

Chapter III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

25. In response to paragraph 11 of General Assembly resolution 57/21 of 19 November 2002, the Commission would like to indicate the following specific issues for some of the topics on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work.

A. Responsibility of international organizations

26. At its next session, in its study concerning international responsibility of international organizations, the Commission will address questions of attribution of conduct. Certain parallel issues relating to attribution of conduct to States are dealt with in articles 4 to 11 of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session.⁶ Article 4, paragraph 1, of those articles sets out as a general rule that “[t]he conduct of any State organ shall be considered an act of that State under international law”.⁷ The following paragraph says that “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State”.⁸

27. The Commission would welcome the views of Governments especially on the following questions:

(a) Whether a general rule on attribution of conduct to international organizations should contain a reference to the “rules of the organization”;

(b) If the answer to subparagraph (a) is in the affirmative, whether the definition of “rules of the organization”, as it appears in article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”), is adequate;⁹

(c) The extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations.

B. Diplomatic protection

28. The Special Rapporteur aims to submit his final report on diplomatic protection in 2004. This final report will deal with two miscellaneous items:

(a) The diplomatic protection of members of a ship’s crew by the flag State (an issue considered by the Sixth Committee in 2002);

(b) The diplomatic protection of nationals employed by an intergovernmental international organization in the context of the *Reparation for Injuries* case.¹⁰

29. The Commission would welcome comments from Governments on whether there are any issues other than those already covered in the draft articles approved in principle by the Commission and the above two items which ought still to be considered by the Commission on the topic.

C. International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities)

30. The Commission would welcome comments from Governments on the different points raised by the Special Rapporteur referred to in paragraph 174 of the present report. In particular, they may wish to comment on the following issues:

(a) The procedural and substantive requirements that the State should place on an operator;

(b) The basis and limits of allocation of loss to the operator;

(c) The types of supplementary sources of funding that might be considered to meet losses not covered by the operator;

(d) The nature and the extent of State funding and the steps that might or should be taken by States in respect of losses that are not covered by the operator or other sources of supplementary funding;

⁶ *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Article 2, paragraph 1 (j), of the 1986 Vienna Convention provides: “‘rules of the organization’ means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.”

¹⁰ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

(e) Taking into consideration the scope of the topic, the extent to which damage to the environment *per se*, meaning damage not included in the concept of “damage” to persons, property including cultural property, the environment including landscape, and the natural heritage within and under the national sovereignty and jurisdiction and patrimony of a State, should or could be covered; and

(f) The final form of the work on this topic.

D. Unilateral acts of States

31. The debate in the Commission at the present session led to a redefinition of the scope of the topic. The Commission will continue to consider unilateral acts *sensu stricto*,¹¹ as it has been doing until now. In addition, however, it will begin its study of conduct of States which may produce legal effects similar to those of such unilateral acts, for the purpose of including guidelines or recommendations, if appropriate.

32. In this connection, the Commission would like to know the opinion of Governments on conduct of States which may come within the category of conduct that may, in certain circumstances, create obligations or produce legal effects under international law similar to those of unilateral acts *sensu stricto*.

33. The lack of information on State practice has been one of the main obstacles to progress on the study of the topic of unilateral acts. The Commission therefore once again requests Governments to provide information on general practice relating to unilateral acts and the unilateral conduct of States, along the lines of interest to the Commission.

E. Reservations to treaties

34. In chapter II of his eighth report (A/CN.4/535 and Add.1), the Special Rapporteur proposed a definition of objections to reservations in order to fill a gap in the Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”) and the 1986 Vienna Convention, which do not contain such a definition. His proposal was based on the fact that objecting States or international organizations intend their statement to produce one or another of the effects provided for in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Conventions. He therefore proposed the following definition:

“2.6.1 Definition of objections to reservations

“‘Objection’ means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the

objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.” (A/CN.4/535 and Add.1, para. 98)

35. The proposed definition was regarded as being too narrow by some members of the Commission, whose view was that it did not take account of other categories of statements by which States express their opposition to reservations, while intending that their objections should produce various effects. Other members considered that the effects of objections to reservations under the 1969 and 1986 Vienna Conventions were not very clear-cut and that it was better not to rely on the provisions of those Conventions in defining objections.

36. The Commission would be particularly interested in receiving the comments of Governments on this question and would be grateful to States for transmitting specific examples of objections which do not contain this (or an equivalent) term and which they nevertheless regard as genuine objections.

37. The Commission would like to know the views of States on the following position taken in 1977 by the arbitral tribunal that settled the dispute between France and the United Kingdom concerning the delimitation of the continental shelf in the *English Channel* case:

Whether ... such [a negative] reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.¹²

Does this position reflect practice? If so, are there clear-cut examples of critical reactions to the reservation which can nonetheless not be characterized as objections?

38. The Commission would also be grateful to Governments for comments on the advantages and disadvantages of clearly stating the grounds for objections to reservations formulated by other States or international organizations.

39. Draft guideline 2.3.5 (Enlargement of the scope of a reservation) gave rise to divergent positions. It was referred to the Drafting Committee. The views of Governments on this guideline would be particularly welcomed.¹³

F. Shared natural resources

40. The Commission would be focusing for the time being on groundwaters within the wider topic of shared natural resources. In the view of the Commission, it

¹² Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, decisions of 30 June 1977 and 14 March 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 33, para. 39.

¹³ The draft guideline proposed by the Special Rapporteur in his report reads as follows:

“2.3.5 Enlargement of the scope of a reservation

“The modification of an existing reservation for the purpose of enlarging the scope of the reservation shall be subject to the rules applicable to late formulation of a reservation [as set forth in guidelines 2.3.1, 2.3.2 and 2.3.3].”

¹¹ A unilateral act of a State is a statement expressing the will or consent by which that State purports to create obligations or other legal effects under international law.

would be essential that it collect basic information on groundwaters in order to formulate appropriate rules in this area. Accordingly, the Commission would welcome information from Governments and international organizations on aspects of groundwaters with which they are concerned. Since the Commission has not yet made a final decision on the scope of groundwaters to be covered in the current study, it would appreciate receiving information on the following issues with regard to major groundwaters, regardless of whether they are related to surface waters or whether they extend beyond national borders:

(a) Major groundwaters and their social and economic importance;

(b) Main uses of specific groundwaters and State practice relating to their management;

(c) Contamination problems and preventive measures being taken;

(d) National legislation, in particular the legislation of federal States that governs groundwaters across its political subdivisions together with information as to how such legislation is implemented;

(e) Bilateral and multilateral agreements and arrangements concerning groundwater resources in general and in particular those governing quantity and quality of groundwaters.