KBMN 32 /98

The Embassy of Malaysia presents its complements to the International Court of Justice and, with reference to the former's Note Verbale No. KBMN 28/98 dated 23 October 1998 in respect of the Order of the International Court of Justice dated 10 August 1998 in connection with the request from the United Nations Economic and Social Council for an Advisory Opinion from the International Court of Justice regarding the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, has the honour to enclose herewith the following documents:

1. Original copy of the letter dated 3 November 1998 from the Solicitor General of Malaysia
2. Two (2) original texts of the Written Comments
3. Two (2) original texts of Annexes Appended to the Written Comments

The Embassy of Malaysia avails itself of this opportunity to renew to the International Court of Justice the assurances of its highest consideration.

The Hague

5 November, 1998

EMBASSY OF MALAYSIA
THE HAGUE

JABATAN PEGUAM NEGARA, MALAYSIA,
(ATTORNEY-GENERAL'S CHAMBERS, MALAYSIA),
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Ruj. Tuan:
Your Ref:

Ruj. Kami:
Our Ref:

Tarikh 3 November 1998
Date:

The Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
THE NETHERLANDS

Sir,

I have the honour to refer to the Order of the Acting President of the International Court of Justice dated 10 August 1998 in connection with the request for an Advisory Opinion of the International Court of Justice regarding the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, and the Written Statements submitted by the United Nations and several other States parties.

Submitted herewith is the Written Comments of the Government of Malaysia to the Written Statements stated above, in accordance with the aforementioned Order of 10 August 1998.

Accept, Sir, the assurances of my highest consideration.

(Dato' Heliliah Mohd Yusof)
Solicitor-General,
Malaysia

International Court of Justice

Difference Relating to Immunity From Legal Process of A Special Rapporteur of The Commission on Human Rights (Request for Advisory Opinion)

Written Comments of the Government of Malaysia on the Written Submissions of the United Nations and Other States

November 1998

ATTORNEY GENERAL'S CHAMBERS
MALAYSIA

TABLE OF CONTENTS

ANNEXES

I. (a) The Legal Effect of Resolutions and Codes of Conduct
by **Stephen M. Schwebel**

(b) International Law in a Divided World
by **Antonio Cassese**

II. Analysis of Dossiers

III. (a) Commonwealth Law Ministers Meeting Agenda
15 - 19 April 1996, Kuala Lumpur, Malaysia

(b) Agenda Item No. 1(a)
Advancing Commonwealth Fundamental Values
Title of paper: LMM(96)22
Independence, Quality and Status of
Judiciary in Commonwealth Countries

IV. Conviction and Suspicion of Members of the Secretariat on
Account of Subversive Activities
by **Stephen M. Schwebel**

V. The Interpretation of Treaties By Domestic Courts
by **C.H. Schreuer**

VI. (a) Universal Declaration of Human Rights

(b) International Covenant on Civil and Political Rights

VII. Breach of Treaty
by Shabtai Rosenne

A. GENERAL

1. Introduction

1.1 Pursuant to Article 96 paragraph 2 of the Charter of the United Nations and in accordance with the General Assembly resolution 89(I) authorising the Economic and Social Council to request Advisory Opinions of the International Court of Justice, the Economic and Social Council, on 5th August 1998 having considered the Note[1] by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, has considered that a difference has arisen between the United Nations and the Government of Malaysia within the meaning of Section 30 of the General Convention on the Privileges and Immunities of the United Nations (hereinafter referred to as "the General Convention") with respect to the immunity from legal process of Dato' Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers. The request for an Advisory Opinion is on the legal question of the applicability of Article VI Section 22 of the General Convention in the case of Dato' Param Cumaraswamy as Special Rapporteur.

1.2 Since the difference that has arisen concerns the interpretation or application of the General Convention and at this stage no other mode of settlement has been agreed upon, Malaysia did not oppose the submission of the matter to the International Court of Justice in accordance with Section 30 of the General Convention.

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1 E/1998/1994

2. The Importance of the Request for the Advisory Opinion and Section 34

2.1 For the purposes of this Written Reply, the Questions that have been referred to the Court are :

1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations does the Secretary General of the United Nations have the exclusive authority to determine whether words are spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 (b) of the Convention.

2(a) In accordance with Section 34 of the Convention, once the Secretary General has determined that such words were spoken in the course of the performance of a Mission and has decided to maintain or not to waive the immunity form legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its normal courts and,

(b) If failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words.

2.2 In the first opinion requested of the Court on Conditions of Admission of a State to Membership in the United Nations, the Court affirmed that as the principal judicial organ of the United Nations, it could exercise, in regard to the Charter, a multilateral treaty, an interpretative function which falls within the exercise of its judicial powers.[2] Malaysia considers the contribution of the Court important as the action of the Special Rapporteur

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2 ICJ Reports 1947-48 at pg.61

has far reaching effects on the role of experts in the performance of a mission.

B. THE FACTS OF THE CASE

3.1 The circumstances giving rise to the Note of the Secretary-General to assert the immunity and the issue of the certificate of the Foreign Minister which gives rise to the question whether Malaysia is refusing to fulfil a treaty obligation is unusual. This is not a case of the Government of Malaysia instituting an action against the Special Rapporteur for contempt of court or a case on the Special Rapporteur being arrested for criminal defamation. As stated in paragraph 16 of the Written Statement submitted on behalf of the Secretary-General of the United Nations (hereinafter referred to as "the Written Statement of the UN"), as a result of certain remarks in an article published in the November 1995 issue of the British magazine International Commercial Litigation, two commercial companies in Malaysia asserted that the article contained defamatory words that had "brought them into public scandal, odium and contempt".

3.2 Paragraph 17 of the Written Statement of the UN refers *inter alia* to the letter dated 3rd January 1997 addressed "To Whom It May Concern" notifying the competent Malaysian authorities that the United Nations maintained the immunity from legal process of its Special Rapporteur pursuant to Article VI, Section 22(b) of the General Convention to which Malaysia has been a party since 28th October 1957 without making any reservation. The Written Statement of the UN at paragraph 17 further stated that 'The Secretary-General issued a note verbale on 7th March 1997 informing the Government of Malaysia that he had determined that "the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission" and that the Secretary-General "therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto".'.

3.3 With regard to the facts, Malaysia wishes to draw the attention of the Court to the difficulty that the suit filed against the Special Rapporteur has

placed on the shoulders of the Government of Malaysia. The Government could not possibly intercede as it is not the Legal Adviser to the plaintiff. Neither could it intercede on behalf of the Special Rapporteur as he is not the agent of the Government of Malaysia. The action of the Special Rapporteur himself in filing an application with the High Court of Kuala Lumpur for leave to enter a conditional appearance had the effect of "converting" the matter into an interlocutory jurisdictional issue.

3.4 References made in the Written Statement of Malaysia to judicial decisions (at pages 60-61) relate to the question of sovereign or state immunity. Those judicial decisions were mentioned by Mann to reflect that a "State's jurisdiction is limited by rules about sovereign, diplomatic and other immunities".[3] However these cases were also cited to indicate the practice as to the manner in which the limitation is applied and in what manner the jurisdiction is or is not exercised.

3.5 In the matter placed before the Court at this instance, paragraph 17 of the Written Statement of the UN above referred to instances where the office of the Legal Counsel of the United Nations appears to be "instructing" competent Malaysian authorities to promptly advise the Malaysian Courts of the Special Rapporteur's immunity from legal process. Once the proceedings had been instituted the question could not have been for the Government of Malaysia to instruct the High Court in the first instance to strike out the plaintiff's pleadings. The Court's attention is drawn again to the fact that procedure taken for the Government of Malaysia to intervene was through the procedure of filing a certificate in accordance with legislation in force namely section 7(1) of the International Organizations (Privileges and Immunities) Act 1992 (at page 25 of the Written Statement of Malaysia).

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[3] Jurisdiction in International Law by Dr. Michael Akehurst BYIL 1972-1973 at pg. 170

C. QUESTION 1

General

4.1 The first part of the question is considered a legal question since it concerns the scope of Section 22(b) of the General Convention and whether that Section has vested the Secretary-General with not only authority to determine whether certain words were spoken in the course of the performance of a mission for the United Nations within the meaning of that Section but also that authority is to be exercised to the exclusion of the Member which has to accord that immunity.

4.2 The Court's attention is drawn again to paragraph 7.12 of the Written Statement of Malaysia whereby Malaysia has referred to the "right" of the Secretary-General. The motion of exclusivity of determination that is proposed appears to bestow on the Secretary-General an authority as though it becomes a right and for this reason Malaysia does not agree to the motion of "exclusivity" in the authority of the Secretary-General as a result of the interpretation given by the United Nations.

4.3 In examining the provisions of the Charter of the United Nations various descriptions have been given of the office and position of the Secretary-General. In a study relating to the Secretariat, it is stated that the functions of the Secretariat can be distinguished from those of the Secretary-General but "although it is necessary to differentiate between the Secretariat and the SG, they nevertheless form a unit.".[4] The duties of the Secretary-General has been described as being divided into two categories that is administrative duties which overlap with the Secretariat

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[4] The Charter of the United Nations, A Commentary: Edited by B.Simma at pg. 1022

and in addition he performs the so-called political functions (Articles 98 and 99 of the Charter of the United Nations)[5].

4.4 However there are other descriptions. Article 100 of the United Nations Charter refers to the performance of their duties (i.e. the Secretary-General and the staff) and Article 100(2) mentions the requirement of each Member of the United Nations to respect the exclusively international character of the responsibilities of the Secretary-General and the staff. The Commentary on the United Nations Charter states that -

> ***"B. General Meaning and Purpose***
>
> ***The ideal underlying Art. 100 is the creation of a truly international secretariat unencumbered by the influence of member states. But it was fully realized that there would always be a potential conflict of loyalties, especially with the state of a staff member's nationality.***
>
> ***The impartiality of the SG and of staff members does not mean that they may not take a stance on contentious political issues, but simply that they must not be influenced by national interests. This precedence of the international outlook has also found expression in the idea that in serving the United Nations, the international official is at the same time serving the higher interest of his or her own country.".***[6]

4.5 Article 101 of the Charter of the United Nations provides that the staff shall be appointed by the Secretary-General under regulations established

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5 see supra at pg. 1023

6 supra at pg. 1059

by the General Assembly. The Commentary on the United Nations Charter also states -

> ***"2. The organizational powers contained in Art. 101 are a consequence of the dual nature of the Charter. The Charter is not only a treaty under international law by which the UN was established according to the will of the member states in order to achieve a common aim. Apart from the 'functional sector' of the Charter, there is also the 'organizational sector', which constitutes a binding legal system for the organs of the Organization. Whereas the functional sector lays down the substantive tasks allocated to the organization and its staff, the organizational sector contains the rules that determine the organization of the community organ and the rights and duties of the authorities responsible for that organ. The Charter authorizes one particular organ (the GA) to issue staff regulations, thus establishing a foundation on which the Organization can act autonomously and independently of the member states in the staff sector.***
>
> ***3. Art. 101 also establishes a legal basis for secondary law, which lays the foundation for the legal relationship between the Organization and its staff, and which empowers the SG to issue staff rules. Consequently, the SG possesses the authority to act autonomously in the staff sector. Even in cases where the Charter does not provide for the establishment of secondary community law, the SG is entitled to organize his internal administrative affairs himself. This 'organizational power' is vested not only in organization***

itself, but also in the individual organs, within their respective spheres of competence. Provided that this administrative independence is possible within the limits set by the structure and the size of the regular budget, and provided that is has not been restricted by the GA, there is considerable scope for the SG to use discretion in implementing the tasks allocated to the Secretariat within the framework of the general appropriation, in order to facilitate the activities of the organization and its organs. He would be exceeding the limits of his organizational power only if he tried to abolish the original structure intended by the member states or to alter the distribution of the balance of the organs.

4. In view of the fact that considerable legislative and administrative competences have been concentrated in one person, the position of the SG has developed into that of an organ of central importance. This concentration of power can also be seen from the fact that the principle of the separation of powers, which applies in the case of states, is absent in international organizations. In its place, we find a relative balance of powers that can be construed from the individual provisions of the Charter in the context of the secondary law of the organization. It is the task of the GA, as the legislative organ, to ensure that this balance is maintained and that, in view of the SG's competences, there is no possibility of his abusing his authority. In this context, the member states decide upon the limits of the delegation of competences laid down in the Charter, by strategically waiving their own

rights in the interests of organizational purposes and decentralization.".[7]

4.6 At page 15 (paragraph 41) of the Written Statement of the UN, it is also submitted that "the exclusive authority of the Secretary-General is inextricably linked to his role as the chief administrative officer of the Organization, under Article 97 of the Charter of the United Nations, and to Member States' obligation, under Article 100, paragraph 2 of the Charter," and in paragraph 39, the United Nations submitted that the authority granted in Article VI, Section 23 of the General Convention to waive the immunity of any expert on mission is vested exclusively in the Secretary-General and waiver could not be effected instead by the expert on mission himself or the national courts of a Member State party to the General Convention.

4.7 It has never been suggested by Malaysia that waiver could be made by the Special Rapporteur or the Minister of Foreign Affairs of Malaysia. On the contrary, it is stressed that Section 23 addresses not only the right but also the duty to waive. It is noted that the Written Statement of the UN has never addressed this aspect and instead focussed on who has the right to waive.

Acts performed in an official capacity and those performed in private capacity

4.8 Paragraph 42 of the Written Statement of the UN cites that the Secretary-General's statement that the distinction between acts performed in an official capacity and those performed in a private capacity lies at the heart of the concept of functional immunity. While it is not denied that Article 105 could be described as the genesis of the functional immunity and

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7 infra at pg. 1077-1079

privileges, the General Convention details further the scope of the privileges and immunities. However Article 105(2) expressly refers to representatives of the Members of the United Nations and officials of the Organization. The position of experts is really only elaborated in the General Convention. The Court's attention has been drawn to the different categories of persons entitled to privileges and immunities but with the General Convention elaborating different levels of immunities.

4.9 It is noted that throughout the Written Statement of the UN, the classes of persons enjoying immunity are referred as staff member, agent of an organization and expert on mission (paragraph 44). Acts are also characterised as those performed in an "official capacity and performed in a private capacity" (paragraphs 42 and 46). In the case of Reparation for Injuries Suffered in the Services of the United Nations (hereinafter referred to as "the Reparation case") , the International Court of Justice made *inter alia* the following preliminary observations -

> ***"The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions - in short, any person through whom it acts".***[8]

4.10 The individual opinion of Judge Azevedo also explains another aspect of the characterisation of classes of persons.

> ***"The different kinds of duties that are performed in the interest of the Organization are not fully set out in***

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8 ICJ Reports 1949 at pg. 177

Article 100 of the San Francisco Charter, nor yet in Article 105, which mentions both officials and representatives of Members. This insufficiency was expressly recognized in the Convention of February 13th, 1946, on Privileges and Immunities, and in certain arrangements and agreements concluded with States or Specialized Agencies.

These acts show that there exists a third class - that of experts, other than officials, who perform duties on behalf of the Organization.".[9]

4.11 The aspect to be considered is whether the use of the term "official" or "unofficial", "public" or "private" is appropriate to persons whose immunity is accorded in accordance with Article VI, Section 22(b) of the General Convention where it relates to experts "performing missions for the United Nations". In Malaysia's view the loose use of such terms interchangeably suffers from over generalisation of the functions and duties of representatives of Members, the staff of the United Nations, the officials who are experts and experts who are not officials differ and are varied in nature under the General Convention.

4.12 Staff Regulations regulate the relationship between the United Nations and its staff . Although the regulations indicate the internal administration relationship it is the regulations that also reflect the obligations of the staff in the conduct and discharge of the functions. This is reflected in Regulations 1.4, 1.5 and 1.8 which state as follows:

"1.4 Members of the Secretariat shall conduct themselves at all times in a manner befitting their status

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9 supra pg. 193-194

as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and in particular any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.

1.5 Staff members shall exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any person any information known to them by reason of their official position that has not been made public, except in the course of their duties or by authorization of the Secretary-General. Nor shall they at any time use such information to private advantage. These obligations do not cease upon separation from the Secretariat.

1.6 ...

1.7 ...

1.8 The immunities and privileges attached to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. These privileges and immunities furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police

regulations. In any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary-General, with whom alone it rests to decide whether they shall be waived.".[10]

4.13 Experts are not staff and if the performance of their mission is to be gauged by their promotional and publicity of their mandate, and the interpretation rendered by the United Nations and the Republic of Costa Rica in respect of the mandate and Section 22(b) is accepted, it would appear to accord the expert immunity in respect of anything and everything uttered or stated anywhere, everywhere and anytime which in other words means limitless immunity. (This observation is made specifically in relation to paragraphs 11 - 16 of the Written Statement of the UN). It appears that for as long as in form there is publicity, the substance of contents are to be disregarded even if the publicity is done indiscriminately. The publication in the International Commercial Litigation is not the press release of the United Nations which at least represents the official bulletin of the United Nations. The bulletin at least represents fair reporting where a Member State if singled out could still offer explanations.

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10 ST/SGB/1998/8

D. REASONS ADVANCED IN SUPPORT OF THE 'EXCLUSIVE' AUTHORITY TO ASSERT IMMUNITY UNDER SECTION 22(b) (IN THE WRITTEN STATEMENT OF THE UN)

5. (a) **Resolutions of the General Assembly**

5.1 There are several references to the resolutions of the General Assembly, subsequent practice and statements before Committees by the Legal Counsel of the United Nations to reflect the interpretation that has been rendered to various provisions of the General Convention relating to immunities and privileges. Certain views relating to the status of the recommendations of the General Assembly have been referred to and are appended herewith as **Annex I**.

5.2 In the Voting Procedure on Questions Relating To Reports and Petitions Concerning the Territory of South-West Africa case, Judge Lauterpacht said -

> ***"Although decisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations and with limited legal effect in other spheres, it may be said, by way of a broad generalisation, that they are not legally binding upon the Members of the United Nations. In some matters - such as the election of the Secretary-General, election of members of the Economic and Social Council and of some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and approval of the budget and the apportionment of expenses - the full legal effects of the Resolutions of the General Assembly***

are undeniable. But, in general, they are in the nature of recommendations and it is in the nature of recommendations that, although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them..... Now "resolutions" cover two distinct matters: They cover occasionally decisions which have a definite binding effect either in relation to Members of the United Nations or its organs or both, or the United Nations as a whole. But normally they refer to recommendations, properly so called, whose legal effect, although not always altogether absent, is more limited and approaching what, when taken in isolation, appears to be no more than a moral obligation.".[11]

5.3 In that case Judge Lauterpacht was considering the recommendation of the General Assembly in relation to the administration of trust territories and the obligation of the Administering Authority to administer Trust Territories. In the context of the case there was no obligation on the part of the Administering Authority to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure. He went on however to state :

"Recommendations in the sphere of trusteeship have been made by the General Assembly frequently and as a matter of course. To suggest that any such particular recommendation is binding in the sense that there is a legal obligation to put it into effect is to run counter not only to the paramount rule that the General Assembly

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11 ICJ Reports 1955 at pg. 115-116

has no legal power to legislate or bind its Members by way of recommendations, but, for reasons stated, also to cogent considerations of good government and administration.".[12]

5.4 The International Court of Justice, in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons with reference to the series of General Assembly resolutions since 1967 that affirm the illegality of nuclear weapons stated:

"GA resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* ***To establish whether this is true of a given GA resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an*** *opinio juris* ***exists as to its normative character. Or a series of resolutions may show that the gradual evolution of the*** *opinio juris* ***required for the establishment of a new rule.".*** [13]

5.5 Sir Gerald Fitzmaurice[14] had also summarized Judge Lauterpacht's views as follows:

"1. Except where this is specifically provided for in the Charter, or inherent in the nature of the case (e.g.

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12 Supra at pg. 116

13 "Reproduced by P. Malanczuk in "Akehurst's Modern Introduction to International Law" 7th ed., pg.52

14 The Law and Procedure of the International Court of Justice at pg. 715-716

the Assembly gives directions to one of its own subsidiary organs, decides to meet for its next session elsewhere than in New York, decides to set up a new main committee, &c.), Assembly resolutions have no binding force or character for Member States.

2. Resolutions of the Assembly in so far as they request, invite, call for, or even enjoin, action by Member States, are basically in the nature of recommendations, and have no higher legal force. The element of decision in so-called 'decisions' of the Assembly relates to the act of the Assembly in deciding to adopt the resolution or to frame it in a certain way, not to the substantive content of the resolution as being obligatory for Member States.

3. The absence of directly binding character does not deprive Assembly resolutions of all legal effect, or reduce them to the status of mere *vœux* ***or expressions of opinion. Member States, by reason of their membership and of their general duty of co-operation, are bound to give the resolutions of the Assembly*** *serious consideration in good faith,* ***and to examine them*** *with a view to seeing if they can be carried out.* ***The discretion possessed by Member States not to give effect to them is not an unfettered one. It exists, but must not be exercised arbitrarily, and must be employed only for what the State concerned*** *bona fide* ***believes to be good cause, as to which it must be willing, if called upon, to give a reasoned explanation.***

4. In addition, the highest international interest, which Members of the United Nations are under a legal duty at least to take into account, demands that they should give serious consideration to the resolutions of the Assembly, since these constitute an embodiment of the general views and wishes of the world community.

5. Repeated failures or refusals to act in accordance with a series of resolutions addressed to the same State or States, and to the same effect, may have a *cumulative* ***effect in the sense that although creating no higher direct obligation, they may put in issue the good faith of any such State, or deprive it of advantages, such as the benefit of the doubt, which it might otherwise claim to receive, or shift on to its shoulders the burden of proof.".***

5.6 Resolution 36/232 of 18 December 1981 and other Resolutions have been referred to in paragraph 43 of the Written Statement of the UN. In paragraph 43, it is concluded that "The General Assembly has thus confirmed the exclusive authority ...". Resolution 36/232 *inter alia* took note of the Report of the Secretary-General. Paragraph 3(b) of the Report which states that 'the term "staff members" should cover officials, experts on mission, locally recruited employees and in general, all persons performing functions or services for the United Nations system, is over generalised'. The acceptance of such term is either for administrative convenience or political expediency. But it is contrary to the provisions of the General Convention and if there is an intention to facilitate such excessiveness to the extent that the provisions of the General Convention are to be revised then it should be properly done in the framework of concluding a fresh treaty. It is noted however that the term used in the Report is "should".

5.7 The Resolutions referred have certainly repeated certain aspects as follows:

(a) reaffirming the responsibility and the authority and [Dossier 109] recalling that under Article 100 of the Charter each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff;

(b) calling upon the Secretary-General to certain matters including *inter alia* to continue personally to act as the focal point in promoting and ensuring the observance of privileges and immunities of officials;

(c) refers to arrests, detentions and other possible matters relating to the security and proper functioning of officials;

(d) refers to a body of principles for the protection of all persons under any form of detention or imprisonment; and

(e) reiterating the obligation of the staff in the conduct of their duties to observe fully the laws and regulations of Member States.

5.8 Having regard to the varied nature of the contents of the Resolutions, Malaysia is of the view that those resolutions do not reflect an emerging rule. Attached herewith is a general analysis of the various dossier which revealed internal advice of the practices of the United Nations, the contents of the resolution which do not reflect an emerging rule for the varied nature of situation that had been dealt. **(Annex II)**

(b) **Subsequent Practice**

5.9 The principle of subsequent practice and the reference to Articles 31 paragraph 3(b) of the Vienna Convention on the Law of Treaties and the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations has been referred to in the Written Statement of UN (paragraph 45).

5.10 On the point of subsequent practice the Court has opined:

> ***"Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument".***[15]

5.11 The principle is further reviewed by Sir Gerald Fitzmaurice as follows:

> ***"the way in which the parties have actually conducted themselves in relation to the treaty affords legitimate evidence as to its correct interpretation. It is, of course, axiomatic that the conduct in question must have been that of both or all - or, in the case of general multilateral conventions, of the great majority of the parties, and not merely of one. But given that, conduct usually forms a more reliable guide to intention and purpose than anything to be found for instance in the preparatory work of the treaty, simply because it has taken concrete and active, and not merely verbal or paper, form. The uncertainties that so frequently attend on the latter case***

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15 ICJ Reports 1950 at pg. 135

are more likely to be absent in the former, for in the course of preparatory work the parties merely state what their intentions are: in their practice subsequent to the conclusion of the treaty they act upon them. In any event they act, and a *consistent* ***practice must come very near to being conclusive as to how the treaty should be interpreted.[16]".***

5.12 It has been elaborated further that the principle of subsequent practice -

"like the principle of effectiveness, be regarded as being, in general, subordinate to the principle of the textual and natural meaning - that is to say, *prima facie,* ***it may serve to confirm that meaning if clear, or may afford an extraneous means of elucidating it, if obscure or ambiguous; but not to change or add to it if no obscurity or ambiguity exits and the sense is clear according to the natural and ordinary meaning. Subsequent practice is (on this basis) primarily one of the extraneous means (like recourse to*** *travaux prèparatoires,* ***or consideration of the circumstances existing previous to or when the treaty was drawn up) of interpreting a text not clear in itself; and, considered as such, it is chiefly its superior*** *reliability* ***as an indication of the real meaning and effect of a text that justifies its treatment as an independent major principle of interpretation. Yet it is difficult to deny that the meaning of a treaty, or of some part of it (particularly in the case of certain kinds of treaties and conventions), may undergo a process of change or development in the***

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16 Sir Gerald Fitzmaurice op. cit. Note 13 at pg. 357

course of time. Where this occurs, it is the practice of the parties in relation to the treaty that effects, and indeed is, that change or development. In that sense there is no doubt about the standing of the principle, as an independent principle, which, in a proper case, it may be not only legitimate but necessary to make use of; for what is here in question is not so much the meaning of an existing text, as a revision of it, but a revision brought about by practice or conduct, rather than effected by and recorded in writing. That agreement can result from conduct, in the international as well as in the domestic field, admits of little doubt (as to various aspects of this, see below, Division B, § 1, subsections (1)(a) and (2)(b). As regards an agreed revision or amendment of treaty terms, if, as already stated, it is, in the language of the Court, the duty of a tribunal 'to interpret treaties, not to revise them', it is equally the duty of a tribunal to interpret them as revised, and to give effect to any revision arrived at by the parties. In the last analysis, it seems to be a matter chiefly of the nature and weight of the evidence required to establish the existence of such a revision, whether it results from writing or from practice.[17]".

5.13 If the rule of subsequent practice is applied on the basis of conduct of Member States, the rule of conduct is not a legal rule until it has been recognised by Member States. References are made in several dossiers cited in the Written Statement of the UN to reflect statements or resolutions intending to show how different practice has been applied. It also shows that while the United Nations advise to assert its practice in

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17 Sir Gerald Fitzmaurice op. cit. Note 13 at pg. 358-359

order to reflect its understanding of the provisions of the Convention, correspondingly, the continued mention of states said to be not observing their obligation also seems to point to the non-establishment of a legal rule especially with regard to the question of exclusive determination by the Secretary-General.

