

REALISM IN LAW-MAKING

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REALISM IN LAW-MAKING

essays on international law in honour of
WILLEM RIPHAGEN

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MANUFACTURED IN THE NETHERLANDS

REALISM IN LAW-MAKING



Willem Riphagen, Head of Delegation of the Netherlands
at the Third United Nations Conference on the Law of the Sea

(Photograph: Studio Bianco, Geneva)

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A *Festschrift* is by definition a cart drawn by many horses, in this case first and foremost of course by those who so willingly and with a great deal of enthusiasm contributed a chapter to the book. Since their contributions appear under their own names, we think it right to mention here those whose participation assisted us in bringing our endeavours to a successful conclusion and who would otherwise remain anonymous. Our thanks go in particular to Ms Mariet Boumans whose secretarial support enabled us to get this cart on the road and to keep it moving. We are also grateful to our colleagues from the Translations Branch of the Ministry of Foreign Affairs, for coordinating the various contributions linguistically.

Those with experience in the field of editing a *Festschrift* will acknowledge that the road is full of potholes, technical and otherwise. We would not have been able to avoid these without the assistance of Ms Marjolijn Bastiaans, Head of the Publications Department, of the TMC Asser Institute, who was responsible for liaison between us and our publisher and at the same time acted as a bridge and a shield.

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This *Festschrift* in honour of Willem Riphagen covers a wide variety of subjects of private and public international law, thus reflecting the wide scope of Willem Riphagen's interests and professional activities, both as the Legal Adviser to the Minister for Foreign Affairs and as a Professor of International Law.

The contributions from his friends and former colleagues deal with subjects such as State Immunity, Law of the Sea, Dispute Settlement, Human Rights and Customary International Law. As will be clear from the list of authors, these topics are dealt with in an outstanding manner: quality needs no praise.

The Editors

WILLEM RIPHAGEN: REALISM IN LAW-MAKING

This collection of essays marks the retirement of Willem Riphagen from the post of legal adviser at the Ministry of Foreign Affairs, a position he has held since 1954, and at the same time honours his work. The job of legal adviser is to provide legal advice to the Minister for Foreign Affairs on matters of international law. The way in which Willem Riphagen, appointed to the position at the age of 35, carried out these responsibilities was outstanding.

Willem Riphagen took up his first major post with the Ministry of Foreign Affairs at the age of 28, when he served in the delegation at the negotiations leading to Indonesia's independence. The memoirs by Van Vredenburg, one of the principal figures in these negotiations and behind the scenes, show how invaluable Riphagen's legal advice was even at that early stage.¹ It was here that Riphagen served his apprenticeship in international negotiations, gaining insight into the way the negotiating process works and the role of personalities in that process. In these negotiations he was responsible for the provision of legal assistance and acquitted himself with great skill, developing into an accomplished negotiator. His experiences in Indonesia served him well in the years that followed – a period which saw intensive efforts in Europe to set up a number of international and supranational organisations, namely the European Coal and Steel Community, the European Defence Community, the European Economic Community, the European Atomic Energy Community and the Benelux Economic Union. It was at this time, too, that the European Convention for the Protection of Human Rights and Fundamental Freedoms was drafted within the Council of Europe. Riphagen was actively involved in the preparation of all these treaties and conventions. His ability both to provide legal advice and to achieve workable results made him an invaluable representative for the Netherlands.

1. "Den Haag antwoordt niet. Herinneringen van Jhr. mr. H.F.L. van Vredenburg" (No answer from The Hague. Memoirs of Jhr. H.F.L. van Vredenburg), Leiden: Martinus Nijhoff 1985, ISBN 90-247-8071-3.

Riphagen once defined the job of a legal adviser as "to find a solution for every difficulty rather than to find a difficulty for every solution", and as a lawyer he more than lived up to this precept. Riphagen took a realistic view of his role as legal adviser. He realised that the task of an international lawyer in the decision-making process in international relations depends on the one hand on the approach of the policy-makers to foreign policy matters and on the other on the jurists' views of the law. If policy-makers lack the necessary breadth of vision and become bogged down in ad hoc decisions dictated by circumstances, it becomes difficult for a legal adviser to operate. On the other hand, in a period such as the 1950s when the process of European unification was in full swing and both policy-makers and international lawyers distinguished themselves by their creative imagination, Willem Riphagen was able to exert considerable influence on Dutch policy in international relations (which is not to say that he and the policy-makers saw eye to eye on every topic).

