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DRAFT REPORT ON THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-FIRST SESSION

Rapporteur: Mr. Robert Rosenstock

CHAPTER VIII

UNILATERAL ACTS OF STATES

CONTENTS

GE.99-64179 (E)

A. Introduction

1. In the report on the work of its forty-eighth session, in 1996, the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law. [1]

2. The General Assembly, in paragraph 13 of resolution 51/160, inter alia, invited the Commission to further examine the topic "Unilateral acts of States" and to indicate its scope and content.

3. At its forty-ninth session, in 1997, the Commission established a Working Group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group. [2]

4. Also at its forty ninth session, the Commission appointed Mr. Victor Rodriguez Cedeño, Special Rapporteur on the topic. [3]

5. The General Assembly, in paragraph 8 of its resolution 52/156 endorsed the Commission's decision to include the topic in its agenda.

6. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic 1. [4] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

7. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group 1. [5]

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[1] See Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10), p. 230 and pp. 328-329.

[2] See Official Records of the General Assembly, Fifty-second session, Supplement No. 10 (A/52/10), paras. 196-210 and 194.

[3] Ibid., paras. 212 and 234.

[4] A/CN.4/486.

[5] See Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10), paras. 192-201.

8. The General Assembly, in paragraph 3 of its resolution 53/102 recommended that, taking into account the comments and observations of Governments, whether in writing or expressed fully in debates in the General Assembly, the Commission should continue its work on the topics in its current programme.

B. Consideration of the topic at the present session

9. At the present session, the Commission had before it the Special Rapporteur's second report on the topic 1. [6] The Commission considered the report at its 2593rd to 2596th meetings from 24 June to 2 July 1999.

1. Introduction by the Special Rapporteur of his second report

10. The Special Rapporteur said that, in terms of both structure and spirit, the 1969 Vienna Convention on the Law of Treaties was the appropriate frame of reference for the Commission's present work. That did not mean that the rules applicable to treaty acts laid down in the 1969 Convention were applicable mutatis mutandis to unilateral acts. If that were so, there would be no need to regulate the functioning of unilateral acts, which were to be understood as autonomous or independent acts with their own distinctive characteristics and were to be distinguished from unilateral acts which fell within the scope of treaties and for which specific operational rules could be formulated.

11. There were important differences, he said, between treaty acts and unilateral acts. The former were based on an agreement (a joint expression of will) involving two or more subjects of international law, while the latter were based on an expression of will - whether individual or collective - with a view to creating a new legal relationship with another State or States or with subjects of international law that had not participated in the formulation or elaboration of the act.

12. To determine the specific character of unilateral acts and justify the formulation of specific rules, possibly based on different criteria from those applicable to treaty acts, it should be borne in mind that a State usually formulated a unilateral act when it could not or did not wish to negotiate a treaty act, i.e. when, for political reasons, it did not wish to enter into negotiations. As an example, the Special Rapporteur mentioned unilateral declarations by nuclear-weapon States containing negative security guarantees

[6] A/CN.4/500 and Add.1.

in the context of disarmament negotiations formulated outside the context of bilateral or multilateral negotiations and without the participation of the addresses - the non-nuclear-weapon States.

13. It followed that a different approach was required in elaborating rules to govern the operation of unilateral legal acts. In particular, they should not be restrictive, particularly as regards the expression of consent, the interpretation and the effects of such acts. In this connection, the Special Rapporteur stressed the need to take full account of political realities as well as the views of States which would probably prefer rules that did not unduly restrict their political and legal freedom of action in the international field.

14. Referring to the comments by State representatives in the Sixth Committee, the Special Rapporteur said that the existence of a specific category of unilateral State acts had been recognized. In international relations, States usually acted, in both the political and legal field, through the formulation of unilateral acts. Some were unequivocally political; others were easily identifiable as belonging in the legal field. Still others were ambiguous and would require careful study to determine in which category they belonged. In the case of legal acts, some were designed solely to produce internal legal effects and could be ignored. Concerning those seeking to produce international legal effects, it was a well-established principle of international law that a State could not impose obligations on other States or subjects of international law without their consent.

15. Furthermore, according to the Special Rapporteur, some unilateral acts could produce international legal effects but not qualify as autonomous, such as those acts related to a pre-existing norm, whether of customary, treaty or even unilateral origin.

16. The Special Rapporteur also pointed out that unilateral acts could be formulated by one State, in which case they were unilateral acts of individual origin, or they could be formulated by two or more States, in which case they would be of collective or joint origin. The latter, in turn, presented significant variations, since collective acts might be based on a single instrument, while joint acts would be formulated through separate acts but of similar purport.

17. While all those acts were unilateral in their elaboration, that did not prevent them from having a bilateral effect, i.e. where there was a possibility of the relationship created in a unilateral way becoming bilateral when the addressee acquired a right and exercised it. However, the unilateral nature of the act was not based on that possible synallagmatic effect but depended on the coming into existence of the act at the time of its formulation.

