bank” includes both, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). IDA does not have separate staff and is equally served by the IBRD management and staff.
Certifying to the Bank's underwriters, external auditors and other relevant parties that the Bank's activities are consistent with its Articles of Agreement and other applicable rules and advising them of any material effect of such activities on the Bank's position.

In addition, the General Counsel has traditionally been elected Secretary-General of ICSID and, in this capacity, manages the ICSID Secretariat.

Other special assignments and miscellaneous activities have also been performed by the General Counsel on an ad hoc basis.

1. Management of the Bank's Legal Department

The World Bank's Legal Department has at present 119 lawyers and 65 administrative and secretarial assistants. The lawyers are of four categories (i) country (operational) lawyers who focus on the legal systems of the country or countries assigned to each of them and handle the legal documentation, and other legal issues, with respect to Bank operations in these countries; (ii) sectorally specialized lawyers who work as advisers on legal matters pertaining to specific fields (e.g., environment, procurement, banking, project finance, legal reform and judicial reform); (iii) financial lawyers who work on the Bank's borrowing operations, as well as its swaps, options and forward contracts and investment of liquid assets; and, (iv) personnel, administration and institutional lawyers who deal with personnel issues as well as the Bank's own procurements, insurance, pension plan and other services needed for the internal functioning of the Bank, including its various organs.

The Legal Department's strategic objectives, as recently defined, include in particular:

- Enabling the Bank to achieve its purposes and carry out its operations by (i) assessing the feasibility of Bank activities from the legal perspective of the Bank and, when relevant, its members; (ii) facilitating innovative approaches; (iii) ensuring that all Bank actions are legally sound; (iv) ensuring that Bank rights are adequately protected; and (v) demonstrating flexibility, emphasizing solutions;

- Contributing to the formulation of, and compliance with the Bank's policies, rules and procedures;
Providing legal support for resource mobilization, including (i) IBRD capital increases; (ii) IDA replenishments; (iii) GEF and other trust funds' financing; (iv) co-financing operations with other lenders/donors/investors; and (v) other initiatives;

- Developing legal methods and instruments for a better coordinated approach among the World Bank Group institutions, paying due regard to their separate legal personalities and the need to avoid conflicts of interest;

- Providing appropriate frameworks for the Bank's cooperation with other international organizations, including close working relationships with other multilateral development banks and relevant UN agencies;

- Assisting in the legal and judicial reforms of Bank borrowing member countries within the framework of the Bank's lending strategy for the country concerned; and

- maintaining the Bank's institutional memory in all legal and formal policy matters through (i) management of the Bank's Legal Information System; (ii) management of the Bank's Legal Database; and (iii) management of the Administrative Tribunal Data Base.

The General Counsel is responsible for the efficient performance by the Legal Department of all the above responsibilities. He is assisted in this role by two Deputy General Counsels, one for Bank Operations and the other for the remaining services, i.e. finance, personnel, administration and institutional affairs. The Deputy General Counsel, Operations, supervises six Chief Counsels who manage the Operational Lawyers (who are organized on a regional basis in six divisions) and six Legal Advisers who also manage the sectorally specialized lawyers. He is assisted by the Assistant General Counsel, Operations. The second Deputy General Counsel supervises an Assistant General Counsel, Personnel and Administration, a Chief Counsel, Finance, and a Legal Adviser, Institutional Affairs. The structure ensures quality control, while allowing, through delegation, timeliness of delivery of legal services. Occasionally, outside counsel are employed by the Legal Department to advise on specific questions of domestic law in the Bank's varied membership (e.g. on issues related to Bank borrowings) or to represent the Bank before national courts.

Although the staff of the Bank's Legal Department come from over 46 different countries and Bank lawyers are trained under various legal systems, managing the Legal Department has proved to be the least difficult function of the General Counsel, at least as far as the
incumbent is concerned. This is due mainly to the able assistance he receives from his senior staff and the maturity and professionalism of the Bank's lawyers as a whole. The Legal Department's standards emphasize quality and professional ethics, especially accuracy, honesty and timeliness. The General Counsel gives particular attention to the observance of these standards in the work of Bank lawyers.

2. Preparing Draft Resolutions of the Bank's Boards

In the Bank's practice, most decisions of the Bank's Executive Directors take the form of recording their approval in the Board's minutes of the proposals made by the President, whether these are loan/guarantee proposals or recommendations for the adoption of new Bank policies or decisions. If the Executive Directors agree on modifications of these proposals or on alternative proposals made by Board members, these are also recorded in the Board's minutes. However, formal resolutions are issued by the Executive Directors when the matter requires a document to be presented to third parties or detailed arrangements to be followed over time. These resolutions are made publicly available. Important examples include resolution authorizing the Bank to borrow, defining its investment authority or establishing new trust funds to be administered by the Bank, as well as resolutions establishing new facilities, such as the GEF or the Inspection Panel. In recent years, the practice has evolved with respect to operational policy papers which are now accompanied as a general rule by a draft "policy statement" which management proposes to issue to staff in case the proposed policy is approved.

In all cases, resolutions issued by the Executive Directors are drafted in the office of the General Counsel and cleared or redrafted by him before their circulation to the Board. All "policy statements", which are usually drafted by operational policy staff and Bank lawyers are cleared by the General Counsel. This applies equally to loan/guarantee proposals and the policy papers presented to the Executive Directors.

By contrast, all decisions of the Board of Governors take the form of formal resolutions which are circulated in draft in advance of the annual meetings of this Board or when a vote is sought on an urgent matter without a Board of Governors meeting. All such resolutions are
prepared in the office of the General Counsel and must be cleared by
him, if they are not drafted personally by him.

3. Assisting the Executive Directors in the Application
and Interpretation of the Bank’s Articles of Agreement
and Advising Them on Legal Issues

Under the Bank’s Articles of Agreement, the Executive
Directors have the power to interpret these Articles, subject only to
possible review by the Board of Governors upon the request of a Bank
member. This power includes resolving any dispute between the Bank
and a member country or among Bank members with respect to the
meaning or implications of the Articles of Agreement. In the first year
of the IBRD’s practice, interpretation of the Articles was made by the
Executive Directors upon the recommendation of a then standing Board
Committee. The Board Committee on Interpretation consulted the
General Counsel before it prepared its report to the full Board. Later
interpretations were issued by the Executive Directors directly with the
benefit of the General Counsel’s advice. Since 30 July 1964, however,
no formal decision on the interpretation of the Articles has been taken
by the Executive Directors, with one exception. Instead, whenever
clarification of the Articles’ requirements was needed, the Executive
Directors discussed it in the light of a legal opinion by the General
Counsel. Such an opinion, it should be noted, does not in itself amount
to an authoritative interpretation of the Articles; the power to make such
an interpretation is vested in the Executive Directors. The Executive
Directors’ endorsement of, or concurrence with, the General Counsel’s
opinions gives them the authority which allow for their incorporation in
the Bank’s subsequent practice. The practice under the IDA Articles of

2 On October 14, 1986, the Executive Directors issued an interpretation to the
effect that the “1944 gold dollar,” which is the standard of value of the IBRD’s capital
according to its Articles of Agreement and which has formally ceased to exist since 1978
(after its convertibility into gold for the benefit of official holders had been terminated
in 1971), has been replaced by the SDR according to the SDR value on July 1, 1974, i.e.
by US$1.20635. This “interpretation”, which is more of a practical attempt to fill in a
gap created by the demise of the gold dollar and which was explicitly adopted “until such
time as the relevant provisions of the Articles of Agreement are amended,” was issued
after elaborate discussion in an ad hoc Board Committee on the basis of a detailed legal
opinion by the General Counsel. See I.F.I. Shihata, The World Bank in a Changing
Agreement has followed the latter course from the inception of IDA.3

In issuing his legal opinions, the General Counsel takes into account the fact that the Executive Directors do not constitute a court of law. While they expect from the General Counsel legally sound analysis and advice, they are primarily interested in developing solutions which best serve the purposes and interests of the Bank and its members as a whole. It is not enough, therefore, for the General Counsel’s advice to be legally correct; it is also expected to be such as to enable the Executive Directors to perform their responsibilities in a manner which best suits the requirements of the Bank’s business. This has proved at times to be a particularly difficult task, especially as the amendment of the Articles is generally deemed to be an impractical method for introducing innovations.4

The General Counsel’s clarifications of the meaning and implications of the Articles have accorded primary attention to their ultimate objective and the overall mandate of the Bank as a financier of investment for productive purposes in the reconstruction or development efforts of its members and as a facilitator of international investment and trade. Such a purposive interpretation has indeed been recommended in scholarly writings for charters of international organizations in general and was adopted by the International Court of Justice in its interpretation of the Charter of the United Nations.5 By the nature of their respective mandate, these organizations must be able to respond to the changing needs of the world in which they operate. What is important here is that this teleological approach does not conflict with the ordinary meaning of the words as used in their context (unless the textual approach leads to absurd or contradictory results). In other words, flexibility in the interpretation process cannot reasonably substitute this process for the amendment of the Articles which goes

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3 That practice, it should be noted, includes one exception, i.e. the formal “interpretation” of the “gold dollar” issued by IDA’s Executive Directors in 1987, following an earlier decision by the IBRD’s Executive Directors to the same effect.

4 Amendment of the IBRD Articles of Agreement requires, after approval by the Board of Governors, further approval by three fifths (60%) of members having eighty-five percent of the total votes. Amendment of the IDA Articles requires the same process, with 80%, rather than 85% of the total votes.

beyond the powers of the Executive Directors, or for that matter, of the Board of Governors.

The General Counsel also acts as legal adviser to the Executive Directors. In addition to the legal opinions he issues to the Board during its meetings and in writing, he has often responded to queries made by individual Executive Directors, in which case his opinions are circulated to all Board members and may lead to a Board discussion of the issues involved.

4. Advising Senior Management

Although the General Counsel is independent in his legal work, he reports to the Bank’s President. He is also a member of the committee required by the Articles to recommend loan/guarantee proposals before they are approved by the Executive Directors (the so-called Statutory Committee), of the Bank’s Operations (loans and guarantees) Committee, Operational Policy Committee, and Finance Committee, as well as the Private Sector Development Group. In these various fora and in response to individual queries by the Bank’s President, Managing Directors and Vice Presidents, the General Counsel provides advice on a daily basis on current issues. Such advice ranges from oral counsel to detailed written opinions and memoranda, some of which eventually find their way to the Executive Directors, typically as an annex to a management paper on the relevant subject. This daily work, along with the review of loan/guarantee proposals and policy papers before they are submitted to the Executive Directors, constitute the routine function of the General Counsel. In this function, the General Counsel acts as the spokesman of the Legal Department, benefiting from the research and analysis made by its members and the deliberations with its managers.

In this, as in his role as adviser to the Executive Directors, the challenge normally lies in finding solutions which are at the same time firmly based on defensible legal grounds and yet helpful to the institution from a practical viewpoint. The task becomes particularly difficult when the issue is entangled with political considerations of significant interest to Bank members or with ideological preferences prevalent among Bank staff.

Under the Bank’s Articles, the Bank and its officers and staff are not to interfere in the political affairs of Bank members, or to be
influenced by the political character of these members. Moreover, the Articles provide that “[o]nly economic considerations shall be taken into account in their decisions.” Many sources, both internal and external, do not always find such injunctions to be feasible or, at times, even desirable. However, the General Counsel has always maintained that the Articles’ requirements must be observed by all organs of the Bank and by all its members, as long as they have not been amended through the appropriate procedure. Interpretation by the Executive Directors enables the institution to adapt old texts to modern circumstances. However, it cannot turn an Article’s explicit prohibition into a permission of the prohibited action. Thus, economic considerations can always be taken into account even when they originate in political factors or are associated with such factors (which is often the case). The Bank’s adjustment operations and its current practice of preparing a Country Assistance Strategy for each active borrowing member also require the Bank to be cognizant of the political and social environment in which it operates. The views of the General Counsel on the extent of possible Bank involvement in governance issues of its members provide an example of the drawing of a line that can be defended on legal grounds and is also helpful from the viewpoint of the Bank and its members.6

5. Defending the Institution

Even though each institution in the World Bank Group is a legally separate international organization, one Administrative Tribunal rules on complaints by the staff of all the five institutions after they exhaust the processes of administrative appeal and appeal before the Bank Group Appeals Committee. For practical reasons, the Bank’s Legal Department represents all these institutions before the Appeals Committee and the Administrative Tribunal. The task is normally performed by the Assistant General Counsel, Personnel and Administration, and the lawyers reporting to her, under the supervision of the Deputy General Counsel concerned. Involvement of the Bank’s General Counsel is sought in the more controversial cases. The same procedure applies to all suits brought by the staff of any of the five

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institutions before national courts, except that the involvement of the Bank's General Counsel is much greater in these cases. While the different institutions are represented in such cases by outside counsel admitted to the bar in the jurisdiction concerned, the defense is discussed beforehand with the General Counsel who approves the strategy and reviews the legal briefs. This is also done for all suits brought against the Bank in other than personnel matters (and would be the case if ICSID, in spite of its unqualified immunity, were sued before national courts, the General Counsel acting in this case as the Secretary-General of ICSID). This mandate does not, however, include defending IFC and MIGA in suits brought against them before national courts by parties other than their respective staff and former staff.

6. Certifying Compliance to Outside Parties

The General Counsel signs periodic letters of comfort to the Bank's external auditors and reviews the semi-annual Financial Statements and other statements needed for third parties to assure them that all Bank actions are consistent with its Articles of Agreement and that to his knowledge no event (in the covered period) has affected the Bank's financial position, except as disclosed by the Bank.

7. Managing the ICSID Secretariat

ICSID, though separate from the Bank, does have important legal and de facto linkages with it. The Bank's President is ex officio chairman of ICSID's Administrative Council. The Bank's General Counsel has traditionally been elected by this Council to serve as Secretary-General of ICSID. The Bank also funds ICSID's administrative budget.

The Secretary-General manages the ICSID Secretariat which oversees arbitration and conciliation proceedings before ICSID arbitral tribunals and conciliation committees. An important function of ICSID's Secretary-General is to decide on whether to register a request for arbitration or conciliation "on the basis of the information contained in the request." Under the ICSID Convention, the Secretary-General is under the duty to register such a request unless the afore-mentioned
information indicates that the dispute manifestly falls outside the scope of ICSID’s jurisdiction.

The initial determination by the Secretary-General to register a case does not preclude the arbitral tribunal from subsequently declining jurisdiction. The tribunal is the judge of its own competence and, unlike the Secretary-General, bases its decisions on all relevant facts and documents, and not merely on the documents submitted by the applicant party. In practice, the Secretary-General’s decision to register or not to register a case has presented difficult choices on several occasions, especially as such a decision has to be based on the information submitted by one party only.

This issue apart, ICSID’s case-load has expanded greatly without any particular difficulty since the incumbent Secretary-General took up this responsibility in 1983. This is due to the vigilance of ICSID’s small staff and ICSID’s Legal Adviser, in particular.

The Secretary-General has also taken advantage of ICSID’s unique mandate to make it a primary source of research and publications on foreign investment law. The first Secretary-General initiated the publication of Investment Laws of the World series and the Investment Treaties series. The incumbent Secretary-General added the publication of the semi-annual periodical: ICSID Review - Foreign Investment Law Journal. As the only specialized law journal on this subject which is published on a world-wide basis, the Review tries to provide a balanced analysis of a field previously known for its great controversies and thus contributes to the emerging consensus on foreign investment law issues. The ICSID Secretariat has also started the publication of books on certain aspects of the law applicable to foreign investment and has a host of other publications on ICSID arbitration.

8. Special Assignments and Miscellaneous Activities

The Bank’s General Counsel was in charge of the preparation of the first draft of each of the treaties which established the IBRD affiliates, IFC in 1956, IDA in 1960, ICSID in 1965, and MIGA in 1985. In each case, the draft was discussed at length by the Bank’s Executive Directors and the final text approved by them was opened for
signature by member countries by decision of the Board of Governors. The preparation of the ICSID Convention required prior consultation in regional conferences which the General Counsel conducted with legal experts of member states. The MIGA Convention required more extensive preparatory work as most Bank members were initially inclined not to support the initiative, developed countries fearing competition with their national agencies and developing countries suspecting the backing of foreign investors’ claims against them, not only by the projected institution, but also by the Bank itself. Through a strenuous consultative process and innovative redesigning of the draft convention, it was finally approved by the Bank’s Executive Directors, without dissent. The General Counsel was in charge of the process and chaired the twenty sessions of the Executive Directors Committee of the Whole which “negotiated” the text in 1984 - 1985. He was subsequently in charge of preparation of the detailed regulations of MIGA and of launching the new institution before the appointment of its first Executive Vice President.

In addition to the above important assignments, other significant roles in recent years included the preparation of the World Bank Guidelines on the Legal Treatment of Foreign Investment, carried out at the request of the Development Committee by a small group consisting of the General Counsel of the Bank, IFC and MIGA and assisted by the ICSID Secretariat. The Bank’s General Counsel, who chaired that group, conducted the consultation over the text of the guidelines with experts of different universal and regional organizations and “its negotiation” with the Bank’s Executive Directors. Although the text covered issues previously known to be contentious among States and scholars alike, it was eventually endorsed without dissent by the Development Committee, within a year from its request.

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7 In the case of ICSID, the constituent convention was opened for signature by decision of the Bank’s Executive Directors after the Board of Governors authorized its preparation.


9 The “Development Committee” is a joint committee of the Boards of Governors of the World Bank and the International Monetary Fund, established in 1974. All member countries are represented in this 24 member committee.

Assignments of lesser importance have also been carried out by the General Counsel at the request of the Bank's Executive Directors or President. These included, for instance, the chairmanship of a World Bank Group committee which reviewed legal and policy impediments to the Bank's lending to private sector enterprises.

Other miscellaneous activities include writing and lecturing on the Bank and the institutional aspects of its work. The extent of these activities depends largely on the General Counsel himself. The incumbent General Counsel has so far published seven books on Bank-related activities. He also actively participates in international legal, financial, environmental and arbitration conferences, either as General Counsel of the Bank or Secretary-General of ICSID. Some of the papers submitted by him to these conferences have had an impact beyond the Bank.

II. Evolution of the Role of the General Counsel and of World Bank Lawyers

The role of the General Counsel, and that of Bank lawyers generally, has evolved with the evolution of the role of the Bank itself. When the incumbent General Counsel joined the Bank as its General Counsel in 1983, the Bank was providing financial assistance to borrowing countries in the form of investment loans and occasionally adjustment loans (the latter accounting respectively for 14.1 percent of total commitments and 12.2 percent of total disbursement in fiscal year 1983 for IBRD and IDA combined). The Bank had not at the time provided any loan guarantees. It had not made any loan for debt and/or

debt service reduction purposes. Nor had it provided any free standing or primarily environmental loan, or any loan for the financing of legal, judicial or civil service reform. Its operations were not based on pre-established country assistance strategies, and did not address any of the issues which later came to be known as governance issues. Furthermore, the Bank's relationship with NGOs was in its infancy and it did not have an Inspection Panel to review complaints from parties adversely affected by its operations, nor was the Bank involved in the administration of hundreds of trust funds financed by other donors. The MIGA had not been created and the GEF did not exist either.

Since that time, however, the Bank's operations have expanded to cover all the above-mentioned areas under continually updated country assistance strategies for each borrowing country. To date, adjustment lending accounts on average for over 33.5 percent of annual commitments, and 35 percent of annual disbursement (in the last five fiscal years for the IBRD and IDA combined). It has moved from addressing only macro-economic policy issues into tackling details of micro-economic and institutional reforms in various sectors. Investment operations have included since 1984 guarantees of private loans and, since 1989, debt and debt-service reduction loans. Primarily environmental loans worth about $12 billion have already been concluded. Furthermore, Bank-funded projects often include at present technical assistance components in areas such as legal reform and judicial reform, with some loans provided exclusively for these purposes, including loans to large borrowers such as China and the Russian Federation. More recently, the Bank has declared its readiness to assist borrowing countries in their effort to combat corruption within the ranks of their civil service and public sector enterprises. The Bank's Legal Department played an instrumental role in the creation and launching of the MIGA and the GEF. It now provides legal services to the GEF Secretariat and the Inspection Panel.

When the Bank finances legal and/or judicial reform programs, the task is managed by the Legal Department. The role of the Bank's lawyer changes in this respect from the typical legal adviser role to that of a hands-on project manager. The Legal Department had to be restructured to play that role effectively. A unit, headed by an Assistant General Counsel, assists operational lawyers in handling legal and judicial reform projects and quite often designates one of its experts to be the task manager for the project. The role of Bank lawyers in this regard is to assist the borrowing country in the design of the reform program to be financed by the Bank and to supervise its implementation
as agreed with the borrower. The project is otherwise "owned" and implemented by the borrowing country, often with the assistance of its own consultants, local or foreign, funded in whole or in part by the Bank's loan.

The road for the expansion of Bank operations in all the new areas enumerated above was paved by enabling legal opinions submitted by the General Counsel and endorsed by the Executive Directors. Through these legal opinions, the conditions of relating these new types of operations to the Bank's purposes were clarified, along with any measures needed to meet the Articles' requirements. Thus, debt reduction operations were deemed possible only to the extent they would have a material effect on the country's development prospects (and not simply as refinancing of commercial debt). Legal and judicial reform loans were related to improving the country's investment climate. More generally, governance issues would be tackled by the Bank to the extent they help the country in the efficient management of its resources, through appropriate rules and institutions, and do not entangle the Bank in the country's partisan politics. Through such legal opinions the Bank's Articles, inspired by considerations of the 1940s, have been and continue to be adapted to the ever changing needs of the contemporary world.

The General Counsel's elaborate legal opinions on the different issues facing the Bank in its borrowing and lending operations, and in its dealings with its member countries and other parties, have had in certain cases an impact outside the Bank and have inspired similar analyses in other international development finance institutions.

To that extent, the office of the Bank's General Counsel may be contributing to the progressive development of international law.
THE ROLE OF THE LEGAL ADVISER IN THE REFORM AND RESTRUCTURING OF AN INTERNATIONAL ORGANIZATION: THE CASE OF UNIDO

Abdulqawi A. Yusuf

I. Introduction

When I joined the United Nations Industrial Development Organization (UNIDO) in 1994 as the legal adviser of the Secretariat, the Organization was in the midst of a far-reaching reform and restructuring process. This process was initiated at the Fifth General Conference of UNIDO in Yaoundé (Cameroon). It was not, however, the first time that UNIDO was undergoing profound changes in its structure and functions. Indeed, UNIDO was transformed in 1986 from an autonomous subsidiary organ of the General Assembly of the United Nations to a specialized agency of the United Nations system. Nevertheless, there was, from a legal standpoint, a major difference between the two processes. The reform and restructuring of UNIDO in the past five years (1993-1998) was carried out without any amendment to its constitutive instrument; while the transformation of the Organization into a specialized agency in 1986 involved the formulation of a Constitution in the form of a multilateral treaty.

The UNIDO Constitution was adopted on 8 April 1979 and entered into force on 21 June 1985, giving rise to the formal conversion of the Organization into a specialized agency of the United Nations system in January 1986. The Constitution laid down under its Article 1 that the primary objective of the Organization shall be “the promotion and acceleration of industrial development in the developing countries with a view to assisting in the establishment of a new international economic order”. It also stipulated that the Organization shall “promote industrial development and cooperation on global, regional and national as well as on sectoral levels”. In order to fulfill these objectives, the Organization was assigned, in Article 2, eighteen functions, including, inter alia:

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encourage and extend, as appropriate, assistance to the developing countries in the promotion and acceleration of their industrialization, in particular in the development, expansion and modernization of their industries;

- create new and develop existing concepts and approaches in respect of industrial development on global, regional and national, as well as on sectoral levels;

- promote and encourage the development and use of planning techniques, and assist in the formulation of development, scientific and technological programmes and plans for industrialization in the public, cooperative and private sectors;

- provide pilot and demonstration plants for accelerating industrialization in particular sectors;

- assist, at the request of governments of developing countries, in obtaining external financing for specific industrial projects on fair, equitable and mutually acceptable terms.

The calls for UNIDO’s reform and the reorientation of its activities came a few years after its establishment as a specialized agency.

Starting in 1991, these calls acquired a sense of urgency as the policy-making organs of UNIDO - the General Conference and the Industrial Development Board - decided to include in their agenda an item on reform and restructuring, and requested the Director-General to carry out consultations with Member States on these issues.

The demand for reforms was mainly predicated on the profound economic and political changes that had taken place in the early 90’s as a result of the collapse of the socialist states of Eastern and Central Europe and the consequent abandonment of centrally-planned and command economic policies by an increasing number of countries. It also partially reflected a growing demand for a wider reform of the United Nations system as a whole, especially in the economic and social
spheres.

Of particular relevance in the case of UNIDO was the fact that the above-mentioned economic and political changes directly affected some of the assumptions and concepts on which UNIDO's mandate and functions were originally based. For example, the establishment of a new international economic order, in which the Organization was mandated to assist under Article 1 of its Constitution, had been virtually abandoned as an economic and political goal by the developing countries in the early 90's. Similarly, the reference under Article 2 to the promotion and encouragement of the "development and use of planning techniques" sounded rather obsolete in a world in which market-led economic policies were being embraced by almost all countries. Moreover, in addition to the developing countries, which were, according to the Constitution, the main beneficiaries of UNIDO's technical cooperation services, countries with "economies in transition" came to demand similar benefits from the Organization.

These changes in the external environment of the Organization were aptly summarized in the report of the Director-General to the fifth session of the General Conference held in Yaoundé in December 1993. Under the section "forces of change and the need for reform", the Director-General observed as follows:

"Since UNIDO became a specialized agency, new driving forces and policy changes in the global economy have affected the roles of governments, enterprises and industrial institutions alike, the pattern and conditions of production and the flows of trade, investment and technology. Most developing countries have shifted from import substitution and regulatory industrial policies, supported by strong public ownership and state participation in industry, towards export-oriented, competition-driven policies - with a general emphasis on privatization and private sector development."²

Equally important, in the view of the Director-General, was the change in the demand for UNIDO services which now stemmed from a greater number of countries and actors than before. Thus, he stated in

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his report that:

"Whereas in the past UNIDO was expected to respond to government requests that were largely focused on public sectors, inward-looking and planning concerns, the demand for UNIDO services is now shifting towards development requirements in the private sector". 3

In the light of these developments, the updating and adjustment of the objectives of the Organization, in the context of the evolution of international economic relations, and the need to prioritize its functions, were considered of utmost urgency and importance. Thus, a general agreement emerged among the Member States for a redefinition of the functions of UNIDO, the reorganization of its structure and the reshaping of its methods of work. These objectives inspired the reform and restructuring measures adopted in 1993 at the Yaoundé General Conference.

Later on, with the notification of the withdrawal by the United States in 19954 and subsequent threatened withdrawals by other Member States5, the need for further deepening of the reform and restructuring of the Organization became imperative, leading to the negotiation and adoption in 1997 of a Business Plan on the future role and functions of UNIDO with the declared objective of focusing the functions of the Organization, streamlining its structure and improving the cost-effectiveness and efficiency of its operations. This was followed in early 1998 by the introduction of new programmatic measures, aimed at establishing a clear corporate identity based on integrated packages of service for technical cooperation, and an effective decentralization of activities to the field.

The purpose of this paper is to examine some of the legal implications of the reform and restructuring of UNIDO and the role that

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3 Ibid.
4 Following this notification, the withdrawal of the United States from UNIDO took effect on 31 December 1996.
5 The United Kingdom deposited an instrument of denunciation of the UNIDO Constitution in December 1996, but later revoked it. Germany also announced in December 1996 that it would reconsider its membership in UNIDO, but later reaffirmed its intention to remain a Member of the Organization in light of the reform.
the Legal Adviser had to play in dealing with those implications, in the absence of formal amendments to the constitutive instrument of the Organization.

II. The implementation of the Yaoundé reforms

Based on a wide-ranging analysis of the changes in the external environment of UNIDO and of the challenges facing the Organization in a new economic and political context, the Director-General submitted proposals for the reform and restructuring of UNIDO to the Yaoundé General Conference. These proposals related to the reorientation and prioritization of UNIDO’s services, the establishment of a new organizational structure, changes in resources mobilization and allocation, and improved management procedures and methods of work.6

In a declaration adopted in Yaoundé, the General Conference endorsed the reform programme proposed by the Director-General so as “to enable the Organization to better realize its objectives and strengthen its role as the central coordinating agency in the United Nations system for the promotion of the industrialization of developing countries”.7

In a separate resolution, the General Conference also reaffirmed the need to revitalize the Organization for the effective achievement of its Constitutional mandates, approved the proposals of the Director-General, and requested him to submit a progress report to the Industrial Development Board at its twelfth session on the implementation of those proposals.8

What were the legal implications of these reforms which were characterized in the Yaoundé Declaration as a “far-reaching reform programme”? How were they implemented by the Secretariat? What was the role of the Legal Adviser in this process?

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6 For details, see UNIDO, Priorities and Structural Reform of UNIDO, proposals by the Director-General, document GC.5/23 of 24 September 1993.

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These questions will be addressed below through an examination of the main aspects of the reform programme and the manner in which it was implemented.

1. The Reorientation and Prioritization of UNIDO’s Services

The proposals of the Director-General approved by the General Conference on the reorientation and prioritization of UNIDO’s services clearly affected the interpretation of the constitutional provisions on objectives and functions of the Organization. However, this issue was neither analyzed in the Director-General’s report nor raised during the debate at the General Conference. The mandate of UNIDO and the objectives laid down in Article 1 of the Constitution were explicitly referred to in paragraph 22 of the Director-General’s report, but the extent to which this constitutional mandate could have been affected by the reform proposals was never addressed in the report.

The General Conference, on the other hand, viewed the reorientation and prioritization of functions as a means for “the effective achievement of its (UNIDO’s) constitutional mandate”. At the same time, in the Yaoundé Declaration, it referred to “UNIDO’s objectives of environmentally sustainable and equitable industrial development” (emphasis added); thus qualifying the central objective of the Organization (i.e. the promotion of industrial development) in an apparent attempt to update it and adjust it to the emerging concerns and needs of the international community.

With regard to the functions of the Organization, the Yaoundé Declaration reiterated that the major means of achieving the objectives of UNIDO (as qualified in the Declaration itself) remained those of investment promotion, technology transfer, development of human resources and the creation of an enabling environment, both nationally and internationally, for industrial growth and competitiveness. These functions largely coincided with the five interlinked development

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9 Article 1 of the Constitution on objectives reads as follows: “The primary objective of the Organization shall be the promotion and acceleration of industrial development in the developing countries with a view to assisting in the establishment of a new international economic order. The Organization shall also promote industrial development and cooperation on global, regional and national, as well as on sectoral levels.”

objectives proposed by the Director-General as the main focus of UNIDO’s services, namely: (a) industrial and technological growth and competitiveness; (b) development of human resources for industry; (c) equitable development through industrial development; (d) environmentally sustainable industrial development; and (e) international cooperation in industrial investment and technology."

The proposals of the Director-General and the Yaoundé Declaration gave rise to a new characterization of the objectives of the Organization, a change of emphasis in the functions assigned to it, and a reinterpretation of its basic mandate aimed at updating it in the light of the new international economic realities. It might therefore be argued that the action taken by the General Conference, and its subsequent implementation, amounted to a modification or implicit abandonment of certain constitutional provisions through subsequent practice. References to the establishment of a “new international economic order”, or to the promotion of “the use of planning techniques” or to the “Provision of pilot and demonstration plants” were nowhere to be found in the Yaoundé Declaration. The list of eighteen functions stipulated in Article 2 of the Constitution had also been reduced, through selectivity and prioritization to a few areas of concentration which, according to the report of the Director-General, constituted an effective response to the changing requirements of the developing countries and reflected the best use of the limited resources available in furtherance of the basic mandate of the Organization."

Nevertheless, it should be noted that the Yaoundé Declaration initiated an evolutionary process aimed at reconfiguring and updating the objectives and functions of the Organization in response to new realities and demands by its Member States. It could not and did not by itself bring about a modification of those objectives and functions, but could rather be viewed as the point of departure for a subsequent practice, which has so far enjoyed the consent of all parties to the UNIDO Constitution, and which may eventually provide cogent evidence of common consent to modify those constitutional provisions.

This interpretation is substantiated by the fact that substantive adjustments had to be made to the priority areas identified by the

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11 See Priorities and Structural Reform of UNIDO, op. cit., p. 7.
12 Ibid.
Yaoundé General Conference during their implementation by the Secretariat. These adjustments were reflected in the seven thematic priorities proposed by the Secretariat in 1995.\textsuperscript{13}

It is also supported by the adoption by the seventh session of the General Conference in 1997 of a Business Plan on the future role and functions of UNIDO which, as is explained below, further elaborated on the functions, structure and role of the Organization.

Acting on the request of the Member States of UNIDO, the Secretariat undertook the process of elaboration of the conceptual framework for the reorientation and prioritization of the activities of the Organization. The implementation of this process was equally entrusted to it. The advice of the Legal Service was often sought during this process. It might, however, be observed that the policy and strategic aspects of the process were given clear predominance over its possible legal implications. These implications were nonetheless taken into account in the adoption of measures relating to various aspects of the reform.

2. Changes in Organizational Structure and Staffing

Following the adoption of the Yaoundé Declaration, and the approval by the General Conference of the Director-General's proposals, changes in the organizational structure of UNIDO were effected in two steps from 1994 to 1996. Two major staff reductions were also carried out during the same period.\textsuperscript{14}

The first organizational restructuring resulted in 1994 in the abolition of an entire management layer, i.e. the Deputy Directors-

\textsuperscript{13} The seven themes, which constituted new dimension of the focusing of UNIDO's activities, were the following:
1. Strategies, policies and institution-building for global economic integration;
2. Environment and energy;
3. SMES: policies, networking and basic technical support;
4. Innovation; productivity and quality for international competitiveness;
5. Industrial information, investment and technology promotion;
6. Rural industrial development; and
7. Africa and Least Developed Countries (LDCs): linking industry with agriculture.

\textsuperscript{14} The second staff reduction exercise of early 1996 was carried out mainly for budgetary reasons following the withdrawal of the United States from the Organization.
General who had hitherto headed the five main departments of the Organization. Instead, the Secretariat was reorganized into eight divisions. These divisions were further reduced to six during the second phase of the restructuring in 1996.

The legal implications arising from the Secretariat restructuring, related mainly to the following: (i) the abolition of the posts of Deputy Directors-General and (ii) the staff reduction exercises of 1993 and 1996.

(i) The abolition of the posts of Deputy Directors-General

The Constitution of UNIDO provides in Article 11, para. 1 that “The Secretariat shall comprise a Director-General, as well as such Deputy Directors-General and other staff as the Organization may require.” (emphasis added). The Director-General’s proposal to abolish the five posts of Deputy Directors-General and to appoint Managing Directors (at the D-2 level) to head the new divisions gave rise to two legal issues. The first one which had to be dealt with immediately was whether the Industrial Development Board could abolish the posts of officials with constitutional status. An affirmative answer had to be given to this question on two grounds. First, the wording of Article 11, paragraph 1, (and in particular the phrase “.... as well as such Deputy Directors-General and other staff as the Organization may require”) makes the existence of Deputy Directors-General dependent on the requirements of the Organization. In other words, the Constitution clearly admits a situation in which there would be no Deputy Directors-General. Secondly, the Industrial Development Board itself had decided in 1985, after a lengthy consideration of the matter, that five Deputy Directors-General be appointed. Thus, there was no legal obstacle for the Industrial Development Board to revoke its earlier decision.

It was therefore on these legal grounds that the Industrial Development Board, in its decision Industrial Development Board.11/Dec.40 of 29 October 1993, “(b) decided in the light of the structural reform of UNIDO, to revoke Board decision IDB.1/Dec.11, which no longer met the requirements of the Organization .......”.

The second legal issue related to the procedure for the appointment of the Managing Directors, whose posts now constituted the first management level under the Director-General, following the abolition of the Deputy Directors-General. The view was expressed by
some delegations, both informally and formally, that the procedure for the appointment of Deputy Directors-General should also apply to appointments at the level of Managing Directors. It should be recalled that Article 11, paragraph 5 of the UNIDO Constitution states that "appointments at the level of Deputy Directors-General shall be subject to approval by the Board". It was therefore argued that the appointment of Managing Directors should be similarly submitted to the Industrial Development Board for approval. Thus, in a letter to the Director-General requesting the inclusion of a supplementary item on the "approval of appointments of Managing Directors" in the agenda of the sixteenth session of the Industrial Development Board, the Permanent Representative of Morocco to UNIDO referred to the procedure contemplated in Article 11, paragraph 5 of the Constitution regarding the appointment of Deputy Directors-General, and stated that:

"The Moroccan delegation believes that this procedure also applies to appointments at the level of Managing Director. At the time the Constitution was drafted, the post of Deputy Director-General was the most important in the Organization after that of Director-General. Now that the Deputy Director-General posts have been abolished, the Managing Directors constitute the second highest level of authority in the Organization after the office of Director-General. Furthermore, the functions assigned to the Managing Directors are of such great importance that it is more than desirable that the policy-making organs, and hence the Member States, should have the right of review regarding their appointment".15

In his reply, the Director-General expressed a different view regarding the interpretation of the constitutional provision (Article 11, paragraph 5) which, in his opinion, clearly referred to "one specific level of official, the "Deputy Directors-General", formally designated by that title in the Constitution".16 According to the Director-General, "this designation does not cover any other functional level in the Secretariat of UNIDO; nor can it be interpreted to refer to any other officials of the Organization".17

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15 For the full text of the letter of the Permanent Representative of Morocco to the Director-General of UNIDO, see UNIDO, document IDB.16/25 of 20 October 1996, Annex I, p. 2.
16 Ibid, p .3.
17 Ibid, p. 3.
The Director-General then referred to the negotiation of UNIDO's Constitution, and in particular to the debate as to whether the function of Deputy Director-General should or should not be included in the Constitution, as well as to the background to the decision of the Industrial Development Board of 15 November 1985 to appoint 5 Deputy Directors-General, and concluded as follows:

"In the light of the clear wording of the relevant constitutional provision, as well as its drafting history during the negotiations on the Constitution, I see no legal grounds to maintain that the approval requirement contained in Article 11, paragraph 5, sentence 2, which refers solely to the appointment of Deputy Directors-General applies to the appointment of Managing Directors at the D-2 level."  

Thus, in the view of the Director-General, the appointment of Managing Directors was governed by the same constitutional provisions (Article 11, paragraph 5, sentence 1) that applied to the appointment of staff members in general, and not by the specific provisions established for Deputy Directors-General. This view was later endorsed by the Industrial Development Board which decided not to require that the appointment of Managing Directors be submitted to it for approval, but simply took note of such appointments whenever it was informed about them by the Director-General.

(ii) Staff reduction

The staff reduction was necessitated by the budgetary aspects of the reform process and the overall streamlining of the Organization's activities. Following a budget reduction of ten per cent in 1993 and of twenty five per cent in 1996, the Organization had to reduce its workforce. This had of course to be done in full respect of staff regulations and rules.

The 1993 staff reduction was considered to be of a limited nature. It was therefore carried out through staff redeployments, abolition of posts through attrition and agreed terminations. The Legal Service was not directly involved in designing or managing the process. However, the implementation of the process generated a relatively high number of appeals and complaints to the International Labour

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18 Ibid.
Organization Administrative Tribunal.

To avoid a repetition of the after-effects of the 1993 staff reduction, the advice of the Legal Service was sought from the outset in the design of the 1996 programme. As a result, it was decided to divide the separation programme into two parts: a voluntary phase and a non-voluntary one. It was also decided that the background, procedures, as well as terms and conditions governing the staff reduction programme would be clearly set out in Director-General's Bulletins for each of the two phases in order to ensure transparency and uniformity of application of the rules and criteria established for this purpose. Furthermore, it was established that the staff reduction would be effected through abolition of posts. To this end, managers were made responsible for identifying the programmes or programme elements to be discontinued or scaled down, and the number and location of posts that, as a result, would be abolished.

In the light of overall twenty-five percent budget reduction, and following the determination of the programmes or programme elements to be discontinued, the number of posts to be abolished turned out to be 238, out of which 60 were in the professional category and 178 in General Service.

As a first step in the process, a Director-General's Bulletin on "UNIDO Voluntary Separation Programme" was issued on 20 November 1995. The objective was to avoid non-voluntary separations to the extent possible and to exhaust the possibilities of voluntary measures. Staff were therefore encouraged to take advantage of the voluntary scheme. Staff members aged 54 and above were specifically invited to consider the possibility of early retirement. To encourage staff to opt for agreed termination, a number of incentives were offered, such as an additional termination indemnity of up to 50 per cent in accordance with staff regulation 10.6(b), applicable also to staff with fixed-term contractual status, and a cash payment equal to three months salary and allowances in lieu of termination notice.

The Director-General's Bulletin is an administrative issuance, generally used to publicize new rules, procedures or directives promulgated by the Director-General, as the Chief Administrative Officer of the Organization.

A second Bulletin on "Non-Voluntary Measures" was published on 16 January 1996. The introduction of the non-voluntary measures became necessary, since the voluntary separation programme did not achieve the appropriate reduction of staff. The Bulletin laid down certain principles and criteria for the implementation of the non-voluntary measures. It also established a review process to be carried out by an Ad Hoc Advisory Group, composed of staff and administration nominees. The Advisory Group was given the responsibility of reviewing and recommending, in accordance with the criteria established in the Bulletin, the retention or separation of staff members whose posts were to be abolished as identified by programme managers. As an additional safeguard, an informal recourse procedure was instituted to enable staff members to bring new elements or information to the attention of the Advisory Group before a final recommendation for separation was made to the Director-General.

The design and structuring of the staff reduction programme in 1996, with the advice and guidance of the Legal Service, lead to the establishment of a stable legal framework which greatly facilitated the implementation of the programme and was later used, in 1998, as a basis for shaping new procedures for staff reduction.

3. Changes in Resource Allocation and Mobilization

The Constitution of UNIDO divides the expenditures of the Organization into two categories: (a) expenditures to be met from assessed contributions (referred to as the "regular budget"), and (b) expenditures to be met from voluntary contributions to the Organization and such other income as may be provided for in the financial regulations (referred to as the "operational budget").

Expenditures for administration, research and other regular expenses of the Organization are to be financed from the regular

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22 See Article 13 of the UNIDO Constitution.
23 The expression "other regular expenses of the Organization" is defined in Annex II to the Constitution and includes: (a) interregional and regional advisers; (b) short-term advisory services provided by the staff of the Organization; (c) meetings, including technical meetings, provided for in the programme of work financed from the regular budget; and, (d) programme support costs arising from technical assistance projects to the extent that these costs are not reimbursed to the Organization by the source of
budget, while the operational budget is meant to provide for expenditures for technical cooperation and other related activities. In order to improve the effectiveness of the Organization's programme of work in the field of industrial development, Annex II to the Constitution also provides for the utilization of six per cent of the regular budget for technical cooperation expenditures.

Thus, UNIDO's technical cooperation projects were traditionally financed through a combination of voluntary and assessed contributions, as well as through financing by the United Nations Development Programme (UNDP). However, the UNDP constituted up to 1993 the main source of financing for UNIDO technical cooperation projects, accounting for about sixty per cent of such funding. Consequently, the massive reductions in UNDP funds in the early 90's and the introduction of national execution by the UNDP led to a substantial reduction of UNIDO funds for technical cooperation projects.

Faced with these difficulties, the UNIDO Secretariat had to develop creative methods for mobilizing funds from new sources for its technical cooperation activities. At the same time, the Organization had to overcome a chronic situation of late-payment or non-payment of assessed contributions by a number of Member States. This problem was later compounded by the withdrawal of the United States of America from the Organization at the end of 1996.

