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Summary record of the 2624th meeting

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2624th MEETING

Friday, 19 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Diplomatic protection (*continued*)* (A/CN.4/506 and Add.1[1])

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRMAN, noting that the Commission had completed its consideration of draft articles 1 to 4 on diplomatic protection, invited the Special Rapporteur to sum up the discussion.

2. Mr. DUGARD (Special Rapporteur) thanked the members of the Commission for having participated in the debate in a constructive manner. He was aware that many of them would have preferred him not to have included draft articles 2 and 4 in his first report (A/CN.4/506 and Add.1), but he had felt intellectually compelled to do so.

3. As far as article 2 was concerned, it had to be acknowledged that the use of force was construed by some States as the ultimate form of diplomatic protection. Support for that position was to be found in the literature both before and after the Second World War. It was a fact that States had, on a number of occasions, forcibly intervened to protect their nationals, arguing that they were exercising the right to diplomatic protection. It could be predicted that they would continue to do so in future. In all honesty, he could not, like his two predecessors, contend that the use of force was outlawed in all circumstances in the case of the protection of nationals. He had, however, attempted to subject such intervention to severe restrictions. Some members had rejected draft article 2 on the grounds that the Charter of the United Nations prohibited the use of force even to protect nationals and that such use was justified only in the event of an armed attack. However, most members of the Commission had not taken a firm position on the Charter provisions, preferring to reject article 2 on the grounds that it simply did not belong to the subject of diplomatic protection. The debate had revealed that there was no unanimity on the meaning of the term "diplomatic protection", but it had also shown that diplomatic protection did not include the use of force. It was thus quite clear that draft article 2 was not acceptable to the Commission.

4. As to article 4 on the obligation of States to protect their nationals, he recognized that he had introduced the proposal *de lege ferenda*. As already indicated, the proposal enjoyed the support of certain writers, as well as of representatives in the Sixth Committee and ILA; it even formed part of some constitutions. It was thus an exercise in the progressive development of international law. But the general view had been that the issue was not yet ripe for the attention of the Commission and that there was a need for more State practice and, particularly, more *opinio juris* before it could be considered. Again, it seemed quite clear that the Commission did not accept draft article 4.

5. Referring to the general philosophy behind draft articles 1 and 3, he noted that the members of the Commission agreed that the concept of diplomatic protection was not obsolete. There had been strong support for the view that diplomatic protection was an instrument for the protection of human rights, although some members had felt that too much emphasis had been placed on the human rights aspect, while others thought that diplomatic protection had nothing to do with human rights at all; that, however, was a minority view.

6. There had also been no strong objection to the idea that diplomatic protection was founded on a fiction. Most members of the Commission thought it a useful instrument for the protection, in the first instance, of nationals of a State and, in a wider perspective, of the whole of humanity. However, there was uncertainty about the general scope of diplomatic protection. The title itself had been criticized and some members had suggested that it should be made clear that the object of the exercise was not to protect diplomats, but nationals in foreign States. Views were also divided on the desirability of including functional protection in the exercise.

7. Article 1 had not given rise to any major objections. However, doubts had been expressed about the language employed, in particular the word "action", which had been construed differently by different members. It had been suggested that the matter should be given closer attention. Some members had also suggested that the language of article 1 should be brought into line with that of the articles on State responsibility. In that connection, he pointed out that the complaints had, in large measure, arisen in connection with the translation of certain terms into French.

8. Interesting comments had been made about the need for a wrongful act to have been committed before diplomatic protection could be exercised. Mr. Brownlie and Mr. Gaja had drawn attention to the possibility of a potentially wrongful act, such as a draft law providing for measures which could constitute a wrongful act. That question, too, would have to be considered further.

9. In article 3, he had proposed that the Commission should adopt the traditional view deriving from the

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* Resumed from the 2620th meeting.

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

judgment of PCIJ in the *Mavrommatis* case, according to which diplomatic protection was a right of the State, which did not act as the agent of its national. Some members had said that the State's claim should be more strongly emphasized. Others had taken the view that greater emphasis should be placed on the fact that the injury to the national was the consequence of a breach of international law. He believed that the idea was implicit in the draft article, but agreed that it could be made more explicit.

10. Article 3 also provided that, subject to article 4, the State of nationality had a discretion in the exercise of diplomatic protection. A number of members had appealed to him not to stress the discretionary power of the State, as that might discredit current constitutional attempts to assert the obligation of States to protect their nationals. Other members had gone so far as to suggest that some of the provisions of article 4 might be included in article 3 in order to attempt to curb the discretionary power of States.

