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On the Saying that "International Law Binds Canadian Courts"

by Stéphane Beaulac[*]

In recent years, the issue of the national application of international law has caused much ink to flow in Canada. It seems that a large part of the polemic among academics resolves around whether or not "international law" is *binding*. The traditional stance that international law is *not* binding was most clearly stated by the Supreme Court in *Ordon Estate v. Grail*.[1] Applying the presumption of conformity, Iacobucci and Major JJ. wrote: "Although international law is *not binding* upon Parliament or the provincial legislatures, a court must presume that legislation is intended to comply with Canada's obligations under international instruments and as a member of the international community."[2] In an article co-authored with Gloria Chao, Justice LeBel reminded us that "international law is generally non-binding or without effective control mechanisms."[3]

However, this traditional position has recently been challenged, presumably following the groundbreaking decision in *Baker v. Canada (Minister of Citizenship and Immigration)*.[4] In the 2002 case of *Suresh v. Canada (Minister of Citizenship and Immigration)*,[5] for instance, the Supreme Court seems to suggest that international is "binding" if implemented ——"International treaty norms are *not*, strictly speaking, *binding* in Canada *unless* they have been incorporated into Canadian law by enactment."[6] Similarly, Rosenberg J. of the Ontario Court of Appeal referred to "the established principle that international conventions are *not binding* in Canada *unless* they have been specifically incorporated into Canadian law."[7]

Karen Knop, for her part, has suggested that the relevance of international law "is not based on bindingness," which means that "the status of international and

*(See **International Law Binds Canadian Courts** on page 4)*

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[1] [1998] 3 S.C.R. 437.
[2] *Id.*, at 526. [emphasis added]
[3] L. LeBel & G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 Supreme Court L. Rev. (2nd) 23, at 62.
[4] [1999] 2 S.C.R. 817.
[5] [2002] 1 S.C.R. 3.
[6] *Id.*, at para. 60. [emphasis added]
[7] *Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107, at para. 73. [emphasis added]
[8] K. Knop, "Here and There: International Law in Domestic Courts" (2000), 32 New York U. J. Int'l L. & Pol. 501, at 520. [emphasis added]

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Message du Président

September/septembre 2003

Récemment, j'ai eu le privilège de participer à un atelier sur les défis auxquels est confronté le Canada en matière de la politique étrangère depuis le 11 septembre 2001, surtout en ce qui a trait à l'utilisation de la force et à l'intervention armée. L'expérience s'est révélée fort instructive, puisque nombre des participants et participantes n'étaient pas des spécialistes du droit international, mais étaient plutôt des spécialistes des relations internationales, des historiens, des diplomates ou des professionnels d'autres disciplines. Aussitôt j'ai remarqué que des parties entières de la discussion se déroulaient sans référence directe au droit international. De plus, lorsque certains juristes parmi les participants ont soulevé le rôle du droit international, il est devenu clair que plusieurs doutaient de sa pertinence ou de son utilité. On ne tenait guère pour acquis que le respect et l'avancement du droit international doit être au cœur du développement de la politique étrangère.

The sobering realization for me was that the importance of safeguarding and enhancing the role of the rule of law in international affairs could still be the subject of serious debate among key players. While I, as any international lawyer, have become familiar with the need to overcome skepticism as to the practical enforceability of international law in given circumstances, I had, perhaps naively, assumed that most thoughtful people would at least accept the need for international law and the desirability of working towards its further entrenchment. (Such may be the result of spending too much time in the company of other lawyers.) I am now forming the growing conviction that such an assumption may perhaps never have been well-founded, but in any event has ceased to be so since September 11, 2001. No longer is the ubiquitous task of the international lawyer merely to argue for ways in which international law should be interpreted, applied and developed. The case for the very relevance of international law in promoting a secure, peaceful and just world has – still – to be made.

De plus, le défi que doivent relever les spécialistes du droit international est bien plus important que le championnat pour un rôle accru du droit international dans l'élaboration de la politique étrangère. Les spécialistes du droit international, surtout les personnes participant à l'élaboration de la politique étrangère, ont le devoir de promouvoir une vision du droit international qui soit juste en substance et non seulement qui 'fonctionne' sur le plan de la procédure; qui permette de composer efficacement avec les crises véritables qui menacent la paix et la sécurité internationales et non seulement de satisfaire aux intérêts des gouvernements plus puissants; et qui réponde aux besoins des individus et des communautés et non seulement des États. Et à en juger par mon expérience récente, tout cela ne sera possible que si les juristes, en particulier les spécialistes du droit international, écoutent parfois le message des autres professionnels qui ont un rôle à jouer en la matière.

President's Message

Which brings me to the theme chosen for the Council's upcoming 32nd Annual Conference: "Reconciling Law, Justice and Politics in the International Arena". The theme was chosen to encourage conference speakers and participants to address squarely the many challenges faced in promoting the role of international law as mediator of international politics; and in closing the gaps between what is internationally lawful on the one hand and just on the other. Conference chair Irit Weiser and her committee have assembled an exciting and diverse array of speakers who will approach these fundamental issues from a wide variety of perspectives. (Members should by now have received the finalized Conference programme and registration form, although these can also be found on the Council's website: www.ccil-ccdi.ca.) The resulting discussion promises not only to be stimulating and relevant, but also the year's most significant event for international lawyers in Canada. If you have not already done so, be sure to return your registration form to the Council's office today. Better yet, enlist two or three colleagues (whether or not lawyers!) to attend with you. And in the unfortunate event that you must miss this important and exciting occasion, be sure to return your annual membership renewal form and fee so that we may remain in touch.

Au plaisir de vous voir à Ottawa du 16 au 18 octobre! We look forward to welcoming you to Ottawa on October 16–18!

John H. Currie
President/Président

Book Announcement — Nouvelle Parution

Un droit dans la guerre ?, *Cas, documents et supports d'enseignement relatifs à la pratique contemporaine du droit international humanitaire*

Marco Sassòli et Antoine A. Bouvier, avec la collaboration de Thomas de Saint Maurice et l'assistance de Geneviève Dufour, CICR, Genève, 2003 (2 volumes, 2084 pp.)

L'emploi de la force est interdit dans les relations internationales. Les conflits armés sont néanmoins fréquents depuis 1945. Depuis le 11 septembre 2001, même le concept de guerre est revenu à la mode, y compris pour désigner la lutte contre le terrorisme. Le droit applicable à la conduite des conflits armés, appelé droit international humanitaire (DIH), est plus que jamais au centre des l'intérêts public et scientifique. Certains se demandent s'il doit être adapté à de nouvelles réalités. D'autres réinterprètent le droit international humanitaire existant et l'utilisent pour priver, par exemple à Guantánamo, des personnes détenues de toute protection par les droits de la personne ou le droit national, tout en prétendant qu'il ne s'agit ni de combattants ni de civils au sens du droit international humanitaire.

