VARIA JURIS GENTIUM

QUESTIONS OF INTERNATIONAL LAW / QUESTIONS DE DROIT INTERNATIONAL

LIBER AMICORUM

PRESENTED TO / OFFERT À

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Member of the United Nations International Law Commission/
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AT THE OCCASION OF HIS SEVENTIETH BIRTHDAY/
À L'OCCASION DE SON SOIXANTE-DIXIÈME ANNIVERSAIRE

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VRAAGSTUKKEN VAN INTERNATIONAAL RECHT

LIBER AMICORUM

AANGEBODEN AAN

JEAN PIERRE ADRIEN FRANÇOIS

Buitengewoon Hoogleraar in het volkenrecht aan de Nederlandsche Economische Hoogeschool te Rotterdam
Secretaris-generaal van het Permanente Hof van Arbitrage
Lid van de Commissie voor Internationaal Recht van de Verenigde Naties

TER GELEGENHEID
VAN ZIJN ZEVENTIGSTE VERJAARDAG
DOOR

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VOORWOORD

Op 5 juli 1959 zal Professor Mr. J. P. A. François de zeventigjarige leeftijd bereiken.

François heeft zijn leven in dienst gesteld van het internationale recht. Elders in dit boek is beschreven, hoe hij dit heeft gedaan. François' naam heeft al spoedig een uitstekende klank gekregen, niet alleen in Nederland, doch ook ver daarbuiten. Vastgesteld moet worden, dat hij de wereld van het internationale recht aan zich heeft verplicht, zowel door zijn belangrijk wetenschappelijk oeuvre, als door zijn velerlei werkzaamheden als practicus.

De ondergetekenden en met hen vele anderen, die het voorrecht hebben hem te kennen, hebben gemeend, dat aan deze vijfde juli voor François enig reliëf dient te worden gegeven. Daarom is besloten de juli-aflevering van het Nederlands Tijdschrift voor Internationaal Recht het karakter te geven van een betoon van hulde aan deze uitnemende geleerde. De bladzijden hierna tonen aan in welke mate dit besluit weerklank heeft gevonden in Nederland en elders.

Moge het François gegeven zijn nog vele jaren zijn zegenrijke arbeid voor de goede zaak van het internationale recht voort te zetten!

M. Bos L. Erades R. D. Kollewijn
J. H. W. Verzijl L. I. de Winter

FOREWORD

On July 5, 1959, Professor J. P. A. François will celebrate his seventieth birthday.

Professor François has devoted his life to international law. Elsewhere in this volume, an account of his brilliant career is to be found. Professor François very soon made a name for himself, in the Netherlands as well as outside. The world of international law owes him a great debt for his important publications in the field and his manifold related activities.

The undersigned, and many others who are privileged to know Professor François, decided that special significance should be lent to this anniversary. The July issue of the *Nederlands Tijdschrift voor Internationaal Recht* was, therefore, given the character of a tribute to this most distinguished scholar. The following pages are evidence of the response the idea brought in this country and abroad.

It is hoped that many more years may be granted to Professor François to continue his work in the cause of international law!

M. Bos L. Erades R. D. Kollewijn
J. H. W. Verzijl L. I. de Winter

AVANT-PROPOS

Le 5 juillet 1959 le Professeur J. P. A. François aura soixante-dix ans.

Sa vie aura été consacrée au droit international et l'on trouvera dans ce volume le récit de sa brillante carrière.

La réputation du Professeur François n'a pas tardé à se répandre aux Pays-Bas et à l'étranger. Le monde du droit international lui doit une vive reconnaissance, tant pour son importante œuvre scientifique que pour ses multiples travaux pratiques.

Les soussignés, ainsi qu'un grand nombre de ceux qui ont le privilège de connaître Monsieur François, ont cru devoir donner un certain relief à cet anniversaire. C'est pourquoi il a été décidé de faire paraître le numéro de juillet de la *Nederlands Tijdschrift voor Internationaal Recht* sous forme d'un hommage à cet éminent savant. Les pages qui vont suivre témoignent de l'écho que cette décision a rencontré dans notre pays même et au dehors.

Nous émettons le vœu que le Professeur François puisse continuer, pendant de longues années encore, son activité fructueuse dans le domaine du droit international!