Were the Ministry ever chosen as the subject of a study of the history of the civil service's role in government, Riphagen's forceful memoranda on virtually all aspects of foreign policy would not only throw new light on our political process, they would also show the breadth of his vision and understanding, frequently extending well beyond purely legal matters. In the early 1960s, for example, when the Minister – in the course of the discussions on political union – wished to confront the other member states, notably France, with a Dutch initiative but gave no precise instructions as to its substance, neither the Directorate General for Political Affairs nor the Directorate General for Economic Co-operation was able to come up with acceptable suggestions, and in the end, after many papers had been drafted to no avail, it was the Legal Adviser who, as "*deus ex machina*", ended the impasse by producing the crucial document on the future of Europe.

Willem Riphagen, a connoisseur with a natural tendency to apply the highest standards, is nevertheless a realist who will not allow himself to be beguiled by unattainable ideals. This was already clear in 1955 when he was reproached, on the publication of his concise and highly instructive study of the legal structure of the European Coal and Steel Community, with being insufficiently "federalist", insufficiently "supranational": but did he not, with his keen eye for realities, for what was feasible in the short term, predict the Europe of today? And was it not he who, in 1954, doffed his hat before the National Assembly building in Paris, since that was the home of the only institution still capable of impeding the creation of the European Defence Community? Orientated as he was towards the Atlantic, Riphagen, who had been forcefully confronted with the concept of power during the negotiations

in Indonesia, knew that a federal Europe could not be assumed from a preamble or from a piece of wishful thinking. He was always alive to the realities of power and to the attendant constraints, no less so when his task was to find a basis for international law and its development. His commitment to this undertaking was evident from his constant endeavour to promote the broadening and deepening of international and community law once his official function and the international confidence he enjoyed afforded him the opportunity of doing so. Always engaging, always – with his sense of proportion – understanding, and with enormous stamina, Willem Riphagen is widely esteemed, above all in the international community, as an expert on international law with a refined feeling for the direction in which small steps forward can be made.

It is impossible in this short space to mention all aspects of Willem Riphagen's professional activities. One of the more recent highlights has undoubtedly been his role in the negotiations on the law of the sea within the United Nations. He is one of a small number of international lawyers who were actively involved both in 1958 in the first UN law of the sea negotiations in Geneva and in the Third UN Law of the Sea Conference (1973 – 1983) at which he chaired the delegation of the Kingdom of the Netherlands. He played an influential role and made his mark in two respects on the text of the Convention. He devised the first concept for the settlement of disputes under the Convention² whereby parties should be given a choice of various methods of settling a dispute. In the subsequent negotiations on the settlement of disputes President Amerasinghe and other delegates were able to benefit from his close involvement in and understanding of this subject. Similarly, he devised settlement clauses for other Conventions, e.g., the Convention on Transit Trade of Landlocked States (New York, 1965) and the Convention on the Law of Treaties (Vienna, 1968 – 1969).

Another part of the Convention to which Willem Riphagen made a crucial contribution was that relating to the participation of international organisations having competence in the area covered by the Convention (i.e., mainly the European Communities). In long and often difficult negotiations with countries outside the European Communities it was he who spelled out the implications of the participation of international organisations. Recognising his skill as a lawyer who understands and can bring together politically inspired negotiations, the EC member states ultimately entrusted negotiations on this part of the Convention to Willem Riphagen.

2. See contribution of Shabtai Rosenne, p. 169.

As legal adviser, Willem Riphagen was frequently involved in the work of the International Court of Justice, setting out and explaining the views of the Netherlands Government, both in contentious cases (*inter alia*, the North Sea Continental Shelf Case) and in advisory proceedings (Certain expenses, Namibia). In these proceedings before the Court one can easily recognise his hand in the comments put forward by the Dutch Government. His capacities and expertise as a lawyer also earned him the honour to be invited by the Belgian Government to act as *ad hoc* judge in the Barcelona Traction Case. This nomination was a source of particular satisfaction to him and his dissenting opinion appended to the judgement reveals the extreme care with which he discharged this responsibility.

A similar admiration for his expertise in the field of dispute settlement can be seen both from his role as arbiter and president in an aviation dispute between the United States and France (Case concerning the Air Service Agreement) and his work as arbiter in the Iran-United States Claims Tribunal.

In his career as legal adviser Willem Riphagen was a supreme exponent of the need to adapt and interpret the principles of international law in circumstances which differ substantially in economic or other respects from the situation which originally gave rise to those same principles. To cite just one example, in the modern era when exploitation of the sea has become so much more intensive, Willem Riphagen has never considered the time-honoured principle of the freedom of the high seas to be an obstacle to devising an international system to regulate exploitation. In such cases he invariably showed a preference for international regulation over arbitrary regulatory action by individual states which, by definition, tends to be prompted more by self-interest.

