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

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CHAPTER VI

UNILATERAL ACTS OF STATES

Addendum

CONTENTS

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1. Members expressed their appreciation for the fifth report of the Special Rapporteur which reviewed a number of fundamental questions on a complex topic that, although not lending itself readily to the formulation of rules, was nonetheless of great importance in international relations. According to another view, the fifth report had, regretfully, not taken a new approach to the topic on the basis of the criticisms and comments made nor had it proposed new draft articles in light of those considerations.

2. Some members reiterated that the topic of unilateral acts of States lent itself to codification and progressive development by the Commission since there was already extensive State practice, precedent and doctrine. It was felt that the work would be useful for States in order to know as precisely as possible what risks they ran in formulating such acts.

3. Nonetheless, the point was made that fundamental doubts existed on the direction and content of the work on the topic. In this connection, it was stated that the language of draft article 1, which spoke of unilateral acts as acts "with the intention of producing legal effects", and draft article 5, which used the phrase "formulation of a unilateral act" and referred to the conditions of validity of unilateral acts as well as their interpretation, were problematic. The draft articles suggested that a unilateral act was to be taken as a fully voluntary scheme or law, a kind of promise or unilateral declaration.

4. From a practitioner's point of view however, it was difficult to recall a single case in which a State had *unilaterally* made a promise and had held itself legally bound by it without expecting reciprocity on the part of any other State.

5. In the relevant jurisprudence, the actor State itself had never conceived of acting in terms of a formulation in order to create legal effects. On the contrary, it had found itself bound by the way it had acted or failed to act or what it had said or failed to say, irrespective of any formulation that it might have made about how it had acted or what it had said.

6. As regards some of the difficulties posed by the topic, it was stated that in the past the Commission had successfully considered topics dealing with legal institutions which could be defined and set off from the rest of the legal order, whereas unilateral acts were a catch-all term to describe ways in which States sometimes were bound other than through the effects of particular institutions or the special ways in which States acted so as to create legal effects. Consequently, the Commission was trying to codify something which did not exist as a legal institution and was at a loss as to how to define it so as to make it a legal institution.

7. Furthermore, another difficulty was that the very concept of a unilateral act was fundamentally ambivalent in that it described two different things. On the one hand, it was a sociological description of States acting. States undertook thousands of acts, and they did so in a unilateral way in the sense that they decided to act as individual identities. On the other hand, the concept also referred to a legal mechanism whereby the legal order projected norms and obligations on the way those States acted and attached legal consequences to their actions; it was a mechanism in which the legal order acted irrespective of the actors themselves.

8. According to this view, when States unilaterally came together in the world of diplomacy, they created expectations, which good faith demanded that they not disappoint. That mechanism was impossible to describe in terms of a voluntary scheme in which States had the intention of creating legal effects and in which they formulated actions that then did so.

9. Consequently, the legal order attached obligatory force to some actions in a manner different from treaties or from other legal institutions, inasmuch as it was a question of creating not universal law but contextual law, a bilateral opposability that existed between the acting State and States in which expectations had been created through particular action.

10. From this perspective, no general rules could be devised, because particular relationships like those between France, New Zealand and Australia in the *Nuclear Tests* case or between Cambodia and Thailand in the *Temple of Preah Vihear* case had been the products of a long history and a geographical situation that could not be generalized. The opposability created through unilateral acts could not be made subject to general criteria of understanding, because it was outside international institutions and had to do with what was reasonable in the context of human behaviour and the history of the States concerned.

11. The approach suggested was based on the assumption that unilateral acts existed as a phenomenon in the social world. Those acts were sometimes linked to legal institutions such as treaties and customary law. In the case of unilateral acts, it was not apparent what institution converted an act into an obligation. According to one thesis, no such institution existed, so that unilateral acts simply fell outside the realm of legality. Sometimes, however, an invisible institution created a link between an act and an obligation. That invisible institution was an amorphous conception of what was just and reasonable in a particular circumstance.