The strategies devised by the Secretariat as well as by the Member States to deal with these problems were not of course devoid of legal implications. Some of the legal issues raised by these strategies and the manner in which they were addressed are discussed below.

(i) Fund-raising and revenue-generating activities

Articles 16 and 17 of the UNIDO Constitution deal with voluntary contributions to the Organization. Article 16 defines the conditions under which the Director-General may accept such contributions, while Article 17 provides for the establishment and administration of an Industrial Development Fund (IDF) financed through voluntary contributions to the Organization.
The main constitutional requirements for accepting voluntary contributions is that "the conditions attached to such voluntary contributions are consistent with the objectives and policies of the Organization" and that they can be administered in accordance with the financial regulations of UNIDO. These requirements can be easily met with regard to freely programmable funds, such as the general purpose segment of the IDF. However, this segment constitutes only a small portion of the total funds made available to the Organization through the IDF. Indeed, the most significant component of the IDF consists of special purpose contributions pledged for projects selected by donors.

As part of its fund-raising drive, the UNIDO Secretariat had also established trust funds in favour of specific projects, as well as self-financed trust funds specifically devised for public and private enterprises willing to pay for UNIDO's services. It was, therefore, with respect to these categories of funds that the issue of consistency with the constitutional requirements for voluntary contributions was most often raised due to the conditions usually attached to them by donors.

To ensure compliance with the provisions of the UNIDO Constitution and its financial regulations, while encouraging fund-raising for technical cooperation projects, two types of legal instruments were elaborated by the Legal Service: (a) model agreements to be concluded with the donor of funds, setting out the responsibilities and obligations of the parties; and (b) guidelines on voluntary contributions specifying certain principles and criteria on the basis of which a "consistency test" could be applied to such contributions. Despite the existence of these detailed legal instruments, special agreements often had to be negotiated and concluded with donors mostly as a matter of form or legal expediency required by the donor, but sometimes also as an attempt to bridge real substantive differences between the donor and the UNIDO Secretariat.

As regards income-generating activities, the Legal Service was called on several occasions to give a legal opinion on UNIDO's participation in international competitive bidding and in selection processes for the provision of consultancy services. The provision of consultancy services by UNIDO on a single source basis, within the framework of a development project, had never given rise to insurmountable legal problems. By contrast, UNIDO's participation in a selection process for consultancy services often necessitated the negotiation of specific adjustments to the model contract in order to safeguard UNIDO's status as an intergovernmental organization, as well
as its administrative regulations and rules, and to ensure that the necessary facilities and privileges could be obtained from the recipient government. Thus, agreements and contracts had to be designed on a case-by-case basis taking into account the specific terms of reference of the selection process.

The issue of charging fees for specific services provided by UNIDO, and its legal implications, was also analyzed on several occasions by the Legal Service, but the only type of service for which specific agreements had to be formulated was in the area of software licensing. In this context, both licensing and distributorship agreements had to be elaborated and negotiated with interested private and public enterprises, mostly in developing countries.

(ii) Late payment or non-payment of assessed contributions

The partial, delayed or non-payment of assessed contributions by some Member States has, on several occasions, placed the Organization in a very serious and unprecedented cash crisis. It also posed a particular challenge to the implementation of the reform process, since it rendered difficult, if not impossible, the proper planning of resource allocations to new priorities and programmes of the Organization.

The only sanction provided for in the UNIDO Constitution for late payment or non-payment of arrears by Member States is the loss of voting rights, and this would apply only "if the amount of [its] arrears equals or exceeds the amount of the assessed contributions due from [it] for the preceding two fiscal years."

The fact that voting was rarely if ever resorted to in the decision-making processes of UNIDO, where most intergovernmental decisions are adopted by consensus, rendered this provision ineffective. Thus, a number of strategies were considered, both within the Secretariat, and at the intergovernmental level, to improve the collection of assessed contributions and to ensure their timely payment.

They included incentive and disincentive schemes, settlement of arrears through a payment plan, and payment of arrears in local currency. It was, however, the options considered under the disincentive scheme that gave rise to a number of legal issues on which the Legal Service was invited to comment. These included the charging
of interest on arrears, suspension of recruitment of nationals of Member States in arrears, suspension of procurement from countries in arrears, and the suspension of the provision of technical cooperation services to countries that lost their voting rights.

However, after consideration by an intergovernmental group of the policy and legal implications of these options, some of them were eventually discarded, while others, such as the settlement of arrears through payment plans and the payment in local currencies, were retained for further consideration and action by the policy-making organs of UNIDO.

III. Business Plan on the Future Role and Functions of UNIDO

Following the withdrawal of the United States from UNIDO in December 1996 and the threatened withdrawals by the United Kingdom and Germany, which were later revoked, the Member States of the Organization decided to convene a special session of the Industrial Development Board to discuss the future of UNIDO. The main objective of the meeting was to try to work out an agreement, to which all Member States could subscribe, on the future role and functions of UNIDO.

After having discussed a proposal submitted by the Director-General, as well as a number of documents containing the views of individual Member States and Regional Groups, the special session of the Industrial Development Board was able to agree on a single text containing “Common Grounds on the Future of UNIDO”. This text was used later, at the seventeenth session of the Industrial Development Board, as a basis for the formulation of a “Business Plan on the Role and Functions of UNIDO”.

Although most of the elements contained in the “Common Grounds” paper were later included in the “Business Plan”, it was only in the former document that a clear justification was provided for

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pursuing the reform process of UNIDO. Paragraph 2 of the paper expressed it as follows:

"The process of meaningful reform of UNIDO should continue for the Organization to adapt its function, orientation and priorities to the new realities of the changing global economic environment, and, ultimately, to remain viable and efficient. It is important to reaffirm the necessity to pursue that reform process with a long-term vision that will make it possible to adapt the Organization’s mandate, structure and financial capacity."  

Thus, it might be stated that the purpose of the “Business Plan” was to ensure the continuation of the reform process and to provide a long-term vision on the role and functions of the Organization.

1. The Main Elements of the Business Plan

In pursuance of the above-mentioned objectives, the Business Plan defines the future role and functions of UNIDO, outlines the main activities on which the Organization should concentrate, establishes guidelines on financing and budget and provides for a new organizational structure.

UNIDO is to “concentrate on those support activities in which the Organization has a comparative advantage over other multilateral development organizations and bilateral assistance”. This means that the Organization does not necessarily have to carry out all those functions assigned to it in the Constitution, but will have to focus primarily on those support functions in which there was a higher demand for its expertise. Moreover, the activities of the Organization would henceforth be directed to support institutions rather than individual enterprises, in order to avoid spreading too thin its limited resources. Similarly, to maximize the potential impact of such resources, the Organization’s support is to be provided in “comprehensive packages of integrated services” based on interdisciplinary team-building.

Regarding the overall activities of the Organization, the

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26 See Report Seventh IDB Special Session, op. cit., p. 4.
27 See Report Seventeenth Session IDB, op. cit., p. 3.
Business Plan states that such activities shall be regrouped into two clusters: (a) strengthening of industrial capacities, and (b) promoting cleaner and sustainable industrial development. The format and presentation of the programme and budgets of the Organization would be revised to reflect these two main areas of activities. The biennium budgets for 1998-1999 would also be reduced by 10 to 20 per cent as compared to the preceding biennium, to better reflect the discontinuation of certain activities and the changes in membership of the Organization.

The Business Plan also stipulates that the future administrative structure of the Organization is to be based on the two clusters of activities, complemented by a third component comprising functions related to administration, operational support and coordination of field representation. In other words, the six main divisions of the Secretariat would have to be reduced to three.

2. Legal Implications and Role of the Legal Adviser

The Business Plan was negotiated and agreed among the Member States of UNIDO. It therefore reflects their common consent to deepen and broaden the reform of UNIDO and in particular the adaptation of its functions to the new international economic environment. Taken together with the reforms implemented under the Yaoundé Declaration, the Business Plan may be viewed as a source of subsequent practice by the parties to the UNIDO Constitution which gives explicit direction to the interpretation and application of the constitutional provisions relating to the role and functions of the Organization.

The text of the Business Plan itself, after having laid down the future role of UNIDO, explicitly states as follows:

"While sharpening its focus in accordance with the above direction, UNIDO should continue to pursue the implementation of its mandate to support and promote the sustainable industrial development of developing countries and countries with economies in transition. Preserving the universal character of the Organization, UNIDO will give special emphasis to least developed countries, in particular in Africa."\(^{28}\)

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\(^{28}\) See "Business Plan" in Report Seventeenth Session IDB, op. cit., p. 3.
The wording of this paragraph testifies to the utmost care taken by the Member States, in drafting the Business Plan, to avoid the impression that the original mandate of the Organization was being radically modified. The objective was rather to update this mandate, in view of the changes in the international environment, by imparting a new direction to its actual implementation. The will of the Member States to update and adjust the functions of the Organization is evidenced by the repeated references in the Business Plan to “sustainable industrial development” and “countries with economies in transition”, expressions which are not to be found in the Constitution of UNIDO, but which clearly reflect the realities of contemporary international economic cooperation.

Throughout the negotiation of the Business Plan, and its subsequent implementation by the Secretariat, the Legal Adviser was closely consulted and requested to provide legal opinions, either formally or more often informally, on the legal implications and possible impact of the text on UNIDO’s Constitution, as well as its regulations and rules. The importance of the legal, institutional and policy issues involved in the adoption of the Business Plan was fully appreciated by all parties. In particular, during the debate at the seventh special session of the Industrial Development Board on the future of UNIDO, many complex legal and policy issues relating to the status, mandate and role of the Organization and its organs had to be addressed, and thoroughly considered. On several occasions, the respective roles and responsibilities under the Constitution of the Secretariat, led by the Director-General, and of the policy-making organs (the General Conference and the Industrial Development Board), composed of Member States, had to be discussed. Nevertheless, as reflected in the final text of the Business Plan, it was possible to identify pragmatic solutions and to avoid approaches that would have either necessitated constitutional amendments or could have given rise to situations that would create conflicts with the provisions of the Constitution and the regulatory framework of UNIDO.

IV. Conclusions

The reform and restructuring of an international organization is a complex process with legal, political and administrative implications. In the present paper I have only highlighted some of the legal implications of the UNIDO reform process and the role that the legal adviser was called upon to play in dealing with those implications.
The reform and restructuring of UNIDO during the past four years may have been unique in many respects, in view of the special circumstances and profound changes in the external environment to which the Organization had to adjust, not only in terms of its operations and functioning, but also in terms of its role and mandate. Nonetheless, many of the legal issues arising from UNIDO’s reform and restructuring, as discussed in this paper, are likely to be faced by any intergovernmental organization undertaking significant reforms or restructuring without resorting to formal amendments of its constituent instruments.

In such circumstances, the manner in which the legal instruments governing the Organization are interpreted and applied can be of pivotal importance to the reform process. Equally significant is, of course, the clear identification of the legal implications of the various aspects of the reform. Should such implications not be clearly understood, or widely shared by all those involved in the process, the viability of certain reform measures may be jeopardized.

The experience in UNIDO shows also the importance of subsequent practice based on the common consent of all parties to a multilateral treaty in the absence of a formal amendment to the treaty. It is through such practice that the re-orientation and refocusing of UNIDO’s basic objectives have been brought about. It is also through such practice that the functions of the Organization have been updated to better reflect the realities of a new international economic environment.

The reform and restructuring of UNIDO has also resulted in the progressive development of the internal law of the Organization and its application to new areas of activity. The legal instruments governing the activities of the Organization had to be progressively adapted, inter alia, to its new relations with the private sector (both as a donor and as a beneficiary of UNIDO services), its new methods of fund-raising and revenue generation, its participation in selection processes for consultancy services, and the licensing of its software products. They also had to be applied in a flexible and creative manner to various aspects of the reform such as the restructuring of the Secretariat, the reduction of staff, the decentralization of functions and delegation of authority to the field, the introduction of new methods of programme
formulation and implementation, and new procedures for financial management.

The role of the legal adviser is to facilitate the process of progressive development and innovative application of the internal law of the Organization. In many instances, creative solutions have to be identified to deal with new problems and new legal and policy instruments have to be developed. The guidance and advice of the legal adviser is also of crucial importance in the elaboration of the conceptual framework for the reform process, whether or not amendments to the constituent instruments are contemplated. In this context, the borderline between policy and legal issues gets often blurred, but it is for the legal adviser to clarify such issues and to identify the legal implications of the policy decisions that are being adopted.
V

THE ROLE OF THE LEGAL ADVISER OR PRACTITIONER IN LITIGATION BEFORE NATIONAL COURTS INVOLVING QUESTIONS OF INTERNATIONAL LAW

LE RÔLE DU CONSEILLER JURIDIQUE OU DU PRATICIEN DANS LE CONTENTIEUX DEVANT LES COURS NATIONALES SOULEVANT DES QUESTIONS DE DROIT INTERNATIONAL
The role of the legal adviser in litigation before national courts involving international law will, to some extent, depend on characteristics peculiar to various national legal systems. However, some of the issues and challenges are common to all national systems. This essay draws on the Australian experience, but also seeks to address the broader issues.

The other essays of this volume confirm the offshore focus of the role of the legal adviser. The legal adviser is primarily involved in matters of multilateral and bilateral engagement involving more the development of international law rather than its implementation and application in national courts. However, the legal adviser may also become engaged in the processes of the domestic legal systems, and may be called upon to act as a bridge between international legal regimes and the national courts. One of the key areas where legal advisers may be required to play a role is in presenting and explaining international law and principles in national courts. In doing so there are inherent tensions between the role of a legal adviser as the advocate for a Government (which may be a litigant in a controversy) and his or her function to explain and establish the relevant principles of international law to the court in question.

The circumstance which makes the role of the legal adviser before national courts somewhat different from their offshore-focused role is the nature of the body before which argument is being presented. A national court is not generally composed of persons with much, or even any, international experience.

By way of a case study in a particular national experience, this essay will consider a number of issues, which have confronted the role of the legal adviser in recent Australian litigation.

* Former Solicitor General of Australia and Acting Solicitor General of Australia respectively. The authors appreciate the contribution to this article made by Ms. Kate Eastman, Barrister, Sydney.
I. Background

Some of the challenges faced by a legal adviser in dealing with international law before national courts are reflected in what Judge Higgins has referred to as "the reality of legal culture" by which she means that while for some judges and counsel international law will be treated as a familiar topic, others have little knowledge or familiarity with international law. The latter group may either be "contemptuous of everything to do with international law, which they doggedly regard as 'unreal' " or "greatly impressed by international law but, feeling insufficiently familiar with it seek to avoid at all costs making determinations upon it".¹

This cultural issue, both individual and systemic, also presents the legal adviser with a challenge in ensuring international law is properly presented before national courts.

The importance of national courts in the development of international law has now reached a position of unusual recognition. As Sir Robert Jennings has said, the areas in which international law rules require to be known and applied by national courts today are "legion", including:

- Human rights;
- Environment and conservation of resources;
- Air law;
- Space law;
- Maritime law;
- Taxation and foreign investment;
- Governmental and non-governmental organizations.²

Hence, at the cusp of the millennium the legal adviser may expect nowadays to be called upon to be involved in the provision of argument to the national courts on a great variety of international law rules.

II. The Australian Context

Before turning to the Australian experience, it is necessary first to say a little about its legal system. Australia is a federal State and treaty making is within the exclusive power of the Federal Government. The negotiation and ratification of treaties are executive acts which historically were undertaken without any reference to Parliament. Very occasionally the courts may be asked to consider the exercise of powers by the Executive in relation to treaties. However, the power of the Executive to enter into a treaty and thus bind Australia is never examined (except possibly in the case of a sham). One of the few cases where the effect of the conclusion of a treaty arose involved a High Court decision considering the effect of executive action of the Minister of Foreign Affairs, through a certificate, in recognizing the People's Republic of China’s responsibility for the international relations concerning the Hong Kong Special Administrative Region.\(^3\) The matter concerned a request for extradition made after Hong Kong was returned to China. The Court said that the issue which it had to determine was the identity of “Hong Kong” for the purposes of extradition legislation, which depended in turn upon its status in international law, and the validity of the warrant seeking Tse Chu-Fai’s extradition from Australia to Hong Kong. The warrant was issued in Hong Kong in March 1997 before the handover and the request to extradite was made on 14 July 1997 after the handover.

The Court examined the status of Hong Kong, the negotiation of new agreements and the exchange of notes between China and Australia. It then considered the respective roles of the Executive and the Judiciary in the operation of extradition laws in Australia. The Court said that it would not accept a Ministerial certificate that would compel an interpretation of statutory words which the Court believed to be false. At the same time, the Court acknowledged that in the conduct of foreign affairs, “the communication of information by the Executive may be both helpful and relevant” and accepted that the certificate in this case confirmed Australia’s diplomatic position in relation to Hong Kong and China.

The impact of recent judicial decisions and Australia’s accession to the Optional Protocol to the International Covenant on

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Civil and Political Rights has resulted in a closer interest in treaty making and a new role for the Parliament. The establishment in Australia of comprehensive procedures has enhanced the involvement of the Parliament, Australian states and territories and the wider community in the treaty-making process.

Australia has a dualist system where international law is not directly incorporated into national law. Of course, “few contemporary national legal systems can be classified as purely monist or dualist”, which is true in Australia’s case. In Australia’s common law system, treaties are not supreme law and depend on domestic law for their implementation if they are to affect rights and obligations in domestic law.

However, international law has always been, in one sense or another, a source of Australian domestic law. In Australia, one of the enumerated powers of the Federal Parliament is to make laws with respect to “external affairs”. Hence international law has been used by the Federal Government as the basis for the enactment of laws which give effect to international instruments. Principles of international law have also been used by the courts to guide them in interpreting statutes and developing the common law.

As for other common law systems, which are principally adversarial in nature, international law is not proved in Australia by expert evidence, as in the case of foreign law. Rather, international law is a matter of which a court takes judicial notice.

The Australian courts accept that the recognized sources of international law are as set out in Article 38 of the Statute of the International Court of Justice. The courts look for evidence of a clearly established international law rule. They will not assume the role of an international court or tribunal in deciding what the international law

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5 The procedures now require a treaty to be tabled in Parliament along with a National Interest Analysis before action is taken by the Executive which would lead to the treaty becoming binding on Australia.
rule is if there is little material to support the proposition.

Proof of customary international law or the other sources of law contained in Article 38, paragraph 1, of the Statute of the International Court of Justice presents greater difficulties in the domestic court. The legal adviser plays a critical role in assisting a court in this regard. If rights or obligations depend on the existence of an international law rule, the national courts are reluctant to find such a rule where the evidence is indeterminate. As a result, Australian courts rarely rely on customary international law in their decisions. The few cases where customary international law was in issue will be discussed in this paper.

Accepting that international law has no direct effect in Australian law, what use may be made of international law? Australian courts are rarely called upon to adjudicate on what might be described as an entirely international legal issue, even though the Australian Constitution vests in the High Court of Australia jurisdiction to determine any matter arising under a treaty.\(^8\)

International law is increasingly used in Australian courts. It has had the most impact in the following areas:

- Statutory interpretation;
- Development of the common law;
- Administrative law and decision making;
- Constitutional interpretation and implications.

This essay will briefly address each of these areas. With all these areas, one of the important tasks of a legal adviser is assembling and presenting appropriate international materials to establish the applicable international law. The presentation of material requires more than the mere assembly of the relevant instruments or evidence of State practice. Often the relevant rule or correct interpretation of a treaty will not be obvious or able easily to be established by relevant materials.

III. Statutory Interpretation

International human rights instruments may be used as an aid

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\(^8\) Section 75(i) of the Australian Constitution.
to the construction of Australian enactments in several ways.  

First, where an Australian statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the Court has said that the prima facie legislative intention is that the transposed text should bear the same meaning in an Australian statute as it has in the treaty. Generally, if an Australian enactment incorporates a provision of an international instrument, that instrument may either be expressly included in the enactment or scheduled or annexed to the relevant statute or regulation.

In Applicant A v. Minister for Immigration and Ethnic Affairs the High Court examined the application of the Convention relating to the Status of Refugees and the term "refugee" to Chinese nationals who sought asylum on the grounds that they would be persecuted if returned to China because they would be forcibly sterilized. The Court held that the terms used in the Migration Act 1958 (Commonwealth (Cth)) derived from the Refugee Convention should be interpreted to give effect to their meaning in international law.

Consistent with this approach, Australian courts will interpret the treaty provision in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969. The High Court of Australia has said that article 31 of the Vienna Convention requires a holistic approach to the interpretation of a treaty which, while giving primacy to the written text, requires a consideration of the context, object and purpose of the treaty.

There is also judicial recognition of the obvious fact that treaties often lack the precision of domestic legislation and cannot be applied with taut, logical precision.

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In Australia, the position of national courts in these cases, as in many other areas, is not helped by the absence of any definitive international body or court making rulings on the same questions of interpretation. The decisions of the International Court of Justice are given particular weight by the Australian High Court, but the Court does look to a wide range of other international tribunals for guidance. In industrial and employment matters, the Court has referred to the decisions and reports of the International Labour Organisation (ILO) and in human rights matters to the decisions of the Human Rights Committee established under article 40 of the International Covenant on Civil and Political Rights and the European Court of Human Rights, and even the Iran-United States Claims Tribunal on the issue of dual citizenship.

Where the treaty obligation is clear, the issue may be what effect the treaty provision was intended to be given by the statutory provisions. This was the issue that the High Court had to resolve in a case concerning Australian content standards for television programmes. The legislation specifically required the Broadcasting Authority to act consistently with Australia’s treaty obligations. The Closer Economic Relations-Trade Agreement between Australia and New Zealand required national treatment in access to services in one country by nationals of the other. The Court said that the content standard could not therefore discriminate against New Zealand-produced programmes as this would be inconsistent with the treaty obligation.

Where the relevant international law is not so clear, the ability to convince an Australian court that a particular interpretation should be given to a treaty provision is often assisted by reference to decisions of

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courts in other jurisdictions. This is particularly so in some areas like liability for aviation accidents under the Warsaw Convention, the Hague Rules on Carriage of Goods by Sea, the Hague Convention on the Civil Aspects of International Child Abduction or issues of sovereign immunity. Indeed courts are often more comfortable relying on such decisions than on international materials. However, this does not always lead the national court to give the treaty the interpretation that a greater reliance on international materials might suggest.

Some of the difficulties faced by a national court in dealing with an issue of treaty interpretation are illustrated by a case concerning the Hague Convention on the Civil Aspects of Child Abduction. *De L v. Director General, NSW Department of Community Services.* In issue was the interpretation of article 13 of the Convention, which provided a ground on which not to return an abducted child if the court “finds that the child objects to being returned”. The issue was whether by reference to the broad purpose and policy of the Convention a strict and narrow reading should be given to the expression “object to being returned” so as to require a strong aversion or whether the expression should be given its ordinary literal sense.

While the Court did not expressly consider articles 31 and 32 of the Vienna Convention, it was presented with conflicting authority in decisions of other national courts. A narrow reading was supported by decisions in Argentina, the United States, Switzerland and Israel and by documents produced by The Hague Conference Permanent Bureau and the Explanatory Report prepared during the negotiation of the Convention. A literal reading was supported by decisions of courts in Canada, England, Scotland and New Zealand. Six judges preferred this view. Only Justice Kirby preferred the narrower view, giving greater weight to the context, the background treaty material and a comparison with the French text.

As with the interpretation of any document, this case highlights the inevitable differences in approach that can occur in the interpretation

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of treaty provisions. The willingness of the Court to consider judicial decisions from a range of different countries is, however, an example of the internationalization of increasing areas of national law and of the inevitable involvement of national courts in this process.

One area of law that highlights the difficulties of establishing the relevant international law position before domestic courts is the application of the Refugees Convention and Protocol. One case involving an Australian court in the analysis of international refugee materials concerned the situation of East Timorese dual nationals having both Indonesian and Portuguese nationality. The argument was made before the Australian Federal Court that Portuguese nationality was not effective and should not be recognized by an Australian Court given Australia's recognition of Indonesian sovereignty over East Timor. The Court's attention was drawn to a variety of academic writings and opinions on the issue. It concluded that the applicant was a national of both Indonesia and Portugal. It found a fear of persecution in Indonesia. The Court decided that if Portuguese nationality was in fact effective Australia owed no protection obligation. The Court concluded that the term "nationality" in article 1A(2) of the Refugees Convention referred to nationality that is effective as a source of protection and not nationality that is merely formal.

In reaching its conclusions, the Court relied heavily on extracts from textbooks provided to it by the parties, including the Government's legal advisers. This included extracts from general international law texts, such as Brownlie and Oppenheim, as well as specialist works relating to nationality.

In areas where the existence of human rights treaties or the Refugees Convention plays a prominent role in the disposition of domestic law cases, the government legal adviser is again called upon to put to the court a clear statement of the Australian Government's

view of its international obligations. Hence the role of the legal adviser may vary. In some instances, the Government will be a party in the proceedings and the legal adviser may be directly involved as counsel in the litigation. In other cases, where the Government is not a party, the legal adviser on behalf of the Federal Government may intervene, at the appellate level, to assist the court in dealing with international legal issues. Nonetheless, the fact that the Government’s views are put forward does not ensure that the Australian courts necessarily will feel bound to adopt any official view of the relevant international law expressed by the legal adviser on the Government’s behalf.

The second area in interpreting statutory provisions where international law has been used is where a statute does not specifically incorporate or refer to an international instrument. The courts have indicated that there is a rebuttable presumption that the Parliament intended to legislate in accordance with international obligations. In this respect, it is accepted that statutes should be interpreted and applied as far as their language admits consistently with the provisions of an international instrument.

The third relevant area is that international instruments may be used where the statute or regulations are ambiguous or unclear. International law may also be resorted to in order to fill lacunae in such legislation.

The Full Bench of the Family Court in its decision of B v. B relied on human rights instruments to construe recent amendments to the Family Law Act 1975 (Cth). The Court addressed the meaning of the “best interests” of the child in relation to parenting orders under that act. The proceedings raised a number of competing interests and rights: the rights of two young children to have contact with both parents, the

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33 See Young v. Registrar, Court of Appeal [No. 31 (1993) 32 NSWLR 262 at 274 and the New Zealand Court of Appeal decision of Tavita v. Minister for Immigration (1994) NZLR 97.

responsibility and interests of a father to be involved in his children's upbringing and the rights of the mother to travel and choose her residence. The Court devoted part of the judgment to considering the relevance and any assistance of international human rights instruments noting:

"The status of international treaties and conventions and the way in which they operate in relation to family law has been the subject of increasing attention."

In that case, the Commonwealth Attorney General himself intervened in the proceedings to argue that the Family Law Reform Act could be interpreted without regard to the Convention on the Rights of the Child (CROC). The Court considered the CROC and its predecessors - the United Nations Declaration of the Rights of the Child of 1959 and the Declaration of Geneva adopted by the League of Nations in 1924. The Court also referred to the Australian Government's report under the CROC and concluded that, against such a backdrop, the CROC was a relevant matter to which the Court could have regard.

In addition to these recognized interpretative principles, an area which is likely to be of increasing importance is where an Australian statute refers to provisions of an international human rights instrument as a relevant matter for a court to take into account in exercising a statutory discretion. This requires the courts to do more than merely interpret the words of the statute. The courts will have to consider the content and nature of any relevant human right and how the application of a statutory provision may impact upon the rights of the person affected.

IV. Common Law

The courts are prepared to have regard to international law in determining the nature and operation of the common law.  

35 General Assembly resolution 44/25.
36 General Assembly resolution 1386 (XIV).
International law has impacted upon Australian common law most significantly in the area of human rights. Australia has no bill of rights or constitutional charter of rights, so the protection of human rights is often left to the common law. The courts in identifying and shaping rights in the common law have used international human rights. In the recent decision of *R v. Swafffield; Pavic v. The Queen*, Justice Kirby said:

"To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights, the common law in Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence."  

In this respect, the Australian High Court has acknowledged that international instruments provide a legitimate and important influence upon the common law. The influence of international law comes about because of the closer relationship between international legal developments and domestic jurisdiction. National courts have to be outward looking and also accept that their decisions may attract international attention. In *Mabo v. Queensland (No.2)* Justice Brennan said:

"The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports."  

As in the field of statutory interpretation, one of the main areas where international law has been used in the common law is as a device to determine the scope of a rule where the common law is unclear.
Some judges refer to the Bangalore Principles developed in 1988 by a group of lawyers and judges from common law jurisdictions within the Commonwealth, where international instruments may be used by a court as a guide to ascertaining the law.

In Dietrich v. R, the High Court considered the position of a person charged with a serious crime who can not afford counsel and the question whether such a person has the right to be provided with counsel at public expense. The appellant in that case argued that he did not receive a fair trial in breach of a fundamental right. Some members of the Court referred to relevant provisions of international human rights instruments where the right to fair trial had been broadly defined and accepted that the right, as it existed in Australian law, accorded with these international principles.

V. Administrative Law

One of the significant developments in the relationship between international law and domestic law has been the Australian High Court’s decision in Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh. The proceedings involved the proposed deportation of a person convicted of drug offences, Teoh. He challenged a decision to deport him on the ground that the decision maker failed to take into account the impact of the decision on his family and, in particular, whether the decision was in the best interests of the children, by reference to article 3 of the Convention on the Rights of the Child (CROC).

The Court held that Australia’s ratification of the CROC gave rise to a “legitimate expectation” that the Minister for Immigration would act in accordance with its terms in any decisions which affect the interests of a child. (The effect of such an expectation is, broadly, that the person having the expectation is entitled to be informed of a proposed decision contrary to it and given a hearing.) In doing so, the Court indicated that:

"[R]atification of a convention is not to be dismissed as a merely platitudinous or ineffectual act ... rather

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43 Dietrich v. The Queen (1992) 177 CLR 292 at 360.
44 Ibid. 392-393.
ratification of a convention is a positive statement by
the executive government of this country to the world
and the Australian people that the executive will act
in accordance with the Convention.”46

The effect of this decision is that administrative decisions may
be impugned if the decision maker fails to have due regard to the
relevant provisions of an international instrument, which, while not part
of the law of Australia, does create “procedural rights” for citizens vis-
à-vis the Government.

One of the judges, Justice McHugh, delivered a strong
dissenting judgement in the case, stressing the practical consequences
of ratifying an international convention if it was to give rise to a
legitimate expectation that the convention would be applied in Australia.
He said:

“It would follow that the convention would apply to
every decision made by a federal official unless the
official stated that he or she would not comply with
the convention. ... The consequences for
administrative decision-making in this country would
be enormous. Junior counsel for the Minister
informed the Court that Australia is a party to about
900 treaties. Only a small percentage of them have
been enacted into law. Administrative
decision-makers would have to ensure that their
decision-making complied with every relevant
convention or inform a person affected that they
would not be complying with those conventions.”47

Justice McHugh did not think that it was reasonable to expect
public officials to comply with the terms of conventions which did not
have the force of law. He highlighted the nature of the obligations
undertaken and considered that it may make it impracticable to
implement the terms of a convention, particularly where the convention
in issue is a convention in relation to which one may regard its
provisions as goals to be implemented over a period of time rather than
mandates calling for immediate compliance. At the least he said it might

46 Ibid. 291.
47 Ibid. 316.
require many years of effort, education and expenditure of resources.48

The Government reacted to the decision by issuing a joint statement by the Attorney-General and the Minister for Foreign Affairs attempting to restore the pre-Teoh decision, by stating that the Government's entry into a convention gave rise to no legitimate expectation, followed by an announcement of proposed legislation to reverse the effect of the decision.49

The Teoh decision brings the role of the legal adviser as the bridge between the international and domestic legal regimes into sharp focus, as it will be the legal adviser who is often best placed to explain the domestic ramifications of entering into international conventions and the nature and extent of the international obligations for domestic law and decision making. The decision also brought into question the way in which Australia enters into treaties and has resulted in increased Parliamentary scrutiny over the process.50

Both Australian legal advisers and administrative decision-makers are still coming to terms with the consequences of the Teoh decision.

VI. Constitutional Interpretation and Implications

The relationship between international law and the Australian Constitution is an uneasy one. Traditionally, international law has not impacted or influenced Australian constitutional law. However, in the absence of a bill of rights or constitutional protection of rights, international human rights laws is increasingly used in interpreting the Constitution, determining the balance of powers between the Federal Government and the states51 and developing implied rights.52

48 Ibid. 317.
49 The bill lapsed when elections were called. A further bill to the same effect remains before the Federal Parliament.
Justice Kirby has said:

"Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights."\(^5\)

He stated that the Constitution “should not be interpreted so as to condone an unnecessary withdrawal of the protection of [fundamental and universal] rights. At least it should not be so interpreted unless the text is intractable and the deprivation of such rights is completely clear.”

In *Kartinyeri v. Commonwealth*\(^24\) it was argued that international human rights principles should be taken into account by the Court in determining the validity of a Federal Law. It was also argued that the Court might have regard to international legal developments in determining the meaning to be given to a constitutional grant of legislative power.

In that case, the Court was asked to determine the application and scope of a power in the Australian Constitution to make laws with respect to “the people of any race”. The issue was whether this power could support the making of racially discriminatory laws and laws which would, if so, be in conflict with Australia’s international obligations. Two of the judges, Justices Hayne and Gummow, referred to earlier decisions of the Court and said that, unlike statutes and the common law, the Constitution stands in a special position and does not cede to international law. This may mean that Australian law could be enacted in conflict with international law.

In the same case, Justice Kirby was again in dissent. He considered that the Australian Constitution not only spoke to the people of Australia but also “speaks to the international community as the basic law of the Australian nation which is a member of that community”. In his view, it was appropriate to have regard to international

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developments prohibiting discrimination on the grounds of race and he
scrutinized the relevant power in the Australian Constitution to
determine whether it could support racially discriminatory laws. He said
it could not.55

VII. The Relationship between Customary International
Law and Australian Law

Reference to and use of customary international law in
Australian courts is meagre compared to the use of treaties. There are
only a few references to customary international law in Commonwealth
enactments and there has been no judicial pronouncement as to the place
of customary international law in the common law of Australia.
Australia has neither expressly followed nor rejected the approach
adopted by the English courts, namely that customary international law
automatically forms part of the common law.56

In practice, the courts have not been receptive to arguments
about customary international human rights law. This may be because
customary international law is often difficult to identify and prove,
particularly where the rules of customary international law are not
codified.

In the Family Court in the matter of Re Jane57 the Human
Rights and Equal Opportunity Commission intervened in the
proceedings to argue that norms of customary international law were
also applicable to the rights provided for in international treaties. Chief
Justice Nicholson summarized the Commission's submissions:

"... that Australian courts will treat customary
international law as incorporated into the domestic

55 Ibid. 599.
1 QB 529, J. H. Rayner Ltd v. International Department of Trade [1990] 2 AC 418 at
513, Wright v. Cantrell (1943) 12 ILR 133, Polites v. Commonwealth (1945) 70 CLR 60;
and commentary in I. Shearer, "The Implications of Non-Treaty Law Making: Customary
International Law and its Implications" in P. Altson and M. Chiam, Treaty Making and
Shearer, "The Relationship Between International and Domestic Law" B. Opeskin and
D. Rothwell, International Law and Australian Federalism (Melbourne, Melbourne
University Press, 1997).
law of Australia so far as it is not inconsistent with any applicable statute law or with any binding precedent. ... The Commission further submits that in order to ascertain the nature of customary international law, the courts will have regard to international treaties and conventions, authoritative texts, the Charter of the United Nations, declarations of the General Assembly and other international developments which show that a particular subject has become a legal subject of international concern."

He rejected the submission and said, "I am extremely doubtful as to whether these propositions represent the law in Australia."

An Australian case that illustrates some of the difficulties associated with proof of customary international law was the Industrial Relations Act case in 1996. The Australian Parliament had enacted provisions which sought to implement a right to strike and to engage in industrial action. Immunity from civil liability was provided in certain situations. The provisions provided for a limited right to strike and a limited right to lock out workers during negotiation of a certified industrial agreement. The strike or lock-out was a "protected action" if it occurred during a "bargaining period" and complied with certain procedural requirements. If these requirements were met, then the action was protected from civil liabilities under any law, written or unwritten, of a state or territory so long as it did not involve personal injury, wilful or reckless destruction of or damage to property, or the unlawful taking, keeping or use of property. The immunity did not apply to an action for defamation.

The purpose of these provisions was stated to be to give effect in particular situations to "Australia's international obligation to provide for a right to strike". The validity of the legislation effectively depended on making good this statement.

This obligation was stated to arise from a number of international law sources including:

(a) Article 8 of the International Covenant on Economic,  

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Social and Cultural Rights (ICESCR); 59

(b) The ILO Freedom of Association and Protection of the Right to Organize Convention of 1948; 60

(c) The ILO Right to Organize and Collective Bargaining Convention of 1949; 61

(d) The Constitution of the ILO; 62

(e) Customary international law relating to freedom of association and the right to strike.

However, the only explicit treaty obligation to provide a right to strike by which Australia is bound is article 8, paragraph 1 (d), of the ICESCR, which provides:

"The State Parties to the present Covenant undertake to ensure:

... (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country."

The ILO Conventions themselves contained no express reference to the right. Material was put before the Court by the authors, who appeared as counsel for the Australian Government to argue for the validity of the laws, which sought to demonstrate ILO practice and understanding concerning the integral nature of the right to strike to the freedom of association, on the basis that interpretations by a body established as part of the supervisory machinery for the conventions in question was relevant to their interpretation. It was argued that this material was sufficient to conclude that the "right to strike" had become an inherent part of ILO treaty obligations.

The customary law foundation for the right was sought to be established principally by the material already referred to, on the basis that it evidenced acceptance of a customary law rule. As to reliance on customary law, the High Court said:

"There is no evidence before this Court that this is the case. It is only if one accepts a different process for

60 Document ST/HR/1/Rev.5, vol. 1, part 2, No. 87, pp. 4-5.
the formation of customary international law that it would be possible to come to the conclusion that there is a rule of customary international law that requires States to afford a right to strike. There is no basis, on the material before this Court, which would allow us to uphold the provisions on the basis that they implement a rule of customary international law."

The Court went on and upheld the constitutional validity of the provisions (other than the lock-out provisions) on the basis that they were a reasonably appropriate translation into national law of the express treaty obligation in the Covenant. The Court did not rely on the ILO Conventions. This decision reflects the greater comfort national courts obtain if they can rely on express treaty provisions, rather than the problems of uncertainty and difficulty of proof that arise in relation to customary international law.

The reluctance of national courts to accept the existence of a customary international law rule in the absence of clear evidence was illustrated by the War Crimes case (Polyukhovich) before the Australian High Court.64 Only two of the seven judges found it necessary to address the detailed argument and material put forward on the international law issues. The other judges were able to decide the validity of the legislation on a constitutional basis that did not require examination of international law.

The authors, again as counsel for the Australian Government, sought to establish that a customary international law obligation existed to the effect that persons alleged to be guilty of war crimes and crimes against humanity should be sought out and brought to trial by a court of competent jurisdiction. The attitude to the establishment of customary international law displayed by the two judges who considered the issue highlights the difficulties that arise. Justice Brennan accepted the international principles for establishing a norm of customary international law and specifically cited the International Court of Justice's decisions in the North Sea Continental Shelf cases65 and

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However, he concluded that there was no evidence of widespread State practice which suggested that States are under a legal obligation to seek out Axis war criminals and to bring them to trial and further that there was no *opinio juris* supportive of such a rule. Justice Toohey agreed with Justice Brennan that the elements of the international customary law obligation for which the Federal Government contended could not be supported by general practice of States and *opinio juris*. He went on to consider whether the provisions of the war crimes legislation dealing with crimes against humanity were consistent with international law at the time the relevant events occurred (in 1944).

In the Canadian war crimes case, *Finta*, the difficulties in establishing the content of customary law in 1945 in relation to crimes against humanity led the judge to rely on general principles of law recognized by the community of nations. This was presumably in reliance on Article 38, paragraph 1 (c), of the Statute of International Court of Justice, although the judge made no reference to the provision.

No similar reliance on general principles was argued for in *Polyukhovich* to support the Australian war crimes legislation. Nevertheless, the approach of Justice Toohey in *Polyukhovich* was to some extent similar to that of the Canadian judge, given his reliance in part on the fact that the crimes in question were universally outlawed in the world's legal systems. However, he was also more willing to find customary law, taking the view that it would be "unrealistic" as well as "incorrect" to adopt an excessively technical approach. There will be few occasions, however, when a general principle will be able to provide adequate content by itself to support a precise rule of law at the domestic level. When one is dealing with customary law the challenge inherent in the proof of principles is even greater.

The Australian *War Crimes* case also provided an example of the difficulty of dealing with international materials in domestic courts. On one argument, the validity of the law depended on establishing its conformity with international law. Four volumes of materials, exceeding 800 pages, were put before the Australian High Court. This

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material included United Nations resolutions, decisions of international tribunals established after the Second World War, decisions of courts in Canada and Israel, International Law Commission documents and academic writings.

It was then the task of counsel for the Government to take the members of the Court through the material and, in effect, instruct the judges as to the manner in which customary international law could be established. Individual judges did not particularly appreciate the lesson, but the process was essential for the preparation of a complete and adequate argument in the domestic court.

VIII. Conclusions

This essay has focused on some of the issues, which confront the legal adviser in litigation before national courts. In Australia, the Government and the courts recognize the increasing importance of international law and accept that national legal systems are directly affected by international legal and political developments. The Australian experience suggests that legal advisers may have a useful role in bridging the divide between international law and domestic law. Sometimes there may be tension between the role of the legal adviser to present and explain international law principles as they apply to domestic legal issues and the partisan duty to act as counsel for the Government representing its interests as a party to litigation. Whether or not their Government has a direct interest in domestic litigation with international reference points, legal advisers may usefully contribute to the understanding and application of international legal principles in a national context.
VI

THE ROLE OF THE LEGAL ADVISER OR PRACTITIONER IN LITIGATION BEFORE INTERNATIONAL COURTS AND TRIBUNALS

LE RÔLE DU CONSEILLER JURIDIQUE OU DU PRATICIEN DANS LE CONTENTIEUX DEVANT LES COURS ET TRIBUNAUX INTERNATIONAUX
LA PRATIQUE DE L’ARTICLE 38 DU STATUT DE LA COUR INTERNATIONALE DE JUSTICE DANS LE CADRE DES PLAIDOIRIES ECRITES ET ORALES

Pierre-Marie Dupuy

1. Contrairement à ce que son auteur a pu entreprendre en d’autres occasions, la présente contribution n’a pas pour objet de tenter une analyse théorique ou technique des sources du droit international public. Elle ne constitue pas non plus une analyse de jurisprudence de la juridiction internationale. Elle présente ouvertement le caractère, nécessairement subjectif, donc, contestable, d’un témoignage. On ne se permet ici d’en faire état qu’à la demande des responsables de cet ouvrage collectif.

Suivant leur invitation, on tentera ainsi de tirer les leçons d’une expérience acquise au gré de la participation à près d’une dizaine d’affaires contentieuses devant la Cour internationale de Justice. Elles portaient notamment sur des problèmes de compétence

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2 C’est seulement en raison du caractère personnel de cette contribution qu’on se permettra ci-après, contrairement à l’habitude, de renvoyer aux travaux du même auteur liés au problème ici examiné.
de la Cour et de recevabilité d’une requête, de délimitation ou de détermination du statut des espaces maritimes, de détermination d’une frontière terrestre, de défense des droits d’un peuple ou de responsabilité internationale d’un État. Cette précision n’est pas gratuite. On ne plaide pas en effet nécessairement de la même manière une affaire portant sur un type de problème ou sur un autre. La prise en considération des faits de l’espèce joue par exemple généralement une moindre place dans l’examen d’une question de compétence que dans une plaidoirie portant sur le fond du droit, encore que l’on puisse, là encore, rencontrer des exceptions ou des tempéraments à cette tendance.

