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## **International Law FORUM du droit international**

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*The opinions expressed herein are those of the authors and  
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International Law Association.*

## Editorial

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### Volume 6, No. 1

The United Nations faces challenges as never before, and, with it, international law. Globalization, conflicts, terrorism, corruption and exploitation all call for effective responses by governments acting in unison – not unilaterally. Repeated failure of states to address new challenges in this joint forum erodes the latter's relevance unless the trend can be reversed and the system revitalized. Meanwhile, international lawyers are faced with the *Catch 22* situation that, in order for international law to be effective, it must be perceived internationally as at least capable of effectiveness. The law must be seen as what it strives to be: a fair and legitimate instrument of justice, not “toothless” treaties, slow in the making and serving special interests, holding no one to account. Tuning in to this debate, Forum devotes its Recurring Theme section in this issue to “Challenges to International Law Making.”

Alain Pellet, of International Law Commission fame, shares with us his insider's view that the distinction between the ILC's twin mandates of codification and progressive development is an artificial one. He posits instead an “uncertainty principle,” whereby customary rules often have to be “clarified” before they can be “codified” – a progress more akin to “art” than exact science. Moreover, Professor Pellet believes that lawyers (or at least ILC Members) should steer clear of technical issues. But, as Joel Reidenberg points out in his article, new technologies – in particular the Internet – have so challenged the way in which societies maintain their values, that we can no longer assume “purely” technical decisions to be “policy-neutral.” Reidenberg urges a stronger legal response at the *technical* level. The contribution by Frances Meadows illustrates how the transposition of international treaty obligations into domestic law can be assisted by a process of pre-legislative scrutiny involving a variety of actors, as has happened in the UK in the context of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

In this issue, Forum profiles Paula Escarameia, Professor of law and one of the first two women ever to be elected to the ILC. One of the prime foci of her career has been the establishment of the International Criminal Court, and Thordis Ingadottir gives us an update of the work in progress at that Court as it prepares for receiving its first case in The Hague.

Three symposia are also surveyed, all having to do with questions about the very bedrock of international law. Gionata Buzzini reports on a symposium on “Alternatives to Treaty-Making,” the participants of which were a veritable Who’s Who of Article 38, paragraph d, of the Statute of the International Court of Justice. Suffice it to say that the disagreement among them over whether or not to insist on formal sources of international law or allow new approaches is, in and of itself, telling. The International Criminal Tribunal for the former Yugoslavia recently adopted a “Completion Strategy” for speeding up its work that has prompted loud criticisms. Angela Banks discusses the Strategy and the justifications for it given by ICTY Prosecutor Carla del Ponte. Finally, Sten Verhoeven reports on a seminar on “The Future of International Constitutional Law.”

Soft instruments, soft law, non-binding-, self-binding-, or de facto law, sovereignty or non-state actors – in the end, it all comes down to the question of *legitimacy* at the international level, a topic on which Forum invites – nay, *challenges* – authors to submit papers for an up-coming issue.

## Recurring Themes / Thèmes récurrents

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### *Les défis à la création normative internationale / Challenges to International Law Making*

#### Law and Networks

JOEL R. REIDENBERG\*

For economic, political and social interactions on the Internet, network regulation involves an important interdependence between public and private rule-making authorities. Internet technologies create and enable important new private sources of rules for information flows such as technical standards and capabilities. The development of Internet technologies affects the expression of public policy objectives and choices in a democratic society. With the maturing of the Internet, democratic governance values and institutions face important challenges in assuring that technologies do not override democratically chosen public policy objectives.

This essay first notes the rise of private rules in the network environment. It then examines a re-emergence of public rule-making being used to assert democratic policy choices on network participants. This re-emergence operates through the very network technologies and private rules that challenged state authority in the first place.

#### **I. The Rise of Private Rules**

Three key sources of private regulation establish critical rules for the online environment: “technical sovereigns” impose rules of interaction through infrastructure designs; “private sovereigns” dictate rules through self-governance; and “individual sovereigns” empower practices through authority derived from technology. The regulatory treatment of information flows is shaped by a complex relationship between these private sources of regulation and law.

“Technical sovereigns” appeared as a powerful regulatory force during the first years of Internet euphoria in the 1990s. Technical choices, system architecture and the deployment of pre-configured software became a fundamental source of regu-

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lation for the treatment of information. Technological decisions are not policy-neutral. Technical rules form a “*lex informatica*” or code that embeds important values directly in the way information can flow on the Internet. For example, network standards, such as the TCP/IP communications protocol, enshrine the value of free speech through designs that promote the unimpeded transmission of data. “Cookies” technology sets parameters for online privacy and digital rights management technologies determine the permissible uses of intangible works. Other technical standards, like the Internet’s geographic indeterminacy, challenge the enforceability of territorial laws. Internet participants can operate across borders and mask their origins to try to evade territorial laws.

“Private sovereigns” on the Internet are closely related to the technical sovereigns and are a similarly significant source of regulation. In the mid-1990s, as the Internet moved from an academic and military research network to an important commercial network, “self-regulation” dominated theories of governance for the Internet, particularly in the United States where the majority of servers, users and content originated. State regulation and states themselves were thought to be less relevant in the borderless electronic world. This meant that key rule-making functions were effectively privatized. Standards groups and corporate decisions created a form of “constitutional” infrastructure for the Internet. For example, the self-regulatory approach to privacy allowed technical organizations to define the rights of citizens. The next Internet communications protocol (known as “IPv6”) proposes a unique identifier for every device connected to the Internet, the equivalent of a digital fingerprint for every Internet connection. IPv6 will have a significant impact on the data surveillance of citizens on the Internet. Yet, the Internet Engineering Task Force, an international consortium of system engineers, developed this protocol rather than an elected political body. Other technical organizations, such as W3C and ICANN, similarly established network routing and transmission standards that determined the control of information flows in a networked society. At the same time, major companies such as Microsoft and AOL implemented technological standards with default rules, like the automatic acceptance of browser “cookies,” that define information policy for millions of users. In effect, these types of decisions are fundamental political decisions that delimit basic political rights of citizens such as privacy and freedom of expression. Yet, these decisions in “private sovereign” groups are typically made by technical elites or self-interested companies who often do not see their role as policy-makers and who, in any case, are not representative of society.

Finally, “individual sovereigns” on the Internet became a potent challenge to public law. Over the last several years, a populist movement, originating in the United States, grew to challenge some of the conventional controls on information

transfers created by the key private actors. Internet technologies empowered individuals to challenge conventional norms and laws. Napster, for example, threatened the rights of owners of copyrighted works. Millions of Internet users downloaded the simple software program that allowed peer-to-peer sharing of files containing copyrighted music. Similarly, DeCSS – a software program that decrypted technical content protections – enabled users to move content across different platforms and challenged the ability of the media industry to control digital distribution through digital rights management technologies. In effect, communications technology vested great power in the aggregation of “individual sovereigns” to challenge public rules.

## II. The Mandate of Public Law

As private rules impose values on networked society and constrain public-law making functions, law may also impose limits on technologies. Public authorities now recognize that they may constrain technological developments or deployments. In effect, these rule systems on the Internet, whether imposed by a *lex informatica* / “code” regime or by traditional regulatory means, both compete against each other and have become interdependent.

Technical, private and individual sovereigns each face checks from public law. Privacy law in Europe, for example, forced technical changes in the design of Microsoft’s “Passport” service. Similarly, music owners in the United States successfully challenged Napster under the copyright law and bankrupted the software company. Contemporaneously, the French courts held Yahoo! liable for the display of illegal content in France despite Yahoo!’s location in the United States and the company’s arguments about technological capabilities. Ironically, the public regulatory response to the populist movement of “individual sovereigns” like those in the Napster case showed that law still exerted significant rule-making authority.

But, even with the assertion of public authority, information technology law continues to evolve in a way that protects private rule-making capabilities. In the United States, for example, the Digital Millennium Copyright Act contains a clause that prohibits the circumvention of technical protections for content. This clause is a powerful instrument that enables content owners to write the rules for their data through technical devices; the law sanctions anyone who tries to defeat those technical protections. Similarly, ICANN continues to define and manage the Internet domain name system.

The September 11th terrorist attacks, though, reminded democracies of the strong need for governments to protect their citizens and the public interest. Despite an ardent promotion of self-regulation in the 1990s, the United States sought to assert an affirmative regulatory role on the Internet and the infrastruc-

ture design following September 11th. For example, the USA PATRIOT Act, enacted shortly after the terrorist attacks, realigns key areas of the control over information flows. The government now forces infrastructure services to build data retention and surveillance capabilities into system architecture. Prior distinctions between public and private sector data profiling merge and private sector organizations face new “police” obligations. This new assertion of the state in controlling the flows of information on the Internet creates an important shift away from rules developed by a process dominated by private sector technical elites and recognizes explicitly the power states retain to police the Internet. In part, the new regulatory approach re-assessed the perception of “public interest” in how behavior on the Internet could be regulated.

While American policies have an important impact on the structure of the Internet, courts and governments around the world have sought to assert various powers of sovereignty. Outside the United States, particularly in France and the European Union, the state has historically taken a more involved role in the regulation of information flows. Decisions such as the French court order prohibiting Yahoo! from transmitting Nazi images to French web users reflect a growing trend to re-assert state values on distant Internet participants and on the technologies themselves. Indeed, the European Union, through directives on electronic commerce and electronic communications, now forces the re-engineering of key aspects of the European communications infrastructure.

As it turns out, states have important capabilities for online enforcement through technological means. States can harness for legitimate public purposes the same technologies that hackers and vigilantes use. For example, states can use technology to block or intercept communications from Internet participants who violate local laws. States can similarly use technology to shut down web sites or Internet servers that undermine and violate democratically chosen laws. These technological enforcement capabilities require a legal framework to assure their proper use by public authorities.

For the online environment, law must play a more affirmative role in the development of technology precisely because the technological decisions are not policy-neutral. Law must strive to create the conditions that foster infrastructure developments in accordance with democratic principles rather than the principles of technocratic players. Indeed, without the framing of information infrastructure designs by law, society moves away from democracy and toward a technocracy.

## Les nouveaux modes de production de la norme internationale à l'épreuve du droit de la procédure

PATRICK WAUTELET

La mode des 'Principes' qui envahit depuis quelques années la recherche juridique européenne, tous domaines confondus, n'a pas épargné les spécialistes du droit de la procédure. Malgré l'enracinement fortement national de cette branche du droit, plusieurs initiatives ont vu le jour ces dernières années qui visent à formuler des principes généraux en s'appuyant sur une étude comparée du plus grand nombre de droits nationaux.

L'on rappellera le travail entrepris par la commission 'Storme', du nom de ce spécialiste belge, dont les travaux n'ont toutefois pas connu de concrétisation immédiate. Cette tentative pouvait s'appuyer sur la nécessité de développer un cadre procédural commun nécessaire à la pleine réalisation du principe de libre circulation des jugements entre les Etats membres. La '*Full Faith and Credit*' à l'europpéenne ne pourra en effet enregistrer de nouveaux progrès qu'au prix d'une réduction sensible des différences entre les règles nationales de procédure, comme le montrent d'ailleurs les résultats des récents travaux sur le titre exécutoire européen.

Ce premier projet européen en a inspiré un deuxième, autrement plus ambitieux : unissant leurs efforts, Unidroit, une organisation internationale bien connue dont la mission est précisément d'assurer l'unification du droit privé, et l'American Law Institute, qui pourrait constituer la réponse américaine à la Law Commission anglaise, ont entrepris de rédiger des *Transnational Rules of Civil Procedure*. L'idée est similaire : rédiger des principes et des règles qui dépassent les particularités nationales et permettent dès lors d'assurer le déroulement correct du procès civil international. L'initiative ne peut toutefois s'appuyer sur une quelconque unification du droit matériel ou même une avancée dans la circulation des jugements étrangers.

