GILBERTO AMADO
MEMORIAL LECTURES

CONFÉRENCES COMMÉMORATIVES
GILBERTO AMADO

A *Fundação Alexandre de Gusmão*, instituída em 1971, é uma fundação pública vinculada ao Ministério das Relações Exteriores e tem a finalidade de levar à sociedade civil informações sobre a realidade internacional e sobre aspectos da pauta diplomática brasileira. Sua missão é promover a sensibilização da opinião pública nacional para os temas de relações internacionais e para a política externa brasileira.

Ministério das Relações Exteriores
Esplanada dos Ministérios, Bloco H
Anexo II, Térreo, Sala 1
70170-900 Brasília, DF
Telefones: (61) 2030-6033/6034
Fax: (61) 2030-9125
Site: www.funag.gov.br

Gilberto Amado
Memorial Lectures

Revised and Expanded Second Edition

Conférences Commémoratives
Gilberto Amado

Deuxième Édition Revue et Amplifiée

FUNDAÇÃO
ALEXANDRE
DE GUSMÃO

Brasília, 2012

Ministério das Relações Exteriores
Esplanada dos Ministérios, Bloco H
Anexo II, Térreo
70170-900 Brasília – DF
Telefones: (61) 2030-6033/6034
Fax: (61) 2030-9125
Site: www.funag.gov.br
E-mail: funag@itamaraty.gov.br

Equipe Técnica:
Fernanda Antunes Siqueira
Fernanda Leal Wanderley
Gabriela Del Rio de Rezende
Henrique da Silveira Sardinha Pinto Filho
Jessé Nóbrega Cardoso
Rafael Ramos da Luz

Programação Visual e Diagramação:
Gráfica e Editora Ideal

Impresso no Brasil 2012

G464

Gilberto Amado: memorial lectures.

Gilberto Amado: memoral lectures = Gilberto Amado: conférences commemoratives / Prefácio à 2. ed. de Gilberto Vergne Saboia. – 2. ed. rev, e ampl., bilíngue – Brasília : FUNAG, 2012.

677 p.; 15,5 x 22,5 cm.

Textos em inglês e francês.

Palestras de Eduardo Jiménez de Aréchaga, Constantin Eustathiades, Manfred Lachs, Humphrey Waldock, Taslim o. Elias, Geraldo Eulálio do Nascimento e Silva, Georges Abi-Saab, José Sette Câmara, Cançado Trindade, Carl-August Fleischhauer, Francisco Rezek, Lucius Caflisch, Celso Lafer, Alain Pellet, José Luis Jesus e Leonardo Nemer Caldeira Brant.

ISBN: 978-85-7631-383-0

1. Tribunal Internacional de Justiça. 2. Comissão de Direito Internacional. I. Fundação Alexandre de Gusmão.

CDU:341

Ficha catalográfica elaborada pela bibliotecária Talita Daemon James – CRB-7/6078

Depósito Legal na Fundação Biblioteca Nacional conforme Lei n° 10.994, de 14/12/2004.

In memoriam:
Ambassador Carlos Calero Rodrigues,
Member of the ILC (1982-1996).

Presentation of first edition

The Alexandre de Gusmão Foundation – FUNAG, an independent unit administratively linked to the Ministry of External Relations of Brazil, publishes this book on the occasion of the fiftieth anniversary of the United Nations International Law Commission.

The series of lectures praising Gilberto Amado, the well-known Brazilian jurist, started in 1972. All texts presented since then till 1996 - with the exception of 1985 – are assembled here and published in their original languages.

April 1998.

The lectures were given by:

H.E. Mr. Eduardo Jiménez de Aréchaga, Judge at the International Court of Justice, on 15 June 1972;

Professor Constantin Eustathiades, University of Athens, on 11 July 1973;

H.E. Mr. Manfred Lachs, President of the International Court of Justice, on 11 June 1975;

H.E. Sir Humphrey Waldock, Judge at the International Court of Justice, on 3 June 1976;

H.E. Mr. Taslim O. Elias, Judge at the International Court of Justice, on 7 June 1978;

H.E. Mr. Geraldo Eulálio do Nascimento e Silva, Ambassador of Brazil to Austria and Permanent Representative to the United Nations Office at Vienna, on 3 June 1983;

Professor Georges Abi-Saab, Graduate Institute of International Studies at Geneva, on 20 June 1985;*

* There is no written text.

H.E. Mr. José Sette Câmara, Judge at the International Court of Justice and former Ambassador of Brazil, on 16 June 1987;

Professor Cançado Trindade, Legal Adviser of the Ministry of External Relations of Brazil, on 16 June 1987;

Mr. Carl-August Fleischhauer, Under-Secretary-General, The Legal Counsel of the United Nations, on 14 June 1989;

H.E. Mr. Francisco Rezek, Minister of External Relations of Brazil, on 2 July 1991;

Professor Lucius Caflisch, Legal Adviser, Federal Department of Foreign Affairs, Bern, on 2 June 1993;

H.E. Mr. Celso Lafer, former Minister of External Relations of Brazil, Ambassador and Permanent Representative of Brazil to the WTO and to the United Nations in Geneva, on 18 June 1996;

Professor Alain Pellet, Univertity of Paris X-Naterre, on July 2000;

H.E. Mr. José Luis Jesus, Judge at the International Tribunal for the Law of the Sea, on 15 July 2009;

Professor Leonardo Nemer Caldeira Brant, Univertsity of Minas Gerais, on 19 July 2011.

The views expressed are those of the authors and do not necessarily coincide with the views of the Organization.

Content

The Law and the Peaceful Settlement of Disputes

Aspects of the Advisory Jurisdiction of the International Court of Justice

The International Court of Justice and the Indication of Provisional Measures of Protection

The Influence of Science and Technology on International Law

A Hundred Years of Plenitude

The Contribution of Gilberto Amado to the Work of the International Law Commission

Reflections on Legal Aspects of United Nations Peacekeeping

International Law, Diplomacy and the United Nations in the Late Twentieth Century

Peaceful Settlement of International Disputes – New Trends

The World Trade Organization Dispute Settlement System

Foreword to the second edition

Gilberto Vergne Saboia, President of the Alexandre de Gusmão Foundation, Member of the International Law Commission

It is an honour for me to introduce this second edition of the Gilberto Amado Memorial Lectures. I do so in my double capacity of President of the Alexandre de Gusmão Foundation, which I am about to relinquish, and of member of the International Law Commission.

The original edition of these lectures, published in two languages, was in great demand and had become out of print. This new edition adds the text of three more recent lectures pronounced respectively by Professor Alain Pellet ("Droits-de-L'Hommisme" et "Droit International"); Judge José Luis Jesus, President of the International Tribunal of the Law of the Sea, ("Advisory Opinions and Urgent Procedures at the Tribunal"), 2009; and Professor Leonardo Nemer Caldeira Brant ("La portée du consentement comme fondement de l´autorité de la sentence de la Cour Internationale de Justice"), 2011.

The goal of the Brazilian Government in sponsoring the lectures, with the endorsement of a resolution of the General Assembly, was both to remember the contribution of Gilberto Amado in shaping and establishing the Commission, together with the other distinguished jurists who composed the "Committee of Seventeen", and to underline its commitment to international law as a foundation for stable and peaceful relations among nations, and for the strenghtening of the rule of law in accordance with the purposes and principles of the Charter of the United Nations.

Many years have passed since the first lecture was given by ICJ Judge Jiménez de Arechaga in 1972. Those who were contemporaries of

Gilberto Amado coincide that rather than his ample understanding of international law, it was his lucid intelligence and strong personality, coupled with a dashing sense of humour, that Amado was able to put his print on the work of the Commission, helping to contribute to a balanced relationship between legal doctrine and State policy which is so vital for the success and relevanve of the ILC.

Among the many quotes that figure in some of the lectures given by his contemporaries there are two which appear as relevant today as then. Mindful of the views of States, Amado once told the Commission "not to propose to States texts which might hamper them when they met in conference to conclude" (…) "conventions the Commission had drafted for them". On another occasion, however, he stated: "we have no right to shut our eyes to realities…in an age when the the present is shrinking and the future is increasingly upon us"[1]. The tension between *lege lata* and *lege ferenda* is a permanent feature of the work of the ILC.

It is interesting to remark also that most lectures, despite the passing of time, remain relevant, not only for its doctrinal content, but because often they proved material for subjects which are of interest for topics that are currently being dealt by the ILC.

I refer, for instance, to the lecture given by Professor Constantin Eustathiades, in 1973, on "Unratified Codification Conventions" which might be useful when the Commission starts considering the topic "Formation and evidence of customary international law". The same could be said regarding the lecture by Ambassador Geraldo Eulálio Nascimento e Silva on "The Influence of Scence and Technology on International Law" (1983) both retrospectively to the subject of transboundary aquifers and prospectively to the one regarding "Protection of the Atmosphere". The important issue of peaceful settlement of disputes, which the Commission from time to time has to refer to, was the subject of various lectures which examined the subject from different angles, Professor Lucius Caflisch taking a broader view, and Professor Celso Lafer examining the particular system of dispute settlement by the WTO.

Finally, the work of judicial settlement was examined in several lectures that remain relevant. The last one, by Professor Leonardo Nemer Caldeira Brant, took the more daring step of looking at the consequences of judgements of the ICJ beyond the parties that have expressly given their consent to submitting their dispute to the Court.

[1] Quoted by Mr. Manfred Lachs, President of the ICJ, in the lecture given on 11 June 1975 on "The Law and the Peaceful Settlement of Disputes".

I hope this new edition of the Memorial Lectures will continue to prove useful to all those interested in the work of making international law better understood and more useful in helping to solve peacefully and constructively the difficult challenges of our contemporary world.

THE AMENDMENTS TO THE RULES OF PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE

Lecture delivered on 15 June 1972
by H.E. Mr. Eduardo Jiménez de Aréchaga
Judge, International Court of Justice

Foreword

There are many persons much more qualified than I to inaugurate the Gilberto Amado Memorial Lectures. However, when the invitation to do so reached me, I was unable to resist the temptation to accept it, for I had a great admiration and respect for him and I had formed a deep friendship with Gilberto during the ten years I was privileged to work with him in the International Law Commission.

Gilberto Amado, on the other hand, really deserved the exceptional tribute of these series of lectures on International Law being associated with his name. He was, as you all know, a distinguished jurist, who, for more than twenty years, had been a member of the International Law Commission and a delegate of his country, Brazil, to the Sixth Committee, of the General Assembly and to most Codification Conferences. He was thus in a unique position to make an outstanding contribution, not only to the actual work of the ILC, but to its creation in 1947 and to the culmination of its efforts in the codification and progressive development of international law. The Commission, in which he became the respected dean and a most influential member, was his special interest in the last twenty years of his fruitful life and an object of personal pride for him.

While Gilberto Amado regarded himself mostly as an international lawyer, he was much more than that: he had a powerful personality and was a poet and a man of letters, a distinguished writer in his mother language. Those who are able to read it will agree with me that in his literary work, particularly in his autobiography, he made an original and

lasting contribution to the enrichment of the literature and the language of Brazil and Portugal.

Another of his peculiar gifts was that of possessing a very original and somewhat caustic sense of humour: he had a penetrating wit, which gave to many of his utterances a memorable character. The social gatherings of members of the International Law Commission or the Sixth Committee usually ended with a recollection of Gilberto Amado's sayings and anecdotes, and that whether he was present or not. At one time I had such a large repertory of "amadiana" that Sir Humphrey Waldock suggested that I should become a sort of Boswell for this Brazilian Dr. Johnson.

I will recall only one example because it illustrates the position he had acquired in the Commission.A freshly elected member came to the initial meetings loaded with textbooks and monographs and lectured to us at great length with very learned speeches full of quotations. Gilberto put an end to this with a remark which duly reached the ears of the offending new member: "À la Commission, il ne faut pas étudier; il faut savoir".

The Amendments to the Rules of Procedure of the International Court of Justice

When the Court began in 1967 the revision of its rules of procedure, the approach then followed was to attempt a systematic revision of the Rules in their entirety and as an integrated whole.

However, in 1972, the Court did not continue with the full-scale and complete revision it had initiated, but decided instead to amend certain articles of the existing Rules of Court.

Among the reasons which determined this change of approach was the advice received from experienced authorities on the work of the Court. In 1970 former judges of the Court, former *ad hoc* and those international lawyers who had pleaded before the Court in at least three cases, were asked for their opinions on the revision of the Rules of Court within the provisions of the Statute.

A striking coincidence was evident in the opinions received as to the identification of those aspects of the Rules which required urgent amendment. A majority of the opinions received coincided as to the need to:

(I) facilitate recourse to Chambers of the Court and concede to the parties some influence in the composition of *ad hoc* Chambers constituted under paragraph 2 of Article 26 of the Statute;
(II) accelerate and simplify both contentious and advisory proceedings and exercise greater control over oral proceedings;
(III) regulate preliminary objections so as to settle them as soon as feasible and avoid the delay and expense involved in a double

discussion of the same questions both at the preliminary stage and the stage of the merits.

Also in 1970 the General Assembly of the United Nations, by its resolution 2723 (XXV), invited Member States and States parties to the Statute to submit views and suggestions concerning the role of the Court on the basis of a questionnaire prepared by the Secretary-General. While the replies of governments covered a much wider field than that of the rules of procedure, several of them, when dealing with the procedures and methods of work of the Court, brought forward a number of similar suggestions on the above-indicated topics.

It is therefore understandable that the Court decided in 1972 to embark as a matter of priority on the limited revision and amendment of certain articles of the Rules only, without prejudice to continuing with its comprehensive work of revision at a more leisurely pace.

It must be recalled that the existing Rules represent the accumulated experience of fifty years of operation of a permanent international judicial institution. This body of experience should not be recast lightly and to do so thoroughly would have required the postponement of the revision of those areas calling for immediate attention. This furnished an additional reason for the selective approach adopted by the Court.

The choice of the three areas to which allusion was made above was dictated by the felt need, as a matter of priority, to simplify the procedure, to avoid excessive delays and, as a consequence, to make the proceedings less burdensome for States. It is hoped that the amendments will help to achieve these purposes.

I. Facilitation of Recourse to Chambers

New provisions have been inserted in the Rules – Articles 24, 25 and 26 – to deal in separate articles with the three different types of Chambers provided for in the Statute: Chamber of Summary Procedure; Chambers formed for dealing with particular categories of cases and *ad hoc* Chambers constituted at the request of the parties to deal with a particular dispute.

At the same time, a uniform summary procedure is provided in Article 76 for all Chambers, allowing them to dispense with oral proceedings, if the parties agree and the Chamber concurs that no further evidence or argument is required. According to the Statute, it is not possible to dispense with oral proceedings in contentious cases before the full Court.

1) Composition of ad hoc Chambers

The main change introduced in this subject is to accord to the parties a decisive influence in the composition of *ad hoc* Chambers. One of the most frequent suggestions made in this respect, particularly by Judge Jessup,[2] was that recourse to *ad hoc* Chambers would prove more attractive to potential litigants if the election of their members would be based on a consensus between the Court and the parties.[3]

The idea of giving effect to the wish of the parties in the selection of the members of an *ad hoc* Chamber as a means of breathing new life into this dormant institution has however encountered some objections. The objection has been made that this would constitute an unwarrantable extension of the Statute, since its Article 26, paragraph 2, requires the approval of the parties for "the number of judges to constitute such a Chamber" but not for the determination of their names, in this line of argument it has also been observed that such a proposal would constitute a derogation from the requirement of a secret ballot for the designation of members of a Chamber and might affect the unity of the Court, transforming Chambers into privately selected bodies.

In this context, attention may be called to two changes, which were introduced in 1945 in the Statute of the Permanent Court with respect to Chambers. The first one was to allow the constitution of *ad hoc* Chambers to deal, at the request of the parties, with a particular case. The second was to delete from the Statute a requirement that Chambers should be selected so far as possible with due regard to the provisions of Article 9 of the Statute. This Article prescribes that Members of the Court should represent the principal legal systems of the world.

It must be further pointed out that while under the Statute the approval of the parties is required for the determination of the number of judges who compose an *ad hoc* Chamber, the Statute does not restrict the scope of the consultations which may be carried out by the President with the parties. It would be in order for the President to consult the parties and inform the Court of their views as to the Chambers' composition and this is what the new Rules envisage.

After the President reports on these consultations, the Court must always proceed to an election of the members of the Chambers by secret ballot, thus retaining ultimate control over the composition of any

[2] "To form a more perfect United Nations", in 129 *Hague Recueil*, p. 21

[3] Cf. suggestion by the Government of Sweden in Doc. A/8382, para. 137 and observations by the United Kingdom Government in A/8382, Ann. 1, para. 9.

Chamber. However, from a practical point of view, it would be difficult to conceive that in normal circumstances those Members who have been suggested by the parties would not be elected. For that, it would be necessary that a majority of the Members of the Court should decide to disregard the expressed wishes of the parties. This would be highly unlikely since it would simply result in compelling them to resort to an outside arbitral tribunal or even to abandon their intention to seek a judicial settlement of the dispute.

(2) Arbitration and ad hoc Chambers

The new rule adopted may have important consequences as to the role of *ad hoc* Chambers of the Court as arbitral tribunals.

The consultation of the President with the parties on the composition of the Chamber could also comprise the names of those members of a Chamber who must step down to give place "to the judges specially chosen by the parties", under the terms of Article 31, paragraph 4, of the Statute.[4] These words in the Statute are sufficiently wide to permit the parties to select jointly the two *ad hoc* judges. It would not be necessary to attribute the selection of each *ad hoc* judge to each one of the parties.

In this way, provided the parties agree on at least one Member of the Court to act as President (and of course on two other names of personalities outside the Court), it might be possible to set up as a Chamber of the Court what in fact would constitute an *ad hoc* arbitration tribunal composed by three members.

Thus the parties could save the heavy expenditure involved in arbitration, particularly arbitrators' and secretary's fees; cost of translation of pleadings and interpretation in the oral proceedings, and other clerical assistance to the tribunal. Since under the Statute the body thus composed would be a Chamber of the Court, all those expenses would be borne on the budget of the Court, which, according to the Statute, is part of the budget of the United Nations.

If the language of both parties is not one of the Court's two official languages, it might be possible to conduct the written and oral proceedings in that language, provided the members of the Chamber thus selected are proficient in it. It would be sufficient for that purpose that both parties make a request under Article 39, paragraph 3, of the Statute. Even if the judgement

[4] Jessup, loc. cit.

of the Chamber must be officially recorded and printed in one of the Court's official languages, the parties would be able to save the heavy expenditure of translation and interpretations of their pleadings and oral presentations and of engaging counsel proficient in one of the Court's two official languages.

Since under Article 28 of the Statute the Chambers may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague, it might be possible for this type of Chamber to function at a seat more convenient for the parties and one which would avoid for them the expense caused by bringing their agents and counsel to The Hague.

It should also be pointed out that in the new Rules the power to appoint assessors has been extended to all Chambers. Thus, assessors with specialist qualifications may sit with Chambers established to deal with particular categories of cases or particular cases requiring technical knowledge or experience.[5]

3) Continuation of a Member of an ad hoc Chamber beyond his Term of Office

In recognition of the role of the parties in the constitution and functioning of an *ad hoc* Chamber, paragraph 3 of Article 26 of the Rules provides that a Member of the Court composing it shall continue to sit in all phases of the case, after the expiry of his term of office as Member of the Court, even if the oral proceedings have not commenced.

For the other two types of Chambers a different rule applies. Under paragraph 5 of Article 27, the outgoing Member of the Court continues to sit in the case only if he ceases to be a Member of the Court after the date on which the Chamber convenes for the oral proceedings. When judgement has been pronounced, such a duty does not extend to sitting in future phases of the same case. This is the interpretation which has been given in practice and for the full Court to the provision of Article13, paragraph 3, of the Statute.

The consideration which has determined a different solution for *ad hoc* Chambers is that in this type of Chamber continued participation in the case should not depend on membership of the Court itself. Otherwise, a Chamber set up at the request and taking into account the wishes of the parties might lose some of its members by the mere effluxion of time.This would also open up the possibility of delays by a party in order to exclude a judge who might have appeared as unfavourable in previous phases of the case.

[5] Cf. observations by the Government of the United Kingdom in Doc. A/8382, Add. 1.

II. Simplification of Written and Oral Proceedings

Certain suggestions for improvement in the Court's procedures and methods of work received from various quarters concerned the questions of the length and cost of litigation before the Court, the need to simplify and speed up both the written and the oral proceedings and to accelerate the delivery of advisory opinions in urgent cases.

(1) Simplification of Written Proceedings

(a) Number of pleadings

The main step adopted by the Court for the simplification of the written proceedings has been the elimination of the right of the parties to submit a Reply or a Rejoinder. What has been abolished is not the Reply or the Rejoinder as such, but the right possessed by a party under the existing Rules to file a Reply or a Rejoinder in any case, if it so desires.

The 1946 Rules as interpreted and applied both by the Permanent Court and by the present Court vest a right in any party to a case before the Court to present a Reply or a Rejoinder, the only exception being when the parties agree to dispense with those pleadings and the Court itself consents to such dispensation.[6]

The existence of such a right, exclusively granted by the Rules, does not correspond to the widespread aspirations expressed concerning the need for shortening the written procedures before the Court and making them less expensive. What is even more important, such a right does not correspond to the provisions of the Statute either. Article 43 (2) of the Statute, while it provides for a Memorial and a Counter-Memorial in every case adds that the written procedure will comprise Replies only if necessary.[7]

In strict correspondence to the provisions of the Statute, and following suggestions presented among others by such an experienced international lawyer as Professor Rolin, Articles 44 and 45 of the new Rules provide that the written pleadings shall consist of a Memorial and a Counter-Memorial and that a Reply and a Rejoinder may be submitted

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[6] The permanent Court interpreted the Rules as entitling any party to a Reply or to a Rejoinder except when there was "an agreement between the Parties to waive the right to present a Reply", *P.C.I.J., Series C. No. 74*, p. 435.
As to the present Court, cf *I.C.J. Reports 1972*, p. 3, where a Reply and Rejoinder were allowed despite the disagreement of the parties and the special nature of the case, merely because one of the parties "indicated that it wishes to submit a Reply".

[7] Cf. Proceedings, American Society of International Law, 1970, p. 258. Cf. observations by the Government of the United States in Doc. A/8382, para. 338.

only if the parties are so agreed or if the Court decides, *proprio motu* or at the request of one of the parties, that these pleadings are necessary.

(b) Time-limits

Another observation frequently made concerns the leniency shown by the Court in fixing time-limits and in granting extensions of those time-limits. Lord McNair, for instance, pointed out "a tendency for the Court to reflect the diplomatic origin of international justice and to be somewhat subservient to the wishes of litigants by granting long periods for the filing of their pleadings".

Several amendments have been incorporated in the Rules to put on notice prospective litigants of the firmer stand to be taken by the Court in the future in fixing and enforcing time-limits.

A sentence has been added to Article 41 providing that time-limits "shall be as short as the character of the case permits". While the Court shall take into account, under Article 40, paragraph 3, any agreement of the parties as to questions of procedure, it will do so only if such an agreement "does not cause unjustified delay". As to the extension of time-limits it is provided that such a request shall be granted if the Court "is satisfied that there is adequate justification for the request" (Art. 40, para. 4).

(c) Printing of pleadings

The requirement in the 1946 Rules to print the pleadings has been eliminated as an obligation not only to save expense but also taking into account that shorter time-limits might be more readily fixed if printing is no longer a requirement and other modern methods of reproduction are equally authorised.

(2) Greater Control over Oral Proceedings

One of the common observations with respect to the procedures and methods of work of the Court is that oral proceedings have tended to become repetitive and excessively lengthy and have of late taken the form of an additional round of written pleadings, the main difference being that the parties attend to read their pleadings to the Court, instead of delivering them through their Agents.[8]

[8] See, for instance, observations by the Government of Canada in A/8382, para. 344, and New Zealand in Doc. A/8382, Add 4, Part IV.

The way for the Court to protect itself against excessively lengthy and repetitive pleadings is to exercise a more effective control than it has tended to in the past over the oral proceedings, in making use of the powers granted in Articles 48 and 54 of the Statute.

(a) Indication of issues to the parties

This could be accomplished not merely by indicating to the parties the time available for the devolopment of their oral arguments on the case as a whole but also by making a positive indication of those issues which the Court desires to see discussed in the oral proceedings. Among the observations received from experts on the work of the Court, those of Professor Guggenheim were particularly insistent on this point.[9]

A new paragraph has been added in paragraph 1 of Article 57 providing that the Court may at any time prior to or during the hearings indicate "any points or issues to which it would like the parties specially to address themselves".

(b) Exclusion of certain issues

It is a different and more delicate matter whether the Court should – as suggested in some of the replies – make a negative indication excluding certain points or issues which a party might wish to deal with. Such an exclusion might interfere with the freedom traditionally enjoyed by parties in international adversary proceedings and a State might even feel its right of defence has been curtailed. In his written reply, Professor Ago, after observing that "once the written phase has come to an end, the parties have the right to present their case in a different manner or base it upon new points", indicated that "any restriction of the oral debate to certain aspects might jeopardise the rights of the parties and prejudice the outcome of the proceedings".[10]

The solution adopted is to insert in paragraph 1 of Article 57 a formulation providing that the Court may at any time prior to or during the hearings indicate any points or issues… on which there has been sufficient argument".

Consequently, in order to exercise this exceptional power of exclusion of issues it is an essential requirement that there should in fact be on the record sufficient argument upon the excluded points or issues

[9] Cf. observations by the United States Government in Doc. A/8382, para. 339, and by the United Kingdom Government in Doc. A/8382, Add. 1, para. 22.

[10] Cf. observations by the Government of Switzerland in A/8382, para. 341.

so as to permit the Court to make a declaration to this effect. In the light of the Court's jurisprudence, it may be expected that this power would be used only when the Court reaches the conclusion that a certain question has been "fully argued by the parties".[11] There seems to be no danger therefore that a party may not be given full scope to present its case.

(c) Contents of oral statements

A new provision in paragraph 1 of Article 56 prescribes the contents of oral statements, a parallel provision to that of Article 46 which only applies to written pleadings.

These types of rules of Court have been criticised as merely hortatory. However, not only are counsel expected to comply spontaneously with the Rules and normally do so, but the existence of a definite rule on the subject, to which the President can draw attention, makes it easier to control and call to order counsel indulging in irrelevant or repetitive discourse.

(d) Final submissions

Paragraph 2 of Article 56 provides that the final submissions shall be read by a party at the conclusion of the last statement made by a party at the hearing and adds that such submissions shall not contain a recapitulation of the arguments presented. This provision is designed to nip in the bud a practice by which an applicant reserved its right to present its submissions until the very end of the oral proceedings, after the adversary had finalised its case, and preceded these submissions with a recapitulation of its own arguments. This practice, if allowed to continue, could easily degenerate into a third round of oral proceedings.

(e) Number of counsel

In article 55 of the new Rules, the Court expressly recalls the power it possesses to determine and, if necessary, to limit "the number of counsel and advocates who will address the Court". This is designed to keep costs of international litigation within reasonable bounds and insure the equality of the parties before the Court. If the number of counsel addressing the Court would be left to the exclusive discretion of each party, not only abuses may occur, as observed by Professor Reuter in his opinion,[12] but a

[11] *Ambatielos* case (jurisdiction), I.C.J. Reports 1952, p. 45.
[12] Cf. observations by the Governments of Switzerland in A/8382, paras. 342 and 349, and Sweden, ibid., para. 450.

de facto inequality might be created. As it has been remarked, "there is a vast difference between the case of a country which can employ her own legal experts in the service of the government and that of a country which has to hire illustrious names from abroad".[13]

(f) New documents

The amendments introduced in Article 52 are designed to strengthen a principle of good order of procedure: that documentary evidence should be annexed to the written pleadings and no last-minute documents should be allowed after the closure of the written proceedings unless the other party consents (Article 52 of the Statute) or the Court authorizes the production of the new document.

Paragraph 2 of Article 52 is a new provision which constitutes a self-denying ordinance: the Court will only permit production of a new document "if it considers the document necessary". This is the same criterion provided in the Statute for the admission of Replies and Rejoinders. Paragraph 4 imposes a restriction which past practice has shown to be necessary to ensure compliance with this procedure: no reference may be made during the oral proceedings to the contents of any document which has not been regularly produced, unless the document is part of a publication readily available.

(g) Information from public international organizations

With respect to the information to be requested or received by the Court from public international organizations in contentious cases, the basic provision is Article 34, paragraph 2, of the Statute. This Article attributes to the Court both a power and a duty: the power to request information relevant to cases before it from public international organizations, if it so wishes, and the duty to receive such information if a public international organization furnishes it on its own initiative.

Paragraph 3 of Article 34 of the Statute was added, not at the Washington Conference of Jurists, but at the San Francisco Conference, as an ancillary provision "intended to provide necessary procedure"[14] for the implementation of paragraph 2. It requires the Registry to notify an international organization whenever the construction of the constituent

[13] Owada in Proceedings, American Society of International Law, 1971, p. 274.
[14] UNCIO, Vol. 13, p. 217.

instrument of that organization or a convention adopted thereunder is in question in a case before the Court. The purpose of the requirement of notification laid upon the Registrar was clearly to permit a speedy implementation of paragraph 2, by enabling the organization either to send information on its own initiative or to prepare itself against the possibility of the Court's requesting information. Paragraph 3 of Article 34 of the Statute was not intended to affect the substance of paragraph 2 or to introduce a third possibility hovering between the requesting of information by the Court and the reception of information sent on the organization's own initiative.

The 1946 Rules, in paragraph 5 of Article 57, provided that after a notification had been made, the Court or its President "shall… fix a time-limit" for the organization to submit its observations. In a case arising in 1972, the Court felt obliged to fix such a time-limit because of the mandatory wording of this provision. In order to avoid such a lack of correspondence between the Statute and the Rules, and thus indicate that the Rules do not create a third and intermediate hypothesis between the request and the reception of information provided as the only alternatives in paragraph 2 of Article 34 of the Statute, the word "shall" in new paragraph 3 of Article 63 has been replaced by "may". This makes it clear that under the Statute the Court is empowered, but not obliged, to fix a time-limit for the presentation of observations by the public international organization in question, even if the interpretation of its constituent instrument is in question in a case before the Court.

It is only if the Court deems the information relevant to the case before it that it will fix a time-limit for those observations. If, on the other hand, the organization wishes to submit observations on its own initiative it must do so before the closure of the written proceedings, under paragraph 2 of Article 63 of the Rules.

(3) Accelerated Procedure in Urgent Requests for Advisory Opinions

Paragraph 2 of Article 87 of the Rules has been amended in order to provide specifically for an accelerated procedure in urgent requests for advisory opinions.

Urgent requests for advisory opinions are identified as those in which the requesting body "informs the Court that its request necessitates an urgent answer" or the Court itself "finds that an early answer would be desirable".

The first alternative, which involves a change in the existing Rules, recognizes the undeniable fact that the requesting organ itself, being

seized of a question and having examined it, is in a better position to express a view as to the urgency of the matter, as the Security Council did in the *Namibia* case.[15] A request for an advisory opinion normally implies a postponement of a decision on the merits by the requesting organ until the answer has been received. Only exceptionally has the Court been asked to advise, for the purpose of future guidance, upon a question to which a solution had already been given.[16]

Naturally the requesting organ only expresses its view and its desire as to the urgency of the answer: it remains for the Court to comply with this request if it is feasible to do so taking into account all its duties and functions.

The Court, in any case, if not in session, shall be convened specially for dealing with the urgent request.

Article 87, paragraph 2, adds, and this is its most important part, that the Court shall be convened "for the purpose of proceeding to a hearing and deliberation on the request".

The essential feature of this accelerated procedure thus consists in dispensing with written statements, the proceedings being limited to a "hearing". The record of previous discussion in the requesting organ, of the question referred to the Court, that is to say the "dossier" which must be transmitted to the Court pursuant to Article 65, paragraph 1, of the Statute, would, in these urgent cases, furnish the basic information which in normal cases is contained in the written statements.

This amendment naturally raised the question of whether it was possible to do away with either the written or the oral proceedings in the exercise of advisory functions.

The Court had already decided, in the *ILO Administrative Tribunal* case, that it could dispense with oral preceedings in the interest of the equality of the parties before the Court.

This appears as a correct interpretation of the Statute, taking into account the flexible nature of its Article 66, the deliberate use of the word "or" in the three paragraphs 2, 3 and 4, where reference is made to written or to oral statements, and particularly the use of the words "or both" in the second line of paragraph 4 of the same Article.

The discussions which took place in the Permanent Court, in relation to the article in the Rules which originated this provision, confirm that this drafting was intentionally adopted so as to permit the Court to

[15] Resolution 248 (1970), I.C.J. Reports 1971, p 17.
[16] P.C.I.J., Series B, No 1.

dispense either with oral or written proceedings.[17] Judge Guerrero, for instance, pointed out that the Court "was not bound to arrange both for written and oral proceedings. It might arrange for either one or the other and might allow interested parties to comment on the statements of others either in the course of written or oral proceedings".[18]

By this amendment the Court in urgent cases will avail itself of the option given by the Statute, dispensing with written proceedings in the interest of an accelerated procedure, just as it has dispensed with oral proceedings in the interest of the principle of equality of the parties.

(a) The transmission of the request and the dossier

A new provision has been inserted in the Rules as Article 88 in order to expedite normal advisory proceedings. According to this provision, allowance is made for the supporting documents referred to in Article 65, paragraph 2, of the Statute, as "likely to throw light upon the question" to be sent to the Court as soon as possible following the request.

If the requirement of Article 65, paragraph 2, of Statute is taken literally, that is, if the dossier must be sent together with the request, then in those cases where the collection of the documents takes some time, the only possible course is to delay the sending of the request. There have been instances where the Court received the request several months after the decision requesting the advisory opinion was adopted by the competent body.

The new article in the Rules interprets liberally the requirement of Article 65, paragraph 2, of the Statute. It provides that the documents referred to therein may be transmitted at the same time as the request or as soon as possible thereafter, but not necessarily accompanying it physically. The receipt of the request by the Court makes it possible to set in motion the proceedings and to send out the notifications and communications provided for in the Statute while the dossier is being prepared.

Another practical step to accelerate the procedure is to have recourse to modern methods of communication such as the use of telegrams. While specific mention of this method would be going into too much detail, the view may be held that considering telegraphic communications as the "written request" required by Article 65 of the Statute (para. 2) would be in line with the decision taken at the Vienna Conference on the Law of Treaties admitting telegraphic full powers as a valid written document.

[17] P.C.I.J., Series D, No. 2, Add 3, p. 415.
[18] Ibid.; p. 700.

(b) Assessors in advisory proceedings

The provision in Article 7 of the Rules concerning assessors has been opposed on the ground that the Court has never in fact made use of them.

However this rule has been maintained and enlarged for two reasons. The first has reference to the way in which the provision relating to assessors is worded in the Statute (Art. 30, para. 2). As there framed, it is not self-executing, but is dependent for its effect on the existence of relevant provisions in the Rules of Court. A provision in the Statute should not be made inoperative by omitting the necessary article from the Rules of Court.

Secondly, while it is true that the Court has never made use of assessors, it has been suggested recently that they could play a very useful part, in advisory proceedings in particular. It has been urged that the use of assessors could provide the sort of expertise which would dispel the fear that the Court "being outside the mainstream of the [international] organization's activity, might come to decisions not fully sensitive to the internal requirements for effective operation".[19]

Paragraph 1 of Article 7 of the Rules has been amended in order to leave no doubt that this enabling provision may be applied by the Court not only in contentious proceedings but also in proceedings concerning a request for an advisory opinion.

III. Preliminary Objections

The need to regulate in the Rules of Court the handling of preliminary objections in a more expeditious and rational way was one of the most frequent recommendations made in the various studies and commentaries concerning the improvement of the methods and procedures of work of the Court. There is a general feeling that past procedures, particularly as they have developed in recent times, are inadequate in the sense that they have resulted in delays, duplication of work, repetition of arguments and unnecessary discussion. It cannot be denied that in more cases than one the handling of preliminary questions has resulted in an expenditure of time, effort and money for what has been in fact a double discussion of the same issues before the Court. The two most important

[19] Leo Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, *A.J.I.L.*, April 1971, p. 278. Cf. Observations by the Government of Switzerland in A:8382, para. 180.

amendments which have been introduced in this context are: (i) the determination of the jurisdiction of the Court at the preliminary stage of the case and (ii) the elimination of the express authorization in the Rules to join a preliminary objection to the merits. A comparison of the possible consequences of the new and old rules on the subject is offered below, as well as an examination of different types of preliminary objections and other procedural aspects concerning the matter.

(1) Determination of the Jurisdiction at the Preliminary Stage

The new rules of procedure provide that the Court must make a positive finding as to its jurisdiction at the preliminary stage of the proceeding, before embarking on the merits of the case.

This requirement is based on the reasoning that the Court must satisfy itself that it possesses jurisdiction, not only before deciding a case, but before hearing its merits, since its jurisdiction comprises both the power to hear and determine a case. A State cannot be compelled to have the merits of a claim against it publicly discussed in the Court, unless it is previously established by the Court in accordance with Article 36, paragraph 6, of the Statute, that the State has given its consent to the Court's jurisdiction. Article 53 of the Statute supports this view by providing that whenever one of the parties does not appear before the Court or fails to defend its case, the Court must, before reaching a decision on the merits, satisfy itself that it has jurisdiction. This priority requirement must apply *a fortiori* when a case is defended and a preliminary objection has been filed.

The need for the Court to reach a preliminary decision on those objections which affect its jurisdiction was not only advocated in the opinions of experts, but is was particularly insisted upon in several governmental replies to the Secretary-General's questionnaire.[20] Some of these replies stated categorically that objections relating to jurisdiction should invariably be ruled upon before an examination of the merits, because a State could hardly be expected to explain its position in respect of the merits until it had been established that it accepted the jurisdiction of the Court.[21]

A new paragraph has been inserted in Article 67 on preliminary objections, which reads as follows:

[20] Observations by the Governments of New Zealand, A/8382, Annex 4; Canada, A/8382, para. 334; United Kingdom, A/8382, add. 1, para. 22.

[21] Observations by the Governments of Switzerland, A/8382, paras. 326 and 327; Sweden, ibid., para. 333; United States of America, ibid., para. 322.

> "6. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue".

The intention of pronouncing upon the Court's jurisdiction at the preliminary stage of the proceedings is announced in this paragraph. The difficulty which has arisen in the past for such a preliminary determination in all cases is due to the fact that sometimes, particularly in relation to reservations to the acceptance of the Court's jurisdiction, extremely delicate and important legal questions are raised, which bear a close relationship to some of the issues on the merits of the case.

The answer which has been found to this difficulty in the past has been to join such a preliminary objection to the merits.

Thus, in the *Right of Passage over Indian Territory* case, the Court joined to the merits the second preliminary objection raised by India to the effect that the dispute had originated before a certain date which had been fixed as a time-limit in the reservation *ratione temporis* made by India to its declaration recognizing compulsory jurisdiction.

The new paragraph 6 is intended to provide a different solution to the difficulties which have in the past compelled the Court to join to the merits a preliminary objection concerning its jurisdiction.

In the presence of such an objection, the Court, instead of bringing in the whole of the merits by means of a joinder, would, according to paragraph 6 request the parties to argue within the preliminary stage those questions, even touching upon the merits, which bear on the jurisdictional issue. Thus, there would no longer be a justification for leaving in suspense or postponing a decision on the question of the Court's own jurisdiction.

Admittedly, a difficulty subsists with regard to a particular objection relating to jurisdiction: the exception of domestic jurisdiction, which was also joined to the merits in the *Right of Passage* case. The invocation by a State of its domestic jurisdiction is equivalent to saying that is has no international obligations vis-à-vis the claimant State. Thus, when the question of domestic jurisdiction is raised as a preliminary objection, not only a part of the merits, but the whole of the merits, is brought into consideration.

The jurisprudence of the Court has found, however, an answer to this problem. If the exception of domestic jurisdiction is obviously well founded, there will be no difficulty for the Court to uphold the objection since in such an hypothesis the respondent State, having no obligation towards the other party, is the "sole judge" and, according to the terms of Article 2, paragraph 7, of the

Charter, is not required "to submit such matters to settlement". But if, as it often happens, the objection does not appear at the preliminary stage to be obviously well founded, before going into the merits or without examining them, there are ways to reject the preliminary objection without prejudging the merits against the respondent. This is accomplished by what has been described as the *prima facie* or provisional conclusion as to the legal titles relied upon by the applicant. The Court, as it did in the *Interhandel* case, does not attempt at the preliminary stage to "assess the validity of the grounds invoked" or "to give an opinion on their interpretation", but it merely considers whether the grounds invoked by the applicant "are such as to justify the provisional conclusion that they may be of relevance" in the case.[22]

(2) Decisions which may be adopted with regard to Preliminary Objections

The 1946 Rules of Court, in paragraph 5 of Article 62, provide that the Court "shall give its decision on the objection or shall join the objection to the merits". Thus, there is a choice among three possible decisions: to uphold the objection, to reject it, or to join it to the merits. The 1946 Rules of Court explicitly permit the Court to postpone its decision on a preliminary objection by joining it to the merits.

Not only the 1946 Rules admit the possibility of a joinder but in recent times four preliminary objections have been joined to the merits: two jurisdictional objections in the *Right of Passage* case, and two objections to admissibility in the *Barcelona Traction* case.

What is even more significant, in the latter case the Court developed a reasoning which has been interpreted as signifying that a joinder is no longer an extreme or exceptional measure, but one which the Court could and would freely adopt wherever it felt is was required by the necessity of avoiding a prejudgment of the merits or by the interests of the good administration of justice. Abi Saab in his study on preliminary objections concludes, after analysing the *Barcelona Traction* Judgement on preliminary objections: "according to this last Judgement, joinder loses its exceptional character. It becomes possibility open to the Court on a foot of equality with the rejection or acceptance of the objection. Its use depends on the appreciation by the Court of considerations of a general nature. It is difficult to avoid the conclusion that this Judgement witnesses a change of orientation in the subject, more favourable to the extension of the field of application of a joinder".[23]

[22] *I.C.J Reports 1959*, p. 24.

[23] Georges Abi-Saab, *Les exceptions préliminaries dans la procedure de la Cour Internationale*, Paris, 1967, p. 198.

This increased possibility of a joinder of preliminary objections to the merits has been criticised in many quarters because by such an action the Court merely postpones its decision on the matter and the practical result is that the same question is pleaded twice over.

In the experts' opinions received and the governmental replies two schools of thought could be discerned as to the remedial action called for. One was the position taken by those who thought that the procedure of joinder should be declared in the Rules to be an exceptional one, only permissible when the objection is so related to the merits that it cannot be decided without going into or prejudging them.[24] The other, more *radical* school, represented by Professor Riphagen and Judge Hidayatullah, was in favour of abolishing the possibility of a joinder altogether.

Judge Morelli, in a penetrating analysis of the question of preliminary objections suggested that "an objection going to the merits which is put forward by a party as a preliminary objection should not be joined to the merits, in accordance with paragraph 5 of Article 62". After recalling his dissenting opinion in the *Barcelona Traction* case, Judge Morelli stated that "on the hypothesis under consideration the Court should 'declare the objection inadmissible as a preliminary objection'". He further suggested that "a declaration of inadmissibility… should be indicated, in the new Rules now to be laid down, as one of the possible hypotheses". Professor Guggenheim echoed this suggestion by recommending that "any objection concerning the merits which is presented as preliminary should be declared inadmissible as a preliminary objection".

In line with this reasoning, it would appear that the fact that an objection presented by a party as preliminary has to be joined to the merits is in itself sufficient evidence that such an objection, if not concerning the Court's jurisdiction, does not objectively possess a genuine preliminary character, that is to say, it is not an objection susceptible of being disposed of at the preliminary stage of the proceedings.

According to this view, when it is found that an objection (other than one relating to the Court's jurisdiction) filed as preliminary, is so linked with the merits that it cannot be decided without examining them, then such an objection should not be joined to the merits but should be considered in the circumstances of the case as not constituting a genuine preliminary objection, that is to say, one which must and may be decided before any proceedings on the merits take place.

Account must be taken of the origin of the two-phases procedure in the Rules of Court. The faculty of raising issues of a preliminary character at an early

[24] Cf. observations of the United States Government in A/8382, para. 322, and of the United Kingdom Government in A/8382, Add. 1, para. 22.

stage of the proceedings, and of having them separately determined in advance of the merits, while these are suspended, is a considerable concession made on the exclusive basis of the Rules of Court to the party raising such issues. Such a concession could and should be limited by the Court in its Rules of Procedure to those issues (other than jurisdictional) which are really susceptible of being determined at the preliminary stage without going into the full merits. It is not sufficient, therefore, for obtaining preliminary treatment, that an objection may, from a logical point of view, be decided independently of the ultimate merits; it is also necessary for obtaining such preliminary treatment that the objection does not compel the Court to go at the preliminary stage into a full examination of the merits. Otherwise the right of the applicant under the Statute to obtain a full hearing, both written and oral, and to present evidence on the merits of his case would be affected by thus telescoping all issues in a preliminary or incidental procedure.

According to such a view, the proper attitude with regard to an objection so mixed with elements pertaining to the merits, should not be to join the objection to the merits, but to declare it inadmissible as a preliminary objection, without prejudice to the right of the party concerned to reintroduce the issue at a later stage as a defence on the merits.

In the light of such views it was suggested to provide for three possible choices to be made with regard to a preliminary objection: (1) to uphold it, (2) to reject it, or (3) "to declare it inadmissible as a preliminary objection".

The formulation of this third choice raised some difficulty however on the ground that certain objections – such as, for instance, the non-exhaustion of local remedies – possess in themselves a preliminary character and therefore it would not seem appropriate to declare such a type of objection "inadmissible as a preliminary objection".

The answer to this observation, in the present writer's view, is that objections do not possess in themselves an intrinsic preliminary character, but such a character is a relative concept which varies and depends on the circumstances of each case.[25]

However, the formulation of the third choice was made providing that the Court may "declare that the objection does not possess in the circumstances of the case an exclusively preliminary character". This sentence corresponds to the view that certain objections do possess, at least in principle, an intrinsic preliminary character, which may only be partially affected by the circumstances of the case.

[25] As the Permanent Court observed in the *Panevezys-Saldutiskis Railway* case:
"Though it is true that an objection disputing the national character of a claim is in principle of a preliminary character, this is not so in the actual case before the Court.
For these reasons the Court cannot regard the first Lithuanian objection as one which in the particular circumstances of the case can be decided without passing on the merits. The Court cannot therefore admit the objection as a preliminary objection within the meaning of Article 62 of the Rules of Court" *P.C.I.J., Series A/B. No. 76*, pp. 17-18.

(3) Comparison between the New and the Old System

The third choice indicated in the amended Rules has been considered as being, in substance, the same thing as a joinder of an objection to the merits; thus, not a change of substance but only of name would have been accomplished.

The present writer does not share this view. Although of course everything will depend on the interpretation to be given in the future to the new Rule, it may be anticipated that the fact that the Court can no longer join an objection to the merits but must either uphold it, reject it or declare that it does not possess an exclusively preliminary character, may have important consequences both for the party filing preliminary objections and for the Court itself.

The present situation is that a party runs no risk at all when it decides to file as preliminary objections certain defences which may compel the Court to go into the examination of the merits but which, from a logical point of view, may be decided independently of the main issue or the ultimate merits of the case. No risk is run because no adverse decision may be adopted: the worst that could happen to such an objection is to be joined to the merits but it is thus preserved intact and even benefits from a double hearing. This situation stimulates a defendant, normally interested in erecting obstacles against the progress of a claim, to bring up at the preliminary stage as many logically independent defences as it may think of. Even the extreme situation has occurred, not before the International Court of Justice but before another international tribunal, that the same party which had filed a preliminary objection requested in the hearings that such an objection be joined to the merits: such a submission implies a recognition of the lack of preliminary character of the objection raised as such.

As a consequence of the amended provision in the Rules, a party may be discouraged from raising as preliminary objections certain objections which cannot be decided without going into the merits, since now it will run the risk of an adverse decision from the Court. The Court may declare that the objection does not possess in the circumstances of the case an exclusively preliminary character, thus clearly rejecting the submission of the objecting State. It may be reasonably expected that the risk of such an adverse decision will act as a deterrent against raising certain issues as preliminary objections and may operate as an inducement towards reserving them as defences on the merits, to be introduced fresh and unprejudiced at the merits stage.

As to the Court, the situation may also change. The Court will be placed under the necessity of taking a definite stand, either upholding the objection or rejecting it or declaring that it does not possess, in the circumstances of the case, an exclusively preliminary character. The easy way out which was represented by the neutral, and in some cases diplomatic answer of a joinder, which really constitutes a postponement of any decision, is now excluded.

The Court is thus put in the position of having to perform the normal function of any judicial organ, to take a definite stand on a submission presented, and argued before it.

If it finds it possible to bring in at the preliminary stage certain limited aspects which, while related to the merits, bear on the preliminary objections, it may request the parties to plead those aspects, exercising its power under Article 57 (1) to indicate to the parties "any points of issues to which it would like the parties especially to address themselves". Thus it would be in a position either to uphold or to reject the preliminary objections.

If, on the other hand, the objection which has been raised by a party as preliminary is so involved with elements pertaining to the merits that a hearing of those issues would siphon off into the preliminary stage the whole of the case, then the Court would most likely declare that, in the circumstances, the objections raised as preliminary does not really possess such a character.

By way of illustration, it may be instructive to imagine how the new rules would have applied to the two preliminary objections joined to the merits in the *Barcelona Traction* case.

The objection which finally prevailed, concerning the lack of *jus standi* of a State protecting its national shareholders of a foreign company, might have been examined at a further hearing at the preliminary stage, since the substantive elements it raised did not comprise the whole of the merits. The Court could then have upheld this objection in 1964, instead of doing that same thing, after long pleadings and hearings, six years later.

On the other hand, the objection concerning non-exhaustion of local remedies was so intermingled with elements pertaining to the merits, that it could not be thoroughly examined at the preliminary stage without bringing in the whole of the case. It would have become necessary to examine and pronounce at that stage on the Belgian complaint of denial of justice in its entirety, since it is not possible to assert that local remedies must be exhausted when a denial of justice is alleged. Such a procedure, by developing enormously the preliminary phase, particularly at the oral stage,

would have curtailed the right of the Applicant to make a full presentation of its case on the merits, both in written and oral proceedings, and to submit evidence; it would also have affected the right of defense of the Respondent. Therefore, it woul have been appropriate for the Court to declare that this particular objection, although raised as preliminary, did not possess, in the circumstances of the case, an exclusively preliminary character.

It would then be for the Respondent to raise such a defence at the stage of the merits, if it so wished. It could incorporate that objection into its case on the merits, not necessarily insisting on its independent or preliminary character. In other words, it could reintroduce it as a basic argument but not as an objection against admissibility, arguing that one of the substantive requirements before a State may be held responsible for its judicial decisions is that the affected foreigners have afforded the highest tribunals the opportunity to correct errors of the lower courts, by exercising the local remedies which may be available.

This is another important difference between the old and the new Rules. It has been urged that when a preliminary objection is joined to the merits, it retains its preliminary character, and must be pronounced upon by the Court, even in the final judgement, before passing on the merits.

According to the new Rules, the objections raised as preliminary would have been entirely disposed of in one of the three possible choices which have been indicated. Therefore, both the parties and the Court acquire greater freedom to propose and to follow the logical sequence they may prefer in the examination and disposal of the various issues which may arise before the Court at the stage of the merits.

(4) Different Types of Preliminary Objections

The new Rules do not contain a definition of preliminary objections, nor restrict preliminary objections to those of a jurisdictional nature, as it was suggested in some of the observations received.

Reference is made, by way of general description in paragraph 1 of Article 67, to any objections "to the jurisdiction of the Court, or to the admissibility of the application, or other objection the decision upon which is requested before *any* further proceedings on the merits".

It was felt that to refer only to jurisdiction or admissibility would not be sufficiently comprehensive. A party may have to raise within the same time-limits and seeking suspensive effects certain preliminary points which would not fall within these two categories of objections. Thus, in the *United States*

Nationals in Morocco case, the preliminary objection filed by the Respondent sought certain clarifications as to the parties in whose name and on whose behalf the proceedings had been instituted. As such, it was really a form of the *exceptio obscuri libelli* which was considered a genuine preliminary objection when filed in the *Phosphates in Morocco* case before the Permanent Court. The fact that such preliminary objection may be withdrawn as a consequence of the clarification furnished later by the Applicant or that the Court finds the obscurities to have disappeared in the course of the further proceedings, have to do with the way of disposing of the objection, but do not affect its preliminary nature nor the right of a party to file it and obtain from it suspensive effects.

Likewise, to restrict preliminary objections to those of a jurisdictional nature or to verify in any way the nature of the objection might have resulted in the establishment of a pre-preliminary phase, including a hearing of the parties, additional to the two-phase procedure now existing, with the purpose of determining whether the objection proposed fell within the permissible category. It was felt that such an initial verification or pre-preliminary procedure far from contributing to solve the existing problems might aggravate them into a most acute form. This would be particularly so because of the differences of concept and terminology with respect to the distinction between objections against jurisdiction and admissibility.

This distinction is a very difficult one to draw and may change from case to case. Thus, the non-existence of a dispute or the non-exhaustion of local remedies may be deemed an objection against admissibility or against jurisdiction, depending on whether the respondent relies upon customary international law or on the text or the compromissory clause conferring jurisdiction on the Court.

The new Rules do not compel the Court to make any scholastic distinctions of this sort nor to classify the objections before passing on them. Paragraph 7 applies to all objections, and the only effect of paragraph 6 on this point is that the Court is compelled to hear all questions of law and fact that bear on the issue of its own jurisdiction, which must be determined at the initial stage.

(5) Other Procedural Aspects of Preliminary Objections

(a) Time-limit for filing a preliminary objection

With a view to accelerate the proceedings and avoid unnecessary delays, it had been suggested that a party should file a preliminary objection as soon as it receives the Application or a short time after receiving the Memorial. While

these proposals have an objective, which coincided with the main approach followed in the amendments to the Rules of Procedure, these suggestions could not be adopted since they might affect the right of defence of the respondent. As to the first suggestion, that the preliminary objection should be filed as soon as the Application had been received, it was felt that a respondent had a right to wait for the full development of the applicant's case in the Memorial, before being obliged to file its objection. Otherwise the applicant who had all the time it wished to draft its Application would also be allowed to shape its Memorial so as to try to defeat the objection it had already been able to study.

As to the second time-limit, for instance, thirty days after the filing of the Memorial, it was felt that this time-limit might not be sufficient in certain cases in view of the increasing legal complications arising from the reservations to the acceptance of compulsory jurisdiction. Both in the *Nottebohm* and in the *Anglo Iranian* case, the objections which finally succeeded before the Court had not been raised in the initial stages of those two cases, probably because they had required expert legal advice and prolonged study by counsel.

(b) Who may file a preliminary objection

The last sentence of paragraph 1 of Article 67 makes it clear that a preliminary objection may be filed by a party other than the respondent. This sentence reads: "Any such objection made by a party other than the respondent shall be filed within the time-limit fixed for the delivery of the party's first pleading."

It had been suggested that the Rules should provide that only the respondent may file preliminary objections against an Application, arguing that the question of preliminary objections does not arise in the case of the applicant or of a special agreement. It is adduced in support of such a restriction that the filing of an Application implies a recognition of the Court's jurisdiction and that the special agreement also has the implication that both parties have recognized the jurisdiction of the Court.

However, the new Rules restate, in a more categorical form, the 1946 system which allows an applicant or the party to a special agreement to file preliminary objections. The 1946 Rules by failing to make any distinction whatsoever as to the right to file preliminary objections allowed any party to a case before the Court to submit them, even after having subscribed a special agreement or being the applicant in the preceedings.

The experience both of the Permanent Court and of the present Court had shown that the filing of preliminary objections by those parties was not *une hypothèse d'école.*

In the *Monetary Gold Removed from Rome*, the present Court found that a genuine Preliminary Objection could be filed by the Applicant.[26] In the *Borchgrave* case, a party to a special agreement providing for the jurisdiction of the Permanent Court had felt compelled to file a preliminary objection because it considered that the other party had made claims which went beyond the scope of the agreement.

This experience indicated that it would have been injudicious to declare or imply in a rule of Court that entering into a special agreement necessarily entails a waiver of certain defences or of their preliminary character. Such a party should not only be authorised to raise objections against the validity or operative force of the agreement, but also with respect to the admissibility of the claim submitted under the agreement. In the history of the law of international responsibility, there are several examples of agreements by which a State has consented to arbitrate or settle by judicial methods certain categories of claims without giving up in so doing, its right to raise before the tribunal as preliminary objection, certain defenses such as lack of nationality, of *jus standi* or the non-exhaustion of local remedies. It would not seem appropriate to prejudge in a rule of Court what must always be *une question d'espèce* depending on the interpretation of each special agreement and on the circumstances of the case.

(c) The decision to be embodied in a judgement

Paragraph 7 of Article 67 of the Rules introduces the requirement that the final decision of the Court on the preliminary objection should be in the form of a judgement. This is appropriate in view of the importance of such a determination, and although it was not required in the 1946 Rules, it corresponds to the established practice of the International Court of Justice. On the other hand, the Permanent Court normally took the decision of joinder in the form of an Order of Court.[27]

(d) Agreement of the parties to hear a preliminary objection in the framework of the merits

It was not the aim of the amendments adopted to exclude a possibility which was afforded by the 1946 Rules as shown by the *Norwegian Loans* case between France and Norway: that after a preliminary objection had been filed, the parties might agree to discuss it and have it decided at the stage of the merits.

[26] *I.C.J. Reports 1954*, p. 29.
[27] *P.C.I.J., Series A/B, No. 52*, p. 14; No. 66 p. 9; No. 67, p. 23; No. 75, p. 5.

It might be pointed out, in this respect, that under Article 34 of the Rules such a possibility continued to exist.

In order, however, to dispel any doubt, paragraph 8 provides that:

"Any agreement between the parties that an objection submitted under paragraph 1 be heard and determined within the framework of the merits shall be given effect by the Court".

(e) Arguments and evidence concerning the preliminary objection

Paragraph 5 of Article 67 provides that the statements of fact and law in the pleadings and the statements and evidence presented at the hearings concerning a preliminary objection "shall be confined to those matters that are relevant to the objection". This provision is in line with the existing practice of the Court, which had attempted to avoid in the pleadings and hearings at the preliminary stage a discussion of the merits of the case, restricting also the evidence to the maintainability of the preliminary objections.

The existence in the Rules of Court of this provision may induce counsel to comply spontaneously with this necessary restriction, thus avoiding the necessity for the President of calling counsel to order for going beyond the scope of the preliminary question.

IV. Conclusions

The amendments introduced by the Court on 10 may 1972 to the Rules of Procedure which have been in force for more than 25 years are calculated to provide greater flexibility, to avoid delays and to simplify procedures in both contentious and advisory proceedings.

To repeat, the main changes are: to permit expressly the parties to influence the composition of *ad hoc* Chambers; to suppress the right to a Reply or Rejoinder, thus reducing the normal number of pleadings to the Memorial and counter-Memorial; to exercise greater control over oral proceedings by indicating precise questions to be dealt with or others on which there has been sufficient argument; to provide for accelerated and exclusively oral proceedings in urgent requests for an advisory opinion and finally, to determine the Court's jurisdiction at the preliminary stage of the case and eliminate the express authorization in the Rules for the joinder to the merits of a preliminary objection.

It is to be expected that the effect of these Rules, and particularly the interaction among the various amendments adopted, will result in

a more expeditious and a less onerous administration of international justice.

The amendments come into force on 1 September 1972 and from that date replace the Rules adopted by the Court on 6 May 1946. However, the new Rules will not apply to any case submitted to the Court before 1 September 1972, or to any phase of such a case, even if that phase begins after 1 September 1972. The reason for this is that if the old Rules apply to the proceedings on the merits of a case submitted before 1 September 1972, they should *a fortiori* apply to any incidental proceedings arising in that case, whatever the date of the commencement of such incidental proceedings.

Of course, if the parties to such a case prefer the application of all or part of the new Rules, they are free to submit a joint request to that effect, under Article 34 of the Rules.

The amendment of the Rules is not a panacea designed to solve all the difficulties with which the Court is faced or to remedy its present problems. It is not to be expected that mere changes in procedure will, by themselves, result in correcting the existing crisis of under-employment which affects the Court. While Rules of Procedure are important, their function is a limited one, dealing as they do, with the orderly and expeditious administration of justice only after States have decided to have recourse to the Court.

However, the improvement and modernisation of the Rules of Court, after 25 years of application, is a duty, which the Court must perform, independently of its effects, whenever its judicial functions allow time for doing so.

Such an effort might be a contributing factor in a renewal of confidence in this organ, showing it capable of bringing up-to-date its procedures and methods of work and of adjusting itself to new requirements and contemporary conditions.

UNRATIFIED CODIFICATION CONVENTIONS

Lecture delivered on 11 July 1973
by Professor Constantin Th. Eustathiades
University of Athens
Member of the Institute of International Law
Former member – International Law Commission

Foreword

Mr. Chairman and illustrious friend,

I thank you, and my former colleagues of the International Law Commission, for the honour you show me in inviting me to rejoin you today. Your kind invitation on behalf of the Commission has nevertheless put me in the somewhat difficult position of having "to send owls to Athens" (γλαυκας ∈ις Αθηνα κομ{ξ∈ω) to quote an ancient Greek proverb meaning that one cannot contribute anything of substance to a place where wisdom and experience already abound. For Geneva is very much Athens as far as the subject to be dealt with here is concerned. Despite that, I accepted this weighty honour for the reason that all of us wish to remember Gilberto Amado, who was the much-loved doyen of the Commission. The memory of this eminent Brazilian jurist and man of letters will never fade for any of us. My first encounter with Gilberto Amado, some 15 years ago at the General Assembly, was a duel; he, with his customary humour, was vigorously attacking the arbitration draft of Georges Scelle, his colleague on the International Law Commission, while I was trying to rescue what could be salvaged from it through a set of rules on arbitral procedure. From then on, whether in New York, Geneva or Vienna, Amado bestowed on me for over 10 years that gentle affection, with its polish, dignity and warmth, which he knew how to give his friends.

No one can forget this illustrious Brazilian with his small figure and his big mind that generated a vivid expression of kindness as well

as criticism. His eyes shone with a readiness to harvest everything in life, which is beautiful. He was progressive and yet realistic, sceptical and yet imbued with constructive common sense and a firm belief in the work of the International Law Commission. We still feel the presence of our doyen Amado, full of humanity and ready to open his arms and his heart to his friends.

Unratified Codification Conventions

There exist several codification conventions which a large number of States have not accepted. The task of codification is undertaken collectively and almost at a universal level, and the texts that result from it, being of general interest to all the States composing the international community, are intended to acquire a virtually universal conventional validity through State consent, given by ratification or accession. Yet that consent is often lacking. Of course, with codification conventions, just as with any other treaty, every State remains the sole judge of whether and when to take a decision that will bind it conventionally to accept the results of the collective work of codification. This freedom on the part of States is their recompense for obligatory submission to the rules of general international law. However, where codification conventions are concerned, these rules may gain the ascendancy after all by establishing themselves in the codification process and thus becoming binding on States. This situation gives rise to difficulties, an inherent characteristic of any process whereby international custom is formed and certainly one which is aggravated in the case of matters covered by unratified codification conventions.

Unratified codification conventions are not a new phenomenon. The problem existed with the 1899 and 1907 Hague Conventions and also with the Declaration of London of 1909, although having different causes and producing different effects. At the beginning of the century, in an international society consisting of only a few States, the characteristic

feature of codification was its declaratory nature. This was so marked at that time that not even the general participation clause *(clausula si omnes)* gave much trouble; because of the fundamentally declaratory nature of The Hague codification, the codified rules expressed in unratified conventions lost their contractual character but remained valid as customary rules of general international law.

This old problem of numerous refusals to ratify conventions or of undue delays in ratification or accession was met with during the League of Nations period also, and has become even more widespread in the present period of codification. This is because there are now a greater number of codification conventions and also many more States; because in today's international society States differ more sharply in their views and in the trends they represent; and perhaps above all, because present-day codification, which goes much further beyond the mere expression of customary international law than the earlier conventions did, is increasingly characterized by the "progressive development of international law". The latter feature means that the codifications process gives rise to texts which, although dictated by the existing needs of the international community, nevertheless establish new rules. In this respect, the question that arises is whether and to what extent the new rules appearing in codification conventions affect general international law regardless of ratification. This is the most difficult and most important aspect of the non-ratification of codification conventions.

The question of the final stage of the codification process, namely State consent, received attention from the International Law Commission at its twentieth session (1968), at which the problem was discussed in the light of a memorandum submitted by Professor Ago (A/CN. 4/205/ Rev.1).[28]

The remedies concerning which the members of the Commission were invited to express an opinion were basically the application, within the framework of the United Nations, of ideas and moves current at the time of the League of Nations, together with the adoption of the rules followed by some of the specialized agencies setting States a time-limit for bringing a convention before their competent national authorities and placing them under an obligation to report any difficulties or other factors preventing or delaying ratification. That was the gist of the system discussed in the International Law Commission. The memorandum submitted to the Commission envisaged three means of giving effect to the system within the framework of the United Nations: (a) amendment to the

[28] *Yearbook of the International Law Commission*, 1968, vol. II, pages 171-178.

United Nations Charter, (b) recommendation by the General Assembly, and (c) adoption of appropriate protocols of signature at codification conferences.

In order to judge the effectiveness of the system and the efficacy of the above means of applying it, we should perhaps first ascertain, after investigating the matter with the assistance of the Secretariat, whether, to what extent and in what circumstances General Assembly resolutions inviting States to ratify this or that convention have been successful in increasing the number of ratifications in the past. For a somewhat peculiar situation would arise, having regard to the importance of the issue, if States were encouraged to recommend to themselves that they should ratify a convention which they had not ratified or if advice was given to others to do something which those giving the advice refrained from doing themselves.

In assessing the significance of the discussion in the International Law Commission, it is necessary to distinguish clearly between the principle or general outline of the system and the three methods of applying it. As far as the methods of application were concerned, the Commission as a whole did not greet them enthusiastically, although some members welcomed one or other of them.[29] As regards the principle, the Commission likewise failed, when it came to it, to show any great enthusiasm for the underlying system to which the methods were to apply, namely the submission of the convention to the competent national authorities within a reasonable period of time and/or the reporting of reasons for non-ratification. At the end of the discussion, the Chairman, Mr. Ruda, said that the Commission should not make any specific recommendations; the United Nations Legal Counsel, Mr. Stavropoulos, endorsed that view and said that the conditions obtaining in the International Labour Organization were special and that its system might not function effectively within the United Nations (978th meeting of the Commission, paragraphs 57–58).[30]

As to whether the system in question is the best or only way of dealing with the problem of non-ratification of codification conventions, the idea forming the basis of the system, and therefore of its means of application, is essentially the exercise of persuasion or pressure against Governments in one form or another in order to encourage them to ratify or accede to a convention.

In the case of existing unratified codification conventions, the discussion of certain means of exerting pressure or persuasion, of the kind

[29] *Yearbook of the International Law Commission*, 1968, vol. I, pages 191-205.
[30] Ibid., page 203.

recommended by the League of Nations and studied by the Commission, is conceivable. For if the possibility of revising a convention is ruled out, the only remedy possible after the event is to attempt to subject States to persuasion. But at this point we must go further and see what causes lie behind non-ratification in each case.

The reasons for non-ratification may well be technical or administrative: a lack of specialists in technical subjects, insufficient knowledge on the part of representatives at codification conferences, a shortage of qualified translators and also, in some cases, the absence of any clear idea as to the purpose of treaties awaiting ratification. In addition, in many instances, States do not regard ratification as urgent or as being as pressing as domestic matters. Even more often, there is the inertia of technical and administrative machinery. Apart from these obstacles, the ratification of a codification convention or accession to one may necessitate interministerial talks, not to mention the fact of delays arising from obligatory constitutional procedures.

If reasons of the above kind, i.e., reasons basically or in the main of a technical and administrative nature, are at the root of non-ratification, they obviously account for delay in ratification, but do not imply genuine opposition to it, so that it would be possible in those circumstances to think in terms of one or other of the means of pressure mentioned above.

On the other hand, in what we may regard as the most serious and most frequent cases, there are other reasons for non-ratification – deeper reasons connected with a genuine opposition to the content of a convention – in other words, reasons which concern the essential interests of the State and therefore occasion refusal or reluctance to ratify the convention. There is really very little likelihood in such cases that the use of pressure will induce States to ratify existing codification conventions.

The matter must be taken further than that, however. Looking ahead and thinking of future codification conventions, we should be wise to consider the question of their ratification from quite a different angle. Any consideration of the problem of unratified codification conventions and possible solutions to it must be based on a distinction between existing and future codification conventions. Different remedies are best suited to one and the other class of instrument. In the case of existing conventions, where the final stage of the codification process has already been reached, the only conceivable way of securing ratification is to use certain methods of persuasion or pressure against Governments, even though such methods, as we have seen, are far from effective, particularly where non-ratification is due to political reasons, to genuine opposition to

the substance of a convention. In the case of future conventions, it would be best to avoid such opposition arising altogether and to think in different terms, i.e., of preventing the evil, in order that the disturbing situation of there being too few ratifications or accessions does not recur.

For what is involved is not only the highly important question of the validity of the codified law geographically, but also the very serious matter of the force and content of general international law.

The existence of codification conventions which are not widely accepted by States raises the following questions: what are the effects of a codifications process which covers several stages and stops at the final stage, that of State consent, and what will its effects be if the present situation continues? Are these effects always beneficial? May they not offer certain drawbacks as well? More specifically, what influence can the codification process have on the rules of general international law? Can it serve to consolidate previously existing customary rules or even help to form new customary rules? These are certainly crucial aspects of the problem.

In order to understand it clearly, in the interests of eliminating undue refusal or delay in ratification, in other words a failure to complete the final stage of the codifications process, we must first review the previous stages of the process:

1. In the initial stage, that of the preparation of the draft, various elements often emerge; they are taken into consideration and cannot subsequently be ignored: municipal legislation, decisions of municipal tribunals, international judicial or arbitral decisions, bilateral or other international conventions, and so on. The richer this material is, the stronger the knowledge will be that the final wording of the draft is based on facts which testify to the existence of an international custom, or at least of one which is at an advanced stage of formation. It may then be the case that during the discussion of the draft all or some of the members of the competent organ (either the International Law Commission or another body) state that in their opinion the proposals discussed reflect general international law. Conversely, a particular provision of the draft may have no solid basis in precedent or may even lack precedents altogether, but may have been included in order to cover the subject matter comprehensively, thus filling a gap in general international law and formulating a rule *de lege ferenda.*

2. Subsequently, when the proposed text is discussed and voted on at an international conference or at the assembly of a widely representative international organisation (the United Nations General Assembly, a conference of a specialised agency or a diplomatic codification conference), it often happens that a majority or a fairly discernible trend emerges in favour of a particular effect or provision of the draft. Moreover, such a majority may include representatives who have not only spoken in support of certain arrangements or provisions, but have also stated that in their view or in that of their Governments the solutions concerned are already recognized in general international law.

Conversely, a minority of representatives that is substantial either numerically or in terms of the importance of the States represented in relation to the subject under discussion may oppose a particular wording and may even say that a certain article or provision conflicts with general international law. This minority may be characterized by the fact that it consists of States, which are especially representative as regards a specific matter and unusually firm in their stand. Minorities of this kind, seen against a background of numerous abstentions – where such is the case – may carry considerable weight if compared with essentially relative majorities. Circumstances of that sort may count when it comes to judging the merits of unratified instruments.

Factors such as those mentioned under headings 1 and 2 above which enter into the preparation of a codifying convention cannot be ignored when the value of an unratified codification convention has to be assessed in a concrete case, e.g., in a dispute between States where all or some of the States concerned have failed to ratify the convention in question. In a disagreement or dispute, the circumstances I have mentioned – legal materials, draft texts, discussion, opinions and statements of participants in deliberative bodies, voting – may be advanced by the parties, or considered by the body responsible for settling the dispute, as support for a particular argument on the value of the disputed rule from the standpoint of general international law. This is because the rule in question, although not binding conventionally, being *ex hypothesi* a rule in an unratified convention, may be regarded as a mandatory rule of general international law before the codification process takes place or may become one afterwards.

This is not a purely theoretical point. Leaving aside other examples, we may confine ourselves to one of the more recent and instructive

instances of it: the International Court of Justice in its consideration of the *North Sea Continental Shelf* cases, had recourse to elements of the kind mentioned above in order to ascertain whether a rule of customary international law existed that corresponded to article 6 of the 1958 Geneva Convention on the Continental Shelf and would therefore be applicable to the Federal Republic of Germany, which had not ratified the Convention. The Court referred more than once to the work of the International Law Commission (Judgement, paragraphs 48 et seq.)[31]. It mentioned in particular the records of the Commission, the views of its members, its discussions (ibid.; paragraphs 49-50) and the Report of the Commission for 1953 (ibid., paragraph 53) and of course the Commission's draft (ibid., paragraph 62) and the discussions at the 1958 Geneva Conference on the Law of the Sea (ibid., paragraphs 54 and 61).

As far as signature is concerned, the position is, generally speaking, that a signed convention to which the consent of a State has not been given by ratification or accession is not legally binding on it, except in the exceptional cases in which ratification is unnecessary. In the case of a convention for the codification of international law, however, although this means that the convention is not binding as such, i.e., that the rules it contains have no contractual force, it does not necessarily follow that those rules are inapplicable as rules of general international law.

Obviously, from the strictly legal point of view, ratifications alone will elevate the signed text from the status of a draft convention to the level of positive law, thus giving it the force of a mandatory contractual rule. But although this is the case with a contract-making treaty or law-making treaty of the bilateral kind, it is scarcely so with a collective convention where the wording of the convention has been elaborated over a long period by a qualified international body and may have been widely discussed at an assembly or an international conference of plenipotentiaries – a collective convention intended to constitute a universally valid codification. The contribution of a signed but unratified convention to the formation of international custom is considerable. That was already the position in the past and it has become more and more certain. Furthermore, in the past the force of a signed and unratified convention in general international law was beyond doubt in the case of a convention declaratory of customary law, and today that force is enhanced by its extension to codification conventions which contain new rules in addition to existing ones, i.e., by the fact that it embraces the new rules as well. A signed convention which is not ratified by the interested

[31] *North Sea Continental Shelf, Judgment, I.C.J Reports 1969* (Sales No. 327).

party may gain in authority in terms of general international law if it has been ratified by a large and representative number of States other than the interested party.

The inaction of a State in the face of a convention open for ratification or accession, particularly where the convention contains new rules, in other words its abstention from becoming a contracting party, may admittedly be due to various causes, but it is the "positive acceptance" of the convention by that State which will govern the application of the convention to it. In the *North Sea Continental Shelf* cases, the International Court of Justice stated: "That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain" (ibid., paragraph 73, page 42). In any event, as regards the application of rules set forth in an unratified convention as an expression of general international law, if the number of States that refrain from accepting the convention is relatively high, the situation is tantamount to broad opposition to the convention, which cannot therefore be regarded as reflecting general international law.

Moreover, with respect once again to a convention which is not purely and simply declaratory and contains new rules, if a long period of time elapses during which numerous and representative States fail to ratify or accede to the convention, the absence of ratification or accession is equivalent to widespread disapproval of the convention; this, combined with contrary practice, i.e., practice not implying acceptance of the rules contained in the convention, destroys the authority which the convention might have had in general international law.

The situation alters completely, however, where the States that have ratified the convention are numerous and representative. A convention codifying international law may, if it has secured a substantial number of representative ratifications, have a decisive bearing on general international law and therefore bind a State which is not a party to it. The numerical level of ratifications or accessions required for a codification convention to be recognized as expressing general international law will of course be a matter for appreciation in each particular case.

In this respect, the International Court of Justice has taken the following position: "With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that even without the passage of any considerable period of time, a very widespread and representative

participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected… the number of ratifications and accessions so far secured is, though respectable, hardly sufficient." (Ibid., paragraph 73). The requisite number thus becomes a question of fact in each particular case. It has to be asked, however, whether there will always be an impartial authority to decide, in a specific case, if the number of ratifications or accessions is "sufficient".

A further point is that an unratified codification convention may produce or, as the case may be, strengthen its effects in general international law where its is subsequently supplemented by international practice which accords with the convention. In the *Nottebohm* case (second phase, Judgement, *I.C.J. Reports 1955*, page 22), the International Court of Justice, although the parties were not bound by The Hague Convention relating to the Conflict of Nationality Laws of 12 April 1930, took account of a practice based on article 1 and 5 of the Convention (cf. *North Sea Continental Shelf, Judgement, I.C.J Reports 1969*, paragraph 74). In order for a practice to constitute an element of proof of the existence of a rule of general international law, it must however be prevalent, "extensive and virtually uniform" and emanate from the States whose interests are specially affected (ibid.). It is therefore possible that, because of the effect of ratifications and the influence of practice which accords with the convention, some uncertainty may arise as to the rules of customary law, since each specific case will raise the question whether, from the point of view of the value of the above mentioned elements as a factor in the formation of custom, the number and importance of the ratifications is to be regarded as "sufficient" or whether subsequent practice must be considered relevant.

The ratifications may bear heavily and decisively on international law, or more precisely on the formation of a customary rule, since they may be found to express an international custom if considered both quantitatively and qualitatively and viewed either in isolation or, as the case may be, in conjunction with other factors. The latter may be anterior circumstances such as unanimous adoption by a very large majority at a codification conference, or the existence of a substantial number of signatures, or posterior circumstances such as general practice subsequent to the convention.

Also, quite apart from signature, a text adopted by a large majority at a major conference such as a codification conference, and particularly a text adopted unanimously or by a majority exceeding the two-thirds majority required by the rules of procedure of such conferences, acquires

considerable authority by the mere fact of that acceptance – one might say that approval of the text in principle.

Not only signed or adopted conventions but also other texts considered during the process of codification may be advanced to support an argument or be given consideration, particularly drafts prepared by a widely representative commission or committee, such as the drafts of the International Law Commission. The Commission's drafts may be cited where the codification process has gone no further than the preparation of a draft by the Commission, and not only where it has continued in the General Assembly or at a codification conference and the Assembly or the conference is known to have taken the draft as a basis for discussion and to have amended it very little.

To sum up, all the elements, which emerge during the codification process, may be taken into consideration in solving a specific dispute where the question arises of the extent to which an unratified codification convention should be recognized in general international law.

Not all the elements mentioned so far will be cited or considered in every dispute, but some or other of them, depending on the circumstances, may come up for examination with a view to the ascertainment of their contribution to and effect on rules contained in an unratified codification convention – rules which are not binding as conventional rules but in respect of which it has to be decided whether they are mandatory as rules of general international law.

The factors referred to above are relevant to the appreciation of the general international law existing both before and after the codification process, regardless of the final stage, which is ratification or accession, the question will arise whether a rule of general international law existed before that process and whether international law was affected by various elements that emerged during the work of codification. It is a difficult and important question and it occurs in relationships between all States – in the relationships of those which have ratified with those which have not and in the relationships of those which have not ratified both with those which have and with others which have not. The force of general international law extends far and wide, to all States forming the international community.

The elements which emerge during the codification process (drafts, discussion, voting, texts adopted by a codification conference, signed conventions) may call for consideration regardless of ratification when it is a question of appreciating, in a specific case, the existence or non-existence of international obligations in the sense of rights which are

not contractual but which flow from general international law, or more precisely form an international custom.

We have seen that the codification process gives rise to various successive factors and raises difficult questions, in particular with regard to the contribution of each factor to general international law, and more particularly as to whether and to what extent a given factor is to be regarded as contributing to the consolidation or formation of a general customary rule. Thus the codification process in itself, considered separately from ratification, may acquire its own significance and have considerable consequences for general international law and therefore for the rights and obligations of States. Such a degree of influence is undoubtedly beneficial when the codification in question is declaratory. Conversely, however, an unratified codification convention, in other words the codification process considered independently of ratification, may encourage disagreement as to general international law and even increase uncertainty as regards customary international law, in particular where provisions setting forth new rules are concerned. Nowadays, of course, "codification" properly includes the "progressive development" of international law in one and the same convention. Consequently, where a codification convention is permeated with the additional aim of developing international law, in other words where it constitutes codification *latu sensu* – which is often the purpose of present-day codification conventions – it will comprise both rules already received into general international law and new rules. In the case of the latter, the codification process considered as such, separately from ratification, may be of substantial significance in terms of general international law and may affect that law, particularly in conjunction with other elements such as ratification by States other than the State which is a party to a dispute; it may thus raise the difficult and important question whether new rules of international law have emerged – rules which , if that were the case, would be opposable to a State which had not given its consent to the convention in question. It may be recalled that article 38 of the Vienna Convention on the Law of Treaties provided for such a situation, although not very forcefully, by stating that "nothing in articles 34 to 37" (Treaties and Third States) "precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such" (the underlining is the speaker's).

This aspect of the problem of unratified codification conventions is illustrated by the *North Sea Continental Shelf* cases mentioned above. The question there was whether the equidistance rule set forth in article 6 of the 1958 Geneva Convention on the Continental Shelf was opposable to the

Federal Republic of Germany; no one disputed the fact that the convention did not bind the Federal Republic contractually, nor was it open to question that the rule in point (the "equidistance-special circumstances" rule) did not belong to previously existing customary law and was definitely a new rule. The following passages of the judgement of the International Court of Justice are relevant in this connexion:

> It is maintained by Denmark and the Netherlands that the Federal Republic, whatever its position may be in relation to the Geneva Convention, considered as such, is in any event bound to accept delimitation on an equidistance-special circumstances basis, because the use of this method is not in the nature of a merely conventional obligation, but is, or must now be regarded as involving, a rule that is part of the corpus of general international law… This contention… is based on the work done in this field by international legal bodies, on State practice and on the influence attributed to the Geneva Convention itself – the claim being that these various factors have cumulatively evidenced or been creative of the *opinion juris sive necessitatis,* requisite for the formation of new rules of customary international law (Judgement, paragraph 37).[32]

From the point of view of the present discussion, it is of little importance that the Court ultimately rejected the contention of Denmark and the Netherlands; what is particularly instructive, as regards our problem, is that in examining the specific case in question the Court followed the same reasoning and the same method of investigation as formed the basis of the argument put forward by those States for determining whether the equidistance-special circumstances rule had "become a rule of positive law through influences such as those of the Geneva Convention and State practice" (Judgement, paragraph 38).

Later in this Judgement we find the following:

> … the question whether… through positive law processes, the equidistance principle has come to be regarded as a rule of customary international law, so that it would be obligatory for the Federal Republic in that way, even though Article 6 of the Geneva Convention is not as such, opposable to it. For this purpose, it is necessary to examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of State practice subsequent to the Convention… The first of these questions can conveniently be considered in

[32] *North Sea Continental Shelf, Judgement, I.C.J. Reports 1969* (Sales No. 327).

> the form suggested on behalf of Denmark and the Netherlands themselves in the course of the oral hearing… Their contention was, rather, that although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet 'the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference'; and this emerging customary law became 'crystallized in the adoption of the Continental Shelf Convention by the Conference'. Whatever validity this contention may have in respect of at least certain parts of the Convention, the Court cannot accept it as regards the delimitation provision (Article 6)… (Judgement, paragraphs 60-62).

Paragraph 69 of the Judgement then runs:

> A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: *qua* conventional rule however, as it has already been concluded, it is not opposable to the Federal Republic.

Finally we read in paragraph 71:

> … a rule which, only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris,* so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed (The underlining is the speaker's).

The conclusion to be drawn from the judgement of the Court is that a rule which is not declaratory of customary international law and is set forth in an unratified codification convention may, if certain conditions are fulfilled, become a rule of general international law. Moreover, the consideration which the Court gave the matter shows that in order to make a finding on the formation of a new rule of customary international law as a result of a codification convention, the Court examined not only State practice subsequent to the convention, but also different elements which had emerged during the process of codification. The Court proceeded in that manner in order to ascertain the influence of the convention on the formation of new rules of general international law – rules opposable *qua*

rules of general international law to a State which had not ratified the convention.

In the light of the foregoing considerations, substantiated as they are by the Judgement of the International Court of Justice referred to above, it will be seen that, in the case of a codification convention *latu sensu,* in other words a convention which codifies and "progressively develops" international law, a convention, that is, which contains innovations, the codification process considered independently of ratification may give rise to new customary rules and thereby alter the rights and obligations of States regardless of the consent which the convention requires from them to be valid as such. Just as States are recompensed for submitting to international law by their freedom to contract, so the *quid pro quo* for that freedom is the authority of general international law irrespective of the consent of States.

We have now seen that the actual process of codification, in other words an unratified codification convention, affects or may affect general international law through non-declaratory provisions which develop international law, i.e., provisions involving new rules, provisions which may be important and turn out to be strongly contested. An unratified codification convention may therefore open the door to disputes and provoke, if not some confusion, at least uncertainty as to rules concerning the matters which are dealt with in the convention and which it was precisely the purpose of the codification to clarify with the result that there may be some uneasiness or doubt as to the state of the law instead of the desired certainty.

Uncertainty concerning the customary law, its content and the point in time at which it becomes valid – the uncertainty that arises from the existence of unratified codification conventions – is of course just one aspect of the more general uncertainty that accompanies the psychological and sociologial complexities involved in the formation of rules of customary international law. It is aggravated, however, by the number and diversity of the factors that arise during the codification process and by the absence of any procedure for the settlement of disputes by an impartial arbiter, even though the difficult questions involved in weighing up the factors concerned call for careful and objective scrutiny in each individual case.

Where differences and arguments founded on such elements exist, there will not always be an international tribunal, as there was in the *North Sea Continental Shelf* cases, to examine and decide difficult questions concerning the validity, in terms of general international law, of a rule set

forth in an unratified codification convention. In the absence of a tribunal capable of finding on the continuance or emergence of customary rules as a result of the codification process, in other words, on the effects of an unratified Convention, the problem will become even more complicated.

During negotiation or talks aimed at settling a dispute in which provisions of an unratified conventions are involved, the parties will have at their disposal a wide range of arguments, since many elements – and possibly contradictory ones – will have emerged in the codification process. This may fortify their opposition and perhaps stiffen their arguments. Their respective contentions may take on a more relative character, since the value of the different elements called from the various stages of the codification process will be relative and not comparable with the undisputed force of a ratified convention. Moreover, if the dispute is referred to an outside body for settlement, there is the possibility that a decision by a judicial or arbitral body will differ considerably from one given by a political body. In short, if either no outside body or alternatively a political body is involved, disagreements and disputes involving an unratified convention will raise highly complex problems, especially where it has to be ascertained whether or not a particular convention has given rise to a rule of customary international law.

It is therefore of great importance that judicial or arbitral settlement should be made mandatory for disputes arising from the application and interpretation of codification conventions. It is common knowledge, however, that the obligation to resort to judicial or arbitral settlement is far from being generally acceptable.

This is one more reason for not showing indifference to the question of unratified codification conventions and for trying all possible means of securing as many acceptances as possible.

We have seen that the path followed by the League of Nations and the International Law Commission leads to methods consisting mainly of the exercise of persuasion or pressure against Governments in order to obtain their ratification or accession. This is certainly a brave course, offering both the merits and the shortcomings of optimism. Doubts may be felt, however, as to the effectiveness of employing *ex post facto* means of persuasion or pressure against Governments, particularly where their opposition is genuine and concerns the substance of the provisions of a codification convention. We may therefore ask how the present situation, in which codification conventions often lack widespread acceptance, could change as regards future codification convention so that in the future Governments are less reluctant to give their consent.

A. The possibility exists of employing certain recognized and specific methods or techniques which would help States to overcome the objections they might have to ratifying or acceding to a codification convention because of their opposition to certain of its provisions. These techniques cater for the fact that, where non-ratification is not due to technical or administrative factors, but to opposition to the substance of the conventional régime, such opposition is only partial and is confined to a particular provision or provisions of the convention. The methods which come to mind, leaving aside the question of which one or more of them would be most suitable for each particular case, are reservations, optional clauses and separate protocols.

(a) The increase to be expected in the number of ratifications as a result of States having been able to enter reservations would help to clarify the legal situation as regards the remainder of the convention, not only with respect to States which ratified it, but also in regard to those which did not, since it would be held, as far as the latter were concerned, that the existence of numerous ratifications by other States was an extremely important element from the point of view of general international law. The Convention on the High Seas, which secured a large number of ratifications, had reservations made to it, though its preamble stated that its provisions were "generally declaratory of established principles of international law".

(b) The same result could be achieved through the use of optional clauses, these being provisions concerning points on which final agreement as expressed by ratification appeared impossible; in the absence of an express declaration of acceptance, such provisions would be inoperative by ratification of the convention or accession to it.

(c) A third way of achieving the aim in question would be the use of separate or additional protocols concerning a particular aspect of the subject matter of the convention, i.e., containing provisions which, as codification progressed, appeared unacceptable to a large number of States. Ratification of the convention would be confined to the body of the convention itself: outside that, the provisions governing the matters regulated by the separate protocol would not apply until ratification of or accession to the protocol.

It will be recalled that the procedure of separate protocols has found particular use in connexion with the settlement of disputes relating to the interpretation or application of codification conventions. Examples of this are the Optional Protocol bearing the same date as the Vienna Convention on Diplomatic Relations of 18 April 1961, the Optional Protocol bearing the same date as the Vienna Convention on Consular Relations of 24 April 1963 and the Optional Protocol bearing the same date as the Convention on Special Missions of 16 December 1969.

The optional clause and additional protocol methods were employed in the European Convention on Human Rights, which contains two optional clauses, one concerning the competence of the European Commission of Human Rights to receive petitions from individuals (article 25) and the other concerning the competence of the European Court of Human Rights (article 46). The Convention is accompanied by an additional protocol dealing with certain social rights. The matters covered by the optional clause and additional protocol were very important, and since a consensus seemed unattainable, at least at the outset, it was thought best to act in such a way as to eliminate any grounds for non-ratification, which would have rendered the main body of the Convention inoperative.

The applicability of the specific methods mentioned above – reservations, optional clauses and separate protocols – will depend on the circumstances surrounding each particular codification convention. In so far as the use of one or other method is found appropriate, it should facilitate wider acceptance of the main body of the convention and promote progress towards universality. There is no denying, however, that the employment of devices of this kind would lead to the absence of a completely uniform set of undertakings for all ratifying or acceding States. The advantages and disadvantages will therefore have to be weighed in each case in order to determine whether a substantial corpus of rules that are widely accepted through ratification or accession is preferable to an instruments which, although more comprehensive, is not extensively ratified. In this respect, alongside other considerations, a judicious and objective forecast of the likelihood of widespread acceptance of the convention will establish whether the methods mentioned above should be employed in any given case. It will be easier to make such a forecast if the conditions discussed in the following paragraphs are met.

B. If the main reason for the lack of ratification by States is a genuine objection on their part to the contents of the convention, the constant aim, from the very start of the codification process and during all its various stages, should be to produce texts that stand a serious chance of gaining

broad acceptance, in order to forestall such opposition. From the choice of topic until the conclusion of the work of codification, an awareness must therefore be maintained, throughout the entire proceedings, of the crucial importance of formulating texts the contents of which are such that the texts are likely to be adopted by numerous and representative States.

As regards the choice of topic, with a view to securing numerous and representative ratifications and at the same time catering for subjects which reflect the present needs of the international community, and therefore necessitate new as well as existing rules of law, attention should be directed towards topics which are widely felt from the outset to call for fairly immediate regulation by convention. It would therefore seem appropriate to ascertain beforehand, on the basis of concrete facts – plain speaking and honest voting – whether in fact a manifest and widespread wish exists to regulate the topic in question in the conventional form. Unless the conventions elaborated concern topics which fulfil the above conditions, it is only to be expected that ratifications and accessions will be unduly delayed or non-existent.

Codifying conventions will of course contain new rules regardless of whether the topics selected meet these conditions. If the new rules are very numerous, it may be expected that many States will decline to consent to the convention, as can be the case with any international treaty which introduces too many innovations.

Although all States evince and declare their readiness to contribute to the task of codifying and progressively developing international law, they are not necessarily prepared to accept an excessive number of obligations or new rules. It must therefore be realized that to combine the creation of new rules with the consent of a large number of States is a delicate task, the success of which necessitates support from States in the form of a constructive attitude during the earlier stages of the codification process, and not a negative or delaying one in the ratification stage.

States certainly have much to answer for – and this is a situation which should not continue into the future – because in the stages prior to ratification they often decline to take advantage of the various opportunities available to them as work proceeds for making clearly known their views and intentions on particular sections or provisions of a draft; they rely instead on the freedom they possess, when the final stage of the codification process is reached, to ratify or not.

One possibility which is open to Governments, but which they have not hitherto utilized to any great extent, is that of making their views known by the submission of written "comments". Although, in

accordance with article 21, paragraph 2, of its Statute, the International Law Commission requests governments to submit comments on a draft in course of preparation, and is required to prepare the final draft "taking such comments into consideration" (Statute, article 22), many States fail to submit comments; these would nevertheless be extremely useful and, where submitted, receive close scrutiny from the Commission.

Later, in the General Assembly or conference of plenipotentiaries, Governments can make their intentions as to eventual acceptance plainly known through their representatives by means of unequivocal statements. The body in question will then have some guidance as to how it should proceed towards the elaboration and adoption of the final text.

Governments have yet another opportunity of taking a clearly defined position, namely at the voting stage, by refraining from voting simply to oblige others or against their better judgement and by not casting a favourable vote unless they seriously intend to ratify. In the elaboration and voting of drafts, representatives of Governments do not always seem guided by a desire, firstly, to avoid approving texts which cannot seriously be expected to secure numerous and representative ratifications and, secondly, to refrain from transforming the field of codification of international law into an arena for political propaganda.

Finally, after debate and voting, when the convention is open for signature at the General Assembly or conference of plenipotentiaries, the impression sometimes exists that signatures are subscribed solely in the knowledge of the rule that signature does not entail a commitment to ratify. Although this rule certainly holds good for codification conventions, the signing of such conventions must not in itself be regarded as devoid of certain effects. These effects are, on the one hand, as regards the State on whose behalf the signature is affixed, the attribution to that State of a provisional status in consequence of its approval of the instrument in principle as expressed by signature; and, on the other, as regards all States, the existence of an element which may enter into the reckoning in any assessment of the force of an unratified convention in terms of customary law.

It may be suspected that some signatures are given without due regard to the fact that, in the case of a codification convention prepared within a universal framework and intended for universal application, the signed text acquires a force which, although only relative, has effects in international law. Although a State which affixes its signature to such a codification convention does not bind itself in terms of contractual law, it nevertheless contributes to the process of formation of customary rules –

rules of general international law to which all States are subject and which *a fortiori* will be opposable to a signatory State.

Leaving the question of signature aside, States display conduct in the discussion and voting stages, as indicated above, which signifies attitudes on their part in the earlier phases of the codification process which are not borne out by their eventual refusal to ratify.

It must be realized that one of the factors which seriously affects the difficult problem of unratified codification conventions is the attitude taken by Governments themselves during the various phases of the codification process that precede the final stage of ratification. Governments and their representatives should make use of the various opportunities which we have seen to be open to them to make their views clearly known by the means mentioned above – written comments, amendments, statements and voting – before the final stage of the codification process is reached, so that, while there is still time, an attempt can be made to work out provisions likely to secure a satisfactory number of definitive assents, i.e., ratification's and accessions and not merely of favourable votes.

We must not forget that the possibility of advances in international law, through its codification and progressive development, depends in large part on numerous and representative ratifications and accessions being obtained, and that all States have an equal interest in this. Where a codification convention is widely ratified, the codification process acquires genuine value and makes a useful contribution to the consolidation or formulation of general rules of customary international law; where, however, the ratifications or accessions are insufficient to bring about such a result, the benefits of the process may give way to uncertainty as to what rule of law is to be applied. This disadvantage will be particularly irksome where no impartial third party is called upon to settle a dispute.

In the *Dictionnaire de la Terminologie du Droit International*,[33] the work of my illustrious teacher, J. Basdevant, we find (page 122) a precise definition of codification: "Codification is understood as involving not merely the declaration of the existing law but its development, improvement, reform, modification and amplification to meet the requirements of international relationships".

This is certainly codification enriched by "progressive development", which is necessary in an international society characterized by changes that necessitate adjustments in the law; when we speak of "progressive development", we mean provisions which set forth innovations by establishing new rules or abandoning traditional ones.

[33] Paris Sirey, 1960.

Since every State has different interests, it is understandable that some States should favour new rules and others object to them, just as it is understandable that some States should desire to retain existing rules and others wish to abolish them. In any such conflicts of attitudes and interests, various States, old or new, may take one side or the other, but it would be mistaken for us to think in terms of the existence of two distinct camps, one consisting of old States and the other of new.

At all events, the codification process has not been without beneficial effects in the sphere of codification itself and, more generally, in having helped to dispel mistrust, reconcile opposing views and promote the establishment and pursuit of collaboration, with the result that there has been a change of climate. With the necessary spirit of co-operation, there should be agreement on a course of action which will ensure that the real purpose of codification is achieved: greater harmony and greater clarity, through the broadest possible contractual acceptance of codification conventions, and not the widening of divergencies or the spread of uncertainty as to the rules of international law through the existence of unratified conventions.

The activity of codification is unquestionably of value to all, because where the rules of customary international law are clear and generally accepted, the effect of giving them conventional shape will be to strengthen them and facilitate their application; furthermore, where customary rules are contested, differing views and concepts will be reconciled to a greater degree if the rules are in the conventional form. International society has always lacked homogeneity, the fact that it is characterized by the existence of conflicting interests should stimulate rather than impede goodwill and a sense of realism on all sides, so that legal changes can be brought about wisely and in a spirit of genuine co-operation with a view to real progress in international law throughout a large part of international society. The existence of unratified texts can scarcely be counted as real progress in the codification and progressive development of international law.

For the sake of clarity in international legal relationships in both conventional and general international law, effort must henceforth be directed towards securing the largest possible number of ratifications and accessions. If this effort is to bear fruit, it must be made by all States at all stages of the codification process, with full awareness of the importance of what is involved and in the general interests of the international community. Those interests cannot be served by the existence of codification conventions, which fail to receive wide acceptance after a lenghthy process

of preparation. To risk jeopardizing the imposing achievements that are now taking place in the elaboration of conventions for the codification and progressive development of international law would be unjustified in the face of so much goodwill and painstaking work that exists.

We may surely hope that with future codification conventions, on the basis of past experience and in a changed climate, States will be guided by a common desire to narrow their differences and tend their support to solutions which are satisfactory to a large number. When all is said and done, it is of equal interest to all States forming the international community that codification conventions should be accepted as widely as possible.

Mr. Chairman, after the great deal of kind attention displayed by this distinguished audience, the hourglass, like the clepsydra by which the Athenians timed their orators, has run out. I thank you.

THE LAW AND THE PEACEFUL SETTLEMENT OF DISPUTES

Lecture delivered on 11 June 1975
by H.E. Mr. Manfred Lachs
President of the International Court of Justice

Speech made by Dr. Abdul H. Tabibi
Chairman of the International Law Commission at the
Gilberto Amado Memorial Lecture Dinner
held on 11 June 1975

President and Mrs. Lachs,
Judge and Mrs. Nagendra Singh,
Dear friends,
Distinguished guests,

In the East we have a proverb which runs like this: "those who live with a good name live forever". We are therefore gathered here to respect the memory of a man who lived with a good name among his friends, among his countrymen in his beloved Brazil and indeed throughout the world.

Gilberto Amado was a unique personality, not only as an international lawyer, but as a diplomat, as a humanist, as a poet and as a man of letters. He had strong devotion for his friends, with penetrating love and sincerity and that is why the memory of his friendship will never fade for any of us. My first encounter with Amado was in 1948 as a young jurist meeting a great patriarch or as the Indians used to say a true "guru". He too accepted me as his friend showering me with his affection and guidance until he died.

In all the conferences and gatherings he was like a torch burning and shining – he was the centre of attraction when he spoke in the General Assembly or in this Commission or in any international conference. He had a special style of his own to which everyone paid attention. He was not talking in rigid terminology of law, but he always gave to his talk an artistic and poetical touch, which made it colourful like a beautiful

piece of lyric. As a poet he was in a different mood, sometimes colourful, rosy, calm as spring breeze and soft like the smile of a baby, but he had moments and moods of rage, with eruption like a volcano and with force like a strong and heavy thunder, striking whoever stood in his path.

He was a short man but with the towering majesty of Mount Everest and splendour of Kilimanjaro. He was like a sun radiating love and affection with great tenderness for those he chose as his friends. He loved youth and new ideas and maybe it was because of this that when I stepped from Law School into the world of the United Nations and the legal work of the sixth Committee, which Professor Lachs was then presiding and where Amado was the great orator, my fate was sealed with them and perhaps that Amado with no son and I having lost a father long ago, were to fill this vacuum. I grew at his side like a young tree at the side and in the care of an oak tree, benefiting from the fruit of his knowledge and the shade of his affection. His defence of youth was proven when, during the discussion of the report of the ILC in the General Assembly, I proposed the item "Technical Assistance in the field of International Law and its wider appreciation". This question was opposed by the big powers and other members on financial grounds and I was fighting alone. The spokesman for the opposition was a well-known and elderly jurist from Belgium. At this moment the forceful personality of Gilberto Amado showed its face and came to my defence, which was the defence of youth and new ideas and it was after that that my proposal was accepted and the present Seminar is one of the offsprings of that programme. Amado served his country and the legal community very well until he set out on the common journey, which we all have to make. I should like to mention a famous poem of a great Indian poet, Rabindranath Tagore, which is quoted over and over again and of which I have been very fond from childhood. The lyric says: "Listen to the rumbling of the clouds, O Heart of mine, be brave, break through and leave for the unknown".

The great heart of Amado left bravely for the unknown but his memory will live forever in the heart of his countrymen and his friends – although as a Moslem and as an oriental I believe that no one dies completely, the real life only leaves the body, which is like a cage or a prison, and joins the power and eternal life, so that even when we pay respect to his memory we feel the vibration of his presence. It is thanks to the support of the Government of Brazil and the efforts of Ambassador Sette Câmara that it is possible to have this annual lecture in the name of our beloved friend, and I hope that whoever goes as representative of the International Law Commission to the annual meeting of the Inter-American Juridical Committee will visit the grave of Amado and pray for his soul and lay a colourful flower on his tomb.

Foreword

Before delivering the third Gilberto Amado lecture, I feel it is fitting for me to recall the man these lectures commemorate.

When the history of the International Law Commission is written, not only covering its work but also presenting the gallery of personalities who took part in it and shaped the Commission, Gilberto Amado will occupy in that gallery a place which is really unique. For unique he was, in the eyes of all who knew him; a true man of the renaissance in the midst of the twentieth century. And yet not out of place. For while recapturing the classical past, he was fully aware of the processes which have so radically changed the world. A man of the renaissance, I said, for vast was the sphere of his interest: poetry and fiction, philosophy and, finally, law. He himself was a poet, a writer, deeply rooted in his native Brazil, profoundly concerned with the well-being of his people and of all other peoples who suffered as a result of economic under-development, and with the human predicament as a whole. He had, to quote another great poet of his country, "the poet's virtuosity" and "the artist's sensitive plate". He shared Santayana's mood, serene and sometimes ironic, but unlike this favourite philosopher of his, he was not "dreamy or detached". Sensitive and sometimes severe, he had no time for ignorance, detested meanness and was generous in friendship and advice. He was a great *causeur,* and there was always much to be learned from conversing with him, as many here today will surely bear witness. Having known him for 23 years and enjoyed his friendship, I have frequently wondered what

led him to join the family of international lawyers after a long career in politics, in parliament and diplomacy, as writer and as poet?

What made him such an enthusiast for what is generally viewed as the dry, unimaginative work of a draftsman of international legal instruments? But I found in him the living refutation of that view. He himself drew inspiration from international law; "in today's tortured world," he once said, he did not think "States had time to call professors together to draw up models by which they might perhaps be guided. What States wanted was that the problem should really be settled and the Commission must settle them".

A master of words and of their choice, he made use of that mastery in his dual existence and dual function. As a writer, he found them an instrument by which to express the beauty and brutality of life. As a lawmaker he saw words as "merely the means used by States to define their interest and explain their views". He therefore kept reminding us, and warning at the same time, "not to propose to States texts which might hamper them when they met in conference to conclude" conventions the Commission had drafted for them.

How can one forget some of the masterly formulations, which fell from his lips, such as "the insidious wiles of that serpent of the law, the *rebus sic stantibus*". Or when he said "we have no right to shut our eyes to realities… in an age when the present is shrinking and the future is increasingly upon us".[34]

Here the philosopher, writer and jurist have become one.

"…it was the responsibility of jurists", he used to say, "to elaborate the instruments which could be applied to create harmony in a rapidly changing world".[35]

To this he devoted his efforts in the last years of his life: it was the journey that mattered, more than the destination. How wise are the words of Simone de Beauvoir:

> Pour que la vieillesse ne soit pas une dérisoire parodie de notre existence antérieure, il n'y a qu'une solution; c'est de continuer à poursuivre des fins qui donnent un sens à notre vie: dévouement à des individus, des collectivités, des causes, travail social ou politique, intellectuel, créateur. Contrairement à ce que conseillent les moralistes, il faut souhaiter conserver dans le grand âge des passions assez fortes pour qu'elles nous évitent de faire un retour sur nous.

[34] General Assembly, Sixth Committee, 29 November 1961.
[35] General Assembly, Sixth Committee, 21 November 1963, para. 31.

And he was fortunate enough to preserve these passions with a remarkable alertness of mind until his last illness. He remained faithful to the last to one of his favourite aphorisms: "To want to be what one is… this is essential. To want to be more than one is, is to be less". We are grateful to him for having been what he was and who he was; for having been among us and enriched our lives.

The Law and the Peaceful Settlement of Disputes

by Manfred Lachs
President of the International Court of Justice

So much has been said on disagreements, disputes and on conflicts between States, that one instinctively doubts whether anything remains to be added.[36] Not only lawyers, but psychologists, political scientists, sociologists and politicians have engaged in serious study on the subject. The literature is thus abundant. I thought, however, that I might share with you this afternoon some reflections on disputes, disagreements and conflicts in a wider setting than is perhaps customary, and on the present-day interaction between their settlement and the development of law.

Differences, disagreements, conflicts of views or of interests are daily phenomena in relations between States. No continent is free from them. In the last thirty years history has recorded hundreds of them, some, as for instance the "Lobster War", or the "Chicken War", were thus dramatically labelled even though they did not lead to any serious confrontation. The term "war", however, was unfortunately fully applicable in other instances. Have they been different from the disagreements of the past, those of the ages and centuries gone by? Some have been the outcome of the Second World War and resulted from the unresolved problems of the peace settlement; other have been the outcome of the liquidation of colonial empires and the birth of new States, others again are conflicts or disputes between new States, others again are conflicts or disputes between new States. Another category consists of disputes between old

[36] Cf. my speech, delivered at the 68th Annual Meeting of the American Society of International Law, April 1974, pp. 323 ff., in which I dealt with some of these and other aspects of the problem.

States. Of course each age records its special disagreements, but there are some which have continued for over centuries and remain part and parcel of our present-day reality – typically disputes concerning such issues as frontiers.

It would be tempting for me to analyse here their ultimate source, but this would be a vast philosophical subject, which would take me too far. I do not propose therefore to make more than a few summary observations thereon. There are of course some who claim, as you well know, that conflict is the inevitable companion of human history and that it is inescapably linked with inter-State relations. There are others who see the past developing into the present under more auspicious augury and take a more optimistic view concerning the future. Episodes of the past, the history of Greece, the Roman imperium, renaissance Italy, le Grand Siècle and other chapters, have been analysed and reanalyzed in an attempt to discover the basic rules of conflict or the secret of its relative absence. One may, of course, dwell, as some do, on the differentiation between disagreements which are real and those which are artificial: i.e., those which have their source in the fact that a State projects into the adversary purposes which do not correspond to reality but whose very projection provokes the dispute consciously or unconsciously desired; between those which are functional and those which have a non-functional character. Some seek their rules in human behaviour, in psychological factors. Others point out that they frequently arise due to a mutual lack of information "between equally good men, equally convinced that their case is morally unassailable".

However, many of our generation's problems are no doubt different from those of the past, and this judgement does not result from the egocentricity of a generation which considers itself as unique, but from certain objective phenomena that stand out when the present is compared to the past. There are the great economic and social changes, which have brought about the co-existence of States of different political and economic systems.

States are today in daily interrelation in almost all spheres of their activities, they have come closer to one another; thus new problems arise. It is obvious that the greater number of contacts among States the greater also will be the number of differences, genuine differences which may be transformed into disputes.

Today, more than ever before, mastery of matter and technical progress have become important factors not only in human relations within each country but also in those between whole nations. It is true

that the industrial revolution, with its coal and iron, had already given man the power to influence his environment (while also, as we now realize, increasing his dependency upon it) and produced far-reaching consequences not only within the boundary of one State but also in relations among States. Today, however, the progress of science and technology is much more decisive. Thus what has been called the gap between science and the humanities, reflected in the great controversies between Plato and Democritus is disappearing. Technology, translating the achievements of science into the language of reality, has a direct and far-reaching impact on life, and this is bound to have its consequences on human relations. It was only in a moment of despair that Malraux exclaimed: "*Quelle notion de l'homme saura tirer de son angoisse la civilisation de la solitude, celle qui sépara de toutes les autres la possession de gestes humains*". In *Les Noyers de l'Altenburg,* he insisted: "L'homme n'a pas tellement changé de Tacite à Mommsen ou à Michelet… seulement les grands voyages sont devenus communs". Yet modern science and technology have given mankind tremendous tools, which enable it to perform wonders, but also to commit suicide. Economics, culture, science and technology have become mutually complementary aspects of our life.

How differently do we read today Goethe's exclamation "Nature, we are surrounded by it, encircled and dominated by it, helpless to separate from it and helpless to penetrate beyond it". Man's power to wield the great forces of nature, and no less his consequent need of access to them, has very far-reaching ramifications in international relations.

The very brief span of time into which these developments have been compressed has compounded their dynamic effects on the pattern, speed and intensity of life in society. The structures of society could not be expected to withstand these effects; nor could relations between them. The resultant pressures have opened a Pandora's box of problems, if I may be permitted a somewhat violent change of metaphor.

Now, given this vast field in which disagreements arise and solutions have to be sought, it is surely obvious that the situation does not merely call for adequate procedures, for you can only subject two disputants to a procedure for the resolution of their conflict if both are in agreement as to the applicable rules. Unhappily, many of the important disputes of the modern world embody not simply an opposition of claims but also of disagreements about both procedures and the rules. They result from a confrontation between the *status quo* and the desire for change; the application of the law versus its revision; conflicting interpretations of the law and the creation of new law is needed in fields which have not hitherto

been tilled. Some chapters of this new law are being shaped by politicians, e.g., the wide area concerning disarmament and security; others are being shaped by politicians and economists. And finally there is an area in which jurists, notably those of the International Law Commission, play a most decisive role. But is it not a truism to state that the legal coefficient is never absent from any of these areas, in which matters of procedure are clearly interwoven with matters of substance. The essential issue which we face, or I would rather say the basic premise which we must accept, is that there is a peaceful solution for every problem, a proper remedy for each and every disagreement – whatever its character facing States in international relations. The remedy which is sought must create agreement whether by ending a disagreement or by creating a framework of new rules of conduct between States concerned. However, while accepting this essential premise can one possibly adopt a limited set of rational models for the solution of these problems? This is frequently impossible as so many elements are involved, in view of the wide-ranging area in which the process is taking place, the multidimensional character of the issues involved.

Before proceeding further may I, speaking as I am to so distinguished a gathering of jurists, say a few words on that old but ever-present and over-arching distinction which it has become traditional to make, namely the division between what is called legal and political disputes or disagreements, a distinction which has become part and parcel of the legal thinking, in particular of the last two centuries. I do it with some hesitation – as you are all too familiar with it, but I think it may be helpful to the conclusions I propose to draw.

Need I recall the traditional distinction made by Vatell, repeated by Calvo and Lamasch, which makes its reappearance in Article 16 of The Hague Convention of 1899, and in Article 38 of The Hague Convention of 1907? It is taken up by a series of bilateral and multilateral treaties and reflected in Article 36/2 of the Statute of the International Court of Justice. But, for the good of mankind, is it not only the nature but, very frequently, the approach to a dispute and the question of its successful solution which have to be taken into account? Certain assumptions in this respect seem to me overfacile.

One should never lose sight of the fact that protection of the independence of States is the cornerstone of international law. Consequently, it is a statement of its first principle and the starting point of its development. The carefully worded paragraph 7 of Article 2 of the United Nations Charter is a famous, if not notorious, embodiment of it.

The complexity of international life in our days is really responsible for a situation in which very many disputes involve several and not only one element concerning inter-State relations. The conclusions we are led to are that while the qualification of a dispute or disagreement is possible, it is not the label but what is behind it that determines the case. Some disputes which *prima facie* concern specifically legal issues, may, owing to the connotations given to the issues involved by the parties, acquire a different character or stand revealed as in fact a different kind of dispute or ramify into a much wider issue. The reverse is also true. The narrow issue may in fact simply be a symptom or a side-phenomenon of the real difference which has to be resolved. This in turn should be a guide in the search, whenever there exists no prior agreement between the parties, for the proper, adequate machinery for the settlement of the dispute or some aspects of it. It should be clearly realised that, whatever the problem or dispute dividing States in international relations, the remedy which is sought to bring it to an end and to restore harmony between the States must be one adapted to the dispute itself.

I think this is one of the key issues which has to be borne in mind in relation to the qualification of all problems and to the ways and means sought for their resolution.

This leads me in turn to further considerations on the subject.

We may all agree that in fact ours is an age of negotiation. It dominates almost all fields of international relations, not only those which can cover the shaping of new law but also the settlement of disputes.

As was said, rightly, by Maurice Bourquin:

> Aucune règle de droit, aucun mécanisme juridique jamais a remplacé ici la ressource de la diplomatie, de son expérience, de son tact. Nous sommes dans une sphère ou le sens de la réalité et l'art de la négociation constituent la valeur suprême et où il sera peut-être même dangereux de vouloir les enfermer dans une construction trop rigide.

However, negotiations today may have many other aspects than the negotiations of the past. In many cases negotiations remain the first and the last resort because there is no alternative in view of the nature of the problem involved and the measures envisaged. Frequently they involve many issues and there is a kind of mutual interdependence of many questions. Thus the isolation of a specific problem may become almost impossible and frequently the solution of one is linked to that of

another. On some occasions the arrival of a new problem may, instead of complicating, facilitate matters, being more urgent and calling for an immediate solution with which may come the solution of the others. In view of the multidimensional character of many questions, it may be necessary sometimes to leave several of the issues untouched, extract the most urgent and drastic one and approach it with the object of arriving at a solution. On other occasions several problems are resolved, while the real issue is left in abeyance. Need I recall as illustration the Washington agreement on Antarctica of 1 December 1959? A temporary arrangement may be sought and this may prevent the dispute from deteriorating and pave the way to an ultimate solution.

Suffice to say that contemporary negotiations are much more complicated and more involved than those which are known from past history. A special and relatively novel phenomenon is multilateralism, an aspect of diplomacy, which used to be rare but now bulks large in the handling of international affairs. Thus, quite apart from the work of law-making bodies, we witness meetings held between a multiplicity of States for the resolution of many issues, meetings within and without international organizations in which efforts are made for the sake of readily acceptable mutual solutions or compromises.

And finally there is a consideration of essential importance. Negotiations can no longer be viewed as a chess game in which one party steers the other into a checkmate position. The parties have to arrive at a conclusion in which the legitimate interests of all survive. At the barest minimum, the least satisfied participants must genuinely feel that the advantage of a new stability outweighs the fading of a cherished hope.

Negotiations have thus acquired not only new dimensions but have also new qualities; new elements are decisive for their success. They are the outcome of a historical necessity.

In view of their predominance, it is frequently argued that the role of the third party, however manifested, has declined. Is this a valid conclusion? It is of course true that States resort less frequently than in the past to the traditional methods for the resolution of conflicts – and I will say something more on the subject later – but new methods have been emerging, some gradually making their way and others appearing in consequences of the very setting in which problems are discussed. There is the phenomenon of multilateralism which I mentioned earlier – the multilateral setting. Here the role of the third party, to an increasing extent, has been overtaken by the activity of third parties, in the plural, in the various international forums which have proliferated. This development

is far more telling than the traditional intervention of the third-party mediator, or conciliator, in the singular. This new development is largely due to the climate in which confrontations may take place and shocks be absorbed. If, nowadays, differences as to the solution of some problems have to be resolved within an international organization or conference, it is not unusual for not all of the participant States to be committed to the same degree to the options offered, or for the interests of each State to differ greatly. This means in practice that the States not directly involved, but not necessarily less concerned that some solution there should be, may take the initiative of bringing the extreme positions closer together or, in the last resort, of even producing a compromise. This procedure will frequently be welcomed by the States involved in the problem to the extent that it enables the yearned-for solution to be reached with a general show of magnanimity and reasonableness. The centre of gravity having shifted, in the multilateral context, from the individual benefit of States to a wider interest. The effect of having won or lost a duel is greatly reduced and the assumption that the outcome is acceptable to the international community as a whole, or a considerable part of it, is an element that greatly facilitates the development of international norms.

Thus we find that something like the role of mediator or conciliator has devolved upon other States. I say "something like", and "less interested" rather than "disinterested", because it would be an exaggeration to endow these actors with judicial impartiality. Nevertheless, the element of consent of interested States to the application of the method and the outcome reached is, or at least should be, fully present in such multilateral gatherings.

There are further important developments in this area. New functions in the resolutions of specific problems have been assumed by international organizations, like the International Labour Organizations or the International Civil Aviation Organization, by UNESCO and the International Monetary Fund, and special methods for the settlement of disputes are provided for by a series of particular agreements. Above it all is the Security Council of the United Nations, which by its very powers has intervened on several occasions, sometimes with success and sometimes without. Several issues were taken up by the General Assembly of the United Nations.

A special role is played by the Secretary-General of the United Nations who frequently offers his good offices or is called upon to act – as mediator or conciliator.

However, the new methods combine some of the traditional ones, within the framework of international organizations. All this goes to show how erroneous is the conclusion that the role of third parties – be they governments or individuals – in the resolution of contemporary disagreement has declined.

Third party decisions have a long history reaching into the remote past: to recall only le *Consistoire Général des Cités grecques*, or the 600 judges of Miletus deciding the dispute between Sparta and Messene, the Senate of Rome, Members of Lombard or Hanseatic Leagues, or the Parliament of Grenoble, princes, kings and Popes; performing the functions of conciliators, mediators, umpires or judges. They have survived many stages of history and by no means have they proved unsuccessful. But turning the pages of history – one must have noticed that each age adapted them to its particular needs. Today the complexity of issues, their multidimensional character, has made them mould with what has traditionally been labeled as negotiations within a wider setting. Thus States, by the mere fact of becoming members of international organizations, submit themselves to these procedures. The "third party" – are other members of the international community, or States belonging to a specific region, elected representatives of States, or even individuals. This is reflected not only in decisions taken, but in the establishment of guarantees required, be it U.N. presence, or specific obligations of third powers.

By joining multilateral conferences called for specific purposes, States retain their freedom of action but frequently abandon it gradually: thus while they are on occasion prisoners of their points of view – but I would say prisoners in a Pickwickian sense – they do overcome this through the persuasion and help of others.

That is how the new procedures reflect the special needs of a complicated world. Though not legal by their nature, they do, as I have suggested, help in shaping law.

Let me turn now to conciliation, mediation, arbitration and judicial settlement. Can it be said that they have become redundant? In a typical situation if two States are divided by an issue, a third party, though it may take no decision, may influence the further course of events. This may even be the case where negotiations have not begun. Take a fairly recent illustration, the offer of the Swiss Government to mediate in a dispute on how to repatriate the diplomatic staffs of two States, in 1971.

It is, of course, true that in the last 30 years they have been used less than in the past. In the period between 1918 and 1962, 301 treaties

were concluded providing for the peaceful settlement of disputes by conciliation, arbitration and judicial settlement. It is worth recalling that the complex character of contemporary disputes has also been reflected in the combination of these traditional methods with modern, multilateral devices. On a wider plane, arbitration and judicial settlement have been built into the system of international organizations while retaining their traditional character. Illustrations can be found in: Article 84 of the Chicago International Civil Aviation Convention of 1944, (Article II); Article XIV (2) of the Constitution of UNESCO; or, Article XVII of the Constitution of FAO (as amended in 1950). Mediators and conciliators were appointed by the United Nations on a numbers of occasions and conciliations commissions set up by the Paris Peace Treaties of 1946.

It suffices to recall that in some bilateral disagreements of a multidimensional character, all the traditional methods were resorted to. Thus some disputes (like those between India and Pakistan), which have had many aspects, have been dealt with by the United Nations, been entrusted to mediators – a commission of three States, then individuals – at a certain stage the good offices of a Prime Minister played an important role. Another aspect was brought to a successful conclusion by arbitration and yet another was submitted to the International Court of Justice. Comparable mixtures have been administered in other situations.

May I now turn to arbitration. We are of course very far from the Arbitral Award of the Duke of Burgundy, of 1432, which stipulated as a condition of peace the obligation of marriage between the eldest son of Count Redimont and the daughter of the Duke of Anjou. Even the dowry was specified. It would be rare, nowadays, for an arbitrator to be given such compulsive powers. Nor would we expect him to be given such wide terms of reference.

In the last 30 years arbitration was resorted to in only about 30 cases concerning bilateral inter-State relations and in about 20 cases of disputes between States and other entities. The comparison with the period between the Jay treaties and the end of the 19th century, when 177 awards were given, is eloquent.

Yet there remains much room for it as a remedy, especially where the typically complex problem of modern times can be broken down into a number of outstanding issues capable of separate resolution. It is perhaps the interdependence of international problems which appears at first to resist such a reduction more than is actually the case, which explains the paucity of recent arbitration cases between States. Perhaps more attention could be given to the possibility of making this method

more attractive to States. At all events, arbitration is now much more typically the chosen method for the settlement of disputes in commercial relations of a relatively homogeneous character. Indeed if it is true that States have largely discarded arbitration, this motivation explains *a fortiori* the little use they have made of the International Court of Justice, the most advanced instrument existing in the domain of the peaceful settlement of disputes. Does this mean that we must despairingly return to the attitude of Hall who "saw no place for the refinement of courts in the rough jurisprudence of nation"?

There has indeed been much talk of a crisis of the Court, of its decline, of the decline of its role in the international community. Personally, I think it is no special pleading to suggest that a sense of proportions is here essential. Far too much has been made of the comparison between the 30-odd cases dealt with by the present Court and the similar number of cases handled in little more than half the span of years by its predecessor. It is well known that statistical arguments are dubious when based upon small quantities, and what does threescore of cases in half a century represent? True, it indicates in an absolute way the paucity of recourse to the International Court and its predecessor. But does it really indicate decline, disenchantment or crisis? It should not be forgotten that many of the cases referred to the Permanent Court were concerned with the aftermath of the First World War and included a whole domain of subject matters which were, as a matter of policy, withheld from the United Nations, thus also from the present Court as its foundation. In fact what the figures do demonstrate is not that the importance of the Court has declined, or that there is any immediate crisis, but that it has not yet fully developed its potentialities as the judicial organ of the international community. The last 50 years constitute in fact the first chapters of its history.

Now bearing in mind the complexity of the problems dividing States, – as I indicated earlier – one may visualize greater possibilities in States referring to it only one aspect of a contentious case, one with a legal theme, requesting that the state of law be clarified. This request would leave the resolution of the controversy as a whole to the States concerned, and thus allay their fears that the case would be out of their control. Once the Court had given its answer, they would be free to arrive at their own decision, one which, in the last resort, would be based not necessarily on legal but on any other consideration which they may agree to take into account. Scores of such situations probably exist, many of them ripe for solution if the impetus is given in the proper direction. But there are other situations. The Court may offer a way out and act as a "scapegoat" upon

which the responsibility is thrown for a solution which one or other of the Governments could not possibly take itself. By resolving one aspect of a problem the Court can not only help to solve this particular aspect, but also make a contribution to the solution of a wider issue which divides the two States. There may be cases which, once brought before the Court, do not end by its decision, but by the mere fact that a certain action has been taken, while the case was pending, through which the dispute is resolved. Finally, there is the possibility of the Court recommending negotiations to the parties even in circumstances other than those envisaged by them when the case was submitted to the Court. Thus, resort to the Court does not compete with negotiations; it can only assist them, contribute to the possibility of moving them from a deadlock. There are no doubt hundreds of cases, smaller in importance and not in the limelight of international relations, legal disputes which, once the Court is asked to decide, may remove irritants in the relations between States and thus help future co-operation. And I need hardly remind this distinguished body that the machinery of the Court's procedures, especially under the revised Rules of Court, does not have to be as ponderous as is commonly supposed.

However, like other instruments in inter-State relations, the Court must evolve and adapt itself to the needs – I stress needs, not fashions – of a changing world. It is bound to take account of change in its decisions, to recognize the trend of law. Sometimes it is compelled to act between the dusk of the old and the dawn of the new; sometimes its decisions may seem unorthodox, but so are the issues it faces. Indeed, the orthodoxy of the late 20th century is still in the making, and it will have to be dynamic, forward-looking. As a distinguished French jurist recently said: "Le juge doit vivre dans le siécle et dans la cité, ce qui comporte pour lui de perpétuels efforts d'adaptation, d'accommodation". The procedures of the Court, also, must be kept under review; though doubts have been expressed by some as to whether improvement or revision of the Rules would affect the activities of the Court, I fell that the Court has a clear obligation not to be defeatist on this score. The more so as the Court should not be looked upon as a *monster sacré*. I personally believe that the adoption of a series of new measures, aimed at expediting and simplifying procedure, will bear fruit. As it was rightly said – "a price paid for the introduction of extensive and sophisticated procedure… is that 'they bring problems of their own, including the problem of devising ways to enforce them… and to assume that they will be interpreted and administered in an enlightened fashion'". The Court has been faced with such problems. But what I consider is one of the most vital areas in which the Court has made a new departure is

that which has opened new possibilities in what has been as yet uncharted ways for the future. I do not wish to go into detail. Let me only say that it is my great wish to see two chambers established before long: one dealing with maritime law and the other with disputes concerning the protection of the environment.

I see also great potentialities in the use of advisory opinions. Though only limited use has been made of this procedure, it has enabled the Court to assist international organizations in developing their law, and international Law in general. Take for instance the Opinion on *Reparation for Injuries in the Service of the U. N.* The findings made when the U.N. was still in its stormy infancy were a milestone in the development of the law on international organizations; or that on *Namibia,* which not only assisted the U.N. in its work but led to an analysis of a considerable number of problems of law of the Charter and outside.

Here, then, are some of the areas in which much can be done to develop and strengthen the law and it is encouraging that these possibilities should have been largely recognized in the recent General Assembly resolutions concerning the Court.

The United Nations should be constantly mindful of its organic link with the Court and the other international organizations in the same family must feel that their ties with the United Nations comprise ready access to the Court. The image of isolation in which the Court seems to have been living is gradually disappearing. The main task remains in the hands of those organizations, i.e., those of their Member States, in fact many States have recently expressed their regret that so little use has been made of the Court in its advisory function.

For the past few minutes, I have been referring to the possibilities open for the more frequent use of the judicial method. I have also glancingly referred to the possibility of employing the judicial method for certain aspects of general problems, or of the overall relationships of different communities.

I would now like, in the time remaining, to deal with what I may call a two-way traffic, a dialectic, whereby the resolution of particular disputes advance the general law – thereby preventing or resolving other disputes – while at the same time the evolution of the law may of itself, in certain fields at any rate, provide the settlement of pending or imminent disputes. Here, as elsewhere, law has been shaped on two levels (by a twin-process); one – the general – consciously directed towards that aim; two – the specific, by the resolution of disputes creating law between the parties but also adding to the case law, as a guide for similar situations

in the future. We have developed an important body of case law from which we can draw in all areas of international relations. In this field an important part has been played by the International Court of Justice, many arbitration tribunals but, also, (as Paul Guggenheim suggested) by conciliation. Thus we can at least take pride in the fact that the international law of today has reached a stage of maturity in which it is difficult for any arbitrator or judge to pronounce a *non liquet*. He cannot claim to be wandering in a dark forest like a man gathering mushrooms, nuts and berries until he has enough to make a meal. It is also true that at no time in history has so much codification been done as in the last 30 years and to this the International Law Commission has made a decisive contribution.

However, if we look at the developments during these years, we cannot but be struck by the fact that so many disputes have accumulated with certain broadly similar characteristics. That is to say that, though they are bilateral in nature they concern, and their outcome is bound to affect general international law. Many such disputes have remained unresolved and few, if any, reach the stage of arbitration or judicial settlement. Lawmakers – such as yourselves – have, of course, noted that problems of this order are now coming simultaneously to a head and that it is time to act.

As the International Court of Justice stated in one of its Judgements about five years ago:

> … considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.

But the Court added:

> Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of system and interests.[37]

Thus, handing down a Judgement in a particular case, the Court found that the law had not evolved further and had not resolved problems in a general way but had left them to bilateral solution.

One may, of course, conclude that even where we are confronted with new areas of human activity, new significancies of different parts of

[37] Barcelona Traction, Light and Power Company, Limited; Judgement, I.C.J Reports 1970, p. 47.

the human environment – the sea is no longer the sea of yester year, the sky is no longer yesterday's sky – there are some principles deducible from the statutes and jurisprudence of the centuries, from treaties or diplomatic practice, elements which can be built up to provide a framework of lawfulness for the government of the new regions of human interaction. Yet the law requires further development; it requires invention.

Law was too late to save the Titanic in 1912. The radio operator of the sinking ship was unable to summon assistance, as he could not establish contact, though the first international regulations of radio communication had been drafted six years earlier but there was no agreement on the allocation of frequency waves.

Law was late too when the disaster of the tanker Torrey Canyon occurred in 1967, spilling thousands of gallons of oil into the sea.

In these and other areas law must catch up with economic and technological developments. But we may take pride in the fact that the international community is at work on the production of new rules for the government of new areas of inter-State co-operation. Thus international law of increasingly universal scope, towards which we are moving, could be more and more relied upon as a pointer to the resolution of individual conflicts. This should be our goal.

I conclude: there is no need to despair. Though the world is teeming with disputes and disagreements dividing States, we do have the means to resolve them. I said at the beginning that this is the age of negotiations. The new forums for international discussion facilitate them and provide not only a sounding-board, as is often said, but also, for those who are aware of their genuine self-interest, an unsurpassed and ready-to-hand medium for the absorption of the shock-waves of inter-States disputes. We can see that in practice our new possibilities have emerged in addition to the traditional resources. Thus the catalogue of means available has been considerably enriched, the choice open to States is greater than ever before. The essence of the problem is that States should agree in general, or in specific cases, to resort to them and choose the most effective and satisfying method or methods. There is here much room for remedies of a legal nature.

Thus, those entrusted with the settlement of disputes, more particularly the umpire and the judge, will be enabled to play their proper role.

ASPECTS OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

Lecture delivered on 3 June 1976
by H.E. Sir Humphrey Waldock
Judge at the International Court of Justice
formerly President at the European Court of Human Rights

Aspects of the Advisory Jurisdiction of the International Court of Justice

This lecture, the fourth to be delivered in memory of Gilberto Amado, is devoted to three aspects of the advisory jurisdiction, which come into prominence when the specific interests of individual States are closely involved in the substance of the question referred to the Court. They will be familiar enough to this learned audience: the representation of the interested States on the Bench, the propriety of giving an opinion when an interested State refuses its consent to the exercise of the advisory jurisdiction, and the propriety of giving an opinion on the basis of facts which are in dispute. Nevertheless, in the light of some modern developments, these aspects of the advisory jurisdiction seem to merit a fresh examination.

The advisory jurisdiction, as we know, had its starting point in Article 14 of the Covenant, which merely said "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly".[38] The original Statute of the Permanent Court contained no reference to the advisory jurisdiction other than might be implied from the bare statement in its first Article that the Court was established "in accordance with Article 14 of the Covenant". In consequence, the Court was to a large extent left free to work out its own procedure and policy in advisory cases.

[38] See generally M. Hudson, *The Permanent Court of International Justice,* (1943), pp. 107-8 and 210-13; S. Rosenne, *The Law and Practice of the International Court* (1965), Vol. 2, Chapter XIX; D, Pratap, *The Advisory Jurisdiction of the International Court,* chapter 1; M. Pomerance, *The Advisory Function of the International Court,* chapter 1.

However, in the drafting of Article 14 and the Statute, certain points had been made plain. The primary objective in introducing the advisory jurisdiction had been to assist the Council and Assembly "in the discharge of their duties of conciliating and reporting upon disputes submitted to them". There had been a strong insistence on the part of some States, especially the United States, that the advisory function entrusted to the Court should be strictly judicial, and surrounded by the same judicial guarantees as its contentious jurisdiction. Particular emphasis had been placed on this where the request concerned an existing dispute and on the need then to apply the rules in Article 31 of the Statute concerning the presence of national judges on the Bench. Anxiety had also been expressed at the possibility that the advisory jurisdiction might be used as an indirect means of introducing a form of compulsory jurisdiction.[39]

When the Court met in 1922 to draw up its Rules of Procedure, it formulated the Rules for advisory cases on the basis of the judicial and public character of the proceedings; and it prudently restricted them to four minimal Articles, leaving itself free to adapt its procedure in the light of experience. At the same time, it adopted the view that Article 14 of the Covenant did not oblige it to give an opinion whenever one was requested: if the language of the French text (*donnera)* appeared mandatory, it was translation from the English text (may give), which was merely permissive.[40] Although not inserting this as a provision in the Rules of Procedure, the Court thereafter treated it as a cardinal principle that it would always be free in any given case to decide whether to reply to the request was compatible with its judicial character.

The advisory jurisdiction played an unexpectedly significant role in the Permanent Court's work; and in the 18 years of its effective existence it adjudicated in 17 advisory cases. The circumstances of these cases were of great variety, throwing up almost all the jurisdictional and procedural problems to which the advisory jurisdiction gives rise. In consequence, the Court was led in 1926 and again in 1931 to revise and slightly expand the four Rules of Procedure devoted to advisory opinions, introducing into them procedures developed in practice and tending to assimilate advisory to contentious cases.

Among the early advisory cases were some in which the request related to an existing contentious "*dispute*", and thus raised the question of the presence on the Bench of national judges of the parties to the

[39] E.g., *Eastern Carelia* case; Series B No. D, pp.28-29, *Interpretation of Peace Treaties* case, I.C.J. *Reports 1950, pp.* 71-72; *Certain Expenses of the United Nations* case, *I. C. J. Reports 1962, p.* 155; *Namibia* case, *I. C. J. Reports 1971,* p. 27; *Western Sahara case, I.C.J. Reports 1975,* p. 21.

[40] *Series D, No. 2 pp. 98,159-61, 292 and 472-1.*

dispute. The Court at first declined to regard Article 31 of the Statute as entitling a party not represented on the Bench to appoint a judge *ad hoc* in advisory proceedings. So requests for judges *ad hoc* were rejected in 1925 in the *Exchange of Greek and Turkish Populations* case[41] and in 1926 in the *Mosul Boundary* case;[42] and a proposal made by Judges Huber and Anzillotti in 1926 to allow judges *ad hoc* in advisory cases met with the same fate. Confronted, however, in 1927, with the possibility in the *Danube Commission* case of seeing three parties with elected national judges on the Bench on one side and one party on the other side without a national judge, the Court reversed its position on the point.[43] It amended the Rules, providing specifically for the application of Article 31 of the Statute in advisory cases "on a question relating to an existing dispute between two or more States…". This gave formal recognition to the distinction in advisory proceedings between cases on a mere "question" and cases on a question relating to an existing contentious dispute between States.

The basic question of the consent of the parties to the exercise of the advisory jurisdiction in regard to an existing dispute had also come under consideration in the *Eastern Carelia*[44] and *Mosul Boundan*[45] cases. In *Eastern Carelia* the situation was that a State, not a member of the League, had objected to conciliation of the dispute by the Council, under Article 17 of the Covenant, and taken no part in its proceedings, and had then refused also to take any part in the Court's proceedings. In that situation, the Court found it impossible to give the opinion on two distinct grounds. The first was "the principle of the independence of States", as to which it made the famous pronouncement:[46]

> It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or to any other kind of pacific settlement. Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation.

What sometimes seems to escape attention is that, in applying the principle in that case, the Court explicitly limited itself to the situation

[41] Series B, nº 10.
[42] Series B, nº 12; Series E.3, pp. 223-4.
[43] Series E.4, pp.296-7.
[44] Series B, nº 5.
[45] Series B, nº 12.
[46] Series B, nº 5, at p. 27.

of a non-Member of the League, not subject to any obligation to accept the Council's conciliation or the Court's advisory jurisdiction. It was unnecessary in that case, the Court said, to deal with the more general problem "as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties". In other words, it left open the question whether specific consent would be necessary in the case of an existing dispute between parties who were subject to the Council's conciliation.

The second ground concerned the handling of matters of fact in advisory cases. The Court pointed out that the question put to it turned on a matter of fact and that, owing to Russia's absence from the proceedings, it would be at a very great disadvantage in enquiring into that fact. As to this it observed:[47]

> The Court does not say that there is any absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.

Then, emphasizing that the question concerned "directly the main point of the controversy" and could only be decided by an investigation into the facts, the Court concluded:

> Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.

The *Mosul Boundary* case[48] differed in important respects. First, the questions posed in the request did not concern the "main point of the controversy" but the nature of the decision to be taken by the Council and the procedure to govern the voting. Secondly, Turkey had participated in the proceedings of the Council; and when the proposal to request an opinion was adopted, it had objected to the proposal merely on the ground that the questions put to the Court were "essentially extremely political". True, Turkey had reiterated this objection before the Court, stating that

[47] Pages 28-9.
[48] Series B, No. 12.

the questions were not "susceptible of a legal interpretation" and that it saw no need to be represented in the proceedings. But it had supplied documents relating to the questions posed in the request and, subject to its reservations concerning the political nature of those questions, had replied to certain points put to it by the Court prior to the hearings.

The Opinion itself contains no explanation of the reasons why, notwithstanding Turkey's absence from the proceedings, the Court considered itself justified in giving the Opinion.[49] Light is, however, thrown on the matter by the Court's second Annual Report, in which it is recorded:[50]

> The Court took the view that, though the question under consideration offered some analogy with that of Eastern Carelia, in that one of the interested Parties held aloof from the proceedings, the circumstances in the present case were distinctly different, since the question before the Court referred not to the merits of the affair but to the competence of the Council, which had been duly seized of the affair and could undoubtedly ask for the Court's opinion on points of law, it was further observed that the Turkish Government had officially sent certain documents and information.

Some have seen in this case a modification of the Court's position in the *Eastern Carelia* case, but this may be doubted. Turkey had consented to the Council's conciliation with respect to the dispute, and in the *Eastern Carelia* case the Court had specifically left open the question of the need for a Party's consent to the exercise of the advisory jurisdiction in such a case. It had also hinted that its position might be different where the questions did not concern "directly the main point of the controversy".

In discussing the question of a judge *ad hoc* in that case, the Court clearly regarded the request as one relating to an existing dispute; for although it decided not to invite Turkey to appoint a judge *ad hoc,* it did so only because at that date it was still opposed to the whole institution of judge *ad hoc* in advisory proceedings. At the same time, however, on the question of consent, it differentiated the case from *Eastern Carelia* and upheld the propriety of its giving an opinion on the ground that the request related not to the merits of the dispute but to the powers of the Council in dealing with it. The *Mosul* case was thus the first example of the problem which divided the present Court in the *Peace Treaties, Namibia*

[49] The President simply stated at the opening of the public hearings that the Court had satisfied itself that "the circumstances did not prevent it from giving the opinion asked for"; Series C/10, page 9.

[50] Series E/2, page 164.

and *Western Sahara* cases, and which may be crucial to the propriety of exercising the advisory jurisdiction: the determination whether a request is to be considered as involving the dispute itself or only the functioning of the requesting organ.

The question of consent in advisory cases also came under discussion in connection with efforts to overcome United States misgivings about acceding to the Statute and with the revision of the Statute of the Court. The story is a long and tangled one,[51] and it must suffice to say that the United States was unwilling to subscribe to the Statute without a guarantee that, except with its consent, the Court would not entertain "any request for an advisory opinion touching any dispute or question in which the United States had or claimed an interest". Nor would it accept the Court's pronouncements in the *Eastern Carelia* case or any provision inserted merely in the Rules of Court as a sufficient guarantee. Every suggestion for meeting its point of view proved abortive and it never acceded to the Statute of the Permanent Court. Even so, the discussions had the important outcome that when in 1936 four Articles on the advisory jurisdiction, largely borrowed from the Rules of Procedure, were introduced into the revised Statute, there was included as Article 68 the provision:

> In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

This made statutory the policy already followed by the Court of assimilating advisory to contentious cases, when they involved "a question relating to an existing dispute between two or more States". On the other hand, as Manley Hudson observed,[52] the provision still left the control of the advisory procedure in these cases in the hands of the Court. The Court was still left to appreciate the conditions in which a request was to be considered as relating to an existing dispute in such a way as to give rise to the need for the parties' consent or to attract the rules concerning representation on the Bench.

The observation has frequently been made that, in contrast with the United Nations period, the majority of advisory opinions requested under the League concerned existing contentious disputes. In fact, in most of these cases, the questions put to the Court related directly to the

[51] M. Hudson, *The Permanent Court of International Justice* (1943), at pp. 218-38.
[52] *Ibid.*, (1943), p. 215.

substance of the dispute. Moreover, after the Court's decision in 1927 to allow judges *ad hoc* in advisory proceedings, the question of the existence of a dispute was considered by it in this connection in no less than 11 of the 13 advisory cases with which it had to deal.

Two of these cases before the Permanent Court throw light on points which recently assumed prominence in the *Namibia* and *Western Sahara* cases. One is the *Minority Schools in Albania*,[53] in which the question at issue was the compatibility of certain Albanian legislation with the Minorities Declaration made by Albania before the League. "Special and direct communications" were sent to Greece and Albania as States likely to be able to furnish information, and these States were both consulted as to the written and oral proceedings and submitted written and oral statements. The Court, while thus treating Greece as directly interested, did not consider the request to relate to an existing dispute, but to Albania's Minorities obligations, the guarantee of which the League had assumed. It therefore held that the question of the appointment of a judge *ad hoc* did not arise.

The second is the *Danzig Legislative Decrees* cases,[54] where the issue was the compatibility of the decrees with the Danzig constitution which likewise was under the guarantee of the League. Danzig, which had been allowed a judge *ad hoc* in three previous advisory cases involving an existing dispute, applied for one again, merely on the basis that "it would be extremely desirable to have a judge thoroughly familiar with Danzig constitutional law upon the Bench". Danzig clearly had a very special interest in the case, but the Court rejected the application, saying that its decision must be in accordance with its Statute and Rules. It observed that the constitution of the Court was governed by Articles 25 and 31 of the Statute; that under Article 31 provision was made for judges *ad hoc* only in cases where there area parties before the Court; and that this condition was not fulfilled in the case before it. As to advisory opinions, it pointed out that the Rules prescribed that they should be given by the full Court as composed under Article 25 of the Statute; and that, although the Rules made the provisions of Article 31 of the Statute regarding judges *ad hoc* applicable in advisory proceedings, they did so only in cases where the advisory proceedings related to an existing dispute between two or more States. Those provisions, the Court held, at present constituted the only exception to the general rule in Article *25,* and they could not be given a wider application in advisory proceedings.

[53] A/B 64.
[54] A/B 65.

Thus both in the D*anzig Legislative Decrees* and *Minority Schools in Albania* cases, the request concerned the legality of the acts of individual States in matters for which the League had assumed responsibilities; and in both cases the Court declined to accept the State's special interest as sufficient to entitle it to a judge *ad hoc.* Moreover, in the Danzig case, it held expressly that it was only when a request related to an existing dispute between two or more States that the provisions of Article 31 regarding judges *ad hoc* were applicable. These are points which have assumed prominence in the *Namibia* and *Western Sahara* cases.

Under the United Nations, a large proportion of the advisory cases have been of an "organisational" rather than "disputes" character; the question has concerned the functioning of the requesting organ rather than the conciliation of an existing dispute between two or more States. This is, perhaps a natural consequence of the much greater use today of multilateral diplomacy. But it has become more difficult to draw a clear line between an inter-State dispute and a mere opposition of views within an organization. There has also been some tendency for cases to involve an element of confrontation between the majority in the organ making the request and one or more individual States; e.g. the *Peace Treaties* case,[55] the three advisory cases regarding *South-West Africa,*[56] the *Namibia*[57] and *Western Sahara*[58] cases. In these cases, the requesting organ itself has had an interest in the substance of the question referred to the Court, an interest in achieving its objectives in the promotion of human rights, self-determination, etc. These developments have, I think, intensified the problem of reconciling the advisory jurisdiction with the interests of States, which have a particular concern in the substance of the question referred to the Court, and the practice of majority voting today in international organisations increases the importance of the problem.

The present Statute, like that of the Permanent Court, has no express provision on the issue of consent. What it has is simply an injunction in Article 68 that the Court shall be guided by the provisions relating to contentious cases to the extent to which it recognizes them to be applicable. Rule 87, which repeats this injunction, adds that for this purpose the Court shall above all consider whether the request relates to a legal question actually pending between two or more States. But the *Peace Treaties, Namibia* and *Western Sahara* cases make it clear that this injunction does not mean that the Court's *competence* to exercise the

[55] *I.C.J. Reports,* 1950, pp. 65 and 221.
[56] *I.C.J. Reports,* 1950, p. 128; *I.C.J. Reports, 1955, p. 67; I.C.J. Reports,* 1956, p. 23
[57] *I.C.J. Reports,* 1971, p. 16.
[58] *I.C.J. Reports,* 1975, p. 12.

advisory jurisdiction is to be considered as dependent on the consent of the interested States.

In the *Peace Treaties,* as in the *Eastern Carelia* case, the Court was concerned with the lack of consent of a State, which both was a non-Member and had taken no part in the proceedings of the organ requesting the opinion. The Court unequivocally held that, even where the Request relates to "a legal question actually pending between States", no State, whether a Member of the United Nations or not, can render the Court *incompetent* to exercise the advisory jurisdiction by refusing its consent. It treated the question of consent as concerning the *propriety* of the Court's giving an opinion and not its jurisdiction. In the *Eastern Carelia* case, the Court distinguished on two grounds: first the question in that case directly related to the main point of a dispute actually pending between two States, so that answering it would be substantially equivalent to deciding the dispute; and, secondly, it raised a point of fact which could not be elucidated without hearing both parties. The question in the *Peace Treaties* case itself, on the other hand, was considered by the Court as solely concerned with the applicability of the *procedures* for settlement of disputes provided in the Treaties, and as not touching the substance of the actual disputes of the jurisdiction of the Commissions contemplated by those procedures. The sole object of the Request, it maintained, was to enlighten the General Assembly as to the opportunities offered by the Peace Treaties procedures for dealing with a matter on its agenda. The legal position of the parties to the disputes could not therefore in its view be compromised by the answers given to the questions in the Request. Some have pointed out that, apart from the disputes in that case about the substance of the human rights allegations, there was also an actually pending dispute regarding the application of the settlement procedures of the Treaties, and that this aspect is not covered in the reasoning. Be that as it may, the Court made clear in the *Peace Treaties* case its general position regarding the relevance in advisory proceedings of the lack of the consent of interested States: namely that it raises a question not of competence but of judicial propriety.

The *Eastern Carelia* case was again distinguished in the *Namibia* case[59] on the ground that the Request did not relate to a dispute but to the functioning of the requesting organ, the Security Council. The Court first noted that South Africa, as a Member of the United Nations, was bound by Article 96 of the Charter which empowers the Security Council to request

[59] I.C.J. *Reports*, 1971, at pp. 23-4.

opinions on any legal question; and also that South Africa, while raising objection to the Court's competence, had taken part in the written and oral proceedings on the merits. Then, it differentiated the Request before it from the Request in the *Eastern Carelia* case:

> It is not the purpose of the request to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of a dispute pending before it between two of more States. The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of those decisions.

It also rejected a suggestion that the Request should nevertheless be considered as one relating to a dispute actually pending between States within the United Nations:

> The fact that the Court may have to pronounce on legal issues, upon which radically divergent views exist between South Africa and the United Nations, does not convert the present case into a dispute…

It added:

> Differences of views among States on legal question have existed in practically every advisory proceeding: if all were agreed the need to resort to the Court for advice would not arise.

The Court thus seems to have taken the position that for a legal dispute or controversy to raise the question of consent in advisory proceedings, it must be one which essentially has the character of a bilateral dispute rather than a difference within the proceedings of the organisation.

That lack of consent raises a matter of propriety, not jurisdiction, was reaffirmed by the Court in the *Western Sahara* case, where it added the further explanation:[60]

> In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the

[60] I. C.J. *Reports*, 1975, at p. 25.

> principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction.

The Court did not, however, find that such a situation existed in the *Western Sahara* case. Spain, a party to the Charter, had necessarily given its general consent to the exercise of the advisory jurisdiction upon a request made by the General Assembly within the scope of the latter's functions. Spain's refusal of consent was to the particular questions put to the Court, questions that related to matters, which it said, were in controversy between itself and Morocco. The Court, however, found that the legal controversy had not arisen independently in the bilateral relations of the two countries, but in the context of the proceedings of the Assembly and in relation to matters with which the Assembly was dealing. The object of the Request had not been to bring before the Court a dispute or legal controversy in order that, on the basis of the Court's opinion, the Assembly might exercise its powers and functions for the peaceful settlement of the dispute or controversy; it had been to obtain an opinion to assist the Assembly in the due exercise of its functions concerning the decolonisation of the territory. The Court's replies would not affect the rights of Spain but would assist the Assembly in deciding its policy for accelerating the decolonisation process in the territory. The legal position of the State, which had refused its consent to the proceedings, would not, therefore, be compromised by such answers as the Court might give to the questions.

Some judges took a different view of the relations between the dispute or legal controversy and the proceeding of the General Assembly which gave rise to the request. This merely confirms what I said as to the greater difficulty there is today in drawing a clear line between bilateral relations and the activities of international organisations. The Court has to appreciate in each case whether, for the purposes of the Statute and Rules, a Request essentially relates to an existing dispute between States or to the functioning of the requesting organ; and the *Western Sahara* case shows that the decision may sometimes be a delicate one.

On that appreciation also hinges the question of the right of an interested State to a judge *ad hoc,* a question which arose in both the *Namibia* and *Western Sahara* cases. Article 89, formerly Article 83, of the Rules provides expressly that if the Request is upon a legal question

actually pending between two or more States, the Court shall apply the provisions of Article 31 of the Statute regarding judges *ad hoc;* and in this event the application of Article 31 is accordingly automatic. Furthermore, the *Namibia* case[61] suggests that the contrary may also be true. Having found that the Request in that case was not one "upon a legal question actually pending between two or more States", the Court decided that South Africa was automatically not entitled to a judge *ad hoc.*

In the *Namibia* case, four judges[62] took the view that, even in the absence of "a legal question actually pending", the Court still has a discretionary power under Article 68 of the Statute to consider Article 31 to be applicable. This discretion the four judges thought that the Court ought to exercise in favour of South Africa because of the latter's very special interest in the case. The Court, however, declined to allow a judge *ad hoc,* and seems to have adopted the same standpoint as that of the Permanent Court in the *Danzig Legislative Decrees*.[63] The composition of the Court is a constitutional matter governed by Articles 25 and 31 of the Statute; and Article 31 provides for an exception to the normal composition of the Court under Article 25 only in cases where there is an existing dispute between two or more States. That is the only exception admitted in the Statute and it follows that in advisory cases the Court has no power to modify its composition otherwise than in the cases provided for in the Statute. In other words, even if recourse is had to the general injunction to the Court in Article 68 of the Statute to be guided by the provisions of the Statute which apply in contentious cases to the extent that the Court recognises them to be applicable, this still only empowers the Court to make the exception to its composition specified in those provisions. On this view of the Statute, it is not enough for a State to show a specific interest in the case without at the same time showing an existing dispute to which it is a "party".

The point arose again in the Western Sahara case,[64] where the Court, by 10 votes to 5, admitted Morocco's claim to a judge *ad hoc* but by 8 votes to 7 rejected that of Mauritania. The order simply stated that, for the purpose of the provisions regarding judges *ad hoc,* the Request appeared to be one "upon a legal question actually pending between two or more States" so far as concerned Morocco but not Mauritania. Here too, then, it was the absence of a legal dispute actually pending which the Court gave as its reason for refusing a judge *ad hoc,* notwithstanding

[61] *I.C.J. Reports, 1971, pp. 24-7.*
[62] *Ibid., pp. 128-9; 139-41; 152-3; 308-17,* and see Pomerance, *American Journal of International Law* (1973), Vol. 67, pp. 446-64.
[63] P.C.I.J. (1935), Series A/B, No. 65, Annex 1, at p. 70.
[64] *I.C.J. Reports,* 1975, pp. 7-8.

Mauritania's special interest in the case. It may be added that the Sahara problem, which had a long history in the United Nations in the context of decolonisation and which divided the Court on the question of judges *ad hoc,* is a good illustration of the point already made about the greater difficulty today of drawing a clear line between an inter-State dispute and a difference of view within an organisation.

The *Namibia* and *Western Sahara* case also carry a little further the Court's jurisprudence on the determination of facts in advisory proceedings. In the former case, South Africa had contended that the Court ought not to reply to a Request if to do so involves making "findings as to extensive factual issues". The Court, however, said that the reference in Article 96 of the Charter to any legal question cannot be interpreted as opposing legal to factual issues, and observed:[65]

> Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues.

