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THE NEW « ARCHITECTURE OF INTERNATIONAL ENVIRONMENTAL LAW » (OR « THE PROFESSOR AND THE STRANGE CASE OF THE MISSING GREEN GLASSES »)

BY

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The Institut de Droit International is a venerable institution which has contributed significantly to the development of international law. In the field of the environment and the use of natural resources its authoritative contributions include resolutions on watercourses (in 1911), pollution of rivers and lakes (1979), and transboundary air pollution (1987). There was, therefore, a considerable expectation when, at its 1989 session at Santiago de Compostelle the Institut's *Commission de Travaux* decided to include the environment as a topic to be addressed in the future. In 1991, at the Basle session, the Institut adopted a Declaration on a Programme of Action on the Protection of the Global Environment (2) and established a Commission (the Eighth Commission) to address environmental issues more globally. The appointment of Professor Luigi Ferrari Bravo — an authority with both practical and academic experience in the field of the environment — as Rapporteur of the Institut's Eighth Commission indicated the Institut's commitment to the topic.

Six years later, in September 1997, the Institut adopted three resolutions on international environmental law : the untitled General Resolution addressing the « architecture of international environmental law » (which is the subject of this Note) and Resolutions on « Responsibility and Liability under International Law for Environmental Damage » and on « Procedures for the Adoption and Implementation of Rules in the Field of the Environment » (which are discussed elsewhere in this volume and which could both contribute significantly to the development of the law in the field of the environment). In the intervening period, the United Nations Conference on Environment and Development (UNCED) had come and gone, a growing

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(2) *Annuaire IDI*, vol. 65-II, p. 408.

multiplicity of regional and global environmental agreements were being adopted, the environment was being integrated into other areas such as trade and human rights, and the International Court of Justice had established a Chamber on Environmental Matters (and was considering environmental matters in three cases) (3). What contribution might the Institut's General Resolution make to the « architecture of international environmental law » ?

In addressing this question it is appropriate to place the General Resolution in its context. For present purposes it is sufficient to note that between 1972 and 1992 there was a remarkable expansion in the principles and rules of international environmental law, catalysed by the Stockholm Conference of 1972. Several dozen regional and multilateral environmental agreements were adopted on a whole range of issues from the protection of bats to the depletion of the ozone layer. Many of these conventions (and decisions taken under them) attracted widespread support, regionally and globally. Some appeared to have been remarkably successful. One thinks of the moratorium on commercial whaling adopted in 1985, the ban on dumping of radioactive substances at sea, and efforts to combat depletion of the ozone layer. But it must be recognised that the great majority of these efforts seemed to have produced little, if any, tangible benefits. Forests around the globe continued to be depleted at an ever greater rate. Many fisheries collapsed, sometimes spectacularly. The number of endangered species multiplied. Problems associated with air pollution were becoming ever more evident. And the amount of pollution discharged into the oceans continued to increase. By 1992 it was apparent that there existed a gulf between aspiration and reality which the law — international law — appeared unable to bridge to any significant extent. In this context UNCED spawned a number of further instruments, including two conventions (on climate change and biological diversity), a non-binding Declaration on Environment and Development (the Rio Declaration, which sought to establish its own architecture of « international environmental law »), and a global action plan for sustainable development entitled Agenda 21 (which included a Chapter on law and institutions).

The text of many parts of these instruments indicates why they were doomed to relative failure (insofar as one takes as the principal measure of effectiveness or success a tangible effect on human behaviour). Much of the language of international environmental law is vague and aspirational. It does not lend itself easily to practical application, and places international adjudicatory bodies called upon to interpret and apply them in real difficulty. One need look no further, for example, than Article 4(2)(a) and (b)

(3) See generally P. SANDS, *Principles of International Environmental Law* (1995), Chapter 2, especially pp. 48-61.

of the 1992 Climate Change Convention to see the problem (4). Possibly one should not be too harsh on the law. It is axiomatic that the law follows, rather than leads. International law in this domain has contributed to a change of consciousness, most notably in the period since 1990. Perhaps one should not expect hard results, and recognise that the caution of governments is understandable in the face of the considerable uncertainties which still exist.

