

International Law FORUM du droit international

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Aims and Scope

The International Law FORUM covers all aspects of public and private international law with an unmatched interdisciplinary approach. Its authors include both distinguished practitioners and scholars as well as fresh, new voices in international law. The objective editorial policy allows readers to form their own opinions based on the balanced coverage and diversity of news presented.

Each issue contains: *Editorial*, *In the News*, *Recurring Themes*, a *Profile*, *Work in Progress*, *Conference Scene*, and the *Bookshelf* of a distinguished guest. Pocket-sized and affordably priced, the FORUM provides an accessible way for academics and practitioners to stay current in the field.

Thought-provoking and controversial, it is also up-to-date and truly international.

* * *

La revue FORUM du droit international privilégie une approche inter-disciplinaire sans précédent pour couvrir tous les aspects du droit international public et privé. Parmi les auteurs qui y contribuent figurent d'éminents praticiens, professeurs et chercheurs ainsi que de nouveaux auteurs en droit international. La politique objective de la rédaction permet aux lecteurs de se forger leur propre opinion basée sur la diversité des informations présentées couvrant de manière équilibrée l'actualité.

Chaque numéro comporte les rubriques suivantes: *Editorial*, *Actualité*, *Thèmes récurrents*, *Profil*, *Travaux en cours*, *Le tour des conférences* et *La bibliothèque* d'un éminent invité. De petite taille et pour un prix raisonnable, FORUM constitue un outil accessible pour les universitaires et les praticiens qui souhaitent suivre l'actualité du droit international.

C'est une revue à jour et réellement internationale qui pousse à la réflexion et à la discussion.

International Law FORUM du droit international

Volume 3, 2001



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*The opinions expressed herein are those of the authors and
do not necessarily reflect the views of the
International Law Association.*

Editorial

Volume 3, No. 1

Ce n'est pas le fruit du hasard si ce premier numéro du millénaire est principalement consacré au thème de la relation entre le droit international et le droit interne.

A l'heure où le droit interne est de plus en plus investi par le droit international, il nous a paru urgent de nous interroger sur le sens de cette relation. La mise en œuvre du droit international, cependant, continue d'être entravée par la sacrosainte souveraineté nationale. Les réactions d'hostilité du Sénat américain suite à la signature par le Président Clinton du Traité de Rome sur la Cour Pénale Internationale hypothèquent sérieusement toutes chances de ratification. De même, les déclarations du Président de la Yougoslavie au sujet de la primauté du Tribunal international pour l'ex-Yougoslavie laissent à penser que le procès de Milosevic à La Haye reste encore incertain.

FORUM revient également sur le thème récurrent des aspects de la justice interne et transnationale. L'échange entre Rakate et Meintjes / Mendes nous enseigne que le débat à ce sujet est loin d'être clos. De même, nous espérons que l'article sur "Une Commission de réconciliation de vérité pour la Bosnie Herzégovine" suscitera vos réactions.

Comme à l'accoutumée, le choix pour la rubrique *Actualité* a été difficile tant ces dernières semaines ont été marquées par des événements tels que la signature du Traité européen de Nice, les rebondissements de l'affaire Pinochet ou encore le rapport onusien sur les « conflict diamonds ».

Mais c'est finalement l'échec de la conférence sur les changements climatiques qui a retenu notre attention, peut-être parce qu'il reflète cruellement la domination des intérêts mercantiles de court terme au détriment d'un environnement viable pour les générations futures.

Le profil de Gabrielle Marceau nous montre, malgré tout, qu'il ne faut pas désespérer de la nature humaine. Les promoteurs du droit international oeuvrent souvent dans l'anonymat. A travers le portrait attachant de Gabrielle, FORUM rend hommage à tous ceux qui dans l'ombre d'une faculté, d'une organisation ou une juridiction internationale ou sur le terrain des conflits armés sont mus par un idéal commun de paix et de progrès.

Enfin, chers lecteurs, pensez à dépoussiérer votre bibliothèque pour nous faire partager les émotions que votre livre préféré vous a procurées.

In the News / Actualité

Climate Change – CoP-6: To be continued

JOYEETA GUPTA*

It is ten years since the international negotiating committee on the Framework Convention on Climate Change began negotiating a treaty to deal with the climate change problem. Ten years later, the negotiations have run into a deadlock at the sixth meeting of the Conference of the Parties at the Hague in November 2000.

The Climate Change Convention had set up a framework within which the international community was expected to work towards achieving the long-term goal of stabilising the concentrations of greenhouse gases in the atmosphere. It entered into force in 1994. At the third meeting of the Conference of the Parties in 1997, the Kyoto Protocol, which included quantitative greenhouse gas emission reduction targets for the developed countries and economic mechanisms to allow the developed countries to reduce their emissions where it is cheapest, was adopted. This Protocol can only enter into effect when at least 55 countries emitting at least 55% of the emissions of the developed countries (Annex I) ratify the protocol. At present only developing countries have ratified the Protocol and although the European Union believes that it is vital that the Protocol enter into effect in 2002 if it is to be effective, it is politically unlikely that the EU will ratify without the United States, Japan and Russia. Ratification for many of these countries also depends on the rules and modalities for the operation of the economic mechanisms and the potential for using 'sinks' in achieving national commitments and within the mechanisms. These were among the critical issues on the agenda, laid out in the Buenos Aires Plan of Action of 1998, for the sixth meeting of the Parties that was held in the second and third weeks of November. The uncertainty regarding the future president of the US, however, hung as a heavy cloud over the negotiations.

The issues for discussion were extremely complicated. Clearly for the developed countries ratification of the Protocol implies strong measures to reduce their emissions of greenhouse gases. Since this is expensive, the rules and modalities for reducing emissions and the compliance mechanisms are critical issues. When the negotiators met at the start of the meeting, they were to go through some 200 pages of complicated consolidated negotiating text. During the first week there

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was no agreement on any of the critical issues and the subsidiary bodies were unable to provide clear draft decisions for the second week of the meeting. Towards the end of the meeting, the president of the Meeting, Minister Pronk of the Netherlands, introduced a revised compact compromise text consisting of four sets of issues: (a) capacity building, technology transfer, adverse effects and guidance to the Global Environment Facility, (b) the economic mechanisms, (c) land use, land use change and forestry and (d) compliance and other issues. Despite the use of a number of procedural innovations such as 'informal informals', informal plenaries, continuous extensions beyond the closing time of the negotiations, and midnight plenaries, it was finally announced that no agreement could be reached and the meeting was suspended till May 2001 and will be continued during the next session of the subsidiary bodies.

The negotiations essentially broke down in relation to three areas – the use of sinks in achieving compliance and as part of the clean development mechanism, the question of how much of the emission reduction should be achieved domestically (supplementarity), and on how compliance is to be defined. The breakdown of the negotiations was primarily seen as a failure to achieve a compromise between the Europeans and the Americans (and other members of the so-called umbrella group) on these key issues, with the Europeans reluctant to include sinks, and to weaken their definition of supplementarity. The British government tried to broker a deal with the US, but France, the Chair of the EU, was unwilling to compromise the environmental integrity of the agreement. There is much criticism about the inability of Europe to concede to the US demands. A bad deal is seen by many as better than none. On the other hand, this can be seen as setting a precedent when countries are willing to do anything to get the US on board.

Having said that, it may be naïve to assume that the developing countries would have accepted any deal that was brokered between the EU and the US. They were not very happy that the agenda was adopted without including the agenda item on the adequacy of the implementation of Article 4.2a and b of the Climate Convention on stabilising emissions at 1990 levels by the year 2000. They were also discontented by the lack of commitment of the developed countries to actually ratify the Kyoto Protocol, to make resources available to prepare the developing country national communications, and the lack of funding for adaptation and technology transfer. In President Pronk's note, he proposed an Adaptation Fund under the GEF, a Convention Fund and a Climate Resources Committee. However although there were long discussions on this issue, no consensus was reached. There were also no decisions taken in relation to capacity building and no agreement was reached on how to facilitate technology transfer. Within the group of the developing countries there is growing division between those who still wish to see equity in the regime

embodied in technology transfer, capacity building and financial assistance along with substantial emission reduction in the North, and those who pragmatically want to optimise the opportunities for receiving assistance by allowing all types of projects to be eligible for the clean development mechanism. There is also the group of oil exporting countries who demand compensation for the adverse effects on their economy as a result of reduced oil exports.

It is inevitable that the complexities of the issue and the hardening positions of individual countries should occasionally lead to deadlock; this is not in itself a major problem. However, the question remains how far should countries be willing to go in search of compromise in dealing with the problem of climate change? A further question is: what is the alternative approach for dealing with the problem of recalcitrant countries in the climate change negotiations?

International Court of Justice

Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)

In its Order of 8 December 2000, the Court unanimously rejected Belgium's request that the case be removed from the List, and found by fifteen votes to two that the circumstances were not such as to require the exercise of its power to indicate the provisional measures requested by the Democratic Republic of the Congo. The merits of the dispute concern an international arrest warrant issued on 11 April 2000 by a Belgian investigating judge against Mr. Yerodia Abdoulaye Ndombasi, then Minister for Foreign Affairs of the Democratic Republic of the Congo, seeking his provisional detention pending a request for extradition to Belgium for "serious violations of international humanitarian law". In its request for the indication of provisional measures, the Democratic Republic of the Congo had asked the Court to order the immediate discharge of this arrest warrant, the practical effect of which was to make it impossible for the Minister for Foreign Affairs to leave the Democratic Republic of the Congo in order to perform his official duties.

In the course of the hearings, it was made known that, subsequent to the filing of the Congo's application and request for the indication of a provisional measure, Mr. Yerodia Ndombasi had ceased to exercise the functions of Minister for Foreign Affairs and had been charged with those of Minister of Education. The Court rejected Belgium's argument that, as a result of this change, the Congo's Application on the merits had been deprived of its object and should therefore be removed from the List. The Court observed that the arrest warrant issued against Mr. Yerodia Ndombasi had not yet been withdrawn and still related to the same individual, notwithstanding his new ministerial duties. According to the Court, the request for the indication of provisional measures also continued to have an object, since the arrest warrant continued to be in the name of Mr. Yerodia Ndombasi, who the Congo contended enjoyed immunities that rendered the arrest warrant unlawful.

However, recalling that the power of the Court to indicate provisional measures "has as its object to preserve the respective rights of the parties pending the decision of the Court", that it "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute" and that "such measures are justified solely if there is urgency", the Court noted that Mr. Yerodia Ndombasi's current function Minister of Education involved less frequent foreign travel. It concluded that "it has accordingly not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency

is such that those rights need to be protected by the indication of provisional measures”.

The Court also rejected Belgium’s objections to the Court’s jurisdiction, which were based on the Congo’s allegedly late invocation of the parties’ declarations of acceptance of the Court’s compulsory jurisdiction, and on the ongoing high-level negotiations between the two Governments, which according to Belgium fell within the exclusion in its declaration with respect to situations or facts “in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement”, and that negotiations at the highest level regarding the arrest warrant were in fact in progress when the Congo seised the Court. The Court noted that Belgium had not provided the Court with any further details of those negotiations, or of the consequences which it considered they would have in regard to the Court’s jurisdiction, in particular its jurisdiction to indicate provisional measures, and concluded that the declarations made by the Parties constituted a *prima facie* basis on which its jurisdiction could be founded in this case.

Amendments to Rules of Court

On 12 January 2001, the Court announced the amendment of two Articles of its Rules, in order to shorten the duration of certain incidental proceedings. The amendments to Article 79 (relating to preliminary objections) and Article 80 (relating to counter-claims) aim to shorten the duration of these proceedings, to clarify the rules in force, and to adapt them to reflect more closely the practice developed by the Court. They will come into force on 1 February 2001. The Rules adopted on 14 April 1978 will continue to apply to all cases submitted to the Court prior to 1 February 2001, and to all phases of those cases.

The Court has also modified its Note containing recommendations to the parties (given to the representatives of parties to new cases at their first meeting with the Registrar), in order to further expedite proceedings on preliminary objections.

Recurring Themes / Thèmes récurrents

Introduction Theme I: The relationship between international law and national law

ANDRÉ NOLLKAEMPER* & ELLEN HEY

In a world where it is becoming increasingly difficult to distinguish between what is national and what is international, the relationship between international law and national law merits revisiting. The topic is one of the traditional subjects of international legal discourse, a status reflected in the fact that it is the standard subject of one of the first chapters of any text book on public international law.

Text book treatment of the topic has changed little over the years, suggesting a serene continuity. Standard treatment focuses on the theoretical foundations of monism and dualism and the limited power of these two concepts in explaining practice. Thereafter, a pragmatic and anti-theoretical approach dominates.

Yet, for all its 'text book continuity', the topic is one of change as international and national law are increasingly becoming more intimately related. Partly because of the topics that they cover, but partly also because of the recognition that the key to their effectiveness is in the national sphere, treaties rely heavily on national law for their implementation. National judicial decisions also indicate an intensification in the relationship between international and national law. There is much evidence that international law and national law, as with international and national aspects of life, are increasingly becoming more entangled.

The development outlined above raises a number of questions. Is the apparent entanglement of international and national law a development in quantitative terms only – reflecting the fact that there is simply more international law and that there thus are also more contacts between international law and national law – or are we also witnessing a qualitative change in the relationship between international law and national law? Is any change, either qualitative or quantitative, truly international, or is it confined to a limited number of western states? And, to the extent that there is a change in quality, is it desirable? A further relevant question in this context is, for instance, whether international law, given current decision making procedures at the international level, has sufficient legitimacy to control the content of national law and the substance of national judicial decisions. More theoretical questions also emerge. Is the traditional treatment of the topic still valid for an understanding

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of the actual relationship between international law and national law? And if not, what new theoretical conceptions may enlighten our understanding? Finally, instrumental questions arise. Assuming that it is desirable that international law increasingly rely on national law for its implementation, should steps be taken to increase the ability of national legal systems to digest international law and thereby the effectiveness of international law? And, if such steps are found to be desirable, should they be taken in the sphere of constitutional law, law-making, in the courts or within various spheres at the same time?

The above sets out only a few of the very many questions that arise in revisiting the relationship between international law and national law. However, as is so often the case, it is much easier to pose the questions than to produce the answers. We left the latter difficult task to the four contributors to the present 'recurrent themes' column. We asked each of the experts to share with us their views on the relationship between international and national law, in general, and to highlight problematic aspects of this relationship, in particular. One point that definitely emerges from the contributions is that the serene continuity, suggested in standard public international law text books, merits revision. The object of such a revision should above all be to reflect the dynamic character of the topic.

A fundamental perspective on the evolution of the relationship between international law and national law is taken by Phillip Allott. Continuing a line set forth in his previous writings on the topic, Allott criticizes the long dominant idea that there are two separate 'mind-worlds', the highly socialized and regulated national sphere and the primitive international sphere. He finds that the beginning of this century provides evidence of a fundamental end to this separation of mind-worlds: we are witnessing an evaporation of the national-international frontier and a de-nationalizing of the national legal systems. The emerging body of law constitutes international constitutional law, a fundamental new development. In the wake of this finding, Allot emphasizes, further questions arise – most significantly questions of legitimacy and accountability: given the de-nationalizing of national legal systems, how can the people keep or attain control over developments in the international public realm that will affect them directly?

Benedetto Conforti takes a no less fundamental approach. Departing from the assumption that international law relies primarily for its effectiveness on implementation by national organs, he presents the view that international law and national law should be treated on the same footing in the national legal order. This, he argues, is essential if the progress made during the last fifty years in developing the content of international law is to be mirrored by progress in the implementation of international law. Conforti subsequently analyses to what extent national organs are persuaded, and should be persuaded, to ensure that international

law is complied with within the national legal order.

More instrumental aspects are covered in the contribution by Gilbert Guillaume. He reviews the work of the International Law Association (ILA) on the role of international law in the practice of national courts. The ILA considered how national courts find and apply rules of international law in domestic proceedings and offered a number of suggestions on how the implementation of international law by national courts might be enhanced. These suggestions included giving a more prominent place to international law in the law school curriculum.

A slightly different focus is taken by Laura Picchio Forlati, who examines the role of cultural values in private international law. Her contribution illustrates how the international harmonization of private law, and thus the increased entanglement between the national and international, may diminish the role accorded to cultural divergence, often enshrined in national law. It is in this respect that there may be lessons to be learned from private international law when public international lawyers engage in efforts to revisit the relationship between public international law and national law. The questions regarding legitimacy and accountability, raised by Allot, are of paramount importance in this context.

