

## ANALYSEN UND BERICHTE

### The Community of the Portuguese Speaking Countries (2)<sup>1</sup> Subsidies for the Definition of the Identity of a Novel International Organization

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#### III. The emerging identity of the CPLP – or a program for the Portuguese speaking "we"

Concerning the characteristics observed in the Commonwealth, there is something especially worthy of attention. This is not the solutions themselves, since these are so many times affected by a different perspective of departure or are inadequate in relation to the specific character of the Portuguese speaking community, but rather the problems with which it has dealt. These constitute a sort of lesson or patrimony of experience that, one day, it may be foreseen, the Community of the Portuguese Speaking Countries (CPLP) itself will have to address. This is especially so because the CPLP, constituting an Organization of the same type and being, as much as the Commonwealth, a set of member States united by a sense of special togetherness, must also be functional in the assuring of social intercourse between these Members, in the taking care of the good relations between them, in meeting their expectations and problems. And this, the Commonwealth has better done than not.

Which are the main problems that should be dealt with and which *solutions* seem to be conceivable? – these seem to be the questions which one should be oriented by in the quest for a long term program for the CPLP.

The key for the success in this task may reside in the identification of what Weber<sup>2</sup> and Gurvitch<sup>3</sup> said to be the most fundamental essence of a community: What is characteristic

<sup>1</sup> The first part of the article was published in the previous issue no. 2 (1998) of VERFASSUNG UND RECHT IN ÜBERSEE, pp. 122-150.

<sup>2</sup> See *M. Weber*, *Wirtschaft und Gesellschaft*, Tübingen, 1922.

<sup>3</sup> See *G. Gurvitch*, *Tratado de Sociologia I*, Lisboa, 1964.

of the "we" that it represents and what is the program of action that may mobilize and enhance this collectivity? After having verified that the "other" is not useful, one may indeed try to densify the "we" and the project it wishes to follow. The two main problems seem then to be: In what resides this sign of identity? And how can we preserve it or reinforce it in a program of action?

It seems possible to attempt to find the answer to this problem on two different levels: internal and external. We'll be first asking about what we are and want to do; we'll then turn our attention to how we want to present ourselves and how to interact with others. In both ways, we think it possible to look for normative supports at an international level, first, and comparative, subsequently. At this second stage, we will be especially looking at the fundamental texts that guide each national community. If their fundamental beliefs and programs are common or similar, it seems appropriate to transport them to the international level of the Portuguese speaking community. We will thus be essentially resorting to the '*ius condito*', which we believe to be sufficiently complete and helpful for the resolution of the problem. This directive should not hinder us, however, from, here and there, making proposals '*de iure condendo*'. This effort is especially necessary in view of the fact that it is the unpredictable future that we are trying to face.

#### A. The Portuguese speaking common house – or going abroad, at home

In regard to the fundamental texts of the CPLP, one comes across the decisive idea that the common path will be charted on the basis of equality and mutual respect of the member States. It is this same idea that will explain the emphasis, possibly sometimes overrated<sup>4</sup>, on the intergovernmental vector at the level of its institutional organization.

But a community which furthermore is international is never a static entity but rather a dynamic set of interactions. On the other hand, this community, precisely because it is so, has a human radical: it is composed of "flesh and blood" people that interrelate and from that interrelation draw a foundation for reinforcing and envisaging (other) interactions.

Therefore, the problem of the communication of the persons and peoples that compose the human radical of the human communities of this community (which is, after all, a *community of communities*, to recall Heller's terms) is of the outmost importance at the first level we want to consider: that of the very internal relations of the CPLP. One of the first problems or questions to be addressed is therefore precisely what we may call the problem of communication: how is this communication to be assured in a discontinuous space and

<sup>4</sup> Apparently in agreement, A. Monteiro, A Comunidade dos Países de Língua Portuguesa, Nação e Defesa 1996, n° 77, p. 49.

furthermore in a space in which, the cycle of the Empire being closed, nothing really obligates to the relationship?

One must surely take advantage of reality, of the fact that the human communities of these States are, historically, in the greater part of the cases, traditionally inclined towards migration or simple international circulation even though also towards the fixing of residence for significant periods of time in the host territories. The territory of the language so many times defines the probability of this localization and places a development to the question under consideration: the legal problem of the protection of this interaction and of the social-political integration of these individuals.

## § 1 The Status of the Individual in the CPLP: the long road to a CPLP citizenship?

### 1. Double nationality

A possible legal form is to stabilize or even perpetuate these relations through the attribution of a double nationality that would make a national of a CPLP country living in another CPLP country feel that he/she is also a Member of that community<sup>5</sup>. It is certainly the most radical solution, because it is also the more definitive. It is, as well, a solution known in the CPLP context, since it has been adopted by the Constitution of Cape Verde which foresees in article 5 § 2 the faculty of "the State (...) to conclude treaties of double nationality" and which in § 3 admits that its nationals may acquire "the nationality of another country without losing the nationality of origin". It will not be, however, a necessary solution and it may even not be generically possible<sup>6</sup>. In fact it is to be explained '*in casu*' by the proportions that the phenomenon of emigration assumes in the Cape Verde population. There are, in any case, equally valid alternatives.

### 2. A liberal regime of concession of nationality

The first one still reveals the same generous inspiration: It constitutes each State, even if it does not confer its nationality to nationals of other CPLP States, demonstrating that it

<sup>5</sup> This is the path followed by Spain (see article 11 § 3 of its Constitution) and various States of Spanish expression in Latin America. See *F. de Castro y Bravo*, La nationalité, la double nationalité et la supra-nationalité, RCADI 1961, pp. 661 ff.; *F. Casas Alvarez*, Trabajadores extranjeros en Espana bajo la óptica de la adhesión a la CEE, Revista de Instituciones Europeas, 1981, p. 79; *J. F. Resek*, Le droit international de la nationalité, RCADI 1986, III, pp. 380-382 and *Moura Ramos*, Nationalité, Plurinationalité et Supranationalité en Droit Portugais, AVR 1996, p. 112.

<sup>6</sup> Portugal, in particular, in the actual framework of Community integration, does not seem to find itself in the political conditions necessary to go in this direction.

views this solution as possible and natural. It may be like this if, on one hand, one does not consider that its nationality excludes the accumulation of another. It will be as such, on the other hand, if one conserves a liberal regime of concession of nationality (be it an original nationality or an acquired "nationality") to residents, even if conditioned by a period of contact and integration that the language objectively facilitates.

One can verify that what one would like to designate as the "common normative soul of the CPLP", *i.e.* principles that are commonly consecrated by (almost) all the constitutional texts or simply the legal texts of its Members, coincides with this analysis and even facilitates it. In fact, generically, all these texts<sup>7</sup> consecrate a formula of acquisition of nationality that is in harmony with this wish (see, at the constitutional level, § 2 of article 5 of the fundamental law of Cape Verde and, at the legal level, the Portuguese law of 1994<sup>8</sup>, about which Moura Ramos, one of the most respected voices of the doctrine in the Portuguese speaking world, says that "the plurinationality is very well received"<sup>9</sup>).

Perhaps one could reinforce it with the establishment, by a conventional via and (who knows?), subsequently, also constitutional, of a '*favor iuris*' towards the CPLP countries' nationals, consisting of the consecration of less rigorous conditions for the acquisition of nationality on the part of the nationals from those States.

There are already elements in this direction whether at the level of conventional practice, or at the level of the Constitutions or legislation of some of the member States. Hence, in Portugal, ever since the enactment of Law 25/94 of the 19<sup>th</sup> of August, the original acquisition of nationality on the basis of a '*ius soli*' criterion has been facilitated to the citizens of the CPLP countries that have had a valid residence title for six years, in contrast with the lengthier period of ten years that conditions the production of the same effect in the case of citizens of other nationalities (line c) of article 1). On the other hand, through the institute of naturalization, the State can, in accordance with article 6 of the referred law, attribute Portuguese nationality to foreigners who cumulatively fulfill several requirements. Now most of these conditions (residence in Portugal or in a territory under Portuguese admini-

<sup>7</sup> Mozambique is the exception: *v.g.* art. 13, 19, 21 a), 22 a) and 24 a) of the Constitution.

<sup>8</sup> On its antecedents, *vide*, for all, the constant attention of *Moura Ramos* in: *Nacionalidade e Descolonização*. Algumas reflexões a propósito do Decreto-Lei nº 308-A/75, de 24 de Junho, RDE 1976, vol. II, pp. 121 ff. and 331 ff.; and: Portugal - Nationalité, *Revue critique de droit international privé* 1982, vol. 71, pp. 796 ff.; *Do Direito Português da Nacionalidade*, Coimbra, 1984; *La double nationalité d'après le droit portugais*, BFDUC; *Oposição à aquisição da nacionalidade portuguesa*, RDE 1986, vol. 12, pp. 273 ff.; "Cidadania", in *Verbo*, vol. 21, pp. 273 ff.

<sup>9</sup> See *Moura Ramos*, *Nationalité, Plurinationalité et Supranationalité en Droit Portugais*, AVR, vol. 34/1, 1996, p. 108. Among other reasons, one can think, for example, on the fact, that the derived acquisition of Portuguese nationality is not conditioned by the loss or renunciation of the nationality previously held.

stration, knowledge of the Portuguese language, proof of the existence of an effective link to the national community) objectively elect the nationals of CPLP countries as natural candidates for the application of this mechanism of concession of nationality. The tribute to the principle of sovereignty and equality that we saw as so fundamental in the constitution of the CPLP would pass through the status not being magnanimously and superiorly (*i.e.* unilaterally) conceded in general terms by the State in cause, but founded on concrete requirements of the individuals interested in them (this is in fact the solution already foreseen by, for example, article 1, line c) of the Portuguese Law of Nationality, Law 25/94 of the 19<sup>th</sup> of August).

### 3. Non discrimination

Another via – which is not necessarily less significant at the level of practical reality<sup>10</sup> – is the one which consists of the consecration of a *principle of national treatment* or of the tendency towards the *non discrimination* between the nationals of a CPLP State and the nationals of the other States resident in the territory of the first (with rare exceptions)<sup>11</sup>. This solution, which, in the case of Portugal, is guaranteed to any foreigner, by article 15 § 1 of the Constitution of the Portuguese Republic, does not affect the '*statu quo*' as to the status of nationality<sup>12</sup>. However, although one does not attribute the nationality of a certain State to certain individuals, one admits that they enjoy the rights that are in general connected to the condition of a national. This is the upon which the so called "2nd generation agreements"<sup>13</sup> between Portugal and the three PALOP countries<sup>14</sup> are founded, that assure, in the territory of the first, equality of treatment of the nationals of these States but

<sup>10</sup> Moura Ramos, La double nationalité d'après le droit portugais, BFDUC, off-print, pp. 37 ff., precisely considers the meaning of a status of double nationality to being comparable with the effects of a formula of equality of treatment equivalent to the one of the Portuguese-Brazilian Treaty of 1971.