M. Bos L. Erades R. D. Kollewijn
J. H. W. Verzijl L. I. de Winter

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BIOGRAPHIE DE JEAN PIERRE ADRIEN FRANÇOIS

par

Mme. C. A. KLUYVER
Ancien directeur au Ministère des affaires étrangères

Jean Pierre Adrien François naquit à La Haye le 5 juillet 1889 et pendant toute sa vie, à l'exception des années d'étude universitaire, cette ville est restée son domicile. Après avoir parcouru l'école primaire, il suivit le « Hoogere Burger School » et se rendit ensuite à Delft, pour devenir ingénieur à la Haute Ecole Technique. En effet pendant deux ans il persista dans cette décision, mais peu à peu fasciné par les livres d'étude juridiques de sa sœur, le désir de devenir juriste triompha. Par un dur travail il réussit à acquérir en une seule année une connaissance suffisante de latin et de grec pour passer le « Staatsexamen », examen qui lui donnait l'accès à la faculté de droit. Ainsi, en 1909, commença-t-il ses études du droit à l'Université de Leyde. Après avoir été reçu docteur en droit en 1914, il continua l'étude des sciences politiques y compris le droit international. A cette époque le professeur de droit international à Leyde était le jonkheer van Eysinga et François n'a jamais manqué de lui exprimer sa reconnaissance; on retrouve des mots chaleureux à cet égard dans un article paru en 1951 dans la Revue d'Histoire du Droit.

La même année où il passa son dernier examen à Leyde, en 1915, il fut nommé fonctionnaire au Ministère des affaires étrangères. Les divers problèmes avec lesquels les Pays-Bas, puissance neutre, pendant la première Guerre mondiale furent confrontés devaient être étudiés au Ministère. François y prit une part active et en 1917 fut détaché pour une courte période à la Légation à Berlin; déjà le droit de la guerre maritime l'intéressait spécialement. En 1919 il obtint le degré de docteur ès sciences politiques après avoir soutenu une thèse, intitulée « Sous-marin et Droit international ».

François appartenait à la section juridique du Ministère, alors sous la direction — selon lui très habile — du baron van Heeckeren. Était du ressort de cette section la question de l'organisation internationale juridique, qui avant la première Guerre mondiale se présentait sous la forme de la préparation de la Troisième Conférence de la Paix, et qui vers la fin de la guerre allait prendre celle de la fondation de la Société des Nations. C'était François qui s'occupait de l'adhésion des Pays-Bas à cette nouvelle organisation, créée par les Alliés, adhésion qui constituait une grave décision pour

Il est compréhensible que tant de capacités et d'activités fructueuses n'ont pas manqué d'être honorées de divers côtés. Sa Majesté la Reine lui a conféré en 1928 la décoration de « Ridder in de orde van de Nederlandse Leeuw », et, lors de son départ du Ministère en 1954, il a été nommé « Commandeur in de orde van Oranje Nassau ». Le Gouvernement, en 1952, a désigné François comme membre de la Cour Permanente d'Arbitrage, fonction qui a toutefois pris fin deux ans plus tard déjà à la suite de sa nomination comme Secrétaire-général de la Cour. Plusieurs puissances étrangères lui ont également donné des décorations.

Dans les années entre les deux guerres où grand nombre de pays concluaient des traités d'arbitrage et de conciliation, la fonction de membre d'une telle commission de conciliation — ordinairement une sinécure — pouvait être considérée comme une sorte de « décoration internationale ». François en reçut quelques unes, étant désigné entre autres dans les commissions belgo-danoise et grèco-italienne. Les deux derniers pays ayant soumis un différend à leur commission, François s'est occupé en 1956 comme président de la commission de l'affaire de la destruction du navire grec « Roula ». Récemment la Norvège et la Pologne ont désigné François dans leur Commission.

Dans le monde juridique international il a reçu la plus haute distinction de l'Institut de Droit International. Après avoir été nommé associé en 1937 déjà et être devenu membre en 1948, il fut, à la session de Grenade, désigné président de l'Institut; en cette qualité il a présidé la session d'Amsterdam en 1957.

A présent presque septuagénaire, François siège dans son majestueux cabinet au Palais de la Paix, s'occupant non seulement des affaires de la Cour Permanente d'Arbitrage, mais continuant à contribuer, de son mieux, au développement du droit international.

le 1er dec. 1958.

