IN MEMORIAM: WILLEM RIPHAGEN 1919-1994

Professor Willem Riphagen passed away on 13 July 1994 at the age of 75.

He was a remarkable man in many respects, even if measured solely according to his professional and academic abilities and achievements. Having held the post of legal adviser to the Minister for Foreign Affairs for 30 years and simultaneously the chair of international law at Rotterdam for 25 years, there is in fact little room for distinction between the two aspects of his activities: his academic analyses were thoroughly inspired by a spirit of political realism which was inherent in his practical experience, and his professional activities always bore the marks of being carefully designed and polished by a rigorous legal mind.

Born on New Year's Day in 1919 in what was then Batavia, in 'the Indies', Willem Riphagen graduated at the age of 21 from the law faculty of the University of Amsterdam. As he himself once revealed, he had just an average law education with an optional course in private international law as the only international sprinkling. His legal career commenced during the war, in 1942, at the Ministry of Home Affairs. Having achieved the post of deputy head of the Legislation Department merely five years later, he left the domestic affairs of his spatially small country behind him to devote his further life to its external relations and the affairs of the world. His ambitions remained focused on the legal field, and it testifies to his abilities at that early stage of his career that he was chosen to enter the newly-founded and prestigious Office of the Legal Adviser at the Ministry of Foreign Affairs as the junior assistant to the late Professor François.

Having hardly settled in his new position he was assigned to serve in the government delegation to the probably most difficult and most frustrating political negotiations ever conducted by the Dutch, i.e., those with the Indonesian nationalists, which later led to the abandonment of sovereignty over the Dutch Asian possessions. The commission of the 28 year-old Riphagen to render legal advice on the extraordinarily sensitive issues involved is most remarkable but was, as was confirmed by the frequent praise heaped upon him by his superior, fully justified. It may without doubt be said that this was his baptismal fire by applying his legal ingenuity on the diplomatic battlefield where, among other things, he found himself in a position of having to notify the other side of the cancellation of a cease-fire within twenty minutes of the commencement of military action.

Riphagen took up his responsibilities of legal adviser, succeeding François in 1954, at a time of tremendous innovations in the field of international law in Western Europe. Economic necessity and political opportunity, as well as a

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rediscovery of common basic Western values and ideals brought the Council of Europe, the European system of human rights protection, and the various European Communities into existence. Riphagen was actively involved in the drafting of the treaties establishing these institutions and afterwards ensured that he kept his knowledge of their workings up to date while sharing it with others.

On the global level, the great number and variety of multilateral treaties at whose birth Riphagen had been in attendance during 40 out of the 50 post-war years cover almost the whole range of present-day inter-State relations. This experience in the field of continental and global law-making gave Riphagen a wealth of insight into the intricacies of the law of nations which will be rarely equalled by others.

While it may hardly be a merit for the legal adviser of a foreign ministry to have attended numerous international conferences, it becomes noteworthy indeed when the person concerned was instrumental in their ultimate results. Reference may here be made to two remarkable cases in which his role was widely acknowledged. Riphagen performed a central function as the Rapporteur in the UN Special Committee that drew up the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. In another area he was one of the few persons who had the privilege, and undoubtedly carried the corresponding burden, of attending all three United Nations Conferences on the Law of the Sea, thus gaining an intimate understanding of the numerous aspects of this most central part of international law. At UNCLOS III Riphagen played an important role in setting up the multi-layered system of dispute settlement procedure on which a consensus was finally reached.

So far as his external activities are concerned, besides participating in, presiding over and contributing to treaty-making conferences, the position of legal adviser also resulted in Riphagen's appearance as Commissioner at the Commission for the Navigation of the Rhine and as the agent of the Netherlands before the International Court of Justice in contentious cases (the *Guardianship of Infants* case and the *Certain Frontier Land* case) as well as in proceedings relating to applications for advisory opinions. Though not directly flowing from the duties of his office, his activities on the international legal plane also included being a judge *ad hoc* at the International Court of Justice in the *Barcelona Traction* case, the presidency of the arbitral tribunal in the *Air Service Agreement* case and, during a brief period following his retirement, the office of arbitrator at the Iran-US Claims Tribunal.

One of his most important functions in the field of elaborating the structure and process of international law, again unrelated to his official duties at the Ministry, was, of course, his membership of the International Law Commission of the United Nations during the period 1977-1985 and, in that context, his achievements as Special Rapporteur on the topic of State Responsibility, succeeding Roberto Ago.