It then reached the conclusion that the suggested limitation on advisory opinions has no basis in the Charter of Statute.

In the *Western Sahara* case, Spain contended that where the Request involved an exhaustive determination of facts, the Court should not give a reply "in the absence of undisputed facts". In advisory proceedings, it argued, "there are properly speaking no parties obliged to furnish the necessary evidence, and the ordinary rules concerning the burden of proof can hardly be applied". The Court, on the other hand, observed that in the *Eastern Carelia* case it was "the actual lack of materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact" which had been held by the Permanent Court to preclude the giving of an opinion. It then stated the principle as follows:[66]

> The issue is whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character.

In the *Western Sahara* case the Court had before it a wealth of documentary materials, while the public hearings had also assumed

[65] *I.C.J. Reports,* 1971, at p. 27.
[66] *I.C.J. Reports;* 1975, at pp. 28-9.

something of the character of adversary proceedings. This being so, the Court considered that the information and evidence before it were sufficient to enable it to arrive at a judicial conclusion concerning the facts relevant to its opinion in that case.

Clearly, the Court has moved quite a distance beyond the decidedly reserved attitude of the Permanent Court towards issues of fact in advisory cases. In this, as in other matters, it has tended to assimilate advisory to contentious proceedings. But to assimilate is not to convert into the same thing. In advisory proceedings, even where a Request relates to an existing dispute, the States concerned are not parties to a contentious *case;* only parties to a dispute in connection with which the requesting organ has asked for an opinion. On matters of fact, their relation to the Court is on a different basis from that of parties in contentious proceedings. They are not normally under any obligation to participate in the proceedings, so that their failure to do so is not therefore equivalent to a default of appearance. When they do so, they strictly speaking furnish information to the Court rather than evidence and proof. Similarly, the primary responsibility of the Court is to the requesting organ rather than to the individual States, however especially interested these may be in the questions referred to the Court. These differences, which are not merely technical, indicate that, in the Court's treatment of issues of fact, there may be limits to the process of assimilation.

The two Courts, largely by the process of assimilation, have developed the advisory jurisdiction into a flexible instrument capable, if the will is there, of fulfilling almost any judicial purpose. In the past, the purposes for which it has been used have been very varied: constitutional questions, bilateral legal disputes, appeals from judicial or quasi-judicial tribunals, legal issues arising before international organisations. Indeed, it is because of the varied character of advisory cases that the Court has kept its Rules of Procedure for these cases comparatively short and adaptable to their particular circumstances. Under the United Nations, as I have indicated, there has been an increasing tendency for request to concern the activities of the requesting organ and yet closely involve the specific interests of particular States. This makes it all the more important for the Court to maintain the strictly judicial character of its advisory function, from whatever body the Request may emanate and whatever the nature of the questions put to the Court.

THE INTERNATIONAL COURT OF JUSTICE AND THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION

Lecture delivered on 7 June 1978
by H.E. Mr. Taslim O. Elias
Judge, International Court of Justice

Foreword

When, after the election of November 1961, I first entered the Commission's meeting room in May 1962, a short, dapper and amiable man, some twenty-five years my senior walked towards me, threw his arms around me and said: "So your are Elias? Judging from your curriculum vitae and the votes at the election, I had expected to meet a much older man. Never mind, we have EI-Erian who is younger than you, and any way we are all friends here". It was a great welcome which Gilberto extended to me and it was to last all his life.

Gilberto Amado, once elected in 1948, had remained a member of the Commission for over twenty years continuously until his death in 1968, having been Rapporteur and Vice-President a number of times. He later became our doyen. He left an indelible mark on the work of the commission, not so much for his academic analysis or erudition as for his objective guidance and wordly wisdom at crucial moments in the Commission's discharge of its task of development of international law and its codification. We recall, for instance, his warning that the commission members must not regard themselves as "jurists shut up in an ivory tower" and that "the work of codification, like that of the development of international law, must be carried out in co-operation with the political authorities of States".[67]

[67] A/AC 10/28.

On the other hand, as Rapporteur, Gilberto, on another occasion, was foremost among the members who defended the right of the Commission to select the topics for development and codification as against the claim asserting the prerogative of the General Assembly to do so. Amado observed that "there was no need for the Commission to restrict itself to the formulation of universally accepted traditional rules. Its main duty was to fill many gaps in existing law, to settle dubious interpretations… and even to amend existing law in the light of new developments… The Commission must choose… topics offering difficulties to be solved and gaps prejudicial to the very prestige of international law".[68] He said further that requests made by the General Assembly "should not hamper the Commission in the performance of its essential function, which was to seek topics for codification".[69]

He had an almost infectious sense of humour by which he often lightened our labours, both during the serious debating sessions and at the occasional members, social parties. His gift of style and of the apt phrase often illuminated our sometimes complicated drafts and his manner was frequently anecdotal, never apocryphal. He generally recalled with obvious ease some sayings and decisions of delegates at the General Assembly or one of its Committees on which he had sat, and the allusion sometimes helped to suggest possible solutions to otherwise knotty problems of codification. An illustration of his delightful quips when in lighter mood at a social gathering was when, at a cocktail party given by Professor Tunkin in June 1963 at the Soviet Embassy, Gilberto Amado came during his usual round to a small group of us which included Radhabinod Pal, our Indian octogenarian member, and said: "Hello, Pal, the man who has the courage to be older than I". And he thereafter joined the group.

His literary accomplishments as a poet and as a novelist are matched only by his graceful autobiography, upon which have been heaped well-deserved praises. Some of my Latin American friends took the trouble to read to me portions of it from the original Portuguese in English translation in order to convey to me something of the real flavour of Amado's felicity of diction and turn of phrase. Above all he was a diplomat of no mean order. As well as possessing these gracious qualities, Amado never let you forget, on occasion, his Portuguese ancestry which at some point had a streak of Afro-Arab element and, when making the joking reference, he would point to his nose. An affable, sincere and cultivated person, Gilberto Amado was undoubtedly a man of universal culture.

[68] Yearbook, ILC, First Session, 1949, p. 18.
[69] G.A.O.R. 4th Session, 1949, Sixth Committee, Summary Records, 103-104, 159th meeting, 12 October 1949.

I must not conclude without a reference to the last public occasion of his appearance which I witnessed. It was at the Vienna Diplomatic Conference on the law of Treaties, during the 1968 Session. Gilberto rose slowly to his feet at his desk in the hall and, with a sardonic grin, made an allusion to the memory of a departed colleague to whom reference had been made by one of the previous speakers; he then recited some lines from Shelley's "Adonais", winding up with a moving tribute to his favourite, deceased actress daughter. As that moment, he obviously evinced a premonition of death, and we were all very sorry indeed to learn of his death a few months later.

Such a man was Gilberto Amado in whose memory I now have the honour and the privilege to deliver this, the Fifth Memorial Lecture.

The International Court of Justice and the Indication of Provisional Measures of Protection

Four recent cases before the International Court of Justice have served to focus attention on the problems concerning the indication of provisional or interim measures of protection to parties before the Court either on an application by one or both parties or *proprio motu.* The first is the *Fisheries Jurisdiction (United Kingdom* v. *Iceland) Interim Protection Order,*[70] *and Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland) Interim Protection Order,*[71] the second are the two *Nuclear Tests (Australia* v. *France) Interim Protection Order*[72] and *Nuclear Tests (New Zealand* v. *France) Interim Protection Order,*[73] *the third is the Trial of Pakistani Prisoners of War, Interim Protection Order,*[74] *and the fourth is the Aegean Sea Continental Shelf Interim Protection Order.*[75] One other factor which has impelled attention to the problem of provisional measures of protection in the jurisprudence of the Court has been the fact that, as an inevitable part of the general overall revision of the Rules of Court during the past two years, it has fallen to my lot to act as Special Rapporteur on the subject as a member of the Court's Committee for the Revision of the Rules of Court. It seems to me, therefore, that it is appropriate to make an assessment of the general position in international law of the indication or the refusal

[70] *I.C.J. Reports 1972, p. 12 and I.C.J. Reports 1973, p. 302.*
[71] *I.C.J. Reports 1973, p. 99.*
[72] *I.C.J. Reports, 1972,* p. 30.
[73] *I.C.J. Reports 1973,* p. 313.
[74] *I.C.J Reports 1973, p. 328.*
[75] *I.C.J. Reports 1976*, p. 3.

of provisional measures of protection under section 41 of the Statute of the Court in the judicial process today. It will be noticed also that the incidence of the resort to interim measures by parties to cases before the Court has become rather more frequent within the last five years or so than has been the case hitherto. It is accordingly permissible to make the preliminary observation that this phenomenon may illustrate a growing intensification of the judicial process of the International Court of Justice and the corresponding response of parties to cases behaving more and more like parties before municipal courts in relation to the question of the application for injunctions as a preliminary means of seeking redress.[76]

Let us now take a brief look at the main features of the application for the indication of interim measures before the Court. The definitive Article 41 of the Statute of the Court provides as follows:

> (1) The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
> (2) Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

We may note, in parenthesis, that, according to Hudson,[77] only two out of six applications to the Permanent Court of International Justice requesting indications of interim measures were granted.

In the *Belgian-Chinese* case,[78] the President of the Court decided that the circumstances did not require an indication. A second request in the Belgian Memorial was granted later and President Huber indicated provisional measures pending the Court's decision. Later still, Belgium asked the Court to revoke the order. In the *Chorzow Factories* case,[79] Poland's preliminary objection to the jurisdiction of the Court was dismissed. The subsequent request by Germany for an indication of interim measures was rejected because it related not to interim *protection* but to an interim *Judgement* in favour of part of the claim formulated in the German application. The Court's action was taken without an

[76] See Prof. B.A. Wortley's interesting comparative study of the procedure of granting injunctions in "Interim Reflections on Procedures for Interim Measures of Protection in the I.C.J." in *Il Processo Internazionale Studi in Onore di Gaetano Morelli* 1975, pp. 1009-1019.
[77] *The Permanent Court of International Justice,* pp. 428-430.
[78] *P.C.I.J., Series A, No.8, p.5; Series C,* No. 18, I, pp. 305-306.
[79] *P.C.I.J., Series A, No. 12.*

invitation to the Polish Government to submit observations. In the *South East Greenland* case,[80] the application by Norway contained a request for an indication of provisional measures, while the Danish application reserved the right to make a similar request. After hearing the Agents of both parties, the Court dismissed Norway's request but reserved the power to reconsider the matter *proprio motu* at a later time. In the *Pless* case,[81] Poland's preliminary objection that the application by Germany was inadmissible was joined to the merits. Germany requested an indication of interim measures against Poland in respect of certain measures of constraint in the form of taxation of property of the Prince of Pless. President Adatci convoked the Court and sent a telegram to the Polish Minister of Foreign Affairs inviting him to desist from taking any further action until the Court should meet. The Polish Government informed the Court that certain of the measures had been due to error and had been amended and that nothing further would be done. The Court, without pronouncing upon the issue of competence, declared that the German request had ceased to have effect. In the *Polish Agrarian Reform* case,[82] Germany, in its application requested an indication for measures "to preserve the *status quo*" until the judgement of the Court was given. After hearing the Parties, the Court dismissed the German application on the ground that it was not in conformity with Article 41 of the Statute since the pending suit related only to what had happened in the past whereas the request had to do with the future. The question of competence was raised but not decided. Finally, in *Electricity Company of Sofia* case,[83] the Belgian Government requested an indication of *a preliminary* measure, but later withdrew it and it was so recorded by the President. Later the Bulgarian Government presented a preliminary objection to the Court's jurisdiction which, after hearing the parties, was upheld in part and dismissed in part. The Belgian Government made a second request that a certain proceeding in one of its courts be suspended until the Court's final decision. At the hearing for the request, Bulgaria was not represented. The Court ordered that Bulgaria should ensure that no step of any kind was taken which would be capable of prejudicing the rights claimed by the Bulgarian Government or of aggravating or extending the dispute submitted to the Court.

In contrast to the foregoing six cases dealt with by the Permanent Court of International Justice, the International Court of Justice has up-to-date heard

[80] *P.C.I.J., Series C, No.69,* pp. 15-49*; Series A/B*, No. 48.
[81] *P.C.I.J., Series C*, No.70, p. 429; *Series A/B.* No. 54.
[82] *P.C.I.J., Series A/B, No. 58.*
[83] *P.C.I.J., series A/B, No. 77; Series A/B, No. 79.*

eight cases in which requests for indication of interim measures have been presented. In addition to the six cases already enumerated,[84] we may mention the A*nglo-Iranian Oil Co.* case[85] and the *Interhandel* case.[86] These and the other cases will be discussed in the course of the present study.

We may now begin with a consideration of the time for bringing the application for provisional measures. It seems clear that the application may be brought at any time during the proceedings in the case in question, that is to say, it may be brought either along with the main application for commencement of the suit itself, or in any document of the written proceedings, there should be no indication in advance of the institution of a proceeding.[87] An application for interim measures may be entertained notwithstanding that there is pending a simultaneous application to the Security Council for the same or complementary complaint by the applicant.[88] The important thing is that an existing dispute has been submitted to the Court prior to the bringing of the application. Unless the Court decides to dismiss forthwith the application requesting the interim measure, the parties must be given an opportunity to present observations usually at the oral hearings.[89] If there is no application by either party, the Court may, acting *proprio motu,* invoke the power to impose interim measures at any time during the proceedings.

An important question which has often been agitated is: can the power of the Court to indicate provisional measures be delegated? There were earlier attempts, especially during the period of the Permanent Court of International Justice, to delegate the power of the Court to the President, but they were all defeated. There is, however, the question of the President's power of *preliminary appreciation* of the situation resulting in the issue of a *provisional* order (not amounting to an indication of interim measures) pending the meeting of the Court for the purpose of indicating interim measures.

The objects and scope of indicating interim measures may be thus summarised: *(a)* to maintain the *status ante* in order to prevent an aggravation or extension of the situation – such measures "shall have the effect of protecting the rights forming the subject of the dispute submitted to the Court";[90] *(b)* to preserve the respective rights of the parties pending

[84] See the cases listed in the opening paragraph.
[85] *I.C.J. Reports 1951, p. 89.*
[86] *I.C.J. Reports 1957, p. 105.*
[87] *Polish Agrarian Reform* case, 1933*; Aegean Sea Continental Shelf case*, 1976.
[88] *Aegean Sea Continental Shelf case*.
[89] *The Chorzow Factories case, (P.C.I.J., Series A*, No. 12. p. 10). Brief summaries of respective oral observations may be submitted.
[90] *P.C.I.J., Series A/B,* No.58, p. 177

the decision of the Court;[91] *(c)* the measures should not be granted to cover anything beyond what is absolutely essential to ensure the effectiveness of the ultimate decision; in other words, nothing is to be done in the interim period which might render the decision nugatory; and, of course, *(d)* the Court may go beyond the proposal of any party and indicate what it deems most appropriate. In the *South-East Greenland* case,[92] after deciding to dismiss the Norwegian request for an indication, the Court considered whether it should make an indication *proprio motu*.

Only rights in issue are to be protected by an indication and there can be no indication in advance of the institution of proceedings: *Polish Agrarian Reform* case.[93] On 26 May 1933 the German Government notified the Registrar that a proceeding would be instituted relating to the Polish agrarian reform and on 30 June 1933 the Registrar was notified that interim protection would be requested; but the request was filed with the application only on 3 July 1933. In the *Electricity Company of Sofia* case,[94] the Court declared that Article 41 of the Statute "applies the principle universally accepted by international tribunals… that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".

The court will not indicate interim measures "for the sole purpose of preventing regrettable events and unfortunate incidents". It took the view that even an action calculated to change the legal status of the territory would not in fact have irremediable consequences.[95] That this somewhat sweeping generalisation regarding the scope of interim measures must be taken as limited to the peculiar facts of the instant case will be shown when we come to discuss the *Aegean Sea Continental Shelf* case later.

A word of explanation of the expression "*interim measures of protection*" seems to be necessary here. When, during the discussion regarding the adoption of the final text of amended articles at its 47th meeting on Thursday, 19 February 1931, sir Cecil Hurst had read out the English text of the Article, Judge Eysinga observed that the expression "mesures conservatoires" in the French text was rendered in English by the words "interim measures of protection", and wondered whether the two expressions exactly coincided. The old Article 57 had used the words "measures for the preservation in the meantime of the respective

[91] *P.C.I.J., Series A,* No. 8, p. 6.
[92] *P.C.I.J., Series A/B,* No. 48, pp. 287-289.
[93] *P.C.I.J., Series C,* No. 71, pp. 136-137.
[94] *P.C.I.J., Series A/B,* No. 79, p. 199.
[95] *P.C.I.J., Series A/B*, No. 48. pp. 284, 288; cf. *Series A*, No. 8, p. 7.

rights of the parties". Referring to the conditions in which the English text of the 1922 Rules of Court had been prepared, the Registrar pointed out that the Expression "mesures conservatoires" was rendered into English by different expressions in Article 41 of the Statute and Article 57 of the rules. He further pointed out, however, that the expression used in the various orders made by the Court under these Articles had nevertheless been "interim measures of protection", which expression was moreover in conformity with the heading of Article 57 of the Rules. Upon this explanation, the Court decided to postpone the question of the best translation of "mesures conservatoires" until the session in which the Court would undertake a general examination of the Rules of Court and in the meantime maintain the text with the expression "interim measures of protection".[96]

Judges *ad hoc* and Provisional Measures

It is desirable to have a judge *ad hoc* for both sides when dealing with an application for interim measures. The case may, however, proceed in the absence of a party if *(a)* either the presence of such a party was not previously excused by the Court, or *(b)* if the absence was not satisfactorily explained. In any case, the proceedings must continue whenever it is clear that the presence of a party concerned is not required by law.

Although judges *ad hoc* are, under Article 31 of the Statute of the Court, on terms of equality with the Members of the Court, yet there are inevitable differences between the two categories. The position is that a judge *ad hoc* must not be taken into account for the calculation of the quorum.[97] Again, the presence of judges *ad hoc* is not necessary for the making of orders relating to the *conduct,* as distinct from the *decision,* of a case;[98] orders relating to fixing the date of the proceedings;[99] orders relating to the termination of the proceedings;[100] or for decisions in regard to the language to be used by a party.[101] Finally, it must be borne in mind that the Court may consider a request for the indication of measures of interim protection in the absence of judges *ad hoc: Chorzow Factories* case,[102]

[96] *See Acts et Document Relatifs* A2 *L'organisation de la Cour. Deuxième Addendum au No. 2 Modifications Apportées au Règlement en 1931,* at pp. 253-254.
[97] See Article 32 of the 1972 Rules and Article 20 of 1978 Rules.
[98] *Series* E. No. 15, p. 115.
[99] *Series* E, No. 1, p. 248.
[100] *South East Greenland* case, *P.C.I.J. Series A/B*, No.55.
[101] *Series E,* No. 14, p. 138
[102] Order of 21 November 1927, *Series A*, No. 12, p. 10.

though a judge *ad hoc* was allowed in the *South-East Greenland* case,[103] on the ground that his presence was not inconsistent with the urgent nature of interim measures.

The Necessity to Hear both Sides

It will have been obvious from all the cases to which we have had to refer, whether heard by the Permanent Court of International Justice or by the International Court of Justice, that it has become an established practice for applications for indication of provisional measures of protection to be disposed of by the Court only after hearing the parties. The hearing may take the form of oral or written observations. Such a hearing may, however, be dispensed with in any particular case if one party does not appear or if it fails to defend its claim. Thus, in the *Aegean Sea Continental Shelf* case,[104] where Greece brought an application for an indication of interim measures and Turkey did not appear because it rejected the Court's jurisdiction, the Greek application was nevertheless heard, though refused on certain other grounds.

One question usually raised is the extent to which the Court is required, if at all, to be satisfied that it has jurisdiction before hearing the application. Does Article 41give the Court an inherent power to hear the application in the sense that the section confers an automatic right to jurisdiction, irrespective of the attitude of the other party to a dispute brought before the Court? Or, is the matter to be considered only within Article 53 of the Statute of the Court?[105] But paragraph 2 of that section requires the Court to be satisfied, not only that it has jurisdiction in accordance with Article 36 and 37 but also that the claim is well founded in fact and in law. As the issue is a fundamental one for the Court, we may as well turn a fairly full consideration of the jurisdictional question.

Application for Provisional Measures and the Issue of Jurisdiction

In the practice of the Court, the view which has prevailed is that the question of jurisdiction need not be first settled by the Court before

[103] *Series A/B.* No. 48, p. 280

[104] *I.C.J.Reports 1976.*

[105] *Hudson, ibid at p*. 420, would seem to be of the view that Article 53 of the Statute of the Court should be invoked if the party objecting to the jurisdiction of the Court in respect of an application for interim measures should fail to appear of the oral hearings.

the request for an indication of interim measure of protection can be dealt with, so long as the Court is satisfied that it *prima facie* has jurisdiction to begin with. Once the Court acts in the belief that its jurisdiction is manifest, that is, that it does not on the face of it lack the power to deal with the subject-matter of the application, the fact that it subsequently decides at a later stage in the proceedings that it does not in fact have such jurisdiction does not render the earlier indication invalid *ab initio,* but the interim indication ceases forthwith to have effect.[106]

It is to be noted that since Article 41 speaks of "party", "parties" and "pending the final decision", it would appear that there must have been a submission to the Court. This point was raised but was not decided in the *South-Eastern Greenland* case.[107]

Of the six applications dealt with by the Permanent Court of International Justice, in only two were objections to jurisdiction raised and considered: in one, it was dismissed, but in the second it was partly dismissed and partly granted. In the *Chorzow Factory* case, the objection to jurisdiction was dismissed while the request for interim measures was also refused because the application did not relate to interim *measures* but to an interim *judgement* in favour of part of the claim formulated in the German application. In the *Electricity Company of Sofia and Bulgaria* case, the Belgian Government, after withdrawing its application for interim measures, later presented a preliminary objection to the Court's jurisdiction and the Court, after hearing the parties, upheld the objection in part and dismissed it in part. Nevertheless, the requested indication was eventually granted.

Before the International Court of Justice, the issue of jurisdiction has been raised in particular in the *Anglo-Iranian Oil Company* case, the *Fisheries Jurisdiction* case and the *Aegean Sea Continental Shelf* case in applications requesting indications of interim measures. One noticeable development in these cases *has,* however, been the great play made of the issue of jurisdiction as a matter of first priority to be settled before anything else. In particular, the argument was advanced, as never before, that no indication of interim measures should be granted by the Court unless and until it first decided *in limine litis* that it has jurisdiction to entertain the case; it is almost always implicit in such an argument that the issue of admissibility of the application for a request for interim measures is inevitably bound up with the issue of the exercise of jurisdiction by the Court. It can be said, however, that both the Permanent Court of International Justice and the International Court of Justice up to and including the *Anglo-Iranian Oil*

[106] *Polish Agrarian Reform* case, *P.C.I.J., Series A/B, No. 54, p. 153;* idem., *No. 58, p. 179.*
[107] *P.C.I.J., Series C,* No. 54 (1932), p. 436; Series C, No.55, p. 419; *P.C.I.J., Series C,* No. 56, p. 427.

Co. case and even the *Interhandel* case have followed the judicial policy of considering any preliminary objection to jurisdiction as worthy of careful examination and, thereafter, if satisfied that the case should be entertained, of proceeding with the request for interim measures, leaving aside the question as to whether or not the Court might decide at a later phase of the case that it has no jurisdiction after all.[108] Even if no preliminary objection has been raised by a party to the Court's jurisdiction, if it is manifest to the Court that it has no apparent jurisdiction to entertain the merits of the dispute as presented in the application for a request or interim measures, the Court has always exercised the judicial caution to desist from taking any further action on the application.

It was only in the *Fisheries Jurisdiction* case, the *Nuclear Tests* case *(Australia v. France)*,[109] and, especially, the *Aegean Sea Continental Shelf* case,[110] that the strongest arguments were first put forward that unless and until the issue of jurisdiction was settled by the Court, it should not entertain the application for an indication of interim measures. The case, it is usually demanded by the party objecting to the Court's jurisdiction, should be removed from the list. On the issue of jurisdiction in the *Aegean Sea Continental Shelf* case, the Court is right in following its own jurisprudence by holding that it was satisfied that it could and should deal with the matter of the request for interim measures, leaving the final determination of the Court's jurisdiction till a later phase in the case. Indeed, it included in its Order a direction that the next stage was for Greece to submit the issue of jurisdiction for the Court's detailed consideration and final adjudication.

To follow the course advocated by those who wanted the issue of jurisdiction settled *in limine litis* would be to go against the grain of the exercise of the Court's normal judicial functions, thus making it possible for a party objecting to the jurisdiction in such a case in effect to veto all proceedings in any dispute brought before the Court, irrespective of the merits or the demerits of the case for either side; such a course might result in endangering international peace and security, contrary to the United Nations Charter.

Under Article 36 (6) of the Statute, the Court is empowered solely to decide its own jurisdiction, and this can be exercised whether

[108] It may be recalled that in the A*nglo-Iranian Oil Co.* case, the Court refused to draw the conclusion that, on the basis of the principle of *forum prorogatum,* Iran, by presenting an objection to the jurisdiction while also raising certain questions of admissibility, had thereby conferred jurisdiction upon the Court, as argued by the United Kingdom (see I.C.J. Reports 1952, pp. 113-4).

[109] See the Dissenting Opinions in this case.

[110] See the Separate Opinions of Judges Morozov and Tarazi.

or not the other party to a dispute in respect of which there has been brought an application for interim measures appears before the Court at the oral hearings. This happened, for instance, both in the *Nuclear Tests* case (Australia v. France) and the *Aegean Sea Continental Shelf* case. This power of the Court to decide its own jurisdiction under Article 36 (6) of its Statute may be regarded as reinforced under Article 41 (1) of the Statute which confers inherent power upon it to indicate interim measures when requested by a party to a dispute or if the Court decides to act *proprio motu*.

The new insistence that the Court must first settle the issue of jurisdiction before considering an application for a request for interim measures also overlooks the fact that any court of law must have a *general* inherent jurisdiction to determine whether or not it has jurisdiction in any *specific* case brought before it. It is only by entertaining a case brought before it that a court can decide whether or not there is anything worth considering at all. Unless an application is patently or manifestly devoid of any merit at all or unless the subject-matter is clearly illegal, as for instance if it is based on an agreement to begin a war, the Court should be able to decide its own competence to indicate interim measures. It may be mentioned in passing that even if an application invokes a treaty that is allegedly vitiated by *jus cogens* within the meanings of Articles 53 and 64 of the Vienna Convention on the Law of Treaties, the procedure laid down in Articles 65 and 66 of that Convention must be followed. On the whole, thereafter, the Court's power under article 41 of the Statute to indicate interim measures would be restricted if not entirely denied were the principle to be accepted that the issue of jurisdiction should be settled prior to an application for a request for interim measures to be entertained. It would hamper the normal course of the Court's judicial process.

Judge Dillard, in the course of the Court's deliberations over the final revision of the Rules of Court in 1977, suggested that a new rule be included under the heading of "Special Appearance", which would enable a party objecting to the Court's jurisdiction in respect of an application for interim measures to appear before the Court for that purpose alone and to withdraw from the case thereafter if that party so wishes.[111] This would be to enable the Court to perform its judicial function of determining whether or not it has jurisdiction while at the same time permitting the other side to

[111] The sentence he would add was: "A preliminary objection, limited to the question of the jurisdiction of the Court, will not be considered by the Court as an acceptance of the jurisdiction of the Court within the meaning of Article 36 of the Statute". A similar suggestion might also be needed to take care of the appointment of an Agent, he thought. Judge Dillard explained: "Its purpose is to avoid the anomaly of a party bringing to bear his views on a case while technically remaining a non-party. The idea is to introduce the legal device of a non-prejudicial "Special Appearance"... This suggestion was tendered to me by a friend and student of the Court (sic, Judge Philip Jessup)... In his recent article on our *Aegean* Sea case, Professor Leo Gross appears to be making a similar suggestion (47 A. J.I.L., 31-59, January 1977)".

appear "without prejudice". It was, however, thought that, on the whole, more or less the same result has in fact been achieved by the procedure so far adopted, for instance in the *Fisheries Jurisdiction* case, the *Nuclear Tests* case and the *Aegean Sea Continental Shelf* case, in each of which the formal appearance of the party objecting to the jurisdiction of the Court did not produce a different result, despite any misgivings expressed so far by those who thought otherwise. The Court decided, rightly it is thought, against the inclusion of a provision for "special appearance".[112]

The Significance of the Word "indicate"

It is interesting to note that the second paragraph of the present Article 41 has remained as it was drafted by the 1920 Committee of Jurists. As for the first paragraph, the Committee put forward the following as its proposed draft Article 39:

> If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require it, the provisional measures which must be taken to preserve the respective rights of either party.

The Committee was of the view that the idea of interim protection had been taken from various treaties between the United States of America and China, especially the Treaty of 15 September 1914 and that between the United States and Sweden of 13 October 1914, the so-called "Bryan Treaties", and that a somewhat similar provision had been included in Article 18 of the 1907 Convention establishing the Central American Court of Justice.

The Sub-Committee of the Third Committee of the First Assembly, however, substituted "indicate" for "suggest" in the 1920 Committee's text[113] as it would seem that the word "indicate" has a diplomatic flavour being deemed to avoid offence to the "susceptibilities of States".[114] The Sub-Committee also dropped the introductory conditional clause so that "all possible cases would be covered".[115] As thus amended, the Article

[112] The Rules Committee so recommended and the Court accepted the recommendation, after carefully considering and examining the purpose served by a "special or conditional appearance" in Anglo-American procedural law. To appear to recognize any procedure whereby a State might not be bound by the Court's decision on the challenge to jurisdiction would be contrary to Article 36, paragraph 6, of the Statute", said the Committee for the Revision of the Rules of Court, RR 77/10 of 7 July 1977, p. 4.

[113] Documents, p. 134. Records of First Assembly Committees I, p. 368.

[114] (Series D, no.2, 3rd add.) p. 282.

[115] Docs., p. 103. Records of First Assembly Committees I, p. 307.

covered "omissions which infringe a right as well as positive acts".[116] We may note in this connection the German request for interim measures of 14 October 1927 in the *Chorzow Factory* case.[117]

In 1929 a proposal was made to add to Article 41 a provision enabling the President to act for the Court, similar to that in Article 57 of the 1926 Rules; but it was thought that the situation was adequately covered by Article 30 of the Statute of the Court.[118]

Sometimes an applicant Government employed in its application the term "order" instead of the term "indicate", as when the Norwegian application requested an order for provisional measures in the *South-Eastern Greenland* case.[119] On the whole, the term "indicate", which had been employed in Article 32 of the Constitution of the International Labour Organisation, was considered to be stronger than the term "suggest".

Hudson made the interesting observation that the change "may have been due to a certain timidity of the draftsmen", and that "it is no less definite than the term 'order' would have been, and it would seem to have as much effect".[120] Hudson further pointed out that "little significance is to be attached to the phrase 'measures suggested' in paragraph 2 of Article 41, no equivalent of which appears in the French version", the use of the term "indicate" does not attenuate the obligation of a party within whose power the matter lies to carry out the measures "which ought to be taken"; he added that "an indication by the Court under Article 41 is equivalent to a declaration of an obligation contained in a judgement, and it ought to be regarded as carrying the same force and effect".

It goes without saying that an indication of interim measures by the Court, whether it is given in the form of an order or otherwise, has the same force as a decision of the Court which "has no binding force except between the parties and in respect of that particular case" (Art. 59 of the Statute of the Court). An indication of interim measures is at least an interim judgement, and may in certain cases be a final decision on a particular issue. As Hudson has said:[121]

> The judicial process which is entrusted to the Court includes as one of its features, indeed as one of its essential features, this power to indicate provisional measures which ought to be taken. If a State has accepted the general office of the Court, if it has joined with other States in maintaining the Court, or if it is

[116] Docs., p. 172. Records of First Assembly, Plenary, p. 467.
[117] *P.C.I.J, Series A,* No. 12, pp. 6-7.
[118] See Minutes of the 1929 Committee of Jurists, pp. 340, 588, 650.
[119] *P.C.I.J., Series A/B, No. 48.*
[120] *Op. Cit., p. 415.*
[121] *Idem,* p. 420.

> a party to a treaty which provides for the Court's exercise of its functions, it has admitted the powers which are included in the judicial process entrusted to the Court. It would seem to follow that such a State is under an obligation to respect the Court's indication of provisional measures; in other words, as a party before the Court such a State has an obligation, to the extent that the matter lies within its power, to take the measures indicated. This obligation exists apart from and prior to a determination of the jurisdiction of the Court to deal with the merits of the pending case, but it ceases to be operative when a determination is made that the Court lacks such jurisdiction.[122]

Such an obligation devolves upon any State which has made a declaration accepting the jurisdiction of the Court "in conformity with Article 36 of the Statute". Numerous instruments provide for the Court's exercise of the power to indicate provisional measures and affirm the obligation of the parties to take the measures indicated; e.g., Article 33 (1) of the General Act of 1928 (the Briand-Kellogg Pact) so provides and Section 33 (3) requires parties to abstain from any action which might aggravate the dispute.[123]

Basis for the Court's Indication of Interim Measures

One of the most crucial problems facing the Court when considering an application requesting an indication of interim measures is to determine upon which factors it should base its decision in each particular case. Article 41 (1) of the Statute gives the Court "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". The jurisprudence of the Court over the past fifty years would seem to permit us to attempt the following summary:

(1) the Court must satisfy itself that it has jurisdiction to entertain the merits of the application. The issue of jurisdiction is accordingly one of the most important of all the relevant circumstances to be taken into account by the Court;

(2) the main object of the provisional measures to be indicated must be the preservation of the respective rights of either party:

[122] See President's Order of 8 January 1927 in the *Belgian-Chinese* case, *P.C.I.J., Series A,* No. 8, p. 7.
[123] See Order of 3 August 1932 in the *South-Eastern Greenland* case, *P.C.I.J., Series A/B,* No. 48, p. 288; Article 19 of Locarno Treaties 1923; League of Nations Treaty Series, pp. 313, 325, 337, 352.

(a) the primary purpose is to maintain the *status quo ante* as between the parties so far as this can in the interests of justice be done. In the *Legal Status of the South-Eastern Greenland* case,[124] the Court refused to indicate provisional measures because it took the view that even action calculated to change the legal status of the territory in question could not in fact have irreparable consequences for which no legal remedy would be available. The Court found that in both countries "the states of mind and intentions were so eminently reassuring that there was no need to indicate interim measures for the sole purpose of preventing regrettable events and unfortunate incidents". This decision must be regarded as limited to the peculiar circumstances of that particular case.

(b) On the other hand, a more relevant and more universal guide is the opinion of the Permanent Court of International Justice in the *Electricity Company of Sofia and Bulgaria* case[125] that Article 41 of the Statute "applies the principle universally accepted by international tribunals… that the parties to a case must abstain from any measures capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".

To the extent to which the majority of the Court in the *Aegean Sea Continental Shelf* case[126] seemed to have laid the most emphasis on aggravation of the situation as essentially limited to the possibility of destruction or disappearance of the subject-matter of the dispute, the present writer disagreed, pointing out that aggravation could and should be given a wider connotation and that the Court should re-consider its position whenever it should find itself called upon to apply this judicial formula to a future case involving different circumstances. In this connection, the present writer drew attention to the General Assembly resolution 171(11) of 14 November 1947, "considering that it is also of paramount importance that the Court should be utilized to the greatest

[124] *P.C.I.J., Series A/B,* No. 48, 1932, p. 268.
[125] *P.C.I.J., Series A/B,* No. 79, 1939, pp. 194-199.
[126] *I.C.J. Reports 1976.*

practicable extent in the progressive development of international law, both in regard to legal issues between the States and in regard to constitutional interpretation…"

(3) The Court would clearly not indicate provisional measures if, as in the *Chorzow Factory* case, the application in fact related not to interim protection but to what would amount to an interim judgement in favour of part or the whole of the claim formulated in the request. If, however, the Court should consider that the application has an independent basis and is not related directly to the issue for decision in the case itself, it would indicate interim measures, as it in fact did in the *Nuclear Tests* case (Australia v. France), in which the dissenting opinions were that the Court should refuse an indication of interim measures on the ground amount to giving an interim judgement.

(4) It is equally inappropriate for the Court to indicate interim measures if to do so would amount to dealing with a situation that had happened in the past whereas the application in question has to do with the future. This was why the Court held it not to be in conformity with article 41 of the Statute to indicate interim measures in the *Polish Agrarian Reform* case.

(5) Where there are concurrent or simultaneous applications requesting the Court to indicate interim measures under Article 41 of the Statute on the one hand and the Security Council to take urgent action to prevent a breach of the peace under Article 36 of the United Nations Charter on the other, any prior action taken or direction given by the Security Council must necessarily have the effect of impeding the granting of any contrary indication of interim measures by the Court. Thus, in the *Aegean Sea Continental Shelf* case, one of the important factors, indeed the most important factor, inducing the Court to decline to indicate interim measures was the earlier recommendation made by the Security Council that both parties should desist from taking action in furtherance of the dispute. It is strange that, in this particular case, the Security Council chose not to heed the significant guideline contained in Article 36 (3) of the UN Charter which reads:

> In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

One ostensible reason for the Security Council's omission to stay its hands and refer the Greek Application to the International Court of Justice as a *legal* dispute might be the difficulty of getting *both* parties to comply with Article 36 of the Statute of the Court. If it be that considerations of the obvious urgency of the situation would brook no delay, why should this same factor not also have warranted the indication of interim measures by the Court so as to maintain the *status quo ante* as between the parties and thus prevent an aggravation of the situation, as the Court did for instance in the *Nuclear Tests (Australia* v. *France)* Interim Order of 22 July 1973,[127] when in paragraph 26 the Court considered "whereas these allegations give substance to the Australian Government's contention that there is an immediate possibility of a further atmospheric nuclear test being carried out by France in the Pacific" and therefore indicated interim measures against France? If the *immediate possibility* of a further atmospheric nuclear test being carried out by France in the Pacific was considered by the Court to be sufficient in the one case, why was it not considered sufficient that the actual bellicose continuation of seismic operations by Turkish gunboats in the Aegean Sea among the Greek islands could aggravate the already dangerous situation? One suspects that the unequal power position of the parties alone enabled a majority of the Court to give as one of its main reasons the fact that any damage that Greece might suffer at the hands of Turkey could be compensated for eventually a doctrine of Might is Right. It would have been better if the Court had based its ruling squarely upon the Security Council's prior determination in the matter rather than upon any absence of possible aggravation of the situation. Greece had clearly been hamstrung by its previous acceptance of the Security Council's recommendations, and the Court should simply have said so. Of course, the Court came close to that conclusion in its operative paragraph which says:

> The court finds, by 12 votes to 1, that the circumstances as they now present themselves to the Court are not such as to require the exercise of its power under Article 41 of the Statute to indicate interim measures of protection.

[127] *I.C.J. Reports 1973, p. 99.*

THE INFLUENCE OF SCIENCE AND TECHNOLOGY ON INTERNATIONAL LAW

Lecture delivered on 3 June 1983
by H.E. Mr. Geraldo Eulálio do Nascimento e Silva
Ambassador of Brazil and
Permanent Representative to the UN Office at Vienna

Foreword

Your very generous invitation, Mr. Chairman, to deliver the "Gilberto Amado Memorial Lecture", has given me an opportunity to invoke the memory of a man I admired, but, curiously enough, it is not an easy task for me as a Brazilian, to speak of Gilberto Amado, since my introductory words might consume the time allotted to me.

Gilberto Amado was a remarkable man in every sense and no one will contest his outstanding position in modern Brazilian literature; yet his written contribution in the field of international law is minimal. However, in the yearbooks of the International Law Commission, his interventions stand out due to their clarity and opportunity. A study of his approach to international law, based on the summary record, could be a challenging and gratifying task which I should have taken up.

But I honestly feel that the theme of my lecture corresponds to his concept of a dynamic international law, and in this sense I am indebted to two of my predecessors in this chair.

Judge Elias reminded us of Gilberto Amado's defence in the General Assembly of the right of the ILC to select the topics for development and codification, observing that "there was no need for the commission to restrict itself to the formulation of universally accepted traditional rules. Its main duty was to fill many gaps in existing law, to settle dubious interpretations… and even to amend existing law in the light of new development…

The Commission must choose… topics offering difficulties to be solved and gaps prejudicial to the very prestige of international law".

Judge Manfred Lachs recalls that "il avait des formules frappantes qui nous sont restées en mémoire", and quoted: "nous n'avons pas le droit de détourner nos regards de la réalité …à une époque où le présent déjá recule et oú l'avenir est sur nous". And Manfred Lachs summarises : Là le philosophe, l'écrivain et le juriste ne font plus qu'un".

I feel that this brief essay on the influence of science and technology on international law does correspond to the juridical and philosophical approach of Gilberto Amado to the realm of law which all of us have embraced.

The Influence of Science and Technology on International Law

In the closing stage of the Second World War, humanity witnessed the birth of the most fearful agent of mass destruction ever designed by man. The initial reaction of scholars on taking cognition of the hecatomb caused by the explosion of the atomic bomb on Hiroshima was that international law should condemn its use in the future. But such an attitude, understandable in every sense, is not practical since States that control such weapons are loathe to abdicate such an advantage over potential enemies and only agree to negotiate when they realize that such weapons may be deployed against them.

Science was able to show that this amazing source of energy could be utilized for pacific needs and further studies showed that man had harnessed a new source of energy and in a little while the first nuclear power plants entered into operation. Once again international law had to enter into this entirely new field, and the Statute of the International Atomic Energy Agency signed in Vienna in 1956 laid down two main purposes: "to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world" and also to ensure that nuclear energy "is not used in such a way as to further any military purpose". The Statute also provides that in carrying out its functions, the Agency shall further "the establishment of safeguarded worldwide disarmament". The Non-Proliferation Treaty of 1968, heralded as a major contribution to world peace, was in this sense a step backwards, since it simply legalized the proliferations of nuclear armament by the nuclear

weapon States while creating additional safeguards for States whose primary interest in nuclear energy is of a pacific nature. I need not elaborate on the solemn obligation undertaken by all the parties to the treaty "to obtain in the shortest time possible the end to the nuclear armament race and adopt efficient measures aimed at nuclear disarmament".

The sudden and dramatic impact caused in so many spheres of human activity by nuclear energy, including the field of international law, needs no substantiation. The phenomenon which we intend to study, however, is not new, since in the past many discoveries also changed or influenced international law. Then a technological breakthrough – and even in this field we must note the changes in terminology – was a rare thing. Nowadays technology has reached a stage in which every scientific discovery can be transformed almost overnight into reality.

If we assume that international law was born with the works of Francisco de Vitoria or those of Grotius, depending on one's approach to the subject, we realize that their first contributions are linked to the changes introduced in navigation which opened up new venues in this field, especially with the creation of the caravels. The invisible barriers which navigators dared not trespass fell and the sea route to India, and later the discovery of the New World, took place.

It is also necessary to examine the new dimensions and the new domains which science and technology opened up. In this sense the most important contributions was to modify the approach of international law that up to a certain moment was limited to a two dimensional plane, i.e., the sea and the earth. With the discovery of radio and aerial navigation, a completely new dimension appears, namely the air, if we should wish to pursue this line of thought a little further, we could point out that after the Second World War, outer space as distinct from air space came into being to the legal world as did the seabed and the ocean floor.

All these recent and past discoveries opened up new horizons but at the same time resulted in international confrontations which demanded a thorough examination in order to adapt international law to new situations.

In this respect one must realize that in many cases these discoveries in the long run have not been advantageous to mankind in general. On the other hand, many weapons of destruction aimed at the annihilation of enemies have often in the aftermath turned out to be beneficial to mankind. As Eric Stein points out: "We all have been preoccupied by the contradiction between the benign and the pernicious effects of modern technology. The benign effects mean higher living standards. The pernicious effects are twofold: the ecological crisis, that is,

the technology-produced threat to the environment; and the technology--produced threat from modern weapons".(1)

Turning in the negative impact of science and technology on international law, it suffices to mention the ecological problems, which are already a major world preoccupation. The simple fact is that in spite of improvements in modern living, many of the advantages are momentary and in the long run may represent a serious threat to the future of the world. Some of the risks passed practically unnoticed, because the threats were not immediate. In other cases the danger is quite evident, such as in the case of nuclear abuse, the pollution of the seas and of the atmosphere and the threat to the ozone layer.

Due to the very wide range of subjects covered, we only intend to examine, albeit in a very superficial manner, the influence of science and technology on the sources of international law, the new dimensions of international law and the question of environmental pollution.

The Influence of Science and Technology on the Sources of International Law

The rapid change in the structure of international law has had a corresponding influence on its sources. Custom has lost its previous predominance in favour of treaties, especially after the creation of the United Nations.

The evolution of international law in the post-war period is due almost exclusively to conventional law, which has adopted rules capable of keeping up with technological innovations that often turn yesterday's rules obsolete. One could multiply the examples in this sense, but it suffices to mention the continental shelf, the legal regime for the deep seabed, and the explorations and use of outer-space including the moon and other celestial bodies.

We feel that treaties are, at the present stage, the ideal source of international law since they have, among other qualities, that of determining in a clear of relatively clear manner the rights and duties of States which ratified them.

It is quite true that the clauses we find in general multilateral treaties may lack clarity, but even in such a case the duties of those States that ratified them are more certain than those that derive merely from custom.

Many treaties aimed at evolutions brought about by science and technology represent the principal and, in most cases, the only source in the matter. In other words, these treaties or conventions are *de lege ferenda*.

This new prominence can be traced to the post-war period and is due to the work of the United Nations and other international organizations and it was also the result of what is called the universalization of international law. In other words, the international community, as substantiated by international organizations, realizes that the ideal solution of certain juridical matters is through treaties and recognizes the necessity to give to the majority of States, especially the newly independent States, the possibility to accept or modify rules in whose formulation they did not participate.

Even now, we find that in the case of such recent problems raised by technological development as the continental shelf and the placing of satellites in outer space, the influence of the more powerful and industrialized nations make itself felt. When minor States dare to proclaim principles which go against the interests of these great powers, they are immediately condemned as being contrary to international law. The 200 miles rule broached for the first time in 1947 was ridiculed and considered inadmissible during the first and second conference on the law of the sea. When the third conference reconvened, the idea of a 200 mile zone was met at the start with considerable oppositions by the two major powers. Their positions in the case of sea bottom and of outer space has been the rule of first come first served, which has certain analogy with international law of the 16th and 17th centuries in the case of the discovery of new territories. Then as now the idea of "first come" only applies to those that can uphold militarily their claim. The deadlock in the Conference on the law of the sea was and still is a result of such a situation since the developing countries do not accept this technological monopoly.

The importance of treaties in the formation of contemporary international law, especially in those new fields opened up by science and technology, is closely linked to the problems of its codification. The controversy as to the convenience or inconvenience of codification is no longer of major importance, even though it has been argued that it may hamper the development of international law.

When the United States put forward its claims to the continental shelf, science taught us that as a depth of approximately 200 metres all forms of life ceased to exist and due to that fact the continental shelf abruptly ceased, plunging into the ocean depths out of reach of mankind and where nothing of value existed. The 1958 Convention on the Continental Shelf was based on this fallacy. But the international community had to override those rules which were piously accepted a quarter of a century ago, since science and technology have proved that

the riches which can be found at the bottom of the sea are immense and that with new techniques their exploitation is viable.

Codification does not necessarily immobilize international law, it does not transform it into a static set of rules since later practice can influence or modify a written treaty and the Charter of the United Nations, as we understand it today, is a vivid example of this phenomenon. Or, to use the words of M. K. Yasseen "it is necessary to take into consideration the evolution of the law, in order to give it a dynamic interpretation, aimed at adapting the old rules of the treaty to the new realities of international law".(2)

The paramount importance of custom as the principal source of international law changed after the Second World War due to the introduction of new subject matters and with the increase in the number of members of the international community.

Paul de Visscher, in his lecture at The Hague in 1972, commented that "custom may seem strangely out of place in today's international community whose members are cognisant of their differences and contradictions and try to solve them by a clear exercise of peaceful coexistence based on consensus and on treaties freely concluded".(3)

In the past, when it was the outcome of uses and customs accepted by a small number of Western European States, custom was the basis of international law, as we understand it today. One might even speculate that if the composition of the international community in the 16th and 17th centuries were identical to the present one, the development of international law would have been almost impossible.

International customs were the result of long established uses over a certain period of time so much so that *duration* was considered as one of its principal elements. The Permanent Court of International Justice had the opportunity to stress the importance of the time-factor: "a constant international practice" (the Wimbledon case, 1923) or of a "constant and uniform usage practised by the States in question" (Asylum case, 1950).

Judge Negulesco, in a dissident opinion, went even further asserting that custom is based on an "immemorial repetition of facts accomplished in the field of international relations".

The rapid changes caused in many cases by science and technology had a consequential effect on the definition of custom and one finds that the time-factor may be very much shorter and lost pride of place to the importance of *opinio juris.*

With the *North Sea continental self* case, the International Court of Justice took an important step in this direction since it considered that

"the passage of only a short period of time does not stand in the way of the creation of a new rule of international law".

Although custom no longer enjoys its traditional preeminence, it would be a mistake to ignore its continuous importance. To begin with, the codification of international law is still in an early stage and since customary international law in some fields is more than satisfactory, it would be a mistake for the International Law Commission to relegate to a secondary place problems which are demanding an immediate solution.

Decisions of the International Court of Justice on recent modification of international law brought about by science and technology are scarce, even though, by analogy, one can quote some previous judgements and advisory opinions. In this sense, the controversial *Lotus* case can be mentioned since it opens up the door to the adoption of rules by a given State as long as they are not contrary to existing international law. Among recent decisions directly linked to the subject matter, we can mention the *North Sea Continental Shelf Case* (1969), the *Nuclear Tests Case* (1974), and the *Aegean Sea Continental Shelf, Interim Protection* (1976). The Court's decisions however were extremely cautious in these three cases and, in our view, disappointing in the *Nuclear Tests Case.*

Of these, the *North Sea Continental Shelf Case* is the most important especially the *consideranda* regarding the value of non-ratified treaties as a source of custom and the modification of the concept of time in the formation of custom. The position adopted in these two problems is applicable to international law as a whole. The Court's decision on the substantive question is however very vague and open to criticism.

The *Nuclear Tests Case* (judgement of 20 December, 1974) also deserves to be mentioned even though the Court avoided a decision on its merits. In its submission the Government of Australia asked the Court to declare that "the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law." The Court, however, taking into account various statements made by French authorities, that no future tests would be held, was of the opinion that "the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon".

In our opinion the Court sidetracked the issue at stake and the six dissenting judges were absolutely right in pointing out that the "judgement fails to take account of the purpose and utility of a request for a declaratory judgement".

An excellent opportunity was lost by the Court to further the progress of international law. We concur that no customary international

law exists condemning such test, but no one can deny that public opinion in the whole world would have applauded a pronouncement of the Court condemning not only such tests but also the continued manufacturing and improvement of these and other inhuman weapons of destruction. In this sense, it could have invoked the various resolutions passed by the General Assembly of the United Nations proscribing such tests, which in the long run represent the opinion of mankind as incorporated in the basic principles of the United Nations Charter.

It is our submission that the prestige of the Court, as distinct from that of its members, is such that it can give to certain principles the status of law, thus contributing to the progressive development of international law. In this sense, we must recall Lauterpacht's rejection of *non-liquet* and his view that a tribunal should always come up with a decision that would deal with the substantive issues of law involved. Apparent gaps and uncertainties could always be filled by "recourse to principles and rules of private law in similar or analogous fields".(4)

Although the majority of authors tend to negate the importance of its judgements as direct sources of international law, we feel that the principles it eventually does acknowledge are usually accepted at a further stage, such as it has occurred with the International Law Commission which has not hesitated to incorporate them into the texts it has adopted.

In its formative stage, the writings of outstanding authors such as Grotius, Bynkershoek, Gentili or Vattel were of prime importance, due, in part, to the lack of other valid sources aimed at backing up new legal concepts which were being broached.

Although the importance of the writings of publicists has lost weight, the role of certain collegiate bodies cannot be ignored. The Resolutions of the *Institut de Droit International* contributed and still contribute substantially to the development of international law. At present mention of the drafts of the International Law Commission, as well as the Reports on the various subjects it has examined, is almost obligatory in any textbook

Frequently, the International Law Commission, in the drafting of its articles, has been obliged to fill in the lacunae of international law in which custom does not offer satisfactory guidelines. In the majority of these cases, the conventions which were signed adopted the new rules which were proposed.

In the new fields of international law opened up by science and technology, the most qualified internationalists must once again play a role similar to that of the authors of the 16th and 17th centuries.

International lawyers and diplomats are no longer capable of coping with all these new problems in which a profound scientific knowledge is indispensable. The spade-work must be done by scientists and lawyers linked to the scientific institutes under whose aegis these innovations are carried out. But the very valid contributions of such experts, quite often with a legal background in other fields of law, have a drawback, namely that the problems are considered from a special point of view, i.e., not in the framework of international law as a whole. In other words, it is up to the specialists in international law to reformulate decisions taken in order to represent them under a different light in harmony with international law.

One example of conflicting approaches to the same legal question can be found in the positions taken by Soviet experts on the 1979 agreement on the activities of States on the Moon and other celestial bodies and on the Non-Proliferation Treaty. The issue is the same: the legal effects of a treaty vis-à-vis States, not parties to it.

According to Prof. Dr. G. P. Zhukov, "the concept of the common heritage of mankind in international space law finds its meaning totally in the text of the 1979 agreement itself. After the agreement is in force, the CHM concept requires obligatory force for the participating States".(5) In the case of the Non-Proliferation Treaty, a document was tabled in January 1982 in the International Atomic Energy Agency, in which the opposite interpretation was proposed, to wit: "Assured nuclear supplies should be based on the conditions of non-proliferation of nuclear weapons that are contained in multilateral, international treaties in force to which most countries of the world are parties". In other words, the position advocated is that provisions contained in multilateral international treaties in force to which most countries of the world are parties bind every State, even those who are not parties to it. The application of the principle of "Estoppel" in regard to this interpretation could have far reaching consequences.

International Spaces

Until the end of the XIX century, international law was bi-dimensional but with the aerial navigation and, in a much smaller scale, radio transmission, a new dimension was opened up.

On 12 July 1901, a young Brazilian, Santos Dumont, caught the imagination of the world when in Paris in a balloon filled with hydrogen, to which he had adapted an internal combustion engine, he proved the

feasibility of navigations with precision by flying from a given point and returning to the same spot. This exploit was heralded all over the world and caught the attention of the *Institut de Droit International* which in its 1906 session in Gand studied the legal aspect of aeronautics and wireless. On that occasion, it endorsed the position put forward by Paul Fauchille that the air should be free, subject to limitations imposed by security of the subjacent State. Subsequent practice, however, was in favour of the other thesis, namely that of the sovereignty of the State, which was duly incorporated in the 1919 Paris Convention on Civil Aviation and in 1944 in the Chicago Convention on International Civil Aviation.

The amazing technological leap of the 50′ and 60′ obliged specialists to reformulate the theoretical approach with regard to the polar regions and to draft new rules on the two domains until then ignored by international law, to wit outer space and the bottom of the high sea. The establishment of the international regime of the high seas and outer space and the Antarctic region has created a basic distinction between national spaces and international spaces in international law.(6)

The 1967 Treaty on the "Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies" changed overnight the approach of international law to this problem which opened up a new dimension in space law. From a chronological point of view, the General Assembly Resolution, which was adopted unanimously in 1963, constituted the first really important step in the formulation of rules aimed at the reglementation of outer space, since some prior declarations by the major States were more in the nature of political stands than of a juridical nature.

The international recognition of outer space as distinct from national and international airspace created a series of complex problems which are still demanding concrete solutions, such as the delimitation of outer space as opposed to national airspace, as well as the legal *status* of outer space.

In the United Nations Committee on the Peaceful Use of Outer Space, the question of the definition and/or delimitation of outer space and outer space activities has been the object of discussion and certain delegations have stressed the view that this item should have a higher priority in future deliberations.

The difficulties faced derive not only from the lack of an entirely satisfactory criterion but also for political and economic reasons since certain major States would prefer the continuation of the *laissez faire* regime which exists.

In spite of the lofty ideals which inspired the Outer Space Treaty, subsequent practice has departed from them in many cases. Suffice to mention the second United Nations Conference on the Exploration and Peaceful Uses of Outer Space, held in Vienna August last year, when paradoxically the centre of the debates was the military uses of outer space. The emphasis placed on militarization led the developing nations to propose a declaration in which *inter alia* it was recommended that all Member Nations, and especially those who have the capability, be asked to refrain from any activities which lead to the extension of arms race into Outer Space; that militarization of Space is detrimental to the entire humanity and hence extension of arms race to Outer Space, the moon and other celestial bodies that are the common heritage of mankind, should not be permitted; that testing, stationing and deployment of any weapons in Space should be banned; that the two major space powers open negotiations for an early agreement to prevent an arms race in outer space.

The bibliography on the regime of the high seas and on deep-sea milling is extensive and the Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, will increase furthermore the list of book and articles on the subject, which can only be mentioned at this stage.

Be it as it may, the opening up of these new international spaces brought in their wake not only the corresponding specific rules of international law but also the general principle of *the common heritage of mankind.* This principle is expressly recognised in the Law of the Sea Convention and in the Moon Treaty of 5 December 1979; and implicitly in the Outer Space Treaty of 1967.

The principle had been proclaimed earlier by the General Assembly in order to avoid unilateral action by States that attributed to the freedom of the sea an abusive interpretation detrimental to the principle. In order to avoid a free-for-all with overlapping claims, the General Assembly passed a series of resolutions declaring the resources of the bottom of the high sea as "the common heritage of mankind".

Even though the principle is considered by some experts as an emerging legal concept still lacking general definition, to the majority of States "it is a fundamental legal principle of international law applied to outer space, celestial bodies and the high sea".

Environmental pollution

Scientific and technological breakthroughs have had a corresponding influence on the relations between members of the international community directly or through the organizations to which they belong, particularly in the specialized agencies, whose creation can frequently be traced to the necessity of regulating on an international scale changes brought about by such scientific developments. In most of these bodies, the formulation of rules of a legal nature has been the responsibility of their legal committees whose work has frequently been decisive, so much so that most of the treaties signed under the auspices of the specialized agencies can be traced back to them.

The awakening of the international community to the hazards which may result from environmental changes has become an almost permanent preoccupation of most of these organizations. The United Nations Charter is silent as regards science, and even though the basic charter of the UNESCO includes science as one of its principal objectives, the focus of the problem is mostly theoretical. Such an approach is understandable if we realize that the original draft was aimed at the creation of an organization for "Education and Culture" (UNESCO) and that the inclusion of Science is due to the efforts of Julian Huxley, under whose guidance UNESCO began to undertake scientific studies aimed at the minimization of the pernicious effects of moderm technology with emphasis on the ecological crisis, i.e., the threat to the environment.

At present, the most important step taken by the international community was the United Nations Conference on the Human Environment realized in Stockholm in June 1972. The principles adopted by the Conference represent a compromise between the environmental approach of the industrialized powers and that of the developing countries which could not accept a position that would in the long run hinder their efforts at rapid development.

The problem of environmental pollution in too wide-ranging and even a cursory examination of the problem would be over-ambitious. We shall therefore limit ourselves to the pollution of the sea in order to give an idea of the task which the international community is carrying out aimed at reaching positive results in a harmonious manner.

The 1972 Conference recognized the decisive influence of science and technology in the opening statement of *The Declaration of the United Nations Conference on the Human Environment* in pointing out that a stage has been reached in which "through the rapid acceleration of science and

technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale".

Until quite recently, it was generally accepted that whatever was dumped into the oceans would rapidly be absorbed and that the ichthyological species were inexhaustible. On the contrary, mankind is quite conscious of the fallacy of these two ideas and the movements in defence not only of the seas and other waterways but also of certain species have the enthusiastic support of national as well as of international organizations of a governmental and of a non-governmental nature.

The implementation of the conclusions of the Conference of Stockholm was entrusted to the United Nations Environment Programme (UNEP), which coordinates the efforts of other specialized agencies in this field.

According to UNEP, "marine pollution means the introduction by man, directly or indirectly, of substances of energy in the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of the quality for use of sea-water and reduction of amenities".

Marine pollution may be deliberate (operational) or accidental. The responsibility for the pollution may be of individuals or of governments (national, provincial or municipal). In the case of deliberate pollution by governments, the problem becomes more serious since local authorities may not be in a position to use defensive measures. A typical example was the decision of the United States Government to dump off the shores of Florida stocks of nerve gas. The State of Florida as well as various individuals raised the question before the courts, but in August 1970 the operation took effect 450 miles from Cap Kennedy. The same can be said of the dumping into the Baltic of 7000 tons of arsenic which forty years later could still exterminate the whole of mankind. To this list, one can add the atomic tests carried out in the Pacific and in this sense we can revert to the *Nuclear Tests Case* in which the International Court of Justice avoided taking a stand on the contention of Australia that the carrying out of further atmospheric nuclear weapons tests in the South Pacific Ocean is not consistent with the applicable rules of international law.

The variety of pollutants is amazingly wide-ranging and the list tends to increase. It is however possible to point out some of the principal classes of pollutants and to begin with we have those of human origin: some are harmless and easily absorbed, but some of the microorganisms expelled may survive for a considerable time in the sea as in the case of pathological germs.

The continuous use of DDT and other similar pesticides and herbicides has been the object of prolonged studies especially in the FAO. Some of these substances are highly toxic and enter the marine environment by water run-off from agricultural areas and from the atmosphere. The dilemma is that no cheap substitute has been found for DDT so much so that the World Health Organisation is of the opinion that at this stage DDT cannot be barred since in combating malaria its ill effects are a lesser evil.

Albeit most States baulk when faced with certain initiatives, some positive results have been achieved in two fields, to wit radio active pollution and the pollution of the sea by oil.

The fear of a major nuclear disaster has provoked justifiable reactions in many countries. In the study of radioactive pollution, emphasis must however be placed on atomic tests in the atmosphere, generally over the Pacific, or the dumping of containers with radio active waste in the oceans. This latter practice represents a real danger since one cannot foresee how they will react in the bottom of the sea, where concrete crumbles and steel rusts.

The 1958 Geneva Convention on the High Seas condemned such a practice in article 25 which stipulates: "Every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations".

This article has been violated systematically by nuclear States. In 1968 the European Nuclear Energy Agency authorised this practice and it is symptomatic that the radioactive waste was not dumped off the shores of Europe.

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (1972), commonly called "London Dumping Convention", distinguishes between radioactive waste whose dumping is prohibited and waste which requires a special permit issued by the national authorities. Since the contracting parties subscribed voluntarily to the Convention, one could expect that its *leit motif,* namely, the protection of the oceans, would prevail. The two-year moratorium on sea dumping agreed upon in February this year was of short duration since in March Japan announced its decision to dump low-level nuclear waste in the Marianas trench in the Pacific; while the United Kingdom decided to dump not only its own waste, but also radioactive waste from Belgium and Switzerland, that declared on May 25 that it will continue to dump radioactive waste in the Atlantic, this year, despite opposition from ecologists and other nations.

Finally we have the pollution of the sea by oil which is the best known by the general public and which has been the object of various international conventions. The stranding of the Liberian tanker "Torrey Canyon" in 1967 and the disaster of the American-owned tanker "Amoco Cadiz" in March 1978 off the coast of Britanny suffice to show the enormous damages that can be used caused by such oil spills. In the case "Amoco Cadiz", 220,000 tons of oil (twice the amount of the "Torrey Canyon") provoked the death of various species of fish and birds, not counting the damage to the beaches of the region, including those of the monastery of Mont St. Michel.

These two cases, heralded as major ecological disasters, were pushed into the background by the Ixtoc 1 blow-out and spill on June 3, 1979, and the present disaster in the Persian Gulf for which no solution is in sight. The Ixtoc 1 spill became the largest oil spill in history within eight weeks of its occurrence, surpassing the spill of 68 million gallons when the Amoco Cadiz ruptured its hull.

In the case of pollution by tankers, the responsibility lies with the owners or operators; in these two cases it is up to international law to regulate this question, which will become more frequent with off-shore exploration.

The considerable increase in the tonnage of tankers and the "Torrey Canyon" disaster obliged IMCO to revise the Conventions of 1954 and 1962 for the Prevention of Pollution of the Sea by Oil.

International law had to determine the extent to which a State directly threatened or affected by a casualty which takes place outside its territorial sea can, or should be enabled to, take measures to protect its coastline, harbours, territorial sea or amenities, even when such measures may affect the interest of shipowners, salvage companies or even a flag government.

A still more delicate problem affecting various branches of law was the evaluation of the nature, extent and amount of liability of the owner or operator of a ship for damage caused to third parties by oil which has escaped or been discharged from a ship as result of an incident.

These problems were discussed in the 1969 Brussels Conference when two new conventions were signed, one on Public Law (relating to the intervention on the high sea in cases of oil pollution casualties), the other on Private Law (on civil liability for oil pollution damage). As a consequence of the 1969 conference, IMCO convened another conference in Brussels in 1971 which resulted in a Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

A further step forwards was taken in 1973 in another Conference on Marine Pollution aimed at eliminating the wilful and intentional pollution of the sea by oil and noxious substances other than oil, and

the minimization of accidental spills. The result was the signing of the "International Convention for the Prevention of Pollution from Ships" and a "Protocol relating to Intervention on the High Sea ill Cases of Marine Pollution by Substances other than Oil".

The pollution of the sea by pesticides, herbicides and other chemicals; by organic and inorganic pollutants such as arsenic and mercury are common knowledge, but in most cases the need to put an end to such abuses meets with a very lukewarm reception by the States directly or indirectly responsible for the damage.

No Government will publicly oppose environment control, but in international fora their attitude is more often than not cautious and non--committal. Suffice to mention the continuous dumping of radioactive waste in the oceans, preferably as far away as possible, the atomic tests in the Pacific, the silent reaction to the need of controlling acid rain, the transformation of rivers, such as the Rhine, into sewers. And we must not forget the discouraging results in the efforts aimed at putting an end to the butchering of baby seals and whales and the criminal attitude of governments that permit the export to less developed countries of drugs whose sale is forbidden since their consumption is provenly detrimental to the human being.

Public opinion the world over is clamouring for an end to such practices and it is up to the internationalist to find the solutions, which in most cases are obvious.

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A HUNDRED YEARS OF PLENITUDE

Lecture delivered on 16 June 1987
by H.E. Mr. José Sette Câmara
Judge at the International Court of Justice
and former Ambassador of Brazil

and

THE CONTRIBUTION OF GILBERTO AMADO TO THE WORK OF THE INTERNATIONAL LAW COMMISSION

Lecture delivered on 16 June 1987
by Professor Cançado Trindade
Legal Adviser of the Ministry of Foreign Affairs of Brazil
Professor of International Law at the
Rio Branco Institute (Brazil's Diplomatic Academy)
and at the University of Brasilia

Gilberto Amado
A Hundred Years of Plenitude

Introduction

The Gilberto Amado Lectures originate with the eminent jurist Taslim Elias – doyen of the African lawyers – who, as Chairman of the International Law Commission, proposed to the twenty-fifth session of the General Assembly, in the Sixth Committee in 1970, shortly after Amado's death, that an annual lecture should be instituted in his memory. His proposal was approved and presented to the International Law Commission during its twenty-third session in 1971. The Brazilian Government agreed to provide a yearly contribution to the programme. The Lectures are printed in two languages, French and English, and are widely distributed to legal circles all over the world. They coincide with the Seminar on International Law held during the sessions of the International Law Commission and are followed by a dinner which has been held, when possible, at the Hôtel des Bergues, where Amado always stayed. Since the first Lecture, delivered by Judge Eduardo Jiménez de Aréchaga in the Council Chamber of the Palais des Nations in 1972, fifteen years have elapsed and the series of Lectures, which have become a tradition of the ILC, has been maintained. Some of the Lectures became important reference texts. Aréchaga's speech was the first public analysis of the revision of the Rules of Court and aroused widespread interest. Judge Elias himself delivered a Lecture on the International Court of Justice and the Indication of Provisional Measures of Protection, which was

frequently referred to during the several instances in which the Court was called upon to decide on the adoption of such measures. Lectures by the Greek member of the ILC, the late Constantin Eustathiades, on Unratified Codification Conventions, and by Judge Sir Humphrey Waldock, Judge Manfred Lachs and several other learned jurists, have often been quoted by scholars and students of international law.

This homage to the memory of Gilberto Amado is an impressive testimony to the force and importance of his personality. The membership of the ILC has included the most eminent international lawyers of the past forty years. It will suffice to recall the names of Brierly, Manley Hudson, Georges Scelle, J. P. A. François, Spiropoulos, Hersch Lauterpacht, and Verdross, among its late members, to show the quality of its membership. The fact that among all these great men Gilberto Amado was singled out for annual commemoration speaks for itself.

Today, as we commemorate the centenary of his birth, we should not forget the name of Taslim O. Elias, today a Judge and former President of the International Court of Justice, to whose initiative we owe this series of Lectures of which Brazil is very proud.

JOSÉ SETTE CÂMARA

Gilberto Amado
A Hundred Years of Plenitude

By José Sette Câmara
Judge at the International Court of Justice
and former Ambassador of Brazil
(Geneva, 16 June 1987)

It was in the early months of 1950 that I met Gilberto Amado for the first time. Transferred from the Consulate General of Brazil in Montreal to the Brazilian Mission to the United Nations, to take charge of legal affairs, I had the additional responsibility of accompanying the Brazilian member of the International Law Commission as his Adviser.

My colleagues had warned me that this was not an easy task. He had an awesome reputation. His extraordinary qualities as a writer, a thinker, and a jurist were generally recognized and extolled. But at the same time, he was feared as a difficult and intractable man, often violent and aggressive in his actions, unpredictable and disconcerting in his reactions.

Therefore I was not very relaxed that morning, on the 60th floor of the Empire State Building, as I waited to meet him.

And there he came: a short thick-set man, with a big brachycephalous head, almost no neck, as is common for people from northeastern regions of Brazil.

"So, this is the victim", he said with a broad, friendly smile, his large mouth showing the front teeth widely separated. Nothing like the terrifying man I had been prepared to meet. The first impression he gave was of neatness and tidiness, his graying hair carefully combed, his suit of good taste and fine cut. We had a long chat, and I think that from the beginning we were set for a life of friendship and wholehearted work together as companions, which continued until the last day of his life on 27 August 1969.

In one of his five volumes of memoirs – the best known of his books – Amado himself depicts his physical appearance in a pungent manner. At the time of his arrival in the big city of Recife, in the hall of a hotel, he found himself before "something he had never seen, very large mirrors covering the whole wall". And he says:

> For the first time I could see myself full length. Until then I had only looked at myself in small wall mirrors, or insignificant pocket mirrors showing no more than the *face,* the neck, the tie. Never like this… the whole of me: jacket, trousers, shoes. I was shocked. It was then that I became aware of my ugliness. I was taken aback. Was "that" me? I would be lying if I tried to describe my feelings. What I do recall is that I was badly shaken. This kind of shock was repeated every time I saw myself in large mirrors frontally or especially in profile. I would shudder and be almost startled at the image of myself… A sensation of uneasiness, I might even say of revulsion, at my appearance.

Gilberto Amado was too harsh in passing judgement on his looks. He was certainly no Apollo, but the force of his personality was such that people would tend to like him at first sight and not notice his physical shortcomings.

Gilberto Amado was born in the little township of Estancia in the interior of the State of Sergipe – the smallest unit of the Brazilian federation – on 7 May 1887, one hundred years ago, the first of a family of fourteen brothers and sisters. In order to understand how he climbed from this humble background to the pinnacles of cultural prestige, one has to look back to the setting where he was born and raised.

The Northeast is the poorest of the Brazilian regions. Periodically affected by disastrous droughts, poor in water supply, its hinterlands consisting of dry savannahs, bristling with rough vegetation, it took its people a lot of courage and character to survive, and somehow to prosper and to exert a decisive influence on Brazilian cultural and political life. The great saga of the northeastern Brazilian, his heroic fight against the impact of adverse land and environment, his strength, his frugality, his attachment to his squalid place of birth, were described by Euclides da Cunha in his classic epic "Os Sertões". Gilberto Amado was a typical northeasterner, both physically and in his soul. He never lost his identity with his homeland, and his origins showed in everything he wrote, regardless of the fact that his life took him to different countries and distant lands.

To understand the special place of Gilberto Amado, as he emerged as a thinker and essayist at the beginning of the century, one should look back at the cultural panorama of Brazil, and especially northeastern Brazil, at that time.

Brazilian cultural life at that epoch was completely turned outwards to foreign realities and influences, particularly the European. We were more concerned with what was happening in Paris, London, Berlin and Vienna than with the huge problems of a country suffocated by underdevelopment, a supplier of raw materials, practically devoid of industry, in which even matchboxes and butter were imported.

Instead of applying their minds to the squalor of economic life and the appalling injustices of the social structure of the country, the Brazilian "intelligentsia" were busy with the philosophical controversies between monists and dualists. The towering figure of a Germanized mulatto, Tobias Barreto, shook the traditional basis of a philosophical structure founded on theological concepts, especially in the field of law. Old obsolete ideas based on dusty dogmas of natural law crumbled under the blows of the monistic, transformistic and deterministic theories deployed by Tobias Barreto, faithful disciple of Immanuel Kant. He mesmerized a whole generation and became the master of the so-called "Recife School", being as he was a professor at the Recife Law School. But if Tobias Barreto led a revolution in the areas of philosophy and philosophy of law, he nevertheless remained confined to the battlefield of ideas and theories prevailing in Europe, and did not deal with the realities of a country desperately in need of a solution, or at least guidance, in order to cope with its economic and social problems. The influence of German thinking in the field of philosophy, in the province of philosophy of law, and on law itself was enormous. Clóvis Beviláqua, a follower of Tobias Barreto, the great jurist responsible for the drafting of the Civil Code of 1916 – still in force today*, with minor amendments – was of purely Germanic formation.

Gilberto Amado could not remain impervious to the maelstrom of ideas, theories and doctrines that had engulfed the old traditional Recife Faculty of Law, once the quiet backwater where the old conservative ideas slowly fermented, and which was taken by surprise by the tornado of revolutionary ideas imported from Europe. He had two previous experiences of university life in Bahia – where he studied for a degree as a pharmacist – of all professions – and followed the first years of a course at the Medical School. But Recife, bristling with ideological disputes, was his first contact with the world of great doctrines, in one of his six books of essays, he describes his first steps in this turmoil of ideas in a curious way:

* The New Brazilian Civil Code of 2002 (which substituted the prior Civil Code of 1916) came into effect as of January 10, 2003.

> But I would have been lost and gone astray in the labyrinth of notions, systems, schools, theories and doctrines, and bibliographies, if it was not for the accounted fact of reading Auguste Comte in the early stages of my formation.

It is not surprising that Gilberto Amado did not escape the attraction and the influence of Auguste Comte. It is a curious fact of Brazilian history that Comte, in the Brazil of the end of the last century and the turn of the century, had much more prestige and influence than he exerted in his native country, France. It is enough to say that the Proclamation of the Republic, which brought to an end 67 years of a peaceful and democratic monarchy, was prepared and executed by a group of fanatical positivist army officers. Republican ideals prospered among the followers of Auguste Comte. And the flag of the Republic itself incorporated a typical positivist motto: "Order and Progress", which has survived until today. But already, at that early age, Amado had enough insight to distinguish the Auguste Comte of the "*Cours de philosophie positive*" from Auguste Comte of the "*Système de politique positive*". It was the latter, with the Religion of Mankind, "the Cult of the Great Being", the "Saintly Practices" and the "Social Sacraments" that conquered and fanaticized the young generation which founded the Republic and inspired the Church of Positivism, which still exists in Benjamin Constant Street, belatedly attended by a few anachronistic relics of the great days of positivistic influence. In one of his essays, Amado reveals:

> I came out of that literature with two Auguste Comtes in my soul – the creator of the Religion of Mankind, the worshipper of his wife, Clotilde de Vaux, the keeper of the famous aphorism appearing in the propaganda of the Church of Benjamin Constant – this one did not interest me. The other, the one who formulated "The Law of Three States", who put together the Classification of Sciences and scientific synthesis, the father of sociology, the critical analyst of materialism and atheism, the apologist of the Middle Ages and Catholicism, – to the latter I remained indebted more than to any author that I have ever read.

Besides his professed enthusiasm for Auguste Comte, Amado underwent the influence of many thinkers of the time, whom he often praises. Of Nietzsche, he says:

> I read him without stopping until Goethe, to whom I was introduced by him, took his place. I still return to him to look for an aphorism and to check one

> or two points of his thinking. As I direct my gaze to the XIXth Century, as one looking from the countryside to the cities, I see him very high, between the tallest towers. And I realize how much the XIXth century would have lost without him. Imagine the XVIIIth century without Voltaire.

But his deep insight when in quest of a truth – as happened with Comte – traced a dividing line between the immense importance of Nietzsche in his revaluation of Greek philosophy and his reappraisal of aesthetic concepts and the Nietzsche who advanced the hypothesis of perpetual recurrence and the praise of the superman, of antichristianism and the morality of masters versus the morality of slaves. Once again, the depth of his insight was anticipating history and discarding the trash of ideas which were outstanding in themselves but dragged dead-weights along with them.

It would be a very long exercise to trace back in the works of Gilberto Amado the presence and influence of great thinkers like Stuart Mill, Leibnitz, Berkeley, Kant, Descartes, Bacon and so many others. He read all of them but followed no one. He had his own ideas and his own approach to the problems of life.

The young student in the Recife Law School – where the boys asked each other all the time, Are you a monist or a dualist?, as if enquiring which football team they supported – simply devoured libraries. At the same time, the young Gilberto went through literature, and came permanently under the spell of Balzac, Goethe and Shakespeare. At a time when very few people in Brazil could read English, Gilberto Amado discovered the vast universe of Shakespeare, whose works he knew thoroughly, as very few know them.

Time would be too short to review the cultural formation of Gilberto Amado and to follow his permanent voyage through the world of books. But it would be futile to try to detect in his life the main influences on his way of thinking and on his behavior. He did not belong to any religious persuasion or school of thought, and he did not comply with the canons of traditional moral codes. His individuality was so remarkable that it would never surrender or align itself with any extraneous influence.

He was never preoccupied with metaphysical problems. Speaking of the problem of God, he once said:

> As to me, in that year of 1906, impregnated with positivism, I did not worry about this problem. I read Nietzsche's tirades against God just as I had read the biblical passages by the Prophets announcing the coming of God – indifferent

> to the religious controversy. Auguste Comte had rooted out of my spirit any interest in this kind of problem. There are those who are born for the quest of God and will persist in searching for Him, no matter how blindfolded they may be. But there are those who have God within themselves, feeling Him inside their own being, who do not experience any urge to search for him outside.

This is one of the rare passages in his voluminous work in which he refers to the problem of the existence of God. It is difficult to know what he meant. Was he so sure of the existence of God within his soul that he rejected any investigation of the subject? Nobody knows, because he never elaborated on the subject and he did not discuss it with his friends. The beautiful passage he once wrote commenting on the famous phrase in which Immanuel Kant, after demolishing the whole construction of metaphysical reasoning, conceded that the existence of God was still proved by the starry sky over his head and the moral law in his conscience, favours the conclusion that he was far from being an atheist, although distant from theological problems.

The philosophical endeavors of Gilberto Amado were devoted mainly to aesthetic problems. And here he preached the return to nature, the primacy of nature over "social" and "moral" principles.

"Happinnes", he said, is a social concept alien to the goals of nature. "Joy" is a concept of nature that society almost always limits and objects to. Happiness as a social concept is beyond the reach of the individual. Joy, a concept of nature, thrives on it.

And that led him to his definition of art:

> Art is liberation, yes. Art is all that liberates man from the moral idea, from the moral sense, from moral existence; all that sets man free from morals, bringing him back to nature.

And again:

> Beauty is the opposite of justice. Beauty is for the whole of life, justice is a piece of life cut down by the will of a few men… Art is a divine disguise, a heroic invasion of nature into the field of our social life. It is instinct freeing itself from reason, it is body departing from conscience.

He derides the idea of those who believe that art is "social" by its nature. In the moments of history when a concentration of moral power

prevails, artistic manifestations fade away. And he asks what work of art was produced by the Puritans in England? What artistic movement sprang from many a country exemplary in moral organization and social discipline? On the contrary, it was during the Renaissance, when men felt attracted by a thousand seductions of adventure, that the great works of art flourished. "It was then that Italy exploded in luminous forms, the Low Countries danced at the Flemish kermises, Portugal sang with Luis de Camões faring towards the great discoveries, Spain rode into the impossible dreams of the Quixote, England burst into the Shakespearian bacchanal and France laughed through the wide mouth of Rabelais".

And he remarks:

> The Renaissance, the greatest period of artistic creation which ever existed, was a time when instincts reprehensible from a moral viewpoint held sway, when men, and artists in particular, would assault each other in the most ferocious and wicked ways.

But he concedes:

> Nevertheless there have been periods of history when society and artistic production have fully coincided. Those times of equilibrium, arising from different causes, trigger auroras full of harmonious colours, when beauty is the expression of justice, where the ink of paintings, the strophes of psalms, the profiles of statutes reflect the social order, and vice-versa, when law, institutions and customs express and determine nature's rhythm. But those are transitory moments. Soon the imbalance will recur and the conflict of the two opposite forms will continue.

His conception of art as a major explosion of natural forms, contrasting with the fetters of moral rules and social conventions, pervades his whole work.

It is curious to note that these ideas about the phenomenon of art are quite unconnected with his behavior in life. Amado was a careful, organized man, who took a punctilious approach to the practical problems of everyday life. He was pragmatic, attentive to his interests, and there was nothing he would abhor more than a Bohemian, careless way of life. He used to say: "There is nothing less poetic than a romantic poet". But art is another story. And there he would discard all the fetters of conventionalism.

Amado in his artistry was an obsessive "*jongleur*" with words. Words were his tools and he used them like a sensitive, meticulous craftsman. He traveled around the world with a portable library of essential books, much of it consisting of his battery of dictionaries, which he would peruse all the time. His favorite pastime was the crossword puzzle. Daily he would sit, after lunch, with his big perfumed Havana cigar and his glasses on his forehead, quickly getting through the *Herald Tribune* puzzle. A passionate and skillful tussle with words is the chief characteristic of his style as an essayist, a poet, a memorialist. In his terse and brilliant style, the richness of the exact and perfect vocabulary never ceases to surprise the reader. From the beginning, as a newspaperman in Recife to the last of his volumes of memoirs, he was always the master craftsman with words.

I shall not deal with his specific contribution to the International Law Commission. My friend Dr. Cançado Trindade, Legal Counsel of the Ministry of Foreign Affairs, is going to take care of that.

He was an outstanding jurist. In the field of constitutional law, his book *Election and Representation*, published in 1931, with the subtitle "A course on political law" is full of learned teachings of great contemporary significance, since the book appeared in the aftermath of a revolution, which strove for the secret ballot and for truly representative elections. As a professor of criminal law, in Recife and later in Rio de Janeiro, he became a famous teacher whose lectures always attracted enthusiastic audiences of young people eager to learn the most up-to-date ideas. His experience as Legal Counsel of the Ministry of Foreign Affairs, succeeding the great jurist Clóvis Beviláqua, marked the turning point in his life towards public international law, to which he devoted his last twenty years, chiefly in the International Law Commission and the Sixth Committee of the General Assembly. In both he enjoyed enormous prestige and considerable influence. But here I trespass on the province of my friend Dr. Cançado Trindade. I cannot omit, however, to note the importance of Gilberto Amado in shaping the methods of work of the International Law Commission since its inception in 1947.

The fifteen-member Commission, established by resolutions 174 (II) and 175 (II), and which, by coincidence, marks its 40th anniversary this very year, was created in the shadow of the experience of the League of Nations. An academic spirit predominated in its work. As with very few exceptions the members were great professors, much more attention was paid to the quality of their scholarly work than to the opinions and interests of member States and the political consequences of the legal

solutions adopted. Great professors like Georges Scelle, Manley Hudson and Brierly did note hide their disdain for the opinions of States. They were erecting the structure of codified international law as they thought it should be in the light of science. It was to be as good as possible according to scholarly standards. Whether or not it pleased governments was irrelevant. The 15-member ILC, working in the old room No. X of the Palais des Nations, was a sort of learned society, proud of being impervious to the influence of governments. Amado was a prophetic non-conformist to the academic trends of the Commission. From the beginning, he understood that the Commission was a subsidiary organ of the General Assembly, providing expert work to serve the interests of States in the field of codification pursuant to Article 13 of the Charter. His often-quoted tirade that States and governments are not so foolish as to forget their interests for the sake of doctrines and academic solutions foreshadows the present methodological approach of the Commission, namely the interplay between scientific expertise and governmental authority, which has ensured the noteworthy success of the diplomatic codification conferences based on its proposals. The failure of the lofty academic approach of the fifteen-member Commission is eloquently illustrated by the draft on Arbitral Procedure, commandeered by Georges Scelle, who sought to devise from doctrine a compulsory judicial structure for arbitration. The draft – to which Gilberto Amado mounted a fierce opposition – has been shunned by governments and demoted to mere model Rules on Arbitration to which States may resort, if willing, as a scholarly supplement of occasional usefulness.

If Amado was a great man as an essayist, a poet, a writer, and a jurist, all this was overshadowed by the power of his personality. What prevailed more than anything was his presence, his way of saying things as nobody else did, which is still legendary in my country. Living with Amado – a privilege I had for almost twenty years – meant never a dull moment. His volcanic temperament would explode at the first sign of provocation. I was with him at a luncheon in Lausanne, where a fat lady sitting next to him remarked: "You are from Brazil; that is a country I would love to visit, but I will never dare to because I am afraid of snakes". Amado's abiding love for his country triggered his immediate sharp rejoinder: "Madam, you may visit my country without fear because there snakes only bite beautiful women". And he staged an immediate walkout in which I was forced to follow him.

The importance of words always haunted him. Hence it was wrong to think that in his presence one could use current everyday clichés without

consequence. Once in a lift he took issue with the lift-man who advised him to "take it easy". He listed all his important missions of the moment, and inquired how a graying man who at his age was still a lift-boy dared to give him such advice. It took me a lot of appeasing interference to get him out of the squabble unhurt. Another time he was drinking his whisky in a bar in New York, in a nirvana of well-being, when a lady who knew him came up to him and said: "Oh dear friend, you look so lonesome!" He shot back immediately: "There is always solitude for those who deserve it". That was the way he was. Words should not be used lightly. He was always hunting for their real meaning.

Until his last day Amado was always in love with life in all its manifestations. He loved nature, the blue sky, the thin air, the starry night and, above all, the trees. He knew the name of every tree, the venerable old trees of Europe and our own tropical flora. He liked to test people by asking for the names of trees, and was often scandalized by the ignorance of those who seldom bothered to find out about them.

On the other hand, he loved the good things of life, especially the pleasures of a good table. He made friends with the best chefs and *maîtres*, who respected him as one who knew his way through the most sophisticated menu. Once he took me to Maxims in Paris for lunch. There we met a lawyer from the US State Department, who used to follow the work of the International Law Commission, devouring one of the famous specialities of the house, *a faisan faisandé* ignominiously accompanied by a cup of coffee with milk, under the shocked gaze of Maître Albert. It was too much for Amado. He inveighed against the American friend: "You do not have the right to insult a country like that". The nice young lawyer, who knew the temperament of the old man, gave an embarrassed smile, the solemn *maitre* approved discreetly and the incident was closed.

The former young country boy from the interior of a backward state of Brazil, with his taste for the good things of life and his ever-present curiosity, became an expert in the knowledge of wines. He studied all the mysteries of the production of the *grands crus*, why one vineyard a few metres away from another produces a marvelous divine nectar, in contrast with its neighbor's mediocre product. He used to tell the story of the Swiss experiment: Swiss winegrowers imported the original grapes of Pommard, they reconstituted with Helvetic punctiliousness the chemical composition of the soil of the Pommard region, the exact temperature and quantity of sunshine, etc. The result was not Pommard. It was Dôle…

There was also a story which became famous. A big formal banquet in the Brazilian Embassy in Paris. The Ambassador, the famous

Souza Dantas who held the office for several decades, was the doyen of the diplomatic corps and knew the whole of the French *Gotha*. The *sommelier* in tails and silver chain came in and solemnly announced the wine: nothing less than a venerable Château Mouton-Rothschild, *millésime* proudly specified. Amado, talking to his neighbor, casually remarked: "It is not Mouton-Rothschild". The Ambassador overheard the conversation and stood by the *sommelier*. The latter was summoned back and urged to produce the bottle as evidence of his announcement. The bottle appeared, and to the shame of a red-faced ambassador it was *not* Mouton-Rothschild.

But with all respect for his written work, the greatest of Amado was not what remains in the books but what he said, his unique remarks, his sense of humor, his way of putting the truth above everything else. Often I regret that I did not have a recorder with me as I talked to him, as I walked with him in the streets and as I followed him in his work. The best of Amado is lost in oblivion. *Verba volant*. But I possess a few hundred letters of Amado, and some of his remarks have also entered into the public domain. I shall try to repeat a few, just a few, to illustrate the extraordinary privilege of listening to him. What comes from my letters has never been published. So I start with some of his well-known aphorisms and turn to things he wrote to me, which are absolutely new.

> Beauty hurts, cuts through an adolescent soul like a blade through the flesh.
>
> A kite is a good toy. It forces children to look at the sky.
>
> The creative spirit is a child in the heart of mature man.
>
> Who can tell where childhood ends? And in the true man does it ever end? Is a man transformed into a social function, a job, a profession, a situation really a man?
>
> To live is to express oneself.
>
> I thank the divine powers for giving me a mouth to savour the taste of things, a skin to enjoy water and soap, a nose to sniff good perfume and to avoid the bad, a hand to caress the back of a book or the face of a child, legs to walk, to walk a lot into the night in silent conversation with the trees, with the houses, with things, in a word the gift to live with simplicity and to find around me – even in the worst moral desert and solitude of spirit – enough to replenish my soul.

> Ugly men enjoy an advantage: stupid women do not chase them.
>
> Old men should not give advice to the young ones. They should take advice from them.
>
> Wishing to be what you are is essential. Wishing to be more than you are is to be less.
>
> Life seldom forgives those who do not live it enough.

From the hundreds of letters he wrote me – an enormous treasure of Amado's dicta – I shall only note a few remarks at random, since time does not allow me to plunge into them.

In 1958 from New York he wrote me: "An intelligent man cannot allow himself to be treated as a 'sucker'".

Referring to a friend who was working with our delegation to the Assembly he observed: "Poor chap, intelligent, suave, he allowed to die in his flesh all the fibres that cause moral vibrations".

Criticizing a colleague in the United Nations who had proposed a "doctrinal" amendment, he said:

> I reminded him that Brazil was not a 'theoretician', or an 'individual' with his own ideas and doctrines, but a State with interests which could be embodied in political formulations.

From Geneva on 5 July 1956 he wrote me:

> I know the importance of living with the full involvement of one's soul and the horror of living away from one's soul – and is that living? The years lived with the involvement of the soul will bathe us with a vivid fluid. The hours, the years lived in frustration will embitter your old age. It is 'unliving' instead of living.

From Paris on 21 July 1957 he said to me:

> I must finish the 5th and 6th volumes because I fear that I expect, after the 7th, the arrival of the ominous signs of sugar in the blood. I have to fight because I do not want to die of diabetes. I prefer to burst off of the heart.

From Geneva on 24 March 1958, referring to the ideas of one of our delegates to the First Conference on the Law of the Sea, he said:

> For him the problems of the sea present themselves on two planes: the horizontal (surface navigation, fisheries, etc.) and the vertical (airspace, continental shelf, seabed)! It would be beautiful to deal with them in such an exact way. But States do not care about beauty. They are moved by interests and systems and what does not favour these immediate interests does not attract them."

In the same letter the observed: "The first duty of a man is to smile at his own blunders."

On 13 August 1958 he told me about an invitation for a formal luncheon:

> I sent my regrets of course. If the host is offended I do not care. Time runs away and I must grasp it by its golden tail. Not a minute to waste.

Referring to a young colleague whom he disliked: "My soul is full of slaps eager to get to the face of that young man".

Gilberto Amado was married to a lady from one of the best traditional families of Recife, and had with her three children, two girls and a boy. He was particularly attached to the girls, the sweet Lou and Vera, an artist, later married to the great film director Henry Georges Clouzot, for whom she starred in the classic films *Le salaire de la peur* and *Les diaboliques*. Amado's marriage did not last long and they divorced. He had only one true and lasting attachment in his life – to a noble Italian lady whom he called "the Egregious Being" in the archaic distinguished sense. The curious thing was that those who were intimate with him would hear him casually speaking of her with that pompous and grandiloquent nickname, as if it were a current name like Mary or Jane. So much so that only a few – like myself – knew her real name.

In a letter from Paris dated 13 July 1959 referring to her he said to me: "Blessed be the one who places me so highly and who brought to my contingent existence absolute love". Twenty years after their romantic affair in Florence, he summoned her to join him in Paris. In a letter of 26 January 1959 he told me:

> The Egregious Being arrived yesterday, weary, tired, poorly dressed. The truth should be recognized: she has become aquiline, angular and she has hardened much more than I expected. But she preserves the lightness of a bird, a being tending to fly, in her way of walking, in her "allure". It was understood that nothing physical should be attempted between us. But I did not have any

> disappointment, such is the greatness of the feelings she inspires in me. Her spirit, her luminous soul will continue to enchant me. Her marvelous voice is a music that envelops me.

In 1967 I was Permanent Representative to the United Nations and Amado, as usual, came to New York as the delegate to the Sixth Committee. At six o'clock one morning, he called me over the telephone complaining of a terrible pain in his chest. It was the first heart attack. I took him in an ambulance to New York Hospital. Knowing his temperament I feared for the worst in the hospital. Surprisingly, there was never a more docile patient. He recovered, but life was not the same for him. Deprived of his good wines and his Havana cigars, he was not the same person.

Two years later in Rio, two days after having received a supreme tribute on the publication of a new edition of his early books of essays, I was summoned to his apartment by one of his brothers. I found him lying there, already dressed in his uniform of the Brazilian Academy of Letters, ready for the final long journey. He died just as he always wanted to: he was spared the sufferings of a long disease.

The great man faded away with the style that marked his whole life, of which he savoured every moment. As he said once:

> To fill with substance and fluid every minute of one's life. Never before our eyes and, above all, inside ourselves to permit the withering away of the roses of life.

The Contribution of Gilberto Amado to the Work of the International Law Commission

By A. A. Cançado Trindade
Legal Adviser of the Ministry of Foreign Affairs of Brazil
Professor of International Law at the Rio Branco Institute
(Brazil's Diplomatic Academy) and at the University of Brasilia

The present session of the UN International Law Commission marks the centenary of birth of Gilberto Amado, its first Brazilian member. As Amado's successor today at the Office of the Legal Adviser to the Ministry of External Relations of Brazil, I am particularly honoured to join in this celebration Judge Sette Câmara and Ambassador Calero Rodrigues, his successors at the International Law Commission. Unlike Judge Sette Câmara and Ambassador Calero Rodrigues, I did not have the occasion and privilege to have known Gilberto Amado personally. My account of his work as a Commission member will thus be marked by the generational gap as much as by the consequent impartiality: it will derive from my study of documentary sources on his performance as a member of the Commission.

Before embarking on such recollection, it would be appropriate to draw very briefly his biographical sketch. Born in the state of Sergipe, northeast of Brazil, on 7 May 1887, Gilberto Amado obtained his LL.B. from the Faculty of Law of Recife in 1909, where he started as Lecturer in Criminal Law (1911), and later transferred to the Faculty of Law of Rio de Janeiro. He was elected, for successive terms of office (1915-1917, 1921, 1924-1928), Representative for the state of Sergipe; at the Federal House of Representatives, he participated, as chairman, in the Commission on Diplomacy and Treaties, and as rapporteur, in the Commission on Finance, where he delivered Opinions on such topics as the attitudes of Brazil

towards Pan-Americanism and towards the League of Nations.[128] In 1927 he was elected Senator for Sergipe (having exercised his mandate until 1930).

His nomination, on 1 November 1934, to succeed Clóvis Beviláqua, as Legal Adviser to Brazil's Ministry of External Relations, marks the beginning of his long career as an international lawyer. During the period he was Legal Adviser to Itamaraty (until 18 December 1935), Amado dwelt upon such questions as the relationship between the executive and the legislative in the treaty-making process.[129] From then onwards he was Delegate of Brazil to the International American Conference of Buenos Aires (1935);[130] Ambassador of Brazil in Santiago (1936-1937), Helsinki (1938-1939), Rome (1939-1942) and Bern (1942-1943);[131] Delegate of Brazil before the ILO Administrative Council (1945) and, from 1946 onwards, before the United Nations (Sixth Committee of the General Assembly); Delegate of Brazil to various international conferences, and Head of the Brazilian Delegation to the Second UN Conference on the Law of the Sea (1960). In 1948 he was elected member of the UN International Law Commission, where he stayed, re-elected, until the end of his life. In 1968 he received the title of Professor *honoris causa* of the Federal University of Rio de Janeiro[132], the city where he died on 27 August 1969.

The name of Gilberto Amado is linked to the creation itself (pursuant to Article 13 of the UN Charter) of the International Law Commission. Gilberto Amado took part in the work of the Committee on the Progressive Development of International Law and its Codification (the so-called "Committee of Seventeen"), set up by General Assembly resolution 94 (I) of 31 January 1947; that Committee laid down the basis for the Statute of the International Law Commission, approved by General Assembly resolution 174 (II), of 21 November 1947, which established the International Law Commission.[133] Amado years later singled out, in his long experience of two decades as member of the Commission, that he was particularly honoured to have been, together with Philip Jessup and Wladimir Koretsky, a draftsman of the approved text of Article 15 of the Commission's Statute, on the meaning of the expressions "progressive development" and "codification" of international law as used in the Statute. Gilberto Amado strongly felt that the two expressions should go

[128] Fundação Getúlio Vargas. *Dicionário Histórico-BiográficoBrasileiro 1930-1983*, vol. I, p. 109. For a survey of Amado's speeches and work as a congressman, cf. Câmara dos Deputados, *Perfis Parlamentares, vol. 11: Gilberto Amado* (org. H. Senna), Brasilia, C.D., 1979, pp. 25-297.

[129] Cf., e.g., his Opinion of 11 September 1935, reproduced *in:* A. A. Cançado Trindade. *Repertório da Prática Brasileira do Direito Internacional Público (*Period 1919-1940), Brasilia, MRE/FUNAG, 1984, pp. 79-80.

[130] Two years earlier, he had been Delegate of Brazil to the International American Conference of Montevideo (1933).

[131] M.R.E., *Almanaque do Pessoal*, 1935, pp. 64-65; 1943, p. 150; 1944, p. 156.

[132] Five years earlier, in 1963, he had been elected member of the Brazilian Academy of Letters (having taken office in 1964).

[133] United Nations, *The Work of the International Law Commission,* 3rd ed., N.Y., UN, 1980, pp. 4-5.

together, as the future Commission should not itself represent yet another effort of codification of international law similar and in addition to other initiatives of the past and at that time.[134] His efforts were not in vain.

As member of the International Law Commission, Gilberto Amado was unanimously elected its Rapporteur at its first session in 1949.[135] He took active part in the Commission's early discussions on its plan of work, i.e., the survey of international law with a view to selecting suitable topics for codification. He pointed out that that choice "could only be exercised rationally" under certain criteria; as the Commission's statute provided no such criteria, it lay with the Commission itself to determine them and to establish the order of priority of the topics chosen in virtue of those criteria. Although the Commission should seek to have its drafts accepted by States so as to provide the basis for international conventions, pondered Amado, the Commission's work did not depend on immediate acceptance by States and the choice of topics should not depend on the prospects of their being accepted. In Amado's view, the Commission should select topics which presented gaps and difficulties, and should keep in mind that "its reports could be approved by the General Assembly and would thus not fail to influence States when they came to deal with them. If the Assembly merely took note of them", Amado added, "they would still have a value as subsidiary means for the determination of rules of law" in the sense of Article 38 (*d)* of the Statute of the International Court of Justice.[136]

In any case, Amado maintained in the ILC debates of 18 April 1949 that the Commission should work "according to a systematic plan, …animated by the interests and aims of the United Nations". Personally he would have wished the Commission to begin its work with two topics in particular, namely, "subjects of international law and recognition of legal situations", especially as they were related to one of the questions referred to it by the General Assembly, that of the rights and duties of States. Amado added that the Commission could then turn to the codification of subjects which were "realizable", such as the law of the sea, the law of war (specially aerial warfare), the formulation of the Principles of Nürnberg, nationality and other questions pertaining to the condition of the individual in international law.[137]

Over the years Gilberto Amado was always attentive to, and constantly reminded his colleagues of, the Commission's basic function, or

[134] "Contribuições de Gilberto Amado ao Direito International", *Correio da Manhã,* Rio de Janeiro, 08/09/1968, 2nd part. p. 1.
[135] Second meeting, on 13 April 1949; cf. UN, *Yearbook of the International Law Commission* (hereinafter referred to as *YILC*) (1949) p. 14; and cf. pp.221, 240-241 and 260-261, for his comments on the draft report of the Commission of the General Assembly pertaining to its first session. He pointed out, *inter alia*, that "the Commission's task was to codify the international law of the future" (ibid. p.260).
[136] *Ibid*., p. 18.
[137] *Ibid*., p. 33.

at least the way he approached it. The Commission's function, he warned in 1950, "was not to settle immediate problems, but to codify and develop international law" a work of a "long-term nature": "the Commission worked steadily for future generations, and it was not proper for it to decide questions hastily".[138] Its work of codification "presupposed the existence of earlier customary material, and this could not be ignored even if it had to be adapted to modern practice".[139] A decade later he again observed that "to achieve positive results progress must of necessity be slow", as exemplified by the Commission's treatment of such subjects as the law of the sea and State responsibility.[140]

In 1961 he recalled in the Commission's debates that, in the past, the League of Nations had been guided by the *Institut de droit international* in choosing a list of subjects suitable for codification, and even earlier, for the Hague Peace Conferences of 1899 and 1907, the *Institut de droit international* "had proposed a number of topics, from which the League of Nations had chosen a few".[141] However, he warned, "it was not the role of the Commission to embark on a detailed restatement of international law", as that type of work was "more suitable" to a purely academic body. The Commission was instead to "sift those rules which were of importance to inter-State relations", and in that its task had "greatly increased in importance" as a result of the emergence of a large number of new States, "anxious to participate in the formulation of the rules" of contemporary international law.[142]

If, on the one hand, Gilberto Amado remarked on more than one occasion that the Commission should not be "unduly concerned" with the reaction of Governments to its drafts,[143] on the other hand he always stressed over the years the importance of State practice.[144] The Commission would face "the greatest difficulty" in systematizing international law "on a subject on which State practice was very recent and rules had not yet emerged",[145] he warned. The practice of States was always a concrete and key element: if extensive and well-established, it would lend itself to the work of codification, in other circumstances (of insufficient development of the law in the practice of States) there would be room for the progressive development of international law; that was why, he explained in 1951, Article 15 of the Statute of the Commission had been drafted in such a

[138] YILC (1950) – I, p. 254.
[139] *Ibid*., p. 65.
[140] YILC (1961) p. 207.
[141] *Ibid*., p. 207.
[142] *Ibid*., p. 249.
[143] As stated in YILC (1960)-I, p. 235.
[144] Cf. his statements to that effect in: YILC (1956)-I, p. 65; YILC (1957), pp. 8 and 102; YILC (1958)-I, p. 187; YILC (1968)-I, p. 35.
[145] YILC (1964)-I, p. 210, and cf. p. 102.

way as to make clear that the expressions "progressive development" and "codification" had been used together to cover the two situations at issue.[146]

In 1952 he claimed that "part of the Commission's task in promoting the progressive development of international law and its codification was to deduce certain general rules from the practice of States".[147] A decade later he returned to the point, in stating, in the debates of 16 June 1961, that "it was the task of the Commission to define the legal rules in force among States and applied by them – codification of international law – and also to formulate certain other rules which were already alive in the legal conscience of peoples – progressive development of international law".[148] In a intervention which revealed most clearly his own view of the Commission's functions and work (debates of 9 July 1952), Gilberto Amado insisted that as a body responsible for codifying and developing international law, it was incumbent upon the Commission "to declare what the existing law was on certain points and to recommend the direction in which it could be improved and developed", and, in that connection, he asserted that he "could not associate himself with that school of idealistic international lawyers which believed itself competent to dictate to States what their vital interests were".[149]

Already in the Commission's early years (mid-1952), he stressed that "any international instrument must be based on recognized principles of international law and be drafted in such a way as to command some reasonable chance of acceptance by states".[150] In the early sixties (debates of 25 April 1962), Gilberto Amado, speaking as the Commission's member of longest standing at the time and one of the members of the "Committee of Seventeen" which had drawn up the Statute of the commission (cf. *supra*), emphasized the "impressive work" performed until then by the Commission: he recalled that more than half the topics mentioned in the 1949 UN Secretariat's "Survey of International Law in Relation to the Work of Codification of the International Law Commission" had by 1962 been disposed of (including "the whole of the law of the sea"), and there only remained six topics outstanding out of those on the 1949 list. In regard to some of those topics, such as recognition of States and governments *(infra),* "State practice was still obscure", and others were "not of great practical importance" to States. In addition, the Commission had dealt

[146] YILC (1951)-I, p. 135; cf. also YILC (1954)-I, p. 40; and cf., on questions of method, YILC (1951)-I, pp. 258-259, 367 and 399 and YILC (1966)-I, part II, p. 296.
[147] YILC (1952)-I, p. 183.
[148] *YILC* (1961)-I, p. 193.
[149] *YILC* (1952)-I, p. 125.
[150] *Ibid.*, p.110.

with a number of subjects referred to it by the General Assembly. Thus, not withstanding "some impatience" shown in the discussion of the Sixth Committee of the General Assembly, Amado recommended that the Commission should "take a calm view": it should then give priority to the law of treaties and, upon completion of this latter, turn to the choice of topic which "were ripe for codification".[151]

In some of his earlier interventions, Amado maintained, in respect of the "sources" of international law, that the inclusion of general principles of law among the categories listed in Article 38 of the Statute of the International Court of Justice rendered "practically impossible" a finding of *non liquet*,[152] he stressed in particular the interaction between custom (which did not need to be in harmony with pre-existing international law) and treaties.[153] As to the condition of States in international law, as early as 1949, at a time when doctrinal writings discussed the so-called constitutive and declaratory theories of recognition of States, Amado clarified that the question of statehood in international law was distinct from that of recognition of States: while "international law did not establish an obligation to recognize States", the "right to exist" – a correlative of which was the "right of independence" – was "the source of all other rights of States".[154]

Gilberto Amado participated actively in the Commission's work on the law of the sea, preceding the First UN Conference on the Law of the Sea (Geneva, 1958). Throughout the prolonged debates of the Commission, in the fifties, reference can be made to his numerous interventions on such topics as the rights of coastal States,[155] the continental shelf,[156] the regime of fisheries,[157] the contiguous zone,[158] the high seas,[159] the regime of islands,[160] and, later on, in the year of the Second United Nations Conference on the Law of Sea (1960), to his intervention on the regime of historic water and especially of historic bays.[161] There was one topic, however, which he particularly dwelt upon, namely, that of the regime of the territorial sea, with special attention to the extent of breadth of the territorial sea.[162]

[151] *YILC* (1962)-I, p.3. In 1950 Amado reminded the Commission was entrusted with the codification (and progressive development) of public international law, but not of private international law; the Commission should not venture into this latter, which should wisely be left out of consideration, he added *(YILC* (1950)-I, p. 196).
[152] *YILC* (1958)-I , pp. 46 and 48; cf. also *YILC* (1954)-I, p. 83.
[153] Cf. *YILC* (1950)-I, pp. 275 and 234-235, cf. also *YILC* (1958)-I, p. 89.
[154] *YILC* (1949), pp. 79-80, 82-83 and cf. pp. 84-85. Years later, asserting the principle of the sovereign equality of States, he pondered that the very term "State" implied the qualification "independent"; *YILC* (1965)-I, p. 29.
[155] *YILC* (1950)-I, pp. 234-235; *YILC* (1956)-I, pp. 51-52 and 81.
[156] Cf. *YILC* (1950)-I, pp. 182, 197 and 219-221; *YILC* (1951)-I, pp. 268-269 and 297-298; *YILC* (1953)-I, p. 348.
[157] Cf. *YILC* (1950)-I, p. 211; *YILC* (1951)-I, pp. 317, 322 and 324; *YILC* (1955)-I, p.158.
[158] Cf *YILC* (1950)-I, p.197; *YILC* (1951)-I, pp. 306 and 325; *YILC* (1952)-I, pp. 158 and 162; *YILC* (1955)-I, pp. 59 and 176.
[159] Cf. *YILC* (1950)-I, pp. 182-183 and 198-200; *YILC* (1951)-I, pp. 285, 311 and 341; *YILC* (1955)-I, p. 59.
[160] Cf. *YILC* (1951)-I, p. 284.
[161] Cf. *YILC* (1960)-I, pp. 115-116.
[162] *YILC* (1950)-I. pp. 204-206.

In the early debates on this particular issue, in 1952, Gilberto Amado wondered whether, given the absence of any legal criterion to determine the extent of the territorial sea, "the Commission could achieve anything by trying to impose uniformity in a matter where divergencies could not be avoided, or by attempting to codify non-existent rules. Perhaps", he added, "the Commission should accept the fact that States must themselves fix the limit of their territorial sea, and concentrate on matters such as the base-line, in which agreement could be reached".[163] To him, the special rapporteur had "not yet succeeded in demonstrating that a rule on the delimitation of the territorial sea… existed or could be derived from practice".[164] Three years later, as the debates of the Commission appeared to reach a virtual deadlock on this particular point, Gilberto Amado submitted a proposal whereby the Commission recognized that international practice was "not uniform as regards limitation of the territorial sea to three miles", and considered that international practice did "not authorize the extension of the territorial sea beyond twelve miles".[165] Amado explained that, given the diversity of State practice on the subject, the Commission had "no authority" to decide that the three-mile rule was part of international law,[166] just as much as it was clear that, in the light of international practice of the time, a claim to extension of the territorial sea to a breadth greater than twelve miles would be exaggerated and unwarranted.[167] Amado's formula approved (by 8 votes to 2, with 3 abstentions) on 14 June 1955,[168] enabled the Commission's consideration of the subject to proceed.

Gilberto Amado then commented that his proposal made it clear that "the breadth of the territorial sea was a subject on which international law was undergoing a process of evolution"; it further acknowledged that "State practice was not uniform with regard to the traditional three-mile rule" and that some States claimed distances up to twelve miles. The Commission could give no further guidance on claims to distances between three and twelve miles,[169] the validity or otherwise of which would be elucidated and determined by State practice and perhaps by arbitral awards and judicial decisions.[170] While he could clearly not have anticipated subsequent claims to a two hundred-mile limit, he strongly opposed the thesis that international

[163] *YILC* (1952)-I, p. 154, and cf. pp. 170 and 172.
[164] *Ibid.*, p. 183, and cf. pp. 187-188.
[165] *YILC* (1955)-I, p. 157, and cf. pp.158 and 169, on Amado's "realistic" (as he termed it) standing on the issue.
[166] The formulation he proposed "gave as much recognition to the three-mile principle as could propertly be accorded it" (*ibid.*, p. 163).
[167] *Ibid,* p.163. and cf. p. 169
[168] Cf. *ibid*., p. 170.
[169] *Ibid.*, pp. 171-173.
[170] *Ibid.*, pp. 172 and 182.

law laid down a three-mile limit: if this latter had become long-established in the practice of certain States, others did not follow it, and he found it "unacceptable that States adhering to a three-mile limit should impose on others the obligation to secure express recognition of their practice".[171] He reiterated that the Commission could at that time go no further than it had gone in adopting his own proposal, as – in his words – it "could only recognize facts" and "could only codify reality"; he urged the Commission "not to define the position any more closely, in view of the fact that the urgent needs of States were compelling them to take action in the matter of the breadth of the territorial sea", i.e., "to extend their territorial sea".[172]

Amado had a clear vision of the evolving state of the matter; always faithful to the reality of facts, he did not want at the same time to hinder or prejudice the evolution of the subject. In the following year (1956), the Commission's chairman, S. B. Krylov, in the opening of the eighth session paid "a tribute to Mr. Amado for his outstanding contribution, which had led to some measure of agreement on the subject of the breadth of the territorial sea"; the chairman added that progress achieved in the codification of the matter "had been largely due to the efforts of Latin American jurists".[173] Amado's formula did not resist the onslaught of time, and has today but a historical interest. Yet, at that time, just over three decades ago, it served to overcome a deadlock and to enable the continuation of the Commission's work on the subject.

An item to which Gilberto Amado devoted special attention was that of the definition of aggression. In a memorandum on the subject submitted to the International Law Commission in 1951, Amado began by recalling the two basic doctrinal trends: on the one hand, a general abstract and flexible definition, of the 1924 Geneva Protocol, and on the other hand a rigid definition listing the situations which amounted to aggression, of the 1933 London Conventions (Conference on Disarmament), based upon the so-called Litvinov-Politis formula. Amado criticized this second method, which in his view would be incomplete, would concentrate on the grossest cases of aggression only, and, on the basis of the territorial criterion, could not cover and solve, e.g., cases where the contending States all claimed effective jurisdiction over a frontier territory. He further recalled the attempts, at the San Francisco Conference, on the part of the

[171] Cf. *ibid.*, pp. 173, 179-180,187 and 193.

[172] *Ibid.*, pp. 186 and 180. Yet he pointed out that "any extension beyond twelve miles was not in conformity with international law" at that time (*ibid.*, p.180).

[173] *YILC* (1956)-I, p. 1. Amado insisted that "the breadth of the territorial sea depended on international practice"; *ibid.*, pp. 173-174, and cf. p. 180.

Philippines and Bolivia, to include in the constitutive charter of the United Nations a definition of aggression, and the majority decision in favour of Article 39 of the Charter, leaving to the Security Council the verification a *posteriori* of the existence of aggression. He also mentioned the Yugoslav project which led to General Assembly resolution 378 (V) of 17 November 1950 (as a "simple criterion" to aid the competent organs in the task of defining aggression – *infra)*, and the 1947 Inter-American Treaty on Reciprocal Assistance (Article 9), which presented the disadvantages of a definition based on the territorial criterion (and listing but two acts as constituting aggression and leaving the others to the determination of the organ of consultation).[174]

Gilberto Amado then proposed a definition of aggression based on the letter and spirit of the UN Charter and the purposes of the system of collective security: it would be close to the method of the Geneva Protocol *(supra),* without trying to set out a rigid list of acts considered as amounting to aggression, for the reasons already discussed at the fifth session of the General Assembly (First Committee) which led to the adoption of a "subsidiary criterion" for the definition (resolution 378 (V) of 1950, based on the Yugoslav proposal). A definition based on a list of acts capable of characterizing aggression, pondered Amado in his memorandum, "could hardly be complete" and an omission "would surely be dangerous", as there was "no definitive consensus on the nature of aggressive acts".[175] A rather flexible formula, he added, "would adapt to all circumstances of fact", and could be used by the Security Council as well as – on the basis of the "Uniting for Peace" resolution (377 A (V) of 1950) – by the General Assembly to determine the existence of an act of aggression *ex vi* of Article 39 of the UN Charter, "without restricting the freedom of judgment of the competent organ of the United Nations. The spirit of the Charter", Amado stated, was that of "conferring on that organ full powers to decide the existence or otherwise of aggression. The definition containing the list of acts of aggression would mean a considerable limitation of those powers",[176] he concluded.

In the Commission's debates of 1951, Amado recalled that "as long ago as 1921, Brazil had proposed to the League of Nations that the task of determining which party was the aggressor be left to the Permanent Court of International Justice".[177] He insisted on the impossibility of exhaustively enumerating examples of aggression or reaching a meticulous definition: a minimum definition was however possible, and by that he meant "very

[174] UN doc. A /CN.4/L6, of 29 May 1951, reproduced *in* YILC (1951)-II. pp. 28-31
[175] *Ibid.*, p. 32.
[17649] *Ibid.*, p. 32.
[177] *YILC* (1951)-I. p. 119.

broad and general terms". To him, any act of violence other than the exercise of self-defense or the implementation of enforcement measures decided upon by the Security Council could amount to aggression.[178] Gilberto Amado reiterated his arguments, this time as Delegate of Brazil, in successive sessions (of 1951, 1952 and 1954) of the Sixth Committee of the UN General Assembly, adding that the majority of agreements against aggression avoided defining it, and that the UN Charter was satisfactory (in that regard):[179] one should not restrict the freedom of action of organs it created with the definition of "concepts not perfectly crystallized"; the "virtual power of expansion" of the principles it asserted "should be left intact", he concluded.[180]

Subsequent developments proved that Amado's views on the matter were well founded. Years later, the Definition of Aggression, concluded by the UN Special Committee on the Question of Defining Aggression and adopted by the General Assembly through resolution 3314 (XXIX) of 14 December 1974, though limiting the concept of aggression to the use of armed force by one State against another (Article 1) and containing a non-exhaustive list of situations (Articles 3 and 4), confers upon the Security Council the faculty of determining an act of aggression in conformity with the UN Charter (Article 2) and states the principle of non-recognition of situations created by aggression (Article 5).[181] The 1974 UN Definition of Aggression has the merit of ensuring the minimum: the Security Council of Aggression cannot, at least, ignore an act of aggression alleged by certain States without opposition.

The characteristic frankness of Gilberto Amado added some flavour to his interventions, which were carried almost to extremes, throughout the fifties, in his long-standing controversy over the project on arbitral procedure with the Commission's Special Rapporteur on the subject, Georges Scelle. Amado began by observing, in 1950, that the *compromis* was "the basis on which the arbitration structure was erected", but Mr. Scelle appeared to call for two *compromis*, one to set up the arbitral tribunal and then the *compromis* proper, i.e., he appeared to divide it up, and "to make it two-storeyed".[182] In 1952 Gilberto Amado, fully endorsing the definition of arbitration given in the 1907 Hague Convention on Peaceful Settlement

[178] *Ibid.*, pp.108, 120 and 234, and cf. pp. 94, 104, 106-107, 111, 113, 115, 134, 229, 231, 250 and 378. And cf. *YILC* (1963)-I, p. 58.

[179] Interventions reproduced *in* A. A. Cançado Trindade. *Repertório da Prática Brasileira do Direito Internacional Público (*Period 1941-1960), Brasília, MRE/FUNAG, 1984. pp. 347-351, and cf. pp. 351-352.

[180] *Ibid.*, p. 349.

[181] Cf. UN, *Report of the Special Committee on the Question of Defining Aggression* (1974), G.A.O.R – twenty-ninth session (1974), suppl. No. 19 (A/9619), pp. 1-40, esp. pp. 7-9 and 11-13; and cf. UN doc. A/9890, of 6 December 1974, pp. 1-7.

[182] *YILC* (1950)-I, p. 266, and cf. p. 267.

of International Disputes (Article 37), claimed that the aim of the system was "to bring the parties together on the basis of respect for the law". He was, accordingly, opposed to introducing "extraneous elements" into the structure of arbitration and starting from the assumption of bad faith of governments. He was opposed to "affirmations of high-flown principles which bore very little relation to reality", and deplored the "idealistic academic approach" from which the project at issue suffered: "arbitration was quite distinct from judicial settlement, and the two must be kept separate", he commented.[183]

To his mind, under Scelle's draft "the parties would no longer remain masters of the procedure". It seemed to him that the rapporteur "wished to preclude the possibility of Heads of States being chosen as arbitrators", but he found it "impossible to generalize", recalling the example of the award of Grover Cleveland of February 1895 leading to a peaceful and satisfactory settlement of the boundary question between Brazil and Argentina. It was essential to safeguard what, in his view, was "crucial to arbitration, namely, the freedom of the parties to choose their judges".[184] Gilberto Amado did not spare the Commission's draft of further criticisms: he strongly opposed the suggestion of the rules of procedure of the International Court of Justice (chapter III of the Statute) being subsidiary to the rules of procedure of the arbitral tribunal as laid down in the *compromis.* "Rules intended for a judicial organ", he remarked, "could hardly be satisfactorily applied in an arbitral tribunal, the structure and purpose of which were more restricted".[185]

Moreover, "the parties normally had recourse to arbitration after having failed to settle the dispute by political means: the arbitral award should therefore be as final as it was possible to make it".[186] The Commission's draft appeared to him "to ignore the realities of international life". Amado paid tribute to "the moral and intellectual integrity of the special rapporteur, whose whole draft was permeated with the conviction that arbitration was a legal and not a political process. On the other hand," he added, "those who believed that arbitration provided States with an outstanding method of settling disputes felt that arbitration awards must be final. Little purpose would be served by sacrificing the feasible on the altar of legal perfectionism".[187]

[183] *YILC* (1952)-I, pp. 21, 24 and 27, and cf. pp. 35-36, 38 and 72. On judicial settlement, cf. his intervention *in YILC* (1963)-I, pp. 175-176.
[184] *YILC* (1952)-I, pp. 27, 42 and 51, and cf. p. 43.
[185] *Ibid.*, p. 57 and cf. pp. 74 and 97.
[186] *Ibid.*, p. 92.
[187] *Ibid.* ,pp. 85 and 94.

In the debates of 1953 Amado insisted that "arbitration was not a judicial procedure" and the Commission's draft "struck a mortal blow at arbitral procedure as hitherto understood".[188] In his view, expounded in 1957, the Commission's draft should not be regarded as a "model", but simply as "a reference document that might be consulted by governments or by jurists in their efforts to avoid the difficulties that frequently arose in arbitral proceedings".[189] In 1958 Amado, faithful to his own view of international law, launched his last attack on the draft. He began by noting that "the idea of a convention had been superseded by that of a set of model rules", but while these latter and the like "might prove useful to theorists" of international law, "what mattered to States was the force of conventional obligations".[190] Gilberto Amado strongly opposed the idea of any form of appeal from an arbitral award or of referring the dispute to the International Court of Justice: the purpose of arbitration was "to put an end to disputes", and the "arbitral award was final".[191] The notion of appeal "was contrary to the whole spirit of arbitration", he stated, quoting the Hague Conventions of 1907 (Article 81) and 1899 (Article 54), which determined that "the arbitral award settled the dispute definitively and without appeal".[192]

He rejected, at last, the idea of making an application for revision to the same tribunal ten years later: he recalled that it had been by virtue of arbitral award that "large areas had been adjudged part of the territory of Brazil" and "so momentous a decision would still be subject to revision as much as ten years after the award had been made".[193] That idea seemed inadmissible to him, as it was "the essence" of an arbitral award that it was definitively "binding on the parties and should be carried out forthwith".[194] As Delegate of Brazil to the Sixth Committee of the General Assembly, he reiterated his strong criticisms of the Commission's draft (sessions of 1953, 1955 and 1958), calling it a "judicialist system" which operated a deformation of the arbitral procedure, a "witty monument of law-making *ex nihilo*", "a perfectionist and panglossist" exercise, and even a monument of wishful thinking".[195] Perhaps Amado overdid his criticisms; it may be recalled, for example, that his compatriot and successor at the Legal Office of Brazil's Ministry of External Relations,

[188] YILC (1953)-I, pp. 11 and 7, and cf. pp. 16-17, 20, 23-24, 50, 262 and 325.
[189] YILC (1957)-I, pp. 175-176 and 187. Anyway, he added, "it established a system which was totally different from the traditional system of arbitrations" (*ibid*., p. 192)
[190] YILC (1958)-I, pp. 7 and 89, and cf. pp. 14, 22-23 and 26-29.
[191] *Ibid*., pp. 27, 37, 74 and 97, and cf. pp. 30, 36, 42-43 and 52.
[192] *Ibid*., pp. 75-76.
[193] *Ibid*., p. 81.
[194] *Ibid*., p. 81.
[195] C.f. his interventions at the G. A. Sixth Committee reproduced *in* A. A. Cançado Trindade, *Repertório da Prática Brasileira do Direito Internacional Público* (Period 1941 – 1960), Brasilia, MRE/FUNAG, 1984, pp. 284-289 and 63-64.

Hildebrando Accioly, in an Opinion of 30 April 1959 felt unable to endorse Amado's criticisms, as he (Accioly) considered the draft "acceptable" since it was not intended to become a general treaty on arbitration, but rather to provide a basis for agreement between States or to serve as guide or orientation for agreements on the matter".[196]

In any case, Gilberto Amado felt that his efforts had been rewarded when the UN General Assembly, by resolution 1252 of 14 November 1958, limited itself to "taking note" of the Commission's *Report* containing the draft Articles on the arbitral procedure, to be forwarded to member States of their considerations. Amado's firm attitude, however, had cost him the friendship of Georges Scelle: as he confessed a decade later, when receiving the title of Professor *honoris causa* at the Federal University of Rio de Janeiro, in a speech of September 1968, just as he regretted the impact of the debates upon Scelle, whose integrity and intellectual vigour he admired, he was overjoyed when Scelle later took the initiative of reconciliation. On that day, according to Amado's account, he asked Scelle whether he remembered former Brazilian Chancellor Rio Branco, and again asked: "Secretary of Ruy Barbosa at the Hague in 1907,[197] how could you conceive that a compatriot of Rio Branco would admit your conception of arbitration? You were destroying the principle of arbitration, and would transform it in a simple instance of the International Court at the Hague… Had your doctrine been in force, Brazil would still have its questions of limits unsettled".[198] Scelle smiled and the two embraced each other.[199]

As the International Law Commission embarked on its prolonged work on the law of treaties (with four successive rapporteurs over the years, namely J. L. Brierly, H. Lauterpacht, G. Fitzmaurice and H. Waldock), Gilberto Amado contributed with numerous interventions, particularly on such topics as the classification of the treaties;[200] negotiation, signature, ratifications and entry into force of treaties;[201] interpretation,[202] validity[203] and termination[204] of treaties; and

[196] Cf. Opinion reproduced *in: ibid*., pp. 291-292.

[197] Professor Georges Scelle himself – it may be remarked – acknowledged his early work as "secrétaire de l'Ambassadeur du Brésil" at the 1907 Second Hague Peace Conference; cf. Haroldo Valladão, *Democratização e Socialização do Direito International*, Rio de Janeiro, Livr. J. Olympio Ed., 1961, p. 50 n. 60.

[198] Amado's account *in* "Contribuições de Gilberto Amado ao Direito Internacional", *Correio da Manhã*, Rio de Janeiro, 08/09/1968, 2nd part, p. 1.

[199] *Ibid*., p. 1.

[200] C.f. YILC (1950) pp. 65 and 75-77; YILC (1956)-I, p. 218; YILC(1962)-I, pp. 85-86, 160, 176, 247 and 249; YILC (1964)-I, pp. 86 and 102; YILC (1966)-I, parte II, pp. 77-78.

[201] C.f. YILC (1950) pp. 89 and 93; YILC (1951)-I, pp. 13-14, 22-23, 25-26, 29, 37-38, 40-41-43 and 46; YILC (1959)-I, pp. 13, 45, 55, 97, 100 and 187; YILC (1961)-I, p. 253; YILC (1962)-I, pp. 108, 113 and 115; YILC (1963)-I, p. 7; YILC (1965)-I, pp. 36, 40, 69 and 112; YILC (1968)-I, pp. 198 and 202.

[202] Cf. YILC (1963)-I, p. 92; YILC (1964)-I, pp. 38 (on interpretation and the effects of inter-temporal law), 50-51, 110, 162, 164, 196, 291 and 312; YILC (1966)-I, part II, pp. 191 and 284.

[203] Cf. YILC (1961)-I, pp. 249-250; YILC (1963)-I, pp. 50 and 142; YILC (1964)-I, p. 234; YILC (1965)-I, p. 98; YILC (1966) –I, part II, pp. 35-36.

[204] Cf. YILC (1963)-I, pp. 97, 101, 111, 114, and 130; YILC (1964)-I, p. 139.

functions of the depositary.[205] On more than one occasion, Amado stressed that a State's treaty-making capacity ensued from its status as a subject of international law,[206] irrespective of any formulation given to a provision on this point; even if no provision to that effect was included in the Commission's draft, the matter remained nonetheless governed by international law.[207] If however one such provision were to be included in the Commission's draft, he added, it might convey the impression that its purpose was to encompass the treaty-making capacity not only of States (which was self-evident and "natural") but also of international organizations. On that point, Gilberto Amado observed, as early as 1950-1951, that a practice on the matter had already gradually emerged and that it could hardly be doubted that "an evolution was taking place towards a situation where international organizations could make treaties".[208] Although it would be preferable to wait for further developments on the matter before the Commission pronounced on the issue,[209] Amado announced that if an article was proposed in order to specify that international organizations were endowed with treaty-making capacity similar to that of States, he would vote in favour of it,[210] in spite of the fact that "the status of international organizations had not yet been defined in international law".[211]

The issue, as known, was discussed at the 1968-1969 Vienna Conference on the Law of Treaties, and was only definitively settled last year, with the adoption of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Article 6). The vision and practical wisdom of Amado's recommendation in the early fifties (*supra*) were to be properly recognized in the years to come, for, had the International Law Commission in 1950-1951 proceeded otherwise, with a premature treatment of the subject, it would have frozen the substantial developments of international practice on the matter in the following decades; the point was appreciated throughout the negotiation, last year, of the second Vienna Convention on the Law of Treaties, as I had occasion to witness, together with Ambassador Nascimento e Silva, as Delegates of Brazil to the 1986 Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations.

In an intervention in 1963, Gilberto Amado welcomed the insertion of the concept of *jus cogens* in the Commission's draft on the law of treaties,

[205] Cf. YILC (1965)-I, p. 188.
[206] Cf. YILC (1965)-I, pp. 247-248.
[207] Cf. YILC (1962)-I, pp. 67-68 and 170-171.
[208] Cf. YILC (1950)-I, p. 80.
[209] *Ibid.*
[210] YILC (1951)-I, p. 138.
[211] YILC (1962)-I, p. 242, and cf. p. 243.

recalling the important role played by the concept of "public order" in municipal law; the problem facing the Commission, be added, was reduced to "how to define illegality in international law, or how to specify the lawful or possible purposes of treaties": he would prefer a statement of the principle alone rather than an enumeration of examples.[212] Years later, at the first Vienna Conference on the Law of Treaties (first session, 7 May 1968), Gilberto Amado, as Delegate of Brazil, explained that the idea of including a provision on *jus congens* had first arisen when the Commission was considering preparing a code, rather than a convention, on the law of treaties. An "extraordinary concordance of views" emerged among members of " widely differing personality and legal background", even though recognizing the "difficulty of ensuring the pre-eminence of certain principles": after all, it was the first time that the Commission proposed a rule in which "no individual interest of two or more States was involved and which was concerned with the overall interests of the international community". This latter, Amado added, was "undoubtedly progressing towards the institutionalization of international law", which, however, remained without means of enforcement parallel to those of municipal law. It was thus important, Amado concluded, "to ensure that the rule of *jus cogens* was not sacrificed", to accept the "principle of the predominance of the universal over the particular", to reckon *jus cogens* as "a reality confronting all States in contemporary international law".[213]

Amado's numerous interventions in the Commission's debates were invariably firm and frank, but he was not a dogmatic person, as he had occasion to demonstrate in the consideration of one or two items of the Commission's agenda. One such item was precisely that of reservations to multilateral treaties. In a memorandum on the matter submitted to the Commission in 1951, Amado began by recalling the practice of the League of Nations whereby reservations, to be regarded as valid, were to count on the acceptance of all other Parties which retained the right to object to them. A new tendency, departing from that principle of unanimity, was represented by the so-called Pan-American doctrine on reservations. The proliferation of multilateral treaties, he added, accounted for the frequency of reservations, and the apparent intention to harmonize the principle of autonomy of the contracting parties with the need to secure the participation of the largest possible number of States in multilateral treaties. While waiting for the delivery of the Advisory Opinion of the

[212] Cf. YILC (1963)-I, pp. 68-69.

[213] *United Nations Conference on the Law of Treaties – Official Records* (first session, 1968), vol.I, pp. 317-318; A. A. Cançado Trindade, *Repertório da Prática Brasileira do Direito Internacional Público* (Period 1961-1981), Brasilia, MRE/FUNAG, 1984, pp. 140-141.

International Court of Justice on the *Reservations to the Genocide Convention* case, recently requested, Gilberto Amado supported the principle of unanimity for the validity of reservations, regretting not to be able to follow his Latin American colleagues who sustained in the Sixth Committee of the General Assembly the adoption of the procedure of the Pan-American Union.[214]

He argued that in the present context nothing could bind a State against its will, and the rule of majority found no place in the treaty-making process: "le principe de l'autonomie est encore la cheville ouvrière de tout le droit international conventionnel".[215] Moreover, the practice of American States in the matter of reservations was "far from being uniform", and the Pan-American procedure, about which he had "serious doubts", was not an established rule recognized by all members States",[216] and could not be transposed from the purely regional to the global level. Amado objected to that procedure, which could give place to a "morcellement des obligations découlant du traité"; in his view, "le traité collectif d'une manière générale a une unité de système qui doit être sauvegardée autant que possible".[217] Accordingly, it was necessary to avoid allowing a convention to be "défigurée par des reserves", it was necessary to restrict the facilities accorded to States "pour modifier, d'après leurs intérêts, le contenu d'un traité déjà approuvé par les Nations Unies, compromettant peut-être le système, le but et les effets juridiques du traité".[218]

Amado insisted on his views in the Commission's initial debates on the subject in the early fifties;[219] even if the Pan-American system were accepted for the American continent, he then pointed out, the question before the Commission was different, it was whether the Pan-American system could be applied generally, and on that point he did not share the opinion of his colleague I.M. Yepes and would vote against his proposal.[220] In the following years, Amado was attentive to developments on the matter.[221] In the Commission's debates on the subject in 1962, Gilberto Amado gave the first signs of his preparedness for a change of position: while, on the one hand, still cautiously feeling that "the principle of the integrity of treaties and the unanimity rule for the acceptance of reservations formed part of the law" and hoping that States "would refrain from making reservations

[214] UN doc. A/CN. 4/L.9, of 31 May 1951, reproduced in YILC (1951)-II, pp. 17-19.
[215] *Ibid*., p. 19; Amado added that most authors supported the unanimity principle (*ibid*., p. 20)
[216] *Ibid*., pp. 20-21; he further pointed out, with regard to the resolution on the matter adopted by the Council of the Pan-American Union in 1932, the earlier "erroneous drafting" of article 7 of the 1928 Havana Convention on Treaties (cf. *ibid*., p. 20).
[217] *Ibid*., pp. 20-21.
[218] *Ibid*., p. 22.
[219] Cf. YILC (1950)-I, pp. 93 and 96-97; YILC (1951)-I, pp. 165, 167 and 176, and cf. p. 194.
[220] YILC (1951)-I, pp. 181 and 386.
[221] Cf. YILC (1960)-I, pp. 228-229.

which threatened the entire structure of the treaty", on the other hand he acknowledged "the realities of the contemporary situation" and the "current practice of States" on the matter facing the Commission[222]. He recognized the existing "tendency towards a partial departure from the principle of the integrity of treaties in the case of leading multilateral treaties. That partial departure", he commented, "had been based on the consideration that it was not reasonable to permit a single State to thwart the wishes of perhaps eighty States, in connection with the statement of rules of international law".[223] On that occasion Sir Humphrey Waldock, in 1962 Special Rapporteur on the subject, stated that if he had been a member of the Commission in 1951, his views "would have been very close to those which Mr. Amado had then expressed", but he also felt it necessary "to take into account developments since then, which tended to qualify the traditional principles of the integrity of the treaty and the unity of its legal regime".[224]

Three years later, returning to the subject, Gilberto Amado observed that his acknowledgment, in the 1962, of the new developments, had helped to enable the discussion to advance and a general trend to take shape in the Commission. This latter, he added, could no longer "move backwards", as "States would not agree to renounce what, rightly or wrongly, they considered a gain which had been confirmed by the Commission in its 1962 draft. The gain was no doubt of debatable value, and one might sigh for the times when every treaty had been a harmonious unit; but the fact remained that many things had been changed by multilateralism",[225] he remarked. He expressly admitted the "retreat" (as he called it) from his earlier position on the matter[226] (*supra*): Gilberto Amado had at last acknowledged and accepted the transformations which the topic of reservations to multilateral treaties had undergone.

Another subject in respect of which Gilberto Amado's position evolved over the years was that of the condition of the individual in modern international law. In 1952 he skeptically pointed out that, for example, Article 15 (on the right to a nationality) of the 1948 Universal Declaration of Human Rights would give rise to difficulties, as "it conflicted with the municipal law of a number of countries"; he commented that "no purpose would be served by enunciating pious principles, the possibility of whose

[222] YILC (1960)-I, pp. 231, 160 and 164, and cf. pp. 150-151 and 176.
[223] *Ibid*., p. 231.
[224] *Ibid*., p. 158.
[225] YILC (1965)-I, pp. 146-147 and 163. and cf. pp. 153, 176-177 and 265.
[226] *Ibid*., p. 170. Under the new draft provision, as pointed out by Amado, "a reservation operated only in the relations between the other parties to the treaty which had accepted the reservation and the reserving State" and "it did not affect in any way the rights or obligations of the other parties to the treaty *inter se*"; he "did not think that the draft could be quite so explicit or that such a conclusion could be drawn from practice" (*ibid*., p. 173).

acceptance was very slender".[227] Such a position was clearly untenable, and his prediction proved unduly pessimistic, as soon the impact of the Universal Declaration was to be felt in the Constitutions of many States, in municipal laws and court decisions. Amado, however, while sounding skeptical, maintained – as early as 1949 – that "the right of the State to exercise its jurisdiction over all the inhabitants of its territory was subject to limitations inherent in the application of international law".[228] Years later, in the Commission's debates of 1964, Gilberto Amado added that "States could not be prevented from agreeing on stipulations concerning individuals".[229] Also in his capacity as Delegate of Brazil, Amado had admitted in the Sixth Committee of the General Assembly – in respect of the Draft Code of Offenses against the Peace and Security of Mankind – that the "traditional concept" whereby only States were subjects of international law was "definitively" overcome.[230] The examples above suffice to show that Amado, even though constantly faithful to his "realistic" approach to international law, kept always an open mind, sensitive to the transformations undergone by the international legal order.

The above-reviewed passages constitute probably his most significant interventions in the debates of the International Law Commission, but reference can further be made to his many other interventions on such distinct subjects as diplomatic and consular relations,[231] the law of international organizations,[232] the Nürnberg Principles and international criminal jurisdiction,[233] nationality and statelessness,[234] State Responsibility,[235] international watercourses,[236] the most-favored-nation clause.[237] The review above shows that Gilberto Amado was in fact engaged in the consideration and treatment, as member of the International Law Commission, of virtually all the great themes of international law of his time.

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[227] YILC (1952)-I, p. 107.
[228] YILC (1949), p. 99.
[229] YILC (1964)-I p. 116.
[230] M.R.E., *Relatório da Delegação do Brasil à VI Comissão da Assembleia Geral da ONU* (IX Sessão, 1954), pp. 7-8 (internal circulation).
[231] Cf. YILC (1957)-I, p. 118; YILC (1958)-I, pp. 85 and 94-95; YILC (1959)-I, pp. 77, 80, 157 and 195; YILC (1960)-I, pp. 30, 45, 55, 93, 199 and 210; YILC (1961)-I, pp. 6, 16, 72, 149, 174 and 265-266; YILC (1964)-I, pp. 10, 14, 210 and 225; YILC (1968)-I, pp. 61-63.
[232] Cf. YILC (1949) p. 136; YILC (1950)-I, p. 80; YILC (1951)-I, p. 138; YILC (1959)-I, p. 50 (on decision-making in international organizations); YILC (1962)-I, pp. 170 and 242; YILC (1968)-I, pp. 15, 40 and 61-62.
[233] Cf. YILC (1949), pp. 134, 185-186, 212 and 218.220; YILC (1950)-I, pp. 19, 23, 26, 40, 50, 56, 61, 100, 101, 108-110, 119, 125, 128-129, 133, 142, 146, 148, 151-153, 164-165, 174, 175, 178 and 280-283; YILC (1951)-I, pp. 28-29, 58-59, 71, 76-77g, 215,216, 221, 244, 246 and 253.
[234] Cf. YILC (1952)-I, pp.106, 114, 117 and 142; YILC (1954)-I, pp.42 and 44.
[235] Cf. YILC (1956)-I, p. 232 and 240 (on reparation for damages) and 245; YILC (1957)-I, p. 154; YILC (1959)-I, p. 151; YILC (1963)-I, p. 82; YILC (1966)-I. part II, p. 105.
[236] YILC (1965)-I, p. 295.
[237] YILC (1964)-I, pp. 187-188; YILC (1968)-I, p. 188.

Gilberto Amado never hid his great pride in being a member of the International Law Commission. His constant readiness to contribute to the Commission's work along two decades won him the appreciation of his colleagues. The way his contemporaries felt about him can be illustrated, for example, by a remark made in 1968 by one of the members of the Commission, E. Jiménez de Aréchaga, who is reported to have said: "The day Amado leaves the Commission, it will not be the same".[238] Gilberto Amado left the Commission on 27 August 1969, the day of his passing.

The Commission decided, in 1971 (1146th meeting),[239] that a memorial in his honour would take the form of annual lectures named after him in connection with the Commission's International Law Seminar. Shortly after his death, at the Sixth Committee of the General Assembly, a similarly impressive tribute to his memory took place (session of 24 September 1969), where the spokesmen of five groups of States took the floor: the spokesmen of the Latin American group (Mr. Ruda, Argentina) and of the Western group (Mr. Tsuruoka, Japan) recalled Amado's dedication to the study of law, whilst that of the Western group (Sir Kenneth Bailey, Australia) stressed the "humanist tradition" he represented; the spokesman of the African delegations (Mr. El-Erian, United Arab Republic) drew attention to Amado's "broad view" of peaceful co-existence, whereas that of the socialist countries (Mr. Secarin, Romania) recalled Amado's "realistic attitude" towards the "problems confronting the progressive development of international law".[240]

Several other delegates took the floor, among whom that of China (Mr. Liang), who recalled Amado's "remarkable objectivity" and "keen practical sense" inspired by a "realistic and positivistic view of law";[241] that of France (Mr. Deleau), who praised his "broad culture";[242] that of Iraq (Mr. Yasseen), who asserted that Amado's work "would leave its mark on the history of the Sixth Committee and International Law Commission".[243] The representative of Israel (Mr. Rosenne) pointed out that Amado "had brought together diplomatic pragmatism and legal precision, had been one of the ablest defenders of the modern concept that only by codifying the rules of international law in the form of international agreements could the necessary progress be made in that field".[244] The Chairman of the International Law Commission, Mr. N. Ushakov, who had been invited to attend that session of the Sixth Committee,[245] quoted the cable which the UN

[238] C. A. Dunshee de Abranches, "A Partida do Mestre", *Jornal do Brasil*, Rio de Janeiro, 30 August 1969, part I, p.6.
[239] Cf. YILC (1971)-I, pp. 390-391. The first memorial lecture took place in 1972.
[240] UN General Assembly (twenty-fourth session), Sixth Committee – Provisional Summary Records (1102nd meeting, 24 September 1969), doc. A/C.6/SR. 1102, pp. 2-3.
[241] *Ibid*., p. 3.
[242] *Ibid*., p. 4 And cf., in the same sense, the intervention of the Delegate of Brazil (Mr. Araújo Castro), *in ibid*, pp. 5-6.
[243] *Ibid*., p. 2.
[244] *Ibid*., p. 2, and cf. pp. 4-6 for other interventions.
[245] Cf. *Ibid*., p. 2.

Secretary-General had sent to the Brazilian Minister of External Relations stating that "Mr. Amado occupied a distinguished place in the history of United Nations legal activities". The Commission's Chairman added that both in the International Law Commission (of which he had been a founding member) and at the Sixth Committee of the General Assembly (as representative of Brazil) Amado's statements had "won the admiration of his colleagues for their wisdom, wit, culture and profound humanism".[246]

Gilberto Amado's numerous interventions, as Delegate of Brazil to successive sessions of the Sixth Committee of the UN General Assembly,[247] and as Delegate of Brazil to the First and Second UN Conferences on the Law of the Sea (Geneva, 1958 and 1960)[248] and at the first session (in 1968) of the first Vienna Conference on the Law of Treaties,[249] are now assembled in the *Repertory of Brazilian Practice in Public International Law*. His work as a long-standing member of the International Law Commission can be appreciated through his numerous interventions scattered throughout the volume of the Yearbook of the International Law Commission from 1949 to 1968, which I have also tried to assemble for the purpose of the present Memorial Lecture.

Shortly before dying in his biographical study of former Brazilian Chancellor Raul Fernandes,[250] Gilberto Amado confessed that he much regretted never to have organized his own writings or recorded his own writings or recorded his own notes, and that such fault then rendered him unable to recollect his steps and his work, and all that gave meaning to his professional life.[251] It is only too proper that, in the present centenary celebration at Geneva, his successors at the International Law Commission and at the Office of the Legal Adviser to Brazil's Ministry of External Relations try to bring about precisely that recollection, to revive some of his best moments, and, as Brazilian international lawyers, pay tribute to his memory.

[246] *Ibid*., p. 5.

[247] Cf. A. A. Cançado Trindade, *Repertório da Prática Brasileira do Direito Internacional Público* (Period 1941-1960), Brasilia, MRE/FUNAG, 1984, PP. 26-28, 30-31, 63-44, 84-85, 95-97, 134-135, 163, 171, 196, 202, 236, 283-289, 337-338 and 347-352; *ibid*. (Period 1961-1981), pp. 53-54, 79-80 and 95-96.

[248] *Ibid.* (Period 1941-1960), pp. 30-31, 162-164 and 171.

[249] *Ibid.* (Period 1961-1981), pp. 97-98.

[250] Who integrated the Committee of Jurists, which met at The Hague in 1920 in order to draft the Statute of the Permanent Court of International Justice.

[251] Gilberto Amado, "Raul Fernandes – Traços para um Estudo", *in*: *Raul Fernandes – Nonagésimo Aniversário,* vol. II, Rio de Janeiro, MRE, 1968, p. 14.

REFLECTIONS ON LEGAL ASPECTS OF UNITED NATIONS PEACEKEEPING

Lecture delivered on 14 June 1989
by Mr. Carl-August Fleischhauer
Under-Secretary-General for Legal Affairs
The Legal Counsel of the United Nations

Ladies and Gentlemen,

I am gratified to have the opportunity to share with you, this evening, some reflections on legal aspects of United Nations peacekeeping. In doing so, I render homage to the memory of the great Brazilian jurist, Gilberto Amado. It is a pleasure and an honour for me to have been asked to give this year's Gilberto Amado Memorial Lecture. This invitation has a particularly welcome personal aspect for me because I had the opportunity to meet Mr. Amado, when, towards the very end of his life, he came to Vienna in 1968 to participate in the first session of the Vienna Conference on the Law of Treaties, as Chairman of the Brazilian delegation. I remember well how impressed I was with the wisdom and the depth of his remarks and interventions.

With new operations under way in Iran, Iraq, Afghanistan, Angola, and – since 1 April of this year – in Namibia, and with the 1988 Nobel Peace Prize bestowed on the United Nations peacekeeping forces, United Nations peacekeeping has been much in the limelight lately. I therefore thought that this distinguished audience would be interested in reflections on some of the lesser-known but still important legal aspects of the operations. Needless to say, I make these remarks strictly in a personal capacity.

The reflections which I wanted to share with you centre on four salient legal aspects of United Nations peacekeeping, namely:

1. The object and purpose of United Nations peacekeeping operations;
2. How such operations are brought about;
3. The financing of such operations; and
4. The *modus operandi* of peacekeeping forces.

The *object and purpose* of peacekeeping operations is the neutralization or defusing of international conflict situations through the use of multinational military personnel under United Nations command. Peacekeeping operations are to prevent situations of conflict from constituting threats to international peace and security; to prevent a conflict from escalating into armed hostilities, or to permit the de-escalation of conflicts that have already reached military levels, in some cases to monitor compliance with armistices or to supervise troop withdrawals, or to ensure the unimpeded exercise of self-determination when it is threatened in such a way that international peace and security are endangered. Peacekeeping is therefore precisely what the word says: neutralization of conflicts for the sake of keeping the peace. It differs from the long-term task of resolving these conflicts, but it provides a breathing space and serves as a stepping stone for peacemaking.

Depending on their purpose, peacekeeping operations take various forms: sometimes a peacekeeping force is stationed between hostile forces in order to disengage them; sometimes United Nations observers are stationed between conflicting parties in order to supervise their compliance with an armistice agreed to by them, as, for example, the United Nations observers in Iran and Iraq do, or they monitor an agreed-upon troop withdrawal, as in Angola. In other cases, United Nations forces have taken over, or – as in Namibia – monitor parts of the administration of an entire territory in order to secure the conditions necessary for the carrying out of plebiscites in the exercise of the right to self-determination.

None of these activities requires the offensive use of weapons. Disengagement, observation or the supervision of plebiscites all do not require combat activities. United Nations troops carry light weapons and fire only in self-defense.

The new Namibia operation is the 17th peacekeeping operation since 1948. In nine of these 17 instances observer missions were sent, and in the other eight cases full-scale forces were used.[252]

[252] *Observer Mission*: UN Truce Supervision Organization (UNTSO; 1948 to present); UN Military Observer Group in India and Pakistan (UNMOGIP; 1949 to present); UN Observation Group in Lebanon (UNOGIL;1958); UN Yemen Observation Mission (UNYOM; 1963-64); Mission of the Representative of the Secretary-General in the Dominican Republic (DOMREP: 1965-66); UN India/Pakistan Observation Mission (UNIPOM; 1965-66); UN Good Offices Mission in Afghanistan and Pakistan (UNGOMAP; 1988 to present); UN Iran/Iraq Military Observer Group (UNIIMOG; 1988 to present); UN Angola Verification Mission (UNAVEM; 1989 to present).

Of course, the United Nations Charter is quite silent on what we now call United Nations peacekeeping. The legal basis for United Nations peacekeeping is therefore the broad mandate given by Article 1 of the Charter according to which an important purpose of the United Nations is "to maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace…" The mechanism foreseen in the Charter for the implementation of this purpose of the Organization is, however, something quite different from what has evolved into United Nations peacekeeping. The Charter contains not only its Chapter VI on "Pacific settlement of disputes", under which the Security Council can make recommendations on any dispute, or any situation which might lead to international friction or give rise to a dispute, but beyond that, the well-known Chapter VII on "Action with respect to threats to the peace, breaches of the peace and acts of aggression". That Chapter provides for the determination, by the Council, of the existence of a threat to the peace, a breach of the peace or an act of aggression. That determination is then to be followed, step by step, by the imposition of mandatory measures, reaching from economic and diplomatic sanctions to, in the last resort, military coercion. The aim is the effective elimination of the threat to the peace, the breach of the peace or the act of aggression. We all know why this system, which requires a series of substantive decisions by the Security Council, has not worked and perhaps cannot work. Possibly it is too simplistic for our complicated world. But you will all agree that the neutralization of conflicts, which is the object and purpose of peacekeeping operations, is a far cry from the elimination of the source of trouble, the aim of the Charter system.

Critical voices have noted that United Nations peacekeeping in effect merely suppresses the symptoms of conflicts rather than addressing their roots, and that maintaining an unresolved conflict on a sub-fighting level makes it necessary to keep the peacekeeping operations going over inordinate lengths of time while the fundamental conflict continues to fester. Other voices have gone further and have expressed concern that a conflict once neutralized might become, through the very fact of its neutralization, more difficult to resolve, since there is no longer a pressing need for a solution. Indeed, some peacekeeping operations have lasted, or are lasting a long time. The first United Nations force in the Sinai was in place for more than a decade when it was forced to withdraw and the Arab-Israeli-War

Peacekeeping forces: First UN Emergency Force in the Sinai (UNEF IL; 1956-67); UN Operation in the Congo (UNOC; 1960-64); UN security Force in West New Guinea (UNSF 1962-63); UN Peacekeeping Force in Cyprus (UNFICYP; 1964 to present); Second UN Emergency Force in the Sinai (UNEF II; 1973-79); UN Disengagement Observer Force (UNDOF; 1974 to present); UN International Force in Lebanon (UNIFIL; 1978 to present); UN Transition Assistance Group in Namibia (UNTAG; 1989 to present).

of 1967 broke out. The United Nations Military Observer Group in India and Pakistan (UNMOGIP) has been in existence since 1949 and the Cyprus operation (UNFICYP) since 1964. UNIFIL is in its 11th year, and there are other examples. Undoubtedly, the parties to some of the frozen conflicts live quite comfortably behind the United Stations lines and do not see many incentives to take the difficult political actions to resolve their conflict.

The logical answer to these shortcomings would be to blur the line between peacekeeping and peacemaking by coupling the authorization for a peacekeeping operation with the imposition of concrete steps towards the solution of the underlying conflict. However, even if these suggestions were to constitute mere recommendations to the parties, I do not think that it would be realistic to advocate such an innovation, for which Member States do not seem to be ready. But such an innovation would also not seem practicable. Experience shows that most peacekeeping operations have had to be set up in great haste in order to defuse an ongoing confrontation or to seize the opportunity to stop actual fighting. There is, as experience shows, in most cases, simply no time to initiate and to pursue negotiations on recommendations for the solution of conflicts in situations in which the neutralization or containment of a conflict is a legitimate goal in itself, in order to avert its growth into a threat to peace and security.