18. The Special Rapporteur referred to what he termed as the question of the autonomy of the unilateral act. In his view, a unilateral act thus existed when it was formally unilateral, when it did not depend on a pre-existing act (first form of autonomy) and when the obligation incurred was independent of its acceptance by another State (second form of autonomy). The second form of autonomy had been confirmed not only by a large body of legal opinion but also by the International Court of Justice, especially in its 1974 judgments in the Nuclear Tests cases.

19. In the Special Rapporteur's view, it was also important to distinguish between the formal act and the material act, since it would then be possible to distinguish the operation whereby the legal effects were created from the actual act itself. It followed that the formal act, as a result of which the effects - particularly the obligation - came into being, was the declaration.

20. In the Special Rapporteur's view, much as in treaty law the treaty was the basic instrument used by States to create legal effects, in the law governing unilateral acts that basic instrument was the declaration.

21. The Special Rapporteur recognized that not everyone in the Sixth Committee or the Commission concurred with that assessment. Some felt that the use of the term declaration to identify a legal act would be restrictive inasmuch as other unilateral acts could be left outside the scope of the present study or regulatory provisions. But, in his view, that need not be the case, because the declaration as a formal act was unique, while material acts, i.e. the content of such acts, could be diverse. For example, a waiver, a protest, a recognition or a promise was an act with its own separate characteristics, which would make the establishment of rules governing all such acts a complex task. He noted, however, that consideration of the material act would be important when the rules governing its effects would be elaborated. Rules that were consistent with the various effects of each of those acts would probably need to be formulated. However, in his view, and

for the time being, the Commission should focus on the declaration as a formal act creating legal norms. The rules applicable to a declaration, as a formal act whereby a State waived a right or a claim, recognized a situation, made a protest or promised to act in a particular way, could be homogeneous, but the rules governing the effects would have to correspond to the category of the material act - a waiver, a recognition, a protest or a promise.

22. The Special Rapporteur went on to examine some questions raised in the Sixth Committee about the relationship between unilateral acts and acts pertaining to international responsibility, international organizations, estoppel, reservations and interpretative declarations.

23. As regards acts related to international responsibility, the Special Rapporteur distinguished between the autonomous primary act, which could give rise to international obligations and fell within the purview of this topic and a secondary act or act by a State that failed to fulfil a previously incurred unilateral obligation thus forming the basis for the State's international responsibility. This secondary act was not autonomous in the same way as the primary act, despite being unilateral in formal terms, since it related to a pre-existing obligation. As a result, in the Special Rapporteur’s view, it did not fall within the purview of the topic.

24. As regards unilateral acts formulated by international organizations, the Special Rapporteur pointed out that they were not included in the Commission’s mandate which was confined to unilateral acts by States. However, the topic should also cover unilateral acts formulated by States and addressed to international organizations as subjects of international law.

25. The Special Rapporteur further pointed out that although acts relating to estoppel could be categorized as unilateral acts in formal terms, they did not of themselves produce effects. They depended on the reaction of other States and the damage caused by a State's primary act. There was certainly a close connection between the two. A State could carry out or formulate a unilateral act that could trigger the invocation of estoppel by another State that felt it was affected. Yet it was a different kind of act because, unlike a non-treaty-based promise, a waiver, a protest or a recognition, it did not of itself produce effects, i.e. it did not come into existence solely through its formulation but depended on the reaction of the other State and the damage it caused, conditions that jurists viewed as a prerequisite for the invocation of estoppel in a proceeding.

26. Concerning the relationship between unilateral acts and reservations and interpretative declarations, the Special Rapporteur distinguished two questions: first, the unilateral character of the act whereby a reservation or interpretative declaration was formulated; and secondly, whether the type of unilateral act with which the Commission was concerned could give rise to reservations or interpretative declarations. The latter question he proposed to take it up at the next session. As to the former question, he was of the view that the act whereby a reservation or interpretative declaration was formulated was plainly a non-autonomous unilateral act by virtue of its relationship with a pre-existing treaty. It was therefore covered by existing rules, as reflected in the 1969 Vienna Convention on the Law of Treaties and fell outside the purview of this topic.

27. Referring to the draft articles contained in his second report, the Special Rapporteur pointed out that, in their present form, they merely intended to serve as a basis for discussion.

28. Article 1, on the scope of the draft was based largely on the 1969 Vienna Convention on the Law of Treaties. It spoke of legal acts, thereby excluding political acts, a difficult distinction the Commission had already discussed. The Special Rapporteur said that he had tried in the commentary to reflect a question that had arisen in the context of the United Nations Conference on Disarmament, namely whether unilateral declarations formulated by nuclear-weapon States and known as negative security guarantees were political declarations or unilateral legal acts. Such declarations were unilateral and of joint origin because, although formulated by means of separate acts, they were virtually identical. They were also formulated well-nigh simultaneously and, in some cases, in the same context, i.e. at the Conference on Disarmament.

