INTERNATIONAL LAW COMMISSION LONG TERM PROGRAMME OF WORK

FUTURE TOPICS

FEASIBILITY STUDY ON THE LAW OF ENVIRONMENT

CHUSEI YAMADA

Since the 1972 Stockholm Declaration on the Human Environment, many important developments have occurred in international environmental law. Its present situation is characterized by an abundance of multilateral conventions and other international instruments, no fewer than 120 of them, which cover many fields and constitute an impressive network of rights and obligations of States. They should be considered as a successful achievement of contemporary international law, as the International Court of Justice has noted that "the existence of the general obligations of States to ensure that obligations within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* para. 29). However, the "Sector-by Sectors" approach, which has been adopted so far in the conclusion of various multilateral conventions, often dictated by the need to respond to urgent and specific requirements, runs the risk of not addressing the need for an integrated approach to the prevention of pollution and the continuing deterioration of the global environment. Wide gaps exist in the net work of obligations of States contained in the multilateral instruments, particularly in the field related to global concerns.

In view of the interests expressed widely by Governments in the Sixth Committee of the General Assembly, as well as in other legal forums such as the Asian-African

Legal Consultative Committee, for the Commission to engage in the codification and progressive development of international environmental law, the Commission has since 1993 considered this subject within the framework of its long term programme of work. Some preliminary outlines were prepared ("Global commons" by Christian Tomuschat; "Rights and duties of the States for the protection of the Human environment", by Chusei Yamada). However, as the subject it substantive, wide, complex and technical, the Commission has not yet identified the scope and content of the topic it would take up under the rubric of the law of environment.

A brief overview of the historical development of international environmental law would be relevant to our review:

(a) Traditional environmental problems are distinguished by the fact that they normally arise between neighbouring States. The prevailing rules of international law have been based on the premise of sovereign equality of territorial States in which the State is expected to exercise due diligence over the economic activities within its territory so that they will not cause any harm to other States;

(b) When at a later stage environmental degradation came to cover not only the injury to the neighbouring States, but also the widespread damage to more extended areas, modifications had to be introduced into the applicable rules of international law. While specific conventions were concluded in the areas of damages caused by ultrahazardous activities such as oil transport, nuclear or space activities, there is no general convention stipulating the rights and duties of States in respect of ultra-hazardous activities;

(c) With the recent drastic expansion of the global economy, significant technological innovations and the explosive population growth, such global environmental problems as the depletion of the ozone layer, climate change (global warming), acid rain, the destruction of tropical forests and bio-diversity have come to be embraced as important topics of international law. Global environmental problems typically caused gradual but widespread and long-lasting, sometimes, irreparable harm to the global environment as a combined result of various activities carried out in various States. These problems, which are the common concern of mankind, give rise to a tally new question of the rights and duties of States which would take the form of "*erga omnes* obligations" in its contents, nature and method of implementation.

The Commission has already formulated drat articles which were the basis of the United Nations Convention on the Law of Non-navigational Uses of International Water courses. The work on "State responsibility" and "International liability arising out of acts not prohibited under international law", which is currently being carried out by the Commission, is very relevant to the environmental problems mentioned in paragraph 3(a) and (b) above.

It is the view of the author of the present paper therefore that the Commission should focus more on those problems mentioned in paragraph 3(c), that is, the field of duties erga omnes where the complaint of deterioration of the environment is directed towards the international community at large, rather than individual States. It would be possible to draft a comprehensive umbrella or framework convention, extracting principles of international law commonly found in existing multilateral instruments and also filling lacuna in them.

At the same time, it is the considered view of the author that the Commission should not initiate the work on a topic if the scope and content are not clearly defined and generally endorsed by the members of the Commission. The Commission should avoid the repetition of difficulties in encountered with the topic "International liability". Accordingly, the author proposes that the Commission authorize, as a first step, a feasibility study of the topic provisionally entitled "The law of environment", so that it would be in a position, after such a study were presented, to decide the exact s cope and content of the future topic. A preliminary list of issues to be considered in such a feasibility study is annexed hereto.