In addition, the Security Council has authorized peacekeeping operations in connection with peace plans, or with good offices missions by the Secretary-General. Moreover, the need to renew or prolong frequently the normally short-term authorizations for peacekeeping operations – to which I am about to refer – regularly enables the Security Council to give repeated thought to the underlying political situation. I would think it would be unwise to go further and to restrict the freedom of action of the Organization in neutralizing conflicts by imposing far-reaching additional conditions, aimed at resolving them. The concentration of United Nations peacekeeping on conflict-neutralization as opposed to conflict-solution demonstrates that United Nations peacekeeping, as we know it, is a compromise between the feasible and the desirable. Conflict neutralization through peacekeeping operations, however difficult and incomplete, is attainable, while the elimination of the source of many conflicts, and their solution, however desirable this may be, may often prove unattainable.

Another area where it is apparent that United Nations peacekeeping, like diplomacy, is the art of the possible, is *the way in which peacekeeping operations are brought about*. As you know, under the collective security system foreseen by the Charter, the initiative for United Nations intervention was to be with the Security Council. Under Chapter VII of

the Charter, it is for the Security Council to make an initial determination of the existence of a threat to the peace, breach of the peace or act of aggression and it is for the Security Council to decide upon the steps following from that determination. Under United Nations peacekeeping, as it has developed, there is still the need to secure the authorization of the competent organ of the Organization; however, the element which triggers United Nations intervention is no longer a binding Security Council determination but the consent of the parties concerned.

In the absence of a binding Security Council determination, it is the principle of consent that underlies United Nations peacekeeping operations; the parties to the conflict must want to be disengaged; they must want to have an armistice or troop withdrawal observed; they must want to have a plebiscite internationally monitored. And when this has been agreed upon, then the Secretary-General must find countries to volunteer troops and equipment, and the countries in which the operation is to take place must agree to the composition of the forces or observers that are to operate in their territories. But all those consents are by themselves not yet sufficient. They must still be ratified by the ultimate consent, that of the world community expressed through the competent organ of the United Nations.

Some 30 years ago, there was an intense dispute as to which organs of the United Nations were competent to authorize peacekeeping operations. Nobody ever contested the Security Council's competence to authorize such operations, and the first observer missions were established, respectively in 1948 and 1949, by resolutions of the Security Council. The dispute was whether the General Assembly has concurrent power to authorize peacekeeping operations when the Security Council is blocked by vetoes, as it was in 1956 when the first United Nations Emergency Force was to be dispatched to the Sinai to stop the war between Israel and Egypt and to displace the British and French forces that had intervened, and again in September 1960 when the continuation of the Congo operation was at stake. The matter was finally settled through a series of understandings, and ever since, all peacekeeping operations have been authorized by the Security Council. To make sure that no operation lasts longer than its current approval by the Council, which in turn requires the continuing approval of the parties, each authorization is limited in time, in some instances to less than six months.

The requirement of consent by the parties to the conflict seems obvious, as a normal consequence of the sovereignty inherent in statehood. However, adherence to this requirement means that it is the parties to the conflict which determine the points in time at which the United Nations can

start its peacekeeping function. Experience shows that States often wait far too long before they permit United Nations intervention in their disputes, and this, of course, is a serious drawback of the consent principle. We run here into a problem parallel to the question of how Member States can be induced to bring their conflicts to the Security Council at an early stage. This problem has been addressed by the present Secretary-General time and again, ever since his first Annual Report in 1982.[253] I can only concede here that I have no ready-made solution to offer. In relation to peacekeeping, Article 99 of the Charter offers little help, since neither the Secretary-General nor the Security Council can substitute their eagerness to act for the necessary consent of the States Parties to the conflict. The other drawback is, of course, that if consent is required, it may also be withdrawn. In this respect, we have the tragic example of the withdrawal, shortly before the outbreak of the Seven-Day War of June 1967, of the Emergency Force in the Sinai. More than ten years after the Force had been installed, Egypt, in May 1967, requested its departure. The then Secretary-General felt that he had no choice but to withdraw the Force.

Secretary-General U Thant was severely criticized for his decision to give effect to the withdrawal of Egypt's consent to the deployment of UNEF I. From a legal point of view, he could not disregard the Egyptian request. But what he could have done, as Sir Brian Urquhart suggests in his autobiography,[254] was to bring the matter to the attention of the Security Council under Article 99 of the Charter, as a matter which, in his opinion, could threaten the maintenance of international peace and security. It is, of course, difficult to assess in hindsight the reasons why he did not do this, and as Sir Brian suggests, nobody knows whether and how the Council would have reacted at the time.[255] Under present practice, the involvement of the Security Council in the conduct of peacekeeping operations is such that it would not be a matter of discretion whether to bring such a matter to the Council or not; under present circumstances, the Secretary-General would be expected to seize the Council with it promptly.

I turn now to the important question of financing *United Nations peacekeeping operations.* The principle of consent, unfortunately, does not mean that peacekeeping operations can be conducted without costs for the Organization. There have been only two operations that were entirely paid for by directly interested states: the 1962/1963 organization and supervision of a plebiscite in West Irian was paid for by the Netherlands

[253] Report of the Secretary-General on the Work of the Organization (37th session of 1982), document A/37/1.

[254] Sir Brian Urquhart, *A Life of Peace and War*, 1987, p. 212.

[255] On the legal *aspects* of the termination of UNEF I and, in particular, the question of a possible involvement of the General Assembly before the withdrawal of the Force, see N. A. El-Araby, "UN Peacekeeping: The Egyptian Experience" in H. Wiseman, *Peacekeeping Appraisals and Proposal* (1983), pp. 65 ff., in particular pp. 73 ff.

and Indonesia, and a 1963/1964 observation mission in Yemen was paid for by Egypt and Saudi Arabia.

Normally, however, the forces put at the disposal of the United Nations have to be paid for by the Organization; the soldiers remain on their national payrolls, but their Governments must be reimbursed at a uniform rate for all contingents. These normally come with some of the materials they need, but their use and losses must be reimbursed.

The transport of peacekeeping troops and their equipment between their home countries and the theatres of operation, including for periodic rotations, must – to the extent not donated – be paid for. Offices and accommodations are often provided by the host State of the operation, but that is not always the case. Then the forces must, of course, be provided for in the field.

In the late 1940s and early 1950s, the expenses for the first peacekeeping operations were simply charged to the regular United Nations budget, which is assessed on all Member States according to the normal scale of contributions. When in 1956 the first United Nations Emergency Force in the Sinai, and in 1960 the Congo operation were mounted, the costs were huge compared to the normal parts of the regular budget, and it proved necessary to create separate accounts for each of them to avoid financial chaos. However, expenses for the two operations continued to be regarded as "expenses of the Organization" within the meaning of Article 17 of the Charter, and Member States were assessed for their contributions to those accounts basically according to the scale of assessments decided on by the General Assembly for the regular budget. This led to a major political and fiscal crisis when a number of Governments refused to recognize the costs for the operations as legitimate expenses of the Organization, and therefore refused to pay their specially assessed contributions for the operations.

In the mid-1960s, thereupon, one operation – that is Cyprus (which is still continuing) – was initiated to be financed exclusively from voluntary contributions; the fact that this method of financing has never again been resorted to speak for itself. However, when in 1973, in order to end the Yom Kippur War, a second Emergency Force in the Middle East was established, a method of financing was found which has essentially been followed ever since, including the financing for the latest operation in Namibia, but excepting the Afghanistan operation in 1988: that operation was charged to the regular budget of the Organization. Under the new mode of financing, the expenses for peacekeeping operations continue to be regarded as expenses of the Organization under Charter Article 17, and they are again charged to special accounts, but this is done according to a scale of assessment different from the normal scale. The new scale

provides for four different categories of Member States: (a) permanent members of the Security Council; (b) economically developed Member States not permanent members of the Security Council; (c) economically less-developed Member States, and (d) economically least-developed Member States. Under this system, the poor and poorest States pay less than their quota under the regular scale of assessments, while the contributions of the permanent members of the Security Council to the financing of peacekeeping operations are correspondingly higher than in respect of their contributions to the regular budget.

As I have already mentioned, the authorization of peacekeeping operations is, under the present practice, given by the Security Council. Under the Charter, however, the power of the purse lies with the General Assembly. Therefore, even after the Security Council has authorized a peacekeeping operation, the financing of that operation must still be decided upon by the General Assembly, the amounts provided for 'unforeseen expenses" in the regular United Nations budget being so limited that they do not go very far in the case of a peacekeeping operation.

In theory, therefore, there is room for friction; the Security Council could authorize a peacekeeping operation which the Assembly could then refuse to finance.

Regrettably, in the area of peacekeeping, and in spite of all attempts to arrive at specifically attuned methods of meeting the expenses for such operations, the payment habits of Member States are particularly bad and there are considerable arrearages. However, while arrearages in payments towards the regular United Nations budget directly diminish the capacity of the Organization to function, that is not so in respect to peacekeeping, where the costs incurred are mainly in the form of obligations to reimburse troop-contributing States. Because of their exemplary devotion to the cause of peace, these countries have maintained their personnel and services, and have put them at the disposal of the United Nations, in spite of the ever-greater delays in reimbursement. The United Nations has thus in effect forced these countries to become important creditors of the Organization.

According to the latest figures I have seen, the unpaid assessed contributions for United Nations peacekeeping, i.e., not including the Cyprus operation, stood, as of 31 December 1988 (and that was before the Namibia operation was budgeted), at US$ 355.2 million. With respect to the voluntarily financed Cyprus operation, the Secretary-General had to state in a letter dated 15 March 1989 to the Governments of all States Members of the United Nations or members of the specialized agencies containing a further appeal for voluntary contributions to the United Nations Peacekeeping

Force in Cyprus: "The United Nations has been able to meet the claims of troop-contributing countries only up to June 1980. It is clear that this highly unsatisfactory situation cannot go on indefinitely".[256]

The situation is indeed unsatisfactory, not only financially, but also politically and legally. It is therefore to be welcomed that since the 43rd Session of the General Assembly, under the impact of the new peacekeeping operations in Afghanistan, Iran/Iraq, Angola and Namibia, Member States have re-directed their attention to the financing of United Nations peacekeeping. The solutions discussed, however, do not yet point in the direction of a satisfactory solution to the problem.

To my mind, the introduction of a separate scale of assessments for peacekeeping operations, geared to the special responsibility of certain Member States for the maintenance of peace and security and to the economic capacities of others, was a step in the right direction. However, a satisfactory solution has to go much further and I for one would advocate the establishment of a special working capital fund specifically set aside for peacekeeping operations mandated by the Security Council. Such a fund could only be used after the General assembly has authorized the financing of an operation and would only help to launch the operation. It would then have to be immediately replenished. The creation of such a fund would, from the very outset, put future peacekeeping operations on a sound financial basis, provided that Member States then come up with their assessed contributions. The payment behavior of Member States, however, cannot be improved merely by legal or procedural means. Payment of the contributions to peacekeeping operations is and must remain a legal obligation under Article 17 of the Charter. If Member States do not comply with that obligation, they risk the penalty foreseen in Article 19, but more importantly, they risk the falling apart of the peacekeeping machinery created by the Organization.

Last, but by no means least, I would now like to turn to *the* modus operandi of *United Nations Peacekeeping Forces*. Over the years, certain basic operational structures have evolved. These were highlighted by the Guidelines for the Second United Nations Emergency Force in the Middle East, which were unanimously approved by the Security Council in 1973 and have served ever since as the structural model for peacekeeping operations. Under that pattern, each United Nations peacekeeping force, be it a full-scale force or an observer mission, is under the command of the United Nations, vested in the Secretary-General acting under the authority of the Security Council. Each operation is placed under a Force Commander, who is appointed by and responsible to the Secretary-General: the latter in turn fully informs the Security Council of developments relating to the functioning of the Force and will refer to the Council all matters which may affect the nature or the continued effective functioning of the Force. The Security Council is thus closely linked not only with the establishment but

[256] Document S/20560.

also with the functioning of peacekeeping operations. Nobody advocates that the day-to-day running of peacekeeping forces should be taken out of the hands of the Force Commander and the Secretary-General, and they clearly should not be restrained too closely by the Council in their operational decisions. Nevertheless, the close involvement of the Council in the conduct of peacekeeping operations is an important improvement over the situation prevailing in earlier years and it prevents the Secretary-General from being frequently left alone with decisions affecting the nature of functioning of an operation. Of course, the establishment of closer links between the Council and these operations has been facilitated by the acquiescence of Member States in the role of the Security Council as the organ competent for the authorization of peacekeeping operations.

The Force Commander establishes his own chain of command through which he communicates with the national contingents in the Force under his command. The individual units of these contingents remain intact and under the command of their own officers. They not only remain under the general disciplinary rules of their national armies but they keep their national uniforms. The United Nations merely furnishes United Nations badges, as well as the blue United Nations berets and blue helmets that have become the well-recognized symbol of these United Nations troops. The contingent commanders are required to act exclusively under the operational orders issued by the Force Commander, and are responsible to him for the proper functioning and discipline of their troops.

In view of the inevitable diversity of experience and operational procedures between the various contingents involved, Standard Operating Procedures are promulgated for each United Nations operation as soon as it is set up, to ensure that all national elements in the Force adhere to a common set of rules and pattern of procedures and operation. These Standard Operating Procedures relate strictly to the operational conduct and performance in the field, and differ from operation to operation. They have one important feature in common – weapons are to be used only in self-defense.

As a rule, a peacekeeping force will be accompanied by supporting civilian personnel, which are provided by the Secretary-General from United Nations officials. The civilian component is also responsible to the Commander in the performance of its functions. However, while serving in the field, these officials remain subject to the Staff Regulations and Rules of the Organization and remain United Nations officials.

While the Standard Operational Procedures correspond to internal requirements for the effective conduct of an operation, there are important operational questions which have to be clarified with the country in which the operation takes place. These questions concern the legal status of United Nations peacekeeping forces in the territory of the host State. Peacekeeping forces are subsidiary organs of the United Nations and their fundamental status in a host State is therefore derived from the provisions

of Charter Articles 104 and 105 which deal with the legal capacity and the privileges and immunities of the Organization. Furthermore, if the host States is a party to the 1946 Convention on the Privileges and Immunities of the United Nations, the Force is also entitled to enjoy the privileges and immunities of the Organization granted thereby.

However, insofar as United Nations peacekeeping forces have special compositional features, and operational necessities, not all aspects of a force may be adequately covered by the two provisions of the Charter and the 1946 Convention. Also, doubts may be raised as to the status of the individual members of the national contingents serving with a force who, in spite of the force's status as subsidiary organs, are neither United Nations staff members nor "experts on mission" for the Organization. Furthermore, while the 1946 Convention has extremely wide acceptance, not all Member States of the United Nations have become parties to it. The United Nations, therefore, in order to provide proper legal protection and arrangements for the forces, endeavors to conclude Status of Forces Agreements with the respective host countries concerning the legal standing of the forces and their personnel.

The Status of Force Agreements are principally designed to grant to the forces freedom of movement in the operational area and freedom of communication, as well as freedom of access to and departure from the area of operation, and to grant to the forces and their personnel, at a minimum, those privileges and immunities provided for by the 1946 Convention. As for the individual members of the national contingents, they should be immune from the criminal jurisdiction of the host State, but remain subject to the criminal jurisdiction of their national State in respect of any offenses committed by them in the host States. They should also have functional immunity from the civil jurisdiction of the host States.

While Status of Force Agreements have been concluded for the earlier operations, the conclusion of such agreements was not possible on a number of occasions in the middle and late 1970s. In these cases, the Organization had to rely, and insofar as these operations still continue, is still relying, on general principles that have evolved from the earlier Status of Forces Agreements and the UNEF II Guidelines which were unanimously adopted by the Security Council. It remains, however, the general policy of the Organization to seek Status of Forces Agreements and such Instruments have been concluded or are in the process of being concluded with respect to the most recent operations. In particular, the operation in Namibia is covered by an elaborate Status of Forces Agreement. Given the highly technical nature of the points covered in these agreements and the diversity of local laws and practice, the policy of the Organization to rely on agreed texts rather than on general principles seems justified.

In addition to the Status of Forces Agreements, which are concluded between the Organization and the host countries, arrangements are made

between the Organization and troop-contributing countries to regulate the conduct of the nationals of the latter while serving with a force. These arrangements correspond in part to the Status of Forces Agreements, the provisions of which they make applicable to the individual members of the contingents; other points of the arrangements with the troop-contributing countries settle questions arising only between these countries and the Organization, which are of a general administrative and financial nature. The arrangements with the troop-contributing countries, the so-called Participation Arrangements, are often concluded hastily and on and *ad hoc* basis; also, they are often badly recorded and badly drafted. It is, however, to be hoped that the increased demand for United Nations peacekeeping troops will lead to a greater standardization of the relevant texts and greater clarity for all those who must implement and interpret these agreements.

Speaking in Geneva, I think it appropriate to turn, before concluding, to the particular question of the application of the humanitarian conventions of the Red Cross to United Nations forces. The application of the initial 1949 Conventions to United Nations forces was first raised by the ICRC soon after their adoption and again during the Congo action. Several academic institutions and individual scholars have argued strongly that the United Nations should become a party to the Geneva Conventions or make a unilateral declaration to the effect that the United Nations accepts these instruments and would apply them.

Although in actual fact no contradiction between the conduct of United Nations forces and the Geneva Conventions has ever arisen, the United Nations has taken the position that the 1949 Conventions, as other humanitarian instruments, are intended for States and that they contain provisions which could not be fully implemented by an intergovernmental organization like the United Nations. Nevertheless, in some of the earlier operations, provisions were incorporated into the internal regulations for the operations and into the arrangements with troop-contributing countries to the effect that "the Force shall observe the principles and the spirit of the general international conventions applicable to the conduct of military personnel".[257] At about the time when the preparations for the Additional Protocols of 1977 took shape, this practice seems to have lapsed. Whether this was due to the emerging Protocols or whether the provisions of the 1949 Conventions were by then regarded as established parts of general international law, I do not know. It seems to me, however, that the question of returning to the earlier practice should be considered.

I hope that this presentation has given you some idea of what peacekeeping operations are like and what the salient legal aspects are. More importantly, I trust you also perceive how much work, imagination and dedication is necessary to set up and maintain such operations.

[257] Article 44, Regulations for the United Nations Emergency Force, 20 February 1957, UNTS. Vol. 271, pp. 168 ff., p. 184.

INTERNATIONAL LAW, DIPLOMACY AND THE UNITED NATIONS IN THE LATE TWENTIETH CENTURY

Lecture delivered on 2 July 1991
by H. E. Mr. Francisco Rezek
Minister of External Relations of Brazil

Ladies and Gentlemen,

My participation in the Gilberto Amado Memorial Lectures, which bring together eminent jurists from all over the world, is due in part to the fact that I am a jurist. But it is as an official responsible for the foreign affairs of my country that I shall speak to you. Today more than ever, law and diplomacy are progressing side by side towards the creation of a new international order, which, we all hope, will be truly orderly as far as the legal equality of States is concerned, and new as regards the prospects for a more cooperative and just world.

In recent years, the first words most often heard at the commencement of gatherings such as this must certainly have been acknowledgements of the fact that we are experiencing a period of intense transition in the history of our peoples, our countries and our ideas. That is a prudent observation, given the speed of the changes taking place which, in a short time, have convulsed modern life. It is also indicative of a justifiable attitude of humility, owing to the lack of clarity surrounding the direction and scope of these changes, which, in all places and at all levels, are in the process of rewriting the end of the twentieth century.

The positive aspect of this situation, and a welcome aspect, is the abandonment of shibboleths and the strengthening of the primacy of reason, leaving aside ideological Manichaeism and prejudices, in an increasingly interdependent world, a world accordingly more inclined to

co-operation, understanding and peace. There is nevertheless a disturbing trend, undoubtedly stronger in some milieus than others, towards a consolidation of structural imbalances, as if the march of history were a competition for prizes between those who have succeeded in overcoming the obstacles in the process of evolution and those who have yet to deal with problems of development. Thus if we were in a concert hall, these introductory words would be more in the nature of an adagio, undoubtedly melodious and optimistic, than a triumphant overture, replete with irreproachable and irreversible conquests, within the reach of all, for the good of all.

What is actually happening is that, although progress, the extraordinary development of science and technology, and the unlimited enrichment of the world of ideas are giving us a better knowledge of the great problems of our times, we are still not able to solve them. At the dawn of the third millennium, all are fully in agreement and deeply aware of the imperative need to secure sustained development, democracy and peace.

The ethics of modern times have restored to the forefront of relations between States and men respect for human rights, freedom and the health of our planet. At the origin of these changes is the commitment to the democratic regime, which has reaffirmed the will of the majority and given new meaning to Ovid's observation that "The Laws have been made so that the mighty shall not be almighty" (*Datae leges, ne fortior omnia posset*). In the context of our era, prosperity has become an objective indissociable from social justice and cooperation, the basic principle of peace.

However, interdependence, which has given so much impetus to the development of the means of production and to that of economic and trade relations between the most dynamic markets, has not yet been reflected in cooperation between countries and the restoration of essential liberties, the attribute of modern times, has not become synonymous with prosperity. Not even the fall of the Berlin Wall has led to the creation of a world system ensuring security and peace, which would finally be free of sources of instability.

As if that were not enough, the international juridical order has been violated. The aggression against the sovereignty of Kuwait caused general indignation, reviving the worst moments of the climate of terror of the Cold War. The community of nations managed to act in concert in order to put an end to the conflict, but it is still fighting to establish security and peace. It is here that the main challenges to our era arise, and it is here that international law reassumes its full importance.

Either peace is the task of everyone, or it is not. Even before the globalization of contemporary problems, peace was already imposing itself on the most just aspirations of the great majority of countries as a necessarily collective objective. In March 1988, when we had already left behind the greatest tensions between East and West (we could, on the contrary, glimpse the dawn of *détente* between the super-Powers), a former United States Secretary of State for Defence was reminding us that at that time in the world there were 25 wars going on, all in the third world, as it is called, and hence on the periphery of the industrialized countries, which were, in fact, enjoying a prosperity unprecedented in history.

If peace is a worldwide objective, the means of securing it will also have to be worldwide, making it necessary to bridge the great disparities in development. In 1981, at the Cancun Summit in Mexico, which was attended by the most important leaders of the countries of the North and South, Willy Brandt, the former Chancellor of the Federal Republic of Germany, was not indulging in sophistry when he stated, "As long as hunger predominates, peace cannot gain the upper hand. Anyone who whishes to ban war will also have to ban poverty. Morally, it is immaterial whether a human being has died in war or whether he is condemned to die in war or whether he is condemned to starve to death because of the indifference of others".

And so the true origin of the sources of instability which are threatening world peace and security has been known for some time. Observations such as those of Willy Brandt have helped to highlight the need for international cooperation as the most effective means of confronting world challenges of our times – the obstacles to development, the degradation of the environment, the difficulties in consolidating democracy and the improvement of a collective system aimed at ensuring peace.

Following the Gulf crisis, we have had the feeling that, at least in the area of collective security, the community of nations has finally succeeded in carrying out concerted and effective actions. Little by little, however, we have come to realize that it was the extremely clear character of Iraqi aggression which rendered possible the unanimity and speed of action of the United Nations Security Council. In the future, threats may not present themselves in such a clear-cut fashion, and this underlines the urgent need for a security system, which is more effective in terms of prevention, control and deterrence in the event of conflict.

In the opinion of Brian Urquhart, former Under-Secretary-General of the United Nations, we are entering a period of great instability, characterized by long-standing grudges and international rivalries, intense

religious and ethnic disturbances, a serious leakage of weapons and military technology, internal disintegration, poverty and deep economic inequalities, mass population pressures, natural disasters, shortage of vital resources and massive population displacements. In such a context, no nation or group of two or three nations can play the role of arbitrator or policeman, even on the unlikely assumption that the other nations would accept such a role.

These few comments point to the need for the reinvigoration of international law and the revitalization of the United Nations, two closely linked objectives which are justifiable for a single reason, peace is our universal heritage, and hence the role of law and diplomacy is to seek agreement and consensus, strengthening and deepening a broad understanding between a growing number of countries, without limiting itself to the viewpoint of a small group of players on the international stage. Law and diplomacy will be all the more effective to the extent that they are democratic.

If the United Nations has not yet been able to present a positive balance sheet in these efforts to achieve world peace and security, it has been because of the conflict of interests between the super-Powers, a conflict which has paralysed the decision-making process of the Organization which we founded with such great hopes in San Francisco. For almost five decades, we have lived in a climate of tension, in which relations between countries have had to conform to the Manichaean demands whereby, if one antagonistic group drew nearer, the other automatically drew further away.

The end of the Cold War has freed us from this bipolar short-sightedness, but apparently not from the circumstances which are repeating themselves today. The sources of instability in the world can be eradicated only through international co-operation, and not through the imposition of codes of conduct, on the initiative of a small group of countries. Although the mechanisms concerning the strengthening of security are still imperfect – and I think we are all in agreement on this point – this is not the case with the principles established in the Charter of the United Nations, and with two of them in particular: the peaceful settlement of disputes and non-interference in the internal affairs of States.

There is no need for a treaty between countries for one of the older and strongest rules of international law to be applied – a rule which is not solely a general rule originating from customary law, but also a general principle of law: territorial sovereignty and the exclusivity of the jurisdiction which each State exercises over its territory.

This principle of sovereignty cannot be called in question without causing chaos in the international arena. The alienation of sovereignty through treaties cannot be confused with the alienation of law through the violation of sovereignty. In the new international order, which is so greatly desired, the major principles of democracy call for the participation of the majority, in whose name only it is lawful and legitimate to exercise power.

Under the impulse of the new times, the fate of mankind requires shared responsibilities, and this involves extending the existing decision-making machinery to a greater number of countries in order that they may participate in the elaboration of a new system ensuring peace, security and development. In this connection, we should be set on restoring to the United Nations its role as a multilateral forum for debate and giving new value to the General Assembly, as a democratic and universal deliberating body *par excellence*, granting priority to international law in the taking of concerted decisions, with the constant aim of seeking consensus.

Let us have no illusions, the difficulties will be many. Seeking consensus in a world characterized by enormous inequalities, that is the challenge confronting modern diplomacy. Brazil is optimistic. This series of lectures in fact represents a tribute to an eminent Brazilian diplomat, Gilberto Amado, an ambassador and jurist; his contribution to the perfecting of the rules of international law will undoubtedly continue to inspire us in the development of this new international order increasingly oriented towards understanding, cooperation, the prosperity of all and, above all, peace.

PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES - NEW TRENDS

Lecture delivered on 2 June 1993 at Geneva
by Professor Lucius Caflisch, Legal Adviser
Federal Department of Foreign Affairs, Bern

Introduction

At municipal law, the machinery for the settlement of disputes is as important as the substantive rules. Its purpose is, of course, that disputes which cannot be settled directly should be settled by a third party. It paves the way for the sanctions prescribed. Sometimes, however, this machinery has a preventive effect: its very existence may bring the parties to reason. The international community, for its part, is by nature decentralized. It is largely States that continue to make and apply the law. It is likewise States that determine when a rule applies and when it does not. The law of nations is essentially self-judging: a characteristic deriving from sovereignty, which many States refuse to sacrifice.

When, at the end of the nineteenth and the beginning of the twentieth century, the first attempts were made to centralize the jurisdictional function at the inter-State level by means of bilateral and multilateral treaties, many states objected. To preserve their sovereignty – using the term in its political sense, as meaning the fullest possible freedom of action – they accompanied those treaties by crippling reservations: national honour and independence, or vital interests. The scope of these reservations was virtually limitless, for in general the international courts did not possess, at that time, competence to determine their own competence. Even where they did, that competence was not of much use. For who can judge the independence, honour and vital interests of a State if not that State itself?

A profound change took place at the end of the First World War with the advent of new intergovernmental organizations, with the League

of Nations leading the way. These agencies aspired to centralize, at least in part, an essentially decentralized legal order, first of all in the legislative and administrative fields. That aspiration led to the beginnings of centralization also in the area of peaceful settlement of disputes, witness the establishment of the Permanent Court of International Justice, which incidentally had been preceded by the inconclusive experiment of the Central American Court of Justice (1907 to 1917). The impetus thus generated, which was characteristic of the inter-war period, led to many multilateral and bilateral efforts. The latter was more successful than the former, and diplomatic modes of settlement have on the whole prevailed over jurisdictional methods. When the bilateral course was taken, in the absence of knowledge of the disputes to be dealt with – since they had not yet arisen – at least the identity of the future opponent was known. And, unlike jurisdictional channels, diplomatic means of settlement are binding only as regards participation in the proceedings and not as regards their outcome.

Furthermore, during the period between the two great world conflicts, there were many occasions when disputes were actually referred to such procedures, so that that period may rightly be termed the golden age of peaceful settlement. The thrust imparted by the Permanent Court as The Hague had a lot to do with this; and it will be noted that there was, over that period, a sharp decline in the number of clauses reserving the honour, independence and vital interests of States.

Unhappily the development of international organizations after the Second World War did not have the beneficial effect it was expected to have in the field we are considering. On the contrary: the machinery for peaceful settlement of disputes gradually weakened and atrophied. This regression is easily explained. Towards the end of the 1940s, a gulf opened between East and West and grew steadily wider. The Western countries set about developing settlement machinery. The members of the socialist camp, for their part, wanted to scrap certain existing rules of international law, which they considered bourgeois and retrograde, and replace them with a new order more in keeping with their requirements. Thus they had no interest in giving their support to machinery and institutions designed primarily to maintain existing law, or in entrusting their disputes to third parties who might come from the camp of their ideological opponents. This phenomenon of rejection was strengthened, immediately after the decolonization wave of 1960, by a North-South antagonism fanned by the strange attitude of the International Court of Justice in the *South-West Africa* case. At the legal policy level, that antagonism generated all-out attacks on existing international law, which had been developed without the participation of the newly independent States and which those

States regarded as iniquitous. It was therefore necessary to adjust the rules of that law, and even to transform those rules perceived as discriminating against the developing countries into rules establishing reverse discrimination (theory of dual norms). That being so, the new States, which set great store by their dearly-acquired independence, had no interest in encouraging the application of the existing law by settlement machinery which, moreover, might involve recourse to the very parties that had created that law.

The two phenomena just described – the antagonism between East and West and North and South – weighed on the international community's efforts in the matter of peaceful settlement of disputes. The post-war record, however, is not entirely negative. The United Nations sough to settle a number of disputes by the means prescribed in Chapter VI of the Charter. The International Court of Justice continued, after a fashion, the work of the Permanent Court. Regional agreements on settlement were drawn up, such as the Pact of Bogotá (1948), the European Convention for the Peaceful Settlement of Disputes (1957) and the Protocol of the Organization of African Unity (1964). But, with a few exceptions, bilateral treaties of conciliation and arbitration were no longer concluded. As to the settlement clauses inserted in the bilateral and multilateral treaties of the day, most of them had little binding force. That applied in particular to the settlement clauses in the conventions prepared by the International Law Commission: recourse to the Hague Court, but only with the consent of the States parties to the dispute, or compulsory conciliation. The declarations made by States parties to the Statute of the Hague Court under Article 36, paragraph 2, of the Statute were few in number and often accompanied by extensive reservations. Lastly, relatively few cases were actually brought before *ad hoc* arbitral tribunals or the International Court before the 1980s.

The purpose of the present survey is to take the temperature a dozen years later and, if possible, discern some prospects for the future. In so doing, we shall examine dispute settlement in general, disregarding the particular methods used in the fields of human rights, tariffs and trade, and regional economic and political integration. Our survey will comprise the following headings:

- Attitude of States to universal adjudication procedures;
- Activities of the Special Committee on the Charter;
- Activities of the International Law Commission;
- Modes of peaceful settlement of disputes in three specific fields: law of the sea, the Antarctic, and the environment;
- The regional efforts.

The Attitude of States towards Universal Adjudication Procedures

In the 1970s the International Court of Justice was declining. Only a quarter of the members of the international community had made declarations accepting its jurisdiction, and those declarations were sometimes accompanied by automatic reservations reminiscent of the old-style exclusions concerning honour, independence and vital interests. The settlement claus-es inserted in the bilateral and multilateral treaties of the day were oriented more towards arbitration and called upon the Court – more specifically, upon certain judges – only to appoint members of arbitral tribunals where the States concerned were unable to agree. The question began to be asked whether the Court still had a part to play.

Fortunately a swift recovery set in at the beginning of the 1980s. That recovery gathered strength by the middle of the decade, probably in response to the upheavals looming on the political horizon. The States of the socialist camp began withdrawing the reservations they had attached to the settlement clauses calling upon the Hague Court and appearing in general multilateral instruments such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The permanent members of the Security Council began seeking out certain categories of disputes that they would all be in a position to entrust to the Court: a search which, unhappily, has still not borne results. Lastly, a series of States unilaterally accepted the compulsory jurisdiction of the Hague Court: Barbados (1980), Senegal (1985), Suriname (1987), Cyprus and Nauru (1988), Guinea-Bissau and Zaire (1989), Spain and Poland (1990), Hungary and Bulgaria (1993).

This development seems encouraging particularly since it is accompanied by a sizeable increase in the volume of cases referred to the Court or to arbitration. Whether this trend is to continue and intensify will depend on the political situation and the will of States, rather than on any change in the structures of the Court and in the possibilities of access to it, contrary to what some had claimed in the 1970s. Neither by extending access to the court to international organizations nor by introducing reference procedures will the future of the Hague Court be permanently secured. Its future depends on the existence of conditions encouraging States to have recourse to it. The Court may contribute to this by high-quality work which is aloof from the fashions and vicissitudes of the moment and which makes the issue of the cases referred to it reasonably predictable.

When the Hague Court is thriving, so, paradoxically, is arbitration. To be specific, the repeated recourse to *ad hoc* arbitration in past years, beginning with the *Beagle Channel* dispute (Argentina/Chile) and the case concerning the *Delimitation of the Continental Shelf* (France/United Kingdom), has probably spurred the activities of the Court. A further factor is that the practice of inserting compulsory settlement clauses in general or regional international conventions has been resumed, witness for example the negotiations on an energy charter now in progress between OECD States and countries of Central and Eastern Europe. Lastly, the revival of interest on the part of the international community in adjudication is in evidence at the level of rules of *procedure*. Up to the present, Articles 51 *et seq*. of the Hague Convention of 1907 for the Pacific Settlement of International Disputes have often been taken as a guide. The Council of the Permanent Court of Arbitration, believing those rules to be somewhat obsolete, and prompted by a probably unrealistic desire to reactivate that venerable institution, has just draw up and adopted a set of provisions to which States parties to a dispute and arbitral tribunals may refer in the future in lieu of Articles 51 *et seq*. of the 1907 Convention.

It is questionable whether the Administrative Council of the Permanent Court of Arbitration was the proper forum for such an exercise. It is also open to question whether the Council did well to be guided by the Arbitration Rules of UNCITRAL, which are designed for disputes between States and individual foreign investors. Nevertheless, the time may have come to answer that question in the International Law Commission and/or the "Decade of International Law" decreed by the United Nations General Assembly. It is not unthinkable, for example, that the Commission might resume study of the Model Rules on Arbitral

Procedure which it adopted in 1958 and make them more acceptable by stripping them of their most "progressive" aspects (for example the rules on the composition and constitution of the arbitral tribunal, or those on the compulsory jurisdiction of the Hague Court in matters of annulment and revision).

The Special Committee on the Charter

In 1990 Guatemala submitted to the United Nations a set of "draft rules for conciliation". This text was referred to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. This document, which was substantially amended and improved in February 1993, contains rules on conciliation proceedings and on the constitution and composition of conciliation commissions, as did the Model Rules on Arbitral Procedure drawn up earlier by ILC. It thus goes beyond the usual framework of rules of procedure; furthermore, it is not known whether the proposed text is intended to serve merely as model regulations for States or to be applied in the absence of contrary rules. The Guatemalan proposal nevertheless demonstrates the revival of interest in conciliation, a mode of settlement discarded since the 1950s although it is particularly respectful of the freedom of States. Does that revival, of which the text submitted by Guatemala is not the sole evidence, suggest that the community of nations is ready to accept not merely a set of rules of procedure but an obligation to submit to conciliation proceedings stipulated in a universal convention? Perhaps the time has in fact come to make an effort in that direction, and perhaps the International Law Commission would be the most suitable forum for the necessary brainstorming.

The Activities of the International Law Commission

In the past, most of the sets of draft articles prepared by the Commission have been supplemented by provisions concerning peaceful settlement of disputes. Two approaches have been used.

A first approach consisted in providing for adjudication – recourse to the Hague Court, or arbitration, or both – which, however, had to be accepted by the States concerned in order to be effective. The model for that approach, which was also used in the 1961 and 1963 Conventions on

Diplomatic and Consular Relations, was the Optional Protocol attached to the four 1958 Conventions on the Law of the Sea.

Under a second approach, an annex to the convention lays down a conciliation procedure which is compulsory for the States parties to the dispute but which, we need scarcely point out, yields no binding result. Instances of this approach – long the prevailing one – were the 1969 Convention on the Law of Treaties and the 1975 Convention on Special Missions.

Unhappily a third approach has recently emerged and consists in providing nothing whatsoever, on the grounds in particular that the peaceful settlement of disputes is a general problem which should be solved, irrespective of the substance of the various sets of draft articles, in bilateral and multilateral agreements dealing specifically with peaceful settlement. This is the approach used in the draft articles on jurisdictional immunities of States and their property, despite a contrary proposal made by one of the Special Rapporteurs. That solution is also to be found in the draft articles on the law of the non-navigational uses of international watercourses, adopted on first reading in 1991. It is to be hoped that this restrictive approach will be discarded on second reading of the draft articles. It would be regrettable if a text called upon to serve as a framework agreement, i.e., as a model for states wishing to conclude watercourse treaties, failed to suggest some settlement clauses to those States. Such clauses would be particularly easy to elaborate since the present Rapporteur's predecessor made detailed proposals on the subject in 1990. Those proposals suggest, for disputes between States, compulsory conciliation proceedings followed where necessary by optional arbitration. On this last point, incidentally, the decision should be taken to go further, for in the field of shared natural resources – the law of the sea comes to mind – methods of settlement with a binding outcome seem particularly desirable.

When he suggested the subject for his lecture, the present speaker was unaware that the peaceful settlement of disputes, the subject of Mr. Arangio-Ruiz's Fifth Report (document A/CN.4/453 of 12 May 1993), would be at the centre of discussion at the Commission's present session. In that document, the Rapporteur rightly emphasizes the changes that have taken place in this matter on the international scene in order to propose, in the area of international responsibility, a partial system of settlement comprising three steps. As a first step, a State which was subjected to a counter-measure and which questions the legality of that measure would have the opportunity to resort unilaterally to conciliation. In the event

of failure, or if the conciliation commission could not be set up or could not function, the State in question might resort to arbitration. Lastly, if the tribunal could not be set up or could not issue its award within the prescribed time-limit, that State would be empowered to submit the matter to the Hague Court by unilateral application.

It is not for the lecturer to comment on this proposal, which is under discussion in the International Law Commission. But it is gratifying that the Commission should devote a thorough discussion to this vital subject at a time when new prospects are emerging. It is also possible to follow Mr. Arangio-Ruiz when he asks the Commission not to miss the opportunity offered it to bring about some progress in the peaceful settlement of disputes. This remark, of course, also applies to most of other texts prepared by the Commission. It will then be for Governments to accept or reject the proposals made by the Commission's experts on this subject. If the Commission should let slip the opportunity thus presented to it, Governments will certainly seize it at a later stage, but to make proposals that might be far less judicious than the Commission's own.

Peaceful Settlement of Disputes in three Specific Fields: the Law of the Sea, the Antarctic and the Environment

The Third United Nations Conference on the Law of the Sea, which ended in 1982, formed in reality the first stage in the ongoing revival of peaceful settlement of disputes, and in particular of adjudication. The 1982 Convention, which appears likely to enter into force about two years from now, submits a sizeable proportion of disputes concerning the interpretation or application of its provisions to compulsory adjudication and establishes special channels for the settlement of disputes involving individual operators exploring or exploiting the mineral resources of the seabed. This machinery goes far beyond what it was customary to prescribe in the years following the Second World War.

At its adoption, this system was hailed as a veritable breakthrough: for the first time the Soviet Union and its allies, resolute opponents of any settlement procedure allowing a third party to intervene, accepted such intervention, as did all the third world countries and China. Did that volte-face herald a new era in the field of peaceful settlement?

Unhappily that question had to be answered in the negative. The attitude of the States in question, and of the Soviet Union in particular, was due to specific concerns – especially fishing interests – which they wished to

protect. The settlement machinery adopted in 1982 nevertheless reflected two trends that could be described as new: direct access to the system for individual operators and, more particularly, the choice of adjudication procedures open to States. By making a unilateral declaration, States might accept one or more of the following means: (1) the jurisdiction of the new International Tribunal for the Law of the Sea; (2) the jurisdiction of the Hague Court: and (3) arbitration.

If the States parties to a dispute declare that they accept the same means, that means will be applicable to the exclusion of any other channel. In the absence of declarations, or of concurrent declarations, the States parties are presumed to have opted for arbitration. In other words, arbitration is the residual mode of settlement that ensures the compulsory character of the machinery. The solution thus described, known as the "choice of procedure" formula, was adopted so that a consensus might be reached between the majority of third world States (Tribunal), the majority of Western countries and certain Latin American States (Hague Court), and France, the Eastern countries and a few other Western countries (arbitration). As we shall see, this formula set a trend.

The Antarctic Treaty of 1 December 1959 stemmed from the Cold War. That is doubtless why article XI of the Treaty merely reiterates the means of settlement enumerated in Article 33 of the Charter of the United Nations and then provides that, failing a settlement reached by those means, the parties to the dispute may by agreement refer it to the Hague Court. All this is so anodyne that it was hardly necessary to include such a provision in the Treaty. The same clause appears in the Canberra Convention of 1980 on the Conservation of Antarctic Marine Living Resources (Art. 25).

With the Wellington Convention of 2 June 1988 on the Regulation of Antarctic Mineral Resource Activities, an instrument unpopular with the ecologists, the Consultative Parties changed course. Articles 55 to 58 of this text establish a mandatory procedure for the settlement of disputes concerning the interpretation or application of the Convention, with a choice between proceedings before the International Court of Justice and arbitration, the latter being the mandatory subsidiary means in the absence of a choice or of identical choices. Article 59, for its part, was intended to give individual operators access, for certain types of disputes, to international settlement procedures to be instituted later on.

As we know, the ultimate fate of the 1988 Convention is expected to remain in suspense for at least 50 years to come. Such is the effect of Articles 6 and 25 of the Madrid Protocol of 4 October 1991 on Antarctic

Environmental Protection. Strangely enough, however, this instrument, one of whose main purposes it was to do away with the Convention, reproduces the essentials of that Convention's provisions on dispute settlement. It prescribes an obligatory procedure for the settlement of disputes concerning the interpretation or application of the Protocol and, moreover, offers a choice between the Hague Court and arbitration, the latter constituting the subsidiary means that guarantees the mandatory character of the procedure.

This formula recurs in other multilateral treaties on the environment, and in particular in two instruments recently draw up under the auspices of the Economic Commission for Europe and concluded on 17 March 1992: the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and the Convention on the Transboundary Effects of Industrial Accidents. The only difference between these two instruments and the Madrid text is that, in the former, the subsidiary means ensuring the mandatory character of the procedure is recourse to the Court rather than arbitration.

From the very succinct description just given, the conclusion may be drawn that, in the case of natural resources to be shared or of environmental protection, there has been in recent years a distinct rise in the level of State obligations with regard to peaceful settlement of disputes. The progress achieved is reflected firstly in the greater prominence given to individuals in settlement proceedings and secondly, and chiefly, in the mandatory force given to the outcome of those proceedings; that force is ensured by a formula which, in its most recent form, offers a choice between the Hague Court and arbitration, the mandatory residual means being sometimes the former and sometimes the latter.

Regional efforts

The European continent has beyond question taken the keenest interest in the question of peaceful settlement of international disputes in recent years. A tentative step in that direction, which dates back to 1957, has already been mentioned: the European Convention for the Peaceful Settlement of Disputes. That attempt led to an instrument, which is more noteworthy for its omissions than for its substance, which has never been put to use, and which is open only to members of the Council of Europe.

From its inception, the Conference on Security and Cooperation in Europe (CSCE) took an interest in the establishment of regional machinery for peaceful settlement. Switzerland in particular submitted

to the Conference in 1973, 1978 and 1984 draft texts proposing arbitration for certain categories of disputes and conciliation for all other disputes between States.

These successive proposals, like those of other Western countries, all came up against the intransigence of the socialist bloc, which, by accepting only negotiation, opposed any means that involved calling in the third parties.

Fresh impetus was gained at Valetta in 1991, when the transformation of Eastern Europe was fully under way. The Valetta Meeting of Experts produced a document which applies to the whole continent, but which is purely political in character. This text prescribes a procedure which oscillates between good offices and mediation and which, moreover, embodies strict limitations *ratione temporis* and *ratione materiae*. Late in 1992 the CSCE, with a Franco-German proposal before it, took up the problem again and, at a meeting held at Geneva in October 1992, drew up and adopted the Convention on Conciliation and Arbitration within the CSCE. This treaty, which has so far been signed by 33 countries (not including the United States, the United Kingdom, the Netherlands and Spain), will enter into force when it has been ratified by 12 States, i.e., probably during the winter of 1993-1994.

The CSCE Convention allows each of the States participating in the CSCE to appoint, for terms of office limited to four years, two conciliators and one arbitrator; all persons thus appointed are placed on two separate lists forming the college of conciliators and the college of arbitrators respectively. The two colleges constitute the "Court of Conciliation and Arbitration" and will jointly elect the President of the Bureau of that Court and then, separately, two conciliators and two arbitrators as members of the Bureau. This semi-permanent body will meet at the seat of the Court in Geneva from time to time to administer the prescribed modes of settlement, namely, conciliation and arbitration.

The cornerstone of the new system is the conciliation procedure. Any State party to the Convention may submit any dispute with another State party – no reservations are allowed – to a conciliation commission to be established *ad hoc* and composed of one member appointed for each party and three persons chosen by the Bureau from the list of conciliators. At the conclusion of the proceedings, this body addresses to the States parties recommendations which, if accepted, put an end to the dispute. It might be argued that this is very little and that the States concerned ought to be confronted by a binding decision. In the reality of inter-State relations, however, bringing the parties before a third party and compelling them to

engage in proceedings comprising elements of assisted negotiation may be a big step towards settling the dispute; furthermore recommendations, which are often difficult to ignore for political reasons, are far less remote than is generally thought from a binding decision, which those concerned often try to evade with an ingenuity worthy of a better cause.

But adjudication should not be underestimated on that account. The authors of the CSCE Convention understood this, for that instrument also institutes a procedure of arbitration before *ad hoc* tribunals composed essentially in the same way as the conciliation commissions. To be applicable, however, the procedure, which leads to a binding decision, must have been accepted, either *ad hoc* or in advance, by the States parties to the dispute. It is a pity that the States participating in CSCE have allowed themselves to be led astray by their fear of binding decisions the effects of which, as we have just pointed out, are nevertheless not so remote from the effects of recommendations as is generally assumed.

Even so it will be noted – and hence the record is, by and large, a positive one – that Europe has at last equipped itself with a mandatory and generalized conciliation procedure that cannot be weakened by reservations. We should add that the CSCE Convention may be re-examined beginning in 1994, when a Review Conference of the CSCE is to meet at Budapest.

Conclusion

The recent developments of the political situation in the world at large and in Europe have doubtless stimulated the search for solutions as regards the peaceful settlement of disputes. They have contributed to the favourable climate at present enjoyed by arbitration – see for example the *Laguna del Desierto* case (Argentina/Chile) – and by the Hague Court – witness, for example, the submission to that Court of the Hungaro-Slovak dispute concerning the Deviation of the Danube (*Gabcikovo-Nagymaros*).

This favourable climate extends into the legislative field. Firstly a noticeable revival of interest in conciliation, which had been neglected since the 1950s, has been noted, witness the procedure instituted by the CSCE Convention of 1992 and the rules for conciliation currently under discussion before the Special Committee on the Charter. Secondly, while many States still take no interest in the Hague Court, they nevertheless seem more inclined to accept even those channels which lead to binding decisions if a choice of means is open to them – for example between the Court and arbitration, or between those two channels and recourse to a new standing tribunal. A third development is the increasing role played by the

individual, not only in what are now such traditional matters as human rights and investment protection (ICSID clauses), but also in the field of the exploration and exploitation of natural resources (law of the sea, Antarctic). It would seem fitting to take advantage of this climate, and to seize the opportunity offered by the "Decade of International Law" to go into action.

This might begin with bilateral action, by reviving the existing treaties of conciliation and arbitration and – why not? – concluding new agreements, as Hungary and Poland have just done with Switzerland.

With the conclusion of the CSCE Convention in 1992, Europe made a leap forward at the regional level. It remains to be seen who will become a party to the new instrument and whether the countries of Europe have the political will to make use of a mechanism whose "arbitration" component, incidentally, is open to improvement. It would doubtless be desirable for similar new departures to be developed in other parts of the world.

Lastly, at the world level, it may be noted that some 50 of the 183 Members of the United Nations have so far made the declaration provided for in Article 36 paragraph 2, of the Statute of the International Court. That is still too few, and it is to be hoped that other States, particularly in Central and Eastern Europe and Central Asia, will join their number.

It appears highly desirable that the International Law Commission should contribute to the incipient movement by ensuring that the draft articles, which it prepares, are equipped with reasonably effective clauses on the peaceful settlement of disputes. Since these drafts are of a legislative character and their provisions might give rise to disputes concerning their interpretation or application, hence legal disputes, the channels described should include mandatory adjudication. To facilitate their acceptance, it would be possible to make use of formulas offering a choice of procedure, in particular between the Hague Court and arbitration. It is difficult to see why such clauses should be accepted in the fields of law of the sea, the Antarctic and transboundary pollution, and be objected to when it comes to the use of international watercourses, jurisdictional immunity and State responsibility. If the Commission were to seek to identify new fields of activity, it might take another look at the Model Rules on Arbitral Procedure which it drew up in 1958. By stripping that text of certain aspects which might be described as unduly "progressive" or which bring arbitration too markedly close to judicial settlement, the Commission might at last transform that "model" into a living reality.

To go on from that to a generalized, universal and mandatory system of adjudication is a step that the international community is probably not ready to take. But to rest content with drawing up mere rules on arbitration and conciliation *procedure* would be to exhibit a singular lack of ambition.

Ought not an attempt to be made, in the setting afforded by the "Decade of International Law", to institute at least a generalized and universal *conciliation* mechanism? And would not the International Law Commission be the appropriate forum for some initial thinking about that idea?

THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT SYSTEM

Lecture delivered on 18 June 1996
by H.E. Mr. Celso Lafer
Professor of Law, Law School, University of São Paulo
Former Minister of External Relations of Brazil (1992)
Ambassador and Permanent Representative of Brazil to
the WTO and the United Nations in Geneva
Chairman (1996) of the WTO Dispute Settlement Body

In memoriam:
Professor Herbert W. Briggs.

The WTO Dispute Settlement System

I. Introduction

One of the core issues of international relations is the dichotomy between war and peace. Thus the importance of a reflection on how to avoid war and to create the conditions for a peaceful world.

(i) Trade

In the context of this significant and important reflection, and having recourse to the lessons of classic authors, one must recall as the first aspect of this lecture is introduced the central role attributed to international trade as one of the conditions for a peaceful world.

Montesquieu, for example, underlines the relevance of the "doux commerce" as a means to curb the impetus of prejudices and to promote a positive interdependence among Nations.[258]

Kant, in "Eternal Peace", points out that one of the warranties of such peace is "the spirit of commerce which cannot coexist with war".[259]

[258] Montesquieu, *De L'Esprit des Lois*, Chronologie, Introduction, Bibliographie par Victor Goldschmidt, Paris, GF – Flammarion, 1979-2 – XX,1/XX,2 pp. 9-10 – also cf. Claude Morilhat – *Montesquieu, Politique et Richesses*, Paris: PUF, 1996.

[259] Eternal Peace, in *The Philosophy of Kant*, edited with an Introduction by Carl J. Friedrich – New York, Modern Library, 1977, p. 455 – The reference is to the first addition to the articles for the Eternal Peace.

This positive view of the relation between trade and peace is at the origin of the International Trade Organization (ITO) and of the Havana Charter as well as of its development into the GATT that paved the way, through the success of the Uruguay Round, to the World Trade Organization - WTO. The United States of America, playing a decisive role in the crafting of the world economic order, in the aftermath of the Second World War, followed the line of thought developed by Secretary of State Cordell Hull in 1930's, who affirmed: "I have never faltered and I will never falter in my belief that enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality and the maximum practicable degree of freedom in international trade".[260] In brief, this would mean "the freeing of international trade from tariff and other restrictions as the pre-requisite to peace and economic development", in the words of Dean Acheson,[261] evaluating the policy of C. Hull.

The end of the East/West conflict and the fall of the Berlin Wall, which precedes and is emblematic of the end of the Cold War, has had the effect of widening and practically universalizing the axiological acceptance of such view of a peaceful humankind through trade. From the same perspective, the prosperity of nations is not possible in autonomous isolation. Prosperity can only be achieved through economic interdependence, which requires a multilateral trading system, based on the rationality, and reciprocity of interests and which is able to rule over the cooperation and the conflict between different national economies in a globalized market.

The WTO is the perfect expression of how deep and wide the logic of globalization has stretched itself in the post-Cold War period. This perception of the WTO is supported by two orders of facts. One is the new *ratione personae* scope of its members: developed and developing countries; former socialist countries in transition to a market economy – and thus, incidentally, the importance and political dimension of the accession of Russia and China to the WTO, as a way to strengthen its universal character. It should be recalled, in this respect, that the GATT had only 23 Contracting Parties at its origin and that, in April 1994, 123 delegations were present at Marrakech. The second order of facts is the *ratione materiae* of issues covered by the WTO Agreements. The GATT, in practice, dealt with the international trade of industrial goods only; the WTO covers, *inter alia*, agriculture, services and intellectual property.

[260] *Economic Barriers to Peace*. N.Y., W. Wilson Foundation, 1937, p. 14 – quoted in K. Dam. The GATT – *Law and International Economic Organization*, Chicago, the University of Chicago Press. 1970. p. 12.
[261] *Present at the Creation.* N.Y., Norton, 1969, p. 9.

It is estimated that the GATT multilateral negotiations involved trade amounting to the following:

> *Dillon Round* – (1960-1961, 45 delegations present) – US$ 4.9 billion;
> *Kennedy Round* – (1964-1967, 49 delegations present) – US$ 40 billion;
> *Tokyo Round* – (1973-1979, 98 delegations present) – US$ 155 billion.
> In the *Uruguay Round* (1986-1994, 123 delegations present), which resulted in the creation of the WTO, the affected trade is estimated at US$ 3.7 trillion.[262]

(ii) The Law

The Law is a technique of social organization which has utmost importance for peace. Thus the idea of peace through Law as another ingredient for the reflection on a peaceful world. This idea goes back to the tradition of Grotius, to recall once again the lesson of classic authors.

"Law is an order of security, that is of peace", says Kelsen, and even if one cannot say, as he points out in the second edition of *The Pure Theory of Law* (modifying what he himself had written in the *General Theory of Law and State*), "that the state of Law is necessarily a state of peace and that the securing of peace is an essential function of Law", there is no doubt, in Kelsen's own words, that "the development of Law runs in this direction".[263]

In international relations, one of the techniques for securing peace, as an ideal limit towards which the Law tends, is the *peaceful settlement of disputes.*

In Public International Law – general and contemporary –, as established in the United Nations Charter [Art. 2(3)], the *Peaceful Settlement of Disputes* is, as pointed out by Bruno Simma, an "obligation of conduct" by the States, it being understood that it is not an obligation requiring the achievement of a specific result.

This "obligation of conduct" is seen an integral and indispensable means to "Friendly relations and cooperation among states in accordance with the Charter of the United Nations", to recall the well-known G.A. Resolution 2625 (XXV) of 1970.[264]

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[262] Cf. John H. Jackson, William J. Davey, Alan O. Sykes, *Legal Problems of International Economic Relations*, 3rd. ed., St. Paul, Minn., West Publishing Co., 1995, p. 314.

[263] Hans Kelsen, *The Pure Theory of Law*, translated from the second (revised and enlarged) German Edition by May Knight, Berkeley and Los Angeles, University of California Press, 1967, p. 38.

[264] Cf. *The Charter of the United Nations* – a *Commentary*, edited by Bruno Simma, Oxford, Oxford University Press, 1995, p. 99; Fabio K. Comparato. *Obrigações de Meios, de Resultados, de Garantia,* Revista dos Tribunais, vol. 353 (1965), pp. 14-16.

Article 33 (1) lists such "means" and the Manila Declaration of 1982 on the Peaceful Settlement of International Disputes (G.A. Resolution 37/10), which recaptures the 1970 Declaration on "Friendly Relations", establishes that Parties shall choose the appropriate peaceful means, taking into account the circumstances and the nature of the dispute. Such means – or techniques aimed at peaceful relations – are "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement", which differ from each other depending on the degree of control that Parties retain, or not, over the direction of the dispute settlement procedures.[265]

In his "Gilberto Amado Memorial Lecture" of 1993, Professor Lucius Caflisch examined "new trends on peaceful settlement of disputes" but he excluded from his survey the methods employed "in the fields of human rights, tariffs and trade, and regional economic and political integration".[266]

It is exactly one of the areas excluded by Professor Caflisch, namely "tariffs and trade", that I intend to cover in this lecture, in which I propose to examine the relation between international trade and the peaceful settlement of disputes, as foreseen and practiced in the World Trade Organization.

II. The ILC, Gilberto Amado and this Lecture

Before proceeding to the above-mentioned examination, the relations between the International Law Commission, the person of Gilberto Amado and the subject of this lecture must be preliminarily pointed out.

Gilberto Amado participated in the creation of the ILC and in the drafting of its statutes, as recalled by Professor Cançado Trindade in his Memorial Lecture in 1987. The object of the ILC is "the promotion and progressive development of international law and its codification" (Art. 1). Article 15, in whose drafting Gilberto Amado also participated actively as recalled by Professor Cançado Trindade, deals with the functions of the ILC and establishes "for convenience" a distinction between "codification" and "progressive development". Both expressions, as understood by Gilberto Amado, should "go together", because they are not separate concepts. Between "codification" and "progressive development", there is

[265] Cf. *The Charter of the United Nations* – a *Commentary*, edited by Bruno Simma. cit. pp. 506-512; J.G. Merrils. *International Dispute Settlement* (2nd. ed.), Cambridge, Cambridge University Press, 1993.
[266] Lucius Caflisch, New *Trends on Peaceful Settlement of Disputes*, Geneva, United Nations, 1993. p. 3.

a dialectic of mutual complementarity. All codification implies progressive development and all progressive development implies codification.[267] Such is the case, as will be shown, of the WTO dispute settlement system, which is, at the same time, a codification of previous codifications and a significant progressive development of the GATT system.

In his 1987 lecture on the personality of Gilberto Amado, Sette Câmara (who before being a Judge of the International Court of Justice was a member of the ILC) observed that, much more than his works, recorded in books it was Gilberto Amado's unique remarks which best showed his wisdom.[268]

From an important book by Herbert W. Briggs – who was a member of the ILC and my Professor at Cornell, and to whose memory and exceptional qualities as a jurist I take this opportunity to pay tribute with reverent admiration – *The International Law Commission*, I take two of Gilberto Amado's remarks.

The ILC, said Gilberto Amado, should avoid the risk of being "a body of jurists shut up in an ivory tower", for "the work of codification, like the development of international law, must be carried out in cooperation with the political authorities of States".[269]

It is my intention to indicate in this lecture that these wise remarks by Gilberto Amado are present in the WTO dispute settlement system.

III. International Trade and the Peaceful Settlement of Disputes – General Observations

A proper examination of the WTO dispute settlement system requires a few general considerations of a political and economic nature about the issue of trade and law.

One of the dimensions of the logic of globalization and of what, in terms of values, the fall of the Berlin Wall has meant – these being fundamental inputs for the understanding of the background which enabled the success of the Uruguay Round and the creation of the WTO – is the significant weakening of the *conflicts of conception* regarding the organization of world economy. Conflicts of conception have an analytical hierarchy which is different from that of *conflicts of interest*. These latter deal basically with an evaluation of what a country is winning or losing, in economic terms, in a

[267] Cf. A. A. Cançado Trindade, *La Contribution de Gilberto Amado aux Travaux de la Commission du Droit International*, Genève, Nations Unies, 1988, pp. 18,19.
[268] José Sette Câmara, *Cent Ans de Plénitude*. Genève, Nations Unies, 1988, pp. 12.13.
[269] Herbert W. Briggs, *The International Law Commission*, Ithaca, New York, Cornell University Press, p. 30.

specific situation, and with possible ways to remedy such a situation. *Conflicts of conception* have a wider scope, and are not placed solely in the economic field, but also in that of values. They are more diffuse, going beyond specific interests, and have to do with profound divergence's or convergence's with respect to the functioning of society, politics and economy.

In the Cold War period, the international system was ruled by defined polarities: East/West; North/South. The consequence of such defined polarities, in the economic field, was a difference of views regarding the ideal model of economic organization.

Thus, the view of the Soviet Union, for example, was of economic planning by the State and hence "managed trade" through quantitative objectives, as expressed internationally in COMECOM.

The view of the Group of 77 was a search for a "new international economic order", which would be the result of global negotiations, of redistributive scope. The UNCTAD, when it was created, and in its development, sought to respond to the North/South view of the organization of world economy.

The WTO represented, in its creation, something new, inherent to the Post-Cold War world and to the logic of globalization: the almost universal and *erga omnes* acceptance of an amplified GATTian view – a "GATT plus" organization of world economy.

Such universalization of a view, whose economic strength and hegemony was unquestionable, translated itself, in the economic field, into the passage from a *heterogeneous international system* (of opposing values) to a *homogeneous international system*, *of shared views*, to use a formula employed by Raymond Aron.[270] The strength of this view resulted from the opening of the inter-state space – through different mechanisms – to a very free circulation of resources such as goods, services, technology, investment, in a process led by States and by private agents and stimulated by technical innovations which reduced time and cost of transportation and communication.

These are fundamental data to explain why and how it was possible to negotiate a "rule oriented" multilateral trading system, of universal scope. Indeed, this new homogeneity allowed the affirmation, with the WTO, of a Grotian reading of international economic interaction – having again recourse to the lesson of classic authors.[271] In brief, there is a potential of sociability which allows for an organized – and not anarchic

[270] Cf. Raymond Aron. *Paix et Guerre entre les Nations*. 3e ed., revue et corrigée, Paris, Calmann-Lévy, 1962, p. 108.

[271] Cf. Hedley Bull, The importance of Grotius in the Study of International Relations, in *Hugh Grotius and International Relations*, edited by Hedley Bull, Benedict Kingsburg, Adam Roberts, Oxford, Claredon Press, 1992, pp. 65-93; Celso Lafer, Brasil y el Nuevo Escenario Mundial, *Archivos del Presente*, 3 – Verano-Austral, 95-96, pp. 61-80.

– interaction between the leading actors of economic life in a globalized market, which does not function as in a "zero-sum" game. There is conflict, but there is also cooperation, based on a comprehensive process, which stems from rationality and functionality of the reciprocity of interests. Thus the positive role that can be played by the International Public Law system and the International Organizations.

Organized interaction among multiple national economies requires a mechanism of interface, for one of the basis of trade among nations is the difference between the comparative advantages of their economies. As observed by Jackson, in a very appropriate metaphor, relations between national economies, in a globalized market, involve a problem which is similar to that of connecting "computers of different design" to work together. This requires an interface mechanism of mediation. The WTO is this mechanism.[272]

Such a mechanism is of fundamental importance, because a market is never perfect and does not operate in a vacuum. It requires a legal framework expressing political and economic realities. Furthermore, if the market and competition can be seen as a Grotian war of all for all – this is the thesis of "doux commerce" –, it can also and simultaneously be seen, as pointed out with subtlety by Simmel, as the Hobbesian war of all against all.[273]

The directing idea of the WTO is that the managing of such relations, of conflict and of cooperation, must be a game which has rules, shared by all the participants and perceived by all of them as being the rules of fair play.

It is in this sense that Peter Sutherland observed that the asset of the WTO is not its resources – as is the case of the World Bank and, to a certain extent, of the IMF. The asset of the WTO is its credibility, and the acceptance and the observance of its rules.

The interpretation of such rules in light of the logic of legal experience is never unequivocal or consensual. States have different understandings of the rules, their scope and application. It is precisely to avoid unilateralism of interpretations and to contain "self help" in the application of rules through retortion and trade retaliation that the WTO multilateral dispute settlement system was conceived. It was conceived as a rule-oriented mechanism, in the Grotian line, aimed at "taming" unilateral trends of the "reasons of State", which are power-oriented. This is, explicitly, the meaning of commitments undertaken in the WTO, *ex vi*

[272] John H. Jackson, *The World Trading System*, Cambridge, Mass., The MIT Press. 1992, p. 218.
[273] Cf. Albert O. Hirshman, *Rival Views of Market Societies and Other Recent Essays*, Cambridge, Mass., Harvard University Press, 1992, p. 120-121.

of article 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

The disputes of economic diplomacy which the WTO seeks to settle – and, in this sense, the organization is tributary to the GATT tradition – relate basically to *conflicts of interest*. Indeed, the GATT, as a model of organized cooperation, was based on the idea of reciprocity of interests, and on the notion that such reciprocity would be maintained in time. Thus the importance of Article XXIII of GATT, which continues to be a cornerstone of the WTO, because conflicts derive from the perception by a Member of the Organization that a "benefit accruing to it directly or indirectly being nullified or impaired".

The GATT dispute settlement system resulted from the practice of its Contracting Parties in relation to Article XXIII. Such practices were codified and progressively developed on more than one occasion. The WTO system was negotiated on the basis of the weight of such experience and of its improvement. In this sense, GATT Article XXII must also be mentioned, for it has an unquestionable connection with Article XXIII and both form the basis and logic of the system.

A reference must therefore be made to the general obligation to consult, foreseen in GATT Article XXII, which remains under the WTO, together with Article XXIII, an axis in the dispute settlement mechanism, as mentioned in Article 3.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

IV. The Obligation to Consult as a Technique of International Economic Law – its role in the GATT/WTO System

The GATT establishes, in its Article XXII, an "obligation of conduct": "Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement" (Art. XXII:1).

The obligation to consult is present in several other provisions of the General Agreement (e.g.: Arts. II:5; VI:7; VII:1; VIII:2; IX:6; XII:4; XVI:1; XVIII:7, 12, 16, 21; XIX:2: XXIV:7; XXV:1; XXVIII; XXVIII:1, 4; XXVII:2), which deal with specific matters, e.g., customs valuation, rules of origin, balance of payments, subsidies, withdrawal of tariff concessions, etc.

What is the reason for such obligations to consult, as obligations of a certain behavior?

Economic life in the market is characterized by conjunctures and aleatory circumstances. Change may alter the reciprocity of interests, mainly because in the WTO it relates to a reciprocity arising from the equivalence of advantages and not from the identity of trade exchanges. I am here referring to the dynamics of comparative advantages and other aspects of economic theory of international trade. Therefore, as pointed out by Prosper Weil, consultation in international economic law is a technique in the elaboration as well as in the application of rules.[274] Consultation in the elaboration of rules will frequently lead to rules, which will be more often legal standards rather than rigid typifications of behavior, since the typification does not capture the changeable character of economic life. The standard, in turn, because of its own nature, will result much more in a "jurisprudence of interests" than in a jurisprudence of concepts".

Indeed, the standard, at the moment of its application, is a "measure of behavior", which will always require a verification, in the variable specificity of circumstances, of the reasonableness and fairness of a given behavior.[275]

Consultations respond to this requirement. They are always an opportunity for parties to evaluate their respective positions through a process of intelligence gathering, in the double meaning of the word intelligence: that of the organization and selection of pertinent information, and that of the possibility to grasp what is relevant for the understanding of a situation which has a potential for an economic dispute.

In this sense, consultations are firstly, in economic international law, an opportunity for fact finding representing a structured form of joint inquiry, which may result, through negotiation, in the conciliation of interests.

The practice of the GATT, as far as consultations are concerned, including the system of Article XXIII, obey this logic, namely that of peaceful settlement of disputes, responding to the specificity of economic disputes. This logic is still present in the WTO: Article 3.7 of the DSU establishes that "a solution mutually acceptable to the parties to a dispute and consistent with the covered agreement is clearly to be preferred". Nonetheless, the multiple consultation procedures established by the GATT did not always

[274] Prosper Weil, *Le Droit International Economique – mythe ou réalité,* in Société Française pour le Droit International, *Aspects du Droit International Economique – élaboration, contrôle, sanction*, Paris, Pedone, 1972, p. 73 ; cf. André Hauriou, Le Droit administratif de l'aléatoire, in Mélanges Trotabas, Paris, Librairie Générale de Droit et de Jurisprudence, 1970, pp. 197-225 ; Celso Lafer. *O Convênio do Café* de 1970 – *da Reciprocidade no Direito Internacional Econômico*, São Paulo, Perspectiva, 1979.

[275] Cf. Stéphane Rials, *Les Standards, Notions Critiques du Droit*, pp. 39-53 ; Jean J. A. Salmon. *Les Notions à Contenu Variable en Droit International Public,* pp. 251-268, in Les *Notions à Contenu Variable en Droit*, Etudes publiés par Chaim Perelman et Raymond Vander Eslt, Bruxelles, Bruylant, 1984.

lead to a solution to the problem. Therefore, a dispute settlement system was established under Article XXIII, which nevertheless is permeated by these considerations on the nature and specificity of economic disputes.

V. The Dispute Settlement System, under the GATT Article XXIII

The GATT dispute settlement system, based on Article XXIII, and focused on the conflict of interests stemming from the "nullification or impairment of benefits", is the result of a certain practice. It results from a process which evolved and was the object of codification and progressive development, which took the form of "Understandings"; "Agreed description of customary practices of the GATT in the field of Dispute Settlement" – (Art. XXIII:2); "Ministerial Declarations" of the Contracting Parties; "Decision" on Dispute Settlement; "Decision on Improvement of GATT Dispute Settlements"; Decision on Procedures under Article XXIII".[276] These formats, which begin in 1966 and end in 1989, represent a *consensual interpretation* of GATT by its Contracting Parties, in the terms of Article 31.3(a) and (b) of the Vienna Convention on the Law of Treaties. They are not, to recall Gilberto Amado, the work of jurists in an ivory tower, but the unequivocal expression of the sensibility of governmental agents and of the perception of their needs.

It should be recalled, in this context, that all of the GATT system, as well as that of the WTO today, is an intergovernmental system of International Economic Public Law. Only the Contracting Parties have the *locus stand* and conduct the process. Private interests – which are always very present, for one is dealing with the market – would only reach the GATT when a government understood that there was a "national interest" in protecting private interest. In this sense operated *mutatis mutandis*, adapted to the nature of economic disputes in international trade, the classic mechanisms of diplomatic protection.

To sum up: codification and progressive development of the dispute settlement system was the result, in the GATT, of an interpretation, formalized by the Contracting Parties – that is, by the Countries or Customs Territories – based on the practice and on its improvements which did not have an explicit legal basis in the General Agreement.[277] The creative evolution of this practice, in a wide sense, indicates the passage –

[276] Cf. GATT Analytical Index: Guide to GATT Law and Practice, 6th ed. 1994, pp. 586-597.

[277] Pierre Pescatore – *Drafting and Analyzing Decisions on Dispute Setllement*, reprinted from Handbook of WTO/GATT Dispute Settlement, edited by Pierre Pescatore, William J. Davey and Andreas F. Lowenfeld, New York, Transnational Publishers Inc., 1995, p. 29.

with steps forward and backwards – of a system which was more focused on conciliation – as it was usual in the case of commodities agreements, such as the coffee agreement, to what Hudek called the "diplomatic jurisprudence", i.e., a 'blend of legal and diplomatic strategies"[278] – to a system which was opening, without excluding the negotiated conciliation of interests, the possibility of thickening legality in the settlement of disputes.

The reason for such evolution is linked to the "security of expectations", which was necessary for the good functioning of the multilateral trading system. In the words of the "1989 Decision on Improvements on the GATT Dispute Settlement": "A-1-Contracting Parties recognize that the Dispute Settlement System of the GATT serves to preserve the rights and obligations of contracting parties under the General Agreement and to clarify the existing provisions of the General Agreement. It is a central element in providing security and predictability to the multilateral trade system".[279] What are, in general lines, the most important points?

The jurisdiction for the process of dispute settlement, in the terms of Article XXIII:2, was vested collectively in the CONTRACTING PARTIES, i.e., the countries or customs territories acting jointly as provided for in Article XXV of the GATT. The CONTRACTING PARTIES were to "promptly investigate any matter referred to them and... make appropriate *recommendations* to the contracting parties which they consider to be concerned, or give a *ruling* on the matter as appropriate".

In exercising these "quasi-judicial powers", as described by Olivier Long,[280] the CONTRACTING PARTIES, acting in concert after an initial phase in which they had recourse to "working parties", started in the mid-fifties to establish independent panels. It is in the functioning of such panels that lies the originality of the GATT system.

The normal function of a panel is to "review the facts of a case and the applicability of GATT provision and to arrive at an objective assessment of these matters".[281]

The panels, usually composed of 3 members, are not an arbitral tribunal. They are not an arbitral tribunal, as pointed out by Pierre Pescatore, for the reasons that follow.

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[278] Robert E. Hudek – The GATT *Legal System and World Trade Diplomacy*, New York. Praeger, 1975, Pref – p. VI; Robert E. Hudek – El Sistema del GATT: Jurisprudencia Diplomática, *Derecho de la Integración*, 8 abril, 1971, pp. 34-66; Celso Lafer, O Convênio Internacional do Café, *Revista de Direito Mercantil*, n. 9, XII, 1973, pp.48-55.

[279] GATT Analytical Index, cit., p. 592.

[280] Olivier Long, *Law and its Limitations in the GATT Multilateral Trade System*, Dordrecht, Nijhoff. 1987. p. 84

[281] Agreed Description of Customary Practice of the GATT in The Field of Dispute Settlement (Art. XXIII:2) in GATT Analytical Index, cit. p. 589.

(i) Members of the panel were not chosen by the parties. They were proposed by the Secretariat. Parties usually agreed after consultations with the Secretariat. In the absence of agreement, they could be appointed by the Director-General. Nationals of the parties in dispute should not compose the panel; panelists were always experts, such as members of delegations to GATT who were familiar with matters and were perceived as neutral in relation to the dispute, and later on academics with legal or international trade backgrounds.

(ii) There was no "compromis" which established an *ad hoc* competence of the panel. In spite of the possibility of negotiating special terms of reference, the competence of the panel usually stemmed from the "standard terms of reference", which basically established that the matter under dispute should be examined "in light of the relevant GATT provisions".[282]

(iii) The findings, recommendations and rulings of the panels did not constitute an arbitral award. They only acquired legal force through consensual adoption by the CONTRACTING PARTIES, meeting in a formal session of the Council. Such findings, recommendations and rulings are therefore a *legal opinion,* or what Bobbio would call an advice (*consilium*) giving a *vis directiva*, and not a command (*preceptum*) with a *vis cogendi*.[283] The following of such advice required the agreement of its addressee – namely the CONTRACTING PARTIES which had, *ex vi* of Article XXVIII, quasi-judicial powers. It is precisely because they are *consilia* and not precepta that the panel reports are, in the words of Pescatore, "persuasive not descriptive documents".[284]

The panel in the GATT system represented therefore, in the first place, an assertion of an *independent instance* – *a* third party – a *tertius.* This *tertius* does not place itself between the parties, as in mediation and conciliation. It places itself *between* and *above* the parties, not by delegation, as in arbitration, but in a *manner authorized* by the system, like a judge in a judicial settlement.[285] However, in contrast with the arbitration and the judicial decision, the panel does not issue a *judgment*, but an *opinion*.

[282] Cf. Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, cit. pp. 11-14.
[283] Cf. Norberto Bobbio, *Studi per una Teoria Generale del Diritto,* Torino, Giappichelli, 1970, pp. 49-78.
[284] Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, cit. p. 17.
[285] Cf. Norberto Bobbio, *Il Terzo Assente*, Milano, ed. Sonda, 1989, p. 222.

The inclusion of the *tertius,* in an institutionalized manner, helped to transform the political connotations of representations made by contracting parties – the tension, which is something diffuse – into a dispute – that is the disagreement between States –, a conflict of interests, having an object which is sufficiently circumscribed so as to allow for clear representations, capable of being evaluated through the rationality of judicial techniques.[286]

The activity of the panel, as all forms of conduct, including that of advising may be the object of legal regulation. The GATT practice, its codification and progressive development regarding the panels represent an effort to arrive at an opinion through a legal due process – with deadlines, first written submissions of the parties and oral hearings, a second set of submissions (rebuttals) and a second hearing. Normally, in the oral hearings with the parties, the panel asked questions about issues of fact and law, as contained in written submissions of the parties, requested documents and evidence, and the parties learned their respective arguments. Some adversarial discussion between the parties would usually follow. There was also room for third parties who had previously indicated an interest in the dispute to present to the panel their arguments orally and in writing.

The opinion of the panel, albeit impregnated, as mentioned above, by the rhetoric of persuasion, sought a form of a judgment: the description of the facts, the arguments of the parties and the conclusion motivated by legal considerations.

The GATT Analytical Index edition of 1994 has a list of 195 cases and 80 panel reports adopted by the CONTRACTING PARTIES[287] and Professor Jackson, in a list updated until 1989, which included cases not taken to panels, counts 233 cases.[288]

Professor Hudek, in an analysis of great importance, covering the period from 1948 to 1989, counts 207 complaints. Out of these, 64 were settled or their validity otherwise conceded without legal ruling; 55 were abandoned or withdrawn without solution; 88 complaints, that is 43% of the total of 207, led to a ruling of some sort. In 68 of these 88 cases, which were ruled upon, that is 77%, the panel decided that the complaint was valid; out of the 68 valid cases, 60 cases, that is 90%, ended with a positive outcome; 37 (55%) with full satisfaction of the legal claim: 8 (12%) ended with the withdrawal of the measure, but independently of a legal ruling; and 15 (22%) with partial satisfaction of the legal claim.[289]

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[286] Cf. Charles de Visscher, *Théories et Réalités en Droit International Public*, 4ª ed., Paris, Pedone, 1970, p. 371.
[287] GATT Analytical Index, cit. pp. 719-734.
[288] John H. Jackson William J. Davey, Alan O. Skyes, *Legal Problems of International Economic Relations*, cit., p. 331.
[289] Cf. Robert Hudek, Daniel L.M. Kennedy, Mark Sgarbossa – A Statistical Profile of GATT Dispute Settlement Cases – *Minnesota J. Global of Trade*, vol. 2:1. 1993, pp. 3, 4, 8, 9, 10.

One can see, therefore, that the *corpus* of solutions found through the GATT system is not only positive, but numerically relevant. John H. Jackson points out that the number of cases handled by the GATT system greatly exceeds that of the World Court (approaching 100) and that some GATT cases "have had as profound consequences on national governments and world affairs as have International Court of Justice cases".[290]

What were, nonetheless, the limitations of the system, and why was it the object of progressive development in the Uruguay Round, which led to the WTO?

Some parties understood that the system of Article XXIII was essentially an extension of the obligation to consult of Article XXII, and that the objective of the dispute settlement mechanism was less to arrive to a legal judgment than to take advantage of the Law to overcome diplomatically a trade problem. What was desirable, according to this view, was an improvement of the due process of panel proceedings, and thus of the quality of the *vis directiva* of their reports.

Others, however, pointed out that the quasi-judicial powers belonged to the Council of Representatives of the Contracting Parties. Therefore, one party accused of wrong doing leading to nullification and impairment had the political power to block the functioning of the system. It could do so by impeding unilaterally the establishment of a panel and even when it agreed to the establishment of a panel and participated in its proceedings, it could block adoption of the panel report, that is, the acceptance of the panel's findings and recommendations by the CONTRACTING PARTIES.[291]

It was precisely to overcome such difficulties – in an international system made more homogeneous by the logic of globalization, which also allowed for a Grotian reading of international economic life, amplified *ratione personae* and *ratione materiae,* recalling what has already been pointed out in this lecture – that the WTO dispute settlement system was arrived at during the Uruguay Round negotiations.

The WTO system is explicitly, as established in Article 3 of the DSU, a reaffirmation of the importance of the experience gathered in the GATT (paragraph 1) (codification), strengthened (progressive development) with elements of security and predictability of expectations. This progressive development was seen as necessary, in a Grotian way, for the good functioning of the world market which, as any market, does not operate in a vacuum (as stated above). It requires a legal framework, supplemented, in the dynamics of its application, by legal techniques, which are able to preserve the rights and obligations of its members, as negotiated in the "covered agreements" (paragraph 2).

[290] John H. Jackson, Reflections on International Economic Law, *University of Pennsylvania Journal of International Economic Law*, vol. 17. n. 1 (Spring 1966), pp. 18-19; Cf. Also Shabial Rosazine. *The World Curt – What it is and how it works* (*5th* revised ed.), Dordrecht, Nijhoff, 1995, caps. VI and VII.

[291] Cf. John Croome, *Reshaping the World Trading System*, Geneva, World Trade Organization, 1995, p. 148-149.

VI. The WTO Dispute Settlement System – Continuity and Change

(i) The first observation to be made about the WTO Dispute Settlement System is that, as an expression of codification and progressive development, and in contrast with the GATT system, it is not the mere product of practice and interpretation. It is an obligation of a different legal hierarchy, since it is contemplated by the Agreement Establishing the WTO, and as such it is binding on all Members of the organization (Vienna Convention on the Law of Treaties, Article 26). In other words, it is part of the basic framework of a new organization, which has specialized international subjectivity, distinct from that of its members (this not being the case of GATT, that had a contractual nature). Indeed, *ex vi* of Article II of the Marrakech Agreement, which deals with the scope of the WTO, Annex 2 of such Agreement, the Understanding (DSU), is an integral part of the commitments of the Members of the Organization.

Article 3, paragraph 1 of the Understanding, already mentioned above, provides for continuity in relation to the GATT system. It must be read in conjunction with Article XVI, paragraph 1 of the Marrakech Agreement, in which it is affirmed that "except as otherwise provided" (progressive development), the WTO "shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947". Therefore, the *corpus* of decisions of the old GATT (the GATT *acquis*) constitutes a valid jurisprudence for the WTO, and as such it has been quoted by new panels and by the Appellate Body.

(ii) The second observation to be made is in the sense that the DSU, in order to face the risk of fragmentation resulting from the dispersion of the Tokyo Round Codes, each one having its own system and favouring forum-shopping, represented the creation of a unified system in the WTO. This system covers all agreements negotiated in the Uruguay Round (cf. Article II:2 of the Marrakech Agreement and Appendix 1 of the Understanding). This means that the new dispute settlement system covers not only the new obligations undertaken in relation to traditional GATT 1947 issues, such as tariff commitments, balance of payments rules, customs unions and free trade areas, waivers,

sanitary and phytosanitary measures, technical barriers to trade, anti-dumping, customs valuation, subsidies and countervailing measures, etc.; but also traditional areas finally covered by WTO such as agriculture and textiles; and more expressively the new issues such as TRIMs (investment), the GATS (services) and TRIPs (intellectual property). This represents, as observed by Pescatore, a new and wider dimension of jurisdiction, given by automaticity of the *standard terms of reference*, which comprehends "all covered agreements" cited by the parties before a panel (DSU – Art. 7).[292] This is a new challenge, as observed by Christopher Thomas, because the panels will face not only the classic core-obligations of the GATT, but also "less familiar rights and obligations in the new areas of intellectual property, services, etc.", with all consequences deriving therefrom, including the issues of evidence and legal qualification of facts – *qualification juridique*.[293]

(iii) From the point of view of the thickening of legality of the WTO dispute settlement system, a new and fundamental element, which circumvents the unilateral "blockage" of its functioning, is the formula conceived in 1991 during the Uruguay Round negotiations in Geneva, based on options presented in the unsuccessful meeting in Brussels in 1990. I am here referring to the inversion of rules on consensus prevailing in the GATT. In the words of Croome: "Whereas consensus had been required in order to move the dispute settlement process forward at each stage, they provided that, in future, consensus agreement would be required *not* to move. The effect would be to end the possibility of a country unilaterally blocking the dispute mechanism, and to build automaticity into the progress of a dispute through the system, unless all countries agreed that the process should be halted".[294]

This represented an effective *right to a panel* (DSU, art. 6.1); *a right to adoption of a panel report* (DSU, Art 16.4); a *right to appeal a panel report* (Art. 16.4); and a *right to adoption of the Appellate Body Report* (DSU, Art. 17.14).

(iv) Reference must also be made to another fundamental innovation regarding the thickening of legality of the system:

[292] Cf. Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, cit. pp. 28-30.34-35

[293] Cf. Christopher Thomas, Litigation Process under the GATT dispute settlement system: lessons for the World Trade Organization, in *Journal of World Trade*, vol. 30, n. 2 (April 1996) 53-81.

[294] Cf. John Croome, *Reshaping the World Trading System*, cit., p. 324.

the creation of an Appellate Body, which has jurisdiction to review the panel reports, based on the Law. The idea of a higher instance, which started to be discussed and negotiated in the Uruguay Round in 1989,[295] was enshrined in the DSU, which provides for the establishment of a Standing Appellate Body. This body is "composed of seven members, three of whom shall serve on any one case" (Art. 17.1), elected "for a four-year term", re-election being allowed (Art. 17.2), and composed of "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matters of covered agreements generally" (Art. 17.3). As the "appeal shall be limited to issues of law covered in the panel reports and legal interpretations developed by the panel" (Art. 17.6), this second instance – almost unique in International Public Law – strengthens, by its functions, the component of legality of the WTO dispute settlement system.

The Appellate Body has already been established and has elaborated its working procedures. It has also pronounced itself on a specific case – *"United States – Standards for Reformulated and Conventional Gasoline – complaint by Venezuela and Brazil"*. The report of the Appellate Body was adopted by the Dispute Settlement Body of the WTO on 20 May 1996.

As far as the working procedures of the Appellate Body are concerned, I wish to observe only two points:

a) The Appellate Body was established with a basis on the standard that it is "broadly representative of the WTO membership" and being comparable to a standing tribunal, nationality is not a factor in the selection – and thus in the exclusion – of any member "to sit on a division to hear a particular case" (Rule 6.2 of the Working Procedures for Appellate Review). In this sense, the second instance is distinct from the rules for establishment of a panel, as a first instance (Art. 8.3 of the DSU), in which the nationality of the parties in a case is seen as presumption of partiality.
b) Although preserving the full responsibility of the division of 3 members, regarding the final decision on a specific case, the working procedures also contemplate information and consultation of the other four members of the Body on cases under examination. This is the so-called "collegiality" rule.

[295] Cf. John Croome, *Reshaping the World Trading System*, cit., p. 264.

The idea of this rule expresses a concern of a legal nature with the coherence in the interpretation of the WTO agreements (Working Procedures for a Appellate Review, Rule 4). This is another element in the thickening of legality.

It is not incumbent on me, and it would not be appropriate in my capacity, to comment on the first report of the Appellate Body and on its relation to the report of the panel. Neither is it reasonable to extract inferences on trends from one single case. However, it would not be preposterous to observe that there is a difference in style in this first report of the Appellate Body, when compared to reports of panels. It is clearly a text of a more legal nature and, without leaving the persuasiveness aside, it is closer to the language of a prescriptive document, that is, to the style of a legal judgment.

(v) Style and automaticity, as referred above, do not transform the reports of panels and of the Appellate Body into legal judgments. Indeed, the reports only acquire legal effects when adopted by the Members, by means of a body established by the agreement establishing the WTO: The *Dispute Settlement Body,* which is the General Council, discharging the responsibilities "provided for in the Dispute Settlement Understanding" (Marrakech Agreement, Article IV:3, DSU, Art. 2:1). Such approval, although having the potential of automaticity, really represents the *exequatur*, through a political confirmation, following the rule of the negative consensus.

This is why I understand that the reports still keep, under the WTO system, the legal nature of an opinion, of a *tertius*, above the parties, giving a *vis directiva*. The change – the progressive development – lies in the thickening of legality, both in terms of the due process and of the conversion of its product, the opinions, into findings with a legal effect.

What do I mean by the expression "thickening of legality"?

The work of Hart has encouraged the general theory of Law to work with a distinction between primary rules and secondary rules, and to see the growing inter-relation between them as a sign of maturity of a legal system.[296]

[296] Cf. H.L.A. Hart, *The Concept of Law*, New York, Oxford University Press, 1961, chap. V, VI; Norberto Bobbio. *Contributi ad un dizionario giuridico,* Torino, Giappichelli, 1994, chap. XI-norma giuridica, chap. XII – norma secondaria.

Primary rules are those which prescribe, proscribe, encourage or discourage certain behaviours. In the case of the WTO, the discretionary way in which they are observed and complied with is restrained by the existence of secondary rules. These are rules about rules. They deal with the elaboration and application of rules. The WTO dispute settlement system has thickened their legality by reducing their diplomatic dimension – to be found in the political control exercised by the Members in the outcome of solutions. It has done so through in the outcome of solutions. It has done so through the multiplication of secondary rules governing the organization and functioning of the system. Examples of the role played by secondary rules in the identification of the *quid sit juris*, in the WTO, are those establishing the competence and powers of the *tertius* (Panels and Appellate Body). Apart from the rules already referred to – jurisdiction given by the terms of reference and the rule of negative consensus in the DSU, I would like to mention, as an illustration of their importance in the thickening of legality, the following rules: Art. 9 (procedures for multiple complaints); Art. 12 (panel procedures and Appendix 3 of the DSU, which establishes, *inter alia*, strict time frames for every step of the process); Art. 13 (right to seek information); Art. 14 (confidentiality); Art. 17 (interim review stage); the Working Procedures of the Appellate Body, which elaboration was attributed to the Appellate Body itself, in accordance with the standards established in Art. 17, paragraphs 9, 10, 11, 12 and 13 of the DSU; Art. 20 (time frame for DSB decisions), etc.

(vi) The legality and the due process of panels and of the Appellate Body must be seen in a wider context, of a diplomatic nature: the Dispute Settlement Body (DSB). This Body, in contrast with the GATT system, as mentioned above, represents a functional specialization of the General Council. Such functional specialization gives the DSB an institutional identity of its own, revealing the hierarchy and importance attributed by the WTO to the settlement of disputes as a central element of the security and predictability of the multilateral trade system, as negotiated in the Uruguay Round (DSU, Art. 3.2).

The DSB must administer all the system. It is this Body that has the authority to establish panels and adopt their reports, as well as those of the Appellate Body. It is also the DSB that, as a diplomatic body, maintains *ex officio* the surveillance of implementation of rulings and recommendations.

The DSB also authorizes "suspension of concession and other obligations under the covered agreements" (DSU, Art. 2.1). In other words, if the process of findings and recommendations (*processo de conhecimento*) passes through the due process *iter* of panels and of the Appellate Body, the process of enforcement (*processo de execução*) is undergone, albeit disciplined by the secondary rules of surveillance of implementation (DSU, Art. 21) and of compensation and suspension of concessions (DSU, Art. 22), that is, trade sanctions by a political-diplomatic body, the DSB.

The above referred "process of enforcement" has two phases. The first phase is the surveillance of decisions taken by the panels and by the Appellate Body and adopted by the Dispute Settlement Body. The surveillance mechanism is foreseen in Article 21 of the DSU, which calls for prompt compliance" with recommendations and rulings of the DSB. Compliance is conceived as being in the interest of all – the "benefit of all Members" cited in Article 21.1. Thus, within 30 days after the adoption of a report by the Dispute Settlement Body, the Member concerned must inform the DSB about its intentions regarding implementation of the recommendations and rulings (Article 21.3). In case immediate compliance is impracticable, a "reasonable period of time" for implementation is foreseen. The "reasonable period of time" is a standard, and as every standard, it is a rule of variable content. In this case, it is the search for a reasonable behavior by the parties in dispute (complainant/defendant), regarding the implementation of a decision, i.e., the balance between diverging rights and interests.

The criteria for the search of such balance are given by the secondary rules of Article 21.3, which establishes three sequential methods for the determination of the "reasonable period of time" for implementation. Article 21.3.(*a*) establishes that the reasonable period will be the one proposed by the Member concerned, provided that the period proposed is approved by the DSB. In the absence of such approval, Article 21.3.(*b*) establishes that parties in dispute may mutually agree on the "reasonable period of time", within 45 days of adoption of the recommendations and rulings by the DSB. In the absence of such agreement between the parties, Article 21.3.(*c*) provides for "binding arbitration", with the objective of establishing the "reasonable period of time". This arbitration is indeed mandatory. The appointment of the arbitrator – either an individual or a group – may be agreed by the parties concerned within 10 days after the matter being referred to arbitration. If parties cannot agree, the Director-General of the WTO will appoint the arbitrator after consulting the parties (footnotes 12 and 13 to Article 21.3.(*c*)).

Article 21 also establishes a guideline for the arbitration of the "reasonable period of time". Such period should not exceed 15 months from the date of adoption of the panel or the Appellate Body reports by the DSB. This period may nonetheless be shorter or longer, "depending on the particular circumstances". It is therefore these "particular circumstances" that the arbitrators will examine. This is the latitude "in concreto" of the examination of the rule's variable content, in order to find a reasonable solution by a "tertius".

Article 21.5 expresses a concern with the consistency with a covered agreement, i.e., with one of the WTO Agreements, of measures taken to comply with the recommendations or rulings. In this sense, although questions relating to this issue can only be raised by the parties to the dispute, a new recourse to the dispute settlement procedures is foreseen, wherever possible resorting to the same panel – indicating therefore a concern with the maintenance of integrity of the rules of the WTO system.

In the case of non-compliance, the DSU establishes a mechanism of sanctions – the second phase of the enforcement process. The sanctions foreseen – as every sanction is a mechanism to reinforce compliance with primary rules – are those typical of Public International Law of Cooperation.[297] They are aimed at the Member found to be in default, reducing the benefits that it enjoys in participating in an economic interdependence, conceived in a Grotian manner.

The application of these sanctions, even through the DSB as a political-diplomatic Body, is rule-oriented. Indeed, the DSU has the explicit purpose of limiting the unilateralism of power-oriented self-help. It establishes the "redress of a violation of objectives or other nullification or impairment of benefits" solely through the *iter* of secondary rules contained in the procedures foreseen in the Understanding (DSU, Art. 23). The choice of the concessions to be suspended, the sector of goods, services or TRIPs to be affected, the possibility of cross-retaliation and the level of suspension are the object of standards elaborated in Article 22 of the DSU. Objections regarding the application of standards may be addressed by arbitration, to be conducted by the original panel, "if members are available or by an arbitrator appointed by the Director-General". The jurisdiction of the arbitrator is established in the DSU (Arts. 23.6;23.7) and thus does not require a *"compromis"*.

These observations are equally relevant in the perspective of the thickening of legality in the process of enforcement. Indeed, the unilateral

[297] Cf. Wolfgang Friedman, *The Changing Structure of International Law*, New York, Columbia University Press, 1964, pp. 88-95.

self-help, being discretionary, tends to violence materialized, *inter alia*, in unpredictability, in discontinuity, in disproportion between the means and the objectives. The secondary rules of the DSU govern, in a multilateral way, the use of economic force. They impose a measure to power through law and establish, as standards for the DSB, the acting within measures, according to measure, and having the measure as a goal.[298]

(vii) The thickening of legality that I am here underlining does not exclude the role of the DSB as a political-diplomatic instance of dispute settlement within the WTO. Much to the contrary. Such strengthening is an important part of the functions of the DSB, as a manager of the Understanding. It is demonstrated, in the DSU, by the recommended caution before bringing a case; by the explicit preference to negotiated solutions (DSU, Art. 3.7); by the recommendation that interpretation of the WTO rules be strict and not constructively widened (DSU, Art. 3.2); by the obligation to consult, as a mandatory preliminary phase, before considering the establishment of a panel (DSU, Art. 4). It should also be recalled that, in the same line, parties in dispute have the alternative of requesting, by mutual agreement, good offices, conciliation or mediation. The Director-General may also, in an *ex officio* capacity, offer good offices, conciliation or mediation (DSU, Art. 5). Another important feature of the system, which indicates the continuity of the GATT tradition of diplomatic jurisprudence, is the possibility given to parties to suspend, at any moment, the work of a panel, with a view to negotiate a solution. In a recent case – *European Communities – Trade Description of Scallops* – complaints by Canada, Peru and Chile – the parties requested the report of the panel, which was already known to them, not to be circulated to the rest of the membership, so as to allow for a solution in view of the conclusions of the panel. A mutually agreed solution was communicated to the DSB at its meeting of 5 July 1996. This possibility also exists in the second instance (cf. Working Procedures for Appellate Review, Rule 30). Incidentally, this is an additional element in support of my affirmation that the reports are not a judgment, but opinions with a *vis directiva,* with a legal *iter* which may be interrupted at any moment, so as to allow for a diplomatic negotiated solution.

[298] Cf. Norberto Bobbio, *Il terzo assente,* cit., p. 151-152.

The political and diplomatic dimension of the DSU in the settlement of disputes can also be demonstrated by the right of any Member to express its views regarding the contents of the report of a panel or of the Appellate Body, at the time of adoption of such report (DSU, Arts. 16.4;17.4). This right was exercised by a member of the WTO, during the session of the DSU, which adopted the report of the Appellate Body in the gasoline case. On that occasion, the Member in question – who was not involved in that dispute – reserved its rights regarding the interpretation of Article III:4 of the GATT as contained in the panel report, which had not been modified, in this particular aspect, by the report of the Appellate Body. The exercise of this right represents a possibility of political control over the legal contents of a report, in the sense of surveillance. The aim of such right is, in my view, to safeguard other rights, making it clear that the findings in a given case only apply to the matter at issue and to the parties involved in that particular case, i.e., to obstruct the concept of mandatory precedent – *stare decisis*.

A survey of the activities of the DSB, from the date of its establishment until today, shows that the Body has been functioning in dealing with disputes both in the sense of encouraging negotiated settlements and in the promotion of solutions of a more juridical nature. Ten cases were settled, in a negotiated manner, either in the period of consultations or after the panel was requested. Among these, the most famous is the case *United States – Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of* 1974 – complaint by Japan.

There are presently in the WTO six active panels and 26 cases of pending consultations. The gasoline case – *United States-Standards for Reformulated and Conventional Gasoline* – complaints by Venezuela and Brazil – is the only one which has gone through all phases from Panel to Appellate Body and is now, as mentioned, in the phase of implementation.

(viii) To conclude, I would like to make a brief observation on the nature of disputes in the WTO, since it touches on a central question of the work of the ILC, namely international responsibility.

The GATT tradition, its focus on nullification and impairment of benefits and the gravitation of the issue of diplomatic jurisprudence tend to privilege a view of the present system as a legally strengthened search for reparation of interests. One of the consequences of this view is that

a case of non-compliance with an international obligation – for instance, the non-implementation of rulings contained in reports adopted by the DSB – would constitute a case of international responsibility, concerning only the parties in a dispute. Thus a focus on the function or reparation can be resolved by traditional mechanisms of international responsibility, i.e., by compensation (*dommages-interêts*). Article 22 of the DSU, although not favouring it, admits the negotiation of compensation, provided that the compensation is consistent with the covered agreements. Incidentally, the concern with consistency with the covered agreements also exists for negotiated solutions of any type. Hence the obligation to notify them to the DSB and the possibility of any Members raising "any point relating thereto" (DSU, Art. 3.6).

This concern with consistency: "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements"(DSU, Art. 3.7); "neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreement"(DSU, Art. 22.1) – brings about another question. Namely, whether the new WTO system, in contrast with the GATT system, does not tend to a dispute of legality. This means, potentially, another conception of the function of international responsibility: the protection of legality. This concept implies that the relation of international responsibility would go beyond the parties involved in a dispute, having a bearing on all Members of the WTO. Indeed, if the international responsibility is a response to the upsetting of the balance of rights and obligations, and if the response excludes as a remedy the obligation of reparation through compensation – negotiated between the parties directly involved by means of an axiological priority conferred to the interest of all Members in the function of legality – then one would be facing a much broader diversification of international responsibility, in the line of proposals of the works of the ILC.[299]

In the WTO, this issue – dispute of reparation/dispute of legality – is being brought up, implicitly, by the role of third parties. Indeed, if the participation in the phase of consultations requires third parties to have a "substantial trade interest" (DSU, Art. 4.11), participation of third parties in a panel or appellate proceeding requires a "substantial

[299] Cf. Société Française pour le Droit International. *La Responsabilité dans le Système International*, Colloque du Mans (1990) – *Paris*, Pedone, 1991, particularly, Pierre-Marie Dupuy, Responsabilité et légalité, pp. 263-297; and Brigitte Stern, La Responsabilité dans le Système International. pp. 319-336.

interest", without such qualification (DSU, Art. 10.2; 17.4). The question is whether "substantial interest" can be understood as a "systemic interest" which, in the WTO jargon, may also be understood as an interest in the function of legality of international responsibility. In other words, the question is whether the panel and the Appellate Body, in dealing with the considerations of third parties, must also pay attention – and how much attention – to these systemic interests. There is no doubt that, in a dispute, only the nullification or impairment of benefits allows a third party to become a full party and have the right to start its own dispute settlement procedure (DSU, Art. 10.4). The same applies to appeals of panel reports: only the parties in dispute, and not the third parties, have the right to appeal (DSU Art. 17.4). In other words, the indirect loss, originating from the systemic interest in the function of legality, does not provide a Member with the right to exercise the role of public prosecution in the protection of a collective interest in the maintenance of the coherence of the WTO legal system. In this sense, I would say, using words of the International Court of Justice in 1966, in the *South West Africa* and *Namibia* case, that the system does not allow for an *actio popularis*, a right of each Member of the WTO to start a dispute settlement procedure aimed at the protection of the collective interest.[300]

These problems of the larger or smaller scope of international responsibility, however, are still open, by force of certain third-party statements, which require reflection and decision. The answer to these questions will have to wait for the tendencies which will be consolidated, or not, in the future jurisprudence of the WTO.

[300] Cf. Dominique Carreau, *Droit International*, 3e ed., 1991, Pedone, 1991 p. 429 ; Brigitte Bolecker-Stern. *Le Préjudice dans la Responsabilité Internationale*, Paris, Pedone, 1972.

"HUMAN RIGHTISM" AND INTERNATIONAL LAW

Lecture delivered on 18 July 2000
by Professor Alain Pellet
Professor of International Law at the
University of Paris X-Nanterre
Member of the International Law Commission

Excellencies, Ladies and Gentlemen, Dear Friends,

It is a great honor to be asked to present the Gilberto Amado conference. I know that if this task falls on me today, it is not a function of merit, but only due to the friendship of which I am honored with Ambassador Baena Soares and his indulgence. Perhaps also to my special relationship with countries of Latin America and, especially, those that associate me with Brazil, which has honored me, to my surprise, with an *Doctorat Honoris causa*, a few years ago; the first one I ever received, and of which I am very proud! That is, somehow, my only "meeting" with him who gave his name to these conferences: he received the same honor, but his was so much more deserved in 1968.

I am probably the second of "Amado speakers" to have not had the privilege of knowing him which I deeply regret (ironically, the first not to have met him was prominent Brazilian jurist A. A. Cançado Trindade[301]). Since this offer to speak before you was made to me, I tried to know more precisely who he was - and I must say it made me regret even more not having met a lawyer and a man with such a an extraordinary and attaching personality. Judge Sette-Camara painted a very remarkable picture during the conference he gave here in 1987, to mark the hundredth anniversary of the birth of Amado. "He loved the pleasures of life and was simple - here

[301] Gilberto Amado's contribution to the work of the International Law Commission'', *in Confèrences commémoratives Gilberto Amado,* Fundação Alexandre de Gusmão, Ministerio das Relações Exteriores, Brasilla, 1998, p. 491.

are at least two reasons which make me find him so agreeable! It is his lack of dogmatism, it is his realism (not excluding the commitment to the principles), it is his ability to recognize his mistakes[302], his desire to follow the developments in international law, his independence of mind within the CDI - And also his special interest in problems related to reservations included in treaties[303] - all this makes him an important predecessor but also one of which I feel close in many ways."

In the study devoted to Amado, Judge Sette-Camara writes "the theological problems were alien to him."[304] That is to say, I think, that Amado had not been a "Human Rightist", because, somehow, the "Human Rightism" is to international law what theology, or rather, faith is to the law in law in general: a virtue, perhaps, however one that is estranged to its purpose.

"Human rightism". The term . . . I agree, is problematic. This has been evidenced by the agitation that has gripped some members of the Commission and the perplexity for our interpreters, whom, however, have heard others, when the announcement of this conference was made by our Chairman. But it is said that Frederic Dard invented no less than 20,000 neologisms. You may well forgive me soon enough as I do not presume to compare myself to the father of the famous San Antonio!

But what is the now almost famous "Human Rightism"? Although I am not sure I can claim full credit for the phrase, I used it for the first time I believe in published form at a conference organized in 1989 by Thierry Hubert and Emmanuel Decaux to the "Arc de la Fraternité"[305]. In my mind, it was pretty neutral and it was only to describe the mood of activists of human rights, for which I harbor the greatest admiration while warning against the confusion of genres: the law on the one hand, the ideology of human rights on the other.

Since then, the phrase has had some fortune, though, searching the internet, I found on *Lexis* only one entry for the expression "human rightism". It refers to the review of a book dedicated to Tunisia and defines Human rightism as "a peculiar manifestation of the moralistic strain in politics"[306]. This expression has also acquired a pejorative nuance probably not within my original intentions. As a recent example

[302] V. *ibid.*, not. pp. 511-514.
[303] V. son Memorandum sur le sujet *in Ann. C.D.I.* 1951, vol. I, p. 17.
[304] "Gilberto Amado – Cent ans de plénitude", *ibid.*, p. 479.
[305] Alain Pellet, "La mise en œuvre des normes relatives aux droits de l'homme" *in* CEDIN (H. Thierry et E. Decaux, dirs.), *Droit international et droits de l'homme - La pratique juridique française dans le domaine de la protection internationale des droits de l'homme,* Montchrestien, Paris, 1990, p. 126.
[306] Andrew Boroviec, as critic of text by Roger Kaplan, *Tunisia: a Case for Realism, Washington Times,* Nov. 22, 1998, Part B, Books; p. B7 (http://web.lexis-nexis.commission/ln.uni).

take the reaction of one of the prominent members of the Committee on Human Rights which I met last week at a cocktail party, who approached me and said: "I received an invitation to attend your conference, but I will not go"; "Oh why?", "Because I think that, given the title of your presentation, you will speak ill of human rights". Obviously I will not say anything bad - in fact, as stated by Michel Villey, "human rights now only have friends"[307], but such reactions strengthens my conviction that "human rightists", whether activists or experts on human rights, have lots of qualities, but unfortunately are not particularly open to dialogue - which leaves me perplexed (or worried) given their noble cause which deserves better.

I have another anecdote, which brings us closer to our definition. In another cocktail (this is a widespread activity in Geneva though I rarely take part ...), I met a colleague for whom I have, moreover, high regards and which I can name, Professor Theodor Meron. Apologizing for not being with us today, he told me: "I think you're going to address the issue of reservations in treaties [I will do it briefly, indeed] – but, on this point, you can not consider me among the Human rightists. In my report to the Council of Europe[308], I do not question the law applicable to reservations in treaties; I am only saying that the rules are problematic from human rights standpoint".

I think there is an attitude typical of Human rightists: it consists of thinking that the rules of general international law are excellent but not well adapted to this area of law – No, can I refer to this as an area of law that law? rather this discipline complete in and of itself which consists of the protection of human rights - even though, in my opinion, the problems posed by the reservations related to human rights are certainly real (at least, they were made so), but they are no more or no less real than in other areas of international law, for example those related to environmental protection, in fact this feature is less a subject of treaty rights than that of the existence of supervisory bodies, more prevalent than in some areas of law.

So let us say *Human rightism* can be defined as that "posture" which consists in wanting at all costs to confer "autonomy" (which, in my opinion, it does not possess) to a "discipline" (which, in my opinion, does not exist as such): the protection of human rights. Here is thus stated both the definition of human rightism and the thesis that I am briefly going to support.

[307] *Le droit et les droits de l'homme,* PUF, Paris, 1983, p. 17.

[308] "Les implications de la Convention européenne sur le développement du droit international public", rapport pour la 19ème réunion du CADHI (Berlin, 13 et 14 mars 2000), CADHI (2000) 11, Annexe III.

We may, indeed, have for human rightism a more extensive definition which includes human rights activism - this may seem a Fren-glish expression "human rights activism". However, since the expression human rightism has acquired a pejorative connotation, I do not think that this would be appropriate: human rights militants "lay their cards on the table", they are fighting for a cause (which I believe to be just) and it is legitimate that they should focus their efforts on their objective, that of a world where human rights will triumph - just as environmentalists mobilize exclusively (sometimes excessively) to fight pollution or as the anti-nuclear activists do to fight atomic weapons.

Still ... one needs to be reasonable. The NGOs are, certainly, "positive counter-powers" to the arbitrariness of States or to the "globalizing" domination of transnational economic powers. Yet, in spite of the respect that one may have for many of them, and the admiration for the men and women who dedicate themselves to them, it is doubtful whether they constitute a real alternative to internationalization. In fact, useful as they are as counter weights, as instruments of pressure and alarm, they could equally be potentially dangerous if they were given excessive powers. The objectives they pursue are, in general, eminently respectable in themselves, but there is only one alternative: either they are specialized and as such, however important their causes may be - women, children, the poor, the environment, human rights - they are not sufficiently broad in scope to take the place of politics, of an overall project for the "global village"; or else, they aim to replace States, and then we risk falling from the frying pan into the fire, the clear conscience of a just cause creates the risk of leading them to even more intolerance than is already shown by the existing political powers. The globalization of the "politically correct" frightens me.

And, as I believe the international protection of human rights is an excellent cause and, for what interests us more particularly today, an essential component of contemporary international law, I also believe that human right-ism activism has no place in the internationalist doctrine.

To be honest, I must state that this does not apply to that the vast majority of recognized internationalists, including those who, rightly, are working to give human rights their proper place in contemporary international law: eminent, but not exclusive. I often tease some of my colleagues on the Commission for their "human rightism", especially John Dugard and Bruno Simma, but I recognize both of them, as I do for Ted Meron, as referred to previously, or Louis Henkin (I salute with respect and affection) or Rosalyn Higgins and many others - I recognize them I said, two formidable qualities: The technical rigor combined with an obvious generosity.

The fact remains that even these formidable experts in international law sometimes allow their generosity to take precedence over the *legal technique* that they otherwise master so well. Without having to be classified among the "human rightists", in the pejorative sense of the expression, they sometimes indulge in what I would call "human rightist drifts" and, from time to time, yield to the temptation of human rightism, thus confirming the well known *dictum* by John Humphrey, an expert in the field of human rights, according to which "Human rights lawyers are notoriously wishful thinkers."[309]

Therefore, whether Giraudoux likes it or not, law is anything but "the best schooling in imagination". Even though I see it as more "art" than "science", it is a normative discipline, whose object arises from the balance of power which it reflects in a way that I consider to be reasonably faithful. One may (and should) want to change the law, but as long as this is not the case the lawyer can only describe legal norms as they are and not as she/he would like them to be, though she/he may judge them severely. *Dura lex!*

In this respect, human rights law and, more precisely, the international law of human rights, which is our prime concern here, is no exception to the rule. It is, and can only be, the art of the possible, and by wanting to ask the impossible of it, the "human rightists" harm the cause that they intend to defend more than they serve it. Often, they would do better to leave changes in the law to the "human rights activists", who have this objective as their respectable function, rather than try and do it themselves, and in so doing hamper progress in both human rights and international law.

The techniques leading to these lapses of judgment are numerous and a serious analysis of them would require more pages than I have available here. Nevertheless, I will refer to the two procedures which constitute, in my view, the most dangerous tendencies of human rightism:

- first of all, there is the fact of believing (or making others believe) that a specific legal technique pertains to human rights even though it is well known in general international law. This is the excessive search for the idiosyncratic;
- conversely, and this is closer to "wishful thinking", our human rightists tend to take their desires for realities and to consider tendencies still in their infancy or, worse, that exist only in their dreams, as legal truths.

[309] "Foreword" *in* R.B. Lillich ed., *Humanitarian Intervention and the United Nations*, U.P. Virginia, Charlottesville, 1973, p. VII.

Let me, without being in any way original illustrate these tendencies which I believe to be harmful with some examples concerning the formation of norms, first, and then their implementation. First, let us examine the creation of norms.

Concerning the formation of legal norms, the international rules that protect human rights are, very typically, the end result of formal processes (roughly what the classical doctrine calls the sources of international law), whose main function is to ensure their legality. In contemporary international law, this function is ensured by conventional means, and the protection of human rights is no exception to this strong tendency. One loses count of the treaties dedicated to it: at universal or regional levels, global or partial ones, by sector or by the category of people they protect, etc. Some of these treaties are very precise, but many remain vague and uncertain in their scope. And if some are widely ratified, others are not, or else their ratification comes with so many reservations that their authority is considerably weakened.

As for reservations, I have had sufficient opportunity to discuss this subject previously[310] so as to avoid returning to the subject at length here, other than to briefly outline a few obvious points, or at least a number of common-sense propositions:

- first of all, I have always wondered why human rightists seem to prefer a non-ratified treaty to one ratified with reservations;
- secondly, it is to be understood that a ratification is naturally only effective if the reserving State does not invalidate the purpose of the treaty. However, the Vienna rules exclude this possibility since a reservation that is incompatible with the purpose and object of the treaty is not permissible;
- thirdly, with or without reciprocity, human rights' conventions are treaties, and however great one's defiance of legal voluntarism may be, such mistrust is not appropriate with regard to treaties which are, in essence, voluntary agreements;
- finally, it follows that a reservation can be impermissible (as can be confirmed by the controlling bodies of human rights' treaties on the basis of the Vienna rules even if they do not have the exclusivity of this control), but if so, it is for the reserving State alone to draw the conclusions (as the International Law Commission recalled in paragraph 10 of its preliminary

[310] V. Alain Pellet, deuxième Rapport sur les réserves aux traités, A/CN.4/477 et Add.1, not. pars. 164-260.

> conclusions of 1997[311] which is the only important point from which it diverges from the famous, though excessive, General Comment No. 24(52) of the UN Human Rights Committee).[312]

I must note in passing, however, that the Committee's position, aligned with that of the organs of the European Convention for Human Rights, did not fail to have the negative effects that I dreaded. As a matter of fact, a State, namely Trinidad and Tobago, ended up, as was within its rights, denouncing the Optional Protocol to the 1966 UN Covenant on Civil and Political Rights once the Committee had declared (rightly or wrongly) a reservation that was made by that State to be impermissible while at the same time considering the same State integrally bound by the Protocol.[313] What did not happen in Strasbourg, despite Swiss and Turkish hesitations,[314] as a result of the greater cohesion between European States, did take place at the universal level: Trinidad and Tobago abandoned the idea of obtaining benefit from protection offered by the Protocol for its entire population (including foreigners). A slightly less rigid position on the part of the Committee would (perhaps) have avoided this...

The results of the treaty formula, too slow and often disappointing in their eyes, distress our human rightists, who seek consolation in custom that is meant to "toughen" a law that is seen as too weak, especially if the treaties are not ratified as they should be, according to them, and therefore remain as propositions of norms for the States who do not adhere to them.

This temptation is particularly developed in the American doctrine, which tries to bypass the limited willingness of the United States to ratify human rights' treaties by means of a generalized "customization" of the most risky rules. The drift is so strong that defenders of human rights have begun to worry, whether they are Americans or not, such as Ted Meron in his book (a bit too US oriented for my taste) on *Human Rights and Humanitarian Norms as Customary Law?*[315] Or non Americans, like Bruno Simma and Philip Aiston in the article that they then dedicated to the legal sources of human rights.[316] Both the former and the latter protest strongly

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[311] Rapport de la Commission du Droit international sur les travaux de sa 49ème session, A/52/10, par. 157, p. 107.

[312] General Comment No. 24(52) of 2 November 1994 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, Doc. CCPRIC/2I/Rev.l/ Add.6, reproduced in HRLJ, 1994, p. 464 ff.

[313] *Kennedy* v. *Trinidad and Tobago,* Communication No. 845/1999, 2 November 1999, Doc. *CCPRIC/67/D/845/1999,* reproduced in HRLJ, 2000, p. 18 ff.

[314] See PELLET, Second Report on Reservations to Treaties, *cit. supra* n. 2, para. 230.

[315] Clarendon Press, Oxford, X-213 p.

[316] ALSTON and SIMMA, "The Sources of Human Rights Law: Custom, Jus Cogens and General Principles", Australian Yearbook of International Law, 1992, pp. 82-108; see also SIMMA, "International Human Rights and General International Law: A Comparative Analysis", Recueil des Cours de l'Académie de Droit Européen, 1993, Vol. IV-2, pp. 153-256, espec. p. 213 ff.

against the tendency that consists in blessing with the oil of custom any norm judged to be desirable *ad majorem gloriam* of human rights.

However the problem remains and our authors turn, perhaps too lightly, towards the famous "third source" of international law, the "general principles of law recognized by civilized nations", mentioned in Article 38 of the Statute of the International Court of Justice. But they do not hesitate to profoundly modify the very nature of these principles which, as is generally accepted, must be recognized *inforo domestic* (by the domestic systems of all the States of which they constitute the common basis) and transposable at international level. But that does not suit our friends who know very well that the freedom of expression or of association, for example, not to mention the right to a fair trial, are far from being guaranteed by the laws of very many States (since it seems that all States must be considered to be "civilized" ...). Thus, these authors hold that the principles in question are sufficiently anchored in positive law by the *opinio juris* of which they are declared to be the object, hiding, if need be, behind the authority of the International Court of Justice.[317] We have come full circle: our authors have, in this way, reinvented a custom without practice, or general principles of law without the recognition by domestic systems.

I am not sure that this has helped to further the cause of human rights. What is the use of engaging in this type of "violence" against States that do not want to commit themselves to a treaty (or that only do so after having assured themselves that they will be able to ignore it with impunity), that clearly manifest their opposition to the formation of a general custom, and that carefully refrain from recognizing the laws in question in their internal order?

I am not among those who defend the "relativism" of human rights. Westerners have plenty to blame themselves for without having to invent themselves a bad conscience about human rights. On this point we have something to offer to the rest of the world and I do not think that we should look for an alibi in the vain and paternalistic search for vague traces of human rights' ideology in civilizations (otherwise perfectly estimable) for which they are not a value. But I also think that we need to look in three directions:

- first, we really ought to question ourselves more about the deeper reasons for the marked "indifference outside the industrialized

[317] See SIMMA, *ibidem,* pp. 224-227. Cfr. also FLAUSS, "La protection des droits de l'homme et les sources du droit international'', in Société française pour le droit international, *Colloque de Strasbourg. La protection des droits de l'homme et l'évolution du droit international,* Paris, 1998, pp. 67-71.

world with regard to what we call human rights and which are doubtless only one aspect of them. For if I maintain that we have no lesson to learn with respect to civil and political rights, I fear that we are not very "good" at economic, social and cultural rights. Globalization does not help on this front: the "right to be a man" starts with the right to have enough to eat;

- second, as Mme. Dundes Rentleln wrote: "[i]nstead of chastising nations for violating standards which they have not ratified or which they have but do not care about, the United Nations could condemn them for ignoring their own standards"[318];
- finally, if it is wrong to impose our values on the rest of the world, as we too often tend to do, nothing stops us from trying to convince the world of their validity (and this is where the human rights' activists - but not the lawyers - are irreplaceable).

That leads me to say a few words about the implementation of human rights.[319]

So we do not impose values that do not constitute legal norms since they have not passed into positive law. On the other hand, we make sure, in as finicky a way as the law permits, that the ones that are today recognized as norms by the international community, be respected. Some of these norms have acquired an imperative value so much so that the norms that protect human rights are, without any doubt, the privileged field of *jus cogens*. But here, too, the human rightists seem to me to exceed in their struggle to justify what cannot be justified with the law, and at the same time, paradoxically, to shy away from calling upon the ordinary rules of human rights, or on the contrary, they oddly underestimate the recent progress made by general international law.

For example, I am struck by the indifference and sometimes the hostility that is shown by some human rights' specialists towards the considerable evolution of the notion of "threat to the peace" as outlined by the Security Council since the end of the cold war. No doubt, it is not an absolute novelty: the loathsome apartheid regime had been defined as a threat to the peace ever since 1977[320]. But, for the past decade, the movement has grown and "human tragedies" or "humanitarian catastrophes" such as the ones in Iraqi Kurdistan, Somalia, Rwanda and Sierra Leone, are

[318] RENTLELN, *International Human Rights - Universalism Versus Relativism,* London I New Delhi, 1990, p. 205 (emphasis in the original).

[319] For more detail see Alain Pellet, "La mise en œuvre des normes relatives aux droits de l'homme", note 5, pp. 101-141.

[320] Resolution 418 (1977) of November 4th 1977.

expressly named "threats to the peace" on the grounds of Article 39 of the UN Charter, although they do not seem to seriously threaten international peace (I am not talking about civil peace).

I am fully aware that the system is not without its flaws and that the right of veto - including the threat of using it - is a source of a decried "double-standard". But, as is often the case, "perfection is the enemy of good", and it is not because other situations of humanitarian distress are discreetly forgotten by the Council that these precedents should be despised, since after all, they hold the promise of a truly humanitarian order. It is not because we are wrong not to intervene on ten occasions, that we should refrain from doing so on the eleventh occasion, if it proves to be possible.

And at the risk of shocking some of you, I would go even further and say that the NATO intervention in Kosovo is far from being a model of orthodoxy from a legal point of view. The fact remains, however, that since it is a question of defending human rights, intervention is, in my view, more commendable than the international community's inaction in Srebrenica. It is true that between the Munich principle and the Zorro-style action taken by the member countries of NATO, there is probably a middle course, but we are entitled to prefer Zorro to Daladier or Chamberlain...

That being said, to get back to more technical problems, the human rightists are, without doubt, wrong to underestimate the huge significance of the notion of "international crimes of State", as envisaged in Article 19 of the 1996 International Law Commission Draft Articles on State Responsibility. Of course, the notion is not limited to the protection of human rights, but it constitutes one of the means of fighting against "serious breach(es) on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid", to repeat the terms used in paragraph 3(c) of Article 19. In order for this means to be efficient, serious conclusions still ought to be drawn from the notion of crime, and this is not done in Articles 51 to 53 of the Commission's 1996 draft articles. Instead, these articles neglect to mention the most important effects of crimes pertaining to human rights, especially State transparency, that makes it possible to reach directly, at the penal level, those responsible for the crime despite their role as State organs, as well as the possibility of an *actio popularis*. However, thanks to the straight line of *dictum* by the International Court of Justice in the *Barcelona Traction* case, any State can question the responsibility of the author of a crime, even if it is not the direct victim.

Independently of these extreme cases, the classical rules of international responsibility remain precious with respect to human rights.

This is obviously the case when treaties that guarantee rights do not contain control mechanisms (or if the rights in question are customary in nature). In this case, one can always claim that human rights are "objective", also that international human rights law does not rest on the principle of reciprocity, the only guarantee of their respect depends on traditional interstate mechanisms, and primarily on diplomatic protection, which is unjustly discredited in this respect. It should be reminded that the International Law Commission is currently working on diplomatic protection, thanks to the report by John Dugard - a report whose very respectable inspiration I wholly acknowledge, but in which I could not help finding traces of human rightist overtones. Although the Special "Rapporteur" undertakes to show that, despite its drawbacks, the traditional concept of diplomatic protection can still be useful, he bases this in part on mechanisms pertaining to human rights. Thus, in doing so he deprives both, in my opinion, of their specificity and leaves diplomatic protection *stricto sensu* with only a marginal role.[321]

I believe that this is a mistake. One can, of course, have some reservations about diplomatic protection, which historically has been an instrument of "dollar diplomacy", to use Philip Jessup's expression[322], and of European and North American domination, at the end of the nineteenth century and beginning of the twentieth century, over the then "third world", that is Latin American countries. The fact remains that it can also be an efficient instrument for the protection of human rights (and not only property rights, to which we often tend to confine it).

In a twenty-year-old article, Eric David mentioned the hanging in Iraq of a Dutch citizen accused of spying and noted that this fact (apparently an internationally illegal act) "formerly would have caused an international good standing claim by the Netherlands. Today, such passiveness is a sign of powerlessness. It should come as no surprise that an international claim in its classical sense gives way to the gracious interposition, though today it is sought more than is required". He concludes as follows: "In terms of human rights, diplomatic protection is therefore more important than it was yesterday."[323] It would have if, rather than diluting it in the general mechanisms of protection of human rights, efforts were made both to give it a narrower framework and to use it more advisedly than in the past to obtain compensation for the violation of human rights suffered by the citizens of the State requesting it.

[321] DUGARD, First Report on Diplomatic Protection, UN Doc. A/CN.4/506.
[322] JESSUP, *A Modern Law of Nations,* New York, 1946, p. 96.
[323] "Droits de l'homme et droit humanitaire", *Mélanges Fernand Dehousse,* vol. I, *Les progrès du droit des gens,* Fernand Nathan/Labor, Paris/Bruxelles, 1979, p. 179.

Nevertheless, human rightists are scarcely interested in it, so convinced as they are of the excellence or, in any case, of the superiority of the mechanisms peculiar to the protection of human rights. Obviously, I am quite aware of the profound and generally positive innovation introduced by these mechanisms in the international law of the second half of the twentieth century. However, this makes them neither a panacea nor a radical revolution, for several reasons.

First, even the most sophisticated of these mechanisms are more like reporting systems than compensation or enforcement mechanisms. In this respect they are strongly anchored in international law: the reporting of breaches by the human rights' control organs may be compulsory - though this is not always the case - but it is never enforceable. As Karel Vasak wrote, "there are no institutions of human rights exercising the functions of sanctioning"[324] and the international law of human rights must call upon general international law to ensure its implementation. It is true that all this is rather reminiscent of the parable of the blind man leaning on the cripple and that international law is not renowned for the effectiveness of its means of implementation. The fact remains that it can offer, even if only marginally or/ and imperfectly, "support for enforcement". This is independently of whether the other States call upon the "classical" law of international responsibility - that is to say countermeasures with all the limitations they present or should present - or whether, in the most serious cases, they activate the mechanisms of Chapter VII of the United Nations Charter.

However, in this field as in others, one should try to avoid showing signs of human rightist blindness and avoid rejecting the contribution that general international law can give to the implementation of the international human rights norms. In particular, one should avoid seeing self-contained regimes in control mechanisms, thus dispensing with the need to turn to "good old" international law, where necessary - I mean, quite simply, towards the international law of the international lawyers! But, if some important human rights specialists have pleaded in that direction - first among them I would again cite Bruno Simma[325], and, insofar as French doctrine is concerned, Professor Cohen-Jonathan[326], though often more "rigidly human rightist" others[327] do not hesitate to consider, wrongly, the

[324] "Les institutions internationales de protection et de promotion des droits de l'homme" *in* Karel Vasak dir., *Les dimensions internationales des droits de l'homme,* UNESCO, Paris, 1978, p. 244.

[325] "International Human Rights and General International Law: A Comparative Analysis", *R.C.A.D.E.* 1993, vol. IV-2, pp.106-210 et 235-236.

[326] "Responsabilité pour atteinte aux droits de l'homme" *in* S.F.D.I., Colloque du Mans, *La responsabilité dans le système international,* pp. 131-132.

[327] This seems to be the view of the International Court of Justice: cf. *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), ICJ Reports, 1986, p. 14 ff., p. 134, para. 267. See also Art. 62 of the European Convention on Human Rights.

human rights mechanisms themselves as self-sufficient, thus depriving the international protection of human rights of a contribution which, imperfect as it may be, is at least complementary. Paradoxically, the human rightists join the totalitarian regimes which, like the USSR and its followers, used to take advantage of their adhesion to human rights treaties in order to shield themselves from any other type of external "intervention" in this domain.

However, in so doing, we come back inexorably to two characteristic features of international law: inter-statism and the primacy, not juridical but *de facto,* of domestic law.

We must not fool ourselves with words or illusions. It is certainly excessive to assert that a State is only obliged "à ce qu'il peut, quand il le peut, avec les moyens qu'il peut, conservant toute latitude quant à la mise en œuvre de l'affirmation internationale des droits à laquelle il souscrit, et d'obligations qui ne sont que de lointains résultat et non de moyens".[328] But, as René Cassin himself reminded us (and he cannot be accused of anti human rightism), it is true that "la responsabilité fondamentale de la mise en œuvre des droits de l'homme ... repose avant tout sur l'action de l'État"[329] whose organs are in charge of the everyday application of human rights norms, even when these are defined at the international level. In this field, as in almost all others, the State has the last word; it is the "secular arm" alone that is able to give life to international norms because, in accordance with Michel Virally's famous *dictum,* "l'ordre juridique international est... incomplet: il a besoin du droit interne pour fonctionner".[330]

Furthermore, as John Dugard has clearly shown in a recent study, there is no doubt that human rights are better and more efficiently protected in the States where domestic law offers genuine guarantees, as opposed to those that ratify international conventions and do not respect them even when they accept the control machinery established therein: "while international protective measures are important, it is essential, in the first instance, that municipal law provides legal protection to the rights contained in international human rights conventions".[331]

In his excellent introductory report, made at the 1997 symposium that the *Société française pour le droit international* dedicated to *"La protection des droits de l'homme et l'évolution du droit international",* Jean François Flauss classified into three "sides" the protagonists of the scholarly debate that

[328] Jacques Mourgeon, *Les droits de l'homme,* PUF, Paris, coll. "Que sais-je?'', n° 1728, 5ème éd. 1990, p. 82.
[329] "La Déclaration universelle et la mise en œuvre des droits de l'homme", *R.C.A.D.I.* 1951-II, vol. 79, p. 327.
[330] "Sur un pont aux ânes: les rapports entre droit international et droits internes" *in Mélanges offerts à Henri Rolin,* Pedone, Paris, 1964, p. 498.
[331] "The Role of Human Rights Treaty-Standards in Domestic Law: The Southern African Experience" *in* Philip Alston and J. Crawford eds., *The Future of Human Rights Treaty Monitoring*, 2000, p. 286.

is raging about the difficult (and important) problem of the relationship between general international law and human rights. On one side, there would be what he calls the "fundamentalists" or the "traditionalists" that are striving to preserve the integrity of classical international law. On the other side, the "autonomists" or "secessionists", who "ont tendance à développer une conception messianique de la protection des droits de l'homme en droit international" and who affirm the existence of an autonomous branch of international law. And, between the two, there would be the partisans of a "moderate evolutionism", who underline "que la protection des droits de l'homme gagnerait à s'appuyer davantage sur les règles établies du droit international, à les prendre en considération plus fréquemment" while advocating "dans certaines cas de figure, la particularisation des règles de droit international".[332]

If it is true that I have criticized the tenants of "secessionism" - a term that suits extreme human rightists quite well - and that I am suspicious of too much particularism when it can be avoided, I have nevertheless very little in common (intellectually speaking) with the supporters of internationalist "integrism"; and I certainly do not underestimate the profound innovation that the "human rights revolution" introduced into the classical structure of international law.

I share without reserve the views of analysts who note that human rights have ceased to be the exclusive prerogative of States; that reciprocity, without being excluded from it, plays a lesser role in the international law of human rights than in more traditional fields[333] (but this is also true of environmental law, and has been so, at one time, sadly past, of the international law of development). I also fully admit that today the individual is a subject of public international law and it is in the field of human rights that this tendency is mostly asserted, even if it is not the only area where it manifests itself - whereas, curiously, certain supporters of moderate human rightism seem to have doubts on this point.[334] And regarding this point I would go even further than many: I am convinced that the individual owes his or her international legal personality not (or, at least, no longer) to the recognition of States, but to the simple "objective" fact that he or she exists, which enables him or her to impose his or her rights (certain rights) even in the absence of express recognition.

[332] "La protection des droits de l'homme et les sources du droit international" *in* S.F.D.I., .Colloque de Strasbourg, *La protection des droits de l'homme et l'évolution du droit international,* Pedone, Paris, 1998, pp. 13-14.

[333] See the excellent article by PROVOST, "Reciprocity in Human Rights and Humanitarian Law", BYIL, 1994, p. 383 ff.

[334] See VASAK, "Vers un droit international spécifique des droits de l'homme'', in ID. (ed.), *cit. supra* n. 17, p. 708; granted, these doubts were expressed more than 20 years ago and the parameters of the issue have changed in the meantime.

Conversely, two essential points separate me from the human rightists, or at least from the most extreme amongst them.

On the one hand, I do not at all believe that the international law of human rights constitutes an autonomous branch, even less so a distinct discipline of general international law. It does enrich, "complexifies", and gives it more soul. But it uses the same sources; it resorts to the same techniques; and it runs into the same difficulties, globally. This quarrel over the autonomy of human rights brings to mind the one that separated Colliard and Weil in 1971. To the first one, who vigorously asserted the existence of an international law of economics distinct from general international law, the other would quite rightly reply that "sur le plan scientifique, le droit international économique ne constitue qu'un chapitre parmi d'autres du droit international général".[335] This is also true of the international law of human rights; and if, obviously, nothing prevents lawyers from specializing in the study of one or the other chapter of international law, they should doubtless take care not to cut the branch from the tree - it would die...

On the other hand, I do not at all believe that the breakthrough of human rights into international law puts into question the principle of sovereignty, which to me seems to remain (if defined correctly) a powerful organizing factor of international society and an explanation, always enlightening, of international legal phenomena. Even if we are today more prudent than in the past on this point, some human rights specialists, carried away by their enthusiasm, venture if not to announce the death of sovereignty, then at least to prophesize its "erosion".[336] That is perhaps moving a little too quickly, and I think it is a little premature to sign the death certificate. Firstly because human rights are certainly a wonderful thing, but they are not everything; and moreover, essentially, international law is made up of the clashes between sovereignties. Also, and above all, because even within the field of human rights, sovereignty is ageing well, to say the least.

Even when it is a matter of the most "supra-national" instruments for the protection of human rights, as the European or inter-American conventions or the international labor conventions, the "sovereignty" element remains extremely present. In some cases, there are treaties applicable on the basis of consent by the participating States expressed most classically; in the case of the former, reservations could be applied and there are numerous

[335] "Le droit international économique, mythe ou réalité?" *in* S.F.D.I., colloque d'Orléans, *Aspects du droit international économique,* Pedone, Paris, 1972, p. 34.

[336] Nicolas Valticos, "Droit international dl. travail et souverainetés étatiques", *Mélanges Fernand Dehousse,* vol. 1, *Les progrès du droit des gens,* Fernand Nathan/Labor, Paris/Bruxelles, 1979, p.124.

palliatives for the supposed impossibility to formulate them with respect to International Labor Organization conventions[337]; special dispensations are possible, etc... And this is even truer for the other international instruments for the protection of human rights, often more clearly impregnated with the notion of sovereignty than these all too exemplary examples!

As far as "objectification" is concerned, if it constitutes an indisputable phenomenon, it is far from being radical and well-informed authors, who can hardly be accused of a lukewarm interest in human rights, have quite rightly pointed out that it extends to the enjoyment of human rights but is very limited in terms of exercising these rights.[338] And regarding absence of reciprocity, it is found in all "treaty-laws" *(traités-lois)* - even if not necessarily with the same intensity, though no one would ever claim that they were sounding the death bell of sovereignty.

In 1950, during the elaboration of the European Convention on Human Rights, professor Pierre-Henri Teitgen became irritated with the fact that "la souveraineté de l'État (prétende) se dresser contre la souveraineté du droit". I do not doubt that modern human rightists share this irritation. But it is not obvious that this is a matter for indignation. Sovereignty exists and, as a lawyer, at least, one can do nothing but put up with it. But perhaps we can go even further and maintain that, far from being incompatible, sovereignty and the law are inextricably linked. Sovereignty is power submitted to the law[339], both the foundation and the limit of a State's competence. Looked at in this way, it can constitute a tool for the promotion and protection of human rights; a tool that is at the same time powerful and perfectible. So powerful that lawyers cannot neglect it; so perfectible that human rightists still have plenty to do in order to harness it better than classical international law does. They are applying themselves to it, and rightly so.

Long live human rights! And indeed, when I think of it, long live human rightism! If it contributes, in its way, to their promotion, and if its champions know how to do it, and resist the temptation of presenting political projects - in the most noble sense of the term - as scientific truths.

Thank you.

[337] Alain Pellet, cinquième rapport sur les réserves aux traités, A/CN.4/508/Add.1, pars. 154-161.

[338] Vers un droit international spécifique des droits de l'homme" in K. Vasak dir., Les dimensions internationales des droits de l'homme, UNESCO, Paris, 1978, p. 711.

[339] Recueil des travaux préparatoires de la Convention européenne des droits de l'homme, t. IV, p. 854, note 61.

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Lecture delivered by Judge José Luis Jesus
President of the International Tribunal for the Law of the Sea
Held during the 61st Session of the International Law Comission
Geneva, 15 July 2009

Mr Chairman,
Excellencies,
Distinguished members of the International Law Commission,

Ladies and Gentlemen,

I am very honoured to have been invited to deliver this year's Gilberto Amado Memorial Lecture. Indeed, I feel very proud and humbled to join such a distinguished list of eminent international jurists who, over the years, have delivered memorial lectures in celebration of Gilberto Amado's highly regarded contributions to international law and to the work of the International Law Commission. The life and work of this great Brazilian international lawyer, his talent, his dedication, as well as his solid legal knowledge and thinking are a great inspiration to those of us striving to labour in this field. I take special pride, as a Portuguese speaker, in addressing you today in celebration of his work and his life-long dedication to international law.

I am also very honoured and grateful to all of you for sparing some of your precious time to be here today.

I take this opportunity to thank Ambassador Gilberto Saboia of Brazil for the invitation.

Jurisdiction of the Tribunal

Ladies and Gentlemen,

When I was approached to deliver this lecture, I thought that it would be a good opportunity to talk about some procedural matters that are peculiar to the International Tribunal for the Law of the Sea. I thought this, partly because the Tribunal, as a novel institution, is not well known to the greater public, and partly because I would like to share with you some particular elements of the special and innovative procedures at the Tribunal that represent a development in the procedures of international courts and tribunals. So I decided that today I would seize this occasion and, with your indulgence, this is the way I shall proceed.

Ladies and Gentlemen,

The theme of my presentation is "advisory opinions and urgent proceedings at the Tribunal". As an introduction I will start by giving a brief outline of the overall jurisdiction of the Tribunal.

The International Tribunal for the Law of the Sea[340] is entrusted by the 1982 United Nations Convention on the Law of the Sea (hereinafter "the Convention") with the authority to settle disputes concerning the law of the sea. However, in accordance with the Convention, the Tribunal is not the only court available for that purpose to disputant parties.

To settle law of the sea disputes States may choose, in accordance with article 287 of the Convention, through a written declaration, the Tribunal, the International Court of Justice (ICJ) or arbitration in accordance with annexes VII and VIII of the Convention. If disputant States have not previously made a choice or have not chosen the same means of dispute settlement, arbitration in accordance with Annex VII of the Convention applies as the default compulsory means of dispute settlement.[341] A State wishing to avoid compulsory arbitration should therefore consider making a declaration in accordance with article 287, by choosing other means of dispute settlement.

The compulsory mechanism, as embodied in Part XV, is perhaps one of the most important and innovative features of the Convention dispute-settlement system though its impact is somewhat diluted by the exclusion from it of certain categories of disputes in respect of the rights of the coastal State relating to fisheries and scientific research in its exclusive economic zone (EEZ)[342] and by the possibility for States to opt out of this compulsory

[340] The Tribunal was established by the 1982 United Nations Convention on the Law of the Sea. It is composed of 21 judges and began its activities in October 1996

[341] See article 287, paragraph 3.

[342] See article 297 of the Convention.

mechanism when it is a matter of disputes on delimitation of maritime borders, disputes related to military activities and those that may be under consideration by the Security Council in compliance with its responsibilities under the Charter.[343]

Although, as I have already stated, disputes concerning the law of the sea may be brought to different international courts and tribunals, in accordance with article 287 of the Convention, the International Tribunal for the Law of the Sea has a core competence to deal with all disputes and all applications submitted to it in accordance with the Convention. As an international judicial body with specialized jurisdiction, the Tribunal is particularly positioned to play a major role in the settlement of international law of the sea disputes. This role is enhanced by the fact that the Convention confers on the Tribunal certain functions which are indeed unique in international adjudication.

As is the case of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), the Tribunal has both contentious and advisory jurisdiction. In particular, it has jurisdiction over (a) any dispute concerning the interpretation or application of the provisions of the Convention which is submitted to it in accordance with Part XV;[344] (b) any dispute concerning the interpretation or application of an international agreement related to the purposes of the Convention, which is submitted to it in accordance with the agreement; and [345] (c) any dispute concerning the interpretation or application of a treaty already in force concerning the subject-matter covered by the Convention if all the parties to such a treaty so agree.[346]

The Tribunal, as a full court, has also jurisdiction to entertain requests for advisory opinions, based on a procedure which has no parallel in previous adjudication practice, as we shall see later.[347]

In addition, the Seabed Disputes Chamber, composed of 11 of the 21 judges of the Tribunal, has quasi-exclusive jurisdiction over any disputes related to activities in the Area[348] and has also jurisdiction to entertain any request for advisory opinions related to the legal regime concerning the Area, as embodied in Part XI and related annexes of the Convention and the 1994 New York Agreement on the implementation of Part XI of the Convention.

[343] See article 298 of the Convention.
[344] See articles 288, paragraph 1 of the Convention and Articles 21 and 22 of the Statute of the Tribunal.
[345] See article 288, paragraph 2.
[346] See article 22 of the Statute of the Tribunal.
[347] See article 138 of the Rules of the Tribunal and article 21 of the Statute of the Tribunal.
[348] See articles 187 and 188, paragraphs 1 and 2(a).

The Chamber has quasi-exclusive jurisdiction because disputes over matters covered by the international seabed regime may be entertained only by the Chamber and by no other international court or tribunal, not even by the Tribunal as a full court, with the sole exceptions established in article 188, paragraph 1, whereby disputes between States concerning the interpretation or application of Part XI and related annexes may be submitted, at the request of the parties to the dispute, to a special chamber of the Tribunal or, in the case referred to in article 188, paragraph 2(a), whereby disputes concerning the interpretation or application of a relevant contract or a plan of work are to be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties agree otherwise.

The jurisdiction of the Tribunal *ratione personae* also represents an interesting development of procedural international law. Traditionally, as is known, only States have access to international courts and tribunals. In the case of the International Tribunal for the Law of the Sea, however, there has been a notable development in procedural law in this respect. Apart from States, international organizations may be parties to disputes before the Tribunal and, in the case of its Seabed Disputes Chamber, the International Seabed Authority, its Enterprise or natural and juridical persons or a state enterprise may also be parties to disputes.[349]

This procedural development, broadening the jurisdiction of the Tribunal *ratione personae* in a way that has not been done before, responds to the need to recognize the increasing role of international organizations and to provide the operators and investors involved in deep seabed mining with an international judicial means to settle potential disputes. It is to be noted that article 20, paragraph 2, of the Statute of the Tribunal seems to have gone a step further, admitting the possibility of broadening access to the Tribunal even further when it states that "the Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case".

Having outlined the overall jurisdiction of the Tribunal, today I will concentrate my observations on some aspects of its jurisdiction that are unique, for they mark a noticeable procedural difference between the Tribunal and other courts and tribunals referred to in article 287 of the Convention. These procedures are unique in the sense that, to a certain

[349] See articles 187 and 288 of the Convention and articles 20, paragraph 2, and 37 of the Statute of the Tribunal (Annex VI of the Convention).

extent, they can be entertained only by the Tribunal and by no other forum for the settlement of international disputes referred to in article 287 of the Convention. The focus of my lecture today will therefore be on some features of these unique procedures, namely the procedural novelty of requests for advisory opinions to the Tribunal as a full court; urgent proceedings for the prescription of provisional measures under article 290, paragraph 5, of the Convention; and urgent proceedings for the prompt release of vessels and crews detained for alleged violations of fisheries legislation or for marine pollution.

Advisory Opinions

Since the Permanent Court of International Justice (PCIJ) was set up, the requesting of advisory opinions has been a usual procedure followed and it has played an important role in the development of international law.[350] Together with contentious cases, advisory opinions are nowadays an integral part of the competence of international courts.

The precedent set by the PCIJ in asserting an advisory role for itself and the experience gained since then by that Court and the ICJ were to a great extent followed by the Statute and the Rules of the Tribunal. Indeed, the provisions of the Rules of the PCIJ and ICJ are reflected, with the necessary adaptations, in the Convention, namely in its Annex VI,[351] which contains the Statute of the Tribunal, and in Part XI of the Convention in respect of the jurisdiction of the Seabed Disputes Chamber.[352]

The advisory function of the Tribunal is exercised by the Seabed Disputes Chamber and by the Tribunal as a full court.

The advisory functions of the Seabed Disputes Chamber

The Seabed Disputes Chamber may be requested to deliver an advisory opinion (a) at the request of the Assembly of the International Seabed Authority "on the conformity with [the] Convention of a proposal before the Assembly [of the International Seabed Authority] on any matter";[353] and also (b) at the request of the Assembly or the Council of

[350] The Permanent Court in its 19 years of work issued twenty-seven advisory opinions, making a significant contribution to international law.
[351] See Article 21 of the Statute.
[352] See articles 159, paragraph 10, and 191 of the Convention
[353] See article 159, paragraph 10, of the Convention.

the International Seabed Authority "on legal questions arising within the scope of their activities".[354]

To a certain extent, the procedural mechanisms by which the Seabed Disputes Chamber may be requested to entertain an advisory opinion follow the procedural pattern set for requests for advisory opinions before the PCIJ and ICJ. The decision to request an advisory opinion is to be taken by a collective body, which in the case of the Seabed Chamber is either the Assembly or the Council of the International Seabed Authority. The situation differs, however, with respect to requests for advisory opinions made to the Tribunal as a full court.

Advisory function of the Tribunal as a full court

Apart from the advisory role of the Seabed Disputes Chamber, the Tribunal, as a full court, also has advisory jurisdiction, under article 138 of its Rules. Indeed, article 138 of the Rules indicates that the Tribunal "may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion".[355]

Unlike requests for an advisory opinion to be made to the Seabed Disputes Chamber, requests to the Tribunal for an advisory opinion can be made on the basis of an international agreement. A bilateral or a multilateral agreement seems to be considered an international agreement for this purpose. Presumably such an international agreement may be made between States, between States and international organizations or between international organizations. This is an important procedural innovation which introduces a flexible and fresh approach to the issue of entities entitled to request advisory opinions.

It is worth noting that in all other aspects requests for advisory opinions to the Tribunal as a full court follow the traditional requirements. This means that the request should be of a legal nature and also should be of a general nature. Possibly, it may even address a "legal question, abstract or otherwise" [356] if the jurisprudence of the ICJ is to be followed by the Tribunal in this respect.

[354] Article 191 of the Convention.

[355] The advisory jurisdiction of the Tribunal is based on Rule 138 of the Convention. On the other hand, article 21 of the Statute of the Tribunal does confer on the Tribunal broad jurisdiction, which is also interpreted as providing an advisory function, by stating that "the jurisdiction of the Tribunal comprises all disputes and *all applications* submitted to it and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal".

[356] See ICJ Advisory Opinion on Conditions of Admissibility of a State to Membership in the United Nations.

The Convention does not expressly refer to the advisory role of the Tribunal as a full court. However, article 21 of the Statute of the Tribunal implicitly provides for such role. Indeed, article 138 of the Rules of the Tribunal is based on article 21 of the Statute of the Tribunal, which confers broad jurisdiction when it states that "the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal".

Advisory opinions are non-binding but can play an important role in clarifying the interpretation of the law. Although no request for advisory opinions has so far been made, the advisory function of the Tribunal as a full court may provide a flexible mechanism for those seeking to clarify points of law or legal questions. As States and other users of the Convention seem to differ on the interpretation and application of certain provisions of the Convention and new world events seem to demand a better understanding of the Convention's provisions, requests to the Tribunal for advisory opinions might prove to be a useful tool. They may assist parties in narrowing their differences on a given legal point or question and facilitate the settlement of disputes through negotiations, thus contributing to curb further escalation of conflicts between States. Additionally, bearing in mind the cumbersome system of Review Conference of the Convention and the political difficulties in making recourse to such a Conference, interpretation of certain provisions of the Convention by means of an advisory opinion may be the most appropriate means of clarifying a legal matter arising within the scope of, or related to, the Convention.

An issue that might be raised in the context of the entity which is to transmit the request for an advisory opinion to the Tribunal is the concept of "body" in article 138 of the Rules of the Tribunal. Paragraph 2 of this article states that requests for advisory opinions to the Tribunal as a full court should be transmitted "by whatever body is authorized by or in accordance with the agreement". The concept of "body" here may be subject to different interpretations, bearing in mind the practice of requests for advisory opinions made to the PCIJ and the ICJ. Some may be tempted to equate the word "body" to a "collective body" as a result of the inertia experienced in the past in the other international courts. As I have stated elsewhere regarding "the meaning of the expression "body", it appears that any organ, entity, institution, organization or State that is indicated in such an international agreement as being empowered to request, on behalf of the parties concerned, an advisory opinion of the Tribunal, in

accordance with the terms of the agreement, would be a body within the meaning of article 138, paragraph 2, of the Rules. Since such body is only the conveyor of the request, it seems to be of little relevance to dwell on the nature of such body. Its legitimacy to transmit the request is derived from the authority given to it by the agreement and not by its nature and any other structure or institutional considerations".

I now turn to urgent proceedings.

The Tribunal has simplified procedures for coping in an expeditious manner with specific cases, in accordance with its Statute and the Rules. They are urgent proceedings in the sense that they are dealt with in record time and usually, within a period of less than a month, from the filing of the application to the delivery of the judgment. This seems too good to be true in the nowadays practice of courts and tribunals. The swiftness of action has been a mark of the work of the Tribunal since its inception 12 years ago.

We have in our Rules two types of urgent proceedings: the provisional measures under article 290, paragraph 5, of the Convention; and the prompt release of vessels and crews under article 292 of the Convention. They both fall under the compulsory jurisdiction of the Tribunal. The Tribunal has so far received 15 cases and of them 13 cases[357] have been cases involving urgent proceedings.

I shall first address the urgent proceedings on provisional measures under article 290, paragraph 5. This paragraph states that "Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4".

The provisional measures referred to in this paragraph represent another example of a new procedural development in international adjudication. Before the Convention, no such possibility existed.

[357] The *M/V "SAIGA" Case* (Saint Vincent and the Grenadines v. Guinea); the *M/V "SAIGA" (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea); *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan); the *"Camouco" Case* (Panama v. France); the *"MonteConfurco" Case* (Seychelles v. France); the *"Grand Prince" Case* (Belize v. France); the *"Chaisiri Reefer 2" Case* (Panama v. Yemen); the *MOX Plant Case* (Ireland v. United Kingdom); the *"Volga" Case* (Russian Federation v. Australia); *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore); the *"JunoTrader" Case* (Saint Vincent and the Grenadines v. Guinea-Bissau); the *"Hoshinmaru" Case* (Japan v. Russian Federation); the *"Tomimaru" Case* (Japan v. Russian Federation).

What is new about this procedure that makes it noteworthy? As is well known, usually a tribunal or court, domestic or international, when dealing with a case on the merits can be requested by one of the parties to the dispute to prescribe provisional measures pending the final decision on the case. That is the procedure envisaged in article 290, paragraph 1. However, in the case of provisional measures under article 290, paragraph 5, we are dealing with a different procedure, one that may, as a compulsory procedure, only be brought before the Tribunal. In accordance with article 290, paragraph 5, if the parties have not reached an agreement on a court or tribunal, the Tribunal may be requested by one of the parties - normally the applicant - to prescribe provisional measures to protect the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, even when the Tribunal is not entertaining the case on the merits.

This may be done in the following circumstances: Article 287 of the Convention establishes that "when signing, ratifying or acceding to the Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration […] (a) the International Tribunal for the Law of the Sea […]; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII". If the parties to a dispute have not chosen the same means for dispute settlement, as listed in article 287, then the dispute may be submitted by one of the parties to the arbitral tribunal under Annex VII to the Convention, which is the default procedure under the Convention. Once a party has notified the other party that it is instituting an Annex VII arbitral tribunal to deal with the dispute between them, one of the parties alone may request the Tribunal to prescribe provisional measures under article 290, paragraph 5, pending the constitution of the arbitral tribunal. The Tribunal will entertain the case if it finds that the urgency of such measures is warranted and that the arbitral tribunal has *prima facie* jurisdiction.

This procedure has been included in the Convention to make sure that while the arbitral tribunal is being constituted the rights of the parties to the dispute or the marine environment are not left unprotected. Indeed, whenever arbitral proceedings are instituted, it may take a long time before the arbitral tribunal becomes operative. Therefore this procedure provides an outlet for provisional measures to be prescribed by the Tribunal until the arbitral tribunal is in a position to deal itself with a request for provisional measures, and may affirm, change or revoke the provisional measures eventually prescribed by the Tribunal.

This procedure is another instance of compulsory jurisdiction in the sense that it takes only one of the parties to the dispute to institute the proceedings through an application submitted to the Tribunal and, as a compulsory procedure, it can be entertained only by the Tribunal. The Tribunal has entertained four cases of provisional measures under article 290, paragraph 5 the *Bluefin Tuna Cases*, the *Mox Plant Case* and the *Land Reclamation Case*[358].

