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Summary record of the 2593rd meeting

Topic:
Unilateral acts of States

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ant to the primary rule which, if they were not fulfilled, gave rise to State responsibility. If the Special Rapporteur agreed to get involved in the consideration of due diligence, he should be asked to carry out a similar study of the other rules, which, in the final analysis, formed the body of secondary rules governing the application of international law.

69. Mr. GOCO noted that due diligence had introduced a new theme that the Special Rapporteur had not contemplated in his report, even though the concept was familiar to jurists. He feared it was not a wise approach, since it would impose an additional burden on a State that invoked a circumstance precluding wrongfulness to relieve itself of responsibility, that of demonstrating that it had exercised due diligence.

70. Mr. SIMMA said that his concerns could be adequately met by either of the two options contemplated: either a reference to the principle of diligence in the commentary to an article or an additional article stating that, in the Commission's view, the subject came within an area that it did not propose to codify, without prejudice, however, to its relevance to State responsibility.

71. Mr. CRAWFORD (Special Rapporteur) said that the discussion had been useful in that it had brought to light a real problem of differentiation between primary and secondary rules. The draft articles would obviously have to include a provision comparable to article 73 of the 1969 Vienna Convention, i.e. a "without prejudice to" clause that would clarify the scope of the draft articles. That would meet the concerns that had prompted Mr. Hafner and Mr. Simma to raise a question of substance which had actually been dealt with already in the commentaries to certain articles, especially articles 23 and 26 (Moment and duration of the breach of an international obligation to prevent a given event), the main elements of which should be included in the commentary to article 16. All of the foregoing should bring it home to States that the Commission had been unable to exhaust the topic of State responsibility even after working on it for 44 years.

The meeting rose at 1 p.m.

2593rd MEETING

Thursday, 24 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Unilateral acts of States (A/CN.4/496, sect. C, A/CN.4/500 and Add.1,[1] A/CN.4/L.588)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his second report on unilateral acts of States (A/CN.4/500 and Add.1).

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

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

4. While a treaty act was the product of negotiations in which States coordinated their will to enter into a commitment, the elaboration, or rather the formulation, of a unilateral act was based on the sole participation of a State or several States, which incurred an obligation towards another State that had not participated in its elaboration. It was therefore a heteronormative act.

5. To determine the specific character of unilateral acts and justify the formulation of specific rules, possibly based on different criteria from those applicable to treaty acts, it should be borne in mind that a State usually formulated a unilateral act when it could not or did not wish to negotiate a treaty act, that is to say when, for political reasons, it did not wish to enter into negotiations. He would consider in due course whether, for example, unilateral declarations containing negative security guarantees in the context of disarmament negotiations, guarantees formulated outside the context of bilateral or multilateral negotiations, could be classed as legal unilateral acts. For

[1] Reproduced in *Yearbook ... 1999*, vol. II (Part One).

the time being, he would simply note that nuclear-weapon States preferred not to negotiate with non-nuclear-weapon States on certain undertakings that they considered adequate although in reality they were not. The addressees—the non-nuclear-weapon States—did not participate in the negotiations for the formulation of the act.

6. It followed that a different approach was required in elaborating rules to govern the operation of unilateral legal acts. In particular, they should be restrictive, particularly as regards the expression of consent, the interpretation and the effects of such acts. Considerable caution should also be exercised in view of the need to take full account of political realities. The Commission's work could only be successful if it was undertaken in a spirit of steadfast political realism. It would be unwise to draft purely academic articles without reflecting the views of States, even where they were not fully consonant with the criteria underlying the Commission's draft. Political realism was vital. The Commission's work might suffer if it engaged in a process of codification that was divorced from reality, that is to say from the will of States. While it had every right to champion its own criteria, it should not overstep the boundaries set by the wishes of States, which would probably prefer rules that did not unduly restrict their political and legal freedom of action in the international field.

7. State representatives in the Sixth Committee had referred to acts that should be excluded from the study and commented on the components of the definition. The first favourable point to be noted was that the existence of a specific category of unilateral acts of States had been recognized. In international relations, States usually acted, in both the political and legal field, through the formulation of unilateral acts. Some were unequivocally political; others were easily identifiable as belonging in the legal field. Still others were ambiguous and would require careful study to determine in which category they belonged.

8. In the case of legal acts, some were designed solely to produce internal legal effects and could be ignored. Even where the State's intention was otherwise, such acts could not produce international legal effects unless the addressee State gave its consent. While a State was entitled to formulate acts in order to incur international legal obligations, it was a well-established principle of international law that a State could not impose obligations on other States or subjects of international law without their consent.

9. Other unilateral legal acts could produce international effects but not qualify as autonomous. They could easily be placed in the treaty category as acts related to a pre-existing norm, whether of customary, treaty or even unilateral origin.

10. A common feature of such acts was their formal unilateral character. They could be formulated by a State, in which case they were unilateral legal acts of individual origin, or they could be formulated by two or more States, in which case they would be of collective or joint origin. The latter, in turn, presented significant variations, since collective acts might be based on a single instrument, while joint acts would be formulated through separate acts but of similar purport. The important point in all cases, one that constituted a first criterion for identifying the acts with which the Commission was concerned, was that their elaboration was unilateral, which did not prevent them from having a bilateral effect, that is to say where there was a possibility of the relationship created in a unilateral way becoming bilateral when the addressee acquired a right and exercised it. Some writers had rightly said that all acts were bilateral because the obligation was ultimately accompanied by a right and a bilateral relationship was forged. However, the unilateral nature of the act was not based on that synallagmatic criterion; it depended on the coming into existence of the act at the time of its formulation.