5.14 Malaysia is not a signatory to the Vienna Convention on the Law of Treaties between States and International Organization or between International Organizations 1986. In addition, it is also relevant to recall Article 4 of the Vienna Convention on the Law of Treaties on non-retroactivity of the Convention without prejudice to the application of rules set forth in the Convention to which treaties would be subject under international law. The status of the Convention is such that only some of its provisions attest to existing customary law or which have given rise to rules belonging to the corpus of general law. Article 31, paragraph 3(b) of both Conventions afford a rule of construction with regards to subsequent practices relied upon by the United Nations as cited in the dossiers to the Written Statement of the UN. Malaysia's conclusion on their effect are as stated above in para 5.13.

(c) **Waiver of Immunity**

5.15 The existence of a waiver of immunity indicates that the immunity is qualified. At paragraph 50 of the Written Statement of the UN it is stated that "in the present case, the Secretary-General at no point waived, or for that matter was ever requested to waive, the immunity from legal process of the Special Rapporteur". Two observations could arise from this statement, namely at which point should the waiver be made if the Secretary-General is authorised to make an exclusive determination. The right and duty of the Secretary-General have not been sufficiently elaborated and have been instead limited to the difficulty, uncertainty and ambiguity of categorising acts as official, non official, public or private

depending on the categories of persons in respect of whom the immunity is claimed. The second aspect is through the request for waiver. In this particular instance it was not for Malaysia to request for that waiver since the Special Rapporteur concerned is not an agent nor a diplomatic representative of Malaysia. Is it then for the party to request for the waiver or is the municipal court expected to request for the waiver? Again, it is necessary to the recall that entering a conditional appearance in accordance with the rule of the High Court in Malaysia does not constitute waiver of immunity. There was never an indication of a possibility of waiver since it was asserted from the outset that the determination of the question of immunity was exclusive in nature.

5.16 On the right and duty of a waiver of immunity the following comments are also referred to:

> **"Immunity is given to protect international officials from prosecution but it does not exempt them from local law. Apart from their legal relationship with the organization, international officials are bound to the rules regulating society in the same way as all other citizens. The impossibility of bringing them before a national court may impede the application of the law and should therefore be restricted as much as possible. Immunity should be invoked only when the interests of the organization so require. If an international civil servant violates the law by an act for which he enjoys immunity, the state in question may ask for a waiver of immunity. This will often be granted. It is in the interest of the secretariat that violations of local laws be adjudicated**

whenever this would not prejudice the functioning of the organization.".[18]

5.17 With regard to the opinion that has to be formed by the Secretary-General on the question of waiver of immunity of persons on mission for the United Nations, the question of exercising it without prejudice to the interests of the United Nations should also take into account the international responsibility of such persons in performing these tasks. Such persons are not above the law. In this case it could have been drawn to the attention of the Secretary-General that not to exercise waiver has an implication that would involve possible violation of the following: namely, Articles 7 and 8 of the Universal Declaration of Human Rights and Articles 2 and 3 of the International Covenant on Civil and Political Rights.

(d) **Section 22(b) - Performance of a Mission;**
Section 23 - Immunities granted in the interests of the United Nations and not for personal benefit

5.18 In considering the above matters *Mazilu's case* needs to be revisited. The Written Statement of Malaysia at page 43 had referred to the opinion of **Judge Oda** where he stated, *inter alia*, that the Court had observed in general terms "that Rapporteurs and Special Rapporteurs enjoy in accordance with Section 22 the privileges and immunities necessary for the exercise of their functions and in particular for the establishment of any context which may be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission.". The interpretation given by the Government of the Republic of Costa Rica puts any Special Rapporteur in an unassailable position.

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[18] H.G. Schermers & Blokker, International Institutional Law, Unity Within Diversity at pg. 360

5.19 The Court in Mazilu's case has stated that as a necessary part of the exercise of their functions, the Special Rapporteur prepares drafts and presents reports to the Sub-Commission. The term "performance of a mission" has been so broad that there are aspects of its performance which elucidates the uncertainties of the application of the terms "official" or "unofficial", "private or public" and as has been mentioned earlier the terms appear to have been assimilated inter changeable in the characterization of functions.

5.20 There are certain aspects that could arise in the performance of a mission. On the municipal level a State is responsible for the conduct of its officials though while done for a public purpose may yet make a State liable in the sense of a vicarious liability. Similarly, if an official in the course of his public duty conducts himself in a manner which shows that he has benefited from it personally, as in charges of corruption, the use of his public office for a personal benefit would render him liable and in general would in fact be a breach of his code of office rendering liable to disciplinary proceedings as is the case in Malaysia.

5.21 The object of granting immunity under section 22(b) is that it is granted to the expert in the interests of the United Nations and not for the personal benefit of the individuals (that is, the experts). At paragraph 7.15 Malaysia had stated that the purpose of the Special Rapporteur's mission has to have a nexus to be established with his mandate and the question here is who is to determine and how is it to be determined. In the nature of reporting it is not denied that it would include words spoken or written.

5.22 Paragraph 55 (page 21 of the Written Statement of the UN) contains the following:

> **"In the absence of complete independence, human right experts and Special Rapporteurs would hesitate to speak out against and report violations of international human rights standards. For example, in his third report the Special Rapporteur indicated that, in the light of the civil suits pending against him in the Malaysian Courts, he had decided to postpone reporting to the Commission on Human Rights on his findings on the initial complaints about the Malaysian judiciary referred to in his second report. National adjudication would inevitably frustrate and, if allowed to proliferate, it would potentially endanger the entire human rights mechanism of the United Nations system. (Dossier No. 11, paragraph 134).".**

5.23 The above is referred to illustrate a point in relation to the performance of the mission. It is very strange that while the proceedings are being filed against the Special Rapporteur in its interlocutory stage, the Rapporteur should deny himself his privilege of putting before the body to which he would make reports, materials which are supposed to be relevant to the performance of his mission. In a sense submitting reports to organ of the United Nations which has granted him the mandate would be proper, and the official publication that follow therefrom would be the accomplishment of the various tasks that have been mandated to him. Preparing reports and putting it up before a forum in an international organization is not unusual as in the forum of the Commonwealth Law Ministers. An item has also been identified in relation to the independence of the judiciary in the

context of the Commonwealth Secretariat in recognizing growing concern relating to the practice of States. (**Annex III**)

5.24 The publication of the feature article which has resulted in civil proceedings being instituted against the Special Rapporteur is illustrative of the fact that such modes of publicising materials to be compiled for reports may not necessarily be in the interests of the United Nations. The feature article taken out of context of the United Nations reports may become misrepresentations or misconstrued by members of the public. But it is hoped that the mechanism established by the United Nations does not become a "cloak and dagger situation to advance personal interests". Misuse of mandate has already been indicated in Dossier No. 104.

5.25 The circumstances under which a Special Rapporteur makes public his position as Special Rapporteur and his conduct could be appraised to ascertain whether at the time the words were uttered they were for the performance of his mission. Simply put are words which give States "bad publicity" or put persons to mistrust a judicial system part of the objects and purposes of the performance of the mandate.

5.26 The Special Rapporteur is a member of the legal profession in Malaysia who is supposedly knowledgeable and would be capable of making his evaluation in keeping with the codes of ethics of his profession. Being a member of the legal profession he must be taken to have been made aware of the "Basic Principles on the Roles of Lawyers" as well as the "Basic Principles on the Independence of the Judiciary". The feature article identified past and present members of the Malaysian Bar Council (that is the Malaysian association of practising lawyers), names of judges and politicians. It is not known what effect it has in the minds of the public in the United Kingdom. But to a Malaysian lawyer it bears a semblance of a meeting of members of the Malaysian legal profession "airing their

grievances". The lack of restraint is remarkable unless it is the immunity of the Special Rapporteur which is used as a "cloak".

5.27 This particular case illustrates the difficulty that has been brought about in the generality of the use of the term "official" but it also illustrates that the mechanism of the United Nations reporting system should not be perpetuated for personal interests. It is to the interests of the United Nations too that where the State has to observe the provisions of the General Convention in the sense that it has to accord immunity, it should also be in a position not to be precluded to have an evaluation that the performance of a mission is for the purposes of the United Nations. For this purpose Malaysia would refer to the simple statement in relation to the interpretation of treaties as described at page 51 of **Sir Gerald Fitzmaurice** treatise wherein he stated, **"Powers or functions provided in a treaty for the performance of the parties mutually cannot be applied or utilised for the benefit of one or some of them only, and against other or others, even if it is the default of the latter that has led to those powers or functions if invoked."**.[19] Although it is a subsidiary interpretative finding which needs to be examined with care nevertheless it is a rule which could be considered and to ascertain whether on the facts there are semblances for its application.

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[19] Sir Gerald Fitzmaurice op. cit. Note 14

E. QUESTION OF INTERPRETATION

6.1 At paragraph 9.1 of the Written Statement of Malaysia, reference had been made to the Court's opinion that in interpreting the provisions of a treaty the duty of a tribunal called upon to interpret and apply the provisions of the treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they appear. In paragraph 40 of the Written Statement of the UN reference has been made to the Reparation's case where reference was made to the observations of the Court as follows, that is, "Upon examination of the character of the functions entrusted to the Organization and of the nature of the mission and its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by *necessary intendment* out of the Charter" (italics underlined for emphasis). The Written Statement of the UN then went on to reiterate that pursuant to the General Convention and the Charter, it is for the Secretary-General, on behalf of the Organization, to afford experts on mission the functional protection they are entitled to when they are acting in the course of their performance of their United Nations missions.

6.2 The question before the Court is not just a general question of the interpretation of Article 100 or the general interpretation of Article 105 of the Charter of the United Nations. The advisory opinion sought by the Commission also concerns the effect or the relationship of the provisions of Articles 100 and 105 which are read with Sections 22(b) and 23 of the General Convention.

6.3 The General Convention refers to the right and duty of waiver while what is asked of the Court is whether, in the same provision, there is an authority vested in the Secretary-General to exclusively determine the existence of such immunity to the extent that it becomes conclusive and

that the determination is to prevail. As a general observation it is to be noted that the Reparation's case renders an interpretation which attributes to the Organization the capacity to exercise a measure of functional protection. In the Written Statement of Malaysia reference has been made to the use of the words "the right of the Secretary-General". The Secretary-General's determination manifests a dual nature, one in relation to the Organization and the other in relation to its administrative responsibility. Article 100 of the Charter of the United Nations refers to the exclusively international character of the responsibility of the Secretary-General in the sense that its underlying basis would be that the office of the Secretary-General would be unencumbered by the influence of Member States and that the Secretary-General himself is an international civil servant whose privileges and immunities are accorded on the same level as that of the privileges and immunities of diplomats. The General Convention vests the Secretary-General with certain authority and the question here is whether he has the authority to the extent that it becomes binding and conclusive on a State to accept his determination, and in the case before the Court it is not a determination under any other section but that of Section 22(b) of the General Convention. This therefore requires a specific interpretation to be given to Section 22(b) as the United Nations has inextricably linked it to Malaysia's obligation under the General Convention as a Member State and certain legal consequences will therefore flow therefrom. In the view of Malaysia there appears to be an interpretation given that the position of the Secretary-General in his administrative and in his organizational functions have been diffused into one so as to vest in him an authority to the extent of a right which would appear to preclude a Member State in making a determination under Section 22(b) which is borne out by the Statement of the Republic of Costa Rica (at pages 18 to 20). In the view of Malaysia it is one thing to say that by *necessary intendment* that the United Nations itself, as a juridical personality, has a functional capacity to afford protection to staff, officials or agents in

general, but it is quite another to say that by *necessary intendment*, the United Nations can exceed the provisions of the General Convention. The proposition that is advanced here seems to be that by *necessary intendment* and based on the functional immunity approach, the Secretary-General is now endowed with an executive authority which is to prevail upon the executive authority of Member States in making an exclusive determination, where in certain instances it could be tantamount to a Member State being obliged to accord persons total immunity or absolute immunity as compared to the official immunity.

6.4 The Written Statements of Member States have reflected varying positions. In the view of the Government of the Federal Republic of Germany the Secretary-General has, pursuant to Article VI, Section 22 of the General Convention, a "prerogative" . The Written Statement of Sweden expresses that the Head of the Organization has an exclusive right to determine whether the immunity of an expert shall be waived and it also refers to the right to determine whether an expert is protected by immunity which it says has been solely and exclusively conferred to the Secretary-General a decision being also considered to be conclusive.

6.5 The Statement of the Government of the United Kingdom states that it considers it to be essential that "all due weight is given to such views by the national courts", that is, in reference to a question arising whether or not an individual is entitled to immunity under Section 22 in a particular case, the views expressed by the Secretary-General are also described as crucial. The Statement of the United Kingdom also added that the United Kingdom would not expect a national court to take a different view from the Secretary-General except for "the most compelling reasons".

6.6 The Statement of the United States of America is found in paragraph 22 which includes, *inter alia*, the opinion that the views of the Head of the

Organization should be accorded great deference. It also suggests that when a criteria for deciding immunities are not precisely articulated, as in the case for official acts, the views of the Organization are partly important and persuasive. The Statement went on to describe that the Head of the Organisation may be uniquely qualified but the Statement went on to describe that in the United States legal system while the views of the Secretary-General are not accorded automatic conclusive effects those views are entitled to receive great weight. At page 16 of the Statement it is also stated that where the Secretary-General provides a certification in support of immunity, that may provide grounds for a presumption in favour of immunity rebuttable only if there is powerful contrary evidence.

6.7 In examining this matter it is necessary to address references made to the Reparation's case with regard to the opinion of the Court in interpreting the provisions of Articles 100 and 105. The question is whether such an interpretation could be applied in an analogous manner to construe that since the Secretary-General has a right and duty to waive where it is understood that the right is his alone and not any other organ and not that of a Member, it is therefore to be implied that by *necessary intendment* he is vested also with the authority which is equally conclusive to the extent that it prevails upon Member States to implement that determination in all circumstances.

6.8 Judge Schwebel has expressed that "the breadth of the Court's construction of Article 100 (of the Charter) is instructive"[20]. The Written Statement of Malaysia at page 67 had referred to the futuristic views of Jenks that "the difficulty that, by reason of the right of a national court to assume jurisdiction over private acts without a waiver of immunity, the

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20 Justice in International Law Selected Writings of Judge Stephen M. Schwebel at pg. 260.

determination of the official or private character of a particular act may pass from international to national control therefore remains. While cases in which there is any room for controversy in the matter may be rare, they may, when they occur, be important". In this respect, the decision of the Court in the Reparation's case is equally instructive in respect of the individual opinions of Judge Hackworth and Judge Badawi in relation to the provisions not only of Article 100 but also Article 105 of the Charter. Judge Hackworth had, *inter alia*, referred to the majority opinion that -

> **`..... the Charter does not expressly provide that the Organization should have capacity to include, in "its claim for reparation", damage caused to the victim or to persons entitled through him, but the conclusion is reached that such power is conferred by necessary implication. This appears to be based on the assumption that, to ensure the efficient and independent performance of missions entrusted to agents of the Organization, and to afford them moral support, the exercise of this power is necessary.**
>
> **The conclusion that power in the Organization to sponsor private claims is conferred by "necessary implication" is not believed to be warranted under rules laid down by tribunals for filling lacunae in specific grants of power.**
>
> **There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements**

concluded by them. Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted. No necessity for the exercise of the power here in question has been shown to exist. There is no impelling reason, if any at all, why the Organization should become the sponsor of claims on behalf of its employees, even though limited to those arising while the employee is in line of duty. These employees are still nationals of their respective countries, and the customary methods of handling such claims are still available in full vigour. ... The exercise of an additional extraordinary power in the field of private claims has not been shown to be necessary to the efficient performance of duty by either the Organization or its agents.

But we are presented with an analogy between the relationship of a State to its nationals and the relationship of the Organization to its employees; also an analogy between functions of a State in the protection of its nationals and functions of the Organization in the protection of its employees.

The results of this liberality of judicial construction transcend, by far, anything to be found in the Charter of the United Nations, as well as any known purpose entertained by the drafters of the Charter.

These supposed analogies, even assuming that they may have some semblance of reality, which I do not admit, cannot avail to give jurisdiction, where jurisdiction is otherwise lacking. Capacity of the Organization to act in the field here in question must rest upon a more solid foundation.

The Court advances the strange argument that if the employee had to rely on the protection of his own State, his independence might well be compromised, contrary to the intention of Article 100 of the Charter.

This would seem to be placing a rather low estimate upon the employee's sense of fidelity. But let us explore this a step further.

Article 100 provides that:

> "1. In the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
>
> 2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to

seek to influence them in the discharge of their responsibilities."

This is a classical provision. It is found in this identical, or a slightly modified, form in each of the agreements establishing the various Specialized Agencies - some concluded before, and some subsequent to, the signing of the Charter.

For example, we find in Article 59 of the Convention on International Civil Aviation, signed in 1944, the following provision:

> "The President of the Council, the Secretary-General and other personnel shall not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the Organization. Each contracting State undertakes fully to respect the international character of the responsibilities of the personnel and not to seek to influence any of its nationals in the discharge of their responsibilities." (*Yearbook of the United Nations*, 1946-1947, pp. 728, 736.)

Article XII of the articles of agreement of the International Monetary Fund, negotiated in 1944, provides in Section 4 (c):

"The Managing Director and the staff of the Fund, in the discharge of their functions, shall owe their duty entirely to the Fund and to no other authority. Each member of the Fund shall respect the international character of this duty and shall refrain from all attempts to influence any of the staff in the discharge of his functions." (II, *United Nations Treaty Series*, 1947, pp. 40, 86.)

Article V of the contemporary agreement relating to the International Bank for Reconstruction and Development is practically identical with the provisions just quoted. (*ibid.*, pp. 134, 166.)

Article 9, paragraphs 4 and 5, of the Constitution of the International Labour Organization, as amended, provides:

"4. The responsibilities of the Director-General and the staff shall be exclusively international in character. In the performance of their duties, the Director-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

5. Each Member of the Organization undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities." (*Yearbook of the United Nations*, 1946-1947, pp. 670, 672.)

To the same effect see:

Article VIII of the Food and Agriculture Organization of the United Nations (*ibid.*, pp. 693, 695); Article VI of the Constitution of the United Nations Educational, Scientific and Cultural Organization (*ibid.*, pp. 712, 715); Article 37 of the Constitution of the World Health Organization (*ibid.*, pp. 793, 797); and Article 9 of the Constitution of the International Refugee Organization (*ibid.*, pp. 810, 813).

Is it to be supposed that each of the Organizations has the capacity to make diplomatic claims in behalf of its agents, and that this should be done in order that their fidelity to the Organization and their independence may not be compromised? Reasons for such a conclusion would seem to have as great force here as in the case of the United Nations. The language employed in the respective instruments bears the same meaning.

Article 100 of the Charter, which, it should be remarked, relates only to the Secretary-General and the

staff, cannot be drawn upon to claim for the Organization by indirection an authority which obviously cannot be claimed under any direct authorization. The most charitable, and indeed the most realistic construction to be given the article is that it is designed to place service with the United Nations on a high plane of loyalty and fidelity and to require Member States to respect this status and not to seek to influence the Secretary-General or members of the staff in the discharge of their duties.'[21]

6.9 Equally instructive is the Dissenting Opinion of Judge Badawi Pasha in the same case especially in relation to the proposition advanced in the Written Statement of the UN that the functional protection to be "supervised by the Secretary-General confers on him an authority to make an exclusive determination on the question of immunity under Section 23 of the General Convention". The parts of his opinion which may be relevant are as follows:

`Both the written statements of the governments (except that of the United States Government) and the statements made in Court recognized that the United Nations had the right to bring an international claim in respect of the damage referred to under (b), and they endeavoured to give reasons for this. Each representative had his own argument.

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21 ICJ Reports 1949 at pg. 198-201

They founded this right on one or more of the following grounds:

(1) The analogy between the position of the United Nations and that of States, because the general principles underlying the position of States would be equally applicable to the United Nations.

(2) Creation of a new situation, owing to the development of international organization; in this situation, the international community requires that a step forward should be taken towards the protection of its agents.

(3) The rule that the reparation of damage suffered by the victim would habitually and principally be the measure of reparation due to the State, and consequently to the United Nations.

(4) Weakening of the bond of national allegiance implied in Article 100 of the Charter on the one hand, and by considerations of expediency on the other hand, there being no national protection for stateless persons, refugees and displaced persons, or such protection being illusory if, for any reason, the national State does not endeavour to exercise it.

(5) An international obligation to ensure protection of a foreign public service; this is confirmed by several precedents derived from the application of Articles 88 and 362 of the Treaty of Versailles, from the diplomatic history of the concert of European Powers in the Cretan question, and from the Corfu affair of 1923 (Tellini Affair).

(6) Article 100 of the Charter.

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* *

Apart from the actual value of each of these arguments, their diversity gives rise to contradictions and inconsistency as regards the justification of the United Nations' right. Those who uphold certain arguments consider others inadequate or insufficient.'.[22]

6.10 With reference to Article 100 Judge Badawi continued:

`It must be added that this Article, and especially paragraph 1, is only a rule of conduct or discipline for the Secretary-General and the staff of the Secretariat. It is a rule which would have been more in place in the Staff Regulations of the Secretariat, if it had not been desired to link it up to the second paragraph, which imposes an obligation on States, and if it had not also been required to justify the privileges and immunities

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22 ICJ Reports 1949 pg. 208 - 209

provided in their favour by Article 105.

An official of the Organization who is a national of a particular State may, in one way or another, have to take part in discussions or decisions of the Organization, where actions and interests of the particular State are involved. This official might consequently find that his national feelings and his duties were in conflict in a particular case. It was therefore necessary to reassure States Members of the Secretariat's impartiality, and to define what would be the situation of the staff in such cases of conflict, and determine their duties. For this reason, in the first paragraph of this Article, the staff are enjoined not to seek or receive instructions from any government or from any other authority external to the Organization. The following provision is a repetition of the same rule in a more extended form; it also relates to the dignity of an international official position. The reference to the exclusive responsibility towards the Organization is a consequence and a necessary confirmation of the preceding rules.

The second paragraph of this Article only repeats the ideas underlying the first paragraph, as looked at from the viewpoint of the State of which the official is a national.'[23]

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23 Supra pg. 209 - 210

6.11 The views of Judge Badawi on Articles 100 and 105 are also further examined for the purposes of the present case:

> **`What is to be said of the other arguments?**
>
> **The Court rejects in general any argument by analogy from the traditional rule of international law as to the diplomatic protection of nationals abroad (p. 182). In this way, it rejects the alleged allegiance resulting from Article 100, which would take the place of nationality for the purpose of the exercise of the right above mentioned. But surely the following reasoning of the Court is only an argument by analogy, namely:**
>
> > **1 that if one goes back to the principle contained in the rule of the nationality of the claim, one observes that, for an international claim on behalf of an individual to be made by a State, a breach by the State claimed to be responsible of an obligation incurred towards the claimant State must be alleged, and**
> >
> > **2 that this principle leads to recognizing that the Organization has the capacity to bring an international claim for injuries suffered by its agent, if the Organization gives as a ground for its claim a breach of an obligation incurred towards it (pp. 181 and 182).**

It is true that when the Court relies on the principle mentioned above and implied in the rule of the nationality of the claim, and when it secondly relies on the existence of important exceptions to that rule, and when it lastly relies on the new situation created by the coming into existence of the United Nations, it only draws the conclusion that a negative reply to Question 1 (b) cannot be deduced from that rule. But that conclusion is only a part of the Court's argument in favour of the Organization's right to make an international claim for the damage referred to in 1 (b). Whether this argument be considered as preliminary or auxiliary, or whether it be given a greater importance, it is in any case only an argument by analogy in favour of an affirmative reply, and draws its elements from the new situation, from the identity of the basic principle of the situations compared, and from the relative and in no way rigid character of the rule of nationality.

But in international law, recourse to analogy should only be had with reserve and circumspection. Contrary to what is the case in municipal law, and precisely owing to the principle of State sovereignty, the use of analogy has never been a customary technique in international law.

In any case, this argument by the Court brings us to the international obligation which the Court regards as involved in this question, and which seems to be the foundation for the above-mentioned argument by analogy.

It has been asked whether this obligation was derived from Article 2, paragraph 5, of the Charter, or from Article 105. But it is evident that the first of these two provisions, which creates a definitely political obligation, could not, if that obligation were infringed, serve to found a right to make a claim for reparation due to the victim. This right presupposes a definite relation between the victim and the Organization, which cannot be deduced from this general political obligation.

Nor can a foundation be discovered in Article 105. For it is a rule that in so far as diplomatic privileges and immunities impose on a State a duty of special diligence, they only authorize and justify a claim for reparation for damage caused to the State which accredited the victim. So much so that in the case of a consul who was not a national of the claimant State, the right of that State would be limited to direct damage. On the other hand, in the case of a diplomatic representative, a combination of his rights as representative and as national enables

reparation due to the victim to be included in the international claim.

On the other hand, it must be observed that:

(1) Article 105 accords privileges and immunities only to officials of the Organization; this term does not necessarily coincide with that of agent, as the Court has pointed out; i.e., it has not the same meaning or scope;

(2) Article 105 does not apply exclusively to the Organization. All the constitutions of the Specialized Agencies contain provisions declaring it to be applicable, or provisions in the same terms.

By connecting up the right to claim reparation due to victims with an obligation derived form provisions of such a nature, situations would be arrived at that are contrary to those admitted by international law in regard to master and servant. The result would also be a generalization, in the interest of all the Specialized Agencies, of a right which has hitherto belonged only to States; the history of this right is closely connected with the notion of nationality, and it draws from that notion a fictitious identification between State and national.

The political character of the Organization and its importance in the hierarchy of international bodies cannot be pertinent in this case, nor can it justify the granting to the Organization, to the exclusion of other bodies, of a right not derived from a provision common to all.

This argument that the right to make an international claim is based on the recognition by a State of its obligation to respect the public services of another State, was upheld by the French Government's representative, who considered that "a State's international responsibility is involved if the protection prescribed by international law for diplomatic and consular services is not provided. The person of a diplomatic agent must be the subject of special vigilance on the part of the State that receives the agent. If this vigilance is lacking, and damage results, the State whose diplomatic service is concerned can make an international claim." It would further seem that damage referred to in Question 1 (a) and that in (b) are both included in this claim. The French representative mentioned several precedents in support of this argument; but in truth none of them is conclusive.

On the other hand, the United Kingdom representative thought that the bond of service,

as opposed to that of nationality, only gives the State the right to make an international claim for the damage directly suffered by it, i.e. damage referred to in Question 1 (a); and he maintained that it was the insufficiency of this argument to justify a claim for reparation referred to in Question 1 (b) which led to the search for another argument. He claimed to find this in Article 100, which the Court thought was not pertinent.