It is to be noted that the Statute of the Tribunal introduced yet another new development to international adjudication regarding the nature of the Tribunal's decision on provisional measures by establishing that the Tribunal "prescribes" provisional measures, rather than "indicating" them. The Statute of the Tribunal, by stating that decisions on provisional measures are "prescribed", made it clear that such measures have binding effect. This may have contributed to the recent evolution in the jurisprudence related to the legal effect of provisional measures in other judicial bodies.

Prompt release of vessels and crews

Another type of urgent proceedings is the procedure for the prompt release of vessels and crews. It is also a novel procedure established by the Convention. This is a further instance in which the Tribunal may be called upon to entertain a case submitted to it based on compulsory jurisdiction.

The prompt release procedure is established in article 292, which states that "[w]here the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of [the] Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining state under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree". This provision enables a flag State or an entity acting on its behalf to request the Tribunal to set a bond it considers reasonable and order the prompt release of a vessel and its crew detained by the

[358] Proceedings relating to the request for provisional measures in the *M/V "SAIGA" (No. 2) Case* were also instituted on the basis of article 290, paragraph 5, of the Convention. Further to an agreement between the parties to submit the case to the Tribunal, the case was then dealt with by the Tribunal under article 290, paragraph 1, of the Convention.

authorities of a State Party for alleged violation of its fisheries legislation (article 73, paragraph 2) or for having caused marine pollution (articles 220, paragraph 7, and 226, paragraph (1)(b)).

It is to be emphasised that the prompt release procedure is a special one that, when based on compulsory jurisdiction, may only be instituted before the Tribunal in cases, as stated before, of detention of vessels and crew for alleged violation of fisheries legislation of the detaining State and for marine pollution or environmental damage. The prompt release procedure cannot be used in cases of detention or arrest of vessels and crew for other reasons.

An application for the release of vessel and crew may be submitted to the Tribunal by the flag State alone when it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security.[359] According to the jurisprudence of the Tribunal, failure to comply with the provisions of the Convention for prompt release (article 73, paragraph 2) applies to situations: (1) when it has not been possible to post a bond; (2) when a bond has been rejected by the detaining State; (3) when the posting of a bond or other guarantee is not provided for in the coastal State's legislation; or (4) when the flag State alleges that the required bond is unreasonable.

It is interesting to note that, as established in article 292, paragraph 2 of the Convention, in prompt release cases the flag State may authorize in writing and through the competent authorities, a private person to institute prompt release proceedings before the Tribunal and to act on its behalf. Several applicant States have made use of this option in past cases entertained by the Tribunal.

Another interesting feature of this procedure is that, unless the case is dismissed on the grounds of lack of jurisdiction or inadmissibility, the outcome of the case will normally be the immediate release of vessel and crew, subject to the posting of the reasonable bond or other financial security as determined by the Tribunal.

The Tribunal has entertained nine cases involving the prompt release of vessels and crew submitted to it by States or on their behalf, following the detention of a fishing vessel for alleged violation of fishing laws in the exclusive economic zone of a coastal State. These applications

[359] The jurisdiction of the Tribunal in prompt release cases is established when all the following conditions have been observed: (1) both disputant States are Parties to the Convention (art. 292); (2) the applicant is the flag State of the arrested vessel (art. 292); (3) the case of release has not been submitted to another court or tribunal in the 10 days following the detention (art. 292); (4) the vessel or crew are still detained for alleged fisheries violation; (5) no bond or other guarantee has been posted; and (6) articles 110 and 111 of the Rules of the Tribunal have been observed.

made on the basis of article 73 of the Convention have provided the Tribunal with the opportunity to develop what is now well-established jurisprudence. The Tribunal, however, has not as yet received any application for prompt release of vessels and crews detained for alleged marine pollution offences or environmental damage under article 220, paragraph 7, or 226 (1)(b).

One of the reasons that may explain why States have not so far had recourse to prompt release of vessels and crew in situations of detention of vessels and crew for marine pollution might be the lack of information on this possibility, having in mind the complex and convoluted manner in which these provisions are drafted.

Although these provisions do not refer expressly to the crew members of detained vessels, they are to be included in the prompt release procedures since they are part of the vessel as a unit. It is to be noted in this regard that the Convention, as stated in the Virginia Commentary on the Convention "does not authorize the imprisonment of any person; at most it permits the detention of the crew along with the vessel, but with prompt release procedures such as bonding or other appropriate financial security".

The Tribunal is the body that ultimately determines the reasonableness of the bond and, once it has determined the amount of the bond or other guarantee it considers to be reasonable, it then orders the release of the detained vessel and crew upon the posting of the bond or guarantee.[360]

This procedure may be used by flag States and ship owners to avoid that their detained vessels remain idle for long periods of time while a decision on the merits by the competent domestic court is awaited. It also provides a mechanism for swift release of crew members from detention that may otherwise last for long periods.

This brings an end to my presentation. I hope I have not worn you out with so many details of our procedures at the Tribunal. For me, it has been a great pleasure to address you on these issues.

I thank you for your attention.

[360] In the jurisprudence of the Tribunal the following factors have been taken into account for the determination of the reasonableness of the bond: (1) the gravity of alleged offences; (2) the penalties imposed or imposable; (3) the value of the vessel; (4) and the amount of the bond imposed by the detaining State and its form.

THE SCOPE OF CONSENT AS A BASIS OF THE AUTHORITY OF THE AWARD OF THE INTERNATIONAL COURT OF JUSTICE

Lecture delivered on 19 July 2011
at Geneva by Professor Leonardo Nemer Caldeira Brant
Professor at Law School at the University of Minas Gerais
President of the Center of International Law – Cedin
Director of the Brazilian Yearbook of International Law
Jurist at the International Court of Justice (2003)

Mr. President.

Mr. Ambassador, Excellencies, Ladies and Gentlemen, Dear Friends and Members of the International Law Commission.

I first want to thank the Hon. Ambassador Gilberto Saboia for the invitation. Thank you. I am indeed honored to be here tonight. First, for the admiration I have for the work of the International Law Commission and also for the friendship I have with some of you. And equally for the dignity and the highest intellectual quality of my predecessors. Finally, as a Brazilian, I feel especially happy to be part of this beautiful tribute to Amado, one of the most famous intellectual of my country.

Gilberto Amado has had an extraordinary career. He was born in Sergipe in northeastern Brazil in the late nineteenth century. He was a pacifist, a free thinker, a skilled diplomat and a great jurist. The lecture given in 1987 by Judge Sette Camara and J. A. A. Cançado Trindade, right here, within the International Law Commission already allows us to understand the scope of the contribution of Amado in the development of international law, as well the greatness of his thought.

But Amado was also a great poet. As such he belongs to the deepest tradition of Brazilian diplomacy that saw the coming forth of master wordsmiths such as João Cabral de Melo Neto, Raul Bopp, Aluízio de Azevedo, Guimarães Rosa, Domicio da Gama, Jose Guilherme Merquior and Vinicius de Moraes. And it is the latter, the great poet who composed

the famous Garota de Ipanema, who also in the '50s wrote a beautiful poem in honor of Gilberto Amado. He summarizes in the simplicity of poetry, the density of this great intellectual internationalist.

Let me read it:

Poem for Amado
(Vinicius de Moraes)

The man who thinks
He has a huge head
He has a head that thinks
Full of torment.
The man who thinks
He brings us into his thoughts
Winds deemed
That come from the sources.
The man who thinks
Clear thoughts
His face is blank
of resentment.
His face thinks
His hand writes
His hand prescribes
The future.
To the man who thinks
Pure thoughts
The day is heavy
The night is light:
Of the man who thinks
Thinks only of what he must do
And must do only what he thinks.

Okay, so I return to my subject :

Indeed, it is important to understand the scope of consent as the basis of the authority of the International Court of Justice. For this we must recognize first and foremost, that in light of a traditional distinction, domestic and international legal systems have many qualities which are intrinsic to each of them. Thus, without going into details, we must note in

a preliminary and general way that domestic law is based on a legal system whereby a Constitution regulates judicial activity which in turn defines its limits. Based on this principle the rule of law states that any dispute may be decided by a competent court. Judicial action is not dependent on the consent of all parties to the dispute. Consequently the authority of the judicial act is rooted in the Constitution of the State.

The question then is how to recognize the authority of scattered and uncertain rulings in the quest of the right to equality, when coordination is decentralized in nature, as is the case with international law. After all, international law was born essentially as an area of law 'without judges', in which the intervention of a court having jurisdiction to make decisions with competent authority is far more the exception than the rule.

In fact, without seeking to deepen the tumultuous history of mandatory justice which were seeking some of the drafters of the PCIJ Statute, it must be noted that this is exactly following such rejection that were confirmed the fundamental principle that the consent of States in dispute is the basis of international jurisdiction. That said, the right of settling international disputes is still based on this assumption.[361] By this we mean that, unlike the situation of individuals in domestic courts, States are subject to the jurisdiction of the Court for a given case only if such States agree. As emphasized in the PCIJ in its advisory opinion on the Status of Eastern Carelia, "it is well established in international law that no State can be compelled to submit its disputes with other States either to mediation or to arbitration, or to any method of peaceful settlement, without consent".[362]

In fact, the need for consent of the State parties for a court to exercise its contentious jurisdiction has been repeated systematically and categorically by the two world courts on numerous occasions. Thus, in the case of *Rights of Minorities in Upper Silesia*, the Court noted that the jurisdiction of the Court depends on the willingness of the Parties.[363] In the case of *Monetary Gold Removed from Rome in 1943*, the Court stated that it may only exercise jurisdiction in respect of a State with the consent of the latter.[364] Similarly, in the case of the *Continental Shelf of the Aegean Sea*, the Court noted that an ex officio examination of the existence of such consent is even more imperative when one party fails to appear or to

[361] S. Rosenne, 'The World Court What It Is and How It Works', Oceana, New York, 1963, pp. 32-33.
[362] P. Daillier, A. Pellet, 'Droit International Public', LGDJ, Paris, 2009, p. 857.
[363] See *Droits des minorités en Haute-Silésie*, C.P.J.I., Série A, n° 15, p. 22. See also the case of *l'Usine de Chorzow*, arrêt sur le fond, C.P.I.J., Série A, n° 17, pp. 37-38.
[364] C.I.J., Rec. 1954. p. 32.

defend its case.[365] The ICJ reiterated in its judgment of June 30th 1995, in the *East Timor case*, that it cannot decide a dispute between two states without them having consented to its jurisdiction.[366] The same was said by the Court more recently in the case of the 2008 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination between Georgia and Russia*.[367]

This means that, with the exception of the request for interpretation or revision of a judgment of the ICJ, the judicial function is essentially voluntary.[368]

In fact, giving such consent, states accept by the same token the judgment. The link between the authority of decisions of the ICJ and the consent is thus well established. As a result of the consent of the parties in dispute, the international court will produce a normative judicial act of a final and binding nature whose effects will be extended to the parties as requested. It is there, it seems, the content of the maxim "*res inter alios judicata aliis neque nocet prodest*" underlying Article 59 of the Statute which provides that "the decision of the Court of Justice is mandatory only for the litigants for which the case was decided." This is also the ultimate goal of Article 36 of the Statute of the ICJ, that is to say, to prevent affecting the rights of third parties without their consent. This is the undeniable reality of international law.

But we can question what really is the scope of consent as the basis of the authority of a judgement of the ICJ?

The very existence of international jurisdiction already manifests itself in the need for cooperation in maintaining peace and legal certainty. Should the authority of the judicial act not be seen as a reflection of a collective interest? From this perspective, the question is therefore how distant from the international tribunal are independent sovereign states, that is to say, where does the authority of the jurisdiction begin and where do the formal requirements for the establishment of the jurisdiction end, regardless of the will of the parties (A). On the other hand, one cannot deny the extension of certain authority of the award of the Court vis-à-vis third party countries whose interests are affected or affected by the decision (B). The decisions of the Court may also have *de facto* authority on third party States in the future (C). The jurisprudence of the Court may also produce effects beyond the parties to the extent that it serves as inspiration for the evolution of international law or even when it reveals the true meaning

[365] C.I.J., Rec. 1978, p. 9.
[366] C.I.J., Rec. 1995, p. 101.
[367] C.I.J., Rec. 2008.
[368] See decision of December 10th 1985, Rec. 1985, p. 216

or interpretation of an international standard (D). Finally, there are also debates about *the erga omnes* nature of certain judicial decisions (E).

I. The limits of consent as the basis of the authority of the decision of the ICJ posed by judicial nature of the Court

First, we cannot accept that the basis of law should be found only in the law itself. There is no "pure law" that disregards the interests and movements of the community in which it exists. This means that the authority of decisions of the ICJ is not only a response to a legal issue which required consent, but such authority also serves a social purpose of stability and harmony. The international award can thereby not be understood exclusively as a contractually based principle of *pacta sunt servanda*. It is rather a full judicial act that demonstrates the affirmation of the superiority of the court as a manifestation of the judicial organization of the international community. As stated by M. Virally, "every legal order gives the recipients of these rights norms and legal powers that they cannot be assigned without such order, it imposes obligations which binds them. Thus, any legal order affirms itself as superior to his subjects, or it is not".[369]

Thus, one can ask the question as to how far, in practice, the states really control the establishment of jurisdiction. The limitations on amendments or retirement of a consent which is given in relation[370] to the power of the ICJ to analyze its own jurisdiction, pursuant to Article 36, § 6, of the Statute, may demonstrate in practice, that the authority of the court often exceeds the immediate intent manifested by States? Freedom of the ICJ to analyze the nuances of consent by establishing its own jurisdiction, often to the detriment of the interpretation of the State concerned, may cause a succession of acts clearly dictated by the rules in the Statute and the regulations it establishes in accordance with what is provided under Article 30 of the Statute and leads to a decision which is binding and final.

This situation is relatively common and creates the possibility for states to raise preliminary objections to jurisdiction and admissibility. Nothing is more revealing thus of the authority of the jurisdiction as States may formally object to the interpretation given to the scope of their own consent. Examples of this disagreement are very common. But there

[369] M. Virally, 'Sur un pont aux ânes : les rapports entre droit international et droit interne', *Mélanges offerts à Henri Rolin*, Pédone, Paris, 1964, p. 497.
[370] See Nicaragua (jurisdiction and admissibility) par : 63-65.

are situations such as the case concerning the *Diplomatic and Consular American Staff in Tehran*, or the case concerning *Maritime Delimitation 1 July 1994 between Qatar and Bahrain*, or even in the case of the *Shared border between Nicaragua and Honduras*, where the Court has shown a very wide discretion. In these cases, we may even wonder if "the Court had truly respected a bona fide intention of either party to the proceeding; keeping in mind that such respect is indispensable to observe the consensual basis of its competence".[371]

However, the issue is not limited only to the power of the Court to determine its own jurisdiction and the scope of consent. In fact, if consent can be clear and result from an express declaration contained in a prior formal agreement, it can also be presumed from the analysis of any "conclusive act"[372], particularly the behavior of the respondent State after referral to the Court. In fact, neither the Statute nor the Rules require that consent be expressed in a specific form. The Court "never alleged that consent must always be express, let alone that it obeys a given form. Indeed, in relations between states, it is reasonable to accept tacit consent, and the validity, under certain circumstances, of a presumption of consent". Here, the application by the Court of the principle of *forum prorogatum*.

This means that, despite some precedents - such as the ones which indicate that submitting arguments on the merits without raising the issue of lack of jurisdiction is clearly a recognition of the court's jurisdiction - the appreciation of the attitude of a given state as a manifestation of consent is subjective to the Court and the defendant is not entitled to return under the principle of good faith or estoppel. This means that statements made by agents of the parties can be seen by the Court as an indication of the factual situation, but can also be considered to have a normative and binding effect. The examples abound as demonstrated by the *Mavrommatis* case and more recently the case of the *Islands Kasikili Seduku and LaGrand.*

Thus, one can easily recognize that the international court manifests a certain balance between the parties' wishes and the authority of the court in extending a binding effect and finality of an international judgement. In other words, in international law the court ruling does not necessarily express the vision of the parties but is largely external to it. As a result, once the consent is established by the Court, the State party to an international dispute cannot rely on its sovereignty to escape the obligations that international law imposes in such case. In recognizing its willingness to resort to a judicial determination for the peaceful settlement of a dispute,

[371] P. M. Dupuy, *Droit international public*, 4th ed, Dalloz, Paris, p. 486.
[372] *Rights of Minorities in Upper Silesia*, C.P.J.I., Série A, nº 12, 1928, p. 23.

the states stand *ipso facto* under the rule of law rules that dominates the international trial, limiting sovereignty and imposing certain obligations.[373] Ultimately, although the authority of the award is subject to consent, its scope does not depend on the acceptance or receipt of such.

But that's not all.

II. The power of the authority of a sentence in relation to third party States which are affected by the decision of the Court

The Court reiterated often, as in the *Territorial and Maritime Dispute case between Nicaragua and Colombia* in 2011[374] that its judgment is binding only on the parties. Of course, the link between consent and authority of the award allows the parties to use or to protect themselves from the effect of the jurisdictional issue. Consequently, it creates a relation that can neither harm nor benefit third parties. Relativity of the jurisdictional issue to the parties who have consented has a double purpose. First, this seeks to define what has to be executed and which parties act. Then appears a mechanism for protecting the interests of third parties which cannot be bound by the result of a proceeding to which they were not obliged to participate.[375]

Indeed, if this conclusion is simple, facts can pose many difficulties as the relationship between the Parties and third party States may be quite variable. To better establish the boundaries the Court needs to identify third parties in a proceeding that have a legal interest which constitutes "the very object of the decision" from those whose legal interests are likely to be "affected" by a decision of the Court. In the first instance, consent is required for the Court to decide. However, according to the Court, the interests of others are already preserved by Article 59 of the Statute. As such, third party States which may be "touched or affected" by a decision of the Court cannot prevent the Court to rule without their consent but have the power to intervene in the debates, as indicated by articles 62 and 63 of the Statutes of the Court.

The starting point of this Court's jurisprudence can be found in the case of *Monetary Gold Removed from Rome in 1943*.[376] This case began with a motion introduced by Italy against France, the UK and the United States

[373] E. Zoller, La bonne foi en droit international public, Pédone, Paris, 1977, p. 123.
[374] C.I.J., Doc 2011. Liste général, par: 66-67.
[375] According to Charles Rousseau, such relativity appears from two points of view, the first, *a priori* and the second, *a posteriori*. C. Rousseau, 'Le règlement arbitral et judiciaire et les Etats tiers', Problèmes de droit des gens, Mélanges offerts à Henri Rolin, Pédone, Paris, 1964, p.301.
[376] C.I.J., Rec. 1954, pp.9ss.

of America[377]. Thus, when the Court recognized that the legal interests of Albania, which was not a party, would not only be affected by a decision, but constitute the very subject of that decision[378], concluded that "the Statute cannot be considered as implicitly authorizing the continuation of proceedings in the absence of Albania"[379]. The Court has had the same thought in the June 30, 1995 judgment in the East Timor case that pitted Portugal to Australia. In this case, Portugal criticized Australia for having signed the treaty with Indonesia's "Timor Gap". The Court recognized that it cannot decide without the consent of Indonesia because this issue would necessarily "the very purpose of its decision".[380]

The real significance of the *Monetary Gold* principle is that it reveals the complexity of this paradox. First, the Court should decline its own jurisdiction if, by adhering to the terms in which the dispute was referred to him, it was asked to rule - expressly or implicitly - on rights, legal claims or on obligations of States against which it has no power to judge, since the consensual basis is lacking.[381]

The dark side of this case law implies, of course, that the Court may well be called upon to rule indirectly on the legal position of a third party State because it ruled on the parties. The Court accepts the distinction between the legal interests of third party countries which do not constitute affected parties however they may be subjected to the decision. In this case the Court could exercise its function.

There are several examples. In the *Border Dispute (Burkina Faso/Mali)* the Court found that "the jurisdiction of the Court is not limited simply because the end point of the border lies on the border of a third party State which is not party to the proceeding. The rights of the neighboring State, Niger, are according to the Court, safeguarded by the operation of section 59 of the Statute". As to whether consideration related to safeguarding the interests of the third party State concerned should cause the Court to refrain from exercising its jurisdiction to determine where to draw the end of the line, would imply, according to the Court, that "the legal interests of that State would not only be affected by the decision but would form the subject of the decision. This is not the case here".[382]

But ultimately what will be the weight or authority of its decision vis-à-vis third parties? I am talking about the rights and obligations in

[377] C.I.J., Rec. 1954, p. 33.
[378] C.I.J., Rec. 1954, pp.19 ss.
[379] C.I.J., Rec 1954, p.32.
[380] C.I.J., Rec. 1995, p.102.
[381] Giuseppe Sperduti, 'L'intervention de l'Etat tiers dans le procès international: une nouvelle orientation', A.F.D.I., 1986, p.291.
[382] C.I.J., Rec.1986, pp. 547ss.

whole or in part belonging to a same number of states, some parties and other third parties to the proceeding. In this case one cannot deny that a judgment of the Court on the rights and obligations of the parties would have been, if not formally, at least materially, a judgment on the rights and obligations of third party States. The impact of the decision will necessarily exceed that of the parties.

There are already classic examples of this. In 1986, the Court did not hesitate to settle the question of whether an armed attack by Nicaragua against one of three countries (Honduras, El Salvador, Costa Rica) had really existed and, therefore, one of them had the right to act in self defense. In fact, when the Court answered the question of whether the action of Nicaragua by supporting rebel forces in El Salvador was a form of armed attack, it was hard not to notice some infringement on the rights of El Salvador as the Court refrained from resolving a dispute that had not been submitted. The Court even pointed out, "that it is undeniable that the right of El Salvador was affected by the decision of the Court"[383]

The case concerning *Certain Phosphate Lands in Nauru*, is even more remarkable. In the case Australia observed that the trusteeship agreement signed within the framework of the UN in 1947, provided that the three governments of the United Kingdom, New Zealand and Australia were jointly responsible for administering the territory of Nauru. Therefore, Australia supported the admissibility of the claims of Nauru and the incompetence of the Court "as any judgment on the issue of violation of the trusteeship agreement involved the responsibility of third party States which have not consented to the jurisdiction of the Court in this proceeding."[384] The Court rejected the objection raised by Australia, reaffirming that "you do not need to decide on the responsibility of New Zealand and the UK to decide on that of Australia"[385]. In this case, the interests of both states are not the subject of the decision to be made on the merits of Nauru's application and the situation in this respect differs from that which the Court has seen in the case of *Monetary Gold*. Ultimately, in this case, the legal interests of third party states would be merely affected but would not constitute the very purpose of the decision, which would allow the Court to exercise its function.[386]

We clearly see that the Court reserves *res judicata* to the parties. But that does not mean that the decision would not have a very wide

[383] C.I.J., Rec. 1986, p.36.
[384] C.I.J., Rec. 1992, pp. 250-260.
[385] C.I.J.,Rec. 1992, pp. 259-261.
[386] B. Conforti, 'L'arrêt de la Cour Internationale de Justice dans l'affaire de *Certaines terres à phosphates à Nauru* (Exceptions préliminaires)', A.F.D.I., 1992, p. 471.

margin of authority vis-à-vis the third parties who are affected. The proof can be seen in the fact that, after failing in the preliminary phase of this trial, the Australian Government, apparently preferring to avert any risk of losing the case before the Court, contributed more than $ 100 million to Nauru in exchange for settling the procedure.[387] Obviously, although cases of withdrawal are common, this settlement presents an interesting aspect: Britain and New Zealand, which were associated with Australia with respect to the facts claimed by Nauru, participated in Financing the transaction between Australia and Nauru. These arrangements illustrate that the guarantee under Article 59 of the Statute, as well as that offered by the *Monetary Gold* principle, appear, therefore, both formal.

III. The Court's decisions can have a *de facto* authority on third party States as they may interpret the multilateral conventions

Indeed, a new problem arises when the Court's decisions have such authority that they can condition and *de facto* be binding on third party States in the future. I think first of all of Court decisions interpreting multilateral conventions. Certainly, as noted by the Court: "We do not see why states could not ask of it to give an interpretation of a convention it seems rather that this is one of the most important functions it can fulfill"[388] . But, what is the authority of a judicial award rendered in a dispute between two Contracting States, vis-à-vis other parties? The problem arises where it is necessary to determine the binding effect of a declaratory judgment following an abstract interpretation of a multilateral treaty with respect to those signatories who have not exercised their right to intervene in the trial. Would such declaratory judgment be left for them as *res inter alios acta*? Or should we attribute to such a judgment greater application?[389]

Faced with this stalemate, the stance taken by scholars is divided. On the one hand, George Seals uses the incorporation of the interpretation of the rule of law to justify acceptance of the extension of the authority of the sentence, irrespective of the signatory.[390] On the other hand, the rule

[387] Jean-Marc Thouvenin, "L'arrêt de la C.I.J. du 30 juin 1995 rendu dans l'affaire du *Timor oriental* (Portugal c. Australie)", A.F.D.I., 1995, p. 334.

[388] Affaire des *Intérêts allemands en l'Haute-Silésie polonaise*, C.P.J.I. Série A, n° 7, pp. 18-19.

[389] N. Scandamis, Le jugement déclaratoire entre Etats; La séparabilité du contentieux international, Pédone, Paris, 1975, p. 289.

[390] According to him : 'Si l'arrêt international aboutit à l'interprétation abstraite d'une règle de droit positif [...] conventionnel, l'on doit admettre que cette interprétation objective s'incorpore à la règle de droit puisqu'il ne peut pas y avoir ou qu'il n'y a pas interprétation législative'. Georges Scelle, Principes de droit public, Cours D.E.S., Paris, 1942-43, p. 244.

supported by Article 59 of the Statute of the Court is that - for the other signatories - the award between the parties is a *res inter alios acta*.

We are now faced with a difficult problem that can be summarized by an equation which is somewhat paradoxical[391]. "If the judicial sentence between States A and B, which gives rise to the interpretation of a treaty to which these states did not agree, should be regarded by other Contracting States as *res inter alios acta*, the Treaty may have the same meaning for all contracting parties, and the same article would be interpreted perhaps by two contracting parties in a direction diametrically opposed to the interpretation given by the other two". "If, however, we consider that the judicial sentence must have legal authority vis-à-vis all States which were parties to the treaty, an interpretation requested by two parties can be binding on all other contracting parties. In this case, they could claim they had no effect on the procedure that has just been completed, or that they needed no judicial interpretation since they were of agreement between themselves on the meaning of the provisions that resulted in the litigation of their co-contractors"[392]. In other words, as they have not collaborated in a way to modify the Treaty, any interpretation cannot have an effect on them.

This conclusion does not eliminate the problem. Sometimes a request for interpretation of a convention arises between a State (which was already party in an earlier dispute which interpreted the same convention) and another co-signatory of the Convention (which was not party to the dispute above), or it may occur that following a decision related to the interpretation of a convention, that two other co-signatories (who were not party to the dispute before) decide to go to the international court to re-apply the same interpretation for same convention, or, it may finally occur that a dispute arises between two States on the interpretation of a convention and that two or more other states have agreed between them on such convention, but in a separate and distinct manner.

Of course, in all these cases, if the third party country does not agree with the decision of the Court and it has arguments of fact or law to support a different position, nothing precludes it to go before an arbitration tribunal or the Court itself. It is clear that the *res judicata* of the first decision cannot be extended to such new demand, notwithstanding the identity of the parties.

However, the *de facto* authority of the previous decision is so conclusive that it is hard to see how an international court can interpret in

[391] J. Limburg, 'L'autorité de la chose jugée des décisions des juridictions internationales', R.C.A.D.I., vol. 30, 1929, p. 551.

[392] J. Limburg, 'L'autorité de la chose jugée des décisions des juridictions internationales', R.C.A.D.I., vol. 30, 1929, p. 551.

two distinct ways a convention simply following a change of parties. We would therefore see the conclusions of the first judgment weigh heavily in the balance or come to a contradiction between the decisions if the second decision is contrary to the first[393]. We can conclude then that the *de facto* authority of a previous decision goes far beyond a simple clarification of the law. A social need more than ever is to increase the authority of the earlier decision without requiring the international court to follow it strictly.

The Court's case law clearly demonstrates this possible problem. I see for example - in the case concerning B*order and Transborder Armed Actions (Nicaragua and Honduras), Jurisdiction and Admissibility*[394] - the impact on the relations of other state parties to the Pact of Bogota's interpretation of the Court's Article XXXI which allows the Court to exercise jurisdiction. The same article may be the basis of new requests made to the Court. In the case concerning *Elettronica Sicula SPA*[395], the Court analyzes and interprets the Articles III, V and VII of the *Treaty of Friendship, Commerce, and Navigation (FCN)* between the United States and Italy as well the Article I of the supplementary agreement[396]. However, these legal provisions have consistently been reaffirmed in numerous treaties with similar characteristics and were ratified by the United States with different parties[397]. Indeed, the ICJ has had the opportunity to analyze and interpret various provisions of the (FCN) Treaties in the case concerning the *Aerial Incident of 3 July 1988*[398], in the case concerning *Military and Paramilitary Nicaragua*[399] and in the case of *Oil Platforms (Islamic Republic of Iran c. United States of America) (Preliminary Exception)*[400].

There is finally another important example. In the case *concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide* of 1996 Bosnia and Herzegovina based its claim against the Former Yugoslavia on the basis of Article IX of the Convention on Genocide. The Court accepted its arguments and deemed itself competent

[393] J. Salmon, 'Autorité des prononcés de la Cour internationale de La Haye', Arguments d'autorité et arguments de raison en droit, Nemesis, Bruxelles, 1988, p.33.

[394] C.I.J., Rec. 1988, pp. 69-107.

[395] C.I.J., Rec. 1989, pp. 15-82.

[396] C.I.J., Rec. 1989, pp. 48-49.

[397] Sixteen such intruments have been entered into by the United Statesnamely with Germany, China, Iran, etc. Patrick Juillard, L'arrêt de la Cour Internationale de Justice (Chambre) du 20 juillet 1989 dans l'affaire de *L'Elettronica Sicula* (Etats-Unis c. Italie) procès sur un traité ou procès d'un traité' ?, A.F.D.I., 1989, pp. 288-289.

[398] G. Guyomar, 'L'ordonnance du 13 décembre 1989 dans l'affaire de *l'Incidente aérien du 3 juillet 1988*, Iran c. Etats-Unis', A.F.D.I., 1990, pp. 390-394.

[399] Fred L. Morison, 'Treaties as a Source of Jurisdiction Especially in U.S. Practice', 'The International Court of Justice at crossroads', Lori-F. Damrosch, Transnational publishers, New York, 1987, p. 65.

[400] L'affaire des *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique) (exception préliminaire),* C.I.J. Rec. 1997, §§. 12-16.

on that basis. The Court even managed to reaffirm its position following a decision in the matter of the *application for review of the judgment of July 11, 1996*. However, the Court in a case requested by Serbia and Montenegro against eight NATO member states decided on the same point in a manner quite different. Indeed, in eight decisions of December 15, 2004 the Court did not recognize itself competent based on the same provisions of the 1948 Convention.[401]

What is important here is not only recognizing the Court's capacity to judge differently similar applications. This is the basis of Article 59 of the Statute. The interesting element here is to note that seven judges in a declaration annexed to the judgment criticized severely the Court's position.[402]

IV. The authority of the decision of the ICJ can go beyond the parties and the cases which are decided as it may reveal or inspire the formation of international law

So a new question arises. Does the authority of the decision of the ICJ go beyond the parties and the cases decided since it may reveal or inspire the formation of international law.[403]

Article 38 § 1 (d) of the ICJ Statute provides for the non binding nature of previous judicial decisions and, therefore, their use as subsidiary means for determining the rules of law. This formal interpretation is entirely consistent with what is provided in Article 59 of the Statute of the ICJ and is in contrast at first sight with the idea that an international award can have an authority that can go beyond the parties and what is decided in the case. Thus, states have delegated to the Court the sole power to declare law[404], because they feared that the precedent created by the Court would have too much influence on the development of international law.

However, the Court has clearly recognized, as noted by Fitzmaurice, that its decisions must be seen as "Authority, but not necessarily as authoritative"[405]. The question, as the Court points out in Nigeria's preliminary objections in the case of *land and maritime borders of 1998*, is to

[401] A. Pellet, The Statute of the International Court of Justice, A commentary: Article 38. Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Oxford University Press, p. 786.
[402] A. Pellet, The Statute of the International Court of Justice, A commentary: Article 38. Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Oxford University Press, p. 786.
[403] A. Boyle et C. Chinkin, 'The making of International Law', 268, 2007.
[404] Comme le remarque la C.I.J. dans l'affaire du *Cameroun Septentrional*, exceptions préliminaires, 'la fonction de la Cour est de dire le droit', C.I.J., Rec. 1963, pp. 33-34.
[405] G.Fitzmaurice, 'The Law and Procedure of the International Court of Justice', vol.I, p. xxxii, note 22.

know for what reason it should not follow its previous reasoning[406]. Here, the Court's attempted to systematically and exhaustively recall its own previous statements on the same points of law, to demonstrate consistency, continuity in its jurisprudence[407] and harmony in the development of international law. In fact, reference to its own jurisprudence has become a marked characteristic of the practice of the two Courts[408]. Recent examples where we can see this is the case of *Kasikili Sedudu 1999* where the Court referred to seven previous cases only to show that the practice of the parties after the establishment of treaties must be seen as important in its interpretation[409]. Similarly, in the Court's advisory opinion *on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[410], the Court made 28 cross-references to previous decisions.[411]

This shows that despite the fact that the Court considers the circumstances which may give different solutions because of the circumstances, we cannot deny the force of precedent in the formation of international law. But that's not all. In fact, how to react when the sentence of the Court is a developing agent of international law?

In reality, already in the Advisory Committee of Legal Experts which prepared the draft Statute of the PCIJ[412], the question of whether judicial decisions declare existing law or if they help create international law was raised and the solution found did not hide certain ambivalence.[413]

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406 C.I.J., Rec 1998, pp. 275-292.

407 G. Abi-Saab, 'De la Jurisprudence, quelques réflexions sur son rôle dans le développement du droit international', 'Hacia un NuevoOrden International y Europeo', Estudios en Homaje al Profesor Don Manuel Diez de Velasco, Tecnos, Madrid, 1993, p. 24.

408 S. Bastid, 'La jurisprudence de la Cour internationale de Justice', R.C.A.D.I., vol. I, 1951, p.631. G. Scelle, 'Les sources des diverses branches du droit, Essais sur les sources formelles du droit international', *in* Recueil d'études sur les sources du droit en l'honneur de François Gény, Paris, 1934, III, p. 427. H. Lauterpacht, 'The Development of International Law by the International Court', Stevens and Sons, Londres, 1959, p. 15. Julio A.Barberis, 'La Jurisprudencia Internacional como Fuente de Derecho de Gentes Segun la Corte de la Haya', ZoV, vol. 31, 1971, pp. 641-670. S. Rosenne, 'The Law and the Practice of the International Court', Martinus Nijhoff, La Haye, 1997, pp. 231-232. Ainsi, des l'affaire *Mavrommatis* C.P.J.I., série A, n°2, p. 16, la C.P.J.I. fait appel à son avis consultatif du 7 février 1923 dans l'affaire du *Décret de nationalité promulgué en Tunisie et au Maroc* (C.P.J.I., série B, n°4, p. 12). Dans l'avis consultatif *Ecole minoritaire en Albanie*, la C.P.J.I. fait référence à son avis consultatif n° 7 et son avis consultatif n°6 (C.P.J.I., série A/B, n°64, p. 20). Dans l'affaire de la *Compagnie d'Electricité de Sophie et Bulgarie*, la Cour insiste sur ce qu'elle avait déjà dit dans l'affaire du *Phosphate du Maroc* (C.P.J.I., série A/B n°77, p. 82). Dans l'affaire de la *réparation des dommages subis au service des Nations Unies*, la C.I.J. reconnaît le ' *implied power'* et ancre sa constatation sur le fait que la C.P.J.I. l'avait déjà considéré dans son avis consultatif n°13 (C.P.J.I., série B, n°13, p. 18). Dans l'avis consultatif *relatif à la compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies*, la Cour incorpore ce qu'elle avait déjà dit dans l'affaire du *Service postal polonais.* C.I.J. Rec.1950, p. 8. Dans l'affaire *Relative à certains emprunts norvégiens*, la Cour fonde sa décision sur la jurisprudence de la C.P.J.I. (C.I.J.,Rec.1957, pp. 23-24).

409 C.I.J. Rec. 1999, pp. 1045-1076.

410 C.I.J., Rec. 2004, pp. 135, 154-156.

411 A. Pellet, The Statute of the International Court of Justice, A commentary: Article 38. Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Oxford University Press, p. 785.

412 'Under the historical proposal as made by Baron Descamps in the Advisory Committee of Jurists, the judge in the solution of international disputes was to consider, *inter alia*, international jurisprudence as a means for the application and development of law.' M. Bos, 'A Methodologie of International Law', North Holand, Amsterdam, 1984, pp.75-76. C.P.J.I., Comité consultatif des juristes, Procès-Verbaux des Séances du Comité, 16 juin -24 juillet 1920, avec annexes, La Haye, 1920, pp. 673-695.

413 M. Shahabuddeen, ' Precedent in the World Court', Grotius Publications, Cambridge, 1996, p. 48.

The Court normally chooses between normative possibilities. But it does not decline to exercise its power to determine because of the silence or obscurity of the law. That said, it can also interpret the meaning of international standards, although it cannot revise them[414]. As such there is no doubt that the Court must contribute to the development of international law[415] as this has already been recognized by the General Assembly since 1947.

However, "the solution of a case, especially in international law, has profound implications; the proposed concepts will take on an almost legislative value despite all the legal explanations to the effect an award is law only between the parties"[416]. In reality the distinction between the concepts of progressive development (which theoretically should fill the silence of law and respect the nature of the *inter partes* decision) and the legislative exercise of the Court is so narrow that they can be confused as deemed appropriate under the circumstances[417]. The reason is that the decision of the Court may have, in certain circumstances, a *de facto* authority that goes beyond either party.

The Court is not insensitive to these arguments. The decision in the case of the *Applicability of the Convention on the Prevention and Punishment of the Crime of Genocide* is clear. The Court determines that the applicant's intention, (...) is not to obtain an indication that the defendant must take some steps to safeguard the rights of the claimant, but rather that the Court should make such a statement of rights involved and that such declaration "would clarify the legal situation for the entire international community"[418]. Indeed, in its judgment in the case of the *Continental Shelf in the Aegean Sea*, the ICJ explicitly admitted that despite Article 59 of its Statute, its reasoning and legal conclusions may be invoked directly in the relationship between third party countries. Thus, for the Court: it is obvious that any ruling on the status of the 1928 Act by which the Court would declare that it is or is not an enforceable agreement would influence the relations of States other than Greece and Turkey.[419]

In reality the authority of the sentence of the Court vis-à-vis third parties can have a progressive approach. Indeed, although the Court avoids making reference to some legislative capacity, it "does not hesitate, when it deems

[414] C.I.J. Rec. 1966, par. 91.
[415] A. Pellet, 'Shaping the Future of International Law: The Role of the World Court in Law-Making, in Looking to the Future': 'Essays on International Law in Honor of W. Michael Reisman', pp. 1065-1083.
[416] Opinion du Juge Azevedo dans l'affaire du *Droit d'asile.* C.I.J., Rec.1950, p. 332.
[417] W. M. Reisman, 'Judge Shigeru Oda: Reflections on the formation of a Judge', in *Liber Amicorum* Judge Shigeru Oda, 2002, p.66.
[418] C.I.J. Rec. 1993, pp. 325-344.
[419] C.I.J., Rec. 2004, pp. 135, 154-156.

it necessary, to interfere in the process of its development, in completing, in solidifying, or in preventing or slowing down change already in progress"[420]. That said, it is no longer about demonstrating the link between a sentence and a previous decision, but to verify that, notwithstanding section 59 of the Statute of the Court and the need to stay within a certain legal construction, some decisions already classics will become paramount in the formation of international law and have an authority that goes well beyond the parties and the cases decided. The play of words between the legislative exercise and progressive development of law thus appears as a purely cosmetic protection.

This is so true that in the *Mavrommatis and the PCIJ Chorzow Factory* the ICJ developed basic principles of tort law. The advisory opinion on *Reparation for Injuries Suffered in Service of the United Nations* finally recognized the legal personality of international organizations. The Advisory Opinion on *Reservations to the Genocide Convention* has been a challenge to the rules applicable to reservations in multilateral treaties. The case of the *Continental Shelf of the North Sea* was also behind the rules concerning the continental shelf. The case concerning *Maritime Delimitation in the Black Sea* also served to define the stages in the process of delimitation of continental shelves or exclusive economic zones or even the design of a simple boundary. The *Fisheries* case, contains important statements about the rules of international law relating to coastal waters. The proof can be found in the speed with which the pronouncements of the Court have been transposed to the Geneva Convention of 1958[421].

From another perspective, this shows that the award of the ICJ may be an independent authority of consent, as case law formulas can be taken over by main sources of international law and thus contribute decisively to the creation of standards which are mandatory in nature, this can be achieved through other means. Here are other examples which are quite important. The concept of using the object and purpose of the treaty as a criterion of validity of reservations contained in Article 19 paragraph c of the Vienna Convention of 1969 was intended by the Court opinion on reservations to the Convention for Punishment of the Crime of Genocide. Article 74, paragraph 1 and Article 83, paragraph 1, of the United Nations Convention on the Law of the Sea provides the principle of equitable outcome to be achieved by the continental shelf or exclusive economic zone. This was strongly inspired by the decision of the Court in the continental shelf of the North Sea in 1969.

[420] A. Pellet, 'L'adaptation Du droit international aux besoins changeants de la société internationale', Conférence inaugurale session de droit international public, Académie de Droit International de la Haye, 2007, p. 44.

[421] M. Shahabuddeen, 'Precedent in the World Court', Grotius Publications, Cambridge, 1996, p.209. H.Thierry, 'L'évolution du droit international', R.C.A.D.I., vol.222, 1990, p. 42.

But the contrary is also possible. The Court can recognize with the authority of a sentence the influence of codification of international law and contribute to its formation. The most striking example can be observed when the Court refers to the ILC's work while they have not yet gone through a codification conference and acceptance by States is lacking. This was the case with the judgment of the Court in the *Gabcikovo Nagymaros* 1997. In that case the Court specifically mentions several times the draft article of the ILC on state responsibility when it was only in its first reading. Indeed the final adoption of the text did not occur until 2001. This is not the only example. One can also cite references to the judgment of Diallo in 2007 (preliminary)[422] and in the draft articles adopted on second reading with regards to diplomatic protection.

The relationship between the Court and the ILC is thus very suitable. Indeed, if the Commission is not a legislator, it is often used an intermediary. That said, for the ILC it is very positive to see the transformation that the Court may operate by reference to its work. The Court is also very convenient to hide behind the work of the ILC to establish the existence of a legal rule when it seems appropriate to him[423]. From the work of the Commission the Court may find a formula to justify its decision as an expression of international law, and comply with the requirements under Article 38 of its Statute. In other words the decision of the Court based on the work of the ILC can be recognized as the expression of a law whose authority obviously goes well beyond the parties.

This means that the contradiction between the power of the Court to declare the existing law and its alleged incompetence to create it, is illusory. Although the Court is not a body with legislative powers, as it demonstrated in its Advisory Opinion of 8 July 1996 on the *Legality of the Use of Nuclear Weapons*. The Court "states the existing law and does not legislate. This is true even if the Court, in stating and applying the law, necessarily has to specify the scope and sometimes note general evolutions"[424]. No doubt about it. However, nothing prevents it from interpreting the rules and principles of international law[425] and, as it can refrain from judging the grounds of the insufficiency or obscurity of positive law, it must also fill the gaps.

[422] C.I.J. Rec. 2007, par 39-93.

[423] A. Pellet, 'L'adaptation du droit international aux besoins changeants de la société internationale', *R.C.A.D.I.* 2007, tome 329, Nijhoff, Leiden/Boston 2008, pp. 9-47.

[424] L'avis consultatif du 8 juillet 1996, *Licéité de la menace ou de l'emploi d'armes nucléaires*, C.I.J. Rec. 1996, p. 237.

[425] Luigi Condorelli, 'L'autorité de la décision des juridictions internationales permanentes', La juridiction internationale permanente, Colloque de Lyon, S.F.D.I., Pédone, Paris, 1987, p. 307.

Such skill opens a new perspective. Indeed, case law may have a much broader role in the formation of international law when the Court outlines and explains the contents of an international custom or when it interprets a rule of general international law. In these cases it says what it means by international law and sheds light on the meaning of formal sources[426]. Thus, the authority of the Court's decision may go beyond the parties as it does not follow precedent, but that such decision demonstrates the significance and highlights a customary rule.

As such, it may happen that when the Court decides in accordance with an earlier decision, it does not necessarily thereby recognize the binding nature of a similar decision or enforce the rule of *stare decisis* in international law. In fact, the Court merely judges in accordance with international law. That is to say, according to what is provided in Article 38 of its Statute. This means that in some cases, the authority of precedent is virtually mandatory for future disputes, because these decisions are the expression of international law.[427]

V. The *de facto erga omnes* authority of a decision of the International Court of Justice

The title here is necessarily exaggerated, but ultimately how can we draw a demarcation of a land or sea border bilaterally while maintaining the interests of third party States? The Court responds that uncertainties related to a triple point should continue to be determined by the position occupied by separate parties and third party States in the judicial procedure. In such cases the Court frequently refers back to *Continental Shelf* (request from Italy to intervene) case, and says that "when a state believes that its interest are in a dispute, it can under the terms of Article 62, either submit a request to intervene by use of procedural means or refrain from taking action and rely on the Article 59"[428].

Of course, as the said by the Court in the case of *Burkina Faso and the Republic of Mali*, the intervention is not mandatory[429]. As such the intervening State who chooses not to become a party and, therefore, does not acquire the rights and is not subject to the obligations that are attached to the sentence[430]. But ultimately, if the protection

[426] W.Jenks, 'The Prospects of International Adjudication', Stevens and Sons, Londres, 1964, p. 671.
[427] M. Shahabuddeen, 'Precedent in the World Court', Grotius Publications, Cambridge, 1996, p. 109.
[428] C.I.J., Rec.1984, p.26.
[429] C.I.J., Rec. 1986, par.46.
[430] C.I.J., Rec. 1990, pp. 134-136.

of third parties is ensured by virtue of section 59, one may wonder what safeguards an intervention's effectiveness[431]. "There may be situations whereby Article 59 of the Statute imperfectly protects the interests of the State, given the nature of the rights involved and the possible consequences of the decision of the Court. There are indeed circumstances where the Court decision could cause irreparable prejudice to a third party State"[432]. Indeed, the declaratory nature of judgments of the Court, conclusions and the legal grounds on which a decision is made inevitably can have an impact on future relations especially when there is a triple point of land or sea[433]. Doubt may be cast on the coexistence between sections 59 and 62 of the Statute of the Court. In fact, if Article 59 provides sufficient protection to third party States and if the protection it gives limits any impact on the rights of third party States, than Article 62 has no use, nor any application.

The dilemma of the Court is even more sophisticated when it comes to exceptional circumstances or in practice the adage res inter *alios acta* cannot be admitted as a formulation outrageous or excessive corollary of a general principle of law[434]. It is in international law, as law, objective nature of decisions that apply to all legal entities of the international community[435]. Indeed, although in general, international law does not know the distinction between decisions '*in personam*' and decisions '*in rem*'[436], it is certain that the decisions on the territorial sovereignty of a State or on the delimitation of maritime or land border between two States - in such case should not draw distinctions between the two[437], - there may be exceptions (de facto) on the relativity of the judicial decision[438].

The reason is simple. Territorial status, is presented in international relations as an objective situation against all and having an effect '*erga omnes*'[439]. Indeed, "sovereign rights to speak up against only a portion is very similar to a contradiction in terms"[440]. The reality is that the judgment

[431] E. Decaux, 'L'arrêt de la Cour internationale de Justice sur la requête à fin d'intervention dans l'affaire du *Plateau continental* entre la Libye et Malte', A.F.D.I., 1985, p. 282.
[432] C.I.J., Rec. 1984, pp. 46-47.
[433] CR 81/4, p. 10.
[434] H.Rolin, ` Les principes du droit international public', R.C.A.D.I., vol. 77, 1950, p.437.
[435] G.Scelle, 'Essai sur les sources formelles du droit international', Mélanges Geny, Paris, 1935, p.426.
[436] 'There are two separate and distinct types of judicial decisions; one, the ordinary type which purports to determine the rights, liabilities and interests only of the parties litigant, and the other the kind which, though incidentally affecting the immediate parties, has for its primary object the final determination of the status of person or thing, and which therefore is conclusive upon the world at large. Decisions of the former class are usually termed decisions *in personam*, or *inter partes*, while those of the later are known as decisions *in rem*'. S. Bower and Turner, 'The Doctrine of *Res Judica*ta', Butterworths, Londres, 1969, p.198.
[437] L'affaire entre le Cameroun et le Nigeria (intervention de la Guinée Equatorial). C.I.J. Rec. 2002, par. 238.
[438] C.P.J.I., Série C, n°66, p.2794.
[439] C. de Visscher, 'La chose jugée devant la Cour internationale de la Haye', R.B.D.I., 1965-1, p.9.
[440] R. Jennings, Opinion dissidente dans l'affaire du *Plateau continental*, (requête de l'Italie à fin d'intervention).

of the Court, in a case of delimitation, directly or indirectly creates an objective situation that is reflected on a map and on the ground[441]. In other words, a decision determining the boundaries of a State or a boundary line in a continental shelf may exceptionally be binding (de facto) for third party States due to an element of stability and permanence whereby one cannot challenge the legal route of a border without touching its territory[442]. Indeed, it is unclear how the determination by the Court of The Hague of the land or sea border between two states could be of interest to others, since they have no independent right to enforce[443].

But, considering that legal interest exists, as is the case of setting a triple point, we must recognize the limits of Article 59. Finally, how can one argue that delimitation of the continental shelf areas is a purely bilateral issue in an area of intersecting and overlapping rights and of a plurality of island and coastal states in narrow maritime areas![444]

Proof that in these cases the authority of the award of the Court may go well beyond the parties and can still be found in changing the law of the Court. Indeed, in the case of 1986 on the land borders between *Burkina Faso and Mali*, the Court decided to refer to Article 59 to say that this judgment will not be opposable to Niger. However this use of backup offered by Article 59 of the Statute was abandoned in the 2005 judgment between *Benin and Niger*. Thus the current case law does not define precisely the triple point while indicating a direction to the border. Thus leaving the precise location of the triple point as undetermined the Court hopes to protect the best interests of third party states. The same hesitation can be found on maritime delimitation. The Court has noted this in several recent cases including the one between Qatar and Bahrain and between Romania and Ukraine.[445]

It can be concluded that the judicial delimitation of land and sea borders is an inherent element of stability and permanence[446]. A judgment may create an indisputable fact at the political level. The idea that state sovereignty is objective in nature and undeniable, and therefore, can be opposed not only to a states immediate neighbors, but also to other members of the international community, is a reasonable consequence of the recognition that territorial sovereignty is *erga omnes*.

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[441] Plaidoirie dans l'affaire du *Plateau continental*, C.R. 1984/6, p.62.

[442] C.I.J. Rec. 1978, par. 85

[443] J. Salmon, 'Autorité des prononcés de la Cour internationale de La Haye', Arguments d'autorité et arguments de raison en droit, Nemesis, Bruxelles, 1988, p.3

[444] C.R. 1984/6, p.68.

[445] Affaire du plateau continental (Tunisie / Jamahiriya arabe libyenne), CIJ Rec. 1982, p. 91, Affaire du Plateau continental (Jamahiriya arabe libyenne / Malte), requête à fin d'intervention, CIJ, Rec. 1984, p. 27, Affaire du plateau continental (Jamahiriya arabe libyenne / Malte), CIJ Rec. 1985, p. 26-28; Affaire de la Frontière terrestre et maritime entre le Cameroun et le Nigéria (Guinée équatoriale intervenant), CIJ Rec. 2002, par. 238, 245.

[446] C.I.J.Rec.1978, p.36.

We must not confuse the authority (de facto) vis-à-vis third party States and the authority of *res judicata*. The two ideas are distinct and the second does not flow from the first[447]. The essential point is that a judgment can have real authority vis-à-vis the international community and go beyond the limits of consent, but, whatever its subject, it will have no finality with respect to third parties.

In fact, expanding the scope of res *judicata* would mean that no state, whether a party to the proceeding or third party, will never again discuss the case already decided. This conclusion is not acceptable. Indeed, how could international law admit that the judgment on a particular point may imposed on all parties at trial and that, in such case, when a third party, on the occasion of a dispute, wants bring forth an issue previously tried in his absence would be hampered by *res judicata*?

The conclusion is that the authority of a Court decision is not to be confused with the exception of *res judicata*. It is not to challenge the finality of the decision vis-à-vis the parties, but to demonstrate that the idea that consent is the sole basis of the authority of the award - can be broken by a *de facto* authority that can go beyond the will shown by States.

Thank you very much.

[447] E. Grisel, '*Res judicata*: l'autorité de la chose jugée en droit international', Mélanges Georges Perrin, Payot, Lausanne, 1984, pp.156-157.

Conférences Commémoratives
Gilberto Amado

In memoriam:
Ambassadeur Carlos Calero Rodrigues,
Membre de la CDI (1982-1996).

Présentation de la première édition

La Fondation Alexandre de Gusmão (FUNAG), du Ministère des Relations Extérieures du Brésil, publie ce livre comme une contribution au programme commémoratif du cinquantenaire de la Commission du Droit International des Nations Unies.

La série de conférences qui rendent hommage à l'illustre juriste brésilien Gilberto Amado a été inaugurée en 1972. Tous les textes présentés depuis lors et jusqu'en 1996 (à l'exception de l'année 1985) sont réunis dans ce volume et reproduits dans leur langue originale.

Avril 1998.

Les conférences ont été données par:

S.E. M. Eduardo Jiménez de Aréchaga, juge à la Cour international de Justice, le 15 juin 1972;

Le professeur Constantin Eustathiades, de l'Université d'Athènes, le 11 juillet 1973;

S.E. M. Manfred Lachs, président de la Cour internationale de Justice, le 11 juin 1975;

S.E. Sir Humphrey Waldock, juge à la Cour internationale de Justice, le 3 juin 1976;

S.E. M.Taslim O. Elias, juge à la Cour internationale de Justice, le 7 juin 1978;

S.E. M. Geraldo Eulalio do Nascimento e Silva, ambassadeur du Brésil en Autriche et représentant permanent auprès de l'Office des Nations Unies à Vienne, le 3 juin 1983;

Le professeur Georges Abi-Saab, de l'Institut universitaire des hautes études internationales de Genève, le 20 juin 1985;*

* Il n'existe pas de texte écrit.

S.E. M. José Sette Câmara, juge à la Cour internationale de Justice et ancien ambassadeur de Brésil, le 16 juin 1987;

Le professeur Cançado Trindade, conseiller juridique du Ministère des Relations Extérieures du Brésil, le 16 juin 1987;

M. Carl-August Fleischhauer, secrétaire général adjoint aux affaires juridiques, conseiller juridique de l'Organisation des Nations Unies, le 14 juin 1989;

S.E. M. Francisco Resek, Ministre des Relations Extérieures du Brésil, le 2 juillet 1991;

Le professeur Lucius Caflisch, jurisconsulte, Département fédéral des affaires étrangères, Berne, le 2 juin 1993;

S.E.M. Celso Lafer, ancien Ministre des Relations Extérieures du Brésil, Ambassadeur et Représentant permanent du Brésil auprès de l'OMC et de l'Office des Nations à Genève, le 18 juin 1996;

Le professeur Alain Pellet, de l'Université de Paris X-Nanterre, le 18 juillet 2000;

S.E.M. José Luis Jesus, juge au Tribunal International du Droit de la mer, le 15 juillet 2009;

Le professeur Leonardo Nemer Caldeira Brant, de l'Université de Minas Gerais, le 19 juillet 2011.

Les opinions exprimées dans le présent texte sont celles de l'auteur et ne reflètent pas nécessairement celles de l'Organisation des Nations Unies.

Sommaire

Les Conventions de Codification non Ratifiées

Le Droit et le Règlement Pacifique des Differends

Quelques Aspects de la Compétence Consultative de la Cour Internationale de Justice

La Cour Internationale de Justice et l'Indication de Mesures Conservatoires

L'influence de la Science et de la Technique sur le Droit International

Cent Ans de Plenitude

Le Système de Règlement des Différends Internationaux de l'Organisation Mondiale du Commerce

"Droits-de-l'Hommisme" et Droit International

Tribunal International du Droit de la Mer

La Portée du Consentement comme Fondement de l'Autorité de la Sentence de la Cour Internationale de Justice

Préface à la seconde édition

Gilberto Vergne Saboia, Président de la Fondation Alexandre de Gusmão, Membre de la Commission du Droit International

C'est un honneur pour moi de présenter cette seconde édition des discours de la Conférence commémorative Gilberto Amado. Je le fait à titre de président de la Fondation Alexandre de Gusmão, auquel je renoncerai bientôt, et à titre de membre de la Commission du droit international.

L'édition originale de ces conférences, publiée dans deux langues, a été très demande et est épuisée. Cette nouvelle édition inclut également les textes de trois conférences prononcées respectivement par le professeur Alain Pellet ("Droits-de-L'Hommisme" et "Droit International''); le juge José Luis Jesus, Président du Tribunal international du droit de la mer, (''Avis consultatifs et les procédures d'urgence devant le Tribunal''), 2009, et le professeur Leonardo Nemer Caldeira Brant ("La portée du consentement comme fondement de l'autorité de la sentence de la Cour internationale de Justice"), 2011.

L'objectif du gouvernement brésilien dans le parrainage des conférences, avec l'approbation d'une résolution de l'Assemblée générale, était à la fois de rappeler la contribution de Gilberto Amado dans l'élaboration et l'établissement de la Commission, en collaboration avec les autres juristes éminents qui composaient le "Comité des dix-sept", et de souligner son engagement au droit international en tant que fondement des relations stables et pacifiques entre les nations, et au renforcement de la primauté du droit conformément aux les buts et principes de la Charte des Nations Unies.

De nombreuses années se sont écoulées depuis que le juge Jiménez de Aréchaga de la CIJ a prononcé la première conférence en 1972. Ceux

qui étaient contemporains de Gilberto Amado s'entendent pour dire que, c'est grâce à son intelligence lucide et à sa forte personnalité, ajoutées à son grand sens de l'humour, bien plus que sa grande compréhension du droit international, que Amado était en mesure de laisser son empreinte sur les travaux de la Commission, en contribuant à équilibre entre la doctrine juridique et la politique de l'État qui est si vital au succès et à la pertinence de la CDI.

Parmi les nombreuses citations qui figurent dans certaines des conférences données par ses contemporains, il y en a deux qui semblent tout aussi pertinentes aujourd'hui qu'autrefois. Conscient du point de vue des États, Amado a dit une fois à la Commission de ne pas proposer des textes qui pourraient contraindre les États lorsqu'ils sont réunis en conférence à conclure'' (...) ''des conventions que la Commission avait rédigées pour eux''. À une autre occasion, toutefois, il a déclaré: ''nous n'avons pas le droit de fermer les yeux aux réalités ... à une époque où le présent nous fuit et l'avenir nous guête''[1]. La tension entre *lege lata* et *lex ferenda* est une caractéristique permanente du travail de la CDI.

Il est intéressant de remarquer également que la plupart des conférences demeurent pertinentes, malgré le passage du temps, non seulement pour leur contenu doctrinal, mais parce que souvent elles se sont avérées importantes pour des sujets qui sont traités actuellement par la CDI.

Je me réfère, par exemple, à la conférence donnée par le professeur Constantin Eustathiades, en 1973, sur les ''Conventions de codification non ratifiées'' qui pourrait être utile lorsque la Commission commence l'examen du thème ''Formation et preuve du droit international coutumier''. La même chose pourrait être dite au sujet de la conférence de l'ambassadeur Geraldo Eulálio Nascimento e Silva sur ''L'influence de la Science et de la technologie sur le droit international'' (1983) à la fois rétrospective sur le sujet des aquifères transfrontières et prospective sur la question de ''La protection de l'atmosphère'' . L'importante question du règlement pacifique des différends, à laquelle la Commission doit se référer de temps à autre, a fait l'objet de diverses conférences qui ont examiné le sujet sous différents angles, notamment, Lucius Caflisch, en prenant une vue plus large, et le professeur Celso Lafer en examinant le système de règlement des différends de l'OMC.

Enfin, le travail de règlement des différends a été examiné dans plusieurs conférences qui restent pertinentes. Lors de la derniére

[1] Cité par M. Manfred Lanchs, Président de la CIJ, dans la conférence donnée le 11 Juin 1975, sur "Le droit et le règlement pacifique des différends".

conférence, le professeur Leonardo Nemer Caldeira Brant a pris l'initiative plus audacieuse de regarder l'impact des arrêts de la CIJ au-delà des parties qui ont expressément consenti à soumettre leur différend à la Cour.

J'espère que cette nouvelle édition des Conférences commémoratives continuera d'être utile à tous ceux intéressés à faire avancer la compréhension du droit international et sera encore plus utile pour aider à résoudre pacifiquement et de manière constructive les grands défis de notre monde actuel.

LES AMENDEMENTS AU RÈGLEMENT DE LA COUR INTERNATIONALE DE JUSTICE

Conférence prononcée le 15 juin 1972
par S.E. M. Eduardo Jiménez de Aréchaga
Juge à la Cour Internationale de Justice

Avant-Propos

Il ne manque pas de personnes bien plus qualifiées que moi pour inaugurer les conférences commémoratives Gilberto Amado. Cependant, lorsque j'ai été invité à le faire, je n'ai pu résister à la tentation d'accepter, car j'ai toujours éprouvé une profonde admiration et un grand respect pour l'homme qu'il fut et nous avions noué des liens d'amitié solides au cours des dix années pendant lesquelles j'ai eu le privilège de travailler à ses côtés à la Commission du Droit International.

D'autre part, Gilberto Amado méritait réellement qu'on lui rende l'hommage d'associer son nom à cette série de conférences sur le droit international. Il était, vous le savez, un juriste éminent, qui pendant plus de vingt ans fit partie de la Commission du Droit International et représenta le Brésil à la Sixième Commission de l'Assemblée générale et à la plupart des conférences de codification. Il s'est donc trouvé dans une situation unique pour apporter une contribution hors pair non seulement aux travaux effectifs de la Commission du Droit International, mais encore à sa création en 1947, puis au couronnement de ses efforts dans la codification et le développement progressif de cette partie du droit. La Commission, dont il est devenu le doyen vénéré et l'un des membres les plus influents, a été au centre de ses préoccupations pendant les vingt dernières années de sa vie féconde et elle était pour lui un objet de fierté personnelle.

Si Gilberto Amado se considérait lui-même avant tout comme un spécialiste du droit international, il était bien davantage: doué d'une très

forte personnalité, il était poète et homme de lettres et comptait parmi les écrivains distingués de son pays. Ceux qui peuvent en juger reconnaîtront que, par son oeuvre littéraire et en particulier par son autobiographie, il a apporté une contribution originale et durable à l'enrichissement de la littérature et de la langue du Brésil et du Portugal.

Amado était doué aussi d'un sens de l'humour très original et assez caustique: ses remarques spirituelles témoignaient d'un esprit pénétrant et c'est pourquoi bien des mots de lui sont restés mémorables. Nombreuses sont les soirées réunissant des membres de la Commission du Droit International ou de la Sixième Commission qui se sont achevées sur l'évocation de mots et d'anecdotes de Gilberto Amado, qu'il fût lui-même présent ou non. À un moment, j'avais accumulé un si vaste répertoire "d'amadiana" que Sir Humphrey Waldock m'a suggéré de devenir le Boswell de ce Dr Johnson brésilien.

Je n'en rappellerai qu'un seul exemple, pour illustrer la place qu'il occupait au sein de la Commission. Un membre récemment élu vint aux premières séances les bras chargés de manuels et de monographies et nous fit de longs discours savants, bourrés de citations. Gilberto Amado y mit un terme par une remarque dont l'intention n'échappa pas à ce nouveau membre mal inspiré: "à la Commission, il ne faut pas étudier; il faut savoir".

Les amendements au règlement de la Cour internationale de Justice

Quand, en 1967, la Cour entreprit de réviser son Règlement, elle voulut d'abord réviser systématiquement l'ensemble de ce texte, considéré comme un tout homogène.

Mais en 1972, la Cour renonça à la révision complète qu'elle avait mise en train et décida de ne modifier que certains articles du Règlement existant.

Les conseils de spécialistes autorisés des travaux de la Cour ont compté parmi les raisons qui ont déterminé ce changement de conception. En 1970, d'anciens juges de la Cour, d'anciens juges *ad hoc* et des spécialistes du droit international qui avaient plaidé devant la Cour dans trois affaires au moins ont été invités à donner leur avis sur la révision du Règlement dans le cadre du Statut.

On a pu constater, parmi les opinions reçues, un accord remarquable sur les aspects du Règlement qui appelaient des modifications d'urgence. La majorité des avis reçus coïncidait sur les points suivants. Il fallait:

1. faciliter le recours aux chambres de la Cour et octroyer aux parties une certaine influence sur la composition des chambres *ad hoc* instituées en vertu de l'article 26, paragraphe 2 du Statut;
2. accélérer et simplifier la procédure, tant contentieuse que consultative, et exercer un meilleur contrôle sur la procédure orale;
3. règlementer les exceptions préliminaires, afin de statuer dès que possible à leur sujet et d'éviter les délais et les frais qu'entraîne

une double discussion des mêmes questions, d'abord pendant la phase préliminaire puis lors de l'examen de la question quant au fond.

Toujours en 1970, l'Assemblée générale des Nations Unies, par sa résolution 2723 (XXV), a invité les États membres et les États parties au Statut à présenter des observations et des suggestions relatives au rôle de la Cour sur la base d'un questionnaire établi par le Secrétaire général. Bien que les réponses des gouvernements aient porté sur un domaine beaucoup plus vaste que celui du Règlement, on a retrouvé dans plusieurs d'entre elles, au sujet des procédures et des méthodes de travail de la Cour, des propositions semblables touchant les thèmes indiqués ci-dessus.

On comprend donc que la Cour ait décidé, en 1972, d'entreprendre par priorité la révision et la modification de certains articles seulement du Règlement, ce qui ne l'empêche pas de poursuivre son travail de révision d'ensemble à un rythme moins rapide.

Il convient de rappeler que le Règlement actuel représente l'expérience accumulée de cinquante ans de fonctionnement d'une institution judiciaire internationale de caractère permanent. Cette somme d'expérience ne doit pas être remaniée à la légère et, pour la remanier de fond en comble, on aurait été amené à refondre la révision de certains éléments qui appelaient une prise en considération immédiate. Il y avait là une justification de plus pour la méthode sélective adoptée par la Cour.

Le choix des trois éléments auxquels on a fait allusion ci-dessus a été dicté par le sentiment qu'il fallait, par priorité, simplifier la procédure, éviter les délais excessifs et rendre ainsi la procédure moins incommode pour les États. On espère que les modifications apportées aideront à atteindre ces objectifs.

I. La simplification du recours aux chambres

De nouvelles dispositions ont été inscrites dans le Règlement (articles 24, 25 et 26) pour que des articles distincts traitent des trois types différents de chambres prévus par le Statut: chambres de procédure sommaire, chambres constituées pour connaître de catégories déterminées d'affaires et chambres *ad hoc* constituées à la demande des parties pour connaître d'un différend déterminé.

En même temps, l'article 76 établit une procédure sommaire uniforme pour toutes les chambres, en leur permettant d'omettre la

procédure orale, si les parties y consentent et si la chambre estime, elle aussi, que l'on n'a besoin ni d'autres preuves, ni d'autres explications. Aux termes du Statut, il n'est pas possible d'omettre la procédure orale dans les affaires contentieuses devant la Cour plénière.

1) La composition des chambres ad hoc

La principale modification apportée dans ce domaine consiste à accorder aux parties une influence décisive sur la composition des chambres *ad hoc*. L'une des suggestions qui ont été faites le plus souvent à ce propos, notamment par le juge Jessup[2], c'est que le recours aux chambres *ad hoc* présenterait plus d'attrait pour les parties à d'éventuels litiges si les membres de ces chambres étaient élus sur la base d'un accord entre la Cour et les parties[3].

L'idée de répondre aux voeux des parties en choisissant les membres des chambres *ad hoc* et, par ce moyen, d'insuffler une vie nouvelle à cette institution en sommeil a cependant suscité quelques objections. On a dit que ce serait là forcer, sans raison valable, les termes du Statut, dont l'article 26, paragraphe 2, exige le consentement des parties pour fixer "le nombre des juges de cette chambre", mais non pour en déterminer la composition proprement dite. Dans le même ordre d'idées, on a fait observer qu'une telle proposition constituerait une dérogation à l'exigence du scrutin secret lors de la désignation de membres des chambres et risquerait de porter atteinte à l'unité de la Cour, en transformant les chambres en organes issus d'une sélection privée.

Dans ce contexte, on peut attirer l'attention sur deux changements qui ont été apportés, en 1945, au Statut de la Cour permanente en ce qui concerne les chambres. D'abord, on a autorisé la constitution de chambres *ad hoc* chargées de connaître, à la demande des parties, d'une affaire déterminée. Ensuite, on a supprimé, dans le Statut, l'obligation de choisir les membres des chambres en tenant compte, autant que possible, des dispositions de l'article 9 du Statut. Cet article dispose que les membres de la Cour doivent représenter les principaux systèmes juridiques du monde.

Il convient de faire observer, en outre, que si le Statut exige l'approbation des parties pour la détermination du nombre des juges qui composent une chambre *ad hoc*, il ne limite pas le champ des consultations

[2] "To form a more perfect United Nations", R.A.C.D.I., vol. 129, p. 21.

[3] Voir la proposition du gouvernement suédois dans le document A/8382, par. 137 et les observations du gouvernement des États-Unis, A/8382, Ann. I par. 9.

auxquelles le président peut procéder avec les parties. Il ne serait pas contraire au Statut que le président procède à des consultations avec les parties et informe la Cour de leurs vues touchant la composition de la chambre; or, c'est là ce qu'envisage le nouveau Règlement.

Une fois que le président a rendu compte de ces consultations, la Cour doit toujours passer à l'élection des membres de la chambre au scrutin secret, gardant ainsi, dans tous les cas, le contrôle ultime sur la composition des chambres. Cependant, d'un point de vue pratique, il serait difficile d'imaginer, dans des circonstances normales, que les membres dont les parties ont suggéré le choix ne soient pas élus. Il faudrait pour cela que la majorité des membres de la Cour décide de ne pas tenir compte de la volonté expresse des parties. Ce serait hautement improbable, car cela équivaudrait à obliger les parties à recourir à un tribunal arbitral du dehors, ou même à renoncer à leur intention de rechercher un règlement juridictionnel du différend.

2) L'arbitrage et les chambres ad hoc

La règle nouvellement adoptée peut avoir une forte incidence sur le rôle des chambres *ad hoc* de la Cour en tant que tribunaux arbitraux.

Les consultations entre le président et les parties au sujet de la composition de la chambre pourraient aussi porter sur les noms de ceux des membres d'une chambre qui devront s'effacer pour céder leur place "aux juges spécialement désignés par les parties", selon les termes de l'article 31, paragraphe 4 du Statut[4]. Ces termes employés dans le Statut sont assez généraux pour permettre aux parties de choisir conjointement les deux juges *ad hoc*. Il ne serait pas nécessaire de confier le choix de chaque juge *ad hoc* à chacune des deux parties.

Ainsi, pourvu que les parties soient d'accord sur un membre de la Cour au moins, qui exercerait les fonctions de président, et, bien entendu, sur deux autres noms de personnalités prises en dehors de la Cour, on pourrait constituer une chambre qui serait en réalité un tribunal arbitral *ad hoc* composé de trois membres.

De cette façon, les parties pourraient éviter les frais très lourds que comporte l'arbitrage et, en particulier, les honoraires des arbitres et des secrétaires, les frais de traduction des actes de procédure et d'interprétation de la procédure orale et tous les autres frais de secrétariat du tribunal. Comme, aux termes du Statut, l'organe ainsi composé serait

[4] Jessup, ibid.

une chambre de la Cour, tous ces frais s'inscriraient au budget de la Cour qui, conformément au Statut, fait partie du budget des Nations Unies.

Si la langue des deux parties n'est pas l'une des deux langues officielles de la Cour, on pourrait éventuellement l'utiliser quand même pour la procédure écrite et orale, à condition que les membres de la chambre ainsi désignée la connaissent bien. Il suffirait pour cela que les deux parties en fassent la demande conformément à l'article 39, paragraphe 3 du Statut. Même si l'arrêt de la chambre doit être rédigé et publié dans l'une des langues officielles de la Cour, les parties n'en éviteraient pas moins les grosses dépenses de traduction et d'interprétation de leurs actes de procédure et de leurs plaidoiries ainsi que les frais afférents aux services de conseils connaissant bien l'une des deux langues officielles.

Comme, aux termes de l'article 28 du Statut, les chambres peuvent, avec le consentement des parties, siéger et exercer leurs fonctions ailleurs qu'à La Haye, une chambre de ce type pourrait siéger en un lieu qui serait plus commode pour les parties et qui leur éviterait de payer le voyage de leurs agents et conseils à La Haye.

Il convient aussi de faire observer que, dans le nouveau Règlement, le pouvoir de nommer des assesseurs a été étendu à toutes les chambres. Ainsi des assesseurs pourvus de qualifications spécialisées peuvent siéger avec des chambres établies pour connaître de catégories d'affaires déterminées ou d'une affaire déterminée exigeant des connaissances ou une expérience techniques[5].

3) Le maintien en fonctions des membres des chambres ad hoc après l'expiration de leur mandat

Pour tenir compte du rôle des parties dans la constitution et le fonctionnement des chambres *ad hoc*, l'article 26, paragraphe 3 du Règlement dispose que tout membre de la Cour qui appartient à une telle chambre continue à y siéger dans toutes les phases de la procédure après l'expiration de sa période de fonctions, même si la procédure orale n'a pas commencé.

Pour les deux autres catégories de chambres, c'est une règle différente qui s'applique. Aux termes de l'article 27, paragraphe 5, le juge titulaire sortant ne continue à siéger dans l'affaire que s'il cesse d'être membre de la Cour après la date à laquelle la chambre se réunit pour la procédure orale. Une fois qu'un arrêt a été rendu, l'obligation de siéger

[5] Voir les observations du gouvernement du Royaume-Uni dans le document A/8382, Add. 1.

lors des phases ultérieures de la même affaire prend fin. C'est ainsi que l'on a interprété, en pratique, la disposition de l'article 13, paragraphe 3 du Statut, lorsqu'il s'agit de la Cour plénière.

Si l'on a retenu une solution différente pour les chambres *ad hoc*, c'est que la possibilité de continuer à faire partie d'une chambre de ce type ne doit pas dépendre de la qualité de membre de la Cour. Sinon, une chambre établie à la demande des parties et répondant à leurs voeux risquerait de perdre certains de ses membres par le seul effet du passage du temps. Pareille règle donnerait aussi aux parties la possibilité de recourir à des moyens dilatoires pour exclure un juge dont l'attitude aurait semblé défavorable pendant les phases antérieures de l'affaire.

II. La simplification de la procédure écrite et orale

Certaines des suggestions reçues de diverses sources touchant l'amélioration des procédures et des méthodes de travail de la Cour portaient sur la duréef de la procédure et les frais d'instance et sur la nécessité de simplifier et d'accélérer la procédure écrite et orale et de rendre plus rapidement l'avis consultatif demandé dans les cas urgents.

1) La simplification de la procédure écrite

a) Le nombre des actes de procédure

La principale mesure que la Cour ait adoptée pour simplifier la procédure écrite a été d'éliminer le droit des parties de déposer une réplique ou une duplique. Ce ne sont pas la réplique et la duplique en tant que telles qui ont été abolies, mais le droit que le Règlement actuel reconnaît aux parties de déposer une réplique ou une duplique si bon leur semble.

Le Règlement de 1946, selon l'interprétation qui a été donnée de ses dispositions tant par la Cour permanente que par la Cour actuelle, confère à toute partie à une affaire dont la Cour est saisie le droit de présenter une réplique ou une duplique, à la seule exception du cas où les parties sont convenues d'omettre ces pièces de procédure et où la Cour elle-même accepte une telle omission[6].

[6] La Cour permanente a interprété le Règlement dans le sens d'un droit reconnu aux parties de présenter une réplique ou une duplique, sauf quand il y avait "l'accord des parties de renoncerà la présentation d'une réplique", *C.P.J.I., Série C. Nº 74,* p. 435. Quant à la Cour actuelle, voir *C.I.J., Recueil 1972,* p.3, où une réplique et une duplique ont été autorisées malgré le désaccord des parties et la nature spéciale de l'affaire, simplement parce que l'une des parties "a indiqué son désir de présenter une réplique".

L'existence de ce droit, exclusivement accordé par le Règlement, ne correspond pas aux aspirations très générales qui ont été exprimées touchant la nécessité d'abréger la procédure écrite devant la Cour et de la rendre moins onéreuse. Qui plus est, ce droit ne correspond pas non plus aux dispositions du Statut. L'article 43, paragraphe 2 du Statut, s'il prévoit un mémoire et un contre-mémoire dans toute affaire, ajoute que la procédure écrite ne comportera qu'éventuellement des répliques[7].

Dans les articles 44 et 45 du nouveau Règlement, on a respecté strictement les dispositions du Statut et l'on s'est conformé aux propositions formulées notamment par l'un des spécialistes les plus expérimentés du droit international: le professeur Rolin; ces articles disposent que les pièces écrites comprennent un mémoire et un contre-mémoire et qu'il ne peut être déposé de réplique et de duplique que si les parties en conviennent d'un commun accord ou si la Cour décide, de sa propre initiative ou à la demande de l'une des parties, que ces pièces sont nécessaires.

b) Les délais

Une autre observation qui a été souvent faite concerne l'indulgence dont témoigne la Cour en fixant les délais et en accordant des prorogations. Lord Mc Nair, par exemple, a relevé une certaine tendance de la Cour à refléter l'origine diplomatique de la justice internationale et à se montrer assez complaisante envers les parties en présence en leur accordant de longs délais pour déposer leurs actes de procédure.

Plusieurs amendements ont été incorporés au nouveau Règlement pour avertir les plaideurs éventuels de l'attitude plus ferme que la Cour va devoir adopter à l'avenir en fixant les délais et en les faisant respecter.

Une phrase a été ajoutée à l'article 41: elle dispose que les délais "doivent être aussi brefs que la nature de l'affaire le permet". La Cour tiendra compte, conformément à l'article 40, paragraphe 3, de tout accord qui serait intervenu entre les parties au sujet des questions de procédure, mais sous réserve que cet accord "n'entraîne pas un retard injustifié". Quant à la prorogation des délais, il ne sera fait droit à une requête présentée à cette fin que si la Cour "estime la demande suffisamment justifiée" (article 40, par. 4).

[7] Cf. Débats, *American Society of International Law*, 1970, p. 258. Cf. Observations du gouvernement des États-Unis, Document A/8382, par. 338.

c) L'impression des actes de procédure

L'obligation de faire imprimer les actes de procédure, que prévoyait le Règlement de 1946, a été supprimée non seulement pour éviter des frais, mais encore parce qu'il sera plus facile de fixer des délais plus courts si l'impression n'est plus obligatoire et si l'on a également la faculté d'utiliser d'autres procédés de reproduction modernes.

2) L'exercice d'un meilleur contrôle sur la procédure

L'une des observations qui reparaît souvent à propos de la procédure et des méthodes de travail de la Cour, c'est que la procédure orale a tendance à se répéter et à se prolonger à l'excès, au point que, ces deniers temps, elle a pris la forme d'un échange supplémentaire d'actes écrits, la différence principale tenant à ce que les parties se présentent pour faire leurs plaidoiries devant la Cour, au lieu de les déposer par l'intermédiaire de leurs agents[8].

Pour se protéger contre le manque de concision et les redites dans l'exposé des moyens, la Cour doit exercer un contrôle plus efficace sur la procédure orale en usant des pouvoirs qui lui sont conférés à cet effet par les articles 48 et 54 du Statut.

a) L'indication des points litigieux aux parties

Pour ce faire, on peut non seulement indiquer aux parties le temps dont elles disposent pour développer leur argumentation orale sur l'ensemble du litige, mais encore spécifier les points litigieux que la Cour souhaite entendre discuter au cours de la procédure orale. Parmi les observations des experts sur les travaux de la Cour, celles du Professeur Guggenheim ont particulièrement insisté sur ce point[9].

Une nouvelle disposition qui fait l'objet du paragraphe 1 de l'article 57 prévoit que la Cour peut, à tout moment avant ou après les débats, indiquer "les points ou les problèmes qu'elle voudrait voir spécialement étudier par les parties".

[8] Voir, par exemple, les observations du gouvernement canadien, A/8382, par. 344 et du gouvernement néo-zélandais, A/8382, Add. 4, Quatrième Partie.

[9] Voir les observations du gouvernement des États-Unis, Document A/8382, par. 339 et celles du gouvernement du Royaume-Uni, Document A/8382, Add. I, par. 22.

b) L'exclusion de certaines questions

Toute autre et plus délicate est la question de savoir si la Cour doit, comme le proposaient certaines réponses, donner des indications négatives pour exclure certains points ou problèmes sur lesquels l'une des parties pourrait vouloir s'expliquer. Pareille exclusion risquerait de porter atteinte à la liberté dont les parties jouissent traditionnellement dans les instances contentieuses internationales et les États pourraient s'estimer lésés dans leur droit de défendre leur cause. Dans sa réponse écrite, le professeur Ago, après avoir fait observer qu'une fois que la phase écrite a pris fin, les parties ont le droit de présenter leur cause d'une manière différente ou de se fonder sur des moyens nouveaux, a indiqué que toute limitation des débats oraux à certains aspects de l'affaire risquerait de porter atteinte aux droits des parties et de compromettre les résultats de la procédure[10].

La solution retenue consiste à insérer, au paragraphe 1 de l'article 57, une formule prévoyant que la Cour peut à tout moment avant ou après les débats "indiquer les points ou problèmes... qui ont été suffisamment discutés".

L'exercice de ce pouvoir exceptionnel d'exclure certaines questions est donc subordonné à la condition expresse que les points ou les problèmes exclus aient déjà fait l'objet d'une discussion suffisamment détaillée pour que la Cour puisse faire une déclaration à cet effet. Compte tenu de la jurisprudence de la Cour, on peut s'attendre qu'elle n'exerce ce pouvoir que lorsqu'elle est parvenue à la conclusion qu'une certaine question a été "complètement débattue par les parties[11]". Il ne semble donc pas y avoir de danger que l'on prive l'une des parties de la faculté de présenter sa cause dans tous les détails.

c) Le contenu des plaidoiries

Une nouvelle disposition du paragraphe 1 de l'article 56 prescrit ce que doivent contenir les exposés oraux; cette disposition est parallèle à celle de l'article 46, qui ne s'applique qu'aux pièces de procédure écrite.

On a dit de ce type de règles qu'elles n'étaient guère que des exhortations. Cependant, non seulement on attend des conseils qu'ils se conforment spontanément au Règlement, ce qu'ils font généralement, mais encore, s'il existe une disposition expresse à ce sujet que le président a la faculté de rappeler, il est plus facile d'intervenir pour rappeler à l'ordre un conseil qui s'écarte du sujet ou qui se répète.

[10] Voir les observations du gouvernement suisse, A/8382, par. 341.
[11] Affaire *Ambatielos (Compétence), C.I.J. Recueil 1952*, p.45.

d) Les conclusions finales

Le paragraphe 2 de l'article 56 dispose qu'à l'issue du dernier exposé présenté par une partie au cours des débats, il doit être donné lecture des conclusions finales de cette partie, mais il précise qu'il en sera donné lecture sans récapituler l'argumentation. Cette disposition est destinée à étouffer dans l'oeuf une pratique qui laissait au plaideur la faculté de ne présenter ses conclusions qu'à l'issue de la procédure orale, une fois que l'adversaire avait mis le point final à la présentation de sa cause, et de faire précéder les dites conclusions d'une récapitulation de ses propres arguments. Cette pratique, si l'on n'y avait mis un terme, aurait facilement pu dégénérer en un troisième tour de plaidoiries.

e) Le nombre des conseils

A l'article 55 du nouveau Règlement, la Cour rappelle expressément le pouvoir qu'elle a de déterminer et, si besoin est, de limiter "le nombre des conseils et avocats qui prennent la parole devant elle". Cette disposition a pour objet de maintenir les frais des procès internationaux dans des proportions raisonnables et de garantir l'égalité des parties devant la Cour. Si le nombre des conseils qui prennent la parole devant la Cour était laissé à la discrétion de chaque partie, non seulement il pourrait y avoir des abus, comme l'a fait observer le professeur Reuter dans son opinion[12], mais encore une inégalité de frais risquerait de s'établir. Comme on l'a fait remarquer en effet, "il y a une grande différence entre la situation d'un pays qui peut employer ses propres juristes au service du gouvernement et celle d'un pays qui doit engager d'éminents experts à l'étranger[13]".

f) Les pièces nouvelles

Les amendements incorporés à l'article 52 ont pour objet de renforcer le principe du bon ordre dans la procédure: les pièces servant de preuves doivent être jointes aux actes de la procédure écrite et l'on ne doit pas accepter que des documents soient déposés en dernière heure, après la clôture de la procédure écrite, à moins que la partie adverse n'y consente (article 52 du Statut), ou que la Cour n'autorise la production du document nouveau.

[12] Voir les observations des gouvernements suisses (A/8382, par. 342 et 349) et suédois (ibid., par. 450).
[13] Owada, dans les travaux de l'American Society of International Law, 1971, p. 274.

Le paragraphe 2 de l'article 52 est une disposition nouvelle, qui constitue une règle d'autodiscipline: la Cour n'autorisera la production d'un document nouveau que "si elle considère qu'il est nécessaire". Ce critère est le même que celui qu'invoque le Statut pour le dépôt des répliques et des dupliques. Le paragraphe 4 impose une restriction dont la pratique passée a fait apparaître la nécessité pour garantir le respect de la procédure: on ne peut se référer, pendant la procédure orale, au contenu d'un document qui n'a pas été régulièrement produit, à moins qu'il ne fasse partie d'une publication facilement accessible.

g) Les renseignements obtenus auprès d'organisations internationales publiques

En ce qui concerne les renseignements que la Cour peut demander à des organisations internationales publiques, ou qu'elle peut recevoir d'elles, dans des affaires contentieuses, la disposition fondamentale est l'article 34, paragraphe 2 du Statut. Cet article définit, pour la Cour, à la fois un pouvoir et un devoir: le pouvoir de demander, si elle le juge bon, des renseignements à des organisations internationales publiques, touchant les affaires portées devant elle et le devoir de recevoir de tels renseignements si une organisation internationale publique les lui communique de sa propre initiative.

Le paragraphe 3 de l'article 34 du Statut a été ajouté, non à la Conférence de juristes de Washington, mais à la Conférence de San Francisco; c'est une disposition auxiliaire qui "a pour but de fournir les règles indispensables[14]" à l'application du paragraphe 2. Il impose au Greffe, chaque fois que l'interprétation de l'acte constitutif d'une organisation internationale publique ou celle d'une convention internationale adoptée en vertu de cet acte est mise en question dans une affaire soumise à la Cour, l'obligation d'aviser l'organisation dont il s'agit. Cette obligation faite au Greffier a visiblement pour but de faciliter l'application rapide du paragraphe 2, en permettant à l'organisation, soit d'envoyer des renseignements de sa propre initiative, soit de prendre ses dispositions pour le cas où la Cour en demanderait. Le paragraphe 3 de l'article 34 du Statut ne vise ni à modifier la teneur du paragraphe 2, ni à introduire une troisième possibilité intermédiaire entre la demande de renseignements par la Cour et la réception de renseignements envoyés par l'organisation sur sa propre initiative.

[14] UNCIO, vol. 13, p. 220.

Le Règlement de 1946 disposait, au paragraphe 5 de son article 57, qu'une fois que l'organisation a été avisée, la Cour ou son président "fixe... un délai" pour lui permettre de présenter ses observations. Dans une affaire dont elle a été saisie en 1972, la Cour a cru devoir fixer un tel délai à cause du libellé impératif de cette disposition. Pour éviter cet écart entre le Statut et le Règlement et bien montrer que le Règlement ne prévoit pas une troisième hypothèse intermédiaire entre la demande et la réception de renseignements, seuls cas prévus à l'article 34, paragraphe 2 du Statut, on a remplacé, dans le nouveau paragraphe 3 de l'article 63 du Règlement, le mot "fixe" par les mots "peut fixer". Ainsi, il reste clair qu'aux termes du Statut la Cour a le pouvoir d'assigner une date-limite à l'organisation internationale intéressée pour présenter ses observations mais n'y est pas tenue, même si l'interprétation de l'acte constitutif de l'organisation visée est mise en question dans une affaire dont la Cour est saisie.

Ce n'est que si la Cour estime que ces renseignements sont utiles dans l'affaire dont elle est saisie qu'elle fixe un délai pour l'envoi de ces observations. Si, au contraire, c'est l'organisation qui souhaite présenter des observations de sa propre initiative, il faut qu'elle le fasse avant la clôture de la procédure écrite, conformément au paragraphe 2 de l'article 63 du Règlement.

3) La procédure accélérée applicable aux demandes urgentes d'avis consultatifs

Le paragraphe 2 de l'article 87 du Règlement a été modifié pour prévoir expressément une procédure accélérée dans le cas des demandes urgentes d'avis consultatifs.

Une demande d'avis consultatif est considérée comme urgente si l'organe qui la présente "informe la Cour que la demande appelle une réponse urgente", ou si la Cour elle-même "estime qu'une prompte réponse serait désirable".

La première hypothèse, qui correspond à une modification du Règlement actuel, reconnaît le fait incontestable que l'organe qui présente la demande, étant saisi d'une question et l'ayant examinée, est mieux placé que tout autre pour exprimer une opinion quant à l'urgence de l'affaire, comme l'a fait le Conseil de sécurité dans l'affaire de *Namibie*[15]. Une demande d'avis consultatif présuppose normalement que l'organe qui la présente attendra d'avoir reçu la réponse pour se prononcer au fond. Ce n'est qu'exceptionnellement qu'il a été demandé à la Cour de donner un

[15] Résolution 248 (1970), *C.I.J., Recueil, 1971*, p. 17.

avis, à titre d'indication pour l'avenir, sur un problème auquel on avait déjà trouvé une solution[16].

Naturellement, l'auteur de la demande ne fait qu'exprimer son avis et ses voeux en ce qui concerne l'urgence de la réponse; c'est à la Cour qu'il appartient de se conformer à ce désir si elle le peut, compte tenu de l'ensemble de ses obligations et de ses fonctions.

De toute manière, si la Cour ne siège pas, elle doit être convoquée spécialement pour examiner la demande urgente.

L'article 87, paragraphe 2 ajoute, et c'est là son aspect le plus important, que la Cour est convoquée "pour tenir audience et délibérer [au] sujet [de la demande]."

Cette procédure accélérée a donc pour caractéristique essentielle de dispenser le cours des observations écrites, la procédure se limitant à une "audience". Dans ces cas urgents, ce sont les procès-verbaux des débats qui se sont antérieurement déroulés, au sein de l'organe qui demande un avis, sur la question soumise à la Cour, c'est-à-dire le "dossier" qui doit être communiqué à la Cour en exécution de l'article 65, paragraphe 1, du Statut, qui fournissent les renseignements de base normalement contenus dans les observations écrites.

A l'occasion de cet amendement, on s'est naturellement demandé s'il était possible de supprimer soit la procédure écrite, soit la procédure orale dans l'exercice des fonctions consultatives.

La Cour avait déjà décidé, dans l'affaire du *Tribunal administratif de l'OIT*, qu'elle pouvait se dispenser de la procédure orale pour sauvegarder l'égalité des parties.

C'est là, semble-t-il, une interprétation correcte du Statut, si l'on considère la souplesse de l'article 66, l'emploi délibéré du mot "ou" dans les trois paragraphes 2, 3 et 4 où il est question des deux types d'exposés et, surtout, l'emploi des mots "or both" à la deuxième ligne du texte anglais du paragraphe 4.

Les discussions qui ont eu lieu à la Cour permanente à propos de l'article du Règlement qui est à l'origine de la disposition dont il s'agit confirment que cette rédaction a été adoptée intentionnellement pour permettre à la Cour d'omettre soit la procédure orale, soit la procédure écrite[17]. Le juge Guerrero, par exemple, a fait observer que la Cour "n'est pas tenue d'ouvrir une procédure écrite et une procédure orale. Elle peut ouvrir l'une ou l'autre et laisser aux intéressés la faculté de discuter les exposés présentés soit au cours d'une procédure écrite, soit au cours d'une procédure orale[18]".

[16] *C.P.J.I., Serie B, No. 1.*
[17] *C.P.J.I., Serie D. No 2, Add. 3*, p. 415.
[18] Ibid., p.700.

Grâce à cet amendement, dans les affaires urgentes, la Cour se prévaudra de l'option prévue par le Statut en omettant la procédure écrite pour accélérer l'affaire, tout comme il lui est arrivé d'omettre la procédure orale pour sauvegarder le principe de l'égalité des parties.

a) La transmission de la demande et du dossier

Une nouvelle disposition a été insérée dans le Règlement (article 88) pour accélérer la procédure consultative normale. Aux termes de cette disposition, les documents "pouvant servir à élucider la question", mentionnés à l'article 65, paragraphe 2 du Statut, doivent être transmis à la Cour dès que possible après la requête.

Si l'on interprète littéralement l'article 65, paragraphe 2 du Statut, c'est-à-dire si le dossier doit être transmis en même temps que la requête, alors, lorsqu'il faut du temps pour rassembler les documents, la seule solution possible est de retarder l'envoi de requête. Il est arrivé que la Cour reçoive la requête plusieurs mois après que la décision de demander son avis consultatif ait été adoptée par l'organe compétent.

Le nouvel article du Règlement interprète l'exigence de l'article 65, paragraphe 2, du Statut avec souplesse. Il dispose que les documents dont il est question peuvent être transmis soit en même temps que la requête soit dès que possible après celle-ci, non qu'ils doivent nécessairement être joints en annexe à la requête. La réception de la requête par la Cour permet de mettre la procédure en marche et d'envoyer les notifications et communications prévues dans le Statut pendant que le dossier est en préparation.

Un autre moyen d'accélérer la procédure consiste à user des méthodes de communication modernes, par exemple du télégraphe. Ce serait trop entrer dans le détail que de mentionner expressément cette méthode, mais on peut estimer que considérer une communication télégraphique comme constituant la "requête" exigée par l'article 65, paragraphe 2 du Statut, serait conforme à la décision prise à la Conférence de Vienne sur le droit des traités, d'admettre que le télégramme est un document écrit suffisant pour conférer les pleins pouvoirs.

b) Les assesseurs dans la procédure consultative

La disposition de l'article 7 du Règlement, relative aux assesseurs, a suscité des objections, car la Cour n'a jamais suivi cette pratique.

Néanmoins, la règle à cet égard a été maintenue et même renforcée, pour deux raisons. D'abord à cause de la manière dont la disposition relative

aux assesseurs est libellée dans le Statut (article 30, paragraphe 2). Telle qu'elle est formulée dans ce texte, elle n'est pas "auto-exécutoire", mais dépend, pour prendre effet, de l'existence de dispositions correspondantes du Règlement. On ne doit pas rendre inopérante une disposition du Statut en s'abstenant d'inclure les articles voulus dans le Règlement.

Ensuite, s'il est vrai que la Cour n'a jamais fait appel à des assesseurs, on a dit récemment qu'ils pourraient jouer un rôle très utile dans les procédures consultatives notamment. On a soutenu que l'emploi d'assesseurs permettrait d'obtenir des avis d'experts qui, par leur nature, pourraient dissiper la crainte de voir la Cour, "se trouvant en dehors du grand courant de l'activité d'une organisation [internationale], aboutir à des décisions qui ne tiendraient pas bien compte des conditions internes qu'exige son bon fonctionnement[19]".

Le paragraphe 1 de l'article 7 du Règlement a été modifié pour mettre fin à toute incertitude quant à la possibilité pour la Cour d'appliquer cette disposition règlementaire non seulement dans les affaires contentieuses, mais encore dans les affaires consultatives.

III. Les exceptions préliminaires

L'une des recommandations que l'on retrouve le plus souvent dans les divers travaux et commentaires consacrés à l'amélioration des méthodes et des procédures de la Cour concerne la nécessité de prévoir, dans le Règlement, un régime plus expéditif et plus rationnel pour l'examen des exceptions préliminaires. De l'avis général, les procédures passées, compte tenu surtout de leur évolution récente, sont inadéquates, car elles ont entraîné des retards, des doubles emplois, des redites et des débats inutiles. On ne saurait nier que, dans plusieurs affaires, l'examen des exceptions préliminaires a coûté beaucoup de temps, d'efforts et d'argent et que le seul résultat a été de discuter deux fois des mêmes questions. Les deux modifications les plus importantes qui aient été adoptées à cet égard sont les suivantes: 1) la compétence de la Cour est établie au stade préliminaire de la procédure, 2) l'autorisation, qui figurait expressément dans le Règlement, de joindre les exceptions préliminaires au fond est supprimée. Les conséquences possibles des anciennes règles et des nouvelles sur ce point sont comparées ci-après; les différents types

[19] Leo Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order.* [La Cour internationale de Justice: examen des conditions du développement de son rôle dans l'ordre juridique international], A.J.I.L., avril 1971, p. 278. Voir les observations du gouvernement suisse, A/8382, par. 180.

d'exceptions préliminaires et d'autres questions de procédure à ce sujet sont examinés également.

1) La détermination de la compétence lors de la phase préliminaire

Le nouveau Règlement dispose que la Cour doit se prononcer sur sa compétence au stade préliminaire de la procédure, avant d'aborder le fonde de l'affaire.

Le raisonnement sur lequel repose cette exigence est que la Cour doit s'assurer de sa propre compétence, non seulement avant de statuer sur une affaire, mais même avant de l'examiner au fond, car sa compétence englobe à la fois le pouvoir d'examiner l'affaire et celui de la juger. Un État ne saurait être contraint d'admettre qu'une demande dirigée contre lui soit publiquement discutée devant la Cour s'il n'est pas préalablement établi, conformément à l'article 36, paragraphe 6 du Statut, que le dit État a reconnu la compétence de la Cour. L'article 53 du Statut confirme cette manière de voir en disposant que lorsqu'une des parties ne se présente pas, ou s'abstient de faire valoir ses moyens, la Cour doit s'assurer qu'elle a compétence avant de rendre une décision sur le fond. Cette obligation préalable doit s'appliquer *a fortiori* lorsque l'affaire est contradictoire et qu'une exception préliminaire a été déposée.

La nécessité, pour la Cour, d'aboutir à une décision préliminaire sur celles des exceptions qui touchent à sa compétence est non seulement soulignée dans les opinions des experts, mais encore plusieurs gouvernements, dans leurs réponses au questionnaire du Secrétaire général[20], y ont insisté tout particulièrement. Dans plusieurs de ces réponses, il est dit catégoriquement que les exceptions relatives à la compétence appellent, dans tous les cas, une décision avant l'examen du fond, car on pourrait difficilement demander à un État d'expliquer sa position sur le fond s'il n'est pas établi qu'il accepte la juridiction de la Cour[21].

Un nouveau paragraphe ainsi libellé a été ajouté à l'article 67, relatif aux exceptions préliminaires :

> "6. Pour permettre à la Cour de se prononcer sur sa compétence au stade préliminaire de la procédure, la Cour peut, le cas

[20] Observations des gouvernements de la Nouvelle-Zélande, A/8382, Annexe 4, du Canada, A/8382, par. 334 et du Royaume-Uni, A/8382, Add.1, par. 22.

[21] Observations des gouvernements de la Suisse, A/8382, par. 326 et 327, de la Suède, Ibid., par. 333 et des États-Unis d'Amérique, ibid., par. 322.

échéant, inviter les parties à débattre tous points de fait et de droit, et à produire tous moyens de preuve, qui ont trait à la question."

Ce paragraphe annonce l'intention de rendre une décision sur la compétence de la Cour lors de la phase préliminaire de la procédure. S'il a été difficile jusqu'à présent de prononcer une telle décision dans toutes les affaires, c'est parce que l'on soulève, bien souvent, surtout à propos des réserves à l'acceptation de la juridiction de la Cour, des questions juridiques extrêmement délicates et importantes, qui sont étroitement liées à plusieurs aspects du fon du litige.

Dans le passé, on a surmonté la difficulté en joignant les exceptions préliminaires de ce genre au fond du litige.

Par exemple, dans l'affaire du *Droit de passage sur territoire indien*, la Cour a joint au fond la deuxième exception préliminaire de l'Inde, qui soutenait que le différend était né avant une certaine date, indiquée comme date-limite dans la réserve *ratione temporis* dont l'Inde avait assorti sa déclaration d'acceptation de la juridiction obligatoire.

Le nouveau paragraphe 6 est destiné à permettre de résoudre autrement les difficultés qui ont, dans le passé, contraint la Cour à joindre au fond des exceptions préliminaires relatives à sa compétence.

En vertu du paragraphe 6, lorsque la Cour se trouvera en présence de telles exceptions, au lieu d'examiner entièrement le fond de l'affaire selon le système de la jonction, elle demandera aux parties de ne discuter, pendant la phase préliminaire, que les questions de fond qui se rapportent au problème de la compétence. Il n'y aura ainsi plus de raison de laisser en suspens ou de renvoyer à plus tard la décision sur la question de la compétence de la Cour.

Une difficulté subsiste, il est vrai, dans le cas d'une des exceptions relatives à la compétence: l'exception de juridiction interne, qui a été, elle aussi, jointe au fond dans l'affaire du *Droit de passage*. Quand un État invoque sa juridiction interne, cela revient à dire qu'il n'est tenu par aucune obligation internationale vis-à-vis de l'État demandeur. Ainsi, lorsque la question du domaine réservé est soulevée à titre d'exception préliminaire, ce n'est plus un élément du fond, mais l'ensemble qui entre en ligne de compte.

Pourtant on a trouvé dans la jurisprudence de la Cour une solution à ce problème. Si l'exception de juridiction interne est manifestement bien fondée, la Cour y fera droit sans difficulté puisque, en pareille hypothèse, l'État défendeur, exempt de toute obligation vis-à-vis de l'autre partie,

est "seul juge" et, aux termes de l'article 2, paragraphe 7 de la Charte, n'est pas tenu de "soumettre des affaires de ce genre à une procédure de règlement". Mais si, comme il arrive souvent, l'exception ne semble pas, lors de la phase préliminaire, être manifestement bien fondée, il y a des moyens de la rejeter avant d'aborder le fond et de l'examiner, sans préjuger l'issue finale au préjudice du défendeur. On y parvient en utilisant ce que l'on a appelé la conclusion *prima facie* ou provisoire sur les titres juridiques invoqués par le demandeur. La Cour, comme elle l'a fait dans l'affaire de *l'Interhandel*, ne cherche pas, lors de la phase préliminaire, à "apprécier la validité des titres invoqués", ou à "se prononcer sur leur interprétation" ; elle s'emploie seulement à déterminer si les motifs invoqués par le demandeur "permettent la conclusion provisoire qu'ils peuvent être pertinents" en l'espèce[22].

2) Les décisions qui peuvent être prises en matière d'exceptions préliminaires

Le Règlement de 1946, en son article 62, paragraphe 5, dispose que la Cour "statue sur l'exception ou la joint au fond". On a donc le choix entre trois décisions possibles: faire droit à l'exception, la rejeter, ou la joindre au fond. Le Règlement de 1946 autorise expressément la Cour à surseoir à statuer sur une exception préliminaire en la joignant au fond.

Non seulement le Règlement de 1946 admet la possibilité d'une jonction, mais à une époque récente, quatre exceptions préliminaires ont été jointes au fond: deux exceptions d'incompétence dans l'affaire du *Droit de passage* et deux exceptions d'irrecevabilité dans celle de la *Barcelona Traction*.

Fait encore plus significatif, dans cette dernière affaire, la Cour a développé une argumentation qui a été interprétée comme signifiant que la jonction au fond ne constitue plus une mesure extrême ou exceptionnelle, mais bien une solution que la Cour peut adopter et adoptera en toute liberté chaque fois qu'elle s'y jugera contrainte par la nécessité de ne pas préjuger l'issue de l'affaire, ou dans l'intérêt de la bonne administration de la justice. Abi-Saab, dans son étude des exceptions préliminaires, après avoir analysé l'arrêt rendu sur ces exceptions dans l'affaire de la *Barcelona Traction*, conclut: "Cependant, selon ce dernier arrêt, la jonction perd son caractère exceptionnel."

Elle devient une possibilité ouverte à la Cour sur un pied d'égalité avec le rejet ou l'admission de l'exception, et dont l'emploi dépend

[22] C.I.J. , Recueil, 1959, p. 24.

de l'appréciation par la Cour de considérations d'ordre général. Il est difficile d'éviter la conclusion que cet arrêt témoigne d'un changement d'orientation en la matière plus favorable à l'extension du champ d'application de la jonction[23].

Cet assouplissement des conditions dans lesquelles la Cour peut joindre au fond les exceptions préliminaires a été très largement critiqué, parce qu'en prenant une telle mesure, la Cour ne fait que surseoir à statuer sur la question, le résultat pratique étant que la même question est plaidée deux fois.

Dans les opinions d'experts[24] comme dans les réponses des gouvernements, on a pu discerner deux écoles de pensée touchant les mesures à prendre pour remédier à la situation. De l'avis de certains, le Règlement doit déclarer que la procédure de jonction présente un caractère exceptionnel et ne peut être appliquée que si l'exception est si intimement liée au fond que l'on ne peut statuer à son sujet sans préjuger l'issue de l'affaire. L'autre école, plus radicale, qui est représentée par le professeur Riphagen et le juge Hidayatullah, préconise l'abolition de toute possibilité de jonction.

Le juge Morelli, dans une analyse pénétrante de la question des exceptions préliminaires, a estimé qu'une exception touchant au fond invoquée par une partie à titre préliminaire ne devait pas être jointe au fond, conformément à l'article 62, paragraphe 5. Après avoir rappelé son opinion dissidente dans l'affaire de la *Barcelona Traction*, il a indiqué que dans l'hypothèse envisagée, la Cour devait déclarer l'exception irrecevable en tant qu'exception préliminaire. Il a ajouté qu'une déclaration d'irrecevabilité devait être mentionnée dans le nouveau Règlement parmi les hypothèses possibles. Le professeur Guggenheim s'est fait l'écho de cette conception en recommandant que toute exception relative au fond présentée à titre préliminaire soit déclarée irrecevable en tant que telle.

D'après ce raisonnement, il semblerait que le fait qu'une exception soulevée par une partie à titre préliminaire doive être jointe au fond suffise à démontrer que cette exception, si elle ne concerne pas la compétence de la Cour, n'a pas, objectivement, un caractère véritablement préliminaire ou, en d'autres termes, qu'il ne s'agit pas d'une exception sur laquelle on puisse statuer pendant la phase préliminaire de la procédure.

Selon ce point de vue, quand on constate qu'une exception invoquée à titre préliminaire et n'alléguant pas l'incompétence se rapporte

[23] Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour Internationale*. Paris, Pédone, 1967, p. 198.
[24] Voir les observations du gouvernement des Etats-Unis, A/8382; par. 322 et celles du gouvernement du Royaume-Uni, A/8382, Add. 1, par. 22.

si étroitement au fond qu'on ne peut statuer sur elle sans examiner le fond, il ne faut pas la joindre au fond, mais conclure qu'il ne s'agit pas, en l'espèce, d'une véritable exception préliminaire, c'est-à-dire d'une exception sur laquelle il faut et sur laquelle on peut statuer avant toute procédure relative à l'objet même du litige.

Il ne faut pas perdre de vue l'origine de la procédure en deux phases prévue par le Règlement de la Cour. La faculté de soulever des questions de caractère préliminaire au début de l'instance et d'obtenir qu'il soit statué séparément à leur sujet avant toute décision sur le fond, dont l'examen reste suspendu, représente une concession très importante que l'on fait, en vertu du seul Règlement, à celle des parties qui soulève ces exceptions. La Cour peut et doit prévoir, dans son Règlement, que cette concession ne sera accordée que pour les questions, autres que les exceptions d'incompétence, qui sont réellement susceptibles de faire l'objet d'une décision pendant la phase préliminaire sans examen de toutes les questions de fond. Il ne suffit donc pas, pour obtenir un traitement préliminaire, qu'une exception puisse, logiquement, faire l'objet d'une décision indépendante de celle qui sera rendue sur le fond; encore faut-il que l'exception n'oblige pas la Cour à s'engager, pendant la phase préliminaire, dans l'examen complet du fond de l'affaire. En agissant autrement, on porterait atteinte au droit que le demandeur tient du Statut d'obtenir que sa cause soit pleinement entendue, tant par écrit qu'oralement, et de présenter des preuves sur le fond, tous les éléments du litige se trouvant ainsi télescopés dans une procédure préliminaire ou incidente.

Selon cette thèse, en présence d'une exception intimement liée à des éléments relatifs au fond, l'attitude qu'il convient d'adopter ne consiste pas à décider de joindre l'exception au fond, mais bien à déclarer l'exception irrecevable en tant qu'exception préliminaire, sans préjudice du droit de la partie intéressée de la présenter à nouveau par la suite comme moyen de défense sur le fond.

Compte tenu de ces considérations, il a été suggéré de prévoir un choix entre trois solutions possibles lorsqu'une exception préliminaire est soulevée: 1) la retenir; 2) la rejeter; ou, 3) la déclarer irrecevable en tant que telle.

Cependant, la formulation de cette troisième option a suscité des difficultés, car certaines exceptions – le défaut d'épuisement des recours internes, par exemple – ont en elles-mêmes un caractère préliminaire et il semblerait donc inapproprié de les déclarer irrecevables en tant qu'exceptions préliminaires.

De l'avis de l'auteur de la présente étude, la réponse à cette observation est que les exceptions n'ont pas de caractère préliminaire propre, et que ce caractère est un concept relatif, qui varie selon les circonstances de chaque affaire[25].

Toutefois, la troisième option a été formulée en des termes qui donnent à la Cour la possibilité de "déclarer que cette exception n'a pas dans les circonstances de l'espèce un caractère exclusivement préliminaire". Cette formule traduit l'idée que certaines exceptions possèdent vraiment, en principe au moins, un caractère préliminaire propre, sur lequel les circonstances de l'affaire ne sauraient avoir qu'une incidence limitée.

3) La comparaison entre le nouveau système et l'ancien

On a dit que la troisième option indiquée dans le Règlement modifié était, pour l'essentiel, l'équivalent de la jonction de l'exception au fond: l'idée resterait donc la même, la terminologie seule étant modifiée.

L'auteur de la présente étude ne partage pas cette opinion. Tout dépendra, bien entendu, da la manière dont on interprétera la nouvelle règle, mais il y a tout lieu de croire que le fait que la Cour ne pourra plus joindre l'exception au fond, mais devra soit la retenir, soit la rejeter, soit déclarer qu'elle n'a pas un caractère exclusivement préliminaire, pourra entraîner des conséquences importantes, tant pour celle des parties qui déposera des exceptions préliminaires que pour la Cour elle-même.

Sous le régime actuel, une partie ne court absolument aucun risque lorsqu'elle décide de déposer, à titre d'exceptions préliminaires, certains moyens de défense qui obligeront peut-être la Cour à s'engager dans l'examen du fond, mais qui, logiquement, peuvent faire l'objet d'une décision indépendante de l'enjeu du litige ou de son issue finale. Il n'y a pas de risque à courir, car aucune décision défavorable ne saurait être prise: le pire qui puisse arriver c'est que l'exception soit jointe au fond, mais on sauvegarde ainsi son intégrité et elle bénéficie même d'un double examen. Cette situation encourage le défendeur, qui a normalement intérêt à dresser des obstacles sur le chemin de la demande, à invoquer, pendant la phase préliminaire, tous les moyens de défense logiquement distincts

[25] Comme l'a fait observer la Cour permanente dans l'affaire du Chemin de fer Panevezys-Saldutiskis: "... S'il est vrai qu'une exception ayant en vue de contester le caractère national d'une réclamation est en principe de nature préliminaire, il n'en est pas ainsi dans le cas concret dont la Cour est saisie".
"...Pour ces raisons, la Cour ne saurait considérer la première exception lithuanienne comme une exception susceptible, dans l'espèce, d'être décidée sans toucher le fond. La Cour ne peut donc la retenir comme une exception préliminaire au sens de l'article 62 du Règlement". C.P.I.J., Série A/B, No 76, p. 17-18.

qui lui viennent à l'esprit. Il est même arrivé, dans un cas extrême, non pas devant la Cour Internationale de Justice, mais devant un autre tribunal international, que la partie qui avait soulevé u ne exception préliminaire demande, à l'audience, la jonction de cette exception au fond: l'auteur de cette demande reconnaissant donc bien que l'exception qu'il avait déposée n'avait pas un caractère préliminaire.

La disposition modifiée du Règlement peut avoir pour effet de décourager les parties de soulever, à titre préliminaire, certaines exceptions sur lesquelles il est impossible de statuer sans aborder l'examen du fond, car désormais la partie en question court le risque d'une décision défavorable de la Cour. La Cour peut déclarer que l'exception n'a pas, dans les circonstances de l'espèce, un caractère exclusivement préliminaire, rejetant ainsi clairement les conclusions de l'État qui l'a soulevé. On peut raisonnablement compter que le risque d'une décision défavorable de la Cour dissuadera les parties de soulever certaines questions à titre d'exceptions préliminaires et les incitera à les garder en réserve comme moyens de défense pour les invoquer, neuves et sans antécédents, quand l'instance en arrivera à l'examen du fond.

La situation peut également changer pour la Cour, qui se trouvera devant l'obligation de prendre position clairement, soit en retenant l'exception, soit en la rejetant, soit en déclarant qu'elle n'a pas, dans les circonstances de l'espèce, un caractère exclusivement préliminaire. La solution de facilité que constituait la réponse neutre et parfois diplomatique de la jonction et qui revenait en fait à surseoir à toute décision, est désormais exclue.

La Cour doit donc s'acquitter de la fonction normale de tout organe judiciaire, c'est-à-dire statuer sur des conclusions déposées et défendues devant elle.

Si la Cour juge possible d'aborder, pendant la phase préliminaire, certains aspects limités de l'affaire qui, tout en se rattachant au fond, concernent les exceptions, elle peut demander aux parties de faire valoir leurs moyens dans ces limites, en usant du pouvoir qu'elle tient de l'article 57, paragraphe 1, d'indiquer "les points ou les problèmes qu'elle voudrait voir spécialement étudier par les parties". Elle se trouvera ainsi en mesure soit de retenir les exceptions préliminaires, soit de les rejeter.

Si au contraire l'exception soulevée par l'une des parties à titre préliminaire est si intimement liée au fond, que l'examen des problèmes ainsi posés exige, à ce stade, l'audition d'ensemble de l'affaire, la Cour déclarera très probablement qu'en pareille circonstance l'exception soulevée n'a pas un caractère véritablement préliminaire.

À titre d'exemple, il peut être utile d'imaginer comment le nouveau Règlement se serait appliqué aux deux exceptions préliminaires qui ont été jointes au fond dans l'affaire de la *Barcelona Traction*.

L'exception qui l'a finalement emporté, celle qui concernait le défaut de *jus standi* d'un État qui protège ses nationaux actionnaires d'une société étrangère, aurait pu être examinée lors d'une audience supplémentaire pendant la phase préliminaire puisque les éléments de fond qu'elle mettait en cause n'entraînaient pas l'audition de toute l'affaire. La Cour aurait donc pu retenir cette exception en 1964, au lieu de le faire, après la présentation de longues pièces de procédure et à la suite de longues plaidoiries, six ans plus tard.

En revanche, l'exception tirée du défaut d'épuisement des recours internes était si étroitement liée au fond qu'il était impossible de l'examiner complètement pendant la phase préliminaire sans débattre de toute l'affaire. Il aurait fallu examiner à ce stade l'ensemble de la plainte belge en déni de justice et statuer à son sujet, et on ne peut affirmer que les recours internes doivent être épuisés lorsqu'une partie se plaint d'un déni de justice. Pareille procédure, en développant énormément la phase préliminaire, surtout la partie orale, aurait porté atteinte au droit du demandeur de faire valoir tous ses moyens sur le fond, tant par écrit qu'oralement, et de présenter des preuves; elle aurait aussi compromis le droit du défendeur de défendre sa cause. La Cour aurait donc été en droit de déclarer que cette exception, soulevée à titre préliminaire, n'avait pas, dans les circonstances de l'espèce, un caractère exclusivement préliminaire.

Le défendeur aurait alors pu, s'il le jugeait bon, invoquer ce moyen de défense lors de l'audition du fond. Il aurait pu incorporer cette exception à son argumentation sur le fond, sans insister nécessairement sur son caractère indépendant ou préliminaire. En d'autres termes, il aurait pu la présenter à nouveau comme un argument essentiel et non comme une exception d'irrecevabilité, en faisant valoir que l'une des conditions de fond, pour rendre un État responsable de ses décisions judiciaires, c'est que les étrangers lésés aient donné aux juridictions les plus élevées la possibilité de corriger les erreurs des juridictions inférieures, en exerçant les recours locaux dont ils disposent.

Il y a, là encore, une différence importante entre l'ancienne procédure et la nouvelle. D'aucuns ont soutenu avec insistance que quand une exception préliminaire est jointe au fond, elle conserve son caractère préliminaire et que la Cour doit statuer à son sujet, même dans l'arrêt définitif, avant de se prononcer sur le fond.

Selon le nouveau Règlement, on serait venu à bout des exceptions soulevées à titre préliminaire de l'une des trois manières indiquées. Avec ce système, tant les parties que la Cour sont plus libres de proposer et de suivre l'enchaînement logique de leur choix pour examiner et résoudre les divers problèmes susceptibles de se poser lorsque la Cour en vient à l'étude du fond.

4) Les différents types d'exceptions préliminaires

Le nouveau Règlement ne contient pas de définition des exceptions préliminaires, qu'il ne limite pas non plus aux exceptions d'incompétence comme il était envisagé dans certaines des observations reçues.

L'article 67, paragraphe 1 mentionne, à titre d'explication générale, toute exception "à la compétence de la Cour ou à la recevabilité de la requête ou toute autre exception sur laquelle le défendeur demande une décision avant que la procédure sur le fond se poursuive".

On a estimé en effet que la seule mention de la compétence ou de la recevabilité ne serait pas assez large. Une partie peut se trouver obligée de soulever, dans le même délai et pour provoquer des effets suspensifs, certaines questions préliminaires qui ne rentreraient pas dans ces deux catégories d'exceptions. Ainsi, dans l'affaire des *Ressortissants des États-Unis au Maroc*, l'exception préliminaire déposée par le défendeur sollicitait diverses précisions sur les parties au nom et pour le compte desquelles l'instance avait été introduite. Il s'agissait donc, en réalité, d'une sorte *d'exceptio obscurilibelli*, qui avait été considérée comme constituant bien une exception préliminaire lorsqu'elle avait été invoquée dans l'affaire des *Phosphates du Maroc* devant la Cour permanent. Le fait qu'une exception préliminaire de cette nature puisse être retirée à la suite des explications fournies ultérieurement par le requérant ou que la Cour estime que les obscurités ont disparu dans la suite de la procédure, concernent la décision qu'appelle l'exception, mais restent sans incidence sur son caractère préliminaire et sur le droit des parties d'en faire état et d'en tirer des effets suspensifs.

De même, en limitant les exceptions préliminaires à celles qui portent sur la compétence, ou en vérifiant la nature de quelque manière que ce soit, on aurait pu aboutir à l'institution d'une phase pré-préliminaire, avec audition des parties, en plus de la procédure en deux phases qui existe déjà, aux fins de déterminer si l'exception soulevée rentre dans la catégorie permise. On a estimé qu'une telle vérification initiale, ou procédure pré-préliminaire, loin de contribuer à résoudre les problèmes actuels, auraient pu les aggraver très sensiblement. Cela ne manquerait pas

d'arriver, surtout à cause des différences de concepts et de terminologie auxquelles donne lieu la distinction entre la compétence et la recevabilité.

Cette distinction est très difficile à définir et peut varier d'une affaire à l'autre. Ainsi, l'inexistence d'un différend, ou le défaut d'épuisement des recours internes peuvent être considérés comme des exceptions soit d'irrecevabilité, soit d'incompétence, selon que le défendeur se fonde sur le droit international coutumier ou sur le texte de la clause compromissoire qui donne compétence à la Cour.

Le nouveau Règlement n'oblige la Cour ni à établir une distinction théorique de ce genre, ni à classer les exceptions avant de statuer à leur sujet. Le paragraphe 7 s'applique à toutes les exceptions et le seul effet du paragraphe 6 sur ce point est que la Cour est tenue d'examiner toutes les questions de droit et de fait de nature à éclairer la question de sa propre compétence, sur laquelle elle doit statuer pendant la phase préliminaire.

5) Les autres aspects procéduraux des exceptions préliminaires

a) Le délai dans lequel les exceptions préliminaires doivent être déposées

Pour accélérer la procédure et éviter des délais inutiles, on a proposé que les parties soient tenues de déposer leurs exceptions préliminaires dès qu'elles reçoivent la requête, ou peu de temps après avoir reçu le Mémoire. Ces propositions, dont l'objet était conforme aux principes fondamentaux qui avaient inspiré les amendements au Règlement, ne pouvaient cependant être retenues, car elles risquaient de porter atteinte au droit du défendeur de présenter sa cause. En ce qui concerne la première proposition, tendant à ce que les exceptions préliminaires soient déposées dès réception de la requête, on a estimé que le défendeur avait le droit de connaître toute l'argumentation du demandeur telle qu'elle apparaît dans le Mémoire avant qu'on l'oblige à déposer son exception. Sinon le demandeur, ayant eu tout son temps pour rédiger la requête, bénéficierait de surcroît de la faculté de déposer un Mémoire conçu pour essayer de réfuter l'exception, qu'il aurait déjà eu la possibilité d'étudier.

Quant au second délai envisagé, trente jours, par exemple, après le dépôt du Mémoire, on a pensé que, dans certains cas, il ne suffirait pas, compte tenu des complications juridiques de plus en plus grandes que créent les réserves à l'acceptation de la juridiction obligatoire. Tant dans l'affaire *Nottebohm* que dans celle de l'*Anglo-Iranian*, les exceptions qui ont finalement triomphé devant la Cour n'avaient pas été soulevées pendant la

phase préliminaire, sans doute parce qu'elles avaient exigé des consultations juridiques d'experts et une étude prolongée de la part des conseils.

b) Qui peut déposer une exception préliminaire

La dernière phrase du paragraphe 1 de l'article 67 indique clairement qu'une exception préliminaire peut être déposée par une partie autre que le défendeur. Cette phrase est ainsi libellée: ''Toute exception soulevée par une partie autre que le défendeur doit être déposée dans le délai fixé pour le dépôt de la première pièce écrite de cette partie''.

On avait envisagé de prévoir dans le Règlement que seul le défendeur pourrait déposer une exception préliminaire contre une requête, les partisans de ce système soutenant que la question des exceptions préliminaires ne se posait ni pour le demandeur, ni dans le cas d'un compromis. A l'appui de cette limitation, on a fait valoir que le dépôt d'une requête implique la reconnaissance de la compétence de la Cour et qu'un compromis, lui aussi, suppose que les deux parties admettent la compétence de la Cour.

Cependant, le nouveau Règlement rétablit, sous une forme plus catégorique, le système de 1946, qui permet au demandeur, ou à l'une des parties à un compromis de déposer des exceptions préliminaires. Le Règlement de 1946, en s'abstenant de faire quelque distinction que ce soit quant au droit de déposer des exceptions préliminaires autorisait toute partie à une affaire dont la Cour était saisie à en déposer, mê me si elle avait souscrit un compromis ou si elle était demanderesse dans l'instance.

L'expérience tant de la Cour permanente que de la Cour actuelle a montré que le dépôt d'exceptions préliminaires par ces parties n'est pas une "hypothèse d'école".

Dans l'affaire de l'*Or monétaire* pris à Rome, la Cour actuelle a jugé qu'une véritable exception préliminaire pouvait être déposée par le demandeur[26]. Dans l'affaire *Borchgrave*, un État partie à un compromis prévoyant la juridiction de la Cour permanente a cru devoir déposer une exception préliminaire parce qu'à son avis une demande formulée par l'autre partie sortait du cadre du compromis.

Cette expérience montrait qu'il n'aurait pas été judicieux de déclarer ou de sous-entendre, dans un article du Règlement, que l'acceptation d'un compromis entraînant nécessairement la renonciation à certains moyens de défense ou aux moyens de caractère préliminaire. Les parties à un compromis doivent pouvoir soulever des exceptions non seulement contre la validité ou l'applicabilité du compromis, mais encore contre la recevabilité d'une

[26] C.I.J., Recueil, 1954, p. 29.

demande formulée en vertu du compromis. Dans l'histoire du droit de la responsabilité internationale, on trouve plusieurs exemples d'accords par lesquels un État a accepté de soumettre à l'arbitrage ou à un règlement de nature judiciaire certaines catégories de demandes, sans renoncer, ce faisant, à son droit de soulever devant le tribunal, à titre d'exceptions préliminaires, divers moyens de défense tels que le défaut de nationalité, de *jus standi*, ou d'épuisement des recours internes. Il ne semblerait pas opportun de préjuger, dans un article du Règlement, ce qui doit toujours constituer une question d'espèce, dont la solution dépend de l'interprétation de chaque compromis et des circonstances de l'affaire.

c) L'obligation d'incorporer la décision à un arrêt

Le paragraphe 7 de l'article 67 du Règlement crée l'obligation de donner la forme d'un arrêt à la décision finale de la Cour touchant l'exception préliminaire. Cette exigence se justifie compte tenu de l'importance de cette décision et, bien qu'elle n'ait pas figuré dans le Règlement de 1946, elle correspond à la pratique établie de la Cour internationale de Justice. La Cour permanente, en revanche, donnait habituellement la forme d'une Ordonnance à la décision de jonction au fond[27].

d) La possibilité d'un accord entre les parties tendant à ce qu'une exception préliminaire soit examinée en même temps que le fond

Les modifications adoptées n'ont nullement pour objet d'exclure l'une des possibilités qu'offrait le Règlement de 1946, ainsi qu'une témoigne l'affaire des *Emprunts norvégiens* entre la France et la Norvège, à savoir qu'après le dépôt d'une exception préliminaire les parties décident d'un commun accord qu'elle sera débattue et tranchée pendant l'examen du fond.

Il convient de faire observer à ce propos que l'article 34 du Règlement laisse subsister cette possibilité.

Cependant, pour dissiper toute incertitude à cet égard, le paragraphe 8 de l'article 67 dispose que ''La Cour donne effet à tout accord intervenu entre les parties et tendant à ce qu'une exception soulevée en vertu du paragraphe 1 soit tranchée lors de l'examen au fond''.

[27] C.P.J.I., Série A/8, No. 52, p. 16; No. 66, p. 10; No. 67, p. 25; No. 75, p. 56.

e) Les moyens et éléments de preuve relatifs à l'exception préliminaire

Le paragraphe 5 de l'article 67 dispose que les exposés de fait et de droit contenus dans les pièces écrites et les exposés et moyens de preuve présentés pendant les audiences consacrées à une exception préliminaire ''sont limités aux points ayant trait à l'exception''. Cette disposition est conforme à la pratique suivie par la Cour, qui s'efforce d'éviter que les actes de procédure et les audiences de la phase préliminaire n'abordent la discussion du fond de l'affaire et de n'accepter que les moyens de preuve servant à justifier le bien fondé des exceptions préliminaires.

La présence de cette disposition dans le Règlement peut inciter les conseils à respecter spontanément cette indispensable restriction; ainsi le président ne sera pas amené à rappeler à l'ordre les conseils qui s'écarteraient de l'objet de la question préliminaire.

IV. Conclusions

Les modifications qui ont été apportées par la Cour, le 10 mai 1972, à un Règlement en vigueur depuis plus de vingt-cinq ans visent à assurer plus de souplesse dans la procédure, tant contentieuse que consultative, à la simplifier et à éviter les délais.

Pour récapituler, les principaux changements sont les suivants: permettre expressément aux parties d'influer sur la composition des chambres *ad hoc*; supprimer le droit de déposer une réplique ou une duplique, en limitant à deux, le mémoire et le contre-mémoire, les actes normaux de la procédure écrite; exercer un meilleur contrôle sur la procédure orale en précisant les questions dont les parties doivent traiter et celles dont on a déjà suffisamment débattu; prévoir une procédure accélérée et exclusivement orale pour les demandes urgentes d'avis consultatifs et, enfin, décider de la compétence de la Cour lors de la phase préliminaire et supprimer l'autorisation expresse, qui figurait dans le Règlement antérieur de joindre au fond les exceptions préliminaires.

Il faut espérer que ces nouvelles dispositions de Règlement, et en particulier l'interaction des différentes modifications adoptées, auront pour effet d'accélérer l'administration de la justice internationale et de la rendre moins onéreuse.

Les modifications entrent en vigueur le 1er septembre 1972 et, à partir de cette date, elles remplaceront le Règlement adopté par la Cour le 6 mai 1946. Cependant, le nouveau Règlement ne s'appliquera pas aux

affaires dont la Cour a été saisie avant le 1er septembre 1972, ni à aucune de leurs phases, même commençant après le 1er septembre 1972. La raison en est que si l'ancien Règlement régit la procédure de fond dans des affaires soumises avant le 1er septembre 1972, il doit à plus forte raison en régir la procédure incidente quelle que soit la date à laquelle elle a commencé.

Bien entendu, si les parties préfèrent que soient appliqués le nouveau Règlement, ou certaines de ses dispositions, elles peuvent présenter une requête conjointe à cet effet, en vertu de l'article 34.

La révision du Règlement n'est pas une panacée capable de résoudre toutes les difficultés que connaît la Cour et de régler tous les problèmes qu'elle affronte aujourd'hui. Il ne faut pas compter que de simples changements de procédure suffisent à remédier à la crise de sous-emploi qu'elle connaît actuellement. Certes, le Règlement est important, mais son rôle est limité: il veille au bon ordre et à la célérité dans l'administration de la justice une fois que les États ont décidé de s'adresser à la Cour.

Cependant, c'est pour la Cour un devoir d'améliorer et de moderniser un Règlement appliqué depuis un quart de siècle et elle doit s'acquitter de cette tâche, quels qu'en soient les effets, dès que ses fonctions judiciaires lui en laissent le temps.

Cet effort peut contribuer à rétablir la confiance dans cet organe, qui témoigne ainsi de sa capacité de mettre à jour ses procédures et ses méthodes de travail et de s'adapter aux nouvelles exigences du monde moderne.

LES CONVENTIONS DE CODIFICATION NON RATIFIÉES

Conférence prononcée le 11 juillet 1973
par M. Constantin Th. Eustathiades
Professeur à l'Université d'Athènes
Membre de l'Institut de Droit International
Ancien membre de la Commission du Droit International

Avant-Propos

Monsieur le Président et illustre ami,

Je vous remercie ainsi que mes anciens collègues de la Commission du Droit International de l'honneur que vous me faites en m'invitant à revenir aujourd'hui près de vous.

Cependant, par cette bienveillante invitation au nom de la Commission vous m'avez mis dans une situation assez délicate, de devoir ''apporter des hiboux à Athènes'' (γλαυκας ∈ις Αθηνα κομ{ξ∈ω) pour rappeler ce dicton de l'ancienne Grèce qui signifie qu'on ne peut apporter une contribution importante à une place qui est riche d'expérience et de sagesse. Car, par rapport au sujet qui sera traité devant vous, c'est bien Genève qui est Athènes. Si je n'ai pas pourtant décliné cet honneur bien lourd, c'est que nous voulons tous évoquer la mémoire de Gilberto Amado qui fut notre bien-aimé Doyen. Le souvenir de cet éminent juriste et homme de lettres du Brésil demeurera ineffaçable à nous tous. Ma première rencontre avec Gilberto Amado, à l'Assemblée générale, il y a déjà une quinzaine d'années, fut un duel, lui combattant avec son humour habituel et avec acharnement le projet sur l'arbitrage de Georges Scelle, son collègue, à cette Commission, moi, essayant de sauver ce qu'on pouvait en sauver par une série de règles sur la procédure arbitrale. Depuis lors, pendant plus de dix ans, à New York, à Genève ou à Vienne, Amado m'entourait de sa tendre amitié, comme il savait le faire pour ses amis, avec élégance, dignité et chaleur.

Qui ne se souvient pas de cet illustre Brésilien, de sa taille, petite et de son grand coeur d'où se lançait ce regard luisant, expression de critique et aussi de bonté. Ses yeux étincelaient, prêts à ramasser toute beauté de la vie. Progressiste, mais réaliste; sceptique, mais imprégné de bon sens créateur et d'une foi solide à l'oeuvre de la CDI, nous le sentons encore près de nous, le Doyen Amado, plein d'humanité, prêt à tendre à ses amis les bras et le coeur.

Les conventions de codification non ratifiées

Par Constantin Th. Eustathiades
Professeur à l'Université d'Athènes
Membre de l'Institut de Droit International
Ancien membre de la Commission du Droit International

Plusieurs conventions de codification ne sont pas acceptées par un grand nombre d'États. Alors que les travaux de codification sont menés collectivement sur un plan quasi-universel, et que les textes qui en résultent ayant un intérêt général pour l'ensemble des États membres de la communauté internationale sont destinés à acquérir une validité conventionnelle quasi-universelle au moyen du consentement des États, donné par ratification ou adhésion, ce consentement fait très souvent défaut. Certes, pour les conventions de codification, chaque État demeure, comme pour tout autre traité, seul juge de l'opportunité et du moment de prendre une décision qui le lierait conventionnellement au résultat du travail collectif de codification. Cette liberté des États est la revanche de leur soumission obligatoire aux règles du droit international général. Or, ces dernières, en matière de conventions portant codification peuvent à leur tour, prendre leur revanche, en se fermant par le processus de codification et en s'imposant ainsi aux États. De là surgissent des difficultés, inhérentes à tout processus de formation d'une coutume internationale, mais certainement aggravées lorsqu'il s'agit de matières couvertes par des conventions de codification non ratifiées.

Le phénomène des conventions de codification non ratifiées n'est pas nouveau. Déjà avec les conventions de la Haye de 1899 et de 1907 et aussi avec la Déclaration de Londres de 1909, on a été en présence d'une situation analogue. Seulement, ni les raisons ne paraissent être les mêmes, ni les effets n'ont été identiques. Au début du siècle, dans une société

internationale composée d'un petit nombre d'États, le trait caractéristique de la codification fut son caractère déclaratoire. Ce caractère était à cette époque marqué à tel point que même la clause de participation générale (*clausula si omnes*) ne gênait pas trop; la nature fondamentalement déclaratoire de la codification de la Haye faisait que les règles codifiées exprimées dans des conventions non ratifiées tout en perdant leur caractère contractuel n'en étaient pas moins valables en tant que règles de droit international général coutumier.

Ce même et ancien phénomène – qui se rencontre aussi pendant la période de la Société des Nations – des nombreux refus de ratification ou des retards excessifs à la ratification ou à l'adhésion, a pris dans la présente période de codification une ampleur encore plus grande. Parce que le nombre des conventions portant codification est plus grand, parce que le nombre aussi des États est beaucoup plus élevé, parce que l'opposition de conceptions et tendances entre États est plus marquée dans la société internationale actuelle, enfin, et peut-être, surtout parce que la codification de nos jours allant bien plus au-delà de l'expression du droit international coutumier que les codifications antérieures, est imprégnée de plus en plus de ''développement progressif de droit international''. Par ce dernier trait le processus de codification aboutit à des textes qui pour être dictés par des besoins présents de la communauté internationale, n'en consacrent pas moins des règles nouvelles. À cet égard la question qui se pose est de savoir si et dans quelle mesure de telles règles nouvelles insérées dans des conventions de codification, affectent, indépendamment de ratification, le droit international général. C'est là l'aspect le plus délicat et le plus important de la non ratification des conventions de codification.

La question de l'étape finale du processus de la codification, à savoir celle du consentement des États, n'a pas manqué d'attirer l'attention de la CDI lors de sa 20e session (1968) qui discuta le problème à la suite d'un Mémorandum soumis par le Professeur Ago. (Doc. A/ Cn.4/ 205/ Rev.1)[28].

Les remèdes sur lesquels les membres de la CDI étaient appelés à exprimer leur avis, étaient essentiellement l'application, dans le cadre des Nations Unies, des idées qui ont prévalu et des efforts qui ont été déployés au temps de la Société des Nations, et l'adoption de règles admises par certaines institutions spécialisées, règles en vertu desquelles, d'une part, un délai est fixé aux États pour saisir les autorités nationales compétentes et, d'autre part, l'obligation leur est imposée d'indiquer les difficultés et les raisons qui empêchent ou retardent la ratification. C'était là l'essentiel

[28] *Annuaire de la CDI*, 1968, vol. II, pages 175 à 183.

du système discuté au sein de la Commission du Droit International. Pour l'application de ce système dans le cadre des Nations Unies, trois moyens ont été envisagés dans le rapport soumis à la CDI: a) amendement de la Charte des Nations Unies, b) recommandation de l'Assemblée générale, c) adoption aux conférences de codification de protocoles de signature appropriés.

Pour juger de l'efficacité du système et des moyens susmentionnées il faudrait peut-être commencer par savoir, après examen de la question à l'aide du Secrétariat, si et dans quelle mesure et dans quelles conditions, dans le passé, des résolutions de l'Assemblé générale invitant à ratifier telle ou telle convention ont pu aboutir à augmenter le nombre de ratifications. Car il serait quelque peu étrange que, sur une question si importante, on puisse se retrouver dans une situation qui consiste, soit à inciter les États à recommander à eux-mêmes de ratifier une convention qu'ils n'ont pas ratifiée, soit à conseiller aux autres de faire ce qu'on ne fait pas soi-même.

Pour saisir le sens des débats au sein de la CDI, il y a lieu de bien distinguer entre, d'une part, le principe, la ligne générale du système, et, d'autre part, les trois méthodes d'application de ce système. En ce qui concerne les méthodes d'application, il ne paraît pas que la CDI dans son ensemble les ait retenues avec enthousiasme, quoique certains membres aient favorablement accueilli telle ou telle des trois méthodes[29]. En ce qui concerne le principe, le système dans lequel se situent les dites méthodes ou moyens et qui fut le point de départ, à savoir soumission de la convention aux autorités nationales compétentes dans un délai raisonnable et (ou) rapport sur les raisons de non ratification, il ne paraît pas non plus avoir été finalement retenu avec enthousiasme. À la fin des débats, d'une part le Président Ruda concluait que la Commission ne devait pas faire de recommandations particulières et, d'autre part, le Conseiller Juridique des Nations Unies, M. Stavropoulos, qui partageait ce point de vue, ajoutait que les conditions qui règnent à l'Organisation Internationale du Travail sont spéciales et que son système ne pourrait pas fonctionner au sein de l'Organisation des Nations Unies (978e séance de la CDI, par. 57-50)[30].

Le système en question est-il le meilleur ou le seul pour faire face au problème de non ratification des conventions de codification? L'idée directrice du système et partant des méthodes de son application consiste, en dernière analyse, à recourir à des moyens de persuasion ou de pression, sous telle ou telle forme, envers les gouvernements afin que ceux-ci soient incités à procéder à la ratification ou à l'adhésion.

[29] Voir *Annuaire de la CDI*, 1968, vol. I, pages 198 à 211.
[30] Ibid., page 209.

Pour les conventions de codification déjà existantes qui ne sont pas ratifiées, on conçoit une discussion sur certains moyens de pression ou de persuasion, tels que ceux conseillés par la SDN et étudiés par la CDI. Car, si l'on met de côté la possibilité de procéder à une révision de la convention, on ne peut après coup faire autre chose que d'essayer de persuader les États. Et encore, dans une telle façon d'envisager les choses, faudrait-il creuser plus avant et voir dans chaque cas les raisons de la non-ratification.

Les raisons peuvent, certes, être d'ordre technique ou administratif: manque de spécialistes dans des domaines techniques ou manque d'une formation suffisante de représentants aux conférences de codification ou encore manque de traducteurs qualifiés, et quelquefois aussi absence d'une idée nette sur l'utilité des traités à ratifier. D'autre part, souvent les États n'envisagent pas la ratification comme une question urgente ou pas aussi urgente que des questions intérieures. Et plus souvent encore, cela peut être l'inertie de l'appareil technique et administratif. Hormis ces obstacles, la ratification ou l'adhésion à une convention de codification peut exiger des consultations interministérielles, pour laisser de côté les lenteurs des procédures constitutionnelles requises.

Si des raisons comme celles qui viennent d'être mentionnées étaient à la base de la non ratification, à savoir des raisons essentiellement ou principalement d'ordre technique ou administratif, elles seraient alors, à bien réfléchir, plutôt des causes de retard et non pas d'opposition réelle; de sorte que l'on pourrait en effet songer à tel ou tel moyen de pression parmi ceux précédemment mentionnés.

Par contre, dans les cas, pensons-nous, les plus sérieux et les plus fréquents où les raisons de non ratification seraient autres, à savoir plus profondes, des raisons qui se rattachent à une opposition réelle quant au contenu de la convention, en d'autres termes des raisons qui concernent des intérêts essentiels de l'État et qui par conséquent dictent, elles, un refus ou des hésitations à ratifier, alors il y aura vraiment très peu de chance que des méthodes ou moyens de pression puissent convaincre les États de ratifier des conventions de codification déjà existantes.

Mais il ne faut pas s'arrêter là. Si l'on regarde vers l'avenir, si l'on envisage les futures conventions de codification, on serait plus avisé d'examiner le problème de leur ratification sous un tout autre angle. L'étude du problème des conventions de codification non ratifiées et des remèdes possibles doit partir de la distinction entre les conventions de codification existantes et celles à venir. Ce sont d'autres méthodes qui conviennent mieux à l'une et à l'autre de ces deux catégories de conventions. Pour

les premières, les conventions qui existent déjà, puisque pour elles on est arrivé à l'étape finale du processus de codification, on ne peut plus, en vue de leur ratification, songer qu'à certaines méthodes de persuasion ou de pression envers les gouvernements, quoique pareilles méthodes, comme on l'a vu, sont loin de paraître efficaces, surtout lorsque la non ratification est due à des raisons politiques, à des objections réelles quant au fond d'une convention. Pour les conventions futures ne serait-il pas mieux d'éviter d'en arriver là? Pour elles il faudrait songer à autre chose, à prévenir le mal, pour qu'à l'avenir ne réapparaisse pas cette situation troublante du manque de nombreuses ratifications ou adhésions. Car ce n'est pas seulement la question très importante de la validité dans l'espace du droit codifié, mais aussi celle très grave de la validité et du contenu du droit international général qui sont en jeu.

L'existence de conventions de codification qui ne sont pas largement acceptées par les États pose la question suivante: quels sont et quels seront, si la situation actuelle devait continuer, les effets d'un processus de codification qui se déroule en plusieurs étapes et qui s'arrête à l'étape finale, celle du consentement des États? Ces effets sont-ils toujours avantageux? Ne peuvent-ils pas présenter aussi certains inconvénients? Plus précisément, quelle peut être l'influence processus de codification sur les règles de droit international général? Ce processus peut-il servir à la consolidation de règles coutumières préexistantes ou, encore, contribuer à la formation de nouvelles règles coutumières? Il y a là certainement un aspect central du problème.

Pour y voir clair, pour éviter les refus ou retards excessifs de ratifications, en d'autres termes la non réalisation de l'étape finale du processus de codification, il y a lieu d'abord de passer en revue les étapes antérieures:

1. Déjà à la première étape, lors de l'élaboration du projet, souvent différents éléments sont venus à la surface qui ont été pris en considération et qui ne peuvent plus être ignorés: des textes législatifs internes, des arrêts de tribunaux internes, des décisions judiciaires ou arbitrales internationales, des conventions internationales bilatérales ou autres, etc. Plus riche sera ce matériel, plus fort sera la conviction que la rédaction finale du projet est inspirée de données justifiant l'impression qu'on est en présence d'une coutume internationale, tout au moins à un stade avancé de sa formation. Puis il se peut qu'au cours des débats les membres de l'organe compétent (CDI ou

autre organe) ou certains d'entre eux aient déclaré que selon leur avis les solutions discutées reflètent le droit international général. Et inversement, une disposition du projet peut avoir été sans un fondement solide de précédents, ou même malgré une pénurie manifeste de précédents, insérée pour compléter la matière, combler une lacune de droit international général, formuler une règle de *lege ferenda*.

2. Ensuite, lors des débats et du vote de textes, au sein de conférences internationales ou d'assemblées d'organisations internationales largement représentatives (Assemblée générale des Nations Unies, conférences d'organisations spécialisées, conférences diplomatiques de codification), il n'est pas rare que des majorités ou des courants plus ou moins marqués se dégagent en faveur de telle ou telle solution ou disposition du projet, majorités au sein desquelles, d'ailleurs, ne manquent pas éventuellement des représentants, parmi ceux qui se sont prononcés en faveur d'une solution ou disposition déterminée, qui déclarent en plus qu'il y avait là, selon leur avis ou selon la position de leurs gouvernements, des solutions déjà admises par le droit international général.

Et inversement il se peut qu'une minorité importante de représentants, par le nombre ou par la qualité des États en rapport avec la matière examinée, se soit opposée à un texte, voire même ait fait des déclarations selon lesquelles tel ou tel article ou disposition ne correspond pas au droit international général. Ladite minorité pourrait se distinguer par le fait qu'elle comprend des États très représentatifs en ce qui concerne une matière concrète et très fermes dans leur position. De telles minorités, considérées dans un contexte éventuel de nombreuses abstentions, pourraient avoir un poids non négligeable vis-à-vis de majorités essentiellement relatives. De telles circonstances pourraient peser dans l'appréciation de la valeur des textes non ratifiés.

Les éléments (ci-dessus sous 1 et 2) versés au cours de l'élaboration d'une convention de codification, ne peuvent plus être ignorés au moment où la valeur d'une convention de codification non ratifiée devra être appréciée dans un cas concret, dans un différend surgissant entre États qui n'ont pas ratifié ou qui n'ont pas tous ratifié la convention en question. Les circonstances dont il a été question jusqu'ici – documents utilisés, textes de projet, discussions, opinions et déclarations de membres participants à des

organes compétents, votes – pourront être invoquées ou retenues au cours d'une contestation ou d'un différend en vue d'appuyer telle ou telle thèse sur la valeur de la règle contestée du point de vue du droit international général, étant donné que ladite règle qui ne lie pas conventionnellement – puisque par hypothèse se trouvant dans une convention non ratifiée – pourrait être considérée déjà avant le processus de codification ou, devenir après ce processus règle obligatoire de droit international général.

En effet, il ne s'agit pas là d'une pure hypothèse théorique. Pour laisser de côté d'autres exemples, nous nous bornons à un des plus récents et des plus instructifs, puisque c'est la Cour internationale de Justice qui en examinant l'affaire du Plateau continental de la Mer du Nord a eu recours à des éléments comme ceux susmentionnés en vue de découvrir l'existence éventuelle d'une règle de droit international coutumier correspondant à l'article 6 de la Convention de Genève de 1958 sur le Plateau continental, règle qui, par conséquent, serait applicable vis-à-vis de la République Fédérale d'Allemagne qui n'avait pas ratifié ladite convention. La Cour internationale de Justice s'est référée plus d'une fois aux travaux de la Commission du Droit International (Arrêt, par. 48 et suiv.)[31]. Plus spécialement, la Cour s'est référée à des documents de la CDI ainsi qu'aux vues de ses membres et aux discussions en son sein (ibid., par. 49 et 50) et également au rapport pour 1953 (ibid., par. 53) et naturellement au projet de la Commission du Droit International (ibid., par. 62) ainsi qu'aux discussions de la Conférence de Genève sur le droit de la mer (1958) (ibid., par. 54 et 61).

Pour ce qui est de la signature, on sait qu'en général une convention signée, pour laquelle le consentement de l'État par ratification ou adhésion n'a pas été donné, n'est pas – sauf les cas exceptionnels où la ratification n'est pas nécessaire – juridiquement obligatoire. Cependant cela, lorsqu'on est en présence d'une convention de codification du droit international, tout en signifiant que la convention n'oblige pas en tant que convention, en d'autres termes que ses règles n'ont pas une valeur contractuelle, ne présume point de l'inapplicabilité des dites règles en tant que règles de droit international général.

Certes, du point de vue du droit strict, seules les ratifications enlèveront du texte signé la qualité de projet de convention pour l'élever au niveau du droit positif, lui attribuer la valeur de règle contractuelle obligatoire. Mais si tel est le cas pour un traité-contrat ou pour un traité-loi bilatéral, il n'en est plus pratiquement de même lorsqu'il s'agit d'une convention collective dont le texte a été pendant longtemps préparé

[31] CIJ, *Recueil des arrêts*. 1969. Plateau continental de la mer du Nord. Numéro de vente: 327.

par un organe international qualifié et éventuellement amplement discuté au sein d'une assemblée ou d'une conférence internationale de plénipotentiaires, convention collective destinée à constituer une codification universellement valable. Pour la formation de la coutume internationale l'apport d'une convention signée et non ratifiée est considérable. Cela était déjà acquisdans le passé; cela est devenu de plus en plus certain. Et, alors que dans le passé la valeur du point de vue du droit international général d'une convention signée et non ratifiée était indiscutable quand il s'agissait d'une convention déclaratoire du droit coutumier, cette valeur s'amplifie de nos jours en s'étendant à des conventions de codification qui contiennent aussi des règles nouvelles, c'est-à-dire également à ces règles nouvelles. Une convention signée peut, à défaut de ratification de la partie intéressée, voir son autorité, sur le plan du droit international général, s'accroître, si elle a été ratifiée par un nombre important et représentatif d'États autres que la partie intéressée.

Certes l'inaction d'un État vis-à-vis d'une convention ouverte à ratification ou adhésion, notamment lorsque ladite convention contient des règles nouvelles, en d'autres termes l'abstention à devenir partie contractante, peut être due à différentes raisons, mais c'est "l'acceptation positive" par l'État qui sera retenue en vue de l'application de la convention à son égard. Dans l'affaire du Plateau continental de la Mer du Nord, la Cour internationale de Justice a dit: "On ne saurait s'appuyer sur le fait que la non-ratification puisse être due parfois à des facteurs autres qu'une désapprobation active de la convention en cause pour en déduire l'acceptation positive de ces principes: les raisons sont conjecturales mais les faits demeurent" (ibid., par. 73, p. 42). Et en ce qui concerne l'application de règles d'une convention non ratifiée en tant qu'expression du droit international général, si le nombre des États qui s'abstiennent d'accepter la convention est relativement grand, cela équivaut en tout cas à une large opposition à la convention, ce qui empêche que celle-ci puisse être considérée comme reflétant le droit international général.

En tout cas, s'agissant toujours d'une convention qui n'est pas purement et simplement déclaratoire, mais qui contient des règles nouvelles, l'écoulement d'une longue période de temps pendant laquelle des États nombreux et représentatifs omettent de ratifier ou d'adhérer, fait que cette omission, équivalant à une large désapprobation de la convention, conjointement à une pratique négative, à savoir qui n'implique pas autrement acceptation des règles contenues dans la convention, ébranle l'autorité que cette dernière aurait pu avoir sur le plan du droit international général.

Mais tout autre devient la situation lorsque les États ayant ratifié sont nombreux et représentatifs. Une convention portant codification du droit international pourrait, si elle a recueilli un nombre important de ratifications représentatives, peser de façon décisive sur le droit international général et partant obliger un État qui n'est pas partie contractante. Mais à partir de combien de ratifications ou d'adhésions une convention de codification non ratifiée pourra-t-elle être reconnue come expression du droit international général? Il y a là certainement une question qui sera à apprécier dans chaque cas concret.

À cet égard, la Cour internationale de Justice a pris la position suivante: "En ce qui concerne les autres éléments généralement tenus pour nécessaires afin qu'une règle conventionnelle soit considérée comme étant devenue une règle générale de droit international, il se peut que, même sans qu'une longue période se soit écoulée, une participation très large et représentative à la convention suffise, à condition toutefois qu'elle comprenne les États particulièrement intéressés... le nombre des ratifications et adhésions obtenues jusqu'ici est important, mais n'est pas suffisant." (Ibid., par. 73) Dès lors, c'est une question de fait dans chaque cas concret. Mais y aura-t-il toujours une instance impartiale pour juger dans un cas concret si le nombre de ratifications ou adhésions est ou n'est pas "suffisant"?

D'autre part, les effets sur le droit international général d'une convention de codification non ratifiée pourront être produits ou, selon les cas, être renforcés, lorsque viendrait d'ajouter ultérieurement une pratique internationale dans le même sens que ladite convention. Dans l'affaire Nottebohm (2e phase, Arrêt, Recueil 1955, p. 22) la CIJ, alors que les parties n'étaient pas liées par la Convention de la Haye du 12 avril 1930 concernant des conflits de lois sur la nationalité, a tenu compte d'une pratique fondée sur les articles 1 et 5 de la Convention. (Cf. CIJ, Arrêt, affaire du Plateau continental, par. 74). Une pratique, afin de pouvoir constituer un élément de preuve pour l'existence d'une règle de droit international général, doit, certes, être répandue, "fréquente et pratiquement uniforme", et émanant d'États particulièrement intéressés. (CIJ, Arrêt, par. 74, affaire du Plateau continental). Il n'est donc pas exclu que de par les effets de ratifications et d'une pratique conforme, des éléments d'incertitude apparaissent quant aux règles de droit coutumier, puisque dans chaque cas concret la question se posera de savoir si, du point de vue de la valeur desdits éléments comme facteur de la formation de la coutume, le nombre et la qualité des ratifications devra être considéré "suffisant" ou si une pratique ultérieure devra être retenue comme pertinente.