11. The unilateral character of an act was thus closely bound up with its genesis which occurred when one or more States formulated a unilateral act and incurred unilateral obligations, with no need, in order for effects to be produced—for their genesis to be completed by the subsequent acceptance or behaviour of the addressee State. That concept corresponded in large measure to what had been called, in the first report on unilateral acts of States,[2] the autonomy of the obligation assumed by the State. It was confirmed not only by a large body of legal opinion but also by ICJ, especially in its judgments in the *Nuclear Tests* cases.

12. In approaching the question of autonomy, a distinction had to be drawn between the legal or formal act and the norm it contained, and, within the norm, between the obligations incurred and the rights acquired as a counterpart to the obligations. A unilateral act thus existed when it was formally unilateral, when it did not depend on a pre-existing act (first form of autonomy) and when the obligation incurred was independent of its acceptance by another State (second form of autonomy).

13. The Commission had attempted at its fiftieth session to distinguish the act from the norm and, within the norm, to identify the obligation and give it an autonomous character in relation to the genesis of the act. It was also important to distinguish between the formal act and the material act, since it would then be possible to distinguish the operation whereby the norm was created from the actual norm itself. It followed that the formal act, as a result of which the norm—particularly the obligation—came into being, was the declaration.

14. In treaty law, the treaty was the instrument most frequently used by States to create legal norms. Treaties were regulated, of course, by the 1969 Vienna Convention, although there could be other norms of different origin produced by legal acts or operations unrelated to treaties.

15. In the law governing unilateral acts, particularly strictly unilateral, autonomous and independent or separately existing acts, the mechanism that was generally used to create legal norms and that could be used, more specifically, to incur unilateral obligations was the declaration. Not everyone in the Sixth Committee or in the Commission concurred with that assessment. Some felt that the use of the term "declaration" to identify a legal act would be restrictive inasmuch as other unilateral acts could be left outside the scope of the present study or

[2] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486.

regulatory provisions. But that need not be the case, because the declaration as a formal act was unique, while material acts, that is to say the content of such acts, could be diverse. For example, a waiver, a protest, a recognition or a promise was an act with its own separate characteristics, which would make the establishment of rules governing all such acts a complex task. It should be noted, however, that consideration of the material act would be important when the rules governing its effects were elaborated. Rules that were consistent with each of those acts would probably need to be formulated.

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

17. The Sixth Committee had raised important questions about the relationship between unilateral acts and acts pertaining to international responsibility, international organization, estoppel, reservations and interpretative declarations.

18. In the case of international responsibility, two different categories of unilateral acts needed to be distinguished: one that could be autonomous and would be the primary act, and another that could not be autonomous, whereby a State would fail to fulfil the requirement of the obligation contained in the former. The Special Rapporteur on State responsibility, Mr. James Crawford, had referred in one of the draft articles in his second report (A/CN.4/498 and Add.1-4) to the inconsistency of the conduct of a State with the requirements of an obligation incurred by that State, which could entail the international responsibility of the State with the ensuing legal consequences. He had included customary norms, treaty norms and others which were to be understood primarily as norms—or rather obligations—of unilateral origin. Acts by a State that failed to fulfil a previously incurred unilateral obligation thus formed the basis for the State's international responsibility. Such acts were or might be autonomous unilateral acts.

19. A State could formulate a unilateral act that was in breach of, or inconsistent with, a previously incurred unilateral obligation. That secondary act constituted the basis of international responsibility. But it was not autonomous in the same way as the primary act, despite being unilateral in formal terms, since it related to a pre-existing obligation. It did not occur autonomously because it was indissociable from a pre-existing norm in the absence of which the proposed effect could not ensue as a generator of international responsibility. As a result, it did not, in his opinion, fall within the scope of the Commission's study.

20. Acts pertaining to international organizations were also closely related to unilateral acts but were to be excluded from the study for the time being, because they fell outside the Commission's mandate and would be difficult to cover along with acts of States. But a distinction had to be drawn between the elaboration of the act and its effects, that is to say acts elaborated by organizations and those elaborated by States and addressed to an international organization. In his view, there were some State acts addressed to international organizations as subjects of international law capable of acquiring international rights that could not be excluded. Whether he would later attempt to formulate rules governing such acts would depend on how the study evolved.

21. Acts relating to estoppel were also an important issue. Although they could be classed as unilateral acts in formal terms, they did not of themselves produce effects. They depended on the reaction of other States and the damage caused by a State's primary act. There was certainly a close connection between the two. A State could carry out or formulate a unilateral act that could trigger the invocation of estoppel by another State that felt it was affected. Yet it was a different kind of act because, unlike a non-treaty-based promise, a waiver, a protest or a recognition, it did not of itself produce effects, that is to say it did not come into existence solely through its formulation but depended on the reaction of the other State and the damage it caused, conditions that were viewed as a prerequisite for the invocation of estoppel in a proceeding.

