

With respect to the topic of "Reservations of Treaties", the Commission considered the third report of the Special Rapporteur, Professor Alain Pellet, concerning the definition of reservations (and interpretative declarations). The Commission adopted seven draft guidelines on definition of reservations, subject of reservations, instances in which reservations may be formulated, reservations having territorial scope, reservations formulated when notifying territorial application, reservations formulated jointly and on the relationship between definitions and admissibility of reservations. For details of the draft guidelines as adopted on first regarding by the ILC see *Part III* of the present report.

The Commission has invited comments and observations from Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty, beyond those stipulated by the treaty itself, ought or ought not to be considered to be reservations. The Commission would appreciate receiving any information or materials relating to State practice on such unilateral statements.

As regards the topic of "Nationality in Relation to the Succession of States" the Commission considered the fourth report of the Special Rapporteur, Mr. Vaclav Mikulka, and established a Working Group to consider the question of the possible orientation to be given to the second part of the topic dealing with the nationality of legal persons. The Commission has once again emphasized the desirability of receiving comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons to assist the Commission in its future work. It has reiterated its request to Governments for written comments and observations on the draft articles on Nationality of natural persons in relation to the succession of States adopted on first reading in 1997, so as to enable it to begin the second reading of the draft articles at its next session.

The Commission has recommended that the General Assembly invite States having undergone a succession of

States, to indicate, how the nationality of legal persons was determined; what kind of treatment was granted to the legal persons which, as a result of the succession of states became 'foreign legal persons'.

The Commission considered the preliminary report of the Special Rapporteur, Mr. M. Bennouna, on "Diplomatic Protection" which dealt with the nature of diplomatic protection and the nature of the rules governing the topic. It established a Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered by the report of the Special Rapporteur for the next Session of the Commission. The Working Group suggested that the Special Rapporteur, in its second report, should concentrate on the issue raised in Chapter One "Basis for Diplomatic Protection" of the outline proposed by the last year's Working Group.

The Commission has sought comments and observations by Governments on the conclusions drawn by the Working Group. The Commission would also request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

As regards the topic "Unilateral Acts of States" the Commission examined the preliminary report of the Special Rapporteur Mr. Rodriguez Cedeno. At the instance of the Special Rapporteur the Commission reconstituted the Working Group that it had established at the Forty-ninth Session. The discussion concentrated mainly on the scope of the topic, the definition and elements of unilateral acts, the approach to the topic and the final form of the Commission's work thereon. There was general endorsement for limiting the scope of the topic to unilateral acts of States issued for the purpose of producing international legal effects and for elaborating possible draft articles with commentaries on the matter. The Commission requested the Special Rapporteur, Mr. Rodriguez Cedeno, when preparing his second report, to submit draft



articles on the definition of unilateral acts and the scope of the draft articles and to proceed further with the examination of the topic, focussing on aspects concerning the elaboration and conditions of validity of the unilateral acts of States.

The Commission has invited views and comments on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur in his first report, or whether the scope of the topic should be broader than declarations and should encompass other unilateral expressions of the will of the State. Comments have also been invited on whether the scope of the topic should be limited to unilateral acts of States directed at or addressed to other States, or whether it should also extend to unilateral acts of States issued to other subjects of international law.

### **Thirty-eighth Session: Discussion**

Introducing the brief of documents prepared by the Secretariat the Deputy Secretary-General Mr. Mohammad Reza Dabiri stated that there was as many as six substantive topics on the agenda of the 50<sup>th</sup> Session of the Commission. These included (i) State Responsibility; (ii) International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law; ; (iii) Reservations to Treaties; (iv) State Succession and its Impact on the Nationality of Natural and Legal Persons; (v) Diplomatic Protection; and (vi) Unilateral Acts of States. He said that the Commission at its 50<sup>th</sup> Session had considered all these items and notes and comments on these subjects were set out in the brief of documents prepared by the Secretariat. He pointed out that the first part of the 50<sup>th</sup> session of the Commission had been devoted to discussion of the reports of the Special Rapporteurs whereas the second part had been used for the adoption of draft articles with commentaries and of the report of the Commission.

Referring to the item "State Responsibility", the Deputy Secretary General pointed out that the Commission commenced the task of second reading of the draft articles on the basis of the comments of member States on the draft

articles as adopted by the Commission on first reading and the first report of the Special Rapporteur, Mr. James Crawford. The details of the work of the Commission were set out in Part I of the brief of documents.

On the issue of the International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, the Commission had adopted on first reading a set of 17 draft articles on Prevention of Transboundary Damage from Hazardous Activities. The details of the draft articles as adopted on first reading by the ILC were set out in Part II of the Secretariat brief. The Commission had two issues related to the International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, to the General Assembly.

