STEPHEN C. MCCAFFREY*

Developments in Public International Law

I. Introduction

This article reviews selected developments during the year 1995 in the field of public international law. Defining the scope of this article is difficult for at least two reasons. First, the dividing line between public and private international law, to the extent that one can speak of such a boundary, is increasingly difficult to identify. Subjects dealt with in other parts of this review would doubtless qualify, at least in part, for inclusion under the topic of public international law. And second, even if a discrete field of public international law exists, that field is extremely broad. To cover all public international law developments, even for one year, would require more space than is available in this issue. In addition, this issue is the first time the Section has presented a review of developments in international law. Experience will no doubt help to clarify which topics should be dealt with under a given rubric.

For these reasons, the coverage of the present article will, at least for this inaugural review, be modest in scope. This article will summarize actions concerning the cases on the docket of the International Court of Justice, review progress made by the international criminal tribunals established under United Nations auspices, and look briefly at the work of the U.N. International Law Commission.

Note: The American Bar Association grants permission to reproduce this article, or a part thereof, in any not-for-profit publication or handout provided such material acknowledges original publication in this issue of *The International Lawyer* and includes the title of the article and the name of the author.

*Professor of Law, University of the Pacific, McGeorge School of Law; Member, International Law Commission of the United Nations, 1982-1991. I am grateful to Darren Bogić, McGeorge School of Law, Class of 1996, for the research assistance he provided for this article.

II. The International Court of Justice

A. Introduction

The International Court of Justice began its fiftieth year in 1995 with twelve cases on its docket, including ten contentious cases and two requests for advisory opinions. Two additional proceedings were instituted in 1995. This section offers brief summaries of those cases and the actions taken with regard to each of them.

B. Contentious Cases

1. *East Timor* (Portugal v. Australia)

Portugal brought this case on February 22, 1991, as the administrator of East Timor. Jurisdiction was based upon the declaration of consent to the Court's compulsory jurisdiction by both states under Article 36, paragraph 2, of the Court's Statute. Portugal requested that the Court declare as opposable to Australia: Portugal's status as "administering Power" of East Timor under various resolutions of the Security Council and General Assembly; and the rights of the people of East Timor to self-determination, territorial integrity and unity, and permanent sovereignty over their wealth and natural resources. Portugal also alleged that Australia breached its international legal obligations by concluding a treaty with Indonesia on December 11, 1989, which established a "Zone of Cooperation" in an area of the continental shelf between Australia and East Timor, rich in hydrocarbons, known as the Timor Gap. Portugal claimed that the agreement failed to observe Portugal's status as the administering Power, East Timor's status as a non-self-governing territory (under Chapter XI of the U.N. Charter), and the rights of the people of East Timor. Australia did not file preliminary objections, electing to have its objections determined within the framework of the Court's decision of the merits. The Court held hearings in the case from January 30 to February 16, 1995.

The Court issued its decision on June 30, 1995.[1] By a vote of fourteen to two, the Court upheld Australia's principal objection, that Indonesia was an indispensable party but was not before the Court. The Court therefore declined to exercise jurisdiction, jurisdiction which it clearly had under Article 36(2) of its Statute. The Court observed that any decision in the case would necessarily involve a decision on whether Indonesia could have acquired the power to enter into treaties on behalf of East Timor relating to the resources of the continental shelf. The Court held that it could not pass upon the legality of Australia's conduct without adjudging the lawfulness of that of Indonesia. Yet the Court could not decide an issue involving Indonesia because its Statute provides that it cannot exercise jurisdiction over a state without the state's consent, which Indonesia did not give in this case.

1. 1995 I.C.J. Rep. 90.

Portugal also argued that Australia breached obligations *erga omnes* in regard to East Timor, and that Indonesia's presence before the Court was therefore not necessary. The Court rejected this argument, but confirmed the *erga omnes* character of the right of peoples to self-determination. The Court insisted that despite the character of the obligations, it would have to rule upon the obligations of a state that was not a party to the case, which it could not do. This case is the first since 1978 in which the Court declined to exercise jurisdiction.[2]

2. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain)

This dispute related to sovereignty over certain islands and shoals in the Persian Gulf and the resulting maritime delimitations between the two states.