ANNEXURE

REPORT OF THE RAPPOTEUR OF THE SPECIAL MEETING ON THE RESERVATION TO TREATIRES HELD ON 14 APRIL 1998

The Special Meeting on the 'Reservation To Treaties' was convened within the administrative arrangements of the 37th Session of the Asian African Legal Consultative Committee. The Special Meeting was chaired by the President (Dr. P.S. Rao) and it was understood that the Bureau of the 37th Session would also be the Bureau of the Special Meeting. Thus Hon'ble Mr. Martin A.B.K. Amidu, the Deputy Minister of Justice and the deputy Attorney Generally of Ghana, who had been elected the Vice President of the 37th Session was the Vice -President of the Special Meeting. The Special Meeting appointed deputy Secretary General, Ambassador Dr. W.Z. Kamil, as the Rapprteur for the Special Meeting.

The Secretary General welcomed the delegates and experts who in response to the invitation of the Secretariat lent their consent to make presentations and steer the discussions in the Special Meeting on the Reservations to Treaties. He further stated it was the third of the Special Meetings to be organized by the Secretariat within the administrative arrangements of the annual sessions of the Committee. He recalled that during the 35th Session of the Committee held in Manila in 1996 a Special Meeting had been convened on the Establishment of an International Criminal Court and that during the 36th Session a Special Meeting had been convened to consider the Interrelate Aspects Between the International Criminal Court and International Humanitarian Law. A large number of delegates to the 35th and 36th Sessions of the committee had considered the two Special Meetings to be useful.

He traced the genesis of the present Special Meeting to a meeting of the Legal Advisors of Members States held, during the 51st session of the General Assembly in New York in October 1996, where a view was expressed that the AALCC

Secretariat consider convening a Seminar on the Law of Treaties. The proposal was advanced in view of the consideration of the question of "the Law and Practice Relating to the Reservation of Treaties" on the work program of the International Law Commission.

The Secretary General stated when the International Law Commission, at its 49th Session, adopted set of Preliminary conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, the Secretariat proposed the convening of a Special Meeting on the Law of Treaties i particular the question of Reservations to Treaties during the curse of the 37th session f the Asian African Legal Consultative Committee. The Secretariat proposal to convene a Special Meeting was considered at a meeting of the Legal Advisers of member States of the Committee held during the 52nd session of the General Assembly in New York.

The Secretary General concluded his welcome ad dress by saying that the Secretariat had prepared a Background Note on the subject to facilitate the deliberations on the Preliminary Conclusions on Reservations to Multilateral Treaties, and invited the Deputy Secretary General Ambassador Dr. W.Z. Kamil, to introduce the Brief of Documents prepared by the Secretariat.

Inviting attention to the Note of the Secretary General prepared for the Special Meeting Doc. No. AALCC/XXXVII/New Delhi/98 SP.1. the Deputy Secretary General, Ambassador W.Z. Kamil, recalled that the Special Meeting on the Establishment of an International Criminal Court and the Interrelated Aspects Between the International Criminal Court and International Humanitarian Law organized within the administrative arrangements of the 35th and 36th Sessions of the AALCC held in 1996 and 1997 respectively had been considered to be useful.

He pointed out that the Preliminary Conclusions on Reservations To Normative Multilateral Treaties Including Human Rights Treaties adopted by the International Law

Commission at its 49th session reiterate that articles 19 to 23 of the Vienna Conventions on Treaties of 1969 and 1986 govern the regime of reservation to treaties and that the "object and purpose of the treaty" is the most important criteria for determining the admissibility of reservations. The Commission has taken the view that the regime of the Vienna Conventions strikes a balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty. It accordingly considered the flexibility of that regime to be suited to all treaties, of what ever nature or object.

