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Summary record of the 2629th meeting

Topic:
Unilateral acts of States

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the same category: a head of State in office was bound by his statements. Having served as Philippine ambassador to Canada, he distinctly remembered the problem brought about by General de Gaulle's famous cry, *Vive le Québec libre!*[14] That, too, had been a statement attributed to a head of State in office. Until the matter reached arbitration or judicial decision, however, intention could not be determined because the statement could always be denied.

37. The distinction between political act and legal act was vague. An act was considered to be political as long as it remained within the territory of a particular State, but it became legal once it affected other States. In the modern-day world, however, any act had repercussions in other States. The definition of the national territory of a particular State had once posed a problem, as it had affected a portion of another State and it was difficult to know whether the issue was political or legal.

38. He reserved the right to speak later on other aspects of unilateral acts of States.

39. Mr. KUSUMA-ATMADJA said the Special Rapporteur had clearly taken account of the comments made by the members of the Commission when he had prepared his third report, which was much clearer on certain subjects.

40. One of the unilateral acts of States that had been mentioned in the second report[15] related to declarations that some countries used when reservations were precluded under certain conventions. As far back as 1960, an article by Anand[16] had made it clear that such declarations should be interpreted as amounting to reservations. In the third report, a proclamation had been cited as one example of a unilateral act having legal effect. The Truman Proclamation[17] had been given as an example in paragraph 164. At that time, there had been a readiness among other States to follow that example because technological progress had made it possible to extend the exploration and exploitation of resources on the seabed. A unilateral act had thus become the basis for the progressive development of international law.

41. There was another example of a unilateral act which, at the time, had been contrary to international law. He was referring to the Indonesian declaration of independence of 17 August 1945. Japan had then occupied Indonesia and listening to news from abroad had been prohibited. Despite that measure, the news had come through that a ceasefire was to be signed by the Japanese forces on 16 August 1945. Japan had arranged to grant independence to Indonesia at a later date and a draft constitution had even been drawn up, but it would have meant that the Republic of Indonesia had been created by a foreign Power and that was unacceptable. The revolutionary youth had forced President Sukarno to declare independence even before a peace treaty had been concluded. The demoralized Japanese forces had put up no resistance to the partisans of independence, who had disarmed them and been able to continue the struggle. That was a unilateral act which had been illegal at the time it had been committed, but had been motivated by a clear intent. It was not true that a unilateral act had to be legal to have a legal effect. Everything depended on the way in which the underlying intention was realized. Sometimes, an act which had been illegal at the outset could be justified if the force of the people was behind it. President Sukarno had explained his decision by saying that an opportunity had arisen that must not be missed. Indonesia had subsequently normalized its relations with its neighbours by concluding bilateral treaties on the seabed and the subsoil, thereby adding an economic aspect to the political act of declaring independence.

42. The CHAIRMAN said the Special Rapporteur had informed him that he wished to hold consultations in the framework of a working group that should be established at the current time.

43. Mr. RODRÍGUEZ CEDENO (Special Rapporteur) announced that the Working Group would be composed of Mr. Al-Baharna, Mr. Baena Soares, Mr. Galicki, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kateka, Mr. Pambou-Tchivounda and Mr. Sepúlveda, but that all members were welcome to participate in its work.

The meeting rose at 1.05 p.m.

2629th MEETING

Tuesday, 30 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Unilateral acts of States (*continued*) (A/CN.4/504, sect. C, A/CN.4/505,[1] A/CN.4/511[2])

[Agenda item 7]

[14] See C. Rousseau, "Chronique des faits internationaux", RGDIP (Paris), vol. 72, No. 1 (January–March 1968), pp. 164 et seq.

[15] See 2624th meeting, footnote 4.

[16] R. P. Anand, "Reservations to multilateral conventions", *Indian Journal of International Law*, vol. I, No. 1 (July 1960), p. 84.

[17] Proclamation on the "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf" of 28 September 1945 (M. M. Whiteman, *Digest of International Law*, vol. 4 (Washington, D.C., United States Government Printing Office, 1965), pp. 756–757).

[1] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

[2] Ibid.

THIRD REPORT OF THE SPECIAL RAPPORTEUR[3] (*continued*)

1. Mr. LUKASHUK congratulated the Special Rapporteur on achieving progress in fulfilling an extremely difficult task. The third report (A/CN.4/505) revealed, however, that other difficulties lay ahead.

2. The draft articles did not adequately reflect the link between unilateral acts and international law. Referring to the judgment of ICJ in the *Nuclear Tests* cases, he said that the principle that the binding force of unilateral acts was determined by international law, and specifically, by the principle of good faith, had to be incorporated in a separate article.

3. Unilateral acts had legal effects in accordance with international law, and that idea must also find expression in the draft. Without making a formal proposal, he would suggest that the phrase "in accordance with international law" might be inserted in article 1, after the words "producing legal effects".

4. The relationship between unilateral acts and peremptory norms of international law was important. Unlike the Special Rapporteur, he thought that a unilateral act that conflicted with a peremptory norm was in breach thereof. Only by mutual accord, and only in their interrelations, could States depart from such norms: unilateral departure was prohibited. The Special Rapporteur pointed to the existence of unilateral acts that had the aim of modifying peremptory norms, but they had no legal force. Such acts—offers, promises—acquired legal significance only when accepted by other States. The fact that States could make proposals to modify peremptory norms was illustrated by recent, highly unilateral interpretations of the principle of non-use of force.

5. A distinction must be drawn between unilateral acts that had legal effects immediately upon their formulation and irrespective of the action taken by other States, and unilateral acts that had legal effects only upon their acceptance by other States. Not all acts that put into effect the rules of law required the acceptance of other States—within the limits of the law, States could unilaterally realize their own rights.

6. The Special Rapporteur had been able to pinpoint the main issues that needed to be resolved at the initial stage of work, but the whole spectrum of unilateral acts could not be covered in general rules. He should identify those unilateral acts that deserved study and then determine the legal characteristics of each. An analysis of doctrine and State practice revealed that in most cases, promises, protests, recognition and renunciation were considered to be unilateral acts. It was not an exhaustive listing, but it could serve as a starting point.