On February 15, 1995, the Court ruled on the questions of jurisdiction and admissibility. By a majority of ten to five, the Court found that it had jurisdiction over the case and that Qatar's application was admissible. The Court reaffirmed its decision of July 1, 1994, that the Doha Minutes signed at Doha on December 25, 1990, by the Foreign Ministers of Bahrain, Qatar, and Saudi Arabia, constituted an international agreement that included an undertaking to place the entire dispute before the Court.[3] The Court also held that the Doha Minutes sufficiently delineated the disputed matters and thus determined the scope of its jurisdiction.

In addition, the Court determined that the method by which it has been seized of the dispute was proper. The majority interpreted the language in the Doha Minutes relating to how the dispute may be brought before the Court to allow the case to be brought unilaterally. In so ruling, the Court rejected Bahrain's contention that the parties must jointly file a special agreement to consent to jurisdiction. This finding demonstrates a certain degree of activism on the part of the Court in taking jurisdiction over a case in the face of a contention by a party that it did not in fact consent to the jurisdiction of the Court. On April 28, 1995, the Court fixed February 26, 1996, as the time limit for the parties to file memorials addressing the merits of the case.

3. *Aerial Incident of 3 July 1988* (Jurisdiction) (Iran v. United States)

Iran brought this case on May 17, 1989, following an incident during the Iran-Iraq war in which the USS *Vincennes*, believing it was under attack by a hostile aircraft, shot down a civilian Iranian Airbus in the Persian Gulf on July 3, 1988. Iran requested the Court to adjudge and declare that: the decision of the Council of the International Civil Aviation Organization (ICAO) of March 17, 1989, was erroneous; that the United States violated Articles 1, 3, and 10(1) of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971; and that the United States was obligated to pay compensation to Iran

2. *See* Peter Bekker, *East Timor* (case note), 90 AM. J. INT'L L. 94 (1996).
3. 1994 I.C.J. Rep. 112.

in an amount to be determined by the Court. The United States filed preliminary objections to the Court's jurisdiction.

By letter of August 8, 1994, the parties informed the Court that they had entered into settlement negotiations and accordingly requested the Court to postpone the oral proceedings. On February 22, 1996, the parties informed the Court by letter that they had agreed to discontinue the case because they had entered into "an agreement in full and final settlement" of the case.[4] The Court consequently removed the case from its list.

4 & 5. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya v. United Kingdom; Libya v. United States)

Libya filed these cases on March 3, 1992. They arose from the aftermath of the crash of Pan Am flight 103. In connection with the incident, the United States and the United Kingdom indicted two Libyan nationals. The U.N. Security Council demanded that Libya extradite the two individuals, even though no extradition treaty exists between Libya and the other two countries. Libya contends that the United States and Great Britain are properly before the Court under the Montreal Convention and that the economic boycott ordered by the Security Council, as well as other activities, violates international law. On April 14, 1992, the Court, by eleven votes to five, declined to indicate provisional measures in the cases.

6. *Maritime Delimitation between Guinea-Bissau and Senegal* (Guinea-Bissau v. Senegal)

Guinea-Bissau brought this case on March 12, 1991, seeking a delimitation by the Court of the maritime boundary between the two countries. Early in 1991, the Court held that an arbitration award rendered in a related dispute was valid. In 1994, the parties provided the Court with the text of the Management and Co-operation Agreement they concluded on October 14, 1993. The Agreement provided in its Article 1 for the joint exploitation of a specified maritime zone and also established the International Agency for the exploitation of the Zone in Article 4.

On November 14, 1995, the Court announced the discontinuance of the case by consent of the parties; and that it had removed the case from its general list by Order of November 8, 1995.