I have enquired into all the details of this obligation of protection, as found in the arguments of the representatives of governments and of the Secretary-General, because it was adopted by the Court itself at the beginning as a hypothesis. Then the Court found itself faced with a new situation - that the Charter did not expressly say that the Organization was entitled to include in its claim reparation for injury suffered by the victim or persons entitled through him. The Court then invoked a principle of international law said to have been applied by the P.C.I.J. to the International Labour Organization, to the effect that "the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties".

In application of this principle, the Court states that in order to ensure the efficacious and independent exercise of its duties and to secure effective support for its agents, the Organization must give them suitable protection, and after asserting that it is essential that the agent shall be able to count on this protection without having to count on other protection (particularly that of his own State), the Court concludes that it is evident that the capacity of the Organization to exercise a certain measure of functional protection arises by intendment out of the Charter.

As this measure is not fixed, the Court adopts the juridical construction given by the Permanent Court to a claim by a State for reparation due to its national, and asserts "in claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization".'.[24]

6.12 Malaysia has made extensive "revisiting" of the views expressed in the Reparation case. The separate opinions have indicated the caution that is to be applied in respect of powers that are to be implied and the caution is applicable here.

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[24] supra pg. 210-213

6.13 The General Convention is not merely supplementary to the Charter of the United Nations. It is a specific treaty. Therefore if it is contended that Articles 100 and 105 of the Charter of the United Nations are also intended to cover the question of functions of the Secretary-General, then on the basis of the principle of *generalia specialibus non derogant* the authority of the Secretary-General could only be construed under the General Convention and taken out of the scope of the Charter of the United Nations for purposes of interpretation.

6.14 In paragraph 18 of the Written Statement of the UN, reference has been made to the inadequacy of the certificate that was then proposed to be filed by the Minister of Foreign Affairs Malaysia for the purposes of the proceedings in the High Court. Paragraph 18 described that the Certificate failed to refer in any way to the Note Verbale which had been issued by the Secretary-General and which had in the meantime been filed with the court. The question here is whether Malaysia is bound under the terms of the General Convention to file a certificate in terms which are identical to that of the Secretary General. The Written Statements of other members have reflected varying reasons for the basis upon which the certificate has been issued. Malaysia's obligation to accept the certificate will constitute an acceptance of the interpretation that has been given by the United Nations that the authority of the Secretary-General under the General Convention includes an exclusive executive authority. In the Norwegian Loans case[25], there was a statement of principle that was made by Judge Lauterpacht in connection with the then French Declaration made under the optional clauses of Article 36 of the Statute accepting the court's compulsory jurisdiction subject to an "automatic reservation" of matters of French national jurisdiction as understood by the Government of the French Republic. (The term "automatic reservation" was utilised by Lauterpacht to denote

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[25] ICJ 1957 at pg. 48 and 51

that type of reservation to a declaration made under Article 36 paragraph 2 of the Statute of the International Court of Justice accepting the compulsory jurisdiction of the court, i.e. so framed as to enable the accepting country to claim the right to determine whether the reservation is applicable to any specific case in which its acceptance of the court's compulsory jurisdiction is invoked by another country). The declaration itself is invalid as lacking in an essential condition of the validity of a legal instrument. This was so "for the reason that it leaves to the party making the declaration the right to determine the extent and the very existence of the application.". This matter was discussed in Sir Gerald Fitzmaurice's treatise where he examined the matter in respect of Judge Lauterpacht's opinion. The following is an extract for the Court's consideration:

"And he continued (ibid.):

"An instrument in [sic: 'under' or 'by'] which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose.'

Lauterpacht was emphatic that it made no difference in this respect which the precise character of the instrument was. It was, he said (ibid.), 'irrelevant for the purpose of the view here outlined whether the instrument .... is a treaty or other mode of creating legal obligations'. Thus although these remarks were made in connexion with the particular case of acceptances or purported acceptances of the Courts' compulsory jurisdiction, Lauterpacht made it quite clear that the principle involved did not in any way depend on the existence of a particular context. Not only (ibid.) was the

principle involved 'no more than a principle of common sense', it was also a 'general principle of law', and (pg. 49)

it was '.... so self evident as a matter of juridical principle that it is not necessary to elaborate [the] point by showing it to be a generally recognized principle of law which the Courts is authorized to apply by virtue of Article 38 of its Statute [sic]'. Lauterpacht nevertheless went on duly to show [ibid.] that was 'a general principle of law as it results from the legislation and practice of courts in various countries in the matter of contracts and other legal instruments'; and he proceeded to cite French and American authorities in support of the proposition that, domestically, instrument were treated as 'invalid whenever the object of the obligation is reserved for the exclusive determination of the party said to be bound by the obligation in question'.

6.15 The principle was repeated in the Interhandel Case. In the view of Malaysia the Note Verbale that was maintained several times from the United Nations bears semblance of that instrument which consist of a unilateral declaration which purports to create a legal right and obligation. In Judge Lauterpacht's view the instrument would not be a legal instrument at all but a mere statement of policy of intention having a political and not a juridical character. The principle was that if a party retains the right to determine for itself the nature or extent of the obligation supposedly involved, or to indicate in what cases this would or would not apply, then no real legal obligation was involved and the instrument was juridically considered a nullity. The Note Verbale used by the Secretary-General in Malaysia's view is therefore of no effect for Malaysia to comply in issuing the Certificate of the Minister.

F. QUESTION 2

General

7.1 The second question before the Court poses a novel situation. The present facts are distinguishable from the facts in the Reparation case. The several Dossiers, that have been placed as a part of the Written Statement of the UN refer to the United Nations' concerns in respect of criminal adjudication in Member States which affect or interfere with the performance of mission by experts, or what are generally described as official acts of staff or officials.(See **Annex IV**) The facts of the present case however arose out of civil adjudication. The reference in the Written Statement of Malaysia (at pg.61) to Mighell v the Sultan of Johore is not just simply on the question of immunity but also to reflect a rule of law of civil procedure applicable in Malaysia. It also concerns the rule that assertions of immunity will require proof which however can still be provided. Dossier 84 discloses the effect of legal processes on the question of determination of immunity.

7.2 By way of a general observation, it has been observed that "the power of domestic courts to interpret international agreements, and their independence from the executive in doing so is subject to a variety of regulations in different countries".[26] It is further elaborated that it "is a well settled rule of English law that the courts will not accept a treaty as a source of law unless it has been incorporated into the Law of England by legislation". The situation is described further that "Strictly speaking in English courts the question is therefore one of statutory interpretation and although their methods of interpretation have been caused somewhat by the legislative means of interpretation adopted by Parliament; which

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26 C. H. SCHREUER: The interpretation of treaties by domestic courts. BY 1971 at pg. 256

range from enacting material provisions of an international agreement so as to bring English law into line with the international obligations of the Crown without direct reference to the treaty to simply enacting the convention word for word; the courts of England have on the whole taken these statutes for what they are: the product of a legislative technique to make the treaty operative in the municipal sphere".[27] It is further explained that this practice is based on the theory of the separation of powers while the courts are competent to exercise control over the administration, they cannot do so with respect to the diplomatic functions, which lies within the exclusive competence of the Foreign Minister. These observations are equally applicable in Malaysia. Attached to this reply is a reference to an appraisal made of the varying practices undertaken by States in relation to the questions of treaties placed before national courts. (**Annex V**)

7.3 It has been suggested in the statement made by the United Kingdom and the United States of America that in giving effect to the provisions of the Convention, the issue of immunity that is claimed could still be considered as a "threshold jurisdictional issue". It also invites the Secretary General to consider more active interventions in other internal processes by which this could be effected without the United Nations itself being joined as a defendant or plaintiff in international proceedings. It has been shown that even in the field of sovereign or state immunities there are orderly developments which show that in certain areas of activity the doctrine has become more limited than absolute and this is evidenced by the effort of the International Law Commission in preparing the Draft Articles On Jurisdictional Immunities of States and Their Property. These suggestions may not necessarily be the responses that are required of the question but may nevertheless have some relevance in seeking a solution as what appears to be an irreconcilable position between denial

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27 infra pg. 257

of immunity and the total denial of executive and judicial consideration by Member States.

7.4 Section 30 does not incorporate any mechanism by which any difference arising out of the interpretation or obligation of the General Convention arose out of matters where an individual is involved. Although Section 30 contains reference to the possibilities that parties do have recourse to another mode of settlement, these various possibilities have not been sufficiently utilised to enable cases, such as this case, where implicated in the difference over interpretation is, an individual who seeks a judicial determination in respect of infringement of a right. If there have been occasions that individuals or corporations should have direct access to the International Court or any other tribunal, no universal recognition has been accepted. Malaysia's reference to the ICSID Convention (page 6 of the Written Statement of Malaysia) is again to reflect that a law could be implemented in Malaysia where the private parties could seek international arbitral assistance in an important area of international economic activity. It is not suggested here that the ICSID machinery is applicable but rather it comes within the range of possibilities that could be examined for consideration where there appears to be a conflict as in the case arising out of the application of the terms of the Convention. Developments in the Law of the Sea Convention have given natural or juridical persons access to the Law of the Sea Tribunal in those situations where such persons might come into direct contact with the rules or organs established by the Convention. But this is not a simple matter of suggestion but has to be borne out of a political will within the framework of contemporary standards requiring the consent to jurisdiction.

7.5 As has been observed: If immunity is the starting point, a requirement of a positive universal practice for any restriction is bound to lead to an assertion of absolute immunity. On the other hand, if we proceed from a general rule of jurisdiction, we will find it difficult, if not impossible to find

proof of a uniform practice supporting immunity[28]. It is now fifty years since the inception of the General Convention. The proposition (at pg. 14 of the Written Statement of the UN) that disputes are not to be settled by the national courts of a party of a Member State party to the Convention but the differences between the United Nations and a Member are to be decided by having recourse to the advisory jurisdiction of court is not accurate. This is the second case. It must evidence then that other cases have been settled before national courts or other means.

Question 2(a)

7.6 Malaysia does not support the reasons nor the conclusion reached by the United Nations in its Written Statement that the Secretary-General has, under Section 22(b) of the General Convention, the exclusive authority to determine whether words were spoken in the course of the performance of a mission. It may well be that he has a separate or independent authority but not exclusive and hence conclusive.

7.7 If it is said that he has such an exclusive authority, it has to be a legal authority and for the reasons that Malaysia has given earlier, if that is indeed intended to be conferred on the Secretary-General then the General Convention has to be amended, that is, such a legal authority has to be vested with the consent of the States. The Written Statement of Germany illustrates how varied are the Member States' interpretation of Section 22(b). The word "Prerogative" is associated with sovereign states. The United Nations is an international organization.

7.8 Even assuming that he has such an authority the question is which, then, will be the authority to determine whether the exclusive authority has been properly exercised, reasonably exercised or exercised in good faith.

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[28] C.H. Schreuer: State Immunity: Some recent development, pg.4 1988 Ed.

Is it the General Assembly? The determination to be made is a determination of both facts and law. When the alleged exclusive authority under Section 22(b) and the right and duty to waive vest solely in one person then the reasons for arriving at the determination of facts and the reasons for not exercising waiver may become assimilated. Absolute immunity would then be established.

7.9 Assuming that Questions 1 and 2(a) are answered in the affirmative then according to the question posed by the United Nations, if the Secretary-General does not waive immunity from legal process there would consequently be an international obligation on the part of the Government of a Member State party to the Convention to give effect to that immunity in its national courts.

7.10 There are two other reasons for Malaysia not to support a conclusion that Question 2(a) be answered in the affirmative. Question 2(a) must have been posed to fit the facts of this case. In addition to the comments given under Sections C - E, to accept Question 1 and 2(a) is tantamount to allowing the United Nations not to observe Articles 2(1) of the UN Charter for there is suggested here that the Secretary-General be conferred with exclusive authority to impose limitations (hence gross limitations) on the Government of Malaysia and the national courts in Malaysia. This exclusive authority circumscribes not a rule of civil procedure in civil adjudication but a substantive matter. In accordance with Section 34 Malaysia has also to introduces changes in its municipal legislation for the application of Section 22(b) is not "self executing".

7.11 The second reason is that the concept of functional immunity is changed and to incorporate it in the General Convention could if not properly considered result in the extinguishment of individual rights contrary to Articles 7 and 8 of the Universal Declaration of Human Rights and Article 3 [Part II] of the International Covenant on Civil and Political Rights

(Extracts attached as **Annex VI**). Persons in the category of experts will also enjoy "special" "immunities" which are already discriminated in nature.

7.12 With such consequences arising from the interpretation given to Section 22(b) it becomes a revised text and for such a change the General Convention must be formally amended to indicate the consent of Member States to be bound.

Question 2(b)

7.13 However even if it be that questions 1 and 2(a) are answered in the affirmative, question 2(b) is not as simple as it appears to be. Question 2(b) is said to arise when there is a failure to give effect to the obligation as stated in question 2(a) and the Reparation case has been principally relied upon. The difficulty that arises from an application of the decision of that case to this case is that the "injuries" are not physical injuries incurred by the Special Rapporteur but financial liabilities. These financial liabilities though incurred by "the assessments of actual costs, expenses or damages arising out of or assessed by courts" arose as a result of the action instituted by an individual and not by Malaysia instituting a civil action. Malaysia's breach of obligation is not to issue a certificate in terms of the Secretary-General's determination, which exclusive determination is allegedly already authorised under Section 22(b).

7.14 The claim by the United Nations in respect of the Special Rapporteur is not a claim of a state for breach of treaty provisions in respect of nationals or non-nationals. The Charter of the United Nations is also not a supra national convention. No further reasons are advanced for the extension of the principle in the Reparation case. In Malaysia's view this question cannot be answered without due consideration to the extent to which the principle in the Reparation case could be made applicable.

7.15 Shabtai Rosenne, in his book "Breach of Treaty" (page 123) had this to say:

> **"...it is noteworthy that despite the lenghty codification process, both of the law of treaties and of the law of State responsibility, and despite the large amount of international case-law that has accumulated over the years dealing with "breach", there is no generally accepted definition of what is meant by "breach of a treaty". The question has even been asked, for instance in the 831st meeting of the ILC in 1966, whether mere non-performance constituted a breach of a treaty. Leaving aside the valuable maxim that all definitions are hazardous (*omnis definitio periculosa est*), and recalling that the definition of "material breach" in Article 60 of the Vienna Convention was made for the limited purpose and is itself entirely narrow, it seems that the only viable description of a breach of a treaty is one that can be deduced not from the law of the treaty-instrument but from the law of treaty-obligation, the law of State responsibility. On that basis it can be described as conduct consisting of an action or omission attributable to a State or to an international organization under international law, that State or organization being a party to a treaty in force and the conduct being incompatible with an obligation grounded in that treaty. "**

7.16 Article 60 of the Vienna Convention on the Law of Treaties provides:

for "material breach" and if committed the Convention lays down

the provisions allowing relevant party/parties to terminate or suspend the operation of the treaty. Article 60(3) defines "material breach" as follows:

> **"3. A material breach of a treaty, for the purpose of this article, consists in:**
>
> **(a) a repudiation of the treaty not sanctioned by the present Convention; or**
>
> **(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.".**

7.17 While the Convention is silent on these "non-material breaches", the position of Article 60 was summarized by Bruno Simma in his article "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its background in General International Law" where he wrote:

> **"... Article 60 constitutes one of the provisions with regard to which - aside from procedural shortcomings - the limited scope of the Vienna Convention on the Law of Treaties will be felt both clearly and painfully. While Article 60 and its related provisions carefully and equitably regulate the application of the reactions to breach having their *sedes materiae* in the law of treaties, any examination of the breach situation limited to an analysis of the rules of the Vienna Convention will, due to the exclusion of similar reactions having their *sedes materiae* in the law of international**

responsibility provide the observer with an incomplete picture."[29]

7.18 Mc Nair's approach on the issue is on a slightly different angle. Rather than to define the term "breach" he went on to describe the forms in which breach may be committed:

> **".. A breach of treaty may be direct, for instance , when a State declines to surrender an alleged criminal to another State in pursuance of an extradition treaty between them which covers the crime alleged and other relevant circumstances;... But breaches are not usually so simple as that. A State may take certain action or be responsible for certain inaction, which , though not in form a breach of treaty, is such that its effect will be equivalent to a breach of treaty; in such cases a tribunal demands good faith and seeks for the reality rather than the appearance.".[30]**

7.19 Mc Nair, in his book[31] listed the followings to describe who can commit breach:

> **"I. State organs**
>
> **A breach of treaty can result from the action of any department of government - executive, legislative,**

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29 reproduced in S. Rosenne *'Breach of Treaty'* at pg. 7

30 Mc Nair, The Law of Treaties, p.540

31 The Law of Treaties, p.550

judicial or purely administrative organs. How it happens is a domestic affair; what matters to the other State is that a breach has occurred. Although a State has a right to delegate performance of a treaty to the appropriate department of its government, but that does not relieve the State of responsibility. In particular, it can delegate the application and interpretation of a treaty to its court of law, but their decisions are not conclusive internationally.

II. Private subjects

A breach of a treaty is an international delinquency, and international delinquency can be committed only by the head or Government of a State, by State officials or by subjects acting under the command or authority of the State. Therefore, strictly speaking, private subjects cannot be held to be in breach of a treaty.

However, the State aggrieved by the acts of the other State's national may be able to show that the other State has not taken all reasonable measures, by enacting and enforcing appropriate statutes or regulations, to ensure compliance with the treaty and has in that way committed an international delinquency."

7.20 The Written Statement of the UN (at pg. 22) submitted that :

"57. Pursuant to Section 34 of the Convention, "[i]t is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be

in a position under its own law to give effect to the terms of this convention". Malaysia acceded to the Convention on 28 October 1957 without reservation.

58. In accordance with Section 34, the Government of a Member State party to the Convention has an obligation to give effect to the immunity from legal process of an expert on mission under Article VI, Section 22(b), of the Convention. At the very least , the latter obligation includes the obligation of the Government to inform its competent judicial authorities that the Secretary-General of the United Nations has determined that the words or acts giving rise to the proceedings in its national courts were spoken, written or done in the course of the performance of a mission for the United Nations and that the United Nations has therefore maintained the immunity from legal process of the expert on mission concerned with respect to those words or acts. In addition, it is also incumbent upon the Government , if necessary to further intervene in the proceedings to uphold and ensure respect for that immunity, thereby giving it effect. International jurisprudence has confirmed that such interventions by the executive agents of a Government do not constitute interference with the independence of the judiciary.".

7.21 The intervention by the Government of Malaysia should be effected in accordance with national legislation and not by direct executive intervention like the Note Verbale. In accordance with Section 34 of the General Convention the Government is required to enact a law to give effect to the terms of the Convention. And this Malaysia has done. Although, as mentioned earlier, the actions by the judiciary does not

relieve the State from responsibility, that is not to say that the interpretations of the national courts are automatically erroneous. Malaysia's actions be it by the executive, by the Foreign Minister issuing the certificate, or by the legislature through enacting a law to incorporate and to give effect to the Convention, or by the judiciary by considering the issue of immunity in the light of the wordings of the Convention have always been consistent throughout. These acts are the manifestations of our understanding and consistent with Article 26 of the Vienna Convention on the Law of Treaties, it shows that our interpretation and acts are performed in good faith. The differences between Malaysia and the United Nations arose in interpretation of the provisions.

7.22 Rosenne wrote -

> **"With the growing complexity of international treaty-making and a rapidly changing general international situation, formal amendment of treaties is becoming an increasingly difficult process. As a counterpart to this, when a treaty applied as its authors originally intended comes under strain, it is easy to proclaim breach. The law seems to be trying to discourage this, and the proceedings of the Vienna Conference together with the repetition of the provisions of the Vienna Convention in the 1982 articles of the ILC suggest that by and large there is a considerable measure of political backing for that approach. The doctrine of approximate application if skilfully used may serve as a prod to the renegotiation, reinterpretation or readaptation of a treaty which in its general lines remains desirable to all parties but which in its details cannot stand up to the wear and tear of daily life. The doctrine is thus a constructive contribution to the**

general stability of juridical relations which are to be coupled in appropriate cases with a properly controlled dose of peaceful change and adaptation. Pejorative assertions will never be helpful in this process."[32]

7.23 With regard to proclaiming breach due to differing interpretation, the same author had this to say -

> **"Treaties are not drafted in the same way that parliamentary statutes are drafted, and most diplomatic drafting includes a heavy dose of political compromise, magnified by contemporary "consensus" procedures applied to treaty drafting. This often produces deliberately ambiguous texts, the ambiguities being augmented by the multiplicity of authentic texts of modern UN and other treaty practices. Underlying these ambiguities is the thought that future developments can be left to take care of themselves. It is not easy, therefore, when treaties are drafted in this way to castigate with absolute confidence that an unexpected interpretation and action by a State party is necessarily a breach of the treaty, simply because it is unexpected and unanticipated. This observation, in the nature of things, is generally applicable to multilateral treaties, but there is no reason why it should not also be applicable to bilateral treaties or treaties concluded between a limited number of States."**[33]

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32 Rosenne, Breach of Treaty, pg.100-101

33 supra at pg. 121

7.24 The Court is referred to **Annex VII** concerning further aspects on the question of breach of treaty obligation. Question 2(b) contains too many assumptions and raises procedural and substantive questions regarding the implementation of a responsibility to be assumed by a Member State arising out of a breach of treaty obligations, the legal basis of which is an interpretation of a provision of a treaty namely Section 22(b) of the General Convention. The extension of the principle in the Reparation case that the United Nations could espouse a claim made against the Special Rapporteur and hold a Member State responsible for the liabilities incurred as a result of civil proceedings instituted in this case by a private individual is a rule without proper legal basis and is a strain on the rule of construction of necessary intendment in the Reparation's case. For these reasons the answer for question should be in the negative and should not enunciate a general rule arising out of an alleged breach of obligations under the General Convention. Even if the Court were to answer question (1) and 2(a) in the affirmative, question of costs expenses or damages which are actually incurred or paid out by the Special Rapporteur, or by the United Nations to him or on his behalf are to be resolved separately even if the Court were to answer question 2(b) in the affirmative since this alleged breach has a arisen over differences regarding a question of the in interpretation of a treaty it should not be made retroactive to the present case.

7.25 Question 2 relates to the determination that is to be made by the Secretary-General in the exercise of his authority for it is the determination which he has to make that will also affect the obligation of a Member State in implementing his decision. It has been pointed out that certain aspects of the activities of the General Assembly and the Security Council are decision making, binding upon States especially the latter in the security sphere. This entails that "the assessment of the evidence and the determination of the law will not be free from collateral political considerations in the same way as the process of reaching a truly

judicial conclusion would or should have been.[34] Similarly in the performance of the task under Section 22(b) of the General Convention, the Secretary-General takes certain decisions that involve determination of law and fact and which decisions will also establish whether a State is in breach of an obligation. Is this "in the vocabulary of the common lawyer - quasi judicial" or really "executive"?

7.26 The Court's observations in the following cases are useful for the Court has assisted in the orderly development of the Charter of the United Nations. In the Peace Treaties case (Second Phase) the Court opined that where a clause confers upon an international authority such as the Secretary-General of the United Nations (e.g. to nominate an arbitrator in disputes) such a clause must 'by its nature .... be strictly construed and can be applied only in the case expressly provided for therein'.[35] Sir Gerald Fitzmaurice observed it would follow from this that international officials when acting or requested to act in the exercise conferred upon them by treaty (or by the Charter of the Organization) should take a conservative view of the nature and scope of the authority. In the Interpretation of the Agreement of 25th March 1951 between WHO and Egypt, the Court took the opportunity of making several statements of principle concerning international organizations. The Court said *inter alia*:

> **"International organizations are subjects of international law and, as such are bound by any obligations incumbent upon them under general rules of law, under their constitutions or under international agreements to which they are parties".[36]**

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34 Lauterpacht: Aspects of the Administration of International Justice, pg. 42

35 ICJ 1950 pg. 227

36 ICJ 1980 pg. 89, para. 37

G. CONCLUSION

8.1 In concluding :

(A) On the basis of submissions made in the Written Statement and the Reply to the Written Statement of the UN and other Member States, Malaysia respectfully submits that :

(1) the Court should consider not to answer question 1 and 2(a) in the affirmative.

(2) if the Court answers questions 1 and 2(a) in the negative, question 2(b) is unnecessary.

(B) As regards principles of law raised :

(1) section 22(b) of the General Convention does not vest the Secretary-General with the exclusive authority to make a determination.

(2) For purposes of (1) and (2) to be applicable the General Convention requires formal amendment.

(3) The Reparation case is distinguishable and is not applicable in determining that a Member State assumes responsibility in respect of question 2(b).

ATTORNEY GENERAL'S CHAMBERS
MALAYSIA

Annex I

Justice in International Law

Selected Writings of

STEPHEN M. SCHWEBEL
Judge of the International Court of Justice

GROTIUS PUBLICATIONS
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The Legal Effect of Resolutions and Codes of Conduct of the United Nations

The Contending Positions

The topic of the impact of resolutions of the United Nations General Assembly on the principles of customary international law has been a subject of controversy for some years. This lecture reconsiders that question in the light of recent material, including current work of the Institute of International Law and the American Law Institute. It will look particularly at relevant holdings in four international arbitral awards. And it will touch upon the subject of the influence of Codes of Conduct on international law, one of the many topics on which that distinguished scholar, Professor Pieter Sanders, has shed light.

The parameters of the question can be summarized as follows. On one side of the debate are those who emphasize that, under the Charter of the United Nations, the General Assembly lacks legislative powers. It does have certain internal and financial powers whose exercise creates legal obligations. Thus when the General Assembly elects the Secretary-General or a Member of the Security Council, or when it apportions the expenses of the Organization, Members are legally bound. But, putting resolutions on such subjects aside, it is plain that not a phrase of the Charter suggests that the General Assembly is empowered to enact or alter international law. It has the broadest authority to adopt recommendations, and those recommendations may embrace legal as well as other matters. But they remain recommendations, which States are legally free to adopt or disclaim. As Judge Sir Hersch Lauterpacht put it, "the paramount rule" of the Charter is that "the General Assembly has no legal power to legislate or bind its Members by way of recommendations . . ."[1]

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[1] *South-West Africa—Voting Procedure, Advisory Opinion of June 7th, 1955: ICJ Reports 1955*, Separate Opinion of Judge Sir Hersch Lauterpacht, pp. 90, 116.

This is clear not only by the terms of the Charter, but by a consideration of its *travaux préparatoires*. At the San Francisco Conference on International Organization, only one State voted for a proposal that would have permitted the General Assembly to enact rules of international law that would become binding for the Members of the Organization once they had been approved by a majority vote in the Security Council.[2] What the terms and the *travaux* of the Charter do not support can scarcely be implied.