12. Consequently, it was stated that the Commission should abandon the voluntary scheme based on States' intentions and should focus on the reasonable aspects of the issue in terms of expectations raised and legal obligations incurred. It should also abandon the analogy with the

law of treaties, which took an impersonal approach to the entire field of diplomacy, and should instead base its considerations on the law of social relations, where individuals exercised greater or lesser degrees of power in the complex web of relationships. The Commission might wish to formulate general principles articulating the manner in which particular relationships between States became binding, an endeavour which would be tremendously ambitious and perhaps unfeasible.

13. Alternatively, the Commission might fill the vacuum created by the absence of a legal institution by considering the institution of recognition of States, an institution which, while operating on a level different from that of treaties or custom, nevertheless served as a link between forms of behaviour and legal obligations.

14. While acknowledging that the topic of unilateral acts was indeed different from the more traditional topics, it was also stated that the Commission had virtually exhausted the latter and that consequently, it was obliged to embark upon new studies that presented a challenge, but also an opportunity for innovative and progressive development and codification.

15. As to the assertion that the Commission was attempting to codify something which did not exist as a legal institution, the point was made that whether unilateral acts were an institution depended on one's definition of that term. The fundamental question faced by the Commission was whether a certain legal entity called a "unilateral act" existed in international law and, if so, what legal regime governed it. Furthermore, under article 15 of its Statute, it was the Commission's task to create institutions where they did not yet exist and to clarify them where needed.

16. Members of the Commission voiced their disagreement with pursuing an approach according to which treaties, as an act of will, were the only means of regulating the world of diplomacy. In this connection, it was noted that the relationship between a State's will and its intention was hard to unravel and, furthermore, it was difficult to pinpoint the frontier between the realms of will and of intention.

17. It was also stated that although international law was not based entirely on the expression of the will of States, it was plain that, insofar as they were bound by treaty obligations and by unilateral acts, it was by their own individual or collective wish.

18. Doubts were also expressed on the validity of the submission that the category of relevant institutions for the exercise the Commission had undertaken was comprised only of treaties and custom. It was stated that, in addition to treaty obligations and obligations under

customary international law, there were clearly also some international obligations stemming from unilateral acts of States. One obvious example, recognition, was a unilateral political act that also gave rise to legal effects on the international plane. Therefore it was suggested that the Special Rapporteur could focus less on the behaviour and intentions of the actor State, and more on the effects of the unilateral act on other States.

19. Recalling that the reason why treaties must be respected was encapsulated in the adage *pacta sunt servanda*, it was noted that one interesting aspect of the codification exercise proposed by the Special Rapporteur was the idea that, *mutatis mutandis*, the same was true of unilateral acts: in other words, that *acta sunt servanda*. The precise conditions under which the latter adage was applicable would of course need to be determined. However, it was not for the Commission to delve into the recondite reasons underlying that principle.

20. In relation to the issue of reciprocity, it was stated that although a State would not normally formulate a unilateral act without some benefit to itself, such benefits did not necessarily constitute reciprocity. This would be the case, for example, of a promise made by a requesting State to a requested State that the death penalty would not be applied to an individual whose extradition is sought.

21. In this connection, it was also noted that a dispute had in effect arisen over the question of which national body was competent to make such a promise on behalf of the requesting State: its Parliament or its Government. There was therefore a logical basis for the draft on the representation of States in the formulation of unilateral acts, something not discussed in the Special Rapporteur's fifth report.

22. Furthermore, it was said that no contradiction existed between the intention to be bound as a factor underlying unilateral acts, on the one hand, and a declaration creating legitimate expectations, on the other; the two concepts being complementary in nature.

23. In relation to the argument that unilateral acts raised only bilateral expectations, and thus did not lend themselves to codification, attention was drawn to the fact that sometimes such acts could be more general in scope. This was the case, for instance, of the protests that Portugal had presented in connection with the Timor Gap Treaty between Australia and Indonesia which had had an effect so broad as to impinge on other States and even on other entities such as multinational corporations with interests in the area. Similarly, Portugal had several times

asserted that the right of self-determination of the people of East Timor had an *erga omnes* character - an assertion subsequently confirmed by the International Court of Justice in the *Case Concerning East Timor*.