<sup>11</sup> In the case of Portugal (article 15 § 3 of the Constitution), these exceptions are constituted by the access to the organs of sovereignty and of the autonomous regions and by service in the armed forces and in the diplomatic career. The Brazilian Constitution, in turn, fixes a more restrictive list of rights reserved for nationals and which thus cannot integrate the status of equality. According to § 3 of article 12, only the offices of President and Vice-President of the Republic, the President of the House of Deputies, the President of the Federal Senate, the Minister of the Federal Supreme Tribunal, members of the diplomatic career and officers of the Armed Forces are reserved to native Brazilians.

<sup>12</sup> This is the also case of what is foreseen in article 2 of the Convention of Brasília. And. for this reason as well, the solution has no consequences in relation to the problem of the right of entry and of permanence.

<sup>13</sup> The happy designation belongs to Moura Ramos. See his Nationalité, Plurinationalité et Supranationalité en Droit Portugais, AVR, vol. 34/1, 1996, p. 115.

<sup>14</sup> PALOP is the general designation, in Portuguese, by which are usually known the African Countries of Official Portuguese Language.

which does not go beyond the professional, cultural, religious and cultural domains. As such it does not minimally contend with the question of political rights, and, in this measure, also does not differentiate these nationals from other foreigners to whom article 15 § 1 of the Constitution of the Republic of Portugal assures an identical result<sup>15</sup>.

It is also this conception which has underlied the Portuguese-Brazilian relationship since the Brazilian Convention of 1971 on Equality of Rights and Duties between the Brazilian and the Portuguese<sup>16 17</sup>. This one foresees an almost total assimilation<sup>18</sup> of rights and duties<sup>19</sup> of Brazilian and Portuguese nationals with the locals, respectively<sup>20</sup> in Portugal

15 We are speaking of the Special Agreement with Cape Verde, of the 15<sup>th</sup> of April of 1976 and of the Special Agreement with Guinea-Bissau of the 12<sup>th</sup> of June of 1976 (see *Diário da República*, I Série, respectively, n° 155 of the 5<sup>th</sup> of July of 1976, and n° 5 of the 7<sup>th</sup> of January of 1977) which are practically identical in the regulation of the status of people and their belongings. We are referring to the General Agreement of Cooperation and Friendship between Portugal and S. Tomé and Príncipe of the 12<sup>th</sup> of July of 1975 (see *Diário do Governo*, I Série, n° 20, of the 24<sup>th</sup> of January of 1976, p.154) as well, which also institutes a regime of national treatment on the condition of reciprocity that is extended to private rights and rights of social and economic content but without any relevance on the political level. One may still note that the otherwise identical Agreements of Cooperation which were celebrated with Angola on the 26<sup>th</sup> of June of 1978, and with Mozambique on the 2<sup>nd</sup> of October of 1975 do not contain the consecration of the right of national treatment (see, respectively, *Diário do Governo*, I Série, n° 34 of the 9<sup>th</sup> of February of 1979 and *Diário do Governo*, n° 286 of the 12<sup>th</sup> of December of 1975).

16 See *Diário do Governo*, I Série, n° 302 of the 29<sup>th</sup> of December of 1971, p. 2028.

17 In the Portuguese case, one must also see Decree-Law n° 126/72 (*Diário do Governo*, I Série, n° 95 of the 22<sup>nd</sup> of April of 1972, p. 481) that came to regulate the application of the Convention in the country.

18 The assimilation has immediate limits on the rights that each Constitution reserves for its original nationals. One must also note that the recognition of the status is conditioned by the verification of a procedural criterion that itself "redirects" to two material conditions. In fact, the recognition has to be the object of a decision of the local public authority (presently the Ministry of Internal Affairs, in the Portuguese case, and the Ministry of Justice, in the Brazilian). The decision is, however, a typical bound decision, only subject to the verification of the two criteria foreseen by the Convention: that the requesting person enjoy civil capacity and that he/she habitually reside in the country in which he/she presents the request (article 5; *vide* also, in the Portuguese case, articles 5 and 6 § 3 of Decree-Law n° 126/72). The concession of the special status of equality supposes an autonomous request, but which is dependent on the concession or request (even if simultaneous) of the general status as well as the verification of proper material requisites, among which may be underlined the permanent residence for a minimum of five years and the non-depriving of political rights in the State of origin. If he/she did not obtain the concession of the status of equality, the Portuguese in Brazil, or the Brazilians in Portugal will not benefit from a more favourable treatment than the one which is given to any other foreigner in the country in question.

19 The status does not have consequences for rights and duties that contend with national sovereignty and the public order of the state of residence (art. 3). Like this, the duty of mandatory military service may only be exercised in the State of nationality (art. 10 of the Convention). It is as well only the State of nationality which can exercise diplomatic protection (art. 11).

and in Brazil<sup>21</sup> (article 1)<sup>22</sup>. It also finds expression in diverse constitutional dispositions of diverse member States (article 7 line e) and 12 § 1 of the Brazilian Constitution, article 15 § 3 of the Portuguese Constitution<sup>23</sup> and article 23 § 3 of the Constitution of Cape Verde). One wonders if it would not be possible to generalize it, whether it be on the level of the Constitution of the CPLP States, or through the celebration of bilateral or multilateral conventions.

#### 4. "CPLP citizenship"

The sublimation of this *via* is naturally the one of definition of a status of a "*CPLP citizenship*". The fact that what is aspired is precisely the participation in the '*polis*' and the conformation of the '*res publica*' seems to speak in its favour. This would pass through the recognition of rights to the originals of the CPLP States dislocated in the other member States of the Organization. This set of rights would comprehend not only civil rights, labour

<sup>20</sup> Previously, an identical objective of improvement of the status of the Portuguese in Brazil was decisive for the celebration of the Treaty of Friendship and Consultation between Portugal and Brazil of the 16<sup>th</sup> of November of 1953 (See *Diário do Governo*, I Série, n° 284, of the 21<sup>st</sup> of December of 1954).

<sup>21</sup> The *status of equality* "unfolds" in two modalities: the *general status* and the *special status*. This last one, the most significant, assures the equality of political rights and equivalence in accessing public functions, making exceptions to those which are reserved for national citizens. That first one assures that the Brazilians are not subjected to the restrictions that, independently of the constitutional principle of equality of treatment of foreigners consecrated by article 15 § 2, affect the legal capacity of foreign citizens in Portugal. However it does not include political rights, the right to circulation in the state of residence, the right to diplomatic protection and the right to not being extradited. One can also note that article 15 § 4, which attributes the right to elect and to be elected in local elections to foreigners residing in Portugal in conditions of reciprocity, was introduced by the Law of Constitutional Revision n° 1/89 (see *Diário da República*, I Série, n° 155 of the 8<sup>th</sup> of July of 1989, p. 2734 (1)), in view of the necessity to harmonize the Portuguese legal order to Community law which had attributed the right to vote to the nationals of member States in municipal elections in the member State of residence. In this measure, other foreigners also have political rights, thus involving, as Maria Luísa Duarte underlines, a, although limited, "*departure from the traditional duty of political neutrality on the part of the foreign citizen*". See *Maria Luísa Duarte*, *A Convenção de Brasília e o Mercado Interno de 1993*, 1990, p. 12. On the problem in general, see *R. Plender*, *Os direitos dos estrangeiros na Europa*, DDC, 1984, vol. 18, pp. 17 ff.

<sup>22</sup> Beyond what was said, in general terms, *supra*, in the previous note, one verifies that, in fact, the status of Portuguese-Brazilian equality does not integrate the recognition of a right of entry and permanence in the territory of Portugal.

<sup>23</sup> One may note that in the Portuguese and Brazilian cases the solution has a constitutional tradition. Hence, the regime consecrated in the above mentioned Convention of Brasília of 1971 was constitutionally authorized in Portugal by article 7 § 3 of the 1933 Constitution, as reviewed in 1971, and, in the case of Brazil, by article 199 of the Constitution of 1967.

rights or rights of establishment, for example, but also *political rights at various levels*, such as those of active and passive electoral capacity.

Once again, some States – Portugal, Brazil and Cape Verde – have consecrated in their Constitution norms that seem to comport the possibility of making the relation evolve in this direction. And the Portuguese-Brazilian conventional status of equality also integrates this dimension, thus going far beyond the common understanding of the national treatment<sup>24</sup>. To these elements, one should also add a recent project of law in Cape Verde that unilaterally defines the status of the Portuguese speaking citizen in this country (article 1). This status, which is not subject to the condition of reciprocity and is generically valid for any “national of any of the other member States of the Community of Portuguese Speaking Countries” (article 2) has a more vast content, comporting a right of family regrouping (article 7), a right to special advantageous conditions if the citizen presents himself as an investor (article 10), passive and active electoral capacity in municipal elections, and also the right to the application of a liberal regime of entry in Cape Verde (article 6) which foresees, for the more common situations, the concession of a “visa of multiple entries and of long duration in Cape Verde” and the possibility of exemption “of the visa by decision of the Government” (§ 4 of article 6). And § 1 and 3 of the same article, relative to, respectively, Portuguese speaking citizens who are holders of diplomatic passports or of service and Portuguese speaking citizens that are “businessmen, liberal professionals, researchers and men of culture”, foresee special regimes that are even more generous. Furthermore, this status is also configured as a framework of equally generous solutions of nationality for the “children, born in Cape Verde territory, of Portuguese speaking parents” (article 4) and of double nationality, already permitted, as we saw, by the Constitution, and that, in accordance with article 5 of this law, may be acquired by the Portuguese speaking citizen “without the obligation to renounce his previous nationality”.