While the contributions recognize that in practice international law and national law have become more entangled, and acknowledge that international law relies for its effectiveness on national legal systems, one broad question remains unanswered: where do we go from here, or put otherwise, how to progress?

Two dimensions to this all important but difficult question need to be distinguished.

First there is the more theoretical dimension. Given that national law is so internationalized, should anything be changed in the procedures for the making of international law? Should international law be subjected to comparable procedures of law-making to those which now govern national law? Should we develop more safety valves that allow states to protect their own (cultural) values? Or should we change our understanding of the legitimacy of the law and develop new methods of law-making?

Second, there is a more instrumental dimension. If it is true that international law relies for its effective implementation on national organs, and at the same time we witness, as Conforti illustrates, a gap between the normative requirements of international law and the actions of national organs, what is to be done to close that gap? Should we rely on the evolution that brought us to where we are now? Or is there a case for a true legal project, for instance in the Institut de Droit International, the ILA or the International Law Commission to enhance the position of international law in the national legal order? And if so, what should be the content and the envisaged end-result of such a project?

The Emerging Universal Legal System

PHILIP ALLOTT*

It is remarkable that the human species has managed to survive for almost 250 years in the grip of the bizarre Vattelien worldview.¹ In the 20th century, the crazy idea that the human race might not survive was treated as a suitable topic for rational discussion and rational decision-making. People who are otherwise sane and sensible could talk about Mutual Assured Destruction and the End of Civilisation. People who are otherwise sane and sensible could make and manage total war, wars with no necessary geographical limit, no effective limit to the methods of death and destruction, no limit to the suffering to be endured by powerless and blameless human beings. In the 20th century, people who are otherwise decent and caring could regard it as regrettable, but natural, that countless millions of human beings should live in conditions of life which are a permanent insult to their humanity, or in chaotic societies dignified by the name of 'state', or in subjection to criminal conspiracies dignified by the name of 'government'.

The fact that, for so long, such madness has been mistaken for sanity is a tribute to the power of simple ideas, and to the power of those who have power over public consciousness. The simple ideas in question – the Vattelien international system – seem infantile by comparison with the complexity and subtlety of the ideas that we have developed to explain and to guide our national systems. But, for those who have power over the national systems, the very simplicity of the international system has been its special charm. It has allowed them to escape from the tiresome burdens of their national political systems into the rarefied upper-atmosphere of 'foreign policy' and 'diplomacy', into a prelapsarian world in which there has been no French Revolution, not even an American Revolution, a world in which 'states' represented by 'governments'² co-exist in a state of nature which is Lockean when things are going well, and Hobbesian from time to time, when things get out of control or when there is no other way to sort things out.

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¹ E. de Vattel's *Le droit des gens, ou, Principes de la loi naturelle: appliqués à la conduite et aux affaires des nations et des souverains* was published in 1758.

² In the Vattelien mind-world a 'state' is simply a society whose public realm is under the control of a 'government' and which is recognised as a state by other governments. But the semantic confusion in Vattel between 'state' and 'nation' proved to be of great significance when, in the 19th century, it became possible to cause ordinary citizens to confuse their allegiance to their genetic nation with their obligations to the systematic state, a state-system which might require them to die by the million.

In John Locke's benign pre-society, human beings are in 'a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the will of any other man.'³ In the non-benign unsociety of Thomas Hobbes, 'during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man'.⁴

For Hobbes, the myth of the state of nature was, in one sphere at least, not a myth but a fact. 'But though there had never been any time, wherein particular men were in a condition of war one against another; yet, in all times, kings and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators.'⁵ And Locke had a simple answer to what he calls the 'mighty' objection that there never have been men in a state of nature: '[S]ince all princes and rulers of independent governments all through the world are in a state of nature, it is plain the world never was, nor ever will be, without numbers of men in that state.'⁶

It was Vattel who made the myth of the state of nature into the metaphysics of the law of nations. 'Since Nations are composed of men who are by nature free and independent, and who before the establishment of civil society lived together in the state of nature, such Nations or sovereign States must be regarded as so many free persons living together in the state of nature.'⁷ And the reified abstractions inhabiting the international state of nature are not fictions. They are persons. 'Such a society has its own affairs and interests; it deliberates and takes resolutions in common, and is thus become a moral person having understanding, and a will peculiar to itself, and susceptible at once of obligations and of rights.'⁸

These pseudo-persons have what Vattelians call 'international relations', pseudo-psychic conditions of amity and enmity, as petulant and whimsical as the personal relations of medieval monarchs or oriental potentates. They play 'the great game' of diplomacy, as they call it, a game whose arcane contests must sometimes be

³ J. Locke, *Two Treatises of Government* (1690) (ed., P. Laslett; Cambridge, Cambridge University Press; 1960), II. §4, p.309 (spelling and punctuation modernised).

⁴ T. Hobbes, *Leviathan* (1651) (London, J.M. Dent & Sons (Everyman's Library); 1914), ch. 13, p. 64 (spelling and punctuation modernised).

⁵ Hobbes, *op. cit.*, p. 65.

⁶ Locke, *op. cit.*, II. §14, p. 317.

⁷ Vattel, *The Law of Nations, or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and Sovereigns* (tr., C.G. Fenwick; Washington, Carnegie Institution; 1916), p. 3.

⁸ At p. 1.

decided by what they call 'the ultimate reason of kings', that is to say, armed force. The only 'law' they recognise is a form of self-regulation, providing minimum conditions of co-existence among neighbouring landowners, the rules of the game.

The peculiar consequence of these strange ideas is that the human species lives in two separate mind-worlds, two forms of human reality, one societal and one pre-societal, one highly socialised and one barely socialised, one primitive and one sophisticated. We live with two conceptions of justice, two conceptions of social justice, two conceptions of morality, two conceptions of law, two conceptions of public order and of public administration, and two conceptions of social organisation, one internal and the other external.

It has been the task of diplomats and international lawyers to do what they can to construct bridges between these two mind-worlds, reconciling the internal and the external. They have sought inspiration in a ragbag of high-voltage ideas designed to redress the ideological poverty of the Vattelian worldview: cultural hegemonism (why cannot foreigners be more like us?); Gladstonian liberal internationalism (foreigners are human beings, after all); naïve constitutional extrapolationism (institutions which are effective nationally can surely be effective internationally); utilitarian risk-assessment (those with the most to lose from international lawlessness have the most to gain from international order); enlightened economic self-interest (we will probably profit, perhaps disproportionately, from maximising the general wealth of nations); and semiotic pragmatism (talk about international law or international morality is a good thing if it causes other people to modify their behaviour in useful ways).

* * *

Over the course of two exceptionally eventful centuries, the international state of nature became a wilderness of ever-increasing unreality and endless danger. At the beginning of the 21st century, at long last, two centuries late, there is reason to think that we are witnessing the first stages of a great metamorphosis of the international system, a change in the metaphysical groundwork of international law, a beginning of the end of the Vattelian worldview. We are witnessing the emergence of a universal legal system.

The transformation involves a tectonic shift in the relationship of the 'law' phenomenon at three levels: the national legal systems; the (transnational) co-existence of the national legal systems; and the international (universal) legal system. It forms part of a much wider, more general re-forming of the relationship between the national and the international, the internal and the external. The notional national-international frontier is evaporating. Social reality is now flooding in both

directions across that frontier, including economic transactions and consciousness transactions (religious, cultural, political). Internal social reality in most countries is now being substantially determined by external social reality. The word 'globalisation' does not adequately reflect the two-way character of the process. The word 'interdependence' does not adequately reflect its intensely dynamic character.

A major component of the two-way free-flow of social reality consists of legal phenomena. A striking effect of the triumphalist expansion of democracy-capitalism in the 1990's, after the end of the Cold War, is that national legal systems have become a matter of international concern. International human rights law had already sought to universalise concern about the performance of national legal systems, but the expansion of democracy-capitalism has transformed that concern into a strictly practical matter. We had hardly noticed, or we had forgotten, that advanced capitalism, whatever its rhetoric of 'freedom' and its naturalistic self-understanding, is a wholly artificial form of social system, requiring vast volumes of law and public administration. Advanced capitalism involves a structural transformation of society, including a transformation of the national legal system and the adoption of new legal institutions, systems, principles, rules, and procedures of every kind.

Legal systems and legal services have become commodities in international trade, as legal experience is transferred from one country to another. It is now possible to get an economic advantage in international trade by ensuring that your trading-partner's legal system is more like your legal system than like those of your competitors. An investor's risk assessment necessarily includes an assessment of the adequacy of the legal system where the investment is to be made.

Liberal democracy is also an artificial form of social system or, rather, set of forms, since there are so many different kinds of democracy. Its social transformation includes the adoption of complex public law and intricate political and administrative systems, together with all the other subtle supporting systems of an 'open society'. In the 1990's we witnessed energetic international efforts to cause democratic social transformation in one national society after another, a genuinely well-intentioned international liberation movement, but one which might also help to make the world safe for capitalism, since a properly-functioning democratic system is a wonderfully efficient way to provide the law and administration required by capitalism.

Transnational transactions of every kind, including economic and cultural transactions, involve the interaction of national legal systems, including the rules of those systems determining the law applicable to transnational transactions. International society now contains an infinitely complex network of overlapping

national-law legal relations, in which the internal and the external are inextricably confused. The internationalising of social transactions is an internationalising of the national legal systems which make them legally possible.

We are also seeing an internationalising of national constitutional systems in the formation of a vast international public realm, as the national executive branches of government come together to regulate collectively every area in which the function of government extends beyond national frontiers and where the activities of governments overlap. The acceleration and intensification of international inter-government, as we may call it, means that there are now, in effect, two forms of international law. Old international law is the modest self-limiting of the potentially conflictual behaviour of governments in relation to each other, as they recognise the emergence of new 'states', settle the limits of each other's land and sea territory and the limits of their respective national legal systems, resolve disputes and disagreements which may arise in their everyday 'relations'. New international law is universal legislation.

New international law is made in countless international forums, implemented through countless international agencies, interpreted and applied by countless new international courts and tribunals. And new international law is re-enacted by national legislatures, implemented by national executive branches of government, enforced in national courts. We are now beginning to see that old international law was essentially a rudimentary international constitutional law, providing the fundamental structures of a primitive form of international society.

The dramatic development of the international public realm and the denationalising of the national legal systems together raise, in an exceptionally acute form, the age-old problem of constitutionalism. How can we, the people, take power over the power of the social systems which govern us? How can we make government politically and legally accountable for what it does on our behalf? How can we achieve this at the level of international society, the society of all societies? The problem of international constitutionalism is the central challenge faced by international philosophers in the 21st century. It involves a fundamental re-conceiving of international society. The first and most important step in meeting the challenge of international constitutionalism is to re-make our international legal worldview, to begin to articulate the eventual structure of a universal legal system, the legal system of all legal systems.

- *International constitutional law* – the principles of the international constitution, fundamental rights, international legal persons, international law-making processes, the relationship between international law and national law, the relationship between national legal systems.
- *International public law* – the powers of international legal persons, the

powers of international institutions, international public order law (international security).

- *International administrative law* – controlling the exercise of powers delegated by international law.
- *International economic law* – (*inter alia*) international commercial law, international environmental law, international intellectual property law, international competition law, international securities law.
- *International transnational law* – international private international law.
- *International criminal law* – national jurisdiction over foreign offences, extradition, international criminal prevention and detection systems, jurisdiction over offences under international law.

International social reality has overtaken international social philosophy. The Vattelian mind-world is withering away under the impact of the new international social reality. The reconstruction of the metaphysical basis of international law is now well advanced. The deconstruction of the false consciousness of politicians, public officials, and international lawyers is only just beginning.

Notes on the Relationship between International Law and National Law

BENEDETTO CONFORTI*

1. – In all my contributions on the integration of public international law into the domestic legal orders I have always argued that international rules – i.e. rules created by custom, by treaties and by binding resolutions of international organisations – should be treated on the same footing as unilateral municipal law. It is not a question of adopting a *monistic* rather than a *dualistic* approach. This is a theoretical question with no practical implications, which can be left in the hands of philosophers. It is rather a question of a change in the mentality of people involved in legal affairs, especially legislators, public administrators and judges. It is a question of persuading this people to use all means and mechanisms provided by municipal law, and to perfect them, in order to ensure compliance with international rules.

International law has dramatically progressed in the last fifty years as far as its *content* is concerned. It has increasingly embodied values of human solidarity and justice. Suffice it to recall the great customary principles which have grown up, such as the principle on the prohibition of the use of force or the principle of the protection of the human dignity. The same can be said of the treaty law, the conventions on human rights being the most, but not the only, important example in this field. On the contrary, international means and procedures for the application and coercive enforcement of such a spectacular set of rules are still very poor and almost non-existent. And this is exactly the reason why, in my opinion, we have to rely – I am tempted to say “exclusively” – on the means of implementation offered by domestic legal orders. Only actions undertaken by states, within their legal orders, can ensure compliance with, and avoid violations of, international law. The awareness of the necessity of such actions by legislators, public administrators and judges, is thus indispensable, and, for the same reason, the subject of the relationship between international law and municipal law is to be considered as the key chapter of every handbook on public international law.

2. – How must a legislator behave in order to prevent violations on the part of its state ?

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Legislators should be led by a principle which may be called the *principle of the external and internal harmony*: they should act in such a way to ensure a perfect harmony between the external and internal action of the state.

This principle is of the outmost importance as far as treaties are concerned. It implies, first of all, that the decisions on the ratification of treaties and their implementation within the internal legal order should be taken at the same time. No matter what means is used. It may be that the simple publication of the treaty in the official journal of the state is sufficient, like in France. From a practical point of view, no different result is achieved where the same legislative act both authorises the ratification and orders that the treaty must be complied with, like in Italy. It is also conceivable that ratification and internal implementation are in the hands of different organs, i.e. that the legislator does not intervene in the process of ratification, not even in order to authorise or formally agree upon the ratification which is decided by the executive, like it happens in the United Kingdom. What is necessary is the adoption of the internal measures of implementation as soon as the ratification has taken place. The fate of the European Convention of Human Rights in the United Kingdom is one of the most striking and negative examples on the subject: the Convention was ratified by this state in 1951 and has been implemented only in 1998 with the Human Rights Act. Moreover, several parts of the Act entered into force only on 31 October 2000.

The principle of external and internal harmony entails also the necessity that the implementation be complete. The legislator must take, or must allow the executive to take, all the measures which are needed in order to integrate the content of the treaty. As it is well known, there are rules in the treaties (the non self-executing rules) which cannot be applied within the domestic legal order, since they necessarily demand additional measures, like, among others, the creation of special organs or procedures. For example, article 14 of the United Nations International Covenant on Civil and Political Rights provides for the right of individuals to appeal to a higher court in criminal matters: it is clear that a person, who has been convicted of a crime, cannot exercise such a right if an higher court is lacking. This is exactly the reason why article 14 has been found inapplicable in the Netherlands and in Italy¹. The same can be said of the principle embodied in Article 6, par. 1, of the European Convention of Human Rights, according to which every person has the right to be judged “within a reasonable time”: when the unreasonable delays on the proceedings are not imputable to the judges’ negligence but to the lack of adequate

¹ See Netherlands Supreme Court, 14 April 1981, *Netherlands Yearbook of Int. Law*, 1982, p. 367, n. 150; Italian Constitutional Court, 6 February 1979, *Italian Yearbook. of Int. Law*, 1978-79, vol. 4, p. 186 ff.

means provided for the administration of the justice, the principle of reasonable length of procedures cannot be applied in the absence of an adequate intervention by the legislator. In all these and similar case, a timely intervention of the legislator is needed.

From the point of view of the completeness of the implementation of treaties a very good example is represented by the already cited English Human Right Act of 1998 in respect of the European Convention of Human Rights.

2.1. – Needless to say, the principle I am speaking of should be applied by the legislators with reference to treaties which entail modifications to the domestic legislation. By contrast, there are treaties which entirely fall in the realm of the executive, as regards both external and internal actions. When this is the case, i.e. when the Government is entitled to conclude a treaty and only administrative regulations are needed for its implementation, the external and internal harmony must be ensured by the executive.