7. *Oil Platforms* (Jurisdiction) (Iran v. United States)

Iran brought this case on November 2, 1992, alleging that the destruction of three Iranian oil platforms by U.S. warships in 1987 and 1988 violated the Treaty

4. *See* International Court of Justice, Communiqué No. 96/6, 23 Feb. 1996.

of Amity between the two states and general international law. Iran contends that the United States is under an obligation to make reparation for the destroyed platforms. The United States raised objections to the Court's jurisdiction and Iran replied. Oral hearings on the question of jurisdiction are set for September 16, 1996.

8. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Hercegovina v. Yugoslavia)

Bosnia instituted proceedings on March 20, 1993, against the rump state of Yugoslavia (Serbia and Montenegro), seeking a declaration that Yugoslavia violated the 1948 Genocide Convention as well as certain other treaties and customary international law. Bosnia applied for, and the Court indicated, provisional measures of protection under Article 41 of the Court's Statute. The Court stated that both parties must prevent the commission of the crime of genocide. On June 30, 1995, Yugoslavia filed certain preliminary objections to the Court's jurisdiction. The Court subsequently fixed November 14, 1995, as the date for presentation of written observations and submissions by Bosnia and Hercegovina.

9. *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia)

The parties brought this case to the Court by Special Agreement, which the parties jointly notified to the Court on July 2, 1993. The case concerns the implementation and Hungary's attempted termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System, signed in Budapest on September 16, 1977.[5] The treaty calls for the construction of a series of dams on the Danube for flood control, navigation improvement, and power generation. The dam at Gabčíkovo on a bypass canal in Slovakia has been operating since late 1992. The dam at Nagymaros, where the Danube is entirely in Hungarian territory, has not been constructed. The written phase of the case ended with the filing by both parties of Replies in 1995. Dates for the oral proceedings have yet to be set by the Court.

10. *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria)

Cameroon instituted this case on March 29, 1994, following Nigeria's occupation of the Bakassi peninsula. Cameroon requested the Court to determine the maritime boundaries between the two states and to declare unlawful the military presence of Nigeria in the Bakassi peninsula. On February 12, 1966, Cameroon requested that the Court indicate provisional measures in the case, referring to "grave incidents which have taken place between the . . . forces [of the two parties] in the Bakassi Peninsula since . . . 3 February 1966." On March 15,

5. 32 I.L.M. 1247 (1993). Other documents concerning the case are also produced in volume 32 of I.L.M.

1966, the Court issued an Order indicating that the parties should ensure that no action of any kind "is taken which might prejudice the rights of the other in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before it. . . ."[6]

11. *Fisheries Jurisdiction* (Jurisdiction) (Spain v. Canada)

On March 28, 1995, Spain instituted proceedings against Canada, seeking a declaration that the boarding of a Spanish flagged fishing vessel on the high seas by Canadian patrol boats and a coast guard vessel on March 9, 1995, and the subsequent detention of the Spanish crew violated international law. Spain bases jurisdiction upon Canada's declaration of consent to the Court's compulsory jurisdiction under Article 36(2) of the Court's Statute. Spain contends that the Canadian Coastal Fisheries Protection Act, as amended in 1994, in so far as it claims to exercise jurisdiction over foreign flagged vessels outside Canada's 200 mile exclusive economic zone, is not applicable to Spain. Spain also requests the Court to declare that Canada must compensate Spain for the damages it sustained.

Canada maintains that the Court lacks jurisdiction on the ground that the Canadian declaration of consent to the Court's compulsory jurisdiction specifically excludes any dispute involving conservation and management measures taken by Canada with respect to vessels fishing in the North Atlantic Fisheries Organization Regulatory Area.

On May 2, 1995, the President of the Court set deadlines of September 29, 1995, for the Memorial of Spain and February 29, 1996, for the Counter-Memorial of Canada on the question of the Court's jurisdiction.