SOME OBSERVATIONS ON THE SCIENCE AND ART OF DIPLOMACY

by

Dr. Ricardo J. Alfaro
Professor of International Law, University of Panama,
Member of the International Law Commission of the United Nations

Many definitons of diplomacy have been offered by the numerous authors who have dealt with the subject. It is noteworthy that Baron de Martens in his classic work does not give a precise definition, but he quotes M. de Flassan who briefly describes diplomacy as "the science of the foreign relations of States". This definition is rather vague and involves to my judgment a confusion with international law, which is recognized essentially as the branch of the law which deals with such relations. Sir Ernest Satow in his renowned *Guide to diplomatic practice* gives a definition which is more descriptive than essential, but supremely elegant, by saying that diplomacy is "the application of intelligence and tact to the conduct of official relations between States". To Pradier-Foderé diplomacy is "the art of representing one's own government before foreign governments and in foreign countries", and Philips says it is "the art of conducting international negotiations". These two definitions lower diplomacy to the category of an art, and while one restricts it to representation the other one restricts it to negotiation whereas diplomacy is also a science and diplomatic action comprises the two elements. Rivier corrects these deficiencies and gives a magisterial, fully satisfactory definition by stating that "diplomacy is the science and art of representation and negotiation in State intercourse". And inasmuch as representation and negotiation do essentially constitute actual application of the principles of international law, I find very much in point the definition of Cogordan, who in a terse and concise manner defines diplomacy as "applied international law".

As a science, diplomacy is a historical science when its object is the knowledge of international relations which existed in the past and of events connected with such relations; it is a theoretical science when it undertakes to study the principles governing the conduct of such relations; and it is a practical science, or as others characterize it, an art, when it becomes the actual application of those means by which States establish, maintain, develop, modify or break off such relations.

Diplomacy as an art is older than the science of international

law. If we consider that the essence of diplomacy is the function of the ambassadors, we may observe that the practice of representation is found among the ancients, even among savage tribes, as a rudimentary manifestation of intercourse between peoples. As a matter of fact, it is considered that the inviolability of ambassadors and the sanctity of the pledged word constitute the two oldest principles of customary international law. Ancient Rome had its *fetiales* who were priests charged with the function of negotiating treaties, exposing grievances, declaring war and adjusting the peace. They formed a *collegium* and applied a body of law, the *jus fetiale*, considered by some authors as a crude forerunner of the law of nations. All along the course of history, from antiquity through the middle ages to the modern era, we find some form of intercourse carried on by envoys, until the art of diplomatic representation, between the XIII and the XV centuries, flowers into the highly developed organization of the Venetian ambassadors, the most refined form of Middle Age diplomacy. Foreign representation had also a remarkable development in the republic of Florence, and among the ambassadors of that great center of culture and political science we find such illustrious names as those of Dante, Bocaccio, Petrarch, Guicciardini and Machiavelli. And after this retrospective glance we find that more time has elapsed between the era of the Italian ambassadors and that of Grotius, than between his *De jure belli ac pacis* and our own day.

Which are the essential differences between the practice of international relationships in the days gone by and in our time? For a proper answer I deem it necessary, first of all, to trace in the course of the ages a dividing line between what we may refer to as old diplomacy and new diplomacy.

Baron de Szillassy divides the history of diplomacy into four periods: 1. *Ancient diplomacy*: from the most remote times to the end of the Middle Ages; 2. *Permanent diplomacy*: from the times when diplomatic missions started to become permanent, to the Vienna Congress of 1915; 3. *Modern diplomacy*: which would be roughly that of the XIX century; and 4. *New diplomacy*: which in the author's judgment began to develop with the pacifist spirit which led to the Hague Peace Conferences of 1899 and 1907.

I do not quite agree with Baron de Szillassy in his outline of the last stage. I concede that the Hague Conferences marked an appreciable progress in statesmanship and in international law. But diplomacy, as practiced in the days of the Congress of Vienna and in those of the Hague Conferences did not show any notable differences.

My conception is that if we have to speak of old and new diplomacy we must trace the line at the end of the first world war. For diplomacy has undergone more radical changes after 1920 than in the prededing times. The chief reason is that international law has experienced deeper transformations in the thirty-odd years elapsed

between the peace of Versailles and our own day than in the three centuries running back from the peace of Versailles to the peace of Westphalia. The notions prevailing between these two transcendent events show lesser differences than those we can discern between international life up to the end of the second decade of our century and that of the present day. The transformation has been deep and rapid, especially since the organization of the Community of States under the Charter of the United Nations in 1945. And along with international law the conduct and development of the foreign relations of States have undergone corresponding and harmonious changes.