The Commission is of the opinion that the twin objectives (i) of the preservation of the integrity of the text of the treaty, and (ii) universality of participation in the treaty are equally applicable in the case of reservations to normative multilateral treaties including treaties in the area of human rights, and consequently the general rules enunciated in Articles 19 to 23 of the Vienna Convention of 1969 and 1986 govern reservations to such instruments. It has further taken the view that the establishment of monitoring bodies by many human rights treaties had, however, given rise to legal questions that had not been envisaged at the time of drafting those treaties connected with appreciation of the admissibility of reservations formulated by States.

The Deputy Secretary General stated further that the Preliminary Conclusions adopted by the Commission recognize that where human rights treaties are silent on the subject of the formulation of reservations the monitoring bodies, established by the Human Rights Treaties, are competent to comment upon and express recommendations with regard to the admissibility of reservations by States in order to carry out the functions assigned to them. Several members of the Commission had however disagreed with this principle as incorporated in paragraph 5 of the preliminary conclusions.

The Commission, it was pointed out, has suggested that the competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the

contracting parties, in accordance with the provisions of the Vienna Convention of 1969 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties.

The Commission has proposed providing specific clauses in multilateral normative treaties, including human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation. It was pointed out in this regard that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers vested in them for the performance of their general monitoring role. It has also called upon States to cooperate with monitoring bodies and give due consideration to any recommendation that they may make or to comply with their determination if such bodies were granted competence to that effect.

Finally, he stated that the International Law Commission has invited comments on the Preliminary Conclusions adopted on the Reservations to Normative Multilateral Treaties, including Human Rights Treaties and consideration could be given to forwarding the views of Members States of the AALCC on the issue of reservation to treaties expressed during the Special Meeting together with any report or recommendation that the Committee may adopt at the current Session.

The discussions during the Special Meeting revolved largely around the presentations made by a group of experts specially invited to make presentations. These had included Mr. B.Sen (Member of UNIDROIT Governing Body and Former Secretary General of the AALCC), Professor F. X. Njenga (Dean, Faculty of Law, Moi University, Kenya and former Secretary General of the AALCC); Professor (Ms) S.K. Varma (Dean Faculty of Law, University of Delhi); Professor M.K. Nawaz (Visiting Professor, National Law School, Bangalore); Professors R.P. Anand; V.S. Mani and Y. K. Tyagi (all of the School of

International Studies, Jawaharlal Nehru University). A paper on "Reservations to Normative Multilateral Treaties and Human Rights Treaties" written by Professor M.K. Nawaz was circulated during the Meeting.

It may be stated that Ambassador Chusei Yamada, member of the International Law Commission represented the Chairman of the Commission and Special Rapporteur of the topic, Professor Alain Pellet.

Following the presentations by the six Special Experts, delegates of 8 Member States, one observer State and two international organizations made statements. These had included China, Egypt, Ghana, India, Islamic Republic of Iran, Kuwait, Sri Lanka and Sudan from among the Member States; Sweden from among the Observer States; and the International Law Commission and the Organization of Islamic Conference from among the international organizations.

The deliberations focused on a wide range of issues arising out of the reservations to treaties. Most participants addressed, in one form or other, the "vexing question" of the effect of reservations to plurilateral treaties, mainly in relation to the provisions of Articles 19 to 23 of the Vienna Convention on the Law of Treaties 1969. Reference was made to a whole host of other international instruments such as the UN Charter, Statute of the International Court of Justice; Nuclear Test Ban Treaty; Antarctic Treaty; Berne Convention on Intellectual Property; UN Framework Convention on Climate Change; UN Convention on Bio-diversity; IMO Convention; Disarmament Conventions(s); United Nations Convention on the Law of the Sea; Convention on the Elimination of Discrimination Against Women (CEDAW); International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights, ; Genocide Convention; Convention on the Reduction of Statelessness; Refugee Convention.

The Special Meeting considered the relevant provisions of the Vienna Conventions of the Law of Treaties, 1969 viz.