7. Unilateral acts could, it seemed to him, be divided into a number of categories. First there were "pure" unilateral acts, those that truly implemented international law and required no reaction from other States. Then there were acts whereby States took on obligations. They were often called promises, although the term was a misnomer as it referred to moral, not legal, imperatives. When recognized by other States, such acts created a form of agreement and, as such, could give rise for other States not only to rights, but also obligations. The classic example of such acts was Egypt's declaration in 1957 concerning the Suez Canal regime.[4] Finally, there were acts corresponding to a State's position on a specific situation or fact—recognition, renunciation, protest—which were also purely unilateral in that they required no recognition by other States.

8. He welcomed the reference in new draft article 1 to the "intention of" producing legal effects, because in some circumstances legal effects were produced indirectly, after the recognition of a unilateral act by other States. On the other hand, the deletion of the word "autonomous", included in previous definitions of unilateral acts (former article 2), created certain difficulties. It would mean that unilateral acts included acts performed in connection with treaties. In view of the insistence of some members of the Commission on deleting the word, however, a compromise might be found by inserting the word "unilaterally" after "intention of". It would be construed in that context to refer to the autonomous nature of the act. He was uncomfortable with the use of the word "formulated", at least in the Russian version, as on the whole it described the generation of an act, not the result.

9. The Special Rapporteur rightly drew attention to the fact that States could produce unilateral acts by silent agreement. In modern times, silent agreement played a major role in the development of general international law, including *jus cogens*. In numerous instances the Security Council had adopted resolutions, including those establishing ad hoc international tribunals, in an exercise of powers that were not accorded to it under the Charter of the United Nations—and the States Members of the United Nations had given tacit recognition to those decisions, which had consequently acquired force.

10. As to new draft article 5, subparagraph (*f*), a unilateral act that conflicted with a peremptory norm of international law could not have legal force before it was recognized by another State. The paragraph might be interpreted as legalizing the breach, not only of customary rules, but also of treaty rules. In article 5, subparagraph (*g*), it should be made clear that a unilateral act was invalid not only if it conflicted with a decision of the Security Council but also, and all the more so, if it went against the Charter of the United Nations. He would like to see the addition, at the end of the subparagraph, of the phrase "and the rulings of international tribunals". Subparagraph (*h*) might be supplemented by wording from the 1969 Vienna Convention concerning conflicts with domestic legislation in the context of the competence of a State to conclude an international treaty. Lastly, the *chapeau* of the article should be amended to make it clear that the State in question was one that had performed a unilateral act.

11. Mr. AL-BAHARNA, referring to paragraph 14 of the third report, said the Special Rapporteur did not seem

[3] For the text of the draft articles contained in his third report, see 2624th meeting, para. 35.

[4] Declaration (with letter of transmittal for the Secretary-General of the United Nations) on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957), United Nations, *Treaty Series*, vol. 265, No. 3281, p. 299).

to doubt the relevance of the topic, but that question did not need to be raised, since the matter had already been decided when the Commission had adopted the topic.[5] In paragraph 17, the Special Rapporteur underlined the relationship of the topic to the 1969 Vienna Convention, but in paragraph 18 pointed to the differences between the law applicable to unilateral acts and the law of treaties. It would be inadvisable to follow closely the Convention, since there were essential differences between treaty law and the law on unilateral acts. In fact, there was no parallelism between the two.

12. In the Sixth Committee, some delegations had expressed doubts that there was even a flexible parallelism, as mentioned in paragraph 22, and had held that the work on unilateral acts should be separated from treaty law. Although the character of a treaty, which required two or more parties, differed from that of a unilateral act, once a unilateral act was validly formulated and recognized as being enforceable, it could become subject to all or some of the legal consequences attributable to a treaty act in accordance with the 1969 Vienna Convention. Accordingly, all or some of the consequences of treaties relating, for example, to validity, capacity, nullity, revocation, reservation, good faith and interpretation could, by analogy, be applicable mutatis mutandis to a unilateral act formulated with the intention of producing legal effects.

13. In the replies from Governments to the questionnaire on unilateral acts requested by the Commission at its preceding session, the United Kingdom's reply, for example, was that inappropriate prominence was being given to the 1969 Vienna Convention and that it was not convinced that the provisions of the Convention could be applied mutatis mutandis to all categories of unilateral acts of States. Georgia had stated that the rules of the Convention could not be applied mutatis mutandis to unilateral acts because of the different character of such acts. The Special Rapporteur should take those views into consideration.

14. With reference to estoppel or preclusion, some representatives in the Sixth Committee had acknowledged the existence of a relationship between estoppel and unilateral acts, while others had denied it because the two were different in nature. The Special Rapporteur was right to affirm that estoppel had no relationship with unilateral acts, and in paragraph 27 of the report pointed to the striking differences between the two, including the fact that the characteristic element of estoppel was not the State's conduct but the reliance of another State on that conduct. The unilateral act was intended to create a legal obligation on the State making it, while estoppel did not create such a relationship on the State using it.

15. The Special Rapporteur indicated the difficulties involved in formulating a proper legal definition of "unilateral acts of States". A number of elements were listed in paragraph 31, all of which already figured in the draft, but the Special Rapporteur had attempted to improve the wording in the light of the discussions in the Sixth Committee and of the written comments provided by Governments. It was noted in paragraph 34 that the intention of the author State was fundamental to the topic, which should be confined to unilateral acts formulated by States with the intention of producing legal effects, thus ruling out all political acts of States or unilateral acts or statements made with political intentions. The Commission should support the Special Rapporteur's position on that point.

16. The Special Rapporteur justified his use of the term "unilateral act" instead of "unilateral declaration" on the basis of the concerns expressed in the Sixth Committee, although in paragraph 40 he concurred that most if not all unilateral acts were formulated in declarations. All the examples cited in paragraphs 37 to 47 provided evidence that unilateral acts were in most cases formulated by means of declarations. In paragraph 41, it was stated that acts formulated by means of oral declarations or by means of written declarations could be seen in practice and the Special Rapporteur acknowledged in paragraph 47 that he had resorted to the term "acts" to satisfy an important body of opinion that considered the term broader and less restrictive.