L'on sait qu'au départ, l'idée a germé dans les esprits de MM. Hazard et Taruffo, dont on connaît par ailleurs l'excellent ouvrage d'introduction au droit américain de la procédure.<sup>1</sup> Très vite toutefois, le projet a quitté la simple sphère académique pour recevoir l'appui de l'American Law Institute. Unidroit a, dans un deuxième temps, apporté son concours à cette entreprise. Cette multiplication des sponsors

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<sup>1</sup> G. Hazard et M. Taruffo, *American Civil Procedure. An Introduction*, New Haven, Yale University Press, 1993, 230 p.

est allée de pair avec une diversification des objectifs puisque le projet actuel vise à produire, outre des principes généraux, également des règles. Différentes versions ont vu le jour, il semble que le projet entre aujourd'hui dans une phase finale pour être prochainement adopté par les deux institutions.

Le but avoué du projet est de rédiger un ensemble de règles susceptibles d'être adoptées par un législateur national pour les litiges présentant une dimension internationale. Les auteurs du projet évoquent également la possibilité pour les juridictions arbitrales de s'inspirer de leur travail pour façonner les règles de procédure de l'instance arbitrale.

L'ambition générale est somme toute assez modeste, il ne s'agit aucunement de remplacer le droit national de la procédure, la vocation première des principes et des règles étant confinée à une catégorie particulière de litiges. Le projet n'en soulève pas moins des questions fondamentales. Des experts plus savants ont déjà mis en lumière certaines de ces difficultés, et notamment celles qui ont trait à l'opportunité même de la démarche d'unification ou encore au réalisme du projet.<sup>2</sup> Notre propos est différent.

Les projets tels que ceux mis en oeuvre par MM. Hazard et Taruffo ont bien des mérites, dont le moindre n'est pas de mettre en lumière les difficultés de l'unification d'une matière réputée rétive à l'harmonisation. Le projet ALI/Unidroit soulève toutefois une question fondamentale : l'entreprise d'unification ainsi engagée n'est-elle pas un aveu de l'impuissance, ou au moins de l'inadaptation, des modes classiques de production de la norme internationale ?

Que l'on ne se méprenne pas : la question ici envisagée n'est pas celle de la légitimité même de l'initiative. L'on ne saurait en effet que féliciter les auteurs du projet de proposer aux législateurs nationaux un modèle de référence que ceux-ci sont libres d'adopter et d'adapter – même si l'on avouera qu'Unidroit occupe à cet égard une position quelque peu ambiguë puisque cette organisation est elle-même composée d'Etats, qui seront invités, une fois le projet abouti, à donner une suite concrète au résultat final. Il ne faudrait d'ailleurs pas voir dans ces travaux une résurgence de l'idée du *Juristenrecht*, à savoir, l'idée, non dénuée d'une arrière-pensée aristocratique, que les juristes réunis au sein de *Stände*, étaient seuls en mesure de définir les principes juridiques fondateurs d'une tradition, principes qui

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<sup>2</sup> V. surtout les contributions rassemblées in *Texas Int'l L.J.*, 1998, en particulier celle de M. G. Born, ainsi que les contributions publiées par le *Cardozo J. of Int'l & Comp. L.*, 1997, et celle de MM Chase, Langbein et Jackson. V. aussi Ph. Fouchard, *Vers un procès civil international ? Les règles transnationales de procédure civile de l'American Law Institute*, Paris, LGDJ, 2001.

s'imposaient ensuite de façon naturelle au législateur. L'autorité scientifique bien comprise que revendiquent les auteurs du projet ALI/Unidroit, ne prive en effet pas les législateurs nationaux de leur pouvoir de décision.

La question posée est autre : quelle réflexion ce projet inspire-t-il pour le processus de production de la norme internationale ? Cette question pourrait également être posée pour l'ensemble des cénacles et commissions qui se penchent à l'heure actuelle sur la rédaction de Principes généraux qui font la synthèse de telle ou telle discipline. Ce mouvement doit beaucoup au renouveau du *ius commune* européen. L'expérience du projet ALI/Unidroit montre toutefois qu'il dépasse largement le seul cadre européen. Quelles leçons tirer de ce mouvement pour le processus de production du droit uniforme ?

À l'actif du projet ALI/Unidroit, l'on mettra tout d'abord la collaboration entre les deux organisations. Certes, l'ensemble formé est quelque peu hybride, puisqu'il rassemble une véritable organisation internationale et une association privée dont le champ d'action premier est le droit fédéral américain et qui ne s'est que récemment aventurée sur la sphère internationale. Il ne faut toutefois pas boudier son plaisir. L'histoire du droit uniforme a montré que la rivalité entre organisations internationales a souvent conduit à de regrettables gaspillages. On pourrait presque parler d'un véritable cimetière d'éléphants où viennent mourir les projets initiés sous le coup d'une stérile rivalité. Même si elle est loin de constituer une première – la pratique du droit international privé révèle quelques exemples d'une saine collaboration entre organisations, par exemple entre la CNUDCI et la Conférence de La Haye pour le droit international privé – la collaboration entre institutions, que la doctrine appelle d'ailleurs de ses vœux depuis longtemps,<sup>3</sup> ne peut être qu'être encouragée.

On applaudira également l'effort appréciable de transparence qui caractérise le projet ALI/Unidroit : dès le premier stade de leurs travaux, les auteurs du projet ont présenté celui-ci dans de nombreux forums, s'exposant parfois à une rude critique tout en promettant de tenir compte des observations formulées. L'ouverture dont font preuve les initiateurs du projet, ouverture dont témoignent certaines autres initiatives comme la Commission européenne du droit de la famille ainsi

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<sup>3</sup> Cf. K. H. Nadelmann, "Conflicts Between Regional and International Work on Unification of Rules of Choice of Law", *Harvard Int. L. J.*, 1974, 213-237; G. van Hecke, "Réflexions sur l'état présent de l'unification du droit", *Rev.dr.intl.dr.comp.*, 1983, 124 et J. Limpens, "Le problème de la coordination des mouvements d'unification du droit", *Rapports généraux du VIIème Congrès International de Droit Comparé de Uppsala*, A. Malmström et al. (éds.), Almqvist & Wiksell, Stockholm, 1968, 95-117.

que le groupe européen de droit international privé, contraste avec le secret qui entoure d'autres entreprises. Il faut sans doute voir dans ce souci de la transparence la traduction d'une aspiration à une certaine légitimité, qui est loin d'être acquise. Au contraire des projets mis en œuvre selon les méthodes classiques de l'unification, qui repose sur la collaboration exclusive d'Etats réunis au sein d'une organisation internationale, les commissions à l'œuvre aujourd'hui ne peuvent compter que sur la qualité de leur travail pour s'imposer. Cette ouverture se traduit également par l'implication très grande d'experts et de spécialistes venus de tous les horizons. La liste des experts invités à participer, à un titre ou à un autre, au projet, se lit comme un véritable *who's who* du droit international civil, et constitue un gage, s'il en fallait un, du sérieux de l'entreprise.

Le rôle moteur joué, à l'origine au moins, par deux hommes ne doit pas non plus surprendre. De tout temps, l'initiative première de tentatives d'harmonisation a été individuelle plutôt qu'institutionnelle. Mais les individus à l'origine d'un projet ont nécessairement besoin d'une plate-forme, que seule peut leur offrir une organisation internationale ou une institution bien établie. Tobias Asser et ses compagnons d'aventure, à l'origine de la Conférence de La Haye, avaient très bien compris à l'époque qu'il leur était impossible, en tant qu'individus, de convaincre les Etats d'unifier le droit international privé.

A ce titre, le projet UNIDROIT/ALI n'est que modérément innovateur : le rôle prépondérant joué par les personnalités impliquées, et en particulier par MM Hazard et Taruffo, n'est finalement que le pendant du rôle joué par un Asser lors des premiers pas de la Conférence de La Haye.

Au vrai, le projet ALI/Unidroit est surtout intéressant en ce qu'il confirme l'érosion du monopole normatif des Etats. Certes, ce monopole n'a jamais été que relatif. De tout temps, les internationalistes se sont réunis au sein de sociétés savantes pour réfléchir ensemble à certaines questions fondamentales, avec l'espoir que le produit de leur réflexion puisse influencer les normes nationales et internationales. Il suffit de rappeler le travail de l'*International Law Association*, fondée en 1873 à Bruxelles, ainsi que de l'*Institut de Droit International*. Ces associations ont toujours constitué un refuge pour l'élaboration de projets dont le caractère fondamental ne s'accommode pas de la contrainte législative du praticable.

Pourquoi, peut-on dès lors se demander, le processus actuel qui voit les meilleurs juristes se réunir pour créer de toutes pièces de nouveaux lieux de réflexion, semble-t-il échapper à ces sociétés savantes, qui pourraient pourtant leur offrir une légitimité qui n'est plus sujette à caution ?

Il y va à notre sens de la nature même des projets concernés. Ce qui caractérise le mouvement actuel des 'Principes', dont le projet ALI/Unidroit ne constitue qu'un exemple, est sans conteste la nature fondamentale des projets en cours. L'ambition

est en effet immense : il s'agit de fixer des principes qui font la synthèse d'une discipline et qui sont susceptibles de s'imposer dans tous les Etats ou en tout cas dans un grand nombre d'entre eux. On est loin de la pratique traditionnelle des associations savantes, qui, à quelques rares exceptions près, se penchaient généralement sur une question précise et bien délimitée.

La nature même du mouvement des 'Principes' appelle de nouvelles formes d'organisation. Les projets comme ceux de l'ALI/Unidroit, nécessitent un travail de réflexion important, qui ne se conçoit que dans la durée. L'implication des juristes concernés ne peut se résumer à une participation, plus ou moins active, à une réunion annuelle. L'intensité du travail nécessaire pour faire aboutir une tentative de codification telle que celle entreprise par l'ALI/Unidroit, se mesure en effet en mois, voire en années, et non en demi-journées. D'autre part, il semble évident que les organisations internationales classiques ne peuvent, à elles seules, assumer la charge de ce type de projet. Les délégations gouvernementales ne disposent pas des ressources nécessaires pour aborder de façon sérieuse la rédaction de Principes destinés à régir l'ensemble d'une discipline. En outre, le travail nécessaire à cette rédaction procède plus de la réflexion que de la classique négociation à laquelle ces délégations sont habituées.

Ceci explique sans doute le désintérêt manifesté à l'égard des organes classiques de réflexion et de négociation, et la création de structures ad hoc, renouvelées au fil des besoins.

En définitive, loin d'annoncer le déclin d'autres formes de production de la norme de droit international, le mouvement sans cesse croissant de codification de 'Principes' généraux, dont le projet ALI/Unidroit ne constitue qu'une manifestation, vient compléter l'arsenal déjà étendu des modes de production. Outre les organisations internationales classiques et les sociétés savantes, il aurait en effet fallu évoquer l'importance de la pratique dans la création d'usages et de clauses standards.

Se dessine ainsi un tableau complexe, où les intervenants, souvent les mêmes, s'investissent selon des modes d'organisation différents suivant la nature du projet. L'apparition de commissions et d'autres cénacles d'un nouveau genre, constitue en réalité le signe d'une vitalité renouvelée des internationalistes, qui, face à la complexité nouvelle des enjeux, ont su innover et repenser l'organisation et le fonctionnement des cercles classiques de réflexion. Il serait prématuré de dire, à ce stade, si cette nouvelle forme d'organisation va s'imposer. Nous sommes sans doute dans une phase de transition et seul l'avenir pourra dire quelle influence exerceront les Principes ainsi dégagés sur les normes internationales.

A cet égard, il est intéressant de noter les similitudes que présente la vague actuelle avec un autre travail de réflexion en profondeur, entrepris par des juristes

allemands du 19<sup>ème</sup> siècle qui, à la suite d'une invitation de von Savigny, se sont attachés à dégager les principes et les concepts fondamentaux destinés à fonder l'unification juridique de leur pays. L'on sait que les travaux de ces Pandectistes ont exercé une influence considérable sur le Code civil allemand, et en particulier sur son *Allgemeiner Teil*.