29. Non-nuclear-weapons States maintained that they were political declarations and should be reflected in a legal document to be really effective, since, in their view, the undertakings of the nuclear-weapons States should proceed from multilateral negotiations in the framework of the Conference. The Special Rapporteur was inclined to consider that they were genuine declarations or acts that were legally binding for the States concerned. The fact that they were vague and subject to conditions did not necessarily mean, in his view that they were not legal. They were, however, inadequate in terms of the expectations of non-nuclear-weapon States.

30. However, the Special Rapporteur also thought that, if they were legal, such declarations were not unequivocally autonomous inasmuch as they could be linked to existing treaties concerning nuclear-weapon-free zones. For example, Protocol II to the Treaty of Tlatelolco of 14 February 1967 specified the guarantees to be provided by nuclear Powers to the effect that they would not use or threaten to use nuclear weapons against States parties to the Treaty. Protocol II to the Rarotonga Treaty of 6 August 1985 contained a similar clause.

31. Article 1 also stated that the acts concerned had international legal effects, a question that had already been thoroughly debated. Unilateral acts of internal scope would not be covered by the draft.

32. Article 2, which defined a unilateral legal act, was closely related to article 1. The Special Rapporteur had included the word “declaration” in brackets because he did not wish to impose it, although he was personally convinced that it constituted the act to be regulated. It was an issue for the Commission to decide.

33. Article 3, concerning the capacity of States to formulate unilateral legal acts, was based to a large extent on the wording of article 6 of the 1969 Vienna Convention on the Law of Treaties and the discussion preceding its adoption, an article which applied only to States and not to federal entities. Although recent developments in international action by decentralized federal States might favour its extension to federal entities, it was unlikely that such entities could formulate declarations or unilateral acts that would entail commitments at that level. Only the State, as an administrative political unit, was capable of incurring international unilateral obligations.

34. Article 4 was based on article 7 of the 1969 Vienna Convention. The Special Rapporteur indicated that a unilateral act, like all legal acts by a State, had to be formulated by a body possessing authority to act on behalf of the State in the sphere of international law. In other words, for a unilateral act to produce international legal effects, it would have to be formulated by a body possessing the authority to engage the State in its international relations. As the 1969 Vienna Convention indicated, such representatives of States were persons who, in virtue of their functions or other circumstances, were empowered to engage the State at the international level. The phrase “in virtue of their functions” must be understood as relating to representatives who were deemed by the doctrine, international

practice and jurisprudence to be empowered to act on behalf of the State with no need for additional formalities such as full powers. Such representatives were Heads of State, Heads of Government and ministers for foreign affairs. International courts had enshrined the principle, for example, in the Legal Status of Eastern Greenland case and, more recently, in the Gulf of Maine case.

35. The Special Rapporteur pointed out that the intention of the State that formulated the act and the good faith that should apply in international relations made it possible to assume that other representatives could also engage the State without the need for special powers, and that was clearly shown in international practice. He was referring to documents signed by ministers of education, health, labour and trade following official meetings which established programmes of cooperation and assistance or even more specific commitments. Such acts were often called agreements, memoranda of understanding, communiqués or declarations, but whatever the name they had legal value and could produce specific legal effects by establishing rights and obligations. Representatives of States were usually officials in the strict sense of the term, but they could also be individuals with a different status, persons with implicit powers granted to represent the State in a specific field of international relations, such as special commissioners, advisers and special ambassadors. For example, in respect of the management or use of common spaces, particularly among neighbouring States, ministers of the environment and public works and commissioners for border zones could make commitments on behalf of the State through the formulation of autonomous unilateral acts.

36. In the view of the Special Rapporteur, although the above considerations were important, given the need for stability and confidence in international relations some restrictions should be applied. Certain categories of individuals, such as technicians, should not be empowered to engage the State internationally. The issue had been examined not only in the doctrine but also by international courts, including the International Court of Justice in its relatively recent decision in the Gulf of Maine case.

37. One important question, in the view of the Special Rapporteur, was whether all declarations and legal acts produced effects at the time they were formulated, regardless of the subject matter and the internal rules of the State, or had to be ratified, as was the case with treaties. A specific

example was the formulation by a State's representative of a legal act on the delimitation or establishment of borders. The internal rules governing the expression of consent might make ratification necessary and even indispensable in such matters as territorial space and, in particular, the establishment of borders. In his opinion, not all unilateral acts could have immediate effect from the time of formulation, inasmuch as the rules applicable to expression of consent in treaty matters applied equally in respect of the formulation of unilateral acts. According to the 1969 Vienna Convention, heads of diplomatic missions could enter into commitments with the State to which they were accredited, as could heads of permanent missions to international organizations or delegations to international conferences, who had the capacity to act on behalf of the State and make commitments on its behalf. They were equally able to formulate unilateral acts.