22. A final issue was the relationship between unilateral acts and reservations and interpretative declarations. Again, there were two separate questions to be addressed: the unilateral character of the act whereby a reservation or interpretative declaration was formulated, and whether the type of unilateral act with which the Commission was concerned could give rise to reservations or interpretative declarations, a question that would be taken up at the fifty-second session.

23. The act whereby a reservation or interpretative declaration was formulated was plainly a non-independent unilateral act by virtue of its relationship with a pre-existing act. It was therefore covered by existing rules, as reflected in the 1969 Vienna Convention.

24. The draft articles proposed in his second report read:

Article 1. Scope of the present draft articles

The present draft articles apply to unilateral legal acts formulated by States which have international effects.

Article 2. Unilateral legal acts of States

For the purposes of the present draft articles, unilateral legal act [declaration] means an unequivocal, autonomous expression of will, formulated publicly by one or more States in relation to one or more other States, the international community as a whole or an international organization, with the intention of acquiring international legal obligations.

Article 3. Capacity of States

Every State possesses capacity to formulate unilateral legal acts.

Article 4. Representatives of a State for the purpose of formulating unilateral acts

1. Heads of State, heads of Government and ministers for foreign affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.

2. A person is also considered as representing a State for the purpose of formulating unilateral acts on its behalf if it appears

from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes.

3. Heads of diplomatic missions to the accrediting State and the representatives accredited by that State to an international conference or to an international organization or one of its organs are also considered as representatives of the State in relation to the jurisdiction of that conference, organization or organ.

Article 5. Subsequent confirmation of a unilateral act formulated without authorization

A unilateral act formulated by a person who cannot be considered under article 4 as authorized to represent a State for that purpose and to engage it at the international level is without legal effect unless expressly confirmed by that State.

Article 6. Expression of consent

The consent of a State to acquire an obligation by formulating a unilateral act is expressed by its representative when making an unvitiated declaration on behalf of the State with the intention of engaging it at the international level and assuming obligations for that State in relation to one or more other subjects of international law.

Article 7. Invalidity of unilateral acts

A State may invoke the invalidity of a unilateral act:

(*a*) If the expression of the State's consent to formulate the act was based on an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;

(*b*) If a State has been induced to formulate an act by the fraudulent conduct of another State;

(*c*) If the expression of a State's consent to be bound by a unilateral act has been procured through the corruption of its representative directly or indirectly by another State;

(*d*) If the expression of a State's consent to be bound by a unilateral act has been procured by the coercion of its representative through acts or threats directed against him;

(*e*) If the formulation of the unilateral act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;

(*f*) If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;

(*g*) If the expression of a State's consent to be bound by a unilateral act has been in clear violation of a norm of fundamental importance to its domestic law.

25. The draft articles were, in their present form, merely intended to serve as a basis for discussion. Draft article 1 (Scope of the present draft articles), was based largely on the 1969 Vienna Convention. It spoke of legal acts, thereby excluding political acts, a difficult distinction the Commission had already discussed. He had tried in the commentary to reflect a question that had arisen in the context of the Conference on Disarmament, namely whether unilateral declarations formulated by nuclear-weapon States and known as negative security guarantees were political declarations or unilateral legal acts. Such declarations were unilateral and of joint origin because, although formulated by means of separate acts, they were virtually identical. They were also formulated well-nigh simultaneously and, in some cases, in the same context, that is to say at the Conference. They were formulated not through negotiations but in the context of the negotiating mandate of the Conference, the only forum for negotiations on nuclear disarmament.

26. Some States maintained that they were political declarations and should be reflected in a legal document to be really effective. That reaction was, of course, politically based or motivated because non-nuclear-weapon States insisted that the undertakings of the nuclear-weapon States should proceed from multilateral negotiations in the framework of the Conference on Disarmament.

27. It was an extremely complicated and political issue. He was inclined to consider that they were genuine declarations or acts that were legally binding for the States concerned. The fact that they were vague and subject to conditions did not necessarily mean they were not legal. They were, however, inadequate in terms of the expectations of non-nuclear-weapon States.

28. Even if they were legal, such declarations were not unequivocally autonomous inasmuch as they could be linked to existing treaties concerning nuclear-weapon-free zones. For example, Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) specified the guarantees to be provided by nuclear Powers to the effect that they would not use or threaten to use nuclear weapons against States parties to the Treaty. Protocol 2 to the South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) contained a similar clause.

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

30. Draft article 2 (Unilateral legal acts of States), which defined a unilateral legal act, was closely related to draft article 1. He had included the word "declaration" in brackets because he did not wish to impose it, although he was personally convinced that it constituted the act to be regulated. It was an issue for the Commission to decide.

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

32. Draft article 4 (Representatives of a State for the purpose of formulating unilateral acts) was based on article 7 of the 1969 Vienna Convention. A unilateral act, like all legal acts by a State, had to be formulated by a body possessing authority to act on behalf of the State in the sphere of international law. In other words, for a unilateral act to produce international legal effects, it would have to be formulated by a body possessing the authority to engage the State in its international relations.