A bien y réfléchir, la ressemblance ne devrait pas étonner : comme le droit allemand naissant à l'époque de Savigny, le droit international actuel, tant privé qu'uniforme, se cherche. La complexité des questions soulevées par MM. Taruffo et Hazard, l'estompement de plus en plus prononcé des frontières nationales, l'incertitude sur la direction que doivent emprunter les normes internationales, nous paraissent typiques d'une période de profonds bouleversements. Quoi de plus naturel dès lors, dans cette période d'incertitude, que de revenir à l'essentiel et de tenter de dégager des principes fondamentaux, une structure et une systématique. Ce n'est pas le moindre des mérites du projet ALI/Unidroit que de fournir les bases d'une réflexion fondamentale qui ne pourra qu'inspirer des travaux ultérieurs.

## Between Codification and Progressive Development of the Law: Some Reflections from the ILC

ALAIN PELLET\*

It could well be asked whether there is a need for codifying international law. After all, the very idea of codification is relatively new in modern times. In domestic law, it was only experimented with – and not in all countries – from the French Revolution onward. At the international level, codification remained a purely doctrinal aspiration until 1930 and, in fact, until the creation of the International Law Commission (ILC) over fifty years ago. Yet the World had survived without a formalised codification process.<sup>1</sup>

However, in the 1920s it became apparent that there was a need for uniform and clear rules applicable to the then organizing international “society” – hardly then, and still debatably a “community”. After the failure of the League of Nations Conference in 1930, the International Law Commission was created to that effect in 1947 with the double purpose of codifying and progressively developing international law.

It is commonplace to recall that distinguishing between “pure” codification on the one hand and progressive development on the other hand, while intellectually attractive, has proved practically impossible. Indeed, the Statute of the ILC is based on such a distinction, but it has never “worked” in practice: neither regarding the selection of topics, nor in respect of the procedure followed or the outcome of its work, has the Commission made (or been able to make) a difference between both aspects; all topics involve partial codification since no topic is entirely new when it is undertaken by the ILC (except, maybe, purely institutional matters like the draft Statute of the International Criminal Court); in addition, all imply an element of

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\* Professor, Université de Paris X-Nanterre; Member and Former Chairman, International Law Commission – The present version is a shortened and updated version of a keynote speech introducing the ASIL/Graduate Institute of International Studies Forum held in Geneva on May 16, 1998 on Multilateral Treaty-Making – The Current Status of Challenges to and Reforms Needed in the International Legislative Process, the papers presented at the Forum have been edited by Vera Gowlland-Debbas (Nijhoff, The Hague/Boston/London, 2000, VI-144 p.).

<sup>1</sup> It must, however, be acknowledged that, even though there did not exist any formalised process, treaties like The Hague Conventions of 1899 and 1907, or, more generally, *traités-lois* as opposed to *traités-contrats*, were, indeed, codification conventions, at least in the broad sense.

progressive development since, almost as a matter of definition, customary rules always comprise some elements of uncertainty calling for clarification and this is precisely one of the main purposes of codification; and this is even true in very ancient fields of international relations largely regulated by well established rules, such as diplomatic or consular relations or the law of treaties.

This being said, in practice, this does not raise real difficulties; it only allows Members of the International Law Commission to make erudite speeches distinguishing between both aspects but nothing can be inferred from this and it is usually of no consequence at all – except in those very rare cases when the Commission confers a distinct status to provisions which, in its opinion, belong to codification on the one hand, and those belonging to progressive development on the other hand.<sup>2</sup>

This shows once again how artificial the distinction is. “Pure” codification constantly interferes with progressive development; there is certainly no clear threshold. Therefore, even though this conclusion would probably disappoint some learned scholars, particularly those – and they are quite numerous in academic circles ... – who are obsessed with clear and straightforward classifications, the only sensible conclusion is that progressive development is indissociable from codification; it is indeed part of codification.

Now, a more difficult question is: when is legal development “progressive”? When is it more than that? Here again, there is no clear, indisputable threshold; and there is nothing strange in that: law in general, and international law in particular, is not a “hard” science; it is an “art”, *ars juris* ... But the absence of threshold certainly does not mean that any new rule of international law qualifies as a “progressive” development.

This is extremely important in respect of the work of the ILC – a group of thirty-four independent experts, without any political mandate or responsibility. It would be absolutely disastrous and extremely arrogant that they assume the role of a legislator; “codification makers” they are; law-makers (even quasi-legislators) they are not, except in the very rare cases where they are expressly given such a role (here, again, the draft Statute of the ICC is probably the only, at least the most striking, example of such an exceptional mandate). The difference is that the ILC

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<sup>2</sup> See the attempt made in the Draft Articles on “Nationality in relations to the succession of States, adopted on first reading in 1997; see e.g.: ILC, Report on the work of its Forty-Ninth Session, 12 May-18 July 1997, UN Doc. GAOR Fifty-Second session, Supp. NE 10 (A/52/10), Article 19, at p. 72.

may complete the existing law with *progressive* developments; it cannot change the whole system of the law of nations. Its duty is to try to understand the logic of existing rules and to develop them in the framework of this logic, not to change the underlying logic.

In fact, as is well known, legal development is, globally, something much too serious to be entrusted to lawyers. And this is not specific to international law: inside the State, law is made by politicians, through (at least in democratic States) Parliaments or through Governments invested with political responsibilities, not by lawyers. As Sir Robert Jennings put it, “No developed nation would allow its legislative policy to be decided upon just by the lawyers. They would be employed to advise and to draft; but the legislative policy would be decided by those who understood the matter the subject of the legislation”.<sup>3</sup> Progressive development is the extreme limit of what is tolerable and the ILC would indeed be well inspired not to abuse the confidence placed upon it by its Statute.

Just to give an example: in 1994, Professor Arangio-Ruiz, the then Special Rapporteur on State Responsibility, presented an admirable report on the determination of crimes (in the meaning of Article 19 of the Draft Articles adopted in first reading in 1996<sup>4</sup>). Inspired by an eminently respectable moral ideal, he had elaborated an incredible system including recourse to the General Assembly, the Security Council and the International Court of Justice (ICJ).<sup>5</sup> This was admirable but, with respect, it was totally unrealistic and, to say the truth, quite absurd: whether you like it or not, international society is not domestic society and it is of no use at all to try to transplant internal legal reasoning and institutions into the international sphere; the transplantation cannot take effect – except if it is very gradual

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<sup>3</sup> “International Law Reform and Progressive Development”, *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday*, Kluwer, The Hague, 1998, p. 334.

<sup>4</sup> In the final Draft adopted in 2001 and of which the General Assembly took note in Resolution 56/83 of 12 December 2001, the word “crime” has been substituted by the tortuous expression: “serious breach by a State of an obligation arising under a peremptory norm of general international law”; but the difference is insubstantial (see A. Pellet, “The New Draft Articles of the International Law Commission on the Responsibility of States for International Wrongful Acts: A Requiem for States’ Crimes?”, *Netherlands Yearbook of International Law*, 2001, pp. 55-79).

<sup>5</sup> See ILC, Yearbook 1994, vol. II, Part II, paras. 261-266, pp.141-42; Sixth Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/461/Add.1, paras. 6-8, p. 4.

and rooted in a political context which makes it acceptable for the community of States.

Moreover and in any case, the ILC is certainly not the appropriate forum to promote such a radical development; nor is it the right place to try to “judicialise” international society, as Part III of these same Draft Articles on State Responsibility tried to do.<sup>6</sup> Legal experts are not negotiators; they are not supposed to bargain or to compromise, but, once again, to codify and to develop *progressively* (that is, gradually) existing law. Would the odd idea that the ILC could be the right forum to discuss the Comprehensive Test Ban Treaty occur to any sensible mind? Certainly not: this kind of treaty implies a huge technical expertise on an immensely complex range of problems outside the legal field, taking into account very diverse factors of a political, military and economic nature which are out of reach of a handful of lawyers, however eminent they may be.

It is good form within international law circles to deplore that the second “codification” of the law of the sea was realised outside the ILC. I would certainly not join the mourners choir! Indeed, the Commission had performed a respectable job in elaborating the 1958 Geneva Conventions; but, at the same time, the failure of the second Conference on the Law of the Sea in 1960 had shown the limits of using a purely legal preparatory process and it can be accepted that the ILC would have been incapable of taking into account all the relevant data, including complex geo-political issues involved by the new developments which had occurred in the rapidly changing political and economic contexts during the 1970s.

This, however, certainly does not mean that multilateral treaty-making should be confined to codification (including progressive development) in the pure sense. It simply means that not all topics are fit for the ILC or comparable forums. If they are highly sensitive politically speaking, they must be tackled in purely political (that is, since we are in the international sphere, diplomatic) forums (with the possibility of having some preparatory work done in the ILC as shown here again, by the precedent of the Criminal Court; but it also shows that it is unavoidable that, in such a case, this work be carried on at the diplomatic level). If the issues at stake are highly technical (besides legal technicalities), the topic must be dealt with in places where this expertise is available. And, if the topic involves a mixture of political, technical and legal issues, then, something like the Third Conference on the Law of the Sea is probably unavoidable.

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<sup>6</sup> See ILC, Report on the Work of its Forty-Eighth Session, 6 May-26 July 1996, UN Doc. GAOR Fifty-First Session, Supp. NE 10 (A/51/10), pp. 147-151.

The inadequacy of the ILC in all these cases is averred even though one of the reasons for its uniqueness is the irreplaceable constant backward and forward motion between the “scientific” and the political parts of the process. For its part, the Commission is (or should be) concerned with collecting and analysing precedents (whether judicial or practical) and doctrinal views, assembling them with a view to ascertaining evidence of practice generally accepted as being the law and to deduce the existence of new trends, and elaborating drafts with a concern for reasonableness, consistency and acceptability. The Sixth Committee in New York, is (or, again, should be) concerned with determining topics which meet the needs of States and deserve attention from the Commission, with making sure that ILC drafts meet these needs, and with giving clear guidance to the ILC in this respect, even though, in practice, this does not work very satisfactorily since States do not show a serious interest in the work of the Commission.

This is not wholly to be regretted; it also allows the ILC to be more imaginative and consistent than it would be if it were under too strict a guidance from the States: in the present state of international relations, this would unavoidably lead to cooling down and drying out the ILC proposals on any sensitive issue. In the present state of international relations, the combination of the ill-advised “leadership” of the United States and of the legal conservatism of its main partners (from China to France, and from Russia to India or Mexico), would only result in “killing” all attempts to adapt international rules to the real needs of the modern, “global”, society.

Thus, on the occasion of its second reading of the draft on responsibility, the Commission has been well advised not to recant the formidable intuition of Ago which has resulted in the redefinition of the very concept of international responsibility by evacuating damage from its definition<sup>7</sup> and, at the same time, it has accepted – although in a shy manner – that the legal consequences of international wrongful acts must be differentiated, thus perpetuating the former distinction between “crimes” and “delicts”.<sup>8</sup> But, at the same time, the ILC has been prudent enough not to recommend the immediate conversion of its Articles into a Convention and this has been accepted by the General Assembly in its Resolution 56/

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<sup>7</sup> On this intellectual “revolution”, see Alain Pellet, “Remarques sur une révolution inachevée: le projet d’articles de la C.D.I. sur la responsabilité internationale des États”, *A.F.D.I.* 1996, pp. 7-32 and for a brief commentary of the new Articles, “Les articles de la C.D.I. sur la responsabilité de l’État pour fait internationalement illicite; Suite – et fin?”, *A.F.D.I.* 2002, pp. 1-23.

<sup>8</sup> See note 3, above.

83: had a diplomatic conference been convened immediately, one could have bet that all the cautious innovations proposed in the Articles would have been mercilessly deleted, while it could be hoped that after some years they would have become normal practice and seen as a *fait accompli*.

One can, of course, object that, since States have turned round and seem to have repudiated the notion of “crime”, why would the ILC maintain it against the whole world? First, this is not the whole world but the mighty, and powerful, and conservative States only. In any case, there must be no confusion: acceptability does not mean servility. As legal experts, the role of the ILC members is to explain why a concept is logically and legally necessary and they should not accept that consistency be sacrificed for reason of a supposed non-acceptability. Then, but only then, the States have to take their responsibility and decide.