38. The Special Rapporteur had doubts on whether it was necessary to include a provision on full powers, as in the Vienna Convention. His initial feeling was that it was not indispensable. For heads of diplomatic missions, heads of permanent missions to organizations and heads of delegations to international conferences full powers were implicit in the letters of accreditation which authorized them to act vis-à-vis the State, international organization or international conference to which they were accredited. Those powers were, of course, limited to a specific sphere of activities in respect of that State, organization or conference.

39. Article 5, on subsequent confirmation of a unilateral act formulated without authorization, was based on article 8 of the 1969 Vienna Convention and was basically concerned with the implicit or explicit confirmation of a unilateral act by a State. The Vienna Convention allowed for both implicit and explicit confirmation. During the consideration of the draft article at the Vienna Conference, a broad formulation had been adopted. Venezuela had made a proposal that had not been taken up but which now appeared pertinent in respect of autonomous unilateral acts: that such acts should only be confirmed explicitly. In the Special Rapporteur’s view, that seemed appropriate in view of the specific nature of such unilateral acts and the restrictive approach that should be applied to them.

40. Article 6 dealt with the expression of consent. The Special Rapporteur stressed that in order for a legal act to be valid under international law, it must be attributable to a State, the representative of that State must have

the capacity to engage it at the international level, the act must be the expression of its will and free of irregularities and it must be formulated in the proper manner. It had to have a lawful object and must not derogate from prior obligations. Article 6 referred specifically to obligations: the State must not be able to acquire rights through its acts and, conversely, it must not be able to place obligations on other States without their consent. Intention was fundamental to the interpretation of the act. Under article 31 of the Vienna Convention, the context for the interpretation of an act comprised, in addition to the text, its preamble and annexes, a whole series of acts carried out by the State before, during and after the formulation of the act.

41. Article 7 brought together the causes of invalidity of a unilateral act, which were nearly identical to those applied in the law of treaties, although they had been ordered somewhat differently for ease of consultation. Subparagraph 1 referred to an error of fact or a situation which was assumed by the State to exist at the time when the act was formulated formed an essential basis of its consent. Subparagraph 2 stated that invalidity could be invoked if the State had been induced to formulate an act by the fraudulent conduct of another State. Other causes mentioned for invoking invalidity were corruption of a State's representative, acts or threats directed against a representative and conflict of the unilateral act with a peremptory norm of international law.

42. The Special Rapporteur indicated that for next year, he proposed to address extremely important and complex issues such as the observance, application and interpretation of unilateral acts and whether a State could amend, revoke or suspend the application of one unilateral act by formulating another.

2. Summary of the debate

43. Members generally welcomed the second report of the Special Rapporteur, and appreciated the wide ranging number of issues therein dealt with which clearly pinpointed the main questions needing to be addressed. They also underscored the usefulness of the topic and the need for its codification and progressive development. Unilateral acts, it was said, were the most common means of conducting day-to-day diplomacy and there was uncertainty, both in the literature and in practice, regarding the legal regime applicable to them. The great variety of such acts was also stressed. As it was the function of

international law to ensure stability and predictability in international relations, some regime was needed in order to prevent unilateral from becoming a source of disputes or conflicts. In one view, however, the topic was not yet ripe for codification or progressive development.

44. As regards the general scope of the topic, remarks were made in connection with acts related to international responsibility, unilateral acts of international organizations and estoppel.

45. In connection with unilateral acts which gave rise to international responsibility, members generally agreed with the Special Rapporteur that such acts fell outside the topic's preview since they were covered by the State responsibility topic. In one view however, the Commission might wish to consider cases in which a unilateral act might produce legal effects towards one State while at the same time being an infringement of an obligation towards another State. One example would be premature recognition by one State which was only "in the making" and would produce an infringement of an obligation towards the sovereign State.

46. As regards unilateral acts of international organizations, it was generally agreed that, at this stage, they should not be included in the topic's scope, not so much for theoretical reasons but because their consideration would introduce a further layer of complexity in an already sufficiently complex matter. The special character and purpose of such unilateral acts might require that separate rules should be applicable to them. They could therefore be addressed separately, at a later stage, after the conclusion of the consideration of the unilateral acts of States. This, of course, did not mean that unilateral acts of States addressed to international organizations, or unilateral acts of States formulated in the framework of an international organization or of an international conference should not be considered under the present topic.