Un professeur enseignant au Canada, Marco Sassòli, et un praticien oeuvrant au Comité international de la Croix-Rouge, Antoine A. Bouvier, viennent de publier avec la collaboration d'un jeune chercheur belge et d'une chercheure québécoise, un livre en deux volumes sur ce droit international humanitaire qui adopte, pour la première fois en langue française, la méthode du « Casebook », des cas pratiques, tout en y ajoutant une présentation théorique de la matière. Il s'agit en fait d'une adaptation française et mise à jour d'un ouvrage publié en 1999, intitulé « How Does Law Protect in War ? ». Il offre aux professeurs d'université, aux praticiens et aux étudiants une base essentielle pour la compréhension, l'enseignement et la pratique du DIH. Le premier volume consiste en une présentation de la matière, incluant des indications bibliographiques et des renvois aux cas et documents reproduits dans le deuxième volume. Ce dernier comprend une sélection, revue en fonction des intérêts des lecteurs francophones et des conflits récents au Kosovo et en Afghanistan, de deux cent sept cas, dont un bon nombre constitue une traduction inédite en français. L'originalité réside dans les Discussions qui mettent les cas en perspective grâce à une série de questions. De même, un grand nombre de plans de cours, rédigés par les auteurs ou par d'éminents experts de droit international humanitaire, est proposé à la fin du deuxième volume afin d'aider ceux qui souhaitent enseigner le DIH ou qui voudraient simplement intégrer certains concepts de DIH au sein de leurs cours. Le livre peut être commandé via le site Internet du Comité international de la Croix-Rouge (www.icrc.org).

Un droit dans la guerre? is an enlarged and updated French version of ***How Does Law Protect in War?*** published in 1999, the first Casebook in the field of International Humanitarian Law. A selection of one hundred and ninety three cases provided university professors, practitioners, and students with the most updated and comprehensive selection of documents on International Humanitarian Law.

Part I is the backbone of the book. It outlines the various issues of International Humanitarian Law. Under each theme an introductory text by the authors is provided, sometimes extracts from articles, books, and documents, which are illustrative of a specific topic are reproduced. Part II is the main body of the book where cases are reproduced. The most innovative part is the discussion of each case through questions. Finally, the third part of the book provides teaching outlines for professors who are willing to set up a course or to introduce International Humanitarian Law into other courses.

The main goal of this book is to show that International Humanitarian Law is relevant in contemporary practice and that it provides – although inherently insufficient – answers to the humanitarian problems appearing in and in relation to armed conflicts. The authors hope to publish in 2004 or 2005 an updated second edition in English, integrating the additions of the French version and the practice of the hopefully not too many armed conflicts arising until then.

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On the Saying that "International Law Binds Canadian Courts"

(continued from page 1 - suite de page 1)

foreign law becomes similar, both being *external sources of law*."[8] In fact, Knop challenged the binding / non-binding distinction — what she called the "on / off switches for the domestic application of international law"[9] — and suggested an alternative approach, that she argued springs from the *Baker* case, "where the authority of international law is persuasive rather than binding."[10] This proposition seemed to "rub"[11] the wrong way some international legal scholars, one of them being Stephen Toope.

Toope has argued that "the dichotomy that Knop sets up between a traditional focus on international law as 'binding' on domestic courts, and international law as 'persuasive authority' is, I think, a false dichotomy."[12] Instead, he opined that "international law can be both"[13] binding and persuasive because "international law is both 'foreign' and 'part of us.'"[14] Toope further argued that "international law is not merely a story of 'persuasive' foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than 'comparative law,' because international law is partly *our* law."[15]

Whether or not one is in agreement with Knop's comparative law metaphor as regards all international law rules, it is still accurate to hold that, strictly speaking, international law does not bind Canada, or any sovereign states for that matter. The fundamental reason behind this lack of obligatory legal force relates to the so-called Westphalian model of international relations, which very much remains at the centre of the present state system and hence the present international law system.

Tenets of the international law system

The matrix in which international affairs are conducted and in which international law operates is based on the Westphalian model of international relations, at the centre of which is the *idée-force* of sovereignty.[16] As Richard Falk explained, it is "by way of the Peace of Westphalia that ended the Thirty Years' War, that the modern system of states was formally established as the *dominant world order framework*."[17] Similarly, Mark Janis wrote: "Sovereignty, as a concept, formed the cornerstone of the edifice of international relations that 1648 raised up. Sovereignty was the crucial element in the peace treaties of Westphalia."[18]

The international reality consists of a community of sovereign states (or nations) which are independent from one another and have their own wills and finalities as corporate-like representatives of the peoples living on their territories. The 18th century author Emer de Vattel proposed an international legal framework to regulate the relations between states in his masterpiece *Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains*.[19] His seminal contribution is a scheme in which sovereign states are the sole actors on the international plane and thus the only subjects of international law; it is also based on the formal equality of states and on a notion of national independence that involves non-interference in the domestic affairs of other states.[20] This is very much indeed the basic theory still underlying modern international law.

Accordingly, the Westphalian model of international relations, which is governed by the Vattelian legal structure, involves an international realm that is distinct and separate from the internal realm. John Currie explained thus: "Public international law is not so much

[9] *Id.*, at 515.
[10] *Id.*, at 535.
[11] "Rub" is indeed the word Toope himself used in describing the effect that Knop's paper had on him — see S.J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001), 80 Canadian Bar Rev. 534, at 535.
[12] *Id.*, at 536.
[13] *Ibid.*
[14] *Id.*, at 540.
[15] S.J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U. New Brunswick L.J. 11, at 18. [emphasis added]

[16] See, generally, S. Beaulac, "The Westphalian Legal Orthodoxy — Myth or Reality?" (2000), 2 J. History Int'l L. 148.
[17] R.A. Falk, Law in an Emerging Global Village: A Post-Westphalian Perspective (Ardsley, U.S.: Transnational Publishers, 1998), at 4. [emphasis added]
[18] M.S. Janis, "Sovereignty and International Law: Hobbes and Grotius," in R.St.J. Macdonald (ed.)," Essays in Honour of Wang Tieya (Dordrecht: Martinus Nijhoff, 1994), 391, at 393. [emphasis added]
[19] E. de Vattel, Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains, 2 vols. (London: n.b., 1758).
[20] See, generally, S. Beaulac, "Emer de Vattel and the Externalisation of Sovereignty" (2003), 5 J. History Int'l L. (forthcoming).

an area or topic of the law as it is "*an entire legal system, quite distinct from the national legal systems* that regulate daily life within states."[21] As far as the relation between international law and domestic law is concerned, there is no direct connection because the two systems are distinct and separate—"public international law exists outside and independent of national legal systems."[22] Thus quite appositely, Karen Knop schematically wrote that "domestic law is 'here' and international law is 'there.'"[23]

Domestic courts and international law

Each of these two distinct and separate realms of the international and the internal of course has its own judiciary. At the international level, the *Charter of the United Nations*, at article 92, provides that: "The International Court of Justice shall be the principal judicial organ or the United Nations." At the national level, to take Canada as an example, there exists a whole judicial structure of domestic courts and tribunals, both provincial and federal, at the pinnacle of which is the Supreme Court of Canada.

The more important point here is that both sets of courts have their own sets of legal norms, that is, the International Court of Justice and other international courts and tribunals apply international law, and the Supreme Court and other Canadian courts and tribunals (or any domestic courts of sovereign states for that matter) apply their domestic law.[24] It does not mean, however, that international judicial instances cannot take into consideration domestic law, which is in fact an explicit source of international law under article 38(1) of the *Statute of the International Court of Justice*, or that domestic case law does not influence their decisions as a secondary source of international law and even as evidence of international customs.

