Agenda Item 159: Report of the International Law Commission on the work of its fifty-second session Chapter V (Diplomatic Protection) & Chapter VI (Unilateral Acts of States)

Statement by Hon'ble Mr. Anant G. Geete, MP on October 30, 2000

Mr. Chairman,

I thank Ambassador Yamada, Chairman of the International Law Commission, for his very Useful introduction of Chapters V and VI of the Commission's Report relating to the topics of 'Diplomatic Protection' and 'Unilateral Acts of State'.

We wish to congratulate Professor John Dugard, Special Rapporteur on the subject of diplomatic protection on his first report producing several articles on the subject. The Commission was engaged in a lively debate on the basis of the draft articles. While eight articles were considered by the Commission, six articles, that is, all the articles except draft articles 2 & 4 originally submitted by the Special Rapporteur, are awaiting consideration before the Drafting Committee. This is an encouraging progress.

As a general comment, we note that several members of the Commission would prefer dealing with the subject of diplomatic protection without any special gloss put on it from the perspective of human rights. The Special Rapporteur's approach to the subject of diplomatic protection was heavily coloured by his concern for the protection of human rights in general and human rights of a foreign national in the jurisdiction of a State in particular. We share the enthusiasm of the Special Rapporteur in the promotion and protection of human rights to the extent the same can be served through proper and appropriate utilization of the instrument of diplomatic protection. We do not however, believe that it is either necessary or desirable to change the very basis and limitation of the instrument of diplomatic protection to serve the broader interest of human rights of an individual.

Accordingly, we support the views of those members of the Commission who favoured limiting the work of the Commission on diplomatic protection to the precedent and practice in this area and not overloading it with broader issues concerning human rights. Further, we believe that action to be taken by a State in pursuance of diplomatic protection of its nationals could embrace a variety of procedures including representation, negotiation and even judicial proceedings, but it cannot be deemed to include resort to reprisals, retorsion, severance of diplomatic relations and economic sanctions.

In this connection, it is also our view that the problems concerning protection of human rights treated in the category of *erga omnes* obligations should not form part of the proper subject of diplomatic protection. In that case, the right of the State to intervene is subject to the general law of State responsibility, which is separately under consideration. This right is proposed not in the narrow sense of a State's right to protect the interest of its own nationals but in the broader context of ensuring respect for obligations owed to the entire international community. While that matter is open to debate, it is enough to note that it is a separate aspect altogether and should not be confused with the study of the subject of diplomatic protection.

Further, we endorse the view that the institution of diplomatic protection and right to use force in defence of the rights of nationals are basically incompatible with each other. Not only they cannot coexist but even more so, they cannot be integrated. Generally, use of force comes as a last resort after all efforts by way of diplomatic protection fail to produce desired results. Even in such an eventuality, any use of force would have to be judged against the general prohibition contained in Article 2(4) of the UN Charter. In any case, this raises complicated questions and is better deleted from the scope of the articles on diplomatic protection. We support the decision of the Commission to delete article 2 on this subject originally proposed by the Special Rapporteur for discussion.

Article 3 addresses the question whether the right of protection was one pertaining to the State or to the individual. We agree with the view that even though the right of diplomatic protection is essentially a right of the State to be exercised in its discretion, it should serve the interest of the nationals as far as possible. However, the concern for the rights of the individual involved should not be stretched beyond a point to make it obligatory for the State of nationality to espouse the claims involved, ignoring necessary political or other sensitivities of the State of nationality. We are happy to note that the Commission decided against inclusion of Article 4 on mandatory obligation of State of nationality originally submitted for discussion by the Special Rapporteur and accordingly, would also drop a cross reference to that concept in Article 3.

The concept of effective nationality and genuine link theory became the subject of Articles 5, 6 & 7. Three different scenarios are involved. Under Article 5, the relevance of effective nationality and genuine link theory for espousing the claims of a national by a State is involved. We agree with the view that in this connection the State's right to espouse the claims of its national should not be open to question, as long as the nationality granted has a proper basis, as for example, birth, descent or naturalisation. Generally, States accord good faith respect to the right of a State to grant nationality to an individual according to its own law.

Under Article 6, the concept of dominant or effective nationality is invoked to entitle one State of which the individual is a national to espouse the claims involved against another State of which he is also a national. We believe that as long as the individual concerned suffered injury within the territory of the State of which he/she is a national, there is no scope for the exercise of diplomatic protection by any State, including the State of which he enjoys dominant or effective nationality. Any problems suffered by individuals in this regard are natural consequences of the benefits he otherwise would enjoy from holding dual or multiple nationality.

. Under Article 7, a different situation is involved. It provides for more than one State of which the individual concerned is a national to sponsor a diplomatic claim either jointly or separately on behalf of the individual in respect of injuries suffered in a third State. In principle, there is no objection to such multiple sponsorship irrespective of the operation of the principle of dominant or effective nationality. However, in this regard, we believe there is need to safeguard against excessive international pressure being put on a State on account of injury suffered by a foreign national within its territory.