2. D’une façon générale, différents éléments varient d’une affaire à l’autre, qui donneront à chacune sa physionomie propre, susceptible de démentir les conclusions que l’on pouvait tirer d’une autre espèce. Il incombe d’ailleurs au conseil expérimenté d’identifier, cas par cas, les caractères propres à chaque différend. Il adaptera ainsi dans une certaine mesure son argumentation sinon même son type de plaidoirie à l’affaire considérée. Quoiqu’avec beaucoup de prudence, l’orientation générale de la politique judiciaire de la Cour n’est, enfin, pas non plus un facteur à négliger. En particulier, le poids ou l’interprétation à donner à certains types de sources, dont la coutume générale en voie de formation ou certains principes généraux du droit international émergeants pourra quelque peu varier. Ils le feront en fonction de la ligne juridique que la Cour semble privilégier; plus favorable à une vision dynamique de l’évolution du droit, comme ce fut dans l’ensemble le cas entre 1969 et 1986, elle préfère au contraire à l’époque actuelle adopter une conception plus classique tant des sources du droit international à prendre en considération que de l’interprétation à en retenir. Il serait donc absurde de prétendre conférer une portée intangible ou absolue aux considérations ici exposées.

3. Sous le bénéfice des observations qui précèdent, on peut cependant constater l’existence d’un fond de données proprement juridiques constituant autant de repères. Elles guident et orientent nécessairement la pratique du conseil d’un gouvernement dans une affaire contentieuse.

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La principale de ces données est bien entendu le Statut de la Cour. Il s'impose à tous : à la juridiction elle-même comme aux parties. Or ce Statut, à peine modifié lors de l'adoption de la Charte des Nations Unies, auquel il est depuis lors annexé, remonte à la création de la Cour permanente de Justice internationale. C'est dire qu'il est ancien, dans sa conception comme dans sa formulation. La constatation, faite par un grand nombre d'auteurs, mérite d'être rappelée. Contrairement à la présentation qu'en font trop souvent les manuels, cet article 38 n'est pas une sorte de norme constitutionnelle énonçant pour la communauté internationale les sources du droit qui la règissent. L'article 38 n'est pas autre chose qu'une clause statutaire relative au droit applicable par la juridiction internationale.

4. D'emblée, la Cour est donc amenée, à l'époque actuelle, à interpréter cette clause en fonction de l'évolution effective des modes de formation contemporains du droit international, insuffisamment reflétée dans la lettre de cette disposition. Elle a d'ailleurs manifesté sa parfaite aptitude à cet exercice. Ainsi, par exemple, dans l'affaire des Essais nucléaires⁴, a-t-elle insisté sur la valeur des engagements que peut prendre un État par la voie d'un acte unilatéral, source d'obligations que l'article 38 ne mentionne pas. Ailleurs, elle a accordé toute leur importance aux actes unilatéraux émanant, cette fois, d'une organisation internationale, l'Organisation des Nations Unies en particulier, du point de vue des obligations des parties à l'instance. D'une façon générale, d'ailleurs, l'imbrication croissante entre droit international général et droit des Nations Unies, bien marquée, notamment, à partir de l'affaire des Activités militaires et paramilitaires au Nicaragua et contre celui-ci⁵, incite et incitera la Cour à resituer la liste tronquée des sources de droit international mentionnée à l'article 38 dans le contexte plus large d'un univers juridique à la fois marqué par la persistance du primat de la souveraineté étatique individuelle et par l'afﬁrmerissement progressif d'un cadre institutionnel ; il dote l'ordre juridique international d'une structuration, même très imparfaite, encore inexistant à l'époque de l'affaire du "Lotus"⁶.

5. Il demeure que, par détermination de son Statut, la Cour est confrontée à une liste de sources de droit applicable. Cette liste, par la

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force des choses, présente ces sources selon un certain ordre. L'article 38, paragraphe 1, nous dit que, pour régler les différends qui lui sont soumis "conformément au droit international", la Cour applique : a) les conventions internationales; b) la coutume internationale; c) les principes généraux de droit "reconnus par les nations civilisées"; d) les décisions judiciaires et la doctrine.

Se contentant de l'idée très classique selon laquelle il n'y a pas de hiérarchie des normes en droit international public, on a trop souvent tendance à n'accorder à cet ordre qu'une attention distraite, comme si on ne désirait y voir qu'une simple contrainte d'énonciation. La réalité est plus complexe.

En premier lieu, il y a bien une première hiérarchie, parfaitement explicite, quant à elle, entre les sources citées par l'article 38. L'alinéa d) de son paragraphe 1 qualifie en effet certaines d'entre elles (la jurisprudence et la doctrine) de "moyen auxiliaire de détermination des règles de droit". Elles sont donc placées au second plan.

Quant aux principes généraux du droit, on sait qu'ils sont en réalité de deux sortes. Ceux que l'article 38 mentionne expressément, les principes "reconnus par les nations civilisées", ont pour objet essentiel d'éviter le non liquet en pourvoyant le juge international d'un fond commun de règles générales puisées dans la substance des principaux systèmes de droit, notamment pour ce qui concerne celles qui sont relatives à une bonne administration de la justice. En ce qui concerne les autres principes généraux, ceux qui sont propres au droit international, la doctrine discute certes de la question de savoir s'ils constituent ou non une source autonome par rapport à la coutume internationale; néanmoins, un accord général entre les auteurs se dégagerait sans doute pour admettre qu'ils partagent à tout le moins avec la coutume bien des points communs; ils en donnent le plus souvent une formulation portée au plus haut degré de généralisation.

En réalité, il existe une autre hiérarchisation des sources suggérée par l'ordre de leur formulation dans l'article 38. Cette hiérarchisation, de toute façon établie à une époque où l'on n'imaginait pas encore qu'il pût y avoir des normes impératives en droit international (jus cogens) présente un caractère fonctionnel. On veut dire par là qu'elle s'adresse à la Cour elle-même, pour lui indiquer comment procéder lorsqu'elle cherche à identifier les
obligations qui s'imposent aux parties. Elle devra, d'abord, rechercher s'il existe ou existait au moment de la naissance du litige un ou plusieurs traités liant les parties, qu'ils soient bilatéraux ou multilatéraux. Elle devra, ensuite, considérer dans quelle mesure des règles générales de caractère coutumier, plus ou moins abstraites dans leur formulation, s'appliquent également, ne serait-ce que pour aider à l'interprétation de la ou des conventions existant entre les États concernés.

Qui plus est, la façon dont la coutume est définie à l’alinéa b) du paragraphe 1 invite en principe la Cour à s’assurer de l’acceptation par les États en général, sinon par les parties elles-mêmes, du caractère obligatoire de la règle en cause. La coutume y est dite en effet “preuve d’une pratique générale, acceptée comme étant le droit” (italiques de l’auteur).

La Cour se trouve donc invitée, à un double titre, à une approche consensualiste : dans la priorité accordée à la recherche des sources conventionnelles d’obligations liant les parties; dans l’acceptation de la coutume internationale proposée par la formulation de la clause énonçant le droit applicable. Cette double invitation n’est au demeurant pas surprenante. Elle apparaît en accord avec les fondements de la compétence de la Cour, également établis par son Statut. Ces fondements, comme chacun sait, sont eux-mêmes consensuels, que l’on s’appuie sur le paragraphe 1 ou le paragraphe 2 de l’article 36 du même Statut. Il est donc normal que, recevant sa compétence des États, la Cour cherche d’abord à savoir ce à quoi ils avaient accepté de s’engager lors de la naissance du différend. Ceci n’est pas à dire qu’elle l’ait toujours fait dans sa jurisprudence. On a pu constater, par exemple, qu’elle avait été plus encline à retenir une conception très “objective” (donc indépendante de la volonté subjective des parties) des règles coutumières, en certains domaines ou à certaines époques de son activité contentieuse7. On a pu aller jusqu’à dire qu’elle avait elle-même fait oeuvre quasi normative, notamment en ce qui concerne le droit de la délimitation des espaces maritimes.

7 Que l’on n’oublie cependant pas ici qu’il s’agit non d’analyser ce que la Cour elle-même peut avoir fait que de raconter la

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7 Voir “Le juge et la règle générale”, op. cit. (voir supra note 1).
façon dont les plaideurs et conseils des parties sont amenés à déterminer les bases juridiques de règlement proposées aux juges. Tout en tenant compte des diverses considérations énoncées plus haut, les conseils se fondent en effet avant tout sur le respect du Statut. La Cour l’a parfois interprété assez librement; eux ne le peuvent pas. Ils doivent en revanche montrer que le bon droit de l’État qu’ils défendent est établi sur les bases les plus sûres, et donc les plus classiques. Ils retiennent donc généralement en priorité de ce Statut une acception elle-même marquée par une vision traditionnellement volontariste, même s’il est des cas où l’on doit au contraire privilégier une vision plus audacieuse du droit applicable.

En d’autres termes, ils accordent d’abord la primauté à la recherche de l’intention des parties; ensuite, à une interprétation consensualiste des règles de droit international général applicables à la matière du différend.

I. Primauté accordée à la recherche de l’intention des parties

8. Ce qui rend passionnant le travail du conseil, très généralement choisi parmi les universitaires spécialisés dans l’analyse du droit international, c’est que, dans le respect scrupuleux des règles les plus élémentaires de l’honnêteté intellectuelle, ils doivent mettre leur science du droit au service d’une cause particulière. Cela exige à la fois rigueur et souplesse. La cause à défendre, il est nécessaire qu’ils en perçoivent les points forts mais aussi les faiblesses, présentes dans à peu près tous les dossiers. Elles sont souvent dues à certaines initiatives prises par les gouvernements eux-mêmes. Les responsables politiques, sous toutes les latitudes, sont généralement peu avertis ou peu soucieux des contraintes du droit et n’écoute pas toujours leurs chancelleries.

9. Toujours est-il que l’intention des parties apparaît souvent dans des actes unilatéraux, souvent des déclarations, parfois impestives, faites par les gouvernants. Une fois qu’ils ont parlé, l’État au nom duquel ils s’expriment risque bien souvent d’être engagé par ces déclarations. L’une des premières façons de savoir ce qu’un État a voulu faire et quelles étaient ses intentions est donc de savoir comment, et à quelle occasion, ses responsables se sont exprimés. La Cour sait heureusement très bien faire la part des choses et ne pas prendre à la lettre toutes les déclarations gouvernementales, dotées en réalité d’une autorité très variable en
fonction, notamment, du contexte de leur énonciation ou de l'autorité de l'agent qui les a tenues.

Une autre façon, beaucoup plus fiable, de rechercher le contenu et la portée des obligations à la charge de chacune des parties consiste à examiner les conventions internationales qu’elles ont souscrites.

A. L'utilisation des actes unilatéraux

10. Il ne s’agit pas ici de faire une présentation systématique du droit des actes unilatéraux, dont on a fait l'étude par ailleurs⁶. Les actes émis unilatéralement par un État peuvent avoir trait à l'opposabilité d'une situation juridique, à l'exercice de droits souverains ou à la création d'engagements juridiques. Qu'on les envisage dans le procès international à un titre ou à un autre, on sait qu'ils se trouvent en quelque sorte en marge de l'article 38. Ce dernier n'en fait pas mention, sans doute en raison de la réticence de principe manifestée par le positivisme juridique classique à l'égard de la possibilité pour un État d'être engagé de la sorte. L'école dominante, du volontarisme strict n'a longtemps voulu percevoir, en particulier, l'engagement unilatéral que comme une promesse ne produisant d'effet qu'au cas où elle serait reçue et acceptée par son destinataire. Cette attitude revenait en réalité à refuser toute existence normative autonome à l'acte unilatéral.

Les plaideurs se sont néanmoins vus incités à spéculer sur le caractère liant de certaines énonciations unilatérales depuis la jurisprudence de la Cour internationale de Justice de 1974. Elle déclarait en effet, dans l'affaire des Essais nucléaires déjà citée :

"Il est reconnu que des déclarations revêtant la forme d'actes unilatéraux et concernant des situations de droit ou de fait peuvent avoir pour effet de créer des obligations juridiques ...".

11. Un aspect, au demeurant traditionnel, du travail de conseil s'est ainsi trouvé encouragé par cette constatation judiciaire. Il s'agit de l'analyse aussi détaillée que possible de l'histoire du différend,

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¹ Recueil C.IJ. 1974, p. 267, par. 43.
² Droit international public, op. cit. (voir supra note 1).
constituée par la narration argumentée de l’enchaînement des faits à son origine.

Parmi eux, l’avocat met en exergue les déclarations de l’État qu’il défend manifestant la clarté des engagements qu’il affirme avoir par la suite respectés ou dont il a poursuivi l’exécution. À l’inverse, il dénoncera dans la mesure du possible les contradictions de la partie adverse, en manifestant comment les déclarations unilatérales de cette dernière, susceptibles en fonction des données de l’espèce de créer à sa charge un engagement, n’ont finalement pas été suivies d’effet par elle.

Il existe évidemment des limites à ce type d’exercice. Elles relèvent de ce que l’on serait tenté d’appeler une déontologie naturelle, inhérente à la fonction. L’avocat a, certes, le droit de mettre en évidence la cohérence des déclarations de son client avec ses actes et, à l’inverse, les contradictions existant chez son adversaire entre ses dires et son action. C’est d’ailleurs la raison pour laquelle on rencontre souvent dans les plaidoiries l’usage de l’argument de non-contradiction, qu’il soit utilisé sous les formes (d’ailleurs distinctes) de l’estoppel ou de la forclusion, ou de l’invocation du principe général de la bonne foi. Il demeure, précisément, que cette dernière doit également s’appliquer aux plaidoiries. Tout plaideur s’exposerait de toute façon à de grands risques en invoquant à la légère une déformation flagrante de la réalité des faits. Les conseils de la partie adverse seraient là pour mettre en évidence toute falsification.

Au demeurant, si l’on accepte d’élargir un peu le débat, on constatera que la Cour se manifeste généralement prudente à l’égard de l’invocation croisée des contradictions respectives ou des malignités réciproques de chacune des parties. Au delà même, elle n’est pas particulièrement impressionnée, semble-t-il, ce qui paraît plus contestable, par le changement brutal d’argumentation que peut opérer un même État d’une affaire à l’autre, voire à divers stades de la même affaire, s’agissant par exemple de l’interprétation d’une même disposition juridique.

Si l’on en reste, cependant, à l’usage fait par les plaideurs des actes et comportements unilatéraux, on devra, là encore, pour illustrer un propos général déjà énoncé dans l’introduction de cet article, constater qu’ils sont plus souvent utilisés dans certains
contentieux que dans d'autres, en fonction de l'objet de chacun. Ainsi, en matière de délimitation d'une frontière terrestre ou d'acquisition de la souveraineté sur une île, par exemple, on sait la part déterminante qui s'attache aux manifestations de souveraineté ou à l'expression de leur revendication concrète : non seulement déclarations ou protestations mais aussi actes de réglementation, d'administration, de police ou de justice. Quoiqu'accomplis dans l'ordre interne, il s'agit de faits juridiquement pertinents au regard du droit international pour manifester l'intention véritable du pays considéré. Leur analyse prend ainsi, en bien des cas, une importance souvent insoupçonnée au début d'un procès; il nourrit les annexes aux plaideries écrites dont la Cour regrette par ailleurs de plus en plus l'abondance croissante !

Mais si l'acte unilatéral est ainsi considéré dans l'argumentation contentieuse pour servir de preuve de l'engagement ou de l'obligation pesant sur un Etat, l'acte conventionnel présente explicitement sur lui l'avantage de lier à la fois les deux parties.

### B. L'invocation des actes conventionnels

13. On a vu précédemment que "les conventions internationales, soit générales, soit spécialisées, établissant des règles expressément reconnues par les États en litige"\(^{10}\) constituent la première source de droit à laquelle la Cour internationale de Justice est invitée par son Statut à se référer.

On peut, en effet, aisément comprendre cette priorité, encore une fois strictement perçue d'un point de vue fonctionnel ou opératoire. C'est, en effet, le traité qui présente en principe le plus de garanties dans la recherche de l'intention, des objectifs communs et des droits et obligations réciproques définis en vue de leur satisfaction par les deux parties. C'est particulièrement vrai pour les traités bilatéraux. Autant que faire se peut, ils auront encore la préférence sur les conventions multilatérales : ils constituent, en effet, en relation avec le cas considéré, l'expression la plus directe et la plus spécifique de l'engagement des deux parties au litige. Souvent même, comme, par exemple, dans l'un des derniers arrêts rendus par la Cour, le 25 septembre 1997, en l'affaire relative au

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10 Article 38, paragraphe 1 a) du Statut de la Cour internationale de Justice.
**Projet Gabčíkovo-Nagymaros**, ils constituent eux-mêmes l’origine principale du différend. Au moins les conseils de l’un et l’autre bord, comme la Cour elle-même, pourront-ils s’appuyer sur une manifestation tangible et concertée de la volonté des parties, consulter le contexte et les conditions concrètes de sa négociation, examiner si besoin est ses travaux préparatoires, encore que ce moyen auxiliaire d’interprétation des traités se soit révélé généralement peu fiable.

14. S’agissant des moyens d’interprétation des traités utilisés par les conseils, ils reflètent par la force des choses aussi fidèlement que possible ceux que la Cour retient elle-même, en conformité générale avec la lettre et l’esprit de l’inventaire qui en est rapporté à l’article 31, paragraphe 1, de la Convention de Vienne sur le droit des traités de 1969 : “Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but”. C’est à cette ligne générale que les conseils viennent très généralement puiser les principes d’interprétation des conventions bilatérales ou multilatérales dont les données de l’espèce les amènent à faire l’exégèse.

15. On ajoutera à cela une observation tirée d’une évolution récente de la jurisprudence de la Cour en matière d’interprétation. Dans son arrêt précité de 1997, elle s’est en effet prononcée en faveur de l’admission d’une interprétation évolutive des termes d’un traité en fonction de l’évolution générale du droit international dans son domaine d’application. Cette conception, si elle devait se confirmer, pourrait avoir des prolongements sensibles dans la façon dont les plaideurs envisageront eux-mêmes l’interprétation qu’ils donneront des conventions pertinentes lorsqu’ils apparaîtront devant la Cour. Il paraît donc justifié de s’y arrêter quelque peu, d’autant que l’auteur de ces lignes en a lui-même connu l’expérience contentieuse en cette même affaire. Dans l’arrêt relatif au **Projet Gabčíkovo-Nagymaros**, la Cour a en effet indiqué que, dans l’application d’un traité bilatéral conclu en 1977 en vue de la réalisation d’un système de barrages en travers du Danube, “ce sont les normes actuelles qui doivent être prises en considération” aux fins de l’évaluation des risques écologiques; ceci, afin de tenir compte des “exigences [...] énoncées dans un grand nombre

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11 Voir le site Web de la Cour, http://www.icj-cij.org/idecis.htm
d'instruments au cours des deux dernières décennies". La Cour acceptait ainsi de faire droit à l'argumentation de la Hongrie. Cette dernière s'était appuyée notamment sur l'avis consultatif donné par la même juridiction dans l'affaire de la Namibie dans lequel elle déclarait déjà qu'un traité devait être interprété "dans le cadre de l'ensemble du système juridique en vigueur au moment où l'interprétation a lieu". Elle semblait ainsi, mais en 1997 plus encore qu'en 1971, avaliser une sorte de clause implicite de réévaluation des données conventionnelles en vue de l'adaptation du traité aux évolutions du droit international général dans le domaine concerné.

16. On ne saurait cependant aller trop loin dans le sens à donner à cette espèce. L'"interprétation évolutive" était rendue possible en l'occurrence par la présence, au sein même du traité bilatéral de 1977 que la Cour invite les parties à réinterpréter de clauses se référant en termes très larges à la "protection de la nature" c'est-à-dire, à ce qu'on appelle aujourd'hui la protection de l'environnement. Or, il s'agit spécifiquement de l'une des branches du droit international ayant connu depuis vingt ans des transformations rapides et considérables.

Ce type de démarche interprétative ne peut ainsi s'appliquer qu'à des conventions s'intégrant dans un contexte normatif ayant subi des transformations décisives. Il connaît de toute façon des limites inhérentes. Il doit en effet rester conciliable avec le maintien de la sécurité juridique et, surtout, avec le respect fondamental de la volonté des parties. Or, par définition, cette volonté n'a pu se former qu'en fonction de l'état du droit tel qu'il existait au moment de la conclusion de l'accord soumis à interprétation. L'interprétation dynamique ne peut donc être pratiquée dans le respect de la volonté initiale des co-contractants que lorsque les évolutions normatives générales en fonction desquelles est effectuée la réinterprétation

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12 Voir respectivement par. 139 et 140 de l'arrêt, ibid. Voir également à ce propos, l'opinion individuelle du Président M. Bedjaoui sous le même arrêt.


peuvent être considérées comme obligeant les parties elles-mêmes. Cela peut être le cas dans deux hypothèses: soit que les nouvelles normes soient elles-mêmes énoncées dans d'autres instruments conventionnels auxquels ces mêmes États sont parties; soit qu'elles fassent d'ores et déjà partie du droit coutumier général. En règle générale, l'"interprétation évolutive" ne saurait aller jusqu'à la révision du traité.

17. Ceci nous conduit directement à envisager la manière dont les conseils sont amenés à invoquer le droit international général dans le cadre de leur argumentation. Ainsi qu'on l'a déjà annoncé plus haut, ils le font le plus souvent en s'inspirant plutôt d'une approche consensualiste des règles de droit international.

II. Primauté accordée à une approche consensualiste des règles générales

18. Le contenu et la portée des obligations conventionnelles réciproques de l'une et l'autre partie une fois identifiées, il conviendra pour le conseil d'examiner le cadre plus large du droit international général au sein duquel ces obligations de "droit spécial" s'insèrent. Déjà, on l'a vu, pour interpréter les normes conventionnelles, il avait pu lui être nécessaire de recourir à l'application d'une règle générale ou d'une autre, ne serait-ce, bien entendu, que le principe général de la bonne foi ou la règle pacta sunt servanda.

Il se tournera alors, en tout premier lieu, vers la coutume générale et les principes généraux du droit international public; en second lieu, vers les moyens auxiliaires d'identification du droit mentionnés à l'article 38, paragraphe 1, alinéa d), mais aussi, si nécessaire, vers les principes généraux du droit "reconnus par les nations civilisées" de l'alinéa c).

A. Recours à la coutume et aux principes généraux du droit international

19. Un conseil ou avocat doit tenter de convaincre la Cour, c'est l'évidence. Pour ce faire, il peut également essayer de la séduire, par la rigueur de sa démonstration, la clarté de sa forme, l'aisance de sa plaidoirie. C'est là affaire de talent propre à chacun. Mais il est, en tout cas, une règle à ne pas oublier. C'est qu'au sein d'affaires généralement complexes, encombrées par un appareil d'annexes
souvent considérables, il est nécessaire d’en rester à l’essentiel et de
simplifier autant que possible la démarche intellectuelle que l’on
suggère à la Cour d’emprunter.

Pour cela, il convient, dans toute la mesure du possible, de se
mettre “à la place des juges”, dont chacun est conscient qu’il
 appartient à une juridiction à la fois prééminente et toujours en
situation précaire, puisque sa compétence repose sur une base
consensuelle. Demain, si la majorité des Etats se détournait de la
Cour, celle-ci ne pourrait tout simplement plus remplir les fonctions
que lui assigne son Statut, à savoir de régler les différends entre Etats
en application du droit international public.

Or, comme on l’a déjà rappelé plus haut, l’article 38,
paragraphe 1 b), donne de la coutume une définition marquée par
une vision volontariste, donc consensualiste. La coutume n’y est sans
doute pas seulement réductible à un accord tacite, mais elle demeure
une pratique généralement “acceptée” comme étant le droit.
L’arrivée sur la scène internationale, et devant la Cour elle-même,
d’un certain nombre de pays nouveaux, au milieu des années
soixante, n’a pas affaibli cette vision des règles générales, alors
même que ces pays se réclamaient -- aussi -- d’une vision nettement
plus objectiviste des principes devant s’appliquer à la communauté
internationale dans son ensemble. Pour ce qui concerne chacun
d’entre eux, le droit international général qu’il trouvait en arrivant
dans la société des Etats devait néanmoins faire l’objet d’un
réexamen, aux fins d’acceptation “sous bénéfice d’inventaire”.

20. Cette vision majoritairement consensualiste de la coutume
internationale incite généralement les avocats devant la Cour à
s’appuyer en priorité sur les coutumes les plus établies et, donc, les
mieux acceptées. De plus, sans forcément s’y référer de façon
toujours explicite, ils privilégient la fameuse théorie dite “des deux
eléments” selon laquelle la coutume résulte de l’adjonction d’une
pratique et d’une opinio juris. Pas de coutume sans pratique, pas de
pratique juridiquement signifiante sans opinio juris. C’est, du reste,
la raison pour laquelle les plaideurs expérimentés auront tendance à
ne pas distinguer statutairement les principes généraux du droit
international public de la coutume elle-même. Les premiers, comme
la seconde, puisent leurs racines dans l’assentiment des Etats, pas
dans le droit naturel. Simplement, ils donnent de la coutume une
formulation particulièrement générale, ramenée en quelque sorte à
l’essence de la règle. Tels, par exemple, le principe de l’égalité souveraine des États, celui de non-intervention ou même celui, beaucoup plus spécifique, pourtant, de “droits préférentiels du riverain” dégagé par la Cour dans l’affaire des Pêcheries de 1951.

Toutefois, la référence à l’un ou à l’autre de ces deux éléments ne deviendra explicite qu’à propos des coutumes dont l’autorité juridique pourrait être encore contestée, en raison de leur relative nouveauté. Nul n’a encore besoin de perdre du temps, en cours de plaidoirie, à démontrer l’acceptation universelle du principe de liberté de la haute mer, même si une affaire récente prouve qu’il peut être sciemment bafoué. Il n’en va cependant pas forcément de même à propos de l’invocation de telle ou telle règle émergente du droit international de l’environnement, telle la règle d’information-consultation préalable ou, a fortiori, le “principe de précaution”, dont on pourrait encore éventuellement douter de l’acceptation proprement universelle.

Il résulte de ce qui précède que les plaideurs, du moins les plus avisés, n’ invoqueront la notion, par excellence d’inspiration objectiviste, de jus cogens ou droit impératif qu’avec certaines précautions. Ils le feront, notamment, sans la détacher de la démonstration d’une acceptation des principes dont il s’agit -- tel, par exemple, celui de droit des peuples à disposer d’eux-mêmes -- par l’ensemble des États membres de la communauté internationale.

La raison en est, du moins à la fin de ce siècle, que des sensibilités différentes se manifestent au sein même de la Cour à l’endroit de cette catégorie normative. Certaines espèces récentes l’ on bien montré, dont, en particulier, une qui n’est pas contentieuse mais consultative.

Il demeure qu’un certain nombre de règles et principes généraux sont dotés d’une telle autorité qu’elle ne saurait être contestée par personne, qu’ on les qualifie ou non de normes impératives. C’est donc non pas leur invocation mais leur qualification qui troublera éventuellement certains tempéraments,

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16 Affaire de la Compétence en matière de pêcheries (Espagne c. Canada).
sauf à considérer que la Cour serait prête à se départir de la grande prudence dont elle a généralement fait preuve durant les douze dernières années à l’égard des normes impératives, y compris dans l’affaire des Activités militaires et paramilitaires au Nicaragua et contre celui-ci. Elle y constatait, certes, la qualification convergente de la règle de non-recours à la force par les deux parties au titre du jus cogens19. Elle se garda, pour autant, d’aller elle-même jusqu’à reprendre à son compte cette identification.

On en vient ainsi naturellement à se tourner vers les “moyens auxiliaires” au premier rang desquels la jurisprudence.

B. Recours aux “moyens auxiliaires de détermination des règles de droit”

22. L’invocation de la jurisprudence occupe une place importante dans l’équilibre interne d’une plaidoirie soumise à la Cour, que ce soit au stade des écritures ou de la phase orale. Elle est la plupart du temps sollicitée pour confirmer ou corroborer l’autorité juridique de la règle invoquée, qu’elle ait trait à la compétence de la Cour, à la recevabilité d’une requête ou au fond du droit. La jurisprudence constitue, par excellence, soit le révélateur, soit la preuve par confirmation de l’existence d’une règle générale de droit international public, qu’on la qualifie de coutume ou de principe.

On pourrait même aller jusqu’à dire, à l’examen des plaidoiries, que la jurisprudence, bien souvent, ne semble pas y constituer un mode auxiliaire mais bien une référence obligée, contrastant ainsi avec le statut presque subalterne que lui confère l’article 38, paragraphe 1 d).

23. Cette invocation abondante de la jurisprudence peut cependant aisément s’expliquer. Le juge international est certes compétent parce que les parties l’ont bien voulu. Pourtant, à partir du moment où ce consentement est acquis, on entre dans un domaine entièrement soumis à l’autorité de la Cour. Par convention, dans tous les sens du terme, on se situe ainsi dans un univers dominé par le juge, ce qui l’apparente dans une certaine mesure à la situation que connaissent les justiciables en droit interne. La force du précédent

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19 C.I.J. Recueil 1986, p. 100 à 101, par. 190.
prend alors un certain ascendant. Ce précédent, toutefois, c'est logiquement celui établi par la Cour internationale de Justice elle-même ou par sa devancière, la Cour permanente de Justice internationale, dans les motifs beaucoup plus que dans le dispositif de leurs arrêts.

On aurait tort de voir dans cette référence obligée et quasi exclusive à la Cour de La Haye l'expression d'une flagomanie de plaideurs courtisans. L'auteur de la jurisprudence internationale universelle, c'est la Cour internationale de Justice et, avant elle, la Cour permanente de Justice internationale. Même dans un avenir proche, marqué par la multiplication des juridictions internationales, y compris au niveau universel, la Cour devrait rester, si, toutefois, elle sait donner l'ampleur requise à sa jurisprudence, la juridiction internationale par excellence. Sa qualité d'organe judiciaire principal des Nations Unies lui confère en outre une situation privilégiée pour statuer sur les relations normatives existant entre les règles les plus fondamentales du droit international général et celles qui sont reprises et développées dans le cadre de la Charte des Nations Unies19.

24. Il importe par ailleurs au plaideur de montrer à la Cour, dans la mesure où c'est effectivement le cas, que la solution de droit ou l'analyse juridique qu'il lui propose se situe dans la continuité de sa jurisprudence. Si, au contraire, il lui présente une solution différente, alors, il lui incombera de justifier les raisons qui diffèrent le cas à l'examen de ceux dans lesquels une solution différente avait été retenue par la Cour. Dans une hypothèse comme dans l'autre, il reste nécessaire, en un regard rétrospectif, de se tourner vers la jurisprudence de la Cour.

Pour l'ensemble des raisons qui précèdent, on constate donc que l'influence, ou, tout au moins, l'utilisation de la jurisprudence tend à prendre dans la réalité du procès international une place beaucoup plus importante que celle suggérée par la place modeste que lui réserve l'article 38 du Statut.

25. Il n'en va pas forcément de même pour la doctrine. Il n'est

19 Voir "The Constitutional Dimension of the Charter or the United Nations Revisited", op. cit. (voir supra note 1).
pas rare que les “publicistes les plus qualifiés des différentes nations” soient cités dans les mémoires et plaidoiries devant la Cour. Cependant, leur autorité, variable suivant les cas, demeure secondaire par rapport à celle de la Cour elle-même. Ils peuvent contribuer à éclairer un point de droit ou à supporter une analyse juridique mais ne sauraient par eux-mêmes apparaître comme des révélateurs de la règle de droit. Des cas très exceptionnels ne se rencontreront qu’à propos de jurisconsultes ou de professeurs dont le renom particulier a été établi en relation, directe ou indirecte, avec la Cour elle-même, soit qu’ils s’en soient fait les exégètes particulièrement qualifiés, soit qu’ils en soient devenus membres. C’est, par exemple, le cas de Dionisio Anzilotti, de Jules Basdevant, de Sir Hersch Lauterpacht ou de Sir Gerald Fitzmaurice. Encore faudra-t-il que les plaideurs placés de l’autre côté de la barre aillent s’assurer par eux-mêmes non pas de la réalité des propos attribués à ces éminents auteurs mais de l’interprétation que la partie adverse veut donner de leurs opinions; car il n’est pas rare qu’elles soient plus ou moins déformées pour les besoins de la cause.

A mi-chemin entre la doctrine et la jurisprudence, la référence aux opinions individuelles ou même dissidentes de certains juges éminents n’est pas non plus exceptionnelle, à raison, précisément, de la liaison établie entre l’autorité personnelle de leur auteur et ses liens avec la juridiction.

26. Enfin, on citera pour mémoire la référence des conseils à l’équité, elle aussi mentionnée à l’article 38 du Statut. A cet égard, l’apport décisif de la Cour dans l’affaire du Plateau continental de la Mer du Nord dicte aux plaideurs la conduite à tenir. Ils ne mentionneront jamais l’ex aequo et bono autrement que pour rappeler ce qu’en dit l’article 38, paragraphe 2, lui-même : à savoir que le juge ne peut y avoir recours que sur habilitation des parties. Quant à l’équité praeter legem, inhérente à l’administration de la justice, elle conserve bien entendu une place de choix dans les affaires de délimitation maritime, pour adapter l’abstraction de la règle générale à la spécificité des situations particulières, même s’il ne s’agit jamais ... “de refaire la nature entièrement”21 !

21 Ibid. p. 50.
27. Les principes généraux du droit "reconnus par les nations civilisées" sont d'un emploi assez exceptionnel par l'avocat international. Ceci n’est pas seulement dû à leur qualification archaïsante, qui continue -- sans doute à juste titre -- à avoir mauvaise presse. C’est aussi parce que l’invocation de l’un d’entre eux équivaut bien souvent à l’aveu que celui qui l’emploie n’a pas été capable d’en trouver un équivalent dans le droit international lui-même. Ces principes constituent donc du droit par défaut. Ils relèvent qui plus est du droit comparé, puisque leur origine est interne. Or, peu d’internationalistes sont de vrais comparatistes. Chacun aura dès lors tendance à privilégier la tradition juridique dont il est issu sur celle des autres, et il n’est notamment pas rare d’entendre certains conseils se laisser aller à plaider devant la Cour internationale de Justice comme ils le feraient devant un tribunal de common law! Pourtant, cette “loi commune” --là n’est pas nécessairement celle qui le serait à l’ensemble des nations.

28. La palette des sources et moyens d’identification du droit énoncée par le Statut de la Cour se trouve ainsi parcourue pour dresser l’ébauche de ce que pourrait être, en droit international un “art de la barre” dont les canons sont finalement relativement bien définis, sans rester figés. Chaque avocat y apporte, Dieu merci, son style personnel, sa réthorique et son rythme, encore que, là encore, les contraintes de l’interprétation simultanée contraignent les plaideurs à respecter certaines exigences, dont l’une des moindres n’est pas d’apprendre ... à lire, ou, plus exactement, à dire un texte en public sans qu’il engende pour autant la lassitude des juges.

Le jugement international se situe dans un univers convenu, dont il faut savoir observer, et le cas échéant, mais alors seulement à bon escient, transgresser les règles, tant il est vrai que tous, juges et plaideurs, éprouvent parfois le besoin de s’en affranchir. Les principes que l’on a ébauché ci-dessus ne prétendent, encore une fois, qu’à la valeur d’un témoignage, dont on pourra aisément contester les propositions.

Mais, après tout, le témoignage est parfois, lui aussi, l’une des techniques du procès ...
LE ROLE ET LES FONCTIONS DU CHEF DU SERVICE DU
CONTENTIEUX DIPLOMATIQUE DANS LE CADRE DE LA
CONVENTION EUROPEENNE DES DROITS DE L'HOMME

Umberto Leanza

Introduction

L'analyse du rôle et des fonctions du Chef du Service du Contentieux diplomatique, en tant qu'Agent du Gouvernement italien auprès de la Commission et la Cour européenne des droits de l'homme (ci-après la Commission et la Cour), est étroitement lié à la nature et à la portée du système européen de garantie des droits de l'homme, et par conséquent, à l'incidence que l'activité de ces organismes a eue dans les relations entre le système juridique international et les systèmes internes et pour l'adaptation des deuxièmes au premier.

Signée à Rome le 4 novembre 1950 et entrée en vigueur le 3 septembre 1953, la Convention européenne de Sauvegarde des droits de l'homme et des libertés fondamentales1 (la Convention), assortie de onze protocoles dont neuf actuellement en vigueur, constitue toujours le modèle le plus avancé et le plus efficace de protection internationale des droits de l'homme2. Mise au point dans le cadre du Conseil de l'Europe, la Convention et certains de ses protocoles garantissent une série de droits de nature essentiellement civile et politique et instituent un système de contrôle judiciaire qui se base sur un double droit de recours et sur la compétence de trois organes, qui à différent titre et en des moments différents, interviennent dans la procédure de constat des

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1 La présente contribution a été complétée au mois de mars 1998 avant l'entrée en vigueur du Protocole n°11 à la Convention européenne des droits de l'homme et elle fait donc état du fonctionnement du système de la Convention tel qu'il a été conçu en 1950.


1 Nations Unies, Recueil des Traités, vol. 213, p. 221

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obligations assumées par les États parties³.

En analysant brièvement le mécanisme de procédure, modifié radicalement par le Protocole n°11, nous rappelons qu'au sens des articles 24 et 25 de la Convention, les États contractants aussi bien que les individus sont légitimés à saisir la Commission⁴. Après avoir examiné la recevabilité de la requête, la Commission, si ladite requête est irrecevable au vu des conditions requises, prononce une décision sans appel; si par contre la requête est déclarée recevable, la Commission établit les faits de l’affaire et s’efforce en cette phase de parvenir à un règlement amiable du différend. Si on n’aboutit à aucun règlement, elle est appelée à exprimer son avis sur le point de savoir s’il y a eu violation ou pas de la Convention par une décision au fond qui toutefois n’est ni définitive ni contraignante. L’avis contenu dans un rapport confidentiel est transmis au Comité des Ministres, organe politique du Conseil de l’Europe qui émet à majorité de deux tiers, une décision définitive ou plus précisément une résolution sur l’affaire. La compétence du Comité des Ministres cesse si dans les trois mois suivant la transmission de ce rapport, l’affaire est soumise à la Cour au sens de l’article 48, par la Commission, un État intéressé ou l’individu, pourvu que la juridiction de la Cour ait été reconnue comme obligatoire. L’arrêt de la Cour est définitif et obligatoire et son exécution est placée sous la surveillance du Comité des Ministres.

Presque cinquante ans après sa signature, la Convention constitue l’instrument le plus significatif et efficace, du point de vue juridique, pour la protection internationale régionale et judiciaire des droits fondamentaux de l’individu. Depuis l’entrée en vigueur de la Convention jusqu’aujourd’hui, le fonctionnement de ce système s’est progressivement perfectionné et grâce à la jurisprudencemise au point par les organes de Strasbourg, le contenu des droits garantis s’est enrichi et a donné lieu à une véritable législation européenne des droits de l’homme à laquelle les différents droits internes sont tenus à s’adapter. Le rapport entre les organes de Strasbourg et les systèmes juridiques nationaux a été caractérisé par une synergie fructueuse et continue: d’une part, en toute indépendance et autonomie, la Commission et la

³ La structure tripartite sur laquelle la Convention se base est le résultat d’un compromis qui a conduit à un équilibre entre les éléments juridictionnels et non juridictionnels.

⁴ Le Protocole n°11 a été ouvert à la signature le 11 mai 1994 et il entrera en vigueur le 1er novembre 1998.
Cour dégagent de la comparaison entre les divers systèmes juridiques nationaux les principes généraux qui représentent le fondement de ce qui a été défini "l’ordre public européen" et, d’autre part, grâce à une appréciation constante et attentive de l’activité des organes de Strasbourg de la part des autorités nationales concernées, le système européen n’a jamais cessé de représenter un paramètre fondamental de référence soit au moment de la mise au point des normes juridiques, soit dans la phase de leur application dans chaque système national.

Les développements de ce processus d’évolution peuvent être constatés, récemment, dans le Protocole n°11 de la Convention qui a modifié dans l’ensemble le mécanisme de procédure en instaurant une Cour unique permanente à laquelle chaque requérant aura directement accès.


I. Les fonctions du Chef du Service du Contentieux diplomatique, en tant qu'Agent du Gouvernement italien, dans le cadre de la Convention européenne des droits de l'homme et sa discipline dans le système juridique italien

La Convention ne contient de références spécifiques ni au rôle de l'Agent du Gouvernement, ni par rapport à ses fonctions dans le cadre du système de procédure européen. Toutefois elle prévoit une série d'obligations et de facultés qui sont inhérents à l'activité de l'État et qui, en pratique, renvoient aux fonctions exercées par l'Agent du Gouvernement lorsqu'il représente l'État dans les différentes phases de la procédure devant la Commission, la Cour et le Comité des Ministres.

Notamment, dans la phase du déroulement de la procédure devant la Commission, après la déclaration de recevabilité de la requête et dans le cadre de la fonction d'établissement des faits, l'article 28 par. 1 alinéa a) de la Convention prévoit que les États fournissent toutes les facilités requises à cette fin. Par la suite, dans le cadre de l'exercice de la fonction de conciliation et comme prévu par l'article 28 par. 1, alinéa b), l'activité des États peut se concrétiser en un règlement qui peut être de nature financière, consistant dans le paiement de sommes au titre d'indemnisation; de nature administrative, par l'adoption d'une mesure spécifique à la faveur du requérant, ou encore de nature législative ou réglementaire moyennant l'adoption de mesures de nature générale modifiant les dispositions qui font l'objet du différend. Enfin, au sens de l'article 48, alinéas b), c) et d), les États peuvent exercer le droit de saisir la Cour par un acte discrétionnaire et unilatéral.

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Concernant la capacité de l'individu requérant d'exercer ses droits en justice, le règlement réformé de la Cour entré en vigueur le 1er janvier 1993, qui formalise une pratique consolidée, a visé à renforcer le statut de l'individu en lui permettant de participer directement à la procédure devant la Cour. Quant à l'instauration d'un système effectif de garantie internationale des droits de l'homme, il semble que les conditions que j'estimai nécessaires à cette fin sont remplies; voir U. Leanza, "Per un'effettiva garanzia dei diritti dell'uomo", Scrifiti in onore di Gaspare Ambrosini, Milan, A. Giuffre, 1970, vol. II, p. 1147 à 1159.
Une référence à l’Agent est par contre contenue dans les Règlements de procédure de la Commission et de la Cour qui le reconnaissent en termes synthétiques comme l’organe préposé à représenter l’Etat au cours du procès.

Concernant la prévision contenue dans le Règlement de la Commission, l’article 31 de ce dernier prévoit que “les Hautes Parties Contractantes sont représentées devant la Commission par leurs agents, qui peuvent se faire assister par des conseillers”. Les dispositions analogues inhérentes à la procédure devant la Cour sont contenues à l’article 28 du Règlement “A” et à l’article 29 du Règlement “B”8. Le premier dispose que “les Parties sont représentées par des Agents qui peuvent se faire assister par des conseils ou des conseillers” et le Règlement “B”, qui s’applique aux États ayant ratifié le Protocole n°9 de la Convention, prévoit que “les Parties Contractantes, demanderesses ou défenderesses, sont représentées par des Agents qui peuvent se faire assister par des conseils ou des conseillers.”

D’après la lettre de ces dispositions qui ont un contenu en substance identique, on ne déduit pas grand-chose quant au profil opérationnel de l’Agent et à ses relations avec les autorités de Strasbourg. Il est évident que chaque État Partie de la Convention est libre de réglementer et d’organiser la fonction de l’Agent de façon tout à fait autonome et correspondante au critère d’attribution des compétences propre de chaque système juridique interne.

