

### III. Report of the International Law Commission on the Work of its Forty-Seventh Session

#### (i) Introduction

The International Law Commission (hereinafter called the Commission or simply the ILC) established by General Assembly Resolution 174(III) of 21 September 1947 is the principal organ to promote the progressive development and codification of international law. The Commission held its forty-seventh session in Geneva from May 3 to July 21, 1995. There were as many as five substantive topics on the agenda of the aforementioned session of the Commission. These included:

- (I) State Responsibility;
- (II) The Draft Code of Crimes Against the Peace and Security of Mankind;
- (III) International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law;
- (IV) The Law and Practice Relating to Reservations to Treaties; and
- (V) State Succession and its Impact on the Nationality of Natural and Legal Persons.

The Commission at its forty-seventh session considered all the abovementioned items and some notes and comments on these topics may be found in the latter part of the note.

It may be recalled that the General Assembly had by its resolution 49/51 of December 9, 1995 *inter alia*, urged the Commission "to resume at its forty-seventh session the work on the draft Code of Crimes against the Peace and Security of Mankind and on State Responsibility in such a manner that the second reading of the draft code and the first reading of the articles on State Responsibility may be completed before the end of the present term of office of the members of the Commission". The

General Assembly had also requested the Secretary-General to update the survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law as a useful contribution to the ongoing work of the Commission on the topic.

It may also be recalled that the General Assembly, at its forty-ninth session, had endorsed the intention of the Commission to undertake work on the topics of "The Law and Practice Relating to Reservations to Treaties" and "State Succession and its Impact on the Nationality of Natural and Legal Persons" on the understanding that the final form to be given to the work on those topics shall be decided after a preliminary study is presented to it.

It needs, however, to be stated that the consideration of two subjects viz. 'State Responsibility and the Draft Code of Crimes Against the Peace and Security of Mankind' are at an advanced stage and the Commission expects to complete the second reading of the draft articles on the Draft Code of Crimes against the Peace and Security of Mankind at its next session. The Commission is also expected to complete the first reading of the draft articles on State Responsibility at its forty-eighth session in 1996. Detailed notes and comments on these topics may be found in Sections I and II of this Note.

As regards 'International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law', it may be stated that the Commission at its current session *inter alia* established a Working Group to deal with the identification of activities which fall within the scope of the subject i.e. dangerous activities. The recommendations of the Working Group and the progress of work of the Commission may be found in Section III of this note. It may be stated, however, that the Planning Group of the Enlarged Bureau established at the forty-seventh session of the Commission has recommended that the Commission make every effort to complete by 1996, the first reading of the draft articles on activities that risk causing transboundary harm.

As regards the subject of State Succession and its Impact on the Nationality of Natural and Legal Persons, the Commission at its forty-seventh session, after considering the preliminary report of the Special Rapporteur, Mr. Vaclav Mikulka, decided to establish a Working Group entrusted with the mandate of identifying issues arising out of the topic, categorizing those issues which are closely related thereto and to direct, to the Commission, those issues which could be profitably pursued given contemporary concerns. The Planning Group of the Enlarged Bureau has expressed the view that the abovementioned Working Group should be

reconvened at the forty-eighth session of the Commission for purposes of continuing its work. The Commission, it felt, would then be in a position to submit to the General Assembly various options as to the form which the outcome of its work on the topic should take.

On the question of the Law and Practice Relating to Reservations to Treaties, the Commission after due deliberation of the preliminary report of the Special Rapporteur, Mr. Alain Pellet, considered the recommendation of the Planning Group of the Enlarged Bureau that the Commission's work could cover a period of five years from 1995 and lead to a guide to practice, containing model clauses rather than a set of draft articles. The Planning Group has recommended that the Commission make all possible progress at its next session on the Law and Practice relating to Reservations to Treaties and the topic of State Succession and its Impact on the Nationality of Natural and Legal Persons.

### **Long-Term Programme of Work of the Commission**

The Commission, at its forty-seventh session, mindful that some of the topics on its agenda had reached an advanced stage of work re-established the Long-Term Working Group set up in 1993 to consider the programme of work for the next five-year term of office. The Working Group reviewed a number of topics and recommended that the following two topics viz. (i) Diplomatic Protection; and (ii) International Global Environmental Law be taken up by the Commission.

#### **(i) Diplomatic Protection**

With regard to the question of Diplomatic Protection it has been argued that work on this topic would complement the Commission's work on State Responsibility and would be of interest to all the member States. The work in the Commission on this subject could cover the content and scope of the rule of exhaustion of local remedies, the rule of nationality of claims as applied to both natural and juristic persons, including its relation to so-called "functional" protection, and problems of Stateless persons and dual nationals; and it could consider the effect of dispute settlement clauses on domestic remedies and on the exercise of diplomatic protection.