12. *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case* (New Zealand v. France)

On August 21, 1995, New Zealand filed this request. In its 1974 judgment in the *Nuclear Tests* cases (*Australia v. France; New Zealand v. France*), the Court held that the claims of Australia and New Zealand that France was violating international law by conducting atmospheric nuclear tests in the South Pacific "no longer [had] any object" in view of public declarations by the French Government that it would conclude the tests.[7] In paragraph 63 of that judgment, the Court stated that it based the judgment on France's commitment to end the tests. But the Court did preserve the possibility that the Applicants could request the Court to examine the situation if it changed. This possibility was the basis of New Zealand's 1995 request, which France provoked by the series of underground nuclear tests in 1995 on the Mururoa and Fangataufa Atolls.

6. *See* International Court of Justice, Communiqué No. 96/13, 15 March 1996.
7. 1974 I.C.J. Rep. 253 and 457.

Australia filed applications for permission to intervene in the case on August 23, Samoa and the Solomon Islands on August 24, and the Marshall Islands and the Federated State of Micronesia on August 28. All five applications based their claims on Article 62, paragraphs 1 and 2 of the Statute of the Court, which provides that if a state has a legal interest that may be affected by the outcome of a case, the state may request permission to intervene.

On September 22, 1995, the Court held, by a vote of twelve to three, that the request of New Zealand did not fall within paragraph 63 of the Court's 1974 judgment and must be dismissed. The Court also dismissed the claims of all states seeking to intervene. The Court held that the 1974 order related only to atmospheric testing and did not apply to underground or any other form of nuclear tests. The Court dismissed the case without prejudice to the obligations of states in general to protect the natural environment.

C. Requests for Advisory Opinions

The Court began the year 1995 with two pending requests for advisory opinions, both dealing with nuclear weapons.

1. *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts* (World Health Organization Request)

In May of 1993, the World Health Organization (WHO) adopted a resolution to request an advisory opinion from the Court on the question of whether, in view of the environmental and health concerns, the use of a nuclear weapon by a state during an armed conflict would be in violation of international law and the WHO Charter.

2. *Legality of the Threat or Use of Nuclear Weapons* (General Assembly Request)

The Secretary General of the United Nations transmitted a letter to the Court dated December 19, 1994, asking the Court "urgently to render its advisory opinion on the following question: Is the threat or use of nuclear weapons in any circumstance permitted under international law." This request originated in the General Assembly. The Assembly made the request at least in part because of questions raised as to the competence of the WHO to make its request.

The Court held oral hearings in both cases in October and November 1995. More than twenty-two states, including the United States, participated. The Court's Opinions are expected in mid-1996.

II. International Criminal Courts

The United Nations has established two ad hoc international criminal tribunals, one for the former Yugoslavia and the other for Rwanda. This section will briefly review developments with regard to those tribunals in 1995 and will also note

developments with regard to the proposal for a standing international criminal court.

A. YUGOSLAVIA

The United Nations Security Council on May 25, 1993, established the International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia.[8] The Tribunal has returned several indictments and has rendered preliminary judgments in a case against one of the indicted individuals.

1. *Indictments*

In November of 1994, the Tribunal issued an indictment of Dagan "Jenki" Nikolic for war crimes committed at the Susica Camp in the town of Vlasenica. The Tribunal issued the indictment under section 61 of its Statute. Section 61 applies if either (1) the accused has eluded justice, (2) the authorities of the state concerned have not located the accused, or (3) authorities have not cooperated with the Tribunal. The Court returned the indictment in an open session during which the Prosecutor brought forth witnesses to testify. The judges considering the evidence determined that reasonable grounds did exist for believing that the accused committed the crimes, and endorsed the indictment. The indictment is not a trial in absentia nor did the judges determine guilt or innocence. The indictment does set forth the crimes for which the accused will be charged. The general charges were: (1) violation of the Fourth Geneva Convention of August 12, 1949, relating to the committing of prohibited acts against protected persons; (2) violations of Laws or Customs of War, including those recognized by Article 3 of the Fourth Geneva Convention, relating to the Protection of Civilians in Time of War; and (3) Crimes against Humanity in the form of prohibited acts committed against a civilian population in an armed conflict. The specific allegations against Mr. Nikolic included the imprisonment of five hundred civilians, at least seven specific acts of murder, and six specific acts of torture and assault.

