

- (a) The customary law approach to diplomatic protection should from the basis for the work of the Commission on this topic:
- (b) The topic will deal with secondary rules of international law relating to diplomatic protection, primary rules shall only be considered when their clarification is essential to providing guidance for a clear formulation of a specific secondary rule;
- (c) The exercise of diplomatic protection is the right of the State. In the exercise of this right, the State should take into account the rights and interests of its national for whom it is exercising diplomatic protection;
- (d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights. The Working Group was of the view that the actual and specific effect of such developments, in the context of this topic, should be examined in the light of State practice and insofar as they relate to specific issues involved such as the nationality link requirement:
- (e) The discretionary right of the State to exercise diplomatic protection does not prevent it from committing itself to its nationals to exercise such a right. In this context, the Working Group noted that some domestic laws have recognized the right of their nationals to diplomatic protection by their Governments;
- (f) The Working Group believed that it would be useful to request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection:

- (g) The Working Group recalled the decisions by the Commission at its forty-ninth session to complete the first reading of the topic by the end of the present quinquennium.

As regards the second report of the Special Rapporteur, Mr. Bennouna, the Working Group suggested that it should concentrate on the issues raised in chapter one "Basis for Diplomatic Protection" of the outline proposed by the last year Working Group. It may be recalled that that outline had envisaged a comprehensive analysis of the basis of diplomatic protection of (a) natural persons; (b) legal person; (c) other cases; and (d) the transferability of claims. The issues identified by the Commission are set out below for ready reference.

A. Natural persons.

1. Nationals, continuous nationality
2. Multiple nationals; dominant nationality, genuine link, effective nationality, bona fide nationality;
 - (a) As against third States
 - (b) As against one of the States of nationality
3. Aliens in the service of the State
4. Stateless persons
5. Non-nationals forming a minority in a group of national claimants
6. Non-nationals with long residence in the State espousing diplomatic protection
7. Non-nationals in the framework of international organizations of integration.

B. Legal persons

1. Categories of legal persons

(a) Corporations, and other associations in varying forms in different legal systems

(b) Partnerships

2. Insurers

3. Right of espousal in multiple nationality and in special cases (factors; nationality of legal persons, theories on control or nationality of share holders).

C. Other cases (ships, aircraft's, spacecraft's, etc.)

D. Transferability of claims

Whilst endorsing the recommendation of the Working Group in respect of the issues which should be covered by the report of the Special Rapporteur for the next session of the Commission viz. that the Special Rapporteur, should concentrate on the issues raised in Chapter One entitled "Basis for Diplomatic Protection" of the outline proposed by the Working Group established at the forty-ninth session of the Commission. The Commission has invited comments and observations by Governments on the conclusions drawn by the Working Group the Commission has requested Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

V. **Unilateral Acts of States**

The Commission has considered the subject "Unilateral Acts of States" appropriate for immediate consideration as it is a well delimited topic and has been the subject of several doctrinal works but has not yet been studied by an international body. Although it has been touched by several

judgments of the International Court of Justice, especially the *Nuclear Test Cases*, the celebrated dicta leave room for questions and uncertainties. Another reason is that States have abundant recourse to unilateral acts and their practice can be studied with a view to drawing general legal principles. Finally, it had been felt that although the law of treaties and the law applicable to unilateral acts of States differ in many respects, the existing law of treaties offers a helpful point of departure and a scheme by reference to which the rules relating to unilateral acts of States could be approached.

By its operative paragraph 13 of Resolution 51/160 the General Assembly had invited the Commission to examine the topic "Unilateral Acts of States", and to indicate the scope and the content of the topic in the light of the comments and observations made during the debate in the Sixth Committee on the report and any written comments that Governments may wish to submit. The Planning Group established by the Commission at its forty ninth session had deemed it desirable that a work plan and detailed outlines be prepared by a Working Group on the topic of Unilateral Acts of States.

At its forty ninth session recalling the mandate given to it by the General Assembly the Commission established a Working Group¹⁵ and on the recommendation of the Working Group the Commission at its forty ninth Session appointed Mr. V. Rodriguez Cedeno, Special Rapporteur, for the topic "Unilateral Acts of States". Thereafter, the General Assembly by its resolution 52/156 of 15 December 1997 had endorsed the decision of the International Law Commission to include in its agenda the topic "Unilateral Acts of States".