This embryo of “CPLP citizenship” is still, however, what we could call an “internal citizenship”, since it is unilaterally determined or conventioned on a bilateral level, and, with the exception of the Capeverdean project, based on the reciprocity of rights. It certainly does not yet correspond to a complete internationalization which would only be achieved if the seven Members celebrated a Treaty generalizing its concession to their diverse spaces of sovereignty (spaces that, in the final analysis, constitute a CPLP space) or going even further by defining a general CPLP status. The difficulty demonstrated by the discrepancy between the agreements of the 1st generation (the agreement of Brasilia of 1971) and of the 2nd generation (the agreements between Portugal and some of the other

<sup>24</sup> The truth, however, is that the status of equality in the area of political rights remains far from the content and scope it has in the area of other rights since the conditions of its recognition are more rigorous: The foreigner must have permanent residence in the country for a minimum of five years and cannot be deprived of the corresponding rights in the State of his/her nationality.



Members of the CPLP) seems to reveal that such a goal is not yet configurable, nor may it be in the near future. But, on the other hand, the promising Capeverdean project also permits us to sustain the hope that its concretization is not a dream in vain.

In any form, the present situation of equal treatment is still characterized by great imperfections. One must underline that the principle does not provide any guarantees in the area of extradition and also that the diplomatic protection is still dependent upon the criterion of nationality and, in the absence of a CPLP citizen status, is assured in strictly classic terms, even in the more "advanced" case of the bilateral Portuguese-Brazilian regime.

## 5. Room for progress?

We believe, however, that it would not be difficult to envisage some punctual forms of progress in light of a true internationalization which would be constituted by the definition of a common regime of some rights and especially with an efficacy exterior to the CPLP. They would justly be situated as responses to the detected imperfections of the regime.

In this spirit, a first example, which would have practical utility since it would give each citizen of the CPLP a concrete dimension of the benefits of the insertion in such a collectivity, would be the conception of diplomatic protection for any citizen of the CPLP in a third State necessitating it. The solution, which would contribute to the dreams of configuration of a status of CPLP citizenship and would not colide with the present situation in the area of the law of nationality, also has the advantage of a certain economy of means, an advantage which is not to be neglected in the case of States which are not great economic powers, if, as we propose, this protection would be assured by the already existing diplomatic or consular structures.

A second example of programmatic progress that seems feasible and that we believe is legitimate to propose – especially because we are only inspired by the Constitutions of the member States and it would only amount to a reinforcement of the human dimension of the CPLP, what seems unquestionably desirable-, is constituted by what we may call the "CPLPization" of the regime of extradition. Indeed, it does not seem inconceivable, especially if one recognizes that the CPLP definitely has a different historical logic and tradition than the Commonwealth, that the CPLP States first convene amongst themselves and then renew the relevant treaties with Third States in order to provide a guarantee to each CPLP citizen that, in principle<sup>25</sup> he/she will not be extradited to a Third State. This

<sup>25</sup> This reservation is made in view of several developments of European law in the field. These point towards the recognition of a possibility to extradite, for practical reasons, regarding very exceptional situations of also very peculiar crimes of an inherently international nature, such as

would only be a generalization at the level of the whole CPLP of a solution that is already practised in relation to each country's own nationals in accordance with the constitutional rules of almost all member States and, at the Portuguese-Brazilian bilateral level, in accordance with the dispositions of the 1971 Convention of Brazilia (which, in this sense, only enlarges the scope of each constitutional prohibition of extradition of nationals, in the benefit of individual bearers of the status of equality consecrated in that Convention; the only exception of the regime resides in the duty of non-denial of extradition of an individual if the request comes from the State Party of his/her nationality (art. 9 of the Convention)).

## § 2. The difficulties in the field of the freedom of movement

### 1. The problem

The majority of the solutions with which we have been dealing, especially those of a non discriminatory treatment, suppose or contend with the resolution of another problem that can, in fact, condition some of the progress that may be desired: that of the permanence and/or movement in the CPLP space and, even prior to this, that of the access to the territories of its Members. One cannot, in fact, ignore that these statuses are dependent on the condition of residence in one of the States.

The problem assumes, at present, a dramatic resonance in view of the fact that, as we shall better see later on, the member States of the CPLP are entirely open to competing integrations whose logic of solidarity may, and indeed does, impose restrictions or even conflict with the exercise of the particular solidarity within the CPLP. It is already like this with Portugal relative to the European Union, potentially with Brazil relative to the Mercosul which is in a process of accelerated reinforcement<sup>26</sup>, and in a more remote future, probably also, even if to a different degree, with Guinea-Bissau relative to the Economic and Monetary Union of Western Africa, with Mozambique relative to the SADEC, and, more generally, with all the PALOP, in relation to the OAU. This question assumes the quality of most pressing actuality with respect to the relation of the other CPLP States with a Portugal constitutionally committed to the reinforcement of the european union<sup>27</sup> and therefore deserves special and urgent consideration.

narcotrafic or the participation in the activities of international crime organizations. Even if these "exceptions" were indeed to be consecrated, the principle could still be completely fulfilled.

<sup>26</sup> See, for all, *P. Borba Casella*, *Mercosul: Exigências e Perspectivas*, 1996.

<sup>27</sup> See § 6 of article 7 of the Constitution of Portugal. We tried to explain the sense of the small letters used for "european union" appearing in the constitutional text in our "Portugal's World Outlook in the Constitution of 1976", BFDUC 1995, p. 533. In the same sense, *Maria Luísa*

## 2. A difficult solution

The answer to the problem is obviously also not easy. In light of the ambitious pretensions presented, it may even be almost unattainable. This being said, it must also be admitted that there is some degree of exaggeration in the catastrophic reading of the 'ius condito' applicable that represents it as a legitimization of a "Fortress Europe".

The truth is, in fact, that if it is certain that the institution of the "Schengen Space" (or, as others say, the Schengenland<sup>28</sup> created by force of the controversial<sup>29</sup> Schengen Agreement<sup>30</sup> of 1985 and the Agreement of Application<sup>31</sup> of 1990<sup>32</sup>), the new Community regime of entry and movement of people in the internal market introduced by the European Union Treaty (article 3 d) and 10 c)), and the institution of a third pillar of the European Union, effectively redounded in a generic retrogression vis-a-vis the traditional openness of Europe<sup>33</sup> to foreigners who are nationals of third States<sup>34</sup>, which happened first of all by

*Duarte*, O Tratado da União Europeia e a Garantia da Constituição, Estudos em Memória do Prof. Doutor João de Castro Mendes, Lisboa, w.d., p. 708, note 118.

28 The expression is taken from *Bolten*, From Schengen to Dublin: the new frontiers of refugee law, in *Meirs et al., op. cit.*, p. 9 *apud* F. Lucas Pires, Schengen e a Comunidade dos Países Lusófonos, Coimbra, 1997.

29 In this line, for example, *Alexis Pauley (ed.)*, Les accords de Schengen: abolition des frontières intérieures ou menace pour les libertés publiques? 1992.

30 More rigorously, the Agreement relative to the Gradual Suppression of Controls on the Common Borders signed in Schengen on the 19<sup>th</sup> of June of 1990.

31 *Rectius*, the Agreement of Application of Schengen of the 14<sup>th</sup> of June of 1985, signed in the same locality of Luxemburg on the 19<sup>th</sup> of June of 1990.

32 In Portugal the ratification of the Protocol of Adhesion to the two conventions was made by the Decreto 55/93 of the 25<sup>th</sup> of November of 1993 published in Diário da República, I Série of the same day.

33 Corroborating this idea, *M.Gorjão-Henriques*, Aspectos gerais dos Acórdãos de Schengen na perspectiva da livre circulação de pessoas na União Europeia, Temas de Integração, nº 2, 1996, pp. 47-95.

34 On the other hand the foreign nationals of Community member States come out substantially favoured with the notable progress towards a Europe of citizens that Maastricht offers and which passes through the generalization of a freedom of circulation to a subjective circle of subject holders that transcends the Community economic agents - which used to be the reference in the past - and that these days undoubtedly includes the idle and inactive - since presently the right has a public and political dimension linked to the status of European or Community citizenship and to the condition of person of the bearer and is thus independent of any economic motivation (see article 8-A of the EC Treaty and, in the Portuguese doctrine, *Moura Ramos*, Les nouveaux aspects de la libre circulation des personnes. Vers une citoyenneté européenne - Rapport Général<sup>14</sup>, FIDE, XV<sup>ème</sup> Congrès de la FIDE, 1992, pp. 409-410, Legislação, 1992, nº 5 p. 210 and *Maria Luísa Duarte*, Les nouveaux aspects de la libre circulation des personnes. Vers une citoyenneté européenne - rapport portugais, FIDE, XV<sup>ème</sup> Congrès de la FIDE, 1992, p. 231 and A liberdade de circulação das pessoas e a ordem pública no Direito Comunitário, 1992, pp. 364, ff., as well as A cidadania da União e a Responsabilidade dos Estados por violação do Direito Comunitário, 1994,

the institution of a whole set of cumulative requirements to obtain an authorization to stay<sup>35</sup> in the territory of any of the Parties of the Schengen system, which in any case will only assure permanence for three months (article 5 of the Agreement of Application), it is also true that the system does (still?) have some "faults" or safety valves that have to be identified and explored since they may contain the answers to many of the pretensions and apprehensions that have been expressed in this context.

### 2.1. *The safety valves of the system*

Thus, and in the first place, if that foreigner were to be a family member of a Community citizen, he/she would have the right to family regrouping and all the rights of entry, movement, residence and access to employment. This is the necessary consequence of the principle of non-discrimination between national citizens of member States<sup>36</sup>.

Secondly, it is also like this if one were a *worker* in the Community space. One could then enter or return to the territory of the State in which one resided, and where one could circulate without restrictions, although one could not do it in the territories of the other Members of the Community<sup>37</sup> (which signifies a strange denial of the proclaimed will of integration of resident emigration<sup>38</sup> and which supposes and implies an even stranger and, probably also, more difficult execution of the maintenance of internal borders in a market and in a space which was hoped to have only external frontiers<sup>39</sup>).

p. 44. *Miguel Gorjão Henriques*, in *Aspectos gerais dos Acordos do Schengen na perspectiva da livre circulação de pessoas na União Europeia*, Temas de Integração, n° 2, 1996, pp. 47-95 speaks, in relation to this, suggestively, of the "face" of the "European coin" of Maastricht, being that the discipline relative to the nationals of third parties is the "head" of such a coin.

<sup>35</sup> There is no right of entry! What exists is a discretionary freedom of concession of an entry visa.

<sup>36</sup> In this sense, *Caseiro Alves*, *Sobre os limites postos pela ordem jurídica comunitária às prerrogativas dos Estados membros em matéria de livre circulação de pessoas - o caso da "reserva de ordem pública"*, RDE, 1982, n° 8, pp. 354 ff.