Developments over this period therefore beg the question : what role can be played by international law and international lawyers ? The Rio Declaration and Agenda 21 exhorted international society — governments, international organisations and the non-state sector — to contribute to the progressive development of international law in the field of sustainable development (5). The spirit of environmentalism seemed in particular to enthuse the legal community, or at least some elements of it. Working groups of legal experts were established to address all manner of issues : the new international law of sustainable development ; (6) the relationship between environmental norms and other areas of international law, such as trade or intellectual property ; (7) and the content and status of the principles and rules of international environmental law itself (8). Expressing leadership from the top, in 1993 the International Court of Justice established a Chamber on Environmental Matters (9).

It is into this breach that the efforts of private associations of international lawyers fall to be considered. Such bodies can play a crucial rule. Unfettered by governmental instruction but informed by practical experience and pragmatism, the members of these bodies are uniquely well placed to authoritatively set out what the law is or indicate where it might go. They are also well placed to ensure that specialised subjects properly develop in the context of general international law. In this context the Institut had a real role to play.

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In 1995 the General Rapporteur to the Institut's Eighth Commission indicated the general outline which he intended to follow in his draft resolu-

(4) 31 *ILM* 849 (1992) Art. 4(2)(a) and (b).

(5) *Agenda 21*, Chapter 39 : UN Doc.A/CONF.151/26 (Vol. III) (1992).

(6) See e.g. Report of a Consultation on Sustainable Development : the Challenge to International Law (Foundation for International Environmental Law and Development, 1993).

(7) See for example the establisment of a Global Environment and trade study by the trade Center for Environmental Law & Policy and the Foundation for International Environmental Law and Development.

(8) UN, Dept. for Policy Coordination and Sustainable Development, Report of the Expert Group Meeting or Identification of Principles of International Law for Sustainable Development, 28 September 1995 (www.un.org/esa/Susdev/law/law.htm).

(9) ICJ Communiqué 93/20, 19 July 1993.

tion. In February 1997 he produced his Final Report (a model of concision, perhaps troublingly so) and unveiled a draft Resolution of ten articles (10). At their Strasbourg session the members of the Institut worked on the draft Resolution, expanding it to eleven articles but maintaining the essential character of the Rapporteur's text.

The guiding principles of the Resolution's eleven articles may be found in Professor Ferrari Bravo's Final Report. This indicates that the Resolution should be « de base » and « générale », for two reasons. First, the subject of international environmental law is largely *in statu nascendi* and he considered it to be important not to adopt too many rules lest too tight a corset be drawn around the subject, thereby hindering its development (11). Second, there remained a tension between the demands of national sovereignty and those of the environment which indicated that there was only one way forward :

> « celle consistant à formuler des principes d'un caractère assez général en laissant à des ordres juridiques divers — communautaire, national, regional — le soin d'édicter l'ordonnancement supportable par les individus qui sont couverts par l'ordre juridique en question. » (12).

Professor Ferrari Bravo was also at pains to point out that even if these principles « de base » might make him appear somewhat conservative and old-fashioned, he preferred to focus on the realities : he would not be wearing « les lunettes vertes des environnementalistes » (13).

Unadorned by these « lunettes » he proceeded to prepare a draft Resolution which skips lightly over the many significant developments which occurred in the period 1991 to 1997, departs from the carefully crafted language of states and the International Court, and by omission fails to grasp a vital opportunity to indicate what role international law could play in resolving some of the crucial outstanding issues. The draft Resolution oscillates between *lege lata* and *lege feranda*. Arriving at their Strasbourg session the members of the Institut were faced with a draft which was general and vague, suggesting the vacuity of the subject which it purported to treat. In the circumstances it is not surprising that the final text of the Resolution, which draws heavily on the draft but which nevertheless indicates some improvements, one hesitates to suggest that it could make much of a contribution to practise or theory. In general circulation, it threatens to add little to the credibility of the subject or the Institut.