As a member of the Rhine Navigation Commission he was also aware that freedom itself calls for regulation. Over a period of thirty years as a member of the Rhine Navigation Commission and chairman of the Dutch delegation he has witnessed the evolution from a situation of complete freedom of navigation of the Rhine for ships of all states to one in which such freedom – while having been clarified – is restricted to ships of the riparian states. Willem Riphagen made a substantial contribution in the Commission to the preparation of Supplementary Protocol No. 2, which radically amended the Convention of Mannheim. The skill with which he carried out his responsibilities as Rhine Navigation Commissioner and his two terms of office as chairman earned him the respect of his colleagues on the Commission.

The Hague Convention for the Suppression of Unlawful Seizure of Air-

craft was drawn up under his chairmanship. In that capacity he made a significant contribution to the texts that were formulated.

A considerable portion of Willem Riphagen's career has been devoted to the codification and further development of international law under the auspices of the UN. He served as the Netherlands representative at a great many UN codification conferences, such as the three conferences on the law of the sea, the conference on the reduction of statelessness, on diplomatic relations, on consular relations, on the law of treaties, and, most recently, the conference on the law of treaties between states and international organisations and between international organisations. At those conferences he could persuade and convince, not so much by lobbying, but through textual proposals in which his Cartesian logic underpinned a highly creative resourcefulness.

One of the offices giving him major satisfaction was, and still is, undoubtedly his membership of the United Nations International Law Commission. Of the Commission's members he is among the most faithful, hardly ever missing a meeting. He sees the job of rapporteur on the complex issue of state responsibility as a challenge to his expertise.

No survey of his career would be complete without a mention of his chair at the Erasmus University, a position which he took up in 1960, succeeding Professor J.P.A. François. Willem Riphagen was naturally suited to this post which calls for a special blend of theoretical knowledge and practical expertise. He had no time for theoretical solutions elaborated in academic seclusion which could not withstand the test of experience. He used to the full his experience as legal adviser to familiarise his students with the practical application of international law. His lectures in Rotterdam were therefore highly instructive and he never took his responsibilities in the field lightly. His retirement from the Ministry coincides with his resignation from the chair at the Erasmus University. In the same vein this collection illustrates the combination of theory and practice in a number of contributions which also pay tribute to Willem Riphagen as a person.

It may no longer be possible to ascertain with accuracy how many treaties, declarations or protocols now in force include passages of his formulation. Nevertheless the sources, the "travaux préparatoires" and the archives of the Ministry, the Rhine Navigation Commission, the United Nations, the specialized agencies, the Council of Europe, Benelux, the European Communities, the International Court of Justice and the International Court of Arbitration (to name only the most important), reveal innumerable instances

of Riphagen acuity of mind and dedication to the development of international and community law.

Willem Riphagen did not seek personal glory, nor did he pursue offices in which he could not be personally active as a lawyer. The promotion of his own candidacy — an activity often associated with personal ambition and political interests — was quite out of keeping with his character. Other people always did the spadework for a chairmanship, a position as rapporteur or his personal membership of any committee — with the desired result, may be it said, right up to his selection as a member of the International Law Commission in 1977. It would have been hard to find a candidate more qualified and more experienced.

Willem Riphagen's colleagues in the Ministry were always impressed by his ability to combine his many international functions with his work as legal adviser. As head of the legal department he knew how to stimulate and inspire his staff while still leaving them room to work independently. He was approachable and ready, if asked, to give his own views on the problems at hand. One could then be certain that the problem would be placed in its appropriate context and an answer be found.

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. This aspect is undoubtedly connected with Riphagen's mathematical mind and philosophical way of thinking, which serves to place the law in a broader context.

Most probably Willem Riphagen will claim that this book is too much of an honour. However, it is clear that the contributors to this collection, all of whom are eminent jurists in the field of international law, consider this to be a perfectly fitting tribute to a colleague who combined talent with personal modesty. A tribute also to Willem Riphagen as a friend.

Willem Riphagen has now taken leave of the Ministry. Throughout his long and distinguished career, those with whom he has come into contact at the Ministry, at international conferences and in academic life, have benefited from his ideas and expertise. His legacy, however, extends much further, for states, organisations and the international community as a whole, have made frequent calls on his services and will certainly continue to do so. This collection is not a leave-taking, rather a reminder of the inspiration which Willem Riphagen has been to his friends.

Adriaan Bos
Piet-Hein Houben
Hugo Siblesz

BIBLIOGRAPHY WILLEM RIPHAGEN

If one defines a bibliography as a list of publications, the bibliography of Willem Riphagen is of necessity a comparatively short one. The bulk of Willem Riphagen's writings either has not been published at all (his internal memoranda run into the hundreds) or has only been published in a form which reaches a small number of readers (e.g., his reports as ILC Special rapporteur on State responsibility) or cannot be attributed to their actual drafter (notably official Netherlands comments in ICJ proceedings or comments on draft texts by the ICL). However, this approach presents a misleading picture of his overall production in terms of writing. The present bibliography refers to the latter categories only in generic terms and is therefore necessarily an incomplete one.

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