<sup>37</sup> With that, just as Lucas Pires points out, *op.cit.*, p. 28, diminishes its capacity to compete in the Community labour market in view that it is disadvantaged in relation to Community national workers that benefit from the freedom of circulation in generic terms in the space of all member States.

<sup>38</sup> In this sense, *Lucas Pires*, *op. cit.*, p. 32.

<sup>39</sup> See *H.U. Jessurun d'Oliveira*, *Expanding External and Shrinking Internal Borders: Europe's Defense Mechanisms in the Area of Free Movement in: O'Keefe / Twomey (eds.), Legal Issues of the Maastricht Treaty*, 1994, London , p. 267.

Thirdly, this is also the case because this system of discrimination of only some types of foreigners<sup>40</sup> is (still?) situated essentially at an intergovernmental or cooperative level<sup>41</sup>, when it is Title VI of the Treaty of the European Union which is in cause, and which is even not Communitarian when it refers only to the Schengen Agreements<sup>42 43</sup>. The "Communitarized" dominion (the freedom of circulation of article 100 C)<sup>44</sup> is, in fact, more limited than seems to be supposed by some critics of the system, since it has not been possible to obtain the necessary consensus between the member States in the preparation of the European Union Treaty to pass the, after all, rather narrow "path" constituted by article K.9. Thus, for example, and contrarily to the entries of short duration, object of the "Communitarization" and that give way to a common visa that only imposes on the visitors a declaration of entry in the territory of a State three days after, those that give way to a circulation that exceeds three months depend on national visas (article 18 of the Convention of Application), even though they also give way to consultation and cooperation between the State Parties in the system in view of the matter being of "common interest" (Art. K.1). In light of this, each State preserves a significant power of determination of its policies or solutions of immigration, of visa, of the status to concede to foreigners and, along with them, of the capacity to maintain, in essence, the relation that it traditionally had with third States in regard to their nationals (and emigration). In this way Portugal did not have any difficulty in recently proceeding to an exceptional "regularization of foreigners" (by Dec. Law n° 219/92 of the 12<sup>th</sup> of October) by which those who are originals from CPLP States were favoured by the provisions of a list of less rigorous criteria. It was also in view of the above mentioned solutions that Portugal, in relation to Brazilian citizens, and in full respect to the Agreement of Suppression of Visas of 1960<sup>45</sup>, assumed the compromise

40 The inference is that in this relationship the traditional national-foreigner dichotomy no longer makes sense, "unfolding" in some other status of fewer or more privileges. It is to be noted that the discrimination in regard to a national of a third country in the Schengen space is not limited to a right of entry since even when he/she has resided "permanently" (that is, over the last five years) in one of the member States, one can only circulate in the other States Parties in the agreement, without the necessity of a visa, for a short period of 3 months. In the rest he/she is subject to each State's national legislation.

41 See *Miguel Gorjão Henriques, op. cit.* p. 23.

42 It is this fact that justifies that the Commission only detains a status of observer when it participates in the Schengen Group.

43 The separation of these two elements of the system does not signify, however, its non-contiguity or complementarity. Quite the contrary, the contiguity is underlined by article 134 of the Convention of the Application of the Schengen Agreement where it states that "the dispositions of the present convention are applicable in the measure that they are compatible with Community law".

44 On the history, *vide*, in particular, *Kay Hailbronner, Perspectives of a harmonisation of the law of asylum after the Maastricht summit*", CMLR 1992, pp. 926, ff.

45 See *Diário do Governo, I Série*, 13th of September of 1960, p. 19. This agreement, and not the 1971 Convention, can raise difficulties of rendering compatible the obligations assured in the Community framework with those of the Schengen Agreements. This is so because it is here recognized the right of entry in Portuguese territory for permanence up to six months, in travels of

of readmitting in the Portuguese territory, for a period of up to six months, any Brazilian who, having entered another country Party to the Schengen Agreements and stayed there more than three months<sup>46</sup>, had done so via Portugal's national borders. But especially a State of the Union maintains the power of determination of national citizenship - and, with this, of the Community citizenship-, although it should use it "in accordance with Community law". We have seen that the law of nationality favours the nationals of Portuguese Speaking countries.

It is like this as well, but already as an exception, with certain possibilities of waiving a visa<sup>47</sup> or with the possibility that the State conserves in the Schengen system of attributing visas to foreigners that do not cumulatively satisfy the requisites for humanitarian reasons, because of the national interest or for the fulfillment of international obligations (because these visas have an efficacy which is restricted to the national territory some designate them as "unilateral visas").

Furthermore, each member State is not prevented from motivating the whole European Community to celebrate a more favourable convention with one or more third States to privilege their nationals. This, in fact, is already done with some States<sup>48</sup>, apparently for (political) reasons which surely would not be superior to those that can be invoked for the celebration of such a treaty with the non-European CPLP countries.

Finally, it seems legitimate to bear in mind several factors, no longer of a legal nature, but of a political one, that are favourable to the preservation of these "loose ends" in the system that Schengen, first, and Maastricht, later, have been indicating, being as these loose ends generically point towards the valorization of these relations between EC member States and third States. The first one is founded on the solid ties of common memories and of a multi-secular shared culture. But even when one is not predisposed to immediately attribute a fundamental weight to this factor, one will undoubtedly always recognize that in the near future of a multipolar organization of the world and also of intense competition between States and/or blocks of States, it will be of vital importance that Europe be able to maintain

transit, business or recreation, without the necessity of a consular visa to Brazilian citizens bearers of valid passports issued by the competent national authorities.

<sup>46</sup> Thus resolving a difficulty to which *Maria Luísa Duarte* had already alerted us on due time in: *A Convenção de Brasília e o Mercado Interno de 1993, 1990*, pp. 60-64.

<sup>47</sup> Like this, the decision of the 30<sup>th</sup> of November of 1994 which permits national students of a non-member State, but who reside in the Union, to participate in study trips in groups to other member States without a visa. See *JOCE*, L 327 of the 19<sup>th</sup> of December of 1994.

<sup>48</sup> V.g. the EC-Turkey Agreement. But see, even here, the difficulties that were raised in the jurisprudence (one is thinking of the Demirel Decision). See *Joseph H. Weiler*, *Thou Shalt not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals -A Critique*, *EJIL*, 3/7, pp. 65 ff.

solidarities with third States. Their immigrated populations can then function as elements of liaison and even privileged interpreters or natural ambassadors of the European "spirit". Their presence in the whole of Europe may even be one of the most effective elements of potentiating the ongoing fight against racism, xenophobic and exacerbated nationalisms, that Europe seems to have to confront again. Furthermore, it seems unquestionable that the emerging external policies of Europe -v.g. the one of development and cooperation- will benefit, in perspective and efficacy, from this natural relation. And finally, one may consider that the "key" to a less partial solution for some of the demographic concerns of Europe or of some of its countries also resides in the capacity of real integration of these immigrants. In any case, and now at the level of global international politics, Europe will thus be contributing to delaying, once again, the ever announced and certainly feared North-South divorce. The recent recognition of "linguistic groups of States" at the heart of the ACP/EC dialogue and in the framework of the EC's own policy of development can be an indication that this optimistic reading is not in vain<sup>49</sup>.

## 2.2. Evaluation

The significance of the data must not lead us to overevaluate them either. One cannot, for example, nurture the illusion that, in the present conditions, Portugal has the possibility, in full autonomy, of extending to the PALOP, by way of international convention, a benefit of suppression of visas similar to the one it contracted with Brazil in 1960. Nor can it institute a simplified procedure of border controls of the citizens of Members of the CPLP, in general. This is so because, in the terms of the law to which it is bound (namely article 134 of the Schengen Treaty), it is obligated to obtain the agreement of the other States of the Schengen system. But especially one must not lose sight of the fact that the European construction is a project constantly '*in fieri*'. And the new developments already in configuration, as a result of the Intergovernmental Conference in course and with the already announced Treaty of Amsterdam, rather point in the opposite direction to the political reasons previously identified. This is to say that they point, on the contrary, towards the deepening of the constraints *vis-à-vis* the desires of immigration and integration of the nationals of these third countries and finally to the desirable reinforcement of the ties of the Community with third States. This will be so namely if the thesis which advocates the communitarization of the relevant policies in the sector wins<sup>50</sup>.

<sup>49</sup> In this sense, see *Lucas Pires, op. cit.*, p. 38.

<sup>50</sup> The truth is that some good arguments favour this negative global result. These are arguments that can even redund in benefits for the interested subjects. Like this, namely, the calling of attention to the democratic deficit and the absence of jurisdictional guarantees of the system introduced by Schengen. In fact, as is known, the European Parliament does not have powers of intervention in these policies of emigration and control of entries or permanence of nationals of third States and these concrete decisions of the application of the regime, even in what contends with the third

It will be left up to the member States of the CPLP to take advantage of this common structure to mutually explain the exact content and range of such constraints. It is certainly to be hoped that, in such a context, they will be duly understood and that some solutions may be found. Those are certainly the '*forum*' and the process to finally turn away the idea, so many times denied, but that periodically resurges, according to which the Portuguese-Brazilian regime of equality established by the Convention of Brasil of 1971, was placed in check by the Schengen and new Community rules. It will then be clarified that this regime, as we have seen, does not comport any right of entry and permanence in Portuguese territory, to begin with, and, in any case, the Brazilian citizen will only benefit from free circulation in the other member States of the European Community if and only when this is permitted simultaneously by the national rules of those States and the Community rules on such matters.

The structure of the CPLP may also function as a locale of exploration or formulation of ideas or solutions that permit the conciliation of interests of a conflicting nature. On the one hand, their presentation as "common positions" will necessarily entrust them a totally different political relevance on the stage of international relations exterior to the CPLP, be it the European Union or any other. It is equally undisputable, on the other hand, that, morally, each Member of the CPLP should try to contract solutions, with the other partners of regional Organizations in which it is integrated, that reveal special attention to (other) relations that are also special and that should be recognized in the heart of these spaces of integration also as valuable. It seems to us that it is with this approach that Portugal should face the perspective (or should we say the spectre?) of the communitarization (sooner or later) of the third pillar of the European Union.

### § 3. Other possibilities

The affirmation of an "us" of the CPLP, still in its intracommunitarian relation, is also guaranteed by solidarities of other types.

