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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-EIGHTH SESSION

Letter dated 5 June 1986 from the Acting Permanent Representative of the Netherlands to the United Nations addressed to the Secretary-General

I have the honour to send you herewith the comments of the Netherlands Government on the report of the International Law Commission on the work of its thirty-seventh session (see annex).

In doing so I recall that the Netherlands delegate to the Sixth Committee stated during last year's General Assembly that the Netherlands Government was still studying said report and that it might at a later stage submit some comments in writing, thereby possibly at the same time initiating a working method that might help shorten and streamline the time-consuming debate in the Sixth Committee on the Commission's work.

I should be grateful if you would have this letter and its annex transmitted to the International Law Commission and also distributed as an official document of the General Assembly under item 133 of the preliminary list.

(Signed) Jaap RAMAKER
Minister Plenipotentiary
Acting Permanent Representative

* A/41/50/Rev.1.

ANNEX

Comments of the Netherlands Government on the report of the International Law Commission on the work of its thirty-seventh session (A/40/40)

I. Draft Code of Offences against the peace and security of mankind

1. In the opinion of the Netherlands Government, the main purpose of establishing a Code is to strengthen international law by providing for legal consequences of internationally wrongful acts beyond the legal relationships between States as such. Thus, whatever may be the special legal consequences between States of the category of internationally wrongful acts qualified as "crimes" in article 19 of the draft articles on State responsibility, there is room for imposing criminal responsibility on individuals for acts which, if imputable to the State, would give rise to State responsibility under international law.

2. Two consequences follow from this approach. The first is, that the Code would be applicable to all individuals, whether or not their conduct is attributable to a State under the rules of State responsibility. Even if it is difficult to imagine that persons or groups of persons, not acting "on behalf of a State" are in fact in a position, without active or passive support of a State, to commit such acts as are covered by the Code, such conduct is not in fact a priori excluded, and, in any case, the protection of the peace and security of mankind requires an equal treatment of those individuals which do, and those which do not act "on behalf of a State".

3. The second consequence of this approach is dictated by considerations as to how States act. Indeed States can only act through individual human beings, and often the number of persons involved is quite large. Thus, e.g., "aggression" requires an army, composed of many individual human beings. It is a priori excluded to hold them all criminally responsible for the act of "aggression".

4. The result of the foregoing considerations is that great care should be given to determine the "real culprits", whether those giving the command, or those executing those commands. In dealing with criminal responsibility of individuals one simply cannot escape the moral question of who deserves punishment.

5. In this connection the "general principles" are of paramount importance. It is dangerous to derive from conduct of States, generally considered as "criminal", a criminal responsibility of individuals, without taking into account the amount of moral choice left, under the circumstances, to the individual concerned, nor, for that matter, to leave out of account the passage of time, and the change of appreciation of facts which often accompanies such passage.

6. It would, therefore, seem advisable to elaborate those "general principles", including the mutual assistance required between States for the apprehension, trial and punishment of the responsible individuals, at the earliest possible moment.

7. Furthermore, it is submitted that the distinction between State conduct and individual conduct, the distinction between individuals giving command in the name of the State and individuals executing such commands, as well as the distinction between individuals and States, suffering from the execution of such commands, should be kept in mind also in defining the various offences. Thus, to give just one example, one cannot normally expect that individuals, who are in a position in which they are supposed to execute commands, are aware of the sometimes fine distinction between what is and what is not an internationally wrongful act of one State as against another State, unless of course the conduct is such as directly involving the lives of other individuals, in which case the question of the possibility of a "moral choice" comes up (compare Principle IV of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal, and article 4 of the 1954 Draft Code of Offences). In this respect the various offences clearly do not stand on the same footing.

8. Finally, it is submitted that the establishment of an international court of criminal jurisdiction is an integral element of the viability and effectiveness of a Code of Offences against the peace and security of mankind.

II. Jurisdictional immunities of States and their property

9. The Netherlands Government consider it unfortunate that the I.L.C. during its 37th session could, as a consequence of the time spent on another, clearly less important, topic (diplomatic courier and bag), only adopt two articles (19 and 20) on the present topic. But at least the Special Rapporteur submitted draft articles 21 to 28 and also, in the light of the discussions in the Commission, new drafts for articles 21 to 24. Some of those articles raise the general question of the "force" intended to be given to the set of draft articles on jurisdictional immunities of States and their property.