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7 Le Règlement de procédure de la Commission, dans sa version revisée, a été adopté le 12 février 1993 et le 6 mai 1993 et il est entré en vigueur le 28 juin 1993.

8 On rappelle qu’actuellement deux différents Règlements de procédure de la Cour sont en vigueur, dénommés “A” et “B”. Le premier a été adopté le 24 novembre 1982 et il est en vigueur depuis le 1er janvier 1983; le Règlement “B” a été adopté le 27 mai 1993 et il est en vigueur depuis le 2 octobre 1993. L’existence de deux sources différentes est justifiée au vu de la procédure différente, régie par le Règlement “B” qui concerne les États qui ont ratifié le Protocole n°9 de la Convention. Voir, infra, note 1.
 Implicitement, il découle toutefois de l’obligation générale de fournir la collaboration requise pour l’instruction de la cause et le déroulement de la procédure, comme prévu par l’art. 28 de la Convention et les Règlements de procédure de la Commission et de la Cour, que les États doivent assurer l’organisation efficace du Bureau de l’Agent pour pouvoir s’acquitter des obligations dérivant de l’acceptation du mécanisme de contrôle européen.

Par conséquent, dans l’ensemble du système, le devoir de coopération de l’État, et partant, de l’Agent du Gouvernement comporte avant tout la transmission des informations requises, la défense de l’État, aussi bien en tant que requérant qu’en tant que défendeur, et l’accomplissement de la fonction de liaison avec les organes internes concernés appelés en cause dans les divers cas d’espèce.

Concernant les aspects de droit interne liés aux attributions et à l’exercice des fonctions de l’Agent et donc à l’organisation de la représentation de l’État italien dans des affaires pendantes devant les instances internationales, il faut faire référence avant tout aux normes qui régissent l’organisation du Ministère des affaires étrangères, qui prévoient que l’étude et la plaidoirie des affaires contentieuses au plan international sont du ressort du Service du Contentieux diplomatique, des traités et des affaires législatives, appartenant à ce Ministère.

Plus précisément, les fonctions d’Agent auprès de chaque instance internationale sont conférées, moyennant un décret du Ministre des affaires étrangères, institutionnellement et traditionnellement au Chef dudit Service. A ce propos, toutefois, il est utile de préciser que les

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9 Par rapport au devoir de coopération de la part des États membres de la Convention, on signale l’importance des normes des Règlements de procédure de la Commission et de la Cour là où on prévoit, par référence aux différentes phases de la procédure, que lesdits organes peuvent demander aux "Hautes Parties Contractantes" toute information utile sur les requêtes introduites. Voir par exemple les articles 45, 47, 48 du Règlement de la Commission.

10 Les normes en question, relatives aux attributions du Service du Contentieux diplomatique, des traités et des affaires législatives, sont contenues à l’art. 14 du D.P.R. n° 18 du 5 janvier 1967. L’article énonce ce qui suit :

"Le service du Contentieux diplomatique, des traités et des affaires législatives pourvoir notamment :

a) à l’activité de recherche et d’étude sur des questions juridiques concernant les rapports internationaux et les questions législatives;

b) aux activités de conseil sur les questions de nature juridique qui lui sont soumises par les bureaux de l’Administration et à l’instruction des questions à soumettre au Conseil du Contentieux diplomatique;"
fonctions d'Agent peuvent être contenues dans un acte autre que le décret de nomination du Chef du Service du Contentieux diplomatique choisi selon la coutume parmi des professeurs de droit international ou des magistrats ayant de l'expérience dans ce domaine. En principe, il pourrait donc être possible que la personne de l'Agent du Gouvernement ne coïncide pas avec celle du Chef du Service du Contentieux diplomatique, des traités et des affaires législatives et que la désignation de la part du Ministre des affaires étrangères, dans l'exercice de son ample pouvoir discrétionnaire, tombe sur des sujets autres que le Chef du Service du Contentieux diplomatique.

La fonction de représentation et de défense de l'État dans les procédures contentieuses devant les instances internationales et communautaires a fait toutefois l'objet de contestations et a donné lieu à des décisions de la part des juridictions administratives italiennes qui ont précisé la nature et la portée du pouvoir de représentation du Ministère des affaires étrangères et donc de l'Agent, par rapport à d'autres organes de l'État italien. A ce sujet, le Barreau de l'État, organe compétent à représenter et à défendre en justice les administrations de l'État, a revendiqué cette compétence aussi dans les instances judiciaires internationales, en vertu d'une disposition de loi qui a étendu ladite fonction aussi aux procès devant les collèges internationaux ou

c) à l'étude et à la plaidoirie des affaires contentieuses sur le plan international et interne;
d) à l'assistance juridique pour la négociation et la signature de traités et de conventions internationales;
e) à la procédure pour l'approbation et la ratification de traités et de conventions internationales;
f) à la collecte d'arrêté, décisions, avis et maximes en matière de différends internationaux et en matière où il est question de droit international public et privé, à la collecte et publication annuelle des traités et conventions conclus par l'Italie ainsi qu'à la publication et mise à jour systématique de repertoires, par Pays et par matières, des traités et des conventions précitées;
g) à la mise au point de mesures législatives et réglementaires relatives à l'Administration des affaires étrangères ainsi qu'aux formalités relatives à la procédure pour leur approbation et promulgation, y excepté les matières du ressort de la Direction générale du personnel et de l'Administration;
h) à l'examen des mesures soumises au Conseil des Ministres et à la préparation des pièces relatives;
i) à l'examen des mesures d'initiative parlementaire et de celles législatives et réglementaires, établies par d'autres Administrations;
j) à la préparation des réponses aux interpellations et aux interrogations parlementaires.
conunautaires”.

D’après une analyse synthétique des principes exprimés dans un avis du Conseil de l’Etat et dans un arrêt de la Cour des Comptes on déduit des éléments significatifs pour identifier les critères sur lesquels se fonde la compétence du Ministère des affaires étrangères et de l’Agent et on dégage aussi les principes qui régulent dans le cas d’espèce, les relations entre les normes de dérivation internationale et celles du système interne.12

Sur la question de la compétence à représenter et défendre l’Etat italien devant les juridictions internationales et communautaires, le Conseil d’Etat et la Cour des Comptes mient que cette compétence soit du ressort du Barreau de l’Etat car “la nomination d’un Agent du gouvernement ne rentre pas dans l’hypothèse de la représentation et défense ordinaire de l’Administration qui relève automatiquement du Barreau de l’Etat”. En effet, en cas d’intervention devant des instances d’arbitrage, internationales et communautaires, le système ordinaire de représentation et de défense doit se coordonner avec les systèmes résultant des traités constitutifs d’organes de justice qui agissent au niveau international ou communautaire et on ne peut appliquer à la fonction de l’Agent la réglementation interne relative à la représentation en justice du Barreau de l’Etat. A ce sujet, on a signalé que, dans le cadre des systèmes internationaux dans lesquels opèrent les divers organes juridictionnels, à savoir la Cour internationale de Justice, le Tribunal de première instance et la Cour de justice des Communautés européennes, la Commission et la Cour européennes des droits de l’homme, il est prévu que les Etats soient représentés par des agents qui peuvent être assistés par des conseils ou des conseillers. A la lumière de la législation internationale, il ressort que l’Agent a un rôle bien précis: il personifie l’Etat et son activité devant les juridictions internationales met en œuvre soit des aspects de nature technico-légale, et dans ce cas l’Agent peut se faire assister par un conseil ou un conseiller, soit des intérêts de nature politique dont la représentation incombe

11 Il s’agit de l’article 9 de la loi n° 109 du 3 avril 1979 qui a modifié l’organisation du Barreau de l’Etat.


13 En ce qui concerne le système de la Convention européenne des droits de l’homme, il faut faire référence aux dispositions précitées des Règlements de procédure de la Commission et de la Cour. Pour les autres juridictions internationales, voir note 5.
institutionnellement au Ministère des affaires étrangères qui l’exerce moyennant son pouvoir discrétionnaire de nommer l’Agent.

En définitive, d’après les décisions sus-visées, on déduit l’importance des normes de nature statutaire et procédurale régissant l’activité et le fonctionnement des instances juridictionnelles internationales pour ce qui est du rôle de l’Agent par rapport aux normes internes qui régissent la représentation et la défense de l’État.

Sur un plan strictement pratique, une organisation différente s’est progressivement consolidée pour la défense de l’État italien dans le cadre communautaire par rapport à Strasbourg. Dans le premier cas, l’Agent du Gouvernement italien confie la défense de l’État au Barreau de l’État tandis que, devant la Commission et la Cour européenne des droits de l’homme, on a cru nécessaire de nommer le “co-Agent” qui réside de façon stable à Strasbourg et qui est responsable, sous le contrôle et la supervision de l’Agent, de l’ensemble de la procédure. On rappelle que le co-Agent est également le conseiller juridique de la Représentation permanente d’Italie auprès du Conseil de l’Europe et qu’en cette qualité il est assujetti à l’autorité de l’Ambassadeur qui dirige la Représentation.

II. Les procédures contentieuses devant les organes de Strasbourg

Concernant l’exercice effectif des fonctions de l’Agent dans le cadre du système de la Convention, il faut avant tout préciser que leur description fait référence à l’organisation actuelle de la procédure devant la Commission et la Cour européennes des droits de l’homme et le Comité des Ministres du Conseil de l’Europe. Comme nous l’avons mentionné, à partir du 1er novembre 1998, à savoir dès l’entrée en vigueur du Protocole no 11, un seul organe à caractère permanent s’installera et donc la Commission cessera d’exister et le Comité des Ministres n’acquittera plus les fonctions d’organe décisionnel. A

14 Sous ce dernier aspect spécifique il est opportun de signaler la grave lacune concernant les garanties du système créé en 1950 qui conflit, en vertu de l’art. 32 de la Convention, des pouvoirs décisionnels et donc en définitive juridictionnels à un organe politico-administratif tel que le Comité des Ministres du Conseil de l’Europe. Le rôle et les compétences du Comité des Ministres prévues par l’art. 32 du système de contrôle institué en 1950, étaient justifiées à la lumière du compromis auquel on avait abouti et qui avait donné vie à une structure tripartite : le Comité des Ministres représentait en effet l’élément requis en cas de non reconnaissance de la part des États, des clauses des articles 25 et 46 de la Convention. À ce propos, voir R. Abraham, “La réforme du
l'heure actuelle, la première phase de l'examen d'une requête introduite
par un individu comporte une décision de recevabilité de l'instance de
la part de la Commission qui, après avoir nommé un rapporteur, peut
demander aux parties des renseignements sur l'affaire et porter la
requête à la connaissance du Gouvernement, en l'invitant à présenter par
écrit, dans un certain délai, ses observations sur la recevabilité et le fond
de l'affaire. À ce moment-là la Représentation permanente d'Italie à
Strasbourg, dans laquelle, on le rappelle, le co-Agent réside et exerce
ses fonctions, transmet au Service du Contentieux diplomatique du
Ministère des affaires étrangères et aux autres Administrations
concernées une copie de la requête. Ensuite, on identifie les bureaux et
les autorités à informer afin de rassembler tous les éléments nécessaires
pour déterminer les circonstances de fait et de droit relatives au cas
d'espèce faisant l'objet de la requête, en vue de préparer la défense du
Gouvernement. La présence du co-Agent du Gouvernement italien à
Strasbourg permet d'identifier immédiatement, en cette phase de la
procédure, les autorités concernées et de procéder rapidement à la
transmission des données et de la documentation pertinente.

Dans la plupart des cas, les requêtes font référence à des procédures
juridictionnelles : en ce qui concerne le système italien, il faut distinguer
entre les divers organes juridictionnels selon la compétence qui leur est
attribuée.

En particulier, la compétence relève du Ministre de la Justice,
normalement par rapport aux procédures civiles et pénales, qui le plus
souvent font l'objet des causes qui concernent l'Etat italien. Quant aux
procès de nature administrative, il faut avant tout identifier la juridiction
mise en cause qui peut être celle des Tribunaux administratifs
régionaux, organes de premier degré, celle du Conseil d'Etat, qui
s'acquitte également des fonctions de Cour suprême administrative,
celle de la Cour des Comptes, ayant compétence en matière de pensions
de l'Etat et de responsabilité civile des fonctionnaires.

A côté de ces juridictions civiles, pénales et administratives, d'autres
instances peuvent être mises en cause, comme par exemple les
Commissions fiscales, ayant compétence en matière de contentieux
fiscal, les Tribunaux militaires ou d'autres juridictions spéciales.

mécanisme de contrôle de la Convention européenne des droits de l'homme : le protocole
n° 11 à la Convention", Annuaire Français de droit international, 1994, p. 619 à 632,
en particulier p. 621.
En identifiant les organes concernés, il faut également tenir compte des autorités politico-administratives responsables soit des conditions matérielles relatives au fonctionnement de chaque organe juridictionnel soit de la matière qui fait l'objet de l'affaire. Ceci est spécialement important dans tous les cas où ressortent des questions d'ordre général du fait d'une éventuelle modification de la législation interne.

Le Service du Contentieux diplomatique est chargé de rassembler les éléments pertinents provenant des diverses juridictions concernées et des administrations relatives et de les transmettre à la Représentation d'Italie à Strasbourg.

À ce stade de la procédure, il est procédé à la rédaction du mémoire de défense du gouvernement qui est en général le résultat d'une concertation entre l'Agent du Gouvernement et le co-Agent, sur la base de considérations de droit et de faits détaillés fournis par les Administrations mises en cause. À ce propos, on signale que plus le rôle de l'Agent sera marquant et décisif, plus l'affaire a d'importance et de valeur. Compte tenu du grand nombre de requêtes et du peu de temps prévu pour chaque phase de la procédure, le co-Agent sera le point de référence pour les divers problèmes de procédure qui pourraient surgir et c'est à lui qu'il incombe en général de prendre les décisions, comme par exemple de choisir entre la procédure orale ou écrite ou le cours à suivre en cas de demande d'informations de la part du rapporteur ou de la Commission. Toutefois, lorsque le choix est forcément discrétionnaire, par exemple quand il s'agit de décider si accorder ou pas au requérant l'assistance judiciaire gratuite, ou dans des affaires spécialement délicates et importantes, la consultation avec l'administration intéressée et la concertation avec l'Agent deviennent indispensables. En outre, quand l'audience a été fixée soit devant la Commission soit devant la Cour, le co-Agent après en avoir informé l'Agent, se charge de la composition du collège de défense en désignant, dans la mesure du possible, des experts externes à l'administration ayant une bonne expérience en la matière faisant l'objet de la requête.

Si la requête est déclarée recevable, une fois terminée la phase contradictoire entre le requérant et le Gouvernement, c'est la phase dite "de conciliation" qui commence, où la Commission se met à la disposition des parties pour essayer d'aboutir à un règlement amiable du différend. Également en cette circonstance il sera procédé à une consultation des organes nationaux concernés. La procédure devant la Commission prend fin par une décision sur le fond contenue dans un
Le rapport qui est transmis au Comité des Ministres et communiqué aux Parties\textsuperscript{15}.

Dans les trois mois qui suivent, l'État défendeur, la Commission ou le requérant doivent décider s'ils entendent saisir la Cour\textsuperscript{16}. Dans la première hypothèse, il semble évident que la décision de l'État présuppose une appréciation attentive de la nature, de l'objet et des éventuelles implications de l'affaire qui exige à son tour une nouvelle consultation avec tous les organes concernés. Si c'est la Commission qui saisit la Cour, l'État défendeur recevra la communication relative aussi bien par la Commission que par la Cour.

La procédure devant la Cour prévoit au préalable une prise de contact de la part du Greffe avec le co-Agent pour l'organisation de la procédure, à la suite de laquelle le délai pour le dépôt des mémoires écrits, pour les observations sur la satisfaction équitable à accorder le cas échéant au requérant, et pour la fixation de l'audience publique est communiqué formellement. A cet égard, la représentation devant la Cour s'entend automatiquement conférée à l'Agent et au co-Agent, qui peuvent se prévaloir, comme pour l'audience devant la Commission, de l'aide de conseillers.

La procédure devant la Cour est également orientée vers le dialogue, la consultation et la concertation avec toutes les autorités impliquées. L'arrêt, après avoir été publié et lu en audience publique à la présence en général du co-Agent ou de toute autre personne déléguée par ce dernier, est transmis au Service du Contentieux diplomatique et à l'Administration mise en cause afin de pourvoir, le cas échéant, à son exécution\textsuperscript{17}.

En dernière hypothèse, si la Cour n'est pas saisie, c'est le Comité

\textsuperscript{15} Le rapport de la Commission est adopté au sens de l'article 31 de la Convention : il est transmis aux États concernés qui toutefois n'ont pas le droit de le publier.

\textsuperscript{16} A cette catégorie de sujets il faut ajouter, dans le cas des requêtes étrangères, introduites au sens de l'art. 24 de la Convention, aussi l'État qui a saisi la Commission. En outre, en ce qui concerne le droit du requérant à saisir la Cour, les considérations formulées dans la note 4 sont valables.

\textsuperscript{17} Un aspect immédiat de l'exécution de l'arrêt en cas de constat d'une violation est celui du paiement d'une satisfaction équitable au sens de l'art. 50 de la Convention. Dans ce cas, il faudra interen la procédure pour que l'État pourvoie au paiement de la somme.

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des Ministres qui se prononcera selon l’article 32 de la Convention, par une décision de nature obligatoire sur le fond de l’affaire, en indiquant le cas échéant, les mesures d’ordre général relatives à la modification de la législation ou de la pratique que l’État doit adopter, en fixant l’éventuelle somme à verser au requérant au titre de satisfaction équitable et en assurant le contrôle de l’exécution.

Pour compléter le tableau des procédures et des compétences des organes du système de la Convention européenne, on rappelle que le Comité des Ministres est en outre investi de la fonction dite “de surveillance” pour ce qui est de la mise en œuvre de l’arrêt émis par la Cour, fonction dont l’importance va faire l’objet d’une réflexion au paragraphe suivant.

III. La jurisprudence de la Cour Européenne des droits de l’homme et le droit italien

En vertu de l’article 53 de la Convention, les Hautes Parties contractantes s’engagent à se conformer aux décisions de la Cour dans les différends auxquels ils sont parties. Les arrêts de la Cour sont définitifs et ils sont de nature déclaratoire dans le sens qu’il échoit à la Cour de déclarer s’il y a eu ou pas violation dans le cas d’espèce, mais elle n’a pas le pouvoir d’abroger une loi, d’annuler un acte administratif ou de casser un arrêt, au cas où elle retiendrait que ces actes sont contraires à la Convention et elle ne peut ordonner l’adoption d’aucune autre mesure. C’est donc aux États concernés qu’incombe l’obligation de se conformer aux décisions adoptées en choisissant les mesures les plus appropriées pour uniformiser leur système conformément à l’arrêt de la Cour.

18 A ce sujet, une pratique s’est consolidée par laquelle le Comité des Ministres demande à la Commission un avis sur l’éventuelle somme à liquider et dans ce cas, une sorte de procédure contradictoire se forme entre les parties, avec l’information et la consultation informelle de l’Administration nationale concernée. On rappelle que l’État concerné par la décision prend part également aux décisions du Comité des Ministres, par l’entremise de son délégué, généralement le Représentant permanent auprès du Conseil de l’Europe. On entrevoit l’anomalie d’une procédure, d’ailleurs abrogée par le Protocole n° 11, là où l’État mis en cause par la requête est à la fois juge et partie à la procédure.

19 Le Comité des Ministres, en s’acquittant de cette tâche au sens de l’art. 54 de la Convention, a été défini comme le “bras armé” de la Convention.

30 En cas de condamnation de l’État au versement d’une satisfaction équitable on parle de “arrêt de prestation” et l’accomplissement, de la part de l’État, de l’obligation d’exécution ne consiste que dans le versement effectif à court terme du montant prévu.
La portée de l’obligation d’exécution des arrêts offre des aspects d’interprétation controversés, notamment dans les hypothèses où les motifs figurent dans l’arrêt de la Cour établissent que la violation de la Convention dépend non seulement de l’existence même de la législation en question mais de l’application, en soi correcte, d’une disposition de loi ou d’un règlement à un cas particulier. Dans ce cas, la seule obligation subsistant pour l’État serait d’adopter une mesure de nature individuelle et non pas générale, vu que l’objet de la décision est l’acte visant à l’application de la disposition interne et non pas cette dernière. Toutefois l’omission, de la part de l’État, de modifier son système expose à la répétition de faits pouvant léser d’autres sujets soumis à sa juridiction; au vu de cette éventualité en pratique les États adoptent généralement les modifications requises de type législatif ou d’orientation jurisprudentielle. C’est dans ce contexte qu’intervient la fonction de contrôle de l’exécution des arrêts de la Cour de la part du Comité des Ministres, dont l’action s’insère dans le cadre du développement de l’ordre public européen et se déploie par la capacité de vérifier de façon toujours plus ponctuelle les formalités et les mesures adoptées par les États.

Concernant le cas spécifique de l’Italie, certains arrêts de la Cour ont donné lieu à l’adoption de mesures de nature générale pour adapter le système italien aux principes qui y sont énoncés.

Par exemple, suite à l’arrêt Colozza, dans lequel on constatait la violation de l’article 6, par. 1 en matière de procès équitable et par référence au déroulement d’un procès par défaut, le nouveau code de procédure pénale de 1989 a expressément prévu la possibilité d’obtenir la réouverture des délais pour interjeter un appel contre un arrêt émis par défaut.

Le code de procédure pénale a également tenu compte d’autres affaires introduites devant la Cour européenne des droits de l’homme en prévoyant, par exemple à l’ar. 169, par. 3, que la notification officielle

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22 À ce sujet, selon certains, l’obligation d’effectuer les modifications découlerait des articles 1 et 57 de la Convention.


de l'accusation concernant la commission d'une infraction pénale doit être communiquée à l'intéressé dans sa langue maternelle quand on ne peut déduire des pièces acquises que l'inculpé connaît la langue italienne25.

En outre, il y a eu une modification de la législation interne au cours même de la procédure devant la Cour européenne et avant l'émanation de l'arrêt. L'affaire en question concernait la légitimité d'une mesure de détention ordonnée par l'autorité judiciaire dans le cadre d'une procédure "de prévention" et pas de caractère pénale26.

Concernant le problème de la longueur excessive des procédures civiles, question qui a valu à l'Italie maints verdicts de de condamnation de la part des organes de Strasbourg, différentes initiatives législatives ont été entreprises en vue d'abréger les délais de la justice civile. Afin de régler rapidement les affaires en souffrance accumulées depuis des ans, une loi a été promulguée établissant les Chambres dites "à épuisement", composées de juges honoraires, engagés à terme27.

La loi de réforme du code de procédure civile a également visé à introduire une série d'institutions comme par exemple les mesures anticipatoires de condamnation moyennant lesquelles il est possible d'obtenir la satisfaction d'un droit même quand le jugement est pendant28. En outre une mesure législative relative à l'institution du juge unique de premier degré fait l'objet d'un examen de la part du Parlement. Cette initiative permettrait de rationaliser l'organisation de la magistrature et d'accroître le nombre de magistrats destinés à devenir juges.

IV. Développements futurs du rôle du Chef du Service du Contentieux diplomatique, en tant qu'Agent du Gouvernement italien, dans la perspective de la nouvelle Cour unique des droits de l'homme

26 Affaire Ciulla c. Italie, arrêt du 22 février 1989, série A, n° 148. Par la loi n° 327 du 3 août 1988, la mesure de privation de liberté qui fait l'objet de l'affaire jugée contraire à l'art. 5 par. 1 de la Convention, a été éliminée. 
27 La loi qui prévoit ces Chambres est la n° 276 du 22 juillet 1997. 
28 La réforme du code de procédure civile est intervenue par la loi n° 353 de 1990 à laquelle ont été ajoutées des modifications successives et elle est en vigueur dans sa totalité depuis le 2 mai 1995.
Nous avons déjà mentionné la prochaine entrée en vigueur du Protocole n°11, par lequel il a été procédé à une modification structurelle du mécanisme de contrôle institué par la Convention de 1950. Les principales nouveautés prévues par cet instrument se résument en l'élimination du caractère facultatif de la requête individuelle, en l'institution d'une Cour unique, en l'élimination du pouvoir décisionnel du Comité des Ministres\(^\text{29}\).

La nouvelle procédure s'inspire amplement à celle actuellement adoptée par la Commission européenne des droits de l'homme\(^\text{30}\). La tâche de filtrer les requêtes en établissant au préalable leur éventuelle irrecevabilité sera soumise, pour les requêtes individuelles, à un comité de trois juges qui à la suite de l'introduction de l'affaire par un juge rapporteur, peut soit se prononcer en ce sens, soit raye l'affaire du rôle, mais seulement à l'unanimité, en promulguant une décision définitive (art. 28 du Protocole). Pour les autres affaires, la Cour agira par l'entremise de ses propres Chambres, Sections composées de 7 juges, y compris le juge national, ayant compétence à se prononcer sur la recevabilité et le fond (art. 29\(^\text{31}\)).

Selon le déroulement normal de la procédure, la Cour, ou plus précisément la Chambre préposée prononce un jugement motivé qui avant de devenir définitif sera communiqué aux parties (articles 42 et 44). Dans les trois mois qui suivent, au sens du nouvel article 43 les parties, sans effectuer de distinction entre Etat et individu, peuvent renvoyer l'affaire devant la Grande Chambre (Section élargie de la Cour) composée de 17 juges.

Le renvoi du différend est prévu au titre d'hypothèse exceptionnelle justifiée par des questions graves relatives à l'interprétation ou à l'application de la Convention ou par une question grave d'ordre général (art. 43, par. 2). La décision sur la recevabilité de la demande de renvoi relève d'un collège de cinq juges de la Grande Chambre. Il est d'ailleurs possible que le différend suive un parcours différent. On prévoit en effet que la Chambre puisse se déssaisir de l'affaire en faveur de la Grande Chambre pour éviter des contrastes jurisprudentiels, ou

\(^{29}\) Voir supra les notes 3 et 5.
\(^{30}\) Sur le rôle et le fonctionnement de la Commission, voir M. De Salvia, *La Convenzione europea...*, op. cit. p. 56 à 65.
\(^{31}\) L'examen sur la recevabilité et celui sur le fond restent en effet séparés (art. 29 par. 3).
lorsqu'il s'agit d'une question d'interprétation de la Convention et de ses Protocoles.

Dans ce cas, il y aura un procès en un seul degré sans possibilité de renvoi: le pouvoir de la Chambre est cependant subordonné au manque d'opposition des parties (article 30).

Concernant le rôle du Comité des Ministres, le Protocole n° 11, en reformulant les dispositions de la Convention -- de l'article 19 à l'article 51 -- s'est limité à n'attribuer à cet organe aucun pouvoir concernant la décision du différend. Alors que dans le système actuel si la Cour n'est pas saisie dans un délai de trois mois après le rapport de la Commission, c'est automatiquement le Comité des Ministres qui doit décider de l'affaire, le Protocole n° 11 maintient en vigueur les seules compétences du Comité des Ministres pour la surveillance de l'exécution des arrêts de la Cour européenne des droits de l'homme.

Concernant cette réforme on ne peut manquer de souligner les progrès qui ont été accomplis au sein d'un système qui semblait déjà des plus avancés, pour avoir prévu une procédure de nature juridictionnelle automatiquement applicable à tous les États parties de la Convention. Cette caractéristique, si elle peut sembler relativement importante pour les pays d'Europe occidentale, assume par contre une signification et une portée exceptionnelle pour les démocraties naissantes d'Europe orientale et leurs ressortissants.

Il est vrai que la réussite et l'efficacité du nouveau système ne pourront être évaluées que dans le temps et lors de sa mise en œuvre concrète. Toutefois nous souhaitons vivement qu'il puisse fonctionner sans interruption selon les principes appliqués par la jurisprudence des organes actuels de la Convention, qui constitueront des bases solides pour l'activité de la nouvelle structure juridictionnelle. On ne peut négliger la valeur, l'importance accrue et l'influence de cette

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22 A ce propos, voir la note 13.
jurisprudence dans le cadre des systèmes nationaux. Dans cette optique, seul un rapport de synergie solide, stable et continu entre le milieu international et le milieu interne, dans un contexte de plus grande efficacité du système de protection des droits de l’homme, pourra mener à la "constitutionnalisation" de la Cour européenne des droits de l’homme, comme garant suprême d’un droit commun des libertés visant à l’installation d’un ordre public européen qui n’inclut pas seulement les démocraties bien enracinées du vieux continent, mais presque 40 États.

Enfin, en ce qui concerne les fonctions de l’Agent et du co-Agent dans le cadre de la nouvelle Cour européenne des droits de l’homme, il semble difficile à l’heure actuelle d’esquisser la nature et la portée des changements liés au fonctionnement et à l’organisation de la procédure de la nouvelle Cour. Des indications utiles à ce sujet nous seront fournies par le texte du nouveau Règlement de la Cour qui toutefois n’a pas encore été adopté.

Si, d’une part, par la suppression de la Commission, on évitera de doubler, répéter une deuxième fois les activités relatives à l’introduction des mémoires ou à tout autre genre d’activité d’information, il est également vrai que la nature permanente du nouvel organe comportera une organisation différente des temps et des modes de travail. Une autre inconnue est celle liée à la possibilité, pour l’individu, d’activer directement le système et la procédure de renvoi et de dessaisissement.

Une modification importante qui aura certainement des conséquences pour l’organisation de la procédure et les fonctions exercées par le co-Agent en tant que membre de la Représentation permanente, est la suppression des fonctions décisionnelles du Comité des Ministres, actuellement exercées en vertu de l’article 32 de la Convention. L’anomalie que nous avons mentionnée relative à l’attribution de pouvoirs de nature juridictionnelle à un organe politique a été éliminée, et avec elle aussi l’existence du rôle, dans la personne du Représentant...
permanent près le Conseil de l'Europe ou son délégué, le co-Agent, de partie défenderesse et d'organe jugeant.

D'après les considérations ci-dessus exposées, incontestablement apparaît l'exigence de renforcer le bureau de l'Agent et surtout du co-Agent, en envisageant par exemple la création d'un Bureau ad hoc, ancré dans la structure du Ministère des affaires étrangères, installé de façon stable à Strasbourg et uniquement saisi des questions concernant la procédure devant la Cour. Dans cette perspective, on pourrait penser à la création d'une structure bureaucratique flexible, formée d'experts en droit international des droits de l'homme et en pratique de la Convention européenne, provenant, par exemple, du Barreau de l'État ou du Ministère de la justice et ayant compétence par matière et pour les volets spécifiques régnis par la Convention. Cette structure s'occuperait de l'étude des questions soulevées sur le plan international et de la défense technique de l'État, l'Agent gardant sa fonction de liaison avec les organes législatifs et exécutifs de l'État et son rôle de surveillance sur les relations entre le système international et interne par rapport soit à la sauvegarde des principes généraux du système de l'État soit à la vérification de l'uniformité et de l'homogénéité de la législation interne concernée par l'application de la Convention européenne des droits de l'homme.
I. Introduction

One of the major contributions of modern international law is the emergence of the principle of peaceful settlement of international disputes as *jus cogens* along with the development of international organization seeking to provide some institutional support to the principle. Article 33 of the Charter of the United Nations reflects the confluence of these two strands of evolution.

At least four major operational ramifications of the principle of peaceful settlement of disputes may be identified for the present purposes. First, it is generally agreed, the principle applies to all international disputes, not merely to those which are likely to endanger international peace and security. Second, the obligation of States to strive for peaceful settlement of a dispute is continuous: it remains unfulfilled so long as the dispute remains unresolved. In other words, failure of a dispute settlement means does not terminate or exhaust the obligation; the States parties to the dispute have an obligation to continue to seek its peaceful settlement by other means. Third, the continuing obligation to seek peaceful settlement of the dispute, gives rise to a further obligation - also based on the principle of good faith - on the part of not only the States parties to the dispute, but also all other...
States, to refrain from aggravating the dispute or frustrating the dispute settlement process.

Finally, the dispute settlement obligations must be pursued in accord with the principle of sovereign equality. This implies sovereign equality in the freedom of choice of peaceful means of settlement, as well as sovereign equality in the process of dispute settlement through a mutually agreed means. It underscores voluntarism as the basis of selection of a dispute settlement means. The parties to dispute may agree on any peaceful means of their choice: they may even agree on more than one means, whether to be pursued simultaneously or successively.

The complementary role of the International Court of Justice in facilitating dispute settlement alongside one or the other peace means has not been widely noted as it should be. Addressing the General Assembly of the United Nations on 15 October 1993, the then President of the Court, Sir Robert Jennings, made a special mention of the Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgement, I.C.J. Reports 1992, p. 240, hereinafter referred to as the Nauru case, (along with two other cases):

"...because they illustrate a new role for the Court, unimagined by earlier commentators on the adjudication process in international matters. In all these instances of settlement, or attempted settlement, by negotiations after the time when the Court has been seized of a case, some part of the procedures of the Court, such as written pleadings, or indeed a hearing and decision on a preliminary phase, such as jurisdiction or interim measures, had been completed. Thus, it was the intervention of some part of the procedures before the Court which apparently not only made further negotiations in this new context possible but made it possible for them to succeed.

In this way, the Court procedure is beginning to be seen as a resort to be employed in a closer relationship with normal diplomatic negotiation. No longer is resort to the International Court of Justice seen, to use the traditional phrase, as a 'last resort' when all negotiation
The present essay is an attempt to adumbrate on the use of the facility of the Court's contentious jurisdiction for resolution of a long standing dispute by the applicant party in the Nauru case. It consists of five parts. The first part consists of a narrative of the dispute; the second deals with the planning and preparation of the litigation before the Court; the third dwells on the case before the Court including the implications of the Court's Preliminary Objections Judgment; the fourth presents the settlement out of Court; and the final part embodies some conclusions drawn from the Nauru experience.

II. The Nauru Dispute

Nauru's dispute with Australia has been, at its core, a typical colonial dispute, but its spread was much vaster; more than that, it involved the conduct of an Administering Power in performance of its obligations under a Trusteeship Agreement with the United Nations; it involved questions of self-determination including the permanent sovereignty over natural resources of a colonial people; it involved compulsory acquisition of property with highly inadequate or no compensation: it involved questions of environmental law obligations relating to mining of an 'international' (i.e. trust) territory; it involved questions of compatibility of the obligations of an Administering Power under international decolonisation regime in respect of a “sacred trust of civilization”, with its pursuit of commercial monopoly in exploitation of the natural resources of the territory; it involved issues of abuse of rights and unjust enrichment on the part the Administering Power vis-à-vis the international organisation. Finally, it also involved the issue of adequacy or otherwise of the role played by the international organisation in supervision of a “sacred trust of civilization”. Yet, not all these issues figured before the Court for its adjudication.

Nauru is a single high coral island atoll on a volcanic platform, situated some 33 miles to the south of the Equator in the mid-Pacific Ocean. With an area of 21 sq. kilometers, the island was covered with

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phosphate deposits except for a narrow coastal belt and a smaller area around the central lagoon. Phosphate mining involves clearing of the topsoil with its rich indigenous vegetation (and biodiversity) and removal of phosphate rich subsoil, leaving only a number of coral pinnacles in the mined out lands which resemble a moonscape.

Nauru became a ‘colonial protectorate’ in the German Empire in 1888. As phosphate was discovered in 1900, a German company was granted an exclusive mining concession, which was later (1905) transferred to an Anglo-German consortium incorporated in Britain. Phosphate exploitation began in 1907. In 1914 upon the outbreak of the First World War, Nauru was taken over by the Australian forces. With an eye on phosphate, Australia wanted to annex Nauru, but New Zealand, the United Kingdom and most importantly the Versailles Peace conference, came in the way. It was no longer fashionable to annex foreign territories, but they could be ‘legitimately’ exploited “as a sacred trust of civilization” under a League of Nations mandate: The Nauru mandate agreement was approved by the League in December 1920. However, to be doubly cautious, Australia, New Zealand and the United Kingdom formally bought off the phosphate mining concession from the Anglo-German company at a price of 3.5 million pounds and this they did just six months before the Mandate Agreement was approved. In words, just before the mandate system became applicable to Nauru, an Australian-New Zealand-British condominium over the phosphate resources of Nauru (British Phosphate Commissioners or BPC) came into existence and thenceforth successfully insulated all matters relating to phosphate industry from the purview of the mandate. The three ‘partner’ governments also authorised Australia to take control of the administration of Nauru. Since then, Nauru, a Class C mandate, was administered as if it were a part of the territory of Australia. The erstwhile German laws were abolished. Along with these were abolished the requirements of just compensation for mining of phosphate, and of restoration of mined out lands. The triumvirate condominium over phosphate and the Australian Administration breached the customary land rights of Nauruans, and undertook exploitation of the phosphate resources of Nauru to provide fertilizers at cost price primarily for Australian farmers. This deprived Nauruans of an estimated phosphate revenue of $350 million to $1 billion over the period until Nauru’s independence, besides other losses such as those relating to land use.

The Second World War witnessed the Japanese forces taking
control of Nauru in 1942 and subjecting the Nauruans to untold miseries and cruel experiences. The Australians recaptured the island in September 1945. The Trusteeship Agreement for Nauru was approved in 1947 by the General Assembly of the United Nations. It permitted the 1919-20 system of economic exploration of Nauru to continue. It designated Australia, New Zealand and the United Kingdom “as the joint Authority which will exercise the administration of the territory” but clarified that the actual administration was to be run by Australia, until otherwise agreed to by the three partner governments. This position of Australia in the governance of Nauru was reconfirmed on a permanent basis by a tripartite Nauru Agreement in 1965.

The problem of inhospitable condition of the mined out of lands was recognized by Australia itself. The Trusteeship Council kept reminding Australia that “the needs of the inhabitants must have precedence” over the so-called requirements of the phosphate industry. The reports of the Administering Authority on Nauru have, by and large, been a consistent exercise in *suppressio veri et suggestio falsi*, in spite of repeated calls for additional information by the Council. Often the United Nations Visiting Missions who went to Nauru biannually gained a feel of the ground realities of the colonial exploitation practised by Australia in Nauru.

Even while making a show of ‘grant’ of self-government to Nauru, Australia made sure that it came in very small doses which did precious little to dismantle the regime of economic exploitation erected in 1919-1920. For instance, the Nauru Agreement Act of 1965, while providing for an elected Legislative Council for Nauru, denied the Council of any legislative power relating to phosphate industry including the ownership, operation and control of the industry,

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4 General Assembly resolution 140 (II) of 1 November 1947.
5 Article 2 of the Trusteeship Agreement.
6 Article 4 of the Trusteeship Agreement.
7 Article 1 (2) & (3) of the Nauru Agreement of 26 November 1965. The Agreement was given legislative effect by the Australian Commonwealth Parliament which enacted the Nauru Act in 1965.
9 Ibid., p. 76. So did the General Assembly of the United Nations. In resolution 322 (V) of 15 November 1949, the Assembly reaffirmed “the principle that the interests of the indigenous inhabitants must be paramount in all economic plans or policies in trust territories...”.
phosphate royalties and the ownership and control of the phosphate bearing lands.  

Since 1949 the Trusteeship Council and the General Assembly continually expressed concern over a number of aspects of the administration of Nauru -- possibility of making use of worked-out phosphate lands, low level of phosphate royalties paid to Nauruans, future home for Nauruans, and the transfer of control of phosphate industry operations to the Nauruan people.

In 1962 the Trusteeship Council recognized "the strongest obligation" on the part of the Administering Authority which had "benefited from low price, high quality phosphate over the many years... to provide the most generous assistance towards the cost of whatever settlement scheme is approved for the future home of the people of Nauru". It also noted the declaration of the Administering Authority that it "will be mindful of its obligation to provide such assistance".

After the disagreement over the relocation of the Nauruan population in one of the Australian islands -- the disagreement being total exercise of Australian sovereignty versus preservation of the Nauruan identity --, the proposal for relocation fell through and Nauruans asserted their right to stay in their traditional homeland. The 1965 General Assembly resolution which asked the Administering Authority to establish a Legislative Council for Nauru and grant independence not later than 31 January 1968, also requested that "immediate steps be taken by the Administering Authority towards restoring the Island of Nauru for habitation by the Nauruan people as a

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10 Article 1 (2) (a) of the 1965 Act.
14 General Assembly Resolution 2221(XXI) of 20 December 1966.
Because of the pressure exerted by world public opinion, the triumvirate grudgingly agreed to transfer the phosphate industry to Nauruan control in 1967. However, negotiations both inside and outside the United Nations concerning rehabilitation of mined out phosphate lands reached a dead-end. Nauruans did not want this to be a stumbling block in the process of their independence. Thus Nauru became independent on 31 January 1968.

Since it became independent, Nauru raised the issue of rehabilitation of mined out lands with Australia, as well as with the United Kingdom and New Zealand, both formally and informally on several occasions. Nonetheless, the Nauruan attempts met with stonewalling by the three former ‘partner’ governments. The latter repeated their stock reply -- that they had no obligation in respect of rehabilitation of lands, worked out by them during the Mandate and Trust administrations of Nauru, that the agreement on Phosphate Industry worked out in 1967 on the eve of independence was an adequate settlement of all issues outstanding at that time between the two sides, and that the United Nations did not leave the rehabilitation issue specially active through independence. In 1987 they went ahead to dissolve their tripartite entity involved in phosphate industry in the South Pacific (BPC) and distributed among themselves all its funds and assets without awaiting the settlement of the Nauruan claim.

III. Planning and preparation of the litigation before the International Court of Justice

The issue of rehabilitation was raised by Nauru intermittently with Australia and the other two ‘partner’ governments since 1969. It figured regularly in the Nauru President’s annual Independence Day address to the nation. Through the seventies, Nauru thought that Australia and others would begin negotiations. That was not to be. Finally, in early 1981, the Nauru Government decided to examine the option of litigation. Should Nauru pursue its case before the national courts of the former ‘partner’ States? Was exhaustion of national

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16 General Assembly resolution 2111(XX) of 21 December 1965. This was repeated in 1966. See General Assembly resolution 2221(XXI) of 20 December 1966.
17 See the statement by Head Chief Hammer DeRoburt of Nauru, Trusteeship Council, 13th special session, 22-23 November 1967, p. 3.
procedures a condition precedent for institution of proceedings before the International Court of Justice?

Even as the above questions were being examined, a larger question of legal and political importance cropped up. The Government of Nauru wanted to ensure a national consensus and organise the available evidence on the issue. Further, it also wanted to examine the question of rehabilitation of all mined out phosphate lands -- lands mined out under colonial administration, as well as those to be mined out until exhaustion of all phosphate deposits. A so-called expert committee appointed by the Australian administration in response to the pressures of the General Assembly of the United Nations in 1965 had found that rehabilitation was an exercise too costly to be practicable. It was thought worthwhile to re-examine the validity of the custom-made conclusions of such expert committees appointed by the colonial administration. All this thinking led to the appointment of an independent Commission of Inquiry in 1986.

The Commission of Inquiry comprised three members -- Professor (now Vice-President of the ICJ) C.G. Weeramantry (Chairman), Mr. R.H. Challan (an Environmental Engineer from Queensland, Australia) and Mr. Gideon Degidoa (a respected senior Nauruan). Professor Barry Connell, an Australian international lawyer and former Chief Secretary of Nauru was appointed counsel for the Commission. The Commission was mandated to inquire into two questions, namely (a) the government(s) and organisation(s) who should accept the responsibility for rehabilitation of phosphate lands worked out during colonial administration, and (b) feasibility of the rehabilitation of such lands and its estimated cost. The access to the Commission was open for all. It held hearings in Nauru, Australia and New Zealand. It met, both formally and informally, a large number of people and companies in these places, as well as in New York, London and Geneva. It met common Nauruans in various district meetings mainly to find out what exactly they understood and expected by rehabilitation. It was indeed an independent Commission in the sense

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18 Article of 83 (2) of the 1968 Constitution of Nauru proclaims that it shall not be the responsibility of the Government of Nauru to rehabilitate the phosphate lands mined out before 1 July 1967.
that it had total freedom of action. While the Commission succeeded in procuring considerable quantity evidence from distant sources such as the United Nations and the United Kingdom Public Records Office, the three former ‘partner’ governments were most uncooperative throughout; they refused to not only participate in the Commissions’ proceedings, but also successfully kept the lid on the BPC phosphate industry records rather firmly. Even avenues such as the Australian Freedom of Information Act were frustrated by the delaying tactics of the Australian Government.