33. As the 1969 Vienna Convention indicated, such representatives of States were persons who, in virtue of their functions or other circumstances, were empowered to engage the State at the international level. The phrase "in virtue of their functions" must be understood as relating to representatives who were deemed by the doctrine, international practice and jurisprudence to be empowered to act on behalf of the State with no need for additional formalities such as full powers. Such representatives were heads of State, heads of Government and ministers for foreign affairs. International courts had enshrined the principle, for example, in the *Legal Status of Eastern Greenland* case and in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*.

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

35. It was an important consideration in view of the need for stability and confidence in international relations, but some restrictions should be applied. It was acceptable and even appropriate that certain categories of individuals, such as technicians, should not be empowered to engage the State internationally. The issue had been examined not only in the doctrine but also by international courts, including ICJ in its judgment in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, in which it had rightly held that a communication emanating from a technical official did not constitute an official declaration by the United States Government concerning its international maritime boundaries [see pages 307 to 309, paragraph 139, of the judgment]. Unfortunately, information was lacking on the apparently abundant State practice in that regard, and the Secretariat should request Governments to provide information.

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

37. One question about which he had doubts was whether it was necessary to include a provision on full powers, as in the 1969 Vienna Convention. His initial feeling was that full powers were not indispensable. For heads of diplomatic missions, heads of permanent missions to international organizations and heads of delegations to international conferences they were implicit in the letters of accreditation which authorized them to act vis-à-vis the State, international organization or international conference to which they were accredited. Those powers were, of course, limited to a specific sphere of activities in respect of that State, organization or conference.

38. Draft article 5 (Subsequent confirmation of a unilateral act formulated without authorization) was based on article 8 of the 1969 Vienna Convention and was basically concerned with the implicit or explicit confirmation of a unilateral act by a State. The Convention allowed for both implicit and explicit confirmation. During the consideration of the draft article at the United Nations Conference on the Law of Treaties, a broad formulation had been adopted. Venezuela had made a proposal that had not been taken up but which now appeared pertinent in respect of autonomous unilateral acts: that such acts should only be confirmed explicitly.[3] That seemed appropriate in view of the specific nature of such unilateral acts and the restrictive approach that should be applied to them.

39. Draft article 6 (Expression of consent) stipulated that the consent of a State to acquire an obligation by formulating a unilateral act was expressed by its representative when it was formulated on behalf of the State, when the declaration was unvitiated and when there was an intention to engage the State at the international level or in relation to one or more other subjects of international

[3] See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969*, *Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), document A/CONF.39/14, p. 121; and ibid., *First Session, Vienna, 26 March-24 May 1968*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 14th meeting of the Committee of the Whole, pp. 76 and 80.

law. In order for a legal act to be valid under international law, it must be attributable to a State, the representative of that State must have the capacity to engage it at the international level, the act must be the expression of its will and free of irregularities and it must be formulated in the proper manner. It had to have a lawful object and must not derogate from prior obligations. Draft article 6 referred specifically to obligations: the State must not be able to acquire rights through its acts and, conversely, it must not be able to place obligations on other States without their consent. Intention was fundamental to the interpretation of the act. Under article 31 of the 1969 Vienna Convention, the context for the interpretation of an act comprised, in addition to the text, its preamble and annexes, a whole series of acts carried out by the State before, during and after the formulation of the act.

40. Draft article 7 (Invalidity of unilateral acts) brought together the causes of invalidity of a unilateral act, which were nearly identical to those applied in the law of treaties, although they had been ordered somewhat differently for ease of consultation. Subparagraph (*a*) indicated that an error of fact or a situation which was assumed by the State to exist at the time when the act was formulated formed an essential basis of its consent. It reproduced the principle set out in article 48, paragraph 2, of the 1969 Vienna Convention and referred to by ICJ in its judgment in the *Temple of Preah Vihear* case that a State could not invoke the invalidity of a unilateral act if it had contributed by its own conduct to the error [see page 26 of the judgment]. Subparagraph (*b*) stated that invalidity could be invoked if the State had been induced to formulate an act by the fraudulent conduct of another State. Since that principle applied in the law of treaties it should likewise be relevant to the law of unilateral acts. Other causes mentioned for invoking invalidity were corruption of a State□╘ representative, acts or threats directed against a representative and conflict of the unilateral act with a peremptory norm of international law.

41. At the fifty-second session of the Commission, he proposed to address extremely important and complex issues such as the observance, application and interpretation of unilateral acts and whether a State could amend, revoke or suspend the application of one unilateral act by formulating another. He would venture to say that, if the act was formulated unilaterally and did not necessitate a reaction on the part of the State or States to which it was addressed, it fell into the context of "bilateralization" of unilateral acts, and that did not affect its autonomous or unilateral nature.

42. Mr. LUKASHUK congratulated the Special Rapporteur on a very professional report on a matter of great practical significance that had been given very little study to date. Unilateral acts were increasingly being used in international practice. They were extremely diverse in terms of content as well as of binding force, but each variety had its specific features. The Special Rapporteur had correctly identified the acts that must be examined and was also right in saying that unilateral acts of international organizations must be considered separately. That approach was justified by experience with the elaboration of the 1969 and 1986 Vienna Conventions and the fact that unilateral acts of international organizations raised broader and more complex problems than did those of States.