Although it is not an aspect usually dwelled upon in judicial decisions, the Supreme Court had such an opportunity to consider its role vis-à-vis the international legal system in the *Reference re Secession of Quebec*.[25] The *amicus curiae* Yves Le Boutillier argued that the Court had no jurisdiction to answer questions of "'pure' international law."[26] The response, significant for the present purposes, was that the "Court would not, in providing an advisory opinion in the context of a reference, be purporting to 'act as' or substitute itself for an international tribunal."[27] Thus, as Justice Louis LeBel and Gloria Chao observed, "the key limits to the [Supreme] Court's use [of these norms] is that it has never seen itself as a final arbiter of international law."[28]

In the *Reference re Secession of Quebec*, an argument was also made that the Court had no jurisdiction to "look at international law"[29] to decide the questions at issue. "This concern is groundless," was the reply. "In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system."[30] Therefore, treaty norms of the distinct and separate international legal system may have an effect within the Canadian domestic legal system. It is important to acknowledge, however, that such a legal effect will not at all be automatic or obligatory. Indeed, as Bill Schabas pointed out, Canadian courts may use "international law to the extent that it is also part of the 'Laws of Canada.'"[31]

Put another way, domestic courts interpret and apply domestic law, and it is to the extent that the constitutional and other domestic legal rules allow international law to be part of domestic law (and that it has in effect become part of that domestic law) that international norms may have an impact on the interpretation and application of domestic law by domestic courts. In that sense, international law can never "bind" a sovereign state like Canada, or more accurately, international law can never be "binding" in or within the domestic legal system because domestic courts have jurisdiction over national law, not international law. What international law can do, and indeed should do as much as possible, is to "influence" the interpretation and application of domestic law, the degree of which will depend on the extent that international law "is also part of the 'Laws of Canada.'"[32]

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[21] J. Currie, Public International Law (Toronto: Irwin Law, 2001), at 1. [emphasis added]
[22] *Ibid.*
[23] K. Knop, supra, note 8.
[24] For the sake of completeness, it must be added that, of course, Canadian private international law can dictate that foreign domestic law will apply to a particular situation. This does not change the basic proposition, however, because Canadian courts fundamentally resort, even in such cases, to Canadian domestic law in the first instance.
[25] [1998] 2 S.C.R. 217.
[26] *Id.*, at 234.
[27] *Ibid.*
[28] L. LeBel & G. Chao, supra, note 4, at 59.
[29] *Supra*, note 26, at 235.
[30] *Ibid.*
[31] W.A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000), 79 Canadian Bar Rev. 174, at 176.
[32] *Ibid.*

The "influence" of international law on the interpretation and application of Canadian law can also be put in terms of the determination of the "persuasive force" of international law or the evaluation of the "weight" of the international law argument. This approach to the domestic use of international law is not an endorsement of the proposition put forward by Karen Knop based on the transgovernmental model and the comparative law methodology. It shares, however, the belief that international law, by definition, cannot "bind" the courts of sovereign states. ◅

Case Comment

UPS v. Canada

On November 22, 2002, the Arbitral Tribunal* constituted under NAFTA Chapter 11 to consider the complaint of United Parcel Service of America Inc. (UPS) against Canada (and its monopoly, Canada Post Corporation) released its award on jurisdiction (http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf). The results are mixed. Some of Canada's challenges to jurisdiction were successful; the rest were either held to be moot, were dismissed, or were joined to the merits. In dismissing some of UPS's claims, the Tribunal noted that Article 1116 of NAFTA only conferred jurisdiction with respect to violations of investors' rights as set out in Section A of Chapter 11. UPS had argued that the reference in Article 1116(1)(b) to Article 1502(3)(a) opened up the whole Agreement to potential investor claims. The Tribunal further held that it was bound by the Free Trade Commission's July 31, 2001 Interpretation that stated:

The concepts of "fair and equitable treatment" and "full protection and security" [set out in Article 1105(1)] do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

The Tribunal observed that regulating anticompetitive behaviour was not required under customary international law.

Timothy Ross Wilson
Legal Counsel, Supreme Court of Canada

The views of the author are his alone. ◅

*The Tribunal consists of Dean Ronald A. Cass, L. Yves Fortier and Justice Kenneth Keith (President).

Commentaire d'arrêt

Sylvie Gravelle Prize

The Sylvie Gravel Prize was established in 1986 in recognition of Sylvie Gravelle's contribution to the Canadian Council on International Law. The annual prize of $200 is awarded to a graduate student in law at the University of Ottawa for the best Masters thesis or Memorial in public or private international law.

This year's prize was awarded to Sophie Lefrançois, whose Memorial is entitled "Le droit au retour des réfugiés palestiniens en Israël".

Past recipients include : Parimal Kasbekar (1985-86), Grace Ntieyong Akpan (1988-89), Steven MacDonald (1989-90), Grégoire Bisson ((1990-91), Gang Wu (1991-92), Abhimanyu Jalan (1992-93), Satinder Cheema (1993-94), Oxana Selska (1994-95), Normand Bonin (1995-96), Ausma Khan (1996-97), Philippe Lortie (1996-97), Stéphane Jean (1997-98), Julie Boulanger et Frédérique Couette (1998-99), Jean-Paul Gakwerere (2000-2001). ◅

Prix Sylvie Gravelle

Le prix Sylvie Gravelle fut établi en 1986 en mémoire de Sylvie Gravelle pour sa contribution au Conseil canadien de droit international. Ce prix annuel de 200 $ est accordé à une étudiante ou à un étudiant aux études supérieures de l'Université d'Ottawa pour le meilleur mémoire ou la meilleure thèse de maîtrise en droit, en français ou en anglais, en droit international, public ou privé.

Cette année, le prix Sylvie Gravelle fut accordé à Mlle Sophie Lefrançois. Sa mémoire portait sur « Le droit au retour des réfugiés palestiniens en Israël ».

Les anciens gagnants du prix inclus : Parimal Kasbekar (1985-86), Grace Ntieyong Akpan (1988-89), Steven MacDonald (1989-90), Grégoire Bisson ((1990-91), Gang Wu (1991-92), Abhimanyu Jalan (1992-93), Satinder Cheema (1993-94), Oxana Selska (1994-95), Normand Bonin (1995-96), Ausma Khan (1996-97), Philippe Lortie (1996-97), Stéphane Jean (1997-98), Julie Boulanger et Frédérique Couette (1998-99), Jean-Paul Gakwerere (2000-2001). ◅

La frontière maritime Cameroun-Nigéria dans le Golfe de Guinée

Par Cissé Yacouba*

Le 10 octobre 2002 la Cour Internationale de Justice a rendu son arrêt dans l'affaire de la presqu'île de Bakassi portant sur la délimitation de la frontière terrestre et maritime entre le Cameroun et le Nigeria. Par cette décision, la Cour a vidé un contentieux de délimitation maritime qui l'avait amené, huit années durant, à statuer d'abord sur sa propre compétence et ensuite à décider sur le fond du différend. Le Cameroun a obtenu gain de cause lorsque la C.I.J. a reconnu d'une part que la péninsule de Bakassi était sous sa souveraineté et d'autre part, qu'une nouvelle délimitation de la frontière maritime entre les deux États s'imposait.