17. The new definition of unilateral acts was silent about the form in which the act could be expressed; yet such acts had to be embodied in some form or other—they were not committed in a vacuum. While the complexity of establishing a comprehensive definition could not be overlooked, the new definition in article 1 was not a satisfactory solution. He would therefore suggest that the phrase "in the form of a declaration or otherwise in any other acceptable form" be inserted after "formulated by a State", or alternatively, that a second paragraph be added, reading: "A unilateral act of a State, as defined in paragraph 1, may take the form of a declaration or otherwise any other acceptable form." He would also suggest that article 1 should include a provision, perhaps in a separate paragraph, stating that a unilateral act of a State could be formulated orally or in written form.

18. Paragraphs 48 to 59 of the report cited examples based on precedents and State practice in support of the use of the expression "producing legal effects" in new draft article 1. He endorsed the proposed reformulation, for the reasons adduced in paragraph 48. The Special Rapporteur referred frequently to the generally accepted principle that the State could not, by means of a unilateral act, impose obligations on another State or international organization without that entity's consent. Yet many of the cases mentioned were relevant to the regime of treaties, rather than to that of unilateral acts.

19. In the section on the "autonomy" of unilateral acts, the Special Rapporteur dealt with an essential issue: the "characteristic of non-dependence" of such acts, as mentioned in paragraph 60. As stated in paragraph 61, the reason for including the expression "autonomous" in the definition of unilateral acts was to exclude acts linked to other regimes, such as all acts linked to treaty law. He was in favour of including the term, as "autonomy" was an important feature of a unilateral act. He therefore disagreed with the Special Rapporteur's apologetic tone and the sweeping statement in paragraph 69.

20. The term "unequivocal", included in the earlier definition of unilateral acts, was retained in new draft article 1. It was a basic and necessary element, since it was

[5] See *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, para. 248, annex II and addendum 3.

hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions, or how it could be easily and quickly revoked. The question raised in paragraph 71 was whether the unequivocal character of the act must be linked to the expression of will or to the content of the act.

21. "Publicity" was also an essential element of the definition, but the word carried broad connotations that could involve the use of the mass media, whereas what was meant was that the commitment contained in the unilateral act should be known at least to the addressee and to other States concerned. The expression "formulated publicly", used in former article 2 had been changed in the Working Group to "notified or otherwise made known to the State or organization concerned",[6] which seemed acceptable. The new formulation suggested by the Special Rapporteur was "and which is known to that State or international organization", but it required elucidation. The reference to "State or international organization" failed to correspond to the words "one or more States or international organizations" used in the preceding clause, and it created confusion. The entities were cited in the plural in connection with legal effects but in the singular in relation to "publicity". Presumably that was unintentional. The last part of article 1 should therefore be recast to read: "organizations, and which is made known to that State or international organization or to those States or international organizations", or, simply: "and which is made known to them". On the other hand, he saw nothing wrong with the formulation contained in former article 2, which should be left unchanged. Accordingly, the words "is known to that State or international organization" should be replaced by the former wording "is notified or otherwise made known to the State or international organization concerned". Paragraph 131 of the topical summary of the discussion in the Sixth Committee (A/CN.4/504) stated that the latter expression had gained the support of delegations. If that was the case, why change it?

22. He agreed with the suggestion to delete former article 1 (Scope of the present draft articles). New draft article 1 contained the elements of the scope of application from the earlier version. Moreover, the draft did not require the addition of an article based on article 3 of the 1969 Vienna Convention. There did not seem to be any parallel between the two situations. As stated in paragraph 89 of the report, the term "unilateral" was broad enough to cover all expressions of will formulated by a State.

23. New draft article 2 was acceptable and he endorsed paragraph 1 of new draft article 3, since heads of State, heads of Government and ministers for foreign affairs could unquestionably bind their States by means of unilateral acts. In its replies to the Commission's questionnaire, the Government of the Netherlands had added heads of diplomatic missions to those three categories, but he doubted that the head of a diplomatic mission could undertake such an important task without specific authorization.

24. He was reluctant to support new draft article 3, paragraph 2, in its current form, for it was too broad. Surely nobody could investigate the practice and circumstances of each State to decide whether a person who had formulated a unilateral act was authorized to act on behalf of his State. That left the door open for any junior official to formulate a unilateral act that would more than likely be invalidated subsequently. The Commission should restrict the category of persons who could formulate unilateral acts under paragraph 2 to heads of diplomatic missions and other State ministers who had full authorization to do so for specific purposes only. In that way, it could draw the line between the general authority attributed to the three categories of persons in paragraph 1 and more limited authority attributed to the category of persons in paragraph 2.

25. New draft article 4 did not command his support because it was not sufficiently restrictive. If a person formulated a unilateral act without authority to do so, how could his State subsequently approve his unlawful action? Under the law of obligations, such a person acted illegally, and his action was therefore void *ab initio*. Accordingly, a State could not give subsequent validity to conduct that was originally unauthorized. However, the article was related to new draft article 3, paragraph 2, which he had suggested replacing by a more specific provision. If his suggestion was accepted, the State would not need article 4 to invalidate acts formulated by unauthorized persons. The Special Rapporteur's attention should, however, be drawn to the fact that new draft article 4 referred to article 3 in general, whereas the reference should be made specifically to article 3, paragraph 2, because the unilateral acts of the persons in article 3, paragraph 1, could never be questioned.

26. As for silence and unilateral acts, in paragraphs 126 to 133 of the report, silence related to the principle of estoppel, which lay outside the scope of the topic. He endorsed new draft article 5, on the invalidity of unilateral acts, but it would be useful to include as another cause for invalidity an act formulated by an unauthorized person. The draft article closely followed the 1969 Vienna Convention, but it was questionable whether the rules of interpretation applicable to the causes giving rise to the invalidity of treaties under the treaty-law regime could be applied mutatis mutandis to the same factors listed in new draft article 5.