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Besides this astonishing range of duties and activities, in 1959 Riphagen succeeded François in the latter's second field of activity, viz., as adjunct professor of international law at the Netherlands School of Economics as it then was and which later developed into the Erasmus University at Rotterdam. The compulsory retirement age proved to be no bar for Riphagen to continue his educational activities by acting in an advisory role in the setting up of international law courses at the Open University, familiarizing himself with the special requirements of written education. At the international level of legal education Riphagen's name figures prominently by having been invited on three occasions to lecture at the Hague Academy of International Law.

In view of Riphagen's abilities it is noteworthy that he never figured in the membership of the well-established international societies for the study and advancement of international law, such as the *Institut de droit international* or the International Law Association. One can only guess as to the reasons: was it his personality which was not able to amass the necessary minimum amount of vanity often involved in joining these doubtlessly most useful activities, or did his passivity result from a kind of fatigue and, who knows, maybe even feelings of *blasé* and *déjà vue*, regarding vast international gatherings and the atmosphere of pseudo-conferences that sometimes go with these academic meetings? Or was it simply a lack of time in what was professionally an already full diary? Yet he was, for very many years, a member of the board of the Dutch International Law Association, whose semi-annual meetings he attended surprisingly regularly. Speculating on what made him such a loyal attendant I used to guess that it might have been some sort of relief for Riphagen to find an opportunity to be back in a familiar, even if rather parochial, environment, away from professional duties and yet dealing with familiar issues.

This is not the place nor the time to attempt to present a survey of Riphagen's legal thinking, although such an endeavour at the proper time and by the proper person would certainly be to the benefit of many of those with a dedication to international law. It should here suffice to refer briefly and generally to some of his writings.

It is, in view of his professional life, not really surprising to find that Riphagen often wrote on topics which were current to him. One of the first known papers penned by him dealt with the basic topic of the 'Legal structure of the European Community for Coal and Steel'. It was written for an occasional lecture at Leyden in 1955. While his restrained views on the feasibility of West-European integration resulted in uneasiness in idealistic Dutch international law circles at the time, it is telling that the solid and comprehensive nature of the paper was so highly valued that the Cornelis Van Vollenhoven Foundation for the Advancement of International Law decided to have it published under its auspices.

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The recent emergence of the European supranational bodies on the international scene understandably drew Riphagen's special attention and he wrote about various aspects for various audiences. The case law of the then ECSC Court of Justice in its first three years was analyzed for an international audience of lawyers in this *Review* (1957), the emergence of a supra-national structure of public authority was submitted to a Dutch administrative law readership (*Bestuurswetenschappen* (1957)), and the relations between different international institutions was described for those interested in international relations (*Internationale Spectator* (1955)). It is typical of Riphagen that his essay on new forms of supranational public authority, certainly not to be considered as one of his major writings, offers a more analytical and more instructive presentation of the topic than many accounts on the subject to be found in voluminous handbooks on the law of international organizations. Riphagen's sustained interest in matters of European Community law is also apparent from other papers on topics like 'Combination of Community law and national law' (1964), 'The transport legislation of the European Communities' (1966), and 'International law aspects of fiscal harmonization in the EEC' (1966).

Riphagen's early acknowledgement of the relevance of municipal practice for the substance of international law may be an aspect of his realistic approach to the latter but was in any case 'modern' for its emphasis on the recording of State practice which it implied and which was forcefully put forward by the United Nations at the time. As early as 1949, shortly after his return to the Hague chambers from his Indonesian assignment, Riphagen started to monitor and write summaries of Dutch judicial decisions in cases involving questions of international law and to publish them in the Yearbook of the Ministry. He thus became the first person in the Netherlands to devote himself to a regular recording of Dutch State practice in the field of international law and by so doing preceded by some two decades the inter-university venture in the field started in the Netherlands by The Hague's T.M.C. Asser Institute.

The simultaneous existence of and the inter-relationship between law emanating from different legal systems both at the municipal and international level was a source of constant query and search for Riphagen, and a constant playground for his penetrating analysis of their applicability to every possible variation of inter-individual and inter-State relationship. Riphagen's early acquaintance with private international law rather than public international law might have been at the root of the ease by which he crossed the borders between the different law disciplines, never limiting his focus on public international law when the subject at hand gave rise to the possibility for reflections on aspects of municipal or, as the case may be, conflict of laws. He chose 'The relations between international law and municipal law in the regulation of international economic relations' as the topic of his inaugural lecture. In the same year, 1960, he devoted a paper to 'The meaning of the structure of treaties and decisions of international institutions for the international and municipal legal order'. In his first Hague

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course in the following year which, remarkably, dealt with conflicts of law rather than public international law, he juxtapositioned a private and public law approach to a law of nations approach in dealing with transnational relationships, and in the same year he wrote 'Some notes on the relation between international and municipal law'.