24. The point was also made that the Commission should guard against watering down "hard" obligations under the law of treaties by drawing analogies between such obligations and weaker obligations undertaken in the context of unilateral acts.

25. Divergent views were expressed regarding the suggestion that the Commission consider the recognition of States. On the one hand, it was felt that the Commission was not the place to deal with human rights or highly political issues such as the one suggested. Furthermore, it was also recalled that practice and doctrine in that area was notoriously divergent, thus making it difficult to codify the law. According to another view however, rules and State practice on issues such as the recognition of States did exist, and the Commission could therefore engage in a blend of codification and progressive development in such areas, despite their political sensitivity.

26. As regards the approach of making an analogy with the law of treaties, it was stated that although the 1969 Vienna Convention could not be taken over in every respect, it could nonetheless provide guidance and give rise to fruitful debate on the extent of its applicability to unilateral acts.

27. In relation to the suggestion by the Special Rapporteur for a rule whose substance would be "*acta sunt servanda*", it was stated that positing such a principle would require the Commission to scrutinize every theoretical explanation as to the binding force of unilateral acts; therefore such a proposal could not be agreed to. Another view expressed that, at the present stage in the study of the topic, an *acta sunt servanda* provision could not go much further than a statement of the author State's duty to adopt consistent conduct in respect of that act, taking into account the principle of good faith and the need to respect the level of confidence and legitimate expectations created by the act, and also bearing in mind the diversity of unilateral acts; it was only when the Commission had moved on to specific categories of unilateral acts that the legal consequences of each act could be stated more clearly.

28. The Commission also had an exchange of views on the question of whether a unilateral act constituted a source of international law of the same rank as the usual sources, namely, treaties and custom. This posed the issue of whether a unilateral act could derogate from general international law or *erga omnes* obligations. In this connection, it was stated that a unilateral act

should never take precedence over general international law or the provisions of a multilateral convention to which the author State of the unilateral act was a party. A suggestion was made that the Special Rapporteur study the relationship between unilateral acts and other sources of international law.

29. On the other hand, the point was made that unilateral acts should not be classified according to the sources of international law. In this connection, it was stated that such acts created obligations, not law, and that the unfortunate use of the word "validity" throughout draft article 5 stemmed from the inability to conceptualize unilateral acts in terms of reciprocal obligations between States which could, under certain circumstances, create a network of opposabilities.

30. According to another view, the question whether unilateral acts were a source of law or a source of obligations was the result of confusion between the making of rules and the production of legal effects. If a unilateral act was placed in a specific context in real life, it would be found that, in some circumstances, it could create an obligation for the author State, that the obligation often determined the future conduct of that State and that other States might rely on that conduct. Whether as rights or as obligations, however, the legal effects of a unilateral act could not stand on their own and must be governed by international law. If the Commission took unilateral acts out of the context of existing law, particularly treaty relations, and treated them as purely creating legal effects in terms of rights and obligations, it might easily get disoriented because it was placing too much emphasis on criteria for the formulation of such acts.

31. It was also said that unilateral acts and the different forms in which they were expressed could be of interest and have legal effects, but that they lacked the value of international obligations in and of themselves. They could be assessed only in light of the responses, actions and acceptance of other States in one form or another.

32. Disagreement however was expressed to such an approach since a promise to do something, recognition of another State or of a situation, waiver of a right or protest against the conduct of another subject of international law did indeed produce legal effects, although in some cases only if other States or an international court took the author State at its word.

33. In addition, attention was drawn to the fact that, although unilateral acts were not *per se* law-creating or norm-creating mechanisms, they might mark the beginning of a State practice which, in turn, created a norm.

34. There was also a discussion in the Commission about the termination of the obligation created by a unilateral act. It was noted that in the case of a treaty there was a procedure and an agreed methodology which must be respected, whereas, in the case of a unilateral act, only estoppel, acquiescence or the existence of a treaty, custom or other obligation prevented an equally unilateral termination.