La requête du Cameroun, en date du 29 mars 1994, priait la C.I.J. de tracer la frontière maritime entre les deux États au-delà de la mer territoriale, de dire et juger que la presqu'île de Bakassi appartenait au Cameroun, d'autoriser l'évacuation des troupes nigérianes sur la presqu'île de Bakassi et de reconnaître la responsabilité internationale du Nigeria. Le Cameroun a par ailleurs plaidé qu'il n'avait jamais abandonné son titre sur Bakassi, ayant toujours octroyé des concessions pétrolières aux compagnies étrangères d'exploration et d'exploitation *offshore*.

Le Nigeria a soutenu que la saisine camerounaise de la Cour était sans objet. À l'appui de sa prétention, il a invoqué la présence d'États tiers, en l'occurrence la Guinée équatoriale et l'archipel de Sao Tomé-et-Principe, dans la zone concernée par la délimitation et l'absence de négociations préalables. Le Nigeria a estimé, par ailleurs, que la ligne qui existait déjà et qui avait pendant longtemps été respectée, était devenue une ligne *de facto* ayant créé une situation juridique à son égard comme à celui du Cameroun et de la Guinée équatoriale. Le Nigeria a donc demandé à la Cour de reconnaître son titre de souveraineté sur la presqu'île de Bakassi aux motifs qu'il y avait exercé une longue occupation et que celle-ci avait été paisible, notoirement reconnue, et jamais remise en cause par le Cameroun (théorie de l'acquiescement ou de *l'estoppel*).

Quant à la Guinée équatoriale, État tiers au différend, il a exercé son droit d'intervention en vertu de l'article 59 du statut de la C.I.J. En cette qualité, la Guinée Equatoriale a rappelé à la Cour que la ligne proposée par le Cameroun aurait pour effet d'enclaver l'île de Bioko qui était sous souveraineté equato-guinéenne et de la bloquer, au large, dans sa projection maritime. Elle a donc prié la Cour de « s'abstenir de délimiter une frontière maritime entre le Nigeria et le Cameroun dans une zone plus proche de la Guinée équatoriale que des parties à l'instance », et de « s'abstenir également d'émettre une quelconque appréciation susceptible de porter préjudice à [ses] intérêts dans le cadre de [ses] négociations relatives aux frontières maritimes avec [ses] voisins ».

De la méthode de délimitation

L'arrêt dans l'affaire Cameroun/Nigeria vient consolider ce qui apparaît comme un acquis juridique, c'est-à-dire la consécration jurisprudentielle de la ligne d'équidistance comme méthode de premier pas ou méthode provisoire. En effet, depuis les plus récentes décisions de la Cour, notamment les affaires de *Jan Mayen* (1993), *Eritrée-Yemen* (1999), *Qatar-Bahrein* (2001), le juge se dit fondé, au regard de sa propre jurisprudence et de la pratique des États, à commencer le processus par une ligne d'équidistance provisoire.

Dans l'affaire Cameroun-Nigeria, après avoir soigneusement balancé toutes les circonstances pertinentes ou spéciales susceptibles de produire un tracé maritime équitable, la Cour en arrive à la conclusion que l'équidistance est, en l'espèce, appropriée et qu'en prenant en considération le contexte géographique et l'aire de délimitation maritime concernée, aucune correction de la ligne d'équidistance ne s'impose[1]. Elle a donc eu recours à une ligne d'équidistance stricte et a adopté une frontière maritime unique[2] délimitant à la fois le plateau continental et la zone économique exclusive des 200 milles marins.

En essayant l'équidistance, qui de tout temps a été au cœur d'un débat de grande controverse, la Cour est ainsi venue consolider sa jurisprudence en restant conforme à ses précédents, notamment dans les arrêts *Tunisie-Libye* 1982, *Libye-Malte* 1985, *Norvège-Danemark* 1993,

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1 *Frontière terrestre et maritime entre le Cameroun et le Nigeria*, 10 octobre 2002 à la p. 138 (para. 294), en ligne : C.I.J. <http :www.icj-cij.org/cijwww/cdocket/ccn/ccnjudgment/ccn_cjudgment_20021010.PDF> (date d'accès : 15 septembre 2003)

2 *Ibid*., à la p.134 (para. 286).

Eritrée-Yemen 1999, *Qatar-Bahrein* 2001. Du coup, elle semble également avoir répondu à la question à savoir si l'équidistance est une règle de droit international coutumier qui s'est déjà cristallisée ou simplement en voie de formation ? Au vu des récentes décisions de la Cour et de la pratique étatique, une réponse affirmative s'impose.

Toutefois, on pourrait reprocher à la Cour de n'avoir pas suffisamment motivé sa décision lorsqu'elle a décidé de déplacer le point G qu'elle croit être situé à l'Est plutôt qu'à l'Ouest. Certes, cet infléchissement du point G vers l'Est lui a permis de rejoindre la ligne d'équidistance comme le souhaitait le Cameroun. Mais, à partir de ce point G, la ligne retenue par la Cour aurait pu prendre la forme d'une ligne azimut et se prolonger simplement vers le large. En procédant comme elle l'a fait, la Cour a manqué une belle occasion de procéder à une délimitation maritime plus équitable, c'est-à-dire celle qui, à partir de ce point G aurait pu couper la poire de sorte à n'octroyer au Cameroun que les deux tiers de l'espace maritime convoité et compenser quelque peu les pertes subies par le Nigeria sur certains aspect su présent différend.

« dans l'éventualité où il existe un conflit entre effectivités et titre juridique, il y a lieu de préférer le titre »

De l'opposabilité de la ligne *de facto*

La ligne *de* facto est une ligne non négociée, mais qui, tacitement a été respectée pendant une certaine période de temps par les États parties à un différend de délimitation maritime. La ligne *de facto* est donc une situation de fait qui, par le jeu des effectivités, se transforme en situation de droit suivant la conduite des États vis-à-vis de cette ligne et qui, sous certaines conditions peut servir de frontière maritime entre États côtiers. Il existe dans la jurisprudence de la C.I.J. une seule affaire, Tunisie *c.* Libye en 1982, où une ligne *de facto* a servi de frontière maritime entre deux États. Ce précédent tuniso-libyen a été perçu par la doctrine comme un précédent dangereux puisqu'il a tenté d'introduire dans le droit de la délimitation maritime la théorie du fait accompli ou de l'effectivité qui, jusqu'alors, n'avait joué aucun rôle dans l'acquisition du titre sur les espaces maritimes.

Dans l'affaire de Bakassi, le Nigeria a soutenu que la ligne *de facto* était opposable au Cameroun au motif que ce dernier y avait acquiescé sans élever la moindre protestation contre les concessions et les permis pétroliers qu'il avait délivrés[3] aux compagnies d'exploitation du pétrole *offshore*. Le Cameroun a rétorqué que « l'attribution des concessions pétrolières est un fait unilatéral, et non un fait juridique opposable à un État tiers »[4].