At its fiftieth Session the Commission considered the First Report of the Special Rapporteur, Mr. Rodriguez Cedeno,

¹⁵ The Working Group comprised of Mr. E. Candioti (Chairman); Mr. Baena Soares; Mr. J. Dugard; Mr. C. Economides; Mr. L. Ferrari Bravo; Mr. N. Elaraby; Mr. G. Hafner; Mr. Qizhi He; Mr. I. Lukashuk; Mr. V. Rodriguez Cedeno; Mr. B. Sepulveda and Mr. Z. Galiciki (ex-officio member).

on the Unilateral Acts of States. The main purpose of the Report was to decide on a systematic study of unilateral acts of States. The Preliminary Report consisted of an Introduction and Two chapter.¹⁶ The introduction drew a distinction between non-legal unilateral acts - or political acts, unilateral legal acts of international organizations and the conduct, attitudes and acts of States which though carried out voluntarily were not performed with the intention of producing specific legal acts.

In his report the Special Rapporteur had pointed out that both the Permanent Court of International Justice and the International Court of Justice have considered unilateral declarations of States on a number of occasions and concluded that they were binding regardless of whether they fell in the treaty sphere (*Eastern Greenland Case*). In two cases the International Court of Justice has held that there had been legal unilateral declarations (*Nuclear Tests Cases*) while in other that there had been political declarations (*Frontier Dispute case* and *Military and Paramilitary Activities case*).

The first Chapter of the report was addressed to the existence of unilateral acts of States. It considered the fundamental question of sources of international law and international obligations, distinguishing between formal legal acts and legal rules that created such acts. It focused on unilateral declarations, as legal acts, whereby legal rules and in particular legal obligations were created for the declarant State. In the opinion of the Special Rapporteur a unilateral declaration was a formal legal act whereby legal rules could be created and accordingly it could be the subject of special rules governing its operation. The Special Rapporteur aimed at defining strictly unilateral, acts with a view to preparing precise reports on rules pertaining to the preparation, validity, effects, nullity, interpretation, revocation and modification of such acts.

¹⁶ See UN Doc. A CN.4/486.

Recognizing that a definition is fundamental for the future work of the Commission the Report of the Special Rapporteur sought to submit its component parts. A strictly unilateral declaration, the Special Rapporteur said, could be regarded as a clear and unambiguous autonomous manifestation of will, expressed explicitly and publicly by a State, with the object of creating a legal relationship and of creating international obligations for itself, in relation to one or more states which had not participated in its elaboration, without any need for that state or those states to accept it or for subsequent conduct signify such acceptance.

The Second Chapter of the first Report of the Special Rapporteur related to strictly unilateral acts of States. The latter term was employed to differentiate such acts from non-autonomous or dependent acts whose operation was governed by existing rules. In treaty law every treaty has to be performed in good faith and likewise given the need for mutual trust and international legal certainty a unilateral declaration had to be respected and good faith had to be regarded as fundamental to the binding nature of unilateral acts of states. Emphasizing that the rule of *pacta sunt servanda* was the basis of the binding nature of the law of treaties the Special Rapporteur suggested that a special rule, such as *promissio est servanda* could be used for the specific case of promise.

At its fiftieth session the Commission reconvened the Working Group on Unilateral Acts of States. The Working Group in its Report to the Commission endorsed the approach adopted by the Special Rapporteur which concurred with the outline adopted by the Commission at its 49th session and which restricted the topic to unilateral acts of States issued for the purpose of producing international legal effects. Thus, the scope of the topic would exclude (i) acts of States of a purely non-legal nature; (ii) unilateral acts of States which are linked a specific legal regime; and (iii) acts of other subjects of international law, such as international organizations.