As explained above, the most precious aspect of the codification process through the ILC is the constant co-operation of the “expert level” with the “political level”; but, in this process, each level must play its own part: the politicians – the States in the case of international law – must fix the aims, but they must leave the experts free to propose. Both levels would be well inspired not to invert the roles.

This might be easier if States, in nominating and electing Members of the Commission, were more faithful to the letter and, certainly, to the spirit, of the ILC Statute. More and more, they nominate and elect candidates who, in reality, are more acquainted with the United Nations and/or the world of diplomacy than with “academic international law”; this, indeed, presents some advantages (it might reinforce support for the Commission and avoids purely metaphysical discussions) but it also has many inconveniences, all the more that, generally speaking, the “professors” come from the West while the “diplomats” are from the Third World. This creates an imbalance inside the Commission in that its composition erases the *raison d'être* of the whole system, that is the complementarity (not the identification) between the ILC on the one hand and the Sixth Committee on the other hand; and the “double cap system”, that is the fact that many Members also represent their countries at the Sixth Committee, is far from commendable.

All this might not sound very encouraging and might give the impression that the ILC is, indeed, definitely not the proper forum to respond to new needs through codification and progressive development. Indeed, the ILC is far from perfect. It is certainly not ideally composed; it is, nevertheless, made up of (globally) independent lawyers, and the system of regional “quotas”, rigid as it may seem, at least guarantees a diversified regional composition and avoids the weaknesses noticeable, for example, in the composition of the Human Rights Committee. Its co-operation with the Sixth Committee is far from ideal; both levels have, nevertheless, a constant dialogue. The ILC’s process might seem desperately slow; its

methods of work have, nevertheless, been improved during the last few years, and they guarantee a serene and in-depth examination of all the facets of a problem; moreover, the Commission has shown that, when necessary (or, simply, when it could benefit from the leadership of a dynamic Rapporteur, as Vaclav Mikulka in the case of nationality in relation to the succession of States or James Crawford for the Criminal Court), it can be quick and efficient.

Now, efficient for what? How can the efficiency of a body like the ILC be measured? Expeditionousness? If this is the test, the average is very bad indeed, not far from zero out of twenty (with, once again, bright but very rare exceptions)! But this is not the only criterion. If we take the quality of the output, things rather improve.

To make the question less subjective: what has happened to the ILC drafts? Statistics in this respect can be made rather short: up to now the Commission has submitted 27 final reports (if one includes both the Code of Crimes and the Statute of the Criminal Court), plus one first reading draft; these 27 reports have resulted in 15 Conventions (plus a number of optional protocols) but this figure includes the Geneva Conventions of 1958 which were four for the sole topic of the law of the sea and are now *de facto* replaced by the “non-ILC” Montego Bay Convention. This is apparently not a wonderful achievement ...

But the picture is less dark than it looks: first, several of these treaties, beginning with the Vienna Convention on the Law of Treaties, are among the most important ever concluded; second, and above all, it is far from certain that the influence of the work of the ILC can be properly measured through these treaty statistics. Suffice it to recall that ILC drafts may exert a considerable influence even before they are completed; just think, in this respect, of the remarkable impact of the Articles on State responsibility even before or when they were adopted on first reading.<sup>9</sup>

It can, nevertheless, be sustained that the ILC is both:

- a misused forum; and
- one forum among others and not *the* forum, appropriate in all circumstances and for all and every possible topics.

It is a misused forum in the sense that this costly mechanism is not properly provided with topics. This might sound as an odd declaration: the Commission now

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<sup>9</sup> ICJ, Judgment of 25 September 1997, Gabcikovo/Nagymaros Project, ICJ Rep. 1997, p. 7. See also “Introduction – The Achievement of the International Law Commission”, in *ILC, International Law on the Eve of the Twenty-First Century*, United Nations, New York, Sales NE E/F 97.V.4, pp. 1-18.

has seven topics on its agenda, more than it has ever had. But, it must be noted, only one, inherited from a remote past, has been assigned to the Commission by the General Assembly.<sup>10</sup> The six others are pure “inventions” of the Commission! Indeed, all these topics have, finally, been endorsed by the Sixth Committee, but they were certainly not chosen by it.

This being said, with the important exception of “Liability”, all these topics are appropriate and fit for the Commission, as the Commission fits them: they bear on “lawyers’ law”; they do not involve too strong short-term political debates; they do not primarily imply expertise in non-legal fields; they do not overlap with similar topics dealt with elsewhere. And they respond, in their own manner, to real needs of the international society.

One could even go so far as to say that they are part of the “constitutional law” of the international society; not in the formal acceptance of the word “constitution” (this would correspond more to the UN Charter or the very rare existing peremptory norms of general international law), but in the substantive sense: they are part of the legal basis in which international society is rooted. This has been the case, until recently, of the law of State responsibility now prolonged with diplomatic protection, and of the law of the sources of law as in the case of treaties (through the topic of reservations) or unilateral acts of States. In all these cases, the ILC consolidates (through progressive development and codification) the legal roots of international society as and when required by its slow process of consolidation.

And, as in all societies, this slowly consolidating international society needs uniform legal rules which transversally cut through all fields covered by international law. Of course, it has to be accepted that rules must adapt to their object, and that special fields, in some cases, might need special rules. But the new mania in the Commission of advocating “diversity” in all and everything, and in particular, human rights and environment, can only be regretted. This way of thinking certainly attracts much sympathy and approval. But there are limits to this decentralised or “exploded” approach to international law: what would one think of a constitution which systematically adopts special rules concerning the adoption or the application of parliamentary acts depending on whether they bear on military or economic or human rights issues? The same holds true concerning treaties: whether human rights activists like it or not, the same general basic rules apply and

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<sup>10</sup> “International Liability for injurious consequences of acts not prohibited by international law” – a topic studied since 1977, which was, in fact, removed from the topic on the “Responsibility of States”.

must apply to all of them.<sup>11</sup> This does not rule out exceptions when exceptions are indispensable, but these exceptions must be included in the *general* codification; and when they are not, they must be provided for in the treaties themselves, not decreed by specialists without regard to the need for clear, general, uniform, well established and well respected rules. And this is not all that constraining: after all, codified rules are only applicable when the special treaties themselves do not provide otherwise! There is nothing “democratic” or “humanist” in the opposite approach: it only tries to justify the dictatorship of the “specialists” or of the “activists”; it is no more acceptable at the international level than that of the dictatorship of bureaucrats inside the States or in the European Union.

In this respect, it can be said that if the ILC did not exist, we should invent it or some kind of similar mechanism. Indeed, one of its main functions is to facilitate and encourage a uniform international law, responding to the needs of international society as a whole, its constant and everlasting needs for uniform transversal rules. This certainly is less exciting, less fashionable, than forging new rules for new needs; but this is a necessary and respectable task which could, certainly, be performed in a better and more efficient way. But, for the time being, let the ILC live ... *faute de mieux!* and for the “new needs”, let other forums, better equipped for that, and unavoidably more political, deal with them. This is a perfectly acceptable sharing of the tasks.

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<sup>11</sup> One of the recently adopted topics on the Agenda of the ILC is “Fragmentation of International Law: Difficulties Arising from the Diversification and expansion of International Law”.

## **The International Law-Making Process: An Innovative UK Practice and Its Use in Transposing International Norms into Domestic Law**

FRANCES MEADOWS

### **History**

When parties to an international convention undertake to make certain types of behaviour a criminal offence within their own countries, this will, almost irrespective of constitutional variations, require to be implemented by national legislation. Such is the case with Article 1 of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”). Parties are required to “take such measures as may be necessary to establish that it is a criminal offence (...) for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official (...) in order to obtain or retain business or other improper advantage in the conduct of international business”. The article goes on to provide an autonomous definition of what, for the purposes of the Convention, constitutes a “foreign public official”, though there is no express obligation to adopt the definition as such.

The parties to the OECD Convention, including member states of the OECD as well as other signatories, undertake to submit to a process of monitoring, in the form of peer review of their compliance. Peer review mechanisms, to date used mostly in the consensus-based OECD context, can provide a valuable tool for encouraging and assisting in the implementation of international obligations in national law. In the case of the OECD Convention, this review comprises two phases: in the first, each country’s implementing legislation is examined to ensure that its criminal provisions fulfil the specific requirements as to the elements of the offence; the second phase examines the implementation in practice of the legislation.

When the United Kingdom underwent Phase 1 of the monitoring process, the OECD Working Group on Bribery noted certain deficiencies in the state of the UK law as it then existed, and recommended reforms. After the enactment of the Anti-Terrorism, Crime and Security Act 2001, Part 12 of which dealt specifically with foreign bribery, a further “Phase 1 bis” review was conducted. This second review found that, when taken together, the UK bribery laws now in force covered the required elements of the offence. However, the Working Group was still concerned about the fragmented and inconsistent nature of the UK law. It is, still, a less than coherent mix of common law and statutes, some of them antiquated, which are too confusing to lend themselves to easy enforcement. The UK Law

Commission had already recommended in its 1998 report on the state of general corruption law that it should be comprehensively reformed, and the Working Group endorsed this view.

On 23 March 2003, the UK government published its new draft Corruption Bill. A single, all-encompassing, statute was proposed, prepared by Parliamentary counsel and based on an earlier Law Commission draft, with the objective of rationalising the laws on corruption in general, as well as ensuring full conformity with the requirements of the OECD Convention.

### **The process of pre-legislative scrutiny**

The Corruption Bill was subjected to an innovative and far-reaching process of pre-legislative scrutiny by Parliamentary committee. The day after the Bill was published, a Joint Committee was appointed, consisting of fourteen members drawn in equal numbers from the House of Commons and the House of Lords. Many of its members were lawyers, and all the major political parties were represented. Lord Slynn of Hadley, a former Law Lord and an eminent international lawyer, was elected chairman. The Committee's remit was to examine the draft Bill and to report to both Houses no later than four months after its presentation. The Committee was given the power to "require the submission of written evidence and documents, to examine witnesses, (...) to appoint specialist advisers, and to make Reports to the two Houses."

The Joint Committee delivered a 56-page report which was published on 31 July 2003.<sup>1</sup> The report was the product of a structured and intensive process, during which the Committee held eighteen meetings. The Committee appointed an academic expert as specialist adviser, and set out six major areas in which it wished to take evidence, one of which was whether the proposals were compatible with international obligations, and how they compared with equivalent law in other countries. It accepted some thirty items of written evidence and held eight sessions during which oral evidence was heard from a broad range of interested parties. These included the heads of the major criminal law enforcement agencies (the Director of Public Prosecutions and the Director of the Serious Fraud Office), the Attorney General, representatives of the Home Office under whose auspices the Bill had been drafted, including the Minister responsible, representatives of major industry, a professor of comparative criminal law, and also representatives of Trans-

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<sup>1</sup> HL Paper 157, HC 705, The Stationery Office Limited. The Report, evidence and publications of the Joint Committee are available at [www.parliament.uk/parliamentary\\_committees/jcdcb/cfm](http://www.parliament.uk/parliamentary_committees/jcdcb/cfm).

parency International, a leading international NGO in the anti-corruption field. Oral witnesses were examined at length by members of the Committee.

The Committee's conclusions were critical and radical. It noted that, while no-one had challenged the need for new legislation, there had been many adverse comments on the approach adopted in the Bill and its drafting, clarity and comprehensibility. The Committee proposed a simplified definition of what constituted corruption, in place of the somewhat abstract approach of the original drafters, and suggested that one of the provisions should be reconsidered from the standpoint of its compatibility with international law. The Committee listed fifteen conclusions and recommendations, unsparing but also constructive in their approach, and invited the Home Office to bring forward a revised Bill taking account of its findings.