11. To sum up, it appeared that there was considerable support for articles 1 and 3 and that a clear majority of members were in favour of referring them directly to the Drafting Committee. However, in view of the difficulties which had arisen, particularly in respect of article 1, he thought that such action would be premature and that it would be preferable to look at the articles in the context of an informal consultation and to reconsider them in plenary before referring them to the Drafting Committee.

12. Mr. ROSENSTOCK recalled that, at the beginning of the debate, it had been suggested that the Commission would do well not to enter into a debate on Article 2, paragraph 4, and Article 51 of the Charter of the United Nations concerning the use of force, as that did not come within the framework of the topic under consideration. In that sense, it was not accurate to say that any particular view on the subject of draft article 2 had prevailed in the discussion. His impression was that the Commission had felt that the point did not need to be raised in the context of the draft articles on diplomatic protection. It would be unfortunate if the summary record of the meeting suggested that all members of the Commission had agreed on any particular view. What they had unanimously agreed upon was not to adopt a position on the question.

13. Mr. BROWNLIE said that he agreed. Many members had said that the question of the use of force was outside the Commission's mandate in relation to diplomatic protection. He hoped that attention would be given in the informal consultations to the question of exercise of diplomatic protection in respect of threatened injury.

14. Mr. ECONOMIDES said that the Commission had unanimously recognized that diplomatic protection was a peaceful international institution, but had then divided up into two schools of thought, the first in favour of having a provision ruling out the use of force, as well as interference in the internal or external affairs of a State, expressly included in the draft articles, and the second considering such a provision unnecessary.

15. Mr. DUGARD (Special Rapporteur) said that Mr. Rosenstock's comments correctly reflected the feeling in the Commission that the question of the use of force fell outside the scope of diplomatic protection. He had simply wanted to indicate that a minority of members of the Commission had taken a stronger position.

16. Mr. KATEKA said that the summary records of meetings should speak for themselves and that no commentary by the Special Rapporteur was required. Mr. Economides was right in saying that the Commission as a whole held diplomatic protection to be a peaceful mechanism. However, some members, such as Mr. Candioti and others, had put forward other proposals. It could therefore not be concluded that there had been unanimity on any question.

17. Mr. PAMBOU-TCHIVOUNDA said that Mr. Economides was right to recall that two schools of thought existed on the subject of draft article 2. The first, based on a principle of contemporary general international law, considered that it was important to remove any trace of ambiguity and that the prohibition on the use of force should therefore be included in the draft articles. The second did not consider it necessary. Still others, such as Messrs Candioti, Galicki and Kamto, had proposed, in order to resolve the problem, that language reflecting the first of those two trends should be incorporated in draft article 1. In the end, the Commission had not taken any decision.

18. He noted with regret that the Special Rapporteur's summing up did not give an accurate picture of the debate. Mr. Dugard had failed to mention some essential matters of methodology and approach to the topic which had been raised several times. All members of the Commission had agreed about the need to delimit, clarify and redefine the topic more clearly than was done in the report. Article 1 was essential in that respect, since it determined the scope of diplomatic protection, from which all other provisions in the draft articles derived. All questions of substance raised by members had some relation to that article. Accordingly, he was in favour of holding informal consultations in order to determine whether the exercise should be resumed.

19. The CHAIRMAN recalled that the discussion on articles 1 to 4 had been concluded, that the Special Rapporteur had already summed it up and that it should not be reopened.

20. Mr. GOCO said that article 2 had been the subject of an in-depth debate which had shown that the question of the use of force did not fall within the scope of diplomatic protection. He therefore considered it essential that the draft should include an absolute prohibition on the use of force in the context of diplomatic protection.

21. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed that articles 1 and 3 should be reconsidered in informal consultations.

It was so decided.

22. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 5 to 8, contained in his first report.

23. Mr. DUGARD (Special Rapporteur) said that article 5 in essence examined the principle stated in the *Nottebohm* case, namely, that there should be an effective link

between the State of nationality and the individual for the purpose of the exercise of diplomatic protection. The question was whether that principle accurately reflected customary law and whether it should be codified.