Another feature of Riphagen's writings was without doubt his deeply felt conviction of the relative force of law, especially international law. He consequently scoffed at those who, either for idealistic reasons or out of sheer naivety, or both, were not prepared to concede the limited extent to which tension between norm and fact could be allowed to exist. In one of his more recent reflections on the inherent aspects of the law, this time on 'The time-factor in international law', he emphasized the greater relativity in international law compared to national law, and recalled that this is 'not to the liking of many "idealists" of humanity who prefer to build a tower of Babel'. This profound acknowledgement of the relative role of law in relations *inter potestates* went hand in hand with his consistent guarding against any confusion between positive law and *lex ferenda*. Yet Riphagen was by no means averse to the deliberate 'progressive development' of international law. His well-structured and coherent, though because of lack of time (in the ILC), less elaborated draft articles on the consequences of State responsibility, which were submitted to the ILC, abundantly testify to this. In response to a plea for realism by one of his fellow Commission members Riphagen replied that although he agreed that it was always desirable to be realistic, a degree of utopian vision was also necessary if any progress was to be made in international law. In so doing, however, he always remained strictly within the confines of legal reasoning, and he consequently abhorred loose utilization or even abuse of non-legal, social and economic notions or, for that matter, 'other currently popular themes' in juristic reasoning.

The 'Remarks on the negative conflict of nationality legislations' from 1962 could be seen in the light of the foregoing remarks about Riphagen's special interests. The paper by no means dealt with the common problems arising from statelessness, but with the phenomenon of the 'encounter' of different legal systems and its entailing consequences. It also focused on the different approaches taken by different States for finding a solution to the problem of statelessness and the reasons for these different options, and concluded that a solution to the conflict could only be achieved on the basis of a mutual recognition by the encountering legal systems.

Riphagen's attachment to international law was expounded by him in 1980 at the beginning of an article on the new developments in the law of the sea, as follows:

> 'One of the most fascinating aspects of international law and its developments is the ever-changing combination of "philosophy" and "politics", of high ideals in regard to humanity as a whole, and of the grim reality of a struggle of all against all or, to put it differently, the manifestation in international law of a continuous compromise

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between the aspirations of humanity, the state, the people and the individual, and also compromise between "movement" and "rest".'

Riphagen's writings may be characterized as abundant in substance and not quite lucid in style. It is difficult to find persons who have become admirers of Riphagen because of the ease with which they have read his writings. On the contrary, more often persons confess to have struggled through his texts, persevering only for the rich harvest of insight to be obtained at the end. From those with experience of working in a group or commission with Riphagen one hears the story that where several if not all of his interlocutors had some difficulty in keeping track or fathoming Riphagen's reasonings, that admission was usually not expressed right away because of one's stealthy fear of being the only ignorant person in the company. And in circles who knew Riphagen less well one might even find circulating the erroneous though forgivable suspicion of some intentional aggravation on the part of an intellectually arrogant man. The complexity of Riphagen's presentation of arguments led to the passing remark by one of his colleagues, made in the latter's review of Riphagen's professorial inaugural address on the 'Relationship between international law and national law in the regulation of international economic relations', to the effect that the occasion might have been even more impressive if the structure of the treatise and its presentation had been easier for the audience to grasp. Another example of the effort required in order to appreciate Riphagen's arguments is to be found in the brief discussion between Riphagen and his Leyden academic colleague Van Panhuys in the Dutch Lawyers Journal in 1964 as a result of a well-conceived misunderstanding of Riphagen's presentation of a mutually shared legal analysis. And when a number of his current and former associates paid hommage to Riphagen in the introduction to a collection of essays in his honour, they admitted that 'Riphagen's writings are by no means easily accessible and demand careful study. Only by meticulous reading can one become familiar with his train of thought'.

In spite of all his academic and professional achievements Riphagen was and remained, basically, a socially shy and, what is more, modest man. No one, I would presume, could recall Riphagen publicly, or, for that matter, privately, taking pride of his achievements, either by way of affirming his capabilities or in self-righteousness. He could not, even if he would, since he was so deeply convinced of the relativity of his trade as a lawyer, and of law itself, as he was, I presume, of the relativity of life itself.

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