#### **(ii) International Global Environmental Law**

It may be recalled that the Commission at its forty-fifth session in 1993 had *inter alia* considered the inclusion of such topics as "Global Commons" and "Rights and Duties of States for the Protection of the Environment". The Working Group had also favourably viewed the suggestion that the question of shared or transboundary resources also had environmental implications. The Working Group believed some preliminary

work would be needed before the precise topic, and its content, could be determined, and for this reason, as regards this topic, the Working Group had recommended that more preparatory work should be undertaken.

In view of the above, the Planning Group recommended the inclusion of the item 'International Global Environmental Law' in the work programme of the Commission. However, as the subject is substantive, wide and complex, it desires to be authorized, as a first step, to conduct an extensive feasibility study on the topic entitled provisionally as 'Rights and Duties of States for the Protection of the Environment', so that it would be in a position, after such a study, to recommend to the General Assembly the exact scope and content of the future topic. The feasibility study would encompass general principles, substantive and procedural rules, and measures for the implementation of obligations for the protection of the global environment. The Commission intends to focus more on the field of duties *erga omnes* where the real complainant of deterioration of the environment is the international community at large rather than individual States, and thus the study would include the topic of 'Global Commons' as well. It would also cover the environmental aspect of the utilization of shared (or transboundary) resources'. The Commission would avoid duplication of the work being performed by it under the topic of "international liability for injurious consequences arising out of acts not prohibited by international law".

### Thirty-fifth Session : Discussions

The Representative of the *International Law Commission* (Dr. Kamil Idris) introduced the Report of the Commission on the work done by it at its forty-seventh session and stated that amongst the five subjects on the Commission's agenda, two had been before it for many years on which the Commission hoped to submit its draft provisions to the General Assembly in 1996.

One of these two subjects was that of the Draft Code of Crimes against the Peace and Security of Mankind. The Commission was now in the course of a second and final reading of the draft articles and reviewing of their provisions in the light of the comments received from Governments as well as the recommendations made by the Commission's Special Rapporteur on the subject in the light of governmental observations. He said that if the Commission could complete its work on the Draft Code of Crimes and if such a Code were adopted by the General Assembly and commended to Governments, a very significant 'beginning' would have been made towards the gradual codification, in one substantive code, of a substantive international law on international crimes.

The other item that had been on the agenda of the Commission was that of State Responsibility. The rules of State Responsibility, in the Draft Articles being prepared by the Commission, were intended to apply subject to the requirements of any special international obligations that might be applicable to the States concerned in a particular case. The Draft Articles would be in three principal parts:

Part One addressed the matter of the origin of the international responsibility of a State—namely the fact that international responsibility of a State would arise in the event of a breach by a State of an international obligation.

Part Two addressed the matter of the form and content of the legal consequences that would ensue in the event of a breach by a State of an international obligation.

Part Three, which to a large extent, was completed by the Commission last year in first provisional reading, addressed the matter of the settlement of disputes that might arise in the interpretation or application of the Draft Articles on State Responsibility.

Another subject on the agenda of the Commission for a number of years was that of "International Liability". He said that the Commission considered the subject of "International Liability" as one dealing with physical transboundary harm occurring in one State (the affected State) as a result of an activity, not prohibited by international law, in another State (the State of Origin). If the activity in question was prohibited by general public international law or prohibited by treaty between the two States—then the conduct of the activity in the State of origin would be a breach of the prohibition; and because it was in breach of the prohibition, the rules of State Responsibility would apply and require provision of compensation under the rules of State Responsibility by the State of origin, for the physical transboundary harm caused in the affected State.

On the question of Reservations to Treaties, he stated that the Commission noted that in the view of legal writers there were in the relevant provisions of the 1969 Vienna Convention on the Law of Treaties a number of remaining uncertainties. The Commission was of the view, however, that it would be helpful if the Commission were to develop a "guide" in the matter of reservations—which could take the form of draft articles accompanied by commentaries—which could serve as guidelines for the practice of States and international organisations in respect of reservations to multilateral treaties. Such guidelines might also provide appropriate model clauses.

On the subject of the "Effects of State Succession on the Nationality of Natural and Legal Persons"—there was, on the basis of a preliminary report prepared by the Commission's Special Rapporteur on the subject, preliminary consideration of the subject last year in the Commission with a view to considering appropriate approaches, issues that could arise, the scope and nature of the Commission's future work etc. The fact that changes in a State, because of occurrences of the nature of what is known in public international law as "State Succession", could seriously affect the nationality of natural and legal persons, in severe and tragic ways in the case of natural persons in particular, was made clear in the discussions.