24. The *Nottebohm* case was seen as authority for the position that there should be an effective link between the individual and the State of nationality, not only in the case of dual or plural nationality, but also where the national possessed only one nationality. Two factors might, however, limit the impact of the judgment in the case and make it atypical. First, doubts remained about the legality of Liechtenstein's conferral of nationality on Nottebohm under its domestic law. Secondly, Nottebohm had certainly had closer ties with Guatemala than with Liechtenstein. He therefore believed that ICJ had not purported to pronounce on the status of Nottebohm's Liechtenstein nationality vis-à-vis all States. It had carefully confined its judgment to the right of Liechtenstein to exercise diplomatic protection on behalf of Nottebohm vis-à-vis Guatemala and had therefore left unanswered the question whether Liechtenstein would have been able to protect Nottebohm against a State other than Guatemala.

25. With regard to the application of the principle, little information on State practice was available and academic opinion was divided. Acceptance of the principle would seriously undermine the scope of diplomatic protection, because, in the modern world, as a result of globalization and migration, many people who had acquired the nationality of a State by birth or descent had no effective link with that State. That was why he thought that the genuine link principle must not be applied strictly and that a general rule should not be inferred from it. His proposed draft article 5 therefore stated that "For the purposes of diplomatic protection of natural persons, the 'State of nationality' means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization." It drew on two fundamental principles that governed the law of nationality. First, a State's right to exercise diplomatic protection was based on the link of nationality between it and the individual; secondly, it was for each State to determine under its own law who its nationals were. It also took account of the fact that, far from being absolute, the right was a relative one, as demonstrated, in paragraphs 95 to 105 of the report, by doctrine, case law, international custom and the general principles of law. For example, birth and descent were deemed to be satisfactory connecting factors for the conferment of nationality and the recognition of nationality for the purposes of diplomatic protection. The same was true, in principle, for the conferment of nationality through naturalization, whether automatically, by operation of law in the cases of marriage and adoption or on application by the individual after fulfilling a residence requirement. International law would not recognize fraudulently acquired naturalization, naturalization conferred in a discriminatory manner or naturalization conferred in the absence of any link whatsoever between the State of nationality and the individual. In that case, it was a question of abuse of right on the part of the State conferring nationality that would render the naturalization *mala fide*. There was, however, a presumption of good faith on the part of the State, which had a margin of appreciation in deciding upon the connecting factors that it considered necessary for the granting of its nationality.

26. Article 6 dealt with dual or multiple nationality, which was a fact of international life, even if all States did not recognize it. The question was whether one State of nationality could exercise diplomatic protection against another State of nationality on behalf of a dual or multiple national. Codification attempts, State practice, judicial decisions and scholarly writings were divided on the subject, as demonstrated in paragraphs 122 to 159 of the report. There was, however, support for the rule advocated in article 6: subject to certain conditions, a State of nationality could exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national where the individual's dominant nationality was that of the first State. The criterion of dominant or effective nationality was important and the courts had to consider carefully whether the person concerned had closer links with one State than with another.

27. Article 7, which dealt with the exercise of diplomatic protection on behalf of dual or multiple nationals against third States, namely, States of which the individual was not a national, provided that any State of nationality could exercise diplomatic protection without having to prove that there was an effective link between it and the individual—the link of nationality had merely to be demonstrated in accordance with article 5. It was a compromise rule, against a background of differing opinions, backed up by the decisions of the Iran–United States Claims Tribunal and the United Nations Compensation Commission.

28. The rule set out in article 8, which concerned the exercise of diplomatic protection on behalf of stateless persons and refugees, was an instance of the progressive development of international law. It clearly departed from the traditional position stated in the *Dickson Car Wheel Company* case. A number of conventions had been adopted on stateless persons and refugees, particularly since the Second World War, but they did not deal with the question of diplomatic protection. Many writers had suggested that that was an oversight which should be remedied because some State must be in a position to protect refugees and stateless persons and that State was the State of residence, given that residence was an important aspect of the individual's relationship with the State, as demonstrated by the jurisprudence of the Iran-United States Claims Tribunal. The question remained whether the Commission was ready to follow that course, even though practice and jurisprudence on the subject were non-existent.

29. Mr. BROWNLIE thanked the Special Rapporteur for his very useful research. The report contained a great deal of helpful material, especially on the relevant jurisprudence and the decisions adopted in specialized jurisdictions like the Iran-United States Claims Tribunal and the United Nations Compensation Commission (established after the Kuwait-Iraq conflict). Nevertheless, he did not always accept the Special Rapporteur's analysis and had serious criticisms concerning draft articles 5 to 8.