On February 13, 1995, the Court issued indictments against Zeljko Meakic as the commander in charge of the Omarska camp. The Court also indicted seventeen other individuals involved with the running of Omarska. The process was the same as that followed for the November 1994 indictments. The general allegations against Meakic and the others were: genocide, recognized as a crime by Article 4(a) of the Statute of the Tribunal, against the Bosnian Muslims and Bosnian Croats; grave breaches of the Geneva Convention of 1949; and crimes against humanity, recognized by Articles 5(f) and 7(3) of the Statute of the Tribunal. Specific charges included six acts of rape as well as seven incidents of beatings and torture.

8. S.C. Res. 827 (May 25, 1993), *reprinted in* 32 I.L.M. 1203 (1993). *See generally* James O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639 (1993).

Also on February 13, 1995, the Tribunal issued an indictment against Dusan Tadić (Dule) for his treatment of three thousand Muslims and Croats held in the Omarska camp preceding the May 22, 1992, Serb attacks on Croat population centers.[9] The Court indicted Tadić for grave breaches of Article 2 of the Statute of the Tribunal, violations of the laws and customs of war as recognized in the Geneva Convention of 1949 and Article 3 of the Statute of the Tribunal, and crimes against humanity as recognized by Article 5(g) of the Statute of the Tribunal. The specific acts in the indictment included one rape, at least three acts of torture, and at least eight specific killings.

It is of interest that the Statute of the Tribunal came into effect after the acts in the indictment occurred. In addition, the indictments do not explain how the Geneva Convention applies to the accused.

2. *Judgments in the Case of* Prosecutor v. Dusko Tadić

The judgment of Trial Chamber II of the Tribunal, issued on August 10, 1995, rejected the defendant's objections to the Tribunal's jurisdiction. Those objections consisted of the following three contentions: first, that the Security Council did not have the authority to establish the Tribunal; second, that the Tribunal's Statute unlawfully accorded the Tribunal primacy over national courts; and third, that the Tribunal lacked jurisdiction *ratione materiae* because the articles of the Statute cited in the indictment applied only to international armed conflict, while the crimes Tadić allegedly committed occurred in an internal armed conflict. Tadić subsequently challenged the judgment of the Trial Chamber in the Appeals Chamber of the Tribunal.

The Appeals Chamber rendered its decision on October 2, 1995.[10] The Chamber first found that it had jurisdiction to hear all of the issues brought on interlocutory appeal by Tadić. The Chamber relied on Security Council resolution 808 of 1993, which allowed for the possibility of appellate proceedings, as well as the specific rules adopted by the Tribunal's judges pursuant to the Statute. Rule 73 stated that the Court should decide all preliminary motions of the defendant at the trial level without the right of interlocutory appeal, except motions based on lack of jurisdiction. The Appeals Chamber found that the interests of justice demanded an interlocutory appeal in this case and that all of Tadić's claims dealt with objections to the trial court's jurisdiction.

The Chamber then examined the contention that the Security Council unlawfully established the International Tribunal. The Chamber first found that it had the right to examine the question by equating the legality of the Tribunal's formation to the essence of jurisdiction itself. The Appeals Chamber rejected Tadić's argument

9. 34 I.L.M. 996 (1995).

10. Prosecutor v. Tadić, Case IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995). *See* George Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64 (1996).

that the Security Council lacked the power to establish the Tribunal. Tadić had argued that Chapter VII did not give the Security Council the power to establish a tribunal as a means of achieving international peace and security. The Appellate Chamber stated that the measures listed in Article 41 of the U.N. Charter that can be taken by the Security Council are illustrative examples and do not exclude other measures. The Appeals Chamber also found that the Charter need not give the Security Council judicial functions for the Council to have the authority to establish a tribunal. The Chamber drew an analogy to the General Assembly's establishment of the United Nations Emergency Force in the Middle East, despite the Assembly's lack of military power.