Be that as it may, the Weeramantry Commission submitted its 10 volume report in November 1988. It held the three former partner governments responsible for the rehabilitation of lands worked out during colonial administration. It concluded that rehabilitation was feasible. Rehabilitation did not mean mere refilling or resoling of craters; but getting the worked out land ready for preferred land use development.

The Commission of Inquiry fulfilled all what was expected of it: mobilisation of a national consensus, triggering of a feeling of public participation in the national decision-making on rehabilitation, collection and organisation of evidence in respect of colonial rehabilitation issue, collection of information on technical and financial issues relating to rehabilitation and developmental planning, and initiation of some regional pressure to bear upon Australia and New Zealand.

As the Commission was set to work, the Government of Nauru sought and received legal opinions on the issue of responsibility for rehabilitation of phosphate lands worked out during colonial administration. The objective was twofold. One, this was necessary to assist the presentation of the Government’s position before the Commission. Second, equally important, in this way the Government could get some eminent legal experts morally committed in respect of its case, thereby depriving the other party of their services, should the matter mature into a litigation.

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Copies of the Weeramantry Commission’s Report were sent to all the three former partner governments with a request that in the light of this report, they reconsider their position and express willingness for a negotiated settlement. The partner governments through nearly identical replies advised Nauru that there was no change in their earlier position, that they had no legal responsibility for rehabilitation and that the 1967 settlement had amply provided for it.

So there was nothing further to negotiate. Hence litigation. It was already decided that there was no need to proceed with litigation under the municipal laws of the three countries. Nor was there any use (remedy). The issue essentially related to the breach of a public, government (Crown) trust and there are a number of cases in the three countries ruling out any justiciable obligations. Since the issue related to governmental trust, it was decided, that it was pre-eminently a matter for litigation based on public international law; for such cases, the rule of exhaustion of local remedies would not apply. It may be of interest to note that Australia did not raise any preliminary objection based on non-exhaustion of remedies before the International Court of Justice.

A legal team was formed to pursue the international litigation option, soon after the presentation of the Weeramantry Commission’s Report. With Professor Ian Brownlie of Oxford as the team leader, the team included Professor James Crawford of Cambridge, Professor Barry Connell of Monash, Professor V. S. Mani of Jawaharlal Nehru University, and Mr. Leo Dkeke, a senior Nauruan lawyer. Prof. Connell was a former Chief Secretary of Nauru and Prof. Mani was Chief Secretary for most part of the duration of the litigation and proceedings of the Commission of Inquiry. The composition of the legal team in terms of the qualifications, intellectual biases if any, and suitability of each of its members, had been elaborately discussed in the Nauru Cabinet, and there was some discussion in the Nauru Parliament as well.

The timing of the lodging of Nauru’s application instituting proceedings before the ICJ was itself considered important. Given the accession of Nauru to the Statute of the ICJ, it was theoretically possible for Australia and other partner governments to withdraw their respective

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20 See particularly Tito v. Waddell, All England Reports (1977-III), p. 129. This case related to issues very akin to Nauru’s case, the British judge holding that the matter fell within the discretionary realm of the Crown.
Optional Clause declarations.

Formulation of the Nauruan Application was based on considerable deliberation. Although Nauru did have three other major claims -- deprivation of property in phosphate, deprivation of opportunity revenue from phosphate at world market price, and war damage claims --, it was decided to confine the Application to the rehabilitation claim. To guard against the flood-gates argument, it was also decided to present the case in terms of the Trusteeship Agreement and the principle of permanent sovereignty over natural resources, read with the principle of self-determination, rather than as an environmental claim.

As an offshoot of the main rehabilitation claim, Nauru decided to make an additional claim for its share in the overseas assets of the BPC’s phosphate industry as they stood in 1987.

Again, it was a deliberate decision to proceed against Australia alone. From Nauru’s point of view, Australia was the colonial power -- the Australian flag flew over Nauru, Australia appointed its administrators, Australia made laws for its administration. These, more than anything else dominated the deliberations.

Indeed, Nauru, one of the smallest countries in the world, felt safe to go before the International Court of Justice, a forum which ensured sovereign equality, unlike the political forums of other international organisations. Presidents Ruda and Jennings made sure that the principle was consistently observed in all procedural matters as well.

Nauru resorted to litigation before the ICJ as the last resort. There was no possibility of negotiation in sight. It opened up only after the Court’s judgment on jurisdiction.

IV. The Case before the International Court of Justice

The case was instituted by the Nauruan application on 19 May 1989. Within the time limit fixed for the filing of its Counter-Memorial, Australia filed its Preliminary Objections to the Court’s jurisdiction and admissibility of the case.

Australia raised six major preliminary objections. Among
them were those relating to non-survival of the dispute after termination of the Trusteeship, laces, and laches, of good faith, but the most important of them was that of non-maintainability of the case for non-impleading of other essential parties, namely the United Kingdom and New Zealand. Rejecting this latter preliminary objection, the Court held that "In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim". This it did, despite conceding that "In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned". It was not necessary for the Court to determine the responsibility of those two States before determining that of Australia. Reserving the question whether the responsibility of the three States was joint, or joint and several, the Court ruled:

"It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia".

The Nauruan claim for a share in the overseas assets of the BPC phosphate industry in 1987 was held inadmissible as "it constitutes both in form and in substance, a new claim".

It is worth noting that the Court's judgment lists His Excellency Hammor DeRoburt as a member of Nauru team during the oral hearing. It appears that there was some hesitation on the part of the Australian team to allow him to be recognised as such. However, Nauru was happy to hear that Canberra intervened, in the meantime, and that there was no difficulty for the Court to recognise DeRoburt as a Counsel

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22 Ibid., p. 261.
23 Ibid., p. 259.
24 Ibid., p. 267.
for Nauru; he was so addressed by the Court. It was important for Nauru to have presented him before the Court. Since his health was constantly failing, it was thought it advisable not to wait for the merits stage to produce him as a key witness for Nauru: he was witness to the unfolding of the Nauruan nationhood, and he had led the Nauruan struggle for independence. He symbolized Nauru’s history. As counsel for Nauru, he presented the facts of Nauru’s case before the Court in his own inimitable style. There is no doubt that he added considerable authenticity to Nauru’s case.

One must add that the working relations of the two legal teams were very cordial, as noted by President Ruda himself. Both sides even agreed not to appoint judges ad hoc of their own. This reciprocal waiver of a rather substantive right was greatly appreciated by the Court.

V. Settlement Out of Court

The judgment of the Court of 26 June 1992 on preliminary objections established a number of points in favour of Nauru. At the outset, the Court found that Australia had responsibility of its own in respect of Trusteeship obligations. If at the merits stage it would be found that Australia had breached these obligations, it could be asked to pay reparation. Evidently, the Nauruan case was that these obligations were breached before the termination of the Trusteeship, and that the breaches had not been made good so far. The Court also found that the Nauruan claim subsisted through the Trusteeship termination and that the General Assembly intended so even when it terminated the Trusteeship. These implications of the Court’s judgment and the fact that the judgment as a whole was supported by at least a 9 to 4 majority of the judges indicated that Nauru had an extremely good case on merits. The victory at the preliminary stage was broadly interpreted in the South Pacific region as a vindication of the Nauruan claim. This did exert considerable pressure on Australia — and New Zealand and the United Kingdom. Additionally, there was a change of guard in the Australian Labour Government in Canberra. Keen to prove that

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25 Indeed, there is no “International Bar” in existence. Nor do the Statute and Rules of the Court require special qualifications for acting as Counsel before it. For more on this, see V.S. Mani, International Adjudication: Procedural Aspects (Martinus Nijhoff, The Hague, 1980), pp 60-69.

26 He breathed his last within a month of announcement of the Court’s judgment in 1992, extremely happy with the outcome of the case.
Australia could be magnanimous to its smaller Pacific neighbours, the new Prime Minister, Paul Keating, decided to score a point as well over his political rival in his own party, Bob Hawke, the outgoing Prime Minister, and opened the door for fresh negotiations; Nauru on its part expressed its willingness for a negotiated settlement. It had always offered to negotiate, even as it instituted proceedings before the Court.

The bilateral negotiations resulted in a comprehensive “Nauru-Australia Compact of Settlement” signed on 10 August 1993. The Compact comprised three documents, namely:

1. An Agreement between Nauru and Australia for the settlement of the case before the Court;
2. A Joint Declaration of principles guiding bilateral relations;
3. A Memorandum of Understanding (MOU) with a “Side Document”.

In fact the Agreement on the settlement of the case, the MOU and the Side Document related to the termination of the case before the Court in consideration of payments of money promised by Australia. “Wishing to settle amicably the application brought by the Republic of Nauru against Australia in the International Court of Justice,” Australia agreed to pay Nauru “a cash settlement” of A$ 107 million, payable in two instalments in 1993, one in 1994, and annual instalments of A$ 2.5 million in real terms for twenty years commencing with the financial year 1993-1994. At the end of the said twenty year period, Nauru would continue to receive development cooperation assistance from Australia at a mutually agreed level.

“In consequence of the undertakings by Australia in Article 1,” both parties agreed to “take action necessary to discontinue proceedings” before the Court. Nauru further agreed not to pursue against any or all of the former partner governments any claim concerning the Mandate or Trust administration, or pertaining to phosphate mining or the overseas assets of the erstwhile tripartite BPC phosphate industry. The MOU contained a format of the

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28 Second preambular paragraph of the Agreement on the case before the Court.
29 Article 1 of the Agreement.
30 Ibid., Article 2. In pursuance of this, the Agents of both countries jointly notified the Court of their agreement to discontinue the Court proceedings in the Nauru case. See I.C.J. Reports 1993, pp. 322-323.
31 Article 3 of the Agreement.
joint letter of discontinuance of ICJ proceedings to be signed by the Agents of both parties.

The Side Document dealt with two matters. First, Nauru expressed its willingness, if requested, to execute an assignment to Australia of its claims against the United Kingdom and New Zealand concerning the administration of Nauru. This comes very close to an Australian admission of joint and several (solidaire) responsibility with respect to the Mandate and the Trust obligations. Second, Australia agreed that nothing in the Nauru-Australia Compact of Settlement would prevent Nauru from pursuing with any third country the matter of reparations for damage sustained by it during the 1939-1945 war.

This provision is in fact tautological, for war damage claims against “any third country” are claims independent of the Mandate and the Trust administration or other possible claims against the former partner governments. Indeed, Nauru remains free and entitled to raise against any State any claim, not arising out of or concerning the Mandate and Trust administration or its termination or any matter pertaining to phosphate mining including those pertaining to the overseas assets of the tripartite phosphate industry, such claim being outside the purview of the Compact. Australia has, under international law, no jus standi in respect of such claims of Nauru vis-à-vis third States.

It must be noted that Australia, while agreeing on “a cash settlement,” made it clear that this was “without prejudice to Australia’s long-standing position that it bore no responsibility for the rehabilitation of the phosphate lands worked out before 1 July 1967.” This reservation had only a political significance, in that it made the Compact look honourable for Australia. Legally, it had no significance at all. The judgment of the Court amounted to acceptance of prima facie maintainability of the Nauruan claim. The development of international law through the United Nations more than fortifies that claim. Furthermore, there was nothing in the Compact foreclosing a possible revival of the claim in case of any material breach of the Agreement by Australia.

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33 Ibid., para. A.
34 See the last sentence of Article 1 (1) of the Agreement.
The Joint Declaration of Principles Guiding Relations between Nauru and Australia gave both the countries an opportunity to review comprehensively their relations since Nauru’s independence, and provided a broad framework for cooperation between them, with regard not only to rehabilitation, but also other fields. Emphasising the mutual commitments to regionalism, the Joint Declaration recounted a number of “basic principles”: -- strengthening of close and friendly relations between the two countries; conduct of relations based on mutual respect for independence, sovereignty and equality; peaceful settlement of disputes and non-intervention; just and fair treatment of nationals of either party; mutually beneficial cooperation and exchanges, with due regard to the capacity, resources and development needs of both countries and on mutual respect. It envisaged mutual cooperation in various fields -- diplomatic and consular; trade and investment; financial services; aviation and other transport and services; fisheries surveillance; health and medical services; rehabilitation and environment; development assistance; communications and travel; legal fields including cooperation in law enforcement, terrorism and smuggling; exchanges of students, individuals, officials and businessmen. It also provides for mutual consultations.

Indeed, the Compact was made possible mainly because of the Court’s preliminary objections judgment. In all probability, Australia assessed its chances of winning the case through the merits phase to be rather dim, and finally decided in favour of a friendly settlement out of Court. The twenty-fourth South Pacific Forum (annual meeting of Heads of States and Governments of the region) being held in Nauru gave it a grand occasion for Australia’s public relations. The Compact vastly improved Australia’s standing in the Pacific. It was an instance of tremendous foreign policy success for Australia in the region.

VI. Conclusions

The Nauru case before the International Court of Justice and its settlement out of Court constitute a standing testimony to the extremely pivotal role played by the Court in influencing the parties to arrive at a mutually acceptable settlement. Nauru went to the Court against Australia having reached a dead-end in diplomacy. Indeed, diplomacy had been a non-starter; there was no negotiation worth the

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35 Three of the preambular paragraphs of the Joint Declaration highlighted this.
name. Australia and its other two former partners were not willing to come to the negotiating table, as they refused to recognise that there existed a dispute at all and that they ever had any responsibility to rehabilitate the phosphate lands mined out during their Mandate and Trusteeship.

It is not difficult to assume that Australia consulted with its former partners throughout the case and even while negotiating the Compact. The simultaneous withdrawals of the records of the BPC from access to the public evidenced this. So did the near-identical notes-verbal received by Nauru since the proceedings of the Weeramantry Commission. During the Court proceedings, Nauru faced difficulties at the hands of some officials of both Australia and New Zealand in the region, particularly in regard to aviation and shipping services. Certain television companies of all the three countries brought out and telecast programmes condemnatory of Nauru, as if influenced by their respective governments. It is of particular interest to note that such programmes were telecast by the British Broadcasting Corporation during the Court hearings and also just before the Court delivered its judgment. Any other small country might have crumbled at the tremendous adversities and adverse international pressure brought to bear on it — but not Nauru. For a small country, going to the International Court of Justice with a claim against a big country is no joke. The feeling of animosity such an act engenders is tremendous. Luckily, Nauru was economically independent; it could afford to be independent in setting its foreign policy goals and in pursuing them with dexterity.

However, the Court’s judgment with such a substantial majority, toppled the apple-cart. It instantly opened the door for negotiations. Thus the Court’s role in the Nauru case was to influence the parties to go for a negotiated settlement. Both parties were willing to negotiate in the face of the Court’s judgment. Quite possibly, both the United Kingdom and New Zealand might have equally supported such settlement — lest the Court should, at the merits phase, uphold the Nauruan claim. That would have been disastrous from their point of view, for it would establish a judicial precedent triggering the opening of the floodgates for the numerous colonial claims to follow close at the heels of the Nauru case. Some were already waiting for such an eventuality in the Pacific region. It is not that such colonial claims are badly placed without the Court’s merits judgment in the Nauru case: there is already a solid body of international law for them to draw upon.
Nonetheless, they then need to be tested fully before the Court.

The role of the legal adviser on Nauru’s side in respect of the Nauru case has been chiefly complimentary to that of the political decision-maker. Decisions on the focus of the dispute, how and how long the dispute must be pursed on the diplomatic plane, the choice and timing of the institution of the case before the International Court of Justice, and timing and acceptance of the offer of negotiation after the Court’s judgment on preliminary objections, and acceptance of the settlement of the dispute out of court, have all been pre-eminently political as they closely related to the identification and execution of the foreign policy of Nauru. Most of them, save perhaps the settlement negotiations, were dominated by the thinking and the titanic personality of the late Hammer DeRoburt. That indomitable Father of Nauruan independence had identified the task of vindication of Nauru’s rehabilitation claim with his life’s mission. Under his leadership, the Government of Nauru developed a well laid out plan of action in the early 1980’s, constantly sought and evaluated legal advice, and frequently reported to the Nauru Parliament. The working of the Nauru legal team was itself a subject of appreciation. It worked as a team, with considerable interactions and self-critique; and its end products were all well organized throughout. Much of the credit for this should go to Professor Ian Brownlie.

The single most important procedural decision the Government took, preparatory to the actual commencement proceedings before the International Court of Justice, was the appointment of the Weeramantry Commission of Inquiry, leaving it totally independent in its functioning. The great utility of the Commission’s work was two-fold. One, it helped organise a great mass of evidence in support of Nauru’s claim; quite possibly, in terms of evidence, Nauru was better placed than Australia in prosecuting its claim before the International Court of Justice, and that credit must go to the work of the Commission. Two, more importantly, the Commission was able to perform considerable groundwork in respect of the elaborate planning of the actual rehabilitation for the whole island. Its thoughts and proposals for secondary mining (the possibility of which was a chance discovery by the technical member of the Commission), use of pinnacle limestone for commercial purposes, land reclamation, land uses development, regional planning, etc., remain valuable. One hopes and trusts that those will continue to receive serious consideration by both Nauru and Australia. They would save a lot of time and money spent on further
feasibility studies. Post-judgment settlement negotiations were marked by the absence of DeRoburt from the centre stage. While the Government under President Bernard Dowiyogo took the important policy decisions on acceptance of the Australian offer of negotiation and on the final settlement reflected in the Compact of 1993, legal advice was sought on the crucial aspects of quantification of the Nauruan claim.

It may be academic interest to speculate whether continuance of DeRoburt at the helm of affairs of Nauru would have made any difference, i.e. whether under his stewardship Nauru would have agreed to negotiate at all, or for the type of settlement it finally agreed on, and for the discontinuance of the case before the International Court of Justice. Having known him as one did, he would probably have preferred the Court to firmly establish a principle behind the Nauruan claim, as well as the quantification of reparation - or at least a set of principles guiding such quantification. He had entertained a hurt feeling, in view of the constant spurning by Australia of the earlier Nauruan offers of negotiation.

Be that as it may, the post-DeRoburt Government was probably inweighed by a variety of other considerations -- that the 1992 judgment was almost a vindication of the Nauruan claim to such an extent that Nauru had made its point internationally; that as a result of the judgment and a change of guard in Canberra, Australia wished to regain some of the lost prestige vis-à-vis its smaller South Pacific neighbors; that prolonged Court proceedings could mean further drain on the exchequer, against the prospects of reduced phosphate production. These were important considerations.

In short, the 1992 judgment of the Court coupled with the changes of guards both at Nauru and in Canberra seems to have done the trick, with the legal advisers playing a midwifery role.
REMARQUES SUR LE “MÉTIER” DE CONSEIL
DEVANT LA COUR INTERNATIONALE DE JUSTICE

Alain Pellet

1. Le cinquantième anniversaire de la Cour internationale de Justice a été l’occasion de nombreuses études, souvent d’un grand intérêt, sur les défis auxquels elles est affrontée et les moyens d’y faire face.

On hésiterait donc à ajouter une contribution à l’étude d’un domaine déjà largement exploré si les travaux qui lui ont été consacrés ne comportaient certaines lacunes, dont l’une est d’ailleurs “traditionnelle”, en ce sens qu’en dépit de l’imposante littérature consacrée à la Cour mondiale, très peu d’études ont porté sur le rôle


des conseils et avocats dans la procédure. La présente étude n'a pas l'ambition de la combler et son but demeure modeste : il ne s'agit, dans une perspective très concrète, que de tenter de lever un coin du voile sur le mystère qui, aux yeux du profane, entoure une activité qui est très largement méconnue malgré son importance quantitative accrue du fait du regain d'activité de la Cour elle-même.

2. Sans doute le métier de Conseil devant la Cour internationale de Justice (C.I.J) -- car c'est un métier -- demeure-t'il un élément quantitativement bien modeste de la pratique du droit international auquel le présent ouvrage est consacré. Dans le petit monde du droit international, on parle couramment de "la mafia de la C.I.J". Toute connotation délinquante mise à part, il y a de cela ...

Le petit groupe de personnes qui gravitent autour de la Cour compte, au grand maximum, outre le personnel du Greffe, quelques dizaines de personnes : les quinze Juges, élus par l'Assemblée générale et le Conseil de sécurité des Nations Unies et renouvelables par tiers tous les trois ans, le Greffier et le Greffier adjoint, l'un et l'autre élus par la Cour; une très petite poignée d'internationalistes réputés -- dont les anciens juges -- susceptibles d'être désignés comme juges ad hoc, et un groupe, plus important mais limité tout de même, de conseils, auxquels on peut ajouter quelques cabinets conseils dont certains tendent à se spécialiser dans les affaires devant la Cour.

3. Quelques statistiques portant sur les douze dernières années d'activité de la Cour suffisent à établir l'existence d'un "barreau invisible" auprès de la C.I.J :

3 Le Statut et le Règlement de la Cour mentionnent toujours conjointement les conseils et avocats sans indiquer de critères de distinction entre les uns et les autres (cf. les articles 42, par. 2 et 3, 43, par. 5 et 54 du Statut, et 58, para. 2, 61, par. 2 et 4, et 65 du Règlement). Il est d'usage (mais nullement obligatoire) de réserver le titre d'"avocats" aux membres de l'équipe de conseils qui prennent la parole durant la procédure orale, tandis que le terme "conseils" vise, d'une façon plus générale, l'ensemble des juristes associés à la présentation de l'affaire.

4 Soit de les années 1986-1998 (mi-octobre); 1986, point de départ de cette période, constitue une charnière dans la mesure où c'est l'année où a été rendu l'arrêt "Nicaragua" sur le fond, qui marque sans doute une étape-clé dans la vie de la Cour ou, en tout cas, dans la politique des États à son égard : regain de confiance du Tiers
- Durant cette période, 21 affaires contentieuses ont été plaidées (à un stade quelconque : mesures conservatoires, exceptions préliminaires ou fond)⁶;

- Sixty-six conseils et avocats se sont présents devant la Cour (si l’on exclut les conseils purement “maison” c’est à dire les diplomates ou experts de l’État partie⁷ et les membres des cabinets conseils, dont le rôle est très particulier⁸);

- Mais ce chiffre cache des réalités très diverses puisque 45 n’ont plaidé que dans une affaire, sept dans deux (souvent pour le même client) et six dans trois affaires ; un dans quatre et les cinq autres respectivement dans six, sept, huit, neuf et dix affaires⁹.

Ces chiffres n’ont aucune prétention scientifique mais ils confirment assez nettement ce que quiconque connaît un peu la Cour de La Haye sait intuitivement : alors qu’il n’existe strictement aucune règle écrite qui régisse le statut des conseils devant la Cour, où tout le monde et n’importe qui peut plaider, il y a bien une sorte de “barreau occulte”⁴⁰ composé d’un nombre restreint de personnes, une petite quinzaine, qui se connaissent, qui connaissent la Cour, et auxquelles les États font appel sinon systématiquement, du moins de manière très privilégiée.

C’est que le métier de conseil devant la Cour mondiale - car l’on peut considérer que c’est un vrai métier - est très spécial, et il est

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⁶ Il paraît préférable de ne pas inclure les affaires consultatives qui ne donnent pas toute lieu à une procédure orale et dans lesquelles les États se font en général (mais pas toujours exclusivement) représenter et conseiller par des membres de la Direction des Affaires juridiques du Ministère des affaires étrangères.

⁷ Cette “catégorie” est évidemment subjective et constitue l’un des éléments qui doivent conduire à relativiser cette “statistique”.

⁸ Voir infra, no 11.

⁹ À nouveau, ces chiffres n’ont rien de rigoureusement scientifique; par exemple : l’avocat qui a plaidé dans neuf affaires a également été conseil dans une dixième, et il en est allé de même de celui qui est apparu dans six affaires devant la Cour.

¹⁰ Commentant le rapport précité (voir note 1, supra), du Groupe d’étude du British Institute, Dame Rosalyn Higgins a utilisé l’expression “the International Bar”(p. 102).
certainement rassurant11 et pour les États et pour les conseils eux-mêmes, de travailler avec des gens qui connaissent les “règles du jeu” et ont l’habitude de travailler ensemble, et dont on sait qu’ils ne feront pas de grosses bêtises, dangereuses pour la cause, toujours importante, parfois essentielle, qui leur est confiée, ou pour la cohésion de l’équipe à laquelle ils appartiennent.

4. Car le métier de conseil est à la fois solitaire et collégial. Solitaire, car une bonne partie de son temps est consacrée à la rédaction des écritures de son client ou de ses plaidoiries dans le silence de son cabinet. Collégial - et souvent “convivial” - , car il doit s’intégrer dans une équipe, l’esprit d’équipe constituant surement l’une des qualités fondamentales que l’on attend d’un bon conseil.

5. Les articles 42, paragraphes 2 et 3, 43, paragraphe 5, 51 et 54, paragraphe 1, du Statut et 58, paragraphe 2, 61, paragraphes 2 et 4, et 65 du Règlement concernent exclusivement les privilèges et immunités des conseils et avocats et leur rôle durant les plaidoiries orales mais aucune disposition ne règle leur recrutement ou leurs qualifications, ni leur déontologie12.

Il ne serait d’ailleurs pas facile d’imposer des règles précises dans ce domaine car les traditions nationales sont très diverses. Ceci est très frappant “dès l’enbouchage”: les mentalités britannique et française (les deux nationalités qui prédominent nettement - encore qu’inégalement - dans le “microcosme” de la C.I.J.13) diffèrent considérablement sur ce point; conformément à la tradition du

11 Malgré les remarques, parfois agacées, de certains internationalistes “non-praticiens” et même de certains juges, dont on peut comprendre par ailleurs qu’ils préféreraient avoir à faire à une plus grande palette de conseils : les plaidoiries sont souvent longues et l’ennui peut naître de l’uniformité ...; mais on peut comprendre également que les États préfèrent ne prendre aucun risque : une équipe entièrement “neuve” serait certainement “à risques”! (Voir sur ce point, les réflexions de M. Bedjaoui, “La ‘fabrication’ des arrêts de la Cour internationale de Justice”, in Le droit international au service de la paix, de la justice et du développement – Mêlanges Michel Virally, Paris, Pédone, 1991, p. 94 à 95).


13 Parmi les quatorze conseils qui ont plaidé dans trois affaires ou plus au cours des douze dernières années, six sont britanniques et quatre français, les quatre autres étant respectivement américain, australien, belge et uruguayen.
barreau anglais\textsuperscript{14}, les conseils britanniques pratiquent le système de la “file d’attente” et acceptent les affaires dans l’ordre où elles se présentent sans, en principe, ouvoir se récuser, ce qui évite tout problème de conscience; les Francais ne peuvent s’abriter derrière une telle tradition, d’autant moins qu’étant tous professeurs d’Université, et non avocats, ils ne sauraient invoquer les règles de déontologie du barreau\textsuperscript{15}. Seule la conception personnelle qu’il se fait de son métier peut donc guider le conseil français dans le refus ou l’acceptation d’une affaire\textsuperscript{16}.

6. Quels que soient les problèmes personnels, juridiques ou de conscience, qui peuvent se poser à telle ou telle personne contactée par un Gouvernement, les Etats peuvent faire appel pour les “assister”\textsuperscript{17} à qui bon leur semble. Aucune qualification particulière n’est exigée. Le “barreau de la C.I.J.” est constitué de

“... those international lawyers who have practiced and continue to practice as oral advocates before the Court, who represent a variety of foreign states other than their own governments, who are well known to the Judges and the Registrar of the Court, who know how things work out in practice, and who understand by experience the difficulties, pitfalls and tricks of the trade”\textsuperscript{18}.


\textsuperscript{15} Cf. les Règles déontologiques du Barreau de Paris (articles 1.3, 2.3.4, 7 et 11). La “clause de conscience” semble, au demeurant, interprétée plus largement en France qu’au Royaume-Uni.

\textsuperscript{16} Bien que l’article 3, alinéa 5, du décret du 29 octobre 1936 (\textit{Journal Officiel de la République Française}, 31 oct. 1936 p. 11860), fasse théoriquement obligation aux professeurs d’Université de demander une autorisation au “Ministre compétent” (éducation nationale ou affaires étrangères?) pour plaider pour un État étranger, les conseils français n’ont pas pour pratique de faire dépendre leur acceptation ou leur refus d’une affaire de la position du Ministère des affaires étrangères, qui, au demeurant laisse toujours ceux qui le saisissent libres de leur décision, tout en leur donnant, le cas échéant, un avis... En revanche, ils ne pourraient, en principe, plaider contre la France elle-même sans une autorisation du Département (cf. L’alinéa 4 de la même disposition); le problème semble cependant ne s’être jamais posé — il en va différemment en droit administratif (cf. C.E., 9 novembre 1954, Bertrand, \textit{Leb.} p. 583 ou 6 octobre 1976, Badinter et Bredin, \textit{Leb.} p. 394).

\textsuperscript{17} Statut, article 42.


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Ce barreau officieux est toutefois caractérisé par la prédominance absolue des professeurs d'Université : 58 des 66 conseils qui ont plaidity devant la Cour depuis 198619, étant entendu que certains de ces professeurs sont également avocats20 et que la plupart appartiennent à ce que l'on a appelé “the invisible college of international lawyers”21, à l'exception des spécialistes de domaines techniques de droit interne, qui ont en général la nationalité de l'une des parties, et que, quel que soit le titre que les États leur donnent, l'on peut considérer davantage comme des experts que comme des conseils22.

Au demeurant, s'il est préférable - mais non nécessaire - d'être professeur de droit international pour plaider devant la C.I.J., ceci ne constitue pas une condition suffisante. Et deux questions, sont souvent posées aux membres du “barreau invisible” qui gravite autour du Palais de la Paix : i/ pourquoi et comment devient-on conseil devant la Cour? ii/ pourquoi et comment intègre-t-on le “noyau dur” des conseils?

7. A vrai dire, une réponse ferme à ces deux questions, liées, est à peu près impossible. Quantité de facteurs, de natures très diverses, entrent probablement en jeu : la chance, les circonstances, les relations, la notoriété, constituent certainement des facteurs explicatifs (et ils le sont peu ...) qui permettent de répondre à la question de savoir comment l'on devient conseil; la capacité de travail, le “sens du dossier” et la faculté à s'intégrer à une équipe expliquent sans doute en partie qu'on le demeure. Mais, selon les cas, ces facteurs entrent en ligne de compte de manière très inégale et seule l’ “histoire personnelle” de chaque conseil et le contexte particulier de chaque affaire sont, finalement, pertinents ...

8. Le plus souvent, l'Etat qui envisage de se présenter devant la Cour fait appel à un conseil – qui deviendra fréquemment le “chef de

19 Voir supra, n° 3; ce chiffre exclut les avocats membres de cabinets conseils.
20 Tel est le cas de tous les conseils britanniques qui sont intervenus durant cette période.
22 Ce sont les États qui décident à quel titre leurs représentants interviennent devant la Cour; le Greffe se borne à reproduire fidèlement les indications données à cet égard par les Agents.
file" de l'équipe de plaidoirie. Pourquoi celui-ci plutôt qu'un autre? Ici encore, il n'y a pas d'explication généralement valable : il peut arriver que cette première personnalité contactée ait conseillé l'Etat soit au cours d'une phase antérieure de l'affaire soumise à la Cour, soit en d'autres circonstances, ou qu'il soit un ami ou un ancien professeur de l'agent ou du Ministre des affaires étrangères, ou même qu'il soit choisi après une étude soigneuse des arrêts récents rendus par la Cour, qui énumèrent les avocats ayant plaidé dans chaque affaire; il peut se faire aussi que le conseil ait lui-même contacté les autorités de l'Etat en cause et lui ait offert ses services.

L'Etat peut procéder simultanément et directement au recrutement de l'ensemble de ses conseillers, mais bien souvent, le premier contacté recommande à son tour le nom de collègues possibles. Ceci étant, les possibilités de choix sont, sans doute, moins grandes qu'il y paraît et elles ne sont en tout cas pas illimitées. Les éléments suivants doivent, en particulier, être pris en considération :

- Il est indispensable d'assurer la cohésion "psychologique" de la future équipe, dont les Membres devront aider l'Etat à définir sa stratégie judiciaire et se retrouveront à de multiples occasions pour de longs "conclaves", y compris, mais pas seulement, au moment des plaidoiries orales;

- Il faut songer également à la complémentarité des spécialisations : si le "noyau dur" des conseils est plutôt "généraliste" et, dès lors, assez "interchangeable", certaines affaires portent sur des problèmes bien définis et relativement techniques pour lesquels la présence, au sein de l'équipe, de spécialistes peut être utile;

- Surtout, et c'est un point absolument fondamental, il est essentiel que l'équipe ainsi constituée réalise un

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24 Voir infra, n° 15.
25 Au demeurant, même si la présence de ces spécialistes est rassurante — y compris pour les autres conseils —, il faut sans doute se garder de toute "hyper-spécialisation" : les Juges aussi sont, en règle générale, des "internationalistes généralistes" et il peut être "contre-productif" de leur présenter des argumentations qui deviennent ésothériques à force de technicité.
équilibre géographique raisonnable, ou, plutôt, une combinaison harmonieuse des systèmes juridiques et des langues de plaidoirie.

9. L'équilibre linguistique est le plus évident. Aux termes de l'article 39 du Statut, “[l]es langues officielles de la Cour sont le français et l'anglais”, et si les Parties peuvent se mettre d'accord pour fixer “la langue dont il sera fait usage”, les Etats n'ont que rarement eu recours à cette faculté, et ceci est sans doute justifié: même si les Parties ont en commun l’usage de l’anglais ou du français, il ne faut pas oublier que les juges sont, eux, soit francophones, soit anglophones, et, pour certains d’entre eux, très sensibles à l’usage de la langue qui leur est la plus familière.

Toutefois, cet équilibre linguistique n’est que l’un des aspects de l’équilibre global des “horizons juridiques” auquel doit tendre la composition d’une équipe de plaidoirie devant la Cour. Celui-ci est imposé par la composition même de la Cour qui, conformément aux dispositions de l’article 9 du Statut, doit assurer “dans l’ensemble la représentation des grandes formes de civilisation et des principaux systèmes juridiques du monde”. On peut ergoter sur la manière dont cette représentation est assurée, mais, globalement, elle l’est : huit juges appartiennent clairement à la culture juridique “latine” ou romano-germanique, tandis que quatre sont imprégnés de common law, les autres étant plus difficilement classables; ceci constitue un équilibre tout à fait satisfaisant à maints égards, mais ne facilite la vie ni des Parties, ni des juges, puisque les uns doivent se faire comprendre par des juges relevant de systèmes juridiques différents, et les autres sont tenus d’aboutir à une solution reposant sur un raisonnement unique. Il est donc de première importance que


27 À l’heure actuelle (octobre 1998), neuf Juges se déclarent anglophones et six, francophones; la plupart, mais pas tous, ont cependant des connaissances suffisantes pour pouvoir lire, et, parfois, rédiger, dans l’autre langue officielle.

28 Surtout les juges francophones...

29 Cette contrainte est atténuée par la possibilité, ouverte aux Juges de la majorité par l’article 57 du Statut, de joindre leur opinion individuelle.
les conseils puissent apprehender les problèmes en fonction de diverses “sensibilités juridiques” et qu’ils s’efforcent d’en faire la synthèse, ce qui n’est guère possible si l’équipe elle-même n’est pas composée de manière plurielle.

Il est donc absolument indispensable que celle-ci comprenne des conseils qui sachent parler une “langue juridique” qui puisse être comprise par un Juge français, issu du Conseil d’État, comme par un Juge britannique, ancien Queen’s Counsel, par un Brésilien aussi bien que par un Chinois, un Russe ou un Sri Lankais ... Faute d’“esperanto du droit” universellement reconnu, ce melting pot juridique ne peut être garanti que par la diversité d’origine des conseils, ce qui exclut tout monolithisme.

Longtemps, les “grandes puissances”, en particulier, les États-Unis, la France et le Royaume-Uni, n’ont pas compris cela et n’ont fait appel, pour les assister, qu’à leurs propres ressortissants.

Ce n’est pas de bonne politique, et la France, qui a rompu avec cette tradition en 1995 dans l’affaire (ou la “non-affaire”...) de la Demande en examen de la situation dans l’affaire des Essais nucléaires contre la Nouvelle-Zélande, a certainement tout lieu de se féliciter d’avoir fait appel, à côté de professeurs français, à un barrister britannique, ancien Conseiller juridique du Foreign Office.

10. Une fois le conseil recruté, il s’intègre dans une équipe. Elle se compose d’abord de l’Agent, qui la dirige et représente l’État

30 Ces précautions sont moins indispensables devant une Chambre, si la diversité des systèmes juridiques auxquels ses membres appartiennent est moindre. Ainsi, dans l’affaire du Differend frontalier entre le Burkina Faso et la République du Mali, la Chambre ne comprenait aucun juge pouvant être considéré comme un pur “common lawyer” et il en est allé de même des équipes de conseils des deux Parties, dont toutes les plaidoiries ont été faites en français. Il n’en reste pas moins que le droit international est un et que la “monoculture” juridique d’une juridiction appelée à l’appliquer ou des conseils et avocats qui assistent les États risque d’être source d’appauvrissement de la jurisprudence.

31 Du moins officiellement, car on peut citer des affaires auxquelles l’un de ces États a été partie et s’est assuré des services de conseillers étrangers, qui, parfois, ont même siégé non pas avec l’équipe de plaidoirie devant la Cour, mais juste derrière elle et ont, par leur attitude, clairement révélé qu’ils étaient très directement impliqués.

partie\textsuperscript{33} et qui effectue en son nom tous les actes de procédure\textsuperscript{34}, et de conseils.

Le nombre de ceux-ci ne répond à aucune règle générale : il dépend de la difficulté de l'affaire et de l'importance, éminemment subjective, que lui attache l'État en cause. Tout ce qu'il est possible de dire à cet égard est que l'équipe ne doit être ni trop nombreuse, ni trop restreinte : outre la charge excessive de travail qui peut en résulter pour les conseils et la responsabilité demeurée pesant sur ses membres\textsuperscript{35}, une équipe trop resserrée présente l'inconvénient de n'être pas suffisamment diversifiée\textsuperscript{36} et de ne permettre qu'un échange trop limité de points de vue\textsuperscript{37}; si elle est trop large, sa cohésion est menacée, le partage des tâches entre les conseils pose des problèmes difficiles et la coordination devient un véritable casse-tête\textsuperscript{38}; en outre, le coût de l'affaire s'en trouve inévitablement accru pour le client\textsuperscript{39}.

\textsuperscript{33} Cf. l'art. 42, par. 2, du Statut : "Les parties sont représentées par des agents".

\textsuperscript{34} Cf. l'article 40 du Règlement de la Cour.

\textsuperscript{35} Dans l'affaire du \textit{Differend frontalier}, deux conseils seulement -- tous deux français et tous deux ayant peu ou pas l'expérience des affaires devant la Cour -- ont véritablement assisté le Burkina Faso tout au long du procès. Bien que ce pays se fût félicité de l'arrêt de la Cour, on peut, avec le recul du temps, penser qu'il a pris un risque en limitant ainsi la composition de son équipe. (Il est vrai qu'un ancien Président de la C.I.J. a participé à certaines réunions de celle-ci, ce qui a constitué pour les conseils un "filet de sécurité" rassurant).

\textsuperscript{36} Voir \textit{infra}, n° 15.

\textsuperscript{37} Il suffit de songer à cet égard aux problèmes de locaux ou de dates (les conseils sont souvent des gens occupés...) que posent les réunions d'équipes composées d'une dizaine de conseillers, de plusieurs ministres en exercice ou anciens, et de nombreuses autres personnes, comme c'est le cas, par exemple de l'équipe de plaidoirie du Cameroun dans l'affaire de la \textit{Frontière terrestre et maritime} avec le Nigeria, qui ne comporte pas moins, au total, d'une quarantaine de personnes ... Dans l'affaire de la \textit{Barcelona Traction} (C.I.J. Rec. 1970, p. 3), la Belgique était représentée par un agent et un co-agent entourés de 15 conseils ou "experts-conseils" et l'Espagne, avait recours aux services de 18 conseils et avocats; dans celle du \textit{Plateau continental Libye/Malte} (C.I.J. Rec. 1985, p. 13) l'équipe libyenne comportait officiellement (Rec. 1985, p. 13 à 15) 25 personnes et le Président Mohammed Bedjaoui relève que "[l']affaire de la \textit{Délimitation de la frontière maritime dans la région du Golfe du Maine} (...) a amené (...) devant la Cour quelque 70 avocats, conseils et autres..." (op. cit. note 11, supra, p. 93).

\textsuperscript{38} Il est très difficile d'évaluer le coût moyen d'une affaire devant la Cour; selon le Professeur Derek Bowett, "[b]y and large, one can expect the total cost of a full case between $3 and $10 million" (op. cit. note 2, supra, p. 7). Dans l'affaire du \textit{Golfe du Maine} (C.I.J. Rec. 1984, p. 246), le Canada et les États-Unis ont rendu public le total de leurs dépenses respectives : 8 millions de dollars des États-Unis de 1984 pour le premier, 6,5 pour le second; on peut évaluer à environ 1,5 ou 2 millions de francs de 444
11. Au demeurant, l'équipe n'est pas composée de l'Agent et des seuls conseils. Elle comprend toujours en outre un nombre plus ou moins important de membres qui y ont des fonctions diverses.

Certaines sont irréductibles. Tel est le cas des tâches de secrétariat (dont il faut souligner qu'elles imposent aux personnes qui s'en acquittent un dévouement et une abnégation très grands, en particulier durant la phase des plaidoiries orales : les conseils travaillent parfois des nuits entières et leurs plaidoiries doivent être dactylographiées et reprographiées au petit matin...). De même, toute affaire devant la Cour implique une documentation "lourde" reposant souvent sur des recherches d'archives longues et difficiles; il n'est pas toujours indispensable que celles-ci soient effectuées par des documentalistes ou des archivistes professionnels, mais ceci est souvent la meilleure solution lorsque les Etats ne font pas appel à des officines spécialisées.  

1985, le coût de l'affaire du Différénd frontalier pour le Burkina — il s'agit probablement là d'un plancher en-deçà duquel il n'est guère possible de descendre. Quant aux honoraires des conseils — qui ne constituent pas toujours la part la plus importante des dépenses, en tout cas lorsqu'interviennent un cabinet-conseil (voir infra, n°11) —, il court beaucoup de rumeurs à cet égard : ils varient fortement d'un conseil à l'autre et, souvent d'une affaire à l'autre (car certains conseils les fixent différemment en fonction du pays qui fait appel à eux; ainsi, dans l'affaire de la Bande d'Ozo, tous les conseils du Tchad s'étaient engagés à diminuer de moitié leurs honoraires habituels); toutefois, il est patent qu'ils sont, dans l'ensemble, inférieurs aux honoraires des avocats dans des affaires commerciales de difficulté moyenne. Dans la quasi-totalité des cas, les honoraires sont fixés sur une base horaire (ou journalière en cas de déplacement à l'étranger).