It is not clear at this time what action will be taken on the report of the Joint Committee. There was no mention of a new Corruption Bill when the agenda for the next Parliamentary session was announced in the Queen's Speech in November 2003. The Committee's report, remarkable for synthesising a variety of relevant viewpoints into a practical and constructive alternative approach, deserves to be taken fully into account in future work on corruption law in the UK, not only because of its practical, even holistic approach and the collective qualifications of its members, but because of the high degree of focus it gives to compliance with international obligations.

## Profile/Profil

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### Paula Escarameia

EDDA KRISTJANSDOTTIR

In 1996, as part of a law school clinic, I was assigned briefly to the Portuguese mission to the United Nations in New York, during the Sixth Committee's consideration of the International Law Commission's (ILC) then draft articles on the non-navigational uses of international watercourses. My supervisor was the legal counsellor to the Portuguese mission, Paula Escarameia, and I was to conduct a little research, accompany the delegation to plenary meetings, and try to follow the discussions. I remember that one of my challenges was trying to keep up with Paula; she walked very fast! And she was kind enough to make me feel as though the benefit of my presence there was entirely hers, although the value of her name alone on my resume has accrued compound interest every year since. By way of example, five years later, I met a research scholar from Portugal who was participating in a special water law program at the Hague Academy's Centre for Studies and Research. I figured: water law, Portugal: she must know Paula. And indeed her face lit up in a big smile: "Of course I know her! She was my professor at university and my inspiration to study international law. And now she is being considered for the ILC!"

Back in New York in 2002, I attended the final Preparatory Commission on the International Criminal Court. Sitting again in the balcony seats overlooking the delegates' floor, I noticed a familiar figure scuttling between tables and bending over fellow negotiators, a hand on their shoulder, to discuss last minute points. It was Paula again – right where I had last seen her. When I caught up with her, at the cocktail reception on the last day of the Prepcom, I discovered just how busy she had been and began to realize that the water law work with which I had associated her was subsumed under the word "etc." in the UN portion on her astonishing CV.

Paula Escarameia was born on the first day of June, 1960, in Lisbon, Portugal. She received her earliest formal education at the British School in Lisbon, observing English festivities and "truly immersed in a British reality." Young Paula excelled at Portuguese and math but "wanted to do everything." She practiced gymnastics from an early age and had her heart set on becoming an Olympic medallist, or alternatively – if forced to choose only one career – the Queen of Portugal.

When the time came to graduate from high school, however, Paula had prepared herself for studying civil engineering, as her father and several other family members had done before her.

But the fateful revolutionary years of 1974 and 1976 changed all that. Picture, if you will, the aspiring engineer making her way towards the university, past smiling soldiers with red carnations in their gun barrels and jubilant crowds dancing on top of tanks, only to find that hardly any classes were being held, grades and homework had been abolished, and the students were all outside, demonstrating. Confronted with this chaos, Paula, although not religious, turned to the only school in Lisbon that was still operating the old way: the Catholic University. While it had no engineering classes, it did offer a law degree, and six years later, Paula graduated with distinction, becoming the first and only lawyer in her family.

Although she specialized in Portuguese domestic law, Paula also enjoyed reading Akehurst's Introduction to International Law with her professors, Dr. Crucho de Almeida and Ambassador Costa Lobo. I contacted the latter during the preparation of this Profile, and he told me that Paula had stood out very early on in his international law class of over a hundred students, for the relevance of her remarks and her analytical strengths. In the end, he said, "her oral exam was brilliant and she received the highest grades of the whole class."

But the Carnation Revolution was not the only event that affected the course of Paula's life in those years. After Indonesia's invasion of East Timor in 1975, some Timorese refugees appeared in Lisbon. These people left a lasting impression on her, "mostly because their eyes were so frightened all the time. I had never seen people like them." As soon as she had the opportunity, she vowed to research the question of East Timor and the root causes of such fear. After a diploma in international relations at the School of Advanced International Studies in Bologna, she wrote both her LL.M. and Ph.D. theses (in 1986 and 1988, respectively) on the topic at Harvard Law School. In those pre-1991 Dili massacre days, virtually nobody wrote on East Timor. Some of the professors Paula approached at Harvard were not even interested in the subject at all. This, she says, just made her more determined to pursue it. Her Doctoral thesis was entitled *Formation of Concepts in International Law: Subsumption under Self-Determination in the Case of East Timor*. In 1991, Paula founded the International Platform of Jurists for East Timor, an academic NGO with the purpose of promoting conferences and publications on Timor and influencing governments to accept its self-determination. In 1992, the Portuguese Parliament awarded her the National Prize (1st place) for her work on East Timor.

Paula has been teaching courses on international law since 1984. She says she always wanted to teach – to transmit to others what she had learned and to work

with young people at a time in their lives when almost all dreams are possible. Another benefit, and great lesson, of teaching, which she says occurred to her only later, is the freedom it has given her to think, to articulate her thoughts and to write about them. “Very few jobs allow you such freedom.” Paula’s mother is a retired schoolteacher, and her grandfather was a teacher who also wrote books on early education.

In 1989, Paula became Assistant Professor of public international law at her alma mater, the Portuguese Catholic University. At the same time, she also served as adjunct to the Secretary of State for Education, drafting several reforms and laws on the reorganization of the Education Ministry. The Portuguese academic structure is incredibly complex. There are, for example, seven separate steps from “lecturer” in law to the position of full professor. The work for the Education Ministry, although frustrating at times, offered invaluable insights into the art of negotiation and the minds of bureaucrats and politicians. In 1992, Paula was appointed Director of the Centre for International Institutions Studies, followed by Associate Professorship, at the Higher Institute of Social and Political Sciences (ISCSP), the Technical University of Lisbon. One of her students at ISCSP, Francisca Saraiva, wrote to me that Paula had been “one of the few female teachers, one of the youngest, and our favorite ... I always looked forward to her next class.” Paula has also, since 1993, taught International Law at the Superior Institute for Naval Warfare in Lisbon (a course for selection of Portuguese War Navy admirals and Air Force generals). In 2003, she added the Law Faculty of the New University of Lisbon to her list.

Paula furthermore spent the 1990-1991 academic year teaching public international law at the University of East Asia in Macau, as part of a mission to train local judges, prosecutors and lawyers to administer the country’s judicial system during the period 1999-2049, after which time the administration of Macau will pass to China pursuant to a Joint Declaration. During the transitional period, Macanese law (closely modeled on Portuguese law) applies.

Concurrently with much of this teaching, from 1995 to 1998, Paula worked as legal counsellor at the permanent mission of Portugal to the UN. In this capacity, she represented Portugal in the General Assembly’s Sixth Committee, headed the Portuguese delegation to several special committees, as well as to ad hoc and Preparatory Committees for the Establishment of a Permanent Criminal Court. From 1999 to 2002, she returned to New York as a member of the Portuguese delegation to the Preparatory Commission for the ICC, and all the while, she has been writing books and articles on that process.

In the book *The Year of the Death of Ricardo Reis* by Portugal's Nobel laureate in literature, José Saramago, the main character, Reis, strolling along the rain-soaked streets of Lisbon and reading old inscriptions on its stone walls, muses to himself that "Perhaps it is the language that chooses the writers it needs, making use of them so that each might express a tiny part of what it is."<sup>1</sup> If Reis is right, it seems that the melodious Portuguese language has chosen Paula Escarameia to write a large part of it that is international law. She has compiled Portuguese language editions of international law documents and cases, exams of international law, and has drafted the Code of Subjects for materials on international law for the Law Library of the Attorney General. She is the Portuguese language's primary source on the Rome Statute and the ICC, and on East Timor's legal history and struggle for self-determination; she also wrote the Preface to the first Angolan book on international law.

In her writings, she has also explored more generally the current state of international law, approaching it less from a static view of what it *is*, but more from the point of view of what it *was* and what it is *becoming*. For example, she has written about the ICC as a phenomenon conceived in a moment of transition, a hybrid institution with both Westphalian vestiges and hints of a new order.<sup>2</sup> Viewing the present in this way surely comes naturally to someone who studied international law because of upheaval and social change, who began her career in a country busy redefining its governing structures, and whose work has been not only to prepare future lawyers and policymakers, but also to assist in the transition from colonial rule to self-administration, as in her work on East Timor and Macau. And what could be more relevant to the work of the International Law Commission – with its mandate of codification and progressive development of international law –

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<sup>1</sup> José Saramago, *The Year of the Death of Ricardo Reis*, Engl. transl., Harcourt Brace, First Harvest ed. 1992, p. 47.

<sup>2</sup> "Prelúdios de um Nova Ordem Internacional: o Tribunal Penal Internacional" ("Prelude to a New International Order: the International Criminal Court"), in *Nação e Defesa*, Lisbon, April 2003. See also, e.g., *O Direito Internacional nos Princípios do Século XXI – Permanência e Mudança (International Law in the Beginning of the 21st Century – Permanence and Change)*, Almedina ed., Coimbra, 2003; "O Direito Internacional em Tempos de Mudança" ("International Law in Times of Change") in *Estudos em Homenagem a Cunha Rodrigues*, Lisboa, 2001; "O Intervalo entre o Modelo Passado e a Visão Futura: o Actual Direito Internacional" ("The Interval Between the Past Model and the Envisioned Future: Present International Law"), *Portuguese Journal on International Institutions Studies*, vol.1, Lisbon, 1993.

than a sense of flux and the ability to look simultaneously to the past and to the future?

In November 2001, Paula Escarameia was one of the first two women ever to be elected to the ILC, in the 55-year history of the Commission.<sup>3</sup> She is also the first ever Portuguese representative to this UN body.

Becoming a member of the ILC was, according to Paula, something far beyond her dreams. After all, she jokes, she had learned that she was not going to make the Olympic Games either! The idea to run for election originated with her successor at the Portuguese mission, Tiago Pitta e Cunha. Paula resisted for quite a while, because she felt she did not have the preparation of most ILC members. But “since there had never been a Portuguese ILC member,” and because she felt she had “nothing to lose” if she did not get elected, she decided to try, hoping that the initiative would serve as a springboard to the ILC for her fellow countrymen. Having won the election with a generous vote, she accredits it mostly to the vigorous campaign efforts of Mr. Pitta e Cunha and the then UN Ambassador Seixas da Costa. But, according to Paula’s former professor, Ambassador Costa Lobo, who also worked alongside her in the ICC negotiations, the election was due in large part to her recognized role in that forum, and the respect and admiration it earned her among the delegates, and to the quality he admires most in Paula Escarameia, namely “her deep commitment to the values in which she believes, and her refusal to accept the ‘easy way’ if it conflicts with those values.”

In any event, this latest success has not made her skip a beat; by the time this article goes to print, Paula will be on her way back to Macau to teach a seminar on UN law.

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<sup>3</sup> The other female Commissioner is Xue Hanqin of China.

## Work in Progress / Travaux en cours

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### International Criminal Court – Senior Officials Take Office

THORDIS INGADOTTIR\*

With the most senior officials now appointed, the International Criminal Court is setting its course. The eighteen judges of the Court were inaugurated in March, 2003, witnessed by various leaders and representatives of the international community. In his address, the United Nations Secretary-General Kofi Annan stated that “these eleven men and seven women, representing all regions of the world and many different cultures and legal traditions, have made themselves the embodiment of our collective conscience”. The principal administrator of the Court, Registrar Mr. Bruno Cathala, was appointed on July 4, and the Court’s Prosecutor, Mr. Luis Moreno Ocampo, took office on June 16. His Deputy-prosecutor, Mr. Serge Brammertz, made his solemn undertaking on November 3, 2003. Another important election took place in September 2003, namely the election of members of the Board of Directors of the Victims Trust Fund: Her Majesty Queen Rania Al-Abdullah, Óscar Arias Sánchez, Tadeusz Mazowiecki, Archbishop Desmond Tutu, and Simone Veil. In September 1999 staff members were working in the Court’s temporary building, the Arch, in The Hague. That same month, the Assembly of States Parties adopted the Court’s budget for the year 2004, totaling EU 55,000 and entailing 395 staffing posts.