With regard to the issue of primacy of the Tribunal over national courts, the appellant contended that by giving effect to this primacy, in removing him from the domestic courts of Germany, the Tribunal infringed upon the sovereignty of Germany. Contrary to the Trial Chamber's holding, the Appeals Chamber found that Tadić had standing to assert Germany's interests in challenging the Tribunal's primacy. However, the Chamber rejected his argument on the ground that primacy of the Tribunal was necessary to prevent defendants from shopping for the most favorable forum. The Chamber also found that Germany was exercising only investigative authority and not trial authority, so that a decision of a German domestic court could not possibly be vacated.

The Court also dismissed Tadić's argument that he had the right to be tried in his home country. The Chamber observed that universal jurisdiction is acknowledged as to international crimes, and suggested that what was at issue was therefore not jurisdiction so much as a concern for a tribunal that was at least as fair as one in the accused's home country. The Chamber found that the Tribunal met this test.

The final argument put forth by Tadić was that the Tribunal lacked subject matter jurisdiction. At the trial level, Tadić argued that the crimes he allegedly committed were during internal, rather than international, armed conflict; and that the provisions of the Statute cited in his indictment applied only to international armed conflict. The Trial Chamber held that the distinction was immaterial because all the crimes involved both internal and international armed conflict. Tadić changed his argument on appeal, contending that no armed conflict of any kind existed in the region in question when the crimes allegedly occurred. The Appeals Chamber rejected this argument. The Chamber concluded that the definition of "armed conflict" includes the entire region in which violence is occurring, and extends until a general peace is established. The Chamber then examined the facts and found that the crimes occurred during an armed conflict.

B. RWANDA

The United States Security Council established the International Tribunal for Rwanda in Resolution 995 of November 8, 1994, by a vote of thirteen to one

(Rwanda) with one abstention (China).[11] In the resolution, the Security Council, acting under Chapter VII of the Charter (which is entitled Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression), adopted the annexed Statute of the International Tribunal for Rwanda. The purpose of the Tribunal is to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in Rwanda or in neighboring states by Rwandans during 1994.

The Security Council spent 1995 laying the legal and practical groundwork for the functioning of the Tribunal. Judges have been elected. The Prosecutor for the Yugoslavia Tribunal also serves the Rwanda Tribunal, but the Council appointed a Deputy Prosecutor for Rwanda. The two tribunals also share the same Appeals Chamber. The Rwanda Tribunal's Registrar is Andronico O. Adede, formerly of the Codification Division of the U.N. Office of Legal Affairs. The Council established the headquarters of the Tribunal in Arusha, Tanzania. Work is proceeding on the necessary physical facilities for the Tribunal as well as for the detention of indicted individuals. The Tribunal has issued a number of indictments and is holding at least some of the indicted individuals in national detention facilities. They will be turned over to the Tribunal once its detention facilities are complete.

C. A Standing International Criminal Court?

In 1994, the International Law Commission of the United Nations adopted a Draft Statute for an International Criminal Court, with commentaries.[12] The U.N. General Assembly, on December 18, 1995, adopted resolution 50/46 entitled "Establishment of an international criminal court" in which the General Assembly established a preparatory committee to discuss the possibility of creating such a tribunal. The General Assembly decided further that the work of the preparatory committee should be based on the draft statute prepared by the International Law Commission. The Preparatory Committee held meetings in April 1996, and further meetings are to be held in August of 1996. According to media reports, the idea of a standing international criminal court is gaining general acceptance, although the permanent members of the Security Council (China, France, Russia, the United Kingdom, and the United States) are reluctant to accept such a tribunal unless the Security Council, in which they have a veto, exercises significant control over the tribunal.[13]

---

11. 33 I.L.M. 1598 (1994).

12. *See* Report of the International Law Commission on the Work of Its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 43-161, U.N. Doc. A/49/10 (1994). *See generally* James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404 (1995).