Those who deny that the General Assembly's resolutions affect the content of customary international law also observe that States Members often vote for much with which they actually do not agree. They may go along with a "consensus" to which they consent only in form and not in substance. Their Delegates may vote without instructions or be loosely instructed; they may vote in accordance with group dictates rather than as an expression of what their Government believes that the law requires. The Members of the General Assembly generally vote in response to political, not legal, considerations. Their intention normally is not to affect the law but to make the point which the resolution makes. "The issue often is one of image rather than international law; States will vote a given way repeatedly not because they consider that their reiterated votes are evidence of a practice accepted as law but because it is politically unpopular to vote otherwise."[3]

The United Nations General Assembly is a forum in which States can express their views, but what they do is more important than what they say, and especially more important than what they say in the General Assembly – not only because the General Assembly is not authorized to legislate but, as Professor Arangio-Ruiz tellingly sums it up, because its Members don't "mean it."[4] That is to say, General Assembly Members often do not meaningfully support what a resolution says and almost always do not mean that a resolution shall make international law. Indeed, as a comprehensive and searching report recently submitted to the Institute of International Law by Professor Krzysztof Skubiszewski observes, in referring to the practical effect of the non-binding nature of the Assembly's resolutions: "These instruments have often secured the required majority or general consensus and could, consequently, be adopted 'precisely because' – as Sir Gerald Fitzmaurice put it – 'they were not binding in law'. The records of discussion in the United

[2] *Documents of the United Nations Conference on International Organization*, Vol. 9, pp. 70, 316.

[3] S.M. Schwebel, "The Effect of Resolutions of the United Nations General Assembly on Customary International Law," *Proceedings of the 73rd Annual Meeting of the American Society of International Law* (1979), pp. 301, 302.

[4] G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations," *Recueil des Cours 1972-III* (1974), pp. 431, 457.

INTERNATIONAL LAW IN A DIVIDED WORLD

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(§62). This can be easily understood if one bears in mind that they now form a minority in the international community and are therefore interested in negotiating with the majority any revision or updating of the old law, or any regulation governing new situations.

This general convergence of interest accounts for the expanding role of codification and progressive development of law through international agreements and conventions.

So far, two major channels have been used to this end. In the more traditional and classical areas of codification (law of the sea; diplomatic and consular immunities; law of treaties; State succession; State responsibility) draft treaties have been elaborated by the International Law Commission (made up of forty-two experts with great diplomatic experience, and, therefore, particularly sensitive to States' demands) and subsequently discussed by the Sixth Committee of the General Assembly; they were subsequently the subject of negotiation in diplomatic conferences. In other, or even in the same, areas when existing law was more in need of radical change, or major differences persisted, the technical co-operation of the ILC was shunned: States preferred to keep the discussion and negotiation under their direct control; accordingly, a Special Committee consisting of their representatives was set up to report to the General Assembly. In some instances where the matter was too controversial for a detailed agreement to be reached, the upshot was the adoption of a Declaration (such as the 1970 Declaration on Friendly Relations). In other cases the General Assembly, after taking account of the discussions in the Special Committee, referred the matter to a diplomatic Conference. An important illustration of this process is the laborious work carried out from 1973 to 1982 on the new law of the sea. In 1958, when four Conventions on the matter were adopted, the main purpose was to restate, codify, and update existing law, and consequently the co-operation of the ILC proved indispensable. By contrast, in the 1970s the main object was to change the law radically; to this end direct negotiation among States was regarded as a more suitable method.

The Role of General Assembly Resolutions in Law-making

107. I stressed above (§95) that owing to the opposition of Western and socialist States, the tentative endeavour made in the 1960s by developing countries to turn General Assembly resolutions into legally binding acts ended in failure. Resolutions are therefore still governed by the UN Charter provisions, which grant the Assembly and other bodies (except, of course, for the Security Council) hortatory powers only. And, indeed, most General Assembly resolutions produce very limited effects because, in addition to the intrinsic limitations deriving from the Charter, their very contents and the sort of majority behind them frequently result in their carrying little

weight. As was said in 1983 by a prominent representative of Jordan, 'UN resolutions are unfortunately seldom landmarks in history; they are more often mere "footprints in the sands of time"'.[23] Nevertheless, some resolutions can be fitted into either of the traditional law-making processes: treaty-making or custom.

I have already given a few illustrations of UN resolutions which accelerated or at least testify to the formation of customary international law (see § 77 on the UN Declaration on Friendly Relations of 1970). Other illustrations include: the turning of wars of national liberation into a special category of international armed conflicts, as distinct from civil wars (§ 161); the gradual transformation of mercenaries into war criminals, in derogation from the traditional standards of international law (the long process of General Assembly resolutions on this subject was compounded by the adoption of a provision on the matter in 1977, in the Geneva Diplomatic Conference on Humanitarian Law: Article 47 of Protocol I (§ 154)). It stands to reason that the unique opportunity afforded by the UN for practically all members of the world community to get together and exchange their views cannot fail to have had a strong impact on the emergence or reshaping of customary rules. In addition, the UN encourages States to develop their views on matters on which they are often called upon to comment. This again ensures that a host of pronouncements are collected which would otherwise only be obtainable with difficulty.

In some instances General Assembly resolutions can also be tantamount to interstate agreements, more specifically to agreements concluded 'in simplified form' (§ 102). This, of course, depends on the intention of the States supporting the resolutions, and can emerge from their declarations as well as from the tenor of the text adopted. It stands to reason that the 'resolution-agreement' only binds those States which voted for it, or at any rate did not voice their opposition explicitly.

The view that, except for a few well-defined cases, resolutions do not possess a legally binding value *per se* is by far the most widespread in the Western legal literature. The same view is also upheld, to a very large extent, by the jurists of Eastern European countries,[24] and is also reflected in the official attitude of those countries (see, for instance, the Soviet Memorandum to the ICJ for the *UN Expenses* case).[25] Some international lawyers from the Third World also tend to regard UN resolutions as devoid *per se* of binding force, although they strongly emphasize the importance that resolutions can acquire in many respects with regard to the customary

[23] See, the Declaration of the Prince of Jordan, Hassan Bin Tallal, to the 'Independent Commission on International Humanitarian Issues' (Geneva), p. 3.

[24] The view of socialist jurists on the legal value of recommendations is set out in Tunkin, 162–76. See also DDR-*Völkerrecht* 1982, i. 206–8.

[25] The Soviet memorandum is in ICJ *Reports* (1962), pp. 270–4 (see also pp. 397–412).

process, or even from the viewpoint of treaty-making. For instance, this stand has been taken, with variations, by the Mexican Castañeda,[26] the Egyptian Abi-Saab[27] and the Chinese Wang Tieya.[28] Wang Tieya recently observed:

> In some instance, General Assembly resolutions—particularly the declaratory documents therein—may specify and systematize rules of customary law and they may reflect or even reaffirm and develop existing principles and rules of international law. If such declaratory documents creatively clarify new principles and rules of international law, no one would be able to deny their law-making effect just because they are, strictly speaking, not legally binding. At least they have been approved by the majority of countries and represent their legal consciousness, thus clearly pointing to the direction in which international law is developing.

Some of the Third World jurists go so far as to contend that the 'cumulative effect' of resolutions may prove sufficient for the creation of new law. A contrary view has recently been propounded by the distinguished Argentinian jurist Barberis,[29] in whose opinion for a rule of customary law to come about or for it to undergo a legal change it is always necessary that the passing of resolutions be attended by the *actual practice* of States.

Interestingly, many a developing State steadfastly argues in the UN that General Assembly resolutions are binding *per se*. Suffice it to quote the statement made in 1982 by the delegate of Zaire in the Security Council, in the course of the debate on the South African raid in Lesotho:

> There is not the shadow of a doubt that all decisions of the UN, through the GA, the S C and all the other bodies which in one way or another deal with the situation in South Africa, in particular, and in southern Africa, in general, are binding on all Member States of the UN. Under other circumstances I have had the opportunity of recalling that UN decisions and resolutions which are in keeping with the principles and purposes of the UN are binding on all Members of the UN whatever position they may have taken on a particular resolution. If that were not recognized, then it would mean that any Member could disown the mission, the goals and the objectives of this universal Organization.

As for the way of assessing the possible impact of resolutions on customary or treaty law, the most appropriate and sensible criteria have been suggested by Abi-Saab:

> Three indices can help us gauge the real value or weight of the contents of a resolution beyond its formal status as a recommendation and chart its progress

[26] J. Castañeda, 'La valeur juridique des résolutions des Nations Unies', Hague *Recueil* 129 (1970-I), 211 ff.

[27] G. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline', *Howard Law Journal* 8 (1962), 109–10.

[28] Wang Tieya, 'The Third World and International Law', *ChYIL*, pp. 23–4.

[29] A. Barberis, 'Nouvelles questions concernant la personnalité juridique internationale', Hague *Recueil* 179 (1983-I), 252–3.

towards becoming part of the *corpus juris* of international law. The first refers to the circumstances surrounding the adoption of the resolution, and in particular the degree of consensus obtaining over its contents. The second is the degree of concreteness of these contents, and whether they are specific enough (by themselves or in addition to those of prior related resolutions) to become operational as law, i.e. identifiable prescribed behaviour. The third is the existence (and effectiveness) of follow-up mechanisms generating a continuous pressure for compliance.[30]

Consensus as a Means of Facilitating Agreement within International Organizations and Diplomatic Conferences in an Age of Deep Divisions

108. In the early 1960s, it became apparent that developing States mustered a broad majority within the UN and that, by siding with socialist countries, they could easily command a two-thirds majority. Consequently, they were in a position to pass resolutions to their liking, overcoming any possible opposition from the West. However, the Third World soon became aware that scoring such easy victories would be self-defeating. It was evident that in consistently losing the support of a powerful segment of the international community they would alienate it for good and doom any international action to failure. Socialist countries too were reluctant to be impelled to make a show of strength with Western States, lest the latter should impair the process of *détente* initiated in the early 1960s—a process the former intended to pursue and even step up. Western countries, on their part, were eager to co-operate for fear of remaining isolated. Thus, a new device gradually evolved in the UN for narrowing down differences and reaching solutions acceptable to everybody—that of the consensus procedure.

After being frequently resorted to both in the UN and in other organizations, as well as in diplomatic conferences, consensus was defined in one of the rules of procedure adopted in 1973 by the European Conference on Security and Co-operation. Rule 69 stipulated that 'Consensus shall be understood to mean the absence of any objection expressed by a Representative and submitted by him as constituting an obstacle to the taking of the decision in question'. A similar definition was included in the Rules of the 1974 World Population Conference, whereby consensus was 'understood to mean, according to UN practice, general agreement without vote, but not necessarily unanimity'. Reference to consensus was also made in subsequent instruments, among which was a famous 'gentleman's agreement' adopted by the Third UN Conference on the Law of the Sea, in 1974.

Consensus therefore denotes a negotiating and decision-making tech-

[30] G. Abi-Saab, *Analytical Study on Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order*, A/39/504/Add.1, 1984, 36-7.

nique, consisting of a collective effort to agree upon a text by reconciling different views and smoothing out difficulties. This process culminates in the adoption without vote of a text basically acceptable to everybody. Consensus is different from *unanimity*, for in the latter case there exists full agreement on a given text and in addition the general consent is underscored by a vote. Consensus is also different from *acclamation*, for although normally texts approved by acclamation are not voted on (as in the case of consensus), they are, however, the subject of unqualified agreement. Often 'reservations' and objections are expressed either before or after it is declared that a consensus decision has been taken. What distinguishes consensus from the usual adoption of decisions by a *majority vote* is that, in the case of consensus, possible 'reservations' do not affect major points of the decision (whereas when there is a split between States favourable, those opposing, and those abstaining, the States casting a negative vote or abstaining usually entertain and express basic differences with the States supporting the text). Moreover, as a consequence of the lack of fundamental divergencies, and with a view to emphasizing the existence of a substantial convergence of views, no vote is taken.

The political and ideological premises on which the consensus procedure rests are clear: first, the fact that at present the world community is deeply divided in many respects; and second, the desire of the various groups of States to refrain from widening the gaps by resorting to traditional methods which under the present circumstances would produce ineffective international 'legislation', valid only for the majority of weak States. Consensus is therefore a decision-making process characteristic of the present stage of development in the world community.

The advantages of the new technique are self-evident: it implies that the prospective minority becomes involved in the process and can therefore see to it that its interests and concerns are safeguarded; it fosters negotiation and compromise; and it means that neither the overpowering (but only rhetorical) force of the many, nor the veto of the few powerful States, are made use of. This in turn increases the chance of resolutions being implemented and of conventions being ratified and observed by a large number of States. The drawbacks of consensus are no less evident, however: divergent views are often ironed out only on paper, by dint of vague compromise formulas which each of the draftsmen subsequently interprets in his own way; international instruments become tainted with ambiguity; and negotiations tend to get bogged down in interminable discussions and trade-offs, because each State or group feels that the more it holds out, the more likely is its counterpart to abandon its initial bargaining position and make substantial concessions. In addition, no benefit derives to the interpreter from preparatory work, for consensus is usually reached through informal consultations, of which no record is taken.

Generally speaking, it can be said that consensus proves beneficial provided the decision reached is not couched in such equivocal terms that it represents only a means of papering over real differences. Whenever such a stage is reached, the States concerned would do better to choose the more clear-cut and straightforward position of calling for a vote, and thus determine exactly where the majority and the minority stand. It should be noted that no formal difficulty stands in the way of such an option. Under the rules of procedure of most international bodies or conferences, whenever a State wishes a vote to be taken, it has a right to ask for it. In some instances the passage from the consensus procedure to the traditional techniques of decision-making has been formalized. Thus, for example, the 'Gentleman's Agreement' of the Third Conference on the Law of the Sea, quoted above, admitted that when the attempt at reaching a consensus decision failed, a vote could be taken on a certain matter (the Agreement, however, stipulated that States 'should make every effort to reach agreement' and that 'there should be no voting ... until all efforts at consensus have been exhausted'; Rule 37 of the Rules of the Procedure of the Conference set out a large number of devices to defer a vote should consensus fail, and to put pressure on States to come to an agreement without voting).

Unfortunately, on more than one occasion States have chosen the short-sighted approach of attaining consensus in spite of unbridgeable divergencies. This pays dividends in the short run only, for it creates confusion, in addition to revealing to any impartial observer a substantial lack of agreement. Furthermore, it merely postpones until after the adoption of the consensus text the settlement of all the problems the text was intended to overcome. As soon as the question of implementing international decisions comes up, differences arise again, with all the attendant political problems. A telling illustration of the snares set by consensus can be seen in the circumstances surrounding the adoption in 1974 by the UN General Assembly of two resolutions on the New International Economic Order.[31]

Emphasis must, however, be laid on certain imaginative techniques evolved within the Third Conference on the Law of the Sea for facilitating and accelerating consensus—techniques which have been termed 'active consensus procedure' (Buzan),[32] and are primarily designed 'to extend the process of consensus formation'. It is not improbable that they will be adopted by other diplomatic conferences, thus proving instrumental in promoting international co-operation.

Finally, let me add that consensus, being only a modality of the negotiating and decision-making process, has no bearing whatsoever on the legal

[31] See A. Cassese, 'Consensus and Some of its Pitfalls', 58 *Rivista di diritto internazionale*, 1975, 756-61.

[32] B. Buzan, *AJIL* 75 (1981), 324 ff.

force of the decision reached. The legal standing of the final text is quite independent of the manner in which the decision is achieved; rather, it depends on the general provisions governing the value of resolutions and other acts of international organizations or diplomatic conferences—provisions to be found in the charter of the organizations or in the terms of reference of conferences respectively, as well as in rules of customary international law. Thus, for instance, a decision taken by the Security Council under Article 25 of the UN Charter is legally binding irrespective of the modalities of its passing. By the same token, a General Assembly resolution concerning matters other than the internal functioning of, or membership in, the UN has only hortatory value, whether or not it has been adopted by consensus. If it fulfils the requisite conditions for being regarded as an agreement entered into by all the States participating in the consensus, this special status would only follow from the general rules concerning treaty-making. The same holds true for resolutions susceptible to being considered as evidence of a customary process of international law.

International Law-making in a Divided World

109. It is apparent that at present all States agree on a basic nucleus of conceptions as to how law is made in international relations. There is full agreement on treaty-making and on the importance of this source of law.

By contrast, States are divided on the way international *custom* becomes binding (§65), on the significance and purport of the 'general principles of law recognized by civilised nations' (§94), and also, albeit to a limited extent, on the legal relevance of resolutions adopted by international organizations. Whereas most developing States tend to attribute quasi-legislative force to resolutions, claiming that their 'cumulative effect' can give rise to binding rules, by contrast, Western and socialist States cling to the traditional view that, subject to certain well-defined exceptions, resolutions have a hortatory value only.

As has been rightly stressed by Condorelli,[33] these differences have often led States eventually to agree upon solutions on a *regional* level, where there is frequently greater homogeneity, and where it is therefore easier to reach agreement. At a universal level the difficulty of attaining substantial arrangements and consequently of passing legally binding rules has often brought about the weakening of the legal force of precepts resulting in the creation of so-called '*soft law*', that is to say, general declarations, resolutions, acts, agreements, and rules so loose in content as to prove virtually ineffective.

[33] L. Condorelli, *Droit international public* (Geneva, 1984–5), p. 26.

Annex II

ANNEX II

1. **1964 UN Juridical Yearbook(JYB) : Dossier 74**

- ***Internal memorandum***

Issue:

- Interpretation of section 18(a), 20 and 29(b) of the Privileges and Immunities Convention (P & I Convention).

- This is a civil action, automobile accidents which involved an official of the UN.

- The parties can resort to arbitration under section 29(b) of the P & I Convention; nonetheless, it is usually made on an ad hoc basis permitting the choice of the most appropriate method for each case.

2. **1967 UN Juridical Yearbook : Dossier 75**

- ***Statement made by the Legal Counsel at the 1016th meeting of the Sixth Committee of the General Assembly on 6.12.67.***

- Reiterated the principles to be adhered to in the granting of privileges and immunities (p & i) to the representatives and officials of the Organization.

- The role of the Secretary - General in relation to privileges and immunities of the staff .

- Commented on the 1961 Vienna Convention on Diplomatic Relations which applies only to the exchange of permanent diplomatic missions between States.

- Commented on the P & I Convention. Noted that the P & I Convention is of a very special character; a convention sue genesis.

- Commented on the usage of the word "Members" rather than `parties' which only manifests in section 30 & 35 of the P & I Convention.

- Emphasized Section 35 of the P & I Convention which characterized the Members' obligation, such obligation persists so long as that Members remains and Member of the UN.

- Also reiterated the basis of Article 105 of UN Charter in relation to the granting privileges and immunity which is deemed `necessary' for the fulfilment of the purpose of the Organisation.

3. **1968 UN Juridical Yearbook : Dossier 76**

- ***Memorandum from the General Counsel of UNRWA.***

- Scope and effect of the p & i under the P & I Convention for locally recruited staff.

- The purpose of the memorandum is to explain on the p & i to be conferred on locally recruited UN staff within the territory of a state.

- 3 important points were raised:

(a) - p & i is not meant for personal benefit of any individual as fortified by section 20 of the P & I Convention;

- The basis purpose of p & i is to ensure the independence of the individual in relation to his official acts. This is consistent with the intention of Article 100 of the UN Charter, which not only embodies the obligation of the staff but also Member State. Also established that 105, paragraph 2 of the UN Charter has a mandatory effect.

(b) Explained that p & i under S18 of the P & I Convention apply to all officials of the UN, except locally recruited officials who are assigned on homely rates, decided by the General Assembly.

(c) Locally recruited staff do not enjoy the same extent of p & i as their expatriate counterpart; this is evident from some provisions in section 18 of the P & I Convention; for instance paragraph (f) of section 18 of the P & I Convention.

■ The memorandum then highlighted the p & i relevant to locally recruited staff which are as follows:

(a) ■ Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. [Section 18(a)].

The rationale is that when the official is acting in this capacity, the act is actually the act of the UN and therefore the issue on nationality is immaterial.

Since it is an act of the UN and if the official is subject to legal process, hence the UN will be implicated and consequently the information rested within the official and also any related documents may be jeopardized. The memo has given a strict interpretation to S18(a) as the phrase 'legal process' has been applied in its broadest interpretation, to include immunity from proceedings of any administrative bodies or tribunals.

■ Nonetheless, the memo also noted that there can be a borderline case where the act may be "official" or "non-official" and the UN must reserve the right to make such decision, based on the finding of facts. However, such unilateral act on the part of the UN is not without any assurance of UN's cooperation. One example which has been quoted as "non-official act" is when the official is involved in political activities.

Even when an act is official, the immunity can and must be waived by the SG when such immunity would impede the course of justice and can be waived without prejudice to the interest of the UN (section 20 of the P & I Convention). It further states that "The Government can always ....., request a waiver in a particular case where these conditions would be met. Even where the Agency is not prepared to waive the immunity of a staff member, this does not mean that no possibilities exist for the

Agency to assist the administrative or judicial authorities of the host Government.". (ibid at p.213 & 214)

(b) ■ Exemption from taxation on the salaries and emoluments paid by the UN (section 18(b).

(c) ■ Immunity from national service obligation (section 18(c)

4. **1969 UN JYB : Dossier 77**

■ ***Memorandum to the Chief of the Rules and Procedures Section, Office of Personnel.***

■ **Issue:**

Would a delegation of authority includes a waiver of p & i of the UN?

■ It was opined that the authority to waive p & i is rested exclusively in the SG of the UN. This is based on the premise that

"…. The charter, the convention on the Privileges and Immunities of the United Nations and the Staff Regulations make it clear that, so far as the United Nations is concerned, in its relation with staff members, privileges and immunities are not perquisites of staff member: on the contrary, they are the prerogative of the Organization itself and are related to the Organization's functions, and it is reserved to Secretary -General to determine when they should be waived "(emphasis added). (ibid at p.255)

(ibid at p.255)

- Conditions for waiver of a staff in the member UN should be uniformed.

5. **1974 UN JYB : Dossier 78**

- ***Letter to the Ass. To the SG of an international organisation***

- **Issue:**

  Whether an internationally recruited staff member having committed a serious offense within the country of his staff station could be presented and punished under the law of the country to whose territory he is returned.

- Laid down the p & i of officials:

  UN staff below the rank of Ass . SG, recruited internationally or locally and whether seconded or not from government service, is only conferred p & i on acts committed in the course of their official duties.

- Staff member has no special immunity from local prosecution for a criminal offence. In the event that staff member is prosecuted, UN would offer general assistance and good office. At the same time staff member would also be subjected to appropriate disciplinary measures under the staff Regulations and Rules of the UN.

- UN officials, below the rank of the Assistant Secretary General, do not have `diplomatic' status under the P & I Convention. However, in some countries where UN offices are maintained, senior UN staff

below that level are accorded with diplomatic p & i by way of special agreement.

- In Headquarters Agreements between host governments and the UN for economic commission all officials are immune from 'personal arrest or detention'. It was noted that such arrangement is less problematic.

- The grant of immunity to officials is justified in terms of the effective functioning of the UN and section 20 empowers the SG to waive immunity from arrest or prosecution in any case 'where in his opinion the immunity would impede the course of justice and can be waived without prejudice to the interest of the UN.

6. **1975 UN JYB : Dossier 79**

- ***Internal Memorandum***

- This memo merely laid down the immigration agreement that UN had with the US.

- The explanation was made due to the visa application made by two nationals on behalf in their family, of a Member State who were locally recruited and who both serve in the General Service Category at the Headquarters.

- The memo then laid down the provisions of the P & I Convention as well as the provisions of the Headquarters Agreement between the UN & the US.

- The general provision in the P & I Convention relating to immigration restriction and alien registration is S18. The Headquarters Agreement further reflected the modus of the department of US in dealing with such issue, as reflected in Article IV, Section II and also Article IV, Section 13 of the Headquarters Agreement.

- The memo also addressed the issue on waiver under article V, Section 20 of the P & I Convention.

- Also explained on deadlock situation where waiver of immunity is refused by UN SG, then it may resort to the dispute settlement provision of the Headquarters Agreement embodied in article VIII, Section 21(a).

[Note: The provision in the Headquarters Agreement seems to provide the detail mechanism for settlement in the event of dispute relating to the interpretation or application of the Headquarters Agreement or any other supplemental agreement. Provision on appointment of arbitrators is also spelt out].

- Besides the P & I Convention and the Headquarters Agreement, the American law which is applicable is the United States Code. From the wording of the relevant provisions, Section 1226 (relating to the procedure for the exclusion of aliens) and 1251 (relating to procedure for deportation of aliens) are not applicable to UN staff members nor their families.

- It concluded by stating that under the P & I Convention, the Headquarters Agreement and the US Immigration law:

(i) staff member holding G.4 visas and subject to the relevant provisions of immunity cannot be subjected to exclusion or deportation proceedings;

(ii) the privileges and immunities granted to staff is also extended to family members, who may not be refused a G.4 visas.

7. **1975 UN Juridical YB : Dossier 80**

- ***Internal memorandum***

- **Issue:**

  Whether staff member of the UN who is a national of a member state should be given leave to complete military service.

- Highlighted Article V, Section 18(c) of the P & I Convention relating to such issue and also the staff who has a contract with the organization qualifies him as an official under Article V, section 17 of the P & I Convention.

- Also looked at the Staff Rules, Appendix C, section C. Despite the clear provision of S18 of the P & I Convention, the Staff Rules stipulated that staff member who has completed one year of satisfactory probationary service or who hold a permanent or regular appointment may be granted special leave without pay to fulfil the military obligation.

- Section (1) of Appendix C also states that SG of the UN may apply the provisions of that Appendix where a staff member volunteers for military under section 18(c) of the P & I Convention. Hence, it is the SG's discretionary authority to either grant leave for the staff member despite the exemption or waive such immunity. The staff member may not waive his own immunity.

8. **1976 UN JYB : Dossier 81**

- ***Letter to the permanent Representative of a member state.***

- **Issue:**

  UN Security Officer as a complainant in a criminal proceeding. Should the UN Security officer be subjected to jurisdictional immunity?

- In this letter, it probed into the national court's approach in determining the action of the security officer, if he has exceeded his official acts. It was explained that this is the exclusive power of the SG; to determine the extent of the authority, duties and functions of UN officials.

- In the event that the national court is empowered to make such determination, it is contended that there will be a mass of conflicting decisions as the organisation operates in many parts of the world.

- Also if the national court can determine the limitation of official act, then it would tantamount to a total denial of immunity. This is further fortified by the existence of internal disciplinary procedures

and also the SG's power to waive after given due consideration to the said act of the official.

- In the event that there is a dispute on the waiver of immunity, the settlement of such dispute can be referred to the appropriate procedures for settlement and not by over-ruling the SG's determination by the national court. It was asserted that the availability of such procedure weaken the assumption that national courts has jurisdiction to determine the extent of immunity from jurisdiction enjoyed by a UN official acting in his official capacity as directed by the Secretary-General.

9. **1976 UN JYB : Dossier 82**

- ***Memorandum to the Under SG for Administration and Management.***

- Opined on the conduct of staff member which is governed by the Staff Regulation 1.4. The staff is obliged at all times to conduct themselves in a manner befitting their status as international civil servant and must avoid any action and any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status.