47. Divergent views were expressed concerning the advisability of including estoppel within the topic's scope. In support of the Special Rapporteur's position that it should not be included a view was expressed that the characteristic element of estoppel was not the conduct of the State in question but the reliance of another State on that conduct. While a unilateral act of the State produced a positive result with a clear intention on the part of the State to be bound by it, the unilateral statement creating the estoppel produced a negative result which was basically not intended by

the author, although the other interested party could seize the opportunity to benefit from it by using the plea of estoppel. Consequently, one aspect of the definition of an autonomous unilateral act of a State, namely the intention of the State to produce international legal effects, was missing in the unilateral statements that gave raise to the plea of estoppel. In estoppel there was no creation of rights or obligations; rather, it became impossible to avail oneself of already existing rights and obligations in the context of a given proceeding.

48. Other members, however, stressed the need for considering estoppel within the topic's scope. In their view, it was not possible to exclude it on the pretext that acts giving rise to an estoppel were not autonomous unilateral acts. Although in common law countries, estoppel belonged in procedural law, in international law it could not simply be reduced to a procedural principle and be left out of the draft. In international law, estoppel was one of the consequences of the principle of good faith, a principle which governs the rules applicable to the legal effects of unilateral acts. While all cases of estoppel did not arise from positive unilateral acts, some of them did and consequently, such acts deserved to be studied. The task of the Commission was to rationalize and make sense of two different legal traditions which had converged in present day international law: the romanist doctrine of the binding effect of unilateral promises and the common law tradition which did not recognize such binding effect but which, in order to fill the gap, had recourse to the doctrine of estoppel as a corollary of the principle of good faith.

49. In connection with the approach to the topic, general remarks were made particularly as regards the parallelism between the proposed draft articles and the Vienna Convention on the Law of Treaties, as well as on the need for further taking into account State practice in the field of unilateral acts.

50. Several members were of the view that the proposed draft articles followed too closely the articles of the 1969 Vienna Convention on the Law of Treaties. They did not believe that a provision included in the Vienna Convention could automatically be transferred mutatis mutandis to the draft articles on unilateral acts, because of the different nature of these acts as against treaties. Many rules contained in the Vienna Convention owed their existence to the meeting of wills of States parties to a treaty, an element which was absent from unilateral acts.

51. Other members disagreed. They thought that the 1969 Vienna Convention on the Law of Treaties was a very helpful guideline. In one view, the Special Rapporteur's report had not followed it close enough. In another view, the Special Rapporteur should take into account not only the 1969 Vienna Convention on the Law of Treaties but also the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It was also said that with the exception of the problem of the invalidity of unilateral legal acts, many procedural and other relevant matters were not addressed in the present draft. For these cases, it would seem necessary to follow the provisions of the law of treaties and consider such matters as rules of interpretation, modification, suspension, termination, etc.

52. Several members maintained that the Special Rapporteur's report lacked sufficient support in State practice. With the exception of some cases from the International Court of Justice, it did not buttress its proposed draft articles with instances or examples taken from the practice of States. The suggestion was made that the Secretariat could produce a representative compilation of State practice grouped under the various categories of unilateral acts in order to help the Special Rapporteur fill that lacuna.

53. As regards article 1 on the scope of the draft articles, there was an acknowledgement that the Special Rapporteur had sought to restrict the scope of the topic to unilateral acts of a strictly juridical nature as opposed to acts of a political nature. However, the formulation he provided had some shortcomings due partly to drafting reasons and partly to the inherent difficulty in distinguishing between legal and political acts.

54. Concerning the drafting aspects of the provision, the suggestion was made that the legal nature of the act arose not so much from the fact that they produce legal effects but from the fact that the State formulating it purported to produce legal effects and that the drafting should be amended accordingly. Another remark was that the word "legal" rather than applying to the act itself should refer to the effects that it purported to produce. It was also suggested that perhaps the word effects could be clarified by speaking of "rights and obligations".

55. In the view of some members, the article, as presently drafted, would also cover unilateral acts which could help in the creation of custom which was an aspect not included within the Commission's mandate on the topic.

Other members thought that this concern was unjustified. It was really impossible to know whether a unilateral act would lead to the creation of a new rule of customary international law or whether it would have some effect on existing customary international law. Consequently, it was important to deal with unilateral acts irrespective of whether they had any effect on customary law.

56. As regards the difficulties inherent in distinguishing a legal act from a political act, the view was expressed that the true criterion of distinction was the intention of their authors. While the Special Rapporteur had indicated this criterion in the commentary to the draft article, it had not found its way into the text itself of the provision.

57. The point was also made that, while intention was indeed the key to distinguish between legal and political acts, unfortunately it could not always be discerned clearly in every instance. A case in point were the negative security guarantees to non-nuclear States formulated by nuclear powers in the context of the Conference on Disarmament. Doubts had been expressed about the legal or political nature of such declarations. Some members pointed out that, in their view, the intention of the nuclear powers in formulating such guarantees was to create legal effects even if non-nuclear powers members of the Conference tended to consider them as political and not legal statements. This question was connected with other important issues related to unilateral acts, such as the role of the addressee vis-à-vis the creation of the effects intended by the act, whether the addressee could reject the legal effect intended to be in its favour as well as the question of the foundation of the binding nature of a unilateral act.