27. Mr. HE said that he agreed with the deletion of former article 1 and its incorporation in new draft article 1 which represented a great improvement and served as the starting point from which the draft articles could be elaborated.

28. It was not essential to retain the element of autonomy in the definition. On the one hand, unilateral acts should have links with earlier rules of international law, although acts linked to other regimes, such as to treaty law, might be excluded. On the other hand, although in some cases there was no need for the addressee State to accept the unilateral act, in others the interests of the addressee State were involved and a response was obligatory.

29. He noted that the words "expression of will" were followed by "with the intention". Such repetition should be avoided. New draft article 1 should be referred to

[6] See *Yearbook . . . 1999*, vol. II (Part Two), para. 589.

the Drafting Committee for a more precise and elegant wording.

30. New draft article 3, paragraph 2, had been taken from the relevant provisions of the 1969 Vienna Convention. However, the meaning of the phrase "if it appears from the practice of the State concerned" was unclear. A more precise wording, such as "person authorized to represent a State for formulating unilateral acts" might be used so as to identify the qualifications of persons representing or acting on behalf of a State.

31. Former article 4, paragraph 3, which had been taken from article 7, paragraph 2 (*c*), of the 1969 Vienna Convention, was fully in line with the scope and meaning of new draft article 3 and should be retained. It was wise to delete former article 6, as the content was already included in new draft articles 3 and 4.

32. It was true that silence had a legal effect in some cases, such as matters involving waivers, protest or recognition. However, it could not be regarded as a unilateral act in the strict sense, since it lacked intention, which was one of the important elements of the definition of a unilateral act. Hence, there was no need to deal with silence in the draft.

33. Lastly, he agreed that new draft article 5 should be drafted in keeping with the main lines and methodology of the 1969 Vienna Convention.

34. Mr. SIMMA commended the Special Rapporteur for his courage in taking on a topic which in his view was not fit for codification.

35. In dealing with unilateral acts, the Commission was in a difficult situation. There was extensive State practice, and all agreed that States constantly had recourse to unilateral acts, but that wealth of practice did not seem readily accessible. Even States appeared to have problems explaining their actions, in which connection it was enough to read the replies to the questionnaire. Unilateral acts were attractive to States precisely because of the greater freedom States enjoyed in applying them, as compared with treaties. The question was how to "codify" such relative freedom of action. The Commission was faced with a dilemma: either it applied a straitjacket *à la* 1969 Vienna Convention to a wide range of unilateral acts, and the product would then be totally unacceptable to States, or it confined its work to unilateral acts for which there was at least some trace of an accepted legal regime. The outcome would then be of limited value, because it would mean prescribing something that States did anyway. However, if the Commission continued with the topic, that had to be its course of action.

36. Again, judicial precedent also displayed a peculiar feature: the Commission had been focusing solely on the *Nuclear Tests* and *Eastern Greenland* cases. In the *Nuclear Tests* cases, ICJ had found itself with a political "hot potato", which it had dealt with by reaching rash conclusions on the binding nature of unilateral promises, whereas in other circumstances it might have been much more cautious. In the *Eastern Greenland* case, legal experts continued to doubt whether a unilateral act in the proper sense was at issue or whether it was a statement made in a treaty context.

37. The Commission must take a more inductive approach, namely, it must first look at specific unilateral acts in terms of a working definition—and article 1 should be no more than a working definition—and then try to pinpoint common problems and perhaps find solutions applicable to all cases. But it was dangerous for the Commission to carry on discussing the applicability of the 1969 Vienna Convention without a clear idea as to which unilateral acts it had in mind.

38. The Commission had not really known what States would accept on the topic, yet it had decided that the Secretariat should send out a questionnaire to help the Special Rapporteur compile State practice.[7] The Special Rapporteur had then submitted his third report in February 2000, although the compilation of State practice had not been ready and no answers to the questionnaire had been received. Perhaps the time had come to wait for more replies.

39. As to the report itself, he had never come across a United Nations document with such flawed language. Paragraph 25, for example, was incomprehensible.

40. With regard to new draft article 1, the Special Rapporteur had shifted in some respects from the working definition on which the Working Group and the Commission as a whole had agreed at the end of the fifty-first session after considerable debate. He did not see why the Special Rapporteur had reverted to certain points on which the majority of members had had misgivings at that session. For example, in paragraphs 70 to 77, he again took up the word "unequivocal", yet the term continued to be confusing, because it was not clear whether an unequivocal expression of will should apply in the sense that a State must clearly mean what it said. Paragraphs 71 and 73 seemed to go in that direction, while the definition also suggested that States made statements that were intentionally equivocal. To cite one example, the Palestine Liberation Organization had been recognized by a large number of States as the legitimate representative of the Palestinian people, but, at least in an international legal context, nobody knew what that meant. States had obviously wanted to keep their statement equivocal. Hence, it was perilous to use the term "unequivocal", which should be deleted.

41. New draft article 1 was a marked improvement over the previous version (former article 2), but he saw no need to speak of an "express" confirmation in new draft article 4. Why should it not be possible for a State implicitly to confirm the validity of a unilateral act that had been expressed by someone not authorized to do so?

42. It was very strange to say, in paragraph 128, that it was worth asking whether a State could formulate a unilateral act through silence, for it was impossible to "formulate" a legal act through silence.

43. As to new draft article 5, he was shocked to read in paragraphs 142 and 143 that one State had been concerned, with regard to fraud, that the provision in subparagraph (*b*) of former article 7 might encroach on certain accepted ways whereby States led their foreign policy and

[7] See 2624th meeting, footnote 5.

convinced other States to join in that policy. In his opinion, fraud should remain a ground of invalidity.

44. In the matter of force, the comment in paragraph 150 was misleading. In new draft article 5, subparagraph (*e*), the Special Rapporteur rightly said that if the act had been procured by the threat or use of force, then it was invalid. But this was entirely different from saying that an act which itself conflicted with the prohibition of the use of force was invalid.