- Violation of this obligations could justify disciplinary action under Chapter X of the Staff Regulation and Rules, besides any criminal proceedings.

- UN can act upon complaint regarding behaviors of its staff but staff will be given a right of hearing before any decision to conduct further investigation or to take further action.

- UN officials do not enjoy diplomatic immunity but only immune from legal process in respect of their official acts. Clearly such explanation excludes any non-UN activities.

- On the assertion or waiver of the immunities of staff member it is for the Secretary General of UN to ascertain and determine it. (staff regulation 1.8)

10. **1977 UN JYB : Dossier 83**

- ***Letter to the Legal Liaison Officer, UN Industrial Development Organization.***

- **Issue:**

  Immunity from legal process in connection with traffic offences involving staff member, who is not granted diplomatic immunity, traveling from home to the Organization.

- Also briefly explain on the difference between section 19(a) of the P & I Convention and the Staff Regulation and Rules and also the basis for the immunity for official acts under the P & I Convention and the basis for various entitlements under the Staff Regulations and Rules.

- Compensation for injuries and benefits in relation to traffic offenses provided in the Staff Regulation and Rules are not to be construed as 'official actions' but is considered as "official on duty'.

- The invocation of privileges and immunity in traffic offences has been restricted. Resolution 22(1) E has instructed that staff member should be properly insured against third-party risks and this has found its implementation in Staff Rule 112.4.

- It is for the SG to decide what constitutes official act and also to decide on the invocation of immunity or its waiver. (`clear from the P & I Convention and Staff Regulation 1.8).

- Recognised that there is no precise definition on the following expression
  - "official capacity"
  - "official duties
  - "official business"

  They are functional expressions which are contextual. Also recognises that the invocation of immunity in traffic offences can give rise to considerable difficulties in dealing with the police, the courts and finally entails political consequences.

11. **<u>1981 UN JYB : Dossier 84</u>**

- ***Statement made by Legal Counsel at the 59th meting of the Fifth Committee of the General Assembly on I December 1981.***

- Made a reference to the report of the Secretary General on respect for the privileges and immunities of the UN and the specialized agencies.
  (A/c.5/36/31)

- 3 basis issues were addressed:

  (a) Draw a distinction between diplomatic and functional immunities. While diplomatic immunity attached to the person, the functional immunity of international officials was the Organization.

  (b) Who is entitled to privileges and immunities under the P & I Convention? The term used is "officials" and the SG should specify the categories of officials to which article V and VII of the P & I Convention should apply. It is noted that similar provision were provided for in the Convention on the Privileges and Immunities of the Specialized Agencies and the IAEA Agreement. In 1946, resolution 76 (I) of the General Assembly approved the granting of the privileges and immunities referred to in Article V and VII of the P & I Convention should be conferred to all members of the staff of UN, excluding those who were recruited locally and were assigned to the hourly rates.

  (c) Discrepancy in the conferment of p & i to officials in the UN Headquarters in New York and other duty stations.

12. **1983 UN JYB : Dossier 85**

- ***Memorandum to the Ass. SG for General Services.***

- **Issue:**

  Civil and criminal liability of members of Security and Safety Service and the application of the US laws in relation hereto.

- Stated that under section 18(a) of the P & I Convention officials of the UN is prime facie immune from legal process.

- It is the exclusive authority of the SG of the UN to determine on the scope of the action and not to be left to the court.

- The SG can waive immunity based on S20 of the P & I Convention.

- Also noted the provision for appropriate settlement of dispute involving the issue on immunity of UN officials, see section 29(b) of the p & 1 convention.

13. **1984 UN JYB : Dossier 86**

- ***Memorandum to the Legal Adviser, United Nations Relief and works Agency (UNRWA) for Palestine Refugees in the Near East.***

- **Issue:**

  Whether the immunity of UNRWA is a matter to be judged under domestic law or some other system of law.

- Opined that it shall not be judged by domestic law except to the extent that it incorporated relevant international obligation.

- Highlighted that application of the P & I Convention at the international fora.

- Stated the distinction between organization immunity which is more restrictive to that of absolute immunity.

- On the immunity of international organisation, it is stated that it need not be asserted as it exists as a matter of law and fact which the court has to take judicial notice.

14. **1985 UN JYB : Dossier 87**

- ***Letter to the Permanent Representative of a Member State to the UN.***

- **Issue:**

  Whether a subcontractor who was involved in an accident was engaged in his official business during the occurrence of the accident. (*This letter did not deal specifically on privileges and immunities of official, rather to deduce from the facts of the case if the action is within the meaning of 18(a) of the P & I Convention.)

- Gave an interpretation that any act which is performed by officials, experts, consultants, which is directly related to the mission or project would constitute prima facie an official act within section 18(a) of the P & I Convention.

- It is the SG alone who will decide what constitute an official act. Nonetheless, the UN is obliged to cooperate with all relevant

authorities to facilitate the proper administration of justice and also to prevent any abuse of privileges and immunities.

15. **1991 UN JYB : Dossier 88**

- ***Memorandum to the Executive Director, United Nations Children's Fund.***

- **Issue:**

  Determine the decision of the Industrial Court in refusing to grant immunity to a former UNICEF employee.

- Also highlighted the UNICEF Agreement 1978 and the P & I Convention and reminded that should the state fail to take appropriate measures to fulfilled their obligations, then such failure shall tantamount to a breach of the said obligation. This duty to communicate and remind the other organs of the government, including the judiciary, shall be undertaken by the Ministry of External Affairs.

16. **1991 UN JYB : Dossier 89**

- ***Memorandum to the Director, Divisional of Personnel, United National Children's Fund.***

- **Issue:**

  Whether the UN should waive immunity in the case of a UNICEF Staff Member to enable her to testify before a commission of inquiry appointed by national authorities to investigate an accident in which she was one of the victims.

- Highlighted S18(a) of the P & I Convention of which the state is a party. In furtherance to the said Convention, the state also entered into an agreement with UNICEF on 5.4.1978.

- Highlighted section 20 of the P & I Convention on the question of waiver.

- In the event waiver of immunity is not invoked, UNICEF was advised to cooperate with the commission by providing information that could facilitate its work.

17. **1992 UNJYB: Dossier 90**

- Internal memorandum to the Senior Policy Officer(Legal), Division of Personnel, UNDP

Issue:

- Request for waiver of immunity in connection with the motor vehicle accident involving a United Nations volunteer performing services on behalf on the United Nations Development Programme (UNDP).

- Legal status of volunteer under the UNDP Standard Basic Assistance Agreement and the 1946 Convention on the Privileges and Immunities of the United Nations.

- Whether the volunteer was acting in an official capacity when the accident occurred.

18. Dossier No. 91 - Unpublished Opinion :
5 May 1982 - Staff

- Intention to acquire permanent resident status, execution of a written waiver of privileges and immunities, by the staff member.

- Waiver of the immunity of officials, can only be done by the Secretary General. The Secretary General has to authorize the execution of a written waiver of privileges and immunities.

19. Dossier No. 92 - Unpublished Opinions
2 April 1984 - Staff

- Personal loans contracted by staff member prior to joining the United Nations.

- Waiver granted.

20. Dossier No. 93 - Unpublished Opinions
23 July 1984 - Staff member

- Lifting of immunity in respect of private debts.

21. Dossier No. 94 - Unpublished Opinions
8 January 1985 - Official

- Sued in his capacity as board member of a condominium.
- No immunity.

22. Dossier No. 95 - Unpublished Opinions
31 May 1988 - United Nations

- Insurance claim
- Waiver allowed.

23. Dossier No. 96 - Unpublished Opinions
17 November 1989 - Staff member

- Waiver allowed for actions arising from his activities as the administrator of a bank account.

24. Dossier No. 97 - Unpublished Opinion
19 March 1990 - Officials

- Waiver of immunity - a waiver executed by a UN official without authorization from the Secretary General would be ineffective under US law. It is for the Secretary General alone to decide whether to waive the privileges and immunities granted to individuals based on their status as officials.

25. Dossier No. 98 - Unpublished Opinion
18 May 1992 - Staff member

- Sued by his household employee.
- Waiver allowed.

26. Dossier No. 99 - Unpublished Opinion
26 April 1993 - Staff member

- Divorce proceedings
- Waiver allowed.

27. Dossier No. 100 - Unpublished Opinion
24 January 1995 - Official

- Civil Suit

- Long lasting and uncontested practice that the competence to determine what constitutes an "official" or "unofficial" act performed by a staff member is vested solely in the Secretary General. The United Nations has never recognized or accepted that courts of law or any other national authorities of member states have jurisdiction in making determinations in these matters.

28. Dossier No. 101 - Unpublished Opinion
20 September 1995 - Staff member

- Served with subpoenas ad testificandum.

- Privileges and immunities accorded to the staff members under the Convention are being maintained by the Organization in regard to their official activities, the privileges and immunities would not apply for the staff members activities involving the AIIC.

29. *Dossier No. 102 - Note Verbale to the Minister of Foreign Affairs of Member States.
25 February 1998 - Expert

- A member of the Board of Trustees of the United Nations Trust Fund for the Victims of Contemporary Forms of Slavery was arrested by the competent authorities of a member state.

- Following hearing on 8 and 9 February 1998 the expert was sentenced on 12 February 1998 to thirteen month detention.

- As a member of the Board of Trustees of the United Nations Trust Fund for the Victims of Contemporary Forms of Slavery, that member is and continues to be an expert on mission for the United Nations.

- The United Nations maintains the position that it is exclusively for the Secretary General, not for the Government of the member state, to determine whether certain words or acts fall within the course of the performance of a United Nations mission.

- In order for the Secretary General to determine whether the acts complained of in the charges fall within the performance of his mission, the Secretary General urgently request that the United Nations be granted immediate access to the expert.

- The United Nations is also entitled to appear in legal proceedings to defend any United Nations interest affected by the arrest and detention.

- The Secretary General also protested any confiscation of United Nations documents as a serious violation of their inviolability and requested a complete inventory of all documents confiscated and the immediate return to the United Nations of any documents belong to it.

30. *Dossier No. 103 - Note Verbale to the Permanent Representative of a Member State

27 April 1998 - Expert

- The expert who was sentenced to thirteen months detention by the

Member State was pardoned by the President of the Member State.

- As the Government did not permit access to the expert until after he was pardoned, the Secretary General was unable to take a decision on whether the actions leading to the arrest and conviction were related to his official duties until after his pardon.

31. *Dossier No. 104 - Letter to Expert referred in Dossier No. 102 and 102 from the Chef de Cabinet
27 April 1998 - Expert

- The Chef de Cabinet informed the expert that the Secretary General was unable to assert immunity in respect of the actions which led to his arrest and convictions since those actions were not related to his mandate as an expert.

- **The expert's actions to expose and eradicate slavery went beyond the United Nations mandate to give advice on the administration of the Fund** (United Nations Trust Fund for the Victims of Contemporary Forms of Slavery).

32. Dossier No. 105 - Staff Regulation

- Regulation 1.4 : "Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. **They shall not engage in any activity that is incompatible with the proper discharge of their duties** with the United Nations. They shall **avoid any action** and in particular **any kind of public pronouncement** that may **adversely reflect** on **their status**, or on the integrity, independence and impartiality that are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions,

they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status.".

- Regulation 1.5 : "Staff members shall exercise the utmost discretion in regard to all matters of official business. They **shall not communicate to any person any information known to them by reason of their official position** that **has not been made public**, except in the course of their duties or by authorization of the Secretary General. **Nor shall they at any time use such information** to **private advantage**. These obligations do not cease upon separation from the Secretariat.".

- Regulation 1.8 " "The immunities and privileges attached to the United Nations by virtue of Article 105 of the Charter are conferred in the interests of the Organization. **These privilege and immunities furnish no excuse to the staff members who enjoy them for non-performance of their private obligations or failure to observe laws and police regulations**. In any case where these privileges and immunities arise, the staff member shall immediately report to the Secretary General with whom alone it rests to decide whether they shall be waived.".

33. *Dossier No. 114 - Reports of the Secretary General on "respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organization.".

UNRWA staff detained in Labanon by the Israeli authorities - Report of the Secretary General (25 October 1983).

- Following the Israeli invasion into South Lebanon in June 1982, more than 200 cases of arrest of UNRWA staff members in Lebanon by the Israeli Defence Forces were reported. Sixty eight staff member were still believe to be in detention on 17 October 1983, 29 of whom have

been reported arrested in 1983. Repeated attempts have been made to obtain information regarding the detained staff to secure access to them and to obtain their early release.

- **The Israeli Foreign Ministry in a reply to the Acting Commissioner-General's letter of 14 January made the point inter alia that no distinction could be made between UNRWA employees and other detainees regarding visits. It was also stated that UNRWA staff detained in Ansar in South Lebanon by IDF were not detained for any activities related to their official capacities and that, therefore no question of the infringement of their functional immunities should arise.**

- The Commissioner-General wrote in reply on 28 March 1983 to the Ministry of Foreign Affairs, focusing on the right of UNRWA (a) to be informed of the arrest of any of its staff; (b) to be informed of the reasons for the arrest so that it might judge whether that arrest related to the official functions of the staff member concerned; and (c) to have access to detained staff.

- On 3 May 1983, the Secretary General wrote to the Permanent Representative of Israel to the United Nations drawing attention to the position of the United Nations under international law and to the terms of the General Assembly resolution 37/236 B and requesting inter alia that his representatives be given facilities to visit UNRWA staff detained in South Lebanon at an early date, to speak to them and to assist them in their legal representation.
- The Israeli Permanent Representative in New York replied on 13 June 1983 to the Secretary General's letter. In substance, the Israeli authorities took the position that **they had the right to decide unilaterally the question of what constitutes an official function of a United Nations official and that, furthermore, the Government of Israel considered that the United Nations** had **no**

standing as regards **proceedings taken** against **its own staff members**.

- The Secretary-General, in his reply of 28 June 1983 to the Israeli Permanent Representative, noted that the position taken by the Government of Israel was not in conformity with international law and practice. In that letter, the Secretary General also referred to the recognized principle that it is exclusively for the Secretary General, as the chief administrative officer of the Organisation, to determine the extent of the duties and functions of the United Nations officials. With regard to the question of standing, the Secretary General pointed out that the position of the Israeli Government was contrary to the well established right, under international law of functional protection of the Organization. It was recalled that the International Court of Justice had held that international organizations had the power and responsibility to protect members of their staff.

- The Permanent Representative of Israel, in his reply of 12 October 1983 to the Secretary General's letter stated that "Israel had detained certain individuals in Lebanon on account of their involvement in hostile authorities, either directly or as accessories, with a view to preventing their involvement in further hostile activities which would endanger the people of Southern Lebanon as well as the citizen of Israel. **Their detention has no connection whatsoever with their professional activities, but only with actions which violated their functions as officials of the United Nations.** It is quite impracticable for the Government of Israel to attempt to differentiate between locally recruited personnel who performed their hostile actions outside the scope of their functions and other detainees. **In neither case is there any immunity**.

- In his reply dated 25 October 1983, the Secretary General drew the attention of the Permanent Representative to the points raised in his

later of 28 June 1983 which had not been addressed by the Permanent Representative stating the fundamental principle of the international civil service where the Organization's right of functional protection with regard to arrested and detained staff members that has been strongly reaffirmed by the General Assembly in a number of resolution most notably resolution 36/232 of 18 December 1981.

- The Secretary General also took note of a judgement which was given on 13 July 1983 in the Supreme Court of Israel sitting as the High Court of Justice. The petitioners in this case, the inmates of Ansar detention had applied to the High Court of Justice for an order directing the respondents, the Minister of Defence and commander of the camp, to inform them of the legal basis of their detention and to show cause why they should not be permitted to see their lawyers. The court ruled that **the respondents were entitled to arrest and detain the petitioners in territory occupied** by the **Israeli army** and **that the detainees** were subject to the rules laid down in Article 78 of the Fourth Geneva Convention. The Court also recorded the respondents' undertaking that the petitioners would be entitled to meet their lawyers, subject to necessary safeguards.
- Taking into consideration all of the measures and the observations and judgement of the Supreme Court of Israel, the Secretary General can only reiterate his request that the continued detention of UNRWA staff be urgently reconsidered by the Government of Israel and that the Organization's right of functional protection be recognized. The Secretary General will continue to monitor the release of UNRWA detainees by the Israeli authorities and will provide to the General Assembly an updated list of UNRWA detainees taking into account any actions taken since 30 June 1983.

34. Dossier No. 115 - Personnel Question : Respect for the Privileges and Immunities Of Official of the United Nations and the Specialized Agencies and Related Organizations.

Report of the Secretary General (2 November 1989).

- The General Assembly in its resolution 43/225 of 21 December 1988, called upon the Secretary General, as chief administrative officer of the United Nations to continue personally to act as the focal point in promoting and ensuring the observance of the privileges and immunities of officials of the United Nations and the specialized agencies and related organizations by using all such means as were available to him. It further urged the Secretary General to give priority, through the United Nations Security Coordinator or his special representatives to the reporting and prompt follow up of cases of arrest, detention and other possible matters relating to the security and proper functioning of officials of the United Nations and the Specialized agencies and related Organizations.

- As was indicated in the report of the Secretary General to the General Assembly at its forty-second session (A/C.5/42/14), when staff members of the United Nations and the specialized agencies and related Organizations are arrested and detained, both **legal** and **humanitarian** considerations are taken into account by the Secretary General or the executive head concerned in seeking access to them. **The legal considerations derive from the relevant international instruments on privileges and immunities and relate principally to the determination of whether or not a staff member has been arrested or detained because of his or her official activities.** This **determination must be made** by the **organization** concerned and, if the **organization determines** on the **basis** of **visits** to the **detained or arrested staff members** that the **arrest or detention is related to official functions** then **immunity is asserted.** If, however, the visiting official is satisfied, both from an interview with the detainee and from the charges brought, that the matter is not related to official functions, there's no legal basis for asserting

immunity and the legal as distinct from the humanitarian grounds for further intervention by the Organization no longer exist.

Annex III

ANNEX III

COMMONWEALTH SECRETARY-GENERAL

H. E. Chief Emeka Anyaoku, C.O.N.

Circular Letter No.42/95 5 December 1995

Re - Commonwealth Law Ministers Meeting
15-19 April, 1996, Kuala Lumpur, Malaysia

1. You will recall that when Commonwealth Law Ministers last met in Mauritius in 1993 they accepted with great pleasure the invitation extended to them by the Government of Malaysia to host their next meeting. I have heard from the Government of Malaysia that the most convenient dates for it will be from 15 - 19 April 1996, and consultations with Law Ministers have indicated that these dates are broadly convenient for most Ministers. Accordingly, I am pleased to confirm these dates as the dates for the Meeting.

2. The question of the possible agenda for the meeting was given preliminary attention by Senior Officials of Law Ministries when they met in Malta in May/June 1995. I have reflected on their suggestions, particularly in the light of legal developments since your Mauritius meeting and set out below what I trust will prove to be a sufficiently thought-provoking agenda for your meeting.

3. When Commonwealth Heads of Government met in Auckland in November 1995 (CHOGM), they took a number of significant decisions some of which impact directly on your work. The Milbrook Commonwealth Action Programme on the Harare Commonwealth Declaration will, I believe, have a special significance to Law Ministers for years to come. The essentials of the fundamental political values in the Harare Declaration are embedded in and expressed primarily through legal institutions.

4. I therefore very much look forward to your Meeting continuing the tradition of furthering your role as standard-setters particularly in developing relevant aspects of Commonwealth mutual legal assistance. Over the years, the achievements of the Law Ministers forum have been truly remarkable and it would be natural to expect that this would, in time, broaden into even a much wider and deeper mutual legal assistance network between Commonwealth jurisdictions beyond what already exists.

5. Against this background, and bearing in mind the recommendations made by Senior Officials at their Malta Meeting, I would suggest for your consideration the following outline agenda:

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11. The Federal Constitution also has provision to ensure that the dignity of the courts and judges are always maintained. It is the power given to the superior courts to punish any person for contempt of itself. Article 126 of the Constitution provides that the Federal Court, Court of Appeal, or the High Court shall have the power to punish any contempt of itself. In Attorney General & Ors. v Arthur Lee Meng Kueng (1987) 1 MLJ 206, the then Supreme Court made the following observations:

> "In this country the need to protect the dignity and integrity of the Supreme Court and the High Court is recognised by Article 126 of the Federal Constitution... A proper balance must therefore be struck between the right of speech and expression as provided for in article 10 of the Federal Constitution and the need to protect the dignity and integrity of the Supreme Courts in the interest of maintaining public confidence in the judiciary".

asked to keep under review. At their meeting in Malta, after an exhaustive discussion of reservations expressed by Singapore, Senior Officials agreed a draft Revised Statement on Mutual Assistance between Business Regulatory Agencies which Ministers will be asked to adopt.

(v) **Money Laundering:**
You may recall that pursuant to the concern expressed by Heads of Government that Commonwealth countries should join the international efforts to combat the laundering of the proceeds of all serious crime, Law Ministers for their part resolved at Mauritius to put into place comprehensive laws to combat money-laundering. To facilitate this, and at the request of Ministers, the Secretariat has prepared a draft model law which has been circulated to governments. Ministers may wish to keep this model law under review. In this respect, it may be recalled that at Mauritius Ministers asked senior officials to work out and administer a system for self-evaluation of progress in implementing anti-money laundering measures, in particular the 40 recommendations of the Financial Action Task Force.

(vi) **Transborder insolvency:**
Many law officers share responsibility for ensuring that the enforcement of the regime for the operation of business, including particularly corporate bodies, is conducted strictly within the confines of the law. The globalisation of business, and in particular the growth of regional trading blocks has highlighted the problems that can be created by transborder insolvency, including corporate insolvency.

(vii) **Intellectual Property Rights: The legal implications of the Agreements on Trade and Intellectual Property Rights arising from the conclusion of the Uruguay Round:**
For many states whether they are party to important multilateral treaties which would serve their national interests well will often depend on an appreciation of the full implications of such treaties. In some instances, analysing the full implications of a complex treaty such as the GATT and the establishment of the World Trade Organisation could be extremely burdensome for some, particularly small states. The inclusion of this item has arisen in part from the wishes of the last Meeting of Law Officers of small Commonwealth Jurisdictions held in Namibia.

(viii) **A review of the activities of the Commonwealth Secretariat in the legal field:**
This is a regular item on the agenda of Law Ministers Meetings providing, as it does, an opportunity for Ministers to assess the usefulness to them of the Secretariat's legal activities and the extent to which they have been relevant to the contemporary needs and expectations of governments. The review will include a consideration of the full Report of the Malta Senior Officials meeting. It will also give Ministers an opportunity to provide the Legal and Constitutional Affairs Division with guidance as to future work plans.

.../4

6. Following, as your Meeting does, almost immediately on the heels of the Auckland CHOGM, it may be that you will also wish to consider other matters remitted to you by Heads of Government which may not have been included above. These might include, for instance, the specific request that Law Ministers keep under review developments in the work being undertaken by the United Nations on the possibility of establishing an international criminal court, and the recommendation urging the ratification by member governments of human rights covenants and other international conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

7. These, then, are some of my preliminary thoughts about the topics which I feel may commend themselves to you and your colleagues for your consideration. I would naturally welcome any comments you may wish to make regarding these suggestions, and in particular any other items you would like to suggest ought to be considered for inclusion in the Agenda.

9. I am writing in identical terms to the Law Ministers and Attorneys General of all member countries of the Commonwealth, and to those of the dependent territories and look forward to hearing from you soon bearing in mind the dates that have been agreed for the meeting. However, if I have not heard from you by 5 January 1996, I shall, in accordance with customary practice, assume that the draft agenda topics proposed here are acceptable to you.

Emeka Anyaoku

AGENDA ITEM NO. 1(a)

ADVANCING COMMONWEALTH FUNDAMENTAL VALUES

TITLE OF PAPER: LMM(96)22

INDEPENDENCE, QUALITY AND STATUS OF JUDICIARY IN COMMONWEALTH COUNTRIES

Researched by: Dato' Stanley Isaacs

TOPIC OF PAPER: INDEPENDENCE, QUALITY AND STATUS OF JUDICIARY IN COMMONWEALTH COUNTRIES

COMMENTARY:

This is a paper that was prepared for the Commonwealth Secretariat by an officer of the Attorney General's Department Australia.

2. The paper recalls the various declarations made at the highest level at various Commonwealth Conferences and Meetings since 1991 which pledged and reiterated the commitment of members inter alia, to the principles of the Rule of Law and the Independence of the Judiciary. The basic declaration is reflected in the 1991 Harare Commonwealth Declaration. That Declaration is regarded as the corner stone declaration of the Commonwealth in relation to such values as the protection and promotion of democracy, the rule of law and the independence of the judiciary, fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political

belief. The Declaration also called for cooperation of members State with a view to entrenching the practices in those areas.

3. In Millbrook New Zealand, in 1995 the Commonwealth adopted an action programme (1995 Millbrook Commonwealth Action Programme) to fulfil the commitments contained in the Harare Declaration, whereby inter-alia the Commonwealth Secretariat would provide advice, training and other forms of technical assistance to Governments to promote inter alia to strengthening the rule of law and the independence of the judiciary "though the promotion of exchanges among and training of the judiciary...."

4. The paper stresses the importance of an independent judiciary which is able to exercise its powers without interference and undue influence of the executive. The paper also recognised that national interests, visions and aspirations is enhanced when the judiciary in each country can perform its judicial functions independently.

5. The paper recalls the 1992 Lusaka Statement on "Government under the Law", which inter-alia opinionated that on a daily basis, it is the responsibility of the judiciary to hold the executive accountable under the Rule of Law and "to ensure (on the people's behalf) that Government takes place on a constitutional basis and under the law."

6. The paper emphasizes importance of maintaining the dignity and status of the members of the judiciary and that such status ought to commensurate with its role in supporting and entrenching the rule of law.

7. The paper noted that the steps taken by each Commonwealth country in the establishment, maintenance, preservation and safeguarding the independence and status of the judiciary differ from one country to another.

8. It is also recognised that each Commonwealth country is free to establish its judiciary as it seems fit within its constitutional framework. There is therefore no necessity for uniformity in the development of the status and independence of the judiciary.

9. The paper has also proposed that Ministers in the Kuala Lumpur Meeting agree to the establishment of a Working Party that would study and report to the next meeting of Law Ministers on the state of development and practice on various matters which fundamentally affect the reality or actuality of the independence of the judiciary in member countries. This work is towards implementation of the 1995 Millbrook Commonwealth action Programme referred to earlier.

MALAYSIAN POSITION

Malaysia has consistently supported every Commonwealth Declaration or statement on the broader principles of the Rule of Law and the Independence of the Judiciary and we have been able to do this without hesitation because they are not only practised but guaranteed by the Federal Constitution and the laws of the country.