35. However, according to another view, a unilateral act could not be revoked at any time because a State which had unilaterally expressed its will to be bound was, in fact, bound. Reference was made to 1974 Judgment in the *Nuclear Tests* case, where the International Court of Justice had stated that the unilateral undertaking "could not be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration". Unilateral acts, like treaties, could be traps in which States were caught against their will; once expressed, their commitment was irrevocable, yet the treaty or act had no effect unless invoked by other States. Nonetheless, the point was also made that a unilateral act could be terminated in good faith and that the technique of revocation deserved its place in the study of means of terminating unilateral acts.

36. A suggestion was also made for the Special Rapporteur to address the issue of the legal effects of unilateral acts over time, as well as the relationship between unilateral acts of States and the conduct of States and consider those related concepts. Furthermore, consideration could also be given as to whether a unilateral act must be confirmed and, if so, how the issues raised by silence could be dealt with.

37. Divergent views were expressed on the classification of unilateral acts. On the one hand, it was said that States obviously intended their unilateral acts to produce legal effects. In that sense, there was no difference between such acts and treaties, which were also impossible to reduce to a single homogeneous category but were nevertheless subject to the application of common rules. Unilateral acts could thus be divided into two categories, at least with regard to their effects. However, rather than the classification proposed by the Special Rapporteur, it was suggested to distinguish between "condition" acts such as notification and its negative counterpart, protest, which were necessary in order for another act to produce legal effects, and "autonomous" acts which produced legal effects, such as promise, waiver, which might be regarded as the opposite, and recognition, which was a kind of promise. In studying legal effects, a distinction would doubtless need to be made in those two categories, but it should be possible to arrive at a definition of, and a common legal regime governing, unilateral acts.

38. On the other hand, the point was also made that the proposal by the Special Rapporteur to distinguish between those unilateral acts whereby States reaffirmed rights and those that were a source of obligations was unacceptable. For instance, the declaration of neutrality cited as an example was both a source of rights for the author State and a source of obligations for the belligerent States to which it was addressed. To treat such a declaration as a waiver or a promise was not a satisfactory solution because the author State might subsequently decide to join in the conflict on grounds of self-defence if it was attacked by one of the belligerents.

39. According to another view, the Commission should refrain from attempting to classify unilateral acts; the literature had addressed the issue without great success and international jurisprudence apparently had little interest in establishing a hierarchy between them. The view was also expressed that a classification was premature; collecting and analysing information on State practice should constitute a prior step.

40. Divergent views were also expressed on the approach that the Commission could take on the topic of unilateral acts. Some members of the Commission felt that it was perfectly possible to establish a set of minimum general rules governing unilateral acts, which are indeed part of international law. It was stated that a general theory on unilateral acts should not be restricted to the four specific acts referred to by the Special Rapporteur, nor should it require that the effects of those unilateral acts necessarily be obligations; furthermore, the relationship involved could be not just bilateral or trilateral, but also *erga omnes*. After consideration of the general rules, the Commission could proceed to consider one or more of the four specific acts. In this regard, it was noted that recognition or promise would seem to offer the most potential as a topic for discussion.

41. The point was made that it was too late for the Commission to change its method of work. Therefore, the Commission should try to complete the task of formulating the general part of the draft articles as quickly as possible, ending its consideration of the draft articles with the question of interpretation, without attempting to formulate an *acta sunt servanda* principle or considering the questions of suspension, termination and retroactivity, which could be considered in the context of the more specific work devoted to certain unilateral acts. Subsequently, the Commission might turn to specific types of unilateral act, namely, promise, waiver, recognition and protest. At a third stage in its work, the Commission should revisit the whole range of principles established in the light of particular cases, with a view to deciding whether the elaboration of draft articles on the topic was the best way forward.

42. While expressing support for the continuation of the Commission's work, preference was voiced for extending it to include the questions of suspension and termination of unilateral acts, so as to have a comprehensive view.

43. According to another view however, the Commission could also start by considering examples of unilateral acts such as recognition, promise, waiver and protest in order to ascertain whether any general rules could be laid down. Subsequently, the Commission could embark on a more detailed study of a particular category of unilateral act; it could also pursue the endeavour with the consideration of other acts or omissions, such as silence, acquiescence and estoppel.