#### 1. Bilateral or multilateral State cooperation

At the State level, and no longer that of the individual person, it seems to us that this effort could be reinforced by the celebration of conventions, bilateral or multilateral, by which CPLP States that are better prepared in a certain sector would guarantee the aid to the ones

pillar of the European Union, are not subject to a jurisdictional control by the Court of Justice nor by the jurisdictional mechanism of the European Convention of the Human Rights.



in need<sup>51</sup>. This goal should be pursued especially when it may be determined that the overcoming of the difficulties these conventions objectively enable contributes to the reinforcement of the CPLP project and the realization of some of its objectives.

Portugal's conventional policy in the area of aid in the training of the Armed Forces of some CPLP States seems to be a positive sign in this direction, in view that it is directed towards the structuring of these States and that it fosters the instauration of an internal climate of greater security and peace which, it is to be hoped, will also end up reflecting externally on the capacity of intervention of these States in the CPLP framework itself.

Also deserving applause are the actions of cooperation in the audiovisual and telecommunications sectors since they equally seem to satisfy the criterion of a global benefit to the CPLP and to its projects (in this case they especially favour the objective of promotion and reinforcement of the Portuguese language and of the approximation of the diverse constituent communities).

It is also like this with all the policies of cooperation in other technical, economic and social fields. By helping to satisfy all the irrefutable internal necessities of some of the societies and of some of these States, they also facilitate their release for exterior (common) projects.

As well, this policy has the virtue of giving voice to the sectors of the civil societies. In this perspective, one may think that these policies and actions could still and actually must be complemented in the field of law in general, especially by actions of the training of judges and of the exchange of experiences<sup>52</sup>. This is moreover so if one realizes that this is most probably one of the most profound and lasting legacies, founded on centuries of coexistence and real integration. In fact, contrary to the Commonwealth that, actually in a visionary way, tried to preserve the colonial common law legacy which was however, at least for some, a very unnatural and, in the end, a badly assimilated system, the Portuguese inheritance in this field does not seem to face serious tensions. The evident inspiration of parts of the Constitution of some of the CPLP countries in the 1976 Portuguese "*Magna Charta*" seems to prove this belief to be well founded.

One could say exactly the same with respect to the formation of educators.

<sup>51</sup> On the problems of cooperation and technical aid, see *L. Gündling*, Economic and Technical Aid, EPIL, vol. 8, pp. 143-147.

<sup>52</sup> A promising example is the recent institution, on the 8<sup>th</sup> and 9<sup>th</sup> of May 1997, of the Jurists' Association of the Portuguese Speaking Countries (Ad-Ius). As to its aims according to its Statutes, see *Direito e Cidadania*, Ano I, nº1, 1997, pp. 257-258.

## 2. CPLP common actions

None of these efforts can, nonetheless, dispense the merit of CPLP actions '*propriu sensu*', *i.e.* of common actions. In view of the present situation of some of these countries, it would, for example, seem desirable that the CPLP conceive (common) actions oriented towards the reinforcement of the sometimes frail democratic organization of some States. The very creation of the Parliament of Seven, as some have proposed, and that, at least in an initial stage, we ideally conceive as a '*forum*' of exchange of experiences of parliamentarians, but also as an instance of control and incentive of the very decisionary organs of the CPLP, would certainly be an excellent example of what could be done in a short period of time.

### § 4. The CPLP in situations of crisis

Any of these solutions of symbolic translation of the friendship that already unites these peoples and States and probably also instruments of its reinforcement are referred to situations of normality of the functioning of that friendship. However it seems also curial to define programs of action and orientations which define what is to be done in different situations, in situations of crisis, whether internal crisis of a CPLP State, or also in cases of an international crisis provoked by the surging of any tensions in the relationship between CPLP States.

#### 1. Internal crisis

In regard to the first one, we venture that the recent political crisis in S. Tomé created by the coup d'Etat which occurred in 1995 can be a pedagogical precedent. One should, however, note that the criterion to be found should also apply to economic or humanitarian crises. One may indeed remember that Portugal discreetly offered its good offices so that the litigating parties could find a solution for the coup on their own. Being discreet, these efforts were clear in their direction: they aimed at the functioning of S. Tomé's democracy. The legitimacy for such an action could be found, it may be argued, in that democracy is a common value of the CPLP countries, according to their constitutional norms and was even elected as a general principle of the CPLP. On the other hand, Portugal did not present itself as the champion of the process of the settlement of the dispute but rather was open to the natural collaboration with the mediation offered by another CPLP country, Angola.

The ideal model seems to be justly this one: one of "CPLP" multilateralism in the framework, one of discretion in the method, one of generosity in the purpose, one of respect for the constituent values of the normative message of the CPLP in the material criterion.

Simultaneously, one has to admit (and this was how things actually happened in this particular case), one of preventing the interference of other actors (one remembers the French '*démarches*'), bearers of another vision of things and with probably different purposes (one may remember the allusions in the press to a proposal of settlement of the crisis via armed intervention), at least before other solutions are authorized on the global international plan.

It is also in this measure that we believe it would not be useless to reinforce the figure of the Secretary-General of the CPLP by instituting it and legitimizing it as the true face of the Organization. Such an action would thus, and especially with another impact, act as the vehicle for the political messages of this Organization and of its Members to the exterior. A weak image could, oppositely, be taken as a reflex of the weakness of the cohesion of its Members. Finally, this reinforcement of powers of the Secretary-General would also be valid as the solution which seems to be recommendable for the possible intra-CPLP crisis, between its member States.

## 2. Intra-CPLP international crisis

In view of the fact that an ample openness to the world and to the law that governs it is part of the historical and legal patrimony of the CPLP countries<sup>53</sup> (an openness that finds constitutionalization in each one of the Members and also at the level of the CPLP), it seems inescapable that its positioning in the world as to the matter under analysis cannot follow the traditional model of the Commonwealth, *i.e.* of derogation or reservation of the more advanced mechanisms of pacific settlement of disputes and, even more generally, of the mechanisms of international law. Not being great powers and moreover being, in many cases, born as the fruit of the advances of International Law, such an attitude would certainly be incomprehensible.

This will mean '*inter alia*' that their way will thus surely not be one of introducing reservations to the competences of the International Court of Justice, being that the filing of an action in the ICJ is but one civilized form and a responsible means of resolving disputes in a society on its way to becoming a true community.

Once again a stronger Secretary-General would be of crucial importance as a first stage of a common process of settlement of disputes.

<sup>53</sup> See *infra* Title IV, devoted precisely to this matter.

#### IV. The CPLP in the global legal international relations: an entity open to international intercourse and friendly to modern international law

The CPLP, as any other International Organization worthy of the name, cannot however – and must not either! – limit itself to being a mere organizer of domestic duties. As a true subject of international law it must place itself, so to say, on the legal market of the international relations.

Only in this way will the CPLP, which is, one has to remember, a product of seven founding States of which at least four were born not through a unilateral act but through contracted wills<sup>54</sup> (that is, an Organization which is a product of States that are, in this

<sup>54</sup> They resulted from agreements – if of international or of mixed nature, this is not the appropriate place to discuss this – between, on the one hand, Portugal, fully committed, after the revolution of 1974 to complying with international standards, and, on the other hand, the national liberation movement(s) which fought for independence or, more simply, had been internationally recognised as the legitimate representative(s) of the people by the United Nations and the OAU during the period of dictatorship in Portugal.

Thus Angola became independent on the 11<sup>th</sup> of November 1975, following the Agreement of Alvor, published in *Diário do Governo*, n° 23, I Série of the 28<sup>th</sup> of January of 1975 (its applicability was however to be unilaterally suspended by Portugal by Decree-Law n° 458-A/75 of the 22<sup>nd</sup> of August - see *Diário do Governo*, n° 193, I Série of the same date), Cape Verde on the 5<sup>th</sup> of July of 1975 (the recognition of Cape Verde's right to "self-determination and independence" was published in *Diário do Governo*, I Série of the 30<sup>th</sup> of August of 1974), Guinea-Bissau saw its *de iure* independence recognised by Portugal on the 10<sup>th</sup> of September of 1974, after the Agreement of Algiers of the 26<sup>th</sup> of August of the same year (see *Diário do Governo*, n° 202, I Série of the 30<sup>th</sup> of August of 1974 and n° 212, of the 11<sup>th</sup> of September of 1974), Mozambique, on the 25<sup>th</sup> of June of 1975, following the Agreement of Lusaka of the 7<sup>th</sup> of December of 1974 (see *Diário do Governo*, I Série of the 9<sup>th</sup> of December of 1974), and S. Tomé and Príncipe reached independence after the Agreement of Algiers between Portugal and the MLSTP (national liberation movement) of the 26<sup>th</sup> of November of 1974 (published in *Diário do Governo*, n° 293, I Série of the 17<sup>th</sup> of December of 1974). See *Miguel Galvão Teles and Paulo Canelas de Castro*, Portugal and the right of peoples to self-determination, AVR 1996, pp. 34-37, where the *particularity of this method*, which reminds the procedure followed by France and the Front of National Liberation which led to the Agreements of Evian in March of 1962 ) (*UNTS*, vol. 507, p. 25 and the independence of Algeria in 1963 (see A. Bleckmann, Decolonization: French Territories, EPIL, vol. 10, pp. 987-989) is already stressed. See also *Fausto de Quadros*, Decolonization: Portuguese Territories, EPIL, vol. 10, pp. 93-96.

Guinea's case will stand out because it had already proclaimed its independence and this independence had even been internationally recognised by some States. Therefore, the agreement between Portugal and the PAIGC (Guinea's national liberation movement) had also a *special object*: Portugal's recognition of independence. On this, *Crawford*, The Creation of States, 1979, A. Rigo Sureda. The Evolution of the Right of Self Determination, Leiden, 1973.

Angola, as we already mentioned, also presents some *specificities*, which makes it possible to consider that the self-determination of Portugal's non-self-governing territories, if we forget the sadly and brutally interrupted process of self-determination of East Timor, followed *three distinct models*. On this, again, *Miguel Galvão Teles and Paulo Canelas de Castro*, Portugal and the right of peoples to self-determination, AVR, 1996, pp.34-35.

measure, themselves a result of international law and of its progress<sup>55</sup>), give full justice to the condition of its Members as States open to and States which preach friendship<sup>56</sup> to international law. Indeed this condition is materialized in so many of the Constitutions of the CPLP Members (in the Portuguese case, amongst other dispositions, in articles 7 and 8<sup>57</sup>, in the case of Cape Verde, for example, in article 11, in the case of S. Tomé and Príncipe, in article 12 § 1), that is to say in constitutional dispositions that thus bind the concerned State to the respect and application of International Law and clearly recognize the influence of the international legal order in the national one.