13. *See, e.g., U.N. Seeks Accord on Permanent War Crimes Court*, N.Y. TIMES, April 7, 1996, p. 8, col. 1. Such reports were also made, *e.g.*, on National Public Radio, on April 10, 1996.

III. The International Law Commission

The International Law Commission of the United Nations (Commission, or ILC), whose mission is the progressive development of international law and its codification, made substantial progress on the five topics on its agenda in 1995.[14] Those topics are: state responsibility; Draft Code of Crimes against the Peace and Security of Mankind; international liability for injurious consequences arising out of acts not prohibited by international law (international liability); the law and practice relating to reservations to treaties; and state succession and its impact on the nationality of natural and legal persons. The ILC considered the two latter topics for the first time in 1995. The Commission also proposed endorsement by the General Assembly of work on two new topics.[15] Those topics are diplomatic protection and a feasibility study on the law of the environment.

The Commission did not complete work on any of the topics on its agenda in 1995. This delay is not unusual, since years are normally required to finish a given project. The ILC did, however, adopt a number of draft articles during its 1995 session. On state responsibility, the Commission adopted articles 13, Proportionality, and 14, Prohibited Countermeasures, in the framework of Part Two of the draft articles.[16] The Commission also adopted a set of seven articles and an annex constituting Part Three of the draft on the settlement of disputes. Those articles are Article 1, Negotiation; Article 2, Good Offices and Mediation; Article 3, Conciliation; Article 4, Task of the Conciliation Commission; Article 5, Arbitration; Article 6, Terms of Reference of the Arbitral Tribunal; and Article 7, Validity of an Arbitral Award. The Annex contains two articles, Article 1, the Conciliation Commission, and Article 2, the Arbitral Tribunal. On the topic of international liability, the Commission adopted four articles (provisionally designated by letters): Article A, Freedom of Action and the Limits Thereto; Article B, Prevention; and Article D, Cooperation.[17] The Commission also adopted, as a working hypothesis, Article C, Liability and Reparation. On the Draft Code of Crimes, the Commission received the texts of thirteen articles from its Drafting Committee, but deferred final adoption of those articles until work on the remaining articles was complete.[18]

The Commission intends to complete work on the first reading of its draft articles on state responsibility and on the second reading of the Draft Code by the end of its current term of office, which concludes in 1996.[19] The Commission

14. *See* Report of the International Law Commission on the Work of Its Forty-Seventh Session, U.N. GAOR, 50th Sess., Supp. No. 10, U.N. Doc. A/50/10 (1995) [hereinafter 1995 ILC Report]. *See generally* Robert Rosenstock, *The Forty-Seventh Session of the International Law Commission*, 90 AM. J. INT'L L. 106 (1996).

15. 1995 ILC Report, *supra* note 15, at 264-65.

16. The draft articles and commentaries are set forth in *id.* at 144-94.

17. *Id.* at 215-39.

18. *Id.*, p. 67.

19. 1995 ILC Report, *supra* note 15, at 263.

will also make every effort to complete the first reading of the portion of the draft articles on international liability that deals with activities causing transboundary harm.[20] The completion of work on Parts Two and Three of the draft articles on state responsibility is long-awaited. The Commission adopted Part One of the draft articles on first reading in 1980; and the Commission has been working on this difficult but central subject virtually since its establishment. Work on international liability has also proceeded slowly since its inception in 1978. The Draft Code is a problematic topic, but the Commission has made useful contributions in the context of its work on it, particularly with regard to the drafting of a statute for an international criminal tribunal. Whether the Commission will be able to meet its objectives at its next session is questionable, especially given the controversial nature of the three topics involved.

IV. Conclusion

The foregoing review of developments in selected areas of public international law demonstrates the extensive activity and development of the law in the field during the year 1995. States continue to resort to the ICJ; and an international criminal tribunal, once only a dream, has been realized for two specific situations. The proposal for a standing international criminal tribunal is under serious discussion. The codification and progressive development of international law continue for both traditional and new topics. Despite plentiful violations by states of their international legal obligations, these developments indicate that the rule of law is strong in the international community.

20. *Id.*