40 Celui-ci est parfois assisté d'un ou de plusieurs co-agents et/ou d'agent(s) adjoint(s), qui peuvent, le cas échéant, avoir la nationalité d'un Etat autre que celui qu'ils représentent; tel a été le cas dans quelques affaires récentes (pour le Tchad dans l'affaire du Différénd territorial (C.I.J. Rec. 1994, p. 6), pour la Slovaquie dans l'affaire du Système de barrages de Gabčikovo-Nagymaros (C.I.J. Rec. 1997, p. 7), pour la Bosnie-Herzégovine dans celle du Génocide (C.I.J. Rec. 1996, p. 595) et pour le Cameroun dans l'affaire de la Frontière terrestre et maritime (non publié)). Ces personnes, qui agissent en général également en qualité de conseils et avocats, peuvent, contrairement aux "simples conseils", avoir des rapports directs avec la Cour, mais sous le contrôle de l'agent, qui conserve toujours la direction "stratégique" de l'affaire. Dans la première phase de l'affaire du Génocide, les deux parties (la Bosnie-Herzégovine et la Yougoslavie (Serbie-Montenegro) avaient, l'une et l'autre, désigné des agents ayant la nationalité d'États tiers.

41 Le recours à de telles officines peut cependant poser des problèmes : outre leur coût élevé, l'expérience montre qu'elles recherchent souvent "à l'aveugle", sans toujours répondre de façon adéquate aux besoins de l'argumentation juridique. La collecte des archives constitue probablement l'un des aspects les plus difficiles et, en général, les plus mal résolus, du travail d'une équipe de plaidoirie devant la Cour.
En dehors de ce noyau incompressible, l'équipe comporte, selon les cas :
- Des techniciens et des experts, par exemple des cartographes dans les affaires de frontière, des géologues dans celles de délimitation du plateau continental, des historiens, etc.;
- Des assistants de recherche, dont s'entourent certains conseillers politiques et diplomatiques, souvent de très haut niveau, qui, telle la langue d'Esopo, peuvent apparaître à la fois comme la meilleure et la pire des choses: la meilleure car ils assurent, collectivement avec l'agent, la direction politique de l'affaire et témoignent de l'importance que l'Etat lui accorde; la pire aussi car l'interférence de ces personnages souvent considérables (et en général sans formation particulière en droit international) dans la définition de la stratégie proprement juridique peut la compliquer passablement ...

12. Il peut arriver enfin que l'Etat fasse appel aux services d'un cabinet conseil. Il s'agit là d'une pratique relativement récente mais qui se développe rapidement, même si elle n'est pas encore tout à fait constante.

Il n'y a certainement pas là une nécessité absolue; mais il n'est pas douteux qu'un cabinet conseil peut rendre de grands services, surtout à des Etats en développement, mal équipés pour assurer la lourde charge de la gestion d'une affaire devant la Cour.

42 Le Statut (articles 43, par. 5, et 51) et le Règlement de la Cour (articles 57, 58, par. 2, 62 à 65, 67, 68, 70, par. 2, et 71, par. 5) évoquent expressément les "experts", mais il s'agit alors d'experts indépendants, qui ne font pas partie de l'équipe de plaidoirie et qui doivent prêter serment avant leur intervention.

43 La pratique est diverse à cet égard; le recours à des assistants de recherche, qui s'est développé au cours des années récentes, doit être encouragé : il décharge les conseils de tâches parfois fastidieuses ou qui ne demandent pas de compétences particulières, diminue, dans la transparence, le coût des recherches pour l'Etat partie, et permet à de jeunes avocats ou universitaires de se familiariser avec la Cour.


45 Depuis 1986, il semble (voir note 44 supra) que 13 des 31 Etats qui se sont présentés devant la Cour dans les 21 affaires recensées (voir supra, n° 2), ont fait appel à des cabinets-conseils, dont l'un est intervenu à neuf reprises et un autre trois fois (ces deux cabinets sont parisiens, mais l'un est rattaché à une law firm britannique, le second est purement français).
(dont il ne faut cependant pas se dissimuler que le coût peut, de ce fait, se trouver considérablement accru).

Le rôle de ces cabinets conseils est d’autant plus utile qu’il ne se confond pas avec celui des conseils : il ne doit s’agir ni d’un simple secrétariat, ni de “doubler” les conseils66; on peut sans doute le résumer en disant qu’il s’agit de la “gestion” du dossier au sens large, consistant à :

- Fournir l’infrastructure indispensable, qu’il s’agisse d’organiser les réunions de l’équipe durant les phases préparatoires ou de prévoir son accueil à La Haye pour les plaidoiries orales;
- Assurer la correspondance entre l’agent et le reste de l’équipe ou des conseils entre eux (en particulier l’envoi des projets et des documents);
- Effectuer l’archivage de la documentation et la tenir à jour; et, surttout, à
- “Finaliser” les pièces de procédure écrite et les projets de plaidoiries pour le premier tour de plaidoiries orales, ce qui ne consiste pas seulement à en assurer l’uniformité formelle, l’assemblage et la reprographie77, mais qui suppose aussi de veiller à la cohérence et à la cohésion de l’ensemble en éliminant les répétitions et les contradictions;
- En outre, il est fréquent qu’un membre du cabinet conseil assiste aux réunions des Parties avec le Président et le Greffier.

Au fond, le cabinet conseil apparaît très largement comme la “mémoire” et le “gardien” de l’affaire.

13. L’existence d’un cabinet conseil a un effet sur l’“organisation interne” de l’équipe; elle rend, en particulier, moins indispensable l’existence d’un “chef de file” parmi les conseils, et il en va de même lorsque l’Etat partie a les moyens de prendre lui-

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66 Bien que certains cabinets conseils se montrent peut-être parfois un peu “encombrants”... ce que les conseils supportent en général assez mal!
77 La reprographie est une tâche lourde et, parfois, exaspérante (surtout lorsque les conseils ne respectent pas les délais fixés pour remettre leurs projets!) : les pièces de procédure écrite doivent en principe être remises en 125 exemplaires au Greffe de la Cour et elles ne comportent pas seulement les écriitures de l’Etat en cause; celles-ci sont assorties de documents annexés, qu’il faut photocopier et qui doivent être lisibles (ce qui est loin d’être évident lorsqu’il s’agit de documents d’archives anciens, manuscrits fragiles, ou de cartes...).
même réellement l'affaire en mains et d'exécuter directement les taches incombant sans cela au cabinet conseil\textsuperscript{48}.

En principe, il n'existe pas de hiérarchie entre les conseils, si ce n'est celle résultant de l'âge et/ou de la notoriété. Ceci peut se traduire par la place des conseils lors des audiences, place qui, en fonction de sa plus ou moins grande proximité avec l'Agent, est souvent le reflet des hiérarchies occultes au sein de l'équipe ... Plus rarement, certains Etats communiquent au Greffe une liste des membres de leur délégation qui énumère les conseils non pas dans l'ordre alphabétique mais en fonction de critères visiblement "hiérarchiques" propres à cette équipe. En outre, il peut se produire qu'un conseil porte également le titre de co-agent ou d'agent adjoint, ce qui reflète son rôle particulier au sein de l'équipe\textsuperscript{49}.

Même lorsque tel n'est pas le cas, ce phénomène de "chef de file" se retrouve, en réalité, peu ou prou dans toutes les équipes : on constate en effet toujours que, rapidement, un conseil émerge et joue un rôle de coordinateur en même temps qu'il donne une sorte d'impulsion générale à l'équipe, et l'expérience prouve qu'elle s'en accommode fort bien la plupart du temps si, du moins, ce chef de file officieux sait se souvenir qu'il demeure un conseil et se comporter en conséquence.

14. Ceci implique d'une part qu'il ne tente pas de se substituer à l'agent, auquel le dernier mot doit toujours revenir en cas de divergences graves entre les conseils sur la stratégie juridique à suivre (ceci se produit rarement d'ailleurs, mais n'est tout de même pas exclu), et, d'autre part, qu'il n'essaie pas d'imposer son point de vue aux autres membres de l'équipe sinon, comme il est normal, à l'occasion des débats "égalitaires" qui font d'ailleurs une grande partie de l'intérêt du travail collectif de préparation des écritures et des plaidoiries. Ceci dit, l'influence réelle de ce "chef de file" est fonction de paramètres assez variables et, notamment,

- Du rôle plus ou moins actif du client lui-même,

\textsuperscript{48} Les conseils et, surtout, leur chef de file, sont affrontés à des problèmes sinon insolubles, du moins extrêmement difficiles lorsqu'un Etat qui ne dispose pas d'une infrastructure suffisante pour faire face, dans des conditions satisfaisantes, aux exigences d'un procès devant la Cour ne fait pas appel à un cabinet juridique.

\textsuperscript{49} Voir supra, note 40.
- De l'existence, parmi les autres conseils de personnalités plus ou moins fortes et de leurs rapports plus ou moins étroits avec l'agent,
- De l'importance numérique de l'équipe, et
- De la participation ou de l'absence d'un cabinet conseil.

Quel que soit cas de figure, le "chef de file", en tant que _primus inter pares_, assume, au minimum, les fonctions suivantes :
- Il constitue le lien entre l'équipe et l'agent, auquel il a directement accès,
- Il centralise les idées des divers membres de l'équipe et correspond directement avec les autres conseils, et avec le cabinet conseil le cas échéant,
- Il établit (en concertation avec les autres conseils) le plan des pièces de procédure écrite et des plaidoiries orales et s'efforce de veiller à leur respect.

15. Ceci ne signifie nullement que les autres conseils se laissent dicter la stratégie juridique à suivre par le "chef de file". Celle-ci est le fruit d'une réflexion collective et n'est arrêtée qu'après de longues réunions au cours desquelles les discussions sont souvent vives et passionnées, et qui n'ont d'utilité que si les points de vue s'expriment très librement. C'est d'ailleurs au cours de ces débats que les diverses "cultures juridiques" représentées au sein de l'équipe se heurtent d'abord le plus nettement puis se fondent en une stratégie qui les prend en compte, les combinent et les concilient dans la mesure du possible.

Il va de soi que cette présentation est une vision rationnalisée de ce qui se produit au sein de l'équipe de conseils et que, en pratique, on procède en général de façon plus empirique. Toutefois, le fait est que la (et parfois les) première(s) réunion(s) de l'équipe de conseils aboutissent au recensement des points forts et des faiblesses du dossier, au poids à accorder respectivement aux différents arguments possibles, à leur combinaison, c'est-à-dire, en définitive, à la définition de la stratégie à suivre.

Le présent article ne constitue pas un cadre adéquat pour "théoriser" cette idée de "stratégie juridique"; et il n'est d'ailleurs pas

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50 Ces relations privilégiées et ce "filtrage" _de facto_ sont à peu près inévitables lorsque, comme cela est maintenant fréquent, l'agent est un ministre en exercice.
certain qu’une théorisation soit possible, tant les stratégies sont fonction du dossier et des circonstances propres à chaque affaire\textsuperscript{51}. Il n’en reste pas moins, qu’ici encore, le poids des traditions juridiques des conseils et celui de leur origine professionnelle jouent souvent un rôle déterminant dans les positions qu’ils adoptent à cet égard. Ainsi par exemple, les avocats et les conseils expérimentés défendent en général l’idée que tout argument doit être développé, même s’il apparaît peu crédible \textit{a priori} car les formations des juges sont suffisamment diverses pour qu’il soit impossible de déterminer à l’avance à quels arguments ils se montreront sensibles; au contraire, les conseils que leur formation professorale ou leur tempérament poussent à une rigueur “académique” répugnent à utiliser des arguments “de repli” qui peuvent sembler contredire l’argumentation principale. Curieusement, il apparaît que cette inclinaison pour une approche monolithique\textsuperscript{52} est souvent le fait des conseils anglo-saxons, comme quoi le “cartésianisme” n’est pas l’apanage de la tradition universitaire française ...

Au demeurant, cette stratégie, qui demeure souvent implicite, n’est jamais fixée \textit{ne varietur} une fois pour toutes : par définition, toute affaire devant la Cour met en présence deux États\textsuperscript{53} ; les positions arrêtées lors de l’élaboration de la Requête ou du Compromis -- à laquelle les conseils ne sont pas toujours associés\textsuperscript{54}, ce qui peut poser des problèmes aux stades ultérieurs --, ou du Mémoire, évoluent souvent au moment de la rédaction du Contre-


\textsuperscript{52} Une telle approche peut conduire à des erreurs d’appréciation, dont l’affaire des \textit{Activités militaires et paramilitaires au Nicaragua et contre celui-ci} fournit une bonne illustration : alors que, dans ses écritures, le Nicaragua avait invoqué, comme base de compétence de la Cour, le Traité d’amitié, de commerce et de navigation de 1956 qui le liait aux États-Unis, il n’a pas réitéré cette argumentation lors de ses plaidoiries orales; la Cour ne l’a pas moins reprise à son compte à l’importante majorité de 14 voix contre 2 (arrêt du 26 novembre 1984, C.I.J. Rec. 1984, p. 426 à 429 et 442).

\textsuperscript{53} Sauf si l’une des Parties ne se présente pas ou s’abstient de faire valoir ses moyens, hypothèse qu’envisage curieusement l’article 53 du Statut; si ceci est prévisible d’emblée, l’État demandeur en tient compte dès les premiers stades de l’affaire; dans le cas contraire, il peut être conduit à revoir sa stratégie dans son Mémoire ou lors des plaidoiries orales.

\textsuperscript{54} Ne fût-ce que parce qu’ils sont souvent recrutés après la conclusion du Compromis.
Mémoire ou de la Réplique : il s’agit ici de répondre à la thèse de la partie adverse.

16. La phase d’élaboration des pièces de procédure écrite est celle qui mêle le plus intimement les aspects solitaires et collégiaux du métier de conseil.

Il s’agit toujours d’une tâche ingrate (les pièces de procédure écrite sont signées du seul agent, le nom des auteurs des chapitres n’y figure pas), mais fondamentale (la longueur de ces pièces n’est pas limitée et elles permettent aux Parties d’exposer complètement leurs
thèses respectives). Le rôle des conseils dans leur rédaction varie considérablement d’une affaire à l’autre.

La plupart du temps, ils se partagent la rédaction des chapitres des différentes pièces de procédure, en fonction d’un plan pré-établi et soigneusement discuté. Les projets préparés par chaque conseil sont ensuite envoyés à tous les autres et passés au crible de la critique collective au cours de réunions de toute l’équipe où les projets sont revus ligne à ligne et harmonisés. Il arrive que cet exercice soit mené à deux reprises.

Certains États — rares — se chargent eux-mêmes de cette rédaction. Dans ce cas, le rôle des conseils est purement — ou essentiellement — consultatif: ils interviennent “en amont” pour établir le plan des Mémoire, Contre-Mémoire, Réplique et Duplique puis ils réagissent aux projets élaborés soit par la Direction juridique du Ministère des affaires étrangères, soit par le Service international de celui de la Justice. Ceci présente des avantages, financiers — les fonctionnaires nationaux ne touchent, en principe, aucune rémunération particulière en plus de leur traitement habituel en rémunération de leur participation au dossier — mais aussi techniques : la cohésion intellectuelle de chaque pièce est plus aisément assurée de cette manière; mais ceci est aussi une faiblesse : l’unité d’inspiration traduit une culture juridique monolithique, ce qui constitue un inconvénient grave devant la C.I.J. En outre, les conseils, moins “engagés” dans la préparation des écritures, éprouvent davantage de difficultés pour rédiger leurs plaidoiries orales, qui, elles, émanent toujours entièrement d’eux.

17. Toutefois, bien que, cette fois, les conseils apparaissent au grand jour et affrontent les “feux de la barre” — les plaidoiries sont faites dans le “grand hall de justice” du Palais de la Paix à La Haye --, le travail collectif n’est pas exclu à ce stade ultime de l’affaire. Certes, chacun rédige son propre texte, mais, dans toute la mesure où le temps le permet, les projets sont, là encore, échangés et commentés dans les réunions de l’équipe organisées avant ou pendant la période des audiences.

57 Le partage des tâches entre les conseils revêt, dès le stade du Mémoire, une grande importance : même si certains le regrettent, il préfigure en général les thèmes sur lesquels porteront les plaidoiries orales de chacun.
58 Voir supra, n° 9.
Il va de soi cependant que ce contrôle mutuel est moins approfondi et pointilleux que durant la phase écrite : chaque conseil a son style et il n’est pas de bonne politique de chercher à le "normaliser" ; surtout, le temps est souvent mesuré, les audiences étant souvent concentrées sur un petit nombre de semaines.

Cette situation, dont la responsabilité incombe surtout à la Cour (et qui tend à s’aggraver du fait, sans doute, des contraintes financières qui pèsent sur elle et de l’augmentation du nombre des affaires inscrites au rôle), est d’ailleurs mal ressentie par les États et n’est pas satisfaisante : la justice ne doit pas seulement être faite, elle doit aussi sembler l’être, or c’est à l’occasion des audiences que les Parties ont le sentiment d’être réellement entendues et que c’est la dernière occasion où elles peuvent l’être ; l’expression orale prend toujours plus de temps que l’écrit; en outre et surtout, malgré les possibilités que lui ouvre l'article 61 de son Règlement, la Cour


60 Le groupe d’étude établi par le British Institute of International and Comparative Law précité (note 1 supra) a consacré de longues critiques à la longueur et au calendrier des plaidoiries orales (op. cit.p. S7-S13 et 35 à 51); à certains égards, ces critiques sont sans doute excessives; en revanche, le groupe est muet sur un aspect contestable de la pratique contemporaine de la Cour qui s’efforce de limiter au maximum (et parfois à l’excès) la durée des plaidoiries orales (pour une défense de cette tendance, voir G. Guillaume, "The Future of International Institutions", International and Comparative Law Quarterly, vol. 43, p. 4, 1995, p. 853 et 854, qui fait valoir que l’extension du nombre des audiences a pour effet de rallonger la durée; de plus, le professeur Ian Brownlie a fort bien montré que les procédures orales devant les tribunaux arbitraux ad hoc ne sont pas plus courtes que devant la Cour pour des affaires comparables; ceci n’empêche pas les sentences d’être rendues plus rapidement que les arrêts de la Cour internationale de Justice -- cf. D. Bowett ed., op. cit. note 2, pp. 106 et 107; on ne peut cependant pousser la comparaison trop loin).

61 Comme l’écrit Sir Robert Jennings, "after all, a principal difference between a court of justice and other kinds of tribunals is that the Court in principle operates in public" et "in fact the oral proceedings are the only part of the process which can be performed before the public" ("The International Court of Justice after Fifty Years", American Journal of International Law vol. 89, n°. 3, 1995, p. 498); dans le même sens, voir la mise au point très ferme d’un autre ancien Président de la Cour, M. Bedjaoui, en réponse au Groupe d’étude du British Institute, op. cit. (note 1 supra, p. 91).
s'abstient de guider les Parties en indiquant les points sur lesquels elle souhaite les voir insister; dans ces conditions, il est prudent et légitime que les États en cause veuillent ne rien laisser au hasard.

Il est vrai, comme l'a relevé le Président Bedjaoui, que “chaque Partie doit pouvoir librement choisir et déployer sa stratégie judiciaire et développer pleinement tous ses arguments [et que] ce serait une entreprise excessivement délicate que de faire remarquer à une Partie que telle matière a été développée à suffisance”62. Un moyen terme est cependant concevable et l'on pourrait imaginer, par exemple, que dans un premier temps, la Cour invite les Parties à récapituler63 leur argumentation, puisque, dans un second temps, et après en avoir délibéré, elle indique “les points ou les problèmes qu'elle voudrait voir spécialement étudier par les parties”64; tout le monde pourrait trouver son compte à une procédure de ce genre : les Parties qui, dans cette phase ultime de la procédure auraient une dernière chance de présenter leur vision “glocale” de l’affaire, et les Juges qui auraient, dans les débats, un rôle moins passif que ce n'est le cas actuellement65 et pourraient véritablement orienter ceux-ci66.

18. La limitation excessive du nombre des audiences n’est pas la seule, ni même la principale critique que l’on peut adresser à


63 “Récapituler” car, malgré les directives de l'article 60, paragraphe 1, du Règlement, c'est bien, en pratique, ce que font les Parties et cela paralt à peu près inévitable. Mais, s'il s'agit clairement d'une récapitulation, il serait beaucoup moins contestable que ce n'est le cas actuellement (voir supra note 59), que la Cour exerce de fermes pressions pour que cette phase des plaidoiries orales soit brève et que les exposés soient succincts.

64 Article 61, par. 1, du Règlement. Voir aussi les suggestions du Groupe d'études du British Institute, op. cit. (note 1, supra), p. 43 et 53 (observations complémentaires).

65 La possibilité de questions orales, envisagée aux par. 2 et 3 de l'article 61 du Règlement, n’est utilisée qu’avec une grande prudence et demeure très formelle; ceci est justifié : les agents sont souvent dépourvus des connaissances techniques nécessaires pour répondre aux questions posées et les conseils ne peuvent parler que sous le contrôle de l’agent, ce qui exclut un dialogue direct avec la Cour.

66 Du même coup, le “pré-délibéré” auquel la Cour pourrait se livrer à l’issue de la première phase du débat oral serait de nature à répondre à l’objection précitée (note 59 supra) du Juge Guillaume, selon lequel de longues plaidoiries orales entraînent un trop long délibéré du fait de la difficulté pour les juges de faire la synthèse des arguments trop longuement échangés entre les Parties.

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l'organisation de celles-ci. Il ne s'agit pas tant de savoir si la Cour devrait siéger matin et après-midi comme elle le faisait encore au milieu des années 1980 et comme elle a cessé de le faire depuis une dizaine d'années, même si cette pratique a suscité des critiques⁶⁷. Le problème tient plutôt à la concentration des audiences dans le temps : en n'accordant aux Parties que quelques jours, voire une seule journée, pour préparer leurs plaidoiries en réponse, la Cour fausse les règles du jeu en ce sens non seulement qu'elle impose aux équipes de plaidoirie un rythme de travail inutilement harassant, mais encore qu'elle incite les conseils à préparer leurs réponses à l'avance -- c'est-à-dire avant même d'avoir écouté l'argumentation adverse. Ceci a plusieurs conséquences fâcheuses :

- Il en résulte une « prime » induue à la Partie qui plaide la première dont l'équipe a tout loisir de préparer les plaidoiries du premier tour, alors que les conseils de l'autre Partie doivent soit improviser, soit se borner à reprendre (en les aménageant tant bien que mal, et souvent plutôt mal ...) des plaidoiries "toutes faites" qui ne tiennent pas compte de celles des adversaires;
- Dans ce cas, les argumentations ne se répondent pas, et l'on retrouve ici, lors de la phase orale, les inconvenients des écritures simultanées⁶⁸ ;
- Au surplus, le manque de temps encourage les conseils à reprendre les arguments figurant déjà dans les écritures faute de pouvoir réfléchir sérieusement aux arguments éventuellement nouveaux de la Partie adverse et effectuer les recherches qui permettraient (peut-être) d'y répondre de manière pertinente.

Le calendrier des plaidoiries orales dans l'affaire du Système de barrages de Gabčíkovo-Nagymaros a, en partie, rompu avec cette pratique puisque la Slovaquie (qui, d'accord parties, plaideait en second) a disposé de plus de deux semaines pour préparer sa plaidoirie en réponse, tandis que la Hongrie a pu élaborer sa réplique orale durant le même laps de temps. Toutefois, ce progrès très réel a été incomplet car les deux jours dont a bénéficié la Slovaquie pour préparer sa duplique sont insuffisants et l'inégalité entre les Parties s'est donc retrouvée à ce stade. De plus, ce calendrier inhabituel a été

⁶⁸ Voir supra, note 53.
fixé en raison de circonstances très exceptionnelles, ce qui limite la portée de ce précédent. Il n’en reste pas moins qu’il va dans le bon sens et qu’il constitue un exemple qui mérite sans aucun doute d’être repris à l’avenir.

19. Lorsque l’Agent du second État à présenter ses plaidoiries orales a donné lecture des conclusions finales de cette partie, "[Je Président prononce la clôture des débats]". Le rideau tombe sur le "grand théâtre" de La Haye. Le débat se poursuit dorénavant en coulisses, entre les Juges de la Cour qui se sont retirés "en Chambre du Conseil pour délibérer". Et les conseils, comme leur mandant, n’ont plus qu’à attendre, impuissants, anxieux, plein d’espoirs, de regrets aussi parfois, en songeant à un argument oublié ou mal présenté, la "scène du dénouement" que constitue la lecture de l’arrêt. À cette occasion, ils retrouveront pour une ou deux heures la pompe et la solennité du Palais de la Paix, avant de se quitter définitivement (ou jusqu’à la prochaine affaire qui réunira ou opposera certains d’entre eux ...).

Le moment de se séparer est un moment difficile; après la tension des semaines passées ensemble, chacun ressent un sentiment de vide. C’est qu’une affaire devant la Cour demeure, malgré la banalisation relative qui résulte de l’abondance (relative aussi) des

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[70] Art. 60, par. 2, du Règlement.

[71] Art. 54, par. 1, du Statut.


[73] M. Bedjaoui, ibidem, p. 106.

[74] Après les commentaires d’usage sur l’arrêt, éventuellement prolongés par d’ultimes notes que les conseils adressent à l’agent sur ce qui leur paraît être le "bon usage" de la décision.

[75] Ceci est sans doute plus vrai encore après la fin des plaidoiries orales. 456
affaires, une grande aventure vécue collectivement. Non seulement des liens d’amitié et d’estime se sont noués entre ceux qui y ont participé, mais encore les conseils sont devenus des “citoyens adoptifs” de l’État qui leur a fait confiance et où, souvent, ils se sont rendus à plusieurs reprises. “Mercenaires” peut-être, au départ, les conseils se sont assimilés à la cause qu’ils ont défendue durant deux ou trois ans, souvent plus. Ce n’est pas à dire que, toujours et sur tous les points, ils soient eux-mêmes convaincus de l’excellence de l’argumentation juridique qu’ils ont défendue; mais ils ont consacré à leur tâche une énergie dans laquelle l’appât du gain joue un rôle infiniment moindre que le souci de tirer le maximum du dossier qui leur a été confié.

L’arrêt est le point d’aboutissement de ces efforts et de cette tension. D’une certaine manière, le résultat final importe moins aux yeux des conseils que le raisonnement suivi par la Cour : que leur client ait “gagné” ou “perdu” l’attention attachée par la Cour à l’argumentation qu’ils ont développée collectivement, le soin pris à la reprendre ou à l’écartier sont certainement des éléments auxquels ils attachent une importance fondamentale. Il est d’ailleurs rare qu’au fond d’eux-mêmes ils soient entièrement surpris de l’issue de l’affaire : comme les juges, ils ont lu les écritures de leurs contradicteurs et suivi avec attention leurs plaidoiries, et ils ont pris conscience à cette occasion, si ce n’était le cas auparavant, des forces, mais aussi des faiblesses et des failles de la thèse qu’ils ont soutenue. Ils n’ont d’ailleurs pas manqué d’en avertir leur agent dès les premières réunions de l’équipe ou au fur et à mesure de l’avancement de la procédure si celles-ci - mais cela est rare -- leur sont apparues plus tardivement.

Cette fonction de mise en garde fait, elle aussi, partie intégrante des fonctions d’un conseil conscient de ses responsabilités et, s’il s’en est acquitté honnêtement, dès le début de son association au dossier, elle garantit la continuation de rapports harmonieux entre lui et son client même après la lecture d’un arrêt qui ne fait pas droit aux conclusions de celui-ci. Mais, dans tous les cas, quelle que soit l’issue de l’affaire, les liens, sans doute, se distendront, au moins au

76 Ce sentiment est cependant très variable selon la personnalité de chaque conseil...

77 D’autant plus que, si le tempérément d’un conseil peut le porter à un optimisme excessif, celui-ci sera, dans une équipe bien composée, tempéré par le pessimisme (ou le plus grand réalisme) de ses collègues.
plan institutionnel; il restera ceux de l'amitié, forgés dans un "compagnonnage juridique" exigeant, accaparant, mais, bien souvent, exaltant.
I. Preliminary Observations

The role of developing and small countries in the system of the International Court of Justice has increasingly taken on particular relevance, both from the point of view of potential and real concerns. Their potential significance is underscored by the fact that the number of these countries that have deposited their declaration of acceptance of the Court's compulsory jurisdiction is clearly superior to that of the developed countries. Furthermore, many of said developing and small countries have been parties to the Statute of the Court since its establishment and, in recent years, have brought before the Court a significant number of international disputes, thus constituting the said nations as real and actual users.

The developing and small countries may rise to prominence in other ways as well, such as procedural or political channels. As for the procedural route, there has been, in recent years, a striking proclivity among these countries to intervene in bilateral cases which, initially, may not be of their direct concern, but in which they have perceived themselves as implicated parties. Such an instance is that of the application for permission to intervene filed by Nicaragua in the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) or in the applications for permission to intervene and declarations of intervention submitted by Samoa, Solomon Islands, the Marshall Islands and the

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1 Figures for the States and the contents of their declarations of acceptance of the Court's compulsory jurisdiction can be consulted in the *I.C.J. Yearbook 1995-1996*, pp. 81 et seq.

2 During the last sixteen years, the following countries have either been parties to or have initiated procedures before the Court: Tunisia, Libya, Malta, Nicaragua, Burkina-Faso, Mali, Honduras, Guinea-Bissau, Senegal, Nauru, El Salvador, Chad, Qatar, Bahrain, Bosnia-Herzegovina, Yugoslavia, Iran, Botswana, Namibia, Nigeria, etc.

Federal States of Micronesia in the Request for an examination of the situation in accordance with paragraph 63 of the Court's Judgement of 20 December 1974 in the nuclear tests (New Zealand v. France) case. From a political perspective, equally significant, at least numerically, is the participation of micro-States, small States and developing countries in the elections or reelections of the Court's judges.

Thus, when we allude to problems that may arise for the aforementioned group of countries, during and after the exercise of international judicial functions, we are not making reference to a secondary or irrelevant question, but rather to situations which, in recent years, have occurred quite frequently within the jurisdictional operation of the Court.

At this point, however, it is necessary to highlight one characteristic which clearly distinguishes some of these countries from the others. A micro-State or a small State can be poor or rich, underdeveloped or highly developed economically and socially; on the contrary, the condition of a developing country, be it large or small, always denotes relative or absolute poverty. Thus, the technical difficulties and the lack of staff or of infrastructure which may handicap these countries during the development of an international litigation may be due to different causes, some of a strictly economic source and others not. Nonetheless, both types of States frequently encounter common obstacles, derived chiefly from deficient internal structures which are incapable of meeting such weighty technical and legal challenges as those involved in the preparation, development and completion of litigation brought before the Court.

If this is taken into account, it becomes obvious that the worst situation, when seeking redress through the channels of international justice, applies to a State which, besides being small and lacking an adequate infrastructure, is also poor. This renders all the more remarkable initiatives which strengthen the handling of international justice, such as those mentioned on 8 November 1991, before the General Assembly of the United Nations by the then President of the Court, Sir. Robert Jennings:

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"I should mention that the use of the contentious jurisdiction is now much assisted by the Trust Fund for helping to meet the expenses of poorer litigant Governments. This important Fund was created on the initiative of our present Secretary-General, and all the Members of the Court are most grateful for this assistance." 

II. The deficit in material and human resources

In cases of international controversy, the countries that we are now considering have a common initial problem: scarce human, economic and professional resources. This important deficit may be of diverse origin: on the one hand, an inefficient and weak civil service system, with few civil servants, having little or null preparation with regard to the specific legal technicalities involved in international law or in international legal procedures. While it is true that many small or poor countries have some civil servants with a good or excellent knowledge of global international law, on the whole such persons represent isolated, individual cases, with little real possibility of relying on the support of national legal teams with sufficient experience to initiate the necessary strategies for handling a contentious case and even less for assuring its further development.

This type of operational deficit tends to arise, as well, from the non-existence or paltry number of libraries specializing in international law, be they those attached to universities or other institutions. Such libraries demand sophisticated doctrinal and jurisprudential collections, as well as records of judicial practice, all covering distinct judicial circuits for both historical and modern developments. On occasion, this type of collection is difficult to locate (for example, some single publications and complete sets from the 19th century and the beginning of the 20th, which are now out of print), and in any case, the acquisition of such volumes would be highly costly. For new, small or developing

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countries having such libraries at their disposal is an expensive and laborious task, resulting from many years of continuous work.

To the aforementioned difficulties, it must be added that certain international disputes, by virtue of their specialized nature, also demand the intervention of specialists in non-judicial areas or sciences: historians, cartographers, geographers, geologists, marine biologists, etc. This may suppose an added difficulty for the formation of a reliable and resolute national legal team.

In the end, if the litigation depends, either directly or indirectly, upon history, documentary and administrative archives are all but indispensable. And in this type of context, there may emerge two connected problems: on the one hand, the system of national archives may not be complete or organized, or, supposing it were, on the other hand, the collection might still be notably insufficient owing to the recent independence of the country. This would lead to dependency in regard to those archives still held by the colonial power, of which these newer countries would be tributaries.

In sum, the mere initiation of an international law case is laden with varied and complex difficulties for these countries. The legal formulation and judicial development will simply multiply these complications geometrically.

III. The economic deficit: financial and budgetary difficulties

In spite of the gratuitousness which prevails in the International Court of Justice procedures, the very dynamics of an international litigation generate expenses: the cost of retaining qualified technical personnel who elaborate the reports and pleadings, judicial or not; expenses involved in the reproduction of documents and deeds of all types; travel expenses; support assistants (border services or marine exploration operations, for example). In short, such legal cases involve expenses of the most varied nature.

International judicial settlement, for the reasons mentioned above, carries with it high structural costs. In the case of developing countries, such costs do not conform well to their paltry economic resources and chronic national fiscal deficit. There may be an added difficulty if such a State should decide to enter into litigation with an economically and culturally powerful State. As we shall see shortly, international litigation is not only expensive, in relative terms, but it is
also protracted, a factor which aggravates the economic needs of such countries. An altogether unfavourable panorama.

Experience has shown that the best way to meet the high costs of international litigation lies in establishing special funds for the specific case, with provisions for annual periodic revision within the national budget. The supervision of these special funds, including expenditures, should fall under the responsibility of a person or civil servant designated by the State. Although advisable, it is not always possible to establish such centralized management and its absence may result in an inadequate or erratic development in the preparatory work or in the litigation procedures.

IV. The anatomy of an international litigation: from the pre-history to procedural completion

Before seeking recourse through the International Court of Justice, certain indispensable preparations must be carried out: the analysis of the controversy and its characteristics, the applicable judicial rules, the evidence at hand and the expectations for the outcome of the case. All of this planning during the embryonic stage of the case requires a legal team free of other commitments and structured by a director acting as coordinator and strategist.

Once the definitive decision has been taken to bring the case before the Court, a set of complex technical problems will begin to appear. As a rule, if the judicial channel is open through the declaration of acceptance of the Court's compulsory jurisdiction (Article 36, 2 of the Statute), it is indispensable for the State concerned to carry out an intense and profound analysis of its own declaration and that of the other State in order to later file an application instituting proceedings and to draw up the specific petitum. From this moment on, a process begins which always requires a high degree of technical and legal specialization. If, on the other hand, the dispute is brought before the Court by application of a special agreement or by recourse to one of the conventional clauses referred to in Article 36, 1 of the Statute, the negotiation of the corresponding compromise clauses is of the highest importance, at least in regard to the following factors: the object of the controversy, the applicable rules, and the issues concerning the temporal scope and evidences agreed upon. In addition, it is necessary to study alternative routes such as submitting the case to the court itself or to a Chamber; if the latter approach is chosen, this requires the study of alternative choices for the Chamber's composition as well as choosing
the ideal candidate for *ad hoc* judge, in the case that such a figure is possible.

As previously mentioned, all of the above procedures entail the initial work of a highly specialized legal team, given that such procedures represent a cardinal role in the success of the litigation. In effect, the decision-making process (assuring for the strategic aspects of the structuring and development of the case) demands previous planning in relation to the political decision which must be adopted.

If the decision is made to bring the case before the International Court of Justice and if the case falls within the Court's jurisdiction, the immediate task will be that of drawing up the pleadings constituting the written proceedings. These pleadings, which may continue over various turns, comprehend essentially two types of contents: the legal arguments and the evidence to support them. Such documents entail finely structured reasoning, in which the theses and positions of the parties relevant for the final decision are progressively laid out.

Upon the closure of the written proceedings, the Court will declare the case ready for hearing, this being the last stage of the proceedings. During this phase, it is equally important to have a complete legal team available, which need not be the same one used in the previous phase. In effect, the dialectical skill of team members, their specialization in the specific issues of the case, their professional prestige, their experience and their capacity for persuasion all might counsel a State to form an *ad hoc* team for this phase, even if its members coincide only partially with those who intervened in the written proceedings. Among the members of these teams there will always be continuity although not necessarily absolute coincidence.

In these last two phases, the actual material preparation of the pleadings and oral statements require an infrastructure which exceeds the competence of the legal team, that is, typists, translators, interpreters, services for document reproduction, professional cartographers, computers specialists, etc. Such highly specialized service personnel are frequently not available to small and developing States. An additional problem must also be kept in mind: that of language barriers.

V. An added problem befalling some States: official languages

As laid out in Article 39,1 of the Statute, the official languages of the Court are French and English. It is true that, according to
paragraph 3 of the same Article, upon petition from one of the parties, the Court may authorize the use of any language other than French or English, but it is no less true that in the event of such a circumstance, the party or parties in question have the burden of covering the high costs of translation and interpretation services. That is, the legal process becomes much more expensive for parties who decide not to use one of the two official languages, and thus, this possibility is, in effect, of a formal rather than of a practical nature.

Such language dispositions are not without their contradictions, specially when one considers that the Statute of the Court forms an integral part of the Charter of the United Nations and that the text of the Charter has been authenticated in five languages; this means, then, that Chinese, Spanish and Russian are discriminated against in the Court's legal procedure. This is the tribute that was paid for the agreed continuity between the former Statute of the Permanent Court of International Justice and the current one, and for the view held during that period that French and English were the aristocratic languages of international relations and diplomacy.

In relation to this previous point, we offer two thoughts. On the one hand, the majority of the one hundred and eighty seven States who are members of the United Nations or parties to the Statute of the Court do not have as an official language either French or English.\(^6\) On the other hand, upon examining the history of the contentious practice of the Court, one finds that the number of interventions by parties whose official language is neither French nor English is higher than the interventions of those parties whose official language coincides with one of the two established for the Court.\(^7\) Here, we merely wish to put forward some objective figures which are helpful for our analysis, rather than to open up a debate on the convenience or not of broadening the number of official languages of the Court.

The conclusion reached from the situation we have been describing is clear. Many of the small or developing countries appeal to the Court with a considerable added difficulty; this is the necessity of carrying out the contentious procedure in a language which is foreign to them, a factor which surely will have economic and legal consequences. Their agents should, therefore, try to form legal teams comprising


\(^7\) Cf. *Ibid*, pp. 3-7.
specialists, who -- at least for the oral proceedings -- are capable of skillfully using either French or English, the languages which will be used to elaborate all the pleadings and oral statements of the procedure.

VI. The inevitable concentration of international litigation in privileged circuits

The developments mentioned in the previous sections constitute a brief outline which will support some posterior conclusions -- these being well-known albeit to the Court experts -- in regard to the possibilities of small and developing countries for bringing a case before the Court. We have already observed that technical and legal complications exist, as well as the expense of creating the necessary material and personnel infrastructure. There may also be delicate political issues involved since, as is well-known, when the rights of a State or its territorial boundaries are questioned, internal political issues can turn an international litigation into a qualitatively different question, that is, into a true question of State.

In such a context, it is logical that the governmental authorities of the parties seek the best legal solution to the dispute which, after serious examination, they have decided to present before the Court. After having weighed the national resources for dealing with all aspects of the litigation, the most immediate question at this point will be how to confront the challenge in practical terms. The agent and, in some cases, the coagent, must initiate their work immediately upon being appointed. For this objective, they already have an important experience: the recent preparation of the case.

In the initial phase (pre-history), as well as in the recent history of the case, small and poor countries, which frequently are the result of an immediate colonial past, may take a first step: resorting to the aid from the old colonial power, whose material and personal means they may envy. From such a power, they may even expect economic aid in terms of international cooperation towards developing countries. This aid frequently entails the use of experts from the colonial country itself. This tendency is usually more apparent when the dismantling of the colonial territories has been a recent event as in, for example, the cases of France and England; it is less apparent when colonial powers were already decrepit in the early nineteen century, as in the case of Spain. It is, of course, belittling when the daughter ends up by devouring -- in economic, political and strategic terms -- the mother. (Could this be the case of the United States in relation to England?).

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These observations might be justly considered as excessively literary or rhetorical. However, in reality, what happens in these cases? What would be the result of an empirical, non-rhetorical analysis of what has been occurring since the International Court of Justice began to exercise its contentious jurisdiction?

It goes without saying that said empirical analysis can be carried out from different perspectives: a personal level and a functional or operative level. Let us start from the beginning, from the proto history of a case. At this point, the fundamental decision entails the personal level, since there is first the question of which person or persons will be commissioned to carry out the initial analyses of the case. Later on, when the legal proceedings have begun, it will be necessary to incorporate a well-organized machinery charged with the elaboration of the pleadings. As it is a given fact that the small or developing country cannot solely confront this challenge, how can it meet such demands?

The history of the Court shows us that ordinarily such countries seek the aid of one or various of the existent university or professional circles. Basically, these are to be found within the French, English, Belgian or Swiss circles, although there are less frequent and not so conclusive interventions from other groups. As can be observed in the following sections of this paper, such groups are not mutually exclusive; rather they frequently maintain contact, since the States usually employ specialists of different nationalities (one of the reasons being the plurality of the Court itself).

The French circle has worked in the interest of Albania (1949), Peru (1949 and 1951), Cambodia (1962), Cameroon (1962), Tunisia

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13 Cf. ibidem, p. 19, with the participation of Professor C.A. Colliard.
15 Cf. ibidem, with the participation of Professor P. Weil.
17 Cf. ibidem, p. 15, with the participation of Professor P. Weil.
19 Cf. ibidem, with the participation of Professors J.P. Queneudec and C.A. Colliard.
22 Cf. ibidem, p. 556, with the participation of Professors R.J. Dupuy and P.M. Dupuy.
24 Cf. ibidem, with the participation of Professor P.M. Dupuy.
27 Cf. ibidem, with the participation of Professors R.J. Dupuy and P.M. Dupuy.
29 Cf. Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 113, with the participation of Professor J.P. Queneudec.
30 Cf. ibidem, with the participation of Professor P. Weil.
31 With the participation of Professors A. Pellet and B. Stern.
32 With the participation of Professors P.M. Dupuy and A. Kiss.
33 With the participation of Professor A. Pellet.
34 With the participation of Professors A. Pellet and J.P. Cot.

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35 Cf. Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960, p. 8, with the participation of Professor C.H.M. Waldock.
36 Cf. Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962, pp. 7 and 8, with the participation of lawyers F. Sokkice, J.G. Le Quesne and D.S. Downs.
37 Cf. Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 19, with the participation of Professor R. Jennings.
38 Cf. ibid, p. 20, with the participation of Professors D. Bowett and Sir F. Vallat.
40 Cf. ibid, with the participation of Professors E. Lauterpacht and I. Brownlie.
42 Cf. ibid, p. 15, with the participation of Professors I. Brownlie and E. Lauterpacht.
43 Cf. ibid, with the participation of Professors D.W. Bowett and Sir F. Vallat.
44 Cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 15, with the participation of Professor I. Brownlie.
46 Cf. ibid, with the participation of Professor D.W. Bowett.
50 Cf. Ibid., with the participation of Professor D.W. Bowett.
51 Cf. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 8, with the participation of Professor D.W. Bowett.
52 Cf. Ibid., p. 8, with the participation of Professor R. Higgins.
54 Cf. Ibid, with the participation of Professors D.W. Bowett and E. Lauterpacht.
55 With the participation of Professor M. Weller.
56 With the participation of Professor I. Brownlie.