Granted that the essence of diplomacy is representation, a fundamental difference between old and new diplomacy is determined by the nature of the person represented. In the old days, if we except the Italian republics, ambassadors represented the person of the Sovereign, i.e., the absolute ruler of a monarchy. The transformation of the concept of sovereignty in the sense that it resides in the people, has consecrated in contemporary diplomacy the principle that diplomatic envoys, whatever their category or title, and whatever the form of their governments, represent their States. This principle was explicitly enunciated in the Havana convention of 1928 on diplomatic agents and has been maintained in the draft Convention on diplomatic relations and immunities approved by the International Law Commission of the United Nations in its session of 1958.

Representation of the person of the Sovereign in the old days did naturally create certain characteristics in the practice of diplomacy. Ambassadors were recruited among courtiers and noblemen; they had to display, and in fact displayed, a great deal of pomp and ceremony; they attached primary importance to questions of etiquette, which sometimes created serious difficulties. The negotiations of the Westphalia treaties were held up and hindered several times by vexatious disputes about rank, title and precedence. In short, old diplomacy was aristocratic; contemporary diplomacy is democratic.

The Congresses of Vienna and Aix-la-Chapelle solved the problem of title by classifying diplomatic agents into the four traditional categories of Ambassadors, Ministers-Plenipotentiary, Ministers-Resident and Chargés d'Affaires. The category of Ministers-Resident has become obsolete. It has been found to serve no purpose other than that of outranking a class of ministers. Likewise, the practice of accrediting permanent Chargés d'Affaires has virtually disappeared. The result is that diplomatic agents today are confined to the two classes of *ambassadors* and *ministers*. The story is current that on one occasion a Member of the British Parliament inquired during a debate: What is the difference between an ambassador and a minister? The Foreign Secretary replied: Five thousand pounds. Fancy or reality, the reported

answer and the facts of international life show that title means nothing so far as the essential function of representing a State is concerned. Formerly ambassadors were accredited only by great powers to great powers. During the last twenty-five or thirty years and especially after the second world war, we have seen not only that small States have elevated their reciprocal missions to the rank of embassies, but also that ambassadors are exchanged between great powers and small States. The tendency to accredit ambassadors has become universal.

When the draft Convention on diplomatic relations and immunities was discussed by the International Law Commission, very serious consideration was given to the advisability of eliminating the class of ministers and adopting the title of ambassadors only to designate the representatives of States before other States. Very cogent reasons were adduced in favor of the proposition by several Members, among them M. François. At the 390th meeting of the Commission, on May 3rd, 1957, he said *inter alia* that the present division of heads of mission in the two great categories of ministers plenipotentiary and ambassadors gives rise to discriminatory practises against certain States; that in the days of the Vienna Congress the distinction was justified by the special position enjoyed by the great powers in law as well as in fact; that even after the first world war, when Belgium favored the maintenance of the system, it was possible to show that in certain cases a State might desire to establish particularly close relationships with certain other States, but that at the present time the appointment of an ambassador does not in any way mean that the relations between the two States are particularly close or important. More and more every day,—he pointed out—ambassadors are appointed to countries where they do not carry any weight, while ministers plenipotentiary find themselves in a position of inferiority which hurts their sense of dignity, as they find themselves outranked by representatives of States which have with the receiving State relations much less important or close, simply because said States are represented by "ambassadors".

The Commission, inspired by pragmatic reasons, chiefly the fact that some States continue to appoint ministers, finally decided to maintain the two classes, although it was generally agreed that the difference between them concerns only rank and ceremony, and that the tendency was to appoint only one class of heads of mission, i.e., that of ambassadors. Thus the Vienna classification remains, but in our day it has no meaning. It is a tribute paid to tradition.

Old and new diplomacy differ also respecting ways of action. A diplomatist is no more the "illustrious liar" described by old authors. It would be wholly unjust to apply to the present-day head of mission the famous joke of Sir Henry Wotton: "An ambassador is an honest man sent to lie abroad for the good of his country."

The traditional conception of a diplomat as a master of deceit, as a professional of intrigue, is superseded by the reality of the contemporary envoy, who acts on the theory that in the diplomatic intercourse of our day mendacity, fiction, dissimulation and duplicity do not pay. Contemporary international politics is quite different from the old game of dynastic interests and monarchial ambitions. The only fruitful method is to lay the cards on the table.