58. Article 2 which contains a definition of unilateral acts of States, was thoroughly examined by members of the Commission and several of its constituent elements were commented upon. Some members expressed their strong reservations concerning the inclusion of the bracketed word “declaration” in the definition and their opposition to substituting the word “declaration” for the word “act”. In their view, the form and the contents of unilateral acts were inseparable and the formal approach to the topic consisting in dealing only with the “instrumentum” and not the “negotium” of the act was unconvincing. In their view, the goal of the codification of the topic should be to bring the diversity of unilateral acts into the unity of a few rules applicable to all of them.

59. Several members were also opposed to the categorization of the acts covered by the definition of article 2 as “autonomous”. In their view, the Special Rapporteur had too restricted a concept of the scope of the topic which could not be reduced to acts which, by themselves, created international legal effects without any relation to a pre-existing treaty or customary norm. If this were to be the case, these members argued, the topic would lose a great part of its usefulness and interest. In their view, while acts which were governed by a set of specific rules, such as reservations to treaties, could be excluded from the scope of the topic, acts which were carried out in implementation of or as to particularization of existing conventional or customary norms should not. Other members felt that the introduction of the notion of autonomy, as understood by the Special Rapporteur, in the definition of a unilateral act, served a useful purpose in order to delimit an otherwise extremely vast field of study.

60. Concerning the word “unequivocal” referred to the expression of will of the State in the definition proposed by the Special Rapporteur, the remark was made that it should rather refer to the intention of the State. It was also suggested that such word should be deleted since it did not adequately reflect the practice of States in the formulation of unilateral acts and in the conduct of their foreign policy.

61. Members of the Commission were of the view that the requirement that the unilateral act should be formulated “publicly”, as contained in the definition proposed by the Special Rapporteur, was inappropriate. In this view, the real requirement was that the act, in order to produce effects, should be known by its addressee.

62. A view was expressed to the effect that the possibility of joint or collective unilateral acts, which was recently contemplated in the definition proposed by the Special Rapporteur should be the subject of some explanation in the commentary to the provision, in particular the distinguishing features, if any, between a joint unilateral act and a treaty.

63. As regards the last component of the definition proposed by the Special Rapporteur, namely “with no intention to acquire legal obligations on the international plane”, the remark was made that through unilateral acts, rights could also be acquired or at least maintained. The proposed article seemed to have in mind only the case of promise, but other unilateral acts, such as protest or even recognition were susceptible of creating or

maintaining rights. Consequently, it would be more appropriate to speak of the creation of legal effects. It was noted, in this connection, that "effects" was the word used in article 1. Furthermore, it was suggested that the most appropriate verb to use in connection with obligations was not "to acquire", but rather "to assume" or "to incur".

64. The following additional suggestions were made: that article 2 should speak of unilateral acts "in whatever form"; that paragraph 2 should be followed by another article stating that this article was without prejudice to other unilateral acts not covered by the scope of the draft articles (along the lines of article 3 of the 1969 Vienna Convention); and that articles 1 and 2 could perhaps be merged.

65. Article 3 on capacity of a State to formulate unilateral acts was generally considered acceptable, subject to some drafting suggestions such as the deletion of the adjective "legal" concerning unilateral acts and the addition of the words "for the purposes of the present draft articles" at the beginning of the article.

66. As regards article 4 on representatives of a State for formulating unilateral acts, some members felt that it followed too closely article 7 of the Vienna Convention on the Law of Treaties and that its contents were not sufficiently supported by State practice. Other members however, felt that this was an instance in which the analogy with the Vienna Convention was fully justified. The point was made in this connection that the range of persons formulating unilateral acts tended in practice to be wider than that of persons empowered to conclude treaties but that point was adequately covered by paragraph 2 of the proposed article. While in one view, paragraphs 2 and 3 could be deleted since Heads of State, Heads of governments and Ministers for Foreign Affairs were the only State officials with the capacity to commit the State internationally without having to produce full powers. Another view felt that such persons were often not the most appropriate to commit the State unilaterally; they should perform a role of representation and leave the definition of the content of their declarations to other officials.

67. The view was also expressed, as regards paragraph 3 of the draft article, that it was doubtful that heads of diplomatic missions or the representatives accredited by a State to an international conference or to an

international organization had the power to bind a State unilaterally. Practice showed that this power was not normally included in the full powers of such persons.