La Cour a d'abord résolu la question relative au statut juridique de Bakassi en reconnaissant que la presqu'île était sous la souveraineté du Cameroun et en répondant au Nigeria que l'invocation par lui « de la consolidation historique ne saurait en tout état de cause conférer […] un titre sur Bakassi ». En se référant à sa décision dans l'affaire du *Différend frontalier*, la cour précisa que « dans l'éventualité où il existe un conflit entre effectivités et titre juridique, il y a lieu de préférer le titre »[5].

On peut dire que l'arrêt Bakassi consacre la prévalence du titre conventionnel par rapport aux effectivités. La Cour affirme en effet que « si l'existence d'un accord exprès ou tacite entre les parties sur l'emplacement de leurs concessions pétrolières respectives peut indiquer un consensus sur les espaces maritimes auxquels elles ont droit, les concessions pétrolières et les puits de pétrole ne sauraient en eux-mêmes être considérés comme des circonstances pertinentes justifiant l'ajustement ou le déplacement de la ligne provisoire »[6]. Autrement dit, l'acquisition du titre sur les espaces maritimes résulte de la volonté expresse des parties. Or, la ligne *de facto* n'émanant pas de ce consentement, elle ne saurait en principe créer des droits acquis au profit de l'État qui l'invoque.

C'est ainsi que dans le secteur au-delà de la mer territoriale (point G), la pratique pétrolière n'a pas été perçue comme une circonstance pertinente dans la balance des facteurs d'équité, la Cour procédant à une délimitation *de novo*. Mais la Cour, toutefois, a reconnu l'existence d'une ligne *de facto* en deçà du point G défini par l'accord colonial anglo-allemand de 1913. Cette ligne qualifiée de « ligne de compromis » par la Cour, a été par la suite respectée par le Cameroun et le Nigeria à travers les déclarations de Yaoundé en 1971 et de Maroua en 1975. Selon la Cour, ces instruments juridiques avaient ôté toute pertinence à la pratique pétrolière du

3 *Ibid*., à la p.131 (para. 282).

4 *Ibid*., à la p.132 (para. 283).
5 [1986] C.I.J. Rec. 554 aux pages 586-587 (para. 63).
6 Cameroun/Nigeria, *supra*., à la p.140 (para. 304).

Nigeria dans la zone concernée par le différend. Dès lors qu'il existait un accord sur la frontière maritime entre deux États, il n'y avait en principe plus lieu de s'attarder sur la conduite des États.

L'analogie est ici bien frappante avec *l'Affaire Tunisie/Libye* où la ligne du 26°, appliquée seulement au premier segment de la frontière du plateau continental était celle que les anciennes puissances coloniales, la France et l'Italie, avaient déterminée par accord. Ayant accédé à leur indépendance, la Tunisie et la Libye avaient respecté pendant une longue période cette ligne en accordant des permis d'exploration aux compagnies pétrolières. La Cour a considéré qu'il y avait dans ces circonstances, à proximité des côtes, un *modus vivendi* qui était devenu contraignant pour les deux États[7] et que par conséquent la ligne formant l'angle du 26° était devenue un frontière *de facto* qui « concrétise la manière dont les deux Parties ont octroyé à l'origine des permis ou concessions pour la recherche ou l'exploitation d'hydrocarbures en mer »[8]. Mais, au-delà du 26°, la C.I.J. a considéré qu'il n'y avait plus de frontière *de facto* et qu'il fallait procéder à une nouvelle délimitation maritime.

L'identification des côtes pertinentes

La frontière maritime est définie à partir de certaines côtes du littoral. Ce n'est donc pas tout le littoral ou toute la façade maritime d'un État qui servira de support juridique à l'établissement de la frontière, mais seulement les côtes dites pertinentes, c'est-à-dire celles qui sont en relation étroite avec la région concernée par la délimitation. En principe, il s'agit des côtes de deux États. Dans ce cas, on fait application de la conception micro-géographique. Exceptionnellement, on peut fixer la frontière maritime entre deux États en se servant des côtes des États tiers. Ici, on aura recours à la conception macro-géographique de la délimitation.

Dans l'affaire Bakassi, le Cameroun a plaidé en faveur de cette seconde hypothèse lorsqu'il a demandé à la Cour de « prendre en considération la côte du golfe de Guinée d'Akasso (Nigeria) au cap Lopez (Gabon) »[9], ce dernier étant tiers à l'opération. La Cour a rejeté cette approche en estimant que la délimitation ne saurait s'étendre aux côtes des États tiers[10].

Cette solution est bien critiquable car le fait de prendre en compte les côtes d'États tiers dans un processus de délimitation ne constitue pas une impossibilité juridique au regard de la jurisprudence et de la pratique des États. S'agissant de la jurisprudence, le juge a eu à recourir à cette approche dans *l'Affaire Guinée/Guinée Bissau* en 1985 et dans *l'Affaire Libye/Malte* en 1985. Dans le premier cas, le Tribunal d'arbitrage a tracé une ligne macro géographique en partant des côtes du Sénégal au Nord jusqu'aux côtes de la Sierra Léonne au sud[11], deux États tiers au différend. Pour le Tribunal « il s'agit non plus de se limiter au *littoral court*, mais de considérer le *littoral long*[12] ». Dans la seconde espèce, la CIJ a pu localiser une ligne médiane à partir des côtes de l'Italie, plus précisément à partir de la Sicile[13]. Pour ce qui est de la pratique des États, on peut relever des exemples d'accords de délimitation maritime où effectivement les côtes des États tiers ont servi de points de base à la délimitation de la frontière maritime[14]. S'il est vrai qu'à travers la théorie de l'*unicum* la Cour n'est pas tenue par ses propres précédents en droit de la délimitation maritime, il est aussi justifié que le Cameroun puisse recourir à l'approche macro géographique de la délimitation maritime.

En conclusion, l'organe judiciaire principal des Nations Unies ne saurait se dédire. Le Nigeria savait pertinemment qu'en adhérant, sans réserve, à la clause de juridiction obligatoire de la C.I.J., il s'obligeait à exécuter ses décisions. Toutefois il existe cette possibilité pour le Nigeria qui consiste à présenter à la Cour une demande en interprétation de la décision. Mais une telle requête ne saurait fondamentalement remettre en cause le dispositif de l'arrêt. Une autre solution plus pratique et sans préjudice de la frontière maritime déjà tracée et de la souveraineté du Cameroun sur la péninsule de Bakassi, consisterait à établir une zone d'exploitation conjointe des ressources pétrolières. La sentence arbitrale de 1989 entre la Guinée Bissau et le Sénégal en est une belle illustration, car dans cette espèce, les deux États ont renégocié non pas la frontière maritime, mais ont décidé d'un système d'exploitation conjointe[15] des ressources minérales et halieutiques susceptible de leur procurer des revenus proportionnels à la superficie de leur plateau continental respectif.

7 [1982] C.I.J. Rec. 18 à la p. 84 (para. 119).
8 *Ibid*., à la p.71 (para. 96).
9 Cameroun/Nigeria, *supra,* à la p.136 (para. 291).
10 *Ibid*., à la p. 136 (para. 291).
11 (1988) 77 I.L.R. 635, 684 (para. 109).
12 *Ibid*., 685 (para.108).
13 *Libye/Malte*, [1985] C.I.J. Rec. 13 aux pages 51-52 (para. 72).
14 J.I. Charney & L.M. Alexander , *International Maritime Boundaries*, vol. I, Boston, Martinus Nijhoff, 1993 aux pages 210-211.
15 M. Miyoshi : *The Joint Development of Offshore Oil and Gas in Relation to Maritime Boundary Delimitation*, (1999) 2:5 *Maritime Briefing* 37-41.