In line with the international mind of our day, secret diplomacy is a thing of the past, so far as its aim is the conclusion of secret treaties. The mandate of article 102 of the Charter of the United Nations, that every treaty or international agreement must be registered with and published by the Secretariat, sounded the death knell of secret covenants.

The most radical difference between the old and the new diplomacy, in my judgment, comes from the fact that nowadays international intercourse is profoundly influenced by moral principles which were ignored or disregarded in the past. No statesman of the democratic countries would dare to do today things that fifty years ago were current and natural, as judged by the international standards prevailing throughout the XIX century and the two ensuing decades. The days are over when it was thought that military conquest was entitled to greater glory than the conquests by which science affords welfare and happiness to the human kind; when war was considered to be an indisputable attribute of sovereignty; when any form of wrong or injustice committed by a government under the pretext that it was for the good of the country was acceptable to its citizens; when the rights and liberties of the human being could be trampled under foot and mass assassination could be carried on in the name of the State.

In harmony with the evolution of public opinion in the civilized world, and with the gospel of international morality embodied in the Charter of the United Nations, the contemporary diplomat is imbued in the belief that there is no such thing as the "right of conquest"; that starting a war is a supreme crime against humanity and that those guilty of perpetrating it must be punished by the Community of States; that injustice against a nation is not justified by the interest of another nation; that fundamental human rights and the equal rights of nations large and small, are sacred; and that peace, tolerance, good neighborliness and cooperation are the goals towards which all diplomatic action must be directed.

Summing up, I would say that sincerity, democracy, openness, national spirit, respect for public opinion, a purpose to be right rather than clever, devotion to the cause of peace, unswerving loyalty to the ideals of the United Nations, and above all, adherence to moral standards, are the avowed aims of contemporary diplomacy, as it has evolved from the practices of the past.

Now, to what an extent these standards are observed by each individual diplomat and by each Chancellery, is a question in

which the human element has to be taken into account. We cannot ignore the existence of governments, which apparently are not concerned over questions of morality and righteousness. But I have no hesitation in asserting that the overwhelming majority of nations today are bent upon conducting their foreign relations in such a manner as will lead humanity towards the reign of peace and right.

QUELQUES ASPECTS DU CONTRÔLE INTERNATIONAL NON-JUDICIAIRE DE L'APPLICATION PAR LES GOUVERNEMENTS DE CONVENTIONS INTERNATIONALES

par

le Baron F. M. VAN ASBECK

1. Le contrôle non-judiciaire de l'application des conventions internationales est devenu peu à peu une véritable « institution » de la société des états à la suite d'une marche irrégulière et compliquée des événements. Le sujet a augmenté en importance à mesure que l'interdépendence des états s'est étendue et intensifiée, et que pari passu le nombre des conventions, et l'intérêt qui s'y attache se sont accrus. Or, il existe déjà de savantes monographies sur ce contrôle [1]; aussi ma tâche se limite-t-elle à indiquer quelques lignes constantes de l'évolution intervenue au cours de l'époque moderne des relations internationales, — disons pour fixer la pensée, depuis le milieu du 19e siècle.

Pour ne pas trop allonger cette contribution je laisserai de côté les conventions de nature exclusivement ou principalement politique; je négligerai également le contrôle certes non-judiciaire au sens exact du terme, néanmoins en fait quasi-judiciaire sous plusieurs rapports, qui s'exerce à l'occasion de « différends » entre états. Comme exemples d'un tel contrôle je cite l'activité attribuée autrefois à la Commission consultative et technique des Communications et du Transit de la Société des Nations en ce qui concerne la solution de différends, ou l'examen par le Conseil de la Société des Nations de pétitions concernant les minorités. Pour l'époque actuelle: le rôle conféré au Conseil d'administration de l'Organisation Internationale du Travail par les articles 26 ss. de la Constitution de l'Organisation Internationale du Travail en cas de « plaintes soumises par un état-membre contre un autre état-membre concernant l'exécution, estimée non-satisfaisante, d'une convention du travail; et en général toute la procédure de « conciliation ».

2. On pourrait réduire les cas possibles du contrôle non-judiciaire qui fait l'objet de cet article, à trois types. Ces types se sont établis successivement au cours du dernier siècle, l'un à côté de l'autre; et ils continuent à exister l'un à côté de l'autre, souvent toutefois sans lien organique.

[1] Voir e.a. N. Kaasik, *Le contrôle en droit international* (1933), Paul Berthoud, *Le contrôle international de l'exécution des conventions collectives* (1946).