30. Article 5, which based the right of diplomatic protection on nationality, did not take account of certain political and social realities. Everyone knew that, in many traditional societies, no provision was made for the registration of births and that, in such societies, large numbers

of illiterate people would be hard pressed to prove their nationality. There was also the case of victims of war and refugees who crossed borders precipitately and generally without travel documents and who were able to say only where they came from. For such people, to demand proof of nationality, particularly documentary proof, was clearly meaningless. What mattered were the facts.

31. In that sense, the principle of "effective nationality" was useful in providing a basis for nationality that would otherwise not be available, but the position of the Special Rapporteur on that point seemed to be a little unclear. After taking the prudent position, in paragraph 117 of the report, in his comments on article 5 that the genuine link requirement proposed by the *Nottebohm* case seriously undermined the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of people from the benefit of diplomatic protection, he then went back to that principle in the comments on articles 6 and 8, giving it a large and positive role.

32. The principle of effective or dominant nationality had not been established by the *Nottebohm* case. There was much francophone material, going back many years, on that principle. In State practice, there was constant reference to residence, not nationality, as the connecting factor that should be taken into consideration in the settlement of territorial disputes. In the real world, residence would provide a basis for diplomatic protection which would otherwise be impossible to prove by normal documentation.

33. Without wishing at the current stage to make a formal drafting proposal, he thought that, at the end of article 5, the words "or by" after the words "descent" should be deleted and that the words "or other connecting factors recognized by general international law" should be added after the words "naturalization in good faith".

34. Mr. OPERTTI BADAN said that he entirely agreed with Mr. Brownlie and would go even further. To base the right of diplomatic protection on nationality was to forget not only the case of stateless persons and refugees but also the increasingly frequent instance of nationals who established their residence abroad. The place of residence created a real link with the host State that was just as effective as nationality. Even if that was a step beyond traditional notions, it was a fact of modern-day life that the Commission should take into account. In the consideration of articles 5 to 8, residence should be considered not just as an accessory factor, but as an actual linking factor.

Unilateral acts of States (A/CN.4/504, sect. C, A/CN.4/505,[2] A/CN.4/511[3])

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

35. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing his third report on unilateral acts of States (A/CN.4/505), said that it consisted of a general introduction, in which he considered the possibility of basing the topic on the 1969 Vienna Convention and referred to the links between unilateral acts and estoppel, and a chapter in which he proposed reformulating articles 1 to 7 as contained in his second report.[4] The new draft articles read as follows:

Article 1. Definition of unilateral acts

For the purposes of the present articles, "unilateral act of a State" means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.

Article 2. Capacity of States to formulate unilateral acts

Every State possesses capacity to formulate unilateral acts.

Article 3. Persons authorized to formulate unilateral acts on behalf of the State

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 to be authorized to formulate unilateral acts on behalf of the State if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as authorized to act on behalf of the State for such purposes.

Article 4. Subsequent confirmation of an act formulated by a person not authorized for that purpose

A unilateral act formulated by a person who is not authorized under article 3 to act on behalf of a State is without legal effect unless expressly confirmed by that State.

Article 5. Invalidity of unilateral acts

A State may invoke the invalidity of a unilateral act:

(*a*) If the act was formulated on the basis of 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 act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State;

(*d*) If the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him;

(*e*) If the formulation of the 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, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council;

(*h*) If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it.

[2] Ibid.

[3] Ibid.

[4] *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1. For the text of the draft articles proposed in his second report, ibid., vol. I, 2593rd meeting, para. 24.

36. Unfortunately, when he had prepared the third report, he had not yet received any reply from Governments to the questionnaire, which had been circulated by the Secretariat to all Governments on 30 September 1999,[5] on their practice in respect of unilateral acts, although some of them had replied since.

37. Everyone recognized the important role played by unilateral acts in international relations and the need to draw up precise rules to regulate their functioning. But such codification and progressive development was made more difficult by the fact that those acts were by nature very varied, so much so that several Governments had expressed doubts as to whether rules could be enacted that would be generally applicable to them. That view must be qualified, however, because it should be possible to pinpoint features common to all such acts and thus elaborate rules valid for all.