The delegate of the *Islamic Republic of Iran* pointed out that the Commission had considered the 13th report of the Special Rapporteur on the Draft Code of Crimes against the Peace and Security of Mankind, based on replies received from 10 States. The Report had made 2 fundamental changes in the Draft Code that had been adopted on first reading in 1991. The number of crimes incorporated in the draft had been reduced from 12 to 6 and the Special Rapporteur had proposed a revised definition of aggression. In his view it appeared to be irrational to change the Draft Code drastically on the basis of replies from a limited number of States. He expressed doubts about reducing the number of crimes from 12 to 6 and was of the view that the definition of aggression as adopted by General Assembly Resolution 3314 while accommodating the list of cases which represents a broad agreement among States should be adopted for the purposes of the Code. On the question of State Responsibility, he expressed the view that Part III of the topic as proposed by the Special Rapporteur establishes new settlement obligations for State parties in relation to disputes that might arise after resorting to counter measures. Due to inter-relationship and possible interaction between dispute settlement provisions contained in Part II and Part III of the draft articles the discrepancy between these provisions needs to be rectified.

With regard to the 'Law and Practice Relating to Reservations to Treaties' he observed that the right to make reservations and becoming party to multilateral treaties subject to such reservations was the exercise of the sovereign right enjoyed by every State under International Law. He pointed out that the main elements of this regime were codified by the 1969 Convention on the Law of the Treaties. In his view, permitting reservations to multilateral treaties was the price that the international community had willingly accepted to pay for achieving wider participation. He emphasized in this regard that the Vienna Convention regime had been strengthened by the Convention on the Succession of States in respect of Treaties, 1978 and the Vienna Convention on the Law of Treaties Concluded between

States and International Organizations or between International Organizations, 1986 and that it would be irrational to expect governments not to insist on the protection of their national interests in the form of reservations. As regards the question of reservations to human rights treaties, his delegation was of the view that the ILC had rightly decided to refuse exceptional treatment for reservations to certain kinds of treaties, and did not subscribe to the proposal of special treatment to certain types of treaties.

The Hon'ble Minister of Justice of *Sudan* expressed the view that the ILC was currently dealing with some very sensitive topics viz. State Responsibility, Draft Code of Crimes Against the Peace and Security of Mankind and International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law. Referring to the provisions of Article 23 of the Statute of the proposed International Criminal Court, related to the role of the Security Council in the determination of an act of aggression, as formulated by the International Law Commission (ILC), he expressed the hope that the ILC would be objective in its approach and take into account the political environment within the United Nations and especially the Security Council so as to ensure that international law is not politicised.

The Delegate of *India* observed that the item "Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law" was marked by the absence of clearly applicable principles and that the European law and practice on the subject was without a sufficient basis. On the concept of crime in State Responsibility, he pointed out the requirement of a prior determination of a prima facie case followed by a judicial determination of the commission of the crime and its attribution needed consideration. He stated that there was need for special consequences to be attached over and above the consequences otherwise attachable.

Reservation to Treaties, the Indian Delegate said, was a means to allow widest subscription to a legal regime allowing variation in the implementation of the basic objectives and purposes of the treaty within the framework and context relevant to the State concerned.

The topic on State Succession should deal with its implications on the law of nationality as agreed, and not deal with the latter topic as a *de nova* exercise with State succession aspects as incidental to such a treatment.

With respect to State responsibility, the Delegate of *Ghana* noted with satisfaction the efforts exerted by the ILC to include clauses which would dissuade States from committing crimes and at the same time uphold their territorial dignity and sovereignty. He envisaged a situation where the counter-

measures carefully worked out could become academic in a scenario where a small and weak State was wronged by a powerful State. In such a situation much would depend on the impartiality and the commitment of the international community to uphold international law. The role earmarked for the UN Security Council, the General Assembly and the International Court of Justice could be of some assistance in this respect. The apprehensions *vis-a-vis* the role of the Security Council, in his view, was tied-up with the larger question of the Council's reform to make it more representative of present day realities. He shared the view that precision of definition was extremely essential if any individual or State was to be prosecuted under any law. Expressing concern, that some of the pre-occupations of developing countries were easily dropped from the list, he said that to give a definite and precise definition to internationally recognized crimes such as apartheid, colonial domination and other forms of alien domination and incorporate them into the Code should be a challenge which the international community should face squarely and not run away from.

The Delegate of *Qatar* said that he could not concur with the definition of the term "significant harm" as proposed by the Special Rapporteur in the draft articles on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law.