2.2. – *Mutatis mutandis*, the preceding remarks apply to customary international law and to the binding resolutions of international organisations. Here, the principle of external and internal harmony is of a special importance as regards the internal measures of integration. Particularly in countries where customary international rules are unable to modify existing legislation, the legislator should promptly intervene in order to avoid inconsistencies within the domestic legal order. It is inconceivable, for instance, that a foreign Head of State or a member of a foreign Government be immune from prosecution for torture – one of the most serious customary international law crimes – due to the existence of domestic legislation granting immunity. On the other hand, in cases in which a crime is prohibited solely by customary international law, it may be necessary that the legislator intervene in order to establish the corresponding punishment as requested by the principle *nulla poena sine lege*. The same can be said with regard to some resolutions of international organisations, which also create particular types of crimes. For instance, the question has been addressed in Italy whether the decisions of the UN Security Council imposing the blockade of, and the halting of foreign vessels directed to, the coast of Yugoslavia, were to be enforced without knowing what kind of punishment was applicable².

3. – Let me turn now to the state officials, i.e. public administrators and judges, and let me address the question of how they can ensure compliance with, and avoid violations of, international law.

I think that nowadays state officials cannot be said to be unaware of the true

² See Italian Court of Cassation, 8 July 1994, *Rivista di diritto internazionale privato e processuale*, 1995, p. 760 ff.

legal nature of international law. The old opinion that international rules had only states as their addressees, that only diplomats were to deal with them, and that international law was a subject to be studied in the Faculties of Political Science rather than in Law Faculties, is completely abandoned more or less in all countries. In fact, nobody can state such an opinion any more, since international law pervades all aspects of the internal life of states. Unfortunately, not all consequences are inferred from this premise. To a large extent international law is still considered as a kind of exotic law to be dealt with by specialised people. The abuse of the notion of non self-executing international rules still remains, in our opinion, the main obstacle to a full and correct application of international rules, especially treaties.

When state officials do not want to apply an international rule, they say that the rule is non self-executing; they say in particular that the rule, especially owing to its vague content or incompleteness, is only a simple, although binding, directive addressed to the legislator and nobody else within the state. Different reasons can be found behind this attitude, such as the fact that the official considers the rule to be contrary to the national interest, or entrenching too progressive values, or simply “undesirable” because of its “foreign” origin and the difficulties related to its interpretation. In all these cases the technical *escamotage* is always to say that the rule is non-self executing. This appears to be nothing but an *escamotage* if we consider what happens in some countries where the same rule is initially considered to be a simple binding directive to the legislator, and subsequently, by a change in the case-law without any change in statute law, a full self-executing rule. The practice of the French *Conseil d'Etat* is very enlightening in this respect, although it is not unique.

I don't intend to deny that there are non self executing rules, which consequently need to be integrated by the legislator, as I have already noted. What I want to say is that the notion must be restricted to rules which are actually not *per se* applicable. Before concluding that a rule is non self-executing, every effort must be done by the interpreter in order to give sense and effect to the rule. Even with regard to international rules which seem to demand the creation of special organs or procedures one must ask whether it is possible to resort to existing organs and procedures by way of analogy. A couple of examples can make my statement understandable .

The first example can be taken from Italian case-law. It is offered by a decision of the Italian Court of Cassation³, dealing with the question of the applicability of Article 5, 1(f), and 4, of the European Convention of Human Rights, on the judicial review of the lawfulness of the detention pending expulsion from the

³ 8 May 1989, *Rivista di diritto internazionale*, 1990, p. 1038 ff.

territory. In previous decisions the Court had always held that it was impossible to apply this rule in Italy due to the lack of a remedy against the warrant of arrest in extradition cases. The peculiarity of extradition cases is that the warrant is not issued by the judiciary but by the Government and the Italian law expressly states that no remedy is admitted against administrative warrants. The decision notes at the outset that, according to Article 112 of the Constitution and Article 190 of the Penal code, the warrants of arrest, when issued by the judiciary, may always be appealed before the Court of Cassation; and then the decision goes on by saying that these two rules can be applied by analogy in order to comply with the obligation laid down by article 5, 1(f) and 4.

As a second example, the case *S.M.H. v. Netherlands* decided by the Supreme Court of this country in 1991⁴ can be cited. Here the Court was confronted with article 13 of the same Convention, according to which the state is responsible if no remedies exist in order to redress a violation of a right set forth in the Convention. *Prima facie* one could say that article 13 is the best example of a rule non self-executing when no remedies are offered by the national legal order. The Dutch Supreme Court does not share this point of view, indeed. Applying article 5 (on lawfulness of detention) and 13 of the Convention, and noting that in the Netherlands there are no remedies against a final decision on a criminal matter, the Court concludes that a person unlawfully convicted within the meaning of the Convention can apply to the President of the District Court for an interim injunction restraining, interrupting or limiting the execution. May be the decision is somehow audacious. It shows, however, how far a domestic organ can go if it is internationally open-minded.

3.1. – The approach to the notion of non self-executing rules I am suggesting here, covers all international rules, including those embodied in binding resolutions of international organisations. It is my firm opinion that such resolutions are self-executing also in the following sense: provided that the constitutive instrument of the organisation has been agreed upon by the legislator, the resolutions of the organisation are directly applicable. Of course, they have to be filled up when their content absolutely requires measures of integration, according to what I have already said. By contrast, they do not need a special measure of implementation in order to acquire legal force within the internal legal order. Once the constitutive instrument has been declared enforceable in the domestic order, the treaty obligation to comply with binding resolutions of the organisation becomes equally enforceable.

3.2. – Are state officials bound by the “international” interpretation of an international rule? It is clear that the interpretation embodied in binding international decisions is binding with regard to the specific case brought before the international

⁴ *Netherlands Yearbook of Int. Law*, 1993, p. 400.

body. However, the problem I want to raise here is whether decisions, especially judicial decisions, may have an effect beyond the specific case concerned, as far the interpretation of international rules applied by the international body is concerned. For instance, must the judgements of the International Court of Justice or the (very abundant) case-law of the European Court of Human Rights be taken into account within the internal legal order? And to what extent?

From a theoretical point of view, it is difficult to say that people which are called to apply international rules within the state have an obligation to follow international case-law. To a large extent, interpretation is a kind of art which depends on the creative attitude of the interpreter and cannot be easily directed in a sense or another. Practically, however, things are different. If domestic judges or other officials abide by international case-law concerning similar cases, the avoidance of international wrongful acts on the part of the national state is much more likely. This is especially true when the case-law is abundant and springs from an international court which has permanent jurisdiction over the national state, like the European Court of Human Rights. The already quoted English Human Rights Act deserves a special mention here, since in many respects it demands English judges to comply with the case-law of the European Court (see Sections 7 and 8 of the Act).

The subject of the relationship between national and international interpretation is worth of being treated in detail. One of the aspects of the subject which should be thoroughly explored is how the notion of international case-law as a parameter of the national interpretation has to be understood. Must the notion be limited to true judicial bodies, or even to international court with permanent jurisdiction? What about quasi-judicial bodies, like the UN Human Rights Committee? What about advisory opinions of judicial bodies?

4. – A consequence which must be inferred from the true legal nature of international law within the domestic legal order is the absolute independence of the judiciary from the executive in dealing with matters of international law. In particular, national courts must be fully independent in determining the existence or content of international rules, in addressing the question whether a treaty has come into existence, or is entirely or partially invalid, or it has been modified or terminated, in pronouncing upon the compatibility of foreign law or other foreign acts with international law when such laws and acts are to be declared enforceable in the *forum*.

This subject has been discussed within, and the independence of national courts has been affirmed by, the *Institut de droit international* in 1993⁵ and it does not need to be resumed here. By contrast, as far as I know, all other aspects of the

⁵ See *Annuaire de l'Institut*, Session of Milan, 1993, p. 220 ff. and p. 319 ff.

relationship between international law and national law have never been treated by the *Institut*. In fact this is due to the opinion that it is for the law of each single state, rather than for international law, to determine how the former must conform to the latter. For the reasons I have indicated in the introduction to the present notes, I cannot share such a view. At least, two aspects of the relationship between the two legal orders could be explored in general terms: one is how to put the principle of external and internal harmony into effect and the other is how to restrict the resort to the notion of non self-executing rules.

5. – Ideas more or less similar to those professed in the present notes have been criticised as being too much influenced by the Community model. It has been said that what is true with regard to the European Union, i.e. an organisation characterised by “common goals and relative developmental equality” of member states, cannot be used with regard to the law of the whole international community⁶. May be the criticism is correct. May be it is only partially correct, since some common goals – like the protection of human rights or the necessity of economic globalisation – can be found also in the broader international context. In my humble opinion, what is necessary here is simply to move from the premise that international law as a whole demands to be complied with in a complete and correct way.

⁶ See H. G. Maier, review of my book on *International Law and the Role of Domestic Legal Systems*, in *Am. Journ. of Int. Law*, 1994, p. 842.

**Le rapport entre droit international et droit interne dans
l'unification du droit international privé:
Respect ou négligence des valeurs culturelles?**

LAURA PICCHIO FORLATI*

Le problème général du rapport entre droit international et droit interne dans l'unification du droit international privé peut être analysé, pour ce qui est de la protection assurée aux valeurs culturelles dans cette unification, à travers trois détecteurs différents: A. le droit à appliquer, en tant qu'expression de valeurs culturelles (du for ou étrangères); B. la loi applicable aux vicissitudes juridiques des biens culturels; C. le sort des conflits de lois en matière de droit d'auteur.

Le droit international privé librement déterminé par le législateur ou la jurisprudence nationale est en soi-même une reconnaissance des valeurs culturelles étrangères telles qu'elles se concrétisent dans le droit étranger objet du renvoi. Le législateur (ou la jurisprudence) des conflits fait confiance, en principe, à la compatibilité de ce droit avec les valeurs culturelles du for. Pour protéger celles-ci, le juge peut en tout cas activer en dernier ressort l'exception d'ordre public. Lorsque d'autre part cette confiance de principe fait défaut, le législateur assure la protection des valeurs culturelles du for par le biais de règles d'application immédiate capables d'écarter carrément, ou de limiter, l'application du droit étranger.

Un sacrifice des spécificités qui caractérisent le droit du for, notamment ce droit privé substantiel qui est une dimension importante de la culture d'un pays, peut découler d'autre part de l'unification ou l'harmonisation du droit international privé sous deux angles différents.

Le droit international privé uniforme peut infliger un premier coup aux valeurs culturelles du pays du for en excluant, ou en réduisant, les cas où le droit matériel de ce pays s'applique. En effet, dans une approche bilatérale, les règles de droit international privé uniforme établissent des critères qui tout à la fois assurent un rattachement à un ou plusieurs systèmes juridiques étrangers et contribuent à délimiter le champ d'application du droit matériel du for. Par ce biais, les cas d'application de ce dernier peuvent se réduire au delà de la limite qui, en dehors d'un processus d'unification/harmonisation, aurait été tracée spontanément par le législateur ou la jurisprudence du for.

Il s'agit là d'un premier type d'effets que l'on pourrait appeler négatifs, et qui découlent du fait même qu'un droit étranger s'applique.

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Un deuxième coup, plus grave, peut être imposé aux valeurs culturelles du for par l'application de règles uniformes, de conflits de lois ou substantielles, adoptées au niveau international, et cela à cause du contenu des règles qui seront en dernier ressort applicables. Il arrive en effet que ce droit ou ces règles soient non seulement éloignés desdites valeurs mais en contradiction directe avec elles, tout en n'atteignant pas le niveau d'incompatibilité qui permettrait d'opposer la limite de l'ordre public.

A. La protection du travailleur

C'est ce qui arrive, par exemple, dans le droit international privé du travail des pays européens à tradition protectrice, représentants, en tant que tels, d'une véritable culture "travailliste". Lorsque la Convention de Rome de 1980 sur la loi applicable aux obligations contractuelles a fixé, avec l'article 6, une réglementation spéciale uniforme en matière de loi applicable aux obligations naissant d'un contrat individuel de travail, on a salué ce texte comme une norme favorable au travailleur, partie faible. En réalité, cela est vrai pour ce qui est des alinéas 1 et 2, lettre *a*), de l'article en question. Ce n'est pas le cas, en revanche, de la lettre *b*) de ce deuxième alinéa. Cette dernière disposition désigne la loi applicable dans l'hypothèse, de plus en plus fréquente à cause de la délocalisation des activités économiques, où le travailleur n'exécuterait habituellement son travail dans aucun lieu déterminé. Il s'agit de l'hypothèse pour laquelle l'article 6 envisage comme applicable la loi du pays où se trouve le siège qui l'a embauché. Or, une solution de ce type au conflit de lois sous-jacent sacrifie l'application de la règle générale autrement assurée par l'article 4 de la même Convention et répond, ce faisant, aux intérêts de l'entreprise, déjà favorisée en principe par la possibilité de choix. En d'autres termes, dans un cas où l'application de la loi du siège de la partie qui fournit la prestation caractéristique jouerait en faveur de la partie structurellement faible du contrat, notamment le travailleur, cette loi est écartée pour faire place à un critère, la localisation du "siège" d'embauche, que l'entreprise peut librement déterminer à l'heure de la mondialisation.

Le coût que cette solution de droit international privé uniforme a imposé à une culture de protection sociale comme celle jadis profondément enracinée, par exemple, en Italie peut se mesurer à travers le soin que la Commission chargée de la révision du droit international privé italien¹ avait pris à rédiger une disposition alternative à l'article 6 de la Convention: disposition qui aurait précisément remplacé le critère du siège d'embauche par celui de la résidence habituelle du travailleur².

¹ Voir, pour la composition de cette Commission, *Rivista di diritto internazionale privato e processuale*, 1989, p. 946.

² Cf., pour le texte du projet de Loi, notamment de l'art. 58, élaboré par la Commission en question, *Rivista di diritto internazionale*, 1990, p. 741 ss.

En dehors de la procédure prévue à l'article 23 de la Convention, toute disposition alternative de ce genre aurait été contraire à la Convention de Rome, qui unifie les règles générales sur les conflits de lois en matière d'obligations contractuelles: ce qui a finalement impliqué l'abandon de l'idée même de règles résiduelles alternatives aux dispositions conventionnelles de la part du Parlement italien. Porté à abandonner sa "culture" par l'exigence de respecter les règles conventionnelles, cet organe a même choisi l'application desdites règles "in ogni caso": autrement dit dans toutes les hypothèses, y compris celles qui auraient été normalement exclues du domaine d'application de la Convention de Rome³.

B. La protection des biens culturels

Il reste que les démarches les plus audacieuses dans le domaine culturel ont porté dans les années récentes sur l'harmonisation du droit international privé et du droit international administratif des biens culturels. Par des étapes qui ont marqué les dernières décennies du XX siècle, la Convention Unesco de 1972, le jugement du *Bundesgerichtshof* allemand dans l'affaire des Masques nigériens⁴, le règlement et la directive CE de 1992 et 1993 et, enfin, la Convention Unidroit de 1995, ont établi un réseau normatif visant expressément la protection des valeurs culturelles. Cette protection consiste à admettre la possibilité de récupérer à l'étranger des objets appartenant au patrimoine culturel (c'est-à-dire des objets capables de définir l'identité d'un Etat, d'une communauté, d'un peuple), aux dépens du principe "en fait de meuble, possession vaut titre".

Certes, cette protection s'articule autour d'éléments complémentaires tels que l'identification formelle, par l'Etat d'origine, des biens ayant cette capacité et les possibilités modulées de restitution ou de retour indépendantes des voies diplomatiques (d'où le rôle des juges et des institutions de l'Etat requis). Cette protection a comme contrepartie la circulation des biens culturels dans les espaces ainsi protégés. La protection des valeurs culturelles peut donc se révéler faible là où les procédures et le processus d'enregistrement des biens culturels sont inadéquats ou trop lents par rapport aux pressions du marché de l'art en faveur de la circulation de ces derniers. A ce point là la protection peut même rester théorique (comme elle peut le rester, on l'a vu ci-dessus, en matière de protection du travailleur).

En plus, il est difficile, pour l'Etat d'origine des biens culturels, de se porter demandeur devant les juges d'autres Etats – qu'il s'agisse des membres de l'Union

³ Art. 57 de la Loi 218/95, sur la Réforme du droit international privé italien.