43. The Special Rapporteur had rightly pointed to one of the most difficult problems, namely that of distinguishing between legal and political acts. A special section on that distinction should be included in the report and in the commentary. Unilateral political acts were just as important as unilateral legal acts. Their use had become extremely widespread, yet they had still not been studied, largely because many jurists retained a purely formalistic approach, considering that rules and obligations could only be of a legal nature. Yet a vast array of normative standards came into play in international relations. True, the best way of settling problems was through legal means, but political declarations and moral standards also had their place in certain situations, their own way of operating and their own force—even if they were not legally binding.

44. The principle of good faith applied not only in the law, but also in politics and morality. International conflicts and the need for timely settlement had spawned a wide variety of political standards that could be applied more rapidly, won acceptance more easily and were more flexible in practice than legal rules. Political standards had proved their effectiveness during the cold war, when the creation of legal rules had been difficult, as acknowledged by representatives of both the East and the West. Political standards were instrumental in resolving security problems, as demonstrated by the example given in the second report of the Special Rapporteur, in the footnote on State practice in paragraph 23 of the report concerning the unilateral acts of nuclear-weapon States in 1995 by which they had undertaken a political obligation not to use nuclear weapons against non-nuclear-weapon States.

45. The sphere of action of political standards also extended to new areas of international cooperation in which legal settlements were impeded for particular reasons: environmental law, for example, which was currently, in general terms, an area of "soft" law.

46. A report of the Foreign Relations Committee of the Senate of the United States of America, with the expressive title "National Commitments", indicated that simply by repeating something often enough with regard to their relations with some particular country, they came to suppose that their honour was involved in an engagement no less solemn than a duly ratified treaty. Thus, the force of declarations was almost commensurate with that of a duly ratified treaty, but it was not of a legal character.

47. The Special Rapporteur had properly emphasized that what really distinguished political acts from legal acts was the intention of their authors. Intention was indeed the key, but, unfortunately, it could not be discerned clearly in every instance. An example was given in the footnote on State practice (see paragraph 44 above): the declarations made by nuclear Powers could be international legal engagements because they had clearly been intended to undertake legal obligations. ICJ, in its interpretation of the unilateral declarations formulated by the French Government in the *Nuclear Tests* cases, had also grappled with the issue. He himself suspected that

through those declarations, France had intended to undertake legal obligations.

48. Draft article 1 referred to unilateral legal acts by States which had international effects. However, many legal acts of States—for example, legislation in the field of private international law—could have international effects. The acts of concern to the Commission had, not international effects, but international legal effects. They created international legal obligations. The Special Rapporteur made that clear in his second report, in his commentary to draft article 1, but passed it over in silence in the article itself.

49. Similarly, draft article 2 should be entitled "Unilateral international legal acts", not just unilateral legal acts. The international community was referred to as a subject of international law, but opinions on that point differed greatly in the literature, and he did not think the draft on unilateral acts was the proper place to raise that question. The requirement of unequivocal expression must relate, not to will, but to intention. Finally, he did not think the requirement that the expression of will be formulated publicly was appropriate. What mattered most was that the addressee State should be made aware of it, as the Special Rapporteur indicated in paragraph 55 of his second report. The term "formulate" as used in draft article 3 and elsewhere seemed inappropriate: it designated a process that had not been completed, whereas the word "adopt" would better convey the sense of completion of the act, as when a parliament adopted a piece of legislation.

50. As to draft article 4, the analogy with the 1969 Vienna Convention appeared, in that instance, to be justified. True, the range of persons formulating unilateral acts, especially in the sphere of specialized cooperation, tended in practice to be wider than that of persons empowered to conclude treaties, but that point was adequately covered by paragraph 2 of the proposed article.

51. With regard to draft article 5, it was difficult to agree with the view expressed in paragraph 107 of the second report that unilateral acts had to be expressly confirmed if they were to have legal effect. In practice, tacit consent was generally considered to suffice.

52. With reference to draft article 7, and particularly subparagraph (*f*), he could not accept the view expressed in paragraph 140 of the report that only norms of *jus cogens* admitted of no exceptions. Norms of *jus dispositivum*, too, were binding in international law and could not be unilaterally waived by States. A State could renounce a norm of *jus dispositivum* in its mutual relations with other States only on the basis of mutual consent. A unilateral act which conflicted with any norm of general international law must therefore be considered invalid. Unilateral acts designed to bring about a change in existing international law—the Truman Proclamation[4] being one example—represented a separate problem the Special Rapporteur ought perhaps to consider.

53. He agreed with the suggestion contained in paragraph 147 of the report that the Special Rapporteur should elaborate and address in a third report questions relating to the termination or suspension of the application of unilateral acts, but he doubted the usefulness of elaborating a provision on *acta sunt servanda* or on such issues as the non-retroactivity and the territorial scope of unilateral acts.

54. Mr. PELLET said that he entirely agreed with Mr. Lukashuk's interpretation of France's intention to be engaged by the so-called unilateral acts that ICJ had found, in the *Nuclear Tests* cases, in the declarations by various politicians. He was, however, less convinced by Mr. Lukashuk's remarks in connection with subparagraph (*f*) of draft article 7, which should in fact speak of peremptory norms of general international law. An act against such a norm was certainly null and void. However, he could not agree that a unilateral act could not depart from customary law. Such an act could not produce legal effects if it was not accepted by the addressee States. The problem was one of legal effects rather than invalidity. States could derogate from customary law by agreement. He saw no reason why the declaring State should not, as it were, make an offer to its treaty partners, and still less why it should not make a unilateral declaration extending or amplifying its obligations under the customary rule in question.