The Delegate of *Japan* pointed out that the Commission intended to complete, by its session in 1996, the second reading of the draft articles of the 'Code of Crimes against the Peace and Security of Mankind' and the first reading of the draft articles on "State Responsibility", two of the important topics long pending in the Commission. The Commission had also made recommendations to include the topic of "Diplomatic Protection" in its agenda as well as to begin a "feasibility study" on a topic concerning the law of the environment as its long-term programme of work. The General Assembly had failed last year to endorse these recommendations by the Commission and had postponed the decision until its next session, while in the meantime requesting the Governments to submit their comments on these recommendations by June this year. Representing regret over inaction by the General Assembly he expressed concern that it would result in the lack of topics to be dealt with by the Commission during the first part of the next quinquennium which would start next year. In the opinion of his delegation, the Commission must be provided with a full agenda. In particular, the proposed feasibility study on environmental law was of great importance. While there had been significant progressive development of international law in the various sectors in the field of environment since the 1972 Stockholm Declaration, however, there was a need for an integrated approach to the prevention of continuing deterioration of the global

environment. An extensive feasibility study on environmental law would contribute to clarify the exact scope and content of the future topic for the Commission and would also assist in defining the scope of the work on international liability. His delegation had submitted a draft decision which *inter alia* requested the Secretary-General to convey to the ILC and UN General Assembly its strong wish that the ILC initiate a study on a topic concerning the law of environment.

The Delegate of *Cyprus* in a statement submitted to the Secretariat with the request that it be read into the records of the 35th Session of the AALCC stated that her delegation supported the retention of the definition of aggression in the Draft Code of Crimes against the Peace and Security of Mankind. It was further stated that the third of the crimes proposed for inclusion in the Code, now comes under the heading "crimes against humanity" and includes some minor modifications in response to comments of governments and further reference to jurisprudence. Her delegation was not convinced that the change in the title was necessary and the reference to the mass element was intended to indicate the gravity of the offence. The Commission and its Drafting Committee might wish to look further into this aspect, she stated. The inclusion of "deportation and forcible transfer of population", included in the earlier as well as the present version, should definitely be retained. She proposed that this draft article be amended to encompass "the institutionalized racial or ethnic discrimination" as a consequential change because of the omission of the crime of apartheid. Consideration should also be given for inclusion of an appropriate reference to the practice of systematic disappearance of persons.

Referring to the fourth crime proposed for inclusion in the Code on the basis of the Special Rapporteur's conclusion that it was difficult in practice to establish an exact dividing line between the "grave breaches" defined in the 1949 Geneva Conventions and Additional Protocol I and the "exceptionally grave breaches" stipulated in the draft adopted on first reading, she pointed out that this conclusion of the Special Rapporteur raised some difficult issues for the Commission. In the course of the debate on the ILC's report in the Sixth Committee in the context of draft Article 20 (jurisdiction of the International Criminal Court), a strong preference was expressed in favour of the formulation as it appears in draft articles 22 and 21 respectively, of the draft Code as adopted in 1991. In particular, para (b) of article 22 of the draft Code on "the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory", which was adopted with considerable support in the Commission in 1991 and was not objected to, either in the Sixth Committee or in the comments of States, should be retained. "Ethnic

cleansing” was a non-legal term but what it meant, whether in the context of events in former Yugoslavia or elsewhere every one knows. In her opinion, the reference regarding the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory, as incorporated in draft article 22 of the 1991 text, had a solid foundation and should be included in the proposed new text in some appropriate way. Although the new text proposed did make a reference to the “unlawful deportation or transfer or unlawful confinement of a civilian” and to the “seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” and to the “plunder of public or private property”, which went a certain way in the same direction, her delegation strongly urged that the wording on the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory as adopted on first reading, be appropriately retained in the final text.

**(ii) Decision of the Thirty-Fifth Session (1996)**  
**Agenda item : Work of the International Law Commission**

(Adopted on 8.3.96)

*The Asian-African Legal Consultative Committee at its Thirty-Fifth Session*

*Mindful* of the role of the International Law Commission in the fulfilment of the objectives of the United Nations Decade of International Law;

*Having taken note* with appreciation of the report of the Secretary-General on the work of the International Law Commission at its Forty-seventh Session (Doc. No. AALCC/XXXV/Manila/96/1);

*Having heard* the comprehensive statement of the Representative of the International Law Commission;

1. *Expresses* its appreciation to the International Law Commission on the achievements of its Forty-seventh Session;
2. *Affirms* the significance of the progressive development of International Law and its codification;
3. *Acknowledges and appreciates* the contributions of the Representative of the International Law Commission, Dr. K. Idris and thanks him for his lucid and succinct report;
4. *Expresses* its appreciation to the Secretary-General for his report on the work of the International Law Commission at its Forty-Seventh Session;