⁴ BGH 22 Juin, 1972, BGHZ 59, 1972, pp. 82 *et seq.* La Cour a considéré nul un contrat d'assurance conclu en violation du droit nigérien pour la protection du patrimoine culturel du pays, même si la loi applicable au contrat n'était pas la loi nigérienne et l'Allemagne n'était pas partie à la Convention Unesco sus-mentionnée.

européenne ou des Parties contractantes à la Convention Unidroit – pour réclamer la restitution d'un bien afférent au patrimoine national, compte tenu de la flexibilité de l'adage *par in parem non habet iudicium*.

C'est pourquoi l'on a pu envisager un rôle, dans le domaine de la restitution des biens culturels, pour l'arbitrage⁵. On pourrait imaginer alors l'établissement, dans le cadre de l'Unesco, d'un Centre pour la solution des différends entre Etats et personnes privées étrangères (aussi bien qu'entre Etats et établissements *publics* étrangers), en matière de restitution. Ce Centre pourrait suivre en quelque sorte le modèle du Centre pour la solution des différends entre Etats et personnes privées étrangères en matière d'investissement (CIRDI) établi au sein du groupe de la Banque mondiale à Washington. Naturellement, dans ce dernier contexte ce sont les personnes privées qui, dans la plupart des cas, sont demanderesse, tandis que les rôles seraient inversés dans le cadre des litiges soumis au Centre Unesco que l'on envisage ici. Surtout, si l'on peut bien imaginer dans le domaine de la restitution de biens culturels un compromis conclu lorsque un différend existe déjà, il n'est pas facile d'imaginer une clause contractuelle qui, à l'avance, établirait la juridiction du Centre sur des requêtes de retour ou de restitution qui présupposeraient un vol ou une exportation illégale. A cet égard, on pourrait de toute manière profiter de la leçon des cours permanentes interétatiques, dépourvues de toute juridiction sur la base des accords internationaux qui en ont prévu la création mais destinées à recevoir compétence sur une base volontaire: par exemple, par des déclarations d'acceptation successives à l'établissement des cours en question. On se réfère ici à la Cour internationale de justice aussi bien qu'à la Cour européenne des droits de l'homme d'après le texte original de la Convention de Rome 1950.

La juridiction du Centre Unesco, voire des tribunaux arbitraux à constituer sous son égide, pourrait être issue, de la même manière, d'un compromis ou de déclarations d'acceptation de la juridiction déposées à l'avance auprès du Directeur général de l'Organisation. Notamment, ces déclarations pourraient être faites avant tout par les Etats, mais aussi par les acteurs de la gestion du patrimoine et du marché des biens culturels: musées, autorités locales, maisons d'enchères, antiquaires, commerçants, collectionneurs etc. *Ex post* il reviendrait à chacune des parties à un différend ayant déposé à l'avance une telle déclaration de désigner un arbitre ou des arbitres destinés à faire partie du tribunal arbitral chargé d'étudier le litige. Au cas où le délai fixé arriverait à expiration sans que cette désignation soit faite, le Président du Centre devrait y pourvoir.

Le système ébauché ici aurait l'avantage de permettre la sédimentation au sein de l'Unesco d'une capacité de peser au fond les intérêts sous-jacents aux différends

⁵ Voir l'article 8 de la Convention Unidroit 1995.

en cause, dans le respect des exigences de l'Etat d'origine des biens culturels et en lui assurant un for adéquat.

C. Le secteur du droit d'auteur

Un centre pour l'administration de l'arbitrage transnational dans le cadre d'un établissement spécialisé des Nations Unies – tel que la Banque mondiale ou l'Unesco, ainsi que nous venons de le proposer – a été créé au sein de l'OMPI pour ce qui concerne les différends en matière de propriété intellectuelle⁶. Il s'agit là d'un secteur dans lequel l'enchevêtrement entre valeurs culturelles et marché, rapports inter-étatiques et promotion humaine, est le plus poussé; secteur qui fournit un terrain privilégié de confrontation entre pays avancés et pays en voie de développement.

En général, l'on pourrait être tenté de penser que, dans le secteur du droit d'auteur, il n'y a pas de place pour le droit international privé. La Convention de Berne de 1886 pour la protection des oeuvres littéraires et artistiques – telle qu'elle a été modifiée à Stockholm en 1967 par la Convention de révision entrée en vigueur en 1970 (pour donner vie, entre autre, précisément à l'OMPI) – aussi bien que la Convention universelle sur le droit d'auteur en vigueur dans le texte révisé à Paris en 1971, tendent à résoudre le problème de la protection de ce droit en imposant aux Parties contractantes, à côté de quelques dispositions de droit substantiel uniforme, la clause de traitement national. D'autre part les accords de Marrakech comprennent l'Adpic (Accord sur les droits de propriété intellectuelle liés au commerce), qui impose aux membres de l'OMC – même s'ils ne sont pas membres de l'OMPI, et au plus tard en 2006 pour les pays les moins avancés – l'obligation d'introduire un système de protection de la propriété intellectuelle suivant précisément les règles OMPI (voir les conventions susmentionnées). Par ce biais la règle du traitement national, à laquelle s'accompagne maintenant, en vertu de l'article 4 de l'accord Adpic, l'obligation de traitement de la nation la plus favorisée, finit par gagner une portée presque générale.

Il n'en est pas moins vrai que les obligations de traitement national et de la nation la plus favorisée impliquent, pour ce qui est des rapports juridiques inter-privés, non pas une exclusion du droit international privé mais une double connection avec ce droit. Elles imposent avant tout une application non discriminatoire des règles des conflits. Elles façonnent, par ailleurs, le contenu de la loi que ces règles indiquent comme applicable: qu'il s'agisse de la loi du pays d'origine du droit de propriété intellectuelle, du pays où la protection de ce droit est invoquée ou encore, d'un autre pays. Il faut plutôt reconnaître que, pour le moment, le droit

⁶ M. Barré, L'OMPI et la mondialisation du droit de la propriété intellectuelle, E. Loquin et C. Kessedjian (sous la direction de), *La mondialisation du droit*, Dijon, Litec-Credimi, 2000, p. 291.

d'auteur n'est pas l'objet d'une réglementation de droit international privé uniforme. La détermination de la loi applicable à l'existence et au contenu de ce droit relève donc, jusqu'à présent, du libre choix des Etats: notamment, de l'Etat du for.

Du point de vue des valeurs culturelles, cette conclusion requiert une mise en garde. Lorsque le juge étatique est investi d'une affaire qui implique un conflit de lois en matière de droit d'auteur, il devra établir si ces valeurs sont suffisamment protégées par la loi applicable et vérifier aussi si le législateur du for s'est prévalu des clauses dictées par l'Adpic dans le but de protéger les intérêts primordiaux des Etats membres de l'OMC: promotion de l'innovation technologique; transfert et diffusion de la technologie; avantages réciproques des producteurs et des usagers de connaissances technologiques dans le but de favoriser le bien-être social et économique (article 7); promotion de l'intérêt public dans des secteurs d'une importance primordiale pour le développement socio-économique et technologique (article 8). Surtout, lorsque le législateur du for ne s'est pas prévalu de ces dispositions, il revient au juge de le faire⁷. En dernier ressort, c'est sur la base de clauses de ce type que des problèmes tels que l'exploitation économique du folklore et des traditions collectives peuvent pour le moment être affrontés⁸.

La défense des valeurs culturelles dans des cas qui impliquent des conflits de lois n'est finalement pas la tâche exclusive de la justice étatique. Comme on le disait, des institutions d'arbitrage et de médiation pour le règlement des litiges entre particuliers touchant à des droits de propriété intellectuelle existent dans le cadre du Bureau international de l'OMPI: institutions accessibles même aux ressortissants d'Etats qui ne sont pas membres de l'Organisation, mais qui sont engagés par l'Adpic à façonner leur législation précisément sur les règles de celle-ci.

* * *

De ce qui précède, nous aimerions tirer les conclusions suivantes.

1. La pratique examinée ne prouve pas une intégration entre droit international et droit interne, si ce n'est dans les formes classiques de la "transformation" du droit international en droit interne ou du renvoi de ce dernier au droit international. Tout au plus, la même pratique prouve une tendance à l'intégration des milieux

⁷ En ayant recours, le cas échéant, à la catégorie des lois d'application immédiate d'un système juridique tiers par rapport à la loi du for et à la loi applicable: cf. B. Cortese, *La legge applicabile al trasferimento di tecnologia: dal Codice Unctad all'Accordo Trips*, in L. Forlati – L. Zagato (a cura di), *Cultura e innovazione nel rapporto tra ordinamenti*, Milano, Giuffrè, 2000, p.24.

⁸ Cf, dans le volume cité à la note qui précède, L. Zagato, *Sul trattamento dei PVS in materia di diritto d'autore*, pp.85-87.

socio-économiques et culturels atteints par des systèmes de droit interne⁹. Le droit international privé est en effet un des moyens pour préciser l'interaction des systèmes étatiques entre eux. Telle est aussi la fonction des règles de droit international privé uniforme, ou du traitement national et/ou de la nation la plus favorisée, sauf que, dans ces derniers cas, l'interaction a généralement lieu sur la base d'engagements internationaux. Un cas limite d'interaction pilotée par le droit international est, on l'a vu, le rôle assigné à l'Etat étranger requérant devant les juges ou les autorités administratives de l'Etat requis en matière de retour ou de restitution de biens culturels volés ou illicitement exportés. Dans ce rôle, l'Etat requérant agit comme personne juridique de droit public étranger obligatoirement reconnue en tant que telle¹⁰ par l'ordre juridique de l'Etat requis.

2. Une intégration poussée, dans le secteur culturel comme dans d'autres secteurs, peut se réaliser entre les bases sociales, voire les milieux régis par le droit interne si, à côté des différents systèmes de droit interne étatique, des expériences de supranationalité se réalisent. On se réfère par ce mot à la manifestation d'une emprise directe de la part d'organes internationaux sur des sujets de droit relevant, pour d'autres aspects, de la souveraineté des Etats. Bien que sectorielles et limitées au point de vue quantitatif, des expériences de ce type sont capables en effet d'influencer le droit commun des Etats et donc de promouvoir dans ce contexte des valeurs partagées. On peut citer des exemples récents d'une telle évolution. Les négociations pour une société européenne qui – ayant été envisagée comme société de sociétés à statut communautaire – n'a pas encore vu le jour¹¹ et qui, pour le seul fait d'avoir été poursuivies pendant des années au sein de la Communauté européenne, ont animé l'harmonisation du droit commun des sociétés. De la même manière, on peut noter l'influence exercée par la protection même pénale des finances communautaires, et spécifiquement par le *Corpus juris*, sur les premières étapes de l'harmonisation du droit pénal entre les Etats membres de l'Union européenne. Enfin, l'expérience entamée avec l'établissement à la Haye du Tribunal international pour les crimes dans l'ex-Yougoslavie a certainement contribué à inspirer les initiatives pénales de plusieurs Etats contre le Général Pinochet.

⁹ Pour une perspective qui aide à éclaircir la distinction ébauchée dans le texte, G. Arangio-Ruiz, L'Etat dans le sens du Droit des gens et la notion du droit international, *Oesterreichische Zeitschrift fuer Oeffentliches Recht*, 1975, pp.3-35, 372-405

¹⁰ Bien que qualifiée de "publique" par des normes autres que celles de l'Etat reconnaissant et douée en tant que telle, d'une publicité différente par rapport à celle qui caractérise ce dernier Etat.

¹¹ Après des années de blocage, un accord politique a enfin été atteint durant le sommet de Nice en décembre 2000.

Pour en revenir à la protection des valeurs culturelles face à l'uniformisation du droit international privé, une juridiction arbitrale spécialisée, que ce soit dans le cadre de l'OMPI ou de l'Unesco, peut avoir une valeur pédagogique et représenter une démarche en direction de formes souples de supranationalité. En tant que telle, elle est compatible avec la résistance à l'harmonisation dans le secteur culturel et la place normalement prépondérante occupée dans ce domaine par des mesures d'incitation et d'encouragement¹². En matière de droits de propriété intellectuelle, des formes poussées de supranationalité sont déjà en place à travers le Bureau international de l'OMPI en tant que gérant des mécanismes de dépôts internationaux (brevets, marques, dessins et modèles), même s'il n'est pas encore le contrôleur de l'enregistrement des noms de domaine sur Internet¹³.

3. Les expériences de supranationalité peuvent enfin permettre des formes de légitimation démocratique adaptées à la dimension transnationale de la culture et des activités économiques d'aujourd'hui. Il s'agit notamment d'exploiter dans ce but les liens de plus en plus fréquents et étroits entre organisations internationales gouvernementales et non gouvernementales.

Dans cette perspective, il est nécessaire de rappeler la pratique du Groupe européen de droit international privé (Louvain-la-neuve) de se maintenir en contact, dans le choix des thèmes à mettre à l'étude et de la suite à donner aux résultats acquis, avec l'Union européenne et la Conférence de la Haye de droit international privé. Cette pratique témoigne du rôle tout à fait discret que des institutions non gouvernementales (IDI et ILA parmi elles) peuvent jouer en faveur de la promotion des valeurs culturelles et autres par les organisations internationales interétatiques.

A côté des associations sans but lucratif à vocation internationale, les établissements commerciaux et professionnels transnationaux sont les premiers candidats à jouir d'une sorte de "citoyenneté" des institutions supranationales. En effet, ils sont les protagonistes d'un type de démocratie qui serait très difficile à réaliser à l'intérieur d'un Etat donné, mais possible dans le cadre de l'ordre juridique qui émane d'une organisation supranationale. Celle-ci finit par développer son propre ordre juridique dans le domaine du droit privé, ne fût-ce qu'à travers une réception de la *lex mercatoria*, de la *lex informatica* ou d'un système de valeurs modelé sur les standards de protection des droits de l'homme, aussi bien que sur les obligations qui lient en général ses Etats membres. Les obligations internationales de ses membres tendent en effet à devenir également ses propres obligations. A ce titre,

¹² Voir Article 151, alinéa 5, premier tiret, du TCE.

¹³ M. Barré, cit. et V.L. Benabou, Les défis de la mondialisation pour l'OMPI: les noms de domaine, E. Loquin et C. Kessedjian (sous la direction de), *La mondialisation* cit., pp. 292-321.

l'organisation pourra bien être appelée à appliquer les conventions de droit international privé uniforme, et voir son propre système juridique appliqué sur la base de ces mêmes conventions acceptées de sa part, le cas échéant, par une adhésion tacite.

En tant qu'échantillons d'une intégration juridico-sociale et politique qui se déroulerait à l'ombre, si non dans le cadre, du droit international au sens propre du terme, les mêmes expériences de supranationalité pourraient assurer la mise à l'épreuve de solutions aux conflits d'intérêts transnationaux respectueuses des valeurs culturelles propres aux différents Etats: solutions dont ces mêmes Etats pourraient à leur tour se rappeler dans l'élaboration et la mise en oeuvre du droit international privé uniforme.

The Work of the Committee on International Law in National Courts of the International Law Association

GILBERT GUILLAUME*

The subjects of international co-operation, in particular by means of multilateral law-making conventions, nowadays reach into nearly every aspect of national life. National legal systems consequently confront issues of international law to an unprecedented extent. In view of the limited attention given in the literature of international law to the actual problems encountered by national courts in this respect, an empirical study has been undertaken by the Committee on International Law in National Courts of the International Law Association (ILA). The broad aim of the study was to ascertain the methods by which courts in different states find and apply principles and rules of international law in domestic proceedings. One motivation of the study was, as a follow-up to a suggestion made by the Dutch Branch of the ILA, to explore the potential merit in proposing the possibility of reference by a national court of questions of international law to the International Court of Justice.

The reports submitted by the National Branches of the ILA in response to a questionnaire on the pertinent issues served as the basis for the survey. The questionnaire invited positions, first, with regard to the role and rank of international law in the national legal order. This familiar and essentially constitutional question constituted the first part of the Committee's study. The main focus of the study, however, lay in the second part, with questions which referred in detail to the practice of national courts in ascertaining and applying international law. Which are the competent courts, the relevant procedures and mechanisms to decide questions of international law? Are the courts required by law or instructed by higher courts to ascertain and apply rules of international law? Which means of interpretation are applied with regard to treaty and custom, respectively? Is expert advice admissible? The following brief outline of some of the major issues is based on the replies received¹ to the above-mentioned questionnaire.

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¹ The replies of the National Branches of Australia, Austria, Belgium, Brazil, Canada, Chile, China (Taiwan), Croatia, France, Germany, Ireland, Israel, Japan, the Philippines, Poland, Russia, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America are taken into account in this outline.