55. Mr. KATEKA, referring to draft article 1, noted that in the commentary the Special Rapporteur, while excluding acts of a political character as well as those which, while legal, did not produce international effects, admitted the complexity of distinguishing political acts from legal ones. The Special Rapporteur, in a footnote to paragraph 23 of the report, referred to declarations made by the nuclear Powers in 1995 providing so-called negative security guarantees to non-nuclear States. In his view, such declarations were purely political and had no legal import. For example, the United States had reaffirmed that it would not use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of "an invasion ... on the United States ... carried out or sustained by ... a non-nuclear-weapon State in association or alliance with a nuclear-weapon State".[5] What, he wondered, would happen if a non-nuclear-weapon State in association with a nuclear-weapon State were to attack the United States with conventional weapons? The Commission should not, perhaps, concern itself unduly with disarmament issues of that kind, but the conclusion of the non-aligned countries that security guarantees had to take the form of a negotiated and legally binding international instrument seemed to him to represent the correct approach. In any event, he doubted whether the Special Rapporteur was justified in singling out so-called negative security guarantees as an example of legal acts formulated in the framework of international organizations or conferences. The declarations in question should have been categorized as political.

[4] 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., U.S. Government Printing Office, 1965), pp. 756-757).

[5] A/50/153-S/1995/263, annex; see *Official Records of the Security Council, Fiftieth Year, Supplement for April, May and June 1995,* document S/1995/263.

56. Throughout his commentaries to the draft articles under consideration, the Special Rapporteur referred extensively to the 1969 Vienna Convention but not to the 1986 Vienna Convention. It was to be hoped that the Commission would avoid the pitfall of relying exclusively on the 1969 Vienna Convention, thus giving currency to the view that the 1986 Vienna Convention was of relatively minor importance.

57. It would be useful to add a "whatever form" clause in draft article 2, in conformity with the view taken by ICJ in the *Nuclear Tests* cases to the effect that it made no essential difference whether a declaration was made orally or in writing. Lastly, referring to the mention in paragraph 62 of the report of unilateral legal acts adopted in connection with the establishment of an exclusive economic zone, he remarked that the adoption of the United Nations Convention on the Law of the Sea in 1982 had fundamentally altered the situation in an area where earlier State practice, from the Truman Proclamation to subsequent declarations on the territorial sea and the continental shelf, had been rich in unilateralism. In that connection, he invited Mr. Pellet to clarify his remarks concerning the role of unilateral declarations in connection with customary international law.

58. Mr. PAMBOU-TCHIVOUNDA said that he shared the doubts expressed by Mr. Kateka concerning the Special Rapporteur's exclusive reliance on the 1969 Vienna Convention. In particular, he would encourage the Special Rapporteur to give further thought in that connection to draft articles 6 and 7.

59. Mr. ROSENSTOCK said that, in his view, all the work done in Vienna in 1986 could have been performed with far less trouble in 1969 had it not been for certain doctrinaire views current in the earlier context which had fortunately been overcome by the later date. As to Mr. Kateka's comments concerning the United States declaration of 1995, the key issue was whether a declaration was political or legal. He wondered whether the non-aligned States' objections to the declaration were addressed to that issue or to the poor comfort to be derived from the declaration, an aspect which could hardly be said to invalidate the act. A treaty to the same effect between the United States and, say, Costa Rica, though perhaps of little practical value, would unquestionably be valid, and he wondered why the same should not be true of a unilateral statement. The Special Rapporteur had shown great intellectual integrity in leaving it to the Commission to decide whether criteria for distinguishing political acts from legal ones existed. To what extent, for example, was intention a meaningful criterion? Without an answer to those issues, the Commission could not hope to make a positive contribution to the topic.

60. Mr. KATEKA said that, as Mr. Rosenstock had implied, the form of a statement could sometimes cloud the judgement of its recipients. Nevertheless, he continued to believe that the non-aligned countries had been on the right track in taking an adverse view of the security guarantees offered by the nuclear Powers because the offer had been made in the form of a unilateral act rather than an international treaty. He agreed that the Commission should begin by trying to define the criteria for distinguishing between political and legal acts.

61. Mr. PELLET said, he too, agreed with Mr. Rosenstock's call for a definition of the criteria to be applied. The essential element of draft article 2 was that the declarant State intended to create legal effects. The nuclear-weapon States' security guarantees sought to have legal effects. The fact that the non-nuclear-weapon States did not accept the "offer" because of the form in which it was made was a different problem. As he saw it, the question whether acceptance was a condition for validity was a separate issue which did not affect the definition of unilateral legal acts. As to Mr. Kateka's comments, the new law of the sea was very much the consequence of an accumulation of unilateralism. In his view, the unilateral acts of States doing away with the old customary three-mile rule had clearly been initially contrary to international law: it was interesting to consider whether or not such acts should be taken into account in the draft. However, the problem was not one of definition. The accumulation of unlawful acts had ultimately overturned the old rule, and he saw no reason to exclude them from the definition.