En Bref

Visite du rapporteur spécial des nations unies sur le racisme

Du 15 au 26 septembre 2003, le Canada recevra le rapporteur spécial de la Commission des droits de l'homme sur les formes contemporaines de racisme, de discrimination raciale, de xénophobie et l'intolérance qui y est associée, M. Doudou Diène. Ce dernier vient en sol canadien suite à une invitation permanente du Canada aux procédures spéciales de la Commission. Durant son séjour, il rencontrera, entre autre, différents représentants des gouvernements locaux et provinciaux, des membres de la Commission canadienne des droits de l'homme, des membres et des dirigeants des communautés autochtones, ainsi que des représentants de divers groupes ethniques, raciaux et religieux. Son séjour l'amènera à Ottawa, à Montréal, à Halifax, à Régina et à Toronto afin qu'il puisse brosser un tableau de la diversité culturelle canadienne.

La visite de M. Diène a pour but de mettre de l'avant une stratégie en deux phases destinée à soutenir les efforts déployés en matière de lutte contre le racisme. La première phase de la stratégie a pour but de comprendre comment s'articule les relations raciales et ethniques au sein de la société. Suite à cela, la Commission des droits de l'homme sur les formes contemporaines de racisme, de discrimination raciale, de xénophobie et l'intolérance qui y est associée tentera de mettre en application des instruments internationaux qui pourraient être pertinents afin de lutter contre ces phénomènes.

Le Rapporteur spécial présentera les conclusions de sa visite à la prochaine session de la Commission des droits de l'homme, qui doit s'ouvrir en mars 2004. Le communiqué de presse est disponible à : <http://www.unog.ch/news2/documents/newsfr/hr0364f.htm>.(JF)

In Brief

Inauguration of Garden of Peace

On 16 September 2003, Sergei Ordzhonikidze, the Director-General of the United Nations Office at Geneva, participated in the inauguration of the Jardin impressioniste de Moillebeau in Geneva, organized by the City of Geneva. The garden was named 'Jardin de la Paix', 'Garden of Peace', in memory of the victims of the attack on the United Nations office in Baghdad on 19 August 2003. Addressing participants during the ceremony, the Director-General stated that it was appropriate that the victims should be honoured in the Garden of Peace in the City of Peace as they had given their lives in the service of peace and had dedicated themselves to the welfare of their fellow human beings. He emphasized that the garden would be a place where visitors could be inspired by the courage, fortitude and passion of the victims. "The tragic loss of our colleagues will not discourage us or diminish our belief in the values and vision of the United Nations", he said, "their memory will spur us on." The UN Press release is available at: <http://www.unog.ch/news2/documents/newsen/dg0367e.htm>.

Cahier du rédacteur

Membership Directory 2004

The fourth edition of the CCIL Membership Directory will be produced and distributed sometime after the October Annual Conference. To ensure the accuracy and completeness of the information, we invite you to review last year's edition and correct on your Conference registration form or CCIL membership renewal form any erroneous or missing information. If you are not planning to attend the conference, it is important that we receive your membership renewal form early in November to ensure that your entry is printed in the new edition of the Directory.

Editor's Notebook

Member Contributions to the Bulletin

There has been much emphasis recently on CCIL student internship programmes but these remain an adjunct to contributions from our members which are essential. Our readers look forward to the insights provided by colleagues in the field, throughout Canada. The Bulletin team therefore encourages members to submit articles in their areas of interest. Submissions are normally in the range of 2,000 words (feature articles, usually two per issue) or 600 words (short articles, usually two per issue). The deadlines for submission are roughly the second week of January for the Winter issue, the second week of May for the Spring issue and the first week of September for the Fall issue.

Canadian Council on International Law
Conseil canadien de droit international

Reconciling Law, Justice and Politics in the International Arena

Réconcilier le droit, la justice et la politique dans l'arène internationale

16-18 October/octobre 2003

CONFERENCE 2003 — The 2003 Annual CCIL Conference will take place from October 16 to 18, 2003. Of particular note is that the Conference will start at the Department of Foreign Affairs and International Trade at the Lester B. Pearson Building. On October 16th, at 17h30, the Legal Adviser will hold a reception and the roundtable on a contemporary topic will follow. On October 17th and 18th, the Conference will be held in the usual setting of the Fairmont Chateau Laurier Hotel in Ottawa. The theme of this yearís conference is the Art of Reconciling Law, Justice and Politics in the International Arena.

On Thursday, there will be the Student Job Fair and Forum, the reception held by the Legal Adviser of the Department of Foreign Affairs and International Trade and the roundtable on a matter of pressing concern. On Friday morning our keynote speaker will offer an exploration of the conference theme. Over both Friday and Saturday the theme will be examined further in panels on a variety of subjects including trade law, the law of the sea, human rights, womenís rights, private international law, humanitarian law, international criminal law, environmental law. The Conference will close with the Annual General Meeting on Saturday.

Location:
Lester B. Pearson Building (Thursday) Chateau Laurier Hotel, Ottawa (Friday and Saturday)

Organizing Committee:
The Chair of the Committee is Irit Weiser. All inquiries, suggestions, etc. related to the Conference can be sent to conference@ccil-ccdi.ca

Draft Conference Programme:
Enclosed with the September issue of the Bulletin and available from the CCIL web site at : <http://www.ccil-ccdi.ca>

Registration Forms:
Enclosed with the September issue of the Bulletin and available from the CCIL web site at : <http://www.ccil-ccdi.ca>

Accommodation:
The CCIL has made block bookings at the Chateau Laurier; Other hotels may also have availability. See details on the CCIL web site.

Student Travel Assistance:
Students who travel to attend the Conference 2003 may be eligible to receive funding for some of their travel expenses. See details on the CCIL web site.

COMPLIANCE MATTERS
Recent Developments Relating to Compliance under Multilateral Treaties in the Area of Disarmament and International Security
• *THE MARKLAND GROUP* •

The Judgment in *Bustani v. OPCW*

By Douglas Scott*

José Bustani, after being removed as Director-General of the Organisation for the Prohibition of Chemical Weapons (OPCW) on 22 April 2002, launched an action against his former employer claiming damages for unjust dismissal. (The OPCW was created by the States Parties to the Chemical Weapons Convention (CWC) for the purpose of ensuring its implementation.)

The Bustani case was heard by the Administrative Tribunal of the International Labour Organisation (ILO). Judgment was rendered on 16 July 2003 awarding Mr. Bustani substantial damages[1]. The Tribunal ruled that Mr. Bustani was entitled to his full salary from the date of his dismissal to the end of his term, a period of slightly over three years. In addition, he was awarded 50,000 euros in "moral damages" (which he had previously indicated would be given to the OPCW to fund one of its underfunded projects). His claim for costs was granted in the amount of 5,000 euros.