Afin d'influencer le droit international général, plus précisément afin de contribuer à la formation d'une règle coutumière, lesdites ratifications, appréciées non seulement quantitativement mais aussi qualitativement, pourront, à côté d'autres éléments antérieurs (adoption à l'unanimité ou à une très forte majorité par une conférence de codification – nombre imposant de signatures) ou ultérieurs (pratique générale postérieure à la convention), ou bien, selon les cas, à elles seules, peser d'un lourd poids, quelquefois de façon décisive, sur le droit international général, pouvant constituer l'expression d'une coutume internationale.

Et même, indépendamment de signature, un texte adopté à une large majorité par une grande conférence telles les conférences de codification, notamment lorsqu'il a été adopté à l'unanimité ou par une majorité dépassant les deux tiers selon le règlement desdites conférences, acquiert déjà de par cette réception – pour ne pas dire cette approbation de principe – une autorité point négligeable.

Rappelons qu'en plus des conventions signées ou adoptées, d'autres textes versés au long du processus de codification peuvent être invoqués et pris en considération, notamment des projets élaborés par un comité ou une commission à composition largement représentative, tels les projets de la CDI. Les projets de la CDI seront invoqués aussi bien quand le processus de codification s'est arrêté là que quand ce processus a été poursuivi au sein de l'Assemblée générale ou d'une conférence de codification, par lesquelles on sait qu'ils sont pris comme base et que finalement ils sont très légèrement modifiés.

Pour résumer, tous les éléments apparaissant au cours du processus de codification pourront être pris en considération, lorsqu'on devra résoudre un différend concret, à l'occasion duquel sera posée la question de la mesure dans laquelle une convention de codification non ratifiée devra être retenue sur le plan du droit international général.

Les éléments qui ont été mentionnés jusqu'ici ne seront pas tous avancés ou pesés dans toute contestation éventuelle, mais tels ou tels éléments, selon les cas, pourront venir à la surface et être examinés afin de se rendre compte de leur apport et de leur influence sur des règles contenues dans une convention de codification non ratifiée, règles qui ne lient pas en tant que règles conventionnelles mais pour lesquelles il reste à savoir si elles ne seraient pas obligatoires en tant que règles de droit international général.

Ces points signalés jusqu'ici entrent en ligne de compte pour l'appréciation du droit international général existant avant le processus de codification et aussi après ce processus, indépendamment de la dernière

étape qui est la ratification ou l'adhésion. Existait-il une règle de droit international général avant ledit processus? Le droit international fut-il affecté par tant d'éléments apparus au cours des travaux de codification? La question est délicate et importante et elle se pose dans les rapports de tous les États, aussi bien des États qui ont ratifié dans leurs relations avec des États qui n'ont pas ratifié que de ces derniers dans leurs relations non seulement avec les premiers, mais aussi avec d'autres États qui eux également n'ont pas ratifié. La force du droit international général s'étend au grand large, à l'ensemble des États membres de la communauté internationale.

Les éléments apparaissant au cours du processus de codification (textes de projet – discussions – votes – textes adoptés par une conférence de codification – conventions signées) peuvent, indépendamment de ratification, entrer en ligne de compte en vue d'apprécier dans un cas concret l'existence ou la non existence d'obligations internationales, et respectivement de droits non pas de caractère contractuel mais découlant du droit international général, plus précisément d'une coutume internationale.

Nous avons vu qu'au cours du processus de codification différents éléments s'ajoutent l'un après l'autre et des questions délicates se posent, en ce qui concerne notamment l'apport de chaque élément au droit international général, en vue plus particulièrement de savoir si et dans quelle mesure tel ou tel élément est à retenir comme facteur contribuant à la consolidation ou à la formation d'une règle coutumière générale. Ainsi le processus de codification considéré en lui-même, indépendamment de ratification, peut acquérir une signification en soi, large de conséquences en ce qui concerne le droit international général et en ce qui concerne, par conséquent, les droits et obligations des États. Ce précieux apport du processus de codification est indiscutablement bienfaisant lorsque la codification est déclaratoire. Mais une convention de codification non ratifiée, en d'autres termes le processus de codification pris indépendamment de la ratification peut, à l'inverse, encourager des contestations quant au droit international général, voire augmenter l'incertitude en ce qui concerne le droit international coutumier, notamment par rapport à des dispositions qui contiennent des règles nouvelles.

On sait que de nos jours la "codification" renferme également, et à juste titre, dans la même convention, le "développement progressif" du droit international. Lorsque, par conséquent, une convention de codification est imprégnée en même temps du souci de développement du droit international, lorsqu'en d'autres termes elle constitue une codification

lato sensu, – ce qui est fréquemment le but des conventions modernes de codification –, cela signifie qu'elle comprend à côté de règles déjà reçues par le droit international général aussi des règles nouvelles. En ce qui concerne également ces dernières, le processus de codification, considéré en lui-même, indépendamment de ratification, peut présenter une valeur importante sur le plan du droit international général, peut affecter ce droit, surtout en liaison avec d'autres éléments – ratification par des États autres que l'État partie à un différend – et ainsi poser la question délicate et importante de savoir si des règles nouvelles de droit international se sont formées, règles qui en pareil cas seraient opposables à un État dont le consentement à la convention n'a point été donné. Rappelons que l'article 38 de la Convention de Vienne sur le Droit des Traités envisage, quoique timidement, une telle situation, lorsqu'il stipule que "aucune disposition des articles 34 à 37 (traités et États tiers) ne s'oppose à ce qu'une règle énoncée dans un traité devienne obligatoire pour un État tiers en tant que règle coutumière de droit international reconnue comme telle" (c'est nous qui soulignons).

Cet aspect du problème des conventions de codification non ratifiée a été également illustré par l'affaire susmentionnée du Plateau continental de la Mer du Nord. La question qui s'y posait était de savoir si la règle de l'équidistance énoncée à l'article 6 de la Convention de Genève de 1958 concernant le Plateau continental était opposable à l'Allemagne; personne n'a contesté que la convention ne liait pas contractuellement la République fédérale; il ne pouvait non plus être contesté que ladite règle (équidistance – circonstances spéciales) n'appartenait pas au droit coutumier préexistant mais était bien une règle nouvelle. À cet égard les passages suivants de l'Arrêt de la CIJ sont pertinents:

> Le Danemark et les Pays-Bas soutiennent que, quelle que soit sa situation par rapport à la Convention de Genève en tant que telle, la République fédérale est de toute façon tenue d'accepter la méthode équidistance-circonstances spéciales en matière de délimitation car, si l'emploi de cette méthode ne s'impose pas à titre conventionnel, il relève – ou doit désormais être considéré comme relevant – d'une règle de droit international général... Cette thèse... se fonde sur des travaux d'organismes juridiques internationaux, sur la pratique des États et sur l'effet attribué à la Convention de Genève elle-même: l'ensemble de ces facteurs attesterait ou engendrerait l'*opinio juris sive necessitatis* indispensable à la formation de règles nouvelles du droit international coutumier. (Arrêt, par. 37[32])

[32] CIJ, *Recueil des arrêts*. 1969. Plateau continental de la Mer du Nord. Numéro de vente: 327.

Du point de vue ici examiné il importe peu que la Cour ait finalement rejeté la demande du Danemark et des Pays-Bas; ce qui est particulièrement instructif pour le problème qui nous occupe est que la Cour en procédant à l'examen du cas concret a suivi le même raisonnement, la même méthode de recherche à la base de laquelle lesdits États ont formulé leur demande afin de savoir si la règle d'équidistance--circonstances spéciales est "devenue une règle de droit positif par l'effet d'éléments tels que la Convention de Genève ou la pratique des États." (Arrêt, par. 38)

Au même Arrêt, on lit plus loin:

> ... la question de savoir si le principe d'équidistance en est venu a être considéré comme une règle de droit international coutumier... par les moyens du droit positif, de sorte qu'il s'imposerait à la République fédérale à ce titre bien que l'article 6 de la Convention de Genève ne lui soit pas opposable en tant que tel. Il faut à cette fin étudier la place qu'occupait ce principe lors de la rédaction de la Convention et celle qui lui a été conférée par la Convention elle-même et par la pratique des États postérieure à la Convention... Il peut être commode d'examiner la première de ces questions sous la forme que lui ont donnée le Danemark et les Pays-Bas dans leurs plaidoiries: ... Leur thèse était plutôt la suivante: si avant la conférence le droit du plateau continental n'était qu'embryonnaire et si la pratique des États manquait d'uniformité, il n'en restait pas moins que la définition et la consolidation du droit coutumier en voie de formation s'étaient effectués grâce aux travaux de la Commission de Droit International, aux réactions des gouvernements devant l'oeuvre de la Commission et aux débats de la Conférence de Genève et que ce droit coutumier en voie de formation s'était cristallisé du fait de l'adoption de la Convention sur le Plateau continental par la conférence. Si juste que soit cette thèse en ce qui concerne du moins certaines parties de la Convention, la Cour ne saurait la retenir pour ce qui est de la clause sur la délimitation (Article 6)... (Arrêt, par. 60-62).

Puis au par. 69 de l'Arrêt:

> Une règle a bien été établie par l'article 6 de la Convention, mais uniquement en tant que règle conventionnelle. Il reste à voir si elle a acquis dès lors un fondement plus large car, comme règle conventionnelle elle n'est pas opposable à la République fédérale, ainsi que la Cour l'a déjà constaté.

Et au par. 71:

> ... une règle qui, purement conventionnelle ou contractuelle à l'origine, se serait depuis lors intégrée à l'ensemble du droit international général et serait maintenant acceptée à ce titre par l'*opinio juris*, de telle sorte qu'elle s'imposerait même aux pays qui ne sont pas et n'ont jamais été parties à la Convention. Certes cette situation et du domaine des possibilités et elle se présente de temps à autre: c'est même l'une des méthodes reconnues par lesquelles des règles nouvelles de droit international coutumier peuvent se former. (C'est nous qui soulignons)

La conclusion à tirer de l'Arrêt de la Cour est qu'une règle qui n'est pas déclaratoire de droit international coutumier et qui se trouve dans une convention de codification non ratifiée, peut, certaines conditions étant remplies, devenir règle de droit international général. D'autre part, de l'examen de l'affaire fait par la Cour, il appert qu'afin de se prononcer sur la formation, à la suite d'une convention de codification, d'une règle nouvelle de droit international coutumier, la Cour s'est penchée non seulement sur la pratique des États ultérieure à la convention, mais aussi sur différents éléments apparus au cours du processus de codification. La Cour a procédé de la sorte en vue de découvrir les effets de la convention sur la formation de règles nouvelles de droit international général, règles opposables en tant que règles de droit international général vis-à-vis d'un État qui n'a pas ratifié la convention.

À la lumière des considérations qui précèdent, confirmées par l'Arrêt précis de la CIJ, on peut se rendre compte que lorsqu'on est en présence d'une convention de codification *lato sensu*, en d'autres termes d'une convention de codification et de "développement progressif" du droit international, autrement dit d'une convention qui contient des innovations, le processus de codification pris indépendamment de la ratification pourra conduire à des règles coutumières nouvelles, et de ce fait à une altération des droits et des obligations des États, indépendamment de leur consentement exigé pour la validité de la convention en tant que telle. Comme la revanche à la soumission des États au droit international est prise par leur liberté conventionnelle, inversement la revanche à cette liberté est l'autorité du droit international général indépendante du consentement des États.

Nous venons de voir que le processus de codification, autrement dit les conventions de codification non ratifiées, affecte ou peut affecter le droit international général par des dispositions non déclaratoires portant développement du droit international, à savoir, par des dispositions

relatives à des règles nouvelles, dispositions qui peuvent être importantes et éventuellement les plus contestées. Il s'ensuit que des conventions de codification non ratifiées peuvent ouvrir des portes à des contestations, provoquer, sinon quelque confusion, une incertitude sur des règles appartenant à la matière faisant l'objet de la convention, matière que la codification avait justement comme but de clarifier, de sorte qu'au lieu de la précision souhaitée, un certain trouble ou une incertitude pourra naître sur l'état du droit.

L'incertitude qui s'ensuivra quant au droit coutumier, quant à son contenu et quant au moment du commencement de sa validité, incertitude naissant de l'existence de conventions de codification non ratifiées, est certes un aspect de l'incertitude qui plus généralement accompagne le complexe psychologique et sociologique de formation des règles internationales coutumières. Mais elle est encore plus accentuée à cause du nombre et de la diversité des éléments apparaissant au long du processus de codification et à cause du manque d'une procédure de solution des différends par un tiers impartial, alors que les questions délicates que pose l'appréciation des divers éléments apparaissant au cours du processus de codification appellent un examen minutieux et objectif dans chaque cas concret.

Pour les contestations et les thèses étayées sur de tels éléments, il n'y aura pas toujours, comme pour l'affaire du Plateau continental de la Mer du Nord, une cour internationale pour juger, pour trancher telle ou telle question délicate concernant la validité, du point de vue du droit international général, d'une règle insérée dans une convention de codification non ratifiée. En l'absence d'une juridiction pouvant se prononcer sur la persistance ou la formation de règles coutumières vis-à-vis desquelles devra être apprécié le processus de codification, autrement dit sur les effets d'une convention non ratifiée, le problème deviendra encore plus complexe.

Déjà au cours des négociations ou pourparlers en vue de régler un différend auquel des dispositions d'une convention non ratifiée seront impliquées, les parties disposeront d'un large éventail d'arguments, puisque des éléments abondants – peut-être contradictoires – auront apparu au cours du processus de codification. Cela déjà pourrait renforcer l'opposition, voire encourager un certain durcissement des thèses en présence. Le caractère relatif des arguments invoqués de part et d'autre pourra être plus accentué, puisque la valeur des divers éléments puisés dans les différentes étapes du processus de codification sera relative, ne pouvant point être comparée à la valeur incontestable d'une convention

ratifiée. Puis, en cas d'intervention d'un organe pour la solution du différend, l´écart entre une décision d'un organe judiciaire ou arbitral et la solution du même différend par un organe politique pourrait être grand. En somme, que ce soit sans intervention d'un organe quelconque ou bien avec l'intervention d'un organe politique, des contestations et des différends liés à une convention de codification non ratifiée poseront des problèmes d'une grande complexité, notamment lorsqu'il s'agira de savoir si du fait d'une telle convention s'est ou ne s'est pas formée une règle de droit international coutumier.

Il importe donc hautement qu'une solution juridictionnelle soit établie comme obligatoire pour le règlement des différends naissant de l'application et de l'interprétation des conventions de codification. Seulement on sait que l'obligation d'une solution juridictionnelle est loin de pouvoir être généralement acceptée.

C'est une raison de plus qu'on ne demeure pas indifférent devant la situation de conventions de codification non ratifiées et qu'on essaie tous les moyens qui pourront conduire à des acceptations aussi nombreuses que possible.

La voie qui a été suivie par la Société des Nations et par la Commission du droit international aboutit, comme nous avons vu, à appliquer des méthodes qui consistent notamment à employer des moyens de persuasion ou de pression envers les gouvernements afin que ceux-ci procèdent à la ratification ou à l'adhésion. C'est une voie certes courageuse qui présente les avantages et les inconvénients de l'optimisme. Cependant ne peut-on pas douter de l'efficacité de l'application *ex post facto* de moyens de persuasion et de pression envers les gouvernements, notamment lorsque l'opposition de ceux-ci est réelle, portant sur le fond des dispositions contenues dans une convention de codification? Comment donc la situation actuelle selon laquelle les conventions de codification souvent ne jouissent pas d'une large acceptation pourrait-elle changer en ce qui concerne les conventions futures de codification, de sorte qu'il y ait à l'avenir moins d'hésitations de la part des gouvernements à donner leur consentement?

A. On peut songer à certaines techniques connues, certaines méthodes spécifiques qui tendraient à aider les États à mettre de côté les objections qu'ils auraient pour la ratification ou l'adhésion à une convention de codification, objections dues à l'opposition contre certaines dispositions. Ces méthodes tiendraient compte du fait que, lorsque les raison de la non-ratification ne sont pas d'ordre technique ou administratif, mais sont dues à une opposition quant au fond de la réglementation

conventionnelle, cette opposition n'est que partielle, ne concerne que telle ou telle disposition de la convention.

Les méthodes ou moyens qui viennent à l'esprit, quitte à voir lequel ou lesquels parmi eux seraient plus appropriées dans chaque cas, sont les réserves, les clauses facultatives et les protocoles séparés.

a) L'augmentation escomptée du nombre des ratifications, par la possibilité de réserves, constituerait pour le reste de la convention un facteur de clarification de la situation juridique, et cela en ce qui concerne non seulement les États ayant ratifié la convention, mais aussi les États qui ne l'ont pas ratifiée, puisque vis-à-vis de ces derniers des ratifications nombreuses par d'autres États seraient retenues comme un élément très important sur le plan du droit international général.

À la Convention sur la Haute Mer qui a réuni un grand nombre de ratifications, des réserves ont été faites, alors que ses dispositions sont selon son Préambule "pour l'essentiel déclarations de principes établis de droit international."

b) Le même résultat pourrait être atteint par des clauses facultatives. Il s'agirait de dispositions qui, concernant des points autour desquels un accord définitif par ratification s'avère irréalisable, ne seraient pas applicables de par la ratification ou l'adhésion à la convention, à moins d'une déclaration expresse d'acceptation.

c) Le même souci que se trouve à la base des réserves et des clauses facultatives dicterait la méthode de protocoles séparés ou additionnels, qui concerneraient un aspect de la matière faisant l'objet de la convention, c'est-à-dire des dispositions qui, à la lumière des travaux de codification, ne paraissent pas acceptables pour un grand nombre d'États. La ratification de la convention se limiterait à un corps principal, au-delà duquel la réglementation de l'aspect régi par un protocole séparé ne s'appliquerait qu'à la suite de la ratification ou de l'adhésion au protocole en question.

On se rappellera que le procédé des protocoles séparés fut employé notamment pour le règlement des différends relatifs à l'interprétation ou à l'application de conventions de codification. Ainsi, le Protocole de

signature facultative portant la même date que la Convention de Vienne sur les relations diplomatiques du 18 avril 1961; de même le Protocole de signature facultative portant la même date que la Convention sur les relations consulaires du 24 avril 1963 et le Protocole de signature facultative portant la même date que la Convention sur les missions spéciales du 16 décembre 1969.

Les systèmes de clauses facultatives et de protocoles additionnels ont été appliqués à la Convention européenne des Droits de l'homme qui, d'une part, contient deux clauses facultatives, concernant la compétence de la Commission européenne des Droits de l'homme à examiner des requêtes individuelles (art. 25) et la compétence de la Cour européenne (art. 46) et, d'autre part, est accompagnée d'un Protocole additionnel pour certains droits sociaux. Les matières couvertes par le clauses facultatives et le Protocole additionnel étaient très importantes, étant donné qu'un accord général ne s'annonçait pas possible, au moins dès le début, mais il a été jugé opportun de ne pas en faire des causes de non ratification et bloquer ainsi l'ensemble du corps principal de la Convention de protection et de sauvegarde des droit de l'homme et des libertés fondamentales.

L'applicabilité des méthodes spécifiques susmentionnées (réserves-clauses facultative – protocoles séparés) dépendra des circonstances de chaque cas concret de conventions de codification. Mais pour autant qu'il sera jugé opportun, le recours à telle ou telle desdites méthodes rendrait plus facile une acceptation plus large du corps essentiel de la convention et favoriserait la marche vers l'universalité. En revanche, il est indéniable que l'application de telles ou telles méthodes en question conduirait à un manque d'engagements absolument uniformes pour tous les États ayant ratifié ou adhéré. Aussi faudra-t-il peser, dans chaque cas, les pour et les contre, voir si mieux vaut avoir un corps principal de règles largement acceptées par ratification ou adhésion que maintenir un texte certes plus complet mais non largement ratifié. À cet égard, à côté d'autres considérations, une sage et objective prévoyance sur les chances sérieuses d'une large acceptation de la convention dictera l'opportunité de l'application, dans chaque cas concret, des méthodes ci-dessus mentionnées, et cette prévoyance sera, d'ailleurs, rendue plus aisée lorsque seront remplies les conditions exposées ci-dessous sous B.

B. Si la cause principale du manque de ratifications de la part des États est l'opposition réelle de leur part, due au désaccord quant au contenu de la convention, ne devrait-on pas, en vue de prévenir une telle opposition, avoir comme souci constant, depuis le début et pendant les

différentes étapes du processus de codification, d'aboutir à des textes pour lesquels il y aurait une sérieuse probabilité d'une large acceptation? Dès lors, n'y aurait-il pas lieu de procéder depuis le choix du sujet à codifier jusqu'à la fin du travail de codification de telle sorte qu'il ne soit pas perdu de vue, tout le long de ce processus, qu'il est de la première importance d'arriver à des textes qui de par leur contenu offriront de sérieuses assurances qu'ils seront adoptés par des États nombreux et représentatifs.

En ce qui concerne le choix du sujet, si l'on veut réussir à obtenir des ratifications nombreuses et représentatives et si, d'autre part, on ne peut laisser de côté des sujets à codifier qui servent des besoins présents de la communauté internationale et qui de ce fait demandent aussi des règles nouvelles, ne devrait-on pas s'orienter vers de sujets pour lesquels il y aurait dès l'abord un sentiment vraiment largement répandu quant à la nécessité plus ou moins urgente d'une réglementation conventionnelle. Ne serait-il pas alors indiqué de constater d'avance, à la base des donnés précises – de déclarations nettes et de votes sincères – qu'il existe en effet un désir général, très net et très répandu, de procéder à une réglementation conventionnelle? Si on s'engage à l'élaboration de conventions sur des sujets qui ne remplissent pas les conditions susmentionnées, alors des retards excessifs ou des refus de ratification ou d'adhésion n'auraient rien de surprenant.

D'autre part, que les sujets choisis remplissent lesdites conditions, les conventions de codification n'en contiendront pas moins des règles nouvelles. Si ces règles nouvelles sont très nombreuses, on peut s'attendre à ce qu'il y ait un grand nombre d'États dont le consentement peut faire défaut, comme tel peut bien être le cas pour tout traité international qui introduit beaucoup trop d'innovations.

Alors que tous les États paraissent et disent être disposés à contribuer à l'oeuvre de codification et de développement progressif du droit international, il n'est pas dit qu'ils sont prêts à accepter trop d'engagements ou trop de règles nouvelles. Dès lors il faut reconnaître que réussir à combiner la nécessité de règles nouvelles avec le consentement de nombreux États, est oeuvre délicate, à la réussite de laquelle ce sont les États qui doivent contribuer par une attitude qui ne devra pas être une attitude négative ou de longue attente, à l'étape de la ratification, mais une attitude constructive aux étapes antérieures du processus de codification.

Les États portant certainement – et il importe qu'il n'en soit pas ainsi à l'avenir – une grande part de responsabilité du fait qu'aux étapes antérieures à la ratification, au cours desquelles la marche des travaux leur offre plus d'une occasion pour manifester nettement leurs vues et intentions

sur telles ou telles parties ou dispositions des projets, souvent ils ne le font pas; ils se retranchent derrière la liberté qu'ils ont de ratifier ou de ne pas ratifier quand arrivera l'étape finale du processus de codification.

Une occasion est offerte aux gouvernements par la faculté qu'ils ont et dont ils ne font pas jusqu'à présent grand usage, de faire connaître leurs vues par l'envoi d'observations écrites. Alors que la Commission du Droit International, se conformant à l'art. 21, par. 2 de son Statut, demande aux gouvernements de lui faire connaître leurs observations sur un projet en cours et alors qu'elle est tenue de préparer le texte final du projet "à la lumière de ces observations" (art. 22 du Statut), un grand nombre d'États omettent d'envoyer des observations, lesquelles cependant seraient très utiles et sont très attentivement examinées par la CDI.

Puis au sein de l'Assemblée générale ou d'une conférence de plénipotentiaires, les gouvernements peuvent par la bouche de leurs délégués faire connaître clairement leurs intentions quant à leur acceptation finale, au moyen de déclarations nettes afin que cela puisse être pris en considération et orienter la suite des travaux avant l'élaboration ou l'adoption du texte final.

Les gouvernements ont aussi une autre occasion, lors du vote, de prendre nettement position, éviter des votes de complaisance ou donnés à contrecoeur, et ne voter positivement que lorsqu'il existe une sérieuse intention de ratification de leur part. Lors de l'élaboration et lors du vote des projets, les délégués des gouvernements ne paraissent pas toujours inspirés du souci d'éviter premièrement d'aboutir à des textes pour lesquels on ne peut pas sérieusement prévoir qu'ils réuniront des ratifications nombreuses et représentatives et deuxièmement de transformer le terrain de la codification du droit international en champ de propagande politique.

Enfin, après les discussions et les votes, au sein de l'Assemblée générale ou d'une conférence de plénipotentiaires, et lorsque la convention est ouverte à la signature, on a quelquefois l'impression que des signatures sont données en ne tenant compte que de la règle selon laquelle la signature n'engage pas à ratifier. Certes cette règle est valable également en ce qui concerne les conventions de codification. Cependant la signature de ces dernières ne doit point être considérée comme ne pouvant pas avoir en elle-même certains effets. Ces effets sont, d'une part en ce qui concerne l'État au nom duquel la signature est donnée, de le placer dans un statut provisoire à la suite d'une approbation de principe de sa part faite par la signature, et d'autre part vis-à-vis de tous les États de constituer un élément pouvant entrer en ligne de compte en vue d'apprécier la valeur de la convention non ratifiée par rapport au droit coutumier.

Or, on peut soupçonner que certaines signatures sont données sans réfléchir suffisamment, que, s'agissant d'une convention de codification, préparée dans un cadre universel et destinée à une application universelle, le texte signé acquiert déjà par les signatures une valeur qui, pour être relative, n'en a pas moins des répercussions sur le droit international général. Un État qui donne sa signature à une telle convention de codification, quoique ne s'engageant par sur le plan du droit conventionnel, ne contribue pas moins au processus de la formation de règles coutumières, règles de droit international général, qui étendent leur empire sur tous les États et qui seront d'autant plus opposable vis-à-vis d'un État signataire.

Quoiqu'il en soit de cette question de la signature, des comportements, au cours de la discussion et des votes, comme ceux qui ont été signalés, marquent de la part des États des positions contradictoires entre leur attitude antérieure pendant le processus de codification et leur refus final de ratifier.

Pour le problème des conventions de codification non ratifiées, on ne peut méconnaître qu'un facteur qui intervient, entre autres, et qui complique ce grave problème, est l'attitude des gouvernements eux-mêmes tout le long du processus de codification avant la dernière étape de la ratification. Il importe par conséquent, que les gouvernements et leurs représentants fassent usage des différentes possibilités qui, comme on vient de voir, leur sont offertes afin que par les moyens susmentionnés – observations écrites, amendements, interventions, votes – ils fassent nettement connaître, avant la dernière étape du processus de codification, leurs vues, de sorte qu'on puisse essayer à temps d'aboutir à des textes pouvant réunir un nombre satisfaisant, non pas de voix lors des votes, mais de consentements définitifs, à savoir de ratifications et d'adhésions.

Car il ne faut pas perdre de vue que les possibilités d'un progrès du droit international par sa codification et son développement progressif, dépendent, au moins en grande partie, de la réunion de ratifications et d'adhésions nombreuses et représentatives, et qu'à cela il y a un intérêt égal pour tous les États. En effet, alors que le processus de codification acquiert, quand une convention de codification est largement ratifiée, une valeur propre, et constitue un apport précieux en ce qui concerne la consolidation ou la formation de règles générales de droit international coutumier, ces avantages risquent, lorsque le nombre de ratifications ou d'adhésions n'est pas suffisant à cette fin, de céder la place à l'incertitude en ce qui concerne la règle de droit applicable, inconvénient qui sera particulièrement gênant si un tiers impartial n'est pas appelé à résoudre le différend.

On trouve dans le *Dictionnaire de la terminologie du droit international*[33] de mon illustre maître J. Basdevant (p. 122) une définition exacte de la codification: "La codification est entendue comme comportant non la simple déclaration du droit existant, mais son aménagement, son amendement, sa réforme, ses modifications et compléments, suivant les exigences des rapports internationaux." C'est bien là la codification enrichie du "développement progressif", lequel s'impose dans une société internationale caractérisée par des transformations qui dictent la réadaptation du droit. Or, qui dit développement progressif, entend par là des dispositions qui consacrent des innovations par l'adoption de règles nouvelles ou par l'abandon de règles traditionnelles. Vu les intérêts différents de chaque État on comprend que certains États soient favorables à des règles nouvelles alors que d'autres y sont opposés, comme on comprend aussi que certains États veulent maintenir des règles existantes, alors que d'autres désirent leur élimination. Dans un tel conflit de positions ou d'intérêts peuvent se ranger d'un côté ou de l'autre divers États, anciens ou nouveaux. Il serait inexact d'y voir l'existence de deux camps distincts, l'un formé par des anciens États et l'autre par des États nouveaux.

Par ailleurs le processus de codification n'a pas été sans exercer, dans le domaine propre de la codification et de façon plus générale, une action bienfaisante pour aplanir des méfiances, pour rapprocher des vues, pour inaugurer et poursuivre des efforts de coopération, de sorte que le climat ait pu se transformer. Dans un esprit de coopération qui s'impose, on devrait s'accorder sur une ligne de conduite telle qui garantirait la réalisation du but essentiel d'une codification, lequel ne peut être de creuser davantage des oppositions et de semer par des conventions non ratifiées l'incertitude sur les règles du droit international, mais bien de réaliser plus d'accord et répandre plus de clarté au moyen d'une acceptation contractuelle aussi large que possible des conventions de codification.

L'oeuvre de codification est incontestablement utile, pour tous, puisque pour les cas où les règles de droit international coutumier sont claires et généralement acceptées, la forme conventionnelle de ces règles aura comme effet de les raffermir et de rendre leur application plus aisée, et pour les règles coutumières contestées, c'est encore la forme conventionnelle qui permettra plus de rapprochements de vues et de conceptions différentes. Que la société internationale, qui a d'ailleurs toujours manqué d'homogénéité, soit marquée par l'existence d'intérêts opposés, cela, loin de les freiner, doit bien plutôt stimuler les bonnes

[33] Paris, Sirey, 1960.

volontés et le sens du réalisme de tous les côtés afin que les transformations juridiques puissent se réaliser intelligemment et dans un esprit de sincère coopération en vue d'aboutir à de réels progrès du droit international, s'étendant largement dans la société internationale. Car serait-il en matière de codification et de développement progressif du droit international un réel progrès que celui qui consisterait à avoir des textes non ratifiés?

Pour la clarté des relations juridiques internationales, aussi bien sur le plan du droit conventionnel que dans le domaine du droit international général, il est nécessaire que dorénavant les efforts s'inspirent et se dirigent vers la réunion du plus grand nombre possible de ratifications ou d'adhésions. De tels efforts, afin qu'ils puissent être fructueux, devraient se déployer de la part de tous les États à toutes les étapes du processus de codification, en pleine conscience de l'importance de l'enjeu, avec comme guide l'intérêt général de la communauté internationale, lequel ne peut pas consister à avoir, après une longue procédure d'élaboration, des conventions de codification qui ne sont pas largement acceptées. Il serait vraiment injuste envers tant de bonnes volontés et de laborieux travaux de risquer de compromettre le travail grandiose d'élaboration de conventions de codification et de développement du droit international qui s'accomplit à notre époque.

Avec l'expérience acquise et dans un nouveau climat, ne peut-on pas espérer que les États, dans un souci commun de rechercher des points de rencontre, puissent dans les futures conventions de codification s'aligner autour de solutions très largement acceptables? Car, tout compte fait, il y a égal intérêt pour tous les États membres de la communauté internationale que les conventions de codification soient acceptées aussi largement que possible.

Monsieur le Président, après tant de bienveillante attention de ce distingué auditoire, le sablier, la "clepsydra" qu'avaient les Athéniens pour leurs orateurs s'est épuisé. Je vous remercie.

LE DROIT ET LE RÈGLEMENT PACIFIQUE DES DIFFÉRENDS

Conférence donnée le 11 Juin 1975
par S.E. M. Manfred Lachs
Président de la Cour Internationale de Justice

Discours prononcé par M. Abdul H. Tabibi
Président de la Commission du Droit International
lors du dîner donné le 11 juin 1975
à l'occasion de la Conférence Commemorative Gilberto Amado

Monsieur le Président Lachs, Madame,
Monsieur le Juge Nagendra Singh, Madame,
Cher amis,

Un proverbe oriental dit que l'homme de bien vit éternellement. Nous nous sommes réunis aujourd'hui pour honorer la mémoire de celui qui fut un homme de bien pour ses amis, pour ses compatriotes dans ce Brésil qu'il aimait tant, que dis-je, pour le monde entier.

Juriste international, diplomate, humaniste, poète et homme de lettres, dans tous ces domaines Gilberto Amado excellait. D'une rare fidélité dans ses amitiés, il avait l'intelligence du coeur. C'est pourquoi son souvenir vit en nous. Je fis sa connaissance en 1948; tout jeune juriste, j'étais le novice devant le patriarche ou, comme disent les Indiens, devant le "gourou". Il me donna son amitié et me prodiga ses affectueux conseils jusqu'à son dernier jour.

Dans toutes les réunions, il était celui vers lequel tous les regards se portent irrésistiblement et il était toujours très écouté lorsqu'il prenait la parole à l'Assemblée générale, dans notre Commission ou dans n'importe quelle conférence internationale. Son style si personnel forçait l'attention. Loin d'être sèchement juridiques, ses interventions étaient toujours empreintes de poésie et de lyrisme. Poète, il savait exprimer le calme d'une brise printanière, la douceur d'un sourire d'enfant, ce qui ne l'empêchait pas à d'autres moments de s'emporter, d'exploser et de fondre sur ses adversaires avec la violence de la foudre.

Il était de petite taille et pourtant majestueux. Personnalité attachante et chaleureuse, l'affection qu'il portait à ses amis était d'une qualité rare. Il aimait la jeunesse, les idées nouvelles et c'est peut-être ce qui décida de mon avenir lorsque, frais émoulu de la Faculté de droit, j'arrivai à l'Organisation des Nations Unies et à la Sixième Commission, présidée à l'époque par le Professeur Lachs. Gilberto Amado y brillait par son éloquence. J'avais perdu mon père très jeune, lui n'avait pas de fils. Il fut pour moi comme un père, me faisant profiter de son expérience et me guidant de ses conseils affectueux. Je vous ai dit qu'il aimait la jeunesse et vais vous en donner un exemple.

Un jour que l'Assemblée générale étudiait le rapport de la Commission du Droit International, je proposai d'inscrire à l'ordre du jour la question suivante: "Assistance technique en vue d'une compréhension plus large du droit international". Plusieurs représentants, dont ceux des grandes puissances, y étaient opposés pour des raisons financières. Le porte-parole de l'opposition était un éminent juriste belge, un homme d'âge. Je menai seul mon combat jusqu'au moment où Gilberto Amado vint à mon secours, c'est-à-dire au secours de la jeunesse et des idées nouvelles, et réussit, grâce à la force de sa personnalité, à faire passer ma proposition, d'où est née l'idée de notre séminaire. Gilberto Amado a bien servi son pays et la communauté juridique jusqu'a ce qu'il parte pour le voyage que tous nous devrons entreprendre un jour. Permettez-moi de citer ces quelques mots d'un poème célèbre de Rabindranath Tagore, que j'ai toujours beaucoup aimé: "Entends les grondements du ciel, ô mon coeur, sois brave, libère-toi de tes liens et va vers l'inconnu".

Notre ami au grand coeur s'en est allé bravement vers l'inconnu mais son souvenir vivra à jamais dans la mémoire de ses compatriotes et de ceux qui l'ont aimé. D'ailleurs, pour le musulman et l'oriental que je suis, l'homme ne meurt pas complètement mais l'esprit, qui est la vraie vie, abandonne son enveloppe charnelle pour se fondre dans la vie éternelle, si bien que tous nous sentons ici la présence de celui que nous honorons. C'est grâce à l'appui du Gouvernement brésilien et aux efforts déployés par l'Ambassadeur Sette Câmara que nous pouvons chaque année entendre mune conférence à la mémoire de l'ami que nous avons perdu, et je souhaite que celui qui sera chargé de représenter la Commission du Droit International à la réunion annuelle du Comité juridique interaméricain aille fleurir sa tombe et s'y recueillir un moment.

Avant-Propos

J'aimerais tout d'abord dire en quelques mots quel fut l'homme dont le souvenir nous réunit aujourd'hui.

Lorsqu'on écrira l'histoire de la Commission du Droit International, pas seulement de ses travaux mais aussi des hommes qui l'ont marquée de leur personnalité, Gilberto Amado y occupera une place de tout premier plan. C'était en effet un être exceptionnel aux yeux de tous ceux qui l'ont connu, un homme de la Renaissance en plein vingtième siècle. Et pourtant un homme d'aujourd'hui. Car s'il faisait revivre le grand passé classique, il n'ignorait rien de tout ce qui a transformé si profondément le monde dans lequel nous vivons. Homme de la Renaissance, ai-je dit, par la variété de ses intérêts: poésie et littérature romanesque, philosophie et, enfin, droit. Lui-même était poète et écrivain, profondément ancré dans son Brésil natal, soucieux du bien-être de son peuple et de tous les autres peuples qui souffrent d'être économiquement sous-développés; c'est toute la condition humaine qui lui tenait à coeur. Pour reprendre les paroles d'un autre grand poète de son pays il avait la "virtuosité du poète" et la "sensibilité de l'artiste". Comme Santayana, il était serein et parfois ironique mais, à la différence de son philosophe favori, il n'était ni "rêveur" ni "indifférent". Sensible et parfois sévère, il supportait mal l'ignorance, il exécrait la mesquinerie, il était généreux en amitié et ne fermait jamais sa porte à ceux qui lui demandaient conseil. C'était un brillant causeur et sa conversation était toujours enrichissante, comme beaucoup d'entre vous peuvent en témoigner. Il fut mon ami pendant

23 ans et je me suis souvent demandé ce qui avait pu l'amener au droit international après une longue carrière dans la politique, la diplomatie et les lettres.

D'où lui venait cet enthousiasme pour la rédaction d'instruments juridiques internationaux, généralement considérée comme un travail aride où l'imagination n'a nulle place? Il était pour moi la preuve vivante que le droit international peut être source d'inspiration. "Dans ce monde torturé qui est le nôtre", a-t-il dit un jour, "les États n'ont pas le temps de réunir des professeurs en leur disant: mettez au point des modèles dont nous nous inspirerons... peut être. Ce qu'ils veulent, c'est que le problème soit réglé et bien réglé, et c'est là le rôle de la Commission".

Sa maîtrise de la langue le servait merveilleusement dans son double rôle. Elle permettait à l'écrivain d'exprimer la beauté et la brutalité de la vie. Pour le juriste, les mots n'étaient "que le moyen grâce auquel les États définissent leurs intérêts et expliquent leur point de vue". C'est pourquoi il ne cessait de nous mettre en garde lorsque nous préparions des projets de conventions: "veillez", nous disait-il, "à ne pas soumettre aux États des textes qui risquent de leur poser des problèmes lorsqu'ils se réuniront en conférence pour les adopter".

Il avait des formules frappantes qui nous sont restées en mémoire. Rappelez-vous "la perfidie insidieuse de ce serpente juridique qu'est la clause *rebus sic stantibus*". Ou encore: "nous n'avons pas le droit de détourner nos regards de la réalité... à une époque où le présent déjà recule et où l'avenir est sur nous[34]".

Là le philosophe, l'écrivain et le juriste ne font plus qu'un.

"... c'est aux juristes", disait-il aussi, "d'élaborer les instruments nécessaires pour établir un climat d'harmonie dans un monde qui se transforme rapidement[35]".

Il s'est consacré à cette tâche durant les dernières années de sa vie: le voyage lui importait plus que la destination. Que de sagesse dans les paroles de Simone de Beauvoir:

> "Pour que la vieillesse ne soit pas une dérisoire parodie de notre existence antérieure, il n'y a qu'une solution; c'est de continuer à poursuivre de fins qui donnent un sens à notre vie: dévouement à des individus, des collectivités, des causes, travail social ou politique, intellectuel, créateur. Contrairement à ce que conseillent les moralistes, il faut souhaiter conserver dans le grand âge des passions assez fortes pour qu'elles nous évitent de faire un retour sur nous."

[34] Assemblée générale, Sixième Commission, 29 novembre 1961.
[35] Assemblée générale, Sixième Commission, 21 novembre 1963, par. 31.

Il lui a été donné de conserver ces passions et un esprit remarquablement alerte jusqu'à la maladie qui l'a emporté. Il est resté fidèle jusqu'au bout à l'un de ses aphorismes favoris: "Vouloir être ce que l'on est... voilà l'essentiel. Vouloir être plus, c'est être moins". Nous lui sommes reconnaissants d'avoir été ce qu'il était, celui qu'il était; nous sommes plus riches de l'avoir eu parmi nous.

Le droit et le règlement pacifique des différends

par Manfred Lachs
Président de la Cour internationale de Justice

Tant de choses ont été dites à propos des désaccords, des différends et des conflits entre États que, d'instinct, on se demande s'il reste quelque chose à ajouter[36]. Des juristes bien sûr, mais aussi des psychologues, des politologues, des sociologues et des hommes politiques se sont penchés sur la question. La littérature ne manque donc pas. Je voudrais pourtant vous faire part de quelques réflexions sur les différends, désaccords et conflits considérés dans un contexte plus large peut-être que d'ordinaire, et sur les rapports qui existent aujourd'hui entre leur règlement et le développement du droit.

Les conflits d'opinions ou d'intérêts sont pain quotidien dans les relations entre États. Aucun continent n'y échappe. Durant les trente dernières années, il y en a eu des centaines; certains portent des noms qui frappent l'imagination, "guerre de la langouste" ou "guerre du poulet" par exemple, bien que l'affrontement ait été sans réelle gravité. Il y en a d'autres par contre où il s'agissait malheureusement bien de "guerre". Etaient-ils différents des conflits des siècles passés? Certains étaient la séquelle de la Deuxième Guerre Mondiale, problèmes laissés sans solution par les règlements de paix; d'autres sont apparus avec la décolonisation et la naissance de nouveaux pays; d'autres ont surgi entre les nouveaux États. Les différends entre États anciens forment une autre catégorie encore. Bien sûr, chaque époque a ses conflits propres, mais sûr, chaque

[36] Voir mon intervention à la 68e réunion annuelle de *l'American Society of International Law*, avril 1914, pp. 323 seq., ou j'ai abordé certains aspects de ce problème.

époque a ses conflits propres, mais il en est qui sont de toujours, comme les conflits de frontières.

Il serait tentant de remonter jusqu'à leur source premiére, mais nous entrerions là dans un vaste domaine philosophique dont l'exploration nous entraînerait trop loin. Je me contenterai donc de quelques brèves remarques. Comme vous le savez, il y a ceux qui affirment que les conflits sont une constante dans l'histoire de l'humanité, et notamment dans les relations entre États. Il y en a d'autres qui voient l'avenir avec plus d'optimisme. On a analysé à maintes reprises certaines périodes du passé, la Grèce antique, l'Empire romain, l'Italie de la Renaissance, le Grand Siècle et d'autres chapitres de l'historie dans l'espoir de découvrir comment et pourquoi naissent les conflits ou, au contraire, pourquoi certains moments de l'histoire en sont relativement exempts. On peut, comme d'aucuns le font, s'attarder sur la distinction qui existe entre les désaccords réels et les désaccords artificiels, c'est-à-dire ceux qui surgissent lorsqu'un État prête à l'adversarie des visées que ce dernier n'avait nullement, faisant naître par là même le conflit que lui-même souhaitait, consciemment ou non; on peut aussi distinguer les désaccords fonctionnels de ceux qui ne le sont pas. Certains cherchent une explication dans le comportement humain, dans des facteurs psychologiques. D'autres incriminent un manque de communication "entre des hommes de bien, également convaincus que leur position est moralement inattaquable".

Disons pourtant que bien des problèmes actuels sont à n'en pas douter différents de ceux d'autrefois. Ne voyez pas là l'égocentrisme d'une génération qui se considère comme unique, mais un jugement fondé sur certains facteurs objectifs qui ressortent d'une comparaison entre hier et aujourd'hui. Je pense aux profondes transformations économiques et sociales qui font qu'existent désormais côte à côte des États dont les systèmes politiques et économiques sont très différents les uns des autres.

Les États ont aujourd'hui des rapports quotidiens dans presque tous les domaines, ils se sont rapprochés les uns des autres, ce qui fait naître de nouveaux problèmes. Il est bien clair que plus les contacts entre États se multiplient, plus les désaccords se multiplient eux aussi, désaccords très réels qui peuvent dégénérer en conflits.

Aujourd'hui, plus que jamais, la maîtrise de la matière et les progrès technique jouent un très grand rôle dans les relations humaines, non seulement à l'intérieur d'un même pays mais aussi entre les nations. Certes la révolution industrielle, avec son charbon et son acier, avait déjà permis à l'homme d'agir sur son environnement (tout en s'en rendant sans cesse plus tributaire comme on le voit aujourd'hui) et avait eu des

conséquences d'une très grande portée pour chaque État de même que pour les relations entre États. Mais, de nos jours, les progrès de la science et de la technique jouent un rôle bien plus décisif encore. Si bien que le fossé entre la science et les humanités, qui alimenta les grandes controverses entre Platon et Démocrite, est en train de disparaître. La technique, qui traduit les découvertes de la science dans le langage de la réalité, exerce une influence directe et profonde sur la vie et partant sur les relations humaines. Ce ne peut être que dans un moment de désespoir que Malraux écrivit ces lignes: "Quelle notion de l'homme saura tirer de son angoisse la civilisation de la solitude, celle que sépara de toutes les autres la possession de gestes humains?". Dans *Les Noyers de Altenburg*, il ajoute: "L'homme n'a pas tellement changé de Tacite à Mommsen ou à Michelet... seulement les grands voyages sont devenus communs". Pourtant la science et la technique modernes ont donné à l'humanité des outils prodigieux qui lui permettent d'accomplir des miracles mais aussi de provoquer son propre anéantissement. L'économie, la culture, la science et la technique sont devenus des aspects complémentaires de notre vie.

La phrase de Goethe: "La nature est tout autour de nous, elle nous encercle et nous domine, nous sommes incapables de nous en dissocier et incapables d'aller au-delà" a pris de nous jours une résonance toute nouvelle. Le pouvoir de l'homme sur les grands forces de la nature – d'où découle d'ailleurs son besoin d'y accéder – a d'importantes répercussions sur les relations internationales.

Toutes ces transformations ont été si rapprochées dans le temps que, par une sorte de phénomène de compression, leurs effets sur le mode, le rythme et l'intensité de la vie en société s'en sont trouvés multipliés. Comment les structures sociales – en elles-mêmes comme dans leurs relations entre elles – auraient-elles pu résister à ces pressions? C'était impossible. Si vous me permettez de changer un peu brutalement de métaphore, je dirai que sous la violence du choc, la boîte de Pandore s'est ouverte, libérant une multitude de problèmes nouveaux.

Le champ des conflits – et des solutions qu'ils appelent – est donc si vaste que disposer de procédures adéquates ne suffit pas, vous en conviendrez aisément; encore faut-il que les parties à un différend soient d'accord sur les règles à appliquer. Malheureusement, nombre de conflits majeurs du monde moderne ont à leur origine non seulement des revendications contradictoires mais aussi un désaccord tant sur les procédures que sur les règles: statu quo contre désir d'innover, application du droit contre sa révision, conflit d'interprétations. Il faut alors innover dans des domaines jusqu'alors inexplorés. Certains chapitres de ce nouveau

code sont actuellement écrits par des hommes politiques, comme ceux qui touchent au vaste domaine du désarmement et de la sécurité; d'autres sont l'oeuvre conjointe d'hommes politiques et d'économistes. Il y a enfin un domaine où ce sont les juristes, en particulier ceux de la Commission du Droit International, qui jouent un rôle décisif. Mais comment ne pas voir qu'il y a nécessairement une composante juridique dans tous ces domaines où la procédure est de toute évidence indissocialble du fond? Nous devons admettre, au départ, qu'il existe une solution pacifique pour chaque problème, un remède pour chacun des désaccords, quelle qu'en soit la nature, qui risquent de surgir entre États. Il faut rétablir l'harmonie, soit en mettant fin au désaccord, soit en instituant de nouvelles règles de conduite entre les États intéressés. Mais peut-on, cette prémisse une fois acceptée, adopter un certain nombre de modèles rationnels pour la solution de ces problèmes? La chose est souvent impossible en raison de la multiplicité des éléments en cause, de l'étendue du champ d'action et de la complexité des problèmes en jeu.

Avant de poursuivre, j'aimerais dire un mot de la distinction – ancienne mais toujours actuelle et qu'il est de tradition de faire – entre différends juridiques et différends politiques, distinction majeure qui fait partie de la pensée juridique, de ces deux derniers siècles en particulier. Je ne le fais pas sans hésitation car vous ne la connaissez que trop bien, mais je crois qu'elle va m'aider à tirer les conclusions auxquelles je veux arriver.

Est-il besoin de rappeler la distinction traditionnelle faite par Vattel, puis par Calvo et Lamasch et que l'on retrouve dans l'article 16 de la Convention de La Haye de 1889 et dans l'article 38 de la Convention de La Haye de 1907? Elle est reprise dans toute une série de traités bilatéraux et multilatéraux et au paragraphe 2 de l'article 36 du Statut de la Cour internationale de Justice. Mais, pour le bien de l'humanité, ne faut-il pas se préoccuper très souvent, non seulement de la nature du différend, mais de la façon de l'aborder pour le règler au mieux? Il me semble que dans ce domaine les raisonnements sont parfois simplistes.

Il ne faut jamais oublier que la protection de l'indépendance des États est la pierre angulaire du droit international, son principe premier, son point de départ. Ce principe est incorporé, en termes soigneusement pesés, dans le presque trop fameux paragraphe 7 de l'article 2 de la Charte des Nations Unies.

La vie internationale est de nos jours si complexe qu'un grand nombre de différends font intervenir non pas un, mais plusieurs aspects des relations entre États. Nous sommes obligés de constater que s'il est relativement facile de qualifier tel ou tel différend ou désaccord, ce n'est pas l'étiquette qui compte mais ce qu'elle recouvre. Certains litiges qui, de

prime abord, concernent des questions purement juridiques peuvent fort bien, de par l'intreprétation qu'en donnent les parties en cause, changer de nature, se révéler même être tout autres que ce que l'on pensait ou prendre des proportions innattendues. L'inverse est également vrai. Une question de portée limitée peut n'être en fait qu'un symptôme du véritable conflit à résoudre ou un simple épiphénomène. Ces considérations doivent guider ceux qui, en l'absence d'accord préexistant entre les parties, recherchent le meilleur moyen de régler le différend, ou certains de ses aspects. Il ne faut jamais oublier que, dans les relations internationales, quel que soit le problème ou le litige qui oppose des États, le mode de règlement destiné à rétablir l'harmonie doit être soigneusement adapté à la nature du litige.

C'est là, me semble-t-il, un point capital qu'il ne faut pas perdre de vue lorsqu'il s'agit de qualifier un problème, quel qu'il soit, et de rechercher les moyens de le résoudre.

Ce qui m'amène à faire quelques autres observations sur ce sujet.

Nous vivons à l'ère de la négociation. Vous êtes sûrement tous d'accord avec moi sur ce point. La négociation domine presque tous les domaines des relations internationales, le règlement des différends aussi bien que l'élaboration de nouvelles règles de droit.

Maurice Bourquin a très bien dit: "aucune règle de droit, aucun mécanisme juridique jamais n'a remplacé ici la ressource de la diplomatie, de son expérience, de son tact. Nous sommes dans une sphére où le sens de la réalité et l'art de la négociation constituent la valeur suprême et où il sera peut-être même dangereux de vouloir les enfermer dans une construction trop rigide".

Mais la négociation embrasse aujourd'hui beaucoup plus d'aspects que par le passé. Dans bien des cas, elle demeure le premier et le dernier recours, la nature des problèmes et les mesures envisagées excluant tous les autres. Souvent, les questions en jeu sont multiples et interdépendantes. Il devient alors presque impossible d'isoler un problème précis, et la solution de l'un est souvent liée à celle d'un autre. Il arrive parfois qu'un nouveau problème, loin de compliquer les choses, les facilite si son caractère d'urgence appelle une solution immédiate qui entraînera celle des autres problèmes. Bien des questions sont si complexes qu'il peut y avoir intérêt à laisser de côté plusieurs de leurs aspects et à ne retenir que le plus crucial et le plus urgent. Dans d'autres cas, on résoud plusieurs problèmes sans chercher à résoudre l'essentiel. Je citerai à ce propos l'exemple de l'Accord de Washington sur l'Antarctique en date du 1er décembre 1959. Un arrangement provisoire peut parfois empêcher que la situation ne s'aggrave et préparer ainsi la voie à un règlement définitif.

Disons, en bref, que les négociations sont beaucoup plus compliquées à notre époque qu'elles ne l'étaient autrefois. Un phénomène relativement nouveau est le multilatéralisme. L'historie de la diplomatie ne nous en offre que quelques rares exemples, alors qu'il occupe maintenant une place très importance dans les affaires internationales. À côté du travail des organes proprement législatifs, on assiste à des réunions qui regroupent, sous l'égide d'organisations internationales ou en dehors d'elles, un très grand nombre d'États désireux de trouver des solutions ou des compromis pour toute une série de problèmes.

Il y a une autre considération encore et qui est essentielle. On ne peut plus ramener les négociations à un simple jeu d'échecs ou chacun cherche à faire l'autre échec et mat. Leur but est de trouver une solution qui préserve les intérêts légitimes de tous. Au pire, il faut que les moins satisfaits soient intimement persuadés que la stabilité nouvellement instaurée vaut bien qu'ils renoncent à un espoir longuement chéri.

La négociation a donc acquis de nouvelles qualités en même temps que de nouvelles dimensions; des éléments nouveaux commandent son succès. Elle découle d'une nécessité historique.

Depuis que la négociation joue un rôle de premier plan, on dit souvent que l'importance du tiers, quelque forme que prenne son intervention, a diminué. Est-ce exact? Il est vrai bien sûr que les États recourent moins que par le passé aux méthodes traditionnelles de règlement – j'y reviendrai tout à l'heure – mais de nouvelles méthodes ont fait leur apparition, certaines s'imposant progressivement et d'autres étant dictées par le cadre même où les problèmes sont débattus. Il y a le phénomène du multilatéralisme dont j'ai déjà parlé – le cadre multilatéral. Là, le rôle du tiers est devenu de plus en plus le rôle des tiers (au pluriel) dans les instances internationales qui ont proliféré. Il s'agit en l'occurrence de tout autre chose que de l'intervention traditionnelle du tiers (au singulier), médiateur ou conciliateur. La différence tient pour une bonne part au climat dans lequel les États s'affrontent et cherchent un accommodement. Si, de nos jours, les divergences quant à la solution de tel ou tel problème doivent être aplanies dans le cadre d'une organisation ou conférence internationale, il arrive assez fréquemment que tous les États participants ne se sentent pas également tenus par les choix qui leur sont offerts, ou que les intérêts individuels divergent considérablement. Ce qui veut dire, dans la pratique, que les États qui ne sont pas directment en cause, mais n'en ont pas moins à coeur de voir une solution intervenir, pourront prendre l'initiative de tenter un rapprochement entre les points de vue extrêmes ou même, en dernier ressort, de réaliser un compromis.

Les États intéressés seront souvent favorables à cette procédure dans la mesure où elle permet d'arriver à la solution tant souhaitée dans un climat général de magnanimité et de modération. Dans le contexte multilatéral, le centre de gravité s'est déplacé et l'intérêt général a supplanté l'intérêt individuel des États. L'impression d'avoir gagné ou perdu la partie est bien moins nette, et le sentiment que l'issue à l'agrément de toute la communauté internationale, ou d'une grande partie de celle-ci, est un élément qui facilité beaucoup l'élaboration de normes internationales.

Nous nous apercevons donc que le rôle de médiateur ou de conciliateur échoit en quelque sorte à d'autres États moins directement "intéressés" plutôt que "désinteressés", parce qu'il serait exagéré de prêter à ces États, somme toute participants, l'impartialité du juge. Toutefois, le consentement des États intéressés, qu'il s'agisse de la procédure ou des conclusions, est unélément indispensable de ces réunions multilatérales, ou du moins devrait l'être.

Il y a encore d'autres développements importants dans ce domaine. Des organisations internationales comme l'Organisation Internationale du Travail, l'Organisation de l'Aviation Civile Internationale, l'Organisation des Nations Unies pour l'Éducation, la Science et la Culture et le Fonds Monétaire International interviennent maintenant dans la solution de certains problèmes, et une série d'accords prévoient des méthodes bien déterminées pour le règlement des différends. Enfin et sourtout nous avons le Conseil de Sécurité des Nations Unies qui, usant de ses pouvoirs, est intervenu en diverses occasions et parfois avec succès. L'Assemblée Générale des Nations Unies s'est occupée de certaines questions.

Un rôle spécial est dévolu au Secrétaire général de l'ONU qui souvent s'offre à remplir les fonctions de médiateur ou de conciliateur ou est appelé à le faire.

Toutefois, les nouvelles méthodes reprennent certaines des méthodes traditionnelles dans le cadre des organisations internationales. On aurait donc tort de conclure que de nos jours le rôle des tiers (gouvernements ou personnes privées) dans le règlement des différends a diminué.

Depuis la plus haute antiquité, l'histoire est jalonnée de décisions prises par des tiers qui furent conciliateurs, médiateurs, arbittres ou juges. Je citerai à titre d'exemples le Consistoire général des Cités grecques ou les 600 juges de Milet arbitrant de litige entre Sparte et Messène, le Sénat de Rome, les membres des Ligues lombarde et hanséatique, le Parlement de Grenoble, des princes, des rois et des papes. Ces décisions ont survécu à bien des vicissitudes et ont fait leurs preuves. Mais on s'aperçoit, en

tournant les pages de l'histoire, que chaque époque a su les adapter à ses besoins particuliers. De nos jours, étant donné la complexité des problèmes et leurs dimensions multiples, ces décisions de tiers se sont coulées dans le moule des négociations, prises dans un sens plus large. Ainsi, endevenant membres d'organisations internationales, les États doivent automatiquement se plier à ces procédures. Le "tiers" désigne d'autres membres de la communauté internationale, ou des États d'une région donnée, ou encore les représentants élus de tels ou tels États, ou même des personnes privées, Cette évolution se traduit non seulement dans les décisions prises, mais aussi dans les garanties exigées, qu'il s'agisse de la présence de l'ONU ou d'obligations précises pour les puissances tierces.

En participant à des conférences multilatérales réunies à des fins bien précises, les États conservent leur liberté d'action mais l'abandonnent souvent petit à petit; si donc il leur arrive d'être parfois prisonniers de leur point de vue – mais prisonniers au sens Pickwickien du terme – ils parviennent à se libérer grâce aux efforts de persuasion et au concours d'autrui.

Voilà comment les nouvelles procédures répondent aux besoins du monde complexe dans lequel nous vivons. Elles sont dépourvues de caractère juridique et pourtant, comme je l'ai indiqué, elles aident à façonner le droit.

Parlons maintenant de la conciliation, de la médiation, de l'arbitrage et du règlement judiciaire. Ont-ils fait leur temps? Dans une situation type, si deux États sont en désaccord sur un point, un tiers peut – sans même prendre aucune décision – influencer le cours des événements. Cela peut être le cas même si les négociations n'ont pas été engagées. J'en donnerai comme exemple relativement récent l'offre du Gouvernement suisse, en 1971, de jouer le rôle de médiateur dans un différend portant sur le mode de rapatriement du personnel diplomatique de deux États.

Il est vrai, j'en conviens, qu'au cours des 30 dernières années ces méthodes ont été moins utilisées que par le passé. De 1918 à 1962, on a conclu 301 traités prévoyant le règlement pacifique de différends par vote de conciliation, d'arbitrage et de règlement judiciaire. Il n'est pas inutile de rappeler que, de nous jours, la complexité des différends a amené à conjuger les méthodes traditionnelles et les méthodes modernes, multilatérales. Sur un plan plus général, l'arbitrage et le règlement judiciaire ont été incorporés dans le système des organisations internationales tout en conservant leur caractère traditionnel. On en trouvera des exemples dans l'article 84 de la Convention de Chicago de 1944 relative à l'aviation civile internationale et l'article 11 de l'Accord

de 1944 relatif au transit des services aériens internationaux; l'XIV (par. 2) de la Constituition de l'UNESCO; ou l'article XVII de la Constituition de la FAO (modifiée en 1950). L'ONU a nommé des médiateurs et des conciliateurs à diverses reprises et les Traités de Paix de Paris de 1946 ont créé des commissions de conciliation.

Il suffit de rappeler qu'à l'occasion de certains différends bilatéraux particulièrement complexes, on a eu recours à toute la gamme des méthodes traditionnelles. Je donnerai comme exemple les différends qui ont opposé l'Inde et le Pakistan: on a vu intervenir l'ONU et des médiateurs (commission de 3 États, puis personnes privées); à un certain stade, les bons offices d'un Premier Ministre ont joué un rôle important; un aspect des différends a été réglé par arbitrage, un autre encore soumis à la Cour internationale de Justice. Et ce n'est pas là un cas isolé.

J'en viens maintenant à l'arbitrage. Nous sommes très loin, bien sûr, de la sentence arbitrale rendue par le Duc de Bourgogne en 1432 et qui faisait du mariage entre le fils aîné du Comte Redimont et la fille du Duc d'Anjou la condition préalable au rétablissement de la paix. Même le montant de la dot était spécifié. On imagine mal, de nos jours, un arbitre investi de pareils pouvoirs ou nanti d'un mandat aussi large.

Au cours des 30 dernières années, il n'a été recouru à l'arbitrage que pour une trentaine d'affaires concernant les relations bilatérales entre États et une vingtaine de différends entre des États et d'autres entités. La comparaison avec la période comprise entre les traités Jay et la fin du 19e siècle, où 177 sentences furent redues, est éloquente.

Pourtant l'arbitrage peut rendre encore de très grands services, en particulier lorsqu'il s'agit d'un de ces problèmes complexes, typiques de notre époque, dont les principales composantes peuvent être réglées séparément. Si les cas d'arbitrage entre États ont été aussi peu nombreux ces dernières années, c'est peut-être parce que l'on s'imagine un peu hâtivement que les problèmes internationaux sont trop interdépendants pour se prêter à un fractionnement de ce genre. On pourrait envisager de rendre la méthode de l'arbitrage plus attrayante pour les États. Il demeure que, de nos jours, on y recourt surtout pour règler des conflits commerciaux relativement homogènes. D'ailleurs, s'il est vrai que les États se détournent de l'arbitrage en général, on comprend pourquoi, *a fortiori*, ils saisissent si rarement la Cour internationale de Justice, l'instrument le plus perfectionné pour le règlement pacifique des différends. Est-ce une raison suffisante pour désespérer et nous ranger à l'opinion de Hall qui pensait "que le droit des rapports entre nations, avec brutalité, s'accommode mal du raffinement des tribunaux"?

On a beaucoup parlé d'une crise de la Cour internationale de Justice, de son déclin, du déclin de son rôle dans la collectivité internationale. Personnellement, je crois pouvoir dire, sans avoir le sentiment de plaider *pro domo*, qu'il ne faut pas en l'occurrence perdre le sens de proportions. On a dit et redit que la Cour actuelle ne s'était occupée que d'une trentaine d'affaires alors que la précédente en avait réglé autant en presque moitié moins de temps. Nous savons tous ce que valent les arguments statistiques quand ils s'appuient sur de petits nombres, et que représentent, dites-le moi, une soixantaine d'affaires en un démi-siècle? Certes, dans l'absolu cela veut dire que les États ne se sont guère adressés à la Cour, ni à celle qui l'a précédée. Mais faut-il réellement parler de déclin, de désenchantement ou de crise? N'oublions pas qu'un grand nombre des affaires confiées à la Cour permanente étaient des séquelles de la Première Guerre Mondiale et touchaient à beaucoup de domaines qui ont été volontairement exclus, au départ, de la compétence des Nations Unies, et, partant, de la Cour actuelle. Ce que les statisques prouvent donc, ce n'est pas que l'importance de la Cour ait diminué ou que nous soyons en pleine crise, mais c'est que la Cour n'a pas encore donné toute sa mesure en tant qu'organe judiciaire de la collectivité internationale. Les 50 dernières années ne sont que les premiers chapitres de son histoire.

Nous avons vu tout à l'heure que les problèmes qui opposent les États sont d'une grande complexité; de nouvelles perspectives pourraient s'ouvrir si les États confiaient par exemple à la Cour un seul aspect d'une affaire contentieuse, un aspect juridique, en lui demandant de dire le droit. De cette façon, le soin de régler l'ensemble du litige appartiendrait aux États intéressés qui ne craindraient plus alors de ne pas demeurer maîtres de l'affaire. La réponse de la Cour une fois connue, la décision finale serait leur, décision qui ne serait pas nécessairement fondée sur un critère juridique et pourrait s'appuyer sur toute autre considération de leur choix. Il y a probablement quantité de situations de ce genre toutes proches d'une solution pour peu que le processus s'amorce dans la bonne direction. Mais ce ne sont pas les seules. La Cour peut offrir une issue, servir en quelque sorte de bouc émissaire en endossant la responsabilité d'une solution que les gouvernements pourraient difficilement prendre eux-mêmes. En statuant sur un aspect de la question, la Cour peut non seulement aider à régler cet aspect particulier mais contribuer à résoudre un problème plus vaste qui oppose deux États. Il peut aussi y avoir des affaires qui, une fois soumises à la Cour, sont réglées non par une décision émanant d'elle mais par le simple fait qu'en cours d'instance telle ou telle mesure a été prise qui se trouve régler le différend. Il est concevable aussi que la

Cour recommande aux parties de recourir à la négociation même dans des circonstances autres que celles qu'elles avaient envisagées lorsqu'elles l'avaient saisie. La saisie de la Cour internationale n'empiète donc pas sur le domaine des négociations; tout au plus peut-elle les aider à sortir d'une impasse. Il y a sûrement des centaines d'affaires mineures et qui ne défraient guère la chronique internationale, des différends juridiques où le fait de demander l'intervention de la Cour aurait toute chance de faire disparaître les causes de friction dans les relations entre États, favorisant ainsi la coopération. Et ai-je besoin de vous rappeler que le mécanisme des procédures de la Cour surtout après révision du Règlement, n'est pas nécessairement aussi pesant qu'on le suppose généralement?

Toutefois, comme d'autres instruments des relations entre États, la Cour doit évoluer et s'adapter aux besoins – aux besoins, dis-je, pas aux modes – d'un monde qui change sans cesse. Il lui faut tenir compte de ce changement dans ses décisions, déceler les tendances du droit. Il lui faut parfois chercher sa voie entre le droit finissant et le droit naissant; ses décisions peuvent parfois paraître peu orthodoxes mais les problèmes qui lui sont soumis le sont tout aussi peu. Force nous est de constater d'ailleurs que l'orthodoxie du 20e siècle est encore floue; elle devra être dynamique et axée sur l'avenir. Comme l'a fort bien dit récemment un éminent juriste francais: "Le juge doit vivre dans le siècle et dans la cité, ce qui comporte pour lui de perpétuels efforts d'adaption, d'accommodation". Les procédures de la Cour, elles aussi, doivent être continuellement remises en question; une révision de son règlement peut-elle influer sur son activité? Certains semblent en douter, mais je crois que la Cour se doit de ne pas être défaitiste à cet égard. D'autant qu'il ne faut pas la considérer comme un monstre sacré. A mon sens, il serait utile d'adopter une série de mesures nouvelles, destinées à accélérer et simplifier la procédure. Quelqu'un à très bien dit: "la rançon de procédures longues et compliquées... c'est qu'elles secrètent leurs propres problèmes: il faut trouver le moyen de les faire respecter... et espérer qu'elles seront interprétées et appliquées avec intelligence". Ces problèmes, la Cour les connaît. Mais ce en quoi elle a innové, me semble-t-il, c'est en ouvrant de nouvelles possibilités dans des régions jusqu'alors inexplorées. Je ne tiens pas à entrer dans le détail. Je dirai seulement que je souhaite ardemment voir se créer prochainement deux chambres, l'une pour le droit maritime et l'autre pour les différends qui ont trait à la protection de l'environnement.

Les avis consultatifs me paraissent eux aussi pleins de promesses. C'est là une procédure qui a été peu utilisée jusqu'à present, mais qui a néanmoins permis à la Cour d'aider les organisations internationales

à développer leur droit, et le droit international en général. Prenez par exemple l'Avis sur la Réparation des dommages subis au service des Nations Unies dont les conclusions, à une époque où l'ONU se débattait encore dans les difficultés du premier âge, ont fait date dans l'histoire du droit des organisations internationales; ou l'Avis sur la Namibie qui n'a pas seulement aidé l'ONU dans ses travaux mais a conduit à analyser un très grand nombre de points de droit liés ou non à la Charte.

Voilà donc quelques domaines où beaucoup peur être fait pour développer et renforcer le droit, et je me réjouis que l'Assemblée générale ait dans une large mesure reconnu ces possibilités dans les dernières résolutions qu'elle a adoptées au sujet de la Cour.

L'ONU ne doit jamais oublier qu'elle est reliée organiquement à la Cour, et il faut que les autres organisations internationales qui ont des liens de parentée avec l'ONU sachent bien que, de ce fait, la Cour leur est ouverte. Le splendide isolement de la Cour est une notion qui tend à disparaître. Tout dépend maintenant de ces organisations, ou plutôt de leurs États Membres dont beaucoup d'ailleurs ont dit récemment combien ils regrettaient que la fonction consultative de la Cour n'eût pas été utilisée davantage.

Je viens de vous parler des possibilités – insuffisamment exploitées jusqu'à présent – qu'offre le règlement judiciaire. J'ai dit aussi en passant que cette méthode pourrait être utilisée pour certains aspects des grands problèmes qui nous occupent ou des relations d'ensemble entre les différentes communautés.

J'aimerais, dans le temps qui me reste, vous parler de ce que j'appellerai un échange de bons procédés: le règlement de certains différends fait progresser le droit général – prévenant ou réglant par là même d'autres différends – et dans le même temps l'évolution du droit peut par elle-même, dans certains domaines tout au moins, apporter une solution à certains différends existants ou imminents. Ici, comme ailleurs, la création du droit s'est faite sur deux plans (selon un processus double): sur le plan général, on a voulu dégager de nouvelles règles de droit; sur le plan particulier, on a réglé des différends et, ce faisant, on a créé un droit entre les parties mais aussi ajouté à la jurisprudence, qui nous guide ensuite dans d'autres situations analogues. Nous avons constitué toute une jurisprudence dont nous pouvons nous inspirer dans tous les domaines des relations internationales. La Cour internationale de Justice, de nombreux tribunaux d'arbitrage et également (comme l'a dit Paul Guggenheim) la conciliation ont joué un grand rôle à cet égard. Le droit international est donc aujourd'hui suffisamment évolué – et de cela au

moins nous pouvons tirer une légitime fierté – pour qu'on imagine mal un arbitre ou un juge rendant une décision de *non liquet* sous prétexte qu'il erre dans une forêt obscure sans point de repère. J'ajouterai aussi que les 30 dernières années ont vu progresser la codification plus qu'aucun autre moment de l'historie et la Commission du Droit International a apporté là une contribuition décisive.

Mais si nous considérons ce qui s'est passé durant cette période, nous ne pouvons pas ne pas être frappés de voir que tant de différends présentent des analogies. Bien que de caractère bilatéral, ils concernent, et leur issue ne peut manquer d'influencer le droit international général. Nombre de ces différends sont restés sans solution et il n'y en a pratiquement pas qui aient atteint le stade de l'arbitrage ou du règlement judiciaire. Vous avez remarqué – et d'autres législateurs avec vous – que plusieurs problèmes de cet ordre entrent aujourd'hui, et tous en même temps, dans la phase critique. Le moment est donc venu d'agir.

> Comme l'a dit la Cour internationale de Justice dans un de ses arrêtés, rendu il y a quelque cinq ans:
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> ...compte tenu aussi de la prolifération des intérêts économiques des États, il peut être à première vue surprenant que l'évolution du droit ne soit pas allée plus loin et que des règles généralement reconnues ne se soient pas cristallisées sur le plan international.
>
> Mais la Cour a ajouté:
>
> Néanmoins un examen plus approfondi des faits montre que le droit en la matière s'est formé en une période d'intense conflit de systèmes et d'intérêts[37].

Ainsi en rendant son arrêt dans une affaire donnée, la Cour a reconnu que le droit n'avait pas progressé au delà d'un certain point, qu'il n'avait pas résolu les problèmes de façon générale mais s'en était remis aux solutions bilatérales.

On peut bien sûr considérer que même lorsqu'il s'agit de nouveaux domaines de l'activité humaine, lorsque certains éléments de l'environnement humain ont pris un sens nouveau – la mer et le ciel par exemple ne sont plus ce qu'il étaient – il y a des principes à glaner dans les lois et la jurisprudence des siècles passés, dans les traités ou la pratique diplomatique, principes qui peuvent fournir un cadre juridique à tous ces

[37] Barcelona Traction, Light and Power Company. Limited; Judgment,ICJ , Reports 1970, p. 47.

nouveaux aspects des relations humaines. Mais le droit demande aussi à être développé, il faut inventer.

Le droit est arrivé trop tard pour sauver le Titanic en 1912. L'opérateur radio du navire en perdition a appelé à l'aide sans être entendu: les premiers règlements internationaux de radiocommunication avaient bien été rédigés six ans auparavant, mais l'entente n'avait pu se faire sur la répartition des fréquences.

Le droit est arrivé trop tard aussi pour le Torrey Canyon qui s'échoua en 1967, déversant des milliers de tonnes de pétrole dans la mer.

Dans ces domaines comme dans d'autres, il faut que le droit rattrape le développement économique et technique. La communauté internationale – et nous pouvons en être fiers – travaille actuellement à la mise au point de nouvelles règles applicables aux nouveaux domaines de la coopération entre États. Un droit international de plus en plus universel, celui vers lequel nous nous acheminons, pourrait ainsi aider de plus en plus souvent à résoudre les conflits individuels. C'est là, le but ver lequel nous devons tendre.

QUELQUES ASPECTS DE LA COMPÉTENCE CONSULTATIVE DE LA COUR INTERNATIONALE DE JUSTICE

Conférence donnée le 6 Juin 1976
par S.E. Sir Humphrey Waldock
Juge à la Cour internationale de Justice
Ancien Président de la Cour européenne des droits de l'homme

Avant-Propos

Gilberto Amado et moi-même avons été collègues à la Commission du Droit International pendant un certain nombre d'années consacrées essentiellement à la codification du droit des traités. Gilberto Amado qui avait aidé à rédiger le Statut de la Commission, qui en avait fait partie dès sa création avant d'en être le doyen, se considérait à juste titre comme le gardien de ses traditions et de ses principes. Juriste éminent, écrivain et poète, ses interventions étaient d'une logique et d'une langue rigoureuses. Rien de rigide pourtant dans sa façon d'aborder le travail de codification. Il se rendait compte que si la Commission voulait parvenir à codifier le droit international, son oeuvre devait être viable aussi bien politiquement que juridiquement; et, sans sacrifier aucunement ses principes, il usait toujours de son influence pour faire prévaloir la solution qui lui paraissait la plus propre à faire l'accord parmi les États.

En ma qualité de Rapporteur spécial de la Commission pour le droit des traités, ma dette de reconnaissance à l'égard de Gilberto Amado, dont le concours nous fut précieux, est particulièrement grande. Je suis donc très heureux de pouvoir prendre la parole aujourd'hui et de rendre ainsi hommage personnellement à la memoire de mon éminent collègue.

Quelques Aspects de la Compétence Consultative de la Cour Internationale de Justice

La présente conférence, la quatrième à la mémoire de Gilberto Amado, est consacrée à trois aspects de la compétence consultative qui revêtent une grande importance lorsque les intérêts particuliers des États sont étroitement liés au fond même de la question soumise à la Cour. Ces aspects, vous les connaissez tous parfaitement: représentation des États intéressés sur le siège; opportunité de rendre un avis lorsqu'un État intéressé refuse de consentir à l'exercice de la compétence consultative; opportunité de rendre un avis sur la base de faits controversés. Pourtant, l'évolution de ces dernières années fait qu'un nouvel examen de ces différents aspects ne paraît pas inutile.

La compétence consultative, vous le savez, est née de l'article 14 du Pacte de la Société des Nations où il était simplement dit:

"Elle (la Cour) donnera aussi des avis consultatifs sur tout différend ou tout point dont la saisira le Conseil ou l'Assemblée[38]". Le Statut initial de la Cour permanente était muet quant à la compétence consultative; tout au plus en était-il question de façon indirecte dans la formule laconique de l'article premier où il était dit que la Cour était instituée "conformément à l'article 14 du Pacte". Une grande latitude était donc laissée à la Cour quant au choix des procédures et des principes applicables en matière consultative.

[38] Voir d'une façon générale M. Hudson. *The Permanent Court of International Justice,* (1943) pp. 107-8, et 210-13; S. Rosenne, *The Law and Practice of International Court* (1965), Vol. 2, chapitre XIX; D. Pratap, *The Advisory Jurisdiction of the International Court,* chapitre I; M. Pommerance, *The Advisory Function of the International Court,* chapitre 1.

Toutefois, certains points avaient été bien précisés au moment de la rédaction de l'article 14 du Pacte et de celle du Statut. L'objet de la compétence consultative était essentiellement d'aider le Conseil et l'Assemblée à s'acquitter de leurs fonctions de conciliation dans les différends qui leur étaient soumis et de leur obligation d'en rendre compte. Certains États, les États-Unis en particulier, avaient beaucoup insisté pour que la fonction consultative confiée à la Cour eût un caractère purement judiciaire et fut entourée des mêmes garanties judiciaires que sa fonction contentieuse. Ils avaient insisté tout particulièrement sur ce point dans les cas où la demande concernait un différend actuellement né, et sur la nécessité d'appliquer alors les dispositions de l'article 31 du Statut relatives à la présence sur le siège de juges nationaux. On craignait aussi que la compétence consultative ne fût une façon d'introduire par la bande une forme de juridiction obligatoire.

Lorsque la Cour s'est réunie en 1922 pour établir le texte de son Règlement, elle a rédigé les articles concernant les affaires consultatives en postulant le caractère judiciaire et public de la procédure; et elle s'est prudemment contentée de quatre articles sommaires, se gardant toute latitude de modifier sa procédure en fonction de l'expérience. Elle a estimé d'autre part que l'article 14 du pacte ne la contraignait pas à rendre un avis chaque fois qu'on l'en priait: si le texte français (donnera) semblait lui en faire une obligation, il s'agissait en fait d'une traduction de l'anglais (maygive), qui impliquait une simple faculté[39]. Sans aller jusqu'à l'énoncer dans son Règlement, la Cour a par la suite toujours posé en principe qu'elle serait libre, dans chaque cas d'espèce, de décider s'il était ou non compatible avec son caractère judiciaire d'accéder à la demande[40].

La compétence consultative a joué un rôle d'une importance inattendue dans les travaux de la Cour permanente; en 18 années d'existence active, elle a rendu un avis dans 17 affaires consultatives. Ces dernières étaient très variées, et soulevaient à peu près toute la gamme des problèmes juridictionnels et de procédure liés à la compétence consultative. Si bien que la Cour a été amenée, en 1926 et de nouveau en 1931, à réviser et à étoffer légèrement les quatre articles de son Règlement consacrés aux avis consultatifs, en y incorporant des procédures nées de la pratique et qui tendaient à assimiler les affaires consultatives aux affaires contentieuses.

[39] Série D, No 2. pp.98,159-61, 292 et 471-2.

[40] Voir par exemple les affaires suivantes: *Carélie orientale,* Série B, No 5, pp. 28-29; *Interprétation des traités de paix,* C.I.J. Recueil 1950, pp 71-72; *Certaines dépenses des Nations Unies,* C.I.J. Recueil 1962, p. 155; *Namibie,* C.I.J. Recueil 1971, p. 27; *Sahara occidental,* C.I.J. Recueil 1975, p. 21.

Parmi les premières affaires consultatives, il y en eut certaines où la requête avait trait à un "différend" contentieux actuellement né et soulevait donc la question de la présence sur le siège de juges ayant la nationalité des parties en cause. La Cour a tout d'abord refusé de considérer que l'article 31 du Statut autorisait une partie non représentée sur le siège à nommer un juge *ad hoc* en matière consultative. C'est ainsi qu'elle a rejeté les demandes de juges *ad hoc* en 1925 dans l'affaire de *l'Échange des populations grecques et turques*[41] et en 1926 dans l'affaire de Mossoul[42]; et une proposition des juges Huber et Anzilotti présentée en 1926 et tendant à autoriser la nomination de juges *ad hoc* dans les affaires consultatives a connu le même sort. Toutefois, la Cour a changé d'avis sur ce point en 1927, dans l'affaire de la *Commission du Danube*, où il y aurait eu sinon trois parties représentées sur le siège par des juges nationaux élus d'un côté et de l'autre une partie sans juge national[43]. Elle a modifié son Règlement et spécifié que l'article 31 du Statut serait applicable en matière consultative lorsque l'avis serait demandé "sur une question relative à un différend actuellement né entre deux ou plusieurs États...". C'était par là même officialiser la distinction en matière consultative entre les affaires ayant trait à un simple "point" et les affaires ayant trait à une question relative à un différend contentieux actuellement né entre États.

Le problème fondamental du consentement des parties à l'exercice de la compétence consultative dans le cas d'un différend actuellement né s'était aussi posé dans les affaires de la *Corélie orientale*[44] et de *Mossoul*[45]. Dans le premier cas, un État, étranger à la Société des Nations, s'était opposé à ce que le différend fût déféré au Conseil, en vertu de l'article 17 du Pacte, et n'avait pas participé à ses débats; il avait ensuite également refusé de prendre la moindre part à la procédure devant la Cour. Dans ce cas précis, la Cour a jugé impossible de rendre un avis, et ce pour deux motifs distincts. Le premier était le "principe de l'indépendance des États", au sujet duquel elle a fait la fameuse déclaration suivante[46]:

> Il est bien établi en droit international qu'aucun État ne saurait être obligé de soumettre ses différends avec les autres États soit à la médiation, soit à l'arbitrage, soit enfin à n'importe quel procédé de solution pacifique, sans son consentement. Ce consentement peut être donné une fois pour toutes sous

[41] Série B, No 10.
[42] Série B, No 12; Série E. 3, pp. 223-4.
[43] Série E, 4,pp. 296-7.
[44] Série B, No 5.
[45] Série B, No 12.
[46] Série B, No 5, p. 2.7.

> la forme d'une obligation librement acceptée; il peut, par contre, être donné dans un cas déterminé, en dehors de toute obligation préexistante.

Ce que que l'on perd parfois de vue, c'est qu'en l'occurrence la Cour a expressément limité la portée de sa déclaration au cas d'un État étranger à la Société des Nations, non tenu d'accepter la fonction de conciliation du Conseil ou la compétence consultative de la Cour. Il n'y avait pas lieu, a dit la Cour, d'élargir le problème et de s'interroger "sur le point de savoir si des questions pour avis consultatif, pour autant qu'elles se réfèrent à des points de fait actuellement en litige entre deux nations, devraient être soumises à la Cour sans le consentement des parties." En d'autres termes, elle ne s'est pas prononcée sur le point de savoir si le consentement exprès des intéressés serait requis dans le cas d'un différend actuellement né entre des parties soumises à la procédure de conciliation du Conseil.

Le second motif concernait la façon de traiter les points de fait dans les affaires consultatives. La Cour a fait remarquer que la question dont elle était saisie reposait sur un point de fait et qu'elle serait bien en peine, la Russie refusant son concours, de procéder à une enquête sur ce point. Elle a dit à ce propos[47]:

> La Cour ne saurait aller jusqu'à dire qu'en règle générale une requête pour avis consultatif ne puisse impliquer une vérification de faits; mais, dans des circonstances ordinaires, il serait certainement utile que les faits sur lesquels l'avis de la Cour est demandée fussent constants: le soin de les déterminer ne devrait pas être laissé à la Cour elle-même.

Puis, après avoir souligné que la question concernait "directement le point essentiel du conflit" et qu'il ne pouvait y être répondu qu'à la suite d'une enquête sur les faits, la Cour a conclu en ces termes:

> Répondre à la question équivaudrait en substance à trancher un différend entre les parties. La Cour, étant une Cour de Justice, ne peut pas se départir des règles essentielles qui dirigent son activité de tribunal, même lorsqu'elle donne des avis consultatifs.

L'affaire de *Mossoul*[48] différait de la précédente sur plusieurs points importants. Tout d'abord, les questions posées dans la demande

[47] Série B, No 5, pp. 28-9.
[48] Série B, No 12.

concernaient non pas le "point essentiel du conflit" mais la nature de la décision à prendre par le Conseil et la procédure de vote. Ensuite, la Turquie avait pris part aux débats du Conseil et, quand la proposition tendant à demander un avis avait été adoptée, elle s'y était certes opposée, mais seulement parce que les questions soumises à la Cour étaient politiques à l'extrême. La Turquie avait, il est vrais, renouvelé cette objection devant la Cour, déclarant que les questions ne se prêtaient pas à une interprétation juridique et qu'elle ne voyait pas l'utilité d'être représentée à la procédure. Mais elle avait fourni des pièces touchant les points soulevés dans la requête et, sous les réserves relatives à la nature politique de ces points, avait répondu à certaines questions qui lui avaient été posées par la Cour avant la procédure orale.

L'Avis lui-même n'explique pas pourquoi, malgré l'absence de la Turquie, la Cour s'est considérée en droit de rendre un avis[49]. Par contre, le deuxième rapport annuel de la Cour fournit l'explication suivante[50]:

> La Cour estime que, bien que le cas d'espèce offre une certaine analogie avec l'affaire de la Carélie orientale, du fait que l'une des Parties ne prend pas part à la procédure, les circonstances sont cependant nettement différentes, étant donné que la question posée à la Cour en l'espèce vise non le fond de l'affaire mais la compétence du Conseil, lequel, saisi régulièrement, peut solliciter, sur des points de droit, l'avis de la Cour. En outre, le Gouvernement turc a transmis officiellement certains documents et expliqué son attitude.

D'aucuns ont vu là un changement de la position qu'avait adoptée la Cour dans l'affaire de la *Carélie orientale,* mais ce n'est nullement certain. D'une part, la Turquie avait accepté la conciliation du Conseil pour ce différend et, d'autre part dans l'affaire de la *Carélie orientale,* la Cour avait expressément laissé en suspens la question de savoir si la compétence consultative pouvait s'exercer en pareil cas sans le consentement d'une partie. Elle avait aussi laissé entendre que sa position pourrait être différente si les questions ne concernaient pas "directement le point essentiel du conflit".

Lorsqu'elle a abordé la question d'un juge *ad hoc* dans l'affaire de *Mossoul,* la Cour a de toute évidence considéré que la requête concernait un différend né et actuel; et si elle a décidé de ne pas inviter la Turquie à nommer un juge *ad hoc,* ce n'est que parce qu'à l'époque elle était encore

[49] Le Président a simplement déclaré à l'ouverture des audiences publiques que la Cour "a pu constater que les circonstances ne l'empêchent pas de donner l'avis qui lui a été demandé". Série C, No 10, p. 9.

[50] Série E/2, pp. 166-7.

opposée au principe même de pareille nomination en matière consultative. Mais, pour ce qui est du consentement, elle a établi une distinction entre les deux affaires et estimé qu'elle était en droit de rendre un avis, motif pris de ce que la requête avait trait non pas au fond même du litige, mais au pouvoir qu'avait le Conseil d'en connaître. C'est donc dans l'affaire de *Mossoul* qu'est apparu pour la première fois le problème qui allait diviser la Cour actuelle dans les affaires des *Traités de paix,* de la *Namibie* et du *Sahara occidental,* et qui commande peut-être l'opportunité d'exercer la compétence consultative: savoir si une demande doit être considérée comme portant sur le litige lui-même ou seulement sur le fonctionnement de l'organe demandeur.

La question du consentement dans les affaires consultatives a aussi été débattue à l'occasion des efforts faits pour convaincre les États-Unis d'adhérer au Statut, et à l'occasion de la révision du Statut de la Cour. C'est une histoire longue et compliquée[51]. Disons simplement que les États-Unis voulaient être assurés que, sauf consentement de leur part, la Cour ne retiendrait aucune demande d'avis consultatif touchant un différend ou un point dans lequel ils auraient ou revendiqueraient un intérêt. Les déclarations faites par la Cour à propos de l'affaire de la *Carélie orientale* ou une disposition qui ne figurerait que dans le Règlement de la Cour ne leur paraissaient pas une garantie suffisante.

Toutes les propositions faites pour tenter de leur donner satisfaction ont échoué et ils n'ont jamais adhéré au Statut de la Cour permanente. Ces discussions n'ont pourtant pas été inutiles puisqu'au nombre des quatre articles ajoutés en 1936 au Statut révisé, et empruntés pour l'essentiel au Règlement, figurait un article 68 ainsi conçu:

> Dans l'exercice de ses attributions consultatives, la Cour s'inspirera en outre des dispositions du présent Statut qui s'appliquent en matière contentieuse, dans la mesure où elle les reconnaîtra applicables.

Cette disposition avait pour effet de consacrer la politique déjà suivie par la Cour et tendant à assimiler les affaires consultatives aux affaires contentieuses lorsqu'elles mettaient en jeu "une question relative à un différend actuellement né entre deux ou plusieurs États." Mais comme l'a fait remarquer Manley Hudson[52], cette clause laissait encore à la Cour la haute main sur la procédure consultative à suivre en pareil cas. La Cour restait libre d'apprécier sous quelles conditions une demande devrait être considérée comme ayant avec un différend actuellement né des liens de

[51] M. Hudson, *The Permanent Court of International Justice*, (1943), pp. 218-38.
[52] M. Hudson, *The Permanent Court of International Justice*, (1943), p. 215.

nature à rendre nécessaires le consentement des parties ou l'application des articles concernant la représentation sur le Siège.

On a souvent fait observer qu'à la différence de la période Nations Unies, la majorité des avis consultatifs demandés du temps de la Société des Nations concernaient des litiges contentieux actuellement nés. En fait, dans la plupart des cas, les questions soumises à la Cour permanente portaient directement sur le fond même du litige. De plus, après avoir décidé en 1927 d'autoriser les juges *ad hoc* dans la procédure consultative, la Cour permanente a été amenée à envisager la question de l'existence d'un litige de ce point de vue dans la très grande majorité des affaires consultatives – 11 sur 13 – dont elle a eu à connaître.

Deux d'entre elles éclairent certains points qui ont récemment pris de l'importance dans les affaires de la *Namibie* et du *Sahara occidental*. Dans la première, l'affaire des *Écoles minoritaires en Albanie*[53], il s'agissait de savoir si certaines lois albanaises étaient compatibles avec la Déclaration sur les minorités faite par l'Albanie devant la Société des Nations. Des "communications spéciales et directes" furent envoyées à la Grèce et à l'Albanie en tant qu'États susceptibles de fournir des renseignements; ces deux États furent aussi consultés l'un et l'autre à propos de la procédure écrite et orale et ils présentèrent des exposés écrits et oraux. La Cour, tout en traitant donc la Grèce comme un État directement intéressé, a néanmoins jugé que la demande portait non sur un différend actuellement né mais sur les obligations de l'Albanie à l'égard des minorités, dont la Société des Nations était le garant. Elle a donc décidé que la question de la nomination d'un juge *ad hoc* ne se posait pas.

Dans la seconde, l'affaire des *Décrets-lois dantzikois*[54], il s'agissait de savoir si lesdits décrets étaient compatibles avec la Constitution de Dantzig, elle aussi placée sous la garantie de la Société des Nations. Dantzig, qui avait été autorisée à désigner un juge *ad hoc* dans trois autres affaires consultatives ayant trait à un différend actuellement né, a présenté une nouvelle demande en ce sens, en se bornant à alléguer qu' "il serait extrêmement utile qu'un juge entièrement au courant du droit constitutionnel dantzikois pût prendre place sur le Siège".

Dantzig avait à l'évidence un intérêt tout particulier dans l'affaire, mais la Cour a rejeté la demande, disant qu'elle ne pouvait se prononcer qu'en conformité de son Statut et de son Règlement. Elle a fait observer que la composition dans laquelle la Cour devait siéger était régie par les articles 25 et 31 du Statut; qu'aux termes dudit article 31, la présence

[53] A/B 64.
[54] A/B 65.

éventuelle de juges *ad hoc* était exclusivement prévue pour le cas où il y avait des parties devant la Cour; et que tel n'était pas le cas dans l'affaire dont elle était saisie. Quant aux avis consultatifs, le Règlement prévoyait qu'ils devaient être émis en séance plénière par la Cour composée conformément à l'article 25 du Statut; et si, aux termes du Règlement, les dispositions de l'article du Statut relatives aux juges *ad hoc* étaient applicables à la procédure consultative, c'était exclusivement lorsque cette procédure avait trait à un différend actuellement né entre deux ou plusieurs États. La Coura a estimé que ces dispositions constituaient alors la seule exception à la règle générale de l'article 25, et que l'application n'en pouvait être étendue dans la procédure consultative.

Donc, tant dans l'affaire des *Décrets-loisdantzikois* que dans celle des É*coles minoritaires en Albanie*, la demande concernait la légalité de mesures prises par certains États dans des domaines où la Société des Nations avait assumé des responsabilités; et dans l'un et l'autre cas, la Cour a décidé que la présence d'un intérêt spécial de l'État ne suffisait pas à justifier la nomination d'un juge *ad hoc*. De plus, dans l'affaire de Dantzig, elle a déclaré expressément que les dispositions de l'article 31 relatives aux juges *ad hoc* n'étaient applicables que si la demande concernait un différend actuellement né entre deux ou plusieurs États. Ce sont là des points qui ont pris de l'importance dans les affaires de la *Namibie* et du *Sahara occidental*.

Depuis la création de l'Organisation des Nations Unies, les affaires consultatives ont souvent porté sur des questions d' "organisation" plus que de "différend"; sur le fonctionnement de l'organe demandeur plus que sur le règlement d'un différend actuellement né entre deux ou plusieurs États. Peut-être cela tient-il tout simplement à ce que l'on recourt bien davantage de nos jours à la diplomatie multilatérale. Mais il est devenu plus difficile de distinguer clairement différends entre États et simples conflits d'opinions au sein d'une organisation. Il arrive aussi que certaines affaires traduisent une opposition entre la majorité de l'organe demandeur et un ou plusieurs États; j'en donnerai pour exemples l'affaire des *Traités de paix*[55] et les trois affaires consultatives du *Sud-Ouest africain*[56], de la *Namibie*[57] et du *Sahara occidental*[58]. Dans toutes ces affaires, l'organe demandeur lui-même avait un intérêt dans le fond de la question soumise à la Cour, il avait à coeur de parvenir à ses fins: défense des droits de l'homme, autodétermination, etc. Cette évolution fait, je crois, qu'il est de

[55] C.I.J. Recueil 1950, pp. 65 et 221.
[56] C.I.J. Recueil 1950, p. 128; C.I.J. Recueil 1955, p. 67; C.I.J. Recueil 1956, p.23.
[57] C.I.J. Recueil 1971, p. 16.
[58] C.I.J. Recueil 1975, p. 12.

plus en plus difficile de concilier la compétence consultative et les intérêts d'États particulièrement concernés par le fond de la question soumise à la Cour; et la pratique du vote à la majorité dans les organisations internationales aggrave encore le problème.

Le Statut actuel, à l'image de celui de la Cour permanente, ne contient aucune clause consacrée expressément à la question du consentement. Tout au plus y lit-on, à l'article 68, que la Cour s'inspirera des dispositions qui s'appliquent en matière contentieuse dans la mesure où elle les reconnaîtra applicables. L'article 87 du Règlement, qui reprend cette injonction, ajoute qu'à cet effet la Cour recherchera avant tout si la demande a trait ou non à une question juridique actuellement pendante entre deux ou plusieurs États. Mais les affaires des *Traités de paix,* de la *Namibie* et du *Sahara occidental* montrent clairement que cette injonction ne signifie nullement que la compétence de la Cour en matière consultative doit être considérée comme subordonnée au consentement des États intéressés.

Dans l'affaire des *Traités de paix*, comme dans celle de la *Carélie orientale,* la Cour était placée devant le non-consentement d'un État qui, d'une part, était étranger à l'Organisation et, d'autre part, n'avait pas participé à la procédure devant l'organe demandeur. La Cour a déclaré sans équivoque que, même si la demande avait trait à "une question juridique actuellement pendante entre États", aucun État, qu'il soit Membre ou non de l'Organisation des Nations Unies, ne pouvait, en refusant son consentement, priver la Cour de sa compétence consultative. À son avis, la question du consentement intéressait non pas sa *compétence* mais l'*opportunité* de rendre un avis.

Dans l'affaire de la *Carélie orientale*, la Cour a avancé deux raisons distinctes: premièrement, la question qui lui avait été soumise concernait directement le point essentiel d'un différend actuellement né entre deux États de sorte qu'y répondre équivaudrait en substance à trancher le différend entre les parties; et deuxièmement, elle soulevait un point de fait qui ne pouvait être éclairci que contradictoirement. Par contre, dans l'affaire des Traités de paix, la Cour a estimé que la question concernait uniquement l'applicabilité de la procédure de règlement des différends instituée par les Traités, et ne touchait pas le fond même de ces différends ni la compétence des commissions envisagées par cette procédure. La demande d'avis ne tendait à rien d'autre, a-t-elle souligné, qu'à éclairer l'Assemblée générale sur les ressources qu'offrait la procédure prévue par les Traités de paix pour régler une question inscrite à son ordre du jour. La position juridique des parties à ces différends ne pouvait donc pas, à son avis, être compromise par les réponses aux questions posées dans la demande. À propos de cette

affaire d'aucuns ont fait observer qu'indépendamment des différends sur le fond des allégations relatives aux droits de l'homme, il y avait aussi un litige actuellement pendant au sujet de l'application des procédures de règlement prévues dans les Traités, et que le raisonnement de la Cour ne tenait pas compte de cet aspect. Quoi qu'il en soit, la Cour, dans l'affaire des Traités de paix a dit clairement ce qu'elle pensait de l'effet, en matière consultative, du défaut de consentement des États intéressés: ce défaut soulève une question non de compétence, mais d'opportunité judiciaire.

L'affaire de la *Carélie orientale* a été invoquée à nouveau dans l'affaire de la *Namibie*[59], motif pris de ce que la requête n'avait pas trait à un différend, mais au fonctionnement de l'organe demandeur, le Conseil de Sécurité. La Cour a tout d'abord noté que l'Afrique du Sud était liée, en tant que Membre des Nation Unies, par l'Article 96 de la Charte qui autorise le Conseil de Sécurité à demander un avis consultatif sur toute question juridique; et que, tout en soulevant certaines objections quant à la compétence de la Cour, l'Afrique du Sud avait pris part à la procédure écrite et orale sur le fond. La Cour a ensuite établi une distinction entre la requête dont elle était saisie et celle qui avait été présentée dans l'affaire de le *Carélie* orientale:

> L'objet de la requête n'est pas de faire en sorte que la Cour assiste le Conseil de Sécurité dans l'exercice de ses fonctions relatives au règlement pacifique d'un différend entre deux ou plusieurs États dont il serait saisi. Il s'agit d'une requête présentée par un organe des Nations Unies, à propos de ses propres décisions, en vue d'obtenir de la Cour un avis juridique sur les conséquences et les incidences de ces décisions.

Elle a également repoussé une proposition tendant à ce que la requête soit néanmoins considérée comme ayant trait à un différend actuellement pendant entre États dans le cadre des Nations Unies:

> Le fait que… la Cour puisse avoir à se prononcer sur des questions juridiques au sujet desquelles les vues de l'Afrique du Sud et celles des Nations Unies, s'opposent radicalement ne suffit pas à transformer la présente affaire en un différend…

Elle a ajouté:

> Presque toutes les procédures consultatives ont été marquées par des divergences de vues entre États sur des points de droit; si les opinions des États concordaient, il serait inutile de demander l'avis de la Cour.

[59] C.J.I. Recueil 1971, pp. 23-4.

Voici donc quelle a été, semble-t-il, la position de la Cour: pour que la question du consentement en matière consultative se pose à propos d'un différend ou d'un conflit juridique, il faut que ce dernier ait essentiellement le caractère d'un différend bilatéral plutôt que d'un désaccord né a l'occasion des débats de l'organisation.

Que le défaut de consentement soulève un problème d'opportunité, non de compétence, la Cour l'a réaffirmé dans l'affaire du *Sahara occidental* ; et elle a ajouté l'explication suivante[60]:

> Ainsi le défaut de consentement d'un État intéressé peut, dans certaines circonstances, rendre le prononcé d'un avis consultatif incompatible avec le caractère judiciaire de la Cour. Tel serait les cas si les faits montraient qu'accepter de répondre aurait pour effet de circonvenir le principe selon lequel un État n'est pas tenu de soumettre un différend au règlement judiciaire s'il n'est pas consentant. Si une telle situation devait se produire, le pouvoir discrétionnaire que la Cour tient de l'article 65, paragraphe 1, du Statut fournirait des moyens juridiques suffisants pour assurer le respect du principe fondamental du consentement à la juridiction.

Mais cette situation ne se retrouvait pas, selon la Cour, dans l'affaire du *Sahara occidental*. L'Espagne, signataire de la Charte, avait nécessairement donné son accord général à l'exercice de la compétence consultative sur requête présentée par l'Assemblée générale dans le cadre de ses fonctions. Le défaut de consentement de l'Espagne concernait les questions mêmes soumises à la Cour, questions qui étaient liées aux points sur lesquels elle disait être en désaccord avec le Maroc. La Cour a toutefois conclu que la controverse juridique n'avait pas surgi indépendamment, dans le cadre des relations bilatérales entre les deux pays, mais lors des débats de l'Assemblée générale et au sujet de problèmes traités par elle. L'objet de la requête n'avait pas été de porter devant la Cour un différend ou une controverse juridique afin que, sur la base de l'avis rendu par la Cour, l'Assemblée puisse exercer ses pouvoirs et ses fonctions en vue de régler pacifiquement ce différend ou cette controverse; il s'était agi d'obtenir de la Cour un avis consultatif pour aider l'Assemblée à exercer comme il convenait ses fonctions relatives à la décolonisation du territoire. Les réponses de la Cour seraient sans effet sur les droits de l'Espagne, mais aideraient l'Assemblée à se prononcer sur la politique à suivre pour hâter la décolonisation. La position juridique de l'État qui avait refusé son consentement à la procédure ne serait donc pas compromise par les réponses que la Cour pourrait donner aux questions posées.

[60] C.J.I. Recueil 1975, p. 25.

Certains juges ne partageaient pas cette façon de concevoir le rapport entre le différend ou la controverse juridique et les débats de l'Assemblée générale qui avaient abouti à la requête. Ce qui vient à l'appui de ce que je disais tout à l'heure, à savoir qu'il est plus difficile de nos jours de faire une distinction vraiment nette entre relations bilatérales et activités des organisations internationales. La Cour doit apprécier, dans chaque cas d'espèce, si, aux fins du Statut et du Règlement, une requête concerne essentiellement un différend actuellement né entre États ou le fonctionnement de l'organe requérant; et l'affaire du *Sahara occidental* montre que la décision n'est pas toujours facile.

De cette appréciation dépend aussi la question du droit d'un État intéressé à désigner un juge *ad hoc*, question qui s'est posée dans les affaires de la *Namibie* et du *Sahara occidental*. L'article 89 du Règlement (ancien article 83) stipule expressément que, si la requête concerne une question juridique actuellement pendante entre deux ou plusieurs États, la Cour applique les dispositions de l'article 31 du Statut relatives aux juges *ad hoc*; et en pareil cas, l'article 31 est automatiquement applicable. L'affaire de la Namibie[61], elle, permet de penser que l'automatisme joue également en sens inverse: ayant constaté que la requête ne concernait pas "une question juridique actuellement pendante entre deux ou plusieurs États", la Cour a décidé qu'automatiquement l'Afrique du Sud n'avait pas droit à un juge *ad hoc*.

Dans l'affaire de la *Namibie,* quatre juges[62] ont estimé que, même en l'absence d'une "question juridique actuellement pendante", la Cour peut décider d'appliquer l'article 31 en vertu du pouvoir discrétionnaire que lui confère l'article 68 du Statut. Ces juges pensaient que la Cour devait user de ce pouvoir discrétionnaire en faveur de l'Afrique du Sud, en raison de l'intérêt tout particulier que celle-ci avait dans l'affaire. Mais la Cour a refusé d'autoriser la désignation d'un juge *ad hoc*, et semble avoir adopté le même point de vue que la Cour permanente dans l'affaire des Décrets-lois dantzikois[63]. La composition dans laquelle la Cour doit siéger est une question constitutionnelle régie par les articles 25 et 31 du Statut ; et l'article 31 dispose qu'il ne sera fait exception à la composition normale de la Cour fixée par l'article 25 que dans les cas où il y a un différend actuellement né entre deux ou plusieurs États. C'est là la seule exception admise dans le Statut, et il s'ensuit qu'en matière consultative la Cour n'est pas en droit de modifier sa composition, si ce n'est dans les cas prévus par

[61] C.I.J. Recueil 1971, pp 24-7.
[62] Ibid., pp. 128-9; 139-41; 152-3; 308-17; voir aussi Pomerance, American Journal of International Law (1973), Vol. 67, pp. 446-64.
[63] C.P.J.I. 1935, Série S/B, No 65, Annexe 1, p. 70.

le Statut. En d'autres termes, même si l'on invoque l'injonction générale donnée à la Cour dans l'article 68 du Statut (s'inspirer des dispositions du Statut qui s'appliquent en matière contentieuse, dans la mesure où elle les reconnaîtra applicables), la seule modification que la Cour puisse apporter à sa composition demeure celle qui est spécifiée dans ces dispositions. Selon cette interprétation du Statut, il ne suffit pas qu'un État établisse un intérêt particulier dans l'affaire, il doit aussi faire la preuve qu'il est "partie" à un différend actuellement né.

La question s'est à nouveau posée dans l'affaire du *Sahara occidental*[64] où la Cour, par 10 voix contre 5, a admis la demande de la Mauritanie. Il était simplement dit dans l'Ordonnance qu'aux fins des dispositions relatives aux juges *ad hoc*, la requête semblait porter sur "une question juridique actuellement pendante entre deux ou plusieurs États" dans le cas du Maroc, mais non dans celui de la Mauritanie. Par conséquent, là encore, c'est l'absence d'un différend juridique actuellement pendant qui fut le motif invoqué par la Cour pourrefuser la nomination d'un juge *ad hoc*, en dépit de l'intérêt spécial que la Mauritanie avait dans l'affaire. Ajoutons que le problème du Sahara, qui a été débattu bien souvent aux Nations Unies dans le contexte de la décolonisation et qui a divisé la Cour sur la question des juges *ad hoc*, est un bon exemple de ce que j'ai déjà dit plus haut, à savoir qu'on discerne de plus en plus mal la frontière qui sépare les différends entre États des divergences de vues au sein d'une organisation.

Les affaires de la *Namibie* et du *Sahara occidental* ont aussi fait progresser quelque peu la jurisprudence de la Cour sur la détermination des faits en matière consultative. Dans le premier cas, l'Afrique du Sud avait fait valoir que la Cour ne devait pas répondre à une requête s'il lui fallait pour cela "se prononcer sur des questions de fait d'une portée étendue". Mais, a dit la Cour, ce n'est pas parce qu'il est fait mention de "question juridique" dans l'Article 96 de la Charte qu'on doit en conclure que cette disposition oppose les questions de droit aux points de fait; et la Cour d'ajouter[65]:

> Pour être à même de se prononcer sur des questions juridiques, un tribunal doit normalement avoir connaissance des faits correspondants, les prendre en considération et, le cas échéant, statuer à leur sujet.

Elle a ensuite conclu que les restrictions aux avis consultatifs suggérés par certains n'avaient de fondement ni dans la Charte, ni dans le statut.

[64] C.I.J. Recueil 1975, pp.15-16.
[65] C.I.J. Recueil 1971, pp. 27.

Dans l'affaire du *Sahara occidental*, l'Espagne a fait valoir que si la requête supposait une vérification approfondie des faits, la Cour ne devrait pas se prononcer en l'absence de "faits non controversés". En matière consultative, a-t-elle allégué, "il n'y a pas à proprement parler de parties tenues de soumettre les éléments probatoires nécessaires et l'on ne peut guère appliquer les règles ordinaires relatives à la charge de la preuve". Par ailleurs, la Cour internationale a noté que dans l'affaire de la *Carélie orientale*, c'était en raison de l'absence concrète des "renseignements matériels nécessaires pour lui permettre de porter un jugement sur la question de fait" que la Cour permanente s'était interdite de rendre un avis. La Cour internationale a formulé ce principe en ces termes[66]:

> Il s'agit...de savoir si la Cour dispose de renseignements et d'éléments de preuve suffisants pour être à même de porter un jugement sur toute question de fait contestée et qu'il lui faudrait établir pour se prononcer d'une manière conforme à son caractère judiciaire.

Dans l'affaire du *Sahara occidental*, la Cour était saisie d'une documentation abondante et les audiences publiques ont fait penser aux débats d'une procédure contradictoire. Cela étant, la Cour a estimé qu'elle disposait de renseignements et d'éléments de preuve suffisants pour arriver à une conclusion judiciaire concernant les fait intéressant l'avis qu'elle était appelée à rendre.

De toute évidence, la Cour s'est beaucoup éloignée de l'attitude à tout le moins réservée qui avait été celle de la Cour permanente à l'égard des points de fait dans les affaires consultatives. Là comme ailleurs, elle a eu tendance à assimiler la procédure consultative à la procédure contentieuse. Mais assimiler n'est pas calquer. En matière consultative, même lorsqu'une requête concerne un différend actuellement né, les États intéressés ne sont pas parties à une affaire contentieuse; tout au plus parties à un différend à l'occasion duquel l'organe requérant a demandé un avis. Sur les point de fait, leurs rapports avec la Cour ne sont pas les mêmes que ceux des parties à une procédure contentieuse. Ils ne sont pas normalement tenus de participer à la procédure, si bien que leur absence n'est pas considérée comme un défaut faute de comparaître. S'ils y participent, ils fournissent à la Cour de simples informations, non des moyens ou éléments de preuve. De même, la Cour est responsable au premier chef envers l'organe requérant plutôt qu'envers les États, quelque spécial que puisse être l'intérêt de ceux-ci dans les questions soumises à

[66] C.I.J. Recueil 1975, pp. 28-9.

la Cour. Ces différences, qui ne sont pas seulement techniques, montrent que, s'agissant de l'examen des points de fait par la Cour, il y a des limites au processus d'assimilation.

Les deux Cours, grâce surtout à ce processus, ont fait de la compétence consultative un instrument très souple et qui se prête, pour peu que les intéressés le veuillent, à presque tous les règlements judiciaires. Il a servi dans le passé à des fins très diverses: questions constitutionnelles, litiges juridiques bilatéraux, appels de décisions de tribunaux judiciaires ou quasi-judiciaires, problèmes juridiques soulevés devant les organisations internationales. D'ailleurs, c'est précisément en raison de la très grande variété des affaires consultatives que la Cour a voulu que les dispositions réglementaires les concernant soient relativement brèves et adaptables au gré des circonstances. Depuis la création des Nations Unies, je vous l'ai déjà dit, les requêtes concernent de plus en plus fréquemment les activités de l'organe requérant, ce qui ne les empêche pas de mettre en jeu les intérêts particuliers de tel ou tel État. C'est pourquoi, d'où que viennent les requêtes et quelle que soit la nature des questions qui lui sont soumises, il importe au plus haut point que la Cour préserve à tout prix le caractère judiciaire de la fonction consultative.

LA COUR INTERNATIONALE DE JUSTICE ET L'INDICATION DE MESURES CONSERVATOIRES

Conférence donnée le 7 juin 1978
par S. E. M. Taslim O. Elias
Juge à la Cour internationale de Justice

Avant-Propos

Quand, après l'élection de novembre 1961, je pénétrai pour la première fois, en mai 1962, dans la salle de séances de la Commission, un petit homme vif et affable, de quelque vingt-cinq ans mon aîné, se dirigea vers moi, m'entoura de ses bras et s'exclama: "Alors, c'est vous, Elias? D'après votre curriculum vitae et le résultat de l'élection, je m'attendais à quelqu'un de beaucoup plus âgé. Mais qu'importe! Nous avons El-Erian qui est plus jeune que vous, et en tout cas, ici, nous sommes tous des amis". Gilberto me faisait ainsi un accueil extraordinaire, et cela continua toute sa vie.

Elu pour la première fois en 1948, Gilberto Amado est resté membre de la Commission pendant plus de vingt années consécutives jusqu'à sa mort, en 1968, après avoir été rapporteur et vice-président à plusieurs reprises, puis notre doyen. Il a marqué les travaux de la Commission de manière indélébile, moins par ses talents d'analyste et d'érudit que par les conseils objectifs et les sages paroles dont il avait l'art, dans les phases délicates de l'oeuvre de développement et de codification du droit international menée par la Commission.

C'est ainsi, par exemple, qu'il mettait en garde les membres de la Commission contre la tentation de se considérer comme des "juristes enfermés dans une tour d'ivoire" ou qu'il rappelait que "l'oeuvre de codification, comme celle du développement du droit international, doit être exécutée en coopération avec le pouvoir politique des États[67]".

[67] A/AC. 10/28.

Mais en même temps, parlant en qualité de Rapporteur, en une autre occasion, Gilberto était au premier rang des membres qui défendaient le droit de la Commission de choisir les sujets propices au développement et à la codification contre la thèse selon laquelle c'était là une prérogative de l'Assemblée générale. Amado faisait observer que "la Commission n'a pas à se limiter à l'énonciation de règles traditionnelles universellement acceptées, sa tâche essentielle est de combler les nombreuses lacunes du droit existant, de lever les doutes sur certaines interprétations, ... et même de modifier les règles juridiques en vigueur, en tenant compte des faits nouveaux... La Commission, disait-il doit choisir des sujets présentant des difficultés à résoudre et des lacunes qui nuisent au prestige même du droit international[68]". Il affirmait aussi que les demandes émanant de l'Assemblée générale "ne doivent pas gêner la Commission dans l'accomplissement de sa fonction essentielle, qui est la recherche des sujets de codification[69]".

Il avait un sens de l'humour presque contagieux qui allégeait souvent le poids de nos travaux aussi bien dans les débats les plus sérieux qu'à l'occasion des réceptions données par les membres. Son don du style et de l'expression juste illuminait souvent nos projets de textes parfois compliqués et s'il recourait fréquemment aux anecdotes, elles étaient toujours authentiques. Il évoquait généralement avec une aisance évidente telles phrases prononcées par des représentants de l'Assemblée générale ou à l'une de ses Commissions où il avait siégé, ainsi que telles décisions, et ces souvenirs aidaient parfois à proposer des solutions possibles à des problèmes de codification qui pouvaient être fort épineux. Je citerai un exemple de ses délicieuses réparties lors des réunions amicales: à une réception donnée par le professeur Tounkine en juin 1963 à l'ambassade soviétique, Gilberto Amado s'approcha, au cours de sa tournée traditionnelle, de notre petit groupe dans lequel se trouvait Radhabinod Pal, notre collègue indien octogénaire et lui lança "Bonjour, Pal, l'homme qui a le courage d'être plus âgé que moi". Et il se joignit à notre groupe.

Ses oeuvres poétiques et romanesques le disputent, en talent littéraire, à sa charmante autobiographie sur laquelle nous sont parvenus de multiples éloges bien mérités. Certains de mes amis d'Amérique latine ont pris la peine de me traduire en anglais des passages du texte original portugais pour me communiquer un peu de la saveur réelle

[68] Yearbook, ILC, First Session, 1949, p. 18 [Annuaire de la CDI, Première session, p. 18, en anglais seulement]. Traduction non officielle.

[69] Documents officiels de l'Assemblée générale, 1949, Sixième Commission, Comptes rendus analytiques, 103-104, 159e séance, 12 octobre 1949.

de ce don de l'expression et du tour de phrase qui était celui d'Amado. Surtout, c'était un diplomate de premier ordre. En plus de toutes ces qualités charmantes, Amado ne manquait pas une occasion de rappeler son ascendance portugaise marquée à un moment donné d'une touche afro-arabe, et lorsqu'il voulait en plaisanter, il nous montrait son nez du doigt. Personnage aimable, sincère et lettré, Gilberto Amado fut indiscutablement un homme d'une culture universelle.

Je ne peux conclure sans évoquer la dernière occasion que j'ai eue de le voir en public. C'était à la Conférence diplomatique de Vienne sur le droit des traités, à la session de 1968. Je vis Gilberto se lever lentement, à son pupitre, dans la salle, et je l'entendis faire une allusion, avec un sombre sourire, à la mémoire d'un collègue décédé dont venait de parler l'un des orateurs précédents; puis il récite quelques vers de l'*Adonais* de Shelley et enchaîna sur un hommage émouvant à sa fille préférée, une comédienne, qui était décédée. Il eut manifestement à ce moment-là une prémonition de sa propre mort et, quelques mois plus tard, nous eûmes la grande tristesse d'apprendre son décès.

Tel était Gilberto Amado, à la mémoire de qui j'ai l'honneur et le privilège de faire cette cinquième conférence commémorative.

La Cour Internationale de Justice et l'indication de mesures conservatoires

En quatre occasions récentes d'affaires soumises à la Cour internationale de Justice, l'attention s'est portée sur les problèmes relatifs à l'indication de mesures conservatoires aux parties en présence devant la Cour, soit sur requête de l'une d'elles ou des deux, soit d'office.

Citons premièrement, l'affaire relative à la Compétence en matière de pêcheries (Royaume-Uni c. Islande), mesures conservatoires[70] et l'affaire relative à la Compétence en matière de pêcherie (République fédérale d'Allemagne c. Islande), mesures conservatoires[71]; deuxièmement l'affaire des Essais nucléaires (Australie c. France), mesures conservatoires[72] et l'affaire des Essais nucléaires (Nouvelle-Zélande c. France), mesures conservatoires[73]; troisièmement, l'affaire relative au Procès de prisonniers de guerre pakistanais, mesures conservatoires[74]; et enfin l'affaire du Plateau continental de la mer Egée, mesures conservatoires[75]. Par ailleurs, le problème des mesures conservatoires dans la jurisprudence de la Cour a également retenu l'attention parce qu'il a fallu, bien entendu, l'étudier dans le cadre de la révision d'ensemble du Règlement de la Cour, ces deux dernières années, et j'ai été Rapporteur spécial sur cette question en ma qualité de membre du Comité pour la révision du Règlement

[70] C.I.J. Recueil 1972, p. 12 et C.I.J. Recueil 1973, p. 302.
[71] C.I.J. Recueil 1972, p. 30.
[72] C.I.J. Recueil 1973, p. 99.
[73] C.I.J. Recueil 1973, p. 135.
[74] C.I.J. Recueil 1973, p. 328.
[75] C.I.J. Recueil 1976. p. 3.

de la Cour. Le moment me paraît donc bien choisi pour exposer l'état actuel de la question, en droit international, de l'indication ou du refus d'indication de mesures conservatoires, en vertu de l'Article 41 du Statut de la Cour, dans la procédure judiciaire. On remarquera aussi que les demandes en indication de mesures conservatoires ont été notablement plus nombreuses ces cinq ou six dernières années par rapport à la période antérieure. On est donc en droit de faire cette observation préliminaire que ce phénomène illustre peut-être le développement croissant du rôle judiciaire de la Cour internationale de Justice et, par voie de conséquence, le fait que, dans les affaires qui lui sont soumises, les parties se comportent de plus en plus comme le font les parties devant les juridictions nationales, en ce qui concerne le recours aux demandes d'injonctions comme moyen préliminaire d'obtenir satisfacion[76].

Examinons maintenant brièvement les principales caractéristiques de la demande en indication de mesures conservatoires devant la Cour.

L'Article 41 du Statut de la Cour, dans sa version définitive, est ainsi libellé:

> 1. La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.
>
> 2. En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

Nous pouvons noter au passage, que, selon Hudson[77] sur six requêtes en indication de mesures conservatoires présentées à la Cour permanente de justice internationale, celle-ci n'en a accueilli que deux.

Dans l'affaire relative à la *Dénonciation du Traité sino-belge de 2 novembre 1865*[78], le Président de la Cour avait décidé que les circonstances n'exigeaient pas l'indication de mesures conservatoires. Une deuxième demande de la Belgique fut accueillie plus tard et le président Huber indiqua des mesures conservatoires en attendant que la Cour rendit sa décision. Ultérieurement, la Belgique demanda à la Cour de rapporter cette ordonnance. Dans l'affaire relative à *l'Usine de Chorzow*[79], la Cour

[76] Voir l'intéressant examen comparé auquel procède le Professeur B. A. Wortley, au sujet de la procédure d'octroi d'injonctions, dans l'étude intitulée *Interim Reflections on Procedures for Interim Measures of Projection in the I.C.J., in II Processo Internazionale. Studi in Onore di Gaetano Morelli*, 1975, pp. 1009, 1019.

[77] The Permanent Court of International Justice, pp. 428-430.

[78] C.P.J.I., série A, No 8, p. 4; série C, No 18 1, pp. 305-306.

[79] C.P.J.I., séries, No 12.

rejeta l'exception préliminaire de la Pologne à la compétence de la Cour. La demande ultérieure de l'Allemagne tendant à l'indication de mesures conservatoires fut rejetée parce qu'elle visait à obtenir en réalité non l'indication de mesures conservatoires mais un jugement provisionnel adjugeant une partie des conclusions de la requête de l'Allemagne. La Cour prit cette décision sans inviter le Gouvernement polonais à présenter ses observations. Dans l'affaire relative au *Statut-juridique du territoire sud--est du Groënland*[80], la requête de la Norvège était assortie d'une demande de mesures conservatoires et dans la requête du Danemark, le Gouvernement danois se réservait de présenter une demande similaire. Après avoir entendu les agents des deux parties, la Cour rejeta la demande de la Norvège, mais se réserva de réexaminer d'office la question ultérieurement. Dans l'affaire relative à l'*Administration du Prince de Pless*[81], la Cour joignit au fond l'exception préliminaire de la Pologne tendant à l'irrecevabilité de la demande de l'Allemagne. Le Gouvernement allemand demanda à la Cour d'indiquer au Gouvernement polonais, comme mesure conservatoire, de s'abstenir de certaines mesures de coercition concernant l'imposition des biens du prince de Pless. Le président Adatci convoqua la Cour et adressa un télégramme au ministre polonais des affaires étrangères, l'invitant à s'abstenir de toute nouvelle mesure jusqu'à la réunion de la Cour. Le Gouvernement polonais informa la Cour que certaines des mesures prises l'avaient été par erreur et avaient été rapportées, et qu'il surseoirait à toute autre mesure. Sans se prononcer sur la question de la compétence, la Cour constata que la demande du Gouvernement allemand était devenue sans objet. Dans l'affaire concernant la *Réforme agraire polonaise*[82], l'Allemagne dans sa requête, demanda à la Cour d'indiquer des mesures conservatoires "pour maintenir le statut quo" en attendant l'arrêt de la Cour. Après avoir entendu les parties, la Cour rejeta la demande du Gouvernement allemand au motif qu'elle n'était pas conforme à l'Article 41 du Statut puisque l'instance en cours portait sur des faits passés alors que la demande visait des mesures futures. La question de la compétence fut soulevée mais ne futpas tranchée. Enfin, dans l'affaire de la *Compagnie d'électricité de Sofia et de Bulgarie*[83], le Gouvernement belge demanda à la Cour d'indiquer une mesure conservatoire puis retira cette demande, et le Président lui donna acte de ce retrait. Ultérieurement, le Gouvernement bulgare présenta une exception préliminaire à la compétence de la Cour; après audition des parties, la Cour admit l'exception en ce qui concernait un des points de la requête, mais la

[80] C.P.J.I., série C, No 69, pp. 15-49; série A/B, No 48.
[81] C.P.J.I., série C: No 70, p. 429; série A/B. No 54.
[82] C.P.J.I., série A/B, No 58.
[83] C.P.J.I., série A/B, No 77, série A/B, No 79.

rejeta pour le surplus. Le Gouvernement belge fit alors une seconde demande tendant à ce qu'un procès introduit devant les juridictions bulgares fût tenu en suspens jusqu'à l'arrêt définitif de la Cour. Le Gouvernement bulgare ne se fit pas représenter à l'audience consacrée à cette demande. La Cour rendit une ordonnance indiquant au Gouvernement bulgare de veiller à ce qu'il ne soit procédé à aucun acte, de quelque nature qu'il fût, susceptible de préjuger des droits réclamés par le Gouvernement belge ou d'aggraver ou d'étendre le différend soumis à la Cour.

Au regard des six affaires précédentes dont la Cour permanente de justice internationale a eu à connaître, on constate qu'à ce jour la Cour internationale de Justice a été saisie de huit affaires comportant des demandes en indication de mesures conservatoires. Outre les six affaires déjà mentionnées[84], on peut citer l'affaire de l'*Anglo-Iranian Oil Co.*[85] et l'affaire de l'*Interhandel*[86]. Dans la présente étude, nous examinerons ces affaires ainsi que les précédentes.

Nous pouvons commencer par la question du moment auquel peut être introduite une demande de mesures conservatoires. Il semble établi qu'une telle demande peut être introduite à tout moment au cours de la procédure dans l'affaire considérée, c'est-à-dire soit lors du dépôt de la requête introductive d'instance principale soit dans tout document de la procédure écrite; il ne peut y avoir indication de mesures conservatoires avant introduction de toute instance[87].Une demande en indication de mesures conservatoires est recevable même si le Conseil de Sécurité est simultanément saisi de la même affaire ou d'une demande connexe[88].

L'essentiel, c'est qu'un différend existant ait été soumis à la Cour avant le dépôt d'une demande de mesure conservatoire. À moins que la Cour ne décide de rejeter d'emblée la demande de mesure conservatoire, les parties doivent se voir offrir la possibilité de présenter des observations, habituellement au cours de la procédure orale[89]. Même si les parties n'ont pas demandé de telles mesures, la Cour a le pouvoir d'ordonner d'office des mesures conservatoires à tout moment de la procédure.

On s'est souvent posé l'importante question suivante: le pouvoir de la Cour d'indiquer des mesures conservatoires peut-il se déléguer? Dans le passé, surtout à l'époque de la Cour permanente de justice internationale, il y a plusieurs tentatives de délégation de ce pouvoir au

[84] Voir les affaires énumérées au premier paragraphe de la présente conférence.
[85] C.I.J. Recueil 1951, p. 89.
[86] C.I.J. Recueil 1957, p. 105.
[87] Affaire concernant la *Réforme agraire polonaise*, 1933; affaire du *Plateau continental de la mer Egée*, 1976.
[88] Plateau continental de la mer Egée.
[89] Affaire relative à l'Usine de Chorzow (C.P.J.I., série A, No 12, p. 10). Les parties peuvent soumettre un bref résumé de leurs observations orales respectives.

Président, mais elles ont toutes échoué. Reste la question du pouvoir du Président de procéder à une appréciation préliminaire de la situation et de rendre en conséquence une tolérance provisionnelle (n'équivalant pas à une indication de mesures conservatoires) en attendant que la Cour se réunisse en vue de l'indication de mesures conservatoires.

L'objet et la portée des mesures conservatoires peuvent se résumer comme suit: a) elles visent à maintenir le *statut quo ante* afin d'éviter une aggravation ou une extension du différend; ces mesures "tendent à sauvegarder les droits, objet du différend dont la Cour est saisie[90]"; b) elles ont pour but de "sauvegarder les droits de chacun en attendant que la Cour rende sa décision[91]"; c) elles ne doivent pas aller au-delà de ce qui est absolument nécessaire pour assurer l'efficacité de la décision finale; en d'autres termes, rien ne doit être fait, pendant la période transitoire, qui puisse vider la décision de tout effet; d) et, bien entendu, la Cour peut aller au-delà de la demande d'une partie et indiquer ce qui lui paraît le plus approprié.

Dans l'affaire relative au *Statut Juridique du territoire du sud-est du Groënland*[92], après avoir décidé de rejeter la demande norvégienne en indication de mesures conservatoires, la Cour a examiné s'il y avait lieu qu'elle procède d'office à l'indication de telles mesures.

Seuls des droits en litige peuvent faire l'objet d'une indication de mesures conservatoires et ces mesures ne peuvent être indiquées avant l'introduction de l'instance: c'est ce qui ressort de l'affaire concernant la *Réforme agraire polonaise*[93]. Le 26 mai 1933, le Gouvernement allemand faisait savoir au Greffier qu'il allait introduire une instance concernant la réforme agraire polonaise et le 30 juin 1933, avisait le Greffier que des mesures conservatoires seraient demandées; mais cette demande ne fut déposée que le juillet 1933, en même temps que la requête introductive d'instance. Dans l'affaire de la *Compagnie d'électricité de Sofia et de Bulgarie*[94], la Cour considéra que l'Article 41 du Statut appliquait "le principe universellement admis devant les juridictions internationales... d'après lequel les parties en cause doivent s'abstenir de toute mesure susceptible d'avoir une répercussion préjudiciable à l'exécution de la décision à intervenir et, en général, ne laisser procéder à aucun acte, de quelque nature qu'il soit, susceptible d'aggraver ou d'étendre le différend".

[90] C.P.J.I., série A/B, No 58, p.177.
[91] C.P.J.I, séries No 8, p. 6.
[92] C.P.J.I., série A/B, No 48, pp. 287-289.
[93] C.P.J.I., série C, No 71, pp. 136-137.
[94] C.P.J.I., série A/B No 79, p. 199.

La Cour n'a pas à indiquer des mesures conservatoires "dans le seul dessein de prévenir des occurrences regrettables et des incidents fâcheux". Elle a considéré que même des mesures de nature à modifier le status juridique d'un territoire n'auraient pas des conséquences irréparables[95]. Cependant, cette généralisation peu nuancée concernant la portée des mesures conservatoires ne vaut que pour les faits de l'espèce considérée, comme on le verra plus loin en étudiant l'affaire du *Plateau continental de la mer Egée*.

Il convient ici d'apporter quelques éclaircissements au sujet de la traduction anglaise de l'expression "mesures conservatoires". En 1931, lors du débat relatif à l'adoption du texte définit des articles amendés, après que sir Cecil Hurst eut donné lecture du texte anglais de l'article 57, le juge van Eysinga fit remarquer que l'expression "mesures conservatoires" du texte français était rendue, dans le texte anglais, par les mots "interimmeasures of protection" et se demanda si ces deux expressions étaient tout à fait équivalentes. L'expression qui figurait à l'article 57 ancien était la suivante: "measures for the preservation in the meantime of respective rights of parties". Ayant rappelé dans quelles conditions le texte anglais du Règlement de 1922 avait été établi, le Greffier signala que l'expressions "measures conservatoires" était rendue en anglais par des expressions différentes dans l'Article 41 du Statut et l'article 57 du Règlement. Mais il précisa que l'expression dont on s'était servi dans les ordonnances rendues par la Cour aux termes de ces articles avait cependant été "interim measures of protection", expression d'ailleurs conforme à la rubrique de l'article 57 du Règlement. Après ces explications, la Cour décida d'ajourner à la session au cours de laquelle elle procéderait à l'examen général du Règlement, le point de savoir quelle serait la meilleure traduction anglaise de l'expression "mesures conservatoires" et, en attendant, le texte contenant l'expression "interim measures of protection" fut maintenu[96].

Les juges *ad hoc* et l'indication de mesures conservatoires

Lors de l'examen d'une demande en indication de mesures conservatoires, il est souhaitable que chaque partie ait sur le siège un juge *ad hoc*. L'affaire peut cependant être examinée en l'absence d'une partie soit si cette partie ne s'est pas fait préalablement excuser par la Cour, soit

[95] C.P.J.I., série A/B, No 48, pp. 284, 288; cf. séries, No 8, p. 7.

[96] Voir Actes et documents relatifs à l'organisation de la Cour, Deuxième addendum au No 2, Modifications apportées au Règlement en 1931, 47e séance tenue le 19 février 1931. pp.253-254.

si son absence n'est pas justifiée de manière satisfaisante. Dans tous les cas, la procédure doit suivre son cours dès lors qu'il est établi que la présence d'une partie en cause n'est pas juridiquement obligatoire.

Bien qu'aux termes de l'Article 31 du Statut les juges *ad hoc* soient placés dans des conditions de complète égalité avec les membres de la Cour, il y a cependant d'inévitables différences entre ces deux catégories de juges. Ainsi, les juges *ad hoc* ne sont pas comptés pour le calcul du quorum[97]. En outre, la présence des juges *ad hoc* n'est pas requise lorsqu'il s'agit de rendre des ordonnances relatives à la "marche" d'une affaire, à la différence de la "décision" proprement dite réglant cette affaire[98], des ordonnances concernant la fixation de la date des audiences[99] ou la clôture de la procédure[100], ou bien des décisions relatives à l'usage d'une langue par une partie[101]. Enfin, il ne faut pas oublier que la Cour peut examiner une demande en indication de mesures conservatoires en l'absence de juges *ad hoc,* comme dans l'affaire relative à l'Usine de Chorzow[102], même si, dans l'affaire relative au *Statut juridique du territoire du Sud-est du Groënland*[103], elle a admis les juges *ad hoc* au motif que leur présence n'était pas incompatible avec le caractère d'urgence des mesures conservatoires.

La nécessité d'entendre demandeurs et défenseurs

Il ressort clairement de toutes les affaires citées, qu'il s'agisse de la Cour permanente de justice internationale ou de la Cour internationale de Justice, que l'usage s'est établi de ne statuer sur les demandes en indication de mesures conservatoires qu'après audition des parties. Les parties peuvent se faire entendre par voie d'observations orales ou écrites. Toutefois, dans toute affaire où l'une ne comparaît pas, ou bien néglige de défendre ses prétentions, la Cour peut passer outre. Ainsi, dans l'affaire du *Plateau continental de la mer Egée*[104], où la Grèce avait formulé une demande en indication de mesures conservatoires, et où la Turquie n'avait pas comparu parce qu'elle contestait la compétence de la Cour, la demande de la Grèce a été néanmoins considérée comme recevable, même si elle a été rejetée pour d'autres motifs.

[97] Voir l'article 32 du Règlement de 1972 et l'article 20 du Règlement de 1977.
[98] Série E, No 15, p. 109.
[99] Série E, No 1, p. 240.
[100] Affaire relative au Statut juridique du territoire du sud-est du Groënland, C.P.J.I., série A/B, No 55.
[101] Série A/B, No 14, p. 135.
[102] Ordonnance du 21 novembre 1927, séries, No 12, p. 10.
[103] Série A/B, No 48, p. 280.
[104] C.I.J. Recueil 1976, p. 3.

On soulève régulièrement la question de savoir dans quelle mesure la Cour doit s'assurer, si même elle doit le faire, qu'elle est compétente, avant de recevoir la demande. L'article 41 du Statut donne-t-il à la Cour le pouvoir inhérent de recevoir une telle demande, comme si cet article conférait à la Cour une compétence automatique, quelle que soit l'attitude de l'autre partie à un différend soumis à la Cour[105]? Mais le paragraphe 2 de cet article impose à la Cour de s'assurer non seulement qu'elle a compétence aux termes des Articles 36 et 37, mais que les conclusions sont fondées en fait et en droit. Comme il s'agit d'une question fondamentale pour la Cour, il convient d'examiner de manière exhaustive la question de la compétence.

La demande en indication de mesures conservatoires et la question de la compétence

Dans la pratique de la Cour, le point de vue qui a prévalu est que la Cour n'est pas tenue de trancher la question de la compétence avant d'examiner la demande en indication de mesures conservatoires, à condition qu'elle estime, *prima facie*, avoir compétence au départ. Dès lors que la Cour agit avec la conviction qu'elle a manifestement compétence, c'est-à-dire qu'elle a, à première vue, le pouvoir de se prononcer sur le fond de la requête, le fait qu'elle décide, à un stade ultérieur de la procédure, qu'en réalité cette compétence lui fait défaut, ne rend pas nulle *ab initio* l'indication antérieur, mais l'indication de mesures conservatoires cesse immédiatement d'avoir effet[106].

Il convient de remarquer que l'emploi des mots "parties" et "en attendant l'arrêt définitif" à l'article 41 suppose que la Cour a été saisie. Cette question a été soulevée mais n'a pas été tranchée dans l'affaire relative au *Statut juridique du territoire du sud-est du Groënland*[107].

Sur les six demandes dont la Cour permanente de justice internationale a eu à connaître, deux seulement ont donné lieu à des exceptions de la compétence de la Cour qui les a examinées: dans un cas, l'exception a été rejetée; dans l'autre elle a été rejetée pour partie et admise pour le surplus. Dans l'affaire relative à l'*Usine de Chorzow*, l'exception à la compétence de la Cour fut rejetée, mais la cour rejeta également la demande en indication

[105] Hudson, ibid., p. 420, paraît être d'avis qu'il faut se référer à l'article 53 du Statut de la Cour si la partie qui oppose une exception à la compétence de la Cour à l'égard d'une demande en indication de mesures conservatoires ne comparaît pas lors de la procédure orale.
[106] Affaire Pless, C.P.J.I., série A/B, No 54, p. 153; affaire concernant la Réforme agraire polonaise, série A/B, No 58, p. 179.
[107] C.P.J.I., série C, No 54 (1932), p. 436; série C No 55, p. 419; séries, No 56, p. 427.

de mesures conservatoires parce qu'elle visait non l'indication de mesures conservatoires mais l'obtention d'un jugement provisionnel adjugeant une partie des conclusions de la requête de l'Allemagne. Dans l'affaire de la *Compagnie d'électricité de Sofia et de Bulgarie*, le Gouvernement belge, après avoir retiré sa demande en indication de mesures conservatoires, présenta ultérieurement une exception préliminaire à l'exception pour partie et la rejeta pour le surplus. Néanmoins les mesures conservatoires demandées furent finalement accordées.

Devant la Cour internationale de Justice, la question de la compétence a été soulevée, a propos de demandes en indication de mesures conservatoires, dans l'affaire de l'*Anglo-Iranian Oil Co.*, dans l'affaire relative à la *Compétence en matière de pêcheries* et dans l'affaire du *Plateau continental de la mer Egée,* notamment. Il faut remarquer dans ces affaires l'importance qu'a prise la priorité absolue sur toute autre question. On a soutenu, en particulier, plus énergiquement qu'on ne l'avait jamais fait, que la Cour ne peut pas indiquer de mesures conservatoires tant qu'elle n'a pas décidé, *in liminelitis* qu'elle a compétence pour connaître de l'affaire; dans cette thèse, on sous-entend presque toujours que la question de la recevabilité de la demande en indication de mesures conservatoires est indissociable de la question de la compétence de la Cour. On peut faire valoir cependant que, tant la Cour permanente de justice internationale que la Cour internationale de Justice, jusques et y compris l'affaire de *l'Anglo-Iranian Oil Co*. et même l'affaire de *l'Interhandel* ont suivi la pratique consistant à procéder à un examen attentif de toute exception préliminaire et, après s'être assurées qu'il y avait lieu de connaître de l'affaire, à examiner alors la demande de mesures conservatoires tout en laissant de côté la question de savoir si la Cour serait ou non amenée à décider, à un stade ultérieur de la procédure, qu'elle n'avait finalement pas compétence[108]. Même si aucune exception d'incompétence n'a été soulevée, s'il est évident pour la Cour, qu'elle n'a pas compétence pour connaître du fond du litige tel qu'il est présenté dans la demande en indication de mesures conservatoires, la Cour s'abstient soigneusement de toute nouvelle mesure liée à la requête.

C'est seulement dans l'affaire relative à la *Compétence en matière de pêcheries*, dans l'affaire des *Essais nucléaires (Australie c. France)*[109] et,

[108] On rappellera que dans l'affaire de l'Anglo-Iranian Oil Co. la Cour a refusé d'admettre la thèse du Royaume-Uni selon laquelle, l'Iran ayant soumis à la Cour, outre l'exception d'incompétence, plusieurs questions de recevabilité, avait ainsi, sur la base du principe du *forum prorogatum*, conféré compétence à la Cour (C.I.J Recueil 1952, pp. 113-114).

[109] Voir, dans cette affaire, les opinions dissidentes.

surtout, dans l'affaire du *Plateau continental de la mer Egée*[110], qu'ont été avancés pour la première fois les arguments les plus catégoriques selon lesquels la Cour ne doit pas examiner la demande en indication de mesures conservatoires tant que la question de la compétence n'a pas été tranchée. En général, la partie qui soulève l'exception à la compétence de la Cour demande que l'affaire soit rayée du rôle. Dans l'ordonnance relative à l'affaire du *Plateau continental de la mer Egée*, c'est à juste titre que la Cour se conforme à sa jurisprudence antérieure en décidant qu'elle peut et doit se prononcer sur la demande de mesures conservatoires, et en renvoyant à un stade ultérieur de la procédure la décision définitive sur la compétence de la Cour. Elle a, d'ailleurs, également décidé, dans cette ordonnance, que les pièces écrites porteraient en premier lieu sur la question de la compétence de la Cour afin qu'elle puisse l'examiner de manière approfondie et statuer définitivement à ce sujet.

Suivre la thèse de ceux qui veulent que la question de la compétence soit tranchée *in liminelitis* serait aller à l'encontre de l'exercice des fonctions judiciaires normales de la Cour et donnerait en fait à toute partie soulevant l'exception d'incompétence dans une affaire un droit de veto contre toute procédure relative à un différend soumis à la Cour, sans qu'il puisse être tenu compte du bien-fondé éventuel de la position des parties; cela pourrait menacer le maintien de la paix et de la sécurité internationales et serait contraire aux dispositions de la Charte des Nations Unies.

Aux termes de l'Article 36, paragraphe 6, du Statut, la Cour a le pouvoir exclusif de décider de sa propre compétence et elle peut l'exercer indépendamment du fait que l'autre partie à un différend, au titre duquel a été présentée une demande de mesures conservatoires, comparaisse ou non lors de la procédure orale. Tel a été le cas, par exemple, dans l'affaire des *Essais nucléaires (Australie c. France)* et dans l'affaire du *Plateau continental de la mer Egée*. On est en droit de considérer que l'Article 41, paragraphe 1, du Statut, qui confère à la Cour le pouvoir inhérent d'indiquer des mesures conservatoires, soit à la demande d'une partie, soit d'office, renforce le pouvoir reconnu à la Cour aux termes de l'Article 36, paragraphe 6, du Statut, de décider de sa propre compétence.

Cette nouvelle tendance à réclamer avec insistance que la Cour se prononce en premier lieu sur la question de la compétence avant de connaître d'une demande en indication de mesures conservatoires ne tient pas compte, non plus du fait que toute juridiction doit avoir la compétence inhérente générale de décider si elle est ou non compétente pour telle affaire déterminée qui lui est soumise. C'est seulement en connaissant

[110] Voir les opinions individuelles de M. Morozov et de M. Tarazi.

d'une affaire à elle soumise qu'une juridiction peut décider s'il y a ou non matière à examen. En dehors des cas où la requête est, à l'évidence, dépourvue de tout fondement ou bien a un objet manifestement illicite, par exemple, si elle est fondée sur un accord conclu en vue d'entreprendre une guerre, la Cour doit pouvoir décider de sa propre compétence pour l'indication de mesures conservatoires. On peut signaler en passant que, même si une demande vise un traité dont la nullité est alléguée sur la base du *jus cogens*, au sens des articles 53 et 61 de la Convention de Vienne sur le droit des traités, il faut suivre la procédure des articles 65 et 66 de la Convention. En définitive, si l'on admettait le principe selon lequel la question de la compétence devrait être tranchée avant que la Cour puisse connaître d'une demande en indication de mesures conservatoires, le pouvoir que tient la Cour de l'Article 41 du Statut d'indiquer des mesures conservatoires s'en trouverait réduit ou même anéanti. Ce serait un obstacle au déroulement normal de l'activité juridictionnelle de la Cour.

En 1977, au cours des débats de la Cour consacrés à la révision définitive du Règlement de la Cour, M. Dillard, a proposé d'introduire, sous la rubrique "comparution spéciale", un nouvel article aux termes duquel une partie qui dénie la compétence de la Cour en ce qui concerne l'application de mesures conservatoires, peut se présenter devant la Cour à cette seule fin et se retirer ensuite de l'affaire si bon lui semble[111]. Cela devait permettre à la Cour de remplir sa fonction judiciaire de détermination de sa compétence tout en donnant à l'autre partie la possibilité de comparaître "sans préjudice". La Cour a estimé, cependant, que, dans l'ensemble, on aboutit plus ou moins au même résultat, en fait, avec la procédure adoptée jusqu'ici, par exemple, dans l'affaire relative à la *Compétence en matière de pêcheries*, l'affaire des *Essais nucléaires* et l'affaire du *Plateau continental de la mer Egée*; dans chacune de ces affaires, la comparution officielle de la partie qui contestait la compétence de la Cour n'a pas eu un résultat différent malgré les craintes exprimées jusqu'ici par ceux qui étaient d'un autre avis. La Cour s'est donc prononcée, à juste titre, semble-t-il, contre l'introduction d'une disposition instituant une "comparution spéciale"[112].

[111] La phrase qu'il proposait d'introduire était la suivante: '' Une objection préliminaire limitée à la question de la compétence de la Cour ne sera pas considérée par la Cour comme valant acceptation de la compétence de la Cour au sens de l'article 36 du Statu '' [Traduction non officielle]. Il estimait qu'une disposition analogue serait peut-être également nécessaire au sujet de la désignation d'un agent. Pour M. Dillard, le but de cette proposition était '' d'éviter l'anomalie tenant à ce qu'une partie fasse connaître ses vues dans une affaire sans être pour autant une partie au sens technique ''. L'idée d'introduire cette comparution spéciale sans préjudice lui avait été suggéré par un ami et spécialiste de la Cour M. Philip Jessup. Il signalait que dans son récent article sur l'affaire du Plateau continental de la mer Egée (47 A.J.I.L., 31-59, Janvier 1977) le Professeur Leo Gross paraissait faire une proposition analogue.

[112] La Cour a ainsi fait sienne la recommandation du Comité pour la révision du Règlement de la Cour, après avoir soigneusement étudié l'utilité de la '' comparution spéciale ou conditionnelle '' en droit procédural anglo-américain. Pour le Comité, '' donner l'impression de consacrer une procédure en vertu de laquelle un État pourrait ne pas être tenu par une décision

Sens du terme "indiquer"

Il est intéressant de noter que le deuxième paragraphe de l'actuel Article 41 a gardé le libellé que lui avait donné le Comité de juristes de 1920. Quant au premier paragraphe, il répond au texte proposé par le Comité pour son projet d'article 39:

> *Dans le cas où la cause du différend consiste en un acte effectué ou sur le point de l'être,* la Cour a le pouvoir d'*indiquer* [to *suggest*], si elle estime que les circonstances l'*exigent*, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

Le Comité avait relevé que la notion de mesures conservatoires avait été empruntée à divers traités entre les États-Unis d'Amérique et la Chine, en particulier au traité du 15 septembre 1914 et au traité entre les États-Unis et la Suède du 13 octobre 1914, appelés Traités Bryan, et qu'une disposition similaire avait été introduite à l'article 18 de la Convention de 1907 instituant la Cour de Justice centre-américaine.

Le Sous-Comité de la Troisième Commission de la Première Assemblée remplaça cependant "*suggest*" par "*indicate*" dans la version anglaise du texte du Comité de 1920[113] car le terme "indiquer" avait un parfum diplomatique qui devait contribuer à ménager les "susceptibilités des États[114]". Le Sous-Comité supprima aussi la condition qui figurait au début du texte, estimant qu'ainsi "tous les cas possibles seraient envisagés[115]". Ainsi amendé, l'article couvrait "aussi bien des omissions portant atteinte à un droit que les actes positifs[116]". On peut relever à cet égard la demande en indication de mesures conservatoires présentée par l'Allemagne le 14 octobre 1927 dans l'affaire relative à *l'Usine Chorzow*[117].

En 1929 il fut proposé d'ajouter à l'article 41, une disposition analogue à celle de l'article 57 du Règlement de 1926, qui permettrait au Président d'agir à la place de la Cour; mais on arriva à la conclusion que l'Article 30 du Statut de la Cour répondait de manière satisfaisante à cette préoccupation[118].

Il arrivait qu'un Gouvernement requérant emploie dans sa demande le terme "ordonner" au lieu d' "indiquer", comme par

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de la Cour sur la contestation relative à sa compétence serait contraire à l'article 36, paragraphe 6, du Statut '', (RR 77/10 du juillet 1977, p. 41).

[113] Société des Nations, Actes de la Première Assemblée – Séances des Commissions I, p. 368.

[114] Série D, Troisième addendum au No 2, p. 282.

[115] Société des Nations, Actes de la Première Assemblée – Séances des Commission I, p. 307.

[116] Ibid., Séances plénières, p. 467.

[117] C.P.J.I., séries, No 12, pp. 6-7.

[118] Voir les procès-verbaux des séances du Comité de juristes de 1920.

exemple lorsque la Norvège demanda à la Cour dans l'affaire relative au *Statut juridique du territoire du sud-est du Groënland*[119]d'ordonner une mesure conservatoire provisoire. D'une façon générale, le terme anglais "indicate" qui avait été employé à l'article 32 ancien de la Constitution de l'Organisation internationale du Travail, était considéré comme plus fort que le terme anglais "suggest".

Hudson a fait cette intéressante remarque que ce changement est peut-être imputable à une certaine timidité des rédacteurs, que le terme "indiquer" n'est pas moins précis que ne l'aurait été le terme "ordonner" et qu'il paraît avoir le même effet[120]. Hudson ajoutait qu'il ne fallait pas attacher beaucoup d'importance à l'expression "measures suggested" de la version anglaise de l'Article 41, paragraphe 2, qui n'avait pas d'équivalent dans la version française. Pour lui, l'emploi du terme "indiquer" n'atténuait pas l'obligation d'une partie à laquelle il incombe d'exécuter les mesures à prendre. Il ajoutait qu'une indication par la Cour en vertu de l'Article 41 équivaut à la constatation d'une obligation figurant dans un jugement et qu'elle devait être considérée comme ayant la même force et le même effet.

Il va sans dire que l'indication de mesures conservatoires par laCour, sous forme d'ordonnance ou autre, a la même force qu'une décision de la Cour qui "n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé" (Article 59 du Statu de la Cour). L'indication de mesures conservatoires est au moins un jugement provisoire et peut dans certains cas constituer une décision définitive sur une question déterminée. Comme l'a écrit Hudson[121]:

> Le pouvoir d'indiquer les mesures conservatoires qui doivent être prises est l'une des caractéristiques essentielles de la fonction judiciaire de la Cour. Si un État a accepté la fonction générale de la Cour, s'il s'est associé à d'autres États pour maintenir la Cour ou s'il est partie à un traité qui prévoit l'exercice par la Cour de ses fonctions, il a admis les pouvoirs qui font partie de la fonction judiciaire de la Cour. Il paraît en résulter que ledit État a l'obligation, dans la mesure où il en a le pouvoir, de prendre les mesures indiquées. Cette obligation existe indépendamment de la détermination de la compétence de la Cour de connaître du fond de l'affaire en cours et antérieurement à cette détermination, mais elle cesse d'avoir effet quand il a été déterminé que la Cour n'a pas compétence[122].

[119] C.P.J.I, série A/B, No 48
[120] Op. cit., p. 415.
[121] Op. cit., p. 420. [Traduction aux fins de la présente conférence]
[122] Voir l'ordonnance rendue par le Président le 8 janvier 1927 dans l'affaire relative à la Dénonciation du traité sino-belge, C.P.J.I., série A. No 8, p. 7.

Cette obligation s'impose à tout État qui a déclaré reconnaître comme obligatoire la juridiction de la Cour, conformément à l'Article 36 du Statut. De nombreux instruments contiennent des dispositions prévoyant l'exercice par la Cour du pouvoir d'indiquer des mesures conservatoires et affirment que les parties ont l'obligation de prendre les mesures indiquées; par exemple, dans l'Acte général d'arbitrage de 1928 (le Pacte Briand-Kellogg) l'article 33 (1) en dispose ainsi et à l'article 33 (3) il est demandé aux parties de ne procéder à aucun acte susceptible d'aggraver le différend[123].