And finally, the important Geneva-Swiss circle has participated, serving the interests of India (1960), Honduras (1960), Tunisia

57 With the participation of Professors J.R. Crawford (holding a Chair at Cambridge) and D.W. Bowett.
58 With the participation of Professor J. Crawford and P. Sands.
59 With the participation of Professors or jurists D.W. Bowett and A. Watts.
60 With the participation of Professor I. Brownlie.
61 With the participation of Professors M. Shaw and I. Sinclair.
62 With the participation of Professors I. Brownlie and J. Crawford.
63 Cf. Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960, p. 8, with the participation of Professor H. Rolin.
64 Cf. Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960, I.C.J. Reports 1960, p. 193, with the participation of Professors P. de Visscher and Ch. Dominicé.
67 Cf. Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 556, with the participation of Professor J. Salmon.
69 Cf. Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 113, with the participation of Professor J. Salmon.
70 With the participation of Professor E. Suy.
71 With the participation of Professors J. Salmon, E. Suy and David.
72 Cf. Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960, I.C.J. Reports 1960, p. 8, with the participation of Professor P. Guggenheim.
73 Cf. Ibidem, p. 193, with the participation of the same cited in the previous footnote.
It goes without saying that this diagnosis does not include all of the possible profiles of the participants within the different circles at each of the distinct stages of the judicial procedure. These data were obtained exclusively from the information published by the International Court of Justice, and this means that only those participating in the oral proceedings are cited, since no record exists of those who have participated in previous stages. In any case, these data are sufficiently representative for the purposes of our analysis.

From another viewpoint, and with these data at hand, it is possible to arrive at other interesting conclusions. First, it is necessary to focus on the participation of North American experts and jurists who, in spite of their quantitative and qualitative importance and the undeniable hegemonic position of their country in international relations, seem to have limited interventions before the Court in the defense of small and developing countries and, in addition, are from diverse academic, professional and conceptual circles. They have intervened on behalf of Honduras and Nicaragua (1960), Cambodia and Thailand (1962), Ethiopia and Liberia (1962), Libya (1982), Libya (1985),

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(Cf. Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 19, with the participation of Professor G. Abi-Saab. Logically, the nationality of the expert is not relevant for our classification, when he or she offers professional and academic services in a different circle.

(Cf. I.C.J. Reports 1984, p. 4, with the participation of Professor E. Grisel.

(Cf. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 8, with the participation of Professors Ph. Cahier and L. Condorelli.

(Cf. With the participation of Professor L. Condorelli.

(Cf. Case concerning the Arbitrary Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960, I.C.J. Reports 1960, pp. 193-194, with the participation of Professors H.W. Briggs and Ph. C. Jessup, respectively.


(Cf. Ibid., p. 320, with the participation on the part of both countries, E.A. Gross and L.S. Sandweiss.


(Cf. Continental Shelf (Libyan Arab Republic Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 14, with the participation of the three mentioned in the previous footnote.
Nicaragua (1986),


The participation of North American specialists is, therefore, relatively limited, with large time intervals between interventions, often explicable for strategic reasons in the defense of a case (Libya and Nicaragua).

Secondly, it is quite notable that representatives or nationals from some traditional, prestigious and substantial national legal circuits appear sporadically in the contentious practice of the Court acting in favour of the countries we have been focusing on. The excellence of the work carried out and the expertise of the members of these legal circuits does not harmonize with their relative isolation within forensic tasks, as is the case of the Italian circle and the German circle.

Thirdly, in the defense of their procedural interests before the Court, it appears to be quite exceptional that developing countries confide exclusively in their own national specialists, or that they demand the services of specialists from other developing nations for

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83 Cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 15, with the significant participation of Professor A. Chayes.
84 Cf. I.C.J. Reports 1991, p. 54, with the participation of Professor M.B. Froman, jointly with K. Highet.
85 With the participation of S.C. McCaffrey and W.D. Sohier. It is true that, in recent years, one of the most active North American lawyer-professors has been K. Highet: Guinea-Bissau (1991), El Salvador (1992) y Bahrain (1994), but this seems to be due primarily to his principal activity as a legal specialist and less owing to his membership in a particular circle.
86 With the participation of Professor T. Franck.
87 With the participation of Ambassador S. Rosenne.
89 Even less explicable is the case of the German experts, among whom only G. Jaenicke has participated, in the defense of the interests of Libya (cf. I.C.J. Reports 1984, p. 4, y I.C.J. Reports 1985, p. 14), and R. Dolzer, commissioned by the same country (cf. I.C.J. Reports 1994, p. 7), as well as Professors B. Simma and Ch. Tomuschat in defense of Cameroon (1998). All considered, the last two decades point to an upsurge in the participation of the German circle before the Court.
90 Worthy of mention is the case of India and Pakistan in their controversy, although in regard to India, the use of national experts is less surprising if we keep in mind that this is a large country with a substantial public infrastructure. See the Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 46.
incorporation into their national legal team. 91 In sum, the contentious practice of the Court demonstrates that the small and developing States are plainly tributaries to the academic and professional circles under discussion here.

Lastly, it is possible to identify instances in which a series of corresponding historical, cultural and geographic factors enter into the decision-making process when forming the national legal teams. This is the case of the participation of Portuguese lawyers and professors in favor of the interests of Guinea-Bissau (1991), 92 or of the prominent intervention of Australian lawyers in favor of Nauru (1992). 93

A different case is that of the participation of Spanish jurists in litigations between Central or South American Republics, not only in cases brought before the Court but also in other arbitration proceedings. In effect, Spanish lawyers and professors have intervened in favor of Perú (1950 and 1951), 94 Nicaragua (1960 and 1988) 95 96 and Honduras (1988 and 1992). 97 98 It is probably true that certain cultural, historical, linguistic, and legal affinities played a role in the inclusion of Spanish lawyers in the respective national legal teams; however, it is no less true

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91 Indeed, examples such as the intervention of M.K. Yassen, acting in favor of Libya (cf. I.C.J. Reports 1982, p. 20), of the Malagasy R. Ranjeva, in favor of Mah (cf. I.C.J. Reports 1986, p. 556), and of the Indian R.K.P. Shankardass, in favor of Qatar (cf. I.C.J. Reports 1994, p. 113), are quite exceptional, although part of the exceptionalism can be explained by the excellent legal offices of these individuals and their expertise in casu.


93 Cf. Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary objections, Judgment, I.C.J. Reports 1992, pp. 241-242, together with the Englishman I. Brownlie, the case also included the Australian Professors B. Connell and J. Crawford (the latter still in an Australia phase of his work); this participation is probably owing not only to geographical affinity, but also to the fact that Australia was the opposing party. In this respect, it is quite surprising to observe that among the legal counselors for Australia there were none of Australian nationality.


95 Cf. I.C.J. Reports 1960, p. 194, with the participation of Professor C. Barcia Trelles.


97 Cf. Ibid., with the participation of Professor J. González Campos.

that their expertise in certain controversial questions (for example, the *uti possidetis juris* corresponding to the Spanish Crown, or the validity of an arbitral award made by the King of Spain) have made the presence of Spanish jurists advisable.

In either situation, both the contribution of evidence in relation to Spanish colonial law and the interpretation of the legal texts, written originally in Spanish, meant that the intervention of Spanish specialists was particularly appropriate. The inclusion of specialists of other nationalities, having great expertise in these legal matters but with little or no knowledge of the original language of the documents, might have led to undesirable results for the country which they represented.

**VII. The choice of material and personnel infrastructure for international litigation**

It has already been observed that, in a legal case brought before the Court, small and developing countries may have difficulties which go beyond the selection of the expert members of the legal team, i.e., the lack of material means: the translation, edition, reproduction and presentation of the evidence, of maps, etc., all within the ambit of material and personnel infrastructure. If medium-sized countries find it necessary to have recourse to such specialized services, this is even more indispensable in the case of small and developing nations.

During the last two decades, one of the solutions frequently provided for this problem is the recourse to the services of legal advisers specializing in international law; such consulting firms, either themselves or having recourse to third parties’ services, can usually offer a global response to the contracting parties. In addition, as is well-known, they have at their disposal expert lawyers with important contacts in the well-known legal circles. Thus, they can offer services à la carte.

The adoption of this solution on the part of legal clients explains the frequent intervention of certain lawyers, as counsels, acting as members or representatives for specialized consulting firms;9 upon occasions, there is the direct invention of the consulting firm itself,

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In other recent cases, a different strategy was used, one which is, in certain ways, a variant of the former. Basically, it consists of obtaining a certain amount of infrastructure in personnel by assuring the participation of assistants or collaborators of the principal counsels and lawyers, thus guaranteeing the elaboration of complementary working documents. This strategy has been used by Chad (1994) and by Bosnia-Herzegovina (1996). In these situations, it appears that the principal counsels, commissioned to establish the technical organization and to assume the most direct protagonism, entrust certain complementary jobs to the persons who form part of their respective academic teams.

VIII. Regarding the election of ad hoc judges

If the choice of legal counsels and experts on the part of the small and developing countries follow certain more or less foreseeable

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102 Cf. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 7, with the participation of various lawyers from the firm Frere Cholmeley (Paris) and from expert cartographers from the Maryland Cartographics, Inc.
103 Cf. Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 113, with the participation of various partners from Frere Cholmeley.
104 Cf. Ibid., with the participation of lawyers from the firm Trowers and Hamlins (London).
105 Also with lawyers from the firm Frere Cholmeley.
106 Ibid.
107 With the participation of various lawyers from the firm D.J. Freeman (London).
108 Cf. Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 7, with the participation of various lawyers and researchers from New York University, from the Free University of Brussels, from the University of Paris X-Nanterre and from the European University Institute of Florence.
109 With the participation of aids and collaborators linked to the University of Paris X-Nanterre, Paris I, and Amsterdam.
tendencies (to the point of almost being able to state that there are
certain guidelines or commonly observed standards), the same cannot be
said of the designation of the *ad hoc* judges. In the latter case, the
conclusions are less evident and generalizable, since there exist many
variants in regard to the criteria for selection. Nevertheless, one must
keep in mind the unquestionable importance and the specific
significance that an *ad hoc* judge may have in the resolution of a case,
especially regarding a Chamber, with a reduced number of judges.

If one examines the *ad hoc* judges designated up to the present,
it is possible to draw some preliminary conclusions.\footnote{Cf. in this regard *I.C.J. Yearbook* 1995-1996, pp. 12-16. The references which appear in the following footnotes are all from this same source.} Firstly, small or
developing countries have a tendency to designate judges of the same
nationality\footnote{This is true of Colombia and Perú in the *Asylum* case, *Request for interpretation of the judgement of 20 November 1950 in the Asylum case and Haya de la Torre case*; with Iran in the *Anglo-Iranian Oil Co.* case; with Guatemala in the *Nottebohm case*; with India in the *Right of passage over Indian territory* case; with Cameroon in the *Northern Cameroons* case; with India as well in the *Appeal relating to the jurisdiction of the ICAO Council* case; with Pakistan in the *Trial of Pakistani Prisoners of war case*; with Iran in the *Aerial Incident of 3 July 1988 case*; with Senegal in the *Arbitral Award of 31 July 1989 case*; with Yugoslavia (Serbia and Montenegro) in the *Application of the Convention on the Prevention and punishment of the crime of genocide case*; with Cameroon and Nigeria in the case concerning the *Land and maritime boundary between Cameroon and Nigeria case*; with Spain and Canada in the *Fisheries Jurisdiction case*, and with New Zealand in the *Request for an examination of the situation in accordance with paragraph 63 of the Court's judgement of 20 December 1974 in the nuclear tests case*.} or of that of the nearby countries.\footnote{This is the case of Nicaragua in the matter of the *Arbitral Award made by the King of Spain on December 23, 1906*, of Ethiopia and Liberia in the *South West Africa case*; of Mali in the *Frontier dispute case*; of Chad in the *Territorial Dispute case*; and of Libya in the case concerning Questions of interpretation and application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie. (Convention for the Suppression of unlawful acts against the safety of civil aviation. *United Nations, Treaty Series*, vol. 974, p. 177).} This does not mean,
however, that some of these countries have not decided to designate as
*ad hoc* judges some of the most significative representatives from
completely different legal and cultural spheres, usually classified within
international law as the "Western" sphere;\footnote{This has occurred, for instance, with Tunisia and the Libyan Arab Jamahiriya in the *Continental Shelf case*, with the Libyan Arab Jamahiriya and Malta in the *Continental Shelf case*, with Burkina- Faso in the *Frontier Dispute case*, with Nicaragua in the case concerning *Military and paramilitary activities in and against Nicaragua*, with Tunisia and Libya in the matter of the *Application for revision and interpretation of the judgement of 24 February 1982 on the Continental Shelf case*, with Guinea-Bissau in the *Arbitral Award of 31 July 1989 case*, and with Libya in the *Territorial Dispute case*. The Islamic Republic of Iran also designated a Belgian judge in the *Oil Platforms case*.} such designations are

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\begin{itemize}
\item[10] Cf. in this regard *I.C.J. Yearbook* 1995-1996, pp. 12-16. The references which appear in the following footnotes are all from this same source.
\item[11] This is true of Colombia and Perú in the *Asylum case, Request for interpretation of the judgement of 20 November 1950 in the Asylum case and Haya de la Torre case*; with Iran in the *Anglo-Iranian Oil Co.* case; with Guatemala in the *Nottebohm case*; with India in the *Right of passage over Indian territory* case; with Cameroon in the *Northern Cameroons* case; with India as well in the *Appeal relating to the jurisdiction of the ICAO Council* case; with Pakistan in the *Trial of Pakistani Prisoners of war case*; with Iran in the *Aerial Incident of 3 July 1988 case*; with Senegal in the *Arbitral Award of 31 July 1989 case*; with Yugoslavia (Serbia and Montenegro) in the *Application of the Convention on the Prevention and punishment of the crime of genocide case*; with Cameroon and Nigeria in the case concerning the *Land and maritime boundary between Cameroon and Nigeria case*; with Spain and Canada in the *Fisheries Jurisdiction case*, and with New Zealand in the *Request for an examination of the situation in accordance with paragraph 63 of the Court's judgement of 20 December 1974 in the nuclear tests case*.\footnote{This is the case of Nicaragua in the matter of the *Arbitral Award made by the King of Spain on December 23, 1906*, of Ethiopia and Liberia in the *South West Africa case*; of Mali in the *Frontier dispute case*; of Chad in the *Territorial Dispute case*; and of Libya in the case concerning Questions of interpretation and application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie. (Convention for the Suppression of unlawful acts against the safety of civil aviation. *United Nations, Treaty Series*, vol. 974, p. 177).} such designations are
\end{itemize}
\end{footnotesize}
probably due to the specialization involved in the case or to other strategic legal considerations. In this regard, the case of Libya is illustrative, since it has held no qualms when designating judges from different nationalities for distinct cases before the Court, most probably with a view to their technical-legal specialization or other such factors. As a counterpoint to the tendency of choosing ad hoc judges from a restricted area, some small and developing countries have had no reservations in designating judges of nationalities different from their own, and who are, in general, more "Eurocentric." \(^{14}\)

Continuing along this same line, one can detect, within the context of ad hoc judges designated by the countries under study, a certain coming and going among persons who were the counsels or lawyers of the parties and of others who have been or will be judges sitting on the International Court of Justice. In sum, the latter, being expert members of legal teams and belonging to different legal circles, will have the opportunity, throughout their professional and judicial careers, of having experience in all the possible roles within the international litigation.

X. Concluding remarks.

Although we accept as natural that developed countries logically use their own national experts -- or those from surrounding countries -- in the defense of their interests before the I.C.J., it is quite striking that small and developing countries continue to pay tribute to the former. This situation affects the different stages of the contentious procedure in the international litigation. This suggests that the aristocratic conception of the judicial function persists. Paradoxically, the most democratic and innovative exponent appears to be the diverse origin -- both in terms of nationality and legal tradition -- of the very judges themselves. It seems unquestionable that when a State brings a case before the Court, its objective is to obtain a favorable resolution. What is more doubtful, however, is that the methods for doing so consist only of those few alternatives reflected in the practice analysed in this

\(^{14}\) Within this group, the following can be cited: Honduras, in the matter of the Arbitral Award made by the King of Spain on December 23, 1906; El Salvador and Honduras, in the Land, Island and Maritime frontier dispute case; Qatar and Bahrain, in the case concerning the Maritime delimitation and territorial questions between Qatar and Bahrain; Bosnia-Herzegovina in the case concerning the Application of the Convention on the prevention and the punishment of the crime of genocide (United Nations, Treaty Series, vol. 78, p. 277), and, Slovakia, in the Gabčíkovo-Nagymaros Project case.

György Szénási*

I. Introduction

The Gabčikovo-Nagymaros case is widely recognized as being one of great complexity, not only in its legal aspects, but also in its environmental and scientific elements. It is not the purpose of this article to examine the historical background of the case or the relative merits of the arguments, whether legal or environmental, which were put forward by the parties. There are many publications, including the submissions themselves, which do full justice to those tasks. The purpose of this paper is, rather, to provide an introductory explanation or illustration, based on the Hungarian experience, of what such a case can involve, both in terms of general policy issues and in matters of organization and management. It also aims to draw attention to some of the potential pitfalls. Hopefully, it may offer some useful pointers for those who may be involved in similar international litigation in the future.

The case concerning the Gabčikovo-Nagymaros Project was submitted to the International Court of Justice by means of a Special Agreement which was concluded between the parties on 7 April 1993.

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1 See Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997. The case was referred to the International Court of Justice in 1993 by means of a Special Agreement between the parties. It concerned a treaty concluded in 1977 for the joint construction of a major hydroelectric dam on the river Danube at Gabčikovo in Slovakia and Nagymaros in Hungary. The parameters of the dispute were determined by the words of the Special Agreement. The Court was asked to determine whether Hungary was entitled to suspend and subsequently abandon work on the project, what were the legal effects of the notification by Hungary, on 19 May 1992, of the termination by Hungary of the 1977 treaty and whether the Czech and Slovak Federal Republic had been entitled to proceed with a "provisional solution" which involved damming the river at an alternative location and constructing various other works.

It was agreed in article 3 of the Agreement that there should be a parallel exchange of Memorials and Counter-Memorials and possibly parallel Replies. In the event, Memorials were submitted on 5 May 1994, Counter-Memorials on 5 December 1994 and Replies on 20 June 1995. The first round of public hearings in the case took place in March 1997, a visit to the area that was the subject of the dispute was made early in April 1997 and a second round of public hearings followed shortly thereafter.

This was the first time that either of the two States which were involved in the case had appeared before the International Court. It was immediately recognized in Hungary that the protocols and formalities required by the Court and the task of submitting Memorials in English to fixed deadlines would be formidable. The Agent, in close consultation with colleagues, established immediate priorities. These were, first of all, the selection of a first-rate legal team, with a balance of Hungarian and international counsel, and, secondly, the creation of a team of national and international scientists to consider the environmental issues. Good judgement -- or good fortune -- produced not only extremely talented legal and scientific teams, but also groups of individuals who were mutually compatible, who understood the constraints of other disciplines and who could work together for a common purpose: namely, the presentation of a persuasive case to the Court.

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3 The Hungarian legal team was led by Professor László Valki, Head of the International Law Department at the Eötvös Loránd University of Budapest. Professor Boldizsár Nagy, also of Eötvös Loránd University, worked in close collaboration with him. Additional contributions were made by Professor János Bruhács of the Janus Pannonius University of Pécs and Professor Vanda Lamm, Director of the Institute of Political and Legal Sciences.

Foreign Counsel were headed by Professor James Crawford of Cambridge University in the United Kingdom, Professor Pierre-Marie Dupuy of the Institut des hautes études internationales in Paris and Professor Alexandre Kiss of the University of Strasbourg. Philippe Sands, Reader in International Law at the School of Oriental and African Studies in the University of London and Global Professor of Law at New York University, and Katherine Gorove, a visiting Professor at the University of Budapest, made important contributions, as well as making presentations before the Court.

4 Many individuals and institutions assisted with the preparation of the scientific and legal argument. The scientists who made presentations before the Court were: Dr. Klaus Kern, an environmental river engineer from Karlsruhe; Professor Howard Wheater, Professor of Hydrology at Imperial College, University of London; Professor Gábor Vida, a member of the Hungarian Academy of Science; and Professor Roland Carbiener, Professor Emeritus of Strasbourg University.
A second set of issues which fell to be addressed comprised questions of policy and the resolution within Hungary of any areas of potential conflict. As Agent, it was important that I immediately focus on and deal with these issues and ensure that the political and bureaucratic environment was conducive to the presentation of the case.

The third element, the preparation and presentation of the written and oral pleadings, represented a substantial challenge in many ways, but especially in terms of coordination and management. The next priority, then, was to establish a management structure which could cope with the demands of the case and with the people involved, liaise with the various agencies, work with the Hungarian bureaucracy and, most importantly, deal with the vast amount of information and documents, diplomatic, scientific and otherwise, relating to the case. It was seen as vital to develop the necessary technical and human resource infrastructure to support the legal team in the most efficient manner possible.

This paper is intended to provide an overview of this third element and to examine the establishment and functioning of the office which was responsible for the management of the case (the “GNBS Office”). I consider it important, though, first to offer some general reflections on a number of the broader issues which influenced the environment within which the case had to be prepared and that office function. These I call “policy issues”.

II. Policy Issues

There were a number of issues which it was important to resolve and which I will briefly mention at this point.

1. Support

It was important that the case receive across-the-board political support and that sufficient money be made available to fund its conduct. In this respect, it was important to ensure that there was an accurate awareness of the case and a realistic understanding of the problems involved. Parliamentary decisions allocated funding and gave full responsibility for the case to the Agent. All Ministries were requested by Parliament to give their full cooperation and support.

2. Media
In any democratic State, institutions and individuals hold a variety of opinions on a range of issues, this diversity being an essential and healthy part of any democracy. Public and institutional opinion on the Gabčíkovo-Nagymaros case certainly exhibited such diversity. It was seen as important that public opinion be well informed and that press statements be made by informed sources. Although many statements were made to the press by different groups and individuals, the Agent was nominated the official spokesperson in respect of the case itself, while the Minister for Foreign Affairs was recognized as the source of information on the broader issues and in other international fora.

3. International Relationships

It was clearly important that the legal and environmental issues relating to the case did not negatively influence or prejudice relationships between the two neighbouring States. I might say in this regard that contact between Hungary and Slovakia, as represented by their Agents, was always courteous and professional and that the involvement of the two States in international litigation did not undermine their general relationship with each other. In this respect, I believe it important that States should regard international litigation not as a potential source of conflict, but rather as a proper means for the resolution of conflict.

4. Authority

The very nature of the case meant that there were potential implications for foreign policy. From the beginning, however, it was accepted that the Agent and the International Law Department, while reporting progress to Ministers, should retain authority for the management of the case itself. Only in this way was it possible to retain the sense of direction which was essential for success.

5. Institutional and Structural Tension

In order to free the case from the problems that institutional and structural tension might create, it was important to resolve any sources of possible conflict and to insulate the management of the case from any interference, however well meaning. This was ensured by the fact that the Gabčíkovo-Nagymaros Office was set up outside the bureaucratic hierarchy, yet under the direct control of the International
Possibly the most important factor which facilitated the smooth operation of the Office was that it remained largely outside normal bureaucratic control. This permitted the Office greater flexibility and made possible the speedier completion of urgent tasks. It is a credit to the Hungarian Government that it could accommodate an enterprise of this nature and allow it such a considerable degree of autonomy.

III. Case Management

1. The Management Structure

It was considered that, in the main, the interests of Hungary would be best served by managing the case in-house rather than by instructing an outside firm of lawyers. This decision was not taken for financial reasons, although it did prove to be very cost-effective. An office incorporated within the International Law Department of the Ministry of Foreign Affairs would contain people dedicated solely to the conduct of the case and who were available to the Agent and Counsel on an immediate and daily basis. It would provide a permanent focus and point of reference for those involved and it would contribute to the development of in-house Hungarian expertise in case management. The problem was how to establish and structure that office.

In the event, the management structure responsible for the coordination of the Hungarian case was not established. Rather, it evolved and adapted to changing demands. It would be fair to say that, in the early stages, the “learning curve” was dramatic and that, initially at least, ad hoc innovation was the rule, rather than the exception. Such ability to innovate and to be flexible proved to be beneficial, though.

The International Law Department of the Ministry of Foreign Affairs, under my direction, provided overall supervision and coordination and it was within this department that a small office was established to manage the case. A number of staff were recruited, each with particular skills, knowledge and abilities. Some of these were bilingual law graduates, others were native English speakers drawn from the international community. An office manager was appointed, as well as a scientific coordinator and a person in charge of systems and

\footnote{Stuart Oldham, who contributed advice and information for this essay.}
computers. The importance of confidentiality was stressed to all staff. All staff were regarded as equally important members of the team and, partly as a result of this philosophy, the working atmosphere was good and motivation strong throughout.

Bearing in mind that the written pleadings before the Court were to be submitted in English, it was acknowledged that the language of the Office and of day-to-day communication would predominantly have to be that tongue. It was fortunate that all colleagues, with the exception of some secretarial staff, had fluent command of English. One valuable spin-off of this situation was that, over the more than four-year period that the Office was in existence, the fluency of its members in English improved to almost native standard.

It was also recognized that the integration of the Gabčíkovo-Nagymaros Office into the International Law Department had the potential of causing dislocation of the routine of that department and disrupting its day-to-day operations. The recruitment of international staff and the consequent introduction of different priorities, work ethics and attitudes also held out the possibility of creating resentments. Fortunately, sensitivity and tolerance were shown by all parties and the benefits of the new situation soon became apparent.

To ensure that operations proceeded smoothly and that conflicts were kept to a minimum, a number of operating principles were established in the Office. All staff had clear job descriptions and contracts. Roles and responsibilities were well defined. Clear goals and objectives were established jointly at team meetings, together with clear lines of management. To this end -- and bearing in mind that there were occasional communication problems caused by language differences -- action lists, setting out tasks, responsibilities and deadlines, were considered de rigueur and were accordingly produced on a continuous basis.

As has already been mentioned, a key factor in the smooth operation of the Office was its autonomy. There was an early appreciation by the authorities that an enterprise of this nature could not succeed under the normal bureaucratic constraints. A considerable degree of latitude was accordingly given, both within the International Law Department and to myself as Agent. Without this latitude, the management of the case within the time constraints which were imposed on it would undoubtedly have been much more difficult, if not

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impossible. A strong recommendation to any Government involved in a similar undertaking would be to allow this degree of detachment and insulation to those responsible for the management of the case, while at the same time ensuring the provision of what might be termed "invisible support".

2. Liaison

A system of speedy liaison with all counsel and experts was essential. Telephone and fax lines were dedicated to the Office and, in the absence at the time of an e-mail system, documents were faxed and longer documents or drafts sent by speed post or courier. Records were kept of all correspondence. It was also important to establish and maintain links with a number of outside agencies and individuals. These included not only the Agent for Slovakia, Dr. Peter Tomka, and the Registrar of the International Court, Eduardo Valencia-Ospina, but also agencies assisting with research and the production of materials for the written pleadings themselves. In this connection, it was important to establish personal contact and to foster good working relationships.

One factor of fundamental importance was that there should be a single focus for communication, both in respect of its receipt and in respect of its dissemination. To protect the Agent from "information overload", that focus was the office manager.

IV. Information Systems

It was recognized that it was essential to establish and maintain control over the massive amount of documentation which was involved and that information systems would need to be installed. The following procedures were therefore adopted.

1. Collection

The first stage in this process was to identify sources and to collect, from the archives and a variety of other locations, all material that might have relevance to the case. This was not an easy task, for much of this documentation dated back many decades, came in many languages and was held in different ministries and government offices, as well as in a number of institutions. The Court required copies of the
originals of any annexed documents and these were obtained. All ministries proved most cooperative and, with their assistance, files were searched, documents analysed and copies made.

2. Identification and Translation

Obviously the vast majority of these documents were in Hungarian and members of the team had the task of identifying those which it was important to translate. A master file of all documents was created and selected ones were sent for translation in the order of their perceived priority. Because of the large amount of work involved, a number of translation companies were used. Accuracy of translation being paramount, all translations were checked and double checked for content and style. An in-house system of translation and verification was later added to the process.

3. Classification

The documents fell into two broad categories. There were, on the one hand, “diplomatic” documents relating to treaties, meetings, negotiations and so forth and, on the other hand, papers and documents relating to the environmental and scientific aspects of the case. In order to maintain control over the growing amount of documentation and to facilitate access to it when needed, it was decided to give each document a code. Diplomatic documents were coded according to date and character. A note verbale of 17 August 1988, for example, would have the code 880817NV, a treaty or agreement of 6 September 1978, the code 780906T, and so on. Hard copies were ordered by date and kept in binders arranged by year, together with the originals. Translations were also kept on diskette. A similar process was applied to scientific documents, although these were classified not only chronologically, but also alphabetically by author. A typical code for a scientific paper predominantly on the subject of fish and dated 8 July 1991 would be 910708F, for one on economics, 920512E, and so on. At a later stage, other files were established, including press files, jurisprudence files and files containing the authorities which were

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6 See Article 50 of the Rules of the Court.
7 The majority of the documents cited were Hungarian in origin. At the same time, a considerable number of documents were in Slovak and most documents of the European Communities were available in English. Correspondence between the Court and the parties was predominantly in English.
invoked or relied on by the parties.

4. Access

Since all computers in the office were networked, a range of possibilities opened up. Documents could be quickly retrieved and searched by key word, formatted for inclusion as annexes and so on. It was possible to collate all documents related to a single topic (COMECON, for example) or those signed by a particular individual. Synopses of political and scientific documents were made and counsel issued with full lists of available material. Counsel could request and receive almost immediately any document which was held by the office. Information could be structured and interpreted in a variety of ways and issues identified and isolated. Research papers could be produced on individual issues. Access to information stored on the computers was limited by the use of passwords known only to a limited number of colleagues, thereby ensuring confidentiality.

V. Production

1. Written Pleadings

The production of the written pleadings was an arduous task. The pleadings had to follow stringent criteria laid down by the Court relating to their format. They had to be accurate and comprehensive, with footnotes and annexes. In total, the Hungarian written pleadings ran to more than 5,000 pages and 1,500,000 words, with hundreds of photographs, illustrations, maps and figures. The Slovak pleadings were of similar dimensions.

To ensure the timely preparation of pleadings and high production standard, it was decided to rely extensively on an in-house production team and to use a local printing company for the final stage. Contributing Counsel submitted electronic versions of material to the in-house team, which collated and formatted all documents in strict conformity with the Court's requirements. The presentation of the pleadings undoubtedly improved over the three written stages and the Office's knowledge of printing-production requirements eventually enabled us, at the Reply stage, to assume complete in-house control of layout and design. Such independence was not merely cost-effective; it also allowed us to accommodate last-minute changes to the text. It also allowed us to
produce many of the charts and tables in-house, including a very
detailed chronology of events for the period 1988-1994.\textsuperscript{8}

Review of drafts for accuracy and style was also conducted
within the framework of a well-regulated system. Accuracy was
paramount, historically, legally and scientifically. Internal citations and
cross-references — primarily, the responsibility of Contributing Counsel
— were comprehensively reviewed by the scientific team and by others
who were familiar with the issues and with the historical record.
Changes to the text, where necessary, were made in consultation with
the authors. Senior Counsel conducted reviews of the drafts and a final
review was conducted by me, as Agent. Since there was more than one
author, it was important to maintain uniformity in style and this was
largely the task of the penultimate and final reviews. Literally
thousands of editing changes were entered and, in order to ensure that
the most recent version was being reviewed, drafts were time coded and
"signed off" after review. A final check was made on footnotes,
references and on formatting.\textsuperscript{9}

2. Maps and Illustrations

Both parties recognized that, in view of the complexity of the
case, maps and diagrams would be important in order to illustrate the
geography of the area and the changes which had taken place. Maps
and diagrams for the Hungarian pleadings were produced by a local
company,\textsuperscript{10} based on data provided by research institutions and
scientists. These were thoroughly checked before their incorporation
into the pleadings themselves. A number of photographs illustrating the
changes caused by the diversion of the Danube were also included.

Following the presentation of the first written pleadings, it was
acknowledged that, though they were accurate, concise and professional
in appearance, the visual presentations which they contained may not
have had the intended impact because they were simply too complex.
The judges of the International Court, our audience, while extremely
knowledgeable on questions of law, were not Global Information
System practitioners and the detailed maps which had been prepared
were liable to be confusing to their untrained eyes. On our suggestion,

\textsuperscript{8} See volume 4 of the Hungarian Reply.
\textsuperscript{9} Slovak, French and Hungarian accents were used in the Memorials.
\textsuperscript{10} Ecoplan Landscape Planning Ltd. of Budapest.
the style of visual presentation was revised for the next set of pleadings and a form chosen which was, hopefully, more familiar and accessible to a wider audience. Unnecessary detail was excluded and the major point of the map or diagram accentuated. In this way, the maps and illustrations of the later pleadings were made simpler and more user-friendly.

For the purposes of the public hearings, illustrations shown to the Court were much simplified and focused on one or two major points only. To enable closer control of their content and presentation and because of time constraints, a large proportion of these illustrations was produced in house.

VI. Public Hearings

Both parties made 21 hours of presentations in the course of the public hearings. Prior to Hungary’s First Round presentation, the Budapest office was relocated in a hotel in The Hague. Three rooms were cleared by the hotel and dedicated as office space, although all members of the team mainly worked in the peace and quiet of their hotel rooms. Most of the office files were transported by minibus to The Hague, together with a considerable amount of office equipment. Some items of equipment were hired in The Hague.

Work on the judges’ folders had begun in Budapest and these, together with their annexes and illustrations, were almost complete by the time that the hearings began. More than 100 overhead transparencies were produced by the office for presentation to the Court and these were copied and included in the folders. The only items missing from the folders were the speeches. Work on these continued until the last possible moment and rehearsal of speeches took place in the hotel in order to ensure adherence to the strict time limits imposed by the Court. Court interpreters had the arduous task of providing

11 Hungarian First Round Oral Pleadings took place from 10 a.m. to 1 p.m. from 3 to 7 March 1997. Slovak First Round Oral Pleadings took place from 10 a.m. to 1 p.m. from 24 to 27 March 1997, with a double session on 25 March 1997. Second Round Oral Pleadings (Replies) were held from 10 a.m. to 1 p.m. on 10 and 11 April 1997 for Hungary and from 10 a.m. to 1 p.m. on 14 and 15 April 1997 for Slovakia.
12 Two were offices and one was an official rest/discussion room.
13 Thirty folders, containing colour illustrations, annexes and an index of presentations, were given to the Court for the First Round presentations. An additional 30 folders were given to the Court for the Reply Round.
simultaneous interpretation from English to French and vice versa; and, to ease their task, the Hungarian party undertook to translate all scientific presentations. This was appreciated by the Court, it seems. Copies of all drafts and translations were delivered to the Court, both in hard copy and on diskette, two hours before presentations were scheduled to commence. All speakers were given an easy-to-read version of their individual speeches in their preferred format.

Innovations

Several innovations were of assistance to Hungary's presentation of its case. It was quickly recognized that having the Hungarian pleadings in electronic format afforded concrete advantages in terms of finding specific references, footnotes and arguments. It was consequently decided to scan the Slovak pleadings as well. This was a time-consuming process, to be sure, as each page had to be scanned, read by a recognition programme and subsequently checked for accuracy; but, in the long run, it led to considerable savings in terms of both time and effort. Once documents had been converted into an electronic format, searching for key words or phrases was largely an automated process. For example, complete lists of references to “pacta sunt servanda”, “State succession” or “state of necessity” were compiled automatically in a matter of minutes. These could then be made available to counsel and scientists, so that ready-made references were available.

Another innovation was the use of a combined video-animation for presentation to the Court. Both parties produced videos and it was agreed for the first time in a case before the International Court that these might be shown in open court.

The Hungarian video was produced in order to enable the Court to understand the natural processes in the area which was the subject of the dispute, the values which were at risk and the effect which the river's diversion would have upon the environment. The video, which was about 20 minutes long, was produced in a local Budapest

14 All presentations had to be given to the Court in Word Perfect 5.1 format.
15 The Court assembled in private on 19 March 1962 during the hearings on the merits of the case concerning the Temple of Preah Vihear in order to view a film of the area that was the subject of the dispute. It did the same on 14 October 1981 in the Tunisia/Libya Continental Shelf case.

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studio by Hungarian scientists who were familiar with the issues. It proved doubly useful, as stills could be taken from the animation and made into illustrations for inclusion in the judges' folders or into overhead transparencies for showing in court. The scientific concepts involved had to be explained in a way which was intelligible to the non-scientist, specifically the Judges of the Court. The film eventually introduced, in what we hope to have been an intelligible fashion, some quite complex scientific concepts and data.

By agreement between the parties, the full Court, from 1 to 4 April 1997, made a visit to the sites of the Gabčíkovo-Nagymaros Project in Slovakia and Hungary in order “to exercise its functions with regard to the obtaining of evidence at a place or locality to which the case relates”. Preparations for this visit ran parallel to the public hearings and considerable additional effort and preparatory work were involved. There was agreement between the parties on the itinerary, the format and logistical arrangements for the visit; and the Court, accompanied by the Agents and a limited number of legal and scientific advisers, visited key locations between Bratislava and Budapest.

Hungary was faced in this connection with the problems not only of showing to the Court locations and structures above the ground, but also of having to show and explain the negative effects of the diversion of the river upon the quality of its waters and upon the environment more generally — features not visible to the untrained eye. To make this easier, a series of scientific demonstrations was planned, together with the presentation of eight detailed posters, which were erected at the relevant locations and explained by scientists to the visiting judges. The members of the Court took a keen interest and asked many questions of the parties.

Both parties cooperated fully in the visit and it was clearly regarded by the judges as enlightening and successful. Without doubt, the visit permitted the Court to come to a better understanding of the issues and of the natural processes involved.

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16 See Article 66 of the Rules of the Court.
17 The various issues were discussed and handled jointly with the Agent for Slovakia.
VII. Summary

Many valuable lessons were learned by Hungary during the preparation of its case and several management principles emerged. These principles will no doubt be familiar to lawyers and management consultants worldwide, but it is interesting to note how the Hungarian experience confirms their validity.

These principles are as follows:

- Use the most advanced technology with which you and your office are comfortable. Where possible, improve staff skills to accommodate this.

- Appoint people to specific and well-defined tasks and roles.

- Involve people fully in the project and allow them to take responsibility for their contributions.

- Value and reward the talents of the team.

- Maintain clear and rapid lines of communication.

- Keep all instructions simple, clear and explicit.

- Maintain as much immediate control over the project as possible.

- Set mutually agreed objectives.

International litigation can be complex, protracted and expensive and a successful outcome requires the effective coordination of the efforts of many legal and technical experts. It also calls for specialized communication skills and presentation techniques, requiring, in turn, advanced and reliable information-management and communication systems. I believe that the environment which is most conducive to success is one which has explicit lines of authority and which is as uncluttered, clear and simple as possible.
POSTSCRIPT

POSTFACE
BETWEEN COMMITMENT AND CYNICISM: OUTLINE FOR A THEORY OF INTERNATIONAL LAW AS PRACTICE

MARTTI KOSKENNIELMI

In a recent article, Professor David Kennedy pointed out the close connection between international law and a reformist-internationalist political agenda. According to him, international lawyers: "... see themselves and their work favouring international law and institutions in a way that lawyers working in many other fields do not — to work for a bank is not to be for banking." To me, this sounds true, important and enigmatic. Taking up international law as one's professional career simultaneously seems to opt for a politics that favours global governance over national sovereignty, human rights over domestic jurisdiction, integration over independence. A powerful public rhetoric and a familiar historical narrative sustain the profession's association with such objectives, vaguely linked with Grotian humanism, Kantian cosmopolitanism and Wilson's institutionalist faith. International lawyers almost invariably see themselves as "progressives" whose political objectives appear not merely as normative hopes, but as necessary insights into the laws of historical or social development: globalization, interdependence, democracy and the rule of law. Coming from different national and legal cultures, international lawyers have little difficulty addressing each other in a common language of

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procedural objectives, public governance, social development and institutional renewal.4

While this cosmopolitan faith is regularly attested to by international lawyers in their United Nations speeches or opening chapters to their general courses at the Hague Academy of International Law, behind it lies another, more humble understanding of international law as a rather marginal professional technique and culture, at best a handmaid to the national political leader or the colleague in a foreign ministry’s operative division, with little connection to the philosophical tradition from which it claims to emanate or the academic theory that aims to articulate it as a system of general principles.

The enigmatic aspect of this lies in the relationship between these two understandings; one a matter of public faith, the other of private knowledge; one pushing in the direction of activism, the other towards passivity. One vision of the relations between theory and practice follows what could be called a programme model: the idea of practice as the implementation of normative ideals about the nature of world society or its ruling principles, portraying the practitioner, as Julius Stone has put it, as “an unconscious or at least acquiescent vehicle of a historical process”.5 The other vision reflects what might be termed a reactive model in which theory is rather more an instrument for responding to contingencies that arise in practical work. Moreover, such dichotomies are very familiar to the profession and continue to structure its discourse by opposing idealistic and pragmatic approaches to each other and occasioning interminable calls from the field and the academia for lawyers to balance the opposing forces, to try to mediate between cosmopolitan enthusiasm and the constraints of diplomatic routine.

In this essay I want to argue, however, that no middle position is available; that to practice international law is to work within both strands of the tradition: a sentimental attachment to the field’s constitutive rhetoric and traditions, an attachment that I like to call “commitment”, and a pervasive and professionally engrained doubt about the profession’s marginality, or even the identity of one’s profession, the suspicion of its being “just politics” after all, a doubt that

I will call "cynicism". I shall aim at providing a somewhat impressionistic sketch of the structure of the psychological positions available to international law practitioners as well as the emotional energies and dangers involved in a commitment to international law.

I

In accounts about international legal practice, reference is often made to the "commitment" that taking up international law seems to require from its practitioners. What is this commitment? As I see it, it involves a wholesale, ultimately unreflective or sentimental "throwing-of-oneself" into one's work, a spontaneous loyalty to one's profession, its constitutive rules and traditions as well as an unwavering belief in its intrinsic goodness.

Despite the centrality of passion to, or the absence of calculating reason from, genuine commitment, we hold it to be a positive thing, a good in itself (that is to say, apart from the consequences that it produces). This, I suppose, is because it seems contrary to two of modernity's familiar negative traits: personal alienation and social nihilism. To have commitment is to be able to combine different aspects of one's life -- private passion and public duty -- into a whole that provides a stable personal identity and a meaningful social role, enabling one to overcome the threat that one's personality is split into private and public selves. Each now becomes an extension of the other; private faith and public profession link harmoniously -- like Einstein's "oceanic feeling" made it possible for him (though not Freud) to have the experience "of an indissoluble bond, of being one with the external world as a whole" -- a sense of "being in" religion without actually being religious.

I wish to emphasize the a-rational character of commitment in three ways. First, a commitment, distinguished from mere "work", has an aspect of heroism in that it works against all odds. One is committed to something the success of which is not automatically guaranteed. Commitment involves danger, or risk of failure. Were it otherwise, mere self-interested calculation would provide a sufficient motivation.

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6 As pointed out in respect of the career of a governmental legal adviser: "... a lawyer's deep interest in and commitment to the law is most frequently the motivation for choosing a career as legal adviser," H.C.L. Merillat, ed., Legal Advisers and Foreign Affairs (Dobbs Ferry, Oceana Publications, 1964), pp. 27-28.

One may, of course, also succeed in what one is committed to, but the end may as well, or will perhaps more likely be a disappointment. But failure takes nothing away from the heroism of commitment. Indeed, tragedy may even be its crowning achievement.

