

## Chapter III

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

#### A. Diplomatic protection

23. The Commission would welcome comments and observations from Governments on all aspects of the draft articles on diplomatic protection adopted on first reading (see chap. IV, sect. C below).

24. The Commission would also welcome comments and observations from Governments on the commentaries to the draft articles (*ibid.*).

#### B. Responsibility of international organizations

25. At its fifty-fifth session, held in 2003, the Commission adopted three draft articles concerning general principles relating to the responsibility of international organizations<sup>3</sup> and, at its 2004 session, four draft articles on attribution of conduct (see chapter V, section C below). In so doing, the Commission has followed the general scheme of the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session.<sup>4</sup> Broadly continuing with the same scheme, the Special Rapporteur intends to address in his third report, which is due in 2005, the following topics: breach of an international obligation; circumstances precluding wrongfulness; and responsibility of an international organization in connection with the wrongful act of a State or another organization. For this purpose, views expressed on the following questions would be particularly helpful:

(a) Relations between an international organization and its member States and between an international organization and its agents are mostly governed by the rules of the organization, which are defined in draft article 4, paragraph 4, as comprising “in particular: the constituent instruments, decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization” (*ibid.*). The legal nature of the rules of the organization in relation to international law is controversial. It is at any event debatable to what extent the Commission should, in its study of responsibility of international organizations under international law, consider breaches of obligations that an international organization may have towards its member States or its agents. What scope should the Commission give to its study in this regard?

(b) Among the circumstances precluding wrongfulness, article 25 of the draft articles on responsibility of States for internationally wrongful acts refers to

“necessity”, which may be invoked by a State under certain conditions: first of all, that the “act not in conformity with an international obligation of that State [...] is the only way for the State to safeguard an essential interest against a grave and imminent peril”.<sup>5</sup> Could necessity be invoked by an international organization under a similar set of circumstances?

(c) In the event that a certain action, which a member State takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that State and of that organization, would the organization also be regarded as responsible under international law? Would the answer be the same if the State’s wrongful conduct was not requested, but only authorized, by the organization?

#### C. Shared natural resources

26. Under this topic, the Commission is focusing for the time being on the question of transboundary groundwaters.

27. At the next session, the Special Rapporteur aims to submit his third report, including a full set of draft articles on the law of transboundary aquifer systems on the basis of the general framework that he proposed in his second report (A/CN.4/539 and Add.1), which is reproduced in the footnote to paragraph 86 in chapter VI below. The Commission would welcome the views of Governments on this general framework.

28. The Commission would also welcome detailed and precise information which Governments can provide on their practice that may be relevant to the principles to be incorporated in the draft articles, in particular:

(a) Practice, bilateral or regional, relating to the allocation of groundwaters from transboundary aquifer systems; and

(b) Practice, bilateral or regional, relating to the management of non-renewable transboundary aquifer systems.

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

29. The Commission would welcome comments and observations from Governments on all aspects of the draft

<sup>3</sup> *Yearbook ... 2003*, vol. II (Part Two), chap. IV, sect. C, p. 18.

<sup>4</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

<sup>5</sup> *Ibid.*, p. 28, para. 76.

principles on the allocation of loss in the case of trans-boundary harm arising out of hazardous activities adopted on first reading (see chap. VII, sect. C below). In particular, the Commission would welcome comments and observations on the final form.

30. The Commission would also welcome comments and observations from Governments on the commentaries to the draft principles (*ibid.*). The Commission notes that the commentaries comprise an explanation of the scope and context of each draft principle as well as an analysis of relevant trends and possible options available to assist States in the adoption of appropriate national measures of implementation and in the elaboration of specific international regimes.

### E. Unilateral acts of States

31. In general, the Commission took the view that the study of practice which began this year should also cover the evolution and lifespan of unilateral acts of States. In particular, it considered that more detailed attention should be paid to various related aspects, such as: the date, author/organ and its competence, form, content, context and circumstances, objectives, addressees, reaction of addressee(s) and third parties, grounds, implementation, modification, termination/revocation, legal scope and court decisions or arbitral awards adopted in relation to unilateral acts. It might thus be possible to determine whether there are general rules and principles that might be applicable to the operation of such acts.

32. The Commission would like to receive comments from States on their practice in this regard, in the light of the elements referred to above, which will be duly taken into account by the Special Rapporteur in his next report on the topic, together with the practical examples that some members of the Commission will make available to him, as agreed in the Working Group established during this session.

### F. Reservations to treaties

33. The Special Rapporteur intends to deal with the question of the “validity” of reservations in his report next year.

34. The 1969 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter 1986 Vienna Convention) deal with cases in which a State or an international organization “cannot” formulate a reservation (art. 19), but they do not contain an adjective qualifying a reservation which might nevertheless be made in one of those cases. The terms used by States in practice are not at all uniform in that regard.

35. Both in the ILC and in the Sixth Committee, there were disagreements and lengthy discussions on the terminology to be used in that regard. It was pointed out, for example, that the word “lawfulness” (*légitimité, licitud*) had the disadvantage of referring to the law of State responsibility, although the Commission has not yet examined the question whether a reservation that was prohibited or improperly formulated would entail its author’s responsibility. Moreover, a choice must not only be made between the words “admissibility” and “permissibility”, but their equivalent in French (*recevabilité*) is not satisfactory. The term “validity” (*validité, validez*), which the Special Rapporteur found neutral and sufficiently comprehensible and which offered the advantage of having an equivalent in all of the Commission’s working languages, was criticized on the grounds that it created confusion between the nullity of a reservation and its opposability.<sup>6</sup>

36. At its fifty-fourth session, in 2002, the Commission “decided to leave the matter open until it had adopted a final position on the effect”<sup>7</sup> of reservations covered by the provisions of article 19 of the Vienna Conventions.

37. Before adopting a final position, the Commission would welcome comments and observations of Governments on this question.

<sup>6</sup> See the preliminary report of the Special Rapporteur on the law and practice relating to reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, paras. 97–114.

<sup>7</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 48 (commentary to draft guideline 2.1.8 [2.1.7 bis], para. 7).