62. Mr. HAFNER said that, while not necessarily agreeing with all Mr. Pellet's arguments, he endorsed his conclusions. Regarding Mr. Kateka's point about the nuclear-weapon States' declaration in 1995, he queried which criterion the non-aligned countries used to decide on the legal effect of that declaration. He believed the non-aligned countries' objection had been based on the content of the act rather than on its form.

63. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that it was difficult to determine whether an act was legal or political solely on the basis of the intention of the declarant State. In rejecting the nuclear-weapon States' declarations, the non-aligned States had argued that decisions on nuclear disarmament negotiations could not be taken at a unilateral or bilateral level but had to be negotiated in the context of the Conference on Disarmament. The non-acceptance of a unilateral act by its addressees undoubtedly affected the issue of its validity but had little to do with its status as a unilateral legal act having international effects.

64. Mr. LUKASHUK said that the only way to solve the problem would be a provision to the effect that the intention to undertake a legal obligation must be set out in a clearly expressed form in the act itself or in an accompanying act. Only if the party declared that it was taking on legal obligations would the act become valid in international law.

65. Mr. ECONOMIDES said that draft article 1 must be pruned back considerably. It currently covered a large number of unilateral acts which the Commission wanted to exclude from the scope of the draft. Mr. Pellet had rightly underscored the importance of a unilateral act for the formation of international custom. As it stood, draft article 1 concerned unilateral acts which could help in creating international custom. In reality, what was at issue was not the internal act, which merely applied an international custom; rather, it was the internal act which created a new custom that did not exist as yet but would in the future. It was the act which would create effects at international level, once custom had taken root, that was of particular interest to the Commission. The same applied

to internal acts which, to cite Mr. Pellet's example, did not simply apply a custom but sought to modify, extend or even cancel a customary rule. In a sense, the unilateral act set itself against custom. If it prevailed, it became an act which produced legal effects.

66. He had the impression that the Special Rapporteur wanted to eliminate such cases, which were very difficult, and was not wrong to contemplate the unilateral act as a kind of source of international law: when a State, by means of a unilateral act, could create a new legal rule containing rights and obligations.

67. Mr. KATEKA, referring to Mr. Economides' question as to when a State, through a unilateral declaration, created a legal effect, said that that was the essence of the problem facing the Commission. Regarding Mr. Hafner's comment, it was difficult to state the criteria for rejecting negative security guarantees, because, regardless of the intention of the States making the declarations, disarmament, and especially its nuclear aspect, were matters of life and death. It had been the cold war which had led to the arms race and the present situation. One side made a declaration that it would not be the first to use nuclear weapons, whereupon the other side followed suit. Hence, the declarations had been made by nuclear Powers and were more political than legal. He did not think that it would be possible to create binding unilateral declarations on nuclear security guarantees.

68. Mr. SIMMA, commenting on the exchange regarding the binding or non-binding nature of negative security guarantees, said the lesson one could draw was that if a State made a unilateral declaration with the intention of it being binding, in other words, a State said that it wanted to assume an obligation by way of a unilateral act, other States could refuse such a "gift" if they did not want it. No State was required to accept that another State wanted to enter into an obligation with it, because there might be less pleasant things concealed behind that obligation. Even if a State intentionally made a unilateral commitment, other States could ask that State to take the treaty avenue.

69. Mr. LUKASHUK said the proposal that the Special Rapporteur should study the role of unilateral acts in forming custom was contrary to the very essence of the Commission's decision at its fiftieth session to consider only autonomous acts, which were not tied in with the creation of other norms. If the Commission started to look at the role of unilateral acts in the development of custom, then why not examine the role of unilateral acts in the creation of international agreements? The proposal to consider the role of unilateral acts in the formation of custom had nothing whatsoever to do with the Special Rapporteur's topic.

70. Mr. GOCO said that the issue had been touched upon already, in particular the distinction between political and legal acts. Unilateral declarations arose simply because, rather than enter into formal commitments in treaties, States formulated a unilateral act that was viewed as creating a legal obligation. But normally the State would be hesitant about that kind of declaration or act creating legal effects. He agreed with the comment made earlier about the *Nuclear Tests* cases. He did not think that there had been an intention to create legal effects, but ICJ had found that France was bound by the unilateral declaration. On the other hand, even the Court had not been certain about the criteria for distinguishing between political and legal acts. He had taken due note of Mr. Lukashuk's point that there must be a clear statement concerning intention. Yet that would be a difficult undertaking too. Eventually it would be a matter of judicial inquiry to determine the intention of the party. The Special Rapporteur had admitted to the difficulty of drawing the line between political and legal acts. If the Commission attempted to formulate criteria for so doing, it would have to rely on judicial precedents.

71. Mr. HAFNER said that he was concerned about Mr. Lukashuk's comment to the effect that the Commission should not deal with unilateral acts which had a bearing on the creation of customary rules in international law. He would have problems with such a working method. It was impossible to know whether a unilateral act would lead to the creation of a new rule of customary international law or whether it would have another effect on existing customary international law. Consequently, it was essential to deal with unilateral acts irrespective of whether they had an effect on customary law, including the creation of new rules of customary international law.