45. Moreover, it was surprising to see that paragraph 153 made no reference to new draft article 5, subparagraph (*h*), which looked as though it had been added at a later stage. The absence of comments on that subparagraph must be remedied. He experienced the same difficulty as did Mr. Lukashuk with the introductory phrase of new draft article 5. Which State could invoke the invalidity of a unilateral act? Unlike Mr. Lukashuk, however, he was of the opinion that, at least as far as subparagraphs (*f*) and (*g*) were concerned, the State which formulated a unilateral act conflicting with *jus cogens* or with a decision of the Security Council was not the only one entitled to invoke such invalidity. The discussion of the impact of Council resolutions on the validity of legal acts was confusing. It was linked to a comment by Mr. Dugard, who was quoted in paragraph 156 as saying that article 7 should include Council resolutions among the factors that could be invoked to invalidate a unilateral act. For example, if a State made a declaration that conflicted with a Council resolution, particularly under Chapter VII of the Charter of the United Nations, that called on Members not to recognize a particular entity as a State, it could be argued that such a unilateral act was invalid.[8] Obviously, a problem arose in that connection and it had to be tackled. The Special Rapporteur had done so, but then asserted that even Council resolutions adopted on the basis of Chapter VI of the Charter could be binding. That was true from a legal viewpoint, as stated in paragraph 160, but it was going too far to say that a Council resolution or decision based on Chapter VI could invalidate a unilateral legal act by a State.

46. In his view, the only possible scenario leading to something like the loss of the effect intended by unilateral acts was one in which the Security Council adopted a decision expressly based on Chapter VII of the Charter of the United Nations or expressly referring to Article 39 thereof. He was of course aware of the practice that had come about as a result of the cold war, during which the Council had in many instances only been able to arrive at any decision at all by obfuscating the legal basis of such decisions; and in the advisory opinion in the *Namibia* case, some members of ICJ had gone to considerable lengths to read binding force into a Council resolution which did not mention its legal basis. But the cold war was over, and he failed to see why a declaration made by a State should be automatically invalid merely because a Council decision, whose binding nature was unclear, stood in its way. He drew attention to Article 103 of the Charter, pursuant to which, in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the obligations under the Charter prevailed. But such prevalence did not necessarily imply that the legal act was to be invalid.

47. Mr. Sreenivasa RAO said that the impact of Security Council resolutions on the legal validity of unilateral acts was a very important issue. He broadly agreed that Council recommendations under Chapter VI of the Charter of the United Nations would not invalidate unilateral acts.

48. As an astute observer, Mr. Simma would certainly be aware that the Security Council was sometimes intentionally equivocal in terms of the implications of its resolutions for Member States, especially when it omitted any specific reference either to Chapter VI or to Chapter VII of the Charter of the United Nations. He wondered whether Mr. Simma considered that Article 25 could be invoked only in the case of Council resolutions that were absolutely unequivocal.

49. Even if unilateral legal acts were not invalidated by Security Council resolutions, he would submit that States Members of the United Nations were required to honour the obligations that such resolutions imposed, especially when they were adopted unanimously. It was even conceivable that States would be moved to reconsider unilateral acts that came into conflict with Council resolutions.

50. Mr. ELARABY noted that, although Mr. Simma disapproved of the use of the word "invalidate", he had referred to Article 103 of the Charter of the United Nations, which clearly stated that, in the event of a conflict between the obligations of Member States under the Charter and their obligations under any other international agreement, their obligations under the Charter would prevail. In his view, the provision set out in Article 103 implied that incompatible legal obligations, either under a treaty or pursuant to a unilateral act, were invalid.

51. Mr. SIMMA said he had no objection to equivocal action by the Security Council. His argument was that the invalidation of a treaty or unilateral act was the most far-reaching legal sanction available. There were other less extreme ways in which a legal system could condemn an act, for example through unopposability. If the Council imposed an arms embargo and certain States concluded an agreement or formulated a unilateral act to the contrary, the agreement or act would not be invalidated but would simply not be carried into effect. If rule A prevailed over rule B, it did not necessarily follow that rule B must be invalid. For instance, according to the jurisprudence of the European Court of Justice, where a rule of domestic law was incompatible with a rule of Community law, the domestic rule was not held to be invalid but was merely inapplicable in specific cases.

52. Mr. TOMKA said that he broadly shared Mr. Simma's views. The 1969 Vienna Convention did not stipulate that non-conformity with a Security Council resolution was a ground for the invalidity of a treaty. And it was not the intention of Article 103 of the Charter of the United Nations to invalidate obligations under other treaties. Those obligations might be suspended where a Charter obligation was activated by a Council decision, but the treaty remained in force and continued to be binding once the Council decision was revoked. The same applied to unilateral acts. If the term "decision of the Security Coun-

[8] Ibid., footnote 7.

cil" in draft article 5, subparagraph (*g*), was intended to include decisions under Chapter VI, the Council was being given more powers than it had thus far sought to arrogate to itself.

53. Mr. SEPÚLVEDA said that, according to new draft article 5, a unilateral act could be invalidated if, at the time of its formulation, it conflicted with a decision of the Security Council. But a unilateral act could also be invalidated at a later stage. For example, Rhodesia's unilateral declaration of independence in 1965 had been subsequently invalidated by the Council, in its resolution 217 (1965) of 20 November 1965, which had also applied coercive measures—chiefly economic sanctions—under Chapter VII of the Charter of the United Nations. In that instance, the Council's decision had been taken after the unilateral act.

54. Mr. PELLET commended the Special Rapporteur on having come to grips again with a subject which, unlike Mr. Simma, he thought was capable of being codified. The third report contained useful clarifications and amendments but was still somewhat abstract and deficient in practical examples, a particularly regrettable shortcoming in the case of a topic whose acceptability depended on the Commission's ability to use current State practice as the basis for its proposals.