The Resolution provides a definition of the environment (Article 1) drawn upon definitions set out in existing international instruments. It then goes on to declare unambiguously that « [e]very human has the right

(10) *Annuaire IDI*, vol. 67-I, pp. 478 and 489.
(11) *Ibid.*, p. 480-1.
(12) *Ibid.*, p. 481.
(13) *Ibid.*, p. 487

to live in a healthy environment » (Article 2). Although this language is not contentions, it fails to indicate what practical implications (if any) are intended to flow from the « right ». Is it a substantive right not to be subject to environmental nuisance (as for example the European Court of Human Rights found in the case of Lopez-Ostra v Spain ?) (14) Or is it a procedural right entitling, for example, access to information (as the same European Court recently found in Guerra and others v Italy) (15) or to the administrative or judicial remedies articulated in Principle 10 of the Rio Declaration on Environment and Development (but recently not applied by the European Court of Human Rights or the European Court of justice in Greenpeace ?) (16) The Resolution does not address these and other practical issues which fall squarely within the Institut's expertise. Instead, it declares that the « right to a healthy environment should be integrated into the objectives of sustainable development » (Article 3). What this means in theoretical or practical terms is similarly unclear. What is clearer, however, is that by not using the formulation of Principle 10 of the Rio Declaration (which was supported by over 180 states) the Resolution implies that Principle 10 neither has nor should have a legal character. This is a regrettable step backwards.

What is the relationship between national law and international law ? Who determines the standards ? Are they minimum, harmonised ?

The Resolution then proceeds to address the role of international law which, it is said, « determines the basic principles and minimum rules for the protection of the environment » and « establishes such rules as may be necessary when national regulations are insufficient or inadequate » (Article 4). If the first element is uncontroversial (does it even need to be said ?), the second most certainly is not. If this is an extension of the European Community's principle of « subsidiarity » (as the Rapporteur suggests in his Final Report (17)) then why not actually use the language of Community law which at least recognises that areas will exist where international regulation positively is required ? As drafted the text leaves entirely open the circumstances in which a situation of domestic insufficiency or inadequacy exists, and provides no guidance as to when international regulation will be required. Whilst one might not quibble with the notion that the need for international regulation should be justified, surely

(14) ECtHR, Series A, No. 303-C ; (1995) E.H.R.R. 277.
(15) ECtHR, Judgment of 19 February 1998.
(16) Case C-321/95P, *Stichting Greenpeace Council et al. v. European Commission, ECJ*, Judgment of 2 April 1998.
(17) *Supra*, note 10, p. 482.

that ought to be on grounds of environmental need where the requirement is that action is needed by more than one state to address a particular environmental issue (for example ozone depletion or climate change). As it is, the draft implies that the current state of international regulation will, from time to time, adequately reflect current requirements. That is an implication which many reasonable observers would not share and which the Institut may not have intended to convey.

WHAT PROCEDURAL REQUIREMENTS ARE IMPOSED BY GENERAL INTERNATIONAL LAW ?

The Resolution also addresses procedural requirements. Two provisions address environmental impact assessment (EIA), a procedure clouded in uncertainty as to its meaning and scope and upon which some clear thinking is needed. Article 5 of the Resolution is worth citing in full :

> « The environmental impact assessment of any project, whether international, national or local, which may have consequences for the environment shall take into account the living conditions and the development prospects of human societies with which the project is concerned. The assessment shall be carried out in accordance with criteria which are comparable to criteria used by other countries and in a spirit of international co-operation. »

This text begs more questions than it answers. It does not indicate under what circumstances an environmental impact assessment will be required by international law, a question which remains very much alive (18). After all, any project — indeed any human activity — will have consequences for the environment. Further, the text implies that there currently exist no minimum international criteria for the conduct of an EIA. Whilst this conclusion may be supported by some as being the case at the global level, it cannot be correct for some regions, including Europe, and it is surprising that no reference is made to regional instruments. The reference back to criteria used by « other countries » is imprecise and suggests a de-internationalisation of the obligation in a manner that can scarcely assist on so important a requirement, given the very significant variations in practise.