It maybe recalled in this regard that the Special Rapporteur had in his report suggested that acts which were

regarded as strictly political, which produced purely and solely political effects could be excluded from the scope of the proposed study. The proposal was advanced in light of the fact that the intention of the State was essential in determining the nature of the unilateral act and it would be for the court to interpret whether a State had in performing on a political act had intended to enter into Legal obligations. This, it was pointed out, was apparent from the *Nuclear Tests Cases* and the decisions taken by the International Court of Justice when it had inferred that political declarations made outside the context of negotiations could contain legal elements binding on a state.

The Working Group was, however, divided as to whether the scope of the topic ought to extend to unilateral acts of States issued in respect of subjects of international law other than States or *erga omnes*, and whether the effects of unilateral acts of states issued in respect of states could be extended to other subjects of international law. It was felt that work could for the present proceed without making a final decision on the matter and subject to further examination by the Special Rapporteur and the Commission and further clarification in the course of further consideration.

Apropos, the final form of the work of the Commission the Working Group generally felt that the elaboration of draft articles with commentaries on the matter would be the most appropriate way to proceed. The preparation of draft articles with commentaries it was felt would ensure concision, clarity, compactness and systematization of a codification exercise without prejudging the final legal status which might be reserved for such draft articles viz. a convention, guidelines, restatement etc.

The Working Group felt that the Special Rapporteur may already be in a position to formulate a number of draft articles viz. (i) on the scope of the draft articles; (ii) the use of terms; (iii) the non-applicability of the draft articles to acts of States linked to a pre-existing international agreement; (iv) the non-

applicability of the draft articles to draft articles to acts of subjects of international law other than States etc.

The Special Rapporteur, the Working Group recommended, could formulate a draft article stating that the draft articles would apply to the unilateral acts of states. This recommendation of the Working Group is based on the fact that the Special Rapporteur's report did not deal with the unilateral acts of international organizations.

A second draft article, it was proposed, could specify the "Use of Terms" stating that a unilateral act (declaration) is an autonomous unequivocal and notorious expression of the will of a State, issued for the purpose of producing international legal effects. A third provision, it was proposed could stipulate that the fact that the draft articles did not apply to a unilateral acts of states which are linked to a pre-existing -existing international agreement, e.g. the Law of Treaties, by the Law of the Sea, by the law of international arbitral or judicial procedure or by other specific legal regimes, was without prejudice to the application to them or any of the rules set forth in the draft articles to which they would be subject under international law, independently of the draft articles.

The Working Group was also agreed that the elaboration of the aspects related to the element of the above definition consisting in the "purpose of producing legal effects" was well within the topic but pertained also to some other section of the draft articles, such as the effects of unilateral acts. This it was felt would cover the study of possible effects of the act, such as the creation of international obligations for the State issuing the act (promise), the renunciation of its rights, and the declaration of opposability to the claims of another State or of a particular legal situation (recognition or protest). It could also cover the question whether it would be necessary or not, in order for the act to produce legal effects, for the addressees to accept it to subsequently behave in such a way as to signify such acceptance.

The Special Rapporteur had indicated in his Report that *estoppel*, a rule of evidence, had now found a place in the doctrine and jurisprudence of international law. While it had been considered on a number of occasions by international judicial bodies it had rarely been used as the basis for any ruling. The judgments in the *Eastern Greenland Case*; the *North Sea Continental Shelf cases*; the *Preah Vihear Temple case*; *Nottebohm case*; *Barcelona Traction case*; and the *Arbitral Award of the King of Spain* were cited in this regard.

The Working Group has recommended that the Special Rapporteur examine at the appropriate time the *question of estoppel* and the *question of silence* with a view to determining the rules, if any, that could be formulated in that respect in the context of the unilateral acts of States. The recommendation has been made in light of the views of the members of the Commission expressed in the plenary.

As to the future work on the topic the Working Group recommended that the Commission request the Special Rapporteur Mr. Rodriguez Cedeno to submit draft articles on the definition of unilateral acts and the scope of the draft articles on the basis of its (the Working group's) Report. It further recommended that the Special Rapporteur "proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts (declarations) of States".

To sum up, while there was general endorsement for limiting 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, focusing 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.

The Secretariat of the Asian African Legal Consultative Committee will continue to monitor the work of the International Law Commission on this subject.