### § 1. The CPLP: a community open to other communities

With this characteristic the CPLP illustrates once again that it has a personality of its own. And once again it reveals itself diverse from natural terms of comparison such as the Commonwealth. In truth, although open to the participation of States that do not have English as an official language (one must remember the recent integration of Mozambique which some believed to be a hindrance to the CPLP project), the Commonwealth is rather exclusivist in its action. It basically takes care of the relations of its Members, having even coined the doctrine '*inter se*' that claims the special legal character of the relations between State members of the Commonwealth to legitimize this result. Diversely, if the CPLP's composition obeys, as we have seen, a more restrictivist criterion of composition (the member States must have Portuguese as their official language according to article 6 § 1 of the Statutes), the very fact that the Organization assumes the condition of an international legal subject clearly indicates that it is frankly open to the interrelation with the world and its normal forms of legal expression. This impression is also easily confirmed by various passages of its constituent texts. In fact, one of the CPLP's most fundamental problems resides precisely in this relation, as is assumed even at the level of its normative objectives. This constitutes, furthermore, in the thinking of many, the principal challenge to the consistency of the CPLP in the near future.

<sup>55</sup> Namely the evolution of the last half of the century of the right to self-determination, as we tried to outline in "Portugal and the Right of Peoples to Self-Determination, AVR, 1996, pp.3-46. Beyond the bibliography there cited, *vide* as well the recent work of A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, Cambridge, 1995.

<sup>56</sup> See, in the German doctrine, A. Bleckmann, *Die Völkerrechtsfreundlichkeit der deutschen Rechtsordnung*, DÖV 1979, pp. 310 ff. and Tomuschat, *Die Entscheidung für die internationale Offenheit*, in *Isensee / Kirchhof*, *Handbuch des Staatsrechts*, vol. VII, p. 486 and, in the Portuguese literature, *Gomes Canotilho*, *Offenheit vor dem Völkerrecht und Völkerrechtsfreundlichkeit des portugiesischen Rechts*, AVR, 1996, pp. 47-72 and our own *Portugal's World Outlook and the Constitution of 1976*, BFDUC, 1995, pp. 470 ff.

<sup>57</sup> See the demonstrative analysis in *P. J. Canelas de Castro*, *Portugal's World Outlook and the Constitution of 1976*, BFDUC, 1995, pp. 470 ff.

## 1. An open International Organization

One should, in fact, remember, in the first place, that the CPLP elected as one of its general objectives "the political - diplomatic concert (...) in the matters of international relations". On the other hand, thereby demonstrating how conscious the CPLP is of the era in which it is located, article 3, line a of the Statutes defines the reinforcement of its "presence in the international forums" as a special goal. Moreover its orientating principles (article 5) seem only to make sense if read as principles of orientation of the external relations of the CPLP and of its Members. This is also, after all, the only posture coherent with the historical tradition of these States and with their constitutional compromises, as we will better see later. If need be, the Constituent Declaration would be, in this context, of decisive hermeneutic utility in that it considers imperative "the strengthening of (...) international affirmation of the set of Portuguese Speaking Countries" (para. 2 of the consideration). It even reaffirms that "the Portuguese language is (...) on the world level, foundation of a joint action more significant and influential" (para. 3 of the consideration)<sup>58</sup>. Concerning this underlined passage, it may be noted that there is no influence without an external object! On the other hand, it makes this language an "instrument of communication and of labour in International Organizations" which can only be understood also as an injunction to the participation in other International Organizations. Furthermore the text considers that each one of the CPLP countries is legitimized "to be the interpreter of the common interests and aspirations in the proper regional context" (last para. of the consideration). Finally it must be added that § 5 of the subsequent consideration makes express reference to the international community as the horizon of the CPLP's activities.

The CPLP must thus be considered as a restricted but open International Organization. It is an International Organization that turns the strength of its convictions (mutual friendship, the concert and cooperation between its Members) into the foundation of its openness to the international community, which seeks to participate in it according to its more typical modalities and that is even guided by principles common to both.

## 2. A valid international partner

This is justly why we believe it would be useful, if not even indispensable, that the CPLP allows itself to be known to the world and let the world recognize it as a valid partner.

We believe and propose that this should be done by the registering of its constituent treaty at the Secretariat of the United Nations as soon as duly ratified by all Members: It would be the first and telling sign of the genuineness of its proclamation of openness to the world.

<sup>58</sup> Our italics.

It should then seek to assure the status of observer in the so called UN family (the UN itself and its specialized Organizations) and in the regional Organizations in which its Members also participate. One can imagine the importance that this move would involve, for example, in the accreditation of projects of businesses or consortia, especially if constituted of several or all member States, for instance to obtain the financing of a world or regional specialised institution. Parallely, the participation in the regional structures to which all the CPLP Members naturally open themselves up would not fail to revert in the facilitation of opportunities to the benefit of the remaining member States and of the CPLP's normative global project also at the regional scale. In addition, the representatives of the States in the "field" of these Organizations, *i.e.* the civil servants who would be committed to the mission of assuring the function of observer, would also be in a privileged position to coordinate or facilitate the coordination of the efforts of concert of the envoys of the concerned States to meetings or events of that particular Organization, not to mention the more common but not less important activity of assuring the circulation of information of the most diverse nature from and for that Organization, all in all, fundamental conditions of meeting the *opportunities* offered in each of such Organizations, with a benefit potentially for all the CPLP Members.

## § 2. The CPLP: a community with friendship to international law

But it is especially at the level of the ideals that one gains the coherence of action, as well as it is in the measure in which these ideals are really lived that one reinforces the sensation of a shared community. One holds that the CPLP already has a few and good mobilizing ideals!

Firstly, it is obvious, there are those expressed in the Treaty. But also in this case it seems legitimate to attempt to find them in another location. We believe it is appropriate to seek them in the constitutional texts of the member States as well. This is especially true if the constitutional values that one may believe possible to identify are shared by all or almost all the CPLP member States thus forming a sort of general principles of law of the CPLP or an '*ius publicum*' of the CPLP useful to integrate possible programmatic lacunae or to reinforce interpretations of the fundamental texts oriented in this direction and to indicate or prove the genuineness and consistency of the commitment of the CPLP to these values.

The result of this search will certainly demonstrate that the member States have unquestionably some values that are basically common to all of their constitutional texts and that these values are even common to the main core of those proclaimed by the Constituent Charter of the CPLP: they certainly prove that, more than being alert to the world and to its Law, the CPLP is truly an entity friendly to international law and in favour of its progress.

## 1. The humanist normative message of the CPLP

More specifically, one common characteristic that they share is a particular sensitivity to Humanity, a generosity that drives all constitutional texts not only to make an ample and rich reference to the human being in general but also to assure the protection and promotion of his/her condition. Two main examples may be sufficient to demonstrate this humanist normative message that the CPLP conveys both to its interior and to its exterior:

### 1.1. *A particular sensitivity to the human rights of the individuals*

The recognition of the inalienable dignity of the individual human person is indeed more or less explicitly present in all of the constitutional texts. But one must underline the Brazilian formula that upholds it *'expressis verbis'* as the very foundation of the State (see article 1, I and preamble). It is, furthermore, foundation or objective of international action, as results expressly from the Constitution of Brazil (art. 4, II); from S. Tomé and Príncipe's (Preamble, art. 1 and art. 12 § 2) and from the Constitution of Cape Verde (art. 10 § 1 and 10 § 15). In complete harmony with this humanist vision, many of these constitutional texts also reject any form of human discrimination (be it of a racist, sexual, origin, economic, religious or ideological nature), elevating this stance to the condition of a national question (v.g. the Constitution of Brazil, art. 3, IV and Cape Verde's article 1 § 2) or even to the quality of an international commitment (Constitution of Brazil, art. 4, VIII).

This general perspective has subsequently a fully harmonious refraction in some special regimes or, more simply, in the normative solutions foreseen for some particular questions.

This is the case, first, of the image given by this Portuguese speaking countries' *'ius publicum'* of the question of political asylum: in Brazil this is erected as a guiding principle of international relations (art 4, Principle X) and it is constitutionally received in the Constitution of S. Tomé and Príncipe (art. 40 § 4, which wants to protect the activities in favour of democratic rights), in the Constitution of Angola (art. 26: asylum for political motives) as well as that of Cape Verde (art. 36, whose list of motives -political motives, national liberation, human rights- is even more vast).

It is reflected, secondly, in the legal conception of the foreigner. We have already seen how especially generous this "CPLP regime" can be when those special foreigners who are citizens of (at least some of) the CPLP States are at stake. But the truth is that a similar generosity is also present when any other foreigners are in question. Indeed, as we have seen, with the exception of a few restrictions, the Constitutions of the CPLP Members concede a treatment at least equal to the national. The Constitution of Cape Verde even consecrates the principle of equal international treatment (art. 7 e)), which, however, may



suffer constitutional and legal restrictions, especially with respect to political rights, the military function and active and passive electoral capacity at the municipal level.

Thirdly, this vision of exaltation or protection of the human being is also translated in very rich catalogues of fundamental rights that comport rights, liberties and guarantees relative to the diverse forms of individual expression and expression in the social whole (as *homo politicus*, *homo oeconomicus*, *homo faber*, *homo artisticus*, etc.) thus not differentiating between human rights of diverse generations and, on the contrary, revealing an integrated and holistic comprehension of human rights<sup>59</sup>.

Fourthly, the organizational and procedural solutions and political values which these texts foresee and consecrate are also coherent with this vision and indeed reinforce it: in all the latest versions of the Constitutions of the CPLP countries there is, in fact, the establishment of a true principle of rule of law, of plural democracies, of independence of the judiciary, of fair and just government.

Finally, it is completed with the protection of the human being before special forms of hardship, such as torture and other forms of cruel treatment (v.g. Cape Verde: article 26 § 2) and in a generic, and at times very emphatic, rejection of the death penalty (in this way, the Constitution of S.Tomé and Príncipe, article' 21 § 2 which proclaims that "in no case" will it be accepted), by which the other constitutionalisms adopt the message that Portugal first sent out to the world a century ago (Constitution of Brazil: art. 5 XLVII, which, however, makes exception to war; the Constitution of Angola: 22 § 2; as well as that of Cape Verde: 26 § 2)<sup>60</sup>.