38. As to the possibility of using the 1969 Vienna Convention as a basis, he noted that the members of the Commission had expressed very differing and even contradictory views on that question at preceding sessions. To avoid reopening an endless discussion, he favoured an intermediate approach: although simply transposing the articles of the Convention to unilateral acts was obviously not conceivable, it was not possible to ignore that instrument and its *travaux préparatoires* either. The parts of the Convention which had to do, for example, with the preparation, implementation, legal effects, interpretation and duration of the act clearly provided a very useful model, although unilateral acts did, of course, have their own features.

39. The link between unilateral acts and estoppel was perfectly clear. However, as he pointed out in paragraph 27 of his report, it should be borne in mind that the precise objective of acts and conduct relating to estoppel was not to create a legal obligation on the State using it; moreover, the characteristic element of estoppel was not the State's conduct but the reliance of another State on that conduct.

40. In view of the comments made by the members of the Commission at the preceding session and by the Sixth Committee, he had taken special care in reformulating article 1 (former article 2) on the definition of unilateral acts, which was very important because it was the basis of all the draft articles. The issue was not so much to give the meaning of a term as to define a category of acts in order to be able to delimit the topic. A number of elements were decisive: the intention of the author State, the use of the term "act", the legal effects and the question of autonomy or, more exactly, the "non-dependence" of the acts. All unilateral acts, whether protests, waivers, recognitions, promises, declarations of war, etc., had in common that they were unilateral manifestations of will and had been formulated by a State for an addressee (whether a State, several States, the international community as a whole or one or more international organizations) with a view to producing certain legal effects. In practice, however, the fact that unilateral acts could take various forms did not simplify matters: for example, a protest could, like a promise, be formulated by means of a written or oral declaration, but also by means of what might be called "conclusive" conduct, such as breaking off or suspending diplomatic relations or recalling an ambassador. The question was whether such acts were really unilateral acts within the meaning of the draft articles.

41. All unilateral acts nevertheless contained a fundamental element, the intention of the author State. It was on that basis that it could be determined whether or not a State intended to commit itself legally or politically at the international level. If the State did not enter into such a commitment, then, strictly speaking, there was no unilateral act.

42. It was worth noting that, in new draft article 1, the word "act" had replaced the words "act [declaration]" used in former article 2. It was usually by means of a written or oral declaration that States expressed waiver, protest, recognition, promise, etc., and, at first glance, it had appeared that that term could serve as a common denominator, but he had ultimately joined those who had considered that that approach was too restrictive and that the word "declaration" could not apply to certain unilateral acts. He therefore decided to use the word "act", which was more general and had the advantage of not excluding, a priori, any material act, although doubts remained as to whether certain acts or conclusive conduct, such as those envisaged in the context of a promise, could be considered unilateral acts.

43. Another question, which had already been raised, was that of legal effects, which would, of course, be dealt with in greater detail at a later stage. In the earlier version, legal effects had been confined to obligations which the State could enter into through a unilateral act, but, after the discussion in the Commission, it had appeared that the words "produce legal effects" had a much broader meaning and that the State could not only enter into obligations, but also reaffirm rights. According to the doctrine, although a State could not impose obligations on other States through a unilateral act, it could reaffirm that certain obligations were incumbent on those States under general international law or treaty law. That was the case, for example, with a unilateral act by which a State defined its exclusive economic zone. In so doing, the State reaffirmed the rights which general international law or treaty law conferred on it and rendered certain obligations operative which were incumbent on other States. Needless to say, that position was not contrary to the well-established principles of international law which were expressed in the sayings *pacta tertiis nec nocent nec prosunt* and *res inter alios acta* because it was clear that a State could not impose obligations on other States in any form without the consent of the latter.

44. The term "autonomous" used in former article 2 to characterize unilateral acts no longer appeared in the new draft article owing to the unfavourable reactions of several members of the Commission, which were summarized in paragraph 63 of the report. He nevertheless believed that a number of points would need to be added to the commentary to distinguish unilateral acts which depended on a treaty from unilateral acts in the strict sense. He had always considered that a dual dependence could be established: dependence vis-à-vis another act and dependence vis-à-vis the acceptance of the unilateral

[5] See General Assembly resolution 54/111 of 9 December 1999, para. 4.

act by its addressee. That was what had prompted him to put forward the idea of dual autonomy in his first report,[6] but he had not included it in the new draft, since the comments of the members of the Commission had been far from favourable. Although the word "autonomy" was not used, however, it must be understood that the unilateral acts in question did not depend on other pre-existing legal acts or on other legal norms. The question remained open and he looked forward with interest to learning the Commission's majority opinion on the issue.