2. Like in most countries that practice parliamentary democracy, the Judiciary in Malaysia is one of the three separate branches of government, the other two being the Legislature and the Executive. The constitution gives judicial power exclusively to the courts of the country namely the federal court, the court of appeal, the two high courts and the lower courts established by federal law. Judicial power means power to hear and determine in accordance with the Constitution and federal laws, actions against the person under the criminal laws; disputes about legal rights and liabilities which includes disputes between the federation and

a state; between state and state; between citizen and the federation or a state and between citizen and citizen. No other branch of Government has this power and in rare cases where it is given this power, its decisions are subject to review by the judiciary.

3. While there is no real separation of powers between the legislature and the executive by reason only of the characteristic of parliamentary democracy such as is practised in Westminster, there is real separation of powers between these two branches on the one hand and of the judiciary on the other.

4. An important feature of the Malaysia judiciary apart from impartiality is it independence i.e. freedom from control by either of the two branches or indeed by anybody. The constitution secure this independence by providing that: [1]

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(1) Introduction to the Legal System of Malaysia by Tun Mohammed Suffian P. 51. Federal Constitution Art. 125 - 127

(a) a judge of the federal court, the court of appeal and of the high courts hold office not at the pleasure of the Yang DiPertuan Agong like members of the general public service. Once appointed he may not be dismissed (by the King) before the compulsory retiring age of 65 years[1] except only on the grounds of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office or on the grounds of any breach of any provision of the code of ethics for judges,[2] and then only on the recommendation of an ad-hoc on tribunal appointed by the King. The tribunal would consist only of judges i.e. five serving or retired judges.[3]

(b) a judge's remuneration is provided for by Act of Parliaments and is charged on the Federal Consolidated Fund, which means that once fixed by the Act it is not subject to annual debate and approval by Parliament and is therefore payable automatically.[4]

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1. Article 125(1)
2. Article 125(3) & (3A)
3. Article 125(4)
4. Article 125(6)

(c) a judge's remuneration and other terms of office (including pension rights) may not be altered to his disadvantage after his appointment.[1] There is a separate statute called the Judges Remuneration Act 1971, that provides in detail the remuneration of Judges, pensions rights and other conditions of service.

(d) unlike members of the public service who are eligible for a pension, a judge is entitled to his[2]; and

(e) the conduct of a judge may not be discussed in either House of Parliament except on a substantive motion of which notice has been given by at least of quarter of the total members of that House and shall not be discussed in the Legislative Assembly of any State[3].

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1. Article 125(1)
2. Article 125(6A)
3. Article 127

7. It should be emphasised that a judge may only be removed by the Yang DiPertuan Agong, and no one else. The detailed procedures are provided for in the Constitution. They are as follows:

(a) The Prime Minister, or the Chief Justice of the Federal Court after consulting the Prime Minister, may represent to the Yang DiPertuan Agong that a judge ought to be removed on any of the specified grounds.

(b) The yang DiPertuan Agong may, after receiving the recommendations of the Tribunal, remove the judge from office.[1]

8. Transfers of judges from one place to another are decided not by the government but by the Chief Justice consultation with the chief judge of the high courts concerned.[2] This is significant in that a judge who gives

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1. Article 125(3)
2. Article 122C

judgement unpopular with the executive cannot be punished by way of a transfer to a place unfavourable to the judge concerned.

9. The checks and balances built into the Constitution are well illustrated by the system of appointments of judges of the superior courts.[1] They are all appointed by the King but the King is duty bound to:

(a) consult the Conference of Rules; and

(b) act on the advice of the Prime Minister.

The Prime Minister's right to advice the King is not absolute. He has to consult the Chief Justice. Usually the nominations emanate from the Chief Justice. Further, in the appointment of the Chief Judge, the Prime Minister is also required to consult the Chief Judge of each of the High Courts concerned. In the circumstances, these constitutional checks and balances make it difficult for one man to pack the judiciary with judges of his personal choice.

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1. Article 122B.

10. Appointment to, and tenure of office of those in the judiciary of the lower courts is also free of executive influence and interference. A Session Court judge is appointed by the King on the recommendation of a Chief Judge of the high court. A first class Magistrate for a Federal Territory is appointed by the King and for a State by the ruler or governor respectively, in each case also on the recommendation of a Chief Judge of the High Court. The Judicial and Legal Service Commission only appoints officers to the judicial and legal services. It does not appoint them as Sessions Court judges or Magistrate. These officers are completely independent in the discharge of their judicial function even though they are by virtue of their appointment classified as civil servants in the public service. Nevertheless it is significant that the Judicial officers are under a separate and independent commission from that of the general civil service, the members of which, with the exception of the chairman and the secretary are senior judges of the superior courts and the Attorney General.

11. The Federal Constitution also has provision to ensure that the dignity of the courts and judges are always maintained. It is the power given to the superior courts to punish any person for contempt of itself. Article 126 of the Constitution provides that the Federal Court, Court of Appeal, or the High Court shall have the power to punish any contempt of itself. In Attorney General & Ors. v Arthur Lee Meng Kueng (1987) 1 MLJ 206, the then Supreme Court made the following observations:

> "In this country the need to protect the dignity and integrity of the Supreme Court and the High Court is recognised by Article 126 of the Federal Constitution... A proper balance must therefore be struck between the right of speech and expression as provided for in article 10 of the Federal Constitution and the need to protect the dignity and integrity of the Supreme Courts in the interest of maintaining public confidence in the judiciary".

12. Unlike say in England where parliament is supreme, and the validity of the laws made by it are unquestionable in Malaysia the Constitution is supreme and it is therefore the role of the superior courts to determine if the laws made by the legislature is valid and sustainable. Subject to certain condition, the superior courts have power to declare a law unconstitutional and hence void. The Courts also have power to declare any act of Government to be unlawful.

The responsibilities which a court carries in a country with a written constitution such as in Malaysia are enormous - much more onerous than the responsibilities of a court in a country without one. In Malaysia the task of interpreting the constitution is given to the courts because of the feeling that a system based on a written constitution can hardly be effective in practice as an authoritative, independent and impartial arbiter of constitutional issues and also that it is necessary to restrain governmental organs from exercising powers which may not be sanctioned by the constitution. [2]

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2. M.P. Jain - "Role of the Judiciary in a Democracy" Journal Undang-Undang [1979].

13. The recommendation by this paper writer to establish a Working Party to study and report on the reality and actuality of the practice of the independence of the Judiciary in member countries, should be welcomed by Malaysia. This is because the situation in Malaysia in respect of the areas to be covered by the study are in a comparatively favourable state.

Annex IV

the Jurists' recommendation for a special régime for host countries was one which he did not accept.[167]

Conviction and Suspicion of Members of the Secretariat on account of Subversive Activities

A member of the Secretariat who engages in subversive activities against his own or any other Government violates the standards of conduct incumbent upon him and should be discharged. What weight is to be given by the Secretary-General in his finding that a member of the staff has so acted to the fact that the latter has been convicted by a national court of a crime involving subversion?[168] The Commission of Jurists advised that "where there has been such a conviction the fact of the crime is *ipso facto* established," that "it is *res judicata*," and that it "should be accepted as such by the Secretary-General."[169] The first Secretary-General, in affirming that there must be "reasonable ground" for believing accusations of subversive activities – that charges "must be supported by a preponderance of evidence" – stated that the Secretary-General "should give proper weight" to national laws and legislative findings and to the findings of fact of national courts and tribunals, in addition to the evidence of the facts of each case.[170] He thus seemed to modify the Jurists' view that the decision of a national court *ipso facto* establishes the fact of the crime by allotting to that decision "proper" rather than conclusive weight. His successor stated that "the conclusions of national authorities concerning activities by staff members, are, of course, not binding on the United Nations, which must apply its own standards," but that "national findings of fact, arrived at in accordance with generally recognized requirements of due process of law, are entitled to weight."[171]

[167] See United Nations doc. A/PV.421, p. 661.

[168] A member of the staff of Soviet nationality, Valentin Gubitchev, was convicted of espionage in the United States, and allowed by American authorities to leave the country (see *United States v. Coplon et al.*, 84 f. Supp. 472, and Spence, "Jurisdictional Immunity").

[169] United Nations doc. A/2364, p. 26.

[170] See United Nations doc. A/2364, p. 13. "This standard," Mr. Lie later added, "should, I believe, be applied ... in complete independence of any national proceeding. The standard is a United Nations standard and would be applied by United Nations organs" (United Nations doc. A/PV.421, p. 661).

[171] United Nations doc. A/2533, p. 22. "A conviction by a national court," the Secretary-General added, "will usually be persuasive evidence of the commission of the act for which the defendant was prosecuted ... However, the Organization must remain free to take no account of convictions ... made without observance of the generally recognized requirements of due process of law" (*ibid.*, p. 24. See above, note 119.). A number of delegations counselled caution against the automatic acceptance of national criteria in this respect. See the statement of the Delegates of New Zealand (A/PV.416, p. 561), India (*ibid.*, p. 567), Belgium (*ibid.*, p. 571), Sweden (*ibid.*, p. 573), Norway (*ibid.*, p. 576), the Netherlands (A/PV.417, p. 584), Indonesia (A/PV.419, p. 620), and Yugoslavia (A/PV.421, p. 660). See

The Secretary-General may perhaps be expected to seek to avoid occasions for implementing these theories which he rightly affirms. His concern for the confidence which the Secretariat must enjoy, for the public standing of the Organization as a whole, and for his political responsibilities under Articles 98 and 99 of the Charter,[172] will impel him, as a matter of policy, to defer to the laws and judgments of courts of Member States. He may hesitate to exercise his discretion against the views of a complainant Government, except in cases in which the member of the staff is patently the victim of unreasonable or arbitrary process. Whatever the defects of the concept of the "host country," it is evident that the difficulties are much greater in cases where the staff member is resident in the State which finds him guilty of a crime involving subversive activities,[173] or, for that matter, of any other crime,[174] whether it is the country of his nationality or not. As with the submission of information by Governments, the actual degree of independence enjoyed by the Secretariat may be limited unless the Member States join the Secretary-General in mutual support of their obligations under Article 100.

There may be instances of charges or conviction of members of the staff for subversive activities which the Secretary-General clearly would have to receive with especial caution. The Charter and the Staff Regulations may not normally be interpreted to justify the dismissal of a staff member who is found guilty by a successor Government of "subversive activities" against it while that Government had not yet "succeeded"; a succession or a change of Government hardly entitles a State to request dismissal of its nationals who preferred or prefer the former Government. It would be for the Secretary-

also Friedmann, "The United Nations and National Loyalties," *International Journal (1952–1953)*, 8, 1, pp. 22–25, and Friedmann and others, "Loyalty Tests and the United Nations Secretariat," *Canadian Bar Review* (December 1952), pp. 1080–1083. For a point of view close to that of the Commission of Jurists, see the statements of the Delegates of France (A/PV.418, p. 607) and China (*ibid.*, p. 615); and see Cohen, "Preliminary Appraisal," on the French view.

[172] See Schwebel, *Secretary-General*, pp. 19–30.

[173] A possibility of evidently limited application would be the transfer of such a staff member to a post in another country (for comment on this point see the Opinion of the Commission of Jurists, United Nations doc. A/2364, p. 26).

If the member of the staff is convicted by the organs of the State in which he is resident, he may of course be subject to immediate imprisonment; indeed, he might be detained before trial. A host country has the power to enforce its jurisdiction and execute its judgments which other Member States lack, barring voluntary submission to that jurisdiction or extradition (which would not apply to political offenses), or the assertion of jurisdiction over their nationals when on home leave. The jurisdiction of all Member States is limited by the immunity of staff members from legal process in respect of all acts performed by them in their official capacity. It would appear to be limited further by Article 100, insofar as prosecution for unofficial acts must be in good faith and not designed to exert pressure upon the staff member *qua* staff member.

[174] Conviction of a member of the staff by any Government for crimes other than those related to subversive activities might so reflect upon his integrity and the conduct incumbent upon him as to call for his dismissal.

General to judge whether the political activities for which the staff member is charged or convicted were in breach of his obligations as an international civil servant. Counter-revolutionary activities might well be so judged, not because the revolution was successful, but because the staff member is required to abstain from political action, whatever its direction. An accusation or conviction of a member of the staff for subversive activities carried on before his appointment would be weighed by the Secretary-General with particular circumspection. The staff member could not have been guilty of a breach of the Staff Regulations prior to his appointment; however, his subversive activities in the past, if proven, may ordinarily be reasonably judged to reflect on his present integrity.[175] If the Secretary-General confines his definition of past subversive activities normally reflecting on the present integrity of the staff member concerned to "serious and generally recognized offences such as espionage or sabotage," as the Secretary-General suggested, there should be no difficulty.[176] It may be suggested that allegations by Governments of past subversive activities, viewed through the limits of that definition, would lead to few, if any, dismissals of staff members.

A particularly delicate question turns upon the alleged likelihood of a member of the staff engaging in subversive activities. The Commission of Jurists advised, and the first Secretary-General agreed, that the Secretary-General should not retain a staff member if he has "reasonable ground for believing that the staff member ... is likely to engage in subversive activities against the government of any Member State."[177] According to the first Secretary-General, for a finding that a staff member is likely to engage in such activities, "something more than a remote possibility of his doing so must be shown. Of necessity, such a finding must be largely based upon the staff member's past conduct. However, convincing evidence that in the past an official had engaged in subversive activities would not necessarily lead to a finding that he was likely to be engaged in such activities either at present or in the future. Later conduct and attitudes might show there was no likelihood of his engaging in such activities again."[178]

[175] That this will not necessarily be the case is shown by Rolin, *Advisory Opinion*, pp. 33, 54–55. See the comments of the Secretary-General, United Nations doc. A/2533, pp. 12, 21, 22, and of the Commission of Jurists, United Nations doc. A/2364, p. 28.

[176] See above, note 113. Elsewhere in the report there cited, however, the Secretary-General declared that subversive activities may be "properly defined as was done in the last report of the Secretary-General on personnel policy, that is, '[as] activities directed towards the overthrow of a government by force, including conspiracy towards such overthrow and incitement and advocacy of it'" (United Nations doc. A/2533, p. 21). This definition would appear to go beyond espionage and sabotage. Conspiracy, in particular, is a legal concept of considerable elasticity.

[177] United Nations doc. A/2364, p. 13. The Commission of Jurists restricted its reference to the Government of any host State.

[178] United Nations doc. A/2364, p. 13.

Annex V

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THE INTERPRETATION OF TREATIES BY DOMESTIC COURTS*

By C. H. SCHREUER[1]

INTRODUCTORY

A STRIKING feature of the many academic writings on the interpretation of treaties[2] is the disregard of the aspect of the problem that arises before municipal courts.[3] Likewise in the deliberations that led to the drafting of what eventually became Articles 31–3 of the Vienna Convention on the Law of Treaties, both in the International Law Commission and at the conference, there is little that suggests awareness that by far the greater part in the judicial interpretation of international agreements falls to municipal, not international, tribunals; and even the *Institut de Droit International* in its discussions on treaty interpretation in 1950, 1952, 1954 and 1956[4] concerned itself almost exclusively with interpretation by governments and international tribunals.[5]

In examining the practice of domestic courts in different countries, it is intended first to ask how far they are authorized to interpret treaties in their respective municipal legal systems, and then to deal, in order, with the relevance of domestic law in treaty interpretation; the argument on the priority of text or intention; the so-called teleological approach; and finally the rule of liberal or extensive construction and the principle of restrictive interpretation.

It is sometimes said that different standards of interpretation apply to

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[2] For a comprehensive list see Strupp-Schlochauer, *Wörterbuch des Völkerrechts*, vol. 3, p. 552. See also the list given by R. Bernhardt in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*ZaöRV*), 27 (1967), p. 492.

[3] As to the relatively few exceptions see J. Basdevant, 'Le rôle du juge national dans l'interprétation des traités diplomatiques', *Revue critique de droit international privé* (1949), p. 413; W. F. Bayer, 'Auslegung und Ergänzung international vereinheitlichter Normen durch staatliche Gerichte', *Zeitschrift für ausländisches und internationales Privatrecht* (*RabelsZ*), 20 (1955), p. 603; J. Benoist, 'L'interprétation des traités d'après la jurisprudence française', *Revue hellénique de droit international*, 6 (1953), p. 103; C. C. Hyde, 'The Interpretation of Treaties by the Supreme Court of the United States', *American Journal of International Law*, 23 (1929), p. 824; F. A. Mann, 'The Enforcement of Treaties by English Courts', *Transactions of the Grotius Society*, 44 (1958/9), p. 29; Lord McNair, *The Law of Treaties* (1961); I. M. Sinclair, 'The Principles of Treaty Interpretation and their Application by the English Courts', *International and Comparative Law Quarterly*, 12 (1963), p. 508; O. C. Giles, *Uniform Commercial Law* (1970); I. Seidl-Hohenveldern, in *Festschrift für Alfred Verdross* (1971), p. 479. The last two works appeared after this article was completed.

[4] *Annuaire de l'Institut de Droit International* (*Annuaire*), 43 (1950–I), 44 (1952–I and II), 45 (1954–I) and 46 (1956).

[5] But see A. N. Makarov's remarks, ibid., 43 (1950–I), p. 447.

'law-making treaties' (*traités-lois*) and 'contract-treaties' (*traités-contrats*).[1] This distinction, however, seems to have been abandoned by most writers,[2] the International Law Commission rejected it in drafting the articles on interpretation in the Vienna Convention;[3] furthermore municipal courts do not seem generally to have employed this distinction. Accordingly, this paper does not adopt it.

I

Competence to Interpret

The power of domestic courts to interpret international agreements, and their independence from the executive[4] in doing so, is subject to a variety of regulations in different countries.

It is a well-settled rule of English law[5] that the courts will not accept a treaty as a source of law unless it has been incorporated into the law of England by legislation.[6] This principle, which found its classical expression in the case of *The Parlement Belge*[7] was formulated most clearly by Lord Atkin in *Attorney-General for Canada* v. *Attorney-General for Ontario*:

> Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other

[1] For an extensive discussion see S. Neri, *Sull'interpretazione dei trattati nel diritto internazionale* (1938), pp. 20 et seq., and J. Soubeyrol, 'The International Interpretation of Treaties and the Consideration of the Intention of the Parties', *Clunet*, 85 (1958), p. 687, at pp. 699 et seq.; also A. Alvarez in *Annuaire*, 44 (1952–II), p. 366, and C. Rousseau, *Principes généraux de droit international public* (1944), pp. 676 et seq. and in *Annuaire*, 44 (1952–II), p. 378.

[2] G. Balladore Pallieri, *Diritto internazionale pubblico* (8th ed., 1967), pp. 80 et seq.; P. Guggenheim, *Traité de droit international public*, vol. 1, p. 249; H. Lauterpacht in *Annuaire*, 43 (1950–I), pp. 374, 434; Lord McNair, op. cit. (above, p. 255 n. 3), p. 366; Sir Humphrey Waldock in *Yearbook of the International Law Commission* (1964–II), p. 55. Cf. also *Re Rizzo*, I.L.R. 19 (1952), p. 478.

[3] 'Some jurists in their exposition of the principles of treaty interpretation distinguish between law-making and other treaties, and it is true that the character of a treaty may affect the question whether the application of a particular principle, maxim or method of interpretation is suitable in a particular case (e.g. the *contra proferentem* principle or the use of *travaux préparatoires*). But for the purpose of formulating the general rules of interpretation the Commission did not consider it necessary to make such a distinction.' Commentary on the 1966 I.L.C. Draft Articles, *American Journal of International Law*, 61 (1967), p. 351.

[4] As to this subject in general see A. B. Lyons, 'The Conclusiveness of the Foreign Office Certificate', this *Year Book*, 23 (1946), p. 240; 'The Conclusiveness of the "Suggestion" and Certificate of the American State Department', ibid. 24 (1947), p. 116; 'Conclusiveness of the Statements of the Executive: Continental and Latin-American Practice', ibid. 25 (1948), p. 180.

[5] For a collection of British cases on treaty interpretation see 6 *British International Law Cases* (*B.I.L.C.*), pp. 619 et seq.

[6] Cf. F. A. Mann, *Transactions of the Grotius Society*, 44 (1958/9), pp. 30 et seq.; Lord McNair, op. cit. (above, p. 255 n. 3), pp. 81 et seq.; I. M. Sinclair, *International and Comparative Law Quarterly*, 12 (1963), pp. 525 et seq. See, however, the reservations as to treaties concerning belligerent rights and duties made by these authors.

[7] (1879) 4 P.D. 129, 154–5. Sir Robert Phillimore's judgment was reversed by the Court of Appeal on another point: (1880) 5 P.D. 197.

countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.[1]

Similar rules have been adopted by the courts of Australia,[2] Canada,[3] India,[4] Palestine[5] and Israel.[6]

Strictly speaking, in English courts the question is therefore one of statutory interpretation. One might expect that the refusal to take cognizance of treaties as such was the end of the matter and the problem did not exist for Her Majesty's courts. English courts have, however, generally adopted a broader approach. Although their methods of interpretation have been influenced somewhat by the legislative means of incorporation adopted by Parliament,[7] which range from enacting material provisions of an international agreement so as to bring English law into line with the international obligations of the Crown without direct reference to the treaty[8] to simply enacting the convention word for word,[9] the courts of England have on the whole taken these statutes for what they are: the product of a legislative technique to make the treaty operative in the municipal sphere.

The position with regard to prize courts in England is different inasmuch as they are directly bound by rules of international law unless the latter are in conflict with an Act of Parliament. Orders in Council conflicting with international law will not as a rule bind such courts.[10] The available case material set out below, however, does not indicate any difference of approach in the two kinds of courts.

In *Marshall* v. *Nicholls*[11] Coleridge J., interpreting the statute giving effect to a Fisheries Convention between Her Majesty and the King of

[1] [1937] A.C. 326, 347. This case although decided by the Privy Council with regard to Canada is of equal relevance to England. See also *Walker* v. *Baird*, [1892] A.C. 491; *Administrator of German Property* v. *Knoop*, [1933] Ch. 439, also in *Annual Digest*, 6 (1931–2), p. 240; *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308, 324; *Republic of Italy* v. *Hambros Bank*, [1950] Ch. 314, 327 et seq.

[2] *Bluett* v. *Fadden*, I.L.R. 23 (1956), p. 477.

[3] *Bitter* v. *Secretary of State for Canada*, *Annual Digest*, 12 (1943–5), p. 264.

[4] *Sharma* v. *State of West Bengal and Others*, I.L.R. 21 (1954), p. 272.

[5] *Amine Namika Sultan* v. *Attorney-General*, *Annual Digest*, 14 (1947), p. 36.

[6] *Association for the Protection of Palestine Government Bondholders* v. *Minister of Finance of Israel*, I.L.R. 18 (1951), p. 398.

[7] F. A. Mann, 'The Interpretation of Uniform Statutes', *Law Quarterly Review*, 62 (1946), pp. 278 et seq.; Sinclair, *International and Comparative Law Quarterly*, 12 (1963), pp. 528 et seq., 549.

[8] e.g. The Merchant Shipping (Liability of Shipowners and Others) Act, 1958, giving effect to the Brussels Convention of 1957 on the Limitation of Liability of Owners of Sea-Going Ships.

[9] e.g. The Carriage by Air Act, 1961, giving effect to the Warsaw Convention as amended by the Hague Protocol, 1955.

[10] *The Zamora*, [1916] 2 A.C. 77.

[11] (1852) 18 Q.B. 882.

France, did not hesitate to resort to the Convention. Similarly the House of Lords in two cases concerning the interpretation of the Treaties of Peace after the First World War, which were in part scheduled and directly enacted in the respective Treaty of Peace Acts and Orders in Council, looked at the treaties themselves, rejecting interpretations purely based on English law.[1]

In *The Croxteth Hall*,[2] a case concerning the interpretation of the British Merchant Shipping Act, 1925, which had the International Labour Convention, to which it purported to give effect, annexed as a schedule, the Court of Appeal was unanimous that resort to the Convention could be had *if* the statute were ambiguous. A majority, however, held that it was clear. In the House of Lords[3] this principle did not emerge quite so clearly. While two of the Lords (Lord Macmillan at p. 148, and Lord Tomlin at p. 147) seemed to imply the admissibility of resort to the Convention in case of ambiguity, Lord Blanesburgh, dissenting, turned to it 'merely as a matter of interest' (at p. 143).[4] In the following year in the case of *Stag Line Ltd.* v. *Foscolo, Mango & Co.*[5] the Lords nevertheless adopted a method that took due account of the true nature of the Carriage of Goods by Sea Act, 1924,[6] and which was expressed in the broadest terms by Lord Macmillan:

> It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.[7]

The House of Lords has since adhered to this view in several cases[8] and Greene L.J. in the Court of Appeal even went so far as to say:

> The Carriage by Air Act, 1932, was passed for the purpose of giving binding effect in this country to the Convention signed at Warsaw on October 12, 1929, a translation of which (omitting the preamble) is set out in the Schedule to the Act. In approaching

[1] *Kramer* v. *Attorney-General*, [1923] A.C. 528, 537; *Josef Inwald A.G.* v. *Pfeiffer*, (1928) 44 T.L.R. 352.

[2] [1930] P. 197, see also this *Year Book*, 12 (1931), p. 183.

[3] *Sub nom.*: *Ellerman Lines Ltd.* v. *Murray*, together with *White Star Line [etc.] Ltd.* v. *Comerford*, [1931] A.C. 126.

[4] See also Lord McNair, op. cit. (above, p. 255 n. 3), p. 423, and this *Year Book*, 13 (1932), p. 120, also *Annual Digest*, 5 (1929–30), p. 342.

[5] [1932] A.C. 328.

[6] See, however, the earlier decision in *Gosse Millard Ltd.* v. *Canadian Government Merchant Marine Ltd.*, [1929] A.C. 223.

[7] At p. 350.

[8] *Philippson* v. *Imperial Airways Ltd.*, [1939] A.C. 332; *Parke Davis & Co.* v. *Comptroller-General of Patents etc.*, [1954] A.C. 321; *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co., Ltd.*, [1961] A.C. 807.

the construction of such a document as this Convention it is, I think, important at the outset to have in mind its general objects, so far as they appear from the language used and the subject-matter with which it deals.[1]

The rule in *Ellerman Lines* was further developed in two recent decisions of the Court of Appeal. In *Salomon* v. *Commissioners of Customs and Excise* the courts had to interpret the Customs and Excise Act, 1952. In the Divisional Court[2] Megaw J. came to the following conclusions on the admissibility of resort to an international convention:

Counsel for Mr. Salomon sought to rely on the Convention on the Valuation of Goods for Customs Purposes made at Brussels on Dec. 15, 1950. The United Kingdom ratified that Convention on Sept. 27, 1952, after the Act of 1952 had received the royal assent. The convention is nowhere mentioned in the Act of 1952. At best, the convention could only be referred to if there were an ambiguity in the Act of 1952, and, as I understand the decision of the House of Lords in *Ellerman Lines, Ltd.* v. *Murray*, only then, if the Convention had been expressly referred to in, or scheduled to, the Act of 1952.[3]

This decision was overruled unanimously in the Court of Appeal.[4] Lord Denning M.R. after coming to a conclusion on the basis of the Act itself said:

I am confirmed in this view by looking at the international convention which preceded the Act of 1952 . . . I think that we are entitled to look at it, because it is an instrument which is binding in international law; and we ought always to interpret our statutes so as to be in conformity with international law. Our statute does not in terms incorporate the convention, nor refer to it; but that does not matter. We can look at it.[5]

The judgment delivered by Diplock L.J. goes into considerable detail on this point and for its remarkable clarity may be quoted at some length:

Once the government has legislated, which it may do in anticipation of the coming into effect of the treaty as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines, Ltd.* v. *Murray*), and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; . . .