44. Another approach considered that it was extraordinarily difficult to find general rules to deal with the great variety of situations dealt with by unilateral acts, each of which was fact-based and involved long relationships between States. Therefore, it was suggested that instead of seeking to subject the very wide range of unilateral acts to a single set of general rules an expository study be made of specific problems in relation to specific types of unilateral acts.

45. The point was also made that it was not enough to compile doctrine and jurisprudence on unilateral acts. Only after the completion of a study on State practice could the Commission decide whether the work should be done on a general basis or whether it should begin with a study of specific unilateral acts.

46. After noting that only three States had replied to the questionnaire addressed to Governments in 2001, it was suggested that other sources could be used, such as the compilation of State practice published by Ministries of Foreign Affairs and other yearbooks of international law. In this connection, it was proposed that a research project be undertaken, possibly with funding from a foundation, that would focus on an analysis of practice based on specific examples of the four classic categories of unilateral acts.

47. As regards the draft articles themselves, the point was made that the effects of the definition of unilateral acts contained in draft article 1 should be extended not only to States and international organizations, but also to other entities such as movements, peoples, territories and even the International Committee of the Red Cross. In this connection, attention was drawn to the need of analysing the case of unilateral acts formulated by a political entity recognized by some Governments, but not by others, or which represented a State in the process of being created, such as Palestine. Furthermore, a unilateral act could also produce effects *erga omnes*; the vital element was that the act produce consequences in the international legal system.

48. Another view suggested provisionally adopting, as a working definition, the text proposed by the Special Rapporteur. According to this view it was correct to refer in the definition to the "intention" of the State to be bound, for such an intention clearly existed in the four types of unilateral act listed; on the other hand, the word "unequivocal" seemed superfluous, for, if the expression of will was not "unequivocal", there would be a strong presumption that there was no real intention to be bound. In this connection, it was also noted that a declaration with equivocal content could nevertheless bind a State if it wished to be bound. Furthermore, it was felt that the word "unequivocal" involved a problem of interpretation, not of definition and consequently had no place in draft article 1.

49. Disagreement was voiced over including the words "and which is known to that State or international organization", since it posed the same problem as "unequivocal" and introduced an element of proof that complicated the definition unnecessarily.

50. A suggestion was made to improve draft article 1 by incorporating the words "governed by international law", as contained in the Vienna Convention, as well as a reference to the non-relevance of the form that the unilateral act might take.

51. Furthermore, in relation to the definition, a query was raised as to the exclusion of the subject of conduct from the category of unilateral acts; it was also stated that more attention could also be given to the concept of silence.

52. The point was also made that a definition of unilateral acts should not be adopted until a study, based on State practice, of the various types of unilateral acts had been conducted so as to determine whether there were common characteristics.

53. Some members welcomed the draft articles on the validity of unilateral acts proposed by the Special Rapporteur, which were based on the use of the relevant provisions of the 1969 Vienna Convention, though the degree to which those provisions could be transposed to the case of unilateral acts was also questioned.

54. In this connection, several suggestions were made for more detailed consideration of the draft articles, both with regard to the subject matter and the need to take into account the relevant State practice. It was suggested that a provision based on article 64 of the Vienna Convention on the emergence of a new rule of *jus cogens* could also be included; a proposal was also put forward to enumerate the effects of the invalidity of a unilateral act rather than to stipulate which entities were able to invoke its invalidity; support was also expressed for shortening the list of causes of invalidity.

55. Another suggestion called for the inclusion of a general rule on the conditions of validity of such acts, namely, whether their content was materially possible, whether they were permissible in international law, whether there was any defect in the expression of will, whether the expression of will was a matter of public knowledge and whether the intention was to produce legal effects at the international level.

56. Furthermore, it was also stated that a distinction must be made between cases of invocation of invalidity of unilateral acts and cases in which an act was void because it conflicted with a peremptory norm of international law. In the latter case, the sanction of international law made the act void, and not the fact that the State which had formulated the act or any other State had invoked that cause.