With a case looming, the new officials of the Court are busy preparing for its arrival. Since the entry into force of the Rome Statute in July 2002, no case has been referred to the Court, neither by the United Nations Security Council nor from any of its 92 member states. However, during the same time, the office of the Prosecutor received numerous communications from NGOs and individuals. The first likely case before the Court concerns a situation in one of its member states, the Democratic Republic of Congo. The Prosecutor has announced that he is conducting preliminary examinations of atrocities committed in Ituri, which could potentially constitute genocide, crimes against humanity and war crimes, all of which fall within the jurisdiction of the Court.

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Registrar Mr. Bruno Cathala's imminent task is to set the Court physically on the ground. He is not entirely new to the job, as he served as the Registrar of the Court in his function as the Director of Common Services since October 2002. His former experience as the Deputy Registrar at the International Criminal Tribunal for the former Yugoslavia will, without doubt, come in handy. His initial task is complicated by the fact that the Court is not a part of the United Nations and therefore does not enjoy its institutional support; he does not enjoy the privilege of being able to call in technical expertise which has done the job so often before. The temporary building of the Court is now being transformed into facilities serving a judicial body, including separate facilities for the office of the Prosecutor, media center, court rooms, and public gallery. Access by victims has to be ensured, as well as facilities for the defence. All the infrastructure must be carefully considered, in particular the information technology system adopted. Having the right IT system in place at the outset will be crucial for the effective functioning of the Court, as well as for its finances in the longer term. The lessons learned from the ad hoc tribunals for the former Yugoslavia and Rwanda, where the same documents have been translated dozens of times, are a good example of bad investments.

While "establishing" the Court, the Registrar is handling the everyday administrator's task, such as serving the Court's officials, conducting a recruitment process, holding tight to the wallet, and presenting a reasonable budget to the Assembly of States Parties. External relations are a crucial component of his agenda, whether it is with states parties, the host government, regional and international organizations, civil society, or conceivable future states parties. States parties' collaboration is now being put to the test. Hopefully, their late payments of assessed contributions are not a indication of dwindling commitment. The government of the Netherlands has to be held to its promise of giving the Court permanent premises, while at the same time taking into account the Court's needs and interest. The recent activities of the office of the Prosecutor have already proven how dependent the Court is on cooperation with the United Nations, and the relationship agreement between the institutions, currently being negotiated, will hopefully substantiate the cooperation between the two. The Registrar acknowledges the vital role NGOs have played in the ICC process, and he has consulted with them regarding victims and defence issues. For instance, in October 2003, he held a seminar with NGOs on victims participation and related issues. However, he did not support the application by the new International Criminal Bar for recognition by the Assembly of States Parties, due to reservations about its representation and transparency, and since the application's subsequent rejection, he has been assembling his own list of counsel for Assembly of States Parties' approval.

The judges of the Court were elected in February 2003. Aside from the event's utmost importance for the Court – for its launching, credibility, and work – in the panoply of international courts and tribunals, the election was not business as usual. ICC member states were faced with new requirements regarding representation among judges, and new procedures governing the manner and conduct of their election. In addition to conventional requirements of fair geographical representation among judges, and representation of the principal legal systems of the world, the Rome Statute stipulates a new requirement: *a fair representation of female and male judges* and inclusion of judges with legal expertise on specific issues, including violence against women and children. In addition, half of the elected judges had to be so-called “A list” candidates: candidates with expertise in trial work, as opposed to academics and diplomats. In response to the new setting, the ICC member states adopted detailed supplementary rules on the procedures of the nomination and election of judges, including an unprecedented “minimum voting requirement system”. In short, in order to have their ballot papers valid, states parties had to vote for at least six female and at least six male candidates; at least nine candidates from list A and at least five candidates from list B (i.e., candidates with competence in international law), and at least three or two candidates from each region (the lower number applying to Asia and Eastern Europe). Following a four-day marathon election, involving a record high 33 rounds of balloting, the courts' eighteen judges were elected, eleven men and seven women, noticeably the highest female representation at any international court.

Six judges are already full time in The Hague, including the three-member Presidency, headed by President Philippe Kirsch. Thanks to the meticulous work of the Preparatory Committee of the International Criminal Court, the preparation work waiting for judges is somewhat less than that of their counterparts at other international courts. Most importantly, the Rules of Procedure and Evidence have already been adopted, a task which at other tribunals had always been assigned to judges. There is, however, plenty of work to do. All judges met in plenary sessions in June and September where they worked on drafting the Regulations of the Court, a document which will govern all daily operations. In addition, new territories have to be ascertained; for the first time in international criminal proceedings, victims have the possibility of participating in the trials – expressing their views and concerns – in their own right, and not merely as witnesses as before. The Court was also given the unprecedented mandate of establishing principles of reparations to victims. The implementation of these new tasks was left largely to the discretion of judges. The judges have also taken on the challenge of preparing a code of conduct for themselves, a work which will undoubtedly benefit the remaining two hundred judges at other international courts and tribunals.

The Prosecutor, Mr. Luis Moreno-Ocampo from Argentina, made his solemn undertaking on June 16, 2003. His appointment was by consensus and came following months of lengthy consultations among member states. The Latin American candidate, a seasoned trial lawyer whose experience includes the prosecution of Argentina's former military regime, came through as the perfect choice for undoubtedly one of the most difficult post in the international arena today.

Facing a daunting task, the Prosecutor has not wasted any time. He used his first two days in office to hold a Public Hearing where diplomats, academics, NGOs, and other interested parties were invited to comment on his proposed Draft Regulations and a Draft Paper on some Policy Issues before his office. The hearing was equally important for its transparency as for the information provided. As reflected in the policy paper, the central policy issue facing the office of the Prosecutor is its complementarity strategy. The Prosecutor has made it clear that his office will only act where there is a clear case of failure at the national level to do so. The policy paper stipulates that his office will encourage and facilitate actions at the national level, even to the extent of assisting states by providing information gathered by the office. With respect to the prosecution strategy, the office recommends that it should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility. Acknowledging that such strategy will in some cases leave an impunity gap, the office calls on the international community to assist in addressing that problem. Further illustrating the transparent and consultative process adopted, the policy paper has been posted on the office's website along with forms for comments.

On 16 July, the Prosecutor held a Press Conference, which he used to give an overview of the communication received by his office. Of the 499 communications received, many included allegations of crimes not within the jurisdiction of the Court. Some related to crimes allegedly committed by nationals of a state party, such as those who were part of the coalition forces during the war in Iraq. In response, the Prosecutor cited the complementarity principle of the Rome Statute, and that it would have to be determined whether national authorities concerned were addressing the matter. The office received six communications regarding the situation in Ituri, Democratic Republic of Congo, including two detailed reports from NGOs. The Prosecutor described this situation as the most urgent one to follow. In his address to the Assembly of States Parties in September, the Prosecutor brought the situation to the attention of states parties, and appealed for the assistance of the international community to assist local authorities to take on the case, or refer it to the Court. While stating that he stands ready to use his *proprio motu* powers and seek authorization from a Pre-Trial Chamber to start an investi-

gation, he indicated that a referral would be more preferable and would show states commitment to end fighting in the region.

The adopted policies of the first officials of the International Criminal Court will shape the Court for times to come. Their work may very well decide the Court's success or failure. However, as with any international institution, irrespective of their officials' good work, the Court's ultimate success will largely depend on member states' cooperation and support. This will now be put to a test, both with respect to proper payments, assistance with investigations, and arrest of suspects. This crucial collaboration, and combined efforts by all interested in getting the job done, remains to be tested in the coming months, as well as member states' commitment to fight off critique and stand guard of the Court's and Rome Statute's integrity.

**Postscript**

In December 2003, the President of Uganda referred the situation concerning the Lord's Resistance Army to the Prosecutor of the International Criminal Court. The Prosecutor's determination to initiate the investigation remains to be taken.

## Conference Scene / Le tour des conférences

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### Carla Del Ponte: Her Retrospective of Four Years in The Hague

ANGELA M. BANKS\*

Over the past ten years the work of the International Criminal Tribunal for the former Yugoslavia (“ICTY” or “International Tribunal”) has significantly advanced the field of international humanitarian law. On 2 October 2003, the Prosecutor for the International Tribunal, Carla Del Ponte, provided a retrospective of her last four years at the Tribunal in which she addressed these legal achievements, ICTY procedural developments that have increased the institution’s efficiency, and the legal contributions of the International Criminal Tribunal for Rwanda (“ICTR”).<sup>1</sup> Del Ponte noted that the ICTR was the first international court to issue a judgment on genocide, which gave new life to the Genocide Convention. There have been several ICTR genocide judgments and together they leave little doubt that segments of the Hutu population were intent on destroying the Tutsi population in Rwanda. The ICTR was also the first international court to conclude that rape constituted a crime against humanity. In addition to providing an overview of ICTY and ICTR contributions to the development of international humanitarian law, Del Ponte discussed the ICTY’s Completion Strategy. This comment will focus primarily on Del Ponte’s comments regarding this Strategy.

The United Nations Security Council has recently endorsed the ICTY Completion Strategy, which requires the Tribunal to complete all investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all work by 2010.<sup>2</sup> Del Ponte stated that two specific developments will be critical in enabling the International Tribunal to meet these deadlines – openness to accepting guilty pleas and plea agreements, and transferring cases to local courts. At the time of Del Ponte’s speech, the ICTY had received fifteen guilty pleas, seven of which had been entered since May 2003. Del Ponte acknowledged that there have been numerous criticisms of the ICTY’s use of guilty pleas and plea agreements, but she placed the trend in the broader context of criminal prosecution. Ninety percent of criminal

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\* Legal Adviser, Iran-United States Claims Tribunal.

<sup>1</sup> Del Ponte’s speech entitled, “Four Years in The Hague: A Retrospective – and the Way Forward” was sponsored by The Netherlands Society for International Affairs.

defendants in the United States plead guilty in exchange for a lower sentence and fifty percent of individuals accused of serious crimes in England plead guilty. Del Ponte also responded to three main critiques of this practice: the nature of the crimes makes it unseemly to bargain for a lower sentence, the procedure runs counter to a transparent process, and victims are given insufficient opportunities to tell their stories. She acknowledged the importance of transparent proceedings and providing adequate opportunities for victims to participate, but maintained that the ICTY has arrived at an appropriate balance between these interests such that the institution remains a model for future prosecutions of war crimes. Del Ponte went even further to stress the value of guilty pleas to the work of the ICTY, stating that such pleas enable the Office of the Prosecutor to obtain valuable information and can help promote reconciliation in the former Yugoslavia.<sup>3</sup> Accused who plead guilty generally provide detailed information about atrocities that could otherwise remain unknown. This information can prove helpful, if not necessary, in prosecuting individuals who had high levels of responsibility.

The other development Del Ponte identified as necessary to enable the International Tribunal to adhere to the Competition Strategy is the increased transfer of cases to local courts. The ICTY has concurrent jurisdiction with national courts “to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991,” but the Tribunal has primacy over the national courts. In 2000, the UN Security Council recalled this fact and began to examine the “length of the mandate of the Tribunal.”<sup>4</sup> Subsequently, the ICTY has been aware of the need to “accomplish its mission in an expeditious and exemplary fashion.”<sup>5</sup> The recent push to transfer ICTY cases to local courts is motivated by this need, but also a desire to ensure that those responsible for violating international humanitarian law are held accountable. Former ICTY President Claude Jorda noted that this course of action,

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<sup>2</sup> S.C. Res. 1503, UN SCOR, 58th Sess., UN Doc. S/RES/1503 (2003).

<sup>3</sup> Del Ponte also quoted Emir Suljagic, a Srebrenica survivor, who has written that “the confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgment I have been looking for these past eight years. While far from an apology, these admissions are a start.” Emir Suljagic, “Truth at The Hague”, *New York Times* (1 June 2003) (op-ed).

<sup>4</sup> S.C. Res. 1329, UN SCOR, 55th Sess., UN Doc. S/RES/1329 (2000).