With respect to the topic "Reservations to Treaties", Mr. Dabiri recalled that the Commission had adopted seven draft guidelines on definition of reservations, object of reservations, instances in which reservations may be formulated, reservations having territorial scope, reservations formulated when notifying territorial application, reservations formulated jointly and on the relationship between definitions and admissibility of reservations. Details of the draft guidelines as adopted on first reading by the ILC were set out in Part III of the brief, he stated.

As regards the topic "Nationality in Relation to Succession of States" he stated that the Commission had considered the question of the possible orientation to be given to the second part of the topic dealing with the nationality of legal persons. It had emphasized the desirability of receiving comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons to assist the Commission on its future work and had reiterated its request to Governments for written comments and observations on the draft articles on Nationality of natural persons in relation to the succession of States so as to enable it to begin the second reading of the draft articles at its next session.



The other two subjects, viz. Diplomatic Protection and the Unilateral Acts of States, on the agenda of the Commission were at a preliminary stage of their consideration. Finally, the Deputy Secretary General said that the Commission at its 50<sup>th</sup> Session had identified "The Law of Environment" as one of the topics which the Commission could consider in future. A feasibility study prepared by Ambassador Chusei Yamada together with the preliminary list of issues to be studied could be found in Part VIII of the Secretariat brief.

The Representative of the International Law Commission (Ambassador Chusei Yamada) in his statement conveyed the greetings of the Chairman of the ILC Ambassador Baena Soares and offered a broad overview of the current work programme of the Commission. The ILC presently had seven substantive items on its agenda. As regards the topic of the "State Responsibility", he informed that the Commission had begun the second reading of the draft articles last year. The notion "crime of State" as provided in article 19 in Part I of the Draft Articles, he said, was a contentious issue and there existed a wide measure of support for the idea that the criminal liability of states should not be dealt within the regime of state responsibility, and thus for the deletion of Article 19 from the draft. Yet, he clarified that this does not mean the existence of the "crime of state" in international law is to be denied. The Commission intends to complete its second reading by end of the year 2001.

With respect to the topic "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law", he recalled that the earlier decision of the Commission to separate the question of "Prevention of Transboundary Damage Arising from Hazardous Activities". Last year, the ILC had completed the first reading of 17 draft Articles. Though some countries particularly from the developing world considered that the core issue is that of "liability" rather than "Prevention", Ambassador Yamada was of the view that it would be difficult to expect any early solution on the issue. In his opinion, it would be more conducive to

approach the issue of "liability" from the perspective of environmental law.

As regards the ILC work on "Reservations to Treaties", he said that the Commission was primarily formulating guidelines on the subject based on State practice and it did not intend to alter the reservation regime established by the Vienna Conventions on Treaties. The work of the Commission on the two new topics "Diplomatic Protection" and "Unilateral Acts of States" were yet in a preliminary stage.

The first reading of a set of 27 draft articles on "Nationality of Natural Persons in relation to the Succession of State" was completed in 1997 and the ILC was currently awaiting comments from States.

Recalling the Draft convention on Jurisdictional, Immunities of States and their Property adopted by the ILC in 1991, Ambassador Yamada stated that the ILC would at its forthcoming session, pursuant to a decision by the General Assembly inviting the Commission to consider outstanding issues and present preliminary comments on this topic, engage in the study of this matter.

Drawing attention to proposals before the ILC on a long-term programme for environmental law, he stated that the Commission welcomes any input from the AALCC in this regard. Expressing satisfaction at the traditional close cooperation between ILC and AALCC, he regretted that the participation of Asian and African States in the process of codification and progressive development of international law had been less than that by the Western States. In this context, he said that the ILC welcomes more active representation of Asian and African States through AALCC.

Recalling the Asian-African contribution to the progressive development and codification of international law the *Delegate of the Arab Republic of Egypt* urged Member States of the AALCC to bear in mind Ambassador Yamada's call for



wider participation in the affairs of the international legal community.

Speaking on substantive topics on the agenda of the ILC, he said that the fiftieth session witnessed the commencement of the second reading of the topic of State Responsibility. Commending the good work done by Special Rapporteur Professor James Crawford, he added that the subject matter was linked to that of state Liability. He expressed the view that before a convention or draft text on the topic is concluded, AALCC Member States must strive to study the elements of liability and settlement of disputes covered under the topic.

The ILC had completed a first reading of the topic of International Liability for Injurious acts not Prohibited by International Law. The Topic had been divided into two sub-topics namely prevention of transboundary damage caused by hazardous substances and liability. He stated that the main issue in the former related to the study of the principles of precaution, polluter pays, equity and justice; and as regards the latter, that is liability, entailed compensation.

As regards the topic of Reservation to Treaties, he said that the 37<sup>th</sup> session of the AALCC held in New Delhi had exhaustively dealt with the topic. Articles 19-23 of the Vienna Convention on the Law of Treaties, which covered reservation, he felt, was a time-tested and flexible regime. The final text, which may be adopted on the topic, should reflect the AALCC views, as was also desired by Prof. Alain Pellet, the Rapporteur on the topic.