Fondement de l'indication de mesures conservatoires par la Cour

L'un des problèmes essentiels que la Cour doit résoudre lorsqu'elle examine une demande en indication de mesures conservatoires est de déterminer les motifs sur lesquels elle doit fonder sa décision dans chaque cas. L'Article 41, paragraphe 1, du Statut dispose que "la Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire". À partir de la jurisprudence de la Cour de ces cinquante dernières années, on peut tenter de résumer comme suit l'état de la question:

1) La cour doit s'assurer qu'elle a compétence pour connaître du fond de la requête. La question de la *compétence* est donc, pour la Cour, l'un des éléments les plus importants à prendre en considération;

2) Les mesures conservatoires à indiquer doivent avoir essentiellement pour objet de sauvegarder les droits de chacun:

   a) le but essentiel est de maintenir, autant que possible, le *statu quo ante* entre les parties, dans l'intérêt de la justice. Dans l'affaire relative au *Statut juridique du territoire du sud-est du Groënland*[124], la Cour refusa d'indiquer des mesures conservatoires parce qu'elle estimait que même des mesures de nature à modifier le statut juridique du territoire en question n'auraient pas, en réalité, des conséquences

[123] Voir l'ordonnance du 3 août 1932 dans l'affaire relative au Statut juridique du territoire du sud-est du Groënland; C.P.J.I., série A/B. No 48, p. 288; l'article 19 des Conventions d'arbitrage de Locarno, 1925; Recueil des traités de la Société des Nations, volume LIV, pp. 312, 324, 336 et 350.

[124] C.P.J.I. série A/B. No. 48, 1932, p. 268.

irrémédiables en droit. La Cour constata l'existence dans les deux pays "d'un état d'esprit et d'intentions" si "éminemment rassurants" qu'il n'y avait pas lieu d'indiquer des mesures conservatoires "dans le seul dessein de prévenir des occurrences regrettables et des incidents fâcheux". On doit considérer cette décision comme s'appliquant uniquement aux circonstances particulières de l'espèce;

b) en revanche, l'opinion exprimée par la Cour permanente de justice internationale dans l'affaire de la *Compagnie de Sofia et de Bulgarie*[125], selon laquelle l'Article 41 du Statut "applique le principe universellement admis devant les juridictions internationales... d'après lequel les parties en cause doivent s'abstenir de toute mesure susceptible d'avoir une répercussion préjudiciable à l'exécution de la décision à intervenir et, en général, ne laisser procéder à un acte, de quelque nature qu'il soit, susceptible d'aggraver ou d'étendre le différend", est un guide plus pertinent et de portée plus générale.

Dans l'affaire du *Plateau continental de la mer Egée*[126], l'auteur du présent exposé s'est séparé de la majorité de la Cour dans la mesure où celle-ci paraissait considérer que l'aggravation de la situation se limitait essentiellement à la possibilité de la destruction ou de la disparition de ce qui faisait l'objet du différend et a souligné que la notion d'aggravation pouvait et devait s'interpréter de manière plus large et que la Cour devrait revoir sa position lorsqu'elle aurait à appliquer cette formule dans une affaire où les circonstances seraient différentes. À cet égard, l'auteur a appelé l'attention sur la résolution 171 (11) adoptée par l'Assemblée générale le 14 novembre 1947, dans laquelle on peut lire cette recommandation: "il est de toute première importance qu'il soit le plus largement fait appel à la Cour pour le développement progressif du droit international, tant à l'occasion de litiges entre États qu'en matière d'interprétation constitutionnelle"...

3) La Cour n'indiquerait évidemment pas de mesures conservatoires si, comme dans l'affaire de *l'Usine de Chorzow*, la demande visait non l'indication de mesures conservatoires,

[125] C.P.J.I. série A/B, No 79, 1939, pp. 194-199.
[126] C.I.J. Recueil 1976.

mais l'obtention de l'équivalent d'un jugement provisionnel adjugeant tout ou partie des conclusions de la requête. Mais si la Cour estime que la demande de mesures conservatoires a une base indépendante et n'est pas directement liée à la question qui doit être tranchée au fond, elle indique les mesures conservatoires, comme elle l'a fait dans l'affaire des *Essais nucléaires (Australie c. France)* à propos de laquelle il était soutenu, dans les opinions dissidentes, que la Cour devait refuser d'indiquer des mesures conservatoires au motif que cela équivaudrait à rendre un jugement provisionnel.

4) De même, la cour s'abstiendra d'indiquer des mesures conservatoires si cela équivaut à connaître d'une situation qui est apparue dans le passé alors que la demande en question vise l'avenir. C'est pourquoi la Cour a estimé qu'il aurait été contraire à l'Article 41 du statu d'indiquer des mesures conservatoires dans l'affaire concernant la *Réforme agraire polonaise*.

5) Lorsqu'il est concurremment demandé, d'une part, à la Cour, d'indiquer des mesures conservatoires conformément à l'Article 41 du Statut et, d'autre part, au Conseil de Sécurité, de prendre d'urgence des mesures visant à éviter une rupture de la paix, conformément à l'Article 36 de la Charte des Nations Unies, toute mesure prise ou toute directive donnée en premier par le Conseil de Sécurité a nécessairement pour effet de faire obstacle à l'indication de mesures conservatoires contraires. Ainsi, dans l'affaire du *Plateau continental de la mer Egée*, l'un des facteurs importants, peut-être même le plus décisif, qui a conduit la Cour à refuser d'indiquer des mesures conservatoires a été l'existence de la recommandation déjà faite par le Conseil de Sécurité, tendant à ce que les deux parties ne procèdent à aucun acte susceptible d'étendre le différend. Il est étonnant que, dans cette affaire, le Conseil de Sécurité n'ait pas cru devoir tenir compte de l'importante disposition figurant au paragraphe 3 de l'Article 36 de la Charte des Nations Unies, ainsi libellé:

> En faisant les recommandations prévues au présent Article, le Conseil de Sécurité doit aussi tenir compte du fait que d'une manière générale, les différends d'ordre juridique devraient être soumis par les parties à la Cour internationale de Justice conformément aux dispositions du Statu de la Cour.

L'une des raisons évidentes pour lesquelles le Conseil de Sécurité a décidé d'intervenir au lieu de renvoyer la requête de la Grèce à la Cour internationale de Justice en considérant l'affaire comme un différend d'ordre juridique, tient à ce qu'il aurait été difficile d'obtenir que les deux parties se conforment aux dispositions de l'Article 36 du Statut de la Cour. Mais si l'urgence était telle qu'aucun retard n'était permis, pourquoi ce même facteur n'aurait-il pas fondé l'indication de mesures conservatoires par la Cour afin de maintenir le *statu quo ante* entre les parties et d'éviter ainsi une aggravation de la situation, comme, par exemple, dans l'Ordonnance du 22 juin 1973[127], portant indication de mesures conservatoires, rendue dans l'affaire des *Essais nucléaires (Australie c. France)?* Dans cette dernière affaire, en effet, la Cour a considéré, au paragraphe 26 de l'ordonnance, que certaines "allégations viennent étayer la thèse du Gouvernement australien selon laquelle il se peut que la France procède immédiatement à un nouvel essai nucléaire atmosphérique dans le Pacifique" et a décidé en conséquence d'indiquer des mesures conservatoires contre la France. Si la possibilité que la France procède immédiatement à un nouvel essai nucléaire dans le Pacifique a paru, dans cette affaire, constituer un motif suffisant, pourquoi la Cour n'a-t-elle pas considéré que la poursuite nettement belliqueuse des explorations sismiques auxquelles se livraient les canonnières turques aumilieu des îles grecques de la mer Egée, pouvait aggraver une situation déjà dangereuse? On peut se demander si ce n'est pas la seule inégalité de la puissance respective des parties qui a permis à la majorité de la Cour de justifier sa décision, essentiellement en soutenant que tout dommage éventuellement causé par la Turquie à la Grèce pourrait donner lieu à indemnisation, ce qui revient à dire que la force crée le droit.

La Cour aurait mieux fait de fonder carrément sa décision sur le fait que le Conseil de Sécurité s'était déjà prononcé sur la question, plutôt que sur l'absence de possibilité d'aggravation de la situation. La Grèce était manifestement bloquée par son acceptation antérieure des recommandations du Conseil de Sécurité, et la Cour aurait dû se borner à le rappeler. Bien entendu, la Cour a dit quelque chose d'analogue dans le paragraphe du dispositif qui est ainsi libellé:

> La Cour dit, par douze voix contre une, que les circonstances, telles qu'elles se présentent actuellement à la Cour, ne sont pas de nature à exiger l'exercice de son pouvoir d'indiquer des mesures conservatoires en vertu de l'Article 41 du Statut.

[127] C. I. J. Recueil 1973, p. 99.

L'INFLUENCE DE LA SCIENCE ET DE LA TECHNIQUE SUR LE DROIT INTERNATIONAL

Conférence donnée le 3 juin 1983 à Genève
par S. E. M. Geraldo Eulalio do Nascimento e Silva
Ambassadeur du Brésil
Représentant permanent auprès de l'Office des Nations Unies à Vienne

Avant-Propos

La très généreuse invitation que vous m'avez adressée, Monsieur le Président, de donner la "Conférence commémorative Gilberto Amado" est pour moi l'occasion d'évoquer la mémoire d'un homme que j'admirais. Cependant, chose étrange, il ne m'est pas facile, à moi qui suis brésilien de parler de Gilberto Amado. Bien plus que quelques mots d'introduction, il me faudrait lui consacrer tout le temps qui m'est imparti.

Gilberto Amado était un homme remarquable à tous égards et nul ne contestera l'éminente position qu'il occupe dans la littérature brésilienne moderne. Sa contribution écrite dans le domaine du droit international est cependant relativement minime. Mais lorsqu'on consulte les annuaires de la Commission du Droit International, ses interventions se distinguent par leur clarté et leur à propos. Ce serait une tâche passionnante, qui vaudrait certainement la peine d'être entreprise, comme j'aurais dû moi-même le faire, que d'étudier, à partir des comptes rendus analytiques de cette commission, son approche du droit international.

Mais honnêtement je crois que le thème de ma conférence correspond à la conception qui était celle de Gilberto Amado d'un droit international dynamique et, à cet égard, je suis redevable à deux de mes prédécesseurs dans ce fauteuil.

Ainsi, M. Elias, Juge à la Cour, nous a rappelé comment Gilberto Amado avait défendu devant l'Assemblée générale le droit de la Commission du Droit International de choisir les sujets de développement et de codification et avait fait valoir que la Commission n'était nullement

tenue de se limiter à la formulation de règles traditionnelles universellement acceptées, que son devoir était essentiellement de combler les nombreuses lacunes du droit existant, de prendre positions au sujet d'interprétations contestables et même de modifier le droit en vigueur pour tenir compte des situations nouvelles. La Commission devait, à son avis, choisir des sujets présentant des difficultés à résoudre et des lacunes préjudiciables au prestige du droit international.

M. Manfred Lachs, Juge à la Cour, nous a rappelé que Gilberto Amado avait des formules frappantes dont nombre nous sont restées en mémoire, telles que celle-ci: "Nous n'avons pas le droit de détourner nos regards de la réalité... à une époque où le présent déjà recule et où l'avenir est sur nous". Et M. Lachs concluait: "Là le philosophe, l'écrivain et le juriste ne font plus qu'un".

Je crois que ce bref essai consacré à l'influence de la science et de la technique sur le droit international correspond bien à la conception juridique et philosophique que Gilberto Amado, avait du droit international, la discipline à laquelle nous tous avons choisi de nous consacrer.

L'influence de la science et de la technique sur le droit international

Durant les derniers jours de la Seconde Guerre Mondiale, l'humanité a assisté à la mise en oeuvre de l'engin le plus terrifiant de destruction de masse jamais conçu par l'homme. La première réaction des humanistes, apprenant l'hécatombe causée par l'explosion de la bombe atomique sur Hiroshima, a été de dire que le droit international devait condamner l'utilisation de cette arme à l'avenir. Cependant, pour compréhensible qu'elle soit à tous égards, cette attitude ne tient pas compte de la réalité, car les États qui disposent de telles armes ne sont pas prêts à renoncer à l'avantage qu'elles leur procurent sur des ennemis potentiels et ils n'acceptent de négocier que lorsqu'ils réalisent que les mêmes armes peuvent être déployées contre eux.

Mais la science a démontré que cette étonnante source d'énergie qui est l'énergie de l'atome pouvait avoir des utilisations pacifiques. À la suite d'études plus poussées faites à ce sujet, il est apparu que l'homme avait domestiqué une nouvelle forme d'énergie et, peu après, les premières centrales nucléaires commençaient à fonctionner. À nouveau, le droit international était appelé à connaître de ce domaine entièrement neuf et le Statut de l'Agence Internationale de l'Energie Atomique, signé à Vienne en 1956, assignait à cette organisation deux buts principaux, "hâter et accroître la contribution de l'énergie atomique à la paix, la santé et la prospérité dans le monde entier" et également s'assurer que l'énergie nucléaire "n'est pas utilisée de manière à servir à des fins militaires". Le Statut prévoit aussi que dans l'exercice de ses fonctions, l'Agence

s'efforce de contribuer à "réaliser un désarmement universel garanti". Le Traité de non-prolifération de 1968, acclamé comme une importante contribution à la paix mondiale, a marqué en ce sens un recul, car il n'a fait que légaliser la prolifération des armements nucléaires des États dotés de moyens nucléaires, tout en prévoyant de nouvelles mesures de sauvegarde à l'encontre des États qui s'intéressaient à l'énergie nucléaire principalement pour ses utilisations pacifiques. Point n'est besoin de commenter l'obligation solennelle que toutes les parties au Traité ont assumée, à savoir "parvenir au plus tôt à la cessation de la course aux armements nucléaires et prendre des mesures efficaces dans la voie du désarmement nucléaire".

Il est incontestable que la découverte de l'énergie nucléaire a eu des répercussions brusques et profondes dans de nombreuses branches de l'activité humaine, y compris dans le domaine du droit international. Cependant, le phénomène que nous nous proposons d'étudier n'est pas nouveau. Dans le passé également de nombreuses découvertes ont modifié ou influencé le droit international. Mais les percées technologiques et là aussi nous notons que le vocabulaire a changé – étaient alors chose rare. Aujourd'hui la technologie a atteint un stade ou chaque découverte scientifique peut être mise en pratique presque du jour au lendemain.

Si l'on considère que le droit international est né avec les travaux de Francisco de Vitoria ou avec ceux de Grotius, selon le point de vue adopté, on constate que leurs premières contributions sont liées aux progrès de la navigation, qui ont ouvert dans ce domaine de nouveaux espaces, notamment avec la construction des caravelles. Les bornes invisibles que les navigateurs n'osaient pas franchir sont tombées et la route maritime des Indes s'est ouverte et a conduit plus tard à la découverte du Nouveau Monde.

Il faut aussi examiner les nouvelles dimensions et les nouveaux domaines que la science et la technique ont révélés. À cet égard leur contribution la plus importante a été de modifier le champ du droit international, qui jusque là n'avait été que bidimensionnel, limité à la mer et à la terre. Avec la découverte de la radio et de la navigation aérienne, une dimension entièrement nouvelle est apparue, celle de l'espace aérien. Et si nous nous rapprochons davantage encore de l'époque actuelle, nous voyons s'ouvrir, après la Seconde Guerre mondiale, l'espace extra-atmosphérique – distinct de l'espace aérien – qui devient une réalité au regard de la science juridique, de même que celui des fonds marins et océaniques.

Toutes ces découvertes, anciennes et récentes ont fait apparaître de nouveaux horizons, mais en même temps elles ont entraîné des affrontements internationaux, qui ont provoqué des études approfondies

pour adapter le droit international aux situations nouvelles. À cet égard, il faut bien voir qu'en fin de compte nombre de ces découvertes n'ont pas profité à l'ensemble de l'humanité. En revanche, l'invention de nombreuses armes de destruction, qui avait pour but d'anéantir l'ennemi, s'est souvent révélée après coup avoir des conséquences bénéfiques pour l'humanité. Eric Stein remarque: "Nous sommes tous préoccupés par les effets contradictoires, bénéfiques et maléfiques, de la technologie moderne. Les effets bénéfiques, ce sont les niveaux de vie plus élevés dont nous jouissons. Les effets maléfiques sont doubles: il y a la menace que la technologie présente pour l'environnement, ce qu'on appelle la crise écologique, et la menace que fait peser sur nous les armes modernes que la technologie fabrique".[1]

C'est là qu'apparaissent les répercussions négatives de la science et de la technique sur le droit international. Il suffit de mentionner les problèmes de l'environnement, qui représentent déjà actuellement une préoccupation mondiale majeure. Le fait est que si les conditions de vie modernes comportent des améliorations, nombre d'entre elles sont momentanées et peuvent, à long terme constituer une menace grave pour l'avenir du monde. Certains des risques qu'elles comportent sont passés pratiquement inaperçus, parce que la menace n'était pas immédiate. Dans d'autres cas, le danger est manifesté, qu'il s'agisse des abus de l'énergie nucléaire, de la pollution des mers et de l'atmosphère ou de la destruction de la couche d'ozone, par exemple.

En raison de la diversité et de l'ampleur du sujet, nous n'examinerons, et encore de manière purement superficielle, que l'influence de la science et de la technique sur les sources du droit international, les nouvelles dimensions du droit international et la question de la pollution de l'environnement.

L'influence de la science et de la technique sur les sources du droit international

Les modifications rapides de la structure du droit international ont exercé une influence correspondante sur les sources de ce droit. La coutume a perdu au profit des traités la prééminence qu'elle avait autrefois, et cela notamment depuis la création de l'Organisation des Nations Unies.

L'évolution du droit international durant la période de l'après-guerre a été presque exclusivement le fait du droit conventionnel, avec l'adoption de règles capables de répondre aux innovations technologiques mais qui

ont souvent entraîne la désuétude des règles suivies jusque-là. On pourrait multiplier les exemples. Qu'il suffise de mentionner la question du plateau continental, le régime juridique des fonds marins et l'exploration et l'utilisation de l'espace extra-atmosphérique, y compris la lune et les autres corps célestes.

Nous considérons que les traités sont, au stade actuel, la source idéale du droit international car ils ont, entre autres mérites, celui de déterminer de manière claire, ou relativement claire, les droits et les devoirs des États qui les ont ratifiés.

À vrai dire, les clauses que nous trouvons dans les traités multilatéraux généraux ne sont pas toujours très claires mais, même lorsqu'il en est ainsi, les droits des États qui les ont ratifiés présentent un degré de certitude supérieur à celui qu'avaient les droits nés de la simple coutume.

Nombre de traités qui ont été élaborés pour répondre à des évolutions produites par la science et la technique représentent la principale et, dans la plupart des cas, la seule source du droit en la matière. En d'autres termes, ces traités ou conventions sont *de lege ferenda.*

Cette situation nouvelle remonte à la période de l'après-guerre. Elle est due aux travaux de l'Organisation des Nations Unies et d'autres organisations internationales et elle est aussi le résultat de ce que l'on appelle l'universalisation du droit international. Ainsi, il apparaît à la communauté internationale, constituée en organisations internationales, que la solution idéale de certaines questions juridiques réside dans une réglementation conventionnelle et qu'il est nécessaire de donner à la majorité des États, spécialement aux États nouvellement indépendants, la possibilité d'accepter ou de modifier des règles à la formulation desquelles ils n'ont pas participé.

Mais même s'agissant de problèmes récents que pose l'évolution technologique, tels que ceux du plateau continental et de la mise en orbite de satellites dans l'espace extra-atmosphérique, on constate que l'influence des nations les plus puissantes et les plus industrialisées se fait toujours sentir. Lorsque des États de moindre importance osent proclamer des principes qui vont à l'encontre des intérêts de ces grandes puissances, ces principes sont immédiatement condamnés comme étant contraires au droit international. La règle des 200 milles marins proposée pour la première fois en 1947 a été tournée en dérision et jugée inacceptable lors des première et deuxième conférences sur le droit de la mer. Lorsque la troisième Conférence s'est réunie, l'idée d'une zone de 200 milles s'est heurtée au début à une très forte opposition de la part des deux grandes puissances. Leur position à l'égard des fonds marins et de l'espace extra-atmosphérique consiste à

défendre le droit du premier occupant, ce qui n'est pas sans analogie avec le droit international des XVI et XVIIe siècles concernant l'appropriation des nouveaux territoires. Comme autrefois, l'idée du "droit du premier occupant" ne vaut que pour ceux qui peuvent soutenir militairement leurs prétentions. Ce fut, et c'est encore la cause de l'impasse de la Conférence sur le droit de la mer, car les pays en développement n'acceptent pas ce monopole technologique.

L'importance des traités dans la formation du droit international contemporain, notamment dans les nouveaux domaines ouverts par la science et par la technique, est étroitement liée au problème de la codification de ce droit. La controverse quant à l'opportunité ou l'inopportunité de la codification a perdu de son importance, bien que d'aucuns prétendent que la codification peut entraver le développement du droit international.

Lorsque les États-Unis ont émis des prétentions sur le plateau continental, la science nous enseignait qu'à une profondeur d'environ 200 mètres, toute forme de vie cessait. Aussi le plateau continental s'arrêtait--il abruptement et immédiatement après commençaient les grands fonds océaniques qui étaient hors de la portée de l'homme et qui ne contenaient rien présentant pour lui quelque valeur. La Convention de 1958 sur le plateau continental reposait sur cette fausse croyance. Mais la communauté internationale a dû renoncer à ces règles pieusement acceptées un quart de siècle plus tôt, car la science et la technique avaient apporté la preuve que les richesses contenues au fond des mers sont en fait immenses et qu'avecles techniques nouvelles, leur exploitation est viable.

La codification n'implique pas nécessairement l'immobilisme du droit international. Elle ne transforme pas ce droit en un ensemble de règles statiques, car la pratique ultérieure peut influer sur un traité écrit et peut le modifier, et la Charte des Nations Unies, telle que nous l'entendons aujourd'hui, est une illustration de ce processus. Aussi bien, pour reprendre les termes de M. K. Yasseen, "il serait peut-être utile de tenir compte de l'évolution du droit international et de permettre par conséquent une interprétation dynamique qui ait pour but d'adapter les vieilles règles du traité aux réalités nouvelles de la vie internationale". [2]

Après la Seconde Guerre mondiale, la coutume a perdu l'importance capitale qu'elle avait en tant que principale source du droit international, avec l'introduction de nouveaux sujets et l'augmentation du nombre des membres de la communauté.

Dans la conférence qu'il a donnée à La Haye en 1972, Paul de Visscher remarquait que "la coutume peut paraître étrangement démodée au sein de cette communauté internationale dont les membres ont pris

conscience de leurs différenciations et de leurs contradictions et entendent surmonter celles-ci par la pratique lucide d'une coexistence pacifique se manifestant par des consensus et des accords librement conclus." [3]

Dans le passé, lorsqu'elle était le résultat de pratiques et d'usages acceptés par un petit nombre d'États d'Europe occidentale, la coutume était le fondement du droit international tel que nous le concevons. N'est-il pas permis de penser que si la composition de la communauté internationale aux XVIe et XVIIe siècles avait été identique à ce qu'elle est aujourd'hui, le développement du droit international aurait été pratiquement impossible?

La coutume internationale était le résultat d'une pratique établie et suivie de longue date, à tel point que la *durée* était considérée comme l'un de ses principaux éléments. La Cour Permanente de Justice internationale et la Cour internationale de Justice ont eu l'occasion de souligner l'importance de cet élément de temps: "une pratique internationale constante " (affaire du *vapeur Wimbledon*, 1923) ou "un usage constant et uniforme pratiqué par les États en question" (affaire du *droit d'asile*, 1950).

Negulesco, dans une opinion dissidente, est allé encore plus loin, considérant que la coutume est fondée sur une répétition immémoriale d'actes accomplis dans le domaine des relations internationales.

La rapidité des changements apportés par la science et la technique a eu des répercussions sur la définition de la coutume et l'on constate que l'élément de temps peut être beaucoup plus court et, en tout cas, a perdu de son importance au profit de l'*opinio juris*.

Dans les affaires du *plateau continental de la mer du Nord*, la Cour internationale de Justice a marqué un pas important dans cette direction en considérant que "le fait qu'il ne se soit écoulé qu'un bref laps de temps ne constitue pas nécessairement en soi un empêchement à la formation d'une règle nouvelle de droit international coutumier".

Bien que la coutume ne jouisse plus de sa prééminence traditionnelle, ce serait une erreur que de méconnaître l'importance qu'elle conserve. Tout d'abord, la codification du droit international n'en est encore qu'à ses débuts et puisque, dans certains domaines, le droit international coutumier est plus satisfaisant, ce serait une erreur pour la Commission du Droit International que de faire passer au second plan des problèmes qui exigent une solution immédiate.

Sur les modifications récentes du droit international apportées par la science et la technique, les décisions de la Cour internationale de Justice sont très rares, bien que l'on puisse se référer par analogie à des arrêts et à des avis consultatif antérieurs. En ce sens, on peut mentionner l'affaire controversée du *Lotus*, car elle ouvre la possibilité pour un État donné

d'adopter des règles, à condition que celles-ci ne soient pas contraires au droit international en vigueur. Parmi les décisions récentes qui ont trait directement à la question, on peut mentionner les affaires du *plateau continental de la mer du Nord* (1969), l'affaire des *essais nucléaires* (1974) et l'affaire du *plateau continental de la mer Egée, mesures conservatoires* (1976). Cependant, les décisions rendues par la Cour dans ces trois affaires seront extrêmement prudentes et même, à notre avis, décevantes dans le cas de l'affaire des *essais nucléaires*.

Parmi elles, l'affaire du *plateau continental de la mer du Nord* est la plus importante, et notamment les considérants relatifs à la valeur des traités non ratifiés en tant que source d'une coutume et à la modification de la modification de la notion de temps dans la formation de la coutume. Les positions adoptées à l'égard de ces deux problèmes valent pour le droit international dans son ensemble. En revanche, la décision de la Cour sur la question de fond est très vague et peut prêter à la critique.

L'affaire de *essais nucléaires* (arrêt du 20 décembre 1974) mérite elle aussi d'être mentionnée, bien que la Cour ait évité de rendre une décision sur le fond. Dans ses conclusions, le Gouvernement australien priait la Cour de dire que "La poursuite des essais d'armes nucléaires dans l'océan Pacifique Sud n'est pas compatible avec les règles applicables du droit international". Cependant, prenant en considération diverses déclarations faites par les autorités françaises selon lesquelles il ne serait plus procédé à des essais, la Cour a jugé que "la demande de l'Australie (était) désormais sans objet et qu'il n'y (avait) dès lors pas lieu à statuer".

À notre avis, la Cour n'a pas abordé le problème en cause et les six juges qui ont émis une opinion dissidente ont eu raison de faire observer que "l'arrêt ne tient pas compte de l'objet et de l'utilité d'une demande d'arrêt déclaratoire".

La Cour a ainsi manqué une excellente occasion de favoriser le progrès du droit international. Nous nous accordons à considérer qu'il n'existe pas de règle internationale de droit coutumier condamnant les essais nucléaires, mais nul ne peut nier que, dans le monde entier, l'opinion publique aurait applaudi à une condamnation par la Cour non seulement de ces essais mais aussi de la fabrication et du perfectionnement incessants des armes inhumaines de destruction massive, nucléaires et autres. En ce sens, la Cour aurait pu invoquer les diverses résolutions adoptées par l'Assemblée Générale des Nations Unies qui proscrivent ces essais et qui, en fin de compte, représentent l'opinion de l'humanité telle qu'elle s'exprime dans les principes fondamentaux de la Charte des Nations Unies.

Nous pensons que le prestige de la Cour, indépendamment de celui de ses membres, est tel que la Cour peut conférer à certains principes le statut de règles de droit, contribuant ainsi au développement progressif du droit international. En ce sens, rappelons le rejet du *non-liquet* par Lauterpacht et sa position selon laquelle un tribunal devrait toujours se prononcer sur le fond des questions de droit en cause. En cas de lacunes et d'incertitudes apparentes, il est toujours possible d'avoir recours au "principes et règles de droit privé qui sont applicables dans des domaines similaires ou analogues".[4]

Bien que la majorité des auteurs ait tendance à nier l'importance des arrêts de la Cour en tant que source directe de droit international, nous sommes d'avis que les principes auxquels la Cour accorde sa reconnaissance sont généralement acceptés à un stade ultérieur, comme c'est les cas pour la Commission du Droit International qui n'hésite pas à incorporer de tels principes dans les textes qu'elle adopte.

Aux stades de la formation du droit international, les écrits des grands auteurs comme Grotius, Bynkershoek, Gentili ou Vattel étaient d'une importance primordiale, faute en partie d'autres sources valables pouvant étayer les concepts juridiques nouveaux qui faisaient leur apparition.

Si la doctrine a perdu de son importance, on ne peut méconnaître le rôle que jouent certains organes collégiaux. Les résolutions de *l'Institut de droit international* ont contribué et contribuent toujours de manière importante au développement du droit international. Actuellement, les manuels doivent obligatoirement faire mention des projets de la Commission du Droit International et des rapports qui sont établis sur les divers sujets que la Commission examine.

Il arrive souvent que lorsqu'elle rédige des projets d'article, la Commission du Droit International doive combler les lacunes du droit international et que la coutume n'apporte pas d'indications satisfaisantes. Or dans la majorité de ces cas, les nouvelles règles proposées ont été retenues dans les conventions adoptées.

Dans les nouveaux domaines du droit international ouverts par la science et la technique, les internationalistes les plus qualifiés doivent de nouveau jouer un rôle analogue à celui des auteurs des XVIe et XVIIe siècles. Les juristes internationaux et les diplomates ne sont plus capables de faire face à tous les nouveaux problèmes qui requièrent des connaissances scientifiques approfondies. Il y a un travail préliminaire qui doit être accompli par des hommes de science et par des juristes attachés aux instituts scientifiques sous l'égide desquels les innovations

sont introduites. Cependant, en dépit de leur valeur, les contributions de ces experts, qui sont souvent spécialisés dans d'autres branches du droit, présentent le défaut de considérer les problèmes sous l'angle de cette spécialisation, c'est-à-dire de ne pas les situer dans le contexte général du droit international. Il appartient alors aux spécialistes du droit international de reformuler les décisions ainsi prises pour les présenter dans une optique conforme au droit international.

À titre d'exemple d'approches conflictuelles d'une seule et même question juridique, on peut rappeler les positions prises par des experts soviétiques à l'égard de l'Accord de 1979 régissant les activités des États sur la Lune et autres corps célestes et du Traité sur la non-prolifération des armes nucléaires. La question qui se pose est la même dans les deux cas: c'est la question des effets juridiques d'un traité à l'égard des États non parties à ce traité.

Selon le professeur Zhukov "la notion de patrimoine commun de l'humanité en droit spatial international trouve son pleins sens dans le texte de l'Accord de 1979 lui-même. Une fois l'Accord en vigueur la notion de patrimoine commun de l'humanité doit nécessairement avoir force obligatoire pour les États participants"[5]. Dans le cas du Traité de non-prolifération un document a été présenté à l'Agence Internationale de l'Energie Atomique en janvier 1982, qui proposait l'interprétation opposée à savoir que les approvisionnements nucléaires garantis soient soumis aux conditions de non-prolifération des armes nucléaires prévues par les traités internationaux multilatéraux en vigueur auxquels la plupart des pays du monde sont parties. En d'autres termes, la position préconisée était que les dispositions des traités internationaux multilatéraux en vigueur auxquels la plupart des pays du monde sont parties lient tous les États, même les États non parties au traité considéré. L'application du principe de l'"estoppel" à l'égard de cette interprétation pourrait avoir de grandes conséquences.

Les nouveaux espaces internationaux

Jusqu'à la fin du XIXe siècle, le droit international était bidimensionnel, mais avec la navigation aérienne et, dans une moindre mesure, avec les radiocommunications, une nouvelle dimension est apparue.

Le 12 juillet 1901, un jeune Brésilien, Santons Dumont, a enthousiasmé les foules lorsqu'à Paris, à bord d'un ballon gonflé avec de l'hydrogène auquel il avait adapté un moteur à combustion interne, il a

démontré qu'il était possible de naviguer dans l'atmosphère avec précision en terminant un voyage au point même ou il l'avait commencé. Cet exploit a été acclamé dans le monde entier et a retenu l'attention de *l'Institut de droit international*, qui, à sa session de Gand en 1906, a étudié les aspects juridiques de l'aéronautique et de la "TSF". À cette occasion, l'Institut a adopté la position défendue par Paul Fauchille, celle du principe de la liberté de l'air, sous réserve des exigences de la sécurité de l'État sous-jacent. La pratique ultérieure a cependant évolué en faveur de l'autre thèse, à savoir celle de la souveraineté de l'État sous-jacent, qui a été consacrée par la Convention de Paris de 1919 portant réglementation de la navigation aérienne et par la Convention de Chicago de 1944 relative à l'aviation civile internationale.

Le prodigieux bond technologique des années 50 et 60 a obligé les spécialistes à reformuler leurs théories concernant les régions polaires et à rédiger des règles concernant deux domaines dont le droit international ne s'était jamais occupé jusque-là à savoir l'espace extra-atmosphérique et les fonds marins correspondant à la haute mer. L'établissement d'un régime international de la haute mer et de l'espace extra-atmosphérique ainsi que de la région antarctique a créé une distinction essentielle en droit international entre les espaces nationaux et les espaces internationaux.[6]

Le Traité de 1967 sur les "Principes régissant les activités des États en matière d'exploration et d'utilisation de l'espace extra-atmosphérique, y compris la lune et les autres corps célestes" a, du jour au lendemain, radicalement modifié l'approche du problème en droit international et a ouvert dans le droit spatial un champ nouveau. Chronologiquement, la résolution que l'Assemblée générale des Nations Unies a adoptée à l'unanimité en 1963 a été la première étape véritablement importante dans la formulation de règles régissant l'espace extra-atmosphérique, car les déclarations antérieures faites par de grands États avaient été des prises de position beaucoup plus politiques que juridiques.

La reconnaissance internationale de l'espace extra-atmosphérique, distinct des espaces aériens nationaux et internationaux, a posé toute une série de problèmes complexes auxquels des solutions concrètes n'ont toujours pas été apportées, tels que la délimitation de l'espace extra-atmosphérique par rapport aux espaces aériens nationaux et le *statut* juridique de l'espace extra-atmosphérique.

Le Comité des utilisations pacifiques de l'espace extra-atmosphérique de l'ONU étudie la question de la définition et/ou de la délimitation de cet espace et des activités qui y sont menées et certaines délégations font instamment valoir que cette question devrait recevoir un rang de priorité plus élevé dans la suite des travaux.

Les difficultés rencontrées tiennent non pas seulement à l'absence d'un critère qui soit tout à fait satisfaisant mais aussi à des raisons politiques et économiques, car la certains grands États s'accommodent fort bien de l'actuel régime de laissez-faire.

Ce sont de nobles idéaux qui ont inspiré le Traité relatif à l'espace extra-atmosphérique mais la pratique ultérieure s'en est souvent écartée. À cet égard, mentionnons simplement la deuxième Conférence des Nations Unies sur l'exploration et les utilisations pacifiques de l'espace extra-atmosphérique, qui a eu lieu l'an dernier à Vienne et où, paradoxalement, les débats ont été centrés sur les utilisations militaires de l'espace. L'accent mis sur la militarisation de l'espace a conduit les pays en développement à proposer un projet de déclaration dans lequel il était notamment recommandé que toutes les nations membres, et en particulier celles qui sont dotées de moyens spatiaux, soient priées de s'abstenir de toutes activités conduisant à une extension de la course aux armements à l'espace extra-atmosphérique; que la, militarisation de l'espace étant contraire aux intérêts de l'humanité tout entière, il ne soit pas permis d'étendre la course aux armements à l'espace extra-atmosphérique, à la Lune et aux autres corps célestes, qui sont le patrimoine commun de l'humanité; que les essais, le stationnement et le déploiement d'armes dans l'espace soient interdits; et que les deux grandes puissances spatiales engagent des négociations pour parvenir rapidement à un accord afin de prévenir une course aux armements dans l'espace extra-atmosphérique.

La bibliographie consacrée au régime de la haute mer et à la prospection minière dans les fonds marins est très abondante et il est certain qu'avec la signature à Montego Bay, le 10 décembre 1982, de la Convention sur le droit de la mer, la liste des ouvrages et articles sur le sujet, dont il n'est même pas possible de donner ici un aperçu, ne manquera pas de s'allonger.

Quoi qu'il en soit, l'ouverture de ces nouveaux espaces internationaux a conduit non seulement à la formulation de règles de droit international qui leur sont propres, mais aussi à l'énoncé du principe général de l'existence d'un *patrimoine commun de l'humanité*. Ce principe est conforme expressément dans la Convention sur le droit de la mer et dans l'Accord régissant les activités des États sur la Lune et les autres corps célestes, adopté le 5 décembre 1979, et implicitement dans le Traité relatif à l'espace extra-atmosphérique de 1967.

Le principe avait été proclamé antérieurement par l'Assemblée générale pour éviter des actions unilatérales de la part d'États qui attribuaient à la liberté de la mer une interprétation abusive, préjudiciable

au principe. Pour éviter que la mer ne devienne la proie d'intérêts effrénés et le lieu de leur affrontement, l'Assemblée générale a adopté une série de résolutions déclarant les ressources du fond de la haute mer "patrimoine commun de l'humanité".

Bien que le principe soit considéré par certains experts comme un concept juridique à l'état naissant et qui n'a pas encore reçu une définition générale, c'est pour la majorité des États un principe fondamental du droit international appliqué à l'espace extra-atmosphérique, aux corps célestes et à la haute mer.

La pollution et l'environnement

Les grands progrès scientifiques et techniques ont exercé une influence sur les relations entre membres de la communauté internationale soit directement, soit par l'intermédiaire des organisations dont ceux-ci font partie, en particulier des institutions spécialisées, dont la création a eu fréquemment pour origine la nécessité de réglementer à l'échelle internationale les modifications entraînées par ces progrès scientifiques. Dans la plupart de ces institutions, la formulation de règles de caractère juridique est du ressort de leurs commissions juridiques, dont les travaux ont été souvent déterminants, à tel point que dans la plupart des cas l'initiative des traités signés sous les auspices d'une institution spécialisée leur revient.

Faire pendre conscience à la communauté internationale des risques qui peuvent résulter de modifications de l'environnement est devenue une préoccupation presque constante de la plupart de ces organisations. Or la Charte des Nations Unies ne contient pas la moindre allusion à la science et si l'instrument fondamental de l'UNESCO inclut la science parmi les principaux objectifs de cette organisation, il envisage le problème d'un point de vue essentiellement théorique. Cette approche est compréhensible lorsqu'on sait que le projet initial prévoyait la création d'une organisation pour "éducation et culture" (UNECO) et que l'inclusion de la science est due aux efforts de Julian Huxley, sous la direction de qui l'UNESCO a commencé à entreprendre des études scientifiques qui tendaient à combattre des effets pernicieux de la technologie moderne en dénonçant la crise écologique, c'est-à-dire la menace qui pèse sur notre environnement.

À l'époque actuelle, la décision la plus importante qui ait été prise par la communauté internationale a été la création de la Conférence des

Nations Unies sur l'environnement, qui s'est tenue pour la première fois à Stockholm en juin 1972. Les principes adoptés par la Conférence représentent un compromis entre l'approche écologique des puissances industrialisées et celle des pays en développement, lesquels ne peuvent accepter une position qui ne tarderait pas à paralyser leurs efforts de développement.

Le problème de la pollution de l'environnement est si vaste qu'un simple survol de la question serait beaucoup trop ambitieux. Nous nous limiterons donc à la pollution des mers, afin de donner une idée de la tâche que la communauté internationale accomplit en vue de parvenir à des solutions positives et harmonieuses.

La Conférence de 1972 a reconnu l'influence décisive de la science et de la technique dans la disposition liminaire de la Déclaration de la Conférence des Nations Unies sur l'environnement, dans laquelle elle souligne que le moment est venu où "grâce aux progrès toujours plus rapides de la science et de la technique, l'homme a acquis le pouvoir de transformer son environnement d'innombrables manières et à une échelle sans précédent".

Récemment encore, il était généralement admis que tout ce qui était déversé dans les océans était rapidement absorbé et que les espèces ichtyologiques ne pouvaient disparaître. L'humanité a maintenant pris conscience que c'étaient là des erreurs, et les mouvements de défense non seulement des mers et des eaux en général mais aussi de certaines espèces, reçoivent un fervent appui de la part d'organisations nationales aussi bien qu'internationales, gouvernementales aussi bien que non gouvernementales.

L'application des conclusions de la Conférence de Stockholm a été confiée au Programme des Nations Unies pour l'environnement (PNUE), qui, dans ce domaine, coordonne les efforts d'autres institutions spécialisées.

Selon le PNUE, on entend par "pollution marine" l'introduction directe ou indirecte, par l'homme, de substances ou d'énergie dans le milieu marin (y compris les estuaires) lorsque celles-ci ont des effets nuisibles, tels que dommages aux ressources biologiques, risques pour la santé de l'homme, entrave aux activités maritimes, y compris la pêche, altération de la qualité de l'eau de mer du point de vue de son utilisation et dégradation des valeurs d'agréments.

La pollution marine peut être délibérée (opérationnelle) ou accidentelle. Les fauteurs de pollution peuvent être des particuliers ou des pouvoirs publics (nationaux, provinciaux ou municipaux). En cas de pollution délibérée par des gouvernements, le problème est plus

grave, car les autorités locales peuvent se trouver dans l'incapacité de prendre des mesures de défense. Un exemple tout à fait caractéristique est la décision qu'a prise le Gouvernement des États-Unis d'Amérique de déverser au large des côtes de Floride des stocks de gaz neurotoxique. L'État de Floride ainsi que des particuliers ont porté la question devant les tribunaux, mais, en août 1970, l'opération a eu lieu à 450 milles du Cap Kennedy. Un autre exemple est celui du déversement dans la Baltique de 7000 tonnes d'arsenic, qui dans 40 ans pourraient encore exterminer la totalité de l'humanité. À cette liste, on peut ajouter les essais atomiques effectués dans le Pacifique, ce qui nous ramène à l'affaire des *essais nucléaires*, dans laquelle la Cour internationale de Justice a évité de prendre position sur les thèses australiennes, selon lesquelles la poursuite des essais d'armes nucléaires qui sont menés dans l'atmosphère dans le Pacifique Sud n'est pas compatible avec les règles de droit international en vigueur. La diversité des agents de pollution est extrême et elle ne fait que croître. Il est néanmoins possible de distinguer quelques grandes classes de polluants et pour commencer, nous avons les polluants d'origine humaine: certains sont inoffensifs et facilement absorbés, mais certains des micro-organismes expulsés peuvent survivre dans la mer pendant un temps considérable, comme c'est le cas des germes pathologiques. L'emploi continu du DDT et autres pesticides e herbicides fait l'objet d'études suivies, notamment de la part de la FAO. Certaines de ces substances sont extrêmement toxiques et sont introduites dans l'environnement marin par les eaux de ruissellement provenant des zones agricoles ou à partir de l'atmosphère. Le problème est que l'on n'a pas trouvé de substitut peu coûteux du DDT, si bien que l'Organisation Mondiale de la Santé considère qu'il est actuellement impossible d'interdire l'emploi du DDT parce que dans la lutte contre le paludisme, les effets nocifs de ce produit sont encore un moindre mal.

Si la plupart des États reculent devant certaines initiatives, des résultats positifs ont néanmoins été obtenus dans deux domaines, celui de la pollution radioactive et celui de la pollution marine par les hydrocarbures.

La terreur d'une catastrophe nucléaire suscite des réactions justifiables dans de nombreux pays. Cependant, en matière de pollution radioactive, il convient de mettre l'accent sur les essais atomiques menés dans l'atmosphère, généralement au-dessus du Pacifique, et sur l'immersion dans les océans de conteneurs de déchets radioactifs. Cette dernière pratique présente un réel danger, car il est impossible de

prévoir comment ces substances réagiront au fond des océans lorsque l'enveloppe de ciment se désagrégera et que les armatures d'acier seront rongées par la rouille.

La Convention de Genève de 1958 sur la haute mer a condamné cette pratique dans son article 25, qui stipule que: "Tout État est tenu de prendre des mesures pour éviter la pollution des mers due à l'immersion de déchets radioactifs en tenant compte de toutes normes et de toutes réglementations qui auront pu être élaborées par les organismes internationaux compétents".

Cet article est systématiquement violé par les puissances nucléaires. En 1968, l'Agence Européenne de l'Energie Nucléaire a autorisé cette pratique, mais les déchets radioactifs ne sont pas immergés au large des côtes de l'Europe, ce qui est symptomatique.

La Convention sur la prévention de la pollution des mers résultant de l'immersion de déchets de 1972, dite "Convention de Londres sur l'immersion des déchets", distingue entre les déchets radioactifs, dont l'immersion est interdite, et les déchets pour lesquels une autorisation spéciale, délivrée par les autorités nationales, est nécessaire. Etant donné que les parties contractantes ont volontairement souscrit à cette convention, on aurait pu s'attendre à ce que son principal objet, à savoir la protection des océans, soit pris au sérieux. Le moratoire de deux ans concernant l'immersion de déchets dans la mer, a été décidé en février de cette année, et a été de courte durée, puisqu'en mars, le Japon a fait part de sa décision d'immerger des déchets nucléaires de faible teneur dans la fosse des Mariannes dans le Pacifique. Dans le même temps, le Royaume-Uni décidait d'immerger non seulement ses propres déchets mais aussi des déchets radioactifs en provenance de Belgique et de Suisse, et ce dernier pays a déclaré, le 25 mai, qu'il continuerait cette année encore d'immerger des déchets radioactifs dans l'Atlantique, malgré l'opposition des milieux écologistes et d'autres nations.

Enfin, il y a la pollution de la mer par les hydrocarbures, qui est la plus familière au grand public et qui fait l'objet de diverses conventions internationales. L'échouement du pétrolier libérien "Torrey Canyon" en 1967 et le heurt du pétrolier américain "Amoco Cadiz" contre un écueil au large des côtes de Bretagne en mars 1978 ont montré les dommages considérables que peuvent causer les pertes d'hydrocarbures. Dans le cas de l'"Amoco Cadiz", 220 000 tonnes de pétrole (soit le double des pertes du "Torrey Canyon") ont provoqué la disparition de diverses espèces de poisson et d'oiseaux, sans compter les dommages aux plages de la région, y compris celles qui entourent le monastère du Mont-Saint-Michel.

Ces deux accidents, dénoncés comme des catastrophes écologiques majeures, ont été éclipsés par l'explosion du puits Ixtoc 1 le 3 juin 1979 et par la catastrophe qui vient de se produire dans le Golfe Persique pour laquelle aucune solution n'est en vue. La quantité de pétrole qui s'est répandue dans la mer pendant huit semaines après l'explosion du puits Ixtoc 1 a atteint un chiffre sans précédent, surpassant les 68 millions de gallons perdus par l'Amoco Cadiz après la rupture de sa coque.

En cas de pollution par les pétroliers, c'est la responsabilité du propriétaire du navire ou de l'entrepreneur de transport qui est engagée. Dans l'un et l'autre cas, c'est au droit international qu'il appartient de réglementer la question, laquelle se posera de plus en plus fréquemment avec l'exploration pétrolière off-shore.

L'accroissement considérable du tonnage des pétrolier et le désastre du "Torrey Canyon" ont obligé l'OMCI à réviser les conventions internationales de 1954 et 1962 pour la prévention de la pollution des eaux de la mer par les hydrocarbures.

Le droit international doit déterminer dans quelle mesure un État directement menacé ou touché par une catastrophe qui survient en dehors de sa mer territoriale peut prendre des mesures, ou devrait être autorisé à le faire, en vue de protéger ses côtes, ses ports, sa mer territoriale ou ses valeurs d'agrément, quand bien même de telles mesures pourraient porter atteinte aux intérêts des armateurs, des compagnies de sauvetage ou même de l'État du pavillon.

Un problème plus délicat encore, qui intéresse plusieurs branches du droit, est celui de la détermination de la responsabilité du propriétaire du navire ou de l'entrepreneur de transport, quant à sa nature, son étendue et son montant en cas de dommages causés à des tiers par des hydrocarbures qui se sont répandus ou ont été déversés à la suite de l'accident d'un pétrolier. Ces problèmes ont été examinés en 1969 par la Conférence de Bruxelles lorsque les deux nouvelles conventions ont été signées, l'une de droit public (sur l'intervention en haute mer en cas d'accident entraînant ou pouvant entraîner une pollution par les hydrocarbures) et l'autre de droit privé (sur la responsabilité civile pour les dommages dûs à la pollution par les hydrocarbures).

À la suite de la Conférence de 1969, l'OMCI a convoqué une autre conférence à Bruxelles en 1971, qui a abouti à l'adoption de la Convention internationale portant création d'un fonds d'indemnisation pour les dommages causés par les hydrocarbures.

Une nouvelle étape a été franchie en 1973 lors d'une autre conférence sur la pollution des mers, dont l'objet était d'éliminer la pollution

volontaire et intentionnelle de la mer par deshydrocarbures et autres substances nocives et de limiter les fuites accidentelles. Cette conférence a abouti à la signature de la Convention internationale pour la prévention de la pollution par les navires et d'un Protocole sur l'intervention en haute mer en cas de pollution par des substances autres que les hydrocarbures.

La pollution de la mer par les pesticides, herbicides et autres agents chimiques et par des polluants organiques et inorganiques, tels que l'arsenic et le mercure, est un état de choses qui n'est que trop connu, mais la nécessité de mettre fin à cet abus se heurte le plus souvent à l'indifférence des États directement ou indirectement responsables des dommages.

Aucun gouvernement ne s'opposera publiquement à une protection de l'environnement, mais dans les instances internationales les gouvernements se montrent généralement réservés et peu enclins à s'engager. Ainsi, l'immersion de déchets radioactifs se poursuit dans les océans, de préférence aussi loin que possible, de même que les essais atomiques dans le Pacifique, la conspiration du silence sur le problème des pluies acides, la transformation de certains fleuves, comme le Rhin, en véritables égouts. Cela sans oublier les résultats décourageants des campagnes contre le massacre des bébés phoques et des baleines, non plus que l'attitude criminelle des gouvernements qui permettent que soient exportés à destination de pays moins développés des médicaments dont la vente a été chez eux interdite parce qu'ils présentaient des dangers.

L'opinion publique mondiale réclame la cessation de toutes ces pratiques. C'est aux internationalistes qu'il appartient de trouver des solutions, qui du reste, dans la plupart des cas, sont des solutions évidentes.

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CENT ANS DE PLÉNITUDE

Conférence donnée le 16 juin 1987, à Genève
par S.E. M. José Sette Câmara
Juge à la Cour internationale de Justice et
ancien Ambassadeur du Brésil

et

LA CONTRIBUTION DE GILBERTO AMADO AUX TRAVAUX DE LA COMMISSION DU DROIT INTERNATIONAL

Conférence donnée le 16 juin 1987, à Genève
par le professeur Cançado Trindade
Conseiller juridique du Ministère brésilien des Relations Extérieures

Avant-Propos

Les Conférences Gilberto Amado ont leur origine dans une initiative de l'éminent juriste Taslim Elias – doyen des juristes africains – qui, en sa qualité de président de la Commission du Droit International, proposa à la Sixième Commission de l'Assemblée générale, lors de la vingt-cinquième session, en 1970, peu de temps après la mort d'Amado, que soit instituée une conférence annuelle à sa mémoire. La proposition de Taslim Elias fut approuvée et la Commission du Droit International en a été saisie à sa vingt-troisième session, en 1971. Le Gouvernement brésilien a accepté de verser une contribution annuelle pour l'exécution du programme. Les conférences sont publiées sous forme imprimée en deux langues, à savoir en anglais et en français, et elles sont largement diffusées dans les milieux juridiques du monde entier. Elles coïncident avec le séminaire de Droit International, qui est organisé pendant les sessions de la Commission du Droit International, et elles sont suivies d'un dîner qui, chaque fois que possible, a eu lieu jusqu'ici à l'Hôtel des Bergues, où Gilberto Amado descendait régulièrement. Quinze années se sont écoulées depuis la première conférence, donnée par le juge Eduardo Jiménez de Arechaga dans la Salle des Conseils du Palais des Nations en 1972, et la série de conférences, devenue une tradition de la CDI, s'est poursuivie. Certaines des conférences sont devenues des textes majeurs de référence. Celle d'Arechaga représentait la première analyse faite en public de la révision du règlement de la Cour, et elle a suscité un intérêt unanime. Le juge Elias lui-même a donné, sous le titre "La Cour

internationale de Justice et l'indication de mesures conservatoires", une conférence à laquelle on s'est fréquemment référé dans les différents cas où la Cour a été appelée à décider de l'adoption de mesures de ce genre. Les conférences faites par un autre membre, maintenant, décédé, de la CID, le juriste grec Constantin Eustathiades, sur "Les conventions de codification non ratifiées", ainsi que celles de plusieurs autres savants juristes, ont souvent été citées par des spécialistes et par ceux qui étudient le droit international.

L'hommage ainsi rendu à la mémoire de Gilberto Amado témoigne de la manière la plus frappante de la vigueur et du poids de sa personnalité. La CDI n'a cessé de compter parmi ses membres les juristes internationaux les plus éminents des quarante dernières années. Il suffit de citer les noms de Brierly, Manley Hudson, Georges Scelle, J.P.A. François, Spiropoulos, Hersch Lauterpacht ou Verdross, parmi ses membres maintenant décédés, pour donner une idée de la qualité des juristes qui en ont fait partie. Dans ces conditions, le fait que, parmi tous ces hommes de premier plan, Gilberto Amado ait été retenu pour une commémoration annuelle parle de lui-même.

En ce jour où nous célébrons le centenaire de la naissance d'Amado, nous ne devons pas oublier le nom de Taslim O. Elias, aujourd'hui juge et anciennement président de la Cour internationale de Justice, à qui nous devons l'initiative de cette série de conférences, dont le Brésil est très fier.

José Sette Câmara

Gilberto Amado – Cent ans de plénitude

par José Sette Câmara
Juge à la Cour internationale de Justice
et ancien ambassadeur du Brésil

C'est au début de l'année 1950 que j'ai rencontré pour la première fois Gilberto Amado. Transféré du Consulat général du Brésil à Montréal à la mission brésilienne auprès de l'Organisation des Nations Unies, où je devais être chargé des affaires juridiques, j'avais en outre pour fonction d'accompagner en qualité de conseiller le membre brésilien de la Commission du Droit International.

Mes collègues m'avaient dit à l'avance que ce n'était pas là chose facile. Gilberto Amado avait une réputation redoutable. Ses qualités extraordinaires d'écrivain, de penseur et de juriste étaient reconnues et loués par tous. Mais, en même temps, on voyait en lui un homme peu commode, voire intraitable, souvent violent et agressif dans ses actes, un homme qui était également imprévisible et déconcertant dans ses réactions.

On comprendra donc que je n'étais guère détendu le matin où j'attendais l'occasion de le rencontrer au 60e étage de l'Empire State Building, à New York.

L'homme que je vis arriver était très trapu, avec un énorme crâne brachycéphale, presque dépourvu de cou, comme cela se voit communément chez les gens des régions du Nord-Est du Brésil.

"Alors, c'est vous la victime?", dit-il avec un large sourire amical, sa grande bouche découvrant des incisives fortement écartées. Rien de

commun avec l'homme terrifiant que je me préparais à rencontrer. La première impression qu'il me donna fut une impression d'ordre et de méticulosité, ses cheveux gris soigneusement peignés, son costume de bon goût et bien coupé. Nous bavardâmes longtemps et je pense que, dès le début, nous nous sommes engagés sur la voie d'une amitié et d'une coopération sans réserve, qui s'est poursuivie jusqu'au dernier jour de la vie de Gilberto Amado, le 27 août 1969.

Dans un des cinq volumes de ses mémoires – le plus connu de ses livres–, Amado lui-même décrit son aspect physique de manière assez piquante. Arrivé depuis peu dans la grande ville de Recife, il se trouva tout à coup, dans le vestibule d'un hôtel, devant "quelque chose qu'il n'avait jamais vu, de très grandes glaces recouvrant le mur tout entier". Mais voici plutôt ce qu'il dit à ce sujet :

> Pour la première fois, je pouvais me voir en entier. Jusqu'alors, je ne m'étais regardé que dans de petits miroirs muraux, ou dans de miroirs de poche, où je ne pouvais voir que le visage, le cou, ou la cravate. Jamais je n'avais vu cela... moi, en entier: veste, pantalon, chaussures. J'en éprouvai un grand choc. C'est alors que je pris conscience de ma laideur. Je fus médusé. Etais-je vraiment comme cela? Je mentirais si je prétendais me souvenir de toutes mes impressions. Ce dont je me souviens cependant, c'est que je fus profondément bouleversé. Par la suite, j'eus le même choc chaque fois que je me suis vu dans de grands miroirs, de face et plus encore de profil. Je frissonnai, comme pris d'un sursaut devant l'image de moi-même... Un sentiment de malaise, je pourrais presque dire de révulsion, devant mon aspect physique.

Gilberto Amado se jugeait trop sévèrement. Certes, ce n'était pas un Apollon, mais la force de sa personnalité était telle que les gens l'aimaient au premier abord et ne remarquaient pas ses défauts physiques.

Gilberto Amado est né à Estancia, petite localité de l'intérieur située dans l'État de Sergipe – qui est le plus petit des États qui constituent la Fédération brésilienne – le 7 mai 1877, c'est-à-dire voici cent ans; il était l'aîné d'une famille de quatorze frères et soeurs. Pour comprendre comment il a pu s'élever de cette humble origine jusqu'aux plus hauts sommets du prestige culturel, il faut jeter un regard en arrière sur le milieu où il naquit et grandit.

La région du Nord-Est est la plus pauvre des régions du Brésil. Elle est périodiquement affectée par des sécheresses désastreuses, on y manque d'eau en général, sa partie intérieure est une savane sèche, à la végétation épineuse. II a fallu à ses habitants beaucoup de courage et de personnalité

pour survivre et, d'une façon ou d'une autre, pour prospérer et exercer une influence décisive sur la vie culturelle et politique du Brésil. La grande aventure du Brésilien du Nord-Est, son combat héroïque contre une terre et un environnement ingrats, sa vigueur, sa frugalité, son attachement au misérable lieu de sa naissance, tout cela a été décrit par Euclides da Cunha dans son épopée, devenue classique, intitulée *Os Sertões*. Gilberto Amado était un homme du Nord-Est typique, à la fois par le physique et sur le plan spirituel. Il ne cessa jamais de s'identifier à sa terre d'origine, et l'on peut retrouver des traces du lieu d'où il est parti dans tout ce qu'il a écrit, alors même qu'il a été amené, au cours de son existence, à se rendre dans des pays bien différents et bien éloignés du Nord-Est brésilien.

Pour comprendre la place particulière qu'occupait Gilberto Amado au moment où il s'est fait connaître comme penseur et essayiste, au début du siècle, il importe de considérer le panorama culturel brésilien de l'époque, et notamment le paysage culturel du Nord-Est.

À cette époque, la vie culturelle brésilienne était entièrement tournée vers des réalités et des influences extérieures, notamment européennes. Nous nous occupions plus de ce qui se passait à Paris, à Londres, à Berlin ou à Vienne que des immenses problèmes qui se posaient dans un pays étouffé par le sous-développement, pays réduit au rang de fournisseur de matières premières, pratiquement dépourvu d'industries, où même les allumettes et le beurre étaient importés.

Au lieu de faire porter leur réflexion sur la hideur de la situation économique et sur les injustices criantes que comportaient les structures sociales du pays, l'intelligentsia brésilienne se perdait dans des controverses philosophiques entre monistes et dualistes. C'est alors qu'apparut la figure dominante d'un mulâtre germanisé, Tobias Barreto, qui secoua les bases traditionnelles d'une structure philosophique fondée sur des notions théologiques, en particulier dans le domaine du droit. Les vieilles idées dépassées reposant sur les dogmes poussiéreux du droit naturel s'écroulèrent sous les coups des théories monistes, transformistes et déterministes exposées par Tobias Barreto, disciple fidèle d'Emmanuel Kant. Barreto fascina toute une génération et devint le maître de ce qu'on a appelé "l'École de Recife", ville où il était du reste professeur à la Faculté de droit. Cependant, si Tobias Barreto prit la tête d'une révolution dans les domaines de la philosophie et de la philosophie du droit, il ne s'écarta pas du champ de bataille où s'affrontaient les idées et les théories ayant cours en Europe, et il ne s'occupa point des réalités d'un pays qui avait pourtant le plus grand besoin d'une solution, ou tout au moins d'une orientation, devant les nombreux problèmes d'ordre économique et social

qui l'assaillaient. L'influence de la pensée allemande dans le domaine de la philosophie, y compris dans le secteur de la philosophie du droit, et son influence sur le droit lui-même, furent énormes. Un disciple de Tobias Barreto, Clovis Bevilacqua, grand juriste qui fut chargé de rédiger le Code civil de 1916 – toujours en vigueur aujourd'hui*, malgré des amendements mineurs – était un homme dont la formation était purement germanique.

Gilberto Amado ne pouvait rester insensible à la tempête des idées, des théories et des doctrines qui avaient envahi la vieille faculté de droit traditionnelle de Recife, qui était jusqu'alors le marécage tranquille où fermentaient les vieilles idées conservatrices, et qui vit venir sans s'y être à aucun moment attendue la tornade des idées révolutionnaires importées d'Europe. Amado avait fait précédemment l'expérience de l'existence universitaire à Bahia. Il s'agissait en fait, pourrait-on dire, d'une double expérience, puisqu'il avait fait des études de pharmacie – aussi peu que cela convienne à son personnage – et avait aussi commencé des études de médecine. Cependant, c'est à Recife, ville tout agitée de débats idéologiques, qu'il prit contact pour la première fois avec le monde des grandes doctrines. Dans l'un des six livres d'essais qu'il a écrits, il décrit de façon plutôt curieuse ses premiers pas dans cette tourmente d'idées:

> Mais je me serais perdu, égaré dans le labyrinthe des notions, systèmes, écoles, théories, doctrines et bibliographies, si je n'avais pas lu Auguste Comte au cours des premières étapes de ma formation.

Il n'est pas surprenant que Gilberto Amado n'ait pas échappé à l'attraction et à l'influence d'Auguste Comte. Aussi étrange que cela paraisse, ce dernier jouissait, dans le Brésil de la fin du siècle dernier et du début de notre siècle, d'un prestige et d'une influence bien plus marqués que dans son propre pays, la France. Il suffira de rappeler que la proclamation de la République, qui mit fin à soixante-sept ans de monarchie démocratique et pacifique, fut préparée et exécutée par un groupe d'officiers positivistes fanatiques. Les disciples d'Auguste Comte se réclamaient d'idéaux républicains. Et le drapeau de la République lui-même comportait une devise positiviste typique: "Ordre et Progrès", laquelle a survécu jusqu'à ce jour. Amado, cependant, quoiqu'encore jeune, avait assez d'acuité pour faire la distinction entre l'Auguste Comte du *Cours de philosophie positive* et l'Auguste Comte du *Système de politique positive*. C'était le deuxième aspect de la personnalité du penseur français,

* Le noveau Code Civil brésilien de 2002 (qui a remplancé le code civil préalable de 1916) est entré en vigueur à compter du 10 janvier 2003.

avec la religion de l'Humanité, le "culte du Grand Être", les "Pratiques saintes" et les "Sacrements sociaux", qui séduisait jusqu'au fanatisme la jeune génération qui avait fondé la République, et qui inspirait l'Église positiviste, laquelle continue d'exister dans la rue Benjamin-Constant, où l'on rencontre encore un petit nombre de témoins anachroniques et attardés des grandes époques de l'influence positiviste. Dans l'un de ses essais, Amado nous apprend ce qui suit:

> Ayant lu ces ouvrages, j'avais devant moi deux Auguste Comte: le créateur de la religion de l'Humanité, l'adorateur de Clotilde de Vaux, son épouse, l'énonciateur des célèbres aphorismes qui apparaissent dans la propagande de l'Eglise Benjamin-Constant; celui-là ne m'intéressait pas. Mais l'autre, celui qui avait formulé la "loi des trois états", celui qui avait pensé la classification des sciences et la synthèse scientifique, le père de la sociologie, l'analyste critique du matérialisme et de l'athéisme, l'apologiste du Moyen Âge et du catholicisme, à celui-là, je devais plus qu'à n'importe quel autre auteur que j'aie jamais lu.

Mis à part l'enthousiasme qu'il professa à l'égard d'Auguste Comte, Amado subit l'influence de nombreux penseurs de son temps, dont il fait souvent l'éloge. De Nietzsche, il dit ceci :

> Je lus ce qu'il avait écrit, avec passion, jusqu'au moment où Goethe, que je lui devais de connaître, prit sa place. Je retourne encore à lui pour retrouver dans son oeuvre tel ou tel aphorisme ou pour vérifier tel ou tel aspect de sa pensée. Si je tourne mon regard vers le XIXe siècle, comme on regarderait une grande ville depuis la campagne environnante, je vois Nietzsche comme s'élevant très haut, comme se dressant parmi les constructions qui dominent toutes les autres. Et je comprends combien il manquerait au XIXe siècle s'il n'avait pas existé. Autant vaudrait imaginer le XVIIIe siècle sans Voltaire!

Cependant, la profonde intuition dont faisait preuve Amado lorsqu'il était en quête d'une vérité – et en cela il est comparable à Auguste Comte – l'incitait à faire le départ entre l'importance énorme de Nietzsche dans sa réévaluation de la philosophie grecque et sa révision des concepts esthétiques, et le Nietzsche qui formula l'hypothèse de l'éternel retour et fit l'éloge du surhomme, de l'antéchrist et de la morale des maîtres par opposition à la morale des esclaves. Là encore, la profondeur de son jugement anticipait sur l'histoire et écartait le rebut d'idées qui étaient le remarquables en elles-mêmes mais qui traînaient après elles des poids morts.

Il faudrait une très longue étude pour pouvoir retrouver dans les oeuvres de Gilberto Amado la présence et l'influence de grands penseurs tel que Stuart Mill, Leibniz, Berkeley, Kant, Descartes, Bacon, et tant d'autres. Il les avait tous lus mais ne s'est attaché à aucun d'eux en particulier. Il avait ses propres idées et sa propre manière d'envisager les problèmes de l'existence.

Jeune étudiant à la Faculté de droit de Recife – ou, parmi les jeunes gens, la question "Es-tu moniste ou dualiste?" était aussi fréquente que pourrait l'être aujourd'hui, dans certaines universités, une question sur l'équipe de football favorite –, Amado dévorait tous les livres qui lui tombaient sous les yeux. En effet, en même temps qu'il s'intéressait aux philosophes, le jeune Gilberto se passionnait également pour la littérature, et c'est à ce moment-là qu'il se laissa envoûter, pour le reste de sa vie, par Balzac, Goethe et Shakespeare. À une époque où très peu, au Brésil, lisaient l'anglais, Gilberto Amado découvrit le vaste univers du poète de Stratford, dont il avait une connaissance peu commune.

On n'aurait guère le temps ici de passer en revue l'initiation culturelle de Gilberto Amado et de le suivre dans ses pérégrinations à travers le monde des livres. Cependant, il serait de toute façon futile de vouloir détecter quelles furent les principales influences sur sa manière de penser et sur son comportement. Il n'appartenait à aucune confession religieuse ou école de pensée, et il n'obéissait pas aux canons des codes moraux traditionnels. Sa personnalité était si tranchée que jamais elle ne voulut s'aligner sur aucune influence extérieure.

Il ne se préoccupa jamais de problèmes métaphysiques. Parlant du problème de Dieu, il eut l'occasion de s'exprimer ainsi :

> Quant à moi, en cette année 1906, tout imprégné que j'étais de positivisme, je ne me préoccupais pas de ce problème. Je lisais les diatribes, nietzschéennes contre Dieu tout comme j'avais lu les passages de la Bible où les prophètes annonçaient la venue du Messie – indifférent à la controverse religieuse. Auguste Comte avait extirpé de mon esprit tout intérêt pour ce genre de problème. Il y a ceux qui sont né pour la quête de Dieu et qui persisteront à le chercher, quelle que soit l'épaisseur du bandeau qu'ils ont sur les yeux. Et il y a ceux qui portent Dieu en eux-mêmes, qui ressentent Sa présence à l'intérieur d'eux-mêmes, et qui n'éprouvent aucun désir de Le rechercher à l'extérieur.

C'est là l'un des rares passages de l'oeuvre volumineuse d'Amado où ce dernier parle du problème de l'existence de Dieu. Il est difficile de savoir ce qu'il voulait dire. Etait-il tellement certain de l'existence de Dieu

à l'intérieur de lui-même qu'il se refusait à toute recherche sur ce sujet? Nul ne le sait, car il ne s'est jamais expliqué sur ce point et n'a jamais abordé cette question avec ses amis. Le très beau commentaire qu'il a consacré à un passage célèbre de l'oeuvre d'Emmanuel Kant – celui où le philosophe allemand, après avoir jeté à bas toute la construction du raisonnement métaphysique, reconnaît que l'existence de Dieu est néanmoins prouvée malgré cela par le ciel étoilé qu'il voit au-dessus de sa tête et par la loi morale qui occupe sa conscience – incite plutôt à conclure qu'il était loin d'être athée, quoique les problèmes théologiques lui fussent étrangers.

L'investigation philosophique de Gilberto Amado a porté principalement sur les problèmes esthétiques. Et, dans ce domaine, il préconisait le retour à la nature, affirmant la primauté de celle-ci sur les principes "sociaux" et "moraux":

> Le bonheur est un concept social qui est étranger aux buts de la nature. La joie est un concept de la nature que la société, presque toujours, cherche à limiter, car elle y voit du mal. Le bonheur, en tant que concept social, échappe à la portée de l'individu. La joie, concept de la nature, s'épanouit dans ce qui est naturel.

Et cela le conduisait à sa définition de l'art:

> L'art est libération, sans aucun doute. L'art, c'est tout ce qui libère l'homme de l'idée morale, du sens moral, de l'existence morale; tout ce qui affranchit l'homme de la morale, le ramenant à la nature.

Ou encore :

> La beauté est le contraire de la justice. La beauté s'attache à la totalité de la vie, tandis que la justice est une parcelle de la vie que la volonté de quelques hommes a détachée du reste de l'existence... L'art est un déguisement divin, une irruption héroïque de la nature dans le champ de notre vie sociale. C'est l'instinct qui se libère de la raison, c'est le corps qui se sépare de la conscience.

Amado ridiculise l'idée selon laquelle l'art serait, par nature, "social". Dans les moments de l'histoire où s'est produite une concentration de la puissance morale, les manifestations artistiques s'estompent. Quelle oeuvre d'art, demande-t-il, doit-on aux Puritains d'Angleterre? Quel mouvement artistique a-t-on vu jaillir de pays exemplaires du point de vue de l'organisation morale et de ladiscipline sociale? Au contraire, c'est

sous la Renaissance, époque où les hommes se laissaient aller à mille séductions et aventures, qu'ont fleuri les plus grandes oeuvres d'art. "C'est alors que l'Italie a explosé en formes lumineuses, que les Pays-Bas dansaient aux kermesses flamandes, que le Portugal chantait avec Luis de Camões en s'élançant à la découverte du monde, que l'Espagne se mit à chevaucher les rêves impossibles de Don Quichotte, que l'Angleterre célébrait les bacchanales shakespeariennes et que la France riait de toutes ses dents avec Rabelais."

Et il ajoute :

> La Renaissance, la plus grande période de création artistique que le monde ait jamais connue, fut une époque où dominaient des instincts qui étaient répréhensibles du point de vue de la morale, une époque où dominaient des instincts qui étaient répréhensibles du point de vue de la morale, une époque où les gens, et les artistes en particulier, s'attaquaient les uns aux autres avec la plus grande férocité et la plus grande cruauté.

Ce qui n'empêche pas Amado de reconnaître qu'il y a des exceptions:

> Néanmoins, il y a eu dans l'histoire des périodes d'adéquation totale entre la société et la production artistique. Ces époques, caractérisées par un équilibre dû à des causes diverses, présentent comme des aurores faites de couleurs harmonieuses, périodes où la beauté est l'expression de la justice, où la sépia des peintures, les versets des psaumes, le profil des statues sont le reflet de l'ordre social et vice versa, où le droit et la loi, les institutions et les coutumes expriment et déterminent le rythme de la nature. Mais ce ne sont là que des moments transitoires. Bien vite, le déséquilibre revient et le conflit entre les deux formes opposées se poursuit.

Cette conception de l'art considéré comme une puissante explosion de formes naturelles, par opposition aux entraves constituées par les règles morales et les conventions sociales, imprègne l'oeuvre d'Amado tout entière.

Curieusement, ces idées sur le phénomène de l'art sont sans rapport aucun avec le comportement d'Amado dans la vie quotidienne. C'était un homme méticuleux, organisé, pointilleux, même lorsqu'il s'agissait des problèmes pratiques de la vie de tous les jours. C'était un pragmatique, attentif à ses intérêts, et il n'y avait rien qu'il détestait autant qu'une vie de bohême désordonnée. Comme il disait: "Il n'y a rien de

moins poétique qu'un poète romantique". Mais l'art est une autre histoire. Et, dans ce domaine, il rejetait toutes les entraves de la convention.

En tant qu'artiste, Amado était obsédé par les mots. Il jonglait avec eux; les mots étaient ses outils et il en usait comme peut le faire un artisan aussi méticuleux que sensible à la matière qu'il travaille. Il parcourait le monde avec une véritable bibliothèque portative contenant les livres essentiels, constituée pour une bonne part par une batterie de dictionnaires qu'il consultait sans cesse. Son passe-temps favori était les mots croisés. Chaque jour, après le déjeuner, ayant allumé un gros havane très aromatisé et mis ses lunettes, il s'attaquait sans tarder à la grille du *Herald Tribune*. Un affrontement passionné et expert avec les mots est ce qui caractérise le mieux son style d'essayiste, de poète et de mémorialiste. Dans son écriture concise et brillante, la richesse, l'exactitude et, en un mot, la perfection de son vocabulaire ne cessent de surprendre le lecteur. Depuis ses débuts de journaliste à Recife jusqu'au dernier volume de ses mémoires, il fut toujours un maître artisan du mot.

Je ne parlerai pas ici de ce qu'il a expressément apporté aux travaux de la Commission du Droit International. Mon ami, M. Cançado Trindade, conseiller juridique du Ministère des Relations Extérieures du Brésil, se chargera de cela.

Je me contenterai de rappeler que Gilberto Amado était un juriste de premier plan. Dans le domaine du droit constitutionnel, son ouvrage consacré aux élections et à la représentation, qui a été publié en 1931 et dont le sous-titre indique qu'il s'agissait d'un cours de droit politique, est plein d'enseignements et revêt une grande importance par rapport à son époque, étant donné que cet ouvrage parut à la suite d'une révolution qui cherchait à instituer le vote au scrutin secret et des élections véritablement représentatives. En tant que professeur de droit pénal, à Recife puis à Rio de Janeiro, Amado acquit une grande notoriété, et ses cours étaient toujours suivis avec enthousiasme par les jeunes, désireux de se familiariser avec les idées les plus neuves. Son expérience de conseiller juridique du Ministère des Relations Extérieures, poste dans lequel il succéda au grand juriste que fut Clovis Bevilacqua, marqua dans sa vie un tournant qui devait déboucher sur le droit international public, discipline à laquelle il consacra les vingt dernières années de sa vie, principalement au sein de la Commission du Droit International et de la Sixième Commission de l'Assemblée générale de l'ONU. Dans l'un et l'autre organe, il jouissait d'un énorme prestige et d'une influence considérable. Mais j'empiète ici sur le terrain de mon ami, M. Cançado Trindade. Je ne peux toutefois manquer de rappeler l'importance qu'a eue l'action de Gilberto Amado

pour ce qui est de formuler les méthodes de travail de la Commission du Droit International depuis sa création en 1947.

La commission de quinze membres créée par les résolutions 174 (II) et 175 (II), voici justement quarante ans cette année même, est née en quelque sorte à l'ombre des conceptions de la Société des Nations. En effet, elle travaillait pour une bonne part dans le même esprit qu'une académie. Etant donné qu'à peu d'exceptions près ses membres étaient des professeurs éminents, on se préoccupait beaucoup plus de la qualité des travaux spécialisés de ces derniers que des avis et des intérêts des États Membres ou des conséquences politiques des solutions juridiques adoptées. De grands professeurs tels que Georges Scelle, Manley Hudson et Brierly ne cachaient pas leur dédain pour les opinions des États. Pour leur part, ils assemblaient l'édifice du droit international codifié, tel qu'ils pensaient qu'il devait être aux yeux de la science juridique. Cet édifice devait être aussi solide que possible au regard des normes de l'érudition. Qu'il fût ou non du goût des gouvernements, cela était hors du sujet. La CDI, travaillant avec ses quinze membres dans la vieille salle n° X du Palais de Nations, était une sorte de société savante, fière d'être indifférente à l'influence des gouvernements. Or, Amado faisait prophétiquement figure de non-conformiste par rapport au détachement dont faisait preuve la Commission. Tout de suite, il comprit que celle-ci était un organe subsidiaire de l'Assemblée générale chargé de fournir des avis d'experts destinés à servir les intérêts des États dans le domaine de la codification, conformément à l'Article 13 de la Charte. Son interpellation, souvent citée, selon laquelle les États et les gouvernements ne sont pas fous au point d'oublier leurs intérêts au profit de doctrines et de solutions purement théorique, annonçait déjà la manière dont la Commission devait procéder par la suite et procède actuellement, méthode fondée sur l'interaction entre la compétence scientifique et l'autorité gouvernementale, qui a assuré le succès notoire des conférences diplomatiques de codification, reprenant les propositions de cet organe. Que l'approche par trop théorique et idéaliste de la Commission des quinze ait échoué, cela est éloquemment illustré par le cas du projet relatif à la procédure arbitrale, qui fut accaparé par Georges Scelle, lequel entendait tirer de la doctrine une structure judiciaire obligatoire en matière d'arbitrage. Le projet – qui se heurta de la part d'Amado à une farouche opposition – a été depuis dédaigné par les gouvernements et ramené au rang d'un simple modèle de règles sur la procédure arbitrale auxquelles les États peuvent recourir, s'ils le veulent, lorsqu'ils jugent utile, à l'occasion, le complément théorique que ces règles représentent.

Si Amado était un homme de grande valeur en tant qu'essayiste, que poète, qu'écrivain et que juriste, tout cela cependant s'estompait devant la puissance de sa personnalité elle-même. Ce qui dominait par-dessus tout, c'était sa "présence", la manière qu'il avait de dire les choses comme personne d'autre, une manière qui est demeurée légendaire dans mon pays. Fréquenter Amado – privilège que j'ai eu pendant près de vingt ans – c'était ne jamais s'ennuyer un seul instant. Son tempérament volcanique explosait au premier signe de provocation. J'assistais un jour avec lui à un déjeuner à Lausanne au cours duquel une dame corpulente assise à côté de lui lui dit: "Ainsi, vous êtes du Brésil; c'est un pays que j'aimerais beaucoup visiter, mais je n'oserai jamais le faire tant j'ai peur des serpents." L'amour qu'Amado ne cessa de porter à son pays déclencha aussitôt-cette réplique: "Madame, vous pouvez visiter mon pays sans crainte, car là-bas les serpents ne mordent que les jolies femmes". Et il se retira aussitôt ostensiblement, tandis que j'étais forcé de le suivre.

L'importance des mots ne cessa de le hanter. Ainsi, on aurait eu tort de penser qu'on pouvait recourir sans conséquence, lorsqu'il était présent, aux clichés de la vie quotidienne. Il fit un jour des remontrances à un liftier qui lui avait conseillé de "rester calme". Après avoir énuméré toutes les missions importantes dont il devait s'acquitter à ce moment-là, il somma l'autre de lui dire comment un homme grisonnant qui, à son âge était encore garçon d'ascenseur pouvait lui donner un tel conseil. Il me fallut beaucoup de talent pacificateur pour le faire sortir indemne de cette querelle. Une autre fois, il était en train de boire un whisky dans un bar de New York, dans un nirvana de bien-être, lorsqu'une dame qui le connaissait vint vers lui et lui dit: "Oh, mon cher ami, vous paraissez si solitaire"! Il répliqua aussitôt: "La solitude attend toujours ceux qui la méritent". C'est ainsi qu'il était. Il ne fallait pas employer les mots à la légère. Quant à lui, il était toujours en quête de leur sens profond.

Jusqu'à son dernier souffle, Amado fut amoureux de la vie dans toutes ses manifestations. Il aimait la nature, le ciel bleu, l'air vif, la nuit étoilée et, par-dessus tout, les arbres. Il connaissait le nom de chaque essence, les vieux arbres vénérables de l'Europe et notre propre flore tropicale. Il aimait mettre les gens à l'épreuve en leur demandant le nom de tel ou tel arbre, et il était souvent scandalisé par l'ignorance de ceux qui se préoccupaient rarement d'en savoir davantage sur ce point.

D'autre part, il aimait les plaisirs de la vie, et en particulier ceux de la table. Il recherchait l'amitié des plus grands "chefs" et "maître-cuisiniers", qui le respectaient comme quelqu'un qui connaît les secrets des plats les plus raffinés. Il m'emmena un jour déjeuner chez Maxim's à Paris. Il y avait là un juriste du Ministère des Affaires Etrangères des Etats-Unis que nous connaissions, car il

suivait habituellement les travaux de la Commission du Droit International. Or ce jeune homme était en train de dévorer, sous le regard scandalisé du maître Albert, l'une des célèbres spécialités de la maison – un "faisan faisandé" – ignominieusement accompagné d'une tasse de café au lait. C'en fut trop pour Amado. Il prit à partie ce collègue américain: "Vous n'avez pas le droit", lui dit-il, "d'insulter ainsi un pays". Le brave juriste, qui connaissait le tempérament du vieil homme, sourit de manière embarrassée: le maître, qui observait solennellement la scène, approuva discrètement, et l'incident fut clos.

Le jeune garçon grandi à la campagne dans l'arrière-pays d'un État retardataire du Brésil était devenu, avec son goût pour les plaisirs de l'existence et sa curiosité toujours en éveil, un expert dans la connaissance des vies. Il s'intéressait aux mystères de la production des grands crus, voulant savoir par exemple pourquoi un vignoble situé à quelques mètres seulement d'un autre produisait un nectar divin tandis qu'à côté on obtenait seulement un produit médiocre. Il aimait raconter l'histoire d'une expérience fait en Suisse: des vignerons de ce pays, ayant fait venir des plants authentiques de la région produisant le pommard, avaient reconstitué, avec une rigueur toute helvétique, la composition chimique du sol de cette région, et essayé de reproduire également la température et l'ensoleillement d'origine. Le résultat ne fut pas du pommard. Ce fut de la dôle...

Une autre histoire est restée célèbre. La scène se situe lors d'un grand banquet officiel à l'Ambassade du Brésil à Paris. L'Ambassadeur, qui n'était autre que Souza Dantas, lequel occupa ce poste pendant plusieurs décennies, était le doyen du corps diplomatique et connaissait tout le gotha français. Le sommelier en queue-de-pie, portant sa chaîne d'argent, annonça solennellement le vin: rien de moins qu'un vénérable Château Mouton-Rothschild, millésime orgueilleusement précisé. Amado, se penchant vers la personne qui était à côté de lui, fit observer négligemment: "Ce n'est pas du Mouton-Rothschild". L'Ambassadeur, qui avait entendu, confirma ce qu'avait dit le sommelier. Celui-ci fut rappelé et on lui demanda de montrer la bouteille. A la grande honte de l'Ambassadeur, ce n'était pas du Mouton-Rothschild.

Avec tout le respect qui est dû à son oeuvre écrite, il faut dire que ce qu'il y a de mieux chez Amado n'est pas ce qui subsiste dans ses ouvrages, mais le paroles qu'il a prononcées, ses observations irremplaçables, son sens de l'humour, la façon qu'il avait de mettre la vérité au-dessus de tout. J'ai souvent regretté de ne pas avoir eu le moyen d'enregistrer ce qu'il disait lorsque nous bavardions en marchant pour nous rendre au travail. Ce qu'il y avait de meilleur chez Amado est à jamais perdu. *Verba volant*. Heureusement, je possède quelques centaines de lettres de lui et d'autre part certaines de

ses observations sont du domaine public. J'en rappellerai quelques unes, vraiment très peu, pour montrer quel bonheur extraordinaire c'était que de l'écouter. Ce qui se trouve dans les lettres que je possède n'a jamais été publié. Je commencerai donc par ceux de ses aphorismes que beaucoup connaissent, pour passer ensuite à ce qu'il m'a écrit, et qui est absolument inédit:

> La beauté fait mal, elle pénètre dans l'âme adolescente comme une lame pénètre dans la chair.
>
> Quel beau jeu que celui du cerf-volant! Il oblige les enfants à lever la tête ver le ciel!
>
> L'esprit créateur, c'est l'enfant au coeur de l'homme mûr.
>
> Qui peut dire où cesse l'enfance? Et chez l'homme digne de ce nom, peut-on dire qu'elle prend jamais fin? Un homme devenu un rôle social, un métier, une profession, une situation, est il réellement un homme?
>
> Vivre, c'est s'exprimer.
>
> Je remercie les puissances divines de m'avoir donné une bouche pour savourer le goût des choses, une peau pour apprécier l'eau et le savon, un nez pour sentir les odeurs délicates et éviter les mauvaises, une main pour caresser le dos d'un livre ou le visage d'un enfant, des jambes pour marcher, pour marcher beaucoup dans la nuit dans une conversation silencieuse avec les arbres, les maisons et toutes choses, en un mot le goût de vivre avec simplicité et de trouver autour de moi – même dans le désert moral le plus aride et dans la plus grande solitude de l'esprit – suffisamment de choses pour remplir mon âme.
>
> Les hommes laids ont un avantage: il ne sont pas poursuivis par les femmes stupides.
>
> Les personnes âgées ne devraient pas donner de conseils aux jeunes. Elles devraient au contraire leur en demander."
>
> Vouloir être ce qu'on est essentiel. Vouloir être plus que ce qu'on est, c'est être moins.
>
> La vie pardonne rarement à ceux qui ne la vivent pas assez.

Dans les centaines de lettres qu'il m'a écrites – immense trésor de "choses dites" par Amado – je puiserai seulement au hasard quelques observations, car le temps dont je dispose ne me permet pas de faire plus.

En 1958, il m'écrivait de New York: "Un homme intelligent ne peut se permettre d'être traité comme une 'poire'."

Parlant d'un ami qui travaillait avec notre délégation à l'Assemblée des Nations Unies, il disait:"Pauvre homme! Intelligent, persuasif mais il a laissé se dessécher dans sa chair toutes les fibres qui créent des vibrations morales."

Critiquant un collègue des Nations Unies qui avait présenté un amendement de caractère ''doctrinal'', il disait:

> Je lui ai rappelé que le Brésil n'était pas un ''théoricien'' ou un ''individu'' – celui-ci ayant ses idées et ses doctrines propres – mais un État possédant des intérêts qui pouvaient s'incarner dans des formulations politiques.

De Genève, le 5 juillet 1956, il m'écrivait:

> Je sais combien il importe de vivre en engageant toute son âme et combien il est horrible de vivre loin de son âme – à supposer que cela s'appelle livre. Les années vécues dans l'engagement total de l'âme seront pour nous comme un bain vivifiant. Les heures, les années vécues dans l'insatisfaction n'apporteront qu'amertume à notre vieillesse. C'est de "non-vie" qu'il faudrait parler et non pas de vie.

M'écrivant de Paris le 21 juillet 1957, il me disait:

> Il faut que j'achève les cinquième et sixième volumes, parce que je crains de devoir constater, après le septième, les premiers symptômes annonciateurs de la présence de sucre dans le sang. Il faut que je me démène, car je ne veux pas mourir du diabète. Je préfère un arrêt du coeur.

Dans une lettre écrite de Genève le 24 mars 1958, il me disait, à propos des idées de l'un de nos représentants à la première Conférence sur le droit de la mer:

> Pour lui, les problèmes du droit de la mer se présentent avec deux dimensions: la dimension horizontale (surface, navigation, zones de pêche, etc.) et la verticale (espace aérien, plateau continental, fond des mers)! Ce serait très beau de pouvoir considérer tout cela de manière aussi tranchée. Mais les États

> n'ont que faire de la beauté. Ils sont mus par des intérêts et des systèmes, et ce qui ne sert pas ces derniers ne retient pas leur attention.'

Dans la même lettre, on peut lire: ''Le premier devoir d'un homme est de sourire de ses propres erreurs''.

Le 13 août 1958, parlant d'une invitation à un repas officiel, il me disait:

> Bien sûr, j'ai demandé à être excusé. Si mes hôtes s'en offensent, peu m'importe. Le temps fuit et il faut que je le rattrape par la queue. Pas une minute à perdre.

Et à propos d'un jeune collègue qu'il n'aimait pas: ''J'ai le plus grand mal à retenir les gifles qui meurent d'envie d'entrer en contact avec le visage de ce jeune homme''.

Gilberto Amado avait épousé une femme qui appartenait á l'une des plus anciennes familles de Recife, et ils eurent ensemble trois enfants, deux filles et un garçon. Il s'intéressait particulièrement à ses deux filles, Lou et Vera, toutes deux très attachantes. Vera, artiste dramatique, devait épouser le metteur en scène Henri Georges Clouzot, et elle eut la vedette dans deux de ses films devenus célèbres, *Le salaire de la peur* et *Les diaboliques*. Le mariage d'Amado ne dura pas longtemps; le couple dut divorcer. Le seul attachement véritable et durable de sa vie eut pour objet une dame de la noblesse italienne qu'il appelait, avec une nuance chevaleresque, ''l'Être insigne''. La chose curieuse est que, lorsqu'il parlait de cette personne avec des intimes, il l'appelait le plus naturellement du monde de ce nom pompeux et grandiloquent, comme s'il avait dit Marie ou Jeanne. Au point que seulement un petit nombre de personnes – dont moi-même – connaissaient son véritable nom.

Dans une lettre de Paris datée du 13 juillet 1959, il me disait en parlant d'elle: ''Bénie soit celle qui me place si haut et qui a apporté à mon existence contingente l'amour absolu''. Vingt ans après leur liaison romanesque à Florence, il lui demanda de le rejoindre à Paris. Dans une lettre du 26 janvier 1959, il m'écrivait:

> L'Être insigne est arrivée hier, lasse, fatiguée, mal habillée. Il faut le reconnaître: son nez est devenu plus aquilin et ses traits sont plus anguleux et durcis que je ne m'y attendais. Mais elle conserve, par son ''allure'' sa légèreté d'oiseau, d'être toujours prête à s'envoler. Il fut entendu que rien de physique ne devrait être tenté entre nous. Mais je n'en fus pas déçu, tant

> sont profonds les sentiments qu'elle m'inspire. Son esprit, son âme lumineuse continueront de m'enchanter. Sa voix merveilleuse est une musique qui m'enveloppe tout entier.

En 1967, j'étais représentant permanent auprès de l'Organisation des Nations Unies et Amado, comme d'habitude, arriva à New York en qualité de représentant à la Sixième Commission. Un jour, à six heures du matin, il m'appela au téléphone, se plaignant d'une terrible douleur dans la poitrine. Ce fut sa première crise cardiaque. Je l'emmenai au New York Hospital. Connaissant son tempérament, je craignais les pires réactions de sa part á l'égard du milieu hospitalier. Mais – chose surprenante – on ne vit jamais malade plus docile. Il se remit, mais la vie ne fut plus la même pour lui. Privé de ses bons vins et de ses havanes, il n'était plus le même.

Deux ans plus tard, à Rio, deux jours après avoir reçu les félicitations les plus flatteuses pour la publication d'une nouvelle édition de ses premiers essais, je fus prié de me rendre chez lui par l'un de ses frères. Je le trouvai étendu, déjà vêtu de son uniforme de l'Académie brésilienne des belles lettres, prêt pour le dernier long voyage. Il mourut comme il avait toujours voulu mourir: les souffrances d'une longue maladie lui furent épargnées.

Cet homme de grande valeur s'éteignit avec la distinction qui avait marqué toute son existence, dont il avait savouré chaque instant.

Mais le moment est venu de le citer une fois encore:

> Remplir jusqu'à le faire éclater chaque instant de sa vie. Ne jamais permettre que, devant nos yeux, et surtout à l'intérieur de nous-même, puissent s'étioler les roses de la vie.

La contribution de Gilberto Amado aux travaux de la Commission du Droit International

Par A. A. CançadoTrindade
Conseiller juridique du Ministère des Relations Extérieures du Brésil
*Professeur de droit international à l'Institut Rio Branco**
et à l'Université de Brasilia

La présente session de la Commission du Droit International de l'Organisation des Nations Unies coïncide avec le centenaire de la naissance de Gilberto Amado, premier membre brésilien de cette commission. En ma qualité de successeur d'Amado aux fonctions de conseiller juridique du Ministère des Relations Extérieures du Brésil, je suis particulièrement honoré de m'associer à cette commémoration avec le juge Sette Câmara et l'ambassadeur Calero Rodrigues, successeurs d'Amado à la Commission du Droit International. À la différence du juge Sette Câmara et de l'ambassadeur Calero Rodrigues, je n'ai pas eu l'occasion et le privilège de connaître Gilberto Amado personnellement. Ce que je dirai de son activité de membre de la Commission fera donc apparaître ce que l'on appelle le fossé entre les générations, et sera également marqué par l'impartialité liéeá ce décalage: ce que je dirai, en effet, découlera de l'étude que j'ai faite des sources documentaires concernant son activité de membre de la Commission.

Avant de rappeler cette action, il serait bon cependant de retracer brièvement ce que fut la vie de Gilberto Amado. Né dans l'État de Sergipe, dans le Nord-Est du Brésil, le 7 mai 1887, Amado obtint son diplôme de licencié en droit de la Faculté de droit de Recife en 1909, et c'est dans cette ville qu'il débuta comme maître de conférences en droit pénal (1911). Il fut ensuite muté à la Faculté de droit de Rio de Janeiro. Il fut élu, pour

* École des Hautes Études Diplomatiques du Brésil.

des mandats successifs (1915-1917, 1921, 1924-1928), député pour l'État de Sergipe; à la Chambre fédérale des représentants, il fit partie de la Commission des questions diplomatiques et des traités, qu'il présida, et, en tant que rapporteur de la Commission des finances, où il eut l'occasion d'émettre des avis sur des questions telles que l'attitude du Brésil à l'égard du panaméricanisme et de la Société des Nations[128]. En 1927, il fut élu sénateur de l'État de Sergipe, et il exerça son mandat jusqu'en 1930.

Sa nomination, le 1er novembre 1934, à la succession de Clóvis Beviláqua comme conseiller juridique du Ministère des Relations Extérieures du Brésil marque le début de sa longue carrière de juriste international. Au cours de la période pendant laquelle il fut conseiller juridique à Itamaraty (c'est-à-dire jusqu'au 18 décembre 1935), Amado se pencha en particulier sur des questions telles que les rapports entre le pouvoir exécutif et le pouvoir législatif dans le processus d'élaboration des traités[129]. Après cette époque, il représenta le Brésil à la Conférence internationale américaine de Buenos Aires (1935)[130]; ambassadeur du Brésil à Santiago (1936-1937), Helsinki (1938-1939), Rome (1939-1942) et Berne (1942-1943)[131]; représentant du Brésil au Conseil d'administration de l'OIT (1945) et, à partir de 1946, à l'Organisation des Nations Unies (Sixième Commission de l'Assemblée générale); représentant de son pays à diverses conférences internationales, et chef de la délégation brésilienne à la deuxième Conférence des Nations Unies sur le droit de la mer (1960). En 1948, il fut élu membre de la Commission du Droit International de l'Organisation des Nations Unies, où il demeura, chaque fois réélu, jusqu'à la fin de sa vie. En 1968, il reçut le titre de professeur *honoris causa* de l'Université fédérale de Rio de Janeiro[132], ville où il mourut le 27 août 1969.

Le nom de Gilberto Amado est lié á la création même (conformément á l'Article 13 de la Charte des Nations Unies) de la Commission du Droit International. Amado avait en effet pris part aux travaux de la Commission pour le développement progressif du droit international et sa codification (la Commission dite ''des Dix-Sept''), instituée par la résolution 94 (I) de l'Assemblée générale, en date du 31 janvier 1947; cette commission jeta les bases du statut de la Commission du Droit International, approuvé par la résolution 174 (II), qui adoptée le 21 novembre 1947 par l'Assemblée général,

[128] Fundação Getúlio Vargas, *Dicionário Histórico-Biográfico Brasileiro 1930-1983,* vol. I, p. 109. Au sujet des interventions et des activités d'Amado à la Chambre des députés, voir Câmara dos Deputados, *Perfis Parlamentares* – vol. II.: *Gilberto Amado* (présentation H. Senna), Brasília, C.D., 1979, p. 25 à 297.

[129] Voir son avis de 11 de septembre 1935, reproduit dans A. A. Cançado Trindade, *Repertório da Prática Brasileira do Direito Internacional Público* (période 1919-1940), Brasília, MRE/FUNAG, 1984, p. 79 et 80.

[130] Deux années auparavant, il avait représenté le Brésil à la Conférence internationale américaine de Montevideo (1933).

[131] MRE, *Almanaque do Pessoal,* 1935, p. 64 et 65; 1943, p. 150; 1944, p. 156.

[132] Cinq ans auparavant, en 1963, il avait était élu membre de l'Académie brésilienne des belles lettres (où il entra en fonctions en 1964).

céda la Commission du Droit International[133]. Amado, plusieurs années plus tard, fit un jour ressortir, parmi les faits qui jalonneront sa longue expérience de membre de la CDI pendant une vingtaine d'années, le fait, dont il s'honorait particulièrement, d'avoir rédigé avec Philip Jessup et Wladimir Koretsky le texte, approuvé par la suite, de l'article 15 du statut de la Commission, c'est-à-dire celui où sont définies, dans le contexte de ce statut, les expressions ''développement progressif du droit international'' et ''codification du droit international''. Il était convaincu que les deux expressions devaient être considérées ensemble, car les activités de la future Commission ne devaient pas représenter un nouvel effort de codification proprement dite du droit international qui fût semblable, ou même moment[134]. On verra que les efforts qu'il fit dans ce sens ne furent pas inutiles.

Devenu membre de la Commission du Droit International, Gilberto Amado en fut unanimement élu rapporteur lors de sa première session, en 1949[135]. Il prit une part active aux premiers débats de la Commission consacrés à son plan de travail, à savoir l'examen d'ensemble du droit international visant à circonscrire les sujets propres à une codification. Il fit observer que le choix des sujets à retenir ne pouvait être opéré rationnellement qu'en fonction de certains critères à cet égard, il incombait à la Commission elle-même de les énoncer, ainsi que d'établir l'ordre de priorité des sujets choisis en vertu de ces critères. Quoique, soutenait Amado, la commission dût s'efforcer de faire adopter ses projets par les États afin de fournir la base des conventions internationales, ses travaux ne dépendaient pas d'une approbation immédiate de la part des États et le choix des sujets ne devait pas dépendre des chances qu'ils avaient d'être acceptés. Selon Amado, la Commission devait choisir des sujets où apparaissaient des lacunes et des difficultés, et garder présent à l'esprit le fait que ''ses rapports pouvaient être approuvés par l'Assemblée générale et, ainsi, ne manqueraient pas d'exercer une influence sur les États lorsque ceux-ci en viendraient à les examiner''. ''Même si l'Assemblée se bornait à prendre note de ses rapports, ajoutait Amado, ils conserveraient au moins cette valeur qu'ils pourraient servir de moyens auxiliaires de détermination des règles de droit'', au sens de l'Article 38 (paragraphe 1, alinéa d) du Statut de la Cour internationale de Justice[136].

[133] Nations Unies, *La Commission du droit international et son œuvre,* 3e éd., New York, Nations Unies, 1980, p. 4 à 6.

[134] "Contribuições de Gilberto Amado ao Direito Internacional", *Correio da Manhã*, Rio de Janeiro, 8 septembre 1968, deuxième partie, p. 1.

[135] Deuxième Séance, du 13 avril 1949; Nations Unies*, Annuaire de la Commission du Droit International* (appelé plus loin "Annuaire" [1949], p. 14 du texte anglais; voir aussi p. 221, de la Commission à l'Assemblée générale concernant les travaux de sa première session. Il insistait notamment sur le fait que la tâche de la Commission était de "codifier le droit international de l'avenir'' (ibid., p. 260 du texte anglais).

[136] Ibid., p. 18 du texte anglais.

Quoi qu'il en soit, Amado réaffirma, lors des débats tenus par la CDI le 18 avril 1949 que la Commission devait procéder ''selon un plan systématique, en ayant en vue les intérêts et les buts des Nations Unies''. Personnellement, il aurait souhaité que la Commission commence par deux questions en particulier, à savoir ''les sujets de droit international et la reconnaissance des situations juridiques'', étant donné notamment qu'elles étaient liées à l'une des questions dont l'Assemblée générale lui avait confié l'examen, celle des droits et des devoirs des États. Amado ajoutait que la Commission pourrait ensuite se tourner vers la codification de sujets qui étaient ''pratiquement réalisables'', tels que le droit de la mer, le droit de la guerre (en particulier la guerre aérienne), la formulation des principes de Nüremberg, la nationalité, ainsi que d'autres questions relatives à la condition de l'individu en droit international[137].

Tout au long des années, Gilberto Amado fut toujours attentif à ce que devait être le rôle fondamental de la Commission, ou tout au moins à la conception qu'il en avait, et il rappelait constamment à ses collègues quel devait être ce rôle. Il n'était pas, déclarait-il en 1950, de régler les problèmes immédiats, mais de codifier et de faire évoluer le droit international, travail ''de longue haleine'': ''La Commission est appelée à progresser lentement mais sûrement au bénéfice des générations futures ; elle ne saurait décider à la hâte[138]''. Selon lui, le travail de codification de cet organe ''présupposait l'existence d'un fonds de caractère coutumier, et ce fonds ne pouvait être négligé, même s'il devait être adapté à la pratique moderne[139]''. Quelque dix an plus tard, il faisait observer de nouveau: "Si l'on veut obtenir des résultats positifs, les progrès doivent nécessairement être lents››, et il citait en exemple la manière dont la Commission avait abordé des matières telles que le droit de la mer et la responsabilité des États[140].

En 1961, Amado rappelait, au cours des débats de la Commission, que par les passé la Société des Nations s'était inspirée des travaux de l'Institut de droit international pour dresser une liste des matières se prêtant à codification, et qu'auparavant même, à l'intention des Conférences de la paix tenue à La Haye en 1889, puis en 1907, l'Institut avait ''proposé un bon nombre de sujets dont la Société des Nations avait retenu quelques-uns[141]''. Toutefois, déclarait-il par ailleurs, ''ce n'est pas le rôle de la Commission que d'entreprendre une remise en forme détaillée du droit international'', car ''ce genre de travail appartient au

[137] Ibid., p. 33 du texte anglais.
[138] *Annuaire (1950)*-I, p. 254 du texte anglais.
[139] Ibid., p. 65 du texte anglais.
[140] *Annuaire* (1961), p. 219.
[141] Ibid. p. 219.

domaine académique''. Quant à la Commission, ''elle doit dégager les règles présentant de l'importance dans les relations interétatiques'', et il ajoutait, précisément sur ce dernier point: ''L'importance de la fiche de la Commission à cet égard s'est considérablement accrue en raison de la naissance d'un grand nombre de nouveaux États (qui) tiennent beaucoup à participer à l'élaboration des règles de droit international du monde contemporain[142]''.

Si, plus d'une fois, Amado a déclaré que la Commission ne devait pas ''se préoccuper exagérément'' de la manière dont les gouvernements accueillaient ses projets d'instrument[143], cela ne l'a pas empêché de souligner tout au long des années l'importance de la pratique des États[144]; la Commission, déclarait-il, éprouverait "les plus grandes difficultés", pour codifier le droit international dans des matières "où la pratique des États [était] très récente et où les règles [n'étaient] pas encore dégagées[145]". La pratique étatique était toujours un élément concret essentiel: si elle était considérablement généralisée et implantée, elle pouvait se prêter au travail de codification; au contraire, dans les cas relativement auxquels le droit n'était pas encore suffisamment développé dans la pratique des États, il y avait place alors pour un développement progressif du droit international; c'est pourquoi, ajoutait Amado en 1951, l'Article 15 du Statut de la Commission avait été rédigé de manière à bien préciser que les expressions "développement progressif" et "codification" avaient été employées ensemble afin de prévoir les deux situations envisagées[146].

En 1952, Amado déclarait qu' "une part du rôle de la Commission en ce qui concerne le développement progressif du droit international et sa codification était de déduire de la pratique des États certaines règles générales[147]". Quelque dix ans plus tard, revenant sur ce point, il déclarait, lors des débats du 16 juin 1961, ce qui suit: "La fiche de la Commission est de définir les normes juridiques en vigueur parmi les États et appliquées par eux – codification du droit international – et, aussi, de dégager certaines autre règles qui vivent déjà dans la conscience juridique des communautés humaines – développement progressif du droit international[148]". Dans une autre intervention qui manifeste de la façon la plus claire sa propre

[142] Ibid., p. 249 du texte anglais.
[143] Voir *Annuaire* (1960)-I, p. 253.
[144] Voir ses déclarations dans ce sens dans: *Annuaire* (1956)-I, p. 70; Annuaire (1957)-I, p. 8 et 108; *Annuaire* (1958)-I, p. 184; *Annuaire* (1968)-I, p. 36.
[145] *Annuaire* (1964)-I, p. 222; voir aussi p. 108.
[146] *Annuaire* (1951)-I, p. 135 du texte anglais; voir aussi *Annuaire* (1954)-I, p. 40 du texte anglais; voir aussi, sur les questions de méthode, *Annuaire* (1951)-I, p. 258-259, 367 et 399 du texte anglais, *et Annuaire* (1966)-I, deuxième partie, p. 327.
[147] *Annuaire* (1952)-I, p. 183 du texte anglais.
[148] *Annuaire* (1961)-I, p. 204.

vision du rôle et du travail de la Commission (débats du 9 juillet 1952), Gilberto Amado déclara avec insistance qu'il incombait à la Commission, en tant qu'organe responsable de la codification et du développement du droit international, "de proclamer quel était le droit en vigueur sur tel ou tel point et de recommander la voie qui, selon elle, devait permettre d'améliorer et de développer ce droit"; et, en même temps, il déclarait à ce sujet qu'il "ne saurait faire sienne l'attitude d'une certaine école idéaliste qui se croyait compétente pour dire aux États quels étaient leurs intérêts vitaux[149]".

Déjà, dans les premiers temps de l'existence de la Commission (au milieu de l'année 1952), il avait souligné que "tout instrument international doit être fondé sur des principes reconnus de droit international et être rédigé de telle manière qu'il ait des chances raisonnables d'être accepté par les États[150]". Au début des années 60 (débats du 25 avril 1962), Amado, qui était à l'époque le membre de la Commission ayant siégé le plus longtemps dans cet organe, et qui avait en outre fait partie de la "Commission des Dix-Sept", laquelle avait rédigé le statut de la Commission (voir plus haut), fit ressortir le "travail impressionnant" accompli par la CDI; il rappela que, parmi les matières énumérées dans le document établi par le Secrétariat de l'ONU en 1949, document concernant un examen d'ensemble du droit international dans la perspective des travaux de codification de la Commission, plus de la moitié avaient été étudiées à la date de 1962 (y compris "la totalité du droit de la mer"), et il ne restait, sur cette liste de 1949, que six matières. En ce qui concernait certaines de ces questions, telles que la reconnaissances des États et des gouvernements (voir plus loin), "la pratique étatique était encore obscure", tandis que d'autres questions "n'avaient guère d'importance pratique" pour les États. En outre, la Commission s'était occupée d'un certain nombre de sujets dont l'étude lui avait été confiée par l'Assemblée générale. Ainsi, nonobstant "une certaine impatience" qui s'était manifestée lors des débats de la Sixième Commission de l'Assemblée générale, Amado recommandait à la Commission du Droit International "d'envisager les choses avec sérénité": elle devait maintenant se donner la priorité au droit des traités, et, après en avoir fini avec cette matière, se préoccuper du choix des sujets "qui étaient parvenus à un stade de maturité suffisant pour pouvoir être codifiés[151]".

[149] Annuaire (1952)-I, p. 125 du texte anglais.

[150] Ibid., p. 110 du texte anglais.

[151] *Annuaire* (1962)-I, p. 3. En 1950, Amado rappela à la Commission qu'elle était chargée de la codification (et du développement progressif) du droit international public mais non du droit international privé; la commission ne devait pas s'aventurer dans ce dernier domaine, '' dont il serait sage de ne pas s'occuper '', ajouta-t-il [*Annuaire* (1950)-I, p. 196 du texte anglais].

Dans certaines de ses interventions antérieures, Amado avait soutenu, en ce qui concerne les "sources" du droit international, que l'incorporation des principes généraux de droit parmi les catégories énumérées à l'article 38 du Statut de la Cour internationale de Justice "empêcherait pratiquement" de jamais prononcer le *non liquet*[152]; il avait fait ressortir en particulier l'interaction entre la coutume (qui n'avait pas nécessairement à être conforme au droit international préexistant) et les traités[153]. Quant à la situation des États au regard du droit international, Amado, dès 1949 – à une époque où les ouvrages doctrinaux débattaient des théories dites constitutives et déclaratives de reconnaissance des États – précisait que la question de la qualité d'État au regard du droit international était distincte de celle de la reconnaissance des États: certes, déclarait-il, "le droit international ne stipule pas l'obligation de reconnaître les États", mais comment ne pas voir que le "droit d'exister" – qui a notamment pour corrélatif le "droit d'indépendance" – est "la source de tous les autres droits des États[154]"?

Gilberto Amado participa activement aux travaux de la CDI concernant le droit de la mer, préalablement à la première Conférence des Nations Unies consacrée expressément à ce sujet (Genève, 1958). Tout au long des débats prolongés qui ont eu lieu à la Commission dans les années 50, on pourrait citer ses nombreuses interventions sur des sujets tels que les droits des États côtiers[155], le plateau continental[156], le régime des pêcheries[157], la zone contigüe[158], la haute mer[159], le régime des îles[160] et, par la suite, au cours de l'année où eut lieu la deuxième Conférence des Nations Unies sur le droit de la mer (1960), son intervention sur le régime des eaux historiques, et en particulier des baies historiques[161]. Il y a un sujet, toutefois, sur lequel il s'est particulièrement attardé, à savoir le régime de la mer territoriale, et en particulier la largeur de la mer territoriale[162].

[152] Voir *Annuaire* (1958)-I, p. 44 et 46; voir aussi *Annuaire* (1954)-I, p. 83 du texte anglais.
[153] Voir *Annuaire* (1950)-I, p. 275 et 234-235 du texte anglais; voir aussi *Annuaire* (1958)-I, p. 85.
[154] *Annuaire* (1949), p. 79-80, 82-83 et 95 du texte anglais. Plusieurs années plus tard, affirmant le principe de l'égalité souveraine des États, il déclarait que le terme même d'"État" impliquait le mot "indépendant"; *Annuaire* (1965)-I, p. 32.
[155] Voir *Annuaire* (1950)-I, p. 234-235 du texte anglais; *Annuaire* (1956)-I, p. 55-56 et 88.
[156] Voir *Annuaire* (1950)-I, p. 182, 197 et 219-221 du texte anglais; *Annuaire* (1951)-I, p. 268-269 et 297-298 du texte anglais; *Annuaire* (1953)-I, p. 348 du texte anglais.
[157] Voir *Annuaire* (1950)-I, p. 211 du texte anglais; *Annuaire* (1951)-I, p. 317, 322 et 324 du texte anglais; *Annuaire* (1955)-I, p. 158 du texte anglais.
[158] Voir *Annuaire* (1950)-Il, p.197 du texte anglais; *Annuaire* (1951)-I, p. 306 et 325 du texte anglais; *Annuaire* (1952)-I, p. 158 et 162 du texte anglais; *Annuaire* (1955)-I, p. 59 et 176 du texte anglais.
[159] Voir *Annuaire* (1950)-I, p. 182-183 et 198-200 du texte anglais; *Annuaire* (1951)-I, p. 285, 311 et 341 du texte anglais; *Annuaire* (1955)-I, p. 59 du texte anglais.
[160] Voir *Annuaire* (1950)-I, p. 284 du texte anglais.
[161] Voir *Annuaire* (1960)-I, p. 125-126.
[162] *Annuaire* (1950)-I, p. 204-206 du texte anglais.

Au cours des premiers débats consacrés à ce problème, en 1952, Amado pose la question de savoir si, étant donné l'absence de critère juridique permettant de déterminer l'étendue de la mer territoriale, "la Commission pourrait parvenir à quoi que ce soit en essayant d'imposer l'uniformité dans une matière où les divergences ne pouvaient être évitées, ou en voulant codifier des règles non existantes". "Peut-être, ajoutait-il aussitôt après, la Commission devrait-elle accepter le fait que ce sont les États qui doivent fixer eux-mêmes la limite de leur mer territoriale, et s'attacher surtout, quant à elle, à des questions telles que celle de la ligne de base, sur laquelle un accord est possible[163]". Selon lui, le Rapporteur spécial n'avait "pas encore réussi à démontrer qu'il existait une règle sur la délimitation de la mer territoriale [...] ou qu'on pouvait en tirer une de la pratique[164]". Trois ans plus tard, alors que les débats de la Commission semblaient être pratiquement dans l'impasse sur ce point particulier, Amado présenta une proposition selon laquelle la Commission reconnaissait que la pratique internationale n'était "pas uniforme en ce qui concerne la limitation de la mer territoriale à trois milles" et considérait d'autre part que la pratique internationale "n'autorisait pas les États à étendre les limites de la mer territoriale au-delà de douze milles[165]". Il précisa qu'étant donné la diversité de la pratique des États en la matière la Commission "n'avait pas compétence" pour décider que la règle des trois milles faisait partie du droit international[166], alors qu'en revanche il était clair que, vu la pratique internationale de l'époque, il serait exagéré et injustifié de prétendre porter les limites de la mer territoriale au-delà de douze milles[167]. La formule d'Amado, approuvée (par 8 voix contre 2, avec 3 abstentions) le 14 juin 1955[168]", permit à l Commission d'aller de l'avant dans l'examen de la question.

Gilberto Amado fit observer par la suite que sa proposition faisait apparaître clairement que ''la largeur de la mer territoriale était un sujet sur lequel le droit international était en train d'évoluer''; cette proposition, en outre, reconnaissait que ''la pratique étatique n'était pas uniforme en ce qui concerne la règle traditionnelle des trois milles'' et que certains États revendiquaient jusqu'à douze milles. La Commission ne pouvait fournir aucun autre avis sur les revendications concernant

[163] *Annuaire* (1952)-I, p. 154 du texte anglais; voir aussi p. 170 et 172 du texte anglais.
[164] Ibid., p. 183 du texte anglais; voir aussi p. 187-188.
[165] *Annuaire* (1955)-I, p. 157 du texte anglais; voir aussi p. 158-169 du texte anglais, au sujet de la position d'Amado sur ce point, position qu'il qualifiait lui-même de "réaliste".
[166] La formulation qu'il proposait "accordait au principe des trois milles autant de reconnaissance qu'il était possible de lui accorder" (ibid., p. 163 du texte anglais).
[167] Ibid., p. 163 du texte anglais; voir aussi p. 169 du texte anglais.
[168] Voir Ibid., p. 170 du texte anglais.

des distances échelonnées entre trois et douze milles[169], et la validité ou la non-validité de cette revendication devait être élucidée et déterminée par la pratique étatique, ainsi que, peut-être, par des sentences arbitrales et des décisions judiciaires[170]. Amado ne pouvait évidemment pas prévoir les revendications formulées par la suite, portant sur une limite de deux cents milles, mais, quoi qu'il en soit, il était opposé à la thèse selon laquelle de droit international établissait une limite de trois milles: certes, déclarait-il, cette dernière limite était depuis longtemps en vigueur dans la pratique de certains États, mais d'autres États ne s'y tenaient pas et, quant à lui, il jugeait ''inacceptable que les États reconnaissant une limite de trois milles voulussent imposer aux autres l'obligation de faire en sorte que la pratique de quelques-uns fût expressément reconnue comme universelle[171]''. Il répéta que, pour le moment, la Commission ne pouvait faire plus que ce qu'elle avait fait en adoptant la proposition de son membre brésilien, car – pour le citer – ''la CDI ne pouvait reconnaître que des faits'', et ''ne pouvait codifier que la réalité''; il demanda instamment à la Commission ''de ne pas chercher à définir de façon plus précise la situation, car c'était un fait que les États étaient amenés, en raison de nécessités urgentes, à prendre des mesures en ce qui concerne la largeur de la mer territoriale'', c'est-à-dire ''à porter plus loin les limites de leur mer territoriale[172]''.

Amado avait une vue précise du fait que la question était en pleine évolution; toujours attentif à la réalité des faits, il ne voulait pas, néanmoins, empêcher ou contrarier l'évolution de cette matière. L'année suivante (1956), le Président de la Commission, S. B. Krylov, à l'ouverture de la huitième session, lui rendit hommage, déclarant que ses ''remarquables travaux'' avaient ''permis de réaliser, dans une certaine mesure, l'accord sur la question de la largeur de la mer territoriale''; le Président ajouta que les progrès accomplis dans le sens de la codification de cette matière étaient ''en grande partie dus aux efforts de juristes d'Amérique latine[173]''. La formule d'Amado ne résista pas aux assauts du temps, et elle n'a plus aujourd'hui qu'un intérêt historique. Cependant, à l'époque, voici un peu plus d'une trentaine d'années, elle permit à la Commission de sortir de l'impasse et de poursuivre ses travaux sur la question considérée.

Un autre sujet auquel Gilberto Amado consacra une attention toute particulière est celui de la définition de l'agression. Dans un mémorandum

[169] Ibid., p. 171-173 du texte anglais.
[170] Ibid., p. 172 et 182 du texte anglais.
[171] Voir ibid., p. 173, 179-180, 187 et 193 du texte anglais.
[172] Ibid., p. 186 et 180 du texte anglais. Cependant, il faisait observer que '' toute extension au-delà de douze milles n'était pas conforme au droit international '' à l'époque (ibid., p. 280 du texte anglais).
[173] *Annuaire* (1956)-I, p. 1. Amado déclarait avec insistance que ''la largeur de la mer territoriale dépendait de la pratique internationales ''; ibid., p. 187; et voir aussi p. 180 du texte anglais.

sur ce sujet présenté à la Commission du Droit International en 1951, il commençait par rappeler les deux positions doctrinales fondamentales: d'une part, une définition très générale, abstraite et souple, celle du Protocole de Genève de 1924, et d'autre part une définition stricte énumérant les situations constituant une agression, à savoir celle des Conventions de Londres de 1933 (Conférence du désarmement), cette dernière étant fondée sur ce que l'on a appelé la formule Litvinov-Politis. Amado critiquait cette deuxième approche, qui selon lui ne donnerait pas une définition complète, mettrait seulement l'accent sur les cas d'agression les plus flagrants et, en ce qui concernait le critère territorial, ne pouvait s'appliquer et apporter une solution, par exemple, aux cas où les États en présence prétendaient tous exercer un pouvoir de fait sur un territoire frontalier. En outre, il rappelait les tentatives faite à la Conférence de San Francisco par les Philippines et la Bolivie pour faire inscrite dans la charte constitutive des Nations Unies une définition de l'agression, et la décision prise par la majorité en faveur de la formule figurant à l'Article 39 de la Charte, qui laissait au Conseil de Sécurité le soin de constater *a posteriori* l'existence d'un acte d'agression.

Amado évoquait également le projet yougoslave qui avait abouti à la résolution 378 (V) de l'Assemblée générale, en date du 17 novembre 1950 (''simple critère subsidiaire pouvant aider les organes compétents dans la tâche de définir l'agression'' – voir plus loin), ainsi que le Traité d'assistance réciproque interaméricain de 1947 (article 9), qui faisait apparaître les désavantages d'une définition fondée sur le critère territorial (et mentionnant seulement deux actes comme constituant une agression, tout en laissant les autres actes à l'appréciation de l'organe de consultation)[174].

Amado proposait ensuite une définition de l'agression fondée sur la lettre et sur l'esprit de la Charte des Nations Unies ainsi que sur les objectifs du régime de sécurité collective: cette définition serait proche de celle qui ressortait de la méthode adoptée dans le Protocole de Genève (voir ci-dessus) en ce sens qu'on s'abstiendrait de vouloir y énumérer de façon rigide les actes considérés comme constituant une agression, et cela pour les raisons déjà débattues lors de la cinquième session de l'Assemblée générale (à la Première Commission), qui avaient conduit à l'adoption d'un ''critère subsidiaire'' pour la définition [résolution 378 (V), de 1950, fondée sur la proposition yougoslave]. Amado argumentait dans son mémorandum qu'une définition fondée sur une énumération d'actes pouvant caractériser une agression ne pouvait guère être ''complète'' et

[174] Document A/CN.4/L.6, du 29 mai 1951, reproduit dans Annuaire (1951)-I, p. 28 à 31.

qu'une omission ''serait sûrement dangereuse'', car il n'y avait pas de ''consensus définitif sur la nature des actes agressifs[175]''. Une formule relativement souple, ajoutait-il, ''s'adapterait à toutes les circonstances de fait'' et pourrait être utilisée par le Conseil de Sécurité, et également – en vertu de la résolution 377 (A) (V), de 1950, intitulée ''L'union pour le maintien de la paix'' – par l'Assemblée générale, pour constater l'existence d'un acte d'agression *ex vi* de l'Article 39 de la Charte des Nations Unies, ''sans restreindre la liberté de jugement de l'organe compétent des Nations Unies''. ''L'esprit de la Charte, déclarait Amado à la suite, est de donner à cet organe pleins pouvoirs de décider de l'existence ou non de l'agression". Et il concluait: ''La définition contenant la liste des actes d'agression signifierait une limitation considérable de ces pouvoirs[176]".

Lors des débats tenus par la Commission en 1951, Amado rappela que, ''dés 1921, le Brésil avait proposé à la Société des Nations de décider que le soin de déterminer qui était l'agresseur soit laissé à la Cour permanente de Justice internationale[177]". Il insista sur l'impossibilité d'énumérer de façon exhaustive les cas d'agression ou de parvenir à une définition rigoureuse; une définition ''très large et générale''. Selon lui, tout acte de violence autre qu'un acte de légitime défense ou un acte accompli pour exécuter les mesures coercitives décidées par le Conseil de Sécurité pouvait constituer une agression[178]. Il répéta ses arguments, mais cette fois en qualité de représentant du Brésil, au cours de sessions successives (1951, 1952 et 1954) de la Sixième Commission de l'Assemblée générale des Nations Unies, en ajoutant que la majeure partie des accords concernant l'agression évitaient de définir cette notion et que la Charte des Nations Unies était satisfaisante à cet égard[179]: il ne fallait pas, en prétendant définir les ''concepts encore imparfaitement cristallisés'', risquer de limiter la liberté d'action des organes créés par la Charte; il fallait ''laisser intacte'', concluait-il, la ''faculté virtuelle de développement'' que possédaient les principes affirmés dans ce texte fondamental[180].

Ce qui s'est passé par la suite a prouvé que les vues d'Amado en la matière étaient fondées. Des années plus tard, la définition de l'agression qui a été arrêtée par le Comité spécial des Nations Unies pour la question de la définition de l'agression et adoptée par l'Assemblée dans la résolution

[175] Ibid., p. 32.
[176] Ibid., p 32.
[177] *Annuaire* (1951)-I, p. 119 du texte anglais.
[178] Ibid., p. 108, 120 et 234 du texte anglais; voir aussi p. 94, 104, 106-107, 111, 113, 115, 134, 229, 231, 250, et 378 du texte anglais. Voir enfin Annuaire (1963)-I, p. 63.
[179] Interventionsreproduitesdans A. A. Cançado Trindade, *Repertório da Prática Brasileira do Direito Internacional Público* (période 1941-1960), Brasília, MRE/FUNAG, 1984, p. 347-351; voiraussi p. 351-352
[180] Ibid., 349.

3314 (XXIX), du 14 décembre 1974, tout en limitant le concept d'agression à l'emploi de la force armée par un État contre un autre État (article premier) et en comportant une énumération non limitative de situations (articles 3 et 4), reconnaît au Conseil de sécurité la faculté de constater l'existence d'un acte d'agression conformément à la Charte des Nations Unies (article 2) et énonce le principe de la non-reconnaissance des situations résultant de l'agression (article 5)[181]. La définition de l'agression donnée par les Nations Unies en 1974 a le mérite de garantir le minimum: le Conseil de Sécurité ne peut, sans risquer une opposition, feindre d'ignorer un acte d'agression qui est allégué par certains États.

La franchise qui caractérisait Gilberto Amado ajoutait sans aucun doute du sel à ses interventions, qui, tout au long des années 50, se firent particulièrement vives au cours de la controverse qui l'opposa pendant longtemps à Georges Scelle, rapporteur spécial pour la question, sur le projet concernant la procédure arbitrale. Amado commença par faire observer, en 1950, que la procédure arbitrale ''reposait tout entière sur le compromis'', mais M. Scelle semblait vouloir deux compromis, à savoir un compromis pour constituer le tribunal arbitral et le compromis proprement dit; en d'autres termes, il semblait vouloir faire de l'arbitrage une ''construction à deux étages[182]''. En 1952, Amado, faisant entièrement sienne la définition de l'arbitrage donnée à l'article 37 de la Convention de La Haye pour le règlement pacifique des conflits internationaux (1907), fit valoir que l'essence du système était ''de rapprocher les parties sur la base du respect de la loi''. Il était, en conséquence, opposé à toute démarche qui introduisait dans la structure de l'arbitrage des ''éléments extérieurs'', et qui prenait pour hypothèse la mauvaise foi des gouvernements. Il se déclarait hostile à l'affirmation de nobles principes qui n'avaient que très peu de rapport avec la réalité'', et déplorait ''l'approche théorique et idéaliste'' dont souffrait le projet considéré: "L'arbitrage, précisait-il, est tout à fait distinct du règlement judiciaire, et les deux notions doivent rester séparées l'une de l'autre[183]".

Selon lui, si le projet de Scelle était adopté, ''les parties ne seraient plus maîtresses de la procédure''. Il lui semblait que le rapporteur ''souhaitait exclure la possibilité de choisir comme arbitres des chefs d'État", alors que, pour sa part, il jugeait ''impossible de généraliser

[181] Voir nations Unies, *Rapport du Comité spécial pour la question de la définition de l'agression (1974), Documents officiels de l'Assemblée générale* – Vingt-neuvième session (1974), supplément nº 19 (A/9619), p. 1 à 45 et en particulier les pages 6 à 9 et 10 à 13; voir aussi Nations Unies, document A/9890, du 6 décembre 1974, pages 1 à 7 du texte anglais.

[182] *Annuaire* (1950)-I, p. 266 du texte anglais; voir aussi p. 267 du texte anglais.

[183] *Annuaire* (1952)-I, p. 21, 24 et 27 du texte anglais; voir aussi p. 35, 36, 38 et 72 du texte anglais. Au sujet du règlement judiciaire, voir son intervention dans *Annuaire* (1963)-I, p. 175-176 du texte anglais.

ainsi'', et il citait l'exemple de la sentence rendue en février 1895 par Grober Cleveland, qui avait été à l'origine d'un règlement pacifique satisfaisant de la question frontalière sur laquelle s'opposaient le Brésil et l'Argentine. Il était essentiel de sauvegarder ce qui, à son avis, était "un élément crucial de l'arbitrage, à savoir la liberté, pour les parties, de choisir leurs juges[184]". Amado n'épargna pas au projet de la Commission d'autres critiques encore: il se déclara fermement opposé a l'idée selon laquelle le règlement de la Cour internationale de Justice (chapitre 111 du Statut) devait être également appliqué (subsidiairement au règlement du tribunal arbitral énoncé dans le compromis). ''Un règlement intérieur conçu pour un organe judiciaire, faisait-il observer, pourrait difficilement être appliqué de manière satisfaisante dans le cadre d'un tribunal arbitral, car la structure et le but de ce dernier sont plus limités[185]".

Amado ajoutait: ''Les parties, normalement, ont recours à l'arbitrage après avoir constaté leur impuissance à régler leur différend par des moyens politiques; en conséquence, la sentence arbitrale doit avoir un caractère aussi définitif que possible[186]". Le projet de la Commission lui semblait ''ne pas tenir compte des réalités de la vie internationale''. Il rendait hommage à ''l'intégrité morale et intellectuelle du Rapporteur spécial, dont le projet, disait-il, était tout entier imprégné de la conviction que l'arbitrage était un processus juridique et non pas politique''. ''D'un autre côte, ajoutait-il ceux qui pensent que l'arbitrage fournit aux États un recours pour régler les différends estiment que les sentences arbitrales doivent être définitives, et [...] il ne faut pas sacrifier ce qui est réalisable sur l'autel du perfectionnisme juridique[187]".

Au cours des débats de 1953, Amado déclara avec insistance: ''L'arbitrage n'est pas une procédure judiciaire'', en ajoutant: ''Le projet de la Commission porte un coup mortel à la procédure d'arbitrage telle qu'on l'entendait jusqu'ici[188]". Selon son argumentation, qu'il expose en 1957, le projet de la Commission ne devait pas être considéré comme un ''modèle'', mais simplement comme un ''document de référence que consulteraient les gouvernements ou les juristes soucieux d'éviter les difficultés auxquelles donne souvent lieu la procédure d'arbitrage[189]". En 1958, fidèle a sa propre conception du droit international, il lança sa dernière attaque contre le projet. Il fit observer, tout d'abord, que ''l'idée d'une convention [avait] été

[184] *Annuaire* (1952)-I, p. 42, 27 et 51 du texte anglais; voir aussi p. 43 du texte anglais.
[185] Ibid., p. 57 du texte anglais; voir aussi p. 74 et 97 du texte anglais.
[186] Ibid., p. 92 du texte anglais.
[187] Ibid., p. 85 et 94 du texte anglais.
[188] *Annuaire* (1953)-I, p. 11 et 7 du texte anglais; voir aussi p. 16-17, 20, 23-24, 50, 262 et 325 du texte anglais.
[189] *Annuaire* (1957)-I, p. 187 et 199. De toute façon, ajoutait-il, '' le projet […] établit un système totalement différent du système traditionnel d'arbitrage '' (ibid., p. 204).

remplacée par celle d'un ensemble de règles types''. Ces règles, et d'autres analogues, pourraient ''se révéler utiles pour les théoriciens'' du droit international, mais déclarait-il, ''ce qui intéresse les États, c'est le caractère obligatoire des textes contractuels[190]''. Gilberto Amado était fermement hostile à l'idée de toute espèce de recours contre une sentence arbitrale, ainsi qu'au renvoi du différend devant la Cour internationale de Justice; le but de l'arbitrage était précisément ''de mettre fin aux différends'', et ''une sentence arbitrale est définitive[191]''. La notion d'appel était ''contraire à l'esprit même de l'arbitrage'', déclarait-il, en citant les Conventions de la Haye de 1907 (article 81) et de 1899 (article 54), qui stipulaient que ''la sentence arbitrale règle le différend définitivement et sans appel[192]''.

Amado rejetait, enfin, l'idée de la possibilité d'introduire une demande en révision auprès du même tribunal dix ans après la sentence: il rappelait que c'était ''en vertu d'une sentence arbitrale que de vastes régions avaient été reconnues comme faisant partie du territoire du Brésil''. Il lui paraissait inadmissible qu'une ''décision aussi importante [put] demeurer sujette à révision pendant dix années après le prononcé de la sentence[193]''. En effet, ''le caractère essentiel de la sentence arbitrale [était] qu'elle lie définitivement les parties et doit être exécutée immédiatement[194]''. En qualité de représentant du Brésil à la Sixième Commission de l'Assemblée générale, Amado renouvela ses vives critiques contre le projet de la Commission (sessions de 1953, 1955 et 1958), disant que ce projet instituait un ''système d'inspiration judiciaire'' qui aboutissait à une déformation de la procédure arbitrale, et qu'il montrait ''comment on pouvait, très élégamment, élaborer le droit à partir de rien'', le qualifiant de ''construction perfectionniste digne de Pangloss'', et même de ''monument d'optimisme béat[195]'. Peut-être Amado alla-t-il trop loin dans ses critiques; on se rappellera, par exemple, que, dans un avis en date du 30 avril 1959, son compatriote Hildebrando Accioly, qui lui avait succédé en qualité de conseiller juridique du Ministère des Relations Extérieures du Brésil, déclara ne pouvoir faire siennes ces critiques; en effet, pour sa part, il jugeait le projet ''acceptable'' étant donné qu'il n'était pas connu comme devant être un traité général sur l'arbitrage mais qu'il était censé représenter une base d'accord entre les États ou devoir servir de guide ou d'orientation pour des accords en la matiére[196].

[190] *Annuaire* (1958)-I, p. 7 et 85; voir aussi 14, 21-22 et 25-28.
[191] Ibid., p. 93, 36, 70 et 93; voir aussi 28, 34, 41 et 50
[192] Ibid., p. 72.
[193] Ibid,, p. 77.
[194] Ibid., p. 77.
[195] Voir ses interventions à La Sixième Commission de l'Assemblée Générale, reproduites dans A. A. Cançado Trindade, *Repertório da Prática Brasileira do Direito Internacional Público* (période 1941-1960) Brasília , MRE/FUNAG, 1984, p. 284-289 et 63-64.
[196] Voir l'avis reproduit ibid., p. 291-292

Quoi qu'il en soit, Gilberto Amado jugea ses efforts récompensés lorsque, dans sa résolution 1262 (XIII), du 14 novembre 1958, l'Assemblée générale des Nations Unies se borna à ''prendre acte'' du Rapport comportant le projet d'articles relatif à la procédure arbitrale, qui, selon les dispositions de cette résolution, devait être porté à l'attention des États Membres afin que ceux-ci prennent en considération ces articles. Cependant, la fermeté d'Amado lui avait coûté l'amitié de Georges Scelle: comme il le reconnut quelque dix ans plus tard, en septembre 1968, dans un discours prononcé alors qu'il venait de recevoir le titre de professeur *honoris causa* de l'Université fédérale de Rio de Janeiro, il avait regretté les effets qu'avaient eus ces débats sur son collègue, dont il admirait l'intégrité et la vigueur intellectuelle, et il fut le plus heureux des hommes lorsque, plus tard, Scelle prit l'initiative de la réconciliation. Ce jour-là, selon le récit fait par Amado lui-même, ce dernier demanda à Scelle s'il se souvenait de l'ancien ''Chancelier'' du Brésil, Rio Branco, et il insista: ''Secrétaire de Ruy Barbosa à La Haye en 1907[197], comment pouviez-vous envisager qu'un compatriote de Rio Branco admettrait votre conception de l'arbitrage? Vous étiez en train d'anéantir le principe de l'arbitrage et vouliez en faire une simple instance de la Cour internationale de la Haye [...] Si votre doctrine avait été en vigueur, le Brésil attendrait encore le règlement des questions de limites territoriales le concernant[198]''. Scelle sourit et les deux hommes s'embrassèrent[199].

Lorsque la Commission du Droit International entreprit ses travaux de longue haleine sur le droit des traités (avec, au cours des années, quatre rapporteurs successifs, à savoir J.L. Brierly, H. Lauterpacht, G. Fitzmaurice e H. Waldock), Gilberto Amado fit à cet égard de nombreuses interventions, en particulier sur des sujets tels que la classification des traités; la négociation, la signature, la ratification et l'entrée en vigueur des traités[200], l'interprétation[201] la validité[202] et la cessation des

[197] On rappelera que le professeur Georges Scelle lui-même a parlé de l'époque ancienne où il était '' secrétaire de l'Ambassadeur du Brésil '' à savoir en 1907, lors de la Conférence sur la paix tenue à la Haye; voir Haroldo Valladão, *Democratização e Socialização do Direito Internacional,* Rio de Janeiro, Livr. J. Olympio Ed., 1961, p. 50, nº 60.

[198] Selon Amado lui-même. Dans "Contribuições de Gilberto Amado ao Direito Internacional", Correio de Manhã, Rio de Janeiro, 8 septembre 1968, deuxièmepartie, p. 1.

[199] Ibid., p. 1.

[200] Voir Annuaire (1950)-I, p. 65 et 75-77 du texteanglais; Annuaire(1951)-I, p.234; Annuaire(1962)-I, p. 96, 179, 273 et 275; Annuaire(1964)-I, p. 91 et 108; Annuaire (1966)-I, deuxièmepartie p.86.
Voir *Annuaire* (1950)-I, p. 89 et 93 du texte anglais; *Annuaire* (1951)-I, p. 13-14, 22-23, 25-26, 29, 37-38, 40-41, 43 et 46 du texte anglais; *Annuaire* (1959)-I, p. 13, 48, 59, 104, 107 et 202; *Annuaire* (1961)-I, p. 268; *Annuaire* (1962)-I, p. 121, 126 et 128; *Annuaire* (1963)-I, p. 7; *Annuaire* (1965)-I, p. 40, 44, 76, et 124; *Annuaire* (1968)-I, p. 204 et 208.

[201] Voir *Annuaire* (1963)-I, p. 100; *Annuaire* (1964)-I, p. 41 (sur l'interprétation et les effets du droit intertemporel), 50-54, 116, 172, 174, 207, 304 et 326; *Annuaire* (1966)-I, deuxième partie, pages 211 et 315.

[202] Voir *Annuaire* (1961)-I, p. 264-265; *Annuaire (1963)-I,* p. 54-55 et 155; *Annuaire* (1964)-I, p. 247; *Annuaire* (1965)-I, p. 108; *Annuaire* (1966)-I, deuxième partie, p. 39-40.

effets[203]des traités; enfin, les fonctions de dépositaire[204]. À plus d'une occasion, Amado souligna que la capacité d'un État à conclure des traités découlait de son statut de sujet de droit international[205], quelle que fut la formulation adoptée sur ce point; même si aucune disposition à cet effet n'était incorporée au projet de la Commission, cette matière demeurait néanmoins régie par le droit international[206]. Toutefois, ajoutait-il, si une disposition de ce genre devait figurer dans le projet de la Commission, elle pourrait donner l'impression que sa portée englobait la capacité de conclure des traités non seulement des États (capacité qui était évidente et ''naturelle''), mais aussi des organisations internationales; sur ce dernier point, Amado fit observer, dès 1950-1951, qu'une pratique s'était déjà fait jour en la matière, et qu'il n'était guère douteux qu' ''une évolution était en train de se produire, à l'issue de laquelle les organisations internationales pourraient effectivement conclure des traités[207]''. Il était préférable que la Commission, avant de se prononcer sur la question, observe plus avant cette évolution[208], mais, ajoutait Amado, si un article était proposé en vue de préciser que les organisations internationales étaient dotées, pour ce qui était de conclure des traités, d'une capacité analogue à celle des États, il émettrait un vote favorable[209], et cela bien que ''le statut des organisations internationales n'[eût] pas encore été défini en droit international[210]''.

Le problème, comme on le sait, a fait l'objet de débats à la Conférence sur le droit des traités qui s'est tenue à Vienne en 1968-1969, et il n'a été définitivement réglé que l'an dernier, en 1986, lorsqu'a été adoptée la Convention de Vienne sur le droit des traités entre États et organisations internationales ou entre organisations internationales (article 6). La sage intuition et le pragmatisme dont faisait preuve la recommandation faite par Amado au début des années 50 (voir plus haut) devaient être reconnus comme il se devait dans les années qui ont suivi; en effet, si la Commission du Droit International, en 1950-1951, avait procédé autrement et s'était attaquée prématurément au sujet, elle aurait bloqué l'évolution substantielle qui s'est produite en la matière dans la pratique internationale au cours des décennies qui ont suivi; cela a été largement reconnu tout au long de la négociation qui a eu lieu l'an dernier au sujet de la deuxième Convention de Vienne sur le droit des traités, comme

[203] Voir *Annuaire* (1963)-I, p. 106, 110, 121, 125 et 142; *Annuaire* (1964)-I, p. 147.
[204] Voir *Annuaire* (1965)-I, p. 206.
[205] Voir *Annuaire* (1965)-I, p. 270.
[206] Voir *Annuaire (1962)*-I, p. 75-76 et 190.
[207] Voir *Annuaire (*1950)-I, p. 80 du texte anglais.
[208] Ibid., p. 80 du texte anglais.
[209] *Annuaire* (1951)-I, p. 18 du texte anglais.
[210] *Annuaire* (1962)-I, p. 268; voir aussi p. 268.

l'ambassadeur Nascimento e Silva et moi-même avons eu l'occasion de le constater en notre qualité de représentants du Brésil lors de la Conférence tenue à Vienne en 1986 sur le droit des traités entre États et organisations internationales ou entre organisations internationales.

Dans une intervention faite en 1963, Gilberto Amado déclare qu'il se réjouissait de l'incorporation du concept de *jus cogens* dans le projet de la Commission relatif au droit des traités, et il rappela le rôle important que la notion d'ordre public avait joué en droit interne; le problème dont la Commission était saisie, ajoutait-il, se réduisait à savoir ''comment définir la non-licéité en droit international'', ou encore à ''préciser l'objet licite ou possible des traités'': pour sa part, il préférait énoncer le principe sans donner d'exemples[211]. Plusieurs années plus tard, lors de la (première session, 7 mais 1968), Gilberto Amado, en tant que représentant du Brésil, précisa que l'idée d'incorporer une disposition sur le *jus cogens* était apparue pour la première fois lorsque la Commission envisageait d'élaborer, pour le droit des traités, non pas une convention mais un code. Une "unité de vues extraordinaire" s'était alors manifestée "entre des membres dont la personnalité et les conceptions juridiques différaient grandement", quoique l'on ait reconnu "la difficulté d'assurer la primauté de certains principes": tout bien considéré, c'était la première fois que la Commission proposait une règle dans laquelle "il ne s'agissait plus des intérêts particuliers de deux ou de plusieurs États, mais de l'intérêt général de la communauté internationale". Celle-ci, ajouta Amado, progressait ''incontestablement dans le sens de l'institutionnalisation du droit international'', lequel, cependant, restait dépourvu de moyens permettant d'assurer l'application qui fussent comparables aux moyens du droit interne. Il importait donc, conclut le représentant du Brésil, ''de faire en sorte que la règle du *jus cogens* ne soit pas sacrifiée'', d'admettre ''le principe de la primauté de l'universel par rapport au particulier'', et de considérer le *jus cogens* comme ''une réalité qui s'impose à tous les États dans le droit international contemporain[212]''.

Les nombreuses interventions faites par Amado lors des débats de la Commission l'étaient dans chaque cas sur le ton de la fermeté et de la franchise, mais il n'était pas dogmatique, comme il eut l'occasion de le montrer en particulier lors de l'examen de certaines questions inscrites à 'ordre du jour de la Commission. L'une de ces questions inscrites à l'ordre du jour de la Commission. L'une de ces questions est précisément celle des réserves

[211] *Annuaire* (1963)-I, p. 74-75.

[212] Conférence des Nations Unies sur le droit des traités – *Documents officiels* (première session, 1968), vol I, p. 344 et 345; A. A. Cançado Trindade, *Repertório da Prática Brasileira do Direito Internacional Público* (période 1961-1981), Brasília, MRE/FUNAG, 1984, p. 140-141.

aux conventions multilatérales. Dans un mémorandum présenté à ce sujet à la Commission en 1951, Amado commençait par rappeler la pratique de la Société des Nations selon laquelle, pour être considérées comme valables, les réserves devaient bénéficier de l'acceptation de toutes les autres parties, qui conservaient le droit de formuler des objections à leur égard. Une tendance nouvelle, qui s'écartait de ce principe, était illustrée par ce que l'on appelait la doctrine panaméricaine. C'étaient, ajoutait Amado, la multiplication des conventions multilatérales ainsi que le désir, apparemment, de concilier le principe de l'autonomie des parties contractantes avec la nécessité d'assurer la participation du plus grand nombre possible d'États aux conventions multilatérales qui expliquaient la fréquence des réserves. En attendant que fût rendu l'avis consultatif récemment demandé à la Cour internationale de Justice dans l'affaire des *Réserves à la Convention pour la prévention et la répression du crime de génocide,* il était en faveur du principe de l'unanimité en ce qui concernait la validité des réserves. Il déclarait qu'il regrettait de ne pas pouvoir suivre ses collègues latino-américains, qui, à la Sixième Commission de l'Assemblée générale, préconisaient l'adoption de la procédure suivie par l'Union panaméricaine[213].

Le juriste brésilien faisait valoir que, dans le contexte actuel, rien ne pouvait lier un État contre sa volonté, et que la règle de la majorité n'avait pas sa place dans le processus d'élaboration des traités: ''Le principe de l'autonomie est encore la cheville ouvrière de tout le droit international conventionnel[214]''. En outre, la pratique des États américains en matière de réserves était ''loin d'être uniforme'' et la procédure panaméricaine, sur le bien-fondé de laquelle il avait ''des doutes sérieux'', n'était pas une règle établie et reconnue par tous les États membres[215], étant une règle purement régionale qui ne pouvait être transposée au niveau universel. Amado formulait des objections contre cette procédure, qui pouvait donner lieu à un ''morcellement des obligations découlant du traité''; selon lui, ''le traité collectif, d'une manière générale, a une unité de système qui doit être sauvegardée autant que possible[216]''. Il importait donc d'éviter qu'une convention fût ''défigurée par des réserves'', et il fallait limiter les facilités accordées aux États ''pour modifier, d'après leurs intérêts, le contenu d'un traité déjà approuvé par les Nations Unies, au risque de compromettre le système, le but et les effets juridiques du traité[217]''.

[213] Document de l'Organisation des Nations Unies A/CN.4/L.9, du 31 mai 1951, reproduit dans *Annuaire* (1951)-I, p.17 et 19.
[214] Ibid., p. 19; Amado ajoutait que la plupart des auteurs étaient en faveur du principe de l'unanimité (ibid., p. 20).
[215] Ibid., p. 20 et 21; d'autre part, il signalait, en ce qui concerne la résolution sur la question adoptée par le Conseil de l'Union panaméricaine en 1932, la '' rédaction équivoque '' antérieure de l'article 7 de la Convention de la Havane relative aux traités (1928) [ibid., p. 20].
[216] Ibid., p. 20 et 21.
[217] Ibid., p. 22.

Amado fit valoir avec fermeté ses opinions au cours des débats initialement consacrés à ce sujet par la Commission, au début des années 50[218]; il fit alors observer que, même si le système panaméricain était accepté par le continent américain, la question qui était débattue à la Commission était différente; elle était de savoir si le système panaméricain pouvait être appliqué d'une façon générale; sur ce point, il ne partageait pas l'opinion de son collègue, J. M. Yepes, et voterait contre sa proposition[219]. Au cours des années suivantes, Amado fut attentif aux développements de la question[220]. Au cours des débats institués par la Commission sur ce même sujet en 1962, il donna les premiers signes d'une disposition à changer d'avis: d'une part, il continuait de penser prudemment que ''le principe de l'intégrité des traités et la règle de l'unanimité pour l'acceptation des réserves sont inséparables des principes fondamentaux qui constituent le noyau irréductible du droit international'', et il exprimait l'espoir que les États ''s'abstiendraient de formuler des réserves capables de menacer toute la structure du traité''; mais d'autre part, il reconnaissait ''les réalités de la situation contemporaine'' et la ''pratique courante des États'' sur le sujet soumis à la Commission[221]. Il reconnaissait que l'on avait actuellement ''tendance à s'écarter partiellement du principe de l'intégrité des traités lorsqu'il [s'agissait] des principaux traités multilatéraux''. Un fait, selon lui, expliquait cette attitude: ''on a jugé qu'il n'était pas raisonnable de permettre à un État de contrecarrer à lui seul les désirs de, peut-être, quatre-vingts États, en matière de formulation des règles du droit international[222]''. À cette occasion, sir Humphrey Waldock, qui en 1962 était le Rapporteur spécial sur la question, déclare que s'il avait ''lui-même appartenu à la Commission en 1951, son opinion eût été très poche de celle que M. Amado avait exprimée cette année-là'', mais qu'il fallait ''tenir compte de l'évolution qui s'était produite depuis lors, laquelle conduisait à assortir de restrictions les principes traditionnels de l'intégrité du traité et de l'unité du régime juridique établi par le traité[223]''.

Trois ans plus tard, reparlant de cette question, Gilberto Amado fit observer que, lorsqu'il avait, en 1962, reconnu la réalité de l'évolution qui s'était produite, il avait contribué à faire avancer le débat et à permettre à une opinion d'ensemble de se dégager au sein de la Commission. Celle-ci, ajouta-t-il, ne pouvait plus ''revenir en arrière''. ''Les États, précisait-il, ne

[218] Voir *Annuaire* (1950)-I, p. 93 et 96-97 du texte anglais; *Annuaire* (1951)-I, p. 165, 167 et 176 du texte anglais; voir aussi p. 194 du texte anglais.
[219] *Annuaire* (1951)-I, p. 181 et 386 du texte anglais.
[220] Voir *Annuaire* (1960)-I, p. 246.
[221] *Annuaire* (1962)-I, p. 256, 179 et 183; voir aussi p. 168-169 et 196.
[222] Ibid., p. 256.
[223] Ibid., p. 177.

consentiront pas à abandonner ce qu'ils considèrent, à tort ou à raison, comme une conquête, et que la Commission a consacré dans son projet de 1962. On peut sans doute s'interroger sur la valeur de cette conquête et regretter le temps où chaque traité était un ensemble harmonieux, mais le fait est que la multilatéralité a changé bien des choses[224]''. Il admit expressément qu'il avait opéré un ''recul'' (pour reprendre son propre terme) par rapport à sa position antérieure sur la question[225](voir plus haut): il avait enfin reconnu et accepté les transformations qu'avait subies la notion des réserves aux conventions multilatérales.

Une autre question sur laquelle la position de Gilberto Amado évolua au cours des années est celle de la condition de l'individu en droit international moderne. En 1952, il exprimait son scepticisme dans une observation selon laquelle l'Article 15, par exemple, (article concernant le droit à une nationalité), de la Déclaration universelle des droits de l'homme, adoptée en 1948, créerait des difficultés car il était ''en conflit avec le droit interne d'un certain nombre de pays". ''Il ne servirait à rien d'énoncer de pieux principes, qui n'avaient que très peu de chances d'être acceptés[226]''. Une position de ce genre était manifestement intenable, et ses prédictions se révélèrent par trop pessimistes. Peu après, l'influence de la Déclaration universelle devait se faire sentir dans la Constitution de nombreux États, dans la législation interne et dans les décisions des tribunaux. Il faut reconnaître toutefois qu'au moment même où il exprimait ses appréhensions, Amado, dès 1949, déclarait que ''le droit qu'a l'État d'exercer sa juridiction sur tous les habitants de son territoire est assujetti à des limites qui sont inhérentes à l'application du droit international[227]''. Plusieurs années plus tard, lors des débats qui eurent lieu à la Commission en 1964, il ajouta: ''On ne peut pas empêcher les États de convenir de stipulations concernant les individus[228]''. De même, en qualité de représentant du Brésil, il avait admis, lors d'une séance de la Sixième Commission de l'Assemblée générale où il était question du projet de code, que la ''conception traditionnelle'', selon laquelle seuls les États étaient des sujets de droit international était "définitivement" dépassée[229]. Les exemples ci-dessus suffisent à montrer qu'Amado, bien que constamment fidèle à son approche ''réaliste'' du droit

[224] *Annuaire* (1965)-I, p. 161-162 et 180; voir aussi p. 168, 194 et 288-289.

[225] Ibid., p. 187. Selon le nouveau projet de disposition, faisait observer Amado ' une réserve ne produit d'effet que dans les rapports entre, d'une part, les autres parties au traité qui ont accepté ladite réserve, et, d'autre part, l'État ayant formulé la réserve ', et ' elle n'influe aucunement sur le droits et obligations des autres parties au traité dans les rapports qu'elles ont entre elles ' il ajoutait: ' Je ne pense pas que l'on puisse être explicite à ce point et que pareille conclusion se dégage de la pratique ' (ibid., p. 190).

[226] *Annuaire* (1952)-I, p. 107 du texte anglais.

[227] *Annuaire* (1949), p. 99 du texte anglais.

[228] *Annuaire* (1964)-I, p. 123.

[229] MRE, Relatório da Delegação do Brasil à VI Comissão da Assembléia Geral da ONU (IX Sessão, 1954), p. 7 et 8 (diffusion interne)

international, conserve toujours l'esprit ouvert, attentif aux transformations subies par l'ordre juridique international.

Les passages cités plus haut constituent probablement ses interventions les plus importantes dans les débats de la Commission du Droit International mais on pourrait citer aussi ses nombreuses autres interventions sur des sujets aussi divers que les relations diplomatiques et consulaires[230], le droit relatif aux organisations internationales[231], les principes de Nuremberg et la juridiction criminelle internationale[232], la nationalité et l'apatridie[233]. La responsabilité des États[234], les cours d'eau internationaux[235] ou la clause de la nation la plus favorisée[236]. On voit donc qu'Amado participa activement à l'examen et à la mise au point, en qualité de membre de la Commission, de pratiquement toutes les grandes questions de son temps en matière de droit international.

Gilberto Amado ne cacha jamais la grande fierté qu'il éprouvait à être membre de la Commission du Droit International. Sa constante disposition à participer aux fiches de la CDI au cours de deux décennies lui valut l'estime de ses collègues. Les sentiments qu'éprouvaient ses contemporains à son égard peuvent être illustrés, par exemple, par une réflexion qu'aurait faite en 1968 l'un des membres de la Commission, E. Jiménez de Aréchaga, qui aurait dit: "Le jour où Amado quittera la Commission, elle ne sera plus la même[237]''. Gilberto Amado quitta en fait la Commission le 27 août 1969, le jour de sa mort.