57. In relation to the distinction drawn between absolute and relative invalidity, it was stated that the question arose whether such a distinction, which was valid in connection with the law of treaties, could be transposed to the field of unilateral acts. The main reason for drawing such a distinction in the law of treaties was to ensure that States did not jeopardize legal security by calling reciprocal commitments into question, yet no such reciprocity of wills existed in the case of unilateral acts.

58. As regards the issue of the validity of a unilateral act, the point was made that it depended on the relationship with a customary or treaty rule, namely another rule of general international law that authorized the State to act unilaterally, a matter which the Special Rapporteur could deal with.

59. The point was made that the concept of “absolute” validity was problematic and that the Commission could consider whether its use was necessary.

60. It was also stated that the notion of invalidity could lead to considerable difficulties in the case of collective unilateral acts. For instance, where the ground for invalidity was present only in the case of some of the author States, the question would arise whether the unilateral act was invalid for all the States collectively. Furthermore, it was suggested that reference to collective unilateral acts could be made in the commentary or that a separate provision could be formulated.

61. The view was also expressed that the concept on which draft article 5 was based, that unilateral acts could be viewed in terms of their validity or non-validity was considered erroneous: unilateral acts should in fact be seen in terms of opposability or non-opposability. Validity was a quality of law: when parliament passed a law, it became valid, and thus binding.

Unilateral acts, on the other hand, did not comply with the formal criteria that a law must meet in order to create legal consequences. Instead, they created legal consequences in particular circumstances, in which a State's conduct was interpreted as opposable by a certain number of other States.

62. On the basis of the assumption that unilateral acts enjoyed validity, the Special Rapporteur went on to list certain conditions for invalidity, yet the list was missing the most evident condition for opposability of an act, namely, the simple case of a wrongful act, one contrary to law and to the State's obligations in the sphere of State responsibility. Clearly, a unilateral act could be non-opposable - or "invalid", to use the Special Rapporteur's term - because it was a wrongful act under a general system of law that was valid and that gave meaning to particular actions of States by projecting upon them the quality of opposability.

63. According to another view, the two concepts of opposability and validity came from two completely different areas. With regard to validity, one asked the question whether an act was in fact capable of creating obligations. Once that question was answered, one could ask for whom the act created obligations, and that could be termed opposability. Nonetheless, that lacked relevance for the subject under discussion. A unilateral act would always be opposable to the party that had validly formulated it, but the question arose whether it was also opposable to other entities. While opposability could be covered in the work on the topic, it should not preclude the Commission from looking into the causes of invalidity.

64. Disagreement was expressed over the argument that once a State intended to be bound, a valid unilateral act existed, even if the act was only opposable to that State. In this connection, it was stated that a unilateral act could not be seen in total isolation from other States; without at least bilateral relations in the sense of the act producing consequences in relation to other States, there was nothing that could be considered binding under international law.

65. Reticence was expressed on the use of the phrase "[expression of will] [consent] to be bound by the act" in draft article 5 (a), since a State might be simply asserting a right in formulating a unilateral act.

66. As regards draft article 5 (d), (e), (f), (g) and (h) as proposed by the Special Rapporteur, the point was made that although based on the 1969 Vienna Convention, they did not reproduce its terminology and could therefore be reformulated.

67. As regards draft article 5 (f), it was noted that article 53 of the Vienna Convention simply stated that a treaty "is void". The point of introducing the concept of "invocation" was to affirm the absolute invalidity of the unilateral act when it was in contradiction with *jus cogens*, and not to create a possibility of invocation for any State.

68. It was stated that under draft articles 5 (f) and (g), invalidity could be invoked by any State, not only when a unilateral act was contrary to a peremptory norm or a decision of the Security Council, but also in the case of threat or use of force. In other words, it would be preferable to reintroduce in that form the distinction between absolute invalidity and relative invalidity found in the Vienna Convention.