On the topics of Diplomatic Protection and Nationality of Persons arising out of succession of states, he felt that they were recently placed on the agenda of the ILC and hence AALCC Member States must actively participate and send their replies on the topic to the ILC.

Furthermore he commended the work of Rapporteur Rodriguez Cedenon on the topic of Unilateral Acts of States. He

expressed the view that the topic was complex and reliance had to be placed on the limited state practice and customary laws available, by the Rapporteur. Thorough discussions on all these topics, he felt, were necessary for evolving a distinct Asian-African view.

*The Delegate of the Islamic Republic of Iran*, thanked Ambassador Yamada, Member of the ILC for his presentation on the work of the Commission at its fiftieth Session. He also expressed his appreciation to the AALCC Secretariat for its concise documentation on this item. Expressing appreciation for the valuable work of the Special Rapporteur Professor Alain Pellet on the formulation of a set of Guidelines relating to "reservation to treaties", he said that this Guide would be of great practical value in filling up any gap left in the Vienna regime on treaties. Highlighting the practical utility of the Vienna regime on treaties, he said the delicate balance between the customary rules of integrity and universality should be preserved. On the item relating to Diplomatic Protection, the delegate complimented the Special Rapporteur for the preparation of the preliminary report. His delegation shared the view that the discussion of the PCIJ in the *Mavromatis Palestine Concessions Case* embodies the customary origin of diplomatic protection. This concept, in his view, had practical significance for international relations - more particularly - in terms of investment and protection agreements. On the topic of "Unilateral Acts of States", the delegate said that in light of the divergent forms of acts of states and the absence of any coherent doctrine encompassing all types of unilateral acts, the ILC's work on developing rules or guidelines on this topic would add clarity to aspects of state actions and help ensure stability in international relations.

*The Delegate of India* commended the work of the ILC at its 50<sup>th</sup> Session, and said that it was a productive session wherein all the seven topics on the agenda of the ILC were considered.

On the topic of "Diplomatic Protection", she stated that it had evinced considerable interest, wherein the focus was

now on individual rights as opposed to the right of the state of nationality. On the topic of Unilateral Acts of States, the delegate felt that they have legal effect, and so far as they create obligations for the state performing the act. Furthermore, she added that the unilateral acts do not represent the source of international law, but only international obligations. Speaking on the scope of the act, she felt that the Commission had narrowed the scope. While supporting the approach recommended by the Special Rapporteur Mohammed Bennouna, that acts of organizations not giving right to any legal obligations could be excluded she added that acts of state are regulated by the law of treaties or laws of state responsibility, should also be excluded.

As regards 'State Responsibility' the delegate applauded the commencement of the second reading of the draft articles on the subject. This reading, she felt, should be based on universal consensus amongst states. The delegate supported the basic point that state responsibility would give certain rights to the injured state, but called for a differentiation between legal injury and material damage. As regards the notion of an injured state the delegate felt that a clarification needs to be made with respect to *erga omnes* obligations and *jus cogens*, whereby there existed a graduated response to designating an injured state, having the right to respond to crime by means of counter measures. In such a situation, the delegate felt that countries could abuse this right to take counter measures, in the name of protecting a community interest.

As regards, the subject of 'Reservations to Treaties', the delegate recalled the special meeting on the subject, held under the auspices of the AALCC. She supported the approach of the Commission that the preparation the guide, should not in any way disturb the Vienna regime on reservation to treaties. While commending the work of the special Rapporteur on the subject, she called for intensifying efforts towards more substantive result. On the topic of nationality of legal persons in matters of state succession, the delegate felt that the topic should be taken up cautiously.

(ii) **Decision on "the Work of the International Law Commission"**

**(Adopted on 23.4.99)**

The Asian-African Legal Consultative Committee at its Thirty-eighth Session

Having taken note with appreciation of the Report of the Secretariat on the work of International Law Commission at its Fiftieth Session as set out in Document No. AALCC/XXXVII/ACCRA/99/S.1.

Having heard the statement of the Deputy Secretary General;

Expresses its appreciation on the comprehensive statement made by the Representative of the ILC on the work of the Commission;

1. *Affirms* the significance of the contribution of the ILC to the progressive development of international law and its codification;
2. *Commends* the International Law Commission on the progress of work on the items on its agenda;
3. *Requests* the Secretary General to bring to the attention of the International Law Commission at its 51<sup>st</sup> session the views expressed on the different items on its agenda during the Thirty-eighth Session of the AALCC; and
4. *Decides* to inscribe on the agenda of its Thirty-ninth Session an item entitled "The Report on the Work of the International Law Commission at its Fifty-first Session"