55. With regard to the bearing on the current topic of the law of treaties, and of the 1986 Vienna Convention in particular, it was still unclear whether the draft covered the effects of unilateral acts by States vis-à-vis international organizations and of acts by international organizations when their conduct was comparable to that of States. International organizations were mentioned only in new draft article 1 and then only as the addressees, not the authors, of international acts. Although the Commission had wisely decided to exclude resolutions adopted by international organizations from the draft, the word "resolution" did not cover the whole range of acts by such organizations. International organizations, above all regional integration organizations, could also enter into unilateral commitments vis-à-vis States and other international organizations. The issues raised by such acts must therefore be addressed mutatis mutandis in the light of the Convention.

56. The addressees of unilateral acts of States could also be other entities such as national liberation movements and individuals. The question arose whether unilateral acts, like treaties, could give rise to integral obligations. He suspected that they might and urged the Special Rapporteur to look into the matter.

57. The Special Rapporteur had rightly adopted a flexible approach to the relationship between the draft articles and the law on treaties, given that their purpose was to highlight the distinctive characteristics of unilateral acts as opposed to those of treaties, one such characteristic being the problems of interpretation of unilateral acts. The Commission had engaged in a very interesting debate at the previous session on the interpretation of the particular unilateral acts formed by reservations to treaties.

58. Although he had never fully understood the subtleties of the rules governing estoppel in the United Kingdom and the United States, the basic idea in international law seemed to be that a State or international organization must not vacillate in its conduct vis-à-vis its partners and thereby mislead them. He therefore queried the meaning of the phrase "acts pertaining to estoppel" in paragraph 25. Any unilateral act could probably give rise to estoppel. He was also somewhat perturbed by the statement in paragraph 27 that the characteristic element of estoppel was not the State's conduct but the reliance of another State on that conduct. Would it not be preferable to say that estoppel could result from a unilateral act when that act had prompted the addressee to base itself on the position expressed by the State that was the author of the act? Estoppel formed part of the topic in that it constituted one of the possible consequences of a unilateral act. It should therefore be addressed when the Special Rapporteur dealt with the effects of unilateral acts.

59. New draft article 1 presented the largest number of difficulties because of its influence on all the other articles. While many aspects of the Special Rapporteur's approach were convincing and the article was better than former article 2, he could not fully agree with the proposed wording. The omission of the word "declaration" was welcome, if only because its relationship with the expression "unilateral acts" was extremely ambiguous. He agreed with the Special Rapporteur that the form of the unilateral act was of little consequence but he was intrigued by his ambiguous position regarding silence. While his own views were not as strong as those of some members, he felt that the Commission must adopt a clear position on the matter, either in the articles or at least in the commentary.

60. The *Nuclear Tests* cases showed that, contrary to what was implied in paragraph 41 of the report, "lack of ambiguity" could result not from a formally identifiable act but from a combination of oral declarations that dispensed with the need for formal written confirmation. Furthermore, he was convinced that the plurilateral acts alluded to in paragraph 45 had the same effect as unilateral acts in terms of their addressee(s). For example, a joint declaration by victors vis-à-vis a vanquished party or a joint declaration on debt relief for a third country clearly constituted a plurilateral act that was experienced as a unilateral act by the addressee. It was not evident, however, how such acts could be distinguished from plurilateral treaties. In any case, the Special Rapporteur should take a clear stand on whether they fell within the scope of the draft articles.

61. He agreed with the Special Rapporteur that the intention of the author of the act was essential for the definition of a unilateral act and disagreed with Mr. He that the terms "expression of will" and "intention" overlapped. Yet if intention was a fundamental component of the definition of a unilateral act, silence could not in all cases fall within the definition. The silence of Siam in the *Temple of Preah Vihear* case had perhaps been a unilateral act but it had extended over a long period of time, whereas the idea of an act suggested immediacy. Furthermore, an inadvertent act certainly did not qualify as a unilateral act.

62. Assuming that intention was essential, the next question concerned the object of the intention. He shared the Special Rapporteur's view that the object was to produce legal effects. But the crux of the matter, at the definition stage, was what legal effects the author of the act

intended to produce, regardless of whether those effects materialized. A unilateral act occurred if the author intended that certain legal effects should ensue. The report was ambiguous on that point. Paragraphs 48 to 59 were concerned not with the effects sought by the author but those achieved by the act. New draft article 1 itself, on the other hand, rightly confined itself to the author's intention.

63. The Special Rapporteur introduced unnecessary restrictions in the phrase "legal effects in relation to one or more other States or international organizations" in new draft article 1. The definition of treaties in article 2, paragraph 1 (*a*) of the 1969 Vienna Convention should serve as a guide in that regard. According to the Convention, a treaty was an international agreement governed by international law. It was essential, in his view, to apply the same terms to unilateral acts, stating that a unilateral act was first and foremost an act governed by international law and thus placing the author of the act squarely within the ambit of international law, although major problems could be expected to ensue in the area of domestic law. For instance, was it possible to speak of a unilateral act when a State imperturbably took up a position in its internal law and displayed complete indifference to international law, as the United States had done in the case of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act).[9] Again, he wondered why the Special Rapporteur wished to limit the legal effects of unilateral acts to relations with other States and international organizations, since peoples, national liberation movements or individuals could also be the beneficiaries of unilaterally assumed obligations. The Drafting Committee should delete the phrase "in relation to one or more other States or international organizations" and insert the phrase "and governed by international law".

64. The addressee of a unilateral act must obviously know about it if the act was to produce legal effects. Yet there too, it was a matter not of the definition but of the legal regime to be applied. The idea of knowledge raised questions regarding the point at which knowledge existed and how to determine whether the addressee possessed such knowledge. A State might obtain knowledge of the act only after a certain period of time. In that case, the question arose whether the unilateral act came into being only from the time of acquisition of the knowledge or from the time when the addressee State indicated that it had obtained knowledge of the act. Notwithstanding the comment by the Swiss Federal Department of Foreign Affairs, cited in paragraph 78 of the report,[10] knowledge was, in his view, a concept that raised many more problems than it solved. He saw no justification for eliminating the idea of the "public formulation" of the act. What counted, for both practical and theoretical reasons, was publicity of the formulation of the act rather than its reception.