In a similar vein of ambiguity the resolution provides that any state which « fears » that activities carried out by another state may « affect its rights » can « request an impartial assessment of the ultimate consequences of such activities » (Article 8). What rights are referred to here ? Is it intended that the requirement to carry out an assessment should apply also to the non-environmental field (the Article makes no reference to the

(18) See P. SANDS, « L'affaire des essais nucléaires II : contribution de l'instance au droit international de l'environnement », 1997 *RGDIP*, 448-474, at 466-70.

environment) ? And who is to carry out the « impartial assessment » ? An international organisation ? A third state ? A private company ?

The inadequacies of Articles 5 and 8 are all the more significant in the face of the very real differences which states and other actors have as to the extent of the obligation under current international to carry out an EIA. This was graphically reflected in the exchanges between New Zealand and France in 1995 around New Zealand's request that the ICJ revisit French nuclear testing. The Institut has missed a real opportunity to contribute to the clarification of the law in this difficult area. Similar concerns may be raised in relation to the Institut's conclusions on the obligation of states to monitor environmental impacts of activities carried on within its territory (Article 7). According to the Resolution there is no such obligation. The Article merely provides that « Whenever a State has at its disposal a monitoring system » then it is to make information available to other states and the international community. A similar « obligation » is said to exist in relation to information gathered on external environmental risks. Countries without a monitoring capacity are, apparently, under no obligation to develop one.

What are the general obligations of states in relation to the environment ?

It is in relation to the obligation of states to ensure that activities within their jurisdiction or control do not cause damage to or fail to respect the environment of other states or of areas beyond national control that one might have expected the Resolution to be more forthcoming. After all, in July 1996 the International Court of Justice had declared this to be « part of the corpus of international law relating to the environment » (19) (presumably the Rapporteur contributed to this language since he was a Judge at the Court at the time). The Resolution does not adopt the carefully crafted language of the Court or of Principles 21 and 2 of, respectively, the 1972 Stockholm Declaration and the 1992 Rio Declaration (upon which the Court's words appear to have been based). Instead, in its Article 6 the Resolution says :

> « Every State, *when intervening on the basis of decisions taken in the exercise of its sovereignty in fields of activity where the effects of such decisions on the environment are clear*, has the responsibility to ensure that activities within its jurisdiction or under its control do not cause damage which may *affect the lives of present and future generations.* » (emphasis added)

(19) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, p. 226, at para. 29.

The first set of words in italics could be seen as limiting the obligation of a state to a situation in which it has « intervened on the basis of a decision ». In other words, a failure to act would not engage the responsibility of the state, unless perhaps it could be shown that a positive decision had been taken not to act. Did the Resolution intend to indicate a less extensive obligation than the International Court, and if so why ? Did the Resolution intend that in the environmental context the ordinary rules of state responsibility, as set out in the ILC's draft Articles, should not apply ? As regards the second set of words in italics, what does the reference to « present and future generations » imply ? In addition to the obligation not to cause « damage to the environment » (Principle 2, Rio Declaration) and to « respect the environment » (the ICJ), we now have the Institut's formulation of the responsibility not to cause damage « which may affect the lives of present and future generations ». Did the Institut purposely intend to discard the formulations chosen by governments and the Court, and if so further cloud the content and meaning of the most fundamental of international environmental obligations ?

As if Article 6 was not problematic enough, Article 9 then goes on to provide *inter alia* that

> « States, regional and local governments and juridical or natural persons shall, to the extent possible, ensure that their activities do not cause any damage to the environment that could significantly diminish the enjoyment of the latter by other persons. In this respect they shall take all necessary care. »

It is unclear how this provision relates to Article 6. It introduces several new concepts into the law, either as it currently is or as the Resolution would like it to evolve. For example the standard of being required to take « all necessary care » is an apparently novel formulation, as is the effort to impose obligations on actors other than states.