10. At first sight one would be inclined to think that - the whole topic being based on the principle of par in parem non habet imperium - in case the authorities of State A would not grant to State B the immunities provided for in the articles, State A would in principle commit an internationally wrongful act in respect of State B, entailing its responsibility in the sense of the draft articles on State responsibility.

11. In this construction there would be room for a counterpart, as e.g. provided for in the European Convention on State Immunity. Under that Convention, in cases where the foreign State (party to the Convention) cannot claim immunity from jurisdiction of the courts, but can still claim immunity of its property from execution the obligation under domestic law to conform to the judgment of the foreign court is (as it were through "inverse direct effect") in principle transformed into an obligation under international law (i.e. under the Convention) of the State to give effect to the judgement (article 20 of the Convention; see also the Additional Protocol).

12. Actually, the European Convention, in so doing, underlines the mutual character of the principle of par in parem non habet imperium. Where on the one hand a State cannot exercise "imperium" over another State, the other State cannot, as it were, as a sovereign enter the jurisdiction of the first State by creating legal relationships with private individuals under the jurisdiction of that State. The mutual character of the principle also appears in the fact that on the side of both States "consent" of the other State may alter one and/or the other of the mutual obligations under international law in this field.

13. Clearly, the Special Rapporteur has not in mind to propose any system of "force" like the one embodied in the European Convention and its Additional Protocol. But that in itself does not exclude an intended force of the articles as indicated in para.10 supra. In this connection it should also be recalled that article 29(1) of Part One of the draft articles on State responsibility envisages "consent" as a circumstance precluding wrongfulness.

14. But article 28, as proposed by the Special Rapporteur on State immunity, and - as regards consent - articles 23 and 24, seem to be based on an entirely different concept of "force" of the rules on (limited) State immunity.

15. Draft article 24, as originally proposed by the Special Rapporteur, seemed to envisage a force of that article, ak to ius cogens under article 29(2) of Part One of the draft articles on State responsibility. Even the new version (as proposed in note 32 in para. 43 of the relevant Chapter of the I.L.C. Report) requires "consent" in the qualified form of "expressly and specifically agreed by the State concerned".

16. On the other hand, draft article 28 (as proposed by the Special Rapporteur in his seventh report) seems to give to the articles of the draft rather the "force" of comitas gentium or "soft law" in as much as - apart from modification through an agreement between the States concerned - it admits "unilateral" deviation from the rules (in both the direction of more, and of less immunities and privileges) on the basis of "reciprocity" (including the reference to "normal practice of the other State").

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17. Now, in theory, there is nothing to be said against the creation of such a system of limited force of the articles on State immunity. It should be noted that "reciprocity" here is not a matter of "countermeasure" against an internationally wrongful act of the other State, if only because it also applies to extension of State immunity beyond the limits, traced by the draft articles But the point is that the proposed article 28 reflects on the whole legal meaning of the exercise to codify rules on State immunity.

18. In practice there is even much to be said for a system of "force" as envisaged in draft article 28. The Government of the Netherlands, through its representative in the Sixth Committee, have on previous occasions already voiced some doubts as to the possibility of getting general agreement on a world-wide scale between States on a sharp and complete delimitation between cases of immunity and cases of non-immunity. It would seem more likely that a "grey zone" would persist (as indeed even the regional European Convention envisages; see article 24) in which some States would accept immunity of foreign States, and others would not.

19. Under those circumstances an article along the lines of article 28 might be a solution, provided however that a "hard core" of immunities would be accepted by all (participating) States (as is the case under article 24(1), in fine of the European Convention).

20. On the other hand, none of the articles should be of a ius cogens character, and the full range of deviation by consent should be preserved.

21. The mere fact that a State does not formally object to another State entering into a legal relationship with (private) persons under the jurisdiction of the former State can obviously not be considered as a consent to let immunities and privileges be invoked. Something more is required, as is rightly provided for in the proposed draft article 28. In this connection the special situation of diplomatic immunities comes to mind, as well as the special treatment given under the present draft articles (and in the European Convention) to State-to-State transactions, governed by domestic law.

The Hague, 1 May 1986