This program of promotion and protection of the individual present in all the constitutional texts is not, however, a mere message for internal consumption. It is also to be taken as the foundation of a CPLP human rights policy or a policy of the "respect of Human Rights (...)" -as is clear in § 13 of the last consideration of the Declaration-, an idea that should be clarified, as we have already defended, by a definition and evident practice, as it is a program to be extended to "the whole world" - in this sense also § 13 of the last consideration of the Declaration.

<sup>59</sup> On the matter, see *Gomes Canotilho*, *Direito Constitucional*, Coimbra, 1996 and *Vieira de Andrade*, *Direitos Fundamentais*, Coimbra, 1985.

<sup>60</sup> Already pointing in this direction see *Macaísta Malheiros'* intervention in the 2<sup>nd</sup> Luso-German Journeys in Law. See *E. Jayme (ed.)*, *2. Deutsch-Lusitanische Rechtstage*, Baden-Baden, 1994.

## 1.2. *A particular sensitivity to the right to self-determination of the peoples*

The second sign of this humanist stance which is also a project to render the world more human is the insistence of these texts on the right to self-determination of the peoples.

Foundation of the recent independence of many of these countries, the right to self-determination figures in all the international and constitutional texts of the CPLP and of its countries, most often in special terms, not only as a recognition of origin but also as a promise of contribution to the democratization of international society.

It is indeed not a simple evocative move. The CPLP countries also are conscious of and want to transmit the idea that the task is not yet complete and that the libertarian idea and project have still to prove their efficacy in this world on the brink of the third millennium. This should thus be read not only as a commitment to applying the principle internally – internal self-determination<sup>61</sup> – an idea that is reinforced as we have seen by the fact that all the Constitutions of the CPLP countries bind them to the furtherance of the democratic project, but also as a claim to the resolution of pending situations of foreign domination and oppression – thus, external self-determination – and, in particular, the one of East Timor to whose people the ones of the CPLP countries share a feeling of intense brotherhood.

### **Final Remarks: Broader Perspectives (/Prospectives?) or On the road towards a CPLP-human rights policy?**

#### **A. A promising reality with new promising projects?**

The CPLP is thus a living reality. It celebrated its second year. From the comparison with the Commonwealth and the reading of the CPLP founding texts it became certain that this new international entity does indeed correspond to a project with no model. It will thus be what its Members want it to be and have the courage and imagination to endeavour. They have at the outset expressed the wish that the association that they have created is not to be a mere society, simply made of the fabric of common interests and of the capacity to find common or contractual answers to them. They have instead placed it as a project of a

<sup>61</sup> On this concept and the parallel one of “external self-determination”, see *K. Doehring*, *Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts*, 1974. The dichotomy is also extensively used by *A. Cassese*, in his *Political Self-Determination – Old Concepts and New Developments*, in: *Cassese (ed.)*, *UN Law / Fundamental Rights. Two Topics in International Law*, 1979, pp. 137-165; *Le droit international dans un monde divisé*, 1984; or *Commentaire à l'article 1 § 2*, in: *Cot and Pellet (eds.)*, *La Charte des Nations Unies - Commentaire article par article*, Paris, 1991, pp. 39-54.

community, thereby stressing the idea that they have some ideals shared in solidarity and that the CPLP will also have to respect and promote them. This actually seems only too fair and matches their history of a special sense of togetherness. But it also implies a particular choice which we have seen to be, only partly, expressed in the objectives that the constituent texts identify as of vital importance for the CPLP to pursue and abide by.

In this light, the beginnings of the CPLP can be said to be promising, in spite of some clouds that shadowed this start.

However, more than the message conveyed by its "Constitution", even if rightly - *i.e.*, dynamically- interpreted, what is undoubtedly of the outmost importance is that there will not be misconceptions about the profound meaning of a true community. This is, assuredly, not simply a being of the perpetuation of symbols. It was perhaps precisely for the oblivion of this that for some time and at a certain point in its life, at least according to some, the Commonwealth started to experience a sense of lethargy in spite of the previous power of attraction of its special symbols (a common crown, a special allegiance as well as a particular notion of alien<sup>62</sup>, the *inter se* doctrine, the not less original reservations made to the declaration of the recognition of a mandatory jurisdiction, the realist regime of extradition). If the CPLP cedes to a similar illusion, it may be expected that its future will not be easy or, at least, it will not be one capable of placing these States and the CPLP as valid partners of the international community in construction. These proclaimed values and also some more enduring interests must, on the contrary, be lived dynamically and thereby certainly reinforced. Only then will they revive the departing sense of togetherness.

This however raises even more clearly the question of what the material project or project of actions of the CPLP for the forthcoming times may be. We tried to demonstrate that the founding texts, in spite of some opacity, already give enough initial indications, especially if integrated with the *ius publicum* of the Portuguese Speaking countries, the general legal constitutional principles of the diverse States of the CPLP. In conjunction they certainly seem to constitute a good basis of action.

In view of these sources, we submit that the essence of this project is the promotion of the condition of the human being, individually and in general, as well as and of the peoples and their protection. The core ideal is thus one of rendering the world more livable and human.

In any case, it must be admitted, this stance cannot be taken seriously in the exterior and have the desired effect if it is not also inside the CPLP and even proves to be the very

62 Apart from the bibliography already indicated on the Commonwealth in general, see, more specifically, *R. Plender*, *British Commonwealth, Subjects and Nationality Rules*, *EPIL*, vol. 8, pp. 53-59.

cement of its common life, and this not only in proclamations of ideals and programs but also and principally in the effective practice. Consistency of proclamations and practice is vital in matters of values and their credibility. This is a reason why we believe a reflection should be initiated on how to deal with this task in the most adequate way. In a shorter or middle term, this may indeed be the cornerstone of the development of an Organization that, clearly referring, as this one does, to the human being and the peoples, still remains dominantly a typically intergovernmental one. The doubts that it raises concerning its efficacy seem to us to reside precisely in the fact that working well as an intergovernmental Organization, it does not seem to meet the promises and expectations at another level. The dead end in which some already, hastily, see it to be in, has probably to do with this.

We would like to venture that there are two fundamental dimensions that should then be considered: 1) objectives of implementation of this ethical stance through a definition of a material policy of the rights of the human being and of the peoples (the material dimension); and 2) adequacy and adaptation of the existing means and especially of the CPLP structures (the organizational dimension).

## § 1. The material Dimension

Regarding the first, we believe that a genuine program of human valorisation, both at a national level and in an international setting, necessarily involves two indissociable objectives: the one of promotion of human rights and the one of their protection. It is then to be concretized in three operative questions: standard-setting, control or supervision, enforcement. All of these questions<sup>63</sup> should be affronted if indeed a policy of human rights is to be posed. From the very start, however, it is advisable to be aware of different degrees of difficulty and the sensitivities for the States members of the CPLP that these questions imply.

### 1. The question of the aims of a human rights policy

#### 1.2. Promotion of human rights

In fact, that the CPLP involves itself in the promotion of human rights - be it individual or collective ones- does not seem to raise great difficulties and we submit might even be already started. In fact, activities such as education in human rights, publishing information on the matter, for instance, should not raise difficulties for any of the countries involved. More problematic may be the related question of who is going to assume the responsibility

<sup>63</sup> On the subject, see *K. Vasak (ed.), The International Dimensions of Human Rights, 1982.*

for that: we immediately venture to submit that it should be the Secretariat, and the Secretary-General, in particular. It could even be that the experience acquired in this field would also serve as a most desirable confidence-building measure for other endeavours for which the reinforcement and dignification of the figure seems equally advisable.

### 1.2. *Protection of human rights*

The task of actual protection, on the other hand, may be more problematic and divisive, since at this international level, it may involve intrusions or simply taking positions concerning affairs that the States traditionally see as their own and, many times, would like to reserve for themselves. But on the one hand, no real human rights' policy would be able to ignore this other side of the coin. And, on the other hand, this, more or less secret aspiration of the States is no longer considered legitimate today, as international lawyers well know<sup>64</sup>.

## 2. Operative questions

In any case, but especially in what concerns the second dimension of this general problem, an international policy of human rights deserving of this designation shall necessarily have to address the three questions of standard-setting, control or supervision and enforcement already exposed.

### 2.1. *Standard-setting - on the road to a CPLP Charter of the rights of individuals and peoples?*

The first one – standard-setting – starts by not being difficult, since the CPLP States have already a common core of fundamental values at the highest level of their legal orders - this was the lesson we withdrew from the analysis made of their Constitutions. Moreover, they even have already had the courage and dignity to place these values at the international level, as the ones to which they have announced their commitment. Some clarifications seem to be necessary though. But even these do not raise significant difficulties. It might

<sup>64</sup> This is the well-known lesson withdrawn from the international practice resulting from the application of article 2 § 7 of the Charter of the United Nations. See, for instance, *A. Cançado Trindade, The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations*, ICLQ 1976, vol. 25, pp. 715-765; *L. Henkin, Human Rights and Domestic Jurisdiction*, in: *T. Buergenthal and J. Hall (eds.), Human Rights, International Law and the Helsinki Accord*, 1979, pp. 21-40; *I. Szabo, Historical Foundations of Human Rights and Subsequent Developments*, *K. Vasak (ed.), The International Dimensions of Human Rights*, 1982, pp. 11-41.

therefore be possible to draw a common CPLP Charter of the Rights of individuals and peoples. This would even be advisable in view of the fact that a lack of a CPLP jurisdictional structure, or any other duly mandated application structure, does not recommend an alternative possibility which would be constituted by the casuistic identification of general principles of law. If this indeed be the case, a definitional and enumerative approach, consisting of the definition (as much as possible) of precise rights and standards and their contents and conditions of operation (if mandatory or of a recommendatory nature, for instance) seems preferable to a more principle-oriented one. It is moreover a solution more in line with the law traditions of the countries involved. Still at this level of standard-setting, the effort of drawing up a CPLP human rights Charter, even if accepted, would not necessarily dispense topic *'ad hoc'* intervention, consisting either of decisions of implementation or of authoritative interpretations and of integration of lacunae. These might be met by the already existing political common organs of the CPLP, but it might be adequate for them to consult a *'forum'* of pre-constituted experts or experts designated *'ad hoc'* for the circumstance.

Even this move would not, however, solve the whole problem and especially dispense a policy concerning the other stages: the ones of control and enforcement.