En 1971, la Commission décida (1146e séance)[238] du principe d'une conférence commémorative annuelle portant son nom qui serait donnée à l'occasion du séminaire de droit international organisé sous l'égide de la Commission. D'autre part, à la Sixième Commission de l'Assemblée générale, peu après la mort d'Amado, un imposant hommage fut rendu à sa mémoire lors de la séance du 24 septembre 1969, où les porte-parole des cinq groupe d'États intervinrent tout à tour. Les porte-parole du Groupe

[230] Voir *Annuaire (1957)*-I, p. 125; *Annuaire* (1958)-I p. 81 et 90-91; *Annuaire* (1959)-I, p. 83, 86, 170 et 210; *Annuaire* (1960)-I, p. 32, 49, 59, 101, 214, et 226; *Annuaire* (1961)-I, p. 6, 17, 76, 158, 184 et 281; *Annuaire (*1964)-I, p. 11, 15, 222 et 238; *Annuaire* (1968)-I, p. 62 et 64-65.

[231] Voir *Annuaire* (1949), p. 136 du texte anglais; *Annuaire* (1950)-I, p. 80 du texte anglais; *Annuaire* (1951)-I, p. 138 du texte anglais; *Annuaire* (1959)-I, p. 53 (sur l'adoption des décisions dans les organisations internationales); *Annuaire* (1962)-I, p. 190 et 268; *Annuaire (1968)*-I, p. 16, 41 et 62-64.

[232] Voir Annuaire (1949), p. 134, 185-186, 212 et 218-220 tu texte anglais. Annuaire (1950) - I, p. 19, 23, 26, 40, 50, 56, 61, 100-101, 119, 125, 128-129, 133, 142, 148, 151-153, 164-165, 174, 178 et 280-283 anglais; Annuaire (1951)-I, p. 28-29, 58-59, 71, 76-77, 215-216, 221, 244, 246 et 253 du texte anglais.

[233] Voir *Annuaire* (1952)-I, p. 106, 114, 117 et 142 du texte anglais; *Annuaire* (1954)-I, p. 42 et 44 du texte anglais.

[234] Voir *Annuaire* (1956)-I, p. 250 et 258 (sur la réparation des dommages) et 264; *Annuaire* (1957)-I, p. 164; *Annuaire* (1959)-I, p. 163; *Annuaire* (1963)-I, p. 89; *Annuaire (*1966)-I, deuxième partie, p. 116-117.

[235] *Annuaire* (1965)-I p. 322.

[236] *Annuaire* (1964)-I, p. 197 et 199; *Annuaire* (1968)-I, p. 194.

[237] C. A. Dunshee de Abranches, "A partida do Mestre", *Jornal do Brasil,* Rio de Janeiro, 30 août 1969, première section, p. 6.

[238] Voir *Annuaire* (1971)-I, p. 405. La première conférence commémorative fut donnée en 1972.

latino-américain (M. Ruda, de l'Argentine) et du Groupe asiatique (M. Tsuruoka, du Japon) rappelèrent l'attachement d'Amado à l'étude du droit, tandis que celui du Groupe occidental (Sir Kenneth Bailey, de l'Australie) insista sur la ''tradition humaniste'' qu'il représentait; le porte-parole des délégations africaines (M. El-Erian, de la République arabe unie) rappela la ''conception très large'' qu'avait Amado de la coexistence pacifique, tandis que celui des pays socialistes (M. Secarin, de la Roumanie) rappelait ''attitude réaliste'' d'Amado envers les ''problèmes posés par le développement progressif du droit international[239]''.

Plusieurs autres délégations prirent la parole, parmi lesquelles celle de la Chine (M.Liang), quirappela la ''remarquable objectivité'' d'Amado et son ''sens pratique accusé'', inspirés par une conception ''réaliste et positive'' du droit[240]; celle de la France (M. Deleau), qui loua sa ''vaste culture[241]''; celle de l'Irak (M. Yassen), qui affirma que l'oeuvre d'Amado ''laisserait sa marque sur l'historie de la Sixième Commission et de la Commission du Droit International[242]''. Le représentant d'Israël (M. Rosenne) déclara ce qui suit: ''M. Amado, alliant pragmatisme diplomatique et précision juridique, était un des meilleurs défenseurs de l'idée moderne selon laquelle la codification des règles du droit international par la méthode des conventions internationales peut seule assurer la réalisation des progrès nécessaire en la matière[243]''. M. Ushakov, président de la Commission du Droit International, qui avait été invité à assister à cette séance de la Sixième Commission[244], donna lecture du télégramme que le Secrétaire général de l'Organisation des Nations Unies avait adressé au Ministre des Relations Extérieures du Brésil, et dans lequel il était dit que Gilberto Amado occupait ''une place illustre dans l'historie des activités juridiques des Nations Unies''. Le Président de la Commission du Droit International ajouta qu'à la fois dans cette commission (dont il avait été l'un des membres fondateurs) et à la Sixième Commission de l'Assemblée générale (en qualité de représentant du Brésil), les interventions de Gilberto Amado lui avaient valu, ''l'admiration de ses collègues par la sagesse, l'esprit, la culture et l'humanisme profond qu'elles manifestent[245]''.

Les nombreuses interventions faites par Amado en tant que représentant du Brésil aux sessions successives de la Sixième Commission

[239] Nations Unies, Assemblée générale (vingt-quatrième session), *Sixième Commission, Comptes rendus analytiques* (1102e séance, 24 septembre 1969), document A/C.6/SR.1102, p. 5 et 6.
[240] Ibid., p. 5 et 6.
[241] Ibid., p. 5 et 6. Voir aussi l'intervention du représentant du Brésil (M. Araujo Castro), ibid., p. 6 par. 22 à 24.
[242] Ibid., p. 5.
[243] Ibid., p. 5; voir aussi les autres interventions du même document.
[244] Voir Ibid., p 5.
[245] Voir plus loin dans le même document.

de l'Assemblée générale[246] et en qualité de représentant du Brésil lors des première et deuxième Conférences des Nations Unies sur le droit de la mer (Genève, 1958 e 1960)[247], ainsi que lors de la première session (en 1968) de la première Conférence de Vienne sur le droit des traités[248], sont maintenant rassemblées dans le *Repertório da Prática Brasileira do Direito Internacional Público.* L'étendue de son activité en tant que membre de la Commission du Droit International pendant de longues années peut être apprécié a travers les nombreuses interventions que l'on trouvera dans les volumes successifs de l'Annuaire de la Commission du Droit International (1949 à 1968), passages que j'ai aussi moi-même essayé de réunir en vue de la présente conférence commémorative

Peu avant sa mort, dans l'étude biographique qu'il a consacrée à l'ancien chancelier du Brésil Raul Fernandes[249], Gilberto Amado a avoué qu'il regrettait beaucoup de ne jamais avoir mis aucun ordre dans ses écrits et que, de ce fait, il était incapable de se rappeler avec exactitude les diverses étapes de ses activités ainsi que beaucoup de choses qui éclairaient sa vie professionnelle[250]. Il est donc on ne peut plus indiqué qu'au moment de la célébration de ce centenaire à Genève, ses successeurs à la Commission du Droit International et aux fonctions de conseiller juridique auprès du Ministère des Relations Extérieures du Brésil s'employent à rassembler ces contributions ou écrits dispersés, s'efforcent de faire revivre certains des moments les plus saillants de sa vie et, en tant que juristes internationaux brésiliens, rendent hommage à sa mémoire.

[246] Voir A. A. Cançado Trindade, *Repertório da Prática Brasileira do Direito Internacional Público* (période 1941- 1960), Brasília, MRE/FUNAG, 1984, p. 26-28, 30-31, 63-64, 84-87, 95-97, 134-135, 163-171, 196, 202, 236, 283-289, 337-338 et 347-352; ibid., (période 1961-1981), p. 53-54, 79-80, et 95-96.

[247] Ibid., (période 1941-1960), p. 30-31, 162 et 171.

[248] Ibid., (période 1961-1981), p. 97-98.

[249] Lequel faisait partie de la Commission de juristes qui s'étaient réunie en 1920 à la Haye pour rédiger le Statut de la Cour permanente de Justice internationale.

[250] Gilberto Amado, "Raul Fernandes – Traços para um Estudo", dans Raul Fernandes – Nonagésimo Aniversário, vol. II, Rio de Janeiro. MRE, 1968, p. 14.

RÉFLEXIONS SUR QUELQUES ASPECTS JURIDIQUES DES OPÉRATIONS DE MAINTIEN DE LA PAIX DE L'ONU

Conférence donnée à Genève le 14 juin 1989
par M. Carl-August Fleischauer
Secrétaire général adjoint aux affaires juridiques
Conseiller juridique de l'Organisation des Nations Unies

Mesdames, Messieurs,

Je suis particulièrement heureux d'avoir l'occasion de partager avec vous aujourd'hui quelques réflexions sur les aspects juridiques des opérations de maintien de la paix de l'Organisation des Nations Unies. Ce faisant, je tiens à rendre hommage à la mémoire de l'éminent juriste brésilien Gilberto Amado. C'est pour moi un plaisir et un honneur d'avoir été prié de donner cette année la conférence prononcée en hommage à la mémoire de Gilberto Amado. Cette invitation a eu pour moi une résonnance particulièrement personnelle étant donné que j'ai eu l'occasion de rencontrer M. Amado vers la fin de sa vie, au moment où il est venu à Vienne en 1968 pour participer en tant que chef de la délégation brésilienne à la première session de la Conférence de Vienne sur le droit des traités. Je me rappelle combien j'ai été frappé par la sagesse et la profondeur de ses remarques et de ses interventions.

Alors que des opérations novelles sont en cours en Iran/Irak, en Afghanistan, en Angola et depuis le 1e avril de cette année, en Namibie et alors que le prix Nobel de la paix pour 1988 a été décerné aux forces de maintien de la paix de l'ONU, ces opérations de maintien de la paix de l'Organisation se sont trouvées récemment tout à fait en vedette. J'ai par suite pensé que l'éminent public auquel j'ai l'honneur de m'adresser en ce moment s'intéresserait peut-être à des réflexions sur quelques-uns des aspects juridiques moins connus mais cependant importants de ces

opérations. Il va sans dire que c'est à titre strictement personnel que je formule les observations qui vont suivre.

Les réflexions que je souhaiterais partager avec vous portent avant tout sur quatre aspects juridiques marquants des opérations de maintien de la paix de l'ONU, à savoir:

1. l'objet et le but des opérations de maintien de la paix de l'ONU;
2. la façon dont ces opérations sont mises en place;
3. le financement de ces opérations; et
4. la façon dont opèrent les forces de maintien de la paix.

Les opérations de maintien de la paix ont *pour objet e pour but* de neutraliser ou de désamorcer des situations conflictuelles internationales grâce à l'emploi d'un personnel militaire multinational sous le commandement de l'ONU. Les opérations de maintien de la paix servent à empêcher que des situations conflictuelles ne menacent la paix et la sécurité internationale, à éviter qu'un conflit ne s'accroisse en se transformant en hostilités armées ou à permettre la désescalade de conflits qui ont déjà atteint des niveaux militaires, et, dans quelques cas, à surveiller l'observation d'armistices ou à superviser des retraits de troupes ou encore à faire en sorte que le droit d'autodétermination s'exerce sans entrave lorsqu'il est menacé de façon telle que la paix et la sécurité internationales se trouvent compromisses. Le maintien de la paix est par suite exactement ce que les termes signifient, à savoir neutraliser des différends dans l'intérêt du maintien de la paix. Il diffère de la tâche à long terme que représente la solution de ces différends, mais il offre un répit et sert de marchepied à l'établissement de la paix.

Selon leur objet, les opérations de maintien de la paix revêtent diverses formes: parfois, une force de maintien de la paix est déployée entre des forces hostiles en vue de leur permettre un dégagement, parfois des observateurs de l'ONU sont placés entre des parties à un conflit en vue de veiller à ce que ces parties respectent l'armistice dont elles sont convenues, comme le font, par exemple, les observateurs de l'ONU en Iran et en Irak, ou encore ils suivent le déroulement d'un retrait de troupes convenu, comme en Angola. Dans d'autres cas, les forces de l'ONU ont assumé l'administration d'un territoire tout entier ou, comme dans le cas de la Namibie, surveillent des parties d'une telle administration en vue de faire en sorte que se trouvent réunies les conditions nécessaires au déroulement de plébiscites dans l'exercice du droit d'autodétermination.

Aucune de ces activités n'exige l'emploi offensif d'armes. Le dégagement, l'observation ou la surveillance de plébiscites sont autant

d'opérations qui n'exigent pas d'activités de combat; les troupes de l'ONU sont dotées d'armes légères et n'ouvrent le feu qu'en cas de légitime défense.

La nouvelle opération menée en Namibie est la dix-septième opération de maintien de la paix depuis 1948. Dans 9 des 16 cas antérieurs, ce sont des missions d'observation que l'ONU a envoyées et, dans les 8 autres cas, l'Organisation a employé des forces au grand complet[251].

Certes, la Charte des Nations Unies ne dit mot sur ce que nous appelons désormais les opérations de maintien de la paix des Nations Unies. La base juridique des opérations de maintien de la paix de l'ONU est donc le mandat de vaste portée que confère l'Article premier de la Charte, aux termes duquel un but important de l'Organisation des Nations Unies est de ''maintenir la paix et la sécurité internationales et, à cette fin: prendre des mesures collectives efficaces en vue de prévenir et d'écarter les menaces à la paix et réprimer tout acte d'agression ou autre rupture de la paix...''. Le mécanisme que prévoit la Charte pour permettre à l'Organisation d'atteindre ce but est toutefois assez différent de ce que sont devenues les opérations de maintien de la paix de l'ONU. La charte ne comporte pas seulement le chapitre VI, concernant le ''règlement pacifique des différends'', en vertu duquel le Conseil de Sécurité peut formuler des recommandations au sujet de tout différend ou de toute situation qui pourrait entraîner un désaccord entre nations ou engendrer un différend, mais elle va au-delà et comporte un chapitre célèbre, le Chapitre VII, qui concerne ''l'action en cas de menace contre la paix, de rupture de la paix ou d'un acte d'agression''. Aux termes de ce chapitre, c'est au Conseil de sécurité qu'il appartient de constater l'existence d'une menace contre la paix ou d'un acte d'agression, constatation qui, une fois établie, est suivie, étape par étape, de l'imposition de mesures impératives, qui vont des sanctions économiques et diplomatiques à la coercition militaire en dernier recours, ces mesures ayant pour but d'éliminer effectivement la menace contre la paix, la rupture de la paix ou l'acte d'agression. Nous savons

[251] *Mission d'observation:* Organisme des Nations Unies chargé de la surveillance de a trêve (ONUST, de 1948 à nos jours); Groupe d'observateurs militaires des Nations Unies en Inde et au Pakistan (de 1949 à nos jours); Groupe d'observateurs des Nations Unies au Liban (GONUL, 1958); Mission d'observation des Nations Unies au Yémen (1963-1964); Mission du Représentant du Secrétaire général dans la République dominicaine (1965-1966); Mission d'observation des Nations Unies pour l'Inde et le Pakistan (1965-1966); Mission des bons offices des Nations Unies en Afghanistan et au Pakistan (de 1988 à nos jours); Groupe d'observateurs militaires des Nations Unies pour l'Iran et l'Iraq (de 1988 à nos jours); Mission de vérification des Nations Unies en Angola (de 1989 à nos jours).
Forces de maintien de la paix: première force d'urgence des Nations Unies dans le Sinaï (FUNU I, 1956-1967); Opération des Nations Unies au Congo (1960-1964); Force de sécurité des Nations Unies en Nouvelle-Guinée occidentale (1962-1963); Force des Nations Unies chargée du maintien de la paix à Chypre (de 1964 à nos jours); seconde force d'urgence des Nations Unies dans le Sinaï (FUNU II, 1973-1979); Force des Nations Unies chargée d'observer le dégagement (FNUOD, de 1974 à nos jours); Force intérimaire des Nations Unies au Liban (FINUI, de 1978 à nos jours); Groupe d'assistance des Nations Unies pour la période de transition en Namibie (GANUPT, de 1889 à nos jours).

tous pourquoi ce régime, qui exige de la part du Conseil de Sécurité tout un ensemble de décisions de fond, s'est révélé inopérant et n'est peut-être pas capable de fonctionner. Il est possible qu'il soit trop simpliste pour notre monde complexe. Mais vous reconnaîtrez tous que la neutralisation des conflits, qui constitue l'objet et le but des opérations de maintien de la paix, est bien éloignée de l'élimination des causes des troubles, qui est l'objectif du régime institué par la charte.

Des voix critiques ont fait observer que les opérations de maintien de paix de l'ONU suppriment simplement en fait les symptômes des conflits au lieu de s'attaquer à leurs racines et que, lorsque l'on maintient un conflit non résolu à un niveau inférieur à celui des combats, il faut prolonger les opérations de maintien de la paix pendant des périodes extraordinairement longues tandis que le conflit fondamental continue de couver. D'autres voix sont allées même plus loin en s'inquiétant du fait qu'un conflit, une fois neutralisé, ne devienne, du fait même de sa neutralisation, plus difficile à résoudre étant donné qu'une solution ne s'impose plus d'urgence. De fait, quelques opérations de maintien de la paix ont duré ou durent longtemps. La première Force d'urgence des Nations Unies dans le Sinaï se trouvait sur place depuis plus d'une décennie lorsqu'elle a été contrainte de se retirer et que la guerre arabo-israélienne de 1967 a éclaté. Le Groupe d'observateurs militaires des Nations Unies en Inde et au Pakistan existe depuis 1949 et l'opération des Nations Unis à Chypre depuis 1964, la FINUL, en est à sa onzième année d'existence et il existe d'autres exemples analogues. Sans aucun doute, les parties à quelques-uns des conflits gelés vivent de façon tout à fait confortable derrière les lignes des Nations Unies et ne voient pas grand-chose qui les incite à prendre les mesures politiques délicates qu'exigerait la solution de leur différend.

La réponse logique à ces insuffisances serait d'estomper la ligne qui sépare les opérations de maintien de la paix de l'établissement de la paix enassortissant l'autorisation d'une opération de maintien de la paix de l'imposition de mesures concrètes dans la voie de la solution du conflit sous-jacent. Et pourtant, même si ces suggestions ne devaient représenter que de simples recommandations à l'intention des parties, je ne pense pas qu'il serait réaliste de préconiser une telle innovation, pour laquelle les États Membres ne paraissent pas prêts. Une telle innovation ne serait pas non plus réalisable. L'expérience montre que la plupart des opérations de maintien de la paix ont dû être mises sur pied en toute hâte en vue de désamorcer un affrontement qui se poursuivait ou de saisir l'occasion de mettre un terme aux combats ayant éclaté sur le terrain. Comme l'expérience le montre, dans la plupart des cas on n'a simplement pas

le temps de mettre en marche et de poursuivre des négociation sur des recommandations concernant la solution de conflits face à des situations dans lesquelles la neutralisation ou l'endiguement d'un conflit constituent un but légitime en soi, en vue d'éviter que ce conflit ne s'accroisse en devenant une menace pour la paix et la sécurité.

En outre, le Conseil de Sécurité a autorisé des opérations de maintien de la paix à l'occasion de plans de paix ou de missions de bons offices du Secrétaire général. De plus, la nécessité de renouveler ou de proroger souvent les autorisations concernant des opérations de maintien de la paix qui sont en règle générale données pour de courtes périodes, autorisations dont je vais traiter sous peu, offre à intervalles réguliers au Conseil de Sécurité l'occasion de réfléchir à maintes reprises sur la situation politique sous-jacente. Je pense qu'il ne serait pas judicieux d'aller plus loin et de limiter la liberté d'action dont l'Organisation dispose pour neutraliser les différends en lui imposant des conditions additionnelles de vaste portée qui viseraient à résoudre ces différends. Le fait que les opérations de maintien de la paix de l'ONU s'attachent à neutraliser des conflits et non à les résoudre montre bien que ces opérations, telles que nous les connaissons, représentent un compromis entre ce qui est faisable et ce qui est souhaitable. Il est possible de neutraliser des conflits grâce à des opérations de maintien de la paix, quelque délicates et incomplètes qu'elles soient, tandis qu'il peut souvent se révéler impossible de supprimer la cause de bien des conflits ou de résoudre ces conflits, quelque souhaitable qu'il soit d'y parvenir. Un autre domaine dans lequel il est manifeste que les opérations de maintien de la paix, comme la diplomatie, sont l'art du possible est ce qui a trait à la *façon dont les opérations de maintien de la paix sont mises en place*. Comme vous le savez, dans le cadre du régime de sécurité collective prévu par la Charte, l'initiative de l'intervention de l'ONU appartient au Conseil de Sécurité. Aux termes du Chapitre VII de la Charte, c'est au Conseil de Sécurité qu'il appartient d'établir initialement l'existence d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression, et c'est au Conseil de Sécurité qu'il appartient de décider des mesures qui découlent de cette constatation. Dans le cadre des opérations de maintien de la paix de l'ONU, telles qu'elles se sont développées, il faut toujours obtenir l'autorisation de l'organe compétent de l'Organisation. Toutefois, l'élément qui déclenche l'intervention de l'ONU n'est plus une constatation impérative de la part du Conseil de Sécurité, mais le consentement des parties intéressées.

Faute d'une constatation impérative de la part du Conseil de Sécurité, c'est le principe du consentement qui est à la base des opérations

de maintien de la paix de l'ONU; les parties au conflit doivent vouloir le dégagement; elles doivent vouloir qu'un armistice ou un retrait de troupe soit respecté; elles doivent vouloir qu'un plébiscite soit observé sur le plan international. Une fois que l'entente s'est faite sur ces points, le Secrétaire général doit trouver des pays disposés à fournir des troupes et du matériel, et le pays dans lesquels l'opération doit avoir lieu doivent accepter la composition des forces ou de la mission d'observation qui vont opérer sur leur territoire. Et pourtant tous ces consentements ne sont pas en eux-mêmes suffisants. Il faut encore qu'ils soient ratifiés par le consentement ultime, à savoir celui de la communauté mondiale tel qu'il s'exprime par l'intermédiaire de l'organe compétent de l'Organisation des Nations Unies.

Il y a une trentaine d'années, les avis différaient beaucoup sur le point de savoir quels organes de l'ONU étaient compétents pour autoriser les opérations de maintien de la paix. Nul n'a jamais contesté que le Conseil de Sécurité eût compétence pour autoriser de telles opérations, et les premières missions d'observation ont été créées, en 1948 et en 1949, respectivement, par des résolutions du Conseil de Sécurité. Les divergences d'opinions portaient sur le point de savoir si l'Assemblée générale disposait de pouvoirs parallèles pour autoriser des opérations de maintien de la paix à un moment où le Conseil de Sécurité se trouvait paralysé par des veto, comme le cas s'était produit en 1956, au moment où la première Force d'urgence des Nations Unies a été envoyée dans le Sinaï, pour mettre un terme à la guerre entre Israël et l'Egypte et pour déplacer les forces britanniques et françaises qui étaient intervenues, et comme le cas s'est à nouveau produit en septembre 1960, au moment où la poursuite de l'opération du Congo était en jeu. La question a été finalement réglée par le truchement de toute une série d'ententes et, depuis, toutes les opérations de maintien de la paix ont été autorisées par le Conseil de Sécurité. Pour garantir qu'aucune opération ne se prolongera au-delà de l'expiration de l'approbation en cours donnée par le Conseil, ce qui, de son côté, exige que l'approbation des parties soit maintenue, chaque autorisation est limitée dans le temps, parfois à moins de six mois.

La condition du consentement des parties au différend paraît évidente en ce qui découle normalement de la souveraineté inhérente à la qualité d'État. Il n'en reste pas moins que s'en tenir à cette condition signifie que ce sont les parties au différend qui fixent les moments auxquels l'Organisation des Nations Unies peut commencer à jouer son rôle de maintien de paix. L'expérience montre que les États attendent souvent beaucoup trop longtemps pour autoriser l'ONU à intervenir dans

leurs différends, ce qui constitue, bien entendu, un grave inconvénient du principe du consentement. Nous abordons ici un problème parallèle à celui de savoir comment les États Membres peuvent être amenés à porter sans attendre leurs différends devant le Conseil de Sécurité. C'est là un problème que l'actuel Secrétaire général a évoqué à maintes reprises depuis le moment où il a présenté son premier rapport annuel en 1982[252]. Je ne puis que reconnaître à cet égard que je ne dispose pas de solution toute faite à offrir. À l'égard du maintien de la paix, l'Article 99 de la Charte n'est pas d'une grande utilité, car ni le Secrétaire général ni le Conseil de Sécurité ne peuvent substituer leur souci d'agir au consentement nécessaire des États parties au différend. L'autre inconvénient est, bien entendu, que si le consentement est exigé, ce consentement peut être retiré. À cet égard, nous ne pouvons oublier le tragique exemple du retrait de la Force d'urgence déployée dans le Sinaï peu de temps avant le déclenchement de la guerre de six jours en juin 1967. Alors que cette force avait été mise en place plus de dix ans auparavant, l'Egypte en mai 1967, a demandé qu'elle s'en aille. Le Secrétaire Général de l'époque a estimé qu'il n'avait pas d'autre choix que de retirer la Force.

Le Secrétaire général U Thant a été sérieusement critiqué pour avoir décidé de donner effet au retrait du consentement de l'Egypte concernant le déploiement de la FUNU I. D'un point de vue juridique, il ne pouvait méconnaître la demande égyptienne, mais ce qu'il aurait pu faire, ainsi que sir Brian Urquhart l'indique dans son autobigraphie[253], c'était de porter la question à l'attention du Conseil de Sécurité en vertu de l'Article 99 de la Charte du fait que cette question, à son avis, pouvait mettre en danger le maintien de la paix et de la sécurité internationales. Il est certes difficile d'évaluer après coup les raisons pour lesquelles il n'a pas agi ainsi et, comme sir Brian Urquhart l'indique, nul ne sait si le Conseil de Sécurité aurait réagi à l'époque et quelle aurait été sa réaction[254]. Dans le cadre de la pratique actuelle, l'engagement du Conseil de Sécurité dans le déroulement des opérations de maintien de la paix est tel qu'il ne serait nullement facultatif de porter ou non la question à l'attention du Conseil; dans les circonstances actuelles, on attendrait du Secrétaire général qu'il en saisisse sans retard le Conseil.

Je passe maintenant à l'importante question du *financement des opérations de maintien de la paix de l'ONU.* Le principe du consentement,

[252] Rapport du Secrétaire général sur les travaux de l'Organisation (trente-septième session, 1982), document A/37/1.
[253] Sir Brian Urquhart, *A life of Peace and War*, 1987, p. 212.
[254] Sur les aspects juridiques de la fin de la FUNU I, et, en particulier, sur la question d'une participation éventuelle de l'Assemblée générale avant le retrait de la Force, voir N. A. El-Araby "Un peacekeeping: the Egyptian experience", dans H. Wiseman, *Peacekeeping Appraisals and Proposals,* 1983, p. 65 et suiv., en particulier, p. 73 et suiv.

malheureusement, ne signifie pas que les opérations de maintien de la paix puissent être menées sans qu'il en résulte de frais pour l'Organisation. Il n'y a que deux opérations qui aient été intégralement payées par les Pays-Bas et par l'Indonésie, et une mission d'observation au Yémen en 1963-1964 a été payée par l'Arabie saoudite et l'Egypte.

En règle générale, toutefois, les forces mises à la disposition de l'Organisation des Nations Unies doivent être payées par l'Organisation; les troupes demeurent inscrites sur les tableaux d'émargement nationaux, mais les gouvernements dont elles relèvent doivent être remboursés à un taux uniforme pour tous les contingents. Ces troupes sont en général accompagnées de certains des éléments de matériel dont elles ont besoin, mais l'utilisation de ce matériel et les pertes éventuelles doivent être remboursées. Le transport des troupes de maintien de la paix et de leur matériel entre leur pays d'origine et les théâtres d'opérations, y compris le transport à l'occasion des relevés périodiques, doit être payé, dans la mesure où il ne fait pas l'objet d'un don. Les bureaux et les logements sont souvent fournis par l'État qui accueille l'opération, mais ce n'est pas toujours le cas. De plus, les forces doivent bien entendu être logées sur le terrain.

Au cours de la fin des années 40 et au début des années 50, le coût des premières opérations de maintien de la paix a été simplement imputé sur le budget ordinaire de l'Organisation des Nations Unies, qui est mis en recouvrement entre tous les États Membres sur la bas du barème normal des quotes-parts. Lorsqu'ont été lancées, en 1956, la première Force d'urgence des Nations Unies dans le Sinaï et, en 1960, l'opération du Congo, les dépenses étaient énormes par rapport aux éléments habituels du budget ordinaire et il s'est révélé nécessaire d'établir des comptes distincts pour chacune de ces opérations en vue d'éviter un chaos financier. Les dépenses concernant des "dépenses de l'Organisation" au sens de l'Article 17 de la Charte, et les contributions des États Membres à ces comptes ont été mises en recouvrement essentiellement sur la base du barème des quotes-parts arrêté par l'Assemblé générale pour le budget ordinaire. Il en est résulté une crise politique et financière très grave au moment où un certain nombre de gouvernements ont refusé de voir dans les dépenses concernant les opérations en question des dépenses légitimes de l'Organisation et ont, par suite, refusé d'acquitter les quotes-parts qui avaient été spécialement mises en recouvrement pour ces opérations.

Ultérieurement, au cours du milieu des années 60, une opération, celle de Chypre (qui se poursuit toujours), a été déclenchée en partant du principe qu'elle serait financée exclusivement par des contributions volontaires; le fait que l'on n'a jamais plus eu recours à ce mode de

financement se passe de commentaires. Toutefois, au moment où, en 1973, pour mettre un terme à la guerre du Kippour, une seconde Force d'urgence des Nations Unies dans le Moyen-Orient a été constitué, il a été établi un mode de financement qui a été essentiellement suivi depuis, y compris pour couvrir la dernière opération, en Namibie, à l'exception toutefois de l'opération lancée en Afghanistan en 1988, qui a été imputée sur le budget ordinaire de l'Organisation. En vertu du nouveau mode de financement, le coût des opérations de maintien de la paix continue d'être considéré comme une dépense de l'Organisation au sens de l'Article 17 de la Charte et il est de nouveau imputé su des comptes spéciaux, cette imputation étant cependant faite en fonction d'un barème des quotes-parts différent du barème ordinaire. Le nouveau barème prévoit quatre catégories distinctes d'États Membres, à savoir: a) les membres permanents du Conseil de Sécurité; b) les États Membres économiquement développés qui ne sont pas membres permanents du Conseil de Sécurité; c) les États Membres économiquement peu développés; et d) les États Membres économiquement les moins avancés. Dans le cadre de ce régime, les États pauvres et les États les plus pauvres acquittent un montant inférieur à celui qui leur incombe aux termes du barème ordinaire des quotes-parts, tandis que les contributions des membres permanents du Conseil de Sécurité au financement des opérations de maintien de la paix sont proportionnellement plus élevées que le montant de leurs quotes-parts au budget ordinaire.

Comme je l'ai déjà indique, dans le cadre de la pratique actuelle, c'est le Conseil de Sécurité qui autorise les opérations de maintien de la paix. Aux termes de la Charte, c'est pourtant l'Assemblée générale qui détient les cordons de la bourse. Par suite, même une fois que le Conseil de Sécurité a autorisé une opération de maintien de la paix, c'est toujours à l'Assemblée générale qu'il appartient de décider du financement de cette opération. Les montants prévus au titre des ''dépenses imprévues'' dans le cadre du budget ordinaire de l'Organisation sont si limités qu'ils sont très insuffisants dans le cas d'une opération de maintien de la paix.

En théorie donc, il y aurait place pour des frictions, le Conseil de Sécurité ne pouvant autoriser une opération de maintien de la paix que l'assemblée refuserait ensuite de financer.

Il est regrettable que, dans le domaine du maintien de la paix et malgré tout ce que l'on s'est employé à faire pour parvenir à des méthodes répondant expressément au financement du coût de telles opérations, les habitudes des États Membres en matière de paiement soient particulièrement mauvaises et qu'il existe des arriérés considérables. Toutefois, si les arriérés au titre du versement des quotes-parts au

budget ordinaire de l'ONU diminuent directement la capacité d'agir de l'Organisation, il n'en est pas ainsi du maintien de la paix, les dépenses correspondantes ayant essentiellement trait à l'obligation de rembourser les états qui fournissent des contingents. Du fait de leur dévouement exemplaire à la cause de la paix, les pays dont il s'agit ont absorbé le coût de leurs contingents et des services qu'ils fournissent et les ont mis à la disposition de l'Organisation des Nations Unies, malgré les retards toujours plus importants qu'accusent les remboursements. L'Organisation des Nations Unies a donc en fait contraint ces pays à devenir des créanciers importants de l'Organisation.

Selon les derniers chiffres dont j'ai eu connaissance, les quotes-parts mises en recouvrement au titre des opérations de maintien de la paix de l'ONU qui n'ont toujours pas été acquittées, compte non tenu de celles qui ont trait à l'opération de Chypre, s'établissaient au 31 décembre 1988 (avant donc que l'opération de Namibie ne soit budgétisée) à 355,2 millions de dollars des États-Unis. En ce qui concerne l'opération de Chypre financée par des contributions volontaires, le Secrétaire général a dû déclarer ce qui suit dans une lettre qu'il a adressé aux gouvernements de tous les États Membres de ‹Organisation des Nations Unies ou Membres des institutions spécialisées, le 15 mars 1989, pour leur demander à nouveau de verser de contributions volontaires à la Force des Nations Unies chargée du maintien de la paix à Chypre: "Il en résulte que l'Organisation des Nations Unies n'a été en mesure de rembourser les pays qui fournissent des contingents que pour les créances allant jusqu'à juin 1980. Cet état de choses tout à fait regrettable ne peut manifestement pas durer indéfiniment[255]".

Cet état de choses est certes regrettable, non seulement sur le plan financier, mais aussi sur le plan politique et sur le plan juridique. Il y a par suite lieu de se féliciter que depuis la quarante-troisième session de l'assemblée générale, sous l'influence des nouvelles opérations de maintien de la paix en Afghanistan, en Iran/Irak, en Angola et en Namibie, les États Membres se soient de nouveau attachés à la question du financement des opérations de maintien de la paix de l'ONU. Les solutions débattues n'indiquent toutefois pas encore que l'on se soit engagé dans la voie d'une solution satisfaisante du problème.

À mon avis, la mise en place d'un barème distinct des quotes-parts pour les opérations de maintien de la paix en fonction de la responsabilité particulière qui incombe à certains États Membres envers le maintien de la paix et de la sécurité et en fonction des moyens économiques des autres États Membres représentait un pas dans la bonne direction. Une

[255] Documents/S 20560.

solution satisfaisante doit toutefois aller beaucoup plus loin et je suis l'un de ceux qui préconiseraient la constitution d'un fonds de roulement spécial mis de côté pour les opérations de maintien de la paix mandatés par le Conseil de Sécurité. Un tel fonds ne pourrait être utilisé qu'une fois que l'Assemblée générale aurait autorisé le financement d'une opération et il aiderait exclusivement à lancer cette opération. Il devrait ensuite être immédiatement réalimenté. La création d'un tel fonds représenterait une saine base financière pour de futures opérations de maintien de la paix, dès le lancement même de ces opérations à condition que les États Membres acquittent leurs quotes-parts mises en recouvrement. Le comportement des États Membres en matière de paiement ne saurait toutefois s'améliorer par le simple truchement de moyens juridiques ou de moyens de procédure. Le versement des quotes-parts au titre des opérations de maintien de la paix est et doit demeurer une obligation juridique découlant de l'Article 17 de la Charte. Si les États Membres ne s'acquittent pas de cette obligation, ils encourent la sanction prévue à l'Article 19, mais, ce qui est plus important, ils risquent de ruiner le mécanisme de maintien de la paix institué par l'Organisation.

En dernier lieu, sans que ce soit aucunement là le point le moins important, je voudrais parler maintenant de la *façon dont opèrent les forces de maintien de la paix de l'ONU.* Au cours des années, certaines structures opérationnelles de base se sont dégagées. Elles ont été mises en lumière dans le principes directeurs de l'Organisation et du fonctionnement de la seconde Force d'urgence des Nations Unies dans le Moyen-Orient que le Conseil de Sécurité a approuvés à l'unanimité en 1973 et qui servent depuis de modèle pour la structure des opérations de maintien de la paix. Dans ce cadre, chaque force de maintien de la paix de l'ONU, qu'il s'agisse d'une force au grand complet ou d'une mission d'observation, est placée sous les commandement de l'Organisation des Nations Unies, commandement dont est investi le Secrétaire général agissant sous l'autorité du Conseil de Sécurité. Chaque opération est placée sous les ordres d'un commandant de la Force qui est nommé par le Secrétaire général et qui est responsable envers lui; le Secrétaire général, de son côté, tient le Conseil de Sécurité pleinement informé des fait nouveaux concernant le fonctionnement de Force et porte à l'attention du Conseil toute question pouvant influer sur la nature ou le fonctionnement efficace continu de la Force. Le Conseil de Sécurité est ainsi étroitement en rapport non seulement avec la mise en place d'opérations de maintien de la paix, mais aussi avec le fonctionnement de telles opérations. Nul ne préconise que la gestion quotidienne des forces de maintien de la paix soit retirée

au commandant de la Force et au Secrétaire général et de toute évidence, ces derniers ne devraient pas être limités de trop près par le Conseil quant à leurs décisions opérationnelles. Il n'en reste pas moins que l'étroite participation du Conseil au déroulement des opérations de maintien de la paix représente une amélioration importante par rapport à la situation que l'on connaissait il y a encore quelques années et elle empêche que le Secrétaire général ne se voit souvent laisser le soin de prendre seul des décisions qui influent sur la nature ou le fonctionnement d'une opération. Certes, l'établissement de liens étroits entre le Conseil et ces opérations s'est trouvé facilité du fait que les États Membres ont admis le rôle du Conseil de Sécurité en tant qu'organe compétent pour autoriser des opérations de maintien de la paix.

Le commandant de la Force établit sa propre voie hiérarchique par l'intermédiaire de laquelle il communique avec les contingents nationaux de la Force placée sous son commandement. Les diverses unités qui composent ces contingents demeurent intactes et son placées sous le commandement de leurs propres officiers. Non seulement les règles générales de discipline des armées nationales dont elles relèvent leur demeurent applicables, mais les membres de ces unités conservent aussi leurs uniformes nationaux. L'Organisation des Nations Unies se contente de leur remettre des écussons de l'ONU ainsi que les bérets et les casques bleus de l'ONU, qui sont devenus les symboles bien établis de ces troupes de l'Organisation. Les commandants des contingents sont tenus d'agir exclusivement selon les ordres opérationnels donnés par le commandant de la Force et ils sont responsables envers lui de veiller à ce que leurs troupes opèrent comme il convient et fassent preuve de la discipline voulue.

En raison de la variété inévitable de l'expérience et des procédures opérationnelles des divers contingents participant à une opération de maintien de la paix, des règles types concernant les fonctions et le fonctionnement de la Force sont promulguées pour chaque opération dès qu'elle est instituée, de sorte que tous les contingents nationaux à l'intérieur de la Force observent un ensemble commun de règles et de prescriptions concernant les fonctions et le fonctionnement de cette force. Ces règles et prescriptions ont strictement trait à la conduite et au déroulement des opérations sur le terrain et diffèrent d'une opération de maintien de la paix à l'autre. Elles ont toutes un trait commun, en ce sens que les armes ne doivent être utilisées qu'en cas de légitime défense.

En règle générale, une force de maintien de la paix sera accompagnée d'un personnel civil d'appui, que le Secrétaire général choisit parmi les fonctionnaires de l'ONU. L'élément civil est également responsable envers

le commandant dans l'accomplissement de ses tâches. Tandis qu'ils sont en poste sur le terrain, ces fonctionnaires demeurent toutefois assujettis au Statut et au Règlement du personnel de l'Organisation et ils demeurent des fonctionnaires de l'ONU.

Si les règles concernant les fonctions et le fonctionnement de la Force répondent à ce qu'exige sur le plan interne le déroulement efficace d'une opération de maintien de la paix, il y a d'importantes questions pratiques qui doivent être clarifiées avec le pays sur le territoire duquel l'opération se déroule. Ces questions ont trait au statut juridique des forces de maintien de la paix de l'ONU sur le territoire de l'État hôte. Les forces de maintien de la paix sont des organes subsidiaires de l'ONU et leur statut fondamental dans un État hôte découle des dispositions des Articles 104 et 105 de la Charte, qui ont trait à la capacité juridique et aux privilèges et immunités de l'Organisation. De plus, si l'État hôte est partie à la Convention de 1946 sur les privilèges et immunités de l'Organisation des Nations Unies, la Force est aussi en droit de jour des privilèges et immunités que cette convention confère à l'Organisation.

Dans la mesure où les forces de maintien de la paix de l'ONU présentent des caractéristiques particulières quant à leur composition et quant aux besoins de leurs opérations, il se peut toutefois que tous les aspects d'une Force ne soient pas couverts comme il convient par les deux articles de la Charte et par la Convention de 1946. On peut aussi avoir des doutes quant au statut individuel des membres de contingents nationaux affectés à une force de maintien de la paix qui, bien que la Force ait le statut d'organe subsidiaire, ne sont ni des fonctionnaires de l'ONU ni ''des experts en mission'', pour le compte de l'Organisation. De plus, si la Convention de 1946 est acceptée à peu près partout, tous les États Membres de l'ONU ne sont pas devenus parties à cette convention. En vue d'assurer aux Forces la protection et les arrangements juridiques appropriés, l'ONU s'efforce de conclure avec les différents pays hôtes des accords relatifs au statut des Forces qui régissent le statut juridique de celles-ci et celui des membres de leur personnel.

Les accords relatifs au statut des Forces ont essentiellement pour objet de leur accorder la liberté de se déplacer dans la zone des opérations et le droit de communiquer librement, ainsi que la liberté de se rendre dans la zone d'opérations et de quitter cette zone, et d'assurer aux Forces et aux membres de leur personnel au moins les privilèges et immunités qu'institue la Convention de 1946. Pour ce qui est des divers contingents nationaux, les membres de ces contingents devraient bénéficier de l'immunité de juridiction pénale envers l'État hôte, mais demeurer assujettis à la juridiction pénale de

l'État dont ils relèvent à l'égard de toute infraction commise par eux sur le territoire de l'État hôte. Ils devraient aussi bénéficier de l'immunité de fonctions quant à la juridiction civile de l'État hôte.

Des accords relatifs au statut des Forces ont été conclus pour les premières opérations, mais la conclusion de tels accords n'a pas été possible dans un certain nombre de cas au cours du milieu et de la fin des années 70. Dans ce cas, l'Organisation a dû se fonder et, dans la mesure où ces opérations se poursuivent, elle continue de se fonder sur des principes généraux qui se sont dégagés des accords antérieurs relatifs au statut des Forces et des principes directeurs de l'Organisation et du fonctionnement de la FUNU II que le Conseil de Sécurité a adoptés à l'unanimité. Il n'en reste pas moins que l'Organisation a pour politique générale de rechercher des accords relatifs au statut des Forces et que de tels instruments ont été conclus ou sont en train d'être conclus à l'égard des opérations les plus récentes de maintien de la paix. En particulier, l'opération de Namibie est couverte par un accord détaillé concernant le statut des Forces. En raison de la nature très technique des questions sur lesquelles portent ces accords et de la diversité des législations et pratiques locales, la politique de l'Organisation tendant à se fonder sur des textes convenus plutôt que sur des principes généraux paraît justifiée.

En plus des accords relatifs au statut des Forces qui sont conclus entre l'Organisation et les pays hôtes, l'ONU et les pays qui fournissent des contingents conviennent d'arrangements pour régler la conduite des ressortissants de ces pays pendant la période au cours de laquelle ils sont affectés à la Force. Ces arrangements correspondent en partie aux accords relatifs au statut des Forces, dont ils rendent les dispositions applicables aux divers membres des contingents; en outre, les arrangements avec les pays qui fournissent des contingents règlent des questions qui ne se posent qu'entre ces pays et l'Organisation et sont de nature administrative et financière générale. Les arrangements avec les pays qui fournissent des contingents, appelés arrangements de participation, sont souvent conclus à la hâte et visent une situation particulière; il arrive ainsi souvent qu'ils ne soient pas consignés comme il convient et qu'ils soient mal rédigés. Il faut toutefois espérer que la demande accrue de troupes de maintien de la paix de l'ONU permettra de normaliser davantage les textes pertinents et de les rendre plus clairs pour tous ceux à qui il incombe d'appliquer et d'interpréter ces accords.

Du fait que c'est à Genève que je m'adresse à vous en ce moment, je pense qu'il est opportun, avant de conclure, d'aborder la question particulière de l'application des conventions humanitaires de la Croix-Rouge aux Forces

de l'ONU. L'application aux Forces de l'ONU des Conventions initiales de 1949 à été soulevée pour la première fois par le Comité international de la Croix-Rouge peu après l'adoption de ces conventions et, à nouveau, quand l'opération du Congo était en cours. Plusieurs institutions universitaires et plusieurs spécialistes agissant isolément ont vigoureusement fait valoir que l'ONU devrait devenir partie aux conventions de Genève ou formuler une déclaration unilatérale aux termes de laquelle l'ONU accepterait ces instruments et les appliquerait.

Bien qu'en fait il ne soit jamais apparu de contradiction entre le comportement des Forces de l'ONU et les Conventions de Genève, l'ONU a adopté la position que les Conventions de 1949, comme d'autres instruments humanitaires, ont été élaborées à l'intention des États et qu'elles renferment des dispositions qui ne pourraient être appliquées pleinement par une organisation intergouvernementale comme l'Organisation des Nations Unies. Néanmoins, pour certaines des premières opérations de maintien de la paix, il a été incorporé aux règlements internes de ces opérations et aux arrangements conclus avec les pays qui fournissent des contingents des dispositions aux termes desquelles "les membres de la Force sont tenus de respecter les principes et l'esprit des conventions internationales générales relatives à la conduite du personnel militaire[256]". C'est à peu près au moment où les préparatifs des Protocoles additionnels de 1977 ont commencé à prendre forme que cette pratique paraît être tombée en désuétude. Je ne sais pas si cela était dû aux Protocoles qui étaient en train de se dégager ou si les dispositions des Conventions de 1949 étaient alors considérées comme faisant partie intégrante du droit international général. Il me semble toutefois que l'on devrait envisager de revenir à la pratique antérieure.

J'espère vous avoir donné une idée de ce que sont les opérations de maintien de la paix et des principaux aspects juridiques de ces opérations. Ce qui est encore plus important, j'en suis convaincu, c'est que vous saisissiez combien de travail, d'imagination et de dévouement sont nécessaires pour mettre en place de telles opérations et pour les maintenir en fonction.

[256] Article 44 du Règlement de la Force d'urgence des Nations Unies, 20 février 1957, Nations Unies, *Recueil de Traités*, vol. 271, p. 169 et suiv., et p. 184.

DROIT INTERNATIONAL, DIPLOMATIE ET LES NATIONS UNIES

Conférence donnée à Genève le 2 juillet 1991
par S.E. M. Francisco Rezek
Ministre des Relations Extérieures du Brésil

Mesdames, Messieurs,

Ma participation au cycle de "Conférences Commémoratives Gilberto Amado", qui rassemble de si éminents juristes du monde entier, se doit également à ma qualité de juriste. Mais c'est en tant que responsable des affaires étrangères de mon pays que je vais vous parler. En effet, aujourd'hui plus que jamais, le droit et la diplomatie marchent de pair vers l'élaboration d'un nouvel ordre international, qui, nous l'espérons tous, sera véritablement ordonné, sur le plan de l'égalité juridique des États, et nouveau, en ce qui concerne les perspectives d'un monde plus solidaire et juste.

Ces dernières années, les premiers mots le plus souvent entendus au début de rencontres comme celle-ci ont dû être certainement tous des déclarations reconnaissant que nous vivons une période de transition intense de l'historie de nos peuples, de nos pays, de nos idées.

Il s'agit là d'une constatation prudente, face à la vitesse des changements, qui en peu de temps, ont bouleversé la vie contemporaine. Il faut y voir également une attitude d'humilité justifiée, en raison de l'imprécision du sens et de la portée de ces changements qui partout et à tous les niveaux sont en train de réécrire la fin du XX^{e} siècle.

L'aspect positif de cet état de choses et dont nous pouvons nous réjouir, c'est le renoncement aux vérités toutes faites, l'affermissement du primat de la raison, laissant de côté les préjugés et les manichéismes

idéologiques, dans un monde de plus en plus interdépendant, plus incliné, par conséquent à la coopération, à l'entente et à la paix.

Néanmoins, nous observons une tendance inquiétante, sans aucun doute plus accentuée dans certains milieux que dans d'autres, en faveur d'une consolidation des déséquilibres structurels, comme si la marche de l'histoire était un concours doté de prix entre ceux qui ont réussi à vaincre les obstacles du processus de l'évolution et ceux qui doivent encore faire face à des problèmes de formation.

Ainsi, si nous étions dans une salle de concerts, ces mots d'introduction ressembleraient plus à un adagio, sans aucun doute mélodieux et optimiste, qu'à une ouverture triomphale, forte des conquêtes irréprochables et irréversibles, à la portée de tous, pour le bien de tous.

Ce qui se passe en vérité, c'est que si le progrès, le développement extraordinaire de la science et de la technologie, l'enrichissement illimité du monde des idées, nous permettent de mieux connaître les grands problèmes de notre temps, nous ne sommes pas pour autant en mesure de les résoudre.

À l'aube du troisième millénaire, tous sont pleinement d'accord et profondément conscients du besoin impératif d'arriver à un développement soutenu, à la démocratie et à la paix.

L'éthique des temps modernes à réhabilité au premier plan des relations entre les États et les hommes le respect des droits de l'homme, de la liberté et de la santé de notre planète. À l'origine de cette évolution se trouve l'engagement pour le régime démocratique qui a réaffirmé la volonté de la majorité et remis à jour la pensée d'Ovide selon laquelle ''les lois ont été faites pour que le puissant ne puisse pas tout'' (*Datae leges, ne fortior omnia posset)*. Dans l'optique de notre époque, la prospérité s'est transformée en objectif indissociable de la justice sociale et de la coopération, principe de base de la paix.

Cependant, l'interdépendance, qui a donné tant d'élan au développement des moyens de production et à celui des relations économiques et commerciales entre les marchés les plus dynamiques, ne s'est pas encore traduite en coopération entre les pays. Le rétablissement des libertés essentielles, apanage des temps modernes, n'a pas non plus réussi à être synonyme de prospérité. Pas même la chute du mur de Berlin n'a mené à la création d'un système mondial assurant la sécurité et la paix, qui serait enfin libre des foyers d'instabilité.

Comme si cela ne suffisait pas, l'ordre juridique international a été violé. L'agression contre la souveraineté du Koweït a provoqué une indignation généralisée, faisant revivre les pires moments du climat de

terreur de la guerre froide. La communauté des nations a su agir de façon solidaire pour mettre un terme au conflit. Mais elle lutte encore pour faire régner la sécurité et la paix.

C'est ici que surgissent les principaux défis pour notre époque, et c'est ici que le droit international reprend toute son importance.

Soit la paix est l'oeuvre de tous, soit elle ne sera pas. Avant même la mondialisation des problèmes contemporains, la paix s'imposait déjà aux aspirations plus justes d'une grande majorité de pays comme un objectif forcément collectif. En mars 1988, alors que nous étions déjà loin des tensions les plus fortes entre l'Est et l'Ouest – nous entrevoyions au contraire, l'aurore de la détente entre les superpuissances – un ancien secrétaire d'État à la Défense des États-Unis rappelait qu'il y avait à l'époque dans le monde, 25 guerres, toutes dans le Tiers Monde comme on l'appelle, donc à la périphérie des pays industrialisés où régnait, par ailleurs, une prospérité sans précédent dans l'histoire.

Si la paix est un objectif mondial, la façon de l'aborder devra l'être également, obligeant par la-même à combler les grandes disparités de niveau de développement. En 1981, au Sommet de Cancun, au Mexique, qui réunissait les responsables les plus importants des pays du Nord et du Sud, l'ancien Chancelier d'Allemagne Fédérale, Willy Brandt, ne disait pas de sophisme lorsqu'il affirmait: ''Tant que la faim prédominera, la paix ne pourra pas l'emporter. Celui qui voudra bannir la guerre devra également bannir la pauvreté. Moralement, cela ne change rien qu'un être humain soit mort à la guerre, ou qu'il soit condamné à mourir à la guerre ou encore qu'il soit condamné à mourir de faim à cause de l'indifférence des autres.''

Cela fait donc un certain temps que l'on connaît la genèse véritable des foyers d'instabilité qui menacent la paix et la sécurité dans le monde. Des réflexions comme celle de Willy Brandt ont contribué à mettre en évidence le besoin d'une coopération internationale comme étant le moyen le plus efficace de faire face aux défis mondiaux de notre époque – les obstacles au développement, la dégradation de l'environnement, les difficultés à consolider la démocratie et l'amélioration d'un système collectif visant à assurer la paix.

À la suite de la crise du Golfe, on a eu la sensation que, en tous cas dans le domaine de la sécurité collective, la communauté des nations avait finalement réussi à mener à bien des actions concertées et efficaces. Cependant, peu à peu, l'on a pu se rendre compte que ce fut le caractère extrêmement clair de l'agression irakienne qui a rendu possibles l'unanimité et la rapidité de l'action du Conseil de Sécurité des Nations

Unies. À l'avenir néanmoins, il se peut que les menaces ne se présentent pas de façon aussi nette, ce qui souligne le besoin urgent d'un système de sécurité qui soit plus efficace au niveau de la prévention, du contrôle et de la dissuasion en cas de conflit.

De l'avis de Brian Urquart, ancien Sous-Secrétaire Général des Nations Unies, nous sommes en train d'entrer dans une période de grande instabilité, caractérisée par d'anciens ressentiments et des rivalités internationales, des troubles religieux et ethniques intenses, une forte hémorragie d'armes et de technologie militaire, la désintégration interne, la pauvreté et de profondes inégalités économiques, pressions des masses de population, catastrophes naturelles, pénurie de ressources vitales et déplacements massifs de populations. Dans une telle conjoncture, aucune nation, on groupe de deux ou trois, ne peut jouer le rôle d'arbitre ou de police, même dans l'hypothèse improbable que les autres nations l'acceptent.

Ces quelques commentaires invitent à la redynamisation du droit international ainsi qu'à la revitalisation des Nations Unies, deux objectifs étroitement liés et justifiables pour une seule et même raison – en effet, la paix est patrimoine universel, donc le rôle du droit et de la diplomatie est de rechercher la concertation, le consensus, resserrant et approfondissant une ententevaste entre un nombre croissant de pays, sans le limiter au point de vue d'un groupe restreint d'acteurs de la scène internationale. Le droit et la diplomatie se font d'autant plus efficaces qu'ils sauront être démocratiques.

Si les Nations Unies n'ont pas encore pu présenter de bilan positif dans cette recherche de sécurité et de paix dans le monde, c'est en raison du conflit d'intérêts entre les superpuissances qui a paralysé le processus deprise de décisions de l'Organisation que nous avons fondée avec tant d'espoirs à San Francisco. Pendant près de cinq décennies, nous avons vécu dans un climat de tension, où les relations entre les pays devaient se plier aux exigences manichéenne selon lesquelles le rapprochement d'un groupe antagonique impliquait automatiquement l'éloignement de l'autre.

La fin de la guerre froide nous a libéré de cette myopie bipolaire, mais apparentement pas des circonstances qui se répètent aujourd'hui. Les foyers d'instabilité dans le monde ne pourront être anéantis que par la coopération internationale, et non par l'imposition de codes de conduite, à l'initiative d'un groupe restreint de pays. Si les mécanismes concernant le renforcement de la sécurité ne sont pas suffisamment perfectionnés, – et je pense que nous sommes tous d'accord sur ce point – il n'en va pas de

même pour les principes consacrés dans la Charte des Nations Unies, et pour deux d'entre eux en particulier: le règlement pacifique des différends et la non-ingérence dans les affaires internes des États.

Il n'est pas nécessaire qu'il y ait de traité entre les pays pour que soit appliquée l'une des règles les plus anciennes et les plus solides du droit international et qui n'est pas uniquement une règle générale découlant du droit coutumier mais également un principe général de droit: la souveraineté territoriale et l'exclusivité de la juridiction que chaque État exerce sur son territoire.

Ce principe de la souveraineté ne peut être remis en cause sans provoquer le chaos sur la scène internationale. L'aliénation de la souveraineté par la force de traités ne peut se confondre avec l'aliénation du droit par la violation de la souveraineté. Dans le nouvel ordre international tant recherché, les principes majeurs de la démocratie demandent la participation de la majorité, au nom de laquelle seulement il est licite légitime d'exercer le pouvoir.

Sous l'impulsion des temps nouveaux, le sort de l'humanité exige des responsabilités partagées, ce qui implique d'étendre les mécanismes de prise de décision existants à un plus grand nombre de pays pour qu'ils puissent participer à l'élaboration d'un nouveau système assurant la paix, la sécurité et le développement. Dans cet ordre d'idées, nous devrions avoir à coeur de redonner aux Nations Unies sa vocation de forum multilatéral de débats et de revaloriser l'Assemblée Générale, en tant que commission de délibérations démocratique et universelle par excellence et privilégier le droit international au niveau de la prise de décisions concertée, en recherchant toujours le consensus.

N'ayons pas d'illusions car les difficultés seront nombreuses. Rechercher le consensus dans un monde marqué par d'énormes inégalités, voilà le défi à relever pour la diplomatie actuelle. Le Brésil est optimiste. En fin de compte ce cycle de conférences rend hommage à un éminent diplomate brésilien, Gilberto Amado, Ambassadeur et juriste; sa contribution au perfectionnement des règles du droit international continuera sûrement à nous inspirer dans l'élaboration de ce nouvel ordre international de plus en plus tourné vers l'entente, la coopération, la prospérité de tous, et surtout la paix.

LE RÈGLEMENT PACIFIQUE DES DIFFÉRENDS INTERNATIONAUX: NOUVELLES TENDANCES

Conférence donnée à Genève le 2 juin 1993
par le professeur Lucius Caflisch, jurisconsulte
Département fédéral des affaires étrangères, Berne

Introduction

En droit interne, les mécanismes de règlement des différends revêtent une importance égale a celle des règles matérielles. Ils servent bien entendu à faire régler par un tiers de conflits qui n'ont pu l'être par la voie directe. Ils ouvrent la voie aux sanctions prévues. Parfois, enfin, ces mécanismes ont un effet préventif: leur seule présence peut amener les parties à la raison. La communauté internationale, elle, est décentralisée de par sa nature. Ce sont largement les États qui continuent à faire le droit et à l'appliquer. Ce sont également eux qui déterminent quand une règle s'applique ou non. Pour utiliser une expression anglaise, le droit des gens est essentiellement ''self-judging'', caractéristique découlant d'une souveraineté que beaucoup d'États refusent de sacrifier.

Lorsque de premières tentatives ont été faites, à l'issue du XIX^{e} et au début du XX^{e} siècle, de centraliser la fonction juridictionnelle sur le plan interétatique au moyen de traités bilatéraux et multilatéraux, nombreux États se sont rebiffés. Pour préserver leur souveraineté – prise, dans son acception politique, comme signifiant la liberté d'action la plus totale possible – ils ont assorti ces traités de réserves débilitantes: honneur et indépendance nationaux, intérêts vitaux. Le champ d'application de ces réserves était virtuellement illimité, étant donné qu'en général les tribunaux internationaux ne disposaient pas, à cette époque, de la compétence de leur compétence. Et même là où ils la possédaient, elle ne servait pas à grand-chose. Qui, en effet, pourra juger de l'indépendance, de l'honneur et des intérêts vitaux d'un État sinon cet État lui-même?

Un profond changement s'est produit, à l'issue de la première guerre mondiale, par l'avènement de nouvelles organisations intergouvernementales, Société des Nations Unis en tête. Ces institutions aspiraient à une centralisation, du moins partielle, d'un ordre essentiellement décentralisé, d'abord sur les plans législatif et administratif. Cette aspiration a entraîné un début de centralisation également dans le domaine du règlement pacifique des différends, à preuve l'établissement de la Cour permanente de Justice internationale, précédée d'ailleurs par l'expérience sans lendemain de la Cour centraméricaine de Justice (1907-1917). L'élan ainsi né, caractéristique de l'entre-deux-guerres, a engendré de multiples initiatives multilatérales et bilatérales. Les secondes ont connu plus de succès que les premières, et les modes diplomatiques de règlement l'ont dans l'ensemble emporté sur les méthodes juridictionnelles. En s'engageant sur le plan bilatéral, à défaut de pouvoir connaître les différends visés – puisqu'ils n'étaient pas encore nés – on connaissait au moins l'identité de la future partie adverse. Et, contrairement aux voies juridictionnelles, les moyens diplomatiques de règlement ne sont contraignants que quant à la participation à la procédure et non quant au résultat de celle-ci.

La période séparant les deux grands conflits mondiaux a vu en outre de nombreuses instances où des différends ont été effectivement acheminés vers de telles procédures, de sorte que cette période a pu être qualifiée à juste titre d'âge d'or du règlement pacifique. Les impulsions émanant de la Cour permanente à La Haye y étaient pour beaucoup; et on notera, pour la période en cause, un net recul des clauses réservant l'honneur, l'indépendance et les intérêts vitaux des États.

Malheureusement, l'essor des institutions internationales à l'issue de la seconde guerre mondiale n'a pas eu, dans le domaine qui intéresse, l'effet bénéfique que l'on croyait pouvoir escompter. Au contraire, les mécanismes de règlement pacifique des différends se sont peu à peu affaiblis et atrophiés. Cette régression s'explique aisément. Vers la fin des années 40, s'est ouvert un fossé Est-Ouest qui allait en s'élargissant. Les pays occidentaux s'employaient à développer les mécanismes de règlement. Les membres du camp socialiste, eux, voulaient faire disparaître certaines règles existantes du droit international, qualifiées de bourgeoises et rétrogrades, et les remplacer par un ordre nouveau, plus conforme à leurs exigences. Ils n'avaient ainsi aucun intérêt à apporter leur soutien à des mécanismes et institutions visant avant tout à maintenir le droit existant, ni à confier leurs litiges à des tiers qui pouvaient provenir du camp de leurs adversaires idéologiques. À ce phénomène de rejet

est venu s'ajouter, immédiatement après la vague de décolonisation de 1960, un antagonisme Nord-Sud attisé par l'étrange comportement de la Cour internationale de Justice dans l'affaire du Sud-Ouest africain. Sur le plan de la politique juridique, cet antagonisme a déclenché des attaques en règle contre le droit international existant, qui avait été élaboré sans la participation des États nouvellement indépendants et que ces derniers qualifiaient d'inique. Il fallait donc ajuster ses règles, voire transformer celles qui étaient perçues comme discriminatoires à l'égard des pays en développement, en règles établissant une discrimination à l'envers (théorie de la dualité des normes). Cela étant, les nouveaux États, qui tenaient à leur indépendance chèrement acquise, n'avaient plus aucun intérêt à favoriser la mise en oeuvre du droit existant par des mécanismes de règlement qui, au surplus, pouvaient entraîner le recours à ceux-là-mêmes qui avaient créé ce droit.

Les deux phénomènes évoqués – les antagonismes Est-Ouest et Nord-Sud – ont pesé sur les efforts de la communauté internationale dans le domaine du règlement pacifique des différends. Pourtant, le bilan de l'époque de l'après-guerre n'est pas entièrement négatif. Les Nations Unies ont cherché à régler nombre de conflits par les moyens prévus au Chapitre VI de la Charte. Tant bien que mal, la Cour internationale de Justice a continué l'oeuvre de la Cour permanente. Des accords régionaux de règlement ont été élaborés, tels le Pacte de Bogota (1948), la Convention européenne de règlement pacifique des différends (1957) et le Protocole de l'Organisation de l'unité africaine (1964). À des rares exceptions près, on n'a plus conclu, en revanche, de traités bilatéraux de conciliation et d'arbitrage. Quant aux clauses compromissoires insérées dans les traités bilatéraux et multilatéraux de l'époque, la plupart d'entre elles étaient peu contraignantes. Tel était notamment le cas de clauses compromissoires dans le conventions préparées par la Commission du Droit international: recours à la Cour de la Haye, mais seulement avec le consentement des États parties au litige, ou procédure obligatoire de conciliation. Les déclarations faites par les États parties au Statut de la Cour de la Haye en vertu de l'article 36, paragraphe 2, de ce texte étaient peu nombreuses et souvent assorties de réserves étendues. Enfin, relativement peu d'affaires ont effectivement été portées devant des tribunaux arbitraux *ad hoc* ou devant la Cour internationale avant les années 80.

Dans le présent exposé, il s'agit de prendre la température une douzaine d'années après et, si possible, de dégager quelques perspectives d'avenir. Ce faisant, on restera sur un plan général, sans tenir compte des méthodes de règlement particulières qui ont cours dans les domaines des

droits de l'homme, des tarifs douaniers et du commerce et de l'intégration économique et politique régionale. La prise d'inventaire ainsi proposée peut s'effectuer dans les rubriques suivantes:

- Attitude des États quant aux procédures universelles de règlement juridictionnel;
- Activités du Comité spécial de la Charte;
- Activités de la Commission du Droit International;
- Modes de règlement pacifique des différends dans trois domaines particuliers: droit de la mer, Antarctique et environnement;
- Efforts régionaux.

Attitude des États quant aux procédures universelles de règlement juridictionnel

Au cours des années 70, la Cour internationale de Justice était en perte de vitesse. Un quart seulement des membres de la communauté internationale avaient émis des déclarations acceptant sa juridiction, et celles-ci étaient parfois assorties de réserves automatiques rappelant les anciennes exclusions relatives à l'honneur, à l'indépendance et aux intérêts vitaux. Les clauses compromissoires insérées dans les traités bilatéraux et multilatéraux de l'époque s'orientaient plutôt vers l'arbitrage et ne faisaient appel à la Cour – plus précisément à certains juges – que pour nommer des membres de tribunaux arbitraux là où les États concernés ne seraient pas parvenus s'entendre. On commença en fait à se demander si cette juridiction permanente avait encore un rôle à jouer.

Heureusement, on a pu assister à une nette reprise au début des années 80. Cette reprise s'est intensifiée dès le milieu de la décennie, sans doute à la faveur des bouleversements qui s'annonçaient sur l'échiquier politique. Les États du camp socialiste ont commencé à retirer les réserves dont ils avaient assorti les clauses compromissoires faisant appel à la Cour de la Haye et figurant dans des instruments multilatéraux généraux tels que la Convention de 1948 pour la prévention et la répression du crime de génocide. Les membres permanents du Conseil de Sécurité se sont mis à la recherche de certaines catégories de litiges qu'ils seraient tous en mesure de confier à la Cour – recherche qui, malheureusement, n'a pas encore abouti. Enfin, une série d'États ont unilatéralement accepté la juridiction obligatoire de la Cour de la Haye: Barbade (1980), Sénégal

(1985), Suriname (1987), Chypre et Nauru (1988), Guinée-Bissau et Zaïre (1989), Espagne et Pologne (1990), Hongrie et Bulgarie (1993).

Sans doute cette évolution est-elle encourageant, d'autant plus qu'elle est accompagnée d'un accroissement appréciable du volume d'affaires acheminées vers la Cour ou vers une procédure d'arbitrage. La continuation et l'amplification de cette tendance dépendront de la situation politique et de la volonté des États plutôt que d'une modification des structures de la Cour et des possibilités d'accès à celle-ci, contrairement à ce que certains avaient prétendu au cours des années 70. Ce n'est ni en élargissant l'accès à la Cour en matière contentieuse aux organisations internationales ni en y introduisant des procédures préjudicielles que l'on assurera définitivement l'avenir de la Cour de La Haye. Cet avenir dépend de l'existence de conditions incitant les États à recourir à cet organe. La Cour peut y contribuer par un travail rigoureux détaché des modes et vicissitudes du moment, qui rend raisonnablement prévisible le règlement des différends qui lui sont soumis.

Un paradoxe veut que lorsque la Cour de La Haye se porte bien l'arbitrage en fait de même. En l'espèce, le recours réitéré à l'arbitrage *ad hoc* au cours des années écoulées, à commencer par les affaires du *Canal de Beagle (Argentine c. Chile)* et de la *délimitation du plateau continental (France c. Royaume--Uni)*, a sans doute eu un effet d'entraînement sur les activités de la Cour. À cela s'ajoute que la pratique consistant à insérer des clauses compromissoires contraignantes dans les conventions internationales générales ou régionales a repris, comme en témoignent par exemple les négociations sur une charte de l'énergie actuellement en cours entre États de l'OCDE et pays de l'Europe centrale et orientale. La renaissance de l'intérêt de la communauté internationale pour le règlement juridictionnel se manifeste enfin au niveau des règles de procédure. A ce jour, on s'est souvent fondé sur les articles 51 et suivants de la Convention de La Haye de 1907 pour le règlement pacifique des conflits internationaux. Croyant pouvoir constater un certain vieillissement de ces règles, le Conseil d'administration de la Cour permanente d'arbitrage, mû par un désir probablement irréaliste de réactiver ce vieil organisme, vient d'élaborer et d'adopter une série de dispositions auxquelles les États parties à un différend et les tribunaux arbitraux pourront à l'avenir se référer en lieu et place des articles 51 et suivants de la Conventions de 1907.

On peut se demander si le Conseil d'administration de la Cour permanente d'arbitrage était l'enceinte idoine pour ce genre d'exercice. On peut également se demander si le Conseil a bien fait de s'inspirer du Règlement de l'UNCITRAL qui, lui, est conçu pour les différends entre États et investisseurs individuels étrangers. Toujours est-il que le

moment est peut-être venu de reprendre cette question dans le cadre de la Commission du Droit international et de la ''Décennie du droit international'' décrétée par l'Assemblée générale des Nations Unies. Il ne serait pas impensable, par exemple, que la Commission reprenne l'étude du Modèle de règles sur la procédure arbitrale adopté par elle en 1958 et qu'elle le rende plus acceptable en le dépouillant de ses aspects les plus ''progressifs'' (par exemple les règles sur la composition et la constitution du tribunal arbitral ou celles relatives à la Juridiction obligatoire de la Cour de La Haye en matière de nullité et de révision).

Le Comité spécial de la Charte

En 1990, le Guatemala a soumis aux Nations Unies un ''projet de règlement de conciliation''. Ce texte a été acheminé vers le Comité spécial de la Charte des Nations Unies et du raffermissement de la Charte. Sensiblement modifié et amélioré en févier 1993, ce document contient des règles sur la procédure de conciliation proprement dite aussi bien que sur la constitution et la composition des commissions, comme le faisait déjà le modèle de règles élaboré par la CDI, en matière d'arbitrage. Il déborde ainsi le cadre habituel des règlements de procédure; de plus on ignore si le texte proposé est destiné à servir de simple règlement modèle aux États ou à s'appliquer automatiquement à titre supplétif. L'initiative guatémaltèque n'en met pas moins en relief le renouveau d'intérêt que suscite la conciliation, mode de règlement écarté depuis les années 50 bien qu'il soit particulièrement respectueux de la liberté des États. Ce renouveau, dont le texte soumis par le Guatemala n'est pas unique témoignage, suggère-t-il que la communauté des nations est prête à accepter non seulement un ensemble de règles de procédure, mais l'obligation de se soumettre à une procédure de conciliation stipulée dans une convention de portée générale? Peut-être le moment est-il effectivement venu d'entreprendre un effort dans ce sens et peut-être la Commission du Droit international serait-elle l'enceinte la plus indiquée pour conduire la réflexion préliminaire nécessaire.

Les activités de la commission du Droit International

Par le passé, la plupart des projets d'articles préparés par la Commission ont été complétés par des dispositions relatives au règlement pacifique des différends. Deux approches ont été suivies.

La première approche consistait à prévoir une procédure juridictionnelle – recours à la Cour de la Haye ou arbitrage, ou les deux – qui, cependant, devait être acceptée par les États concernés pour être effective. Le modèle de cette approche, adoptée également dans les Conventions de 1961 et 1963 sur les relations diplomatiques et consulaires, était le Protocole facultatif joint aux quatre Conventions de 1958 sur le droit de la mer.

Seconde approche: une annexe à la Convention établit une procédure de conciliation qui est obligatoire pour les États parties au différend mais qui, est-il besoin de le rappeler, n'a pas d'issue contraignante. Les modèles pour cette approche longtemps dominante ont été les Conventions de 1969 sur le droit des traités et de 1975 sur les missions spéciales.

Malheureusement, il y a eu, tout dernièrement, une troisième approche qui consiste à ne rien prévoir du tout, fondée notamment sur l'idée que le règlement pacifique des conflits est un problème général qui doit être résolu, indépendamment des matières traitées dans les différents projets d'articles, dans des accords bilatéraux et multilatéraux portant spécifiquement sur le règlement pacifique. C'est l'approche suivie dans le projet d'articles sur les immunités juridictionnelles des États et de leurs biens, en dépit des propositions faites par un des Rapporteurs spéciaux. Cette solution se rencontre également dans le projet d'articles sur le droit relatif à l'utilisation des cours d'eau internationaux à des fins autres que la navigation, adopté en 1991 en première lecture. On doit espérer que l'approche restrictive ainsi suivie sera abandonnée lors de la seconde lecture du projet. Il serait regrettable qu'un texte appelé à servir d'accord-cadre, c'est-à-dire de modèle, aux États désireux de conclure des traités de cours d'eau ne suggère pas de clauses règlement à ces mêmes États. Prévoir de telles clauses sera d'autant plus facile que le prédécesseur de l'actuel Rapporteur avait fait des propositions détaillées sur ce point en 1990. Celles-ci suggèrent, pour les différends entre États, une procédure obligatoire de conciliation, suivie, le cas échéant, de l'arbitrage facultatif. Sur ce dernier point, on devrait du reste se résoudre à aller plus loin, car, dans le domaine des ressources naturelles partagées – que l'on songe au droit de la mer – des modes de règlement à résultat obligatoire semblent particulièrement désirables.

En suggérant le sujet de sa conférence, celui qui vous parle ignorait que le règlement pacifique des différends, objet du cinquième rapport de M. Arangio-Ruiz (document A/CN 4/453 du 12 mai 1993), serait au coeur des débats de la présente session de la Commission. Dans ce document, le Rapporteur insiste à juste titre sur les changements intervenus en la matière

sur la scène internationale pour proposer, dans le domaine de la responsabilité internationale, un système partiel de règlement consistant en trois phases. Dans une première phase, l'État destinataire d'une contre-mesure, qui met en doute la légalité de celle-ci, aurait la possibilité de recourir unilatéralement à la conciliation. En cas d'échec, ou d'impossibilité d'établir ou de faire fonctionner la commission de conciliation, l'État en cause pourrait déclencher une procédure d'arbitrage. Enfin, si le tribunal ne peut être mis sur pied ou ne peut rendre sa sentence dans le délai prescrit, cet État serait habilité à saisir la Cour de La Haye par voie de requête unilatérale.

Il n'appartient pas au conférencier de commenter cette proposition, qui est en train d'être débattue par la Commission du Droit International. On peut en revanche se réjouir de ce que la Commission consacrera un débat approfondi à ce sujet capital, à un moment où des perspectives nouvelles s'ouvrent. On peut également suivre M. Arangio-Ruiz lorsqu'il demande à la Commission de ne pas manquer l'occasion qui lui est offerte de faire progresser le règlement pacifique des différends. Naturellement, cette remarque vaut aussi pour la plupart des autres textes que prépare la Commission. Il appartiendra ensuite aux gouvernements d'accepter ou de rejeter les propositions formulées en cette matière par les experts de la Commission. Si la Commission laisse passer l'occasion qui lui est offerte, il est certain que des gouvernements la saisiront à un stade ultérieur, mais en présentant des propositions qui pourraient être beaucoup moins judicieuses que les siennes.

Modes de règlement pacifique des différends dans trois domaines particuliers: droit de la mer, Antarctique et environnement

La troisième Conférence des Nations Unies sur le droit de la mer, qui s'est terminée en 1982, formait en fait la première étape de l'actuelle renaissance du règlement pacifique des différends, en particulier de ses modes juridictionnels. La Convention de 1982, qui semble devoir entrer en vigueur d'ici à deux ans environ, soumet une partie importante de litiges relatifs à l'interprétation ou à l'application de ses dispositions à des procédures juridictionnelles obligatoires et établit une voie particulière pour régler les différends impliquant des opérateurs individuels explorant ou exploitant les ressources minérales des grands fonds marins. Voilà des mécanismes qui vont bien au-delà de ce que l'on a eu l'habitude de prescrire au cours des années consécutives à la seconde guerre mondiale.

Lors de son adoption, ce système a été salué comme une véritable percée: pour la première fois, l'Union Soviétique et ses alliés, adversaires décidés de toute procédure de règlement permettant l'intervention d'un tiers, ont admis cette intervention, tout comme l'ensemble des pays du tiers monde et la Chine. Cette volte-face annonçait elle une ère nouvelle dans le domaine du règlement pacifique?

La réponse à cette question devait, malheureusement, être négative. L'attitude des États en cause, en particulier de l'Union Soviétique, était en effet due aux intérêts particuliers – notamment en matière de pêche – qu'il s'agissait de protéger. Les mécanismes de règlement adoptés en 1982 n'en reflétaient pas moins deux tendances qui pouvaient être qualifiées de nouvelles: l'accès direct au système ouvert aux opérateurs individuel et,

surtout, le choix de procédures juridictionnelles offert aux États. Ceux-ci peuvent, en émettant une déclaration unilatérale, accepter un ou plusieurs des moyens suivants: 1) la juridiction du nouveau Tribunal international du droit de la mer; 2) la juridiction de la Cour de La Haye; et 3) l'arbitrage.

Si les États parties à un litige déclarent accepter le même moyen, celui-ci sera applicable, à l'exclusion de toute autre voie. En l'absence de déclarations ou de déclarations concordantes, les États parties sont présumés avoir choisi l'arbitrage. Autrement dit, l'arbitrage est le mode résiduel de règlement assurant le caractère obligatoire du mécanisme. La formule ainsi décrite, dite de choix de procédures, a été retenue afin de permettre qu'un consensus se réalise entre la plupart des États du tiers monde (Tribunal), la majorité des pays occidentaux et certains États latino-américains (Cour de La Haye), et la France, les pays de l'Est et quelques autres États occidentaux (arbitrage). Comme on va le voir, cette formule a fait école.

Le Traité du 1er décembre 1959 sur l'Antarctique est issu de la guerre froide. C'est sans doute pourquoi l'article XI du traité se borne à rappeler les moyens de règlement énumérés à l'Article 33 de la Charte des Nations Unies, puis à prévoir qu'à défaut de règlement produit par ces moyens les parties au différend peuvent, d'un commun accord, saisir la Cour de La Haye. Tout cela est si anodin qu'il n'était guère nécessaire d'inscrire une pareille disposition dans le traité. La même clause figure dans la Convention de Canberra de 1980 sur la conservation de la faune et de la flore marines de l'Antarctique (article 25).

C'est avec la Convention de Wellington du 2 juin 1988 sur la réglementation des activités relatives aux ressources minérales de l'Antarctique, mal aimée des écologistes, que les Parties consultatives ont amorcé un virage. Les articles 55 à 58 de ce texte établissent une procédure obligatoire de règlement des différends relatifs à l'interprétation ou à l'application de la convention, avec un choix de procédures entre la Cour internationale de Justice et l'arbitrage, ce dernier étant la voie subsidiaire obligatoire en l'absence de choix ou de choix identiques. L'article 59, quant à lui, doit permettre aux opérateurs d'accéder, pour certains types de différends, à des procédures internationales de règlement à créer ultérieurement.

L'on sait que le sort définitif de la Convention de 1988 est censé rester en suspens au moins pour les cinquante années à venir. Cela résulte des articles 6 et 25 du Protocole de Madrid, du 4 octobre 1991, relatif à la protection de l'environnement antarctique. Mais, curieusement, cet instrument, dont un des buts principaux était d'anéantir la Convention

de Wellington, reprend l'essentiel des dispositions de celle-ci en matière derèglement des différends. Il prévoit une procédure obligatoire de règlement des litiges portant sur l'interprétation ou l'application du protocole, offrant par ailleurs un choix entre la Cour de La Haye et l'arbitrage, ce dernier constituant le moyen subsidiaire garantissant le caractère obligatoire de la procédure.

Cette formule se retrouve dans d'autres traités multilatéraux relatifs à l'environnement, en particulier dans deux instruments récemment élaborées sous les auspices de la commission économique pour l'Europe et conclus le 17 mars 1992: la Convention sur la protection et l'utilisation des cours d'eau transfrontières et des lacs internationaux, ainsi que la Convention sur les effets transfrontières des accidents industriels. La seule différence entre ces textes et celui de Madrid est que le moyen subsidiaire assurant le caractère obligatoire de la procédure est, ici, le recours à la Cour plutôt que l'arbitrage.

La description fort sommaire qui vient d'être faite autorise la conclusion que, s'agissant de ressources naturelles à partager ou de protection de l'environnement, on a pu assister, au cours de ces dernières années, à un net rehaussement du niveau des obligations étatiques en matière de règlement pacifique des différends. Le progrès accompli s'exprime d'abord dans la plus grande place réservée aux individus dans les procédures de règlement, ensuite et surtout dans la force obligatoire attribuée au résultat de ces procédures, assurée grâce à une formule qui, dans sa forme la plus récente, permet de choisir entre la Cour de La Haye et l'arbitrage, le moyen résiduel obligatoire étant tantôt la première, tantôt le second.

Efforts régionaux

C'est incontestablement le continent européen qui, ces dernières années, a montré le plus d'intérêt pour la question du règlement pacifique des conflits internationaux. Une tentative dans ce domaine, qui remonte à 1957 – la Convention européenne pour le règlement des différends –, a déjà été signalée. Cette tentative aboutit à un instrument qui est plus remarquable pour ses lacunes que pour sa substance, qui n'a jamais été utilisé et qui n'est ouvert qu'aux membres du Conseil de l'Europe.

Depuis sa naissance, la Conférence sur la Sécurité et la Coopération en Europe (CSCE) s'est intéressée à l'établissement de mécanismes régionaux de règlement pacifique. La Suisse, notamment, a présenté à la Conférence, en

1973, 1978 et 1984, des projets proposant l'arbitrage pour certaines catégories de conflits et la conciliation pour l'ensemble des autres litiges interétatiques. Ces initiatives successives, de même que celles d'autres pays occidentaux, se sont toutes heurtées à l'intransigeance du bloc socialiste qui, en n'acceptant que la négociation, écartait tout moyen faisant appel à des tiers.

Un nouvel élan a été pris, en 1991, à la Valette, alors que l'Europe de l'Est était en pleine mutation. La Réunion d'experts de La Valette a produit un document dont le champ d'application est paneuropéen, mais qui a un caractère purement politique. Ce texte prévoit une procédure qui oscille entre les bons offices et la médiation et qui, de plus, comporte de sévères limitations *ratione temporis* et *ratione materiae*. Vers la fin de l'année 1992, la CSCE, saisie d'une initiative franco-germanique, s'est à nouveau penchée sur le problème et, au cours d'une réunion qui s'est tenue à Genève en octobre 1992, a élaboré et adopté la Convention relative à la conciliation et à l'arbitrage au sein de la CSCE. Signé à ce jour par 35 pays (sans les États-Unis, le Royaume-Uni, les Pays-Bas et l'Espagne), ce traité entrera en vigueur lorsqu'il aura été ratifié par 12 États, soit vraisemblablement au cours de l'hiver 1993/94.

La Convention CSCE permet à chacun de ses États parties de désigner, pour des mandats limités à quatre ans, deux conciliateurs et un arbitre, l'ensemble des personnes ainsi nommés étant porté sur deux listes séparées formant, respectivement, le collège des conciliateurs et celui des arbitres. Les deux collèges constituent la ''cour de conciliation et d'arbitrage'' et éliront ensemble le président du bureau de cette cour, puis, séparément, deux conciliateurs et deux arbitres en tant que membres du bureau. Cet organe semi-permanent se réunira périodiquement au siège de la cour, à Genève, pour gérer les modes de règlement prévus, la conciliation et l'arbitrage.

C'est la procédure de conciliation qui forme la pierre angulaire du nouveau système. Tout État partie à la Convention peut soumettre tout différend l'opposant à tout autre État partie – il n'est pas possible de formuler des réserves – à une commission de conciliation à constituer *ad hoc,* composée d'un membre nommé par chaque partie et de trois personnes choisies sur la liste des conciliateurs par le bureau. À l'issue de la procédure, cet organisme adresse des recommandations aux États parties, qui, si elles sont acceptées, mettent fin au litige. On pourrait faire valoir que c'est bien peu de chose et que les États concernés devraient être confrontés par une décision obligatoire. Mais, dans la réalité des relations interétatiques, amener les parties devant un tiers et les astreindre à une procédure comportant des éléments de négociation assistée peut être un

pas important vers le règlement du litige; de plus, la distance entre des recommandations – qu'il est souvent difficile d'ignorer pour des raisons politiques – et la décision obligatoire – que ses destinataires cherchent souvent à éluder avec une ingéniosité qui mériterait d'être mieux employé – est bien inférieure à ce que l'on croit généralement.

Il ne faut pas pour autant sous-estimer les procédures juridictionnelles. Les auteurs de la Convention CSCE l'ont compris, puisque cet instrument institue également une procédure d'arbitrage devant des tribunaux *ad hoc* composés essentiellement de la même façon que les commissions de conciliation. Mais, pour être applicable, cette procédure, qui aboutit à une décision obligatoire, doit avoir été acceptée par les États parties au litige, soit *ad hoc*, soit d'avance. On regrettera que les États participant à la CSCE se soient laissés égarer par leur crainte des décisions obligatoires dont les effets, on vient de le dire, ne sont pourtant pas aussi éloignés de ceux des recommandations qu'on le croit généralement.

On n'en retiendra pas moins – le bilan est donc globalement positif – que l'Europe est enfin nantie d'une procédure obligatoire et généralisée de conciliation, qui ne saurait relativisée par des réserves. On ajoutera que la Convention CSCE pourra faire l'objet d'un réexamen dès 1994, année où se réunira, à Budapest, une conférence dite d'examen de la CSCE.

Conclusion

L'évolution de la situation politique dans le monde et en Europe, au cours de ces dernières années, a sans doute stimulé la recherche de solutions en matière de règlement pacifique des différends. Elle a contribué à la conjoncture favorable dont jouissent à l'heure actuelle l'arbitrage – voir à titre d'exemple l'affaire de la *Laguna del Desierto (Argentina c. Chili)* – et la Cour de La Haye; on citera en exemple la soumission à cette cour du différend hungaro-slovaque relatif à la *Déviation du Danube (Gabcikovo-Nagymaros).*

Cette conjoncture favorable s'étend au domaine législatif. On a d'abord noté un net regain d'intérêt pour la conciliation, délaissée depuis les années 50, à preuve la procédure instituée par la Convention CSCE de 1992 et le règlement de conciliation actuellement débattu devant le Comité spécial de la Charte. Autre développement: si beaucoup d'États continuent à se désintéresser de la Cour de La Haye, ils semblent en revanche plus enclins à emprunter même des votes dont l'issue est obligatoire, si un

choix de moyens leur est offert – entre la Cour et l'arbitrage, par exemple, ou entre ces deux votes et le recours à un nouveau tribunal permanent. Un troisième développement est le rôle croissant joué par l'individu, non seulement dans les domaines désormais traditionnels de droits de l'homme et de la protection des investissements (clauses CIRDI), mais aussi dans celui de l'exploration e de l'exploitation des ressources naturelles (droit de la mer, Antarctique). Il semblerait approprié de profiter de cette conjoncture ainsi que de l'occasion offerte par la Décennie du droit international pour passer à l'action.

Action sur le plan bilatéral d'abord, en ranimant les traités de conciliation et d'arbitrage existants et, pourquoi pas, en concluant de nouveaux accords, comme la Hongrie et la Pologne viennent de le faire avec la Suisse.

Avec la conclusion en 1992 de la Convention CSCE, l'Europe a fait un bond en avant sur le plan régional. Reste à voir qui deviendra partie au nouvel instrument et si les pays de l'Europe auront la volonté politique de se servir d'un mécanisme dont le volet ''arbitrage'' est du reste perfectible. Sans doute serait-il souhaitable que des initiatives semblables se développent dans d'autres régions du monde.

Sur le plan universel, enfin, on peut relever qu'une cinquantaine parmi les 183 États Membres de l'ONU ont à présent fait la déclaration prévue à l'Article 36, paragraphe 2, du Statut de la Cour internationale. C'est toujours trop peu, et il faut espérer que d'autres États, notamment en Europe centrale et orientale ainsi qu'en Asie centrale, viendront s'y ajouter.

Il paraît hautement souhaitable que la Commission du Droit International contribue au mouvement esquissé, en s'assurant que les projets d'articles préparés par elle soient munis de clause de règlement pacifique des différends raisonnablement efficaces. Étant donné qu'il s'agit de projets de caractère législatif, dont les dispositions pourront engendrer des litiges quant à leur interprétation ou à leur application, donc des litiges juridiques, les voies prévues devraient englober des procédures juridictionnelles obligatoires. Pour en faciliter l'acceptation, il serait possible de recourir à des formules de choix de procédure, choix notamment entre la Cour de La Haye et l'arbitrage. On voit difficilement, en effet, pourquoi de telles clauses seraient admises dans les domaines du droit de la mer, de l'Antarctique et de la pollution transfrontière, et bannies de ceux de l'utilisation des cours d'eau internationaux, de l'immunité de juridiction et de la responsabilité des États. Et si la Commission cherchait à identifier de nouveaux domaines d'activité, elle pourrait reprendre le modèle des règles relatif à la procédure arbitrale élaboré par elle en 1958.

En dépouillant ce texte de certains aspects qui pourraient être qualifiés de trop ''progressifs'' ou qui rapprochent l'arbitrage de façon trop marquée du règlement judiciaire, la Commission pourrait peut-être et enfin transformer ce ''modèle'' en une réalité vivante.

De là à passer à un système généralisé, universel et obligatoire de règlement juridictionnel, ce serait un pas que la communauté internationale n'est sans doute pas prête à franchir. Mais en rester à l'élaboration de simples règlements de procédure d'arbitrage et de conciliation serait singulièrement manquer d'ambition. Ne faudrait-il pas tenter, dans le cadre offert par la Décennie du droit international, d'instituer au moins un mécanisme généralisé et universel de conciliation? Et la Commission du Droit International ne serait-elle pas le forum approprié pour procéder à une première réflexion sur cette idée?

LE SYSTÈME DE RÈGLEMENT DES DIFFÉRENDS INTERNATIONAUX DE L'ORGANISATION MONDIALE DU COMMERCE

Conférence donnée le 18 juin 1996
par S.E.M. Celso Lafer
Professeur à la Faculté de droit de l'Université de São Paulo
Ancien Ministre des Relations Extérieures du Brésil (1992)
Ambassadeur et Représentant permanent du Brésil auprès de l'OMC et de
l'Office des Nations Unies à Genève
Président de l'Organe de Règlement des Différends de l'OMC (1996)

À la mémoire du
Professeur Hebert W. Briggs.

Le système de règlement des différends de l'OMC

I. Introduction

L'un des problèmes cruciaux des relations internationales est la dichotomie entre la guerre et la paix. D'où l'importance d'une réflexion sur la manière d'éviter la guerre et de créer les conditions propices à l'instauration d'un monde pacifique.

i) Le commerce

Dans le contexte de cette importante réflexion, et en recourant aux leçons des auteurs classiques, on doit rappeler – au moment de présenter le premier aspect de cette conférence – le rôle essentiel depuis longtemps attribué au commerce international comme l'une des conditions d'un monde pacifique.

Montesquieu, par exemple, souligne l'importance du ''doux commerce'' comme moyen d'endiguer le flot des préjugés et de favoriser l'interdépendance positive entre les nations[257].

Kant, dans son ''projet de paix perpétuelle'', fait observer que l'une des garanties d'une telle paix est ''l'esprit de commerce, qui ne peut coexister avec la guerre[258]''.

[257] Montesquieu, *De l'esprit des Lois,* Chronologie, Introduction et Bibliographie par Victor Goldschimidt, Paris, GF – Flammarion, 1979-2 – XX, 1/XX, 2 p. 9 et 10 – voir aussi Claude Morilhat – *Montesquieu*, *Politique et Richesses,* Paris: PUF, 1996.

[258] Eternal Peace, in *The Philosophy of Kant,* edited with an Introduction by Carl J. Friedrich – New York, Modern Library, 1977, p. 455 – Il est fait référence à la première adjonction des articles du Projet de paix perpétuelle.

Cette vision positive des rapports entre le commerce et la paix est à l'origine de l'Organisation Internationale du Commerce (OIC) et de la Charte de La Havane, ainsi que de leur évolution, qui a abouti au GATT, ce dernier ayant ensuite ouvert la voie, grâce au succès du Cycle d'Uruguay, à l'Organisation Mondiale du Commerce (OMC). Les États-Unis d'Amérique, jouant un rôle décisif dans l'élaboration de l'ordre économique mondial après la seconde guerre mondiale, ont suivi la ligne de pensée définie dans les années 30 par le secrétaire d'État Cordell Hull, qui affirmait: ''Je n'ai jamais hésité et je n'hésiterai jamais dans ma conviction qu'une paix durable et le bien-être des nations sont complètement subordonnés aux relations d'amitié, à l'équité, à l'égalité et à une liberté aussi grande que pratiquement réalisable du commerce international[259]''. En résumé, cela signifierait ''la possibilité de libérer le commerce international des restrictions tarifables et autres comme préalable à la paix et au développement économique'', pour reprendre les paroles de Dean Acheson commentant la politique de Corell Hull[260].

La fin du conflit Est/Ouest et la chute du mur de Berlin, qui précèdent et symbolisent la fin de la guerre froide, ont eu pour effet d'élargir et, pratiquement, d'universaliser l'acceptation axiologique de cette vision d'une humanité rendue pacifique grâce au commerce. Dans la même perspective, la prospérité des nations n'est pas possible dans l'isolement autonome. Elle ne peut être réalisée que dans l'interdépendance économique, qui exige un système d'échanges multilatéraux fondé sur le caractère rationnel de la réciprocité des intérêts et capable de régir la coopération et les conflits entre des économies nationales différentes sur un marché globalisé.

L'OMC exprime de façon parfaite combien profondément et largement la logique de la globalisation s'est développée au cours de l'après-guerre. Ce jugement sur l'OMC s'appuie sur deux ordres de faits. Il y a d'abord, *ratione personae*, le nombre et la diversité de ses membres – pays développés et pays en développement; anciens pays socialistes en train de passer à une économie de marché –, d'où, incidemment, l'importance et la dimension politique de l'entrée de la Russie et de la Chine dans l'OMC comme moyen de renforcer le caractère universel de cette organisation. Il y a lieu de rappeler, à cet égard, qu'à l'origine le GATT comptait seulement 23 parties contractantes, alors qu'en avril 1994 ce sont 123 délégations qui se sont retrouvées à Marrakech. Le deuxième

[259] *Economic Barriers to Peace,* N.Y., W. Wilson Foundation, 1937, p. 14 – cite cité dans K. Dam, *The gatt-Law and International Economic Organisation,* Chicago, the University of Chicago Press, 1970, p. 12. *Present at the Creation,* N.Y., Norton, 1969, p. 9.

[260] *Present at the Creation,* N.Y., Norton, 1969, p.9.

ordre de faits est (*ratione materiae)* celui qui traite des sujets couverts par les accords de l'OMC. Le GATT, en pratique, ne s'occupait que du commerce international des biens industriels; or l'OMC s'occupe, entre autres choses, de l'agriculture, des services et de la propriété intellectuelle. On estime que les négociations multilatérales du GATT concernaient des échanges commerciaux correspondant aux montants ci-après:

> *Cycle Dillon* – (1960-1961, 45 délégations présentes) – 4,9 milliards de dollars des États-Unis.
> *Cycle Kennedy* – (1946-1967, 49 délégations présentes) – 40 milliards de dollars des États-Unis.
> *Cycle de Tokyo* – (1973-1979, 98 délégations présentes) – 155 milliards de dollars des États-Unis.
> Or, pour le *Cycle d'Uruguay* – (1986-1994, 123 délégations présentes), cycle qui a abouti à la création de l'OMC, les échanges commerciaux concernés sont estimés à un montant de 3 700 milliards de dollars des États-Unis[261].

ii) Le droit

Le droit est une technique d'organisation sociale qui a une extrême importance pour la paix. D'où l'idée de la paix par le droit comme autre élément de la réflexion concernant un monde pacifique. Et pour rappeler encore une fois la leçon des auteurs classiques, on dira que cette idée remonte à la tradition de Grotius.

''Le droit est un ordre de sécurité, c'est-à-dire de paix'', pour citer Kelsen, et même si l'on ne peut dire, comme il le fait dans la deuxième édition de *The Pure Theory of Law* (modifiant ce qu'il avait écrit lui-même dans la *General Theory of Law and State*), ''que l'état de droit est nécessairement un état de paix et qu'assurer la paix est une fonction essentielle du droit'', il n'y a aucun doute, selon les paroles mêmes de Kelsen, que ''le développement du droit va dans cette direction[262]''.

Dans les relations internationales, l'une des techniques qui permet d'assurer la paix, en tant que limite idéale vers laquelle tend le droit, est le *règlement pacifique des différends.*

En droit international public – général et contemporain –, comme établi dans la Charte des Nations Unies (par. 3 de l'Article 2), le *règlement pacifique des différends*, ainsi que le fait observer Bruno Simma, est une

[261] Voir John H. Jackson, William J. Davey, Alan Sykes, *Legal Problems of International Economic Relations,* 3rd Ed., St Paul, Minn., West Publishing Co., 1995, p. 314.
[262] Hans Kelsen, *The pure Theory of Law*, traduit de la deuxième édition allemande (revue et élargie) par Max Knight; Berkeley et Los Angeles, University of California Press, 1967, p. 38.

''obligation de conduite'', de la part des États, étant entendu qu'il ne constitue pas une obligation de résultat précis.

Cette ''obligation de conduite'' est envisagée comme un moyen indispensable, faisant partie intégrante des ''relations amicales'' et de la ''coopération entre les États conformément à la Charte des Nations Unies'' pour rappeler le texte familier de la résolution 2625 (XXV) de l'Assemblée générale, adoptée en 1970[263].

Le paragraphe 1 de l'Article 33 de la Charte énumère les ''moyens'' en question, et dans la Déclaration de Manille sur le règlement pacifique des différends internationaux (résolution 37/10 de l'Assemblée générale), déclaration adoptée en 1982 qui reprend celle de 1970, relative aux ''Relations amicales'', il est dit que les parties choisiront les moyens pacifiques appropriés, en tenant compte des circonstances et de la nature du différend. Ces moyens – ou techniques ayant pour but des relations pacifiques – sont les suivants: ''négociation, enquête, médiation, conciliation, arbitrage, règlement judiciaire'', et ils diffèrent entre eux selon le degré d'autorité dont les parties disposent pas, sur le déroulement des procédures de règlement pacifique[264].

Dans sa ''Conférence commémorative Gilberto Amado'' en 1993, le professeur Lucius Caflisch a examiné les ''nouvelles tendances du règlement pacifique des différends internationaux'', mais il a exclu de son étude les méthodes employées ''dans les domaines des droits de l'homme, des tarifs douaniers et du commerce et de l'intégrité économique et politique régionale[265]''.

C'est exactement de l'un des domaines laissés de côté par le professeur Caflisch à savoir les ''tarifs douaniers'' et le ''commerce'', que j'ai l'intention de parler au cours de ma conférence, où je me propose d'examiner la relation entre le commerce international et le règlement pacifique des différends selon ce qui est prévu et pratiqué à l'Organisation Mondiale du Commerce.

II. La CDI, Gilberto Amado et la présente conférence

Je voudrais évoquer à titre préliminaire ce qui unit la Commission du Droit International, la personne de Gilberto Amado et le sujet de la présente conférence.

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[263] Voir *The Charter of the United Nations – A Commentary,* commentaire de la charte publié sous la direction de Bruno Simma, Oxford, Oxford University Press, 1995, p. 99; Fabio K. Comparato, *Obrigações de Meios de Resultados, de Garantia,* revista dos Tribunais, vol. 353 (1965), p. 14 à 16.

[264] Voir *The Charter of the United Nations – A Commentary,* commentaire de la charte publié sous la direction de Bruno Simma, *op.cit.,* p. 506 à 512; J. G. Merrils, *International Dispute Settlement* (2nd. ed.), Cambridge University Press, 1993.

[265] Lucius Caflisch, *Le règlement des différends internationaux: nouvelles tendances,* Genève, Organisation des Nations Unies, 1993, p. 3.

Gilberto Amado a participé à la création de la CDI et à la rédaction de son Statut, comme l'a rappelé le professeur Cançado Trindade dans sa conférence commémorative de 1987. Le but de la CDI est de ''promouvoir le développement progressif du droit international et sa codification'' (article premier).

L'article 15, à la rédaction duquel Gilberto Amado a également participé activement – comme l'a rappelé le professeur Cançado Trindade –, article qui concerne la tâche de la CDI, établit ''pour la commodité'' une distinction entre les expressions ''codification'' et ''développement progressif''. Les deux expressions, comme les comprenait Gilberto Amado, devraient ''aller de pair'', car il ne s'agit pas de notions distinctes. Entre la ''la codification'' et ''le développement progressif'', il y a une dialectique de complémentaire mutuelle. Toute codification implique un développement progressif et tout développement progressif implique une codification[266]. Il en est ainsi, comme on le montrera plus loin, du système de règlement des différends de l'OMC, qui est à la fois une codification de codifications antérieures et un développement progressif important du système du GATT.

Dans sa conférence de 1987 sur la personnalité de Gilberto Amado, Sette Câmara (qui avant de devenir juge à la Cour internationale de Justice siégeait à la CDI) a fait observer que bien mieux que ses oeuvres, rassemblées dans différents ouvrages, c'étaient les observations irremplaçables de Gilberto Amado qui manifestaient sa sagesse[267].

D'un ouvrage important d'Hebert W. Briggs – qui à siégé à la CDI et qui a été mon professeur à Cornell et je saisis cette occasion pour dire la révérence et l'admiration que j'éprouve à l'égard de ce juriste – donc, de son ouvrage intitulé *The International Law Commission*, je voudrais extraire deux des observations faites par Gilberto Amado.

La CDI, disait Gilberto Amado, devait se garder de devenir ''un corps de juristes enfermés dans une tour d'ivoire''; etil ajoutait: ''le travail de codification, comme le développement du droit international, doit être accompli en coopération avec les autorités politiques des États[268]''.

J'ai l'intention de montrer au cours de cette conférence que ces sages observations de Gilberto Amado sont en quelque sorte présentes dans le système de règlement des différends de l'OMC.

[266] Voir A. A. Cançado Trindade, *La contribution de Gilberto Amado aux travaux de la Commission du Droit International,* Genève, Nations Unies, 1988, p. 18 et 19.
[267] José Sette Câmara, *Cent ans de plénitude,* Genève, 1988, p. 12 et 13.
[268] Herbert W. Briggs, *The International Law Commission*, Itchaca, New York, Cornell University Press, p. 30.

III. Le commerce international et le règlement pacifique des différends – observations générales

Pour pouvoir exprimer comme il se doit de le système de règlement des différents de l'OMC, il faut tout d'abord énoncer un certain nombre de considérations générales, de caractère politique et économique, sur le problème des rapports entre le commerce et le droit.

Les éléments de la logique de la globalisation et de ce qu'a signifié,du point de vue de valeurs, la chute du mur de Berlin – il s'agit là d'éléments fondamentaux pour la compréhension des circonstances qui ont permis le succès du Cycle d'Uruguay et la création de l'OMC – sont multiples; parmi ces dimensions figure le net affaiblissement des *conflits de conception* en ce qui concerne l'organisation de l'économie mondiale. Dans le cas des conflits de conception, la hiérarchie analytique n'est pas la même que dans celui des *conflits d'intérêts.* Ces derniers conflits concernent, fondamentalement l'évaluation de ce qu'un pays gagne ou perd, du point de vue économique, dans une situation précise, ainsi que les moyens possibles de remédier à cette situation. Les *conflits de conception* ont une portée plus large, et ne se situent pas uniquement dans le domaine économique, mais s'étendent au domaine des valeurs. Ils sont plus diffus, allant au-delà de tels ou tels intérêts précis, et ils concernent des divergences ou des convergences profondes quant au fonctionnement de la société, de la politique et de l'économie.

Au cours de la guerre froide, le système international était soumis à des polarités définies: Est/Ouest; ou Nord/Sud. La conséquence de ces polarités définies était, dans le domaine économique, une divergence d'opinions au sujet du modèle idéal d'organisation économique.

Ainsi, la conception de l'Union Soviétique, par exemple, était celle de la planification économique effectuée par l'État et, en conséquence, d'un ''commerce dirigé'', assorti d'objectifs quantitatifs, qui trouvait son expression internationale dans le COMECON.

La conception du Groupe 77, c'était la recherche d'un ''nouvel ordre économique international'' qui serait le résultat de négociations globales tendant à une redistribution. Le CNUCED, quand elle a été créée, et au cours de son développement, cherchait à répondre à la conception Nord/Sud de l'organisation de l'économie mondiale.

L'OMC a représenté, par sa création, quelque chose de nouveau, inhérent au monde de l'après-guerre froide et à la logique de la globalisation: l'acceptation presque universelle et *erga omnes* d'une conception inspirée du GATT mais amplifiée – une organisation de l'économie mondiale représentant un ''GATT plus''.

Cette universalisation d'une conception dont la force et la suprématie économique étaient indubitables s'est traduite, dans le domaine économique, par le fait qu'on est passé d'un *système international hétérogène* (de valeurs antagonistes) à un système employée par Raymond Aron[269]. La force de cette conception résultait du fait que – par différents mécanismes – l'espace inter-États s'est ouvert à une circulation très libre des marchandises, services, techniques, investissements, etc., dans le cadre d'un processus mené par des États et par de acteurs privés et stimulépar des innovations techniques qui ont réduit les délais et le coût des transports et des communications.

Ce sont là des données fondamentales pour expliquer pourquoi et comment il a été possible de négocier un système de commerce multilatéral ''axé sur la règle'' et de portée universelle. En fait, cette homogénéité nouvelle a permis d'affirmer, avec l'OMC, une interprétation grotienne de l'interaction économique internationale (pour reprendre une fois de plus les leçons des auteurs classiques)[270]. En résumé, il existe un potentiel de sociabilité qui permet une interaction organisée – et non pas anarchique – entre les acteurs principaux de la vie économique sur un marché globalisé, système qui ne fonctionne pas comme un jeu ''de somme nulle''. Il y a opposition, mais il y a aussi une coopération fondée sur un processus d'ensemble découlant du caractère rationnel et fonctionnel de la réciprocitédes intérêts. De là le rôle positif que peuvent jouer le système du droit international public et les organisations internationales.

L'interaction organisée entre des économies nationales multiples exige un mécanisme d'interface, car l'une des bases du commerce entre les nations, c'est la différence entre les avantages comparés de leurs économies. Comme l'a fait observer Jackson, usant d'une métaphore très pertinente, les relations entre les économies nationales, sur un marché globalisé, posent un problème semblable à celui qui se pose quand il s'agit de connecter ''des ordinateurs de conception différente'' afin de les faire travailler ensemble. Cela exige un mécanisme d'interface, un mécanisme de médiation. L'OMC est ce mécanisme[271].

Un tel mécanisme est d'importance fondamentale, étant donné qu'un marché n'est jamais parfait et ne fonctionne pas dans le vide. Il exige un cadre juridique exprimant des réalités politiques et économiques. De plus, si le marché et la concurrence peuvent être considérés comme une guerre de type grotien, livrée par tous au profit de tous – c'est la thèse

[269] Voir Raymond Aron, *Paix et guerre entre les Nations,* troisième édition revue et corrigée, Paris, Calmann-Lévy, 1962, p. 108.
[270] Voir Hedley Bull, The importance of Grotius in the Study of International Relations, in *Hugh Grotius and International Relations,* publication dirigée par Hudley Bull, Benedict Kingsburg, Adam Roberts, Oxford, Clarendon Press, 1992, p. 65 à 93; Celso Lafer, *Brasil y el Nuevo Escenario Mundial,* Archivos del Presente, 3 – Verano-Austral, 95-96, p. 61 à 80.
[271] John H. Jackson, *The World Trading System,* Cambridge, Mass., The MIT Press, 1992, p. 218.

du ''doux commerce'' – , ils peuvent également, et simultanément, être considérés, comme l'a fait subtilement observer Simmel, comme la guerre (hobbesienne) de tous contre tous[272].

L'idée directrice de l'OMC est que le maniement de ces relations – de conflit et de coopération – droit être un jeu qi a ses règles, règles reconnues par tous les participants etconsidérées par tous comme étant celles d'un jeu loyal.

C'est dans ce sens que Peter Sutherland a fait observer que l'atout de l'OMC, ce n'est pas ses ressources – comme c'est le cas de la Banque Mondiale et, dans une certaine mesure, du FMI. L'atout de l'OMC, c'est sa crédibilité, ainsi que l'acceptation et le respect des règles de l'Organisation.

L'interprétation de ces règles selon la logique de l'expérience juridique n'est jamais dépourvue d'équivoque ou consensuelle. Les États ont une interprétation différente des règles, de leur portée et de leur application. Le système multilatéral de règlement des différends de l'OMC a été conçu précisément pour éviter le caractère unilatéral des interprétations et pour empêcher le ''chacun pour soi'' dans l'application des règles, c'est-à-dire les mesures de rétorsion et les représailles commerciales. Il a été conçu comme un mécanisme axé sur les règles, d'inspiration grotienne, et visant à ''dompter'' les tendances unilatérales des ''raisons d'État'', lesquelles sont axées sur la puissance. Tel est, explicitement, le sens des engagements pris au sein de l'OMC en vertu de l'article 23 du Mémorandum d'accord sur les règles et procédures régissant le règlement des différends.

Les différends de diplomatie économique que l'OMC vise à régler – et, en ce sens, cette organisation est tributaire de la tradition du GATT – ont trait fondamentalement à des *conflits d'intérêts*. En fait, le GATT, en tant que modèle de coopération organisée, reposait sur l'idée de la réciprocité d'intérêts, et sur cette idée que la réciprocité se maintiendrait dans le temps. De là découle l'importance de l'article XXIII du GATT, qui demeure l'une des pierres angulaires de l'OMC étant donné que des conflits surgissent du fait qu'un membre de l'Organisation estime ''qu'un avantage résultant pour (lui) directement ou indirectement'' des accords conclus ''se trouve annulé ou compromis''.

Le système de règlement des différends du GATT résultait de la pratique des parties contractantes en ce qui concerne l'article XXIII. Ces pratiques ont été codifiées et progressivement élaborées à plusieurs occasions. Le système de l'OMC a été négocié sur la base de l'importance de cette expérience et des améliorations prenant cette expérience pour

[272] Voir Albert O Hirsman, *Rival Views of Market Societies and Other Recent Essays*, Cambridge, Mass. Harvard University Press, 1992, p. 120.

point de départ. En ce sens, l'article XXII du GATT doit également être mentionné, car il y a indubitablement un rapport entre cet article et l'article XXIII, et ils constituent tous deux la base et la logique du système.

Il faut donc évoquer l'obligation générale de procéder à des consultations, prévue à l'article XXII du GATT, qui demeure dans le cadre de l'OMC, en même temps que l'article XXIII, l'un des axes du mécanisme de règlement des différends, comme il ressort du paragraphe 1 de l'article 3 du Mémorandum d'accord sur les règles et procédures régissant le règlement des différends.

IV. L'obligation de procéder à des consultations en tant que technique de droit économique international – son rôle dans le système GATT/OMC

Le GATT prescrit, dans son article XXII, une ''obligation de conduite'': ''Chaque partie contractante examinera avec compréhension les représentations que pourra lui adresser toute autre partie contractante et devra se prêter à des consultations au sujet de ses représentations, lorsque celles-ci porteront sur une question concernant l'application du présent Accord'' (art. XXII, par. 1).

L'obligation de procéder à des consultations est présente dans diverses autres dispositions de l'Accord général (par exemple, les suivantes: paragraphe 5 de l'article II, paragraphe 7 de l'article VI; paragraphe 1 de l'article VII, paragraphe 2 de l'article VIII; paragraphe 6 de l'article IX; paragraphe 4 de l'article XII; paragraphe 1 de l'article XVI; paragraphes 7, 12, 16, 21 de l'article XVIII; paragraphe 2 de l'article XIX; paragraphe 7 de l'article XXIV; paragraphe 1, 4 de l'article XXVIII; paragraphe 2 de l'article XXVII) qui traient de questions précises, par exemple la valeur en douane, les règles d'origine, la balance des paiements, les subventions, le retrait de concessions tarifaires, etc.

Quelle est la raison de cette obligation de procéder à des consultations, cette obligation de s'astreindre à un certain comportement?

La vie économique du marché est caractérisée par des changements conjoncturels et des circonstances aléatoires. Le changement peut affecter la réciprocité des intérêts, étant donné principalement qu'à l'OMC il s'agit d'une réciprocité découlant de l'équivalence des avantages et non de l'identité des échanges commerciaux. Je veux parler ici de la dynamique des avantages comparés et d'autres aspects de la théorie économique du commerce international. Dans ces conditions comme l'a fait observer

Prosper Weil, la consultation, dans le domaine du droit économique international, est une technique de l'élaboration des règles aussi bien que de leur application[273]. Les consultations entreprises pour l'élaboration des règles aboutiront fréquemment à des règles qui seront plus souvent des normes ''standards'' juridiques que des définitions rigides de comportements, car la définition ne saisit pas le caractère changeant de la vie économique. Le ''standard'', d'autre part, vu sa nature même, produira bien davantage une ''jurisprudence des intérêts'' qu'une ''jurisprudence des concepts''.

En fait, le ''standard'', au moment de son application, est une ''mesure de conduite'' qui exigera toujours une vérification, compte tenu de la spécificité variable des circonstances, quant au caractère raisonnable et équitable d'une conduite donnée[274].

Les consultations répondent à cette exigence. Elles sont toujours, pour les parties, une occasion d'évaluer leurs positions respectives par un processus dont le but est double: organiser et choisir l'information pertinente, d'une part et pouvoir saisir ce qui est important pour la compréhension d'une situation qui comporte en puissance un différend économique.

En ce sens, les consultations sont tout d'abord, en droit économique international, une occasion pour l'établissement des faits, qui représente une forme structurée d'investigation commune et peut aboutir, grâce à la négociation, à la conciliation des intérêts en présence.

La pratique du GATT en qui concerne les consultations, y compris le système de l'article XXIII, obéit à cette logique, à savoir celle du règlement pacifique des différends, qui répond à la spécificité des différends économiques. Cette logique demeure présente à l'OMC: le paragraphe 7 de l'article 3 du Mémorandum d'accord sur le règlement des différends dispose: qu'une ''solution mutuellement acceptable pour les parties et compatible avec les accords visés est nettement préférable''. Néanmoins, les procédures de consultations multiples mises en place par le GATT n'ont pas toujours conduit à une solution du problème considéré. Par conséquent, on a mis en place dans le cadre de l'article XXIII un système de règlement des différends qui, cependant, est imprégné de ces considérations sur la nature et la spécificité des différends économiques.

[273] Prosper Weil, Le droit international économique – Mythe ou réalité, in Société française pour le droit international, *Aspects du droit international économique – Elaboration, contrôle, Sanction,* Paris, Pedone, 1972, p. 73; voir André Hauriou, Le Droit Administratif de l'Aléatoire, in *Mélanges Trotabas,* Paris, Librairie générale de droit et de jurisprudence, 1970,p. 197 à 225; Celso Lafer, *O Convênio do Café de 1970 – Da Reciprocidade no Direito Internacional Econômico,* São Paulo, Perspectiva, 1979.

[274] Voir Stéphane Rials, Les standards, Notions critiques du droit, p. 39 à 53; Jean J. A. Salmon, Les notions à contenu variable en droit international public, p. 251 à 268, in *Les notions à contenu variable en droit* , Etudes publiées par Chaim Perelman et Raymond Vander Eslt, Bruxelles, Bruylant, 1984.

V. Le système de règlement des différends dans le cadre du GATT – l'article XXIII

Le système de règlement des différends du GATT, fondé sur l'article XXIII et axé sur le conflit d'intérêts découlant du fait que des avantages seraient ''annulés ou compromis'', est l'aboutissement d'une certaine pratique. Il résulte d'un processus ayant fait l'objet d'une codification et d'un développement progressif qui ont pris les formes suivantes: mémorandum d'accord; description concertée des pratiques coutumières du GATT dans le domaine du règlement des différends (par. 2 de l'article XXIII); déclarations ministérielles des parties contractantes; décision concernant des différends ; décision concernant l'amélioration du système de règlement des différends du GATT; décision concernant les procédures relevant de l'article XXIII[275]. Ces textes, dont les premiers remontent à 1966 et les derniers datent de 1989, représentent une *interprétation consensuelle* du GATT par ses parties contractantes, au sens des alinéas a) et b) du paragraphe 3 de l'article 31 de la Convention de Vienne relative au droit des traités. Ce ne sont pas, pour reprendre les paroles de Gilberto Amado, le travail de juristes retirés dans une tour d'ivoire; ce sont l'expression sans équivoque de la sensibilité des responsables gouvernementaux et de l'idée qu'ils se faisaient de leurs besoins.

Il y a eu de rappeler, dans ce contexte, que le système du GATT tout entier, ainsi que celui de l'OMC aujourd'hui, est un système intergouvernemental de droit économique international public. Seules les parties contractantes ont qualité pour agir et mènent le processus. Les intérêts privés – qui sont toujours très présentes, car il s'agit du marché – ne se frayaient un chemin jusqu'au GATT que lorsqu'un gouvernement considérait qu'il avait un ''intérêt national'' à protéger un intérêt privé. En ce sens, les mécanismes classiques de la protection diplomatique entraient en jeu, *mutatis mutandis*, adaptés à la nature des différends diplomatiques économiques du commerce international.

Pour résumer: la codification et le développement progressif du système de règlement des différends ont été le résultat, au GATT, d'une interprétation, mise en forme par les parties contractantes – c'est-à-dire par le pays ou territoires douaniers –, fondée sur la pratique et les améliorations de celles-ci, interprétation qui n'avait pas de base juridique explicite dans l'Accord général[276]. L'évolution créative de cette pratique, au sens large,

[275] Voir GATT Analytique Index: Guide to Law and Practice, 6th edition, 1994, p. 586 à 597.

[276] Pierre Pescatore – *Drafting and Analyzing Decisions on Dispute Settlement,* réimpression fondée sur le Handbook of WTO-GATT Dispute Settlement, publication dirigée par Pierre Pescatore, William J Davey et Andreas F Lowenfeld, New York, Transnational Publishers Inc., 1995, p. 29.

témoigne de ce que l'on est passé – avec des avancées et de reculs – d'un système qui était davantage axé sur la conciliation (comme cela était habituel dans le cas des accords de produits, tels que l'accord sur le café) à ce que Hudek a appelé ''diplomatic jurisprudence'', c'est-à-dire une ''combinaison de stratégies juridiques et diplomatiques[277]'' à un système de règlement de différends qui, sans exclure la conciliation négociée des intérêts en présence, se caractérisait par une plus grande densité juridique.

La raison de cette évolution est liée à la ''sécurité des résultats attendus'', qui était nécessaire pour le bon fonctionnement du système de commerce multilatéral. Pour reprendre les termes de la décision de 1989 relative aux ''améliorations des règles et procédures de règlement des différends du GATT'': ''A – 1 – les parties contractantes reconnaissent que le système de règlement des différends du GATT a pour objet de préserver les droits et les obligations des parties contractantes au titre de l'Accord général et de clarifier les dispositions existantes dudit Accord. Ce système est un élément essentiel pour assurer la sécurité et la prévisibilité du système commercial multilatéral[278]''. Quels sont dans leurs grandes lignes ses principaux aspects?

Aux termes du paragraphe 2 de l'article XXIII, la compétence, en ce qui concerne le processus de règlement des différents, était dévolue collectivement aux parties contractantes, c'est-à-dire aux pays ou territoires douaniers agissant conjointement comme prévu à l'article XXV du GATT.

Les parties contractantes devaient procéder ''sans délai à une enquête au sujet de toute question dont elles (seraient) ainsi saisies... et (adresser) des *recommandations* aux parties contractantes qui, à leur avis, (étaient) en cause, ou *(statueraient)* sur la question''.

Dans l'exercice de ces pouvoirs ''quasi judiciaires'', comme les a qualifiés Olivier Long[279], les parties contractantes agissant de concert après une phase initiale au cours de laquelle elles ont recouru à des ''groupes de travail'', ont commencé au milieu des années 50 à mettre en place des groupes spéciaux indépendants. C'est dans le fonctionnement de ces groupes spéciaux que réside l'originalité du système du GATT.

Le rôle normal d'un groupe spécial est d'''examiner les fait de la cause et l'applicabilité des dispositions de l'Accord général, et d'arriver à une appréciation objective de ces éléments[280]''.

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[277] Robert E Hudek – *The GATT Legal System and World Trade Diplomacy,* New York, Praeger, 1975, Pref. – p. VI; Robert E Hudek – El Sistema del Gatt: Jurisprudencia Diplomática, *Derecho de la Integración,* 8 avril 1971, p. 34 à 66; Celso Lafer, O Convênio Internacional do Café, *Revista de Direito Mercantil,* nº9 , XII, 1973, p. 48 à 55.

[278] GATT Analytical Index, *op.cit.*, p. 592.

[279] Olivier Long, *Law and its Limitations in the GATT Multilateral Trade System*, Dordrecht, Nijhoff, 1987, p. 84.

[280] Description convenue de la pratique habituelle du GATT en matière de règlement des différends (art. XXIII, par. 2), dans Instruments de base et document divers – Décisions – Négociations commerciales multilatérales, Supplément nº 26, 1980, p. 237.

Les groupes spéciaux, généralement composés de trois membres, ne sont pas un tribunal arbitral. Et ceci, comme l'a fait observer Pierre Pescatore, pour les raisons qui sont exposées ci-après:

i) Les membres du groupe spécial n'étaient pas choisir par les parties. Leur nom était proposé par le secrétariat. Les parties se mettraient habituellement d'accord après des consultations avec le secrétariat. À défaut d'accord, les groupes spéciaux pouvaient être constitués par le Directeur général. Les ressortissants des parties aux différends ne pouvaient pas être membre du groupe spécial; les membres de ces groupes étaient toujours des experts, tels que des membres des délégations auprès du GATT qui connaissaient bien les questions considérées et que l'on estimait neutres à l'égard du différend, et par la suite des universitaires ayant l'expérience du droit ou du commerce international.

ii) Il n'y avait pas de "compromis" établissant la compétence *ad hoc* du groupe spécial. Il était possible de négocier un mandat particulier, mais la compétence du groupe spécial découlait habituellement du ''mandat type, qui prévoyait essentiellement que la question faisant l'objet du différend devait être examinée ''à la lumière des dispositions pertinentes du GATT[281]''.

iii) Les conclusions, recommandations et décisions des groupes spéciaux ne constituaient pas une sentence arbitrale. Elles n'acquéraient force légale qu'après avoir été adoptées de manière consensuelle par les parties contractantes, réunies en session officielle du Conseil. Ces conclusions, recommandations et décisions sont donc un *Avis juridique* – ou ce que Bobbio appellerait un avis (consillium) possédant une *vis directiva*, et non pas un ordre (*preceptum*) possédant la *vis cogendi*[282]. Pour que cet avis soit suivi, il fallait l'accord de ses destinataires – à voir les parties contractantes –, qui, en vertu de l'article XXVIII, disposaient de pouvoirs quasi judiciaires. C'est précisément parce qu'il s'agit de *consilia* et non de *precepta* que les rapports des groupes spéciaux sont, pour citer Pescatore, des ''documents persuasifs et non pas precriptifs[283]''.

[281] Voir Pierre Pescatore , Drafiting and Analyzing decisions on dispute Settlement, op. Cit., p. 11 à 14.
[282] Voir Norbeto Bobbio – *Studi per une Teoria Generale del Diritto,* Torino, Giappicheli, 1970, p. 49 à 78.
[283] Pierre Pescatore – Draftind and Analyzing Decisions on Dispute Settlement, op. cit., p. 17.

Le groupe spécial du système GATT représentait donc, pour commencer, l'affirmation d'une *instance indépendante* d'un tiers. Ce *tertius* ne se place pas entre les parties, comme dans le cas de la médiation et de la conciliation. Il se place *entre* et *au-dessus* des parties, non pas par délégation, comme dans le cas de l'arbitrage, mais de *manière autorisée* par le système, comme un juge dans un règlement judiciaire[284]. Toutefois, à la différence de ce qui se passe dans le cas de l'arbitrage et de la décision judiciaire, le groupe spécial n'émet pas un *jugement*, mais une *opinion*.

L'institution du *tertius* a contribué à mettre une sourdine aux résonnances politiques des représentations faites par les parties contractantes, à transformer la tension (qui est quelque chose de diffus) en un différend – qui est un désaccord entre des États –, un conflit d'intérêts dont l'objet est suffisamment circonscrit pour qu'il soit possible de faire des représentations claires, susceptibles d'être évaluées grâce aux moyens rationnels des techniques juridiques[285].

Les activités du groupe spécial, comme toute espèce d'activité, y compris le fait de donner son avis, peuvent faire l'objet d'une règlementation juridique. La pratique du GATT, sa codification et son développement progressif en ce qui concerne les groupes spéciaux représentent un effort pour parvenir à une opinion grâce à une procédure régulière – avec des délais impératifs, un premier exposé écrit des parties et des auditions, une deuxième série d'exposés écrits (réfutations) et une deuxième audition. Normalement, au cours des auditions avec les parties, le groupe spécial posait des questions sur les faits ou sur des points de droit, tels qu'ils figuraient dans les exposés écrits des parties, il demandait des documents et des preuves, et les parties étaient tenues au courant de leurs arguments respectifs. Il y avait ensuite habituellement un débat contradictoire entre les parties.

D'autre part, les tierces parties qui avaient prélablement déclaré avoir un intérêt dans le différend pouvaient présenter au groupe spécial leurs arguments oralement et par écrit.

L'opinion du groupe spécial, quoique formulée sur le ton de la persuasion, comme on l'a dit plu haut, visait à constituer une sorte de jugement: exposé des faits, arguments des parties et conclusion motivée par des considérations juridiques.

L'index analytique du GATT, dans son édition de 1994, comporte la liste de 195 affaires et 80 rapports de groupes spéciaux adoptés par les parties contractantes[286], et le professeur Jackson, dans une liste mise à jour

[284] Voir Norberto Bobbio, Il terzo Assente, Milano, ed. Sonda, 1989, p. 222.
[285] Voir Charles de Visscher, *Théories et réalités en droit international public,* 4ème édition, Paris, Pedone, 1970, p. 371.
[286] GATT Analytical Index, *op.cit.*, p. 719 à 734.

à la date de 1989 qui comportait des affaires n'ayant pas été portées devant un groupe spécial, compte pour sa part 233 affaires[287].

Le professeur Hudek, dans une analyse de grande importance portant sur la période comprise entre 1948 et 1989, compte 207 plaintes. Sur ce nombre, 64 ont été réglées (ou leur bien fondé a été autrement reconnu) sans qu'intervienne une décision juridique; 55 ont été abandonnées ou retirées sans solution. Dans le cas de 88 plaintes, c'est-à-dire 43% du nombre total de 207, il y a eu sous une forme ou une autre une décision. Dans 68 des 88 cas ayant fait l'objet d'une décision, c'est-à-dire 77% de ces cas, le groupe spécial a estimé que la plainte était fondée; sur ces 68 cas, 60, c'est-à-dire 90%, ont eu une issue positive; 37 (55%) dans lesquels la plainte juridique a reçu pleine satisfaction; 8 (12%) ont abouti au retrait de la mesure considérée, mais indépendamment de toute décision juridique; et dans 15 affaires (22%), il y a eu satisfaction partielle de la demande juridique[288].

On peut donc voir que *le corpus* des solutions auxquelles on est parvenu grâce au système du GATT n'est pas seulement positif mais numériquement important. John H. Jackson fait observer que le nombre des affaires traitées par le système du GATT dépasse de beaucoup celui de la Cour internationale de Justice (près de 100) et que certaines affaires traités dans le cadre du GATT ''ont eu pour les gouvernements nationaux d'aussi graves conséquences que les affaires portées devant la Cour internationale de La Haye[289]''.

Quelles étaient néanmoins les limitations du système, et pourquoi a-t-il fait l'objet d'un développement progressif au cours du Cycle d'Uruguay, qui a conduit à la création de l'OMC?

Selon l'interprétation de certaines parties, le système de l'article XXIII était essentiellement un prolongement de l'obligation de procéder à des consultations qui était prévue à l'article XXII, et l'objet du mécanisme de règlement des différends n'était pas tant de parvenir à une décision juridique que de tirer parti du droit pour résoudre de manière diplomatique un problème commercial. Ce qui était souhaitable, selon cette manière de voir, c'était une amélioration des garanties de procédure dans le cadre du fonctionnement des groupes spéciaux, et donc de la qualité de la *vis directiva* des rapports établis par ces organes.

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[287] Jhon H. Jackson, William J. Davey, Alan O. Skyes, *Legal Problems of International Economic Relations,* op.cit., p. 331.

[288] Voir Robert Hudek, Daniel L.M. Kennedy, Mark Sgarbossa – A Statistical Profile of GATT Dispute Settlement Cases – Minnesota Journal of Global Trade, vol. 2:1, 1993, p. 3, 4, 8, 9, 10.

[289] John H. Jackson, Reflexions on international Economic Law, *University of Pennsylvania Journal of International Economic Law,* vol. 17, Nº 1 (printemps 1966), p. 18 et 19; voir également Shabtai Rosenne, *The World Court – What it is and how it works* (5th revised ed.), Dordrecht, Nijhoff, 1995, chap. VI et VII.

D'autres, en revanche, faisaient observer que les pouvoirs quasi judiciaires appartenaient au Conseil des représentants des parties contractantes. Par conséquent, si une seule partie était accusée d'un acte répréhensible aboutissant à annuler ou à compromettre un avantage résultant de l'Accord, elle avait le pouvoir politique et juridique d'empêcher le fonctionnement du système. Elle pouvait le faire en s'opposant, unilatéralement, à la mise en place d'un groupe spécial et, même si elle acceptait la constitution d'un groupe spécial et participait à ses travaux, elle pouvait faire obstacle à l'adoption du rapport de cet organe, c'est-à-dire à l'acceptation, par les parties contractantes, de ses conclusions et recommandations[290].

C'est précisément pour surmonter ces difficultés (dans le cadre d'un système international rendu plus homogène par la logique de la globalisation, qui d'autre part autorisait une interprétation grotienne de la vie économique internationale, amplifiée *ratione personae* et *ratione materiale*, pour rappeler ce qui a déjà été signalé au cours de la présente conférence) que l'on est parvenu au cours des négociations du Cycle D'Uruguay au système de règlement des différends de l'OMC.

Le système de l'OMC est explicitement comme il est précisé à l'article 3 du Mémorandum d'accord sur les règles et procédures régissant le règlement des différends, une réaffirmation de l'importance de l'expérience accumulée dans le cadre du GATT (par. 1) (codification), renforcée (développement progressif) par des éléments relatifs à la sécurité et à la prévisibilité des attentes des intéressés. Ce développement progressif était considéré comme nécessaire, en un sens grotien, au bon fonctionnement du marché mondial, qui, comme tout marché, ne fonctionne pas dans le vide (question examinée plus haut). À ce marché mondial, il faut un cadre juridique, complété, pour l'application concrète, par des techniques juridiques propres à préserver les droits et les obligations des membres, conformément à ce qui a été négocié dans les "accords visés" (par. 2)

VI. Le système de règlement des différends de l'OMC – continuité et changement

(i) La première observation qu'il faut faire au sujet du système de règlement des différends de l'OMC est que, comme expression d'une codification et d'un développement

[290] Voir John Croome, *Reshaping the World Trading System,* Genève, Organisation Mondiale du Commerce, 1995, p. 148 et 149.

progressif, et à la différence du système du GATT, il n'est pas le simple aboutissement de la pratique et de l'interprétation. Il s'agit d'une obligation d'un autre ordre dans la hiérarchie juridique, étant donné que ce système est envisagé par l'Accord instituant de l'OMC et qu'à ce titre il engage tous les membres del'organisation (Convention de Vienne relative au droit des traités, art. 26). En d'autres termesil fait partie du cadre fondamental d'une nouvelle organisation, dotée elle-même d'une subjectivité juridique propre, distincte de celle de ses membres (ce qui n'était pas le cas duGATT, lequel avait un caractère contractuel). En fait, en vertu de l'article II de l'Accord de Marrakech, qui concerne le champ d'action de l'OMC, l'annexe 2 dudit accord, à savoir le Mémorandum d'accord sur les règles et procédures régissant le règlement des différends, fait partie intégrante des engagements des membres de l'Organisation.

Le paragraphe 1 de l'article 3 du Mémorandum d'accord, dont il a déjà été question prévoit une continuité par rapport au système du GATT. Il doit être lu conjointement avec le paragraphe 1 de article XVI de l'Accord de Marrakech, où il est affirmé que ''sauf disposition contraire'' (développement progressif), l'OMC ''sera guidée par les décisions, les procédures et les pratiques habituelles des Parties contractantes du GATT de 1947 et des organes établis dans le cadre du GATT 1947''. Par conséquent, le *corpus* des décisions de l'ancien GATT (*les acquis* du GATT) constitue une jurisprudence valable pour l'OMC, et en tant que tel il a été cité par de nouveaux groupes spéciaux et par l'Organe d'appel.

(ii) La deuxième observation qu'il faut faire est que le Mémorandum d'accord sur le règlement des différends, face au risque de fragmentation résultant de la dissémination des codes du Cycle de Tokyo (chaque code ayant son propre système et chaque partie recherchant l'instance lui convenant le mieux), représentait la mise en place d'un système unifié à l'OMC. Ce système englobe tous les accords négociés au cours du Cycle d'Uruguay (voir le paragraphe 2 de l'article II de l'Accord de Marrakech et l'appendice 1 du Mémorandum d'accord). Cela veut dire que le nouveau système de règlement des différends ne s'étend pas seulement aux nouvelles obligations contractées au sujet des questions relevant traditionnellement du GATT de 1947

(engagements tarifaires, règles relatives à la balance des paiements, unions douanières et zones delibre-échange, dérogations, mesures sanitaires et phytosanitaires, obstacles techniquesaffectant le commerce, dispositions antidumping, valeur en douane, subventions et mesures compensatoires, etc.); il s'étend aussi à des domaines traditionnels finalement placés dans lechamp d'action de l'OMC tels que l'agriculture et les textiles; et également, de manière plus significative, aux nouvelles questions telles que les MIC (investissements), les AGCS (services) et les ADPIC (propriété intellectuelle). Cela représente, comme l'a fait observer Pescatore, une dimension nouvelle et plus vaste de la compétence, découlant du caractère automatique du *mandat type,* lequel englobe ''tous les accords visés'' cités par les parties en présence devant un groupe spécial (art. 7 du Mémorandum d'accord sur le règlement des différends)[291]. C'est là comme l'a noté Christopher Thomas, une mission nouvelle, étant donné que les groupes spéciaux devront faire face non seulement aux obligations fondamentales classiques du GATT, mais aussi à des ''droits et obligations moins familiers relevant des domaines nouveaux que sont la propriété intellectuelle, les services, etc.'', avec toutes les conséquences qui peuvent en découler, y compris les problèmes que soulèvent les éléments de preuve et la *qualification juridique*[292].

(iii) Pour parler de la densité juridique accrue qui caractérise le système de règlement des différends de l'OMC, il y a eu lieu de rappeler l'existence d'un nouvel élément, fondamental, qui permet de circonvenir le "blocage" unilatéral du fonctionnement du système; il s'agit de la formule mise au point en 1991 au cours des négociations du Cycle d'Uruguay à Genève, à partie d'options qui avaient été présentées lors de la réunion infructueuse tenue à Bruxelles en 1990. Je veux parler de l'inversion des règles du consensus qui étaient en vigueur dans le cadre du GATT. Croome écrit à ce sujet ce qui suit: "Alors que le consensus était exigé pour pouvoir, à chaque stade, faire avancer le processus de règlement d'un différend, il a été prévu qu'à l'avenir le consensus serait exigé *pour ne pas aller de l'avant*. Ainsi il ne serait plus possible à un pays de bloquer

[291] Voir Pierre Pescatore – *Drafting and Analyzing Decisions on dispute Settlement, op.cit.,* p. 28 à 30, 34 et 35.
[292] Voir Christopher Thomas, Litigation process under the GATT dispute settlement system: lessons for the World Trade Organisation, in Journal of World Trade, vol. 30, Nº 2 (Avril 1996) 53 à 81.

unilatéralement le mécanisme de règlement des différends et l'on rendrait automatique la progression du traitement d'un différend dans le cadre du système, sauf dans le cas où tous les pays seraient d'accord pour interrompre le processus[293]''.

Cela instituait en fait le *droit à un groupe spécial* (Mémorandum d'accord, par. 1 de l'article 6); le *droit à l'adoption d'un rapport établi par un groupe spécial* (Mémorandum d'accord, par. 4 de l'article 16); le *droit de faire appel à l'encontre du rapport d'un groupe spécial* (par. 4 de l'article 16); et le *droit à ce que le rapport de l'Organe d'appel soit adopté* (par. 14 de l'article 17).

(iv) Il faut également parler, à propos de la densité juridique accrue du système, d'une autre innovation fondamentale: la création d'un Organe d'appel, qui a compétence pour examiner les rapports des groupes spéciaux en se fondant sur le droit. L'idée de disposer d'une instance supérieure, qui a été examinée et négociée au départ lors du Cycle d'Uruguayen 1989[294], a étéentérinée par le Mémorandum d'accord sur le règlement des différends, qui prévoit la création d'un organe d'appel permanent. Cet organe est ''composé de sept personnes, dont trois (siègent) pour une affaire donnée'' (par. 1 de l'article 17), organe élu pour quatre ans, le renouvellement du mandat étant autorisé (par. 2 de l'article 17); il comprend ''des personnes dont l'autorité est reconnue, qui auront fait la preuve de leur connaissance du droit, du commerce international et des questions relevant des accords visés en général'' (par. 3 de l'article 17). Etant donné que l'appel est "limité aux questions de droit couvertes par le rapport du groupe spécial et aux interprétations du droit donnés par celui-ci'' (par. 6 de l'article 17), cette deuxième instance – chose presque unique en droit international public – renforce, par son action, le caractère juridique du système de règlement des différends de l'OMC.

L'Organe d'appel a déjà créé et a élaboré ses procédures de fonctionnement. Il s'est également prononcé sur une affaire précise, à savoir une plainte du Venezuela et du Brésil qui vise les États-Unis sur les normes concernant l'essence – nouvelle et ancienne formules. Le rapport de l'organe d'appel a été adopté par l'Organe de Règlement des Différends de l'OMC le 20 mai 1996.

[293] Voir John Croome, *Reshaping the World Trading System*, *op.cit*, p. 324.
[294] Voir John Croome, *Reshaping the World Trading System*, *op.cit*, *p. 264.*

En ce qui concerne les procédures de fonctionnement de l'Organe d'appel, je voudrais faire seulement deux observations:

a) L'Organe d'appel a été institué sur la base d'une disposition selon laquelle il est largement représentatif de la composition de l'OMC et, étant donné qu'il est comparable à un tribunal permanent, la nationalité n'intervient pas dans le choix – et donc dans la récusation – d'un membre pour ce qui est de siéger dans une chambre en vue de l'examen d'une certaine affaire (art. 6.2 des procédures de travail concernant l'examen en appel). En ce sens, la constitution de la deuxième instance obéit à des règles distinctes de celles qui président à la constitution d'un groupe spécial destine à examiner une affaire en première instance (par. 3 de l'article 8 du Mémorandum d'accord sur le règlement des différends), instance pour laquelle la nationalité des parties dans une affaire donnée est considérée comme une présomption de partialité.

b) Tout en conservant la pleine responsabilité de la chambre de trois membres en ce qui concerne la décision finale sur une affaire donnée, les procédures de travail prévoient également l'information et la consultation des quatre autres membres de l'Organe au sujet des affaires examinées. C'est la règle dite de la "collégialité". L'adoption de cette règle exprime une préoccupation de caractère juridique en ce qui concerne l'uniformité de l'interprétation des accord de l'OMC (procédure de travail relative à l'examen en appel, art. 4). Il s'agit là d'un autre élément qui tend à étoffer le caractère juridique du système.

Il ne m'incombe pas – et cela ne serait pas de mise en tant que Président de l'Organe de Règlement des Différends – de commenter le premier rapport de l'Organe d'appel et ce en quoi il se distingue du rapport du groupe spécial. Il n'est pas non plus raisonnable de déduire d'une seule affaire l'existence de telle ou telle tendance. Toutefois, il n'est pas absurde de dire qu'une différence de style apparaît dans ce premier rapport de l'Organe d'appel quand on le compare aux rapports des groupes spéciaux. C'est manifestement un texte d'un caractère plus juridique et, sans oublier son caractère persuasif, on constate que ce texte est plus proche du langage d'un document de caractère prescriptif, c'est-à-dire d'un jugement.

(v) Ni le style ni le caractère automatique, dont il a été question précédemment, ne font des rapports des groupes spéciaux et de l'Organe d'appel des décisions judiciaires. En fait, les rapports n'acquièrent d'effets juridiques que lorsqu'ils sont adoptés par les membres, agissant par le truchement d'un organe créé dans le cadre de l'accord instituant l'OMC: l'*Organe de règlement des différends*, qui est le Conseil général s'acquittant des fonctions de l'Organe de Règlement des Différends ''prévu dans le Mémorandum d'accord sur le règlement des différends'' (Accord de Marrakech, par. 3 de l'article IV; Mémorandum d'accord par 1 de l'article 2). Cette approbation, quoiqu'elle puisse devenir automatique, représente en fait l'*exequatur,* donné par le moyen d'une confirmation politique selon la règle du consensus négatif.

C'est pourquoi je considère que les rapports conservent, dans le cadre du système de l'OMC, le caractère juridique d'une opinion, l'opinion d'un *tertius* se situant au-dessus des parties et possédant une *vis directiva.* Le changement – le développement progressif – réside dans la plus grande densité juridique, à la fois pour ce qui est de garanties d'une procédure régulière et du fait que les résultats de cette procédure, c'est-à-dire les opinions, deviennent des conclusions possédant un effet juridique.

Que veux-je dire quand je parle d'une ''densification du caractère juridique''?

Les travaux de Hart ont encouragé la théorie générale du droit à prendre en considération la distinction entre règles primaires et règles secondaires, et à considérer les liens d'interdépendance entre les deux catégories de règles comme un signe de maturité pour un système juridique[295].

Les règles primaires sont celles qui prescrivent, proscrivent, encouragent ou découragent certains comportements. Dans le cas de l'OMC, la manière discrétionnaire dont elles sont suivies et respectées est limitée par l'existence de règles secondaires. Celles-ci sont des règles s'appliquant aux règles. Elles concernent l'élaboration et l'application de règles. Le système de règlement des différends de l'OMC en a étoffé le caractère juridique en réduisant leur dimension diplomatique – représentée par le contrôle politique qu'exercent les membres au stade final des solutions. Cela s'est accompli par la multiplication des règles secondaires régissant l'organisation

[295] Voir H.L.A. Hart, *The concept of Law* – New York, Oxford University Press, 1961, chap. V, VI; Norberto Bobbio – Contributi ad un dizionario giuridico, Torino, Giappichelli, 1994, chap. XI norma giuridica, chap. XII – norma secondaria.

et le fonctionnement du système. Parmi les exemples du rôle que jouent les règles secondaires dans la détermination du *quid sit juris* à l'OMC, on citera celles que fixent la compétence et les pouvoirs du *tertius* (groupes spéciaux et Organe d'appel). Mis à part les règles déjà évoquées – compétence conféré par le mandat-type, et règle du consensus négatif dans le Mémorandum d'accord sur le règlement des différends – je voudrais mentionner, pour illustrer leur importance en ce qui concerne le renforcement du caractère juridique du système, les suivantes: l'article 9 (procédures applicables en ce cas de pluralité des plaignants); l'article 12 (procédures des groupes spéciaux, et l'appendice 3 du Mémorandum d'accord sur le règlement des différends, qui fixe, entre autres choses, des délais stricts pour chaque étape du processus); l'article 13 (droit de demander des renseignements); l'article 14 (caractère confidentiel); l'article 15 (phase de réexamen intérimaire); les procédures de travail de l'Organe d'appel lui-même, agissant conformément aux principes fixés dans les paragraphes 9, 10, 11, 12 et 13 de l'article 17 du Mémorandum d'accord sur le règlement des différends; l'article 20 (délais relatifs aux décisions de l'ORD), etc.

(vi) Le caractère juridique, et les garanties de procédure en ce qui concerne les groupes spéciaux et l'Organe d'appel, doivent être considérés dans un contexte plus large, qui est de caractère diplomatique: celui de l'Organe de règlement des différends (ORD). Cet organe, à la différence de ce qui se passait dans le système du GATT, dont il a été question plus haut, représente une spécialisation fonctionnelle du Conseil général qui donne à l'ORD une identité institutionnelle qui lui est propre et qui manifeste l'importance que l'OMC attribue, notamment sur le plan hiérarchique, au règlement des différends en tant qu'élément essentiel de la sécurité et de la prévisibilité du système commercial multilatéral, tel qu'il a été négocié lors du Cycle d'Uruguay (Mémorandum d'accord sur le règlement des différends par. 2 de l'article 3).

Il incombe à l'ORD d'administrer tout le système. C'est à lui qu'il revient d'établir des groupes spéciaux et d'adopter leurs rapports, ainsi que ceux de l'Organe d'appel. C'est également l'ORD qui, en tant qu'organe diplomatique, assure d'office la surveillance de la mise en oeuvre des décisions et recommandations.

L'ORD est également habilité à autoriser ''la suspension de concessions et d'autres obligations qui résultent des accords visés''

(Mémorandum d'accord sur le règlement des différends, par. 1 de l'article 2). En d'autres termes, si le processus des conclusions et recommandations (processo de conhecimento) passe parla voie (*iter)* des garanties de procédure des groupes spéciaux et de l'Organe d'appel, le processus d'exécution (processo de execução) passe quant à lui, quoique discipliné par des règles secondaires de surveillance de la mise en oeuvre (Mémorandum d'accord, art. 21) ainsi que de compensation et de suspension de concessions (Mémorandum d'accord art. 22) (c'est-à-dire de sanctions) par un organe politico-diplomatique, l'ORD.

Le ''processus d'exécution'' en question comporte deux phases. La première phase est surveillance de l'application des décisions prises par les groupes spéciaux et par l'Organe d'appel et adoptées par l'Organe de règlement des différends. Le mécanisme de surveillance est prévu à l'article 21 du Mémorandum d'accord sur le règlement des différends, où il est dit qu'il est indispensable de donner suite ''dans les moindres délais'' aux recommandations ou décisions de l'ORD. Le respect de ces recommandations ou décisions est considéré comme étant ''dans l'intérêt de tous les membres'', pour reprendre les termes du paragraphe 1 de l'article 21. Ainsi, dans les 30 jours qui suivent l'adoption du rapport du groupe spécial ou de l'Organe d'appel, le membre concerné doit informer l'ORD de ses intentions au sujet de la mise en oeuvre des recommandations et décisions (par. 3 de l'article 21).

Si l'exécution immédiate est irréalisable, il est prévu un ''délai raisonnable''. Ce ''délai raisonnable'' est un standard, et comme tous les ''standards'' c'est une règle dont le contenu est variable. Dans ce cas, il s'agit d'obtenir un comportement raisonnable de la part des parties, au différend (plaignant/défendeur) quant à l'exécution d'une décision, c'est-à-dire l'équilibre entre des droits et des intérêts divergents.

Les critères de la recherche de cet équilibre sont fournis par les règles secondaires du paragraphe 3 de l'article 21, qui stipule trois moyens, à utiliser successivement pour la détermination du ''délai raisonnable'' relatif à l'exécution. Selon l'alinéa 'a' du paragraphe 3 de l'article 21, le délai raisonnable est celui qui est proposé par le membre concerné, à condition que ce délai soit approuvé par l'ORD. Faute d'une telle approbation, il est prévu que le délai raisonnable peutêtre un délai mutuellement convenu par les parties au différend dans les 45 jours qui suivent la date d'adoption des recommandations et décisions de l'ORD. Enfin, faute d'un tel accord entre les parties, l'alinéa 'c' prévoit un ''arbitrage contraignant'' visant à déterminer le ''délai raisonnable''. Cet arbitrage a effectivement un caractère obligatoire. La désignation de

l'arbitre – le mot pouvant s'entendre soit d'une personne, soit d'un groupe – peut faire l'objet d'une entente entre les parties concernées intervenant dans un délai de dix jours après que la question a été soumise à arbitrage. Si les parties ne parviennent pas à s'entendre, le Directeur général de l'OMC désigne l'arbitre après avoir consulté (notes de bas de page 12 et 13 de l'article 21.3c).

L'article 21 fixe également des principes directeurs pour l'arbitrage relatif au ''délai raisonnable''. Ce délai ne doit pas dépasser 15 mois à compter de la date à laquelle l'ORD a adopté le rapport du groupe spécial ou de l'Organe d'appel. Toutefois, il peut être plus court ou plus long, ''en fonction des circonstances''. Ce sont donc ces ''circonstances'' particulières que les arbitres examineront. Telle est la latitude prévue ''in concreto'' pour l'appréciation du contenu variable de la règle, le but étant de parvenir, par l'intermédiaire d'un *tertius*, à une solution raisonnable.

Le paragraphe 5 de l'article 21 a notamment pour objet la question de compatibilité entre, d'une part, un accord visé, c'est-à-dire l'un des accords conclus dans le cadre de l'OMC, et d'autre part, les mesures prises pour se conformer aux recommandations ou décisions. En ce sens, bien que sur ce point les questions ne puissent être soulevées que par les parties au différend, il est prévu un nouveau recours à l'égard des procédures de règlement des différends, étant entendu que dans tous les cas où cela sera possible, on s'adressera au groupe spécial initial – ce qui laisse entendre qu'on se préoccupe de préserver l'intégrité des règles du système de l'OMC.

En ce cas d'inobservation, le Mémorandum d'accord sur le règlement de différends prévoit un mécanisme de sanctions – deuxième phase du processus d'exécution. Les sanctions prévues – toute sanction étant un mécanisme visant à renforcer le respect des règles primaires – sont des sanctions typiques du droit international public de la coopération[296]. Elles visent le membre dont on a constaté la défaillance, et consistent à réduire les avantages dont il bénéficie en raison de sa participation à un système d'interdépendance économique, le tout s'inscrivant dans une perspective grotienne.

L'application de ces sanctions, même par l'intermédiaire de l'Organe de règlement en tant qu'organe politico-diplomatique, est axée sur la règle. En fait, le but du Mémorandum d'accord sur le règlement des différends est explicitement de limiter le caractère unilatéral d'un ''chacun pour soi'' fondé sur la puissance dont on dispose. Il prévoit que la ''réparation en cas de violations d'obligations ou d'annulation ou de réduction d'avantages'' ne peut intervenir que par la voie *iter* des règles secondaires figurant dans

[296] Cf. Wolfgang Friedman, *The Changing Structure of International Law*, New York, Columbia University Press, 1964, p. 88 à 95.

les procédures que prévoit le Mémorandum lui-même (Mémorandum d'accord sur le règlement des différends, art. 23). La détermination des concessions devant être suspendues, le secteur de marchandises, services ou ADPIC concernés, l'éventualité de représailles et le niveau de la suspension font l'objet de normes exposées en détail dans l'article 22 du Mémorandum. Il est possible de soumettre à arbitrage les contestations concernant l'application des normes, arbitrage devant être assuré par le groupe spécial initial ''si les membres sont disponibles, ou par un arbitre désigné par le Directeur général''. La compétence de l'arbitre est définie dans le Mémorandum d'accord (par.6 et 7 de l'article 22), et il n'est donc pas besoin de ''compromis''.

Ces observations sont tout aussi pertinentes en ce qui concerne la densité juridique accrue des mécanismes d'exécution. En fait, le ''chacun pour soi'' et les actes unilatéraux, étant donné leur caractère discrétionnaire, sont propices à une violence qui se manifeste, entre autres choses, par l'imprévisibilité, le manque de continuité et la disproportion entre les moyens et les objectifs. Les règles secondaires du mémorandum d'accord régissent, dans une perspective multilatérale, l'emploi de la contrainte économique. Elles imposent à la puissance, par l'intervention du droit, la modération, une mesure à respecter, et elles stipulent, sous la forme de normes énoncées à l'intention de l'Organe de règlement des différends, l'obligation d'agir en respectant certaines mesures, de façon mesurée, et en se donnant la mesure pour objectif[297].

(vii) La densité juridique accrue, sur laquelle j'insiste ici, n'exclut pas le rôle de l'ORD en tant qu'instance politico-diplomatique de règlement des différends au sein de l'OMC. Bien au contraire. Ce renforcement représente une part importante des fonctions de l'ORD en tant qu'administrateur des dispositions du Mémorandum. Il apparaît à travers le fait que la prudence est recommandée avant le dépôt d'un recours; le fait que la préférence pour les solutions négociées y est explicitement formulée (Mémorandum, par. 7 de l'article 3); la recommandation visant à ce que les règles de l'OMC soient interprétées de manière stricte, sans extrapolation (Mémorandum, par. 2 de l'article 3); l'obligation de procéder à des consultations, phase préliminaire obligatoire, avant d'envisager la mise en place d'un groupe spécial (Mémorandum, art. 4). Il faut se souvenir également que, dans le même ordre d'idées, ''les bons

[297] Voir Norberto Bobbio, *Il terzo assente*, op. cit., p. 151 et 152.