<sup>5</sup> Press Release, ICTY, Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security Council (27 Nov. 2001), available at <http://www.un.org/icty/pressreal/p641-e.htm>.

would have the merit of considerably lightening the International Tribunal's workload, thereby allowing it to complete its mission at an even earlier juncture. Moreover, it would make the trial of the cases referred before the national courts more transparent to the local populations and so make a more effective contribution to reconciling the peoples of the Balkans.<sup>6</sup>

If the Tribunal is to complete all investigations and trials in the first instance by 2008, it has to be selective in its prosecutions and Del Ponte has stated that the ICTY will focus on high-level individuals. She also recognizes, however, the importance of prosecuting the lower- to mid-level perpetrators, stating that these are the individuals who brought devastation to the local people's lives. Local courts thus provide a venue in which "the international community's historic effort to bring accountability to those who commit terrible atrocities" can be realized.<sup>7</sup> The ICTY has been working with the Office of the High Representative ("OHR") for Bosnia and Herzegovina ("BiH") to establish the War Crimes Chamber within the Court of Bosnia and Herzegovina. This chamber will be responsible for prosecuting individuals accused of committing war crimes in BiH during the war. It is anticipated that the War Crimes Chamber ("WCC" or "Chamber") will initially take over fifteen lower-level ICTY cases.<sup>8</sup>

The option to transfer cases to local courts in BiH has not been utilized in the past because, as current ICTY President Theodore Meron has noted, the local courts currently face problems related to structural difficulties, the lack of cooperation between Republika Srpska and the Federation of Bosnia and Herzegovina, political pressure on judges and prosecutors, the mono-ethnic composition of local courts, ethnic bias, difficulties protecting witnesses and victims, and inadequate

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<sup>6</sup> *Id.*

<sup>7</sup> Press Release, ICTY, Statement of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (9 Oct. 2003) (speech given 8 November 2003), available at <http://www.un.org/icty/pressreal/2003/p788-e.htm> [hereinafter Meron 2003 Security Council Statement]; see also Press Release, ICTY, Address by Ms. Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (10 Oct. 2003) (address given 9 October 2003), available at <http://www.un.org/icty/pressreal/2003/p791-e.htm>.

<sup>8</sup> "Bosnia gets war crimes court", *BBC News* (31 Oct. 2003), available at <http://news.bbc.co.uk/1/hi/world/europe/3229263.stm>.

training for court personnel.<sup>9</sup> The creation of the Chamber in BiH will avoid these problems because it will begin its work with an international staff of judges and prosecutors. The WCC, which is scheduled to open in 2004 at the latest, will have a staff of approximately 100, with seven prosecutors and eleven judges. Over time, power will “gradually be handed over to Bosnian officials and the court will become fully national after five years.”<sup>10</sup> In the early planning stages of this Chamber, former President Jorda hastened to emphasize that the new court would not be “‘a mini-international tribunal’ in Sarajevo.”<sup>11</sup> Instead the War Crimes Chamber was envisioned as a “national court already in place” that would provisionally be accorded “a *minimal* international character in order to guarantee its impartiality and independence.”<sup>12</sup>

Unfortunately this strategy risks exacerbating a problem that has contributed to the ICTY’s inability to transfer cases to local BiH courts – the failure to build the institutional capacity of these courts.<sup>13</sup> Noting this problem, one commentator has stated that “[i]nstead of serving as an important tool of legal development and as a catalyst for local war crime prosecutions, the tribunal will apparently fold its operations without contributing much to either the justice systems in the region or the prosecution of war crimes.”<sup>14</sup> Aware of the increased importance of building the capacity of local courts, Del Ponte shared several types of assistance that the

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<sup>9</sup> Meron 2003 Security Council Statement, *supra* note 7. Former President Jorda noted these obstacles in 2002 when he explained why a new war crimes chamber was necessary. Press Release, ICTY, Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security Council (26 July 2002) (address took place 23 July 2002), available at <http://www.un.org/icty/pressreal/p690-e.htm> [hereinafter Jorda 2002 Security Council Address].

<sup>10</sup> Anthony Deutsch, “Bosnia Gets \$18.4M for War Crimes Court”, *Newsday* (30 Oct. 2003), available at <http://www.newsday.com> (last visited 17 Nov. 2003).

<sup>11</sup> Jorda 2002 Security Council Address, *supra* note 9.

<sup>12</sup> *Id.* (emphasis in original).

<sup>13</sup> Given the uncertainty of the International Tribunal’s future when the institution began it is understandable that considerable focus was not placed on local courts. It made sense for the ICTY to concentrate on creating and developing its own capacity to conduct war crimes trials. See Gabrielle Kirk McDonald, “Reflections on the Contributions of the International Criminal Tribunal for the former Yugoslavia”, *Hastings Int’l & Comp. L. Rev.* 155, 158-59 (2001) (discussing meager beginnings of the International Tribunal).

<sup>14</sup> David Tolbert, “The International Criminal Tribunal for the former Yugoslavia: Unforeseen Success and Foreseeable Shortcomings”, 26 *Fall Fletcher F. World Aff.* 7, 15 (2002).

ICTY can and will provide to local courts in an effort to prepare them to prosecute war crimes in the near future. The ICTY plans to provide documents, evidence, knowledge, expertise, and advice.

One aspect of capacity building was noticeably missing from Del Ponte's comments: how the new Chamber will address issues related to cooperation between the relevant political entities, the ethnic composition of the courts, and ethnic bias. Del Ponte appears to envision technical legal assistance; however it has been noted that the overriding problem when trying war crimes "is one of ethnicity."<sup>15</sup> This may overstate the issue; however the international community is not confident that the local courts of BiH can, currently, fairly and freely prosecute war crimes. This opinion is partially based on the nearly mono-ethnic judiciary in which judges are believed to be appointed based on ethnic and political grounds.<sup>16</sup> Factors such as these can produce legitimacy problems. When a judicial body with jurisdiction over war crimes was created in Kosovo, there were few ethnic Serb judges who were willing to serve and the few who agreed resigned soon thereafter.<sup>17</sup> The lack of Serb representation caused the independence of the institution, which was important for local legitimacy, to be severely questioned. Consequently, "there was little ability for the local justice system to deliver verdicts perceived to be legitimate in trials of those suspected of committing mass atrocities."<sup>18</sup> Even the ICTY, despite its international staff and location outside of the former Yugoslavia, has faced allegations that it is biased "to the benefit or detriment of one or [an] other ethnic group, and [mistreats] persons detained under its authority."<sup>19</sup> Not only did these views negatively affect the ICTY's credibility in the region, they impeded the

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<sup>15</sup> "Hague Tribunal to Hand Over Cases to Local Courts", *Radio Netherlands Wereldomroep* (18 June 2002), available at <http://www.rnw.nl/hotspots/html/icity020618.html>.

<sup>16</sup> *International Crisis Group, Rule Over Law: Obstacles to the Development of an Independent Judiciary in BiH, ICG Report No. 72*, at i, 15-17 (5 July 1999); see also The Human Rights Center & the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors", 18 *Berkeley J. Int'l L.* 102, 107 (2000); Meron 2003 Security Council Statement, *supra* note 7.

<sup>17</sup> Laura A. Dickinson, "The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo", 37 *New Eng. L. Rev.* 1059, 1066 (2003).

<sup>18</sup> *Id.*

<sup>19</sup> Lal C. Vohrah & Jon Cina, "Outreach Programme", in *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* 551 (Richard May et al. eds., 2001).

work of the Prosecutor. In 1999, Judge Gabrielle Kirk McDonald, then President of the ICTY, created the Outreach Programme, which designed and implemented an information campaign that highlighted the ICTY's impartiality and independence. Through this program, the ICTY has been able to counter and overcome many of the perceptions of bias.

These examples, from Kosovo and the ICTY, demonstrate that it is important for the War Crimes Chamber to begin working on issues related to perceived bias early. Relying on an international staff for the early functioning of the Chamber without addressing these issues will only recreate the current problem – lack of confidence in the local courts of BiH. Building and maintaining a legitimate and effective judicial institution within a multiethnic society depends as much on the structural characteristics of the institution as on societal, political, and economic factors. Equal access and representation can address the ethnic composition of the institution, but those factors alone will not combat ethnic bias. Therefore it is critical that the ICTY, the OHR, and the WCC confront these issues early, in concert with other governmental and civil society entities, to ensure that the Chamber will be in a position to be completely national by the target deadline.

**The Future of International Constitutional Law:  
Seminar of the Amsterdam Center of International Law,  
Friday 28 November 2003**

STEN VERHOEVEN\*

The Amsterdam Center of International Law recently organized a seminar with the intriguing title “The Future of International Constitutional Law”. A small group of participants, mainly from Western Europe, tried to find an answer in three sessions, each devoted to a specific question. First of all, what is the structure of the international constitutional order? Secondly, what kind of international community is there today? Thirdly, what is the hierarchy of norms in international law? Since it is impossible to give a nuanced and detailed description of all contributions, emphasis will be laid on only two of them. For the rest, we refer the reader to the Conference Proceedings which will be published shortly.

**The UN Charter as the Constitution of the International Community**

The contribution of Prof. Fassbender (Humboldt University Berlin) deserves our attention because of its bold opinion. He gave the UN Charter a central position and identified it as the constitution of the international community, despite the crisis of the UN. Nevertheless, the constitutional idea on the international level is nowadays more and more accepted. Prof. Fassbender underlined that this is due to several approaches, which have in common that their supported international constitutionalism is a progressive movement to enhance international cooperation. The main disadvantage of these approaches, however, is that they remain vague. Therefore, he suggested to associate international constitutional law closely with the UN Charter. This approach had the unquestionable advantage that there is one visible document serving as an authoritative statement of both the fundamental rights and responsibilities of the members of the international community and the values of this community, as well as the basis of the most important community institutions. Prof. Fassbender also accepted, however, other fundamental rules of customary and treaty law, supplementing the Charter, as being of a constitutional nature. These rules, however, attained this status because of the UN: the UN provided (and provides) a forum to create opportunities to make treaties and to foster customary law on fundamental norms and principles. The UN Charter

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can hence be seen as the gateway through which norms have to pass to obtain a constitutional status.

Prof. Peters replied by stressing the effects of globalization on national constitutions: they become more and more imperfect, losing their status of total constitutions. As a result, States have to increasingly act on the international level to compensate for the “deconstitution” on the national level. Although she stressed that, judged by traditional standards of constitution or constitutional law, there does not exist an international constitution, she identified general and specific phenomena indicating a *constitutionalization* of international law. Prof. Peters referred in particular to the existence of a “constitutional network” or a fragmentary and complementary constitutional law on various levels of governance. There is, however, a strong antagonist trend, namely the factual US-hegemony.

The discussion proved that the idea of an international constitutional order still has a long way to go. Besides the reference to the UN Charter, suggestions were made to look at alternative bodies of law (e.g. human rights) as potential sources for this constitutional framework.

Both contributions were a good starting point for the discussion on the international constitutional order and the value of the UN Charter and alternative bodies of law (e.g. human rights).

#### **The National and International Effects of *Jus Cogens***

Prof. de Wet (University of Amsterdam) gave an inspiring contribution based on an original approach to *jus cogens*. She explored the validity of the *Furundzija* dictum, according to which *jus cogens* must bind the State in its treaty relations and with respect to acts of the legislature, the executive and the judiciary. Prof. de Wet mainly focused on the implications of the prohibition of torture as a limitation to the national (constitutional) legislative process, as well as to national legislation pertaining to sovereign immunity. Her contribution gave some good indications of the role of *jus cogens* in determining the applicable law in conflict of law disputes and in fulfilling the double criminality requirement in extradition proceedings. Prof. de Wet also managed to reflect clearly the complex relationships between *jus cogens* and national law. She exposed the emerging hierarchy of norms in international law, which is underpinned by a deepening of the international consensus pertaining to the content and hierarchical order of the international value system.

In her accurate comment, Prof. Knop briefly discussed some arguments of Dr. de Wet and introduced new questions and arguments on the effects of *jus cogens* on the domestic and international level. Furthermore, Prof. Knop tried in her comments to highlight the various ways that the analysis of Dr. de Wet complicated the understanding of the hierarchy in international law and also to suggest how any

such understanding could not escape the ambiguities of the very concept of *jus cogens* in terms of its source, its legitimacy and, ultimately, its impact.