72. Mr. ROSENSTOCK, referring to Mr. Simma's comment, wondered whether a State would really be released from an obligation made in a unilateral declaration when another State refused to recognize it. For example, if a case was brought against a State for particular behaviour, it was assumed that the State in question did not regard the other State as bound by the unilateral declaration to which reference was not made. Did that mean the unilateral declaration was of no validity? Certainly, mere non-action to accept it was not enough, but he wondered whether even a rejection of a unilateral declaration as inadequate released the State which had made the declaration from the obligation it had undertaken, however slight that obligation might be. He did not know the answer, but he thought that it did not. In his view, the other party was irrelevant to whether there was a commitment, perhaps not irrelevant to whether the commitment was legal or illegal, but its quality as a commitment by the State making it had to be unaffected by the response from the "donee" State—assuming the issue was not that the "donee" State had done something to adopt a particular course of conduct.

73. Mr. SIMMA said Mr. Rosenstock's comment brought the Commission back to the fundamental issue of unilateral acts of States, namely the foundation of the binding nature. There were two schools on that question. One derived from Roman law, according to which a promise was binding simply because it had been made. The other school, to which he adhered, was that unilateral promises or other statements could become binding only if another party expected the promising State to keep its promises. That expectation created a legal obligation. The philosophical foundation of the problem could have an impact on the solution of very practical topical issues.

74. Mr. GAJA said that while the definition of treaties raised some problems in a few borderline cases, and the legal regime of treaties was basically uniform, the same could not be said of unilateral acts, which lay largely in uncharted territory. The first difficulty that arose was to

identify unilateral acts and then try to arrange those which were to be considered unilateral acts but formed a rather heterogeneous group into reasonably homogeneous categories. Some unilateral acts could be considered to be analogous to treaties to a certain extent. Others, while they involved the State's intention to produce effects, were of another nature. One example of that was acquiescence. He noted in that context that what the Special Rapporteur had said about estoppel, which was a procedural institution, did not apply to acquiescence, which was a well-known element that was also addressed in the 1969 Vienna Convention. Hence, there was a range of unilateral acts, from promise to acquiescence, some formal and some not, some producing well-defined legal effects and others more doubtful legal effects, such as recognition.

75. One of the consequences of the great variety of unilateral acts was that it was difficult to apply the principles stated in respect of one unilateral act—for example by ICJ with regard to promise in the *Nuclear Tests* cases—to all the others. Should it really be said that recognition, waiver, acquiescence and the like had to be made publicly and explicitly? The Special Rapporteur recognized the variety of elements which needed to be considered, but seemed to think that that variety affected not so much the formation, as the content, of the various acts. That view was reflected in his basic approach, which was to try and apply rules similar to those in the 1969 Vienna Convention to all unilateral acts. That approach had already been criticized from a slightly different perspective by Mr. Kateka and Mr. Pambou-Tchivounda. In his opinion, that sort of analogy could apply to some categories of unilateral acts, such as promise, but would not be suitable for all other acts.

76. It did not seem that the basic approach had been adopted consistently. In some cases, the Special Rapporteur had given reasons for deviating from the application of the rules of the 1969 Vienna Convention, but not in others. He had referred to the issue of the competence of State organs to make a unilateral act. There was no mention of article 46 of the Convention when the second report on unilateral acts of States dealt with validity, and the only rules present were based on article 7 of the Convention, which addressed another problem. Even before defining the scope of the articles, there should be an in-depth analysis of the various categories to see whether the Commission could deal with all unilateral acts or with a subcategory of those which might be more similar to treaties.

77. In his introduction to the second report, the Special Rapporteur argued that issues of international responsibility should not be considered in the context of unilateral acts. That was not clear, partly because no example was given of the issues he wanted to leave aside. The matter had been clarified in the oral presentation: insofar as a unilateral act produced legal effects, they could comprise an obligation under international law; infringement caused international responsibility, and there was no reason to distinguish between that type of international responsibility and other types referred to in article 16 of the draft articles on State responsibility.[6] There was no doubt that such issues should be left aside. Yet the problems started when the Special Rapporteur mentioned unilateral acts by which States engaged their international responsibility. That should not be taken as implying that reference was being made to conduct, albeit deliberate conduct, on the part of the State infringing an obligation. In his opinion, asserting that a deliberate infringement was a unilateral act would sound odd.

78. The Commission might consider the case in which a unilateral act might produce legal effects towards one State, while at the same time being an infringement of an obligation towards another State. One example would be premature recognition by one State of a State "in the making", which would produce an infringement of an obligation towards the sovereign State. That kind of issue had to be considered in the draft.

79. Mr. GOCO said that he had also taken note of the remark in the Special Rapporteur's report, in response to the Sixth Committee's request, to address the subject of State responsibility. However, although the effects of unilateral acts and State responsibility were related, the Special Rapporteur had done well to point out that the latter topic was being considered elsewhere.

The meeting rose at 1 p.m.

2594th MEETING

Friday, 25 June 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/496, sect. C, A/CN.4/500 and Add.1,[1] A/CN.4/L.588)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft articles contained in the

[6] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[1] Reproduced in *Yearbook ... 1999*, vol. II (Part One).