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The Tribunal first determined that it had jurisdiction to deal with the complaint by virtue of certain clauses in the OPCW Staff Regulations (11.1 and 11.3) and Article II.5 of the Tribunal's Statute. It then proceeded to overrule the complainant's objection to the procedure by which the Conference of the States Parties had been convened to consider the question of termination. On the merits, the key parts of the Judgment are as follows:

In accordance with the established case law of all international administrative tribunals, the Tribunal reaffirms that the independence of international civil servants is an essential guarantee, not only for the civil servants themselves, but also for the proper functioning of international organizations. In the case of heads of organizations, that independence is protected, inter alia, by the fact that they are appointed for a limited term of office. To concede that the authority in which the power of appointment is vested – in this case the Conference of the States Parties of the Organisation – may terminate that appointment in its unfettered discretion, would constitute an unacceptable violation of the principles on which international organisations' activities are founded (and which are in fact recalled in Article VIII of the Convention, in paragraphs 46 and 47), by rendering officials vulnerable to pressures and to political change.

The possibility that a measure of the kind taken against the complainant may, exceptionally, be justified in cases of grave misconduct cannot be excluded, but such a measure, being punitive in nature, could only be taken in full compliance with the principle of due process, following a procedure enabling the individual concerned to defend his or her case effectively before an independent and impartial body. In this instance, the complainant had no procedural guarantee, and given the circumstances of his case, he has good grounds for asserting that the premature termination of his appointment violated the terms of his contract of employment and contravened the general principles of the law of the international civil service.

What the Judgment Stands For

It would appear that the States Parties to the CWC should conclude that, in the case of future difficulties with a Director-General, the following rules would apply:

1. In a proper case, the Conference has authority to terminate the appointment of a Director-General and it would appear that that authority can be

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[1] www.ilo.org/public/english/tribunal/fulltext/2232.htm

exercised in the absence of a recommendation by the Executive Council.

2. However, a simple vote of non-confidence by the Conference based on a belief that the Director-General's conduct and management pose a threat to the Organisation is not sufficient grounds for terminating an appointment before its expiry.

3. The principle of independence for international civil servants applies to the Director-General. Its application in the case of the OPCW dictates that:

   (a) the Conference does not have unfettered discretion to terminate the appointment of a Director-General;

   (b) the Conference may terminate the appointment only on grounds of grave misconduct.

4. The procedure adopted for establishing a case of grave misconduct against a Director-General must fully comply with the principle of due process and afford him or her an opportunity to present a defence effectively before an independent and impartial body.

5. Any resolution adopted by the Conference to terminate an appointment must refer to the grave misconduct upon which it is based.

6. In order to deal with cases where a Director-General is faced with proceedings to terminate his/her appointment on the grounds of grave misconduct, the Judgment appears to suggest that the Staff Rules of the Organization should be altered to make provision for his or her case to be examined by an impartial judicial body.

The Tribunal did not offer any guidance as to the type of behaviour that would constitute grave misconduct of a degree sufficient to justify termination. Presumably, it did not consider it necessary to enter upon this matter in view of the fact that it had already determined that the termination was wrongful (because the requirements for due process had not been met and the Conference's resolution was not properly framed).

In addition to awarding damages, the Tribunal's decision includes the following clause:

The decision taken by the Conference of the States Parties of the OPCW on 22 April 2002 is set aside.

This part of the Judgment leaves matters in some confusion. It is possible to interpret these words as meaning that the Conference decision should be regarded as a nullity. According to this interpretation, Mr. Bustani should be regarded as never having been terminated. This would call into question the legal status of the person appointed to replace him.

The OPCW should not allow this state of confusion to remain unresolved, for to do so would indicate that the Organisation was simply ignoring the Judgment. Two avenues should be explored towards resolving the confusion. The Organisation could apply to the Tribunal for an order clarifying this aspect of the Judgment. An alternative approach would be an application to the International Court of Justice for an advisory opinion pursuant to Article XIV.5 of the Convention. It should not be too difficult to persuade the Tribunal or the Court that this part of the Judgment should not be taken as affecting the legal fact of the termination nor the validity of the appointment of the present incumbent. This point becomes especially clear when it is recalled that the Judgment notes that Mr. Bustani did not ask to be reinstated as Director-General.

The Role of the US

The process for dismissal started when the US alternate permanent representative to the OPCW visited Mr. Bustani a few days before 21 February 2002 and laid out a series of complaints and asked for his resignation[2]. When this was refused, the US called for a meeting of the Executive Council and circulated a nine-page non-paper on 6 March with a list of its complaints. The list was organized under three headings:

- Polarizing and confrontational conduct
- Management issues
- Advocacy of inappropriate roles for the OPCW

2 Recorded in a letter from Bustani to US Secretary Powell dated 21 February 2002: www.opcw.org/SS1CSP/CSS1_dg1.html

This list loses much of its impact when it is remembered that many of the items listed above were based on Mr. Bustani's refusal to take certain specific actions and when it is remembered that the US was always free to ask the Executive Council to order him to take such actions, in which case he would have been required to comply. It seems possible that the US had already tried and failed to persuade the Executive Council to issue such orders and was now trying to achieve its purpose by replacing the Director-General.

On 21 March 2002, the US tabled a resolution in the Executive Council expressing no confidence in Mr. Bustani and requesting his resignation. The motion was defeated. The US then called for a special meeting of the Conference of the States Parties and began a campaign among all 145 States Parties to support a motion for dismissal. The meeting took place on 21-22 April. Most of the western group including Canada supported the US motion to dismiss, as a result of which it passed with the required two-thirds majority. Subsequently, on 25 July 2002 a new Director-General was appointed in the person of Roger Pfirter, an experienced diplomat from Argentina.

Looking to the Future

The next session of the Conference of the States Parties will be its annual meeting due to begin on 20 October. It would appear to be incumbent upon this body to recognize the validity of the Tribunal's Judgment by:

- making provision in the Organization's 2004 budget for payment of the damage award;
- seeking judicial clarification of the clause in the Judgment that sets aside the decision to dismiss;
- providing the "procedural guarantee" referred to in the Judgment, which it would presumably do by adopting whatever decision is needed to ensure that in future, when a Director-General is confronted with proceedings to terminate his appointment, there will be a right of appeal to an independent and impartial body.

One positive outcome of the Tribunal's Judgment is that Mr. Pfirter and his successors are likely to feel a little more protected from US pressure than they would have been without the Judgment. It is now clear that the US will not be able to marshall the States Parties to vote for the dismissal of a Director-General unless it is in a position to prove grave misconduct before an impartial tribunal. This is a welcome improvement over the situation before the Judgment was issued. After the dismissal of Bustani, until the Tribunal put things right, it looked as if the US was in a position to threaten any Director-General with dismissal.

The world owes Mr. Bustani a multiple debt of gratitude: for having pursued his action in the ILO Administrative Tribunal (at his own personal risk and expense), for having refused to yield to US pressure to resign, and for having reinforced the principle that the Director-General must be free to act independently, exempt from pressure from any State Party and from the threat of dismissal.

Note: An expanded version of this paper will appear shortly on The Markland Group website under "Back Issues of Our Newsletter".