A. National Constitutional Framework

With regard to the role and rank of international law in the national legal order, distinctions arise between customary and conventional international law which derive from the different ways in which they are formed.

Only some constitutions provide that customary law automatically becomes part of national law. What happens in the case of a conflict between customary international law and national law, however, is not always stated in these constitutions. In courts of the Common Law tradition (except the United States), on the other hand, there is a continuing debate on whether customary international law is automatically incorporated into national law or requires some positive act of incorporation.

Where a clear conflict between a prescription of national law and a relevant rule of customary international law arises, some national courts are obliged to follow national law for general constitutional reasons. Where a doubt exists as to whether there is such a conflict between customary international and national law, national courts have a tendency to choose the interpretation of national law which conforms to the prescription deriving from international law.

With regard to international treaties in the domestic sphere, not only does the question arise of status and rank within the national legal system, but also the question of limitations on the power to conclude such treaties. In countries of the Common Law tradition, the power to make treaties is an aspect of executive power and in principle not limited in a general way. Where legislative action is required to give effect to the treaty, however, the executive government must have sufficient support from the legislature.² Countries of the Civil Law tradition recognise the right of the executive to conclude treaties, which enter into force after appropriate procedures. They recognise the automatic applicability of treaties in national law at the same level as, or even at a higher level than, statute law, provided the operative provisions of the treaty are apt for direct application. As a general rule, however, treaties do not rank above the constitution, although in some cases they may have equal rank, as, for example, the European Convention on Human Rights in Austria.

The various approaches towards the ascertaining and applying of international law as part of national law have to be seen against this constitutional background.

² An exception to this Common Law position are the United States insofar as, in accordance with the Constitution, treaties require the advice and consent of the Senate before definitive signature or ratification.

B. National Court Practice*I. General framework*

1. Subject matter

The subject matter of cases involving questions of international law in national judicial practice most frequently relates to: extradition, human rights, refugees, state immunity, consular and diplomatic immunity, the interpretation and application of treaties, criminal procedure, maritime law, international business transactions, and compensation for state acquisition of foreign owned property. With the subjects of international conventions ever widening, it may be expected that the range of subject matter will increase even more.

2. Competence of the courts

The competence to decide the relevant questions of international law arising in the course of such national proceedings, in general, does not appear to be restricted to any particular court or to the higher courts. In the jurisdictions surveyed, neither provisions at constitutional or statutory level, nor directions issued from higher courts to the lower courts regulate the manner in which courts are to ascertain and apply rules of international law relevant to cases before them. Possible ways of seeking guidance on questions of international law are recourse to higher national courts or to the jurisprudence of foreign or international courts as well as recourse to executive guidance or expert evidence. Their availability varies widely in the countries that were examined.

II. Finding the Law: Ascertaining international law in practice

1. The role of higher national courts

Practice varies with regard to the obligation to refer questions of international law to a higher court and the availability of a path of voluntary reference to a higher court. With the exception of the famous Article 234 (ex Article 177) of the European Community Treaty as far as the highest national courts are concerned,³ practice does not, however, support a general compulsory reference.

Where a question of international law does not relate to an actual litigious proceeding, the device of asking a specific court for an advisory opinion on that question is not generally available in either Civil Law or Common Law countries. One exception is Canada, where the Cabinets of the Federal and Provincial

³ According to this article, those courts of the Member States, against whose decisions there is no appeal in national law, are obliged to request a (binding) preliminary ruling of the European Court of Justice on any doubtful question of interpretation of the EC Treaty or on the validity and interpretation of acts of the institutions of the Community. All other courts may voluntarily request the European Court of Justice to give such a ruling.

governments may seek advisory opinions on legal questions, including questions of international law, from the Supreme Court of Canada and the Provincial Courts of Appeal, respectively.

With regard to judicial decisions that are contrary to international law and thus leave the state exposed to international responsibility, an appeal in the instant case is in all jurisdictions seen as the obvious means of correction. Specific corrective mechanisms are available in certain civil law countries in the event that an appeal is not available.⁴

2. The role of expert evidence

Expert evidence as to the content, meaning, or scope of application of a treaty or rule of customary or general international law is not generally resorted to by national courts. The Civil Law countries seem to regard the maxim "*jura novit curia*" as applicable; thus national courts are not authorised to seek external help in finding it. The Common Law countries similarly regard knowledge of international law as within their unaided grasp, unlike the law of foreign states, which requires proof by expert evidence as though it were fact. An exception is the United States, where courts "may in their discretion consider any relevant material or source, including expert testimony, in resolving questions of international law."⁵ The position in Canada is reported to be the same. The general attitude of Civil Law countries appears not to allow the submission of opinions, but use of expert opinions is allowed in Chile and Japan. In the special case of reference by lower courts of disputed questions of international law to the Federal Constitutional Court of Germany, that Court may solicit expert opinions by way of an *amicus curiae* procedure.

3. Ascertainment of international treaty law

When international treaties have to be interpreted, the use of the methods directed by the Vienna Convention on the Law of Treaties is most common. The use of reference to the *travaux préparatoires* is particularly remarkable in courts of the Common Law tradition, since that tradition has been generally resistant to going beyond a statute itself in order to ascertain its meaning.

Reference to the decisions of other national courts, however, is not yet firmly established as a principle. It may not always be appreciated by courts and counsel that access to national court decisions on questions of international law is available

⁴ For example, in Belgium under Articles 1088 and 1089 of the Judicial Code the State Attorney at the Cour de Cassation may request that Court to annul a decision in order to prevent the State from incurring international responsibility.

⁵ Section 113 of the Restatement (Third) of the Foreign Relations Law of the United States (1986).

from a number of sources, such as the International Law Reports, the International Legal Materials and the *Revue Générale de Droit International Public*.

In most legal systems, formal guidance is not sought by courts from the executive, nor is it regarded as decisive when offered. Exceptions are France, before 1990, and the United States. In France, before 1990, the Conseil d'Etat referred questions of interpretation of treaties to the Foreign Minister and considered itself bound by the answer. The practice was changed in 1990 to the effect that the Minister now may be consulted and invited to submit views, but the judge will have the last word on the question. In the United States, the practice of "executive suggestion" made to courts in questions of international law has grown out of a lengthy tradition of the executive and the judiciary attempting to speak with one voice in international affairs. The courts are not bound by the executive suggestion, but follow it in almost all cases.

4. Ascertainment of customary international law

In respect of customary international law, on the other hand, it can be said that courts do have regard to the jurisprudence of international courts and tribunals, of national courts in other states, and to the writings of scholars, as contained in textbooks, commentaries, digests, and articles in learned journals. However, such sources are generally used sparingly and rather by way of incidental confirmation of the existence of a clearly established rule.

An issue to be given further consideration is, whether executive statements or suggestions on the existence and the content of rules of customary international law of the type mentioned above could assist national courts. These courts could benefit from the greater extent of knowledge of, or access to, that law that governments tend to possess. On the other hand, such a formalised procedure might tend to entrench parochial or self-interested views of international law, or compromise the principle of judicial independence.

III. Possible outcomes and their reasons

1. Failed application of international law

Possible reasons that were indicated to the Committee on why national courts in certain cases failed to correctly interpret or apply international law include: failure by counsel to argue the case comprehensively or thoroughly, failure by the court to advert to available sources or evidence of the rule in question, reliance by the court on outdated textbooks on international law, and undue deference to perceived national legal or policy considerations. In addition, there may be a tendency to see greater legitimacy in national law and a preference to state the issues in terms of that law. In the case of treaties that are regarded as not applicable, a national court may fail to consider that some of its provisions may reflect customary international law.

2. Additional justification by reference to international law

On the other hand, it appears that national courts do on occasion justify their decisions by additional reference to international law such as by confirming that national law already reflects, or has a parallel in, international law. Where national law contains an ambiguity which can be resolved by the courts in the exercise of their interstitial power to shape and develop the law, courts in several Common Law countries have used human rights instruments as justifying a development or extension of national law in a similar direction. This is less common in countries of the Civil Law tradition. Another type of case where reference especially to international human rights is used, are comprehensive codes of rights, such as the Canadian Charter of Rights and Freedoms, which can be supplemented or further developed through reference to the International Covenant on Civil and Political Rights or the European Convention on Human Rights. It remains to be discussed, whether national courts should be encouraged to take greater account of the international law dimensions, or analogies, arising in their application of national law.

3. Identity between international and national law

Where a court is free to decide a case on the basis of international law but can arrive at the same result under national law, practical convenience might explain the instances in Civil Law countries, where courts have preferred the solution under national law. In the Common Law countries there are also examples of this preference. In both Australia and the United Kingdom, the highest courts have refused to apply particular provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights, respectively, fearing that these provisions might become incorporated “through the back door” if the courts applied them without legislative authority.⁶ They have been willing to develop the common law along parallel lines, however.

4. Conflict between international and national law

With regard to national provisions that are contrary to international law, there is a fairly sharp divide between the approaches of the courts of the Civil Law countries and those of most Common Law countries. In the Civil Law countries, it is not at all unusual for the courts to disregard or overrule a provision of national law found to be in conflict with international law. This is said to be a matter of “everyday occurrence” in France. In other Civil Law countries the answer to the question may depend upon the respective hierarchical positions of the conflicting prescriptions.

⁶ In the United Kingdom such legislative authority is now available after the Human Rights Act was passed by Parliament on November 9, 1998.

In most Common Law countries, however, clear conflict between international law and national law must be resolved in favour of the latter, since an essentially dualist approach is taken towards the relationship between the two orders. However, the higher courts would regard a conflicting rule of international law as constituting good reason for at least reconsidering the existing law and there is always the possibility that the legislature would make the necessary changes to the law in order to bring it into line with international law.

IV. International legal background of the judges

One final aspect which has been surveyed by the Committee on International Law in National Courts is the international legal background of the judges themselves. Generally speaking, the judges of the Civil Law countries are more likely to have studied international law as a compulsory part of their legal studies than their Common Law colleagues. Nevertheless, awareness is growing in the Common Law world, and international law is becoming a popular elective subject in law schools. Moreover, judges in all countries tend to be chosen more for their general legal knowledge and personal qualities, than for their specialised competence in any particular field.

This brief survey is far from comprehensive of the positions of states as seen through the submission of reports by National Branches of the ILA, but it is indicative of the wide range of state practice and of the many issues calling for further study in this particular area.

Introduction Theme II: National and international aspects of transitional justice

FRANCES MEADOWS

In Volume 2, No. 2, we embarked upon the theme of 'National and International Aspects of Transitional Justice', an exploration, which promises to continue throughout several issues, of the interrelationship between international criminal tribunals and the various national initiatives, often involving truth and reconciliation commissions, which are developing in parallel. In this issue, Neil Kritz and Jakob Finci contribute their reflections on the prospects for the establishment of a truth and reconciliation commission in Bosnia and Herzegovina. In their article in our earlier issue, Garth Meintjes and Juan E. Méndez looked at the granting of amnesties, in particular in South Africa, in the context of obligations under international law. Their views provoked a response from Phenyoo Kaiseng Rakate, to which the authors have replied. We invite you to read them both. And, even as the debate moves forward, the landscape is fast changing. This is a subject to which we expect to return.

Reconciling Amnesties with Universal Jurisdiction in South Africa – A Response to Garth Meintjes & Juan Méndez

PHENYO KEISENG RAKATE*

The international law aspect of the South African amnesty process as presented by Meintjes and Mendez is not convincing to say the least. The two authors contend that the "... South African case is a significant step in the evolution of domestic efforts to deal with the past in a manner that satisfies the requirements of international law."¹ Meintjes and Mendez do not tell us how the South African amnesty process satisfies international law. In my view this assertion is incorrect and misleading in many respects.

The South African Truth and Reconciliation Commission (TRC)² is not "restorative" justice, as upheld by the Constitutional Court in the *Azapo* case and in the final Report³ submitted by the Commission in October 1998, because most victims got nothing. Even as an exercise in reconciliation, the TRC has arguably failed. Many perpetrators such as PW Botha remain arrogant and non-contrite. In a recent survey conducted by the Human Sciences Research Council (HSRC) most white South Africans still believe that apartheid was a good idea, but badly administered.⁴ The TRC (headed up by two clerics), can be seen as an essentially Christian exercise. Christianity emphasises the need to forgive enemies and confess ones sins *etc.* But not every victim of the apartheid regime accepts this Christian theology. Many would say that forgiveness and reconciliation is necessarily a private, person-to-person thing, not a public catharsis as the TRC and politicians want us to believe. The bottom line is that the TRC is in fact totally unsatisfactory, but that it is what South Africans had to accept, because no other solution was politically or materially conceivable.

Scholars writing about transitional justice in South Africa ignore the fact that apartheid is a crime against humanity as proclaimed in the 1976 International

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¹ Garth Meintjes & Juan Méndez "Reconciling Amnesties with Universal Jurisdiction" 2 *International Law FORUM du droit International* (2000) 76 at pp. 88.

² Created in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995.

³ *Truth and Reconciliation Commission of South Africa Report*, October 1998. The Amnesty Committee continues to hear amnesty applications of perpetrators of gross human rights violations and is expected to complete its task before the end of 2000. The Committee will attach a codicil to the TRC Report once it has completed its task.

⁴ See Kenneth Christie *The South African Truth Commission* (2000), Chp.6, pp. 156-157.

Convention on the Suppression and Punishment of the Crimes of Apartheid and now within the jurisdiction of the International Criminal Court (ICC).⁵ In the early 1960s the UN General Assembly passed several resolutions condemning the policies of apartheid as inconsistent with the UN Charter and a threat to international peace and security.⁶ What the United Nations considered crimes against humanity included for example, the Group Areas Act (1950) which empowered the government to separate races in residential areas, the Bantu Authorities Act (1951) which provided for the creation of separate homelands called *Bantustans* where Africans were to live according to their tribal identity. The policies and practices of the apartheid government were considered a threat to international peace and security under Chapter VII of the UN Charter (Articles 55 & 56), and constituted a violation of human rights treaties such as the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).

In 1985 the United Nations Human Rights Commission appointed an *ad hoc* Committee of Experts to investigate the possibility of implementing the Apartheid Convention.⁷ The *ad hoc* Committee proposed the establishment of an international criminal court to prosecute perpetrators of apartheid crimes. However, owing to the Cold War, the Court did not materialise.

Although the TRC in its final Report found that liberation movements such as the African National Congress (ANC), United Democratic Front (UDF), and the Pan African Congress (PAC) were also responsible for gross human rights violations, it nevertheless concluded that the preponderance of responsibility rests with the apartheid government and its agencies.⁸ The TRC was aware that apartheid as a system was a crime against humanity and those responsible might be liable for prosecution in foreign jurisdictions, hence it appealed to the international community to recognise its amnesty process:

“The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the

⁵ Article 7(J). UN Doc. A/CONF. 183/9 (17 July 1998) (adopted 17 July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court).

⁶ UN GA Res. 3068.

⁷ Commission on Human Rights, Thirty-Seventh Session, UN Doc. E/CN. 4/1426, 19 January 1985.

⁸ *Supra*, Vol. 5, para 130-150.

Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility of such policies”⁹

The Commission’s plea is indeed vague because it does not say which amnesties should be accorded international recognition. Implicitly, the Commission contemplates crimes which constitute political offences and not crimes of apartheid such as those responsible for the policies of apartheid. Apartheid as a crime against humanity would not qualify as a political offence under extradition law.

Apartheid as a crime against humanity is not subject to statute of limitations. In November 1970, the UN General Assembly passed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.¹⁰ The Convention imposes a duty on member states to take appropriate steps to enforce the Convention and to “... adopt all necessary domestic measures, legislative or otherwise ...” with the view to enforcing the Convention.¹¹ State practice shows that a number of countries such as Ethiopia¹² and Greece¹³ have provisions in their constitutions which prohibit statutory limitations on crimes against humanity. Although it may be argued that the prohibition of statutory limitations of war crimes and crimes against humanity are not universally recognised principles (only 43 countries have ratified the Convention), it is generally accepted that such offences afford all states universal jurisdiction. A number of national courts continue to prosecute Nazi war criminals for crimes committed 50 years after the end of the Second World War and defences based on statutory limitations have been rejected.

In December 1992 the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance.¹⁴ Article 18(1) of the

⁹ *Supra*, Vol. 5, para 114.

¹⁰ UN GA Res. 2391 (XXIII), 26 November 1970.

¹¹ Articles 2 & 3 of the Convention.