It has been argued that the terms of an international convention cannot be consulted to resolve ambiguities or obscurities in a statute unless the statute itself contains either in the enacting part or in the preamble an express reference to the international convention which it is the purpose of the statute to implement. The learned judge seems

[1] *Grein* v. *Imperial Airways Ltd.*, [1937] 1 K.B. 50, 74. [2] [1966] 2 All E.R. 340.
[3] At p. 344. [4] [1966] 3 All E.R. 871. [5] At p. 874.

to have been persuaded that *Ellerman Lines, Ltd.* v. *Murray* was authority for this proposition; but, with respect it is not. . . . If from extrinsic evidence it is plain that the enactment was intended to fulfil Her Majesty's Government's obligations under a particular convention, it matters not that there is no express reference to the convention in the statute. One must not presume that Parliaments intend to break an international convention merely because it does not say expressly that it is intending to observe it.[1]

In *Corocraft* v. *Pan American Airways*,[2] the Court of Appeal had to interpret the Carriage by Air Act, 1932, incorporating the Warsaw Convention.[3] The Convention provided for certain limits to the liability of carriers if specific conditions were fulfilled. In respect of these conditions a discrepancy was found between the English translation, which had been made English law by the above Act and the authentic French text of the Convention. The court found that the French version had to prevail. In the words of Lord Denning M.R.:

It was plainly the intention of all the parties to the convention that the French text shall be the one official and authorised text; and it was plainly the intention of the English Parliament to give effect to that French text by making an exact translation of it into English. The English Parliament failed in their object. The translator whom they employed, by introducing the word 'and', put his own gloss on the French text. He produced certainty where there was ambiguity: and clarity where there was obscurity. . . .

Such being the clear intention of Parliament, I think we should follow it. If there is any inconsistency between the English text and the French text, the text in French should prevail.

And a little later:

There is another, and perhaps more powerful, reason for adopting the French text. The Warsaw Convention is an international convention which is binding in international law on all the countries who have ratified it: and it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it. Seeing that the convention itself gives authority to the French text, and to the French text alone, we should so construe our legislation as to give priority to the French text over the English version. That appears from *Salomon* v. *Commissioners of Customs and Excise. Ellerman Lines, Ltd.* v. *Murray*, is no authority to the contrary, for there the English statute was clearly given priority over the convention. Not so here.[4]

The particular importance of this case lies in the fact that here for the first time the court went beyond the clear and unambiguous words of an Act of Parliament in order to ascertain its meaning by having resort to the international convention underlying it.

We can therefore conclude that English courts, although influenced by the methods of transformation adopted by Parliament, will not stop short

[1] At pp. 875 seq.
[2] [1969] 1 All E.R. 82.
[3] The amendment made to the Warsaw Convention in 1955, although made law for England by the Carriage by Air Act, 1961, had not been ratified by the U.S.A., so that in the present case the old Act was applicable.
[4] At pp. 86 et seq.

of looking at and interpreting international agreements, once effect has been given to them in English law by legislation.[1]

A completely different situation exists in treaty interpretation before French courts.[2] The highest judicial authority in administrative matters, the *Conseil d'Etat*, has developed a consistent practice that whenever it is confronted with the task of interpreting a treaty the meaning of which is not clear (*théorie de l'acte clair*),[3] it will decline to do so, and stay the proceedings, until the interpretation requested from the Minister of Foreign Affairs or another competent administrative authority is known. It will then consider itself bound by this interpretation: 'Considérant . . . que celui-ci présente le caractère d'une convention internationale et que son sens n'est pas clair; que, dès lors, le Ministre des Affaires étrangères est seul qualifié pour en donner l'interprétation.'[4]

This practice is based on the theory of the separation of powers. While the courts are competent to exercise control over the administration, they cannot do so with respect of the diplomatic function, which lies within the exclusive competence of the Foreign Minister. As only he is supposed to know the intentions of the contracting parties, this procedure is designed to avoid complaints from interested foreign powers.[5] A protest by the Spanish Government after the First World War on the application of Article 4 of the Franco-Spanish Convention of 1852,[6] however, shows that this method has not always been successful.

More recently the *Conseil d'Etat* has mitigated its practice by developing the concept of the *acte interne d'exécution détachable du traité international*.[7] With the help of this construction it has held that matters concerning the

[1] For other recent examples see: *Post Office v. Estuary Radio Ltd.*, [1967] 3 All E.R. 663, esp. at 675 in the Divisional Court and at p. 681 *per* Diplock L.J. in the Court of Appeal; *R. v. Kent Justices, Ex parte Lye and others*, Q.B., [1967] 1 All E.R. 560 at 574; *The Annie Hay*, [1968] p. 341; *The Mecca*, [1968] 2 Lloyd's Rep. 17.; *The Banco, The Times*, 9 December 1970. But see *Cheney v. Conn*, [1968] 1 W.L.R. 242.

[2] For a general outline see J. Benoist, *Revue hellénique de droit international*, 6 (1953), p. 103, and M. Stassinopoulos, 'Remarques sur la jurisprudence française relative à l'interprétation des traités internationaux', *Revue générale de droit international public*, 73 (1969), p. 5.

[3] M. Stassinopoulos, loc. cit. (this page, n. 2), pp. 9 et seq.

[4] Decision of 29 March 1957 in *Société des mines et fonderies de la Vieille-Montagne*, in *Répertoire de la pratique française en matière de droit international public*, by A. C. Kiss, vol. 1, No. 854. The cases on this point are innumerable. See esp. *Répertoire*, vol. 1, Nos. 851–4, 888, 889 and the cases cited there. Also *Annual Digest*, 1 (1919–22), pp. 333 and 334; 5 (1929–30), p. 358 with a note; 7 (1933–4), p. 431; 8 (1935–7), pp. 464 and 347; 11 (1919–42), pp. 46, 77 and 229; 12 (1943–5), p. 280; I.L.R., vols. 17 (1950), p. 315; 18 (1951), p. 399; 22 (1955), p. 478; 23 (1956), p. 418; 26 (1958–II), p. 99. Also the cases quoted by Stassinopoulos, loc. cit. (this page, n. 2), pp. 7 et seq.

[5] J. Benoist, loc. cit. (this page, n. 2), pp. 107 et seq.; M. Stassinopoulos, loc. cit. (this page, n. 2), pp. 13 et seq.

[6] J. Benoist, op. cit., p. 108. The dispute was later settled by arbitration.

[7] *Lehéricy* case, Kiss, *Répertoire*, vol. 1, No. 890 (dec. of 30 January 1948); *Commentaire, Fourchambault et Decazeville* (dec. of 28 February 1952) in *Revue critique de droit international privé* (1953), p. 109.

application of a treaty can constitute the object of a case before the administrative jurisdiction without interfering with the diplomatic function and that these matters are therefore susceptible of jurisdictional control like any other administrative act.[1]

The *Cour de cassation*, supreme court in judicial matters, has, however, developed a different practice. It distinguishes matters concerning *un intérêt privé* and *un intérêt public*. The competence to interpret the treaty will then depend on the category into which the case falls:

> En ce qui concerne l'interprétation judiciaire et gouvernementale, il faut distinguer suivant que l'intérêt en jeu est un intérêt privé ou un intérêt public. Dans le premier cas, les tribunaux ont seuls le droit de faire cette interprétation sans être liés par celle qui émanerait unilatéralement du Gouvernement. . . . Dans le second cas, c'est au Gouvernement qu'il appartient d'indiquer le sens du traité, les tribunaux n'ayant plus alors qu'à en tirer les conséquences de droit.[2]

The criteria for this distinction, which has its origin in the famous *Duke of Richmond* case,[3] are rather empirical and depend on the circumstances of the particular case.[4]

Thus the following matters have been held to fall within the public domain and therefore to rule out judicial interpretation of treaties regulating them: peace and armistice,[5] law of warfare,[6] territorial changes,[7] protectorates,[8] immunity of international organizations from jurisdiction,[9] consular immunity,[10] rights granted to foreign nationals,[11] and extradition.[12] But even if the court finds that the question before it falls into the private

[1] Cf. P. Guggenheim, *Traité de droit international public* (1967), vol. 1, pp. 87 et seq.; J. Benoist, loc. cit. (above, p. 261 n. 2), p. 105.

[2] Advocate General Rey in *Consorts Friedmann*, dec. of 27 April 1950, Kiss, *Répertoire*, vol. 1, No. 869; *Sanchez* v. *Gozland*, dec. of 22 December 1931, *Annual Digest*, 6 (1931–2), p. 369, and Kiss, *Répertoire*, vol. 1, No. 864. For further cases see the note in *Annual Digest*, 6 (1931–2), at pp. 370 et seq. and Kiss, *Répertoire*, vol. 1, Nos. 864, 869, 875 and 876. See also H. Batiffol, *Droit international privé*, pp. 36 et seq., with further references and M. Stassinopoulos, loc. cit. (above, p. 261 n. 2), pp. 8 et seq., 16 et seq.

[3] Dec. of 24 June 1839, *Sirey* (1839), I, 577.

[4] For a detailed evaluation of this distinction see M. Stassinopoulos, op. cit. (above, p. 261 n. 2), pp. 18 et seq.

[5] *Consorts Friedmann*, dec. of 27 April 1950, Kiss, *Répertoire*, vol. 1, No. 869.

[6] *In re Thyssen*, *In re Krupp*, decs. of 22 March 1923, 9 August 1923, *Annual Digest*, 2 (1923–4), p. 327; see also Kiss, *Répertoire*, vol. 1, No. 871.

[7] *French Concession at Shanghai* v. *Compagnie française de tramways et d'éclairage électrique de Shanghaï*, dec. of 2 June 1923, *Annual Digest*, 2 (1923–4), p. 326; see also Kiss, *Répertoire*, vol. 1, No. 872.

[8] *Administration des finances tunisiennes* c. *Zanna Haï*, dec. of 28 February 1930, Kiss, *Répertoire*, vol. 1, No. 873. As to mandates see dec. of the *Tribunal civil de la Seine* of 1 March 1937 in *Aegyptian Enterprise* c. *Ministre de la Guerre*, Kiss, *Répertoire*, vol. 1, No. 874.

[9] *Procureur Général of the Court of Cassation* v. *Syndicate of Co-owners of the Alfred Dehodencq Property Company*, dec. of 6 July 1954, I.L.R. 21 (1954), p. 279, and Kiss, *Répertoire*, vol. 1, No. 875.

[10] *King*, dec. of 23 February 1912, Kiss, *Répertoire*, vol. 1, No. 876.

[11] *Yter*, dec. of 27 July 1877, Kiss, *Répertoire*, vol. 1, No. 880; *Estades* v. *French Government*, dec. of 19 January 1954, I.L.R. 21 (1954), p. 277. For further cases to this extent see I.L.R. 21 (1954), pp. 280, 281; 22 (1955), p. 622; 23 (1956), p. 376; 24 (1957), pp. 599, 600; 26 (1958–II), pp. 490, 494.

[12] *Viremaître*, dec. of 18 July 1851, Kiss, *Répertoire*, vol. 1, No. 879.

sphere it can nevertheless request an opinion from the Minister of Foreign Affairs without being bound by it.[1]

It appears that the Mixed Courts of Egypt have followed the French example on this point.[2]

American courts have always held that: 'The construction of treaties is the peculiar province of the judiciary.'[3] They have, however, attached a certain significance to statements of the executive where the matter had political aspects:

> While the question of the construction of treaties is judicial in its nature, and courts, when called upon to act, should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the government, charged with the supervision of our foreign relations, should be given much weight.[4]

The courts of Germany although they consider themselves '. . . competent to construe the relevant international agreements, seeing that they had become German laws',[5] have nevertheless taken into account statements of the executive.[6]

Similarly Swiss courts in their interpretation of treaties are not bound by instructions or directives from the authorities competent for the conclusion and the approval of treaties.[7] This position was particularly clearly expressed by the Supreme Court of Poland in 1930:

> The moment . . . the Treaty had been ratified and published in Poland in the *Journal of Laws*, its provisions, in so far as they relate to private rights, are binding equally on the State and on the individuals concerned. Consequently, from that moment it was only for the courts or for the legislative authority, and not for the administrative authorities, to interpret the provisions of the Treaty in a way which would be binding for the plaintiffs in the present case.[8]

[1] *Gambino* c. *Cons. Arcens*, dec. of 11 March 1953, *Dalloz* 1953, I, 297 at 299.

[2] *Cambiaso and Delacroix, Commissioners of the Egyptian Public Debt, and Others* v. *The Egyptian Government*, dec. of 21 January 1933, *Annual Digest*, 7 (1933–4), p. 412; *Domingès Caitano Rodrigues* v. *Ministère Public*, dec. of 6 June 1938, ibid. 9 (1938–40), p. 466; *Ministère Public* v. *Spender*, dec. of 30 May 1938, ibid., p. 478; *Brandt & Co.* v. *Egyptian Customs Administration*, dec. of 29 January 1942, ibid. 11 (1919–42), p. 224.

[3] *Jones* v. *Meehan* (1899), 175 U.S. 1, 32. See also Hackworth, *Digest*, vol. 5, p. 267.

[4] *Sullivan et Al.* v. *Kidd* (1921), 254 U.S. 433, 442 also *Annual Digest*, 1 (1919–22), p. 344. See also *Ross* v. *McIntyre*, 140 U.S. 453, 468; *Charlton* v. *Kelly*, 229 U.S. 447, 468; *Factor* v. *Laubenheimer*, 290 U.S. 276, 295, also *Annual Digest*, 6 (1931–2), p. 298; *Kolovrat et Al.* v. *Oregon*, 366 U.S. 187, 194, also I.L.R. 32, pp. 203, 207. For older cases see Moore, *Digest*, vol. 5, pp. 241 et seq. Also C. C. Hyde, *International Law* (2nd ed.), vol. 2, pp. 1484 et seq.

[5] *Status of Russian Trade Delegation* case, *Reichsarbeitsgericht* of 6 December 1930, *Annual Digest*, 5 (1929–30), pp. 309, 312.

[6] *Basler Lebensversicherunges. AG* v. *Sp. Werke AG*, dec. of the *Reichsgericht* of 20 May 1933, *RGZ* 140, pp. 353, 357. It is interesting to note that in this case official inquiries were made with the central authorities of both contracting parties (Germany and Switzerland).

[7] P. Guggenheim, op. cit. (above, p. 262 n. 1), vol. 1, p. 267.

[8] *Archdukes of Habsburg-Lothringen* v. *Polish State Treasury*, dec. of 16 June 1930, *Annual Digest*, 5 (1929–30), p. 346. The Court held, however, that the concordant interpretation by the contracting parties must be considered as a significant expression of their intention.

II

Domestic Law and the Interpretation of Treaties

One might suppose that International Agreements incorporated in the municipal legal systems of the contracting parties, and susceptible of application by the domestic courts, would create identical legal situations in the countries concerned. In the case of the international private law codifications, the so-called 'uniform statutes', this was the prime purpose of the undertaking.[1] Experience, however, shows that this is not the case. Reports of divergent developments of identical legal provisions (although they did not have their origin in treaties) are already to be found concerning laws enacted in Napoleonic times in the Benelux countries.[2] They can be found also in regard to the interpretation of the Geneva Convention on Bills of Exchange, 1930 and on Cheques, 1931, on the Warsaw Convention and on Labour Conventions.[3]

The tendency of national courts to apply the concepts and methods of their own municipal law is probably one of the most important causes of this divergence. Consciously or unconsciously they tend to follow their own precedents and doctrines even in cases where they have to interpret and apply law which does not originate in their domestic legal systems:[4] a tendency which is naturally more marked in common law countries.

While the opinions of most authors point towards the application of international standards in the interpretation of treaties[5] for the sake of achieving uniformity—some even go to the extent of holding that there is an obligation under international law to secure this uniformity[6]—others maintain that treaty law, as soon as it has become part of the domestic legal system, should be treated like any other domestic law.[7]

The different techniques of incorporating treaties into the municipal

[1] Cf. F. A. Mann, *Law Quarterly Review*, 62 (1946), p. 278.

[2] O. Riese, 'Einheitliche Gerichtsbarkeit für vereinheitlichtes Recht?', *RabelsZ* 26 (1961), pp. 604, 607.

[3] Ibid., pp. 612 et seq.

[4] Cf. H. Batiffol, op. cit. (above, p. 262 n. 2), p. 39; C. Tomuschat, *ZaöRV*, 28 (1968), pp. 141 et seq.

[5] F. A. Mann in *Law Quarterly Review*, 62 (1946), pp. 278, 291; J. P. Niboyet, 'Le problème des "qualifications" sur le terrain des traités diplomatiques', *Revue critique de droit international privé* (1935), pp. 1, 19; C. Tomuschat, *ZaöRV* 28 (1968), p. 142; P. G. Vallindas, 'Autonomy of International Uniform Law', *Revue hellénique de droit international*, 8 (1955), pp. 8, 12. See also the remarks made by A. Verdross in the *Institut de Droit International* in *Annuaire*, 44 (1952–II), p. 384, and A. D. McNair, this *Year Book*, 13 (1932), p. 122.

[6] E. Hirsch, *Neue Juristische Wochenschrift* (1961), p. 1093; O. Riese, *RabelsZ* 26 (1961), p. 611.

[7] E. Bartin, 'La doctrine des qualifications', *Recueil des cours*, 31 (1930–I), p. 614; A. Mestre, 'Les traités et le droit interne', ibid. 38 (1931–IV), pp. 299 et seq.; I. S. Peterskii, quoted in *The Theory, Law, and Policy of Soviet Treaties* (1962) by J. F. Triska and R. M. Slusser, at p. 116. For more references on this point see W. F. Bayer, *RabelsZ* 20 (1955), pp. 607 et seq., who is in favour of a consideration of both aspects with an emphasis on the side of municipal law (p. 633).

sphere doubtless play an important part in this confusion;[1] though the liberal attitude of English courts in recent decisions (see above), despite the extreme practice of special transformation in the United Kingdom, shows that the difficulties are not insurmountable.

There are broadly three ways in which municipal courts have interpreted treaties in the light of their own domestic legal systems: (i) they have construed treaty provisions so as to avoid conflict with existing municipal, especially constitutional, law; (ii) they have interpreted terms used in treaties in the sense they have in the domestic system; and (iii) they have applied to international agreements municipal law rules of construction intended to apply to contracts, statutes or other documents. Examples of each of these three approaches are as follows.

(i)

In Hidalgo County Water Control, etc. v. *Hendrick et al.*,[2] the United States Court of Appeals for the Fifth Circuit found that, to interpret a treaty with Mexico in accordance with the plaintiff's contentions that it vested him with property rights, would bring the treaty into conflict with the United States Constitution which reserves the power to regulate tenure of real property to the individual states. After saying that it wished to avoid such a conflict, the court held that it could find no evidence of an intent to supersede the law of the contracting Parties.

Again, quoting the Supreme Court of California, the Court of Appeals of Maryland held in 1940:

> The question presented . . . is also of grave importance because its solution in favor of the appellant necessarily ascribes to the federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.[3]

Similarly the Supreme Court of Appeals of West Virginia held that:

> The primary rule is that the treaty shall be liberally construed. . . . But such construction should not be extended so as to infringe upon the Constitution of the United States, or to invade the province of the states of the Union in matters inherently local, or to restrict the various states in the exercise of their sovereign powers.[4]

[1] This can be seen with particular clarity in the deliberations of the *Deutsche Gesellschaft für Völkerrecht*, 6 (1964) in *Die Anwendung des Völkerrechts im innerstaatlichen Recht* (report by K. J. Partsch, pp. 109 et seq).

[2] Dec. of 30 September 1955, I.L.R. 22 (1955), p. 572.

[3] *Schneider* v. *Hawkins et al.*, dec. of 17 December 1940, *Annual Digest*, 9 (1938–40), pp. 485, 487.

[4] *Antosz* v. *State Compensation Commissioner et al.*, dec. of 10 June 1947, *Annual Digest*, 14 (1947), p. 163. See also G. R. Delaume, 'Application and Interpretation of Treaties by the Internal Courts in Franco-American relations', *Clunet*, 80 (1953), p. 585, at pp. 611 et seq.

On the other hand, courts in the United States have repeatedly emphasized that the construction of treaty provisions is not restricted by any necessity of avoiding conflicts with state legislation, as the treaty-making power is superior to the legislative power of the states and treaty law must prevail over inconsistent state enactments.[1]

The Supreme Court of Mexico in a case concerning property rights and a convention with the United States for the recovery and restoration of stolen vehicles, found that the constitutional rights of the complainant had been violated by the administrative measures taken under the Convention. The court held that the Convention had to be interpreted in conformity with the Constitution as 'It cannot be the intention of the said Convention that the Federal Executive by means of its agents shall violate the Constitution, . . .'.[2]

German courts also have repeatedly rejected interpretations that were not in conformity with pre-existing German law.[3] The Federal Constitutional Court in a case concerning the compatibility with the Constitution of a treaty with France on the Saar territory held that:

> We must, as a general rule, proceed on the basis that the political organs of the German Federal Republic who took part in the making of a treaty did not intend to undertake liabilities which are contrary to the Constitution. . . . Where several interpretations are feasible, preference must be given to an interpretation which permits the treaty to exist, having regard to the requirements of the Constitution.[4]

The Federal Administrative Court was even clearer when it stated that:

> The provisions of the Geneva [Refugee-] Convention have become municipal law. They have to be interpreted within the scope of the Constitution. They form part of a uniform legal system.[5]

As a justification—it can hardly be called reason—for this method of interpretation it is usually said that it cannot have been the intention of the negotiators to bring the treaty into conflict with the Constitution or with well-established domestic law. Apart from the more general question of intention, which will be dealt with elsewhere, this reasoning shows a disregard for the bilateral or multilateral nature of the international agreement. The intention of the parties is only relevant, if at all, where it is common to all participants and it is difficult to imagine the contracting

[1] *Nielsen* v. *Johnson*, 279 U.S. 47, 52; *Universal Adjustment Corp.* v. *Midland Bank Ltd.* in the Supreme Judicial Court of Massachusetts, *Annual Digest*, 8 (1935–7), pp. 460, 463. Also G. R. Delaume, loc. cit. (above, p. 265 n. 4), pp. 597 et seq.

[2] *In re Hernández del Valle*, dec. of 2 June 1949, *Annual Digest*, 16 (1949), p. 312.

[3] See decision of the *Reichsgericht* of 5 December 1921, *Juristische Wochenschrift* (1922), p. 1127 and of 20 May 1922, *RGZ* 104, pp. 352, 355.

[4] *Statute of Saar Territory* case, dec. of 4 May 1955, *BVerfGE* 4, pp. 157, 168, also in I.L.R. 22 (1955), p. 630.

[5] Dec. of 27 September 1962, quoted in *ZaöRV* 28 (1968), p. 141.

governments as having any intentions in respect of the domestic law of their partners, which may not even be known to them.

(ii)

In two cases concerning the interpretation of the peace treaties after the First World War, the House of Lords refused to base its construction of terms purely on considerations of English law.[1] A less liberal spirit was, however, shown by the Lords in subsequent cases concerning maritime law. In *Gosse Millard Ltd.* v. *Canadian Government Merchant Marine, Ltd.*, Lord Hailsham L.C. said:

> I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924[2] have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion.[3]

This attitude was somewhat modified in *Stag Line, Ltd.* v. *Foscolo, Mango & Co.*,[4] which concerned the same Act. Lord Atkin while accepting Lord Macmillan's dictum[5] did so with an important reservation:

> For the purpose of uniformity it is, therefore, important that the Courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the same sense already judicially imputed to them.[6]

In the following year, however, the Lords reverted to their earlier views when confronted with the task of interpreting the Merchant Shipping Act, 1925, passed to give effect to an International Labour Convention of 1920: In *Barras* v. *Aberdeen Steam Trawling and Fishing Co.*[7] the court relied on a decision previous to the enactment of the statute, in order to define the word 'wreck' appearing in it. In the words of Viscount Buckmaster:

> It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it.[8]

[1] *Kramer* v. *Attorney General*, [1923] A.C. 528, 537; *Josef Inwald AG* v. *Pfeiffer* (1928), 44 T.L.R. 352.
[2] i.e. the Carriage of Goods by Sea Act, 1924, incorporating the Hague Rules of 1922.
[3] [1929] A.C. 223, 230.
[4] [1932] A.C. 328.
[5] See above, p. 258.
[6] [1932] A.C. at 343.
[7] [1933] A.C. 402, also *Annual Digest*, 7 (1933–4), p. 466.
[8] At p. 411.

This reluctance to depart from well-established principles of English maritime law has been ascribed by Dr. Mann to the pre-eminence of English law in the maritime field and its influence upon foreign legal systems.[1]

The Lords have since taken a completely different course. In *Philippson* v. *Imperial Airways* the House of Lords[2] overruled the decision of Porter J.,[3] upheld by the Court of Appeal,[4] who had based his construction of the term 'High Contracting Parties', contained in the Warsaw Convention, 1929, purely on considerations of English law. It was held that the use of the phrase must 'depend upon the meaning in the Convention'.[5]

If there were any doubt left, the case of *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co. Ltd.*[6] made the new attitude of the highest English court quite clear. There, for the sake 'of preserving the uniformity of interpretation'[7] of the Hague Rules of 1922,[8] the Lords looked at American, Canadian, New Zealand as well as at English decisions, at the same time deploring the absence of citation of authority from European maritime countries.[9]

In a recent case in the House of Lords, *Athanassiadis* v. *Government of Greece*,[10] concerning the Extradition Treaty with Greece, 1910, the appellant contended that the word 'month' appearing in the treaty should not be construed in accordance with the Interpretation Act, 1889, the latter not being in general applicable to international documents, but by reference to the meaning of the word in common law. In the words of Viscount Dilhorne:

> While I agree that the meaning of language used in a treaty is not to be interpreted as if an Act passed in the territory of one of the powers governed it, it does not, in my view, follow that a rule of construction applicable under the law of one power in relation to legal documents namely, the common law rule that 'month' means 'lunar month', is to be applied in relation to it. In each case, it seems to me, one has to consider what was the intention of the treaty.[11]

He then, however, came to the conclusion that it was the intention of the parties to the treaty that 'month' should mean the same as it does in the Extradition Acts by virtue of the Interpretation Act. It appears that the lower courts have generally adopted the same attitude.[12]

[1] In *Law Quarterly Review*, 62 (1946), p. 282.