45. Another question considered in the report was that of the unequivocal character of unilateral acts. As already pointed out, the State's manifestation of will must be unequivocal and that question was more closely linked to the intention of the State than to the actual content of the act. The manifestation of will must be clear, even if the content of the act was not necessarily so. "Unequivocal" meant "clear" because, as noted by the representative of one State in the Sixth Committee, it was obvious that there was no unilateral legal act if the author State did not clearly intend to produce a normative effect.

46. In a final point on new draft article 1, he said that the term "publicly", which had to be understood in connection with the State to which the act in question was addressed, which must be aware of the act in order for it to produce effects, had been replaced by the words "and which is known to that State or international organization". What was important was for the text to indicate that the act must be known to the addressee because the unilateral acts of the State bound it to the extent that it intended to commit itself legally and the other States concerned were aware of that commitment.

47. It was also suggested in the report that the draft should not include an article based on article 3 of the 1969 Vienna Convention because, unlike that instrument, the draft articles covered unilateral acts in the generic sense, which included all categories of unilateral acts. The Convention had to do with a type of treaty act, the treaty, which it defined without excluding other acts distinct from the treaty to which the Convention might also apply. Account had also been taken of the opinion of the members of the Sixth Committee who did not want an article on that question to be included in the draft.

48. New draft article 2 was by and large a repetition of former article 3 based on the drafting changes suggested by the members of the Commission at the preceding session. The report also contained a new draft article 3, which had been modelled on article 7 of the 1969 Vienna Convention and followed former article 4 with a few changes. Some States had indicated that the Convention might be closely followed in the case of the capacity of representatives or other persons to engage the State. He had said that paragraph 1 of the article should remain unchanged, since, during the consideration of his second report, the comments had been very similar to those made when the Commission had adopted its draft articles on the law of treaties and to those made at the United Nations Conference on the Law of Treaties. Paragraph 2 had been amended, however, and its scope expanded so as to permit persons other than those referred to in paragraph 1 to act on behalf of the State and to engage it at the international level. That text was in keeping with the specificity of unilateral acts and departed from the corresponding provision of the Convention. The point was to take account of the need to build confidence and security in international relations, although it might be thought that, on the contrary, such a provision might have the opposite effect. In his view, enlarging authorization to other persons who could be regarded as acting on behalf of the State might very well build confidence, and that was precisely the aim of the Commission's work on the topic. The paragraph used the word "person" instead of the word "representative" and, in the Spanish version, the word *habilitada* instead of the word *autorizada*, which had not been accepted at the preceding session for the reasons given in paragraphs 106 and 107 of the third report.

49. New draft article 4, which had been based on the 1969 Vienna Convention, adopted the wording of former article 5. That provision covered two different situations: either a person might act on behalf of the State without being authorized to do so or he could act on behalf of the State because he was authorized to do so, but either the action in question was not within the competencies accorded to that person or he acted outside the scope of such competencies. In such cases, the State could confirm the act in question. In the Convention, that confirmation by the State could be explicit or implicit, but it had been considered that, in that particular case, in view of the specificity of unilateral acts and the fact that, in certain instances, clarification must be restrictive, such confirmation should be explicit so as to give greater guarantees to the State formulating the unilateral act.

50. The second report had contained a specific provision, draft article 6, on expression of consent, that had been considered unduly reminiscent of treaty law, i.e. too close to the corresponding provision of the 1969 Vienna Convention and hence neither applicable nor justifiable in the context of unilateral acts. As indicated in paragraph 125 of the report, if it was considered that articles 3 and 4 could, in fact, cover the expression of consent, then a specific provision on the manifestation of will or expression of consent would not be necessary. The question of manifestation of will was closely connected with the coming into being of the act, i.e. the time at which the act produced its legal effect or, in the case of unilateral acts, the time of their formulation. Under treaty law, by contrast, the coming into being of a treaty, or the time at which it produced its legal effect, was connected with its entry into force. That was undoubtedly the most complex and important issue that the topic raised and it would be addressed at a later stage.