¹² Section 28(1) of the Ethiopian Constitution provides:

(1) Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.

¹³ Section 47 in part provides:

(2) Amnesty may be granted only for political crimes, by statute passed by the Plenum of the Parliament with a majority of three-fifths of the total number of members.

(3) Amnesty for (serious) crimes may not be granted even by law.

¹⁴ Doc. A/47/49 (1992).

Declaration provides that “persons who have or are alleged to have committed offences referred to ... shall not benefit from any special amnesty or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.” In 1997, Mr. Louis Joinet, Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities in his final report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political Rights) said “amnesty cannot be accorded to perpetrators before victims have obtained justice by means of an effective remedy.”¹⁵ Similarly the International Law Commission, in its Draft Code of Crimes Against the Peace and Security of Mankind, established in terms of article 9 that “each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17 (genocide), 18 (crimes against humanity) ... and 20 (war crimes) irrespective of where or by whom those crimes were committed”.¹⁶ Finally, although the Rome Statute of the International Criminal Court is silent on amnesties, the Statute in its Preamble commits the Court “... to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case¹⁷ clarified the customary law status of crimes against humanity and held that “(i)t is now settled rule of customary law that crimes against humanity do not require a connection to international armed conflict.” In that context, crimes against humanity can also be committed in peace times. In the *Furundja* case,¹⁸ the ICTY indicted and charged Anto Furundja of Bosnia-Herzegovina for crimes against humanity, including torture. The Trial Chamber held that crimes against humanity including torture have reached the status of *jus cogens* in international law from which states cannot derogate and that under no circumstances will national measures prevent the prosecution of alleged perpetrators. The Tribunal said:

“... If such a situation were to arise, the national measure, violating the general principle and any relevant treaty provision ... would not be accorded international legal status. Proceedings could be initiated by political victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful or the victims could bring a civil suit for the damage in a foreign court which

¹⁵ E/CN. 4/Sub.2/1997/20, para 32.

¹⁶ See Yearbook of the International Law Commission 1996, Vol. II, (2).

¹⁷ *Prosecutor v Tadic* Case No. IT-94-1-AR72 para 141.

¹⁸ *Prosecutor v Anto Furundja* Case No: IT-95-17/1-T-10.

would therefore be asked *inter alia* to disregard the legal value of the national authorising act.”¹⁹

The *Furundja* opinion is a signal that international criminal courts are not likely to recognise national amnesties such as those in South Africa where crimes against humanity have been committed. It may well be argued that given the number of countries which have ratified the Apartheid Convention (about 101) and other global actions which included the expulsion of South Africa from the UN and its agencies, economic sanctions and exclusion from world events such as sport are somewhat persuasive indications that the prohibition of apartheid has reached the level of *erga omnes* obligations under international law.

The moves in the last decade by the international community, including the UN, to bring an end to a culture of impunity, including prosecuting perpetrators of gross human rights violations in Rwanda, the former Yugoslavia and hopefully Sierra Leone, Cambodia and East Timor, makes it difficult to comprehend why South Africa is an exception. In my view, Meintjes and Mendez have not told us on what basis the South African amnesty process complies with international law.

¹⁹ Para 155 (footnote omitted).

Reconciling Amnesties with Universal Jurisdiction – A Reply to Mr. Phenyo Keiseng Rakate

GARTH MEINTJES AND JUAN MÉNDEZ*

Our article published in your previous volume has drawn a critical response from Mr. Rakate for failing to explain why we believe the South African amnesty process satisfies the requirements of international law. The criticism perhaps would be justified if we had made such a claim, however we did not. The criticism is based on a misreading of a single sentence that ignores the context and focus of our argument.

The offending sentence in our article is the claim that “The South African case is a *significant step* in the evolution of domestic *efforts* to deal with the past in a manner that satisfies the requirements of international law.”¹ As indicated by the italicized words, we simply acknowledge that South Africa appears to have done more than most states have done before it in its attempt to deal with the past in an internationally acceptable manner. When read in the context of our brief overview of the various ways in which states have attempted to deal with the past, it is easy to see that South Africa has avoided some of the completely unacceptable responses, such as simply burying the past or granting a blanket amnesty.

The focus of our argument, stated in the section preceding this sentence, is that reconciling amnesties with universal jurisdiction requires a two step process. In the first instance, “We believe the inquiry into whether a state’s treatment of its past satisfies the expectations of the international community should *start* with an examination of the general efforts towards accountability implemented at the national level.”² However we go on immediately to state that, “as illustrated by the Rome Statute’s treatment of the issue of complementarity, *it will also be necessary* to examine the particularities of each individual case to determine whether the international community’s expectations regarding individual accountability have been met.”³

The aim of our article was not to provide a judgement about whether South Africa has in fact satisfied the international community in the way that it dealt with its past, although we did provide a citation reference to a scholar who does. Indeed, as we noted in our description of the general considerations influencing a judgement about the merits of the South African approach, it would be a mistake

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¹ Garth Meintjes and Juan E. Méndez, “Reconciling Amnesties with Universal Jurisdiction”, 2 *International Law FORUM du droit international* 75, 88 (2000) (italicization added).

² *Id.* at 84 (italicization added).

³ *Id.* (italicization added).

to pass any final judgements on the success or failure of the South African approach. Not only would this be premature, since the work of the Commission has not yet ended with the issuing of its report, but it also would be unduly speculative, since much will depend on how the new government will build upon the foundations laid. In particular, the integrity of the process will depend on how firm the new government remains in its commitment to prosecute those who did not apply for amnesty.⁴

Mr. Rakate's criticism also implies that we ignored the fact that apartheid is a crime against humanity. In truth, our analysis of the evolving principles of accountability is directed towards the very opposite result. For example, we commended the South African approach as having held "the promise of being able to uncover the full scope of the widespread and systematic crimes of both the former government and its opponents."⁵ We also noted that "If it had worked as had been hoped, it may well have demonstrated that the apartheid regime not only was filled with criminals, but that it was by its very nature also a criminal regime."⁶ In addition, we clearly expressed the belief that international law requires that any set of amnesty criteria must provide for the exclusion of crimes against humanity from the list of amnestiable offenses.⁷

As for Mr. Rakate's claim that the South African Truth and Reconciliation Commission (TRC) was totally unsatisfactory, we believe that the process deserves a more carefully reasoned evaluation. For example, when compared to other truth commissions elsewhere, the TRC's investigations covered a wider scope of human rights abuses and probed deeper into the causes and circumstances of such events. In fact, no other truth commission has ever had the power to compel the participation of perpetrators through the issuing of subpoenas or the offering of individualized amnesties. For many victims these hearings presented the first real opportunity to face and cross-examine their abusers.

Moreover, when evaluating a country's transitional justice efforts, it is a mistake to view the work of a truth commission in isolation to other accountability measures. For example, while Mr. Rakate is essentially correct in criticizing the inadequacy of the compensation given to victims, it should be recognized that the TRC was only mandated to make recommendations to the President concerning reparations for victims.⁸ Accordingly, the recommendations contained in the TRC's report provide for significant amounts of victim compensation, but await implementation by the

⁴ *Id.* at 92.

⁵ *Id.* at 91.

⁶ *Id.*

⁷ *Id.* at 97.

⁸ Promotion of National Unity and Reconciliation Act 34 of 1995, Section 4(f)(i) (S. Afr.).

government.⁹ It is therefore wrong to criticize the TRC for giving nothing to victims. If there is any blame to be placed in this regard, then it should be laid at the feet of the government.

Finally, to the extent that Mr. Rakate implies that the South African transition is an example of impunity for the past, we strongly disagree. The amnesties that were granted were individualized and conditional, and were not intended to apply to international or foreign crimes. With the exception of Adriaan Vlok, the former minister of law and order, none of the political leadership who may be responsible for the crime of apartheid or other crimes against humanity either applied for or received amnesty. To the extent that evidence of their criminal activities can be uncovered, they should and can – subject to the principle of legality – be prosecuted either domestically or abroad. In short, while they may not yet have been punished, they certainly have not been forgiven. Like Nazi war criminals, they do not enjoy the assurance of a legal oblivion for their criminal pasts.

⁹ See Truth and Reconciliation Commission of South Africa Report, Volume 5 Chapter 5, October 1998.

A Truth and Reconciliation Commission in Bosnia and Herzegovina: An Idea Whose Time has Come

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Those emerging from a history of abuses and massive trauma – whether individuals or societies – are ill-advised to repress their painful past rather than confronting and dealing with it. On a societal level, perhaps no case has better proven this rule than that of the former Yugoslavia. Horrible misdeeds were committed during World War II by organized members of one Yugoslav ethnic group against fellow citizens of another ethnic group. Immediately following the war, however, in the name of the Tito regime's policy of "brotherhood and unity," discussion and treatment of these abuses were suppressed. Continuation of this policy over the next four decades did not heal the societal wounds and resentments deriving from the 1940's atrocities; it simply allowed them to fester beneath the surface, made it possible for myths about the wartime abuses to diverge ever farther, and provided the opportunity for cynical nationalists to use these mutually exclusive versions of victimization to stoke the flames of new conflict and abuse in the 1990's. This is not a mistake that Bosnia can afford to repeat. Accordingly, one of the more promising prospects in the search for a lasting peace in Bosnia and Herzegovina is the effort to establish a national Truth and Reconciliation Commission (TRC) in the coming months.

Truth commissions are appropriate in two different situations. When these bodies were established in various Latin American transitions – in countries such as Argentina, Chile, and El Salvador – they were needed because the systems of abuse in these countries had been designed to hide the facts. Torture and related abuses were committed largely in secret; crimes like "disappearances" were intended to erase any trace of the victim or the crime. As a consequence, in such places, there was a compelling need to uncover and acknowledge the truth. In places like Bosnia, on the other hand, such a commission is needed not due to a hidden truth, but rather because of the existence of multiple "truths," each with a distinct ethnic coloration. Nationalists of each the three ethnic communities which were involved in the recent war propagate a history which portrays their group solely as the victim of mass abuses and the other two as evil perpetrators and monsters. Three separate

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war crimes commissions, dominated respectively by Bosniak, Croat and Serb perspectives, have focused on the victimization of their own group. At a meeting in 1997 which included the leaders of these three commissions, the leader of one recognized that he and his counterparts were “in the process of creating three conflicting versions of the truth, and if we keep going along this path, fifty years from now our grandchildren will fight again over which one is correct.” Sadly, three years later, this state of affairs remains largely unchanged.

A Comprehensive Approach to Justice and Reconciliation

The challenge of establishing justice, historical reckoning and a process of reconciliation in Bosnia is enormous, complex and multifaceted. Societal wounds such as those suffered in the Balkans during the last decade will not quickly be healed, nor will they be treated comprehensively by any one institution, whether international or local. An extremely insightful conceptualization of the multifaceted nature of this process was developed by the German theologian Karl Jaspers. In a seminal volume in 1946, he articulated four categories of guilt – criminal, political, moral and metaphysical – with which German society needed to grapple in order to deal constructively with the Nazi period.

The courts, Jaspers noted, can address the first of these categories of guilt, by serving the crucial role of determining individual criminal accountability and meting out punishment. In the Bosnian context, this task of apportioning *criminal guilt* is carried out primarily through the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The trials being conducted by the ICTY can serve several functions. They provide victims with a sense of justice – a feeling that their grievances have been addressed on at least one level and can more easily be put to rest, rather than smoldering in anticipation of the next round of conflict. In addition, they can convey the message that the international community will not tolerate such atrocities and will hold future aggressors and those who attempt to abuse the rights of others in this fashion accountable, hopefully deterring those who would contemplate committing such crimes, whether in the Balkans or elsewhere. Perhaps most importantly for purposes of long-term reconciliation, the ICTY process makes the statement that specific individuals – not entire ethnic or religious or political groups – committed atrocities for which they need to be held accountable. In so doing, it rejects the dangerous culture of collective guilt and retribution that could produce further cycles of resentment and violence.

As Jaspers explained, however, this addresses only one of the four categories of guilt which a society must confront if it is to restore and cleanse itself from a period of inhumanity. Questions of *moral guilt*, he noted, “can truthfully be discussed only in a loving struggle between men who maintain solidarity among themselves.”

Crimes against humanity do not occur in a vacuum. Beyond individual criminal accountability, a society which has been sullied by the commission of genocide or other widespread atrocities in its midst must also explore and reckon with the problem of passivity when war crimes are committed in the name of one's people, and with the "commission of countless little acts of negligence, of convenient adaptation of cheap vindication, and the imperceptible promotion of wrong; the participation in the creation of a public atmosphere that spreads confusion and thus makes evil possible."¹ At these crucial levels of reckoning, a truth commission can be a key element in the reconstruction of a fractured society like Bosnia.

In contrast to a trial's focus on the specific crimes of individual perpetrators, truth commissions are commonly mandated to focus on the experience of the victims, and to analyze and report not simply on the facts of abuses suffered, but on the broader context in which they occurred, examining in particular the structural elements of government, of the security forces, and of other elements in society which made those patterns of violations possible in the first place. The Bosnian TRC will shine the spotlight on whole sectors that will never (and should not) be the focus of criminal prosecution. Examples may include the role of the media, the judiciary, intellectuals, the educational system or religious institutions.

In this way, the TRC process will help the people of Bosnia and Herzegovina to explore together what in their socio-cultural make-up resulted in the especially cruel and inhuman nature of this latest breakdown of their society, and thereby avoid the same mistakes in the future. This knowledge can only be achieved by painful self-examination. As stated by Justice Richard Goldstone, the ICTY's first prosecutor, the "Tribunal can tell an important part of the story, but it is equally important that the people come to their own consensus about their recent history and acknowledge the abuses suffered by all victims ... Through the [Truth and Reconciliation] commission, Bosnians could figure out how former neighbors and friends were driven to inflict such evil upon one another."² As has been the case with other truth commissions, the Bosnian TRC, based on its evaluation of these trends, structural and cultural elements, will then be responsible for proposing specific steps which ought to be taken to restructure society, to deal with past abuses and to preclude their repetition.

Another example of the way in which the TRC and the judicial process will complement one another relates to the testimony of victims. Trials will, appropriately, only provide an opportunity for a few victims – well under one percent of the

¹ Karl Jaspers, *The Question of German Guilt* (Dial Press Inc., 1948), p. 62.

² Richard Goldstone, "Ethnic Reconciliation Needs the Help of a Truth Commission," *International Herald Tribune*, October 24-25, 1998, p. 6.

total – to tell their story, as it relates to the charges against the particular defendant. The TRC will provide an official forum for all victims and perpetrators to tell their story and ensure that their experience and that of their relatives and friends is preserved as part of the publicly acknowledged history of Bosnia and Herzegovina. This is also an important step for the country to move forward in a constructive way. Given the prominence of the recent South African experience, it should be noted that the Bosnian TRC will not include any amnesty provision. As has been the case with most truth commissions, this will undoubtedly mean that the overwhelming majority of those coming forward to the TRC will be victims, not perpetrators, further reinforcing this victim-oriented focus.

The drafters of the Bosnian peace accords recognized the need for such a multi-pronged approach. While the Dayton Agreement confirms the obligations of all parties to cooperate with the ICTY, a side-letter to the Agreement commits them to establishing a concurrent commission of inquiry which would undertake many of the tasks which will be pursued by the TRC in Bosnia and Herzegovina. U.S. negotiator Richard Holbrooke has stated that the TRC process is vital to the securing of a stable peace in Bosnia and the avoidance of a future round of conflict.

The members of the Commission will be individuals whose moral character, integrity and commitment to objectivity transcend all ethnic, religious and political lines. They will be chosen following a process of extensive public participation and consultation.

Documenting Acts of Humanity

Each truth commission has developed certain new features or approaches. The Bosnian TRC will introduce one innovation that has already earned the praise of members and staff of truth commissions from several other countries. As part of its mandate to document the abuses suffered by all victims in the recent conflict, the Commission will attempt to document the stories of the real war heroes, i.e., those individuals of all ethnic groups who, despite grave risks, resisted ethnic cleansing and acted to protect victims of other ethnic groups. If Bosnian society is to really reconstruct itself, its citizens need to be informed not only of the crimes committed, but also, against that backdrop, of the potential for goodness and brotherhood which remained even in the midst of barbarity and insanity. This is not an appropriate role for any court, but a powerful complement to the process of determining individual criminal accountability: together, they comprise the two sides of the coin of rejecting collective blame. Nationalist extremists who oppose the peace process would prefer to bury such stories of cross-ethnic valor and humanity (of which there are many), because these accounts will make it harder to divide people. It is notable that governmental authorities, including the members

of the Presidency, and NGOs on all sides in Bosnia and Herzegovina have already endorsed this element of the TRC's mandate.

