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**Summary record of the 2628th meeting**

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or passports and had only residence or habitual residence to connect them with a particular country. That, of course, was correct, but surely, in such a case, if a State wished to exercise diplomatic protection on behalf of a person who habitually resided within its territory, it could grant that person nationality. Nationality was open to all persons when they could prove to the State of nationality that they habitually resided in it. Thus, although many suggestions had been made on how to improve article 5, no one had questioned the need for such a provision. No one had suggested that the *Nottebohm* rule was an absolute one that should be codified. He therefore thought the article could usefully be referred to the Drafting Committee.

59. Article 6 presented greater difficulties and had created a clear division of opinion. He agreed it would be more appropriately placed after article 7. He did not, unlike some members, see it as a clear case of progressive development of international law. Two points of view existed, both backed by strong authority, and it was for the Commission to make a choice between the competing principles. Mr. Momtaz had made a strong plea for the principle of non-responsibility on the part of the respondent State. On the other hand, Mr. Sepúlveda had made the cogent point that many States did not allow a national to denounce or lose his or her nationality. Cases might therefore occur in which a person had relinquished all ties with the original State of nationality and acquired the nationality of another State yet was formally bound by a link of nationality with the State of origin. That would mean that, if the individual was injured by the State of origin, the second State of nationality could not provide protection. Clearly, the draft must contain a provision covering the material in article 6. Since views were so divided, however, and it seemed unlikely that the division could be remedied in the Drafting Committee, he proposed that article 6 be discussed in informal consultations.

60. There was widespread support for article 7, some helpful drafting suggestions had been made and the principle set out in the article had not been seriously questioned. He was therefore proposing that it could be referred to the Drafting Committee.

61. Article 8 was clearly an exercise in the progressive development of international law and an overwhelming majority of members had expressed support for it. The objections raised were not really well founded. First, the State reserved the right to exercise diplomatic protection and thus had discretion in the matter. Secondly, there was no suggestion that the State in which the individual had obtained asylum could bring an action against the State of origin. That was made very plain in paragraphs 183 and 184 of the report, although it could perhaps be made clearer in the article itself. Thirdly, the provision was not likely to be abused: stateless persons and refugees residing within a particular State were unlikely to travel abroad very often, as the State of residence would be required to give them travel documents, something that in practice was not done frequently. Only when a person used such documents and had suffered injury in a third State other than the State of origin might diplomatic protection be exercised. Mr. Kabatsi had brought out that point with the example he had given. A number of suggestions for improvements had been made, including the suggestion that the article should be split into one part on stateless persons and another on refugees. Such matters would best be dealt with by the Drafting Committee, and he proposed that the article be referred to it.

62. All in all, articles 5, 7 and 8 could be referred to the Drafting Committee, but only if, after hearing the report on the informal consultations on articles 1 to 3, the Commission so decided. Article 6, on the other hand, should be considered in informal consultations.

63. The CHAIRMAN announced that the Commission had concluded its discussion of articles 5 to 8. He said that, if he heard no objection, he took it that the Commission wished, as recommended by the Special Rapporteur, to discuss article 6 in informal consultations and would take a final decision on referral of the remaining articles to the Drafting Committee after the report on the informal consultations on articles 1 to 3.

*It was so agreed.*

*The meeting rose at 1 p.m.*

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## 2628th MEETING

*Friday, 26 May 2000, at 10.05 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. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

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### International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)[1] (A/CN.4/504, sect. D, A/CN.4/509,[2] A/CN.4/510[3])

[Agenda item 4]

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1998*, vol. II (Part Two), p. 21, para. 55.

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

[3] Ibid.

REPORT OF THE WORKING GROUP

1. The CHAIRMAN invited the Chairman