51. Silence, which was linked to expression of consent, was being omitted from the study because, as recognized by the majority of the members of the Commission, it did not constitute a legal act, even if it could not be said to produce no legal effect. On the other hand, the importance attached to silence in the shaping of wills and the forging of agreements and in relation to unilateral acts themselves was well known. Nevertheless, whether or not silence was a legal act and regardless of the fact that the current study dealt with acts formulated with the intention to produce legal effects, silence could not, in his view, be considered to be independent of another act. In remaining silent, a

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

State could accept a situation, even waive a right, but it could hardly make a promise. At all events, silence was basically reactive conduct that must perforce be linked to other conduct, an attitude or a previous legal act.

52. Lastly, the report examined the question of the invalidity of a unilateral act, an issue that had to be addressed in the light of the 1969 Vienna Convention and international law in general. New draft article 5 was broadly based on the provisions of the Convention and was similar to former article 7 proposed in the second report. In the new version, he had inserted an important cause of invalidity based on a comment Mr. Dugard had made at the preceding session[7] on the invalidity of an act that conflicted with a decision adopted by the Security Council under Chapter VII of the Charter of the United Nations on the maintenance of international peace and security. Although the Council could also adopt decisions under Chapter VI on the establishment of commissions of enquiry, the cause of invalidity related solely to Council decisions adopted under Chapter VII.

53. In conclusion, he said that his report was a general introduction to the topic and that he intended to expand on different aspects, taking into account the guidance offered by members of the Commission in the working group to be established.

54. Mr. CANDIOTI thanked the Special Rapporteur for his efforts to bring order into a topic that presented many difficulties owing to its complexity and diversity and to come up with new ideas that helped demarcate and pinpoint the purpose of the study. He shared the Special Rapporteur's view of the importance of unilateral acts in day-to-day diplomatic practice and agreed that an attempt must be made to organize and clarify the general legal principles and customary rules governing such acts in order to promote stability in international relations. It was a pity that so few States had thus far responded to the questionnaire on the subject sent to them by the Secretariat. The information contained in replies to the questionnaire, particularly on specific practice in respect of unilateral acts, would be of invaluable assistance to the Special Rapporteur and the Commission in their work.

55. Like the Special Rapporteur, he thought that the treaty law norms codified in the 1969 Vienna Convention served as a useful frame of reference for an analysis of the rules governing unilateral acts of States. Treaties and unilateral acts were two species of the same genus, that of legal acts. It followed that the rules reflecting the parameters and characteristics shared by all categories of legal act should be applicable both to bilateral legal acts—treaties —and to unilateral legal acts. But the existence of parallel features did not warrant the automatic transplantation of the norms of the Convention for the purpose of codifying the rules governing unilateral acts of States. There were important differences and that was why the Special Rapporteur had wisely recommended "a flexible parallel approach".

56. The comments by the Special Rapporteur on the question of estoppel and its possible connection with unilateral acts were pertinent. Obviously, estoppel was not, as such, either a unilateral or a bilateral legal act, but a situation or an effect which was produced in certain circumstances in the context of both legal and ordinary acts and which had a specific impact on a legal relationship between two or more subjects of international law. It could therefore be omitted for the time being from the general study of unilateral acts and taken up later to determine its possible impact in particular contexts.

57. With regard to the definition of a unilateral act in new draft article 1, the new wording proposed by the Special Rapporteur, which was a simplified version of his previous proposals, was an improvement, although it could probably be further refined. The definition should set out the basic components of a unilateral act, namely, an expression or manifestation of will whereby a State, without requiring the assistance of one or more other subjects of international law, intended to produce legal effects at the international level. The definition therefore had two components, i.e. the unilateral expression of its will by a State and the intention to produce, by that means, legal effects at the international level. The Special Rapporteur had been right to leave out the notion of autonomy, which was ambiguous and could mean two different things at the same time, namely, the unilateral nature of the manifestation of will and the exclusion from the scope of the study of unilateral acts governed by other specific norms.

58. In his view, the word "unequivocal", as a description of the manifestation of will, could be deleted. It should be understood that the expression of will in law must always be clear and comprehensible; if it was equivocal and could not be clarified by ordinary means of interpretation, it did not create a legal act. Moreover, the definition of the term "treaty" in the 1969 Vienna Convention did not require that the agreement of wills should be "unequivocal", although it clearly should be in order genuinely to constitute an agreement.

59. The definition also did not have to deal in detail with the requirement that the addressee should know of the act of expression of will. That was already implicit in the terms "expression" or "manifestation" of will. A will that was not manifested or expressed in such a way as to come to the knowledge of its possible addressee could have no legal force whatsoever. Knowledge was thus a condition of validity rather than a part of the definition.