[2] [1939] A.C. 332, also in *Annual Digest*, 9 (1938–40), p. 444, and see a note in this *Year Book*, 21 (1944), p. 201.

[3] (1937) 53 T.L.R. 850.

[4] (1938) 54 T.L.R. 523.

[5] Lord Atkin, at p. 346.

[6] [1961] A.C. 807, also in I.L.R. 33, p. 397.

[7] [1961] A.C., Lord Merriman at 855.

[8] The court was in fact dealing not with the U.K. Carriage of Goods by Sea Act, 1924, but with its Australian counterpart the Sea Carriage of Goods Act, 1924.

[9] [1961] A.C., Lord Hodson at 874.

[10] [1969] 3 All E.R. 293.

[11] At p. 298.

[12] *Administrator of German Property* v. *Knoop*, [1933] Ch. 439, 454; *The Eurymedon*, [1938] P. 41, 61; *Bank voor Handel* v. *Slatford*, [1953] 1 Q.B. 248, 271 reversed on another point, also in I.L.R. 18 (1951), p. 171; *Pyrene Co. Ltd.*, v. *Scindia Navigation Co. Ltd.*, [1954] 2 Q.B. 402 also in I.L.R. 21 (1954), p. 297.

The little evidence available seems to suggest that while French courts used to adopt municipal standards in interpreting treaty terms,[1] they have now changed their practice in favour of a more international attitude.[2]

The Egyptian Court of Cassation in a case concerning German Trademarks in Egypt,[3] interpreting the Paris Agreement on Reparations from Germany of 1945, which provided in Article 6 that 'each of the signatory Governments, by the methods of its own choice, will retain German enemy property . . .', held, that this freedom in the choice of *means* was a reference to the domestic law of the respective country to determine what the *object* of the treaty, i.e. 'property' was.

Austrian courts in two recent cases have interpreted terms used in the State Treaty of 1955[4] and the Headquarters Agreement with the I.A.E.A.[5] by relying on their meaning in Austrian statutes. In neither case, however, were the decisions exclusively based on the relevant domestic provisions.

German courts, although there are isolated examples of reliance on domestic law,[6] have on the whole approached treaty terms with due regard to their international origin. The *Reichsgericht* and later the *Bundesgerichtshof* have repeatedly looked at the meaning in foreign laws and decisions of terms used in treaties they had to construe.[7] The *Reichsgericht* has, however, held that it will not be bound by the interpretation given by the courts of another contracting State[8] and that the fact that the authentic text of the treaty was in English was not to be taken as a reference to English legal terminology.[9] Where a construction of the terms after the exhaustion of all international law sources of interpretation is still impossible and no information about the intention of the parties is forthcoming, the court will apply the corresponding German legal terms.[10] The German Federal Administrative Court, in a recent case concerning the Geneva

[1] 'Les traités diplomatiques doivent être entendus dans le sens qui les met en harmonie avec le droit civil et public.' *Duke of Richmond* case, dec. of *Cass. civ.*, 24 June 1839, *Sirey* 1839. I. 578.

[2] *French State* v. *Établissements Monmousseau*, dec. of 6 April 1948 in which the Court of Appeal of Orleans held that the French concept of *immeuble par destination* could not be used for the interpretation of the Fourth Hague Convention of 1907. *Annual Digest*, 15 (1948), p. 596.

[3] *Société allemande Shirring* v. *Société britannique Shirring*, dec. of 23 June 1955 in I.L.R. 26 (1958–II), p. 657.

[4] *Austrian Gliding Club* case, dec. of the Administrative Court of 31 May 1957, I.L.R. 24 (1957), p. 639.

[5] *Evangelical Church in Austria* v. *Grezda*, dec. of the Supreme Court of 27 February 1964, I.L.R. 38, p. 453.

[6] *Treaty of Versailles* (*Art. 299 a, 1*) case, *Kammergericht*, dec. of 19 May 1927, *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* (*IPRspr.*) (1926/7), p. 133; *C. of A.* case, dec. of the *Hans OLG* of 10 May 1933, *IPRspr.* (1933), p. 54.

[7] Dec. of 23 June 1890, *RGZ* 26, pp. 117, 127; *National Cash Register Comp.* v. *Sch.a.S.*, dec. of 20 November 1909, *RGZ* 72, pp. 242, 247; dec. of 8 July 1953, *BGHZ* 10, pp. 149, 155; dec. of 15 November 1956, *BGHZ* 22, pp. 148, 152.

[8] Dec. of 3 November 1936, *Juristische Wochenschrift* (1937), p. 160.

[9] Dec. of 28 September 1921, *RGZ* 102, pp. 403, 404.

[10] *Swiss-German Mortgage Agreement* case, dec. of 4 February 1931, *Juristische Wochenschrift* (1932–I), p. 243, also in *Annual Digest*, 6 (1931–2), p. 386.

Refugee Convention, put its decision into harmony with legal conceptions, developed on the basis of this agreement, in Norway, Great Britain, France, Belgium and the United States.[1]

Courts in the United States have shown a similarly broad-minded attitude on this point,[2] and Dutch decisions[3] and a Panamanian case[4] have also rejected resort to the *lex fori* for the interpretation of treaty terms.

(iii)

On the point of applying to treaties the same rules of interpretation that are applicable to documents in municipal law, English judges in early decisions were reasonably clear: in *Les Quatres Frères* the Admiralty Court, interpreting a treaty between England and Denmark of 1670 in the light of subsequent practice, held that 'there is but one way of expounding all grants and contracts, private or public'.[5] Similarly Eyre C.J. in *Marryat* v. *Wilson in Error* said:

> We are to construe this treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words and from the context, the intent and meaning of the contracting parties, whether they are A. and B., or happen to be two independent States.[6]

This principle was, however, strongly limited by the Privy Council in the case of *The Blonde*[7] where it said:

> The principle of ascertaining the intention of the parties to an agreement by giving due consideration to what they have said is no doubt valid in international matters, but there are many rules both as to the formation, the interpretation and the discharge of contracts, which cannot be transferred indiscriminately from municipal law to the law of nations.[8]

It is not surprising that, saddled with the method of special transformation of treaty provisions, English courts have been tempted to apply rules of statutory interpretation to the Acts that gave effect to international agreements.[9] Two instances of the application of the rule that concepts having a well-established meaning in common law retain this meaning when

[1] Dec. of 4 November 1965 quoted in *ZaöRV* 28 (1968), p. 144. For more details on German practice see W. F. Bayer, *RabelsZ* 20 (1955), pp. 610 et seq.

[2] U.S. Supreme Court in *Geofroy* v. *Riggs*, 133 U.S. 258, 271; Court of Appeals, Ninth Circuit in *American Trust Co.* v. *Smyth et al.*, of 8 July 1957 in I.L.R. 24 (1957), p. 632, *Berner et al.* v. *British Commonwealth Pacific Airlines Ltd. et al.*, in the District Court, Southern District, New York on 28 June 1963, I.L.R. 34, pp. 201, 206.

[3] Dec. of the High Court of the Netherlands of 21 April 1932, *Soc. Maatschappy Rijnschip Belgica* c. *Westphalische Transport AG*, *Revue critique de droit international privé* (1934), p. 476; *Bukowsky* v. *Management of the Bank for Social Insurance*, Central Court of Appeal in Administrative Law cases on 2 April 1958, I.L.R. 26 (1958–II), p. 587.

[4] Supreme Court, *In re Rivas* on 27 February 1934, *Annual Digest*, 7 (1933–4), p. 444.

[5] (1778) Hay & M. 170, 172.

[6] (1799) 1 Bos. & Pul. 430, 439.

[7] [1922] 1 A.C. 313.

[8] At 331.

[9] Cf. F. A. Mann, *Law Quarterly Review*, 62 (1946), pp. 279, 284.

incorporated into a statute have already been quoted above.[1] Such a rule is unknown to continental law. Similarly in *Parke Davis & Co.* v. *Comptroller-General of Patents, Designs and Trade Marks*[2] Lord Asquith found it quite natural to apply the *ejusdem generis* rule to the International Convention for the Protection of Industrial Property 1934.[3]

With American courts the application of contract law concepts of interpretation to treaties seems to have developed into something like a well-established rule. In *Sullivan et al.* v. *Kidd*[4] the Supreme Court of the United States found that: 'Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals . . .'.[5]

The Court of Appeals, Fifth Circuit, has held in two decisions that consideration should be given to the intent of the parties because the treaty had to be construed as other contracts.[6] This rule was followed by the Supreme Court of New Hampshire.[7] Californian courts have stated the principle that 'treaties are subject to the same rules of interpretation as other documents'.[8] It is therefore surprising to find in a recent decision of the Court of Claims the statement: 'The document being a writing accomplished by international agreement, an American court does not have the right to interpret it as freely as it might interpret an American statute or contract.'[9]

The German *Bundesgerichtshof* has clarified its position with regard to rules of statutory interpretation when it said that 'the courts are not entitled to use the technique employed in the interpretation of German laws when interpreting international agreements'.[10] This view was shared by the District Court of Rotterdam[11] and a Singapore court.[12]

[1] *Gosse Millard* case and *Barras* case, above, p. 267.
[2] [1954] A.C. 321, see also a note in this *Year Book*, 31 (1954), p. 465.
[3] [1954] A.C. at 327.
[4] 254 U.S. 433. This concerned a bilateral treaty with Great Britain.
[5] At 439.
[6] *Hidalgo Water* v. *Hendrick*, dec. of 30 September 1955, I.L.R. 22 (1955), pp. 572, 577, concerning a bilateral convention with Mexico; *Board of County Commissioners of Dade County Florida* v. *Aerolineas Peruanasa, S.A. et al.*, dec. of 31 August 1962, I.L.R. 33, pp. 410, 411, concerning the Chicago Convention on International Civil Aviation of 1944.
[7] *Lazarou et al.* v. *Moraros et al.*, dec. of 1 July 1958, I.L.R. 26 (1958–II), p. 585, concerning a bilateral treaty with Greece.
[8] Supr. Ct. of California in *Estate of Clausen* case on 10 October 1927, *Annual Digest*, 4 (1927–8), p. 449, concerning a bilateral treaty with Denmark; District Ct. of Appeal, 2nd Appellate Division, California, in *Kaname Tokaji* v. *State Board of Equalisation* on 30 April 1937, ibid. 8 (1935–7), p. 412, concerning a bilateral treaty with Japan.
[9] *Flying Tiger Line, Inc.* v. *United States*, dec. of 11 February 1959, I.L.R. 28, p. 99, at p. 104, concerning the interpretation of the Warsaw Convention on International Air Transport of 1929.
[10] *BGHSt.* 12 (1959), p. 36, also *sub nomine Escaped War Criminal* case in I.L.R. 26 (1958–II), pp. 707, 711.
[11] *The Vredeburg* v. *The Sarina Dorina*, dec. of 17 December 1952, I.L.R. 19 (1952), p. 487.
[12] Original Civil Jurisdiction: *Public Trustee* v. *Chartered Bank of India, Australia and China*, dec. of 21 February 1956, I.L.R. 23 (1956), pp. 687, 699.

The pattern emerging from the evidence adduced in this Section is far from uniform. On the contrary, it shows that the courts of one and the same country, while dealing with one aspect in a broad and internationally minded spirit, adopt a nationalistic if not insular attitude towards other problems. Thus English and American judges while realizing that treaty terms need not have the same meaning as words used in their national legislation or in precedents, still seem to believe it proper to apply to treaties rules of statutory or contract interpretation developed in their municipal law. German courts, on the other hand, have shown a more realistic attitude in these two matters. Even so, where there was danger of a conflict between treaty obligations and the Constitution they avoided the difficulty by simply interpreting the treaty in the appropriate way, a method also used by some United States courts.

III

Text or Intention

The International Law Commission in its commentary to the 1966 draft articles found that there were three basic approaches of jurists to the interpretation of treaties, depending on the relative weight given to:

(*a*) The text of the treaty as the authentic expression of the intentions of the parties;
(*b*) The intention of the parties as a subjective element distinct from the text; and
(*c*) The declared or apparent objects and purposes of the treaty.[1]

It is the first two points, the conflict between objective or subjective interpretation, that we will have to deal with in this chapter.

While 'most writers have begun with the fundamental principle that the function of interpretation is to discover what was, or what may reasonably be presumed to have been, the intention of the parties to a treaty when they concluded it . . .',[2] the textual or objective approach

[1] *American Journal of International Law*, 61 (1967), p. 349. This classification had already been used by Sir Gerald Fitzmaurice in this *Year Book*, 28 (1951), p. 1, and was later adopted by Sir Humphrey Waldock in his report to the International Law Commission, see *Yearbook of the International Law Commission* (1964–II), p. 53. For a detailed analysis of the three approaches see F. G. Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference', *International and Comparative Law Quarterly*, 18 (1969), p. 318.

[2] Harvard Research, *American Journal of International Law*, 29 (1935), Supp. II, p. 940; e.g. G. Dahm, *Völkerrecht* (1961), vol. 3, p. 43, but see p. 49; C. Fairman, *Transactions of the Grotius Society*, 20 (1934), p. 123; P. Guggenheim, op. cit. (above, p. 256 n. 2), p. 252; H. Lauterpacht, this *Year Book*, 26 (1949), pp. 55, 83, but see the limitations at pp. 52, 76 et seq.; S. Neri, op. cit. (above, p. 256 n. 1), p. 59; C. Parry in Sørensen's *Manual*, p. 210; A. Verdross, *Völkerrecht* (5th ed.), p. 173; M. S. McDougal in *The Interpretation of Agreements and World Public Order*, probably has the same thing in mind when he talks of 'genuine shared expectations' (at p. 29).

Annex VI

PART SIX

HUMAN RIGHTS AND SELF-DETERMINATION

I. UNIVERSAL DECLARATION OF HUMAN RIGHTS

The references to human rights in the Charter of the United Nations (see preamble, Articles 1, 55, 56, 62, 68 and 76) have provided the basis for elaboration on the content of standards and of the machinery for implementing protection of human rights. On 10 December 1948 the General Assembly of the United Nations adopted a Universal Declaration of Human Rights (U.N. Doc. A/811). The voting was forty-eight for and none against. The following eight states abstained: Byelorussian S.S.R., Czechoslovakia, Poland, Saudi Arabia, Ukrainian S.S.R., U.S.S.R., Union of South Africa, and Yugoslavia. The Declaration is not a legally binding instrument *as such*, and some of its provisions depart from existing and generally accepted rules. Nevertheless some of its provisions either constitute general principles of law (see the Statute of the International Court of Justice, *infra*, art. 38(1)(c)), or represent elementary considerations of humanity. More important is its status as an authoritative guide, produced by the General Assembly, to the interpretation of the Charter. In this capacity the Declaration has considerable indirect legal effect, and it is regarded by the Assembly and by some jurists as a part of the 'law of the United Nations'. On the Declaration, see Oppenheim, *International Law*, 8th ed., i, pp. 744–6; 9th ed., Vol. i, pp. 1001–4; Waldock, 106 *Recueil des cours de l'académie de droit international* (1962, II), pp. 198–9. Generally on human rights see Brownlie, *Basic Documents on Human Rights*, 3rd ed., 1992; Lauterpacht, *International Law and Human Rights*, 1950; Robinson, *The Universal Declaration of Human Rights*, 1958; Lillich and Newman, *International Human Rights*, 1979; McDougal, Lasswell and Chen, *Human Rights and World Public Order*, 1980.

effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3. Everyone has a right to life, liberty and security of person.

Article 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6. Everyone has the right to recognition everywhere as a person before the law.

Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

2. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and the observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(*a*) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(*b*) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(*c*) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Annex VII

UNIVERSITY OF CAMBRIDGE
RESEARCH CENTRE FOR INTERNATIONAL LAW

HERSCH LAUTERPACHT MEMORIAL LECTURES

BREACH OF TREATY

by

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serves as another indication of the great care that must be exercised before conduct or actions of Governments are formally castigated as breach, and it leads to the thought that while in given circumstances conduct or action may constitute an international wrongful act from the point of view of Part One of the law on State responsibility, it would seem to be diplomatically desirable to find a way to formulate the law on this point in a manner that it would not be based actually or notionally on pejorative concepts such as "breach" or "violation". Would it not be sufficient a basis, in most cases, to say that conduct which is not compatible with duly interpreted international obligations of the State concerned can be the origin of an instance of international responsibility?

3. THE CLASSIFICATION OF TREATIES FOR PURPOSES OF BREACH

It is now obvious, whether Riphagen's subsystem approach is the final basis for Part Two of the articles on State responsibility or not, that whatever may have been the justification for the unwillingness or inability of the International Law Commission to base its work on the law of the treaty-instrument on any formal classification of treaties (which, indeed, became unnecessary after it was realized that what was being codified was the law relating to the instrument and not the law relating to the obligation, and after the Commission rejected proposals entitling "all States" to become parties to treaties, leaving the question of participation to the negotiating States), different considerations will apply when we come to deal with the question of treaty-obligations and the breach of those obligations as the origin of the State responsibility. Here it seems that a functional classification, which it will not be easy to compose, is called for, so as to supply a subsystematic regime within the framework of which the treaty as a whole in general, and the allegedly breached provision of a given treaty in particular, can be situated and weighed before the default can be definitively established.

Notwithstanding this, the classification of treaty-instruments, largely formal though it might be, cannot be entirely ignored for this purpose, and we have already seen that the treatment of material breach of a multilateral treaty within the framework of the law of treaty-instruments, poses a whole series of problems which do not arise in the case of a bilateral treaty. We must therefore first take note of the types of treaty-instruments to which the Vienna

Convention of 1969 refers specifically (some of them are also repeated in the 1978 Convention), since some of them certainly contain within their typical context special provisions for dealing with breach. These include: international agreements between States and other subjects of international law; international agreements between other subjects of international law; international agreements not in written form (a topic which we have left aside in these lectures, although in principle the international obligations derived from these agreements are no different from international obligations derived from agreements in written form, that is, a treaty); constituent instruments of international intergovernmental organizations (these are usually self-policing by the organization, with expulsion from the organization as the ultimate sanction); treaties adopted within an international intergovernmental organization; treaties authenticated in two or more languages; successive treaties relating to the same subject matter (a matter which can lead to a particular kind of breach); unamended treaties; treaties conflicting with a peremptory norm of international law; invalid treaties (philosophically, a contradiction in terms!); multilateral treaties; bilateral treaties; a treaty establishing a boundary; treaties for which there is a depositary; and (by implication) treaties concluded between a limited number of States.

Most of the types of treaty mentioned in this list are clearly references to the instrument as such, but some aspects of that typology apply as much if not more to the substance than to the form, or are a combination of both. This remark applies notably to the treaty which is or contains the constituent instrument of an international organization, successive treaties relating to the same subject matter, a treaty conflicting with a peremptory norm of international law, and a treaty establishing a boundary. At one time the Commission, no doubt responding to the earlier doctrinal distinction between what were called *traités-loi* and *traités-contrat*, proposed using the term "general multilateral treaty". This was defined for the purposes at hand as a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole. But that was dropped partly under the impact of criticism of Governments and partly because it was found to be unnecessary as the work of codification progressed, especially after the Commission had reached a negative decision on what was then the thorny question of participation as of right by all States in certain treaties—an issue which since 1974 has lost its political status and no longer seriously interferes with modern treaty making.[25]

[25] U.N. General Assembly Resolution 3233 (XXIX), 12 November 1974.

But clearly classifications of this character would have little relevance to the major issues of breach of treaty-obligations and the ensuing responsibility of States. It would be tempting to return to and try and refine the distinction between the *traité-contrat* and the *traité-loi* as expounded in the well known writings on the topic. But this too does not seem to be adequate or practical to reflect the complex body of aims and objects for which the modern treaty is employed. As I. Paenson has recently pointed out:

> For purposes of classification international treaties may, in theory, be divided into various categories according to their object, but one should bear in mind that each treaty contains, as a rule, elements belonging to different categories.[26]

One must reach out for a more sophisticated and at the same time more practice-oriented and functional system of classification.

Although not designed scientifically for that purpose, a starting point, a rough-and-ready one it is true, for such a classification can be found through the general table of contents of the annual publication of the United Nations Secretariat entitled *Multilateral Treaties Deposited with the Secretary-General*.[27] That table of contents includes 28 arbitrarily but instinctively chosen major functional groupings of treaties, each one of which (with perhaps isolated exceptions) could constitute a subsystem or even a sub-subsystem for the purposes of analysing the totality of the treaty-regime or regimes within which a given treaty provision, breach of which is alleged in a concrete case, could be placed. They are as follows: I. Charter of the United Nations and Statute of the International Court of Justice (in fact this could be broadened to include all treaties which comprise in themselves or which contain the constituent instrument of an international intergovernmental organization, whether that is the sole purpose of the treaty as in the case of the United Nations Charter, or whether the constituent instrument is part of a treaty of broader but functional scope, such as the constitution of the International Civil Aviation Organization which is part of the 1944 Chicago Agreement on Civil Aviation,[28] or the 1982 United Nations Convention on the Law of the Sea which contains among its provisions the constituent instruments of at least two new international organizations, the International Sea-

[26] I. Paenson, *Manual of the Terminology of Public International Law (Peace) and International Organizations* (1983), p. 268, §204.

[27] ST/LEG/SER.E/–.

[28] 15 *U.N.T.S.* 298.

Bed Authority and the International Tribunal for the Law of the Sea); II. Pacific settlement of international disputes; III. Privileges and immunities, diplomatic and consular relations; IV. Human rights; V. Refugees and stateless persons; VI. Narcotic drugs and psychotropic substances; VII. Traffic in persons; VIII. Obscene publications; IX. Health; X. International trade and development; XI. Transport and communications, subdivided into (a) customs matters, (b) road traffic, (c) transport by rail, (d) water transport and (e) multimodal transport; XII. Navigation; XIII. Economic statistics; XIV. Educational and cultural matters; XV. Declaration of death of missing persons; XVI. Status of women; XVII. Freedom of information; XVIII. Miscellaneous penal matters; XIX. Commodities; XX. Maintenance obligations; XXI. Law of the sea; XXII. Commercial arbitration; XXIV. Outer space; XXV. Telecommunications; XXVI. Disarmament; XXVII. Environment; and XXVIII. Fiscal matters.

These are all multilateral treaties. When we turn to bilateral treaties further functional distinctions can be found. Paenson[29] refers to political treaties, treaties of mutual assistance, treaties of alliance, non-aggression treaties, treaties of neutrality, treaties of guarantee, treaties establishing a protectorate, treaties governing the boundary regime (which may not be the same as the Vienna Convention classification of a treaty establishing a boundary), peace treaties, economic and social treaties including treaties of navigation, friendship treaties, establishment treaties, most-favoured-nation clauses, agreements on scientific and technical collaboration, agreements on cultural collaboration, treaties on international legal assistance and extradition treaties. There are series of treaties on maritime matters as distinct from the law of the sea, and another series on private international law, and one could go on and on. The Labour Conventions are a class of their own. Some of these treaties belong to well defined branches of law, both international and domestic. Others are still in an embryonic stage. Some have built-in procedures for dealing with alleged breach (preserved, as regards both the instrument and the obligation by article 60, paragraph 4, of the Vienna Convention), while others leave the issue of breach to be dealt with through the normal legal, diplomatic or organizational procedures.

The reader who looks closely at the treaties which come within these groupings, especially, to simplify matters, the detailed list contained in the table of contents of the United Nations publication

[29] Paenson, *op. cit.*, p. 268.

already mentioned or, to take another outstanding example, the International Labour Organisation's *International Labour Conventions and Recommendations 1919–1981, arranged by subject matter* (1982), cannot fail to be struck by the great variety of topics which form the principal subject matter of these treaties, and the great variety and multiplicity of processes which have been and are continuously being evolved to meet the practical requirements of the States concerned, especially in the related aspects of monitoring and the treatment of, or more often as not the avoidance of, breaches of their provisions.

Let us take the law of diplomatic privileges and immunities, and more especially the law relating to the protection and safety of diplomats, concerning which, as we have seen earlier, Professor Ago as special rapporteur on the topic of State responsibility, had some perhaps surprising remarks. Breaches of this branch of the law have now become an international scourge, so much so that above the turmoil and turbulence of international relations in general, the General Assembly has gradually but unobtrusively been working out over the last few years new systems for dealing with this; and by blunting the force of the so-called "political crime" as a ground for non-extradition of a person wanted for this kind of offence or as an excuse for inaction and non-co-operation between national police forces and their international counterparts in these matters, may have made a significant practical contribution to the alleviation of this problem. This action of the General Assembly, so far always adopted by some form of consensus, is of course based on a common interest of all countries in the maintenance of the general fabric of the law of diplomatic and consular relations, and the procedure that has been adopted faithfully reflects this point of departure. But the existence of a common interest of this character is not always present, even as between the co-contracting States of a multilateral treaty of major and universal import, and fundamental conceptual differences of approach may render more difficult the adoption and even more so the practical application of measures designed to forestall or minimize the effects of a breach of those treaties.

The classification of treaties for purposes of breach, and more precisely for the determination of the rules of law for repairing the consequences of breach of treaty as being an internationally wrongful act giving rise to a claim to reparation, is thus seen to be inherently difficult and politically delicate at the same time. It also runs into many theoretical difficulties of conceptual jurisprudence, rendered more acute in an expanding international society. These

difficulties and others, especially the appropriateness of the various kinds of restitution and reparation usually discussed in the context of State responsibility, lead to the question whether it is really possible to arrive at a single unitary set of rules for the topic, or whether the multiplicity of reservations which will certainly be required, or their generality, may not make it preferable to exclude from the detailed legal treatment of the consequences of an internationally wrongful act when that wrongful act originated in a breach of treaty. This indeed goes to the heart of the matter. Given the absence of permanent independent determinative machinery whether judicial or not, given the open-endedness of Article 33 of the United Nations Charter and the difficulties of concretising, monitoring and establishing dispute settlement procedures in any given case, it seems that only a negative answer can be given to our question.

In short, while breach of a treaty like any other internationally wrongful act creates a new legal situation between the defaulting State and the other States concerned in the treaty, the problem of repairing that new legal situation, which has been placed at the heart of the codification of the law of State responsibility, does not appear to provide an adequate basis for the treatment of this branch of international relations. These difficulties are increased, not reduced, by the complex but limited provisions of the Vienna Convention, with their general thrust towards preserving the integrity of international treaty relations. In addition, the danger exists that to attempt to meet this problem within the framework of a general statement of the law of State responsibility may overcharge that topic, something which, we believe, it would be in the general interest to avoid.

4. THE ENFORCEMENT OF INTERNATIONAL LAW AND BREACH OF TREATY

It should by now be clear that the questions of breach of treaty (which of necessity raise issues of interpretation and application of the treaty and can, as we have seen, if the will is there be disposed of in that context thus avoiding pejorative political assertions), questions of the possible reactions to the breach including the separability of treaty provisions in these circumstances, as well as acts of reprisal and retorsion (within the limits imposed by the Charter of the United Nations), or indeed of the very nature of the