Article 8 provides for the exercise of diplomatic protection on behalf of stateless persons and refugees. This is proposed by way of progressive development of international

law. Many members have supported the principle while stressing the need for 'residence for a certain period' or the requirement of 'effective link'. However, we feel that Article 8 treads a controversial path. Neither the 1951 Convention on Refugees nor the 1961 Convention on Reduction of Statelessness requires such a role for the State giving refuge. It is difficult for us to envisage the circumstances under which such protection would require to be exercised on behalf of the refugees. Surely such protection cannot be exercised against their State of nationality. In respect of exercise of such protection against a third State, it appears that the continued treatment of the individual as a refugee in the territory in which he suffered the injury would come in the way of the State of habitual residence to take up the claims involved. It may be useful to compile data concerning actual factual situations where refugees would need diplomatic protection from such States over and above the role and duties of the UN High Commissioner for Refugees. We are in any case opposed to extend the principle involved obligating the State of habitual residence of a refugee to espouse the claims involved against the State of his nationality. This could create excessive and unacceptable burdens to the States.

Mr. Chairman,

I now turn to the topic of Unilateral Acts of States. The Report of the Special Rapporteur, Mr. Victor Rodriguez Cedeno, which was considered by the Commission this year contained a revised set of draft articles 1 to 7. A number of issues connected with the subject are still a matter of continuing debate within the Commission. These relate to the relevance of the topic, the possibility of drawing appropriate inferences from the 1969 Vienna Convention on Law of Treaties, the relationship of unilateral acts to estoppel and proposed re-wording of Articles 1 to 7 contained in the Second Report.

There is no doubt that the legal effect of unilateral acts as a source of international legal obligation is an eminently fit subject for study. The important point for consideration is whether any uniform or common features could be identified from different and varied types of unilateral acts that occur from time to time in State practice, to determine the nature of international obligation involved. For the purpose of the present study, the Special Rapporteur assumed that such acts exist and went on to provide a possible definition and conditions under which a State or its Representatives could, through their unilateral acts, produce legal effects on the international plane involving rights and obligations. Various articles proposed in this regard particularly those that could engage the authority and responsibility of the State are modeled after the Vienna Convention on the Law of Treaties.

The conclusions drawn by the Special Rapporteur so far are based on a survey of the existing legal literature on the subject. However, as this is not adequate or sufficient to clear many of the doubts that still persist, the Commission chose to seek necessary information from the Governments through a questionnaire. At the time of preparing his Third Report, the Special Rapporteur only had the benefit of comments from some Governments, but not their responses to the questionnaire addressed to them. It is necessary therefore to wait for these responses, before available evidence on State practice could properly be assessed.

It is also necessary to see, according to the constitutional procedures of a State, how many States would allow engagement of international obligations on the basis of oral and

unilateral acts, including silence as opposed to acquiescence or by way of estoppel, which involves certain type of conduct. The Special Rapporteur himself distinguished the latter type of conduct such as acquiescence and estoppel as outside the scope of his study. We support the position taken by the Special Rapporteur that the provisions of the 1969 Vienna Convention on the Law of Treaties and its *travaux preparatoires* could provide useful guidance in formulating the legal regime governing unilateral acts, even as it is understood that it is not possible to simply transpose those articles into the present exercise.

Certain basic propositions identified by the Special Rapporteur for determining the status of unilateral acts as having legal effects are very useful: the intention of the author State concerned, the nature of the act as autonomous, in the sense that it is not related to or dependent on a treaty or another act of acceptance by the addressee, the act to be unambiguous or clear, even if it is conditional, and finally the requirement of publicity, in the sense of making it known to the State or the international organization concerned.

The various propositions submitted by the Special Rapporteur on the capacity of States to formulate unilateral acts, the persons authorized to formulate unilateral acts on behalf of a State, subsequent confirmation of an act formulated by a person and authorized for the purpose, the invalidity of unilateral acts, and on the problem of consent and silence, we notice, are all subjects of considerable amount of discussion. In this regard, the Commission established a Working Group to further examine the issues involved. It is encouraging to note that within the limited time allowed for the Working Group it was able to make useful contribution by identifying some elements for further advancing the work on the subject. These points are identified in paragraph 127 of the Report, and they are in conformity with the observations we already made above in paragraphs 3 and 5.

The subject under study involves very subtle and delicate questions of law and State practice. The Special Rapporteur has done a commendable job so far in moving the matter beyond initial doubts and difficulties about conceptualization of the issues involved. The debate so far indicates the active interest of States and possible options open to the Commission. We have no doubt that work on the subject when completed would make yet another valuable contribution to the codification and progressive development of international law.