The Role of Civil Society

An important and under-noticed factor in the evaluation of truth commissions is the role played by civil society. As described above, a core objective of truth commissions – perhaps their most important contribution – lies in their ability to engage all of society and to provide a forum for everyone to be heard. Truth commissions are different from blue-ribbon commissions of inquiry which are often established in various states to conduct an investigation into various matters and produce a report. A truth commission is about a society beginning a soul-searching exploration of its own ills and defects which have made it possible for some of its citizens to ravage the rights and lives of other of its citizens. Such bodies should facilitate a dialogue between competing perspectives without in any way compromising or shying away from the objective truth. Without the public being engaged and invested in the process, without their active participation and sense of ownership, a truth commission can produce a completely accurate and objective report to go on a shelf somewhere, but it is unlikely to have a substantial impact.

A sufficiently robust civil society is necessary to ensure such broad-based public participation. The NGO sector has played a crucial role in various countries not only in mobilizing pressure for establishment of a commission to deal with the legacy of past abuses, developing public understanding of the nature of and need for the process, but also in collecting information useful to the commission's work and in organizing and assisting various constituencies to participate in the process. To note three very different models and contexts as examples, Chile, South Africa and Guatemala arguably each engaged in successful truth commission processes. In each of these cases, the role of civil society was crucial to that success. Without the work of victims' coalitions, human rights groups, church leaders and other components of civil society in these countries, the three truth commissions would have been much less effective.

A useful case in counterpoint is that of Rwanda. From the time of the 1994 genocide, there were various outside observers and experts who suggested the establishment of a truth commission in that country. Civil society in Rwanda, however, along with virtually all social institutions, was decimated by the genocide, in which up to a million people (some 15% of the population) were slaughtered in one hundred days. Several factors directed Rwandan policy away from the truth commission approach at the time, but one important factor was this absence of a functioning and vital civil society. Without this option of a process relying on an active public and civil society, Rwanda required more of a "top-down" approach, as

provided by the process of criminal justice. Only now, six years after the genocide, has Rwandan society been sufficiently re-established to the point that there are plans to shift to a new approach by the autumn of 2000 which will be centered on broad-based and active community discussion and participation.³

For too long in Bosnia and Herzegovina, owing in no small part to the legacy of communism, people have come to expect a “top-down” approach, in which the population passively permits their leadership to determine their fate. As has been the case in many formerly communist countries, shedding this mentality has been a slow process. The notion of an emergent and diverse civil society setting the agenda has been a foreign concept. It is, of course, essential to the democratization of Bosnian society. When it comes to confronting the abuses and ills of Bosnia and Herzegovina’s recent past with an eye to shaping a better future, a growing number of its citizens have grown impatient with the top-down approach. Perhaps regarding no other issue has the emergence of a dynamic civil society in Bosnia been more apparent than in the current effort to establish the Truth and Reconciliation Commission.

Over one hundred NGO, political, religious and civic leaders have, to date, signed a petition calling for the Truth and Reconciliation Commission. In January 2000, an extraordinary conference in Sarajevo on the subject of the proposed TRC brought together a diverse group of 80 leaders of civil society. These individuals, from both the Federation and Republika Srpska, from human rights groups, victims’ associations, religious orders, political parties, academia, youth groups and others (including several which have not previously found common cause with one another), collectively represent thousands of people throughout the country. One after another explained why they believe that the TRC is vital to the attainment of a durable peace. Independent media re-broadcast the entire eight-hour discussion. This broad-based grassroots citizens’ coalition has now established a National Coordinating Committee for Establishment of the Truth and Reconciliation Commission. This is an important step in the processes of both democratization and reconciliation in Bosnia. If successful, it will mean that nationalist extremists will no longer control history and skew it to divide their respective ethnic groups; instead, the TRC will objectively reflect the history of all citizens of Bosnia and Herzegovina.

Relationship to the ICTY

As described above, the Truth and Reconciliation Commission and the Hague Tribunal will serve equally essential and complementary roles. Earlier in the

³ A detailed description of this new Rwandan approach, called “gacaca,” is beyond the scope of this paper.

consideration of the TRC idea, some observers, including some ICTY officials, suggested that establishment of the Commission might conflict with the work of the Tribunal and should be opposed. This was based on certain factors that have now changed:

- (1) The imperative, in the view of these individuals, to consolidate the Tribunal's stature and the level of international and domestic support for its work, to the exclusion of any "distractions." Fortunately, in the past few years, the ICTY has built a more solid foundation. Its central role and its authority in pursuing criminal accountability for those responsible for horrendous crimes in the former Yugoslavia are now unquestioned, as should be the case. Its budget and resources have been strengthened, and assistance by international forces in the arrest of indictees has markedly improved.
- (2) Fear that nationalist leaders might undermine the independence and objectivity of the TRC and use it for their own purposes, perhaps as a counterweight to the Tribunal. The advocates of the TRC, however, from all ethnic and political groups, have been the ICTY's primary supporters in Bosnia, and have been united in their determination that these two very different institutions will be complementary to one another. As an example of this, in negotiations regarding the creation of the TRC more than two years ago, one member of the collective presidency, Momcilo Krajisnik, insisted that (a) he, rather than the public, would select the Serb members of the Commission and (b) the final report of the TRC could not be published until it was first reviewed and approved by the members of the Presidency, thereby vesting in them censorship powers. Rather than agreeing to these crippling compromises, the TRC project was tabled. Former President Krajisnik is now in the custody of the ICTY, and the TRC effort is moving forward with renewed vigor.
- (3) Lack of awareness regarding the very different function, focus and method of the TRC relative the ICTY. This, we believe, has been largely rectified. In addition, a number of experts, including current and former ICTY staff and members and staff of various countries' truth commission have been working together to develop appropriate guidelines for the relationship between this international tribunal and this domestic truth commission. This work will be useful not only for the ICTY and the Bosnian TRC but also for the relationship between the future International Criminal Court and various local programs to deal with past atrocities;
- (4) Lack of awareness in the international community of the depth and breadth of grassroots support for the TRC within Bosnia and Herzegovina. This support includes all of those who are most interested in building a stable peace in the Bosnia, and, as discussed above, is an important step in the

democratization of the country.

- (5) Limited recognition of the imperative of pursuing a more comprehensive, multi-faceted strategy, including a process by which the citizens of Bosnia and Herzegovina explore with each other their ills and the appropriate reforms in order to avoid any further cycle of violence. The international community, acting through the United Nations Security Council, established the ICTY in recognition of the fact that, while justice and accountability were essential to the attainment of lasting peace in Bosnia and Herzegovina, a process of objective and credible criminal justice was not possible through the domestic institutions of justice. The resolution creating the Tribunal is explicit in recognizing that it should “contribute to the restoration and maintenance of peace.”⁴ Given the core objectives of the international community in creating the Tribunal – punishing the perpetrators and deterring new abuses – and given the objective reality that the ICTY alone will not prevent another round of violence in Bosnia, it would defeat these very objectives to conduct ICTY proceedings to the exclusion of the TRC if such a single-minded strategy increased the possibility of new atrocities and new victims in Bosnia’s future.

Finally, some have suggested that the TRC should not be established until the conclusion of the work of the Tribunal. In addition to this being unwarranted for the reasons discussed above, this would postpone for at least another four to five years the start of a process that many believe is essential to the achievement of reconciliation in Bosnia and Herzegovina. This would mean another five years during which three competing nationalistic versions of history would become further embedded in the collective psyches of these three respective constituent groups. A boy who was ten years old at the start of the recent conflict has already reached the age of military service. With each passing year in which such children are raised on propagandistic accounts of recent history that demonize other ethnic groups and refuse to acknowledge their suffering, it becomes more likely that these children will grow up to fight. It is a common belief that if NATO peacekeeping troops withdrew tomorrow, Bosnia and Herzegovina would likely descend anew into bloodshed and further division. In order to make the departure of these troops possible and their re-insertion unnecessary, it is imperative that Bosnia begin down the road represented by the TRC. Clearly, where a society like that of Bosnia and Herzegovina, in order to prevent a new cycle of violence and abuse, urgently needs to confront the legacy of evil committed by neighbor against neighbor, to identify the defects in its political, legal and social institutions which render such abuses possible, and to begin the extraordinarily difficult and slow work of re-stitching its

⁴ United Nations Security Council Resolution 827 (1993).

social fabric in a way that will prove more durable, delaying the start of such a process by several years would be both tactically mistaken and morally wrong.

The significant progress on each of these issues, combined with the growing drive within Bosnia for the TRC, the perspective of new ICTY leadership, and the commitment of the National Coordinating Committee to moving forward in a way which enhances the effectiveness of both institutions are, after nearly three years of gestation, moving the final establishment of the Truth and Reconciliation Commission toward reality. The process which is expected to be initiated by the TRC in the coming months will be a slow one – one which will certainly long outlast the life of the TRC itself. Societal wounds such as those suffered in Bosnia in the last decade will not be quickly healed, but the national dialogue and objective confrontation of these problems begun by the TRC will hopefully prevent these wounds from becoming reinfected and will move Bosnia toward a healthier future.

Profile / Profil

Gabrielle Marceau, juriste à l'Organisation Mondiale du Commerce (OMC)

Gabrielle Marceau, juriste québécoise, fut longtemps la seule femme parmi les membres du service juridique de l'OMC. Elle a accepté de partager avec les lecteurs de FORUM son enthousiasme pour son travail et de leur livrer les grandes lignes du parcours qui l'a menée jusqu'au service juridique de l'OMC.

Intellectuellement curieuse de tout, dynamique et infatigable, elle s'est toujours efforcée d'enrichir sa vie universitaire et professionnelle de nombreuses expériences, au Canada et à l'étranger, qui la mèneront sur la voie du droit du commerce international. Ses études de droit au Québec à l'Université de Laval et celle de Sherbrooke puis son accession au barreau la destinaient à pratiquer le droit privé dans son pays. Pendant plus de cinq années elle exerce la fonction d'avocat en droit des assurances et relations de travail à Québec. C'est durant cette période qu'elle fonde avec Bernard Colas la *Société de droit international économique*. Cette association de juristes, première dans son genre au Québec et toujours en activité à l'heure actuelle, connaît rapidement un grand succès.

L'engagement de Gabrielle Marceau au sein de cette association et le contexte de l'Uruguay Round de l'époque lui permettent de développer un intérêt plus poussé pour le droit international économique et lui donnent l'idée de s'y consacrer pour quelque temps. Elle part alors pour Londres où elle obtiendra un LLM à la London School of Economics. Elle reste marquée par l'un de ses professeurs, Rosalyn Higgins, qui va lui transmettre sa passion du droit international. Nous sommes à la fin des années 80, quelques années après l'époque de grands arbitrages internationaux sur les expropriations des compagnies pétrolières en Iran, Lybie, etc..., et les enseignements du Professeur Higgins la convainquent que le droit international se développe et qu'il s'applique de façon pratique dans les relations internationales des entreprises.

Elle décide donc de poursuivre dans cette voie en Europe et achève, sous la direction de Valentine Korah et Brian Hindley à Londres, son doctorat sur le thème de la "concurrence et le droit antidumping dans les zones de libre échange" (« Antidumping and Antitrust Issues in Free-Trade Areas »). Cette thèse, qui sera remarquée et publiée par la prestigieuse maison d'édition Oxford University Press, lui donnera un coup de pouce décisif. Durant ses années de thèse, elle se rend à Bruxelles où elle complète sa formation par un court stage à la Commission européenne dans la Direction de la concurrence – au sein de la nouvelle section sur

la concurrence internationale. Elle effectuera également un « Fellowship de recherche » à New York (Fordham University) pour enrichir ses connaissances en droit américain et droit comparé de la concurrence.

Après ses études, Gabrielle rentre brièvement au Canada pour y pratiquer le droit antidumping chez Gottlieb & Pearson. En effet, en 1994, elle répond sans trop y croire à une offre d'emploi pour travailler au service juridique du GATT et décroche le poste! Elle réalise enfin ce qu'elle considère comme le rêve de sa vie professionnelle. De plus, le contexte du moment offre tous les défis à qui veut les prendre. Les accords instituant l'OMC viennent d'être signés mais tant de choses restent à faire! Dans sa nouvelle fonction, elle participe à toutes les négociations visant à mettre en place le système de règlement des différends de l'OMC, dont celles relatives aux règles dites d'éthique auxquelles sera assujettie toute personne directement impliquée dans le règlement d'un litige porté devant les instances de l'OMC. Ces négociations pour l'établissement d'un « code d'éthique » furent sensibles: elles opposaient des pays ayant des conceptions différentes de l'indépendance et de l'impartialité des juges, et ce fut donc l'occasion pour Gabrielle de mieux saisir le contexte culturel et social à l'intérieur duquel se tiennent toutes les négociations commerciales internationales.

Le travail de Gabrielle Marceau au service juridique est varié. Il est tout d'abord juridique puisque les membres du service juridique agissent comme conseillers auprès des juges en première instance, qui sont appelés "membres des groupes spéciaux" et agissent en quelque sorte comme des arbitres. Ce rôle est d'autant plus important que, souvent, ces arbitres ne sont pas juristes. Un autre aspect de son travail qu'elle apprécie beaucoup est la formation qu'elle dispense aussi bien à l'intérieur de l'OMC qu'à l'extérieur, auprès des représentants des gouvernements qu'elle informe sur les nouvelles règles de l'OMC. Cet aspect de son travail illustre le contexte dualiste de l'activité de l'OMC dans le cadre du mécanisme de règlement des différends, à la fois juridique et politique. En effet les procédures et les décisions en cas de litiges sont par nature juridiques mais elles se situent toujours dans un contexte plus large sur fond de conflits commerciaux entre Etats et blocs régionaux.

Parallèlement, Gabrielle Marceau a choisi de réserver une partie de son temps libre à l'enseignement. Une fois par an elle se rend en Australie pour y donner un cours de maîtrise sur les aspects juridiques de l'OMC à l'Université de Monash, Melbourne. Activité qui semble lui convenir tout à fait puisqu'elle a accepté cette année d'enseigner également à l'Université de Paris I et à la Faculté de droit de l'Université de Genève. Elle s'efforce aussi de publier régulièrement afin de transmettre l'information et d'expliquer les méandres de l'OMC.

Gabrielle Marceau croit beaucoup à la justesse de ce qu'elle fait et après plus de six années passés à l'OMC elle n'a pas perdu son enthousiasme. Elle considère que

le but ultime d'une telle organisation est la paix et le mieux-être des hommes et voit le commerce comme un outil pour promouvoir cette paix. Cependant, elle reconnaît avoir été ébranlée par ce qu'elle a pu voir dans les pays en voie de développement au gré des voyages dans le cadre de son travail. La misère en Asie, en Amérique du Sud et en Afrique l'a notamment beaucoup affectée et elle s'est impliquée personnellement dans l'aide aux enfants prostitués en Thaïlande. Elle reconnaît que les négociations internationales peuvent paraître éloignées des préoccupations quotidiennes des habitants de ces pays. Elle est consciente de la difficulté que peuvent éprouver certains pays pauvres à répondre à court terme aux exigences de l'Organisation, mais elle est sûre que l'OMC les aidera dans le long terme parce qu'elle leur permettra d'accroître leurs exportations, condition nécessaire pour éradiquer la pauvreté et assurer un développement durable.

L'ouverture d'esprit de Gabrielle Marceau et sa préoccupation pour les questions sociales doivent être soulignées dans un contexte qui est actuellement hostile aux institutions économiques et financières internationales, souvent accusées de promouvoir un libéralisme sauvage, vecteur de pauvreté et d'injustice dans le monde. Les questions « sociales », c'est-à-dire non commerciales, ne sont-elles pas une des raisons qui ont conduit à l'échec des négociations de Seattle ?