60. He endorsed the criteria invoked by the Special Rapporteur in support of the rules embodied in the two paragraphs of the new draft article 3. However, instead of mentioning "States concerned" in paragraph 2, it would be preferable to refer only to the practice and intention of the State formulating the unilateral act because it was, in principle, the only "State concerned" whose expression of will gave rise to the unilateral act through authorized persons, other than the head of State or Government or the minister for foreign affairs.

61. New draft article 5 concerning the invalidity of a unilateral act should probably be viewed as a preliminary approach to the issue, as the causes of invalidity called for more systematic and detailed analysis. The Special Rapporteur could perhaps try to specify the conditions determining the validity of unilateral acts in a subsequent

[7] *Yearbook ... 1999*, vol. I, 2595th meeting, para. 24.

study, once the question of invalidity had been discussed. That would call for an examination of the possible material content of the act, the lawfulness of the act in terms of international law, the absence of flaws in the manifestation of will, the requirement that the expression of will be known and the production of effects at the international level. Once those conditions had been identified and described in detail, it would be easier to lay down appropriate rules governing invalidity.

62. He awaited with considerable interest the continuation of the Special Rapporteur's study of the topic, which would deal with extremely important issues such as the form, effects, binding character, interpretation, amendment, duration, suspension and revocation of unilateral acts. He had no doubt that, once the Special Rapporteur had submitted those components to the Commission, it would have a more comprehensive overview of the key components of the topic and would be better equipped to engage in a penetrating and mature discussion and to make headway in its work.

63. Mr. PAMBOU-TCHIVOUNDA paid tribute to the Special Rapporteur's fine achievement in reflecting the concerns of the members of the Commission and the representatives of States in the Sixth Committee. His third report was lively and well paced, although certain matters of substance, such as the reception of the manifestation of will by the addressee of the act, especially the form of reception, and the specification of the addressee or the whole circle of addressees, still had not been dealt with.

The meeting rose at 1 p.m.

2625th MEETING

Tuesday, 23 May 2000, at 10 .a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Diplomatic protection (*continued*) (A/CN.4/506 and Add.1[1])

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of draft articles 5 to 8 contained in the first report of the Special Rapporteur (A/CN.4/506 and Add.1).

2. Mr. SIMMA said he wished to take issue with some of Mr. Brownlie's remarks (2624th meeting). In particular, he was unsure what Mr. Brownlie had in mind when he criticized the Special Rapporteur for failing to take due account of habitual residence in the list of factors connecting the State and the individual set forth in draft article 5. If he was referring to habitual residence as a means of acquiring nationality, it was an issue that had been discussed at length in the topic of nationality in relation to the succession of States and was out of place in the current discussion.

3. If, however, for argument's sake, habitual residence was examined in the context of diplomatic protection, two questions arose. First, did a person's habitual residence in a State give that State the right to exercise diplomatic protection? In his view, if the person concerned possessed another nationality acquired *jure soli* or *jure sanguinis* or through bona fide naturalization, the State whose sole connection with the individual consisted in his or her habitual residence there did not, by virtue of that fact alone, acquire the right to diplomatic protection. The situation would be different if the person concerned was stateless or a refugee, an issue that was addressed in article 8. The second question was whether a State whose nationality a natural person had acquired through *jus soli*, *jus sanguinis* or naturalization lost the right to diplomatic protection if the person concerned habitually resided in another country. Mr. Brownlie seemed to imply that it did. Habitual residence under those circumstances would become the natural enemy of diplomatic protection. He vehemently opposed that view, which at worst could lead to a revival of the Calvo clause,[2] and he strongly supported the Special Rapporteur's argument in paragraph 117 of the report, which had been severely criticized by Mr. Brownlie.

4. Again contrary to Mr. Brownlie, he considered that the Special Rapporteur's handling of the *Nottebohm* case was clever and appropriate. Given its status as the leading case of reference in the area of diplomatic protection, he could not agree that it had been overemphasized. He noted in passing that the words "and *jus soli* or *jus sanguinis*", in paragraph 112, should be altered to read "*jure soli* or *jure sanguinis*".

5. He urged the Special Rapporteur to expand on the subject of mala fide naturalization and its consequences in his comments on article 5 and would also welcome

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

[2] See *Yearbook . . . 1956*, vol. II, pp. 206–208, document A/CN.4/96.