Chapter III

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

A. Reservations to treaties

23. The Special Rapporteur on reservations to treaties proposed to complete his presentation of problems posed by the invalidity of reservations in 2008. With this in view, the Commission welcomed replies from States to the following questions:

(*a*) What conclusions do States draw if a reservation is found to be invalid for any of the reasons listed in article 19 of the Vienna Convention on the Law of Treaties (hereinafter "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")? Do they consider that the State formulating the reservation is still bound by the treaty without being able to enjoy the benefit of the reservation? Or, conversely, do they believe that the acceptance of the reserving State is flawed and that the State cannot be considered to be bound by the treaty? Or do they favour a compromise solution and, if so, what is it?

(*b*) Are the replies to the preceding questions based on a position of principle or are they based on practical considerations? Do they (or should they) vary according to whether the State has or has not formulated an objection to the reservation in question?

(*c*) Do the replies to the above two sets of questions vary (or should they vary) according to the type of treaty concerned (bilateral or normative, human rights, environmental protection, codification, etc.)?

(*d*) More specifically, State practice offers examples of objections that are intended to produce effects different from those provided for in article 21, paragraph 3 (objection with minimum effect), or article 20, paragraph 4 (*b*) (maximum effect), of the 1969 and 1986 Vienna Conventions, either because the objecting State wishes to exclude from its treaty relations with the reserving State provisions that are not related to the reservation (intermediate effect), or because it wishes to render the reservation ineffective and considers the reserving State to be bound by the treaty as a whole and that the reservation thus has no effect ("super-maximum" effect). The Commission would welcome the views of States regarding these practices (irrespective of their own practice).

24. The Commission noted that it is aware of the relative complexity of the above questions, which are related to problems that are themselves highly complex and take into account a wide range of practice. The Commission suggested that the replies to these questions be addressed to the Special Rapporteur in writing through the Secretariat. It would be particularly useful if the authors could include with their replies as precise a description as possible of the practice they themselves follow.

25. The Commission had noted that, in the main, the formulation of objections to reservations is practised by a relatively small number of States. It would thus be particularly useful if States that do not engage in this practice could transmit their views on these matters, which are fundamental to the topic of "Reservations to treaties".

B. Shared natural resources

26. The Commission intended to study issues concerning oil and gas under the topic "Shared natural resources". It would be useful for the Commission in the consideration of these issues to be provided with relevant State practice, in particular treaties or other arrangements existing on the subject.[8]

C. Expulsion of aliens

27. The Commission would welcome any information concerning the practice of States under this topic, including examples of domestic legislation. It would welcome in particular information and comments on the following points:

(*a*) State practice with regard to the expulsion of nationals. Is it allowed under domestic legislation? Is it permissible under international law?

(*b*) The manner in which persons having two or more nationalities are dealt with under expulsion legislation. Can such persons be considered aliens in the context of expulsion?

(*c*) The question of deprivation of nationality as a possible precondition for a person's expulsion. Is such a measure allowed under domestic legislation? Is it permissible under international law?

(*d*) The question of the collective expulsion of aliens who are nationals of a State involved in an armed conflict with the host State. In such a situation, should a distinction be drawn between aliens living peacefully in the host State and those involved in activities hostile to it?

(*e*) The question of whether an alien who has had to leave the territory of a State under an expulsion order subsequently found by a competent authority to be unlawful has the right of return.

[8] A questionnaire on this issue was circulated to Governments.

(*f*) Criteria that could be used to distinguish between the expulsion of an alien and the question of non-admission; more specifically, determining the point at which the removal of an illegal immigrant is governed by the expulsion procedure and not by the non-admission procedure.

(*g*) The legal status of illegal immigrants located in the territorial sea or in internal waters, or in the frontier zone excluding port and airport areas. Specifically, apart from port and airport areas, is there an international zone within which an alien would be considered as not having yet entered the territory of the State? If so, how is the extent and breadth of such a zone determined?

(*h*) State practice in relation to grounds for expulsion, and the question of whether and, where appropriate, the extent to which such grounds are restricted by international law.

28. The Commission also approved the Special Rapporteur's recommendation that the Secretariat should contact the relevant international organizations in order to obtain information and their views on particular aspects of the topic.

D. Responsibility of international organizations

29. The Commission would welcome comments and observations from Governments and international organizations on draft articles 31 to 45, in particular on draft article 43, relating to an obligation of members of a responsible international organization to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation to make reparation.

30. The Commission would also welcome views from Governments and international organizations on the two following questions, due to be examined in the next report:

(*a*) Article 48 on responsibility of States for internationally wrongful acts provides that, in case of a breach by a State of an obligation owed to the international community as whole, States are entitled to claim from the responsible State cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached.[9] Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?

(*b*) If an injured international organization intends to resort to countermeasures, would it encounter further restrictions than those that are listed in articles 49 to 53 of the articles on responsibility of States for internationally wrongful acts?[10]

E. The obligation to extradite or prosecute (*aut dedere aut judicare*)

31. The Commission would welcome any information that Governments may wish to provide concerning their legislation and practice with regard to this topic, particularly more contemporary ones. If possible, such information should concern:

(*a*) International treaties by which a State is bound, containing the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

(*b*) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

(*c*) Judicial practice of a State reflecting the application of the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

(*d*) Crimes or offences to which the principle of universal jurisdiction in criminal matters is applied in the legislation and practice of a State; is it connected with the obligation *aut dedere aut judicare*?

32. The Commission would also appreciate information on the following:

(*a*) Whether the State has authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality?

(*b*) Whether the State has authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals?

(*c*) Whether the State considers the obligation to extradite or prosecute as an obligation under customary international law and, if so, to what extent?

33. The Commission would also welcome any further information and views that Governments may consider relevant to the topic.

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[9] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 126–128.

[10] *Ibid.*, pp. 129–137.