The BWC After the Collapse of the Protocol Process: The First Meeting of Experts

By Sean Howard*

Efforts to strengthen the 1972 Biological Weapons Convention (BWC) entered a new phase in late August with the first in a series of experts' meetings at the Palais des Nations in Geneva. For two weeks (August 18-29), experts from 83 of the 150 states parties to the BWC discussed national measures (generally taken to mean national legislation) to ensure implementation of the treaty's main provisions (week one) and national mechanisms to ensure the security of pathogenic micro-organisms and toxins (week two). The meeting's main function is to prepare a report for the annual meeting of states parties scheduled for November 10-14. A similar process – an annual meeting on a specific subject, preceded by an experts' meeting to provide guidance – will be followed in 2004 and 2005. The subjects of these meetings for the next two years will be international capabilities for investigating and responding to suspicious

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outbreaks of infectious diseases, and the elaboration of scientific codes of conduct.

In 2006, states parties will convene for the Sixth BWC Review Conference. While they will doubtless wish to consider any recommendations emerging from the 2003-2005 meetings, they will also have to decide on their basic approach to strengthening a treaty currently possessing no compliance mechanism or verification regime. Between 1994-2001, states parties undertook painstaking negotiations on a protocol designed to correct these glaring deficiencies. In July 2001, the Bush administration withdrew from the talks, arguing that no multilateral system of inspections, monitoring and investigation could hope to detect clandestine activity. US opposition to the protocol led to the acrimonious suspension of the Fifth Review Conference in December 2001; when the Conference resumed in November last year, it reached agreement on a Final Document (BWC/CONF.V/17) containing the programme of meetings outlined above, without prejudice to the possible revitalisation of protocol discussions.

While sticking to the subjects at hand, the first Meeting of Experts – which also saw the participation of the United Nations, other international organisations, and a number of NGOs – provided glimpses into the underlying tensions leading to the collapse of the 1994-2001 protocol effort. A US working paper, one of 61 submitted to the meeting, insisted that "traditional arms control measures, including routine declarations or facility investigations" – measures, it is worth noting, which form important elements of the verification regime established under the Chemical Weapons Convention (CWC) – "cannot be effective against biological weapons" for a simple reason: "Biological agents and the facilities and equipment used to produce them for illicit purposes cannot be distinguished from their legitimate counterparts." Instead of the "traditional" (CWC) approach, the paper argues, a more effective agenda would contain seven main items: effective national legislation and its rigorous enforcement; "confronting non-compliance" – how is unspecified; improving "global disease surveillance"; "coordinating assistance" in the event of a BW attack or suspicious outbreak of disease; enhancing public and private sector biosecurity standards; elaborating codes of conduct for scientists; and "urging non-BWC members to join and adhere to the treaty".

While these objectives may be worthy enough in their own right, the lacunae in the US agenda invite two levels of suspicion. First, many states parties fail to see how a multilateral compliance and verification mechanism is less likely to succeed than a "legal patchwork" – in the words of a working paper from the Netherlands – of national measures. Second, there is widespread concern that the US rejection of the protocol was motivated in part by a desire to shield from view an expanding range of research potentially crossing the line between legitimate 'biodefence' and the development and even weaponisation of new biological warfare agents and delivery systems. Unfortunately, the louder the US insists on describing the 2003-2005 process as a clean, permanent break from the search for a protocol, the more such suspicions may grow, detracting from what might otherwise prove a modest but nonetheless valuable interim exercise in confidence-building and information-sharing.

Many countries continue to argue (at least by implication) in favour of a verification protocol. For instance, a German working paper argues that national implementation only becomes "a prime concern of states parties" in "light of the failure to agree upon a verification protocol", and should only remain a top priority "pending agreement on a new approach towards verification."

On August 20, the BioWeapons Prevention Project (BWPP), an international network of NGOs founded in November 2002, hosted a lunch seminar for delegates attending the BWC meeting of experts. The Verification Research, Training and Information Centre (VERTIC) presented the findings of a new report entitled "Time to Lay Down the Law: The Status of National Laws to Enforce the BWC". The study includes the results of a questionnaire circulated to all BWC parties requesting details of legislation enacted pursuant to Article IV of the Convention, and a preliminary survey of 165 pieces of legislation received from 63 countries. The full report and supporting material is available from VERTIC at www.vertic.org/datasets/bwclegislation.html.

Information Note: for the text of all working papers and related documentation, readers are directed to the website of the United Nations Department of Disarmament Affairs (DDA) at http://disarmament.un.org/wmd/bwc/annualmeetings/2003meetings.html.

Note: An expanded version of this paper will appear shortly on The Markland Group website under "Back Issues of Our Newsletter".

Au Calendrier

Upcoming Events

Indigenous Rights, Globalization and Federalism

October 16-17, 2003, Vancouver. The 15th Annual Conference of the Indigenous Bar Association will be held at the Crowne Plaza Georgia Hotel in Vancouver, B.C. During Day 1, the conference will focus on the theme of indigenous rights in both the international and the domestic context. On Day II, participants will be invited to explore the theme of indigenous rights and federalism, with particular attention to recent SCC decisions. More information about the conference is available at: <http://www.indigenousbar.ca/conferences/vancouver_2003.html>.

International Criminal Law : The Expansion of Individual Rights and Responsiblities for Human Rights Violations

October 16-18, 2003, New Orleans. The 2003 International Law Students Association Fall Conference will be hosted by Loyola University New Orleans School of Law. The conference will explore different areas of international criminal law such as the U.N. International Criminal Tribunals, prosecution of aliens in domestic courts, and the newly created International Criminal Court. An overriding focus of the conference will be the increasing responsibility of individuals in international law as a method to curb international terrorism and war crimes. In addition to panels featuring experts in international criminal law, the conference will also highlight student research in this area. More information on the conference, including details on registering, is available on the ILSA web site at: <http://www.ilsa.org>.

Participatory Justice in a Global Economy: The New Rule of Law?

October 16-18, 2003, Banff. Organised by the Canadian Institute for the Administration of Justice with the support of Alberta Justice and the Alberta Law Foundation, the Conference will tackle, among many other important questions, the extent to which the rule of law is necessary to enable effective involvement in the global economy and how the development of international norms, standards and laws is impacting on the development of national laws. A conference programme and registration details are available on the CIAJ web site at: <http//www.ciaj-icaj.ca>.

International Law in Crisis – and in Business

October 23-25, 2003, New York. The American Branch of the International Law Association will be holding its annual Weekend Conference at the House of the Association of the Bar of the City of New York. The overall theme of the Weekend will be « International Law in Crisis – and in Business », covering a broad range of both public and private international law topics. Speakers include: Michael Hartman, International Prosecutor, United Nations Mission in Kosovo, on "International and Transnational Justice Initiatives"; David Crane, Prosecutor, Special Court for Sierra Leone and Carla Del Ponte, Prosecutor, International Criminal Tribunal for the former Yugoslavia discussing the arrest of indicted war criminals; Jose Alvarez, Professor at Columbia University Law School on the future of the Security Council; and Ambassador Jeanne J. Kirkpatrick, former United States Ambassador to the United Nations on "U.S.-European Relations and the War Against Terrorism". Detailed information about the conference is available from: <http://www.ila.ambranch.org>.

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