## 2.2. *Control*

The experiences in policies of control of human rights in other contexts seem to indicate that there are certain structural requirements which are to be met for it to become real, but also some more topic interventions.

Concerning the structural set of requirements, a sure first 'must' is information on human rights and practices. This is indeed even a logistic condition for the establishment of any (country) record and eventual evaluation of it. Apart from this more continuous effort - which might give way to the publication of a regular report- the supervisory or investigative procedures in human rights may also consist of the recourse to observer groups, enquiries or fact-finding individuals or commissions to deal with special situations - elections, for instance.

## 2.3. *Enforcement*

At a further stage, the question of enforcement raises a fundamental dilemma, which is parallel to two different levels of "respect" for the sovereignties of the States involved: Is persuasion and consultation techniques, or at the most, recourse to shame, the fundamental way to deal with the problems that may arise? Or is there even room for recourse to

coercive strategies involving, for instance, such sanctions as embargoes or suspension of assistance or suspension of membership, especially designed to deter other violations of the common values and to elicit change in behaviour?

### 3. Difficulties

These two last stages, and especially the very last, naturally may run counter to the consensual '*modus operandi*' of the Organization, but also are a test to its determination in defending the proclaimed values. But they should never be taken so far though as to give rise to challenging the communitarian spirit of the Organization. The risk is that it would provoke a reduction in its already restricted membership. The delicate balance to be struck should certainly not forget that the CPLP, remains, in the first place, an association of States.

These difficulties may precisely tempt some to pose a more radical question: Is such a policy really necessary? Could the CPLP for instance not rest on the existence of other mechanisms of the sort, both at (geographically more homogeneous) regional and global levels? Wouldn't it even be more advisable not to duplicate international efforts?

To these doubts and possible objections, one may first remember that the founders of the United Nations expressly relied on other Organizations (situated closer to the matter, so to say) to defend and pursue international peace, giving preference to global collective mechanisms only in extreme conflictual situations (this is the fundamental message of Chapter VIII of the Charter of the United Nations)<sup>65</sup>. The well known crisis of the universal Organization, moreover, recommends this policy of decentralisation and subsidiarity, a policy that already even corresponds to the international practice of the last decade. An argument of principle then arises: if the Members of an Organization (especially the founding Members) do commit themselves expressly to a goal, it is only ethical to act correspondingly as well as logical to expect them to do so. Furthermore, if indeed these matters have a certain degree of private character, and since the public scrutiny is unavoidable in the global Organization, where power politics and formality are more intense, it seems only more logical to discuss them in an Organization which is more "private". Moreover, this is an Organization, where informality and friendship are naturally characterising factors. It hence appears preferable to do so, at least at a first stage. If for no other reasons, then, at least in the hopes that the matter does not have to ascend to the global level, for the eyes of all the world.

<sup>65</sup> See *J. Wolf*, Regional Arrangements and the UN Charter, EPIL, vol. 6, pp. 286-296 and, in the Portuguese literature, *Barbosa de Melo and P. Canelas de Castro*, Direito Internacional Público - II. Sumários das Lições ao 5º ano, Coimbra, 1988.

## § 2. The institutional dimension

These two last stages of control and enforcement- and especially the second, this time- also are linked with and give further prominence to the question of who is to be the 'custodes' of this common soul of the CPLP.

### 1. Another status for the Secretary-General?

We believe there to be several important advantages, logistical, functional and political in electing the Secretariat, in general, and the Secretary-General, in particular, to perform this sensitive task. The main reason is of course that it would be a means of diminishing a natural sensitivity to a certain degree of publicity that the operations of control and enforcement naturally involve. This intervention would, hence, so to say, contribute to rendering more objective the procedure and, hopefully, reducing fears or temptations of alleging that the intervention is founded in vested interests and considerations of mere power politics. Such a solution, along with other reasons already mentioned, would, however, demand a revision of the content and status of the Secretariat, or, at least, of its Head-Officer, the Secretary-General. We advocate namely that it be entrusted a certain ("political") power of discretion and of initiative. Apart from his typical frankly administrative tasks, he might, for instance, be entrusted the capacity to collect and disseminate data, be empowered to determine the opportunity of constituting a group of observers to supervise an electoral act or process, or a commission of experts to investigate certain alleged human rights abuses, and even to use his personal and functional persuasion and authority to encourage compliance. In general, his status would have to be modified so that he would - and that he would no longer be situated, as presently happens, as the "last man on the totem pole" but rather as a more typically communitarian partner to the Conference of Heads of States and Government.

### 2. A 'forum' for the CPLP civil societies?

Such desirable policy of human rights would then highlight a second institutional deficit of this Community. For an Organization that wants to be a setting for furthering communitarian values and aspirations, and that is so profoundly committed to human rights (be it at the level of the individual or people rights), there is certainly a strange lack of an organ, a 'forum' where the NGOs and other actors of the civil societies in general and even the peoples can meet and have a possibility of wording their concerns. This is especially so - but not necessarily only- pending the definition of a status of some form of participation in the collective works of the Organization. We believe that even if the projects of the Parliament of the Seven or of the University of the Seven or the Institute of the Language become



reality, they might not be sufficient to appropriately answer this deficit<sup>66</sup>. We rather think that a solution which would be a kind of cooperative ensemble of the NGOs or civil societies' structures or groups that would naturally be created would be preferable. These might still be helped by the means of the Secretariat. Probably they would also need the definition of another status foreseeing the modalities of collaboration with the intergovernmental institutions of the CPLP.

### 3. Status(es) of observer?

The third institutional deficit has already been identified, at least partially<sup>67</sup>. It is a status of observer which might, first of all, be applied to the Timorese<sup>68</sup>. As we have also advocated this status should have a variable content or even be plural. It would hence enable first the integration of other Portuguese speaking communities, also with an historical, cultural and language identity of their own but who, differently from the Timorese, have not been recognised an international legal status, such as the Goese<sup>69</sup> or the Macaense<sup>70</sup>. It would, second enable the integration in this project of the emigrants of so many of the Portuguese Speaking countries. Thirdly, it would also be useful to integrate other International Organisations, world or regional, political or specialised, with which the CPLP develops a special relationship. This last solution would indeed be only coherent with the openness that the CPLP proclaims and demonstrates.

#### B. Or just old plain wishful thinking?

All these "concluding" remarks may however give rise to the question of whether they are not mere *suggestions*, and even so visionary, in face of a reality that did not necessarily start without problems - finances, housing, process of ratification-, of whether such suggestions are ultimately even unhelpful for the resolution of these difficulties.

To this reasoning, we believe it may be opposed that these tensions and loopholes certainly are not of a greater magnitude than the qualitative leap which was required for giving origin to the CPLP and for establishing it as an undisputable fact of contemporary international

<sup>66</sup> Where would the interests of so many economic individuals or collective agents for instance find expression? And how could associations, such as the already existing association of Portuguese Speaking Cities, express their concerns and views?

<sup>67</sup> See *supra* footnote 16.

<sup>68</sup> See *supra* footnote 17.

<sup>69</sup> See *supra* footnote 18.

<sup>70</sup> See *supra* footnote 19.

relations. We should not take the trees for the forest! And the "forest" is, moreover, that, in spite of so many pessimistic predictions formulated at its birth, not only was the CPLP founded and became a positive partner of the international community but it has also done so under the rule of law: we were always able to base ourselves on the founding texts of the CPLP, on the Constitutions of its Members, or on common experience as principles and rules binding the new Organization. Furthermore, the fact that the CPLP presents itself as a structure committed to the service of humanity seems also to be praised.

This is really what seems fundamental at the present stage of development of the novel Organisation. And, as for the argument of a possible excessive idealism of such construction, it may suffice to start by recalling a maxim by Camus in his *The Myth of Sisyphus*: "In every fundamental problem, I mean thereby those problems that involve the risk of conducting to death or those that intensify the passion for life, there are, probably, two methods of thinking: La Palisse's method and the one by Dom Quixote". It may then be admitted that this construction does indeed involve a choice: but it seems to be the only one which may be simultaneously legitimate and...productive!

This being said, it may also be recognised that the present conditions set some limits and make the elaboration of agendas of priorities and a certain gradualism in the response to the program advisable. This is certainly a project and a juridical order that, apart from being just recently born, is decisively a *reality 'in fieri'*.

Its full implementation will therefore not be for the immediate day of tomorrow. The Portuguese people have a maxim which expresses the idea in a subtle form: "Rome and Pavia were not created in one day". This is far from pessimism, though. Or else it is the particular kind of pessimism that Mia Couto, a Mozambican writer, who through his literary works, already became one of the great names and certitudes of the Portuguese speaking culture, rightly evoked when, asked a similar question about the CPLP, replied: "Pessimistic? Yes, but full of hope!"

## ABSTRACTS

### **The Community of the Portuguese Speaking Countries (2)**

By *Paulo Canelas de Castro*

On July 17, 1996 the Community of Portuguese Speaking Countries (*Comunidade dos Países de Língua Portuguesa – CPLP*) was created as an association of seven States, not characterized by a regional coherence, but primarily by a language and a “regionalism of identity”. The first part of the article, published in *VERFASSUNG UND RECHT IN ÜBERSEE*, no. 2 (1998), p. 122-150, surveyed the constituent treaty, especially regarding the institutions provided and their functioning. It also focussed on the objectives of the international organization in multilateral diplomacy, internal cooperation and promotion and diffusion of the Portuguese language and its orientating principles. Finally, the author compared the CPLP structures to the British Commonwealth from a political and legal perspective. This second part of the article deals with the emerging identity of the CPLP, the status of the individual within the CPLP on the road to citizenship, the position of the CPLP in global international relations and international law and, finally, with perspectives of an own human rights policy.

### **From Colony to Special Administrative Region: Issues of Hong Kong's Autonomy within a Centralized Authoritarianistic State**

By *Anthony B.L. Cheung*

Since Hong Kong from 1 July 1997 onwards has become an SAR of the People's Republic of China one of the key tests of Hong Kong's viability is whether the city will be able to maintain the high degree of autonomy as guaranteed by the 1984 Sino-British Joint Declaration. The article focusses on the details of this autonomy within the PRC's present constitutional configuration compared to the British colonial past and analyses some concerns referring to special aspects of the transition from British rule to PRC's sovereignty. The author comes to the conclusion, that Hong Kong will have to learn from the experience of its provincial/municipality counterparts on the mainland the tactics of bargaining and negotiation with the centre, for autonomy in practice "... is to be achieved and shaped on the ground, at the micro-level of day-to-day interaction".