Work in Progress / Travaux en cours

UNCITRAL Working Group on Arbitration

J.A. FREEDBERG*

“Possible uniform rules on certain issues concerning settlement of commercial disputes: written form for arbitration agreement, interim measures of protection, conciliation” was the subject of UNCITRAL’s (the United Nations Commission on International Trade Law) Working Group on Arbitration (previously named Working Group on International Contract Practices) thirty-third session held in Vienna from 20 November to 1 December 2000. Concerns, long voiced in arbitration circles about the requirement of an arbitration agreement “in writing” and how to define this requirement, coalesced at the commemorative New York Convention Day organised by UNCITRAL. This special event was held in New York on 10 June 1998 to celebrate the 40th anniversary of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Following this commemoration, a note prepared by the UNCITRAL Secretariat (A/CN.9/460) served as the basis of the discussions of the Commission in May-June 1999. The Commission decided to give its Working Group on Arbitration a broad mandate to assess the experiences gained not only from applying the 1958 New York Convention, with its rather narrow definition in Article II of an arbitration agreement “in writing”, but also the UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL’s arbitration and conciliation rules and to evaluate the “acceptability of ideas and proposals for improvement of arbitration laws, rules and practices”.

The Working Group first met to discuss these topics in March 2000, continuing its work in November 2000. At the November meeting, the Working Group, chaired by Mr. José Maria Abascal Zamora (Mexico), first addressed the topic of *defining an arbitration agreement*. A modern definition, suitable for trade in the twenty-first century with its increasing use of electronic means of communication for agreeing to arbitrate, might be based on the definition found in Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration which is somewhat broader than that of the 1958 New York Convention, combined with the forward-looking approach of UNCITRAL’s Model Law on Electronic Commerce. The Secretariat was requested to prepare draft texts for the next session, based on several more or less comprehensive alternative texts which had been

* General Counsel, Permanent Court of Arbitration, and Observer to the Working Group

presented by the informal drafting committee.

Although amending the definition of “in writing” in the UNCITRAL Model Law on International Commercial Arbitration might be feasible, the Working Group tended to consider that it was not practical to consider amending or making a protocol to the 1958 New York Convention, currently adhered to by more than 120 States. In order to provide uniform interpretation of the 1958 New York Convention, the Working Group discussed the variants of a declaration, a resolution or a statement dealing with the interpretation. There was general support for a declaration on interpretation although there was little agreement on to whom it should be addressed: legislatures or courts.

In arbitration, *interim measures of protection* may take two forms: they may be ordered either by a court, or by an arbitral tribunal, the latter, however, giving rise to questions of enforceability. The Working Group’s discussion on a model legislative provision on the enforcement of interim measures of protection was based on two draft proposals presented by the Secretariat, one establishing an obligation for a court to enforce interim measures ordered by an arbitral tribunal and the other allowing the court a degree of discretion in enforcing such measures. The Working Group also discussed defining interim measures in order to deal with the variety of names given to them by arbitral tribunals. Due to constraints of time, the discussion of the proposed texts will be completed at the next session.

The final topic covered at the session was *model legislative provisions on international commercial conciliation*. The proposed provisions included the scope of application, general provisions on the conduct of conciliation, communication between conciliator and parties, disclosure of information, commencement of conciliation, termination of conciliation, limitation period, admissibility of evidence in other proceedings, the role of conciliator in other proceedings, resort to arbitral or judicial proceedings, the arbitrator acting as conciliator and enforceability of settlement. The secretariat was requested to prepare revised drafts of a number of articles and others were not considered due to lack of time.

The Working Group also supported the proposal that future work be undertaken on the additional topics of court-ordered interim measures of protection in support of arbitration; the scope of interim measures that may be ordered by arbitral tribunals and the validity of the agreement to arbitrate.

The Working Group will meet again on 21 May to 1 June in New York.

Conference Scene / Le tour des conférences

Resolution of Disputes in International Art Trade Third Annual Conference of the Foundation “The Venice Court of National and International Arbitration” Venice, 29-30 September, 2000

KURT SIEHR*

In 1998 the Venice Court of National and International Arbitration (Venca) was established. It offers its services to the business community and also organizes conferences.¹ In September 2000 the Third Conference was devoted to Arbitration of Art Trade and Cultural Property Disputes.² Apart from lectures on international arbitration in general (*Antonio Crivellaro*, Milan) and in administrative law (*Renato Laschena*, Rome), the conference concentrated on different problems of art trade: on problems of substantive law in cultural property disputes, on problems of arbitration concerning such disputes, and on a mock trial of a hypothetical dispute.

I. Problems of International Art Law

1. *John Henry Merryman*, Professor of Stanford University, founder of the International Cultural Property Society and its first president as well as doyen of the cultural property scholars,³ stated that international art law is still a young field “riddled with conflicts, lacunae, infirmities and obscurities.”⁴ Three of these conflicts arise from different attitudes with respect to good faith purchases, export controls and their constitutional validity and with respect to national ownership laws. The conflicting policies towards the protection of good faith purchasers could be mitigated by the Art Loss Register and obligations to register own losses and to ask the register whether a traded object has been registered as lost, stolen, looted or

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¹ Cf. the Rules of the Venice Court of National and International Arbitration may be obtained from the Foundation – The Venice Court of National and International Arbitration. Calle Longa dell’Accademia dei Nobili 605/G, Giudecca/Venice Fax: 0039-041-2775848, e-mail: venca@venca.it

² Una Corte per le controversie nel mercato dell’arte: *Il Giornale dell’Arte*, September 2000, p. 4.

³ Cf. John Henry Merryman/Albert E. Elsen, *Law, Ethics and the Visual Arts*, 3rd ed. London/The Hague/Boston: Kluwer 1998.

⁴ Merryman, *Ownership in the International Art Market* (mineograph) p.1.

illegally exported. Many problems of international trade might be more easily solved by arbitration tribunals than by state courts because arbitrators are extranational and can avoid cultural nationalism and because they are likely to have more expertise than judges of state courts.

2. *Marc-André Renold* of the Art-Law Centre in Geneva recalled the various legal problems to be solved in art trade and cultural property disputes. They range from questions of a purely private law character to difficult problems of public international law. *Manlio Frigo* of Milan, one of the Italian experts in cultural property law,⁵ analysed the several international treaties on cultural property, their impact on art trade disputes and referred to national statutes implementing these treaties.

3. Special problems of art trade were presented by *Fabrizio Lemme*, Rome/Siena, the “Avvocato dell’Arte” of “Il Giornale dell’Arte”. He presented problems with respect to authenticity and the liability of experts who are asked for an attribution of a work of art or who accept or decline to place a piece of art in a *catalogue raisonné* of all works of a certain artist.⁶ What he said about the Italian civil law is also true for other legal systems. The expert makes use of his right of free exercise of opinion and he will only be liable for damages if he acts fraudulently in order to infringe somebody’s rights.⁷ Lemme also pointed out that the artist his or her heirs have no exclusive right to authenticate the artist’s works.

4. *Julian Radcliffe*, president of the Art Loss Register (ALR) in London (with branches in New York, Cologne and St. Petersburg) explained the objectives of the ALR: identifying and recovering stolen art, providing a central “checkpoint” to prospective purchasers and lenders, deterring art theft and unauthorized sale of works of art, and reducing trade in stolen art. Search certificates confirm that a specific work of art not registered with the ALR is a lost object. Today 100,000 stolen items are registered. In the future art objects looted during the holocaust shall also be registered. *Gerard Champin* (Paris) informed the audience of special problems of intellectual property and on the forthcoming European directive on the *droit de suite*.

⁵ Manlio Frigo, *La protezione dei beni culturali nel diritto internazionale*, Milano: Giuffrè 1986.

⁶ Cf. the lecture of Fabrizio Lemme, Diciamo chiaro: quanto è responsabile un critico delle sue expertise? *Il Giornale dell’Arte*, September 2000, p. 35.

⁷ Cf. *Lariviere v.E.V. Thaw*, The Pollock-Krasner Authentication Board *et al.*, Supreme Court, New York County Decision, index no. 100627/99 of June 26, 2000; and Ronald D. Spencer, A Legal Decision in New York Gives Experts Protection for Their Opinions on Authenticity, 3 *IFAR Journal* 23-26 (No. 2 of 2000).

II. Nightmare Litigation

A round table discussed several cases of nightmare litigation about art objects.

1. *Erik Jayme* (University of Heidelberg, Germany) told the story of litigation concerning a painting by the Dutch painter Pieter van Laer lent by the Czech Republic for an exhibition in Cologne (Germany). The Prince of Liechtenstein filed a law suit in Cologne to recover the painting which was exhibited until 1945 in one of the Liechtenstein castles located in Czechoslovakia and which in 1945 had been wrongfully confiscated by the government of Czechoslovakia. The inferior courts declined jurisdiction misconstruing an international treaty,⁸ the *Bundesgerichtshof* did not accept the case for review⁹ and the *Bundesverfassungsgericht* confirmed the decisions of the inferior courts.¹⁰ The European Court of Human Rights may correct these decisions which have been heavily criticized by experts of public international law and constitutional law.¹¹ What a nightmare: four courts rendered decisions and still no end to litigation.

2. *Richard A. Rothman* (attorney of New York City) reminded the audience of the SEVSO litigation in New York. Hungary, the Lebanon and Yugoslavia claimed ownership of a silver treasure held by Lord Northampton. None of the plaintiffs could establish the provenance of the treasure from their respective territories.¹² But this was not the end of the story. Lord Northampton could not sell the treasure because of its unclear provenance. He turned to those who persuaded him to acquire the SEVSO treasure and finally settled this dispute.¹³

3. *Norman Palmer* (University of London) explained the English law of civil procedure and pointed out that litigation is very expensive in the United Kingdom

⁸ Landgericht Köln 10 October 1995 and Oberlandesgericht Köln 9 July 1996. Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1996 Nos 123a and 123b.

⁹ Bundesgerichtshof 25 September 1997, unpublished.

¹⁰ Bundesverfassungsgericht 28 January 1998, *Praxis des Internationalen Privat- und Verfahrensrechts* 1998, 482.

¹¹ Cf. Doehring, Völkerrechtswidrige Konfiskation eines Gemäldes des Fürsten von Liechtenstein als „deutsches Eigentum“: Ein unrühmlicher Schlußpunkt, *Praxis des Internationalen Privat- und Verfahrensrechts* 1998, 465-467; Fassbender, Klageausschluß bei Enteignungen zu Reparationszwecken – Das Gemälde des Fürsten von Liechtenstein, *Neue Juristische Wochenschrift* 1999, 12445-1448; Seidl-Hohenveldern, Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich „deutsches“ Eigentum, *Praxis des Internationalen Privat- und Verfahrensrechts* 1996, 410-412.

¹² Peter Fischer, Ein Kampf um Sevso Silberschatz. Zum Ausgang des New Yorker Prozesses, *Frankfurter Allgemeine Zeitung* 8 January 1994, p. 31.

¹³ Colin Renfrew, *Loot, Legitimacy and Ownership* (London 2000) 46-51.

with heavy obligations of lawyers (solicitors, barristers) to investigate the facts and to plead and explain domestic and foreign law. Any out-of-court settlement or alternative dispute resolution is better for plaintiffs of limited means than any litigation.

4. *Jan Christie Clark* (the Canadian Ambassador) recalled the Canadian nightmare litigation against Roger Yorke. Yorke had imported into Canada 6000 items of Peruvian and Bolivian textiles protected under Peruvian and Bolivian law as cultural property and not permitted for export. In 1990 Yorke was charged under the Canadian Cultural Property Export and Import Act of 1977.¹⁴ Yorke's conviction became final in 1998. Still pending is the civil action launched by Yorke challenging the original seizure of the textiles under the Canada Customs Act.

III. Mock Trial in Venice

In contrast to nightmare cases the hypothetical dispute between Heirs of Giovanni Gobbi v. Harry Armstrong and others was tried, pleaded and decided within less than six hours. The facts were these: Part of the Giovanni Gobbi Collection in Italy was also the painting "The Joyous Maiden" by Egon Schiele. In 1943 it was transferred to Field Marshall Göring in exchange for free passage of the Gobbi family to Switzerland. All members of the Gobbi family perished except Gobbi's daughter Francesca. In 1990, the Swiss art dealer Peter Nedermann, after checking the provenance of the painting with the Art Loss Register, acquired the Schiele painting from an elderly Italian lady who allegedly had received the painting from Mr. Gobbi in 1936. One year later in 1991 Peter Nedermann sold the painting to Howard Stanhope of London for \$ 500,000, without indicating its provenance but having also checked with the Art Loss Register. In 2000 Mr. Harry Armstrong of New York bought the painting in London for \$ 3,200,000, and took it to New York. One month later the Italian government claimed the painting as Italian national treasure exported without export licence. Mr. Armstrong waived all claims to the Schiele painting and placed it at the disposal of the Italian Consulate in New York. The Italian plane on which the painting was to be shipped to Italy crashed and the painting was destroyed. The children of Francesca Gobbi apply to be compensated by Mr. Armstrong for the loss of their title in the painting and the previous holders brought interpleader claims against their sellers.

After pleadings by attorneys from Geneva, London, Milan and Paris, the court retired to deliberate. At night the bench pronounced the decisions in the Palazzo Pisani Moretta facing the Canale Grande before a gala dinner was served: the plaintiffs were successful and the defendants could recover some of their losses from their sellers.

¹⁴ Cf. Robert K. Paterson, *Bolivian Textiles in Canada*, 2 *International Journal of Cultural Property* 359-370 (1993).

IV. Final Remarks

The question remained open whether art trade disputes can be handled better by arbitration tribunals than by state courts. This may be true for disputes concerning art objects looted during the Nazi period because in state courts there is hardly any remedy and yet the present owner feels uneasy in holding such an object. In normal cases of theft, illegal export and fraud, the parties, not being bound by contractual relations with an arbitration clause, will hardly submit to an arbitration tribunal. The plaintiff is often not interested in secrecy. He or she is interested in support by publicity and press campaigns. In the Schiele case the Leopold collection of Vienna was ready to submit to arbitration but the plaintiffs, although faced with difficult problems of evidence and time barriers, declined and, as far as can be seen, the nightmare litigation in New York seems to confirm this reluctance. The practice of mediation and conciliation offered by certain institutions may help to develop art trade arbitration in the future.¹⁵

¹⁵ Cf. Emily Sidorsky, The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration, 5 *International Journal of Cultural Property* 19-72 (1996).

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Sur la couverture

Si un jour, au détour d'un pont ou d'un désert, vous rencontrez le Grand Masaï, vous serez frappés par sa force et sa douceur ; par la beauté de son visage ; par son calme intérieur. C'est son visage que vous pouvez admirer sur la couverture de l'ouvrage que vous tenez en main. Quand on interroge Ousmane Sow, des mains duquel le « Guerrier debout » (dans la série des Masaï) est né, il vous parle d'une œuvre africaine et universelle, d'audace et de simplicité, de maturité, d'ouverture au monde et à l'homme. Ces valeurs, le Comité de rédaction de FORUM, les partage. Nous sommes particulièrement reconnaissantes à Ousmane Sow d'avoir accepté, à titre gracieux, que figure le visage du « Guerrier debout » sur la couverture du Volume 3 de FORUM.

Ousmane Sow est représenté par Béatrice Soulé, 10, Impasse Chandon, 75015 Paris, France (tel +33 1 45 58 45 32; fax +33 1 45 57 85 69; e-mail: beatrice.soule@wanadoo.com; Web Site: ousmanesow.com)

On the Cover

If, one day, at a bend in a bridge or in the desert, you should meet the Grand Masaï, you will be struck by his strength and his gentleness, by the beauty of his face, and by his inner calm. It is his face that you can admire on the cover of the work you now have in your hand. When you ask Ousmane Sow, whose hands it was that fashioned the 'Standing Warrior' (in the Masaï series), about it, he tells you of a work which is African and universal, audacious and simple, with maturity and openness to the world and to mankind. These are values shared by the Editorial Board of FORUM. We are especially grateful to Ousmane Sow for having offered to let us feature the face of the 'Standing Warrior' on the cover of Volume 3 of FORUM.

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Manuscripts and correspondence relating to articles for submission should be sent to: International Law FORUM du droit international, The Publisher, Annebeth Rosenboom, Kluwer Law International, P.O. Box 85889, 2508 CN The Hague, The Netherlands. Four typewritten copies of papers should be submitted with double spacing between the lines. Footnotes should be numbered consecutively. Figures should be provided camera-ready. No page charges are levied on authors or institutions. Twenty-five free offprints will be provided for each accepted paper; additional offprints will be available to order. The author will receive one set of page proofs. One set with corrections must be returned to the publishers without delay to avoid hold-up in the production schedule. A charge may be made for any substantial alteration to the manuscript at this stage.