68. Article 5 on the subsequent confirmation of a unilateral act formulated without authorization was also the subject of some remarks. In one view, the Special Rapporteur's report did not reflect enough State practice to support the formulation of the article. Another view held that express confirmation was not necessarily required and that, often, tacit consent was generally considered to suffice. It was also pointed out by some members that the reference of the draft article to article 7 on grounds for invalidity was not appropriate, particularly since some of the grounds therein contemplated, such as paragraph 6, were not susceptible of later confirmation. In this view, the reference should rather be to article 4 which dealt with the representatives of a State for the purpose of formulating unilateral acts. As regards the French version of the article, a suggestion was made to replace the expression "sans autorisation" by the words "sans habilitation".

69. Article 6 on the expression of consent was found acceptable by a number of members. Some other members found that the report of the Special Rapporteur did not reflect enough State practice to justify its inclusion. They thought the draft article could be deleted without prejudice to the draft as a whole. Some suggestions were made concerning its wording. The words "consent of a State to acquire an obligation" and "representative" were considered, in one view, to be too closely modelled on the Law of Treaties. It was also suggested that the word "acquire" might be replaced by the words "incur" or "assume". The words "unvitiated declarations" were also questioned. One view pointed out that two additional issues should be dealt with in the context of article 6. One issue was the role of silence in the possible assumption of international obligations, a role which had been underscored by a number of judicial and arbitral cases. Another issue was the legal effect of the individual withdrawal by one of the authors from a previous joint statement.

70. Speaking generally on article 7 dealing with invalidity of unilateral acts, one view felt that it was too closely modelled on the relevant provision of the 1969 Vienna Convention on the Law of Treaties. On the other hand, some other members felt that it did not follow close enough articles 48 to 53 of that Convention. Another view held that it was too early to assess the full

implications of the draft article since this provision should be evaluated with utmost care in the light of the full context of the draft articles.

71. On paragraph 1, dealing with error of fact, a view was expressed to the effect that it could not be applied in the same manner as in the Law of Treaties. In this view, for a State committing an error when formulating a declaration it should be easier to be able to correct that error than it was for a State making an error at the time of adopting a treaty. On paragraph 2, concerning fraud, and in particular on the comment by the Special Rapporteur that fraud could be committed by omission, the same view held that this might encroach on certain accepted ways whereby States led their foreign policy and convinced other States to join in that policy.

72. Referring to paragraph 3 dealing with the corruption of the representative of a State, the view was held that this was an interesting addition to existing international law, in which the influence of Latin America could be detected. It was a necessary provision, but it needed to be explained in greater detail in the article itself and in the commentary.

73. General support was expressed for paragraph 6 on acts conflicting with a peremptory norm of international law, although it was felt that the paragraph should follow more closely the corresponding provision of the 1969 Vienna Convention on the Law of Treaties. Attention was also drawn to a discrepancy in the French version which translated the English word "formulation" by the word "accomplishment". It was also suggested that the Special Rapporteur should take into account any reformulation of the terms "peremptory norm" in the context of the draft articles on State responsibility.

74. Different views were expressed as to whether a unilateral act would be valid if formulated in contradiction with a norm of general international law. In the view of some members, such act would be invalid and such a ground of invalidity should be included in article 7. In the view of some other members, a unilateral act could depart from customary international law, but such an act could not produce legal effects if it was not accepted by the addressee States. The problem was one of legal effects rather than invalidity. However, even the view that considered unilateral acts conflicting with any norm of general international law as invalid, maintained that unilateral acts designed to bring about a change in existing

international law - President Truman's declaration on the continental shelf in 1946 being one example - represented a separate problem that the Special Rapporteur ought perhaps to consider.

75. As regards paragraph 7 on violation of a norm of fundamental importance to the State's domestic law, one view held that it should follow more closely article 46 of the 1969 Vienna Convention on the Law of Treaties. Another view, however, thought that this norm, in the case of unilateral acts, should be more flexible than the one contained in that provision.

76. A suggestion was also made to the effect that article 7 should contain an additional ground of invalidity, namely unilateral acts formulated in violation of a United Nations Security Council resolution adopted under Chapter VII of the Charter, for example an act of recognition adopted in violation of a Security Council resolution which called on members not to recognize a particular entity as a State.

77. Some members commented on the paragraphs that the Special Rapporteur, in Chapter VIII of his report, devoted to reservations and conditions in relation to unilateral acts and to the non-existence of unilateral acts.

78. The Special Rapporteur in his report seemed to contemplate the possibility that a State, when formulating a unilateral act, might also formulate a reservation. Some members felt that to introduce the notion of reservation in connection with unilateral acts was a source of great confusion: a unilateral act could not be subject to reservations on the part of the State author of the act. It was clear that the addressee of the act could accept it subject to certain conditions. But although this acceptance and these conditions tended to bilateralize the relation thus created, it was still better not to apply the term "reservations" in connection with unilateral acts. This, for rigorous terminological reasons, and in order to avoid confusions.

79. On the other hand, the same members stressed that a unilateral act could perfectly be subject to certain conditions by the author of the act without thereby placing the act in the field of the Law of Treaties.