> offices, la conciliation et la médiation sont des procédures qui sont ouvertes volontairement si les parties au différend en conviennent ainsi''.

D'autre part, le Directeur général peut, ''dans le cadre de ses fonctions, offrir ses bons offices, sa conciliation ou sa médiation'' (Mémorandum, art. 5). Il y a un autre aspect du système, aspect important, qui dénote la continuité par rapport à la tradition du GATT en matière de jurisprudence diplomatique: c'est la possibilité qui est donnée aux parties de suspendre, à tout moment, les activités d'un groupe spécial en vue de négocier une solution. Dans une affaire récente – affaire concernant les Communautés Européennes qui portait sur la description commerciale des coquilles Saint-Jacques (plaintes du Canada, du Pérou et du Chili) –, les parties ont demandé que le rapport du groupe spécial – dont elles connaissaient déjà la teneur – ne soit pas diffusé auprès des autres membres, afin qu'une solution pût être trouvée compte tenu des conclusions du groupe. Lors de la réunion tenue le 5 juillet 1996 par l'ORD, les parties ont fait connaître la solution mutuellement acceptée. Cette possibilité existe également en deuxième instance (vois les procédures de travail concernant l'examen en appel, règle N^{o} 30). Incidemment, il y a là un argument de plus en faveur de mon affirmation selon laquelle les rapports ne constituent pas des jugements, mais des opinions possédant une *vis directiva,* le cheminement juridique *iter* pouvant être interrompu à tout moment pour faire place à une solution diplomatique négociée.

La dimension politique et diplomatique du Mémorandum d'accord sur le règlement des différends apparaît également dans le fait que tout membre a le droit de faire connaître ses vues sur le contenu du rapport d'un groupe spécial ou de l'Organe d'appel au moment de l'adoption de ce rapport (Mémorandum, par. 4 de l'article 16; par. 4 de l'article 17). Ce droit a effectivement été exercé par un membre de l'OMC lors de la session de l'ORD au cours de laquelle a été adopté le rapport de l'Organe d'appel dans l'affaire des carburants pour automobile. À cette occasion, le membre en question – qui n'était pas impliqué dans ce différend – a réservé ses droit au sujet de l'interprétation du paragraphe 4 de l'article III du GATT figurant dans le rapport du groupe spécial, interprétation qui n'avait pas été modifiée, sur ce point particulier, par le rapport de l'Organe d'appel. L'exercice de ce droit représente une possibilité de contrôle politique sur le contenu juridique d'un rapport, dans la perspective de la surveillance. Le but de l'institution de ce droit, et selon moi, de sauvegarder d'autres droits en précisant que les conclusions formulées dans une affaire donnée

ne s'appliquent qu'à la question considérée et aux parties impliquées dans l'affaire considérée – c'est-à-dire de faire obstacle à la notion de précédent contraignant – *stare decisis*.

Quand on regarde les activités de l'Organe de règlement des différends (ORD) depuis la date où il a été créé jusqu'à ce jour, on constate que, dans le cadre de son fonctionnement, l'Organe a réglé les différends à la fois en encourageant les règlements négociés et en préconisant des solutions de caractère plus juridique. Dix affaires ont été réglées, par la négociation, soit au cours de la période de consultations soit après la demande de constitution d'un groupe spécial. Parmi celles-ci, la plus célèbre est l'affaire concernant les États-Unis relative à l'imposition de droits d'importation sur les automobiles provenant du Japon en vertu des articles 301 et 304 de la loi sur le commerce de 1974 (plainte du Japon).

Il y a actuellement à l'OMC six groupes spéciaux en activité et 26 cas de consultations en cours. L'affaire du carburant pour automobile, qui concerne les États-Unis et porte sur les normes applicable à l'essence reformulée et à l'essence classique (plaintes du Venezuela et du Brésil), est la seule qui soit passée par toutes les phases, depuis le groupe spécial jusqu'à l'Organe d'appel, et elle en est actuellement, comme on l'a vu, à la phase d'exécution.

(viii) Pour conclure, je voudrais faire une brève observation sur la nature des différends à l'OMC, étant donné que le caractère de ces différends concerne une question qui est essentielle pour les travaux de la Commission du Droit International, je veux parler de la responsabilité internationale.

La tradition du GATT, l'importance accordée, dans cette tradition, au fait qu'un avantage peut se trouver annulé ou compromis, et la force d'attraction exercée par la question d'une jurisprudence diplomatique, tout cela incite à voir, dans le système actuel de l'OMC, une procédure contentieuse de densité juridique accrue concernant la réparation d'intérêts lésés. L'une des conséquences de cette façon de voir est de faire de l'inexécution d'une obligation internationale – par exemple, l'inexécution de décisions figurant dans des rapports adoptés par l'ORD – une hypothèse de responsabilité internationale qui concerne à peine la relation entre les parties directement impliquées dans les activités du groupe spécial. Ainsi, la fonction de réparation peut être satisfaite par les mécanismes traditionnels de la responsabilité, c'est-à-dire par la compensation (dommages-intérêts). L'article 22 du Mémorandum

d'accord sur le règlement des différends, quoique cette solution n'ait pas sa préférence, admet la négociation d'une compensation, sous réserve que cette dernière soit compatible avec les accords visés. Incidemment, le souci de compatibilité avec les accords visés est présent pour les solutions négociées de quelque type que ce soit. D'où l'obligation de notifier ces solutions a l'ORD et la possibilité, pour tout membre, de soulever ''toute question à ce sujet'' (Mémorandum d'accord sur le règlement des différends, par. 6 de l'article 3).

Cette préoccupation relative à la compatibilité [''...le mécanisme de règlement des différends a habituellement pour objectif premier d'obtenir le retrait des mesure en cause, s'il est constaté qu'elles sont incompatibles avec les dispositions de l'un des accords visés'' (Mémorandum d'accord, par. 7 de l'article 3); ''ni la compensation ni la suspension de concessions ou d'autre obligations ne sont préférables à la mise en oeuvre intégrale d'une recommandation de mettre une mesure en conformité avec les accords visés'' (Mémorandum d'accord, par. 1 de l'article 22)] fait surgir une autre question. Celle de savoir si le nouveau système de l'OMC, à la différence du système du GATT, ne tend pas vers un contentieux de légalité. Cela correspond, en puissance, à une autre conception du rôle de la responsabilité internationale: la protection de la légalité. Cette notion sous-entend que la relation relevant de la responsabilité internationale s'étendrait au-delà des parties impliquées dans un différend, que sa portée s'étendrait à tous les Membres de l'OMC. En fait, si la responsabilité internationale est une réponse à une rupture d'équilibre entre des droits et des obligations, et si la réponse exclut comme remède l'obligation de donner réparation par le moyen d'une compensation – négociée entre les parties directement impliquées –, en vertu d'une priorité axiologique conférée à l'intérêt de tous les Membres dans la fonction concernant la légalité, alors on serait en présence d'une diversification très élargie de la responsabilité internationale, allant dans le sens des propositions qui figurent dans les travaux de la Commission du Droit International[298].

À l'OMC, cette question – contentieux de réparation/contentieux de légalité – est actuellement posée implicitement parle rôle des tierces parties. En fait, si la participation à la phase des consultations exige que les tierces parties aient un ''intérêt commercial substantiel'' dans ces consultations (Mémorandum d'accord, par. 11 de l'article 4), la participation des tierces parties à un groupe spécial ou à une procédure

[298] Voir Société française pour le droit international, *La responsabilité dans le système international,* Colloque du Mans (1990) – Paris, Pedone, 1991, et en particulier Pierre-Marie Dupuy, Responsabilité et légalité, p. 263 à 297; et Brigitte Stern, La responsabilité dans le système international, p. 319 à 336.

d'appel exige un ''intérêt substantiel'' tout court (Mémorandum d'accord, par. 2 de l'article 10; par. 4 de l'article 17). La question est de savoir si l'''intérêt substantiel'' peut s'entendre comme signifiant ''intérêt du point de vue du système'', ce qui, dans le langage de l'OMC, peut être compris comme étant aussi un intérêt dans la fonction de la responsabilité internationale qui concerne la légalité. En d'autre termes, il s'agit de savoir si le groupe spécial et l'Organe d'appel, quand ils examinent les considérations des tierces parties, doivent accorder attention – et jusqu'à quel point – à ces intérêts ''systémiques''. Il ne fait aucun doute que, dans un différend, c'est seulement lorsque les avantages on été annulés ou compromis qu'une tierce partie peut agir à part entière et avoir le droit d'engager pour son compte une procédure de règlements de différends (Mémorandum d'accord sur le règlement des différends, par. 4 de l'article 10). De même pour ce qui est de faire appel à l'encontre des rapports des groupes spéciaux: seules les parties au différend, et non les tierces parties, possèdent ce droit (Mémorandum d'accord, par. 4 de l'article 17). Autrement dit, le préjudice indirect, découlant de l'intérêt du système dans la fonction concernant la légalité ne donne pas à un État Membre le droit d'exercer le rôle du ministère public pour la défense d'un intérêt collectif concernant le maintien de la cohésion du système juridique de l'OMC. En ce sens, je dirais, en reprenant les termes employés par la Cour internationale de Justice en 1996 dans l'affaire du *Sud-Ouest africain/ Namibie,* que le système n'autorise pas une *actio popularis,* ne donnes pas à chaque État Membre de l'OMC le droit de déclencher une procédure de règlements des différends visant à protéger l'intérêt collectif[299].

Toutefois, ces problèmes concernant le champ d'action, plus vaste ou plus étroit, de la responsabilité internationale, sont encore en suspens, en vertu de certaines interventions de tierces parties qui appellent une réflexion et une décision. Pour pouvoir répondre à ces questions, il faudra attendre de voir quelles tendances seront ou non renforcées dans la future jurisprudence de l'Organisation Mondiale du Commerce.

[299] Voir Dominique Carreau, *Droit international,* 3ème éd., 1991, Pedone, 1991, p. 429; Brigitte Bolecker-Stern, *Le préjudice dans la responsabilité internationale,* Paris, Pedone, 1972.

"DROITS-DE-L'HOMMISME" ET DROIT INTERNATIONAL

Conférence donnée le 18 juillet 2000
par Alain Pellet
Professeur à l'Université de Paris X -Nanterre
membre et ancien Président de la
Commission du Droit International des Nations Unies

Excellences, Mesdames et Messieurs, Chers Amis,

C'est un grand honneur d'être appelé à présenter la conférence Gilberto Amado. Et je sais que s'il m'échoit aujourd'hui, je ne le dois nullement à mes mérites, mais seulement à l'amitié dont m'honore l'Ambassadeur Baena Soares et à son indulgence. Peut-être aussi à mes liens spéciaux avec les pays d'Amérique latine et, tout spécialement, à ceux qui me lient au Brésil, qui m'a gratifié, sans que je le mérite davantage, d'un professorat *honoris causa* il y a quelques années; le premier que j'ai eu, et j'en suis très fier! C'est, en quelque sorte, ma seule "rencontre" avec celui qui a donné son nom à ces conférences: il reçut le même honneur, mais de manière autrement plus méritée, en 1968.

Je suis probablement le second des "conférenciers Gilberto Amado" à ne l'avoir pas connu et j'en ai grand regret (paradoxalement, le premier a été l'éminent juriste brésilien A. A. Cançado Trindade[300]). Depuis que cette proposition m'a été faite, j'ai essayé de savoir plus précisément qui il était -et je dois dire que cela m'a fait regretter plus encore de ne pas l'avoir rencontré tant sa personnalité de juriste, mais aussi d'homme, semblait extraordinaire, et extraordinairement attachante. Le Juge Sette-Camara en a dressé un portrait très remarquable au cours de la conférence qu'il a faite ici même en 1987, à l'occasion du 10ème anniversaire de la naissance

[300] "La contribution de Gilberto Amado aux travaux de la Commission du Droit international", *in Conférences commémoratives Gilberto Amado,* Fundação Alexandre de Gusmão, Ministerio das Relações Exteriores, Brasilla, 1998, p. 491.

d'Amado. Il aimait les plaisirs de la vie et n›était pas commode - voici au moins deux raisons qui me le rendent particulièrement sympathique! Son absence de dogmatisme, son réalisme (n'excluant pas l'attachement aux principes), sa faculté à reconnaître qu'il s'était trompé[301], son souci de suivre les évolutions du droit international, son indépendance d'esprit au sein de la C.D.I. - et aussi son intérêt particulier pour les problèmes des réserves aux traités[302] - tout cela en fait un prédécesseur pas seulement illustre, mais aussi dont je me sens proche à maints égards.

On lit notamment dans l'étude que lui a consacrée le Juge Sette-Camara que "les problèmes théologiques lui étaient étrangers"[303]. C'est dire, je crois, que Gilberto Amado n'eût pas été "droits-de-l'hommiste"; car, d'une certaine manière, le "droits-de-l'hommisme" est au droit international ce que la théologie, ou, mieux, la foi, est au droit en général: une vertu, peut-être, mais étrangère à son objet.

"Droits-de-l'hommisme". ..L'expression, j'en conviens, fait problème. J'en veux pour preuve l'agitation qui s'est emparée de certains membres de la Commission et la perplexité de nos interprètes, qui, pourtant, en ont entendu d'autres, lorsque l'annonce de cette conférence a été faite par notre Président. Mais on dit que Frédéric Dard a inventé pas moins de 20 000 néologismes. On peut bien m'en pardonner un même si je n'ai pas l'outrecuidance de me comparer au père du célèbre San Antonio!

Mais qu'est-ce que ce déjà presque fameux "droits de l'hommisme"? Bien que je ne sois pas sûr de pouvoir revendiquer la paternité exclusive de l'expression, je l'ai utilisée pour la première fois je crois sous une forme publiée lors d'un colloque organisé en 1989 par Hubert Thierry et Emmanuel Decaux à l'Arche de la Fraternité[304]. Dans mon esprit, c'était assez neutre; il s'agissait seulement de qualifier l'état d'esprit des militants des droits de l'homme, pour lesquels je nourris la plus grande admiration tout en mettant en garde contre la confusion des genres: le droit d'une part, l'idéologie des droits de l'homme de l'autre.

Depuis lors, l'expression a connu une certaine fortune, même si, cherchant sur Internet, je n'ai trouvé, sur *Lexis* qu'une seule entrée pour l'expression *"human rightism"*. Elle renvoie à la critique d'un livre consacré à la Tunisie et définit le droits-de-l'hommisme comme

[301] V. *ibid.*, not. pp. 511-514.
[302] V. son Memorandum sur le sujet *in Ann. C.D.I.* 1951, vol. I, p. 17.
[303] "Gilberto Amado – Cent ans de plénitude", *ibid.*, p. 479.
[304] Alain Pellet, "La mise en œuvre des normes relatives aux droits de l'homme" *in* CEDIN (H. Thierry et E. Decaux, dirs.), *Droit international et droits de l'homme - La pratique juridique française dans le domaine de la protection internationale des droits de l'homme,* Montchrestien, Paris, 1990, p. 126. Je reprends, ci-après, certains éléments de cette communication qui me paraît toujours globalement exacte.

"a peculiar manifestation of the moralistic strain in politics"[305]. Elle a acquis en outre une nuance sans doute péjorative qui n'entrait pas dans mes intentions initiales. J'en veux pour preuve cette réaction de l'un des Membres éminents du Comité des Droits de l'homme, rencontré la semaine dernière à un cocktail, qui m'a abordé en me disant: "j'ai reçu une invitation pour assister à votre conférence; mais je n'irai pas"; "Ah? pourquoi?"; "Parce que je pense que, vu le titre de votre présentation, vous allez dire du mal des droits de l'homme!". Je ne vais évidemment pas en dire du mal - d'ailleurs, comme l'a écrit Michel Villey, "les droits de l'homme n'ont plus que des amis"[306]; mais ce genre de réactions me renforcent dans ma conviction selon laquelle les "droits-de-l'hommistes", qu'il s'agisse de militants ou de spécialistes des droits de l'homme, ont des tas de qualités, mais pas celle d'être particulièrement ouverts au dialogue - ce qui ne laisse pas d'être paradoxal (ou inquiétant) étant donnée la cause qu'ils défendent et qui mérite mieux.

Autre anecdote, mais qui nous rapprochera de notre définition. Dans un autre cocktail (c'est une activité très répandue à Genève même si je m'y livre peu!...), j'ai rencontré un collègue, pour lequel j'ai, d'ailleurs, une grande estime et que je peux nommer, le Professeur Theodor Meron. S'excusant de ne pouvoir être avec nous aujourd'hui, il ajoute: "Je pense que tu vas aborder la question des réserves aux traités [je vais le faire brièvement, en effet] mais, sur ce point, tu ne peux me classer parmi les droits-de--l'hommistes. Dans mon rapport au Conseil de l'Europe[307], je ne remets pas en cause le droit applicable aux réserves aux traités, je dis seulement que les règles en vigueur posent des problèmes en matière de droits de l'homme".

Voilà, me semble-t-il une attitude typiquement droits-de--l'hommiste: elle consiste à penser que les règles du droit international général sont excellentes mais totalement inadaptées à cette branche du droit - que dis-je, cette branche du droit? cette discipline à part entière, que serait la protection des droits de l'homme - alors même que, à mon avis, les problèmes posés par les réserves en matière de droits de l'homme sont, certes, réels (en tout cas, ils ont été rendus tels), mais ni plus, ni moins que dans d'autres domaines du droit international, en particulier en matière de protection de l'environnement et que cette particularité tient moins à l'objet des traités de droits de l'homme qu'à l'existence d'organes de contrôle, plus répandue que dans d'autres domaines.

[305] Andrew Boroviec, critique de l'ouvrage de Roger Kaplan, *Tunisia: a Case for Realism, Washington Times,* Nov. 22, 1998, Part B, Books; p. B7 (http://web.lexis-nexis.commission/ln.uni).

[306] *Le droit et les droits de l'homme,* PUF, Paris, 1983, p. 17.

[307] "Les implications de la Convention européenne sur le développement du droit international public", rapport pour la 19ème réunion du CADHI (Berlin, 13 et 14 mars 2000), CADHI (2000) 11, Annexe III.

Alors disons que l'on peut définir le droits-de-l'hommisme comme cette "posture" qui consiste à vouloir à toute force conférer une autonomie (qu'elle n'a pas à mon avis) à une "discipline" (qui n'existe pas en tant que telle à mon avis): la protection des droits de l'homme. Voici exposées du même coup et la définition du droits-de-l'hommisme et la thèse même que je vais brièvement soutenir.

On peut, à vrai dire, avoir du droits-de-l'hommisme une définition plus extensive et y inclure le militantisme en matière de droits de l'homme - on dirait en franglais l'activisme des droits de l'homme. Dans la mesure où l'expression droits-de-l'hommisme a acquis une connotation péjorative, je ne crois pas que ce soit approprié: les militants des droits de l'homme "annoncent la couleur"; ils se battent pour une cause (que je crois profondément juste) et il est légitime qu'ils polarisent leurs efforts sur leur objectif, celui d'un monde où triompheront les droits de l'homme - comme les écologistes se mobilisent exclusivement (trop, parfois) contre la pollution ou les anti-nucléaires contre l'arme atomique.

Encore que. ..Même ici, il faut savoir raison garder. Les O.N.G. d'opinion et de solidarité internationale sont, assurément, des "contre--pouvoirs positifs" à l'arbitraire des États ou à la domination "mondialisante" des pouvoirs économiques transnationaux. Pourtant, malgré les respect que l'on peut avoir pour beaucoup d'entre elles et l'admiration que suscitent les hommes et les femmes qui s'y dévouent, il est douteux qu'elles constituent une alternative véritable à l'internationalisation.. Autant, en effet, elles ont la plus grande utilité en tant que contrepoids, comme instruments de pression et d'alerte, autant elles pourraient être, elles aussi, potentiellement dangereuses si des pouvoirs excessifs leur étaient reconnus; les buts qu'elles poursuivent sont, en général, éminemment respectables en soi; mais de deux choses l'une: ou bien ils sont spécialisés et, pour importants qu'ils soient - la cause des femmes, des enfants, des pauvres, de l'environnement, des droits de l'homme...- ils ne suffisent pas à tenir lieu de politique, de projet global pour la "cité du monde"; ou bien c'est le cas, et il s'agit pour elles de remplacer les Etats et l'on risque alors de tomber de Charybde en Scylla, la bonne conscience d'une juste cause risquant de les conduire à encore plus d'intolérance que n'en montrent les pouvoirs politiques existants. La mondialisation du "*politically correct*" m'effraie!

Et, autant je pense que la protection internationale des droits de l'homme est une excellente cause et, pour ce qui nous intéresse plus spécialement ici, un élément essentiel du droit international contemporain, autant je considère que le militantisme droits-de-l'hommiste n'a pas sa place dans la doctrine internationaliste.

Pour être honnête, je dois dire d'ailleurs que la très grande majorité des internationalistes reconnus échappent, globalement, à ce travers, y compris ceux qui, à juste titre, s'emploient à faire reconnaitre aux droits de l'homme leur juste place dans le droit international contemporain: éminente, mais pas exclusive. Je taquine souvent certains de mes collègues à la Commission pour leur "droits-de-l'hommisme", surtout John Dugard ou Bruno Simma; mais je leur reconnais, à l'un et à l'autre - et à d'autres, comme Ted Meron, que j'ai mentionné, ou Louis Henkin (que je salue respectueusement et affectueusement) ou Rosalyn Higgins et bien d'autres - je leur reconnais disais-je, deux qualités formidables: La rigueur technique alliée à une évidente générosité.

Il reste que même ces excellents connaisseurs du droit international laissent parfois leur générosité prendre le pas sur la technique juridique qu'ils maîtrisent par ailleurs si bien. Sans devoir être classés parmi les droits-de-l'hommistes, au sens péjoratif de l'expression, ils se laissent parfois aller à ce que j'appellerais des "dérives droits-de-l'hommistes" et succombent de temps en temps à la tentation, donnant ainsi raison à la formule célèbre de John Humphrey, qui s'y connaissait en matière de droits de l'homme, selon laquelle "Human rights lawyers are notoriously wishful thinkers"[308].

Or, n'en déplaise à Giraudoux, le droit est tout ce qu'on veut, mais assurément pas la "meilleure école de l'imagination". Même si je le crois plus "art" que "science", il est une discipline normative, dont l'objet est issu des rapports de force, rapports qu'il reflète d'une manière que je crois raisonnablement fidèle. On peut (et sans doute on doit) vouloir les changer, mais, aussi longtemps que ce n'est pas le cas, le juriste ne peut guère que décrire les normes juridiques telles qu'elles sont et non comme il voudrait qu'elles soient, quitte à les juger sévèrement. *Dura lex*!

À cet égard, le droit des droits de l'homme et, plus exactement, le droit international des droits de l'homme qui seul nous retiendra ici, n'échappent pas à la règle. Il est et ne peut être que l'art du possible et, à vouloir lui demander l'impossible, les droits-de-l'hommistes font, à mon avis plus de tort à la cause qu'ils entendent défendre qu'ils ne la servent. Et, souvent, ils feraient mieux de laisser aux "activistes des droits de l'homme", dont c'est la très respectable fonction, le soin de changer le droit plutôt qu'à s'y essayer eux-mêmes au risque de ne faire progresser ni les droits de J'homme, ni le droit international.

Les techniques aboutissant à ces dérives sont nombreuses et leur analyse sérieuse demanderait plus de temps que celui dont je dispose. Je

[308] "Foreword" *in* R.B. Lillich ed., *Humanitarian Intervention and the United Nations*, U.P. Virginia, Charlottesville, 1973, p. VII.

citerai tout de même les deux procédés qui constituent à mes yeux les plus dangereuses dérives du droits-de-l'hommisme:

-il y a d'abord le fait de croire (ou de faire croire) qu'une technique juridique particulière est propre aux droits de J'homme alors qu'elle est bien connue en droit international général; c'est la recherche abusive du particularisme;

-à l'inverse, et cela est plus proche du *"wishful thinking"*, nos droits--de-l'hommistes ont une certaine tendance à prendre leurs désirs pour des réalités et à tenir pour vérités juridiques des tendances encore balbutiantes ou, pire, qui n'existent que dans leurs espoirs.

Laissez moi, sans originalité, illustrer ces tendances, que je crois néfastes, par quelques exemples en ce qui concerne la formation des normes d'abord, leur mise en œuvre ensuite. La formation d'abord.

Les règles internationales protectrices des droits de l'homme sont, très classiquement, l'aboutissement de processus formels (en gros ce que la doctrine classique appelle les sources du droit international), dont la fonction essentielle est d'assurer (ou de permettre de s'assurer de) leur juridicité. Dans le droit international contemporain, cette fonction est assurée d'abord par la voie conventionnelle et la protection des droits de l'homme n'échappe pas à cette tendance forte: on ne compte plus les traités qui y sont consacrés, aux plans universel ou régionaux, globaux ou partiels, par secteurs ou par catégories de personnes protégées, etc. Certains de ces traités sont très précis, mais beaucoup demeurent flous et incertains dans leur portée. Et si certains sont largement ratifiés, d'autres le sont peu ou leur ratification est assortie de tant des réserves que leur autorité s'en trouve parfois considérablement affaiblie.

Pour ce qui est des réserves, j'ai eu, je crois, suffisamment l'occasion de m'exprimer[309] pour qu'il ne soit pas indispensable d'y revenir longuement, si ce n'est pour rappeler rapidement quelques évidences ou, du moins, quelques propositions qui me paraissent relever du bon sens:

- en premier lieu, je me suis toujours interrogé sur l'acharnement que semblent mettre les droits-de-l'hommistes à préférer un traité non ratifié à un traité ratifié avec des réserves;

- étant entendu, en deuxième lieu, que, bien sûr, une ratification n'a de portée que si l'État réservataire ne vide pas le traité de sa portée; mais les règles de Vienne excluent qu'il puisse en aller ainsi, puisqu'une réserve incompatible avec le but et l'objet du traité n'est pas licite;

- en troisième lieu, réciprocité ou pas, les conventions de droits de l'homme sont des traités et, si l'on peut avoir la plus grande défiance

[309] V. Alain Pellet, deuxième Rapport sur les réserves aux traités, A/CN.4/477 et Add.1, not. pars. 164-260.

à l'encontre du volontarisme juridique, cette méfiance n'est pas de mise s'agissant des traités qui, par essence, sont des accords de volonté;

-il s'en déduit, quatrième et dernier point, qu'une réserve peut être illicite (comme les organes de contrôle des traités de droits de l'homme peuvent le constater sur la base des règles de Vienne même s'ils n'ont pas l'exclusivité de ce contrôle); mais, s'il en va ainsi, c'est à l'État réservataire et à lui seul d'en tirer les conséquences comme l'a rappelé la C.D.I. au paragraphe 10 de ses conclusions préliminaires de 1997[310], seul point important sur lequel elle se dissocie de la fameuse, mais excessive, Observation générale n° 24 du Comité des Droits de l'homme[311].

Je relève d'ailleurs en passant que la position du Comité, alignée sur celle des organes de la Convention européenne des Droits de l'homme, n'a pas manqué d'avoir les effets pervers que je redoutais, puisqu'un État, Trinité et Tobago, a fini, comme il en avait le droit, par dénoncer le Protocole facultatif au Pacte de 1966 sur les Droits civils et politiques après que le Comité eut déclaré (à tort ou à raison) illicite une réserve de cet État tout en le tenant comme intégralement lié par le Protocole[312]. Ce qui, malgré les hésitations de la Suisse et de la Turquie[313], ne s'était pas produit à Strasbourg, du fait de la plus grande cohésion des États européens, s'est donc produit dans le cadre universel: Trinité et Tobago a renoncé à faire bénéficier l'ensemble de sa population (et les étrangers) de la protection offerte par le Protocole, ce qu'une moindre rigidité du Comité aurait (peut-être) permis d'éviter...

Les résultats, trop lents et souvent décevants à leurs yeux, de la forme conventionnelle désolent nos droits-de-l'hommistes, qui cherchent une consolation dans la coutume, supposée "durcir" un droit jugé trop mou - surtout si les traités en question ne sont pas ratifiés comme, selon eux, ils devraient l'être et demeurent donc pour les États qui n'y adhèrent pas des propositions de normes.

Cette tentation est particulièrement développée dans la doctrine américaine qui cherche à contourner le peu d'empressement mis par les États-Unis à ratifier les traités de droits de l'homme par une "coutumiérisation" à tout va des règles les plus hasardeuses. La dérive est si forte que des défenseurs des droits de l'homme, américains, comme Ted Meron, dans son livre (un peu trop "*U.S. oriented*" pour mon goût tout

[310] Rapport de la Commission du Droit international sur les travaux de sa 49ème session, A/52/10, par. 157, p. 107.
[311] Observation générale n° 24 sur les questions touchant les réserves formulées au moment de la ratification du Pacte ou des Protocoles facultatifs y relatifs ou de l'adhésion à ces instruments, ou en rapport avec des déclarations formulées au titre de l'article 41 du Pacte", CCPR/C/21/Rev.1/Add.6, 11 novembre 1994.
[312] 31 décembre 1999, *Rawle Kennedy c. Trinité et Tobago*, communication N° 845/1999, CCPR/C/67/D/845/1999.
[313] V. Alain Pellet, Deuxième rapport sur les réserves aux traités, A/CN.4/477/Add.1, par. 230.

de même...) intitulé *Human Rights and Humanitarian Norms as Customary Norms*[314], ou non, comme Bruno Simma et Philip Alston, dans l'article qu'ils ont consacré naguère aux sources du droit des droits de l'homme[315], s'en sont inquiétés: l'un et les autres s'y élèvent avec vigueur contre la tendance consistant à bénir de l'onction coutumière n'importe quelle norme jugée souhaitable *ad majorem gloriam* des droits de l'homme.

Mais le problème demeure, et nos auteurs se tournent, peut-être un peu légèrement, vers la fameuse "troisième source" du droit international les "principes généraux de droit reconnus par les nations civilisées", mentionnés à l'article 38 du Statut de la Cour internationale de Justice. Mais ils n'hésitent pas, alors, à modifier profondément la nature même de ces principes dont il est généralement admis qu'ils doivent être reconnus *in foro domestico* (par les droits internes de tous les États, dont ils constituent le fonds commun) et transposables au plan international. Mais cela ne fait pas l'affaire de nos amis qui savent bien que les libertés d'expression ou d'association, par exemples, sans parler de l'exigence d'un procès équitable, sont loin d'être garanties par les droits de très nombreux États (puisqu'il paraît que tous les États doivent être considérés comme des "nations civilisées"…). Qu'à cela ne tienne, on décidera que les principes en question sont suffisamment ancrés dans le droit positif par l'*opinio juris* dont on décrète qu'ils sont l'objet, en s'abritant, si besoin est, derrière l'autorité de la C.I.J.[316]. La boucle est bouclée: nos auteurs ont, ce faisant, réinventé une coutume sans pratique, ou des principes généraux de droit sans reconnaissance par les droits internes.

Je ne suis pas sûr que la cause des droits de l'homme en soit très avancée. À quoi sert de "violer" ainsi des États qui ne veulent pas s'engager par un traité (ou ne le font qu'après s'être assurés qu'ils pourront impunément n'en tenir aucun compte), qui manifestent clairement leur opposition à la formation d'une coutume générale et qui s'abstiennent soigneusement de reconnaître les droits en cause dans leur ordre interne?

Je ne fais pas partie de ceux qui défendent le "relativisme" des droits de l'homme. Les Occidentaux ont bien assez de choses à se reprocher pour ne pas encore s'inventer une mauvaise conscience en matière de droits de l'homme. Sur ce point, nous avons quelque chose à apporter au reste du monde et je ne pense pas que nous devions chercher un alibi dans la vaine

[314] Clarendon Press, Oxford, X-213 p.

[315] "The Sources of Human Rights Law: Custom, *Jus cogens* and General Principles», *Australian YBIL*, 1992, pp. 82-108; v. aussi B. Simma, «International Human Rights and General International Law: A Comparative Analysis», *R.CA.D.E.* 1993, vol. IV-2, pp. 153-256, not. pp. 213 et s.

[316] V. B. Simma, *ibid.*, pp. 224-227; v. aussi Jean-François Flauss, «La protection des droits de l'homme et les sources du droit international» *in* S.F.D.I., .Colloque de Strasbourg. *La protection des droits de l'homme et l'évolution du droit international,* Pedone, Paris, 1998, pp. 67-71.

recherche paternaliste de vagues traces d'idéologie des droits de l'homme dans des civilisations (parfaitement estimables par ailleurs) pour lesquels ils ne sont pas une valeur. Mais je pense aussi qu'il nous faut chercher dans trois directions:

- d'abord, nous devrions sans doute nous interroger davantage sur les raisons profondes de l'indifférence marquée hors du monde industrialisé à l'égard de ce que nous appelons droits de l'homme et qui ne sont sans doute qu'un aspect de ceux-ci; car, si je maintiens que nous n'avons pas de leçons à recevoir en ce qui concerne les droits civils et politiques, je crains que nous ne soyions pas très "bons" en matière de droits économiques, sociaux et culturels et la mondialisation n'arrange rien sur ce point; or le "droit d'être un homme" passe d'abord par celui de manger à sa faim;

- ensuite, comme l'a écrit Mme. Dundes Rentleln, dans un petit ouvrage assez subtil intitulé *International Human Rights - Universalism Versus Relativism,* paru en 1990, "[i]nstead of chastizing nations for violating standards which they have not ratified or which they have but do not care about, the United Nations could condemn them for ignoring their *own* [le mot est souligné dans le texte] standards"[317];

- enfin, s'il n'est pas question d'imposer nos valeurs au reste du monde, comme nous avons trop tendance à le faire, rien ne nous empêche de tenter de le convaincre de leur bien-fondé (et là, les "activistes" des droits de l'homme - mais pas les juristes - sont irremplaçables).

Cela me conduit à dire quelques mots de la mise en œuvre des droits de l'homme[318].

Ne pas, donc, imposer des valeurs qui, faute d'être passées dans le droit positif ne constituent pas des normes juridiques. Mais, en revanche, veiller, de manière sourcilleuse - aussi sourcilleuse que le droit le permet -, au respect de celles qui sont aujourd'hui reconnues comme telles par la communauté internationale dans son ensemble, et dont certaines ont acquis une valeur impérative, tant il est vrai que les normes protectrices des droits de l'homme sont, sans aucun doute, le domaine privilégié du *jus cogens.* Mais, ici encore, les droits-de-l'hommistes me semblent pêcher à la fois par excès (en ce qu'ils s'efforcent parfois de justifier ce qui ne peut l'être en droit) mais aussi, paradoxalement, par timidité (en ce qu'ils négligent trop le recours à des institutions classiques du droit des gens ou, au contraire, sous-estiment, curieusement, des avancées récentes du droit international général).

[317] Sage Publications, Newbury Park, London, New-Delhi, 1990, 205 p.

[318] Pour plus de détails, v. Alain Pellet, "La mise en œuvre des normes relatives aux droits de l'homme", préc. note 5, pp. 101-141.

Je suis, par exemple, frappé par l'indifférence et, parfois, l'hostilité dont font preuve certains spécialistes des droits de l'homme à l'égard de l'évolution considérable de la notion de "menace contre la paix" telle que les contours en sont définis par le Conseil de sécurité depuis la fin de la guerre froide. Sans doute, n'est-ce pas là une novation absolue: dès 1977, l'infâme régime d'apartheid avait été qualifié de menace contre la paix[319]. Mais, depuis une décennie, le mouvement s'est amplifié et des "tragédies humaines" ou des "catastrophes humanitaires" qui, pourtant, ne semblent guère menacer sérieusement la paix *internationale* (je ne parle pas de la paix civile) sont, comme au Kurdistan irakien, en Somalie, au Rwanda, en Sierra Leone, qualifiées comme telles au titre de l'article 39 de la Charte.

Je sais bien que le système n'est pas sans faille et que le droit de veto - y compris la menace de son exercice - est source d'un "double standard" décrié. Mais, comme souvent, le mieux est l'ennemi du bien, et ce n'est pas parce que d'autres situations de détresse humanitaire sont pudiquement oubliées par le Conseil qu'il faut mépriser ces précédents malgré tout prometteurs pour l'avènement d'un véritable ordre humanitaire minimal. Ce n'est pas parce que l'on a tort de ne pas intervenir dix fois, que l'on doit s'abstenir de le faire la onzième fois, lorsque cela se révèle possible.

Et, au risque de choquer certains d'entre vous, j'irais plus loin: l'intervention de l'OT AN au Kosovo n'est certainement pas, au point de vue juridique, un modèle d'orthodoxie. Il reste que, s'agissant de la défense des droits de l'homme, elle me paraît plus recommandable que l'inaction de la communauté internationale à Srebrenica. Il est vrai qu'entre le principe de Münich et l'action à la Zorro des pays membres de l'OT AN, il y a sans doute un moyen terme, mais il est permis de préférer Zorro à Daladier et Chamberlain...

De même, pour revenir, malgré tout, à des problèmes plus techniques, les droits-de-l'hommistes ont sans doute tort de sous-estimer l'immense intérêt de la notion de "crime international de l'État", telle que l'envisage l'article 19 du projet d'articles sur la responsabilité adopté en première lecture par la C.D.I.: sans doute la notion n'est-elle pas limitée à la protection des droits de l'homme, mais elle constitue l'un des moyens de lutter contre les "violations graves et à une large échelle d'obligations internationales d'importance essentielle pour la sauvegarde de l'être humain, comme celles interdisant l'esclavage, le génocide, l'apartheid" pour reprendre les termes du paragraphe 3 de l'article 19. Encore faudrait-il, pour que ce moyen soit efficace, que des conséquences sérieuses soient tirées de la notion de crime - et ce n'est pas ce que font les

[319] Résolution 418 (1977) du 4 novembre 1977.

articles 51 à 53 du projet d'articles actuel de la Commission, qui oublient les effets les plus importants des crimes en matière de droits de l'homme et, d'abord, la transparence de l'Etat, qui permet d'atteindre directement, pénalement, les responsables du crime malgré leur qualité d'organes de l'État, et la possibilité d'une *actio popularis* grâce à laquelle, dans la droite ligne du *dictum* de la C.I.J. dans l'affaire de la *Barcelona Traction,* tout État peut mettre en cause la responsabilité de l'auteur d'un crime, même sans en être la victime immédiate.

Indépendamment de ces cas extrêmes, les règles classiques de la responsabilité internationale demeurent précieuses en matière de droits de l'homme.

C'est évidemment le cas lorsque les traités qui les garantissent ne comportent pas de mécanisme de contrôle (ou si les droits en cause sont de nature coutumière). Dans ce cas, on peut toujours clamer que les droits de l'homme sont "objectifs", que le droit international des droits de l'homme ne repose pas sur le principe de réciprocité, la seule garantie de leur respect tient aux mécanismes interétatiques traditionnels, et d'abord à l'institution, à cet égard injustement méprisée, de la protection diplomatique, dont la C.D.I. se préoccupe actuellement grâce au rapport de notre collègue John Dugard, rapport dont je ne méconnais nullement l'inspiration très respectable, mais auquel je n'ai pu m'empêcher de trouver quelques relents droits-de-l'hommistes. Bien que le Rapporteur spécial s'emploie à montrer que, malgré ses inconvénients, la vieille institution de la protection diplomatique peut encore rendre des services, il la fond en partie dans les mécanismes propres à la protection des droits de l'homme, privant ainsi, à mon avis, l'une et les autres de leur spécificité et ne laissant à la protection diplomatique *stricto sensu* qu'un rôle marginal[320].

Je crois que c'est une erreur. On peut, certes, avoir quelque défiance à l'encontre de la protection diplomatique qui a été, historiquement, un instrument de la "diplomatie du dollar", pour reprendre l'expression de Philip Jessup[321] et de la domination des pays européens et des États-Unis sur le "tiers monde" de la fin du XIXème siècle et du début du XXème, les pays de l' Amérique latine. Il n'en reste pas moins qu'elle peut aussi être un instrument efficace de protection des droits de l'homme (et pas seulement du droit de propriété auquel on a trop tendance à la confiner).

Dans un article vieux de vingt ans, Éric David évoquait la pendaison en Irak d'un ressortissant hollandais accusé d'espionnage et notait que ce fait (apparemment internationalement illicite) "aurait

[320] Premier rapport sur la protection diplomatique, A/CN.4/506.
[321] Cf. Philip Jessup, *A Modern Law of Nations*, MacMillan, New York, 1946, p. 96.

provoqué jadis une réclamation internationale en bonne et due forme des Pays-Bas. Aujourd'hui, leur impassibilité trahit leur impuissance. Il ne faut donc pas s'étonner si la réclamation internationale classique cède le pas à l'interposition gracieuse, si aujourd'hui on sollicite plus qu'on n'exige". Et de conclure: "En matière de droits de l'homme, la protection diplomatique n'a donc plus le poids qu'elle avait hier"[322]. Elle l'aurait si, plutôt que de la diluer dans les mécanismes généraux de protection des droits de l'homme, on s'efforçait à la fois de l'encadrer plus étroitement et de l'utiliser à meilleur escient que jadis pour obtenir réparation des atteintes aux droits de l'homme subis par les ressortissants de l'État s'en prévalant.

Les droits-de-l'hommistes, pourtant ne s'y intéressent guère, persuadés qu'ils sont de l'excellence ou, en tout cas, de la supériorité, des mécanismes propres à la protection des droits de l'homme. Je ne méconnais évidemment pas la novation profonde et globalement heureuse introduite par ces mécanismes dans le droit des gens de la seconde moitié du XXème siècle; il n'en reste pas moins qu'ils ne sont ni une panacée ni une révolution radicale; et pour plusieurs raisons.

Même les plus sophistiqués d'entre eux sont des mécanismes de constatation plus que de réparation ou, surtout, d'exécution. En cela, ils sont fortement ancrés dans le droit international: les constatations de manquement faites par les organes de contrôle des droits de J'homme peuvent être obligatoires -ils ne le sont pas toujours; ils ne sont jamais exécutoires. Comme l'a écrit Karel Vasak, "[i]l n'existe pas d'institutions des droits de l'homme exerçant la fonction de sanction"[323] et le droit international des droits de l'homme doit se retourner vers le droit international général pour assurer sa mise en œuvre. Il est vrai que cela n'est pas sans rappeler la parabole de l'aveugle s'appuyant sur le paralytique et que le droit des gens ne brille pas par l'efficacité des moyens de sa mise en œuvre. Il reste qu'il peut offrir même marginalement, même imparfaitement, un "soutien à l'exécution", soit que les autres États recourent au droit "classique" de la responsabilité internationale, c'est-à-dire aux contre- mesures, avec toutes les limitations dont celles-ci sont (ou devraient être) assorties, soit que, dans les cas les plus graves, l'on actionne les mécanismes du chapitre VII de la Charte des Nations Unies.

Encore faut-il, dans ce domaine comme dans d'autres, ne pas faire preuve d'aveuglement droits-de-l'hommiste et ne pas récuser l'apport

[322] "Droits de l'homme et droit humanitaire", *Mélanges Fernand Dehousse,* vol. I, *Les progrès du droit des gens,* Fernand Nathan/Labor, Paris/Bruxelles, 1979, p. 179.

[323] "Les institutions internationales de protection et de promotion des droits de l'homme" *in* Karel Vasak dir., *Les dimensions internationales des droits de l'homme,* UNESCO, Paris, 1978, p. 244.

que le droit international général peut constituer à la mise en œuvre des normes internationales de droits de l'homme. Il faut, en particulier, ne pas voir dans les mécanismes de contrôle des régimes se suffisant à eux-mêmes (*self-contained regime*), dont l'existence dispenserait de se tourner, quand besoin est, vers le "bon vieux" droit des gens - je veux dire vers le droit international des internationalistes, tout simplement! Mais si, d'importants spécialistes des droits de l'homme ont plaidé en ce sens, au premier rang desquels je citerai, à nouveau, Bruno Simma[324], mais aussi, dans la doctrine française, le Professeur Cohen-Jonathan, pourtant souvent plus "rigidement droits-de-l'hommiste"[325], d'autres[326] n'hésitent pas à considérer, bien à tort, les mécanismes propres aux droits de l'homme comme auto-suffisants, privant ainsi la protection internationale des droits de l'homme d'un apport, sans doute imparfait mais, au moins, complémentaire. Paradoxalement, les droits-de-l'hommistes rejoignent ainsi les régimes totalitaires qui, comme l'URSS et ses amis naguère, se prévalaient de leur adhésion aux traités de droits de l'homme pour prétendre s'affranchir de toute autre "intervention" (je mets le mot entre guillemets) extérieure dans ce domaine.

Mais, ce faisant, on en revient, inexorablement, à deux traits caractéristiques du droit international: l'inter étatisme et la primauté, non pas juridique mais de fait, du droit interne.

Car il ne faut pas se payer de mots ou d'illusions. Il est certainement excessif d'affirmer qu'un État n'est obligé qu'"à ce qu'il peut, quand il le peut, avec les moyens qu'il peut, conservant toute latitude quant à la mise en œuvre de l'affirmation internationale des droits à laquelle il souscrit, et d'obligations qui ne sont que de lointains résultat et non de moyens"[327]. Mais il est bien vrai, comme l'a rappelé René Cassin lui-même (peu suspect d'anti droits-de-l'hommisme...), que "la responsabilité fondamentale de la mise en œuvre des droits de l'homme (...) repose avant tout sur l'action de l'État"[328], dont les organes sont chargés de l'application quotidienne des normes de droits de l'homme, même lorsque celles:ci sont définies internationalement. Dans ce domaine comme dans presque tous les autres, l'État a la compétence du dernier mot; il est le "bras séculier" seul capable de donner vie à la norme internationale car, conformément à la

[324] "International Human Rights and General International Law: A Comparative Analysis", *R.C.A.D.E.* 1993, vol. IV-2, pp.106-210 et 235-236.

[325] "Responsabilité pour atteinte aux droits de l'homme" *in* S.F.D.I., Colloque du Mans, *La responsabilité dans le système international*, pp. 131-132.

[326] Telle semble aussi être l'opinion de la C.I.J. (cf. l'arrêt du 27 juin 1986 dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, *Rec.* 1986, par. 267, p. 134); v. aussi l'article 62 de la Convention européenne des Droits de l'homme.

[327] Jacques Mourgeon, *Les droits de l'homme,* PUF, Paris, coll. «Que sais-je?», n° 1728, 5ème éd. 1990, p. 82.

[328] "La Déclaration universelle et la mise en œuvre des droits de l'homme", *R.C.A.D.I.* 1951-II, vol. 79, p. 327.

formule célèbre de Michel Virally, "l'ordre juridique international est (. ..) incomplet: il a besoin du droit interne pour fonctionner"[329].

Au surplus, comme l'a bien montré, récemment, John Dugard dans une étude consacrée au "Role of Human Rights Standards in Domestic Law" dans les pays d'Afrique australe, il n'est guère douteux que les droits de l'homme soient mieux et plus effectivement protégés dans les États dont les droits internes offrent des garanties effectives en ce domaine que dans ceux qui ratifient les conventions internationales et ne les respectent pas, même s'ils acceptent la compétence des organes de contrôle; "[w]hile international protective measures are important, it is essential, in the first instance, that municipal law provide legal protection to the rights contained in international human rights conventions"[330].

Dans son excellent rapport introductif au colloque que la Société française pour le droit international a consacré, en 1997, à *La protection des droits de l'homme et l'évolution du droit international*, Jean-François Flauss, aujourd'hui professeur à l'Université de Lausanne, classait en trois "camps" les protagonistes de la "véritable querelle scolastique" qui fait rage autour de la difficile (et importante) question des rapports entre le droit international général et les droits de l'homme. D'un côté, il y aurait ce qu'il appelle les "intégristes" ou les "traditionalistes" qui s'efforcent de préserver l'intégrité du droit international classique; de l'autre, les "autonomistes" ou les "sécessionnistes", qui "ont tendance à développer une conception messianique de la protection des droits de l'homme en droit international" et qui affirment l'existence d'une branche autonome du droit international; et, entre les deux, il y aurait les partisans d'un "'évolutionnisme' modéré", qui soulignent "que la protection des droits de l'homme gagnerait à s'appuyer davantage sur les règles établies du droit international, à les prendre en considération plus fréquemment" tout en préconisant, "dans certains cas de figure, la particularisation des règles de droit international"[331].

S'il est vrai que j'ai critiqué aujourd'hui les tenants du "sécessionnisme" - c'est un terme qui convient assez bien aux droits--de-l'hommistes extrêmes - et que je me méfie de trop de particularisme lorsque celui-ci peut être évité, je n'en ai pas moins que peu d'atomes crochus (intellectuellement parlant) avec les tenants de "l'intégrisme"

[329] "Sur un pont aux ânes: les rapports entre droit international et droits internes" *in Mélanges offerts à Henri Rolin*, Pedone, Paris, 1964, p. 498.

[330] "The Role of Human Rights Treaty-Standards in Domestic Law: The Southern African Experience" *in* Philip Alston and J. Crawford eds., *The Future of Human Rights Treaty Monitoring*, 2000, p. 286.

[331] "La protection des droits de l'homme et les sources du droit international" *in* S.F.D.I., .Colloque de Strasbourg, *La protection des droits de l'homme et l'évolution du droit international,* Pedone, Paris, 1998, pp. 13-14.

internationaliste; et je m'en voudrais d'avoir donné l'impression que je sous-estimais la novation profonde qu'a introduite la "révolution des droits de l'homme" dans l'ordonnancement classique du droit international.

Je partage, sans réserve, les vues des analystes qui constatent que, les droits de l'homme ont cessé de faire partie du domaine réservé des États, que la réciprocité, sans en être exclue, joue, dans le droit international des droits de l'homme, un rôle moindre que dans les domaines plus traditionnels[332] (mais cela est vrai aussi du droit de l'environnement et l'a été, un temps, malheureusement révolu, du droit international du développement). J'admets aussi pleinement que l'individu est, aujourd'hui, un sujet du droit international public et que c'est en matière de droits de l'homme que cette personnalité est le plus affirmée, même si ce n'est pas le seul domaine où elle se manifeste -alors que, curieusement, certains tenants d'un droits-de-l'hommisme modéré semblent avoir des doutes sur ce point[333]. Et, j'irais même plus loin que beaucoup à cet égard: j'ai la conviction que l'individu doit sa personnalité juridique internationale non pas (en tout cas, plus) à la reconnaissance des États mais au seul fait, "objectif" qu'il existe, ce qui lui permet d'imposer ses droits (certains droits) en l'absence même de toute reconnaissance expresse.

Sur deux points essentiels, en revanche, je me sépare des droits-de--l'hommistes, en tout cas des plus extrêmes d'entre eux.

D'une part, je ne crois nullement que le droit international des droits de l'homme constitue une branche autonome, moins encore une discipline distincte du droit international général. Il l'enrichit, certes; il le "complexifie"; il lui apporte un "supplément d'âme". Mais il utilise les mêmes sources; il recourt aux mêmes techniques; et il se heurte, globalement, aux mêmes difficultés. Cette querelle de l'autonomie des droits de l'homme n'est pas sans rappeler celle qui, en 1971, avait opposé le Doyen Colliard à Prosper Weil. Au premier qui affirmait avec vigueur l'existence d'un droit international de l'économie distinct du droit international général, le second répondait, non sans raison, que "sur le plan scientifique, le droit international économique ne constitue qu'un chapitre parmi d'autres du droit international général"[334]. C'est aussi le cas du droit international des droits de l'homme; et si, évidemment, rien n'empêche les juristes de se spécialiser dans l'étude de tel ou tel chapitre

[332] V. l'excellent article de René Provost, "Reciprocity in Human Rights and Humanitarian Law", *BYBIL*, 1995, p. 454.

[333] V. par exemple Karel Vasak, "Vers un droit international spécifique des droits de l'homme" in K. Vasak dir., Les dimensions internationales des droits de l'homme, UNESCO, Paris, 1978, p. 708; il est vrai que ces doutes ont été exprimés il y a plus de vingt ans et que les données du problème ont évolué depuis lors.

[334] "Le droit international économique, mythe ou réalité?" *in* S.F.D.I., colloque d'Orléans, *Aspects du droit international économique*, Pedone, Paris, 1972, p. 34.

du droit des gens, ils devraient sans doute prendre garde de ne pas couper la branche de l'arbre: elle dépérirait...

D'autre part, je ne crois nullement que la percée des droits de l'homme dans le droit international remette en cause le principe de souveraineté, qui me semble demeurer (si on la définit correctement) un puissant facteur organisateur de la société internationale et une explication, toujours éclairante, des phénomènes juridiques internationaux. Même si l'on se montre, aujourd'hui, plus prudent que jadis sur ce point, certains spécialistes des droits de l'homme, emportés par leur enthousiasme, se hasardent, sinon à annoncer la mort de la souveraineté, du moins à prophétiser son "érosion"[335]. C'est peut-être aller un peu vite en besogne, et je crois qu'il est prématuré d'envoyer les faire-part. D'abord parce que les droits de l'homme sont certes une grande et belle chose, mais ils ne sont pas tout, et, pour le reste, l'essentiel du reste, le droit international demeure fait du heurt des souverainetés. Mais ensuite et surtout parce que, même dans le domaine des droits de l'homme, la souveraineté a, pour le moins, de "beaux restes".

Même s'agissant des instruments les plus "supra-nationaux" de protection des droits de l'homme comme les Conventions européenne ou interaméricaine ou les conventions internationales du travail, l'élément "souveraineté" demeure extrêmement présent: dans tous les cas, il s'agit de traités applicables du fait du consentement des États parties exprimé le plus classiquement qui soit; aux premières, l'on peut faire des réserves et il existe de nombreux palliatifs à la prétendue impossibilité d'en formuler à l'égard des conventions de l'O.I.T.[336]; des dérogations sont possibles; etc. Et ceci vaut, plus encore, pour les autres instruments internationaux de protection des droits de l'homme, souvent plus nettement imprégnés de la notion de souveraineté que ne le sont ces exemples... trop exemplaires!

Quant à l'"objectivisation", si elle constitue un phénomène indéniable, il est loin d'être radical et des auteurs avertis, et peu suspects de tiédeur pour les droits de l'homme - je pense à M. Vasak par exemple - ont fort justement fait remarquer qu'elle s'étend à la jouissance des droits de l'homme mais est très limitée en ce qui concerne leur exercice[337]. Et, pour ce qui est de l'absence de réciprocité, elle se retrouve dans tous les "traités-lois" (même si ce n'est pas forcément avec la même intensité), dont nul n'a jamais prétendu qu'ils sonnaient le glas de la souveraineté.

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335 V. par exemple Nicolas Valticos, "Droit international dl. travail et souverainetés étatiques", *Mélanges Fernand Dehousse,* vol. 1, *Les progrès du droit des gens,* Fernand Nathan/Labor, Paris/Bruxelles, 1979, p.l24.

336 V. Alain Pellet, cinquième rapport sur les réserves aux traités, A/CN.4/508/Add.1, pars. 154-161.

337 "Vers un droit international spécifique des droits de l'homme" in K. Vasak dir., Les dimensions internationales des droits de l'homme, UNESCO, Paris, 1978, p. 711.

En 1950, lors de l'élaboration de la Convention européenne des droits de l'homme, le professeur Pierre-Henri Teitgen s'impatientait de ce que "la souveraineté de l'État [prétende] se dresser contre la souveraineté du droit"[338]. Je ne doute pas que les modernes droits-de-l'hommistes partagent cette impatience. Mais il n'est pas évident qu'il y ait là matière à indignation. La souveraineté existe et l'on ne peut guère, en tant que juriste en tout cas, que s'en accommoder. Mais on peut aussi, peut-être, aller plus loin, et soutenir que, loin d'être incompatibles, la souveraineté et le droit forment un couple indissociable. La souveraineté, c'est le pouvoir soumis au droit, à la fois le fondement et la limite des compétences des États. Envisagée ainsi, elle peut constituer un outil pour la promotion et la protection des droits de l'homme. Un outil à la fois puissant et perfectible. Si puissant que les juristes ne peuvent la négliger; si perfectible que les droits-de-l'hommistes ont encore bien du pain sur la planche pour la domestiquer mieux qu'elle ne l'est par le droit international classique. Ils s'y emploient et c'est bien ainsi.

Vive les droits de l'homme, Mesdames et Messieurs! et même, à la réflexion, vive le droits-de-l'hommisme! s'il contribue, à sa manière, à leur promotion, et si ses zélateurs savent ne pas mélanger les genres, et résister à la tentation de présenter comme des vérités scientifiques des projets politiques au sens le plus noble du terme d'ailleurs.

Merci beaucoup!

[338] Recueil des travaux préparatoires de la Convention européenne des droits de l'homme, t. IV, p. 854, note 61.

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

Conférence donnée par Juge José Luis Jesus
Président du Tribunal international du droit de la mer
Soixante et unième session de la Commission du droit international
Genève, 15 juillet 2009

M. Le Président,
Excellences,
Chers membres de la Commission du droit international,
Mesdames et messieurs,

C'est un véritable honneur d'avoir été invité à présenter la conférence commémorative Gilberto Amado cette année. En effet, je suis très honoré et c'est avec une grande humilité que je joins cette liste d'éminents juristes internationaux qui, au fil des années, ont prononcé des discours en hommage à la grande contribution de Gilberto Amado au droit international et au travail de la Commission du droit international. La vie et l'oeuvre de ce grand juriste brésilien spécialisé en droit international, son talent, son dévouement ainsi que ses connaissances et son raisonnement approfondis sont une grande inspiration pour ceux d'entre nous qui souhaitent travailler dans ce domaine. Je me sens particulièrement fier en tant que lusophone de vous entretenir aujourd'hui dans le cadre de cette commémoration de son oeuvre et son dévouement au droit international au courant de toute sa vie.

Je suis également très honoré et reconnaissant envers vous tous pour avoir consacré un peu de votre temps si précieux pour être ici aujourd'hui.

Je profite de cette opportunité pour remercier l'Ambassadeur du Brésil Gilberto Saboia pour l'invitation.

Compétence du Tribunal

Mesdames et messieurs,

Lorsque j'ai été approché pour présenter ce discours, j'ai cru qu'il était une bonne occasion de parler de certains éléments de procédure propres au Tribunal international du droit de la mer. J'ai pensé ceci en partie parce que le Tribunal en tant que nouvelle institution n'est pas très connu du grand public et en partie, parce que j'aimerais partager avec vous certains éléments particuliers de la procédure innovatrice et spéciale du Tribunal qui représente une évolution de la procédure des cours et des tribunaux internationaux. J'ai décidé donc de saisir cette opportunité, et je vais donc procéder ainsi, si vous me le permettez.

Mesdames et messieurs,

Ma présentation porte sur "les avis consultatifs et les procédures urgentes devant le Tribunal". En guise d'introduction, je vous résumerai brièvement les champs de compétence du Tribunal.

Le Tribunal international du droit de la mer[339] a été créé par la Convention des Nations Unies de 1982 sur le droit de la mer (ci-après la "Convention"). Il a la compétence pour régler les différends relatifs au droit de la mer. Cependant, conformément à la Convention, le Tribunal n'est pas la seule cour disponible aux parties en litige.

Pour régler les différends relatifs au droit de la mer, en vertu de l'article 287 de la Convention, les États peuvent choisir par voie d'une déclaration écrite le Tribunal, la Cour internationale de justice (CIJ) ou l'arbitrage conformément aux annexes VII et VIII de la Convention. Si les États en litige n'ont pas fait un choix préalable ou s'ils ne s'entendent pas sur l'instance appropriée, l'arbitrage s'applique obligatoirement par défaut en vertu de l'annexe VII de la Convention.[340] Un État qui veut éviter l'arbitrage obligatoire doit envisager de faire une déclaration selon l'article 287 en choisissant un autre moyen de résolution des conflits.

Le moyen obligatoire tel que prévu à la Partie XV est peut-être l'une des caractéristiques les plus importantes et les plus innovatrices du système de résolution des conflits prévus à la Convention. Toutefois, son impact est quelque peu amoindri par l'exclusion de certaines catégories de différends concernant les droits des États côtiers relatifs aux pêcheries et à la recherche scientifique dans leur zone économique exclusive (ZEE)[341]

[339] Le Tribunal a été créé par la Convention de 1982 des Nations Unies sur le droit de la mer. Il est composé de 21 juges et a commencé à siéger en octobre 1996

[340] Voir article 287, paragraphe 3.

[341] Voir l'article 297 de la Convention.

ainsi que par la possibilité pour les États de se soustraire du mécanisme obligatoire lorsque les différends portent sur la délimitation des zones maritimes, les activités militaires ou des matières qui sont examinées par le Conseil de sécurité conformément de ses responsabilités en vertu de la Charte.[342]

Malgré le fait que les différends relatifs au droit de la mer peuvent être soumis à différents tribunaux et cours, tel que je l'ai indiqué précédemment, en vertu de l'article 287 de la Convention, le Tribunal international du droit de la mer a la compétence principale pour régler tous les différends et les demandes qui lui sont soumis conformément à la Convention. En tant qu'organe judiciaire international spécialisé, le Tribunal est bien placé pour jouer un rôle important dans la résolution de conflits relatifs au droit international de la mer. Ce rôle est accru par le fait que la Convention confère au Tribunal certaines fonctions qui sont en effet uniques dans l'adjudication internationale.

Telles que la Cour permanente de Justice internationale (CPJI) et la Cour internationale de Justice (CIJ), le Tribunal a une compétence contentieuse et une compétence consultative. Plus précisément, il est compétent pour entendre a) tout différend relatif l'interprétation ou l'application des dispositions de la Convention qui lui est soumis en vertu de la Partie XV;[343] b) tous les différends relatifs l'interprétation ou l'application d'un accord international portant sur les questions visées par la Convention qui lui sont soumis conformément aux dispositions prévues dans cet accord;[344] et c) tout différend relatif l'interprétation ou l'application d'un traité déjà en vigueur qui a trait à l'une des questions visées par la Convention, si les parties au traité y conviennent.[345]

Le Tribunal, telle une cour à part entière, a aussi la compétence pour entendre des demandes d'opinions consultatives selon une procédure qui n'a pas de précédent dans la pratique adjudicative, tel que nous le verrons plus loin.[346]

De plus, la Chambre pour le règlement des différends relatifs aux fonds marins, composée de 11 des 21 juges du Tribunal, a la compétence quasi-exclusive sur les différends relatifs aux activités dans la Zone.[347] Elle a aussi la compétence pour entendre toute demande d'opinion consultative sur le régime juridique applicable à la Zone, tel que prévu à

[342] Voir l'article 298 de la Convention.
[343] Voir l'article 288, paragraphe 1 de la Convention et les articles 21 et 22 du Statut du Tribunal
[344] Voir l'article 288, paragraphe 2.
[345] Voir l'article 22 du Statut du Tribunal.
[346] Voir l'article 138 du Règlement du Tribunal et l'article 21 du Statut du Tribunal.
[347] Voir les articles 187 et 188, paragraphes 1 et 2(a).

la Partie XI et aux annexes de la Convention et de l'Accord de New York de 1994 sur l'application de la Partie XI de la Convention.

La Chambre a une compétence quasi exclusive car les différends sur les questions relatives aux fonds marins ne peuvent être entendus que par la Chambre à l'exclusion de tout autre cour ou tribunal international incluant le Tribunal siègeant en plénière. Les seules exceptions sont énoncées au paragraphe 1 de l'article 188 qui prévoit que les différends entre les États sur l'interprétation ou l'application de la Partie XI et de ses Annexes peut être soumis à la demande d'une partie à une chambre spéciale du Tribunal ou, dans le cas prévu au paragraphe 2(a) de l'article 188, les différends relatifs à l'interprétation ou l'application d'un contrat ou d'un plan de travail doivent être soumis à un arbitrage commercial obligatoire à moins que les parties en décident autrement.

La compétence ratione personae du Tribunal représente également un développement intéressant du droit procédural international. Traditionnellement, comme on le sait, seuls les États ont accès aux cours et aux tribunaux internationaux. Cependant, dans le cas du Tribunal international du droit de la mer, il y a eu une évolution remarquable dans le droit procédural à cet égard. Mis à part les Etats, les organisations internationales peuvent être parties à des litiges devant le Tribunal et, dans le cas de sa Chambre pour le règlement des différends relatifs aux fonds marins, l'Autorité internationale des fonds marins, son entreprise ou les personnes physiques et morales ou une entreprise d'État peuvent également être parties à un différend.[348]

En élargissant la compétence *ratione personae* du Tribunal d'une manière qui n'avait pas été faite auparavant, cette évolution de la procédure répond à la nécessité de reconnaître le rôle croissant des organisations internationales et de fournir aux opérateurs et aux investisseurs impliqués dans l'exploitation minière des grands fonds marins avec un moyen judiciaire international de régler d'éventuels différends. Il est à noter que l'article 20, paragraphe 2, des Statuts du Tribunal semble avoir franchi une étape supplémentaire, en admettant la possibilité d'élargir encore davantage l'accès au Tribunal quand il énonce que "le Tribunal est ouvert à d'autres entités que les Etats Parties dans tous les cas expressément prévus à la Partie XI ou pour tout différend soumis en vertu de tout autre accord conférant compétence au Tribunal qui est accepté par toutes les parties au différend".

Ayant décrit la compétence générale du Tribunal, je me concentrerai aujourd'hui sur certains aspects de sa compétence qui sont uniques car ils

[348] Voir les articles 187 et 288 de la Convention et les articles 20, paragraphe 2 et 37 du Statut du Tribunal (annexe VI de la Convention).

distinguent la procédure du Tribunal de celle des autres cours et tribunaux auxquels l'article 287 de la Convention fait référence. La procédure du Tribunal est unique car elle confère une compétence exclusive au Tribunal à l'exclusion de autre forum international de règlement de différends visés par l'article 287 de la Convention. Ma présentation portera donc sur certains aspects de la procédure notamment, la procédure novatrice des demandes d'avis consultatifs du Tribunal siègeant en séance plénière, la demande de mesures provisoires pour les affaires urgentes selon l'article 290, paragraphe 5 de la Convention et les procédures pour la prompte mainlevée de l'immobilisation des navires et la prompte libération de leurs équipages détenus en raison de contreventions présumées à la législation sur les pêcheries ou la pollution marine.

Avis consultatifs

Depuis la création de la Cour permanente de Justice internationale (CPJI), la demande d'avis consultatif a été une procédure qui a été communément utilisée et qui à jouer um role important dans Le développement du droit international.[349] Les avis consultatifs, ajoutés aux procédures contentieuses, font désormais partie intégrante de la compétence des cours internationales.

Le précédent établi par la CPJI en assumant elle-même un rôle consultatif et son expérience ainsi que celle de la CIJ ont été grandement suivis par les Statuts et les Règlements Du Tribunal. En effet, les Réglements de la CPIJ et de la CIJ sont reflétés avec les adaptations nécessaires dans la Convention, plus précisément dans son annexe VI[350], qui contient les Statuts du Tribunal, et dans la Partie XI de la Convention qui traite de la compétence de la Chambre pour le règlement des différends relatifs aux fonds marins.[351]

Le rôle consultatif du Tribunal est exercé par la Chambre pour le réglement relatif aux fonds marins et par le Tribunal siégeant en séance plénière.

Le rôle consultatif de la Chambre pour le règlement relatif aux fonds marins

La Chambre pour le règlement relatif aux fonds marins entend les demandes d'avis consultatifs (a) à la demande de l'Assemblée de l'Autorité des fonds marins "sur la conformité avec la Convention d'une

[349] La Cour permanente a émis vingt-sept avis consultatifs dans ses 19 années d'existence contribuant ainsi de façon importante au développement du droit international.
[350] Voir l'article 21 du Statut.
[351] Voir les articles 159, paragraphe 10, et 191 de la Convention.

proposition qui lui est soumise sur une question quelconque"[352]; et, à la demande de l'Assemblée ou du Conseil de l'Autorité internationale des fonds marins "sur les questions juridiques qui se posent dans le cadre de leurs activités".[353]

Dans une certaine mesure, la procédure selon laquelle la Chambre pour le règlement relatif aux fonds marins peut être appelée à entendre une demande d'avis consultatif ressemble à la procédure des requêtes pour un avis consultatif auprès de la CPJI et de la CIJ. La décision de demander un avis consultatif doit être prise par l'un des organes compétents soit, l'Assemblée ou l'Autorité internationale des fonds marins. Cependant, la situation diffère pour les demandes d'avis consultatif faites au Tribunal siègeant en séance plénière.

Rôle consultatif du Tribunal siégeant en séance plénière

En plus du rôle consultatif de la Chambre pour le règlement des différends relatifs aux fonds marins, le Tribunal siègeant en séance plénière a aussi une compétence consultative qui lui est conférée par l'article 138 de son Règlement. En effet, l'article 138 du Règlement indique que le Tribunal "peut donner un avis consultatif sur une question juridique dans la mesure où un accord international se rapportant aux buts de la Convention prévoit expressément qu'une demande d'un tel avis est soumise au Tribunal".[354]

Contrairement aux demandes d'avis consultatifs soumises à la Chambre pour le règlement des différends relatifs au fonds marins, les requêtes soumises au Tribunal peuvent être fondées sur un accord international. À cette fin, un accord bilatéral ou multi-latéral semble être considéré comme un accord international. Un tel accord peut être conclu entre des États, entre des États et des organismes internationaux ou entre des organismes internationaux. Il s'agit d'une innovation procédurale importante en ce qu'elle introduit une approche nouvelle et flexible à la question des entités ayant droit de demander des avis consultatifs.

Il est important de souligner que tous les autres aspects des demandes d'avis consultatifs au Tribunal siégeant en séance plénière suivent

[352] Voir article 159, paragraphe 10, de la Convention.

[353] Article 191 de la Convention.

[354] La compétence consultative du Tribunal est prévue à l'article 138 de la Convention. Cependant, l'article 21 du Statut du Tribunal lui confère une compétence élargie qui est interprétée comme lui donnant une compétence consultative en prévoyant que " le Tribunal est compétent pour tous les différends et toutes les demandes qui lui sont soumis conformément à la Convention et toutes les fois que cela est expressément prévu par tout accord conférant compétence au Tribunal."

les exigences traditionnelles. Ce qui signifie que les demandes doivent être de nature juridique et doivent aussi être de nature générale. Les demandes peuvent même porter sur une "question juridique abstraite ou autre"[355] si la jurisprudence de la CIJ doit être suivie par le Tribunal à ce sujet.

La Convention ne réfère pas expressément au rôle consultatif du Tribunal siégeant en séance plénière. Cependant, l'article 21 du Statut du Tribunal prévoit implicitement ce rôle. En effet, l'article 138 du Règlement du Tribunal est fondé sur l'article 21 du Statut du Tribunal qui lui confère une compétence élargie en prévoyant que " le Tribunal est compétent pour tous les différends et toutes les demandes qui lui sont soumis conformément à la Convention et toutes les fois que cela est expressément prévu par tout accord conférant compétence au Tribunal."

Les avis consultatifs ne lient pas les parties mais ils jouent un rôle important car ils contribuent à clarifier l'interprétation du droit. Malgré le fait qu'à ce jour aucune demande d'avis consultatif n'a été soumise, la compétence consultative du Tribunal siégeant séance en plénière offre un mécanisme souple permettant d'obtenir des éclaircissements sur des points de droit ou des questions juridiques. Comme les États et les autres entités relevant de la Convention ont des divergences sur l'interprétation et l'application de certaines dispositions de la Convention et comme les nouveaux événements mondiaux semblent exiger une meilleure compréhension des dispositions de la Convention, les demandes d'avis consultatifs auprès du Tribunal pourrait s'avérer un outil précieux. Les avis consultatifs peuvent aider les parties à régler leurs divergences sur un point de droit donné ou sur une question juridique et faciliter le règlement des différends par voie de négociation, contribuant ainsi à éviter une escalade des conflits entre États. En outre, compte tenu de la lourdeur du système de la Conférence de révision de la Convention et des difficultés politiques d'avoir recours à une telle conférence, l'interprétation de certaines dispositions de la Convention au moyen d'un avis consultatif peut être le moyen le plus approprié pour clarifier une question juridique découlant de la Convention ou à propos de celle-ci.

Une question qui pourrait être soulevée dans le cas d'une entité qui soumet une demande d'avis consultatif au Tribunal est le concept d'"organe" en vertu l'article 138 du Règlement du Tribunal. Le paragraphe 2 de cet article stipule que les demandes d'avis consultatifs au Tribunal siégeant en séance plénière sont transmis "tout organe qui aura été autorisé á cet effet par cet accord ou en vertu de celui-ci". Le concept d' "organe" peut ici faire l'objet d'interprétations différentes, en tenant compte de la

[355] See ICJ Advisory Opinion on Conditions of Admissibility of a State to Membership in the United Nations.

pratique des demandes d'avis consultatifs présentées à la CPJI et à la CIJ. Certains pourraient être tentés d'assimiler le mot "organe" à un "organe collectif" en raison de l'inertie des autres cours internationales dans le passé. Comme je l'ai dit ailleurs sur "le sens de l'expression 'organe', il semble que n'importe quel organe, entité, institution, organisation ou Etat qui est autorisé en vertu d'un tel accord international à demander, au nom des parties concernées, un avis consultatif du Tribunal, conformément aux termes de l'accord, serait un organe au sens de l'article 138, paragraphe 2, du Règlement. Puisque le corps est uniquement le convoyeur de la demande, il semble y avoir peu de pertinence de s'attarder sur la nature de cet organisme. Puisque l'organe est uniquement l'expéditeur de la demande, il ne paraît pas pertinent de s'attarder sur sa nature. Sa légitimité à transmettre la demande découle de l'autorité qui lui est donnée par l'accord et non de sa nature ou de toute autre considération structurelle ou institutionnelle.

J'en viens maintenant aux procédures d'urgence.

Le Tribunal a simplifié la procédure pour traiter de façon expéditive de cas spécifiques, conformément à son Statut et à son Règlement. Il s'agit de cas d'urgence en ce sens qu'ils sont traités en un temps record et, en général, dans un délai de moins d'un mois entre le dépôt de la demande et le moment où l'arrêt est rendu. Cela semble trop beau pour être vrai si l'on considère la pratique actuelle des autres cours et tribunaux. La rapidité d'action a été l'un des traits distinctifs du Tribunal depuis sa création, il y a 12 ans.

Le Règlement prévoit deux types de procédures d'urgence: les mesures conservatoires en vertu de l'article 290, paragraphe 5, de la Convention, et la prompte mainlevée de l'immobilisation des navires et la mise en liberté de leurs équipages en vertu de l'article 292 de la Convention. Ces deux catégories de procédure relèvent de la compétence obligatoire du Tribunal. Le Tribunal a été saisi jusqu'à présent de 15 affaires dont 13[356] ont été des cas impliquant des procédures d'urgence.

Je vais d'abord m'attarder aux mesures conservatoires en vertu de l'article 290, paragraphe 5. Ce paragraphe stipule qu' "En attendant la constitution d'un tribunal arbitral saisi d'un différend en vertu de la présente section, toute cour ou tout tribunal désigné d'un commun accord

[356] Affaire du navire"SAIGA" (Saint-Vincent-et-les- Grenadines c. Guinée); Affaire du navire "SAIGA" (No. 2) (Saint-Vincent-et-les- Grenadines c. Guinée); Affaires du thon à nageoire bleue (Nouvelle-Zélande c. Japon; Australie c. Japon); Affaire du "Camouco" (Panama c. France); Affaire du "MonteConfurco" (Seychelles c. France); Affaire du "Grand Prince" (Belize c. France); Affaire du "Chaisiri Reefer 2" (Panama c. Yemen); Affaire de l'usine MOX Plant (Irlande c. Royaume-Uni); Affaire du "Volga" (Fédération de Russie c. Australie); Affaire relative aux travaux de poldérisation par Singapour à l'intérieur et à proximité du détroit Johor (Malaisie c. Singapour); Affaire du "JunoTrader" (Saint-Vincent-et-les-Grenadines c. Guinée-Bissau); Affaire du "Hoshinmaru" Case (Japon c. Fédération de Russie); Affaire du "Tomimaru" (Japon c. Fédération de Russie).

par les parties ou, à défaut d'accord dans un délai de deux semaines à compter de la date de la demande de mesures provisoires, le Tribunal international du droit de la mer ou, dans le cas d'activités menées dans la Zone, la Chambre pour le règlement des différends relatifs aux fonds marins, peut prescrire, modifier ou rapporter des mesures conservatoires conformément au présent article s'il considère, *prima facie*, que le tribunal devant être constitué aurait compétence et s'il estime que l'urgence de la situation l'exige. Une fois constitué, le tribunal devant lequel le différend a été soumis peut modifier, rapporter ou confirmer ces mesures conservatoires, agissant en conformité avec les paragraphes 1 à 4".

Les mesures conservatoires visées au présent paragraphe représentent un autre exemple d'une innovation dans la procédure internationale. Avant la Convention, cette possibilité n'existait pas.

Quelle est la nouveauté de cette procédure qui la rend remarquable? Comme on le sait, généralement, un tribunal ou une cour, national ou international, lorsqu'il examine une affaire sur le fond peut, à la demande de l'une des parties au différend, prescrire des mesures conservatoires en attente de la décision finale. C'est la procédure prévue à l'article 290, paragraphe 1. Toutefois, dans le cas des mesures conservatoires en vertu de l'article 290, paragraphe 5, il s'agit d'une procédure différente, qui, à titre de procédure obligatoire, ne peut être portée que devant le Tribunal. Conformément à l'article 290, paragraphe 5, si les parties n'ont pas conclu un accord sur la désignation d'une cour ou d'un tribunal, le Tribunal peut être appelé par l'une des parties, normalement la requérante, à prescrire des mesures conservatoires pour protéger les droits respectifs des parties au différend ou pour prévenir un dommage grave au milieu marin, même si le Tribunal n'est pas saisi de l'affaire sur le fond.

Cette demande de mesures conservatoires au Tribunal peut être faite dans les circonstances suivantes: l'article 287 de la Convention prévoit que ''lorsqu'il signe ou ratifie la Convention ou y adhère, ou à tout moment par la suite, un État est libre de choisir, par voie de déclaration écrite [...] a) le Tribunal international du droit de la mer [...]; b) la Cour internationale de Justice; c) un tribunal arbitral constitué conformément à l'annexe VII; d) un tribunal arbitral spécial, constitué conformément à l'annexe VIII ". Si les parties à un différend n'ont pas choisi le même moyen de règlement des différends parmi ceux énumérés à l'article 287, le différend peut être soumis par l'une des parties au tribunal arbitral en vertu de l'annexe VII de la Convention, qui est la procédure par défaut aux termes de la Convention. Une fois qu'une partie a notifié l'autre partie qu'elle constitue un tribunal arbitral à l'annexe VII pour entendre leur

différend, l'une des parties peut, de sa propre initiative, demander au Tribunal de prescrire des mesures conservatoires en vertu de l'article 290, paragraphe 5, en attendant la constitution du tribunal arbitral. Le Tribunal entendra l'affaire s'il considère que l'urgence de la situation justifie ces mesures et que le tribunal arbitral a *prima facie* compétence.

Cette procédure a été incorporée dans la Convention pour assurer la protection des droits des parties au différend ou du milieu marin en attendant la constitution du tribunal arbitral. En effet, à chaque fois que la procédure d'arbitrage est instituée, cela peut prendre un certain temps avant que le tribunal arbitral ne soit fonctionnel. Par conséquent, cette procédure permet au Tribunal de prescrire des mesures conservatoires jusqu'à ce que le tribunal arbitral soit lui-même en mesure d'entendre une demande de mesures conservatoires, et qu'il puisse, si tel est le cas, confirmer, modifier ou révoquer les mesures conservatoires prescrites par le Tribunal.

Cette procédure est un autre exemple de la compétence obligatoire en ce sens qu'elle peut être intentée par une seule des parties au différend moyennant la présentation d'une demande au Tribunal et, étant une procédure obligatoire, elle ne peut être entendue que par le Tribunal. Le Tribunal a été saisi de quatre cas de demandes de mesures conservatoires en vertu de l'article 290, paragraphe 5 : les *Affaires du thon à nageoire bleue*, *l'Affaire de l'usine Mox* et l'*Affaire des travaux de poldérisation*.[357]

Il est à noter que le Statut du Tribunal a introduit encore une autre nouveauté dans le processus décisionnel international concernant la nature de la décision rendue par le Tribunal au sujet des mesures conservatoires en établissant que le Tribunal ''prescrit'' des mesures conservatoires plutôt que les '' indique ''. Le Statut du Tribunal, en stipulant que les décisions sur les mesures conservatoires sont ''prescrites'', a précisé que ces mesures ont un effet contraignant. Cela peut avoir contribué à l'évolution récente de la jurisprudence concernant l'effet juridique des mesures conservatoires prescrites par d'autres instances judiciaires.

Prompte mainlevée de l'immobilisation des navires et mise en liberté des équipages

Un autre type de procédure d'urgence est la procédure pour la prompte mainlevée de l'immobilisation des navires et la libération

[357] Une demande de mesures conservatoires en vertu de l'article 290, paragraphe 5, de la Convention a également été présentée dans *l'Affaire du navire "SAIGA" (No. 2)*. À la suite d'une entente entre les parties de soumettre l'affaire au Tribunal, l'affaire a été examinée par le Tribunal conformément l'article 290, paragraphe 1, de la Convention.

des équipages. C'est également une nouvelle procédure établie par la Convention. Il s'agit d'un autre cas dans lequel le Tribunal peut être saisi d'une affaire qui lui est soumise sur la base de la compétence obligatoire.

La procédure de prompte mainlevée est prévue à l'article 292, qui stipule que "[l] orsque les autorités d'un Etat Partie ont immobilisé un navire battant pavillon d'un autre Etat Partie et qu'il est allégué que l'État qui a immobilisé le navire ne s'est pas conformé aux dispositions de la Convention pour la prompte mainlevée de l'immobilisation du navire ou de la mise en liberté de son équipage dès le dépôt d'une caution raisonnable ou d'une autre garantie financière, la question de la mainlevée ou de la mise en liberté peut être portée devant une cour ou un tribunal désigné d'un commun accord par les parties ou, à défaut d'accord dans les 10 jours à partir du moment de l'immobilisation du navire ou de l'arrestation de l'équipage, cette question peut être portée devant un tribunal accepté conformément à l'article 287 par l'Etat qui a procédé à l'immobilistation ou à l'arrestation, ou au Tribunal international du droit de la mer, à moins que les parties n'en conviennent autrement". Cette disposition permet à un État du pavillon ou une entité agissant en son nom de demander au Tribunal de fixer une caution qu'elle juge raisonnable et d'ordonner la prompte mainlevée de l'immobilisation d'un navire et la mise en liberté de son équipage détenu par les autorités d'un Etat Partie en cas de violation présumée de sa législation sur la pêche (article 73, paragraphe 2) ou en raison d'avoir polluer le milieu marin (articles 220, paragraphe 7, et 226, paragraphe (1) (b)).

Il convient de souligner que la procédure de prompte mainlevée est particulière qui, lorsqu'elle est fondée sur la compétence obligatoire, ne peut être intentée devant le Tribunal que dans les cas, comme indiqué précédemment, de l'immobilisation des navires et de l'arrestation des équipages en raison d'une violation présumée de la législation relative aux pêcheries ou en raison de la pollution marine ou de dommages environnementaux. La procédure de prompte mainlevée ne peut être utilisée dans les cas de détention de navires ou d'arrestation des équipages pour d'autres raisons.

Une demande pour la mainlevée de l'immobilisation du navire et la mise en liberté de l'équipage peut être soumise au Tribunal par l'État du pavillon seul quand il est allégué que l'État qui a immobilisé le navire ne s'est pas conformé aux dispositions de la Convention prévoyant la prompte mainlevée de l'immobilisation du navire ou de son équipage dès le dépôt d'une caution raisonnable ou autre garantie financière[358]. Selon la jurisprudence du Tribunal, il y a défaut de se conformer aux dispositions

[358] La compétence du Tribunal dans les affaires de prompte mainlevée est établie dès lors que toutes les conditions suivantes sont réunies: 1) les deux États en litige sont parties à la Convention (art. 292); 2) le demandeur est l'État dont le navire immobilisé bat le pavillon (art.292); 3) la demande de mainlevée n'a pas été soumise à une autre cour ou à un autre tribunal dans les 10 jours suivant l'immobilisation du navire (art.292); 4) le navire ou son équipage demeurent détenus

de la Convention sur la prompte mainlevée (article 73, paragraphe 2) dans les situations suivantes: (1) quand il n'a pas été possible de déposer une caution; (2) quand un caution a été rejetée par l'État de détention; (3) lorsque le dépôt d'un cautionnement ou une autre n'est pas prévu par la législation de l'Etat côtier, ou (4) lorsque l'État du pavillon allègue que la caution exigée est déraisonnable.

Il est intéressant de noter que, tel que prévu à l'article 292, paragraphe 2 de la Convention, dans les cas de prompte mainlevée, l'Etat du pavillon peut autoriser par écrit par l'entremise des autorités compétentes, une personne physique à engager une procédure de prompte mainlevée devant le Tribunal et à agir en son nom. Plusieurs Etats demandeurs ont fait usage de cette option dans les dernières affaires entendues par le Tribunal.

Il est intéressant de noter que, comme prévu à l'article 292, paragraphe 2 de la Convention, dans les cas de prompte mainlevée de l'Etat du pavillon peut autoriser par écrit et par les autorités compétentes, une personne privée d'engager une procédure de prompte mainlevée devant le Tribunal et à agir en son nom. Plusieurs Etats demandeurs ont fait usage de cette option dans d'autres affaires entendues par le Tribunal.

Une autre caractéristique intéressante de cette procédure est qu'à moins que l'affaire ne soit rejetée pour des raisons de défaut de compétence ou d'irrecevabilité, son issue sera normalement la libération immédiate du navire et l'équipage, sous réserve du paiement d'une caution raisonnable ou d'une autre garantie financière déterminée par le Tribunal.

Le Tribunal a été saisi de neuf cas impliquant la prompte mainlevée des navires et des équipages qui lui ont été soumis par les États ou en leur nom, à la suite de la détention d'un navire de pêche en raison d'allégations de violation des lois de pêche dans la zone économique exclusive d'un État côtier. Ces demandes faites en vertu de l'article 73 de la Convention ont fourni au Tribunal la possibilité de développer ce qui est maintenant une jurisprudence bien établie. Cependant, le Tribunal n'a encore reçu aucune demande de prompte mainlevée de l'immobilisation des navires et des équipages détenus pour de prétendues infractions de pollution marine ou de dommages environnementaux conformément à l'article 220, paragraphe 7, ou à l'article 226 (1) (b).

L'une des raisons qui peut expliquer pourquoi les États n'ont pas encore eu recours à la procédure de prompte mainlevée dans des situations de détention des navires et des équipages pour cause de pollution marine

pour une violation alléguéede la législation relative aux pêcheries; 5) il n'a pas été déposé de caution ou d'autre garantie; et 6) les articles 110 et 111 du Règlement du Tribunal ont été respectés.

pourrait être qu'ils ignorent cette possibilité, compte tenu de la rédaction complexe et sinueuse de ces dispositions.

Bien que ces dispositions ne réfèrent pas expressément à l'équipage des navires détenus, il doit être inclus dans les procédures de prompte mainlevée, car il fait partie du navire en tant qu'unité. Il est à noter à cet égard, comme indiqué dans le Commentaire de l'Université de Virginie, que la Convention "n'autorise pas l'emprisonnement d'une personne, tout au plus elle permet la détention de l'équipage en même temps que celle du navire, sous réserve des procédures de prompte mainlevée telles que le paiement d'une caution ou d'une autre garantie financière appropriée".

Le Tribunal est l'organe qui, en définitive, détermine le caractère raisonnable de la caution et, une fois qu'il a déterminé le montant raisonnable de la caution ou de toute autre garantie, il ordonne la prompte mainlevée du navire détenu et la mise ne liberté de son équipage dès le dépôt de la caution ou de la garantie.[359]

Cette procédure peut être utilisée par les États du pavillon et les armateurs pour éviter que les navires détenus restent immobilisés pendant de longues périodes de temps en attendant que le tribunal national compétent statue sur le fond. Elle constitue également un mécanisme permettant la mise en liberté rapide des membres de l'équipage, qui pourraient autrement être détenus pendant de longues périodes.

Ceci met fin à ma présentation. J'espère ne pas vous avoir lassés en présentant avec tant de détails les procédures qui peuvent être invoquées devant le Tribunal. Pour moi, il a été un grand plaisir de vous parler de ces questions.

Je vous remercie de votre attention.

[359] Selon la jurisprudence du Tribunal, les facteurs à prendre en considération pour déterminer le caractère raisonnable de la caution sont: (1) la gravité des infractions alléguées; (2) les sanctions imposées ou qui peuvent être imposées; (3) la valeur du navire; (4) le montant de la caution exigée par l'Etat ayant immobilisé le navire et sa forme.

LA PORTÉE DU CONSENTEMENT COMME FONDEMENT DE L'AUTORITÉ DE LA SENTENCE DE LA COUR INTERNATIONALE DE JUSTICE

Conférence donnée le 19 juillet 2011 à Genève
par le Professeur Leonardo Nemer Caldeira Brant
Professeur à la Faculté de Droit de l'Université de Minas Gerais
Président du Centre de Droit International – Cedin/Brésil
Directeur de l'Annuaire Brésilien de Droit International
Juriste Associé à la Cour Internationale de Justice (2003)

M. Le Président,

M. l'Ambassadeur,

Excellences, Mesdames et Messieurs, Chers Amis et Membres de la Commission de Droit International.

Je tiens tout d'abord à remercier l'Ambassadeur Gilberto Saboia pour l'honorable invitation. Merci. Je suis, en effet, très honoré d'être parmi vous ce soir. D'abord par l'admiration que je porte aux travaux de la Commission de Droit International et par l'amitié que j'entretien avec certain d'entre vous. Ensuite par la dignité et la plus haute qualité intellectuelle de mes prédécesseurs. Finalement, en tant que brésilien, je me sens spécialement heureux de pouvoir participer de cette belle hommage à Gilberto Amado, l'un des plus célèbres intellectuelles de mon pays.

Gilberto Amado a eu une carrière extraordinaire. Il est née à Sergipe au nord est du Brésil encore à la fin du XIX siècle. Il a été un pacifiste, un libre penseur, un habile diplomate et un grand juriste. La conférence donnée en 1987 par le Juge Sette Camara et le Juge A. A. Cançado Trindade, ici même, au sein de la Commission de Droit International permet déjà de comprendre la portée de la contribution de Gilberto Amado pour le développement du droit international, bien comme la grandeur de sa pensée.

Mais Gilberto Amado a été également un grand poète. E ainsi il s'inscrit en effet dans la plus profonde tradition de la diplomatie brésilienne qui a vu naitre des maitres de la plume comme João Cabral de Melo Neto, Raul Bopp, Aluízio de Azevedo, Guimarães Rosa, Domício da Gama, Jose Guilherme Merquior e Vinícius de Moraes. Et ce justement ce grand poète, qui a composé la célèbre Garota de Ipanema, qui dans les années 50 a écrit un très beaux poème en hommage à Gilberto Amado. Il résume ainsi par la simplicité de la poésie, la densité intellectuelle de ce grand internationaliste.

Je me permets de le lire :

Poème pour Gilberto Amado
(Vinicius de Moraes)

L'homme qui pense
Il a une tête immense
Il a une tête qui pense
Plein de tourments.
L'homme qui pense
Il nous apporte dans ses pensées
Les vents réputés
Qui vient des sources.
L'homme qui pense
Des pensées claires
Il a le visage vierge
De ressentiment.
Sa face pense
Sa main écrit
Sa main prescrit
Le temps futur.
Á l'homme qui pense
Les pensées pures
Le jour lui est difficile
La nuit lui est légère:
Que l'homme qui pense
Ne pense qu'à ce qu'il doit
Ne doit qu'à ce qu'il pense.

Bon, je reviens ainsi à mon sujet :

En effet, il s'agit de bien comprendre la portée du consentement comme fondement de l'autorité de la sentence de la Cour internationale de Justice. Pour cela on doit reconnaître tout d'abord, qu'à la lumière d'une distinction classique, les ordres juridiques interne et international présentent de nombreuses qualités qui leur sont propres. Ainsi, sans vouloir entrer dans les détails, on doit constater d'une manière préliminaire et généraliste que dans le droit national tout ordre juridique repose sur leur Constitution que réglemente ainsi l'activité juridictionnelle et qui en définit les limites. Partant de ce principe l'État de droit indique que n'importe quel différend peut être décidé par une juridiction compétente. L'action juridictionnel ne dépend pas du consentement des tous les parties en litige. Par conséquence l'autorité de l'acte juridictionnel trouve son fondement dans la Constitution de l'État.

La question qui se pose alors est celle de savoir comment se reconnait l'autorité incertaine et diffuse de l'acte juridictionnel dans un droit d'égalité, de coordination et qui est décentralisé par nature, comme c'est bien le cas du droit international. Après tout, le droit international est né essentiellement comme un droit 'sans juge', dans lequel l'intervention d'une juridiction ayant compétence pour rendre des décisions ayant l'autorité est l'exception bien davantage que la règle.

En fait, sans chercher à approfondir l'histoire tumultueuse de la justice obligatoire à laquelle songeaient certains des rédacteurs du Statut de la C.P.J.I., on doit constater que c'est exactement suite à son rejet que fut confirmé le principe fondamental selon lequel le consentement des Etats en litige est à la base de la juridiction internationale. Ceci étant, le droit du règlement des différends internationaux repose toujours sur ce postulat[360]. On entend par là que, à la différence de la situation des particuliers devant les tribunaux internes, les Etats ne sont soumis à la juridiction de la Cour pour un litige donné que pour autant qu'ils y consentent[361]. Comme le souligne la C.P.J.I. dans son avis consultatif concernant le *Statut de la Carélie orientale,* 'il est bien établi en droit international qu'aucun Etat ne saurait être obligé de soumettre ses différends avec les autres Etats soit à la médiation, soit à l'arbitrage, soit enfin à n'importe quel procédé de solution pacifique, sans son consentement'[362].

[360] S. Rosenne, 'The World Court What It Is and How It Works', Oceana, New York, 1963, pp. 32-33.
[361] P. Daillier, A. Pellet, 'Droit International Public', LGDJ, Paris, 2009, p. 857.
[362] C.P.J.I., série B, N°5, p. 27.

En fait, la nécessité d'un consentement des Etats parties pour que la Cour puisse exercer sa compétence contentieuse est rappelée systématiquement et en termes catégoriques par les deux cours mondiales. Ainsi, dans l'affaire des *Droits des minorités en Haute-Silésie*, la Cour a signalé que la juridiction de la Cour dépend de la volonté des Parties[363]. Dans l'affaire de *l'Or monétaire pris à Rome en 1943*, la Cour a déclaré qu'elle ne peut exercer sa juridiction à l'égard d'un Etat si ce n'est avec le consentement de ce dernier[364]. De même, dans l'affaire du *Plateau continental de la Mer Egée*, la Cour a signalé qu'un examen d'office de l'existence de ce consentement est d'autant plus impératif lorsque l'une des parties s'abstient de comparaître ou de faire valoir ses moyens[365]. La C.I.J. a rappelé, dans son arrêt du 30 juin 1995, dans l'affaire du *Timor oriental*, qu'elle ne peut trancher un différend entre deux Etats sans que ceux-ci aient consenti à sa juridiction[366]. Le même a été dit par la Cour plus récemment comme ce bien le cas dans l'affaire de 2008 de *l'Application de la Convention Internationale sur l'Élimination de Toutes les Formes de Discrimination Raciale* entre la Géorgie et la Fédération de Russie[367].

Cela veut dire que, à l'exception de la demande d'interprétation ou de révision d'un arrêt de la C.I.J[368], la fonction juridictionnelle est essentiellement de nature volontaire.

En réalité, en donnant un tel consentement, les Etats acceptent par là-même le jugement. Le lien entre l'autorité des décisions de la CIJ et le consentement est ainsi bien établit. Comme conséquence du consentement des parties en litige, la juridiction internationale produira un acte juridictionnel normatif de nature obligatoire et définitive dont les effets seront étendus aux parties conformément aux demandes. C'est bien là, semble-t-il, le contenu de l'adage ''*res inter alios judicata aliis neque nocet prodest*'' posés par l'article 59 du Statut de la Cour qui dispose que ''la décision de la Cour n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé''. Tel est aussi le but ultime de l'article 36 du Statut de la C.I.J, c'est-à-dire empêcher que les droits des tiers ne soient définitivement tranchés sans leur consentement. Voilà la réalité indéniable du droit international.

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[363] Voir, l'affaire des *Droits des minorités en Haute-Silésie*, C.P.J.I., Série A, n° 15, p. 22. Voir aussi l'affaire de *l'Usine de Chorzow*, arrêt sur le fond, C.P.I.J., Série A, n° 17, pp. 37-38.

[364] C.I.J., Rec. 1954. p. 32.

[365] C.I.J., Rec. 1978, p. 9.

[366] C.I.J., Rec. 1995, p. 101.

[367] C.I.J., Rec. 2008.

[368] 'Quel que soit le mode de saisine initiale de la Cour, le consentement de la partie adverse n'est pas nécessaire pour qu'une demande en interprétation présentée sur le fondement de l'article 60 du Statut soit recevable' (V. l'arrêt du 10 décembre 1985, Rec. 1985. p. 216). Il en va de même pour ce qui est des requêtes en révision.

Mais, on peut cependant se demander qu'elle est vraiment la portée du consentement comme fondement de l'autorité de la sentence de la CIJ ?

L'existence même de la juridiction internationale se manifeste déjà dans la nécessité de coopération pour le maintien de la paix et la sécurité juridique. L'autorité de l'acte juridictionnel ne doit-il pas être vue comme le reflet d'un intérêt collectif ? Dans cette optique, la question sera donc de savoir jusqu'à quel point la juridiction internationale est indépendante des Etats souverains, c'est-à-dire, où prennent fin les exigences formelles pour l'établissement de la juridiction et où commence son autorité, indépendamment de la volonté des parties (A). D'autre part, on ne peut pas nier l'extension d'une certaine autorité de la sentence de la Cour vis-à-vis États tiers dont les intérêts seront touchés ou affectés par la décision (B). Les décisions de la Cour peuvent également avoir une autorité *de facto* sur les Etats tiers pour l'avenir (C). La jurisprudence de la Cour peut produire aussi des effets au-delà des parties dans la mesure où elle sert d'inspiration pour la production du droit international ou même lors qu'elle révèle ou interprète le vrai sens d'une norme internationale (D). Finalement, il y a aussi les débats concernant la nature *erga omnes* de certaines décisions juridictionnelles (E).

I. Les limites du consentement comme fondement de l'autorité de la sentence de la CIJ posé par la nature juridictionnel de la Cour

Tout d'abord, on ne peut pas accepter que le fondement du droit doive être trouvé uniquement dans le droit lui-même. Il n'existe pas de "droit pur" qui méconnaisse les intérêts et le mouvement de la communauté dans laquelle il s'insère. Cela signifie que l'autorité des décisions de la CIJ répond non pas uniquement à une conséquence simplement juridique de l'acte juridictionnel liée au consentement, mais également à une finalité sociale de stabilité et d'harmonie. La sentence internationale ne peut donc être comprise exclusivement comme un ordre contractuel fondée sur le principe du *pacta sunt servanda*. Elle est un véritable acte juridictionnel qui démontre l'affirmation de la supériorité de la juridiction en tant que manifestation de l'ordonnancement juridique de la communauté internationale. Comme le souligne M. Virally : "tout ordre juridique confère aux destinataires de ces normes des droits et pouvoirs juridiques qu'ils ne sauraient s'attribuer sans lui, il leur impose des obligations qui les lient. Par là même, tout ordre juridique s'affirme supérieur à ses sujets, ou bien il n'est pas"[369].

[369] M. Virally, 'Sur un pont aux ânes : les rapports entre droit international et droit interne', *Mélanges offerts à Henri Rolin*, Pédone, Paris, 1964, p. 497.

Ainsi, on peut se poser la question de savoir jusqu'à quel point, dans la pratique, les Etats contrôlent vraiment l'établissement de la compétence juridictionnelle. Les limitations concernant l'amendement ou la retraite d'un consentement donnée liée[370] au pouvoir qu'a la C.I.J. d'analyser sa propre compétence, conformément à l'article 36, §6, du Statut, ne démontre-il pas que, dans la pratique, l'autorité de la juridiction dépasse souvent la volonté immédiate manifestée par les Etats ? La liberté qu'a la C.I.J. pour analyser les nuances du consentement en établissant sa propre compétence, souvent au détriment de l'interprétation de l'Etat intéressé, provoque une succession d'actes clairement dictés par les règles prévues dans le Statut et dans le Règlement qu'elle établit elle-même, conformément à ce qui est prévu dans l'article 30 du Statut[371] et aboutit à une décision dotée de l'effet obligatoire et définitif.

Cette situation est relativement courante et elle a pour origine la possibilité pour les Etats de soulever des exceptions préliminaires de compétence et d'admissibilité. Rien de plus révélateur donc de l'autorité de la juridiction que l'opposition des Etats à l'interprétation donnée de la portée de leur propre consentement. Les exemples de ce désaccord sont très fréquents. Mais il y a des situations comme dans les affaire relative au *Personnel diplomatique et consulaire des Etats Unis à Téhéran,*[372] ou l'affaire de la *Délimitation maritime du 1er juillet 1994 entre Qatar et Bahreïn*[373], ou même dans l'affaire des *Actions frontalières entre le Nicaragua et le Honduras*[374], où la Cour a manifesté une très grande liberté d'appréciation. Dans ces cas, on peut même se demander si 'la Cour a respecté véritablement l'intention de l'une ou l'autre des parties à l'instance, dont le respect scrupuleux est pourtant indispensable à l'observation du fondement consensuel de sa compétence'[375].

Cependant, la question ne se limite pas uniquement au pouvoir de la Cour de déterminer sa propre compétence et la portée du consentement. En réalité, si le consentement peut être clair et résulter d'une déclaration expresse contenue dans un compromis formel préalable, il peut aussi être présumé après l'analyse de tout "acte concluant"[376], en particulier du comportement de l'Etat défendeur

[370] Voir l'affaire Nicaragua (juridiction et admissibilité) par : 63-65.

[371] Article 30 du Statut de la C.I.J. : 'La Cour détermine par un règlement le mode suivant lequel elle exerce ses attributions. Elle règle notamment sa procédure'.

[372] L'Iran n'a pris aucune part à l'instance. Il n'a déposé aucune pièce écrite, ne s'est pas fait représenter à la procédure orale et aucune conclusion n'a été présentée en son nom. Toutefois, son attitude a été définie dans deux lettres adressées à la Cour par son Ministre des Affaires étrangères les 9 décembre 1979 et 16 mars 1980. Il y soutient entre autres que la Cour ne peut ni ne doit se saisir de l'affaire. Malgré la position prise par l'Iran, la Cour décide que cet Etat a violé des obligations envers les Etats-Unis d'Amérique, en vertu des conventions internationales en vigueur entre les deux pays. Arrêt du 20 mai 1980, C.I.J., Rec. 1980. , pp. 3-46.

[373] C.I.J., Rec. 1994, p. 127.

[374] Arrêt du 20 décembre 1988, C.I.J., Rec. 1988, p. 82.

[375] P. M. Dupuy, *Droit international public*, 4° éd, Dalloz, Paris, p. 486.

[376] L'affaire des *Droits des minorités en Haute-Silésie*, C.P.J.I., Série A, n° 12, 1928, p. 23.

postérieurement à la saisine de la Cour[377]. En fait, ni le Statut ni le Règlement n'exigent que le consentement s'exprime sous une forme déterminée[378]. La Cour 'n'a jamais prétendu que le consentement doit être toujours exprès et moins encore qu'il obéisse à une liturgie donnée. En effet, dans les rapports entre Etats, il est raisonnable d'admettre l'assentiment tacite, ainsi que la validité, dans certaines circonstances, d'une présomption d'assentiment'[379]. Voila, l'application par la Cour du principe du *forum prorogatum*.

Cela veut dire que, malgré quelques jurisprudences - comme celle qui indique que le fait de plaider sur le fond sans soulever la question de l'incompétence de la Cour est manifestement une reconnaissance de sa compétence[380]– l'appréciation de l'attitude d'un Etat donné en tant que manifestation de son consentement est donc subjective de la Cour et la partie défenderesse n'est plus en droit de revenir en vertu du principe de la bonne foi ou de l'estoppel. Cela signifie que les déclarations faites par les agents des parties peuvent être vues par la Cour comme une indication factuelle de la situation, mais peuvent également être considéré comme dotée d'effet normatif et obligatoire. Les exemples ne manquent pas comme démontre l'affaire du Mavrommatis ou plus récemment les affaires des Iles Kasikili Seduku et LaGrand.

Ainsi, on peut facilement reconnaitre que la juridiction internationale manifeste un certain équilibre entre la volonté des parties et l'autorité de la juridiction dans l'extension de l'effet obligatoire et définitif de la sentence internationale. En d'autres termes, en droit international la sentence judiciaire n'exprime pas forcément la vision des parties mais est, dans une large mesure, extérieure à celle-ci. Il en résulte qu'une fois que le consentement soit établit par la Cour, l'Etat partie à un différend international ne saurait exciper de sa souveraineté pour échapper aux obligations que le droit international objectif lui impose en l'espèce. En voient reconnu sa volonté de recourir à une solution juridictionnelle pour le règlement pacifique de ses différends, l'Etat se place *ipso facto* sous l'empire des règles du droit objectif qui dominent le procès international, limitent sa souveraineté et lui imposent certaines obligations'[381]. En dernière analyse, bien que l'autorité de la sentence soit soumise au consentement, sa portée ne dépend pas de l'acceptation ou de la réception.

Mais cela n'est pas tout.

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[377] P. Daillier, A. Pellet, *Droit international public*, L.G.D.J., Paris, p. 859.

[378] *Détroit de Corfou*, C.I.J, Rec. 1947-1948, p. 27.

[379] F. Rezek, 'Sur le fondement du droit des gens', Theory of International Law at the Threshold of the 21st Century, Essays in Honour of Krzysztof Skubiszewsk, Klumer, La Haye, 1996, p. 273.

[380] Ce procédé fut validé formellement par la C.P.J.I. dans l'affaire des *Droits de minorités en Haute-Silésie*, ainsi que dans l'affaire de *l'Interprétation de l'arrêt n° 3* et dans l'affaire des *Concessions Mavrommatis à Jérusalem*. Ce mécanisme a été décrit par la C.I.J. elle-même dans l'affaire *Haya de la Torre* et la distinction établie entre la jurisprudence de l'affaire du *Détroit de Corfou* et celle de l'affaire de *l'Anglo-Iranian Oil Company* est emblématique.

[381] E. Zoller, La bonne foi en droit international public, Pédone, Paris, 1977, p. 123.

II. La puissance de l'autorité de la sentence par rapport aux États tiers qui sont touché où affecté par la décision de la Cour

La Cour rappelle souvent, comme dans l'affaire du *Différend territorial et maritime* entre le Nicaragua et la Colombie de 2011[382], que son jugement est obligatoire uniquement pour les parties. Bien entendu, le lien entre le consentement et l'autorité de la sentence permet aux parties soit de se prévaloir, soit de se protéger à l'intérieur de l'effet de la décision juridictionnelle. Par conséquence cela établit un rapport qui ne peut ni nuire ni profiter à des tiers. La relativité de la décision juridictionnelle aux parties qui ont consenti a ainsi un double caractère. D'abord ce lien cherche à délimiter ce qui doit être exécuté et les parties qui doivent le faire. Ensuite, il apparaît comme un mécanisme de protection des intérêts des tiers qui ne sauraient être liés par le résultat d'une instance à laquelle ils n'étaient pas obligés de participer[383].

En effet, si la constatation est simple, la réalité des faits peut poser bien des difficultés car la puissance du lien entre les Etats parties et les Etats tiers peuvent être très variables. Ainsi pour mieux établir cette frontière la Cour a distingué les tiers à une instance qui justifient d'un intérêt juridique constituant" l'objet même de la décision", de ceux dont un intérêt juridique est susceptible d'être "touché, ou affecté" par une décision de la Cour. Dans le premier cas, le consentement est requis pour que la Cour puisse se prononcer. En revanche, selon la Cour, les intérêts des tiers sont déjà préservés par l'article 59 du Statut. Dans ce cas, les Etats tiers susceptible d'être "touché, ou affecté" par une décision de la Cour ne peuvent empêcher la Cour de statuer sans leur consentement, mais ont la faculté d'intervenir aux débats, comme l'indiquent les articles 62 et 63 du Statut de la Cour.

Le point de départ de cette jurisprudence de la Cour peut être trouvé dans l'affaire de *l'Or monétaire pris à Rome en 1943*[384] Cette affaire a commencé par une requête introduit par la République italienne contre la France, le Royaume-Uni et les Etats-Unis d'Amérique[385]. Ainsi, lorsque la Cour reconnaît que les intérêts juridiques de l'Albanie, qui n'était pas partie, seraient non seulement touchés par une décision, mais constitueraient l'objet même de ladite décision[386], elle conclut que "le

[382] C.I.J., Doc 2011. Liste général, par: 66-67.
[383] Selon Charles Rousseau, cette relativité apparaît à deux points de vue, l'un, pourrait-on dire étant *a priori* et, l'autre *a posteriori*. C. Rousseau, 'Le règlement arbitral et judiciaire et les Etats tiers', Problèmes de droit des gens, Mélanges offerts à Henri Rolin, Pédone, Paris, 1964, p.301.
[384] C.I.J., Rec. 1954, pp.9ss.
[385] C.I.J., Rec. 1954, p. 33.
[386] C.I.J., Rec. 1954, pp.19 ss.

Statut ne peut être considéré comme autorisant implicitement la poursuite de la procédure en l'absence de l'Albanie"[387]. La Cour a eu la même pensée lors de l'arrêt rendu le 30 juin de 1995 dans l'affaire du *Timor oriental* qui opposait le Portugal à l'Australie. Dans cette affaire, le Portugal reprochait à l'Australie d'avoir signé avec l'Indonésie le traité du "Timor *gap*". La Cour a reconnu qu'elle ne saurait rendre une telle décision en l'absence du consentement de l'Indonésie car cette question ferait nécessairement "l'objet même de sa décision"[388].

La signification réelle du principe de *l'Or monétaire* révèle alors la complexité de son paradoxe. D'abord, la Cour doit décliner sa propre compétence si, en s'en tenant aux termes en lesquels le différend lui a été déféré, elle était amenée à se prononcer - expressément ou implicitement - sur des droits, des prétentions juridiques ou encore sur des devoirs d'Etats par rapport auxquelles elle n'a pas le pouvoir de juger, étant donné que la base consensuelle fait défaut[389].

La face cachée de cette jurisprudence implique, bien entendu, que la Cour peut bien être amenée à se prononcer indirectement sur la situation juridique d'un Etat tiers parce qu'elle s'est prononcée sur celle des parties. La Cour admet ainsi la distinction entre les intérêts juridiques des Etats tiers qui ne seraient qu'affectés mais ne constitueraient pas l'objet même de la décision. Dans ce cas la Cour pourrait exercer sa fonction.

Il y a plusieurs exemples. Dans l'affaire du *Différend Frontalier* (Burkina Faso/République du Mali) la Cour estime en outre que "sa compétence ne se trouve pas limitée du seul fait que le point terminal de la frontière se situe sur la frontière d'un Etat tiers non partie à l'instance. Les droits de l'Etat voisin, le Niger, sont selon la Cour, sauvegardés en tout état de cause par le jeu de l'article 59 du Statut". Quant au fait de savoir si des considérations liées à la sauvegarde des intérêts de l'Etat tiers concerné devraient l'amener à s'abstenir d'exercer sa compétence pour identifier le tracé de la ligne jusqu'au bout, cela supposerait, selon la Cour, que "les intérêts juridiques de cet Etat seraient non seulement touchés par sa décision mais constitueraient l'objet même de la décision. Tel n'est pas le cas en l'espèce"[390].

Mais, finalement quelle sera le poids d'autorité de sa décision vis-à-vis des tiers ? Je pense plutôt aux droits et obligations en tout ou en partie identiques appartenant à un certain nombre d'Etats, dont certains sont parties et d'autres tiers à l'instance. Dans ce cas on ne peut pas nier

[387] C.I.J., Rec 1954, p.32.
[388] C.I.J., Rec. 1995, p.102.
[389] Giuseppe Sperduti, 'L'intervention de l'Etat tiers dans le procès international: une nouvelle orientation', A.F.D.I., 1986, p.291.
[390] C.I.J., Rec.1986 , pp. 547ss.

qu'un jugement de la Cour sur les droits et les obligations des parties aurait été, sinon formellement, du moins matériellement, un jugement sur les droits et les obligations des Etats tiers. L'autorité de la décision dépassera forcement la frontière des parties.

Il y a déjà des exemples classiques. En 1986, la Cour n'a pas hésité à trancher la question de savoir si une attaque armée du Nicaragua contre l'un des trois Etats (Honduras, El Salvador, Costa Rica) avait vraiment existé et si, par conséquent, l'un d'entre eux avait le droit d'agir en autodéfense. En réalité, lorsque la Cour a répondu à la question de savoir si l'action du Nicaragua en soutenant les forces rebelles à El Salvador constituait une sorte d'attaque armée[391], il sera difficile de ne pas constater une certaine atteinte au droit d'El Salvador de voir la Cour s'abstenir de trancher un différend qu'il ne lui a pas soumis. La Cour en arrive même à remarquer "qu'il est donc indéniable que ce droit d'El Salvador se trouverait affecté par la décision de la Cour"[392]

L'affaire de *Certaines terres à phosphates à Nauru*, est encore plus remarquable. Dans cette affaire l'Australie faisait observer que l'accord de tutelle conclu dans le cadre de l'ONU en 1947, prévoyaient que les trois gouvernements du Royaume-Uni, de la Nouvelle Zélande et de l'Australie étaient conjointement chargés d'administrer le territoire de Nauru. Par conséquent, l'Australie a soutenu l'irrecevabilité des demandes de Nauru et l'incompétence de la Cour "du fait que tout jugement sur la question de la violation de l'accord de tutelle mettait en cause la responsabilité d'Etats tiers qui n'ont pas consenti à la juridiction de la Cour en la présente instance"[393]. La Cour a rejeté l'exception soulevée par l'Australie en réaffirmant" qu'il n'est pas nécessaire qu'elle se prononce sur la responsabilité de la Nouvelle-Zélande et du Royaume-Uni afin de statuer sur celle de l'Australie"[394]. En l'espèce, les intérêts des deux États ne constituent pas l'objet même de la décision à rendre sur le fond de la requête de Nauru et la situation est à cet égard différente de celle dont la Cour a connu dans l'affaire de *l'Or monétaire*. En définitive, dans la présente affaire, les intérêts juridiques des Etats tiers ne seraient qu'affectés mais ne constitueraient pas l'objet même de la décision, ce qui permettrait à la Cour d'exercer sa fonction[395].

[391] C.I.J., Rec. 1986, p.36.
[392] C.I.J., Rec. 1986, p.36.
[393] C.I.J., Rec. 1992, pp. 250-260.
[394] C.I.J.,Rec. 1992, pp. 259-261.
[395] B. Conforti, 'L'arrêt de la Cour Internationale de Justice dans l'affaire de *Certaines terres à phosphates à Nauru* (Exceptions préliminaires)', A.F.D.I., 1992, p. 471.

On voit très bien que la Cour réserve la chose jugée aux parties. Mais cela ne veux pas dire que la décision n'aurait pas une très large marge d'autorité vis-à-vis des tiers affectés. La preuve peut être observé dans le fait que, après avoir échoué dans la phase préliminaire de son procès, le Gouvernement australien, préférant apparemment conjurer tout risque de perdre devant la Cour cette affaire, a versé plus de 100 millions de dollars australiens à Nauru en échange de sa renonciation à la procédure[396]. Evidement, bien que les cas de désistement soient nombreux, ce règlement à l'amiable présente un aspect intéressant: la Grande-Bretagne et la Nouvelle-Zélande, qui étaient associées à l'Australie lors des faits que Nauru lui reprochait, ont participé au financement de la transaction entre l'Australie et Nauru[397]. Ces arrangements, illustrent le fait que la garantie prévue à l'article 59 du Statut, ainsi que celle offerte par le principe de *l'Or monétaire*, paraissent, dès lors, bien formelles.

III. Les décisions de la Cour peuvent avoir une autorité *de facto* sur les États tiers car elles peuvent interpréter les conventions multilatérales

En effet, une nouvelle problématique surgit lorsque les décisions de la Cour ont une telle autorité qu'elles peuvent conditionner et lier *de facto* les Etats tiers pour l'avenir. Je pense tout d'abord aux décisions de la Cour qui interprètent les conventions multilatérales. Certes, comme le note la Cour: "On ne voit pas pourquoi les Etats ne pourraient pas lui demander de donner une interprétation abstraite d'une convention ; il semble plutôt que c'est une des fonctions les plus importantes qu'elle puisse remplir"[398]. Mais, quelle sera l'autorité d'une sentence juridictionnelle rendue dans un différend entre deux des Etats contractants, vis-à-vis des autres parties contractantes ? Le problème se pose là où il faut déterminer la force obligatoire d'un arrêt déclaratoire portant interprétation abstraite d'un traité multilatéral à l'égard de ceux des cosignataires qui n'auraient pas exercé leur droit d'intervention au procès. L'arrêt déclaratoire resterait-il pour ceux-ci une *res inter alios acta* ? Ou faudrait-il attribuer à un tel jugement une force accrue[399]?

Face à cette impasse, la position de la doctrine est divisée. D'une part, George Scelle fait appel à l'incorporation de l'interprétation de la

[396] Jean-Marc Thouvenin, '' L'arrêt de la C.I.J. du 30 juin 1995 rendu dans l'affaire du *Timor oriental* (Portugal c. Australie) '', A.F.D.I., 1995, p. 334.
[397] Ibid, p. 335.
[398] Affaire des *Intérêts allemands en l'Haute-Silésie polonaise*, C.P.J.I. Série A, n° 7, pp. 18-19.
[399] N. Scandamis, Le jugement déclaratoire entre Etats; La séparabilité du contentieux international, Pédone, Paris, 1975, p. 289.

règle de droit pour justifier l'acceptation de l'extension de l'autorité de la sentence, sans distinction de la qualité du signataire[400]. D'autre part, la règle soutenue par l'article 59 du Statut de la Cour reste que - pour des autres signataires - la sentence entre les parties sera une *res inter alios act*.

Nous nous trouvons ici devant un problème assez épineux qui peut être résumé par une équation assez antinomique[401]. "Si la sentence juridictionnelle entre les Etats A et B, qui donne l'interprétation des dispositions du traité sur lesquelles ces Etats n'étaient pas d'accord, devait être considérée par les autres Etats contractants comme une *res inter alios acta*, le traité peut n'avoir plus le même sens pour toutes les parties contractantes, et le même article serait interprété peut-être par deux des parties contractantes dans un sens diamétralement opposé à l'interprétation qu'en donnent les deux autres". "Si, au contraire, on considère que la sentence juridictionnelle doit avoir autorité vis-à-vis de tous les Etats qui étaient parties au traité, une interprétation sollicitée par deux des parties peut avoir force obligatoire pour toutes les autres parties contractantes. Dans ce cas, celles-ci pourraient prétendre qu'elles n'ont eu aucune action sur la procédure qui vient d'être terminée; ou bien, qu'elles n'avaient besoin d'aucune interprétation judiciaire, puisqu'elles étaient d'accord entre elles sur le sens des dispositions qui ont donné lieu au procès de leurs cocontractants"[402]. En d'autres termes, qu'elles n'ont aucunement collaboré à la modification du traité, modification qui par conséquent ne pourra avoir aucun effet pour elles.

Cette conclusion n'épuise pourtant pas le problème. Il peut arriver qu'une demande d'interprétation d'une convention surgisse entre un Etat (qui était déjà partie dans un différend antérieur qui a interprété la même convention) et un autre cosignataire de la convention (qui n'était pas partie au différend précédent), ou il peut arriver encore qu'après une décision d'interprétation d'une convention, deux autres cosignataires (qui n'étaient pas parties au différend précédent) décident d'adresser à la juridiction internationale une nouvelle demande identique d'interprétation de la même convention ; ou alors, il peut arriver finalement qu'il s'élève un différend entre deux Etats sur l'interprétation d'une convention et que deux ou plusieurs autres Etats aient conclu entre eux exactement la même convention, mais d'une manière séparée.

Bien sur, dans tous ces cas, si l'Etat tiers n'est pas d'accord avec la décision de la Cour et qu'il a des arguments de fait ou de droit pour soutenir une position différent, rien ne lui interdit de saisir un tribunal arbitral ou la Cour

[400] Ainsi, selon lui : 'Si l'arrêt international aboutit à l'interprétation abstraite d'une règle de droit positif [...] conventionnel, l'on doit admettre que cette interprétation objective s'incorpore à la règle de droit puisqu'il ne peut pas y avoir ou qu'il n'y a pas interprétation législative'. Georges Scelle, Principes de droit public, Cours D.E.S., Paris, 1942-43, p. 244.

[401] J. Limburg, L'autorité de la chose jugée des décisions des juridictions internationales', R.C.A.D.I., vol. 30, 1929, p. 551.

[402] J. Limburg, L'autorité de la chose jugée des décisions des juridictions internationales', R.C.A.D.I., vol. 30, 1929, p. 551.

de cette même question. Il est clair que la chose jugée de la première décision ne peut être étendue à la nouvelle demande, faute d'identité des parties.

Toutefois, l'autorité *de facto* de la décision précédente est tellement conclusive qu'on voit mal comment une juridiction internationale peut interpréter de deux manières distinctes une convention en raison d'une simple différence des parties. On risque alors que le poids du premier arrêt pèse lourd dans la balance ou d'aboutir à une contradiction entre deux arrêts si la deuxième décision est contraire à la première[403]. On peut conclure alors que l'autorité *de facto* d'une décision précédente va bien au-delà d'un simple éclaircissement du droit. Le besoin social plus que jamais augmente la puissance de l'autorité de la décision antérieure sans obliger pour autant la juridiction internationale à la suivre formellement.

La jurisprudence de la Cour démontre clairement cette possibilité problématique. Je voix par exemple - dans l'affaire *relative aux actions armées frontalières et transfrontalières* (Nicaragua et Honduras) *compétence et recevabilité*[404] - l'impact sur les relations des autres Etats-parties au pacte de Bogota de l'interprétation donnée par la Cour de son article XXXI que permettait à la Cour d'établir sa compétence. Ce même article peut être à la base des nouvelles sollicitations à la Cour. Dans l'affaire de *l'Elettronica Sicula S.P.A.*[405], la Cour analyse et interprète les articles III, V et VII du Traité d'amitié, de commerce, et de navigation (FCN) entre les États Unies et l'Italie bien comme l'article premier de l'accord complémentaire[406]. Or, ces dispositions juridiques ont constamment été réaffirmées dans de nombreux traités aux caractéristiques semblables et elles ont été ratifiées par les Etats-Unis auprès des différentes parties[407]. En effet, la C.I.J. a eu l'occasion d'analyser et d'interpréter différentes dispositions figurant sur des traités (FCN) dans l'affaire de *l'Incident aérien du 3 juillet 1988*[408], dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*[409] et dans l'affaire des *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique) (exception préliminaire)*[410].

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[403] J. Salmon, 'Autorité des prononcés de la Cour internationale de La Haye', Arguments d'autorité et arguments de raison en droit, Nemesis, Bruxelles, 1988, p.33.

[404] C.I.J., Rec. 1988, pp. 69-107

[405] C.I.J., Rec. 1989, pp. 15-82.

[406] C.I.J., Rec. 1989, pp. 48-49.

[407] Seize instruments de ce type seront conclus par les Etats-Unis - avec, notamment, l'Allemagne, la Chine, le Danemark, l'Iran, l'Irlande, l'Italie et le Japon. Patrick Juillard, L'arrêt de la Cour Internationale de Justice (Chambre) du 20 juillet 1989 dans l'affaire de *L'Elettronica Sicula* (Etats-Unis c. Italie) procès sur un traité ou procès d'un traité' ?, A.F.D.I., 1989, pp. 288-289.

[408] G. Guyomar, 'L'ordonnance du 13 décembre 1989 dans l'affaire de *l'Incidente aérien du 3 juillet 1988*, Iran c. Etats-Unis', A.F.D.I., 1990, pp. 390-394.

[409] Fred L. Morison, 'Treaties as a Source of Jurisdiction Especially in U.S. Practice', 'The International Court of Justice at crossroads', Lori-F. Damrosch, Transnational publishers, New York, 1987, p. 65.

[410] L'affaire des *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique) (exception préliminaire)*, C.I.J. Rec. 1997, §§. 12-16.

Il y a finalement un autre exemple important. Dans l'affaire *relative à l'application de la Convention pour la prévention et la répression du crime de génocide* de 1996 la Bosnie Herzégovine a fondé sa demande contre la Ex Yougoslavie sur la base de l'article IX de la Convention sur le génocide. La Cour a accepté ses arguments et s'est considéré compétent sur ce fondement. Elle arrive même à réaffirmer sa position dans une décision suivant dans l'affaire de la *demande de révision de l'arrêt du 11 juillet 1996*. Or la Cour dans une affaire demandée par la Serbie et le Monténégro contre 8 Etats membre de l'Otan a décidé sur le même point d'une manière tout à fait différent. En effet, dans 8 arrêts du 15 décembre 2004 la Cour ne se reconnait pas compétent sur la base de la même disposition prévue dans la Convention de 1948[411].

Ce qui est important ici n'est pas la reconnaissance de la capacité de la Cour de juger de manière différent des demandes similaires. Ce bien ça le fondement de l'article 59 de son statut. L'intérêt ici c'est bien de démontrer comment 7 juges dans une déclaration joint à l'arrêt ont d'une manière assez sévère critiqué la position de la Cour[412].

IV. L'autorité de la sentence de la CIJ peut aller au delà des parties et du cas décidé car elle peut révéler ou inspirer la formation du droit international

Alors, une nouvelle question se pose. Est-ce que l'autorité de la sentence de la CIJ peut aller au delà des parties et du cas décidé car elle peut révéler ou inspirer la formation du droit international[413].

L'article 38, §1, (d), du Statut de la C.I.J, prévoit le caractère non contraignant des décisions juridictionnelles précédentes et, par conséquent, leur utilisation comme moyen auxiliaire de détermination des règles de droit. Cette interprétation formelle est tout à fait d'accord avec ce que prévoit l'article 59 du Statut de la CIJ et contraste à première vue avec l'idée selon laquelle une sentence internationale peut avoir une autorité qui puisse aller au-delà des parties et du cas décidé. Ainsi, les États ont délégué à la Cour la seule faculté de dire le droit,[414] car ils craignaient que le précédent rattachant accorde à la Cour une trop grande influence sur le développement du droit international.

[411] A. Pellet, The Statute of the International Court of Justice, A commentary: Article 38. Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Oxford University Press, p. 786.

[412] A. Pellet, The Statute of the International Court of Justice, A commentary: Article 38. Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Oxford University Press, p. 786.

[413] A. Boyle et C. Chinkin, 'The making of International Law', 268, 2007.

[414] Comme le remarque la C.I.J. dans l'affaire du *Cameroun Septentrional*, exceptions préliminaires, 'la fonction de la Cour est de dire le droit', C.I.J., Rec. 1963, pp. 33-34.

Cependant, la Cour a indéniablement reconnu, comme le note Fitzmaurice, que ses décisions doivent être vu comme "authority, but not necessarily as authoritative"[415]. La question, comme rappelle la Cour dans les objections préliminaires du Nigeria dans l'affaire des *Frontières terrestre et maritimes* de 1998, est de savoir pour qu'elle raison elle ne doit pas suivre ses raisonnements précédents"[416]. Voila, que la Cour elle-même s'efforce de rappeler systématiquement et exhaustivement ses énoncés antérieurs sur un même point, pour démontrer la constance, la continuité de sa jurisprudence[417] et l'harmonie dans le développement du droit international. En fait, la référence à sa propre jurisprudence est devenue quelques-uns des traits les plus caractéristiques de la pratique des deux Cour[418]. Uniquement comme des exemples récents on peut voir que dans l'affaire *Kasikili Sedudu* de 1999 la Cour a fait référence à sept jurisprudences antérieures uniquement pour montrer que la pratique des parties après l'établissement des traités doit être vue comme important lors de son interprétation[419]. De même, dans l'opinion consultative de la Cour relative aux *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*[420], la Cour a fait 28 références croisée à des décisions antérieures[421].

Cela montre que malgré le fait que la Cour juge selon les circonstances et peut donner des solutions différentes en raison des conjonctures, on ne peut pas nier la force du précédent dans la formation du droit international. Mais cela n'est pas tout. En fait, comment réagir lorsque la sentence de la Cour sert d'agent révélateur du droit international ?

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[415] G.Fitzmaurice, 'The Law and Procedure of the International Court of Justice', vol.I, p. xxxii, note 22.

[416] C.I.J., Rec 1998, pp. 275-292.

[417] G. Abi-Saab, 'De la Jurisprudence, quelques réflexions sur son rôle dans le développement du droit international', 'Hacia un NuevoOrden International y Europeo', Estudios en Homaje al Profesor Don Manuel Diez de Velasco, Tecnos, Madrid, 1993, p. 24.

[418] S. Bastid, 'La jurisprudence de la Cour internationale de Justice', R.C.A.D.I., vol. I, 1951, p.631. G. Scelle, 'Les sources des diverses branches du droit, Essais sur les sources formelles du droit international', *in* Recueil d'études sur les sources du droit en l'honneur de François Gény, Paris, 1934, III, p. 427. H. Lauterpacht, 'The Development of International Law by the International Court', Stevens and Sons, Londres, 1959, p. 15. Julio. A. Barberis, 'La Jurisprudencia Internacional como Fuente de Derecho de Gentes Segun la Corte de la Haya', ZoV, vol. 31, 1971, pp. 641-670. S. Rosenne, 'The Law and the Practice of the International Court', Martinus Nijhoff, La Haye, 1997, pp. 231-232. Ainsi, des l'affaire *Mavrommatis* C.P.J.I., série A, n°2, p. 16, la C.P.J.I. fait appel à son avis consultatif du 7 février 1923 dans l'affaire du *Décret de nationalité promulgué en Tunisie et au Maroc* (C.P.J.I., série B, n°4., p. 12). Dans l'avis consultatif *Ecole minoritaire en Albanie*, la C.P.J.I. fait référence à son avis consultatif n° 7 et son avis consultatif n°6 (C.P.J.I., série A/B, n°64, p. 20). Dans l'affaire de la *Compagnie d'Electricité de Sophie et Bulgarie*, la Cour insiste sur ce qu'elle avait déjà dit dans l'affaire du *Phosphate du Maroc* (C.P.J.I., série A/B n°77, p. 82). Dans l'affaire de la *réparation des dommages subis au service des Nations Unies*, la C.I.J. reconnaît le *'implied power'* et ancre sa constatation sur le fait que la C.P.J.I. l'avait déjà considéré dans son avis consultatif n°13 (C.P.J.I., série B, n°13, p. 18). Dans l'avis consultatif *relatif à la compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies*, la Cour incorpore ce qu'elle avait déjà dit dans l'affaire du *Service postal polonais.* C.I.J. Rec.1950, p. 8. Dans l'affaire *Relative à certains emprunts norvégiens*, la Cour fonde sa décision sur la jurisprudence de la C.P.J.I. (C.I.J.,Rec.1957, pp. 23-24).

[419] C.I.J., Rec. 1999, pp. 1045-1076.

[420] C.I.J., Rec. 2004, pp. 135, 154-156.

[421] A. Pellet, The Statute of the International Court of Justice, A commentary: Article 38. Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Oxford University Press, p. 785.

En réalité, déjà au sein du Comité consultatif de juristes chargé d'élaborer le projet du Statut de la C.P.J.I.[422], la question de savoir si les décisions juridictionnelles déclarent le droit existant ou si elles contribuent à créer le droit international était posée et la solution trouvée ne cache pas une certaine ambivalence[423].

La Cour fait normalement un choix entre des possibilités normatives. Mais, elle ne décline pas de son pouvoir de décider en raison du silence ou de l'obscurité du droit. Ceci étant, elle peut également interpréter le sens des normes internationales, bien qu'elle ne puisse pas leur révisé[424]. Dans ce cas il n'a pas des doutes que la Cour doit contribuer au développement du droit international[425] comme il a été déjà reconnu par l'Assemble générale depuis 1947.

Mais, "la solution d'un cas d'espèce, en droit international surtout, a de profondes répercussions; les concepts retenus vont prendre une valeur presque législative en dépit de toutes les explications juridiques qui veulent que la sentence ne fasse loi qu'entre les parties"[426]. En réalité la distinction entre les concepts de développement progressive (qui théoriquement doit remplir le silence du droit et respecter la nature *inter partes* de la décision) et l'exercice législative de la Cour est tellement étroit qu'on peut les confondre selon les convenances[427]. La raison est que la décision de la Cour peut avoir, dans certaines circonstances, une autorité *de facto* qui va au delà des parties indifféremment du non qu'on doit la donnée.

La Cour ne reste pas insensible à ces arguments. Sa jurisprudence dans l'affaire de *l'Applicabilité de la Convention pour la prévention et la répression du crime de génocide,* est claire. La Cour détermine que l'intention du demandeur, (…), n'est pas d'obtenir qu'elle indique que le défendeur doit prendre certaines dispositions pour la sauvegarde des droits du demandeur, mais plutôt que la Cour fasse une déclaration précisant ces droits, déclaration qui "clarifierait la situation juridique à l'intention de l'ensemble de la communauté internationale"[428]. En effet, dans son arrêt sur l'affaire du *Plateau Continental de la Mer Egée*, la C.I.J. a explicitement admis qu'en dépit de l'article 59 de son Statut, un raisonnement et une

[422] 'Under the historical proposal as made by Baron Descamps in the Advisory Committee of Jurists, the judge in the solution of international disputes was to consider, *inter alia*, international jurisprudence as a means for the application and development of law'. M. Bos, 'A Methodologie of International Law', North Holand, Amsterdam, 1984, pp.75-76. C.P.J.I., Comité consultatif des juristes, Procès-Verbaux des Séances du Comité, 16 juin -24 juillet 1920, avec annexes, La Haye, 1920, pp. 673-695.

[423] M. Shahabuddeen, ' Precedent in the World Court', Grotius Publications, Cambridge, 1996, p. 48.

[424] C.I.J. Rec. 1966, par. 91.

[425] A. Pellet, 'Shaping the Future of International Law: The Role of the World Court in Law-Making, in Looking to the Future': 'Essays on International Law in Honor of W. Michael Reisman', pp. 1065-1083.

[426] Opinion du Juge Azevedo dans l'affaire du *Droit d'asile.* C.I.J., Rec.1950, p. 332.

[427] W. M. Reisman, 'Judge Shigeru Oda: Reflections on the formation of a Judge', in *Liber Amicorum* Judge Shigeru Oda, 2002, p.66.

[428] C.I.J. Rec. 1993, pp. 325-344.

conclusion juridique de sa part pourraient être invoqués directement dans les rapports entre des Etats tiers. Ainsi, pour la Cour: "il est évident que tout prononcé sur la situation de l'Acte de 1928 par lequel la Cour déclarerait que celui-ci est ou n'est plus une convention en vigueur pourrait influencer les relations d'Etats autres que la Grèce et la Turquie"[429].

En réalité l'autorité de la sentence de la Cour vis-à-vis de tiers peut avoir un approche toute à fait progressive. En effet, bien que la Cour évite de faire référence à une certaine capacité législative, elle "n'hésite pas, lorsque cela lui semble nécessaire, à interférer dans le processus de son élaboration, soit qu'elle le complète, soit qu'elle l'infléchisse, soit qu'elle s'emploie à empêcher ou a freiner des évolutions en cours"[430]. Ceci étant, il ne s'agit plus de démontrer le lien entre une sentence et une décision précédente, mais de vérifier que, malgré l'article 59 du Statut de la Cour et du besoin de rester à l'intérieur d'une certaine construction légale, quelques décisions déjà classiques vont devenir décisives dans la formation du droit international et auront une autorité qui va bien au-delà des parties et du cas décidés. Le jeu des mots entre l'exercice législatif et le développement progressif du droit apparait ainsi comme une protection purement cosmétique.

Cela est tellement vraie que, dans les affaires *Mavrommatis* et de l'*Usine de Chorzow* la CPJI a élaboré les principes fondamentaux du droit de la responsabilité. L'avis consultatif concernant la *Réparation des Dommages subis au Service des Nations Unies* a reconnu finalement la personnalité juridique des Organisations Internationales. L'avis consultatif concernant les *Réserves à la Convention sur le Génocide* a été une remise en cause des règles applicables aux réserves dans les traites multilatérales. L'affaire du *Plateau Continental de la Mer du Nord* a été aussi à l'origine des règles concernant le plateau continental. L'affaire de la *Délimitation maritime en mer Noire* a également définit les stages dans la procédure de délimitations des plateaux continental ou des zones économiques exclusive ou même le dessein d'une simple ligne de délimitation. L'affaire des *Pêcheries*, contient des déclarations importantes quant aux règles du droit international qui ont trait aux eaux côtières. La preuve peut être trouvée dans la rapidité avec laquelle les prononcés de la Cour ont été transposés vers la Convention de Genève de 1958[431].

Cela démontre dans une autre perspective que la sentence de la CIJ peut avoir une autorité indépendante du consentement, car les formules jurisprudentielles peuvent être reprises par des sources principales du droit international et ainsi contribuer de façon décisive à la création des

[429] C.I.J., Rec.1978, p. 17.

[430] A. Pellet, 'L'adaptation Du droit international aux besoins changeants de la société internationale', Conférence inaugurale session de droit international public, Académie de Droit International de la Haye, 2007, p. 44.

[431] M. Shahabuddeen, 'Precedent in the World Court', Grotius Publications, Cambridge, 1996, p.209. H.Thierry, 'L'évolution du droit international', R.C.A.D.I., vol.222, 1990, p. 42.

normes de nature obligatoires, mais par d'autres moyens. Il n y a d'autres exemples assez importants. Le concept du recours à l'objet et au but du traité comme critère de validité des réserves contenu dans l'article 19 alinéa c de la Convention de Vienne de 1969 a été prévu par l'avis de la Cour concernant les réserves à la Convention pour la répression du crime de génocide. L'article 74, paragraphe 1, et l'article 83, paragraphe 1, de la Convention des Nations Unies sur le droit de la mer prévoit le principe du résultat équitable auquel doit aboutir la délimitation du plateau continental ou de la zone économique exclusive. Celui-ci a été fortement inspiré de la décision de la Cour dans l'affaire du plateau continental de la mer du nord de 1969.

Mais le mouvement inverse est également possible. La Cour peut reconnaitre avec l'autorité de sa sentence l'influence des travaux de codification du droit international et ainsi contribuer à sa formation. L'exemple le plus frappant peut être observé lorsque la Cour fait référence à des travaux de la CDI alors qu'ils n'ont pas encore passé par une conférence de codification et l'acceptation par les Etats fait défaut. Ce fut le cas de l'arrêt de la Cour dans l'affaire *Gabcikovo Nagymaros* de 1997. Dans cet arrêt la Cour mentionne expressément plusieurs fois le projet d'article de la CDI sur la responsabilité des Etats alors qu'il n'en n'était qu'à sa première lecture. En effet l'adoption définitive du texte n'est intervenue qu'en 2001. Cela n'est pas le seul exemple. On peut citer également les références par l'arrêt *Ahmadou Sadio Diallo* de 2007 (exception préliminaire)[432] au projet d'articles adopté en deuxième lecture relatif à la protection diplomatique.

Le rapport entre la Cour et la CDI est ainsi très convenable. En effet, si la CDI n'est pas un législateur, elle est un intermédiaire souvent utilisée. Ceci dit, pour la CDI il est très positif de voir la transformation que la Cour peut opérer en faisant référence à ses travaux. Pour la Cour il est très commode aussi de s'abriter derrière les travaux de la CDI pour établir l'existence d'une règle juridique lorsque ceci lui parait opportun[433]. A partir des travaux de la CDI la Cour peut trouver une formule pour justifier que sa décision est l'expression du droit international, conforme les exigences prévus par l'article 38 de son Statut. En d'autres termes la décision de la Cour fondé sur les travaux de la CDI permet de la reconnaitre comme l'expression d'un droit dont l'autorité évidemment va bien au delà des parties.

[432] C.I.J. Rec. 2007, par 39-93.

[433] A. Pellet, 'L'adaptation du droit international aux besoins changeants de la société internationale', *R.C.A.D.I.* 2007, tome 329, Nijhoff, Leiden/Boston 2008, pp. 9-47.

Cela veut dire que la contradiction entre le pouvoir qu'a la Cour de déclarer le droit existant et sa prétendue incompétence de le créer, n'est qu'illusoire. Certes, la Cour n'est pas un organe doté de compétence législative, comme elle a démontré dans son avis consultatif du 8 juillet 1996 concernant la *Licéité de l'utilisation des armes nucléaires.* Elle "dit le droit existant et ne légifère point. Cela est vrai même si la Cour, en disant et en appliquant le droit, doit nécessairement en préciser la portée et, parfois en constater l'évolution"[434]. Nul doute à ce sujet. Cependant, rien ne l'empêche d'interpréter des règles et principes du droit international[435] et, comme elle ne peut s'abstenir de juger au prétexte de l'insuffisance ou de l'obscurité du droit positif, force lui est d'en combler les lacunes.

Cette compétence ouvre une nouvelle perspective. En effet, la jurisprudence peut avoir un rôle beaucoup plus élargie dans la formation du droit international, lorsque la Cour énonce et explique le contenu d'une coutume internationale ou qu'elle interprète une règle de droit international général. Dans ces cas elle dit ce qu'elle entend par droit international et fait la lumière sur la signification d'une de ces sources formelles[436]. Ainsi, l'autorité de la décision de la Cour peut aller au delà des parties car elle ne découle pas de la chose jugée, mais du fait que la décision démontre la signification et éclaircit une règle coutumière.

Dans ce cas, il peut arriver que, lorsque la Cour décide en accord avec une décision antérieure, elle ne reconnaît pas forcément par là le caractère obligatoire d'une décision analogue ni n'applique la règle du *stare decisis* en droit international. En réalité, la Cour ne fait que juger conformément au droit international. C'est-à-dire, conformément à ce qui est prévu dans l'article 38 de son Statut. Cela signifie que dans certains cas, l'autorité du précédent est pratiquement obligatoire pour les différends à venir, parce que ces décisions sont l'expression des règles de droit international[437].

[434] L'avis consultatif du 8 juillet 1996, *Licéité de la menace ou de l'emploi d'armes nucléaires*, C.I.J. Rec. 1996, p. 237.
[435] Luigi Condorelli, 'L'autorité de la décision des juridictions internationales permanentes', La juridiction internationale permanente, Colloque de Lyon, S.F.D.I., Pédone, Paris, 1987, p. 307.
[436] W.Jenks, 'The Prospects of International Adjudication', Stevens and Sons, Londres, 1964, p. 671.
[437] M. Shahabuddeen, 'Precedent in the World Court', Grotius Publications, Cambridge, 1996, p. 109.

V. L'autorité *de facto erga omnes* d'une décision de la Cour internationale de Justice

La proposition ici est forcement exagéré, mais finalement comment tracer une délimitation d'une frontière bilatéral territorial ou maritime vis à vis des tiers Etats intéressé ? La Cour répond toujours que les incertitudes relatives à un point triple doivent être résolut par la situation distinct qu'occupent les parties et les tiers États dans la procédure juridictionnel. Dans ce cas la Cour reviens fréquemment à sa jurisprudence que dans l'affaire du *Plateau continental* (requête de l'Italie à fin d'intervention), indique que ''quand un Etat estime que, dans un différend, un intérêt d'ordre juridique est pour lui en cause, il peut, selon les termes de l'article 62, soit soumettre une requête à fin d'intervention et réaliser ainsi une économie procédurière de moyens, soit s'abstenir d'intervenir et s'en remettre à l'article 59"[438].

Evidement, comme dit la Cour dans *l'affaire du Burkina Faso et de la République du Mali,* l'intervention n'est pas obligatoire[439]. Ceci étant l'Etat intervenant peut ne devenir pas partie et, par conséquent, il n'acquiert pas les droits et n'est pas soumis aux obligations qui s'attachent à la sentence[440]. Mais finalement, "si la protection des tiers est assurée du fait même de l'article 59, on peut se demander quel effet utile conserve l'intervention"[441]. "Il peut s'agir d'une situation dans laquelle l'article 59 du Statut ne protège les intérêts de l'Etat qu'imparfaitement, eu égard à la nature des droits en cause et des suites possibles de la décision de la Cour. Il y a, en effet, des circonstances où la décision de la Cour pourrait porter un préjudice irréparable à un Etat tiers"[442]. En effet, le caractère déclaratoire des appréciations de la Cour, les conclusions et motifs juridiques sur lesquels une décision serait fondée peut avoir immanquablement une incidence sur les relations ultérieures surtout quand il s'agit d'un point triple terrestre ou maritime[443]. Le doute pèse sur la coexistence entre les articles 59 et 62 du Statut de la Cour. En réalité, si l'article 59 fournit toujours une protection suffisante aux Etats tiers et si la protection qu'il donne est telle qu'elle empêche que l'intérêt de l'Etat tiers soit réellement en cause dans une affaire pendante, alors, l'article 62 n'a plus aucune utilité, ni aucun champ d'application.

[438] C.I.J., Rec.1984, p.26.
[439] C.I.J. Rec. 1986, par.46
[440] C.I.J., Rec. 1990, pp. 134-136.
[441] E. Decaux, 'L'arrêt de la Cour internationale de Justice sur la requête à fin d'intervention dans l'affaire du *Plateau continental* entre la Libye et Malte', A.F.D.I., 1985, p. 282.
[442] C.I.J., Rec. 1984, pp. 46-47.
[443] CR 81/4, p. 10

Le dilemme de la Cour est encore plus sophistiqué lorsqu'il s'agit des situations exceptionnelles ou dans la pratique l'adage *res inter alios acta* ne peut être admis que comme une formulation outrancière ou un corollaire excessif d'un principe général de droit[444]. Il est en droit international, comme en droit interne, des décisions à caractère objectif qui valent pour tous les sujets de droit de la communauté internationale considérée[445]. En effet, bien qu'en règle générale, le droit international ne connaisse pas la distinction entre les décisions *'in personam'* et les décisions *'in rem'*[446], il est certain que les arrêts qui statuent sur la souveraineté territoriale d'un Etat ou sur la délimitation des frontières maritime ou terrestre entre deux Etats et - dans ce cas il ne faut pas tracer les distinctions entre les deux[447], - peuvent faire exception *(de facto)* à la relativité de la décision juridictionnel[448].

La raison est simple. Le statut territorial, se présente dans les rapports internationaux comme une situation objective opposable à tous et ayant un effet "*erga omnes*"[449]. En effet, "parler de droits souverains opposables à une partie seulement ressemble fort, à une contradiction dans les termes"[450]. La réalité, c'est que l'arrêt de la Cour, dans un cas de délimitation, crée directement ou indirectement une situation objective qui se concrétise sur la carte et sur le terrain[451]. En d'autres termes, un arrêt déterminant les limites territoriales d'un Etat ou une ligne frontière dans un plateau continental peut exceptionnellement avoir force obligatoire *(de facto)* pour les Etats tiers qui en raison d'un élément de stabilité et permanence ne pourront contester le tracé judiciaire d'une frontière sans contact avec son territoire[452]. En effet, on voit mal en quoi la détermination par la Cour de La Haye de la frontière terrestre ou maritime entre deux Etats pourrait intéresser les tiers, puisqu'ils n'ont aucun droit propre à faire valoir[453].

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[444] H.Rolin, ' Les principes du droit international public', R.C.A.D.I., vol. 77, 1950, p.437.

[445] G.Scelle, 'Essai sur les sources formelles du droit international', Mélanges Geny, Paris, 1935, p.426.

[446] 'There are two separate and distinct types of judicial decisions; one, the ordinary type which purports to determine the rights, liabilities and interests only of the parties litigant, and the other the kind which, though incidentally affecting the immediate parties, has for its primary object the final determination of the status of person or thing, and which therefore is conclusive upon the world at large. Decisions of the former class are usually termed decisions *in personam*, or *inter partes*, while those of the later are known as decisions *in rem*'. S. Bower and Turner, 'The Doctrine of *Res Judica*ta', Butterworths, Londres, 1969, p.198.

[447] L'affaire entre le Cameroun et le Nigeria (intervention de la Guinée Equatorial). C.I.J. Rec. 2002, par. 238.

[448] C.P.J.I., Série C, n°66, p.2794.

[449] C. de Visscher, 'La chose jugée devant la Cour internationale de la Haye', R.B.D.I., 1965-1, p.9.

[450] R. Jennings, Opinion dissidente dans l'affaire du *Plateau continental*, (requête de l'Italie à fin d'intervention)

[451] Plaidoirie dans l'affaire du *Plateau continental*, C.R. 1984/6, p.62.

[452] C.I.J. Rec. 1978, par. 85.

[453] J. Salmon, 'Autorité des prononcés de la Cour internationale de La Haye', Arguments d'autorité et arguments de raison en droit, Nemesis, Bruxelles, 1988, p.31.

Mais, en considérant que cet intérêt juridique existe, comme c'est bien le cas de la fixation d'un point triple, il faut reconnaitre les limites des dispositions de l'article 59. Finalement, comment peut-on soutenir qu'une délimitation de zones de plateau continental est une opération purement bilatérale dans une région où s'entrecroisent et se superposent les droits d'une pluralité d'Etats riverains et insulaires dans des espaces maritimes étroits![454]

La preuve que dans ces cas l'autorité de la sentence de la Cour peut aller bien au delà des parties peut être trouvée encore dans le changement de la jurisprudence de la Cour. En effet, dans l'affaire de 1986 concernant les frontières terrestres, entre le Burkina Faso et le Mali la Cour a décidé de faire référence à l'article 59 pour dire que le présent jugement ne sera pas opposable au Niger. Cependant ce recours à la sauvegarde proposé par l'article 59 du Statut a été abandonné dans le jugement de 2005 entre le Benin et le Niger. De ce fait la jurisprudence actuel consiste à s'abstenir de définir avec précision le point triple tout en indiquant une direction pour la frontière. En laissant ainsi la localisation précise de ce point triple indéterminé la Cour espère protéger mieux les intérêts des tiers Etats. Les mêmes hésitations peuvent être constatées concernant les délimitations maritimes. Comme remarque la Cour dans plusieurs affaires récents et inclut celui entre le Qatar et le Bahreïn ou entre la Roumanie et l'Ukraine[455].

On peut conclure par la que les délimitations judiciaires des frontières terrestres et maritimes apportent en elles-mêmes un élément inhérent de stabilité et de permanence[456]. L'arrêt peut créer un fait incontestable au niveau politique. L'idée que la souveraineté d'un Etat a un caractère objectif indéniable et que, de ce fait, elle doit pouvoir être opposée non seulement à ses voisins immédiats, mais aussi aux autres membres de la communauté internationale, est la conséquence raisonnable de la reconnaissance qu'un titre de souveraineté territoriale vaut *erga omnes*.

Il faut juste bien garder de ne pas confondre l'autorité *(de facto)* vis-à-vis des Etats tiers et l'autorité de la *res judicata*. Les deux idées sont bien distinctes et la seconde ne découle nullement de la première[457]. Le point essentiel est qu'un arrêt, peut avoir une autorité réelle vis-à-vis de la communauté internationale qui dépasse les limites du consentement, mais, quel que soit son objet, il n'aura pas de caractère définitif à l'égard des tiers.

[454] C.R. 1984/6, p.68.

[455] Affaire du plateau continental (Tunisie / Jamahiriya arabe libyenne), CIJ Rec. 1982, p. 91, Affaire du Plateau continental (Jamahiriya arabe libyenne / Malte), requête à fin d'intervention, CIJ, Rec. 1984, p. 27, Affaire du plateau continental (Jamahiriya arabe libyenne / Malte), CIJ Rec. 1985, p. 26-28; Affaire de la Frontière terrestre et maritime entre le Cameroun et le Nigéria (Guinée équatoriale intervenant), CIJ Rec. 2002, par. 238, 245.

[456] C.I.J.Rec.1978, p.36.

[457] E. Grisel, '*Res judicata*: l'autorité de la chose jugée en droit international', Mélanges Georges Perrin, Payot, Lausanne, 1984, pp.156-157.

En fait, l'élargissement du champ d'application de la chose jugée impliquerait qu'aucun Etat, qu'il soit partie à l'instance ou tiers, ne pourra plus jamais discuter à nouveau le cas déjà décidé. Cette conclusion n'est pas acceptable. En effet, comment admettre qu'en droit international le jugement rendu sur un point déterminé pourra s'imposer à tous les tiers au procès et que, dans ce cas, lorsqu'un tiers, à l'occasion d'un litige, souhaite remettre en cause la chose précédemment jugée en son absence se heurtera à une exception de la chose jugée ?

La conclusion est que l'autorité de la décision de la Cour ne se confond pas avec l'exception de *la res judicata*. Il ne s'agit pas de contester la nature définitive de la décision vis-à-vis des parties, mais de démontrer que l'idée selon laquelle le consentement est le seule fondement de l'autorité de la sentence - peut être brisé par une autorité *de facto* qui peut aller au delà de la volonté manifesté par les Etats.

Merci beaucoup.

Formato	15,5 x 22,5 cm
Mancha gráfica	12 x 18,3cm
Papel	pólen soft 80g (miolo), cartão supremo 250g (capa)
Fontes	Verdana 13/17 (títulos), Book Antiqua 10,5/13 (textos)