65. He continued to be very puzzled by the notion of "autonomy" of unilateral acts. Apparently, the Special Rapporteur had decided not to mention the autonomous character of such acts in the definition and that was a welcome move. Nevertheless, he was not convinced by the argument set out in paragraph 69, which suggested that the idea of autonomy subsisted beneath the surface of the definition. A unilateral act could not produce effects unless some form of authorization to do so existed under general international law. The authorization could be specific, for example where States were authorized to fix unilaterally the extent of their territorial waters within a limit of 12 nautical miles from the baseline. Or it could be more general, as States were on the whole authorized to unilaterally enter into commitments limiting their sovereign authority. But unilateral acts were never autonomous. Acts that had no basis in international law were invalid. It was a matter not of definition but of validity or lawfulness.

66. With regard to the deletion of former article 1 it was perfectly conceivable that some categories of unilateral acts should be excluded from the draft, for example those pertaining to the conclusion and application of treaties (ratification, reservations, etc.). A detailed list of acts to be excluded would therefore have to be compiled and that called for the reintroduction of a draft article concerning scope comparable to articles 1 and 3 of the 1969 Vienna Convention. It should be specified that the draft articles were applicable only to unilateral acts of States, and not to acts of international organizations. The 1986 Vienna Convention would then no longer be of any relevance. Secondly, unilateral acts pertaining to the conclusion and application of treaties should be excluded. Thirdly plurilateral acts should be excluded, without necessarily ruling out the possibility that they produced the same effects as unilateral acts *stricto sensu*.

67. If such was the wish of the majority of members of the Commission, it should perhaps be clearly indicated that the draft did not deal with the legal effects produced by unilateral acts in relation to entities other than States and, possibly, international organizations. As already explained, he personally would regret such a limitation of the draft's scope.

68. New draft article 2, corresponding to former article 3, did not pose any difficulties. New draft article 3 and especially the Special Rapporteur's observations on it were less convincing. The references in paragraphs 103 and 104 to pledging conferences—a subject on which the Special Rapporteur failed to reach any definite conclusion—would perhaps be more appropriate under the heading of the intention to be bound. Generally speaking the rather inconclusive character of many of the considerations accompanying the draft articles was to be regretted. It was also difficult to explain why, in paragraphs 105 and 106, the Special Rapporteur considered that technical ministers did not commit the State, whereas elsewhere he appeared to say that high-ranking officials could. If that was true of the latter, it was certainly true of technical ministers. While welcoming the Special Rapporteur's decision to modify the text of new draft article 3—which in its earlier form (former article 4) had perhaps been too closely modelled on the corresponding rules of the 1969 Vienna Convention—he questioned the drafting of paragraph 2. It should be made clear that "A person" meant another person. In addition, was it appropriate to speak of "the States concerned", in the plural? Surely, the State which formulated the unilateral act was the only one concerned, and the singular case alone should be used. The reference to "other circumstances" in the same paragraph

[9] See ILM, vol. XXXV, No. 2 (March 1996), p. 359.

[10] L. Caflisch, "La pratique suisse en matière de droit international public 1995", *Revue suisse de droit international et de droit européen*, 1996, No. 4, p. 593, at p. 596.

was very useful; assurances given by a State's agent or other authorized representative in the course of international court proceedings might perhaps be given specific mention in that regard in the commentary to article 3. An appropriate example was the *East Timor* case.

69. As to new draft article 4, he questioned the use of the adverb "expressly" in connection with the confirmation by a State of a unilateral act formulated by a person not authorized to act on its behalf. The confirmation of a unilateral act should be governed by the same rules as its formulation. He preferred the earlier wording, as it was less rigid. In the French version the words *effets juridiques* should be placed in the singular. On the subject of silence and unilateral acts, in paragraphs 126 to 133, he reiterated the view that, while some kinds of silence definitely did not and could not constitute a unilateral act, others might be described as an intentional "eloquent silence" expressive of acquiescence and therefore did constitute such an act. The *Temple of Preah Vihear* case was precisely a case in point.

70. With reference to new draft article 5, a separate article, accompanied by its own commentary, should be assigned to each of the grounds of invalidity of unilateral acts. He was strongly opposed to the inclusion of subparagraph (*g*) relating to unilateral acts which conflicted with a decision of the Security Council, and pointed out that the 1969 Vienna Convention maintained a prudent silence on that point. Aside from the fact that the provision could offend the sensibilities of States, a decision of the Council did not need to be singled out, as it simply formed part of law derived from the Charter of the United Nations and, consequently, from treaty law in general. While welcoming the Special Rapporteur's decision to base subparagraph (*f*) on article 53 of the Convention he wondered why article 64 of that Convention, on the emergence of a new peremptory norm of general international law, had not been similarly taken into account. Indeed, the definition of *jus cogens* could well be inserted in the draft.

71. Lastly, he suggested that, in referring the draft articles to the Drafting Committee, the Commission should invite the Committee to consider the differences between the Special Rapporteur's formulations and the provisions of the 1969 Vienna Convention, to reflect on the desirability of including an article defining the scope of the draft and on the question of unilateral acts not covered by the draft.

72. Mr. BAENA SOARES, congratulating the Special Rapporteur on the imaginative and conciliatory powers displayed in the preparation of his third report as well as on his serene acceptance of criticisms and suggestions made within the Commission and the Sixth Committee as well as in the replies from Governments to the questionnaire, said that more extensive information on State practice would have greatly facilitated the work on the topic. In its report to the General Assembly, the Commission should perhaps reiterate in more precise terms its appeal to States to provide such information.

73. Like most members, he recognized the relevance of the topic as a means of enhancing the stability and predictability of international relations. He endorsed the definition of "flexible parallelism" given by the Special Rapporteur to the relationship between the draft articles and the 1969 Vienna Convention and supported the Special Rapporteur's position on the question of estoppel.

74. New draft article 1 incorporated many of the suggestions made in the Commission and the Sixth Committee and was definitely an advance on the version considered at the previous session. The decision to maintain the idea of "unequivocal expression of will" as an essential element of the definition of unilateral acts was to be welcomed. Although a measure of ambiguity could, in some diplomatic negotiations, help to pave the way to a solution, it was not acceptable in the current context. Further discussion was needed of the idea of the non-independence of a unilateral act, so as to couch the matter in consensus wording. As for publicizing an act so that it was known to the State or international organization concerned, the Special Rapporteur could perhaps indicate in the commentary what forms of conveying such knowledge he had in mind.