80. As regards the concept of "inexistence of a unilateral act" referred to by the Special Rapporteur, a view was expressed that such a concept should be better explained lest it might lead to a confusion with the concept of illegality of an act.

81. The Special Rapporteur, summing up the debate, recalled that the topic under discussion already had a certain history, the Commission having adopted a decision in 1997 setting up a working group which had produced some broad guidelines, and the first report on the basic aspects of unilateral acts of States, i.e. on their definition and constituent elements, having been published in 1998. This history, however, was not always taken into account by some members.

82. Issues which seemed to have been settled at the 1998 session had been brought back for discussion, in particular that concerning the relationship between a legal unilateral act and the formation of custom. It was precisely in that context that the question of an act's autonomy arose. For the Special Rapporteur that autonomy had two aspects: autonomy with regard to rules, and existential autonomy, meaning that an act was carried out whatever the reaction of its addressee. In truth, no act was really autonomous, in that it always came within the realm of law. On the other hand, it was evident that a unilateral act became "bilateralized", so to speak, once it was recognized by another State. That did not prevent it from existing as soon as it was formulated, independently of such recognition.

83. The 1969 Vienna Convention on the Law of Treaties constituted a very important point of reference for the work on unilateral acts. The 1986 Convention, on the other hand, was a by-product of the former.

84. In this connection it was worth noting that the ways of expressing consent and the grounds for invalidity contemplated in the 1969 Vienna Convention seemed to be fully applicable to unilateral acts of States. One member had envisaged another cause of invalidity, namely the conflict between a unilateral act and binding decisions of the Security Council. It was an interesting and constructive idea worthy of further examination.

85. One member had referred to a situation involving silence and assent on the part of the addressee State. In the Special Rapporteur's view, silence was not strictly a legal act, although it produced legal effects. The element of intent was missing. A great deal of jurisprudence existed on the matter. It was an issue that would require further work aimed at excluding from the scope of study everything that did not fall precisely within the definition given at the beginning.

86. Another member had spoken of the difference that existed between a legal act and a political act. He seemed to believe that any act was political and

that certain political acts were legal. The classic example concerned the negative guarantees given by the nuclear powers to non-nuclear-weapons States. The topic was vast. Even its delimitation was difficult, as it was impossible, without interpreting the author's intentions, to draw a distinction between a legal act and a political act.

87. For some members the definition of a unilateral act given in article 2 was too restrictive because it stated simply that a unilateral act was formulated "with the intention of acquiring international legal obligations". The Special Rapporteur wondered whether one could maintain, for example, that a blockage imposed by State A on State B established obligations for State C? A declaration of neutrality posed a similar problem: it only had effects for other States if they confirmed it, either by their conduct or through a formal act. The Special Rapporteur had already advised against referring in the draft articles to acts by which a State incurred obligations on behalf of a third party State, which were the concern of conventional law.

88. Several drafting proposals had been made. Some members had suggested combining articles 1 and 2. There was no doubt that the two provisions, one concerned with the scope of the articles and the other with the definition of unilateral legal acts of States, were, of necessity, complementary. The Special Rapporteur preferred to keep the two provisions separate, and felt that in any event the most important consideration was to maintain the logical connection linking one to the other.

89. A proposal had also been made to include in the draft a provision similar to article 3 of the Vienna Convention of 1969, referring to unilateral acts other than those covered by the draft articles. In the Special Rapporteur's view, such a provision was understandable in the Vienna Convention, which was concerned not with conventional law in general but with written treaties between States, and thus had to allow for conventional acts with which it was not specifically concerned. In the present case, however, the definition given in article 1 covered all unilateral acts having legal effects with the exception of acts of international organizations.

90. Questions had also been raised about the notions of publicity and notoriety. The Special Rapporteur regarded the two terms as virtually synonymous, although one could speak of notoriety in relation to a statement erga omnes. Publicity had to be understood in connection with the State to

which the act in question was addressed, which must be aware of the act in order for it to produce effects. The publicity for an act should thus be regarded as one of its constituent elements.

91. As regards the use of the term “international community” in article 2, the Special Rapporteur said that international life was evolving towards the establishment of an international society, a phenomenon he regarded as inevitable. As evidence, there were the extensive areas of common interest which had emerged, for example human rights or the environment and which no longer came under exclusive national jurisdiction. The issue was a sociological one that certainly required further consideration, and whose importance was highlighted by the growing influence of multilateralism in the modern world.

92. In conclusion, the Special Rapporteur pointed out that there was a need to set up a working group that would define unilateral acts of States and clarify their constituent elements. There was also a need to become better informed about the practice of States and how they viewed, received and responded to unilateral acts. The working group could have, as one of its main tasks, the drafting of a questionnaire to be sent to States to inquire about their practice regarding unilateral acts.

3. Establishment of a Working Group

(See A/CN.4/L.585/Add.1)