Final provisions

The Resolution concludes with the Article 11 :

> « International procedures for the settlement of disputes relating to matters of environment should allow any interested person to make known their points of view, even if they are not subject of international law. »

This is a laudable view fully consistent with the spirit and tendency of various non-binding international instruments, such as Agenda 21 and the Rio Declaration. But of course it bears no relation to the real world of, for example, the International Court of Justice and the Dispute Settlement Understanding of the World Trade Organisation. And it seems hard to imagine that the various judges of the International Court of Justice who are also members of the Institut were, by this resolution, signalling their

support for a most radical change of the circumstances in which access to the Court might be permitted (unless the resolution envisages that « making known their points of view » means nothing more than sitting in on hearings or writing informally to the Judges). Again, what would have been useful would have been a more detailed elaboration of how relevant views could be made known (e.g. *amicus* briefs, third party interventions, appointment of experts and assessors etc), and which persons, in particular, the resolution had in mind.

Issues unaddressed

Beyond the matters addressed in the Resolution there is also the problem of what it has left unaddressed. Three points in particular stand out.

First, the Institut's thinking on the meaning and effect (if any) of various emerging principles in the field of international environmental law (for example the precautionary principle and the polluter-pays principle) would have been most useful. As it is these concepts are referred to in the preamble to the Resolution. This might have allowed the Institut to shed light on a particular difficulty face d by lawyers working in this domain, namely how to take account of risk and uncertainty in decision-making.

Second, the Institut might also have addressed the principle of integration of environmental and developmental objectives, namely how to ensure that environmental considerations are integrated into other areas of activity or interest, and how other objectives (e.g. developmental or economic) can be integrated into environmental decision-making (shortly after the Institut's Resolution was adopted the International Court noted that the « need to reconcile environmental and development has been aptly expressed in the concept of sustainable development ») (20). This would have allowed the Institut to consider the techniques available in international law to integrate environment and development, including perhaps through the process of interpretation (by application of Article 31(3)(c) of the Vienna Convention the Law of Treaties (21)), and assist in reconciling differing societal objectives such as trade and environment, and human rights and the environment.

Finally, the Resolution had little to say about international adjudication and fact-finding (beyond indicating that it should be effected in a « reliable » manner : Article 10). International environmental disputes are on the increase. Questions are being asked about the ability of existing

(20) *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, at para. 140 (37 *ILM* 162 (1998)).

(21) See P. Sands, « Treaty, custom and the cross-fertilisation of international law », 1 *Yale Journal of Human Rights and Development Law* (1998), forthcoming.

institutions to adequately address the technical issues which may arise. And states are indicating a desire to move away from traditional, contentious dispute settlement towards administrative arrangements which are non-contentious (for example the non-compliance procedure under the Montreal Protocol on Substance that deplete the Ozone Layer). It would have been most useful if the Resolution could have provided some guidance as to how existing institutions might carry out their environmental functions (for example in the appointment of independent assessors), the interrelationship between these various bodies (for example, between practise of the non-compliance procedure and arbitral and judicial activities) (22), and on the function of fact-finding and conciliation in its domain.

Conclusion

Much in the Resolution is laudable in aspiration. However, a useful opportunity has been missed. Rather than build on the language and work of others, identify the areas on which further elaboration is needed, and indicate the role which international law can play as the environmental challenges mount, the General Resolution takes a path which neither synthesises nor seeks to codify, and which most certainly does not « progressively develop ». It is, most regrettably, to appropriate the words of the Rapporteur, a « flatus vocis » which is likely to be « dépourvu de tout impact sur la réalité des choses » (23), impressionistic sketch rather than architecture.

(22) See M. Koskenniemi, « Breach of Treaty or Non-Compliance ? Reflections on the Enforcement of the Montreal Protocol », 3 *Ybk. Int. Envt'l L.123* (1992), at 155-61.

(23) *Supra*, note 10, p. 483.