The seminar did not offer a definitive answer to the question of what is the international community and what is its (desired) constitution, but it certainly went a long way in giving food for thought to the participants.

**The Development of International Law: Alternatives to Treaty-Making?**  
**Max Planck Institute, 14-15 November 2003**

GIONATA PIERO BUZZINI\*

This two-day symposium, organised by Professor Rüdiger Wolfrum and his team, addressed a very timely issue: do treaties still play, and will they carry on playing, a prominent role in the development of international law? In addressing this issue, a large number of theoretical and practical questions were discussed. This report will focus on only three of them.

**1. What are the Alternatives to Treaty-Making?**

Admittedly, treaties possess advantages (e.g. certainty and explicit consent) over other means of international law-making, such as *custom* and *general principles*. However, as Professor Thomas Franck (New York University) aptly observed, in some cases it is wiser not to take the treaty-path. In this respect, Professor Yoram Dinstein (US Naval War College) insisted on the advantages of a simple “restatement of the law”: unlike codification treaties, which can produce unsuccessful or even devastating results, restatements, at worst, can do no harm; at best, they can change the law without anyone noticing it! As pointed out by some participants – in particular Professors Thomas Franck and Alain Pellet (University of Paris X) – such considerations may explain why the International Law Commission (ILC) did not ask the UN General Assembly to convene a codification conference for the adoption of a multilateral convention on the basis of the ILC’s Articles on State Responsibility.

*The case-law of international tribunals* was considered by some participants as a valuable alternative to treaty-law. Professor Alain Pellet insisted on the legislative function of the International Court of Justice (ICJ) in a highly decentralised society. Professor Georges Abi-Saab (Graduate Institute of International Studies, Geneva; WTO Appellate Body) and Judge Abdul Koroma (ICJ), while recognising the

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I thank my friend and colleague Sarah Heathcote for re-reading this text.

important role of the ICJ for the development of international law, preferred to speak of “normative accretion” inherent in the judicial function.

Discussing the role of international courts and tribunals from the perspective of the growing number of adjudicating bodies and the risks of fragmentation it entails, Judge Tullio Treves (International Tribunal for the Law of the Sea) considered that such risks are frequently overestimated. He adopted instead a rather ecumenist view, suggesting that adjudicating bodies are “ready to engage in constructive dialogue that through cross-fertilisation of their views may bring about progress in the law”.

The role of *Security Council Resolutions* as an alternative to treaty-law was not discussed to its full extent. The stimulating report by Professor Erika de Wet (University of Amsterdam) focused on the limits of the Security Council’s powers and on its (quasi)-judicial decisions, rather than on its potential legislative function. The latter issue, however, was briefly addressed during the debates, especially by Mr. Michael Wood (Foreign and Commonwealth Office, United Kingdom of Great Britain and Northern Ireland), Professor Georg Nolte (Georg-August-University of Göttingen) and Professor Christian Tomuschat (Humboldt University Berlin). Full exploration of the legislative potential of the Security Council is needed. This has become a topical question after the adoption of Security Council Resolution 1373, which imposes upon States a considerable number of general obligations in the fight against terrorism.

Other alternatives to treaty-law were discussed. Professor Daniel Thürer (University of Zürich) insisted on the role of public conscience as a possible source of law, at least with respect to basic questions, particularly in the field of humanitarian law. Professor Laurence Boisson de Chazournes (University of Geneva), mentioning the World Bank Operational Standards and the UN Secretary-General’s Bulletin of 6 August 1999 (“Observance by United Nations forces of international humanitarian law”), stressed the inadequacy of a treaty format in the daily work of international organisations, taking into consideration the need for the latter to implement the rule of law in the course of their operational activities. Professor William Edeson (University of Wollongong), dealing with technical/informal expert bodies, illustrated the cases of the *Codex alimentarius* and the Code of Conduct for Responsible Fisheries, which create standards, although not by way of treaty.

Finally, as Professor Eckart Klein (University of Potsdam) pointed out – in his comments on Professor Gudmundur Alfredsson’s (Raoul Wallenberg Institute) presentation – in respect of the Concluding Observations issued by human rights treaty bodies, non-conventional instruments, instead of being alternatives to treaty-making, can also be tools for developing treaty regimes. Professor Anthony Aust

(London School of Economics and University College London), in his paper on “Domestic consequences of Non-Treaty (Non-Conventional) Law-making”, commented on by Professor Francisco Orrego-Vicuña (Academia Chilena de Ciencias Sociales, Políticas y Morales) and Mrs. Susanne Wasum-Rainer (Department of Legal Affairs, German Foreign Office), also stressed the role played by Memoranda of Understanding in order to clarify, correct or complete treaty rules.

## **2. New Actors and Their Influence on International Law-Making**

Professor Michael Reisman (Yale University) suggested that, if new actors have appeared in the international system, they also contribute to law-making. Drawing inspiration from the New Haven School, which considers law as a process of decision-making, Professor Reisman adopted a wide definition of “international law”. Admittedly, the ICJ and other international tribunals may only apply the rules of Article 38 of the ICJ Statute, but outside judicial procedures, actors of the international system may invoke “the plenum” of international law, which includes “non-state law”, provocatively called by Professor Reisman “media law”. Such a thesis was rejected by Professor Georges Abi-Saab, who stressed that law needs to satisfy the requirements of security, stability and predictability by providing for pre-set standards; therefore, one must not blur the distinction between material and formal sources. The concept of “media law” was also criticised by Judge Vladlen Vereshchetin (ICJ). Professor Christian Tomuschat considered it dangerous because it may produce results incompatible with the basic concept of “sovereign equality”.

As pointed out by some participants, the distinction between “Article 38 Law” and “Non-Article 38 Law” does not seem to be acceptable. Article 38 clearly states that the ICJ applies “international law”. Therefore, if new rules have appeared in the international legal system, they should also be applied by the ICJ. The “*renvoi*” operated by Article 38 to “international law” must be considered as dynamic rather than static, the latter covering only the law as it existed in 1945. Anyway, has such new “non-state law” really appeared in the international legal system? And if it has, what kind of law is it? “Hard-law”, “soft-law”, or something else?

In addition, as observed by Professor Pierre-Marie Dupuy (Université Panthéon-Assas Paris II; European University Institute, Florence) in his comments on Professor Volker Röben’s (Max Planck Institute for Comparative Public Law and International Law) exploratory paper on “Proliferation of actors”, one should not simply talk of “non-state actors”; further distinctions need to be made between those that are subjects of international law, and those that do not possess such status. In this respect, Professor Steve Charnovitz (Georgetown University Law Center) also stressed the need for distinguishing between actors and the institutions for which

they act. However, due to time constraints, these thorny questions and distinctions were not analysed in depth during the debates.

Finally, the differentiated role played by “non-state actors” in the elaboration of international law, and their involvement at different stages of law-making, were examined by Professors Eibe Riedel (University of Mannheim), Stephan Hobe (University of Cologne) and Rahmatullah Khan (Jawaharlal Nehru University). The new legislative imperatives of globalisation were also touched upon by Professor Laurence Boisson de Chazournes, who stressed the multi-dimensional character of law in a globalised world, the important place left to usage and practice, and the emergence of various forms of “co-regulation” based on the concept of public versus private partnership.

### 3. Soft-law and State Consent

Generally, the symposium’s participants were not hostile to the idea of “soft-law”. Nevertheless, the definition of “soft-law” and its legal status were debated at length. Professor Georges Abi-Saab insisted on the importance of distinguishing between “soft substantive law” – which may be embodied even in a treaty – and “soft instruments”, whose content may not be soft at all. Professor Daniel Bodansky (University of Georgia) illustrated the complexity of contemporary international law-making and stressed the need for finding new criteria in order to assess the status of different rules and to develop further classifications. Some participants also used the terms “non-binding law” or “*de facto* law”. The latter was introduced by Professor Jutta Brunnée (University of Toronto) in respect of regulations adopted by the “Conferences of the parties” or by their subsidiary organs within the context of environmental framework conventions. “*De facto* law” means that such regulations, even though they do not possess clear legal status, are likely to operate as formal law.

Professor Brunnée also suggested that law could be “self-binding” regardless of formal consent. The idea of “self-bindingness” was criticised by Professor Geir Ulfstein (University of Oslo), who pointed out that States are not ready to renounce formal criteria. Professor Gunther Handl (Tulane University) also mentioned the strong reactions by States against moving away from consent-based law-making. Professor Francisco Orrego-Vicuña insisted on the role of consent and on the need to elaborate new tools, such as judicial review of discretionary decisions or the establishment of an international constitutional Court, in order to improve democratic governance and legitimacy at the international level. In more general terms, some participants – in particular Professors Jutta Brunnée, Ellen Hey (Erasmus University Rotterdam) and Daniel Bodansky – pointed to the fact that, in those situations in which state consent is departed from, issues of legitimacy

arise, and that it is unclear how these should be dealt with by the international community.

Referring to the General Comments issued by treaty bodies, Professor Eibe Riedel suggested that, if they are not contradicted, they can be regarded as reflecting what States do. Some speakers, in particular Professor Thomas Franck, observed that “soft-law” may reveal customary international law and general principles. Others, like Judge Bruno Simma (ICJ), called for prudence in this respect. However, the participants did not deal in great depth with the question of the relations between “soft-law” instruments – particularly those adopted within international organisations, which were discussed by Professor Ved Nanda (University of Denver) in his stimulating paper on “The Role of International Organisations in Non-Contractual Law-Making”, commented on by Judge Thomas Mensah (International Tribunal for the Law of the Sea) and Professor Armin von Bogdandy (Max Planck Institute for Comparative Public Law and International Law) – and the development of contemporary (general) international law.

Many participants insisted upon the advantages of “soft-law” instruments over treaty-law. Professor Hanspeter Neuhold (University of Wien) discussed some of them, such as speed, clarity, uniformity, universality, flexibility and adaptability. Professor Alain Pellet stated that “soft-law” “constitutes a precious experimentation ground for future ‘hard’ legal rules”. Mr. Jörg Polakiewicz (Council of Europe), dealing with the experience of the Council of Europe, also stressed the role and the advantages of “soft-law” instruments as laying the groundwork for treaty-law. Professors Joel Trachtman (Tufts University, The Fletcher School of Law and Diplomacy) and Kong Qingjiang (Hangzhou University of Commerce), commenting on Mr. Jörg Polakiewicz’s paper, presented insightful perspectives on the potential role of “soft-law” at the global and regional level.

Concerning the effects of “soft-law”, Professor Anthony D’Amato (Northwestern University) compared the situation of a State not willing to conform to a “soft-rule”, to that of a person deciding to skate in the opposite direction to that chosen by the majority of skaters: that State puts itself in a very uneasy situation in respect of its relations with other members of the international community. Professor D’Amato, as well as Professor Ellen Hey, also suggested that “soft-law” be taken into account as a predictive model indicating directions for future legal developments or behaviours.

A question then arises. Should “soft-law” be defined in opposition to the traditional sources of international law? – in that case, “soft-law” would correspond to “law” that is neither treaty-law, nor customary law, nor general principles as referred to in Article 38 of the ICJ Statute. Or should the issue of “soft-law” be discussed in relation to what French legal theorists call “*critère de la juridicité*”? In

fact, one cannot exclude that “soft-law” may also find its place within the traditional sources of international law according to Article 38 of the ICJ Statute. Why not speak of “soft-treaties”, “soft-custom” or “soft-general principles”? Perhaps the issue of “soft-law” could be better understood if it were not necessarily opposed, as it frequently is, to the “real” international law enunciated in Article 38 of the ICJ Statute.

The Heidelberg symposium, thanks to the debates that took place in a wonderful atmosphere amongst a large number of outstanding international lawyers, undoubtedly contributed to stimulating fruitful thinking on the role of treaties and alternatives to treaties for the development of contemporary international law.



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