75. New draft article 3 referred not only to the practice of the State but also to "other circumstances". He would prefer a more restrictive wording. Incidentally, with regard to the reference to "technical ministers" in paragraph 105 of the report, a cabinet was generally made up of politicians, some of whom might be more conversant with specific subjects than others, but none of them could be described as "technical ministers". The second of the two issues covered in paragraph 117, relating to new draft article 4, was that of a person authorized to formulate an act on behalf of the State but acting outside the scope of such competencies. Unfortunately, it was not reflected in the draft article.

76. As to new draft article 5, the Special Rapporteur was to be congratulated on the care taken to identify eight separate grounds for the invalidity of unilateral acts in order to reflect views expressed in the Commission and the Sixth Committee, but the reasons for including some of them might have been given more detailed treatment in the comments. The incorporation of corruption in subparagraph (*c*) was welcome. Corruption was being combated universally, by legal instruments such as the Inter-American Convention against Corruption. He wondered, however, whether it was necessary to narrow down the possibility of corruption to "direct or indirect action by another State". One could not rule out the possibility that the person formulating the unilateral act might be corrupted by another person or by an enterprise. Lastly, while commending the inclusion, in subparagraph (*g*), of unilateral acts in conflict with a decision of the Security Council, he noted that the Special Rapporteur had referred to Chapter VII of the Charter of the United Nations in his oral presentation of the report and regretted that a similar reference had not been incorporated in the text.

77. Mr. ROSENSTOCK said that, while less convinced than Mr. Simma that the topic under consideration was not susceptible to codification, he shared Mr. Simma's doubts and, in large measure, endorsed his views. In particular, he wished to urge the Special Rapporteur to place greater emphasis on State practice and, as a working method, to focus separately on each issue. With reference to subparagraph (*g*) of new draft article 5, it was not at all clear that Security Council resolution 221 (1966) of 9 April 1966 pursuant to which the vessel the *Joanna V* had been stopped in connection with the Rhodesian sanctions had been an action taken under Chapter VII of the Charter of the United Nations. Key elements to make it an action

under Chapter VII had been missing, but he had no doubt that the Council's action, if it had not obligated, had most assuredly empowered, the stopping of the tanker. The issue was a highly complex one situated on the interface between legal and political obligations, and he did not believe that mentioning it *en passant* was a responsible way of dealing with it.

78. Mr. Sreenivasa RAO, congratulating the Special Rapporteur on his positive approach to a complex and difficult subject, said that greater focus on what was missing in terms of State practice would perhaps have made the exercise even more useful. The point on which members would expect guidance from the Special Rapporteur were the circumstances and the general rules of international law which made unilateral acts different from political acts and produced legal effects.

79. As to the definition of unilateral acts in new draft article 1, the legal effect produced by an act did not necessarily, or always, indicate the original intention of the State formulating the act. A State was a political entity whose intentions could be equivocal or unequivocal, depending on the context. In his view, the criterion of the effect actually produced had always to be assessed in order to determine the nature of the intention. A contextual examination of policy considerations played a very important role in assessing the intention underlying an act. An inductive approach taking account of policy considerations was called for.

80. With reference to the Special Rapporteur's conclusions on the subject of estoppel, there again it was difficult to separate the conduct of the State formulating a unilateral act from the effect that the act produced on the target State, especially if it was agreed that unilateral acts did not have to be characterized as autonomous. That question, too, deserved to be carefully looked at. Lastly, while the issue covered in new draft article 5, subparagraph (*h*), was undoubtedly related to new draft article 3, it had important aspects which meant that it was not related to that article alone. Could a State utilize the provisions of its own national law to evade international obligations it had otherwise produced by a valid unilateral act? In other words, could a State, having formulated a unilateral act, claim that its domestic law did not provide for such an act although the act had produced an international obligation? Further reflection was needed on that point.

The meeting rose at 1.05 p.m.

2630th MEETING

Wednesday, 31 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Unilateral acts of States (*continued*) (A/CN.4/504, sect. C, A/CN.4/505,[1] A/CN.4/511[2])

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR[3] (*continued*)

1. Mr. GOCO congratulated the Special Rapporteur for producing, despite the difficulties inherent in the subject, a coherent and detailed third report (A/CN.4/505) in which many sensitive questions were addressed and which took account of the various views expressed in the Commission and other bodies.

2. Commenting on the replies by a number of Governments to the questionnaire on unilateral acts of States that had been sent to them, which was circulated as an informal paper,[4] he noted that, in their general comments on the issue, those States seemed to agree that unilateral acts were by nature very diverse, but they also acknowledged that they were frequently used by States in international relations. In the absence of a formal treaty, those acts were the means by which a State conveyed its wishes to another State, and that was a convenient way to conduct day-to-day diplomacy.

3. The replies also referred to specific questions. With regard to the applicability of the 1969 Vienna Convention, there seemed to be an emerging consensus that the Convention might not be applicable to unilateral acts, but could serve as a useful guide in that area. On the question of persons authorized to act on behalf of the State, the States replying to the questionnaire agreed that the Convention was relevant by analogy. With regard to the forms the unilateral act might take, both oral and written declarations were acceptable, depending on the type of act. As for the content of the unilateral act, it could be of various types and was not restricted to certain categories. However, one State, Italy, had cited three categories: that of acts referring to the possibility of invoking a legal situation, that of acts which created legal obligations and that of acts required for the exercise of a sovereign right. On the question of legal effects, the replies emphasized the creation and extinction of obligations and the creation and revocation of the rights of other States. Some States would draw a distinction between the different acts and the legal effects they purported to produce. One State, the

[1] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

[2] Ibid.

[3] For the text of the draft articles contained in his third report, see 2624th meeting, para. 35.

[4] See 2628th meeting, para. 11.