69. Furthermore, it was pointed out that draft article 5 (g) might give rise to difficulties, for even though, in the event of a conflict of obligations, obligations under the Charter prevailed, that did not mean that a unilateral act contrary to a decision of the Security Council must necessarily be invalid; in this connection, preference was expressed for finding a formulation that would give full effect to the hierarchy of norms while avoiding the very dangerous term "invalidity"; the provision would also have no place in the section of the draft articles on invalidity.

70. In addition, it was noted that a distinction had to be made between unilateral acts which were contrary to decisions of the Security Council made under Chapter VI of the Charter, where it was not clear if invalidity could be invoked, and those made under Chapter VII of the Charter, which would be null and void.

71. Draft article 5 (h) said that the State formulating a unilateral act could invoke the invalidity of the act if it conflicted with a norm of fundamental importance to the domestic law of the State formulating it. In this connection, the query was made as to whether domestic law could be invoked to invalidate an act which had already produced international legal effects and whether that entailed the international responsibility of the author State. It was also suggested to incorporate a reference to the "manifest" nature of the conflict with a norm of fundamental importance to the domestic law of the State.

72. Concerning the question of who was mandated to formulate a unilateral act, a view was expressed that such capacity should be limited to those persons mentioned in article 7, paragraph 2 (a), of the Vienna Convention, though another view considered it necessary to look at the relevant State practice in order to determine if other organs could bind States in specific areas.

73. The question was raised as to whether an organ that acted beyond its powers or contravened its instructions nevertheless bound the State internationally in so doing; based on article 7 of the articles on State responsibility, the answer was in the affirmative. Therefore draft article 5 (h) needed to be considered in much greater detail since its very principle was open to question. Furthermore, it was stated that the same point was true, *a fortiori*, of the issue of specific restrictions on authority to express the consent of a State, dealt within article 47 of the Vienna Convention; the Special Rapporteur had not provided reasons for not transposing it to the case of unilateral acts.

74. However, according to another view, there was no need to make reference to the draft articles on State responsibility because the issue was not responsibility, but an expression of will that was binding on the State and which could not be formulated simply by an official of the State.

75. Furthermore, it was pointed out that only the author State could challenge the competence of the person who had formulated the unilateral act; it was not clear if other States could invoke that argument.

76. As for the provisions concerning error, fraud, corruption and coercion, the view was expressed that further thought should be given to their formulation, with fuller account taken of the wealth of State practice that was available in that area.

77. Some members agreed that in the interpretation of unilateral acts, the essential criterion was the author State's intention and that it might be useful to consult the preparatory work, where available. In this connection, it was noted that reference to preparatory work was made only in the context of a supplementary means of interpretation and was put in square brackets in article (b), which showed that it was a minor consideration, whereas actually it was important and should be emphasized in the context of intention.

78. On the other hand, other members voiced their reservations regarding the reference to preparatory work, because in the case of unilateral acts, the feasibility of having access to such work was quite doubtful. Furthermore, it was mentioned that the restrictive interpretation of unilateral acts, for which the Special Rapporteur had made a case, was not reflected in the text of the draft articles.

79. It was suggested that the retention of the words "preamble and annexes", found in draft article (a), paragraph 2, might not be justified in light of the fact that they were not found frequently in unilateral acts. In this connection, it was also suggested that the provision could

state that the context for the purpose of the interpretation of a unilateral act should comprise the text and, where appropriate, its preamble and annexes. A similar approach should be taken with regard to the reference to preparatory work in article (b).

80. A suggestion was made for simplifying the approach by having a broad general rule on the interpretation of unilateral acts which would relegate to the commentary details such as the use of preambles and preparatory work, on the understanding that it might later be necessary to draft rules of interpretation that were specific to certain categories of acts.

81. It was also suggested that, in light of the diversity of State practice, it might be preferable to proceed on a case-by-case basis rather than trying to establish any common, uniform rule of interpretation.

82. Another proposal called for the Commission to look at the object and purpose of unilateral acts as a guide to the interpretation thereof. According to another view, the consideration of the interpretation of unilateral acts was premature.

83. In relation to draft article 7, which stated that a unilateral act was binding in nature, it was noted that such a provision could not serve as a general rule, in that it could not necessarily be said that protest, for example, was binding on the State which formulated it.