In international law, this aspect of commitment is immediately evident. The hopes of the reconstructive scholarship of the inter-war era as well as the projects for peaceful settlement and collective security within the League of Nations were easily dashed by Fascist aggression. Though tragedy is the name we apply to that period, we still admire the heroism of the profession’s leading names: Anzilotti, Kelsen, Lauterpacht, Scelle. Their criticism of sovereignty, their methodological individualism, their belief in public governance through international institutions and the pacifying effects of interdependence remain part of the professional ethos today, while prospects for a public law governed global federation -- the logical and sometimes expressly stated corollary of their writings -- are no nearer today. Within diplomacy, the profession continues to speak from the margin to the centre. It is not at all certain that a judgement of the International Court of Justice will be complied with, or that the advice of the foreign office legal counsel will be followed. There is a wealth of writing about the utopianism that seems indissociable from the profession. To struggle for “world peace through law”, “world order models”, the rights of future generations, “fairness” or indeed global governance is far from a recipe for diplomatic success. But we would not recognize the profession for what it is if it did not hark back to such objectives.

Second, commitment is against one’s own (immediate) interests as well as the (immediate) interests of one’s clan, party or nation. Commitment overrides competing loyalties and normative demands. This is also an aspect of the heroism that we see in commitment: its unselfish generosity. Many aspects of international law practice appear to underscore this. After law school, a purely economic calculation will not convince one of the wisdom of choosing international law from the available fields of legal specialization. To be a voice for no particular interest or position is not a lucrative affair; it calls for commitment! Yet, what one loses in salary, one may think one


\[\text{I write "immediate" because it is a part of the professional dogma that in the long run the interests of individual peoples, represented by States and the global cosmopolis coalesce. This seems often the last bridgehead in the battle with international law sceptics.}\]
gains in one’s ability to lead a life of commitment.10

This aspect of commitment has to do with the avoidance of politics, prejudice and everything else that appears as external, or strictly outside the law and is often described in terms of the good lawyer’s particular “integrity”. As Fitzmaurice expressed it:

“... the value of the legal element depends on its being free of other elements, or it ceases to be legal. This can only be achieved if politics and similar matters are left to those whose primary function they are, and if the lawyer applies himself with single-minded devotion to his legal task ... By practicing this discipline and these restraints, the lawyer may have to renounce, if he ever pretended to it, the dominance of the rule of lawyers in international law, but he will establish something of a far greater importance to himself and the world -- the Rule of Law”. 11

Third, commitment involves distance from both truth and faith. One is not committed to the proposition 2+2=4. One knows it to be true and knowing this involves no emotional attachment, and no risk. Nor was Aristotle “committed” to the idea that the end of human life was virtuous action. He knew this to be the case in the same way that Benthamite utilitarians know that the end of political action is the production of maximum happiness. Knowing something is incompatible with being committed to it. Knowledge relies on the speaker’s ability to support what one believes with evidence that, when laid out, will convince everyone sharing the speaker’s concept of evidence and rational argument of the truth thus validated. No emotional attachment to such a truth is needed -- emotional attachment may even disqualify a proposition from being “true”.

Commitment to international law in the conditions of agnostic

10 “... the dedicated lawyer, while normally a sociable person, has little relish for the intensive representational activities inseparable from any diplomatic post”, G. Fitzmaurice, “Legal Advisers and Foreign Affairs (Review Article)”, American Journal of International Law, vol. 59 (1965), p. 84. He observes: “the best lawyer is the dedicated lawyer – the man or woman who would never really be happy doing work that was not legal work and who, for the sake of doing that, is prepared to make considerable sacrifices in other desirable directions”, idem.

modernity is different from knowing a number of things to be true in the
above, hard sense. The propositions of which the rhetorical stuff of
international law consists do not possess, as philosophers would say, the
kind of truth-value that rationally demonstrable propositions do. In
what sense would “sovereign equality” be true? What would constitute
irrefutable proof for “self-determination”, “equidistance”, “most-
favoured nation clause” or “domestic jurisdiction”? To work with such
expressions involves acknowledged uncertainty as well as semantic and
evaluative indeterminacy. These expressions attain sense and
applicability only through interpretive acts that involve the interpreter's
“life-view” or commitment to particular understandings of the world.12

But commitment to international law is also different from
genuine faith. St. Augustine was not committed to belief in God. He
believed in God even if his reason told him that it was absurd. A priest
may be committed to a religion as a system. In such case, there is, or
has been, a moment of doubt, a moment overcome neither by revelation
nor by rational calculation but by an existential act; an act of will to join
a tradition of priesthood to which one feels attached. In a purely faith-
based political order, legal practice would become theology. As
Victoria argued in 1539, even if one took the right legal position, taking
that position would be a sin if it were taken from other reasons than by
deference to theological authority.13 However much one might be
committed to “law”, no such commitment could be determinative of
one’s action. The ultimate reference must always be to faith.

The identity of international law as a distinct practice depends
on this distance from truth and faith. Without it, the legal profession
would collapse into science or theology. That it is neither is nicely
evident in the profession’s ability to resist recurring academic calls to
integrate rational means-ends calculations or a greater sensitivity to
moral axioms. While it is not absurd to describe, say, banking law as
a form of “social engineering”, such a description for international law
would seem strangely out of place. Providing legal advice to a
delagation at an intergovernmental conference departs so far from

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12 Here lies the modernist-agnostic basis of commitment. Rather like protest
of indignation, it emerges from a sentimental bond to a program, an inability or
unwillingness to seek further reasoned argument, a denial of even the ex hypothesi
arguability of the opposite case. For further characterization, cf. A. MacIntyre, After
13 F. de Victoria, “De Indis et de lure Belli Relectiones”, The Classics of
International Law, (Washington, Carnegie Institution of Washington, 1917), pp. 116-
117.
empirical reality or moral discourse — without this of course making the advice any less useful — that describing it in terms of science or morality would not seem plausible.

Let me illustrate this by reference to the advisory opinion of the International Court of Justice in the case concerning the *Legality of the Threat or Use of Nuclear Weapons* (1996).\(^{14}\) It would have been possible for the Court to discuss the matter by reference to quantitative-technical calculations about the effects of nuclear weapons: the number of (civilian) casualties under different scenarios and the relative effects of nuclear strikes compared to non-use ("sitting duck") and conventional warfare. Or it might have been possible for the Court to take a moral stand: it is inconceivable that the use or threat of use of such vicious weapons could ever be lawful! Surely democracy must be defended by any means! But the Court chose neither tack, leaving the matter open in its unprecedented *non liquet*.\(^{15}\) If law were silent, then no scientific or moral truth could speak in its stead. Otherwise, the service rendered would no longer have been legal.

To say that international law involves commitment in each of these three senses is to say that it involves an existential *decision*; that it is not a mechanical activity determined by power or interest, truth or faith. The decision is not arbitrary, however, but reflects the rituals of the tradition of liberal cosmopolitanism, its criteria of professional competence, and its narratives about the role of law and the lawyer in foreign affairs.\(^{16}\)

II

Yet, for all its psychological importance and its ability to create a sense of personal-professional identity, commitment to international law is fragile and difficult to sustain. How long, for example, can one be committed to a project of State responsibility that commenced in the United Nations in 1949 and is today no more than a set of controversial draft articles with no realistic prospect of being accepted as hard law in the foreseeable future?\(^{17}\) Can one still be


\(^{15}\) Ibid.


\(^{17}\) In 1996, the Commission adopted the texts of the draft articles on State responsibility and transmitted them to governments for comments by 1998. For a brief
enthusiastic about a Common Heritage of Mankind after the redistributory goals of the United Nations Convention on the Law of the Sea were watered down in a 1994 Implementation Agreement, concluded under the grandiose banner of "securing the universality of the Convention", but in fact underwriting the demands of the developed West to create a cost-effective and market-oriented platform for private enterprise in the deep seabed?

Commitment to the United Nations may still feel appropriate as a vaguely left-leaning, public-law-oriented countermove to the increasing predominance in international life of informal structures of the transnational private market. Any such move is, however, undermined by the anachronistic pomp that surrounds the Organization's daily activity against which successive cycles of reform proposals have turned into failures. The General Assembly never succeeded in growing into the kind of global polis that legal imagination always saw as its proper role. No new international economic or information order arose from the interminable debates in the Assembly in the 1970's. Who apart from a few diplomats posted in New York still remembers the 1982 Manila Declaration on Peaceful Settlement of Disputes, the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations or the 1988 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? Even the contrived titles of such instruments testify to the futility of hopes about the efficient management of global affairs through the Organization.


22 Cf. General Assembly resolutions 37/10, 42/22 and 43/51.
ambiguity. The debate about a "legitimacy crisis" concerning the Council's action to define and forestall what counts as a "threat to international peace and security" focuses directly on the question of determining agency: the practice of authorizing powerful Member States to take action in the Gulf, Somalia, Haiti, Rwanda, Liberia, the former Yugoslavia and Albania makes it doubtful whether these activities can be understood as an international community response to unlawful behaviour.\textsuperscript{23}

There may be progress in such areas as environmental law, trade law, humanitarian law and outer space law. But is the "Kyoto process" and the interminable wrangles about national emission rates for greenhouse gases to be seen as a step towards an effective public regulatory regime for the global environment?\textsuperscript{24} Can international lawyers be committed to the Energy Charter Treaty\textsuperscript{25} or to the Multilateral Agreement on Investment,\textsuperscript{26} with all the uncertainty they imply about who is to gain and who is to lose? What about the negotiations on reform of intellectual property regimes so as to provide for the commercial confidentiality needed by Microsoft or Nokia while allowing access codes to the Pentagon or the FBI in their pursuit of international criminality? Which side should international lawyers commit themselves to in that struggle? What faith is left after the experience of the setting up of the Rwanda Tribunal when five years after the genocide commenced it still had not rendered one judgement?\textsuperscript{27} Or what should lawyers think of the negotiating process for the

\begin{itemize}
\item \textsuperscript{24} One mainstream assessment of the United Nations Conference on Environment and Development (UNCED) follow-up process stated that, "... so far no crucial steps have been taken to save the global environment, nor has there been any significant move towards improving the development perspective of most countries in the South", P. Malanczuk, \textit{Akehurst's Modern Introduction to International Law}, 7th ed. (New York, Routledge, 1997), p. 252.
\item \textsuperscript{26} OECD, Multilateral Agreement on Investment, Consolidated Texts and Commentary OLIS 13 January 1997.
\end{itemize}
International Criminal Court that turned out to be largely an exercise about drafting the jurisdictional clauses and “trigger mechanisms” of the Court so as to guarantee that it would never be of effective use?28

Examples about high hopes turning into frustration multiply to the point of parody. The elaborate provisions of the 1992 Conference on Security and Cooperation in Europe (CSCE) decision concerning the peaceful settlement of disputes have never been resorted to and no recourse has so far been made by anyone to the Court of Conciliation and Arbitration set up at the same time.29 This is an ironic repetition of the silence that has surrounded the Permanent Court of Arbitration for the post-war era. Despite the increase in the workload of the International Court of Justice, it would seem quite misplaced to show the same enthusiasm about it as James Brown Scott did when the Assembly of the League of Nations approved the Statute of the Permanent Court of International Justice, exclaiming that: “We should ... fall upon our knees and thank God that the hope of ages is in the process of realization.”30

The “recent sharp deterioration in the resources available to the Court”31 that has led to a serious backlog in the publication of its reports and ended that of the pleadings altogether is a reminder of the slightness of the political appeal of classical third-party settlement. How much enthusiasm may be enlisted for the settlement of the one case that has come before the International Tribunal for the Law of the Sea (ITLOS) which involved a dispute between St. Vincent and the Grenadines against the Government of Guinea about the prompt release of a vessel?32

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29 International Legal Materials, vol. 32 (1993), pp. 551 et seq. For a review of the ratifications (22) as of 18 September 1997 and a plea for the use of the mechanisms, cf. statement by the President of the Court of Conciliation and Arbitration, Robert Badinter, 18 September 1997 (OSCE, PC.GAI10/97).


And is there not something of high comedy about the Decade of International Law, too, that has so far produced nothing of normative substance? Based on a Nicaraguan initiative within the Non-Aligned Movement in 1989, the Decade was routinely declared by the General Assembly later that same year; although by then a change of government in the initiating country had made it imprudent for it to continue its originally anti-American move.33 Painfully aware of the fact that a decade once declared by the General Assembly could not just be set aside, dutiful delegations from a handful of legalist traditions sought to provide it with a substantive programme -- in vain. Year after year the only activities under the Decade were the setting up of a sessional working group and a procession of statements from Sixth Committee representatives about how much money their government had allocated to the teaching and study of international law -- reports they would anyway have provided under the recurrent agenda item on the "Teaching and Dissemination of Information on International Law". The United Nations Congress on Public International Law in 1995 gathered nearly every prominent name in the profession at the United Nations Headquarters (on their own or their Government's expense) to hear for five days roundly worded statements on general aspects of international law.34 As the cliché goes, "it is not the meeting but the opportunity to have private and confidential conversations ..." As the embarrassment became simply too great, a few traditionalist Governments decided to commemorate international law in honouring the "Centennial of the first International Peace Conference" by holding meetings in The Hague and St. Petersburg in 1999.35 Once again, this commemorative effort is (so far) devoid of any definite substantive objective36 and as such a fitting wrap-up for a century of recurrent

35 The Meeting in The Hague was held on 17-18 May 1999.
enthusiasms gone sour, a *fin-de-siècle* fireworks for the celebration of commitment to meaninglessness.

III

But parody is a facile extension of journalistic accounts about "Utopia Lost", a post-modern trope. If it is not the United Nations, what is there for international lawyers to commit to? Do regionalism or specialization provide relief? But if law seems to work in the European Union, might this be precisely because of the "special" character of that law and its success in distancing itself from intergovernmental diplomacy? It is certainly possible to recognize the functioning of a legal system under the European Convention on Human Rights -- but do the Strasbourg Court's judgements on allowable detention periods, rendered five years after the event, provide a stable focus for commitment?

Today's international dynamism looks elsewhere than at public international law, the United Nations and projects of formal governance. Its focus is on non-State-centred pragmatism, private economy and technocratic management of informal transnational regimes with a speed and flexibility for which rules and public governance are anathema and that need no specific commitment to anything to appear useful or convincing. It is also a world of unilateralism, "liberal millenarianism", attempts to forge a new international order beyond sovereign equality through economic liberalization, tactical recourse to international organizations and a globalizing recourse to Western conceptions of political legitimacy. It is a world where human life can sometimes be used as a symbol of the law's frustrating weakness against power.

In this world, public international law, including the formal

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structures of sovereignty and treaties, is replaced by fluid transnational patterns of exchange between various types of more or less stable actors and interest-groups. There, to quote Philip Alston, the public international lawyer's professional antics appear little other than "exercises in nostalgia". Instead, now a professional technique seems needed that transgresses the limit between the international and the domestic, the public and the private, politics and economy, and becomes context-sensitive, short-term, market-oriented and ad hoc. Technical specialization combines with what could be called "fragmentation" only if there were a centre against which something would appear as a "fragment". From their position as managers of a global polity, international lawyers find their cosmopolitan fantasy increasingly as an old-fashioned cultural eccentricity, out of step with the needs of the liberal consensus, of globalizing financial markets, regional economies and de facto principles of identification of human groups. As sovereignty breaks down, rules that used to be international become the professional stuff of all lawyers, while no rule remains exclusively linked to a domestic background or sphere of applicability. The management of the European Union's economic sanctions, for instance, becomes part of the commercial framework of the Community's external trade relationships that links together diplomatic decisions within the Council and domestic criminal law enforcement. Between "liberal States" no inter-sovereign jurisdictional or immunity barriers seem justified; while precisely those rules are used to isolate not only "rogue States", but much of the outside world from the benefits of increasing integration within the industrialized world. Instead of a "common law of mankind", international law becomes its ideological contrary; a divisive weapon; a protective shield under which the privileges of some can be upheld against the claims of others; and a unilateral weapon in the hands of the hegemon.

IV

If such is the disillusionment, and the remedy lies in shedding one's "Victorian" optimism and meliorism, what then can be left of commitment? Let me sketch the dilemma. Because what one is committed to cannot be proven as true or accepted as faith, the object of

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commitment always remains ambivalent and frequently changes into its contrary. While the lawyers' public rhetoric seems to imply a general preference for the international over the particular, often this preference cannot be maintained. It seems sometimes necessary to support sovereignty over attempts at international intervention. Statehood seems both a positive danger to human rights and an indispensable instrument for upholding them. Claims for self-determination are liberating as well as threatening. To fix the law's substance in some particular way seems always to require something more: a political decision. Whether to accept or reject extraterritorial jurisdiction, for example, depends on what one thinks are the basic values or interests represented by one's State.\[4\] What amounts to a "threat to the peace" hinges on one's construction of the meaning of "peace".\[45\] The law brings the committed lawyer to the brink of the (legal) decision, but never quite into it. If a civil strife arises, the law tells the lawyer: "Here are two rules, 'self-determination' and 'uti possidetis'. Now choose".

There is a duality about international law rules and principles: they are sometimes applicable and sometimes not and whether or not they are (and how they are) depends on a (political) decision. In fact, this phenomenon is very familiar. As a former legal adviser at the Quai d'Orsay explains, in regard to the principle of *pacta sunt servanda*, Governments: "... déploient beaucoup d'ingéniosité pour découvrir des moyens commodes de prendre des libertés avec le principe en question".\[46\] This is no externally introduced distortion, however, but follows from the fluid character of international legal rules and principles: one is bound to make a choice and it is hardly unnatural that one's choice is for the alternative that is closest to oneself. But this is a slippery slope. From the fact that law involves political decision, it is tempting to move to where law is seen as an instrument of (particular) politics.

"Une certaine non-application des traités beneficie en fait d'une indulgence très générale comme si chacun comprenait fort bien, même s'il ne juge pas opportun de le dire officiellement, qu'il est imprudent de trop blâmer chez l'autre la recherche d'une liberté que


\[45\] See footnote 23 above.

I'don entend bien revendiquer pour soi". 47

In this passage the former French diplomat and lawyer articulates a pragmatism that is only slightly removed from a cynicism that pits one's public faith against one's private scepticism. Now cynicism is precisely the reverse of commitment. Because commitment is identical neither with truth nor with faith, it always involves doubt, uncertainty about whether it is really warranted, whether it really provides a sufficiently stable practice and identity. This is an aspect of the danger that commitment involves, the danger that once the sentimental energy on which commitment works is exhausted one is left with a voice that finds no support in inner emotion. The spoken or written word camouflages a self that secretly believes otherwise. This loses the heroism of commitment and transforms it into its contrary: advancement of private ends, partisan positions, group or national interests, complacency, manipulation and careerism.

Now each of the three aspects of commitment that I have sketched may well turn into or present itself as cynicism. The utopian aspect of commitment may be associated with a firm conviction that the object of one's public faith will never be realized. In such case, one's use of the rhetorics of global governance, democracy and human rights no longer emerges from a commitment that refuses to accept the reality of impending frustration but from, say, the speaker's wish to associate his or her interests or objectives with a positive value content drawn from a tradition of utopianism, an intent to camouflage what one knows will be the case, or simple inertia.

Some of this is, I suppose, visible in the human rights field. The Convention on the Rights of the Child48 was signed in September 1990 at a summit meeting attended by 71 heads of State or Government -- and the Convention has received an unprecedented number of ratifications. Nonetheless, it is far from evident what the effect of the Convention has been on the lives of children. 49 For many, the central issue in the Gabčíkovo–Nagymaros case was the environmental aspects of the large construction works in the Danube. The Court was well aware of this and included passages in the judgement that stress the need

47 Ibid., p. 201.
48 General Assembly resolution 44/25.
to take account of environmental considerations and the interests of future generations in the continuation of the works. These aspects of the judgement, however, stand out from the rest of the Court’s reasoning and have nothing to contribute to the *ratio decidendi* that builds squarely upon the bilateral treaty aspects of the case.\(^5\) The Rights of the Child Convention or the environmental passages in the *Gabčíkovo-Nagymaros* case are to be seen as formal deference to the utopian expectations of the general public that not only remain practically inconsequential but were never believed to attain the objectives they proclaimed. In a general way, even the discrepancy between the high rhetorics of United Nations human rights conventions and the dismal funds available to their implementation bodies may be understood in terms of a cynical distance between governmental faith and private willingness to depart from the privileges of sovereignty.\(^5\)

Likewise, commitment’s avowed distance from self-interest or the interests of one’s group may sometimes hide a consistent pattern of partiality in a way that we recognize as the cynical structure of hypocrisy. Despite its universal rhetoric, the practice of international law empowers Governments in the international field to the exclusion of voices that are unable to secure governmental representation for themselves. As Philip Allott puts it, "Only international law is left speaking to Governments the words that Governments want to hear."\(^5\) In the Court’s practice, this aspect may be illustrated by the *East Timor* case in which the brief and inconsequential reference to the right of self-determination of the Timorese people is overshadowed by the formal-procedural decision not to allow Portugal *locus standi* in a matter conceptualized as an inter-sovereign conflict in which one of the sovereigns (Indonesia) was asked to submit to a decision on the justifiability of its conduct without its formal consent.\(^3\)

Finally, powerful arguments seek to replace commitment to international law either with scientific fact or moral truth. Yet, neither empiricism nor morality can live up to the law’s cosmopolitan credo.

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\(^5\) See the reports of the respective treaty bodies.


The policy-science approaches that envisage international law in terms of means-ends calculations either present the ends in such a general fashion that any interpretation of the law can be matched with them, or reveal themselves as rhetoric intended to support particular interests.\(^{54}\) To think of law as a technical instrument for goal-values such as "democracy", "human dignity", "fairness" or "global governance", leaves unexplained uncertainties in the causal relations between technical norms and such goals and leaves open the question of who determines what such goals in practical terms mean.\(^{55}\) An instrumentalist approach to the law that presents a claim of scientific objectivity disguises the fact that political decisions are needed to interpret the goal and to fix the assumptions on which a chain of causality can be constructed to lead from the norm to the goal.

Now the purpose of these examples about the dialectic of commitment and cynicism is not to throw doubt on the actual difficulties of settling international disputes in a workable fashion or the bona fides of individual lawyers or statesmen negotiating international treaties. My intention is to describe the work of *ambivalence* in the rhetoric of legal practice that enables the simultaneous justification and critique of particular normative outcomes.\(^{56}\) Although that ambivalence is immediately visible in the open disagreement among lawyers and academics about such outcomes, I wish to argue that it is likewise present in the roles and mental structures of the practitioners whose task it is to produce them. In other words, the dialectic of commitment/cynicism is not just a result of external interpretations of the behaviour of particular agents, but structures the psychological reality of those agents themselves. It appears frequently as a doubt, often suspended but never wholly suppressed, that all practitioners share about the "ultimate" justifiability of what they do. For although it is

\(^{54}\) This is typically argued to be the case in respect of the "human dignity values" espoused as the law's naturalist basis by the "New Haven School". Cf. the studies by K. Krakau, *Missionsbewusstsein und Völkerrechtsdoktrin in den Vereinigten Staaten von Amerika* (Hamburg, 1967); B. Rosenthal, *Etude de l'oeuvre de Myres Smith McDougal en matière du droit international public* (Paris, 1970).


often silent assumed (especially by academic lawyers) that practitioners have a privileged access into the law’s truth, being so close to the “real world” where it all “takes place”, in fact practitioners live among the same uncertainty about the “real character” of the problems they deal with and the consequences of their actions as anyone else. It is, I believe, precisely this sense of doubt, uncertainty, and occasional schizophrenia (is my work useful or not; does it produce the consequences that I say it does; am I Dr. Jekyll or Mr. Hyde) that is in the background when international lawyers describe their practice in terms of a commitment, instead of, say, a knowledge or a faith. Let me now sketch the way in which that dialectic is present in the four standard roles offered to practitioners.

The Judge

Few international lawyers ever become judges in the International Court of Justice or even members of an arbitral tribunal. Nonetheless, as Brownlie notes: “The International Court of Justice stands at the centre of the world of the professional international lawyer”.57 However much sociologists stress the marginality of formal dispute resolution and point to the conventional normality of conforming behaviour as occupying the largest amount of legally relevant behaviour, the activity of judging -- or the eventuality of a judgement -- still lies in the conceptual centre of international and, possibly, any law.58 Without judging -- and judges -- something of the distinctiveness about law would be lost, something that cannot be replaced by sovereign power, conforming behaviour or effective enforcement. The judge personifies what in law is more than “how nations behave”, that can never be reduced to a partisan position, somebody’s power and interest. When called upon to perform a legal service, even a non-judge (as adviser, academic, activist) must momentarily construct himself or herself as judge. One need not share a legal realist’s ontology about law being (predictions about) what courts decide in order to think that there is very little distance between the question “what does the law say?” and the question “how would a judge decide the case?”.


58 Cf. also M. Koskenniemi, From Apology ... (footnote 56 above), pp. 9-12.
The judge personifies impartiality, rising above national and other group interests. Judges, writes Duncan Kennedy, "are supposed to 'submit' to something 'bigger' and 'higher' than 'themselves'." This is the central aspect of their commitment. This "bigger" and "higher" is "the legal system", more specifically the legal system as a system or an aggregate of legal rules. The judge's commitment is a commitment to the substance of the law as neutral and objective rules whose formal validity guarantees their distance from "politics" whether in the guise of power, interest or ideology.

Commitment to rules, however, is as fragile as any other commitment. Much in the activity of judging testifies to the futility of thinking of judges in Montesquieu's familiar image as mouthpieces of (an impartial) law. Rules are indeterminate, open to interpretation and interpretation involves "subjective evaluation". For every rule there is a counter-rule or a soft standard that allows the judge to choose. To quote Kelsen: "Die Frage, welche der im Rahmen einer Norm gegebenen Möglichkeiten die richtige ist -- voraussetzungsgemäss -- überhaupt keine Frage der auf das positive Recht gerichteten Erkenntnis ist ... sondern ein rechtspolitisches Problem". Also international lawyers -- including members of the International Court of Justice -- have stressed the open-ended, artistic or political character of rule-interpretation, sometimes calling for an evaluative approach to it. No less an authority than Sir Hersch Lauterpacht ridiculed the doctrine of the "plain meaning" and advocated an openly flexible and goal-oriented approach to legal interpretation. For Lauterpacht, as for many others, judging was inseparable from a progressive development of the law by means of balancing interests and having recourse to the law's purposes and internal values. What Georges Abi-Saab has called "justice transactionnelle" has become an ineradicable part of the Court's...

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64 G. Abi-Saab, "Cours général de droit international public", Collected courses ... (footnote 21 above), pp. 261-272.
practice, illustrated by the increasing use of equity and equitable principles and the bilateralization of the cases brought to it even as general rules have been invoked by the parties.  

Much of what we know of the practice of judging corroborates this vision. The negotiation between the judges at the International Court, for instance, is sometimes described almost as a diplomatic process of trying to reach a compromise between the differing positions. Counsel pleading for the parties know this and routinely formulate their arguments accordingly, knowing that while, in accordance with Article 2 of the Statute, the judges must be “independent”, according to Article 9 they also need to act in a “representative” capacity.  

We recognize this as we admire them if they rule ostensibly in favour of the underdog -- Nicaragua or Libya against the United States or the United Kingdom -- and are ashamed as they do the contrary -- South Africa against Liberia and Ethiopia, for instance.

Here is the dilemma: the role of the judge is defined by reference to a commitment to neutral rules. The actual experience of judging, however, shows that rules never suffice but that evaluation and “ideology” are part of the job. Judges are required, in other words, to believe and not to believe at the same time, oscillating between a public faith and a private scepticism. Peter Sloterdijk has analysed a similar phenomenon by reference to the condition of “enlightened false consciousness.” What is this condition?

“It is that modernized, unhappy consciousness, on which enlightenment has laboured both successfully and in vain. It has learned its lessons in enlightenment, but it has not, and probably was not able to, put them into practice. Well-off and miserable at the same time, this consciousness no longer feels affected by any critique of ideology; its falseness is already reflexively buffered.”  

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66 A fact in which Abi-Saab detects “a whiff (soupçon) of contradiction”, “Ensuring the Best Bench”, Increasing the effectiveness ... C. Peck and R. S. Lee, eds. (footnote 31 above), p. 168.
In other words, commitment to rules cannot be sustained because the "labour of enlightenment" has performed its task -- the value-freedom or neutrality of rules and interpretation have revealed themselves as illusion. Privately, most judges are quite ready to admit that they are no automatons, that how they go about the work of rule-application involves background assumptions, prejudices or commitments of various kinds, seeking compromises and trying to find a solution that is equitable or fair. The commitment to the law as rules, then turns out to be not one that judges themselves would accept as a correct characterization of the definition of judging.

Nevertheless, the public image of the judge has remained what it was before that "labour." The form of judicial activity, its rituals and its public justification are constructed as if rules were all there was to it. And this is where, to follow Duncan Kennedy, the judge’s cynicism -- or "bad faith" -- lies. For despite his or her knowledge that what goes on under rule-application is a "politics of law", that knowledge does nothing to the public image of the judge's impartiality. But the situation cannot really be remedied, either, provided that the judge wishes to remain a judge, to preserve loyalty to the profession and to the political society that builds upon a distinction between (objective) law and (subjective) politics, adjudication and legislation. The judge can only continue within this "cognitive dissonance", seeking energy to suppress any possible anxiety thereby created in a mirage-like axiom that judging provides a useful -- perhaps necessary -- service to society as a whole. Denying the work of ideology, judges simultaneously have nothing but "ideology" to explain their behaviour.

Inasmuch as "the judge" is at the heart of the law, this oscillation between commitment and cynicism also lies there and, not only in the eyes of external observers, but also, much more crucially, embedded in the roles and the psyche of the practitioners themselves. If judging involves a schizophrenic consciousness and a kind of "bad faith", buttressed by a sentimental loyalty to the ideological assumptions about the beneficiality of legal work in the international society, then that bad faith is indissociable from any legal practice. This situation ("enlightened false consciousness") is not to be got rid of without tremendous psychological and social cost. A public acknowledgment that what judges do is "politics" would undermine the liberal ideal of the rule of law and transform the image of judges from faithful servants of

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Kennedy, *A Critique* ... (footnote 59 above), Chap. 8, 12 and conclusion.

Ibid., pp. 191-212.
social consensus to political manipulators. The ideal of fulfilling externally set social objectives would be lost. On the other hand, the critique of rules cannot simply be unlearned, either. From this existential schizophrenia the ways out may be no more appealing than the situation itself, namely either marginalization in an arrogantly "political jurisprudence" or opting for an elitism that says "I know this is politics but it is better that the masses -- for their own sake -- live in ignorance about this fact". 70

The Adviser

Before entering university, I worked for a number of years as a "lawyer-diplomat" 71 at the Finnish Ministry for Foreign Affairs. Much of the writing about the work of the legal adviser in a Foreign Office concentrates on what appears as a tension between a commitment to the cosmopolitan pursuits of the profession and loyalty to one's Government. That tension, however, alone fails to capture the sense in which the legal adviser's role is constructed, on the one hand, by critical projection from activist and academic lawyers and, on the other hand, from the "political" colleagues in the operative departments of the home Government. For legal advisers, the interplay of commitment and cynicism forms particularly complex patterns.

The perception of governmental legal advisers by their activist and academic colleagues is coloured by an ambivalent mixture of distancing and envy. From the perspective of cosmopolitan idealism, the governmental lawyer's position may seem like the paradigm of cynicism. To be professionally committed to always producing justifications for what one's Government does may appear as an unappealing and unprincipled opportunism. What happens when equally competent governmental lawyers in the Sixth Committee of the United Nations General Assembly, for example, defend with equal rigor contradictory normative conclusions, each legal conclusion miraculously underwriting the policy of the adviser's Government? Is that not the clearest proof of the façade legitimation aspect of international law, the harnessing of cosmopolitan ideals in the service of particular interests?


71 The term is from G. Fitzmaurice, "Legal Advisers and Foreign Affairs (Review Article)", American Journal of International Law, vol. 59 (1965), pp. 72-80.
From the internal perspective of the adviser, things look different. Unlike the judge, the adviser is perfectly prepared to admit that the law as rules is general and open-textured and leaves much room for policy-choices. This does not lead to cynicism, however, because what is good for my Government is also usually good for the world at large -- and what is good for the world cannot be bad for my country.\(^2\)

For the legal adviser, working for the Government is a form of commitment to an international law that is more a (diplomatic) process than any set of substantive rules or axioms about world order, justice or human rights.\(^7\) Providing advise to the Government, the legal adviser sees himself or herself often as a "custodian and exponent of international law for the foreign ministry",\(^7\) or a "gentle civilizer" of national interest.\(^7\) The legal adviser's commitment, often underlined by commentators, would in such case lie in not giving in to the temptation of pleasing the minister.\(^7\) Such recalcitrance is then sometimes seen from the political colleagues perspective as the adviser's typical formalism and narrowness of vision ("finding a difficulty for every solution") -- an attitude which the adviser is ready to accept ("heroically") as a necessary evil of the job and to which the adviser may react by projecting the political colleague as an altogether superficial seeker of the quick pleasure.

The adviser's attitude towards the activist is ambivalent. On the one hand, that attitude is one of nostalgia, if not envy towards the activist's (innocent) commitment to substance. "Oh I wish I could have said that" remarked a former colleague to me once after a meeting of a


parliamentary committee that had discussed a bilateral investment treaty with Indonesia and in which I, as an academic, had been criticizing the draft due to the absence of a human rights clause. Maybe such a wish was there. But I could also detect the adviser's hidden pleasure at having fulfilled her professional commitment of bracketing -- again, heroically, as it were -- her private morality. And I remembered the sense of satisfaction from my time in the Foreign Service of being committed to the good of one's country -- a commitment which is never too difficult to turn into the more sophisticated moral position about this being also the general good "of the long run".

From the adviser's perspective, the academic's easy moralism (just like the political colleague's simple (if legally dubious) solution) looks like a facile and irresponsible indulgence in self-aggrandizement and ignorance of the lessons of diplomatic history. In the adviser's eyes, such moralism may be psychologically satisfactory but bears shades of an ultimately shallow and egoistic cynicism. By contrast, the adviser's difficult, perhaps painful bracketing of private faith and the defence of positions one thinks of as untenable may not appear only as "fully reconcilable with correct standards of professional conduct" but is perhaps the clearest evidence of the adviser's commitment, loyal acknowledged as such within the tight group of legal advisers, often one's principal (if invisible) audience.

The adviser's position oscillates between commitment and cynicism depending on whether the justification of governmental positions is seen from the inside through the rhetoric of process, "gentle civilizing" and the ultimate harmony of interests between the Government's (real) interests and those of the international community, or from the outside as a servile submission to the whims of national leaders, a short-sighted pursuit of every advantage that may appear, a diplomatic careerism that strives for those special privileges with which diplomacy is popularly associated, or a narrow and "legalistic" obstruction of smooth policy-making.

The Activist

I recently published an article defending the International

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77 Fitzmaurice, loc. cit. (footnote 71 above), p. 77.
Court's *non liquet* in the *Nuclear Weapons* advisory opinion.  
For this, I was criticized by friends who were active in non-governmental disarmament organizations: how could I think that the law had (or should have) nothing to say in a matter of such vital importance? This was, I suppose, a variant of the cynicism critique: did I not see that such a position ended up supporting the intolerable threat to life that the existence of such weapons entailed? I shall use this critique to illustrate the role of the activist in international legal practice -- a role of which I have no direct experience.

The activist participates in international law in order to further the political objectives that underlie his or her activism. The principal commitment of the serious activist is not to international law but to those objectives. If the law fails to develop in the right direction, or sets itself as an obstacle to it, then commitment to policy will need to override the law. From the activist's perspective, a commitment to law is a commitment to empty formalism or worse, taking a substantively conservative political position disguised as law. The lawyer's "impartiality" now seems as being constrained by a professional convention and hierarchy where intrinsic merit appears as a political category.

To take an open attitude against international law, however, would put the activist in a strategically difficult position, running the risk of marginalization. The eventuality of influencing or participating effectively in public decision-making in legal institutions will be lost. The activist likes to dress his or her objectives as international law claims. This was, indeed, the point of the critics of the Court's opinion in the *Nuclear Weapons* case (and of my article): the law was not to be rejected in favour of a (controversial) policy but the Court (and I) had simply made a professional mistake. Nuclear weapons were already condemned by positive international law. While professional lawyers regularly meet with the experience that equally competent lawyers routinely argue opposite cases, the activist interprets this as the profession's inherent cynicism and wants to attain more. It is not enough that legal technique has been applied. It must be applied for the correct result.

Arguing within the law, however, often makes the activist

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seem like an impossible dilettante in the eyes of those whose principal commitment is to the law and who have internalized its argumentative structures, the way it cunningly makes each position both justified and vulnerable to further criticism. To think, for instance, that the situation in East Timor may be influenced by setting up an (activist) jurists' platform in Lisbon and by adopting a resolution calling for the realization of East Timorese self-determination seems as naive as thinking that the activist's newly adopted formalism betrays a mere deference to the law's external antics.\textsuperscript{80} Or it may perhaps seem like a (cynical) move in the in-fighting between non-governmental organizations for power and privilege.

The more the activist learns the tricks of the trade, however, and starts to "think like a lawyer" -- that is, the more the activist's commitment shifts from political objectives to the law (with the resulting schizophrenia about believing and not believing at the same time) -- the more the activist's old colleagues interpret this as a cynical betrayal of the common cause.

The activist may try to deal with the dilemma (marginalization/co-option) by arguing that the law has a moral basis and that the condemnation of nuclear weapons, for example, emerges directly from it. This commits the activist to a programme model of the law; it is a theological argument that is premised on faith in a moral reality and defines international law as compatible with it. Being based on faith (or knowledge, as the activist would have it), the position is incompatible with a commitment to international law and often leads the activist to non-formalist positions (for example, about \textit{jus cogens} or soft law) that traditional lawyers view with suspicion. Besides, to argue this way leads the activist back to marginalization: if there is no agreement within the profession about what the law's morality says, or what consequences should be drawn from it, then an appeal to how deeply one personally feels about a decision is merely to shout louder. It has no additional convincing force to anyone not already committed to that moral truth.

Moreover, the activist's strong view on legal argument's ability to produce the (politically) correct result leads to another problem. What happens if a legal authority -- say the International

Court of Justice -- arrives at a conclusion different from that of the activist? In such case, the activist will either have to yield -- and face the critique of former friends in the cause, or the activist will say that the authority has made a mistake -- but such arrogance seems psychologically implausible and tends to lead to marginalization: what use is there in thinking that my position is the correct one if it is not held by a legal authority?

Activism, too, functions within a dilemma. In case the activist is committed to his or her political objectives, the emphasis on such commitment to legal argument runs the risk of naïveté and marginalization. The activist is not taken seriously by the international law profession. If the activist downplays the extent of his or her political commitment, and instead argues the preferred conclusion in terms of legal technique, then the risk of cynicism emerges in two forms. First, from the perspective of the other members of the activist's group: the activist has (cynically) allowed himself or herself to be co-opted by the mainstream, perhaps because of the activist's (secret) careerism. Second, his or her commitment to law may not be what the activist claims: he or she is prepared to accept a legal argument only if it accords with his or her political objectives -- in which case the activist's legal rhetoric looks like a manipulative-cynical facade to those whose commitment is to the law.

The Academic

The academic's position is much less stable than that of the activist or the adviser, hovering as it does between the two: a commitment to a rational and, if possible, scientifically argued vision of the rule of law; and a wish to be associated with those positions of influence that are available to governmental advisers. In any national community of academic international lawyers it is easy to distinguish between two groups. There are those "visiting professors" who are more or less regularly consulted by the foreign ministry and who participate in governmental delegations as experts and publish commentaries on topics that enjoin governmental policies with the creation and administration of legal rules. And there are those professors, whose principal loyalty is to their activist or bureaucrat friends, who hold themselves aloof from governmental positions and tackle in their sometimes interdisciplinary writings and lectures large

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issues about world order, international justice or human rights, often
taking a critical view of public diplomacy.

The academic's ostensible object of commitment is to the
discipline of international law, its truth and its "objectivity". From the
inside, the academic's commitment lies in his or her often somewhat
marginal role in the legal faculty. The academic is also the one who
from the isolation of his or her study speaks truth to power in the
fashion that Hans Morgenthau characterized Kelsen, or as described by
Julius Stone, standing: "... on the mountain of all human knowledge,
with his eyes open to the vistas that all others have seen". From this
perspective, both the activist's politics and the adviser's governmental
connections appear as forms of cynicism: they must know better than
that! With all the academic's reading, interdisciplinary techniques and
scientific orientation, he or she is able to show the errors of the activist's
politics and the self-betrayal of governmental justifications. Choosing
a sociological language, for instance, the academic may think that he or
she can penetrate appearance to perceive a "reality" that remains hidden
from those who advocate governmental or political causes.

But the academic's (relative) isolation from Government and
activism may also cast doubt on the nature of the academic
commitment. How easy it is to write a critical article on almost
anything from one's ivory tower -- with no social objectives that one
would need to pursue, and no professional responsibility within any
political hierarchy. Moreover, legal indeterminacy may occasion a
doubt about the academic pursuit altogether; is not law precisely about
political/governmental decision-making and not about the academic's
abstract norms. In such case, academics could never have practical
relevance, nor even the ability to articulate the intuitive distinctiveness
of the legal practice that practitioners themselves distinctly feel. Yet,
when they do engage in practice as advisers to Governments or
representatives of litigators, as many of them do, their academic
colleagues may deridingly look at their scholarly work and conclude
that they have become cynics, that their "pragmatism has supplanted
theory".

82 Stone, "Scholars in ...", Law ..., op. cit. (footnote 5 above), pp. 255-256.
83 Ibid., p. 260, footnote omitted.
84 Cf. D. Kennedy, "A Rotation in Contemporary Scholarship", Critical Legal
Studies -- an American--German Debate, Joerges and Trubek, eds. (Baden-Baden,
85 C. Warbrick, "The Theory of International Law: Is there an English
Contribution?", Theory and International Law: An Introduction, Allott and others, eds.,

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Hence the academic, too, is always liable to be criticized as a cynic from both the activist’s and the adviser’s perspective. For the activist, the academic is but an activist manqué who hides behind the academic edifice of technical rhetoric and at crucial moments defers to diplomacy. Although (as explained above) the adviser may envy the academic’s ability to “speak the truth”, he or she can still see the academic really as an amateur, delighting in speaking the language of public governance without responsibility to anyone about his or her statements. For both the activist and the adviser, the academic may seem like the true cynic, falling short of a commitment to ideals or to power, enjoying both the privilege of academic freedom, which elevates the academic to the status of the truth-speaker, and occasional counselling work that satisfies the academic’s quest for practical relevance.

V

International law is what international lawyers do and how they think. The dialectic between commitment and cynicism that I have surveyed in the preceding pages is part of the psychological reality of being an international lawyer. This is not to say that what international lawyers do or think today is terribly wrong. It is to highlight the emotional aspect of the ambivalences of yet another period of transformation at the end of a century of successive “transformations” that have led to unforeseen failures, to enthusiasms grown stale, to normative and institutional ideals resulting in bitter disappointments. If international lawyers are now wary of being enlisted as whole-hearted protagonists of globalization, the end of the nation-State, the proliferation of liberal markets and Western political rhetoric (“democracy”), then this should not be too great a surprise. History provides little support for the belief that revolution or happiness could survive the first moments of enthusiastic bliss. The morning after is cold, and certain to come. And as we pick up the pieces of yesterday’s commitment, we might perhaps fight tomorrow’s cynicism by taking ourselves lightly, for a change.


The four roles I have outlined are, of course, ideal-typical. I am aware that, for instance, feminist critiques have sought to challenge them. But though such challenges nuance the strategies embedded in particular roles, I am not convinced that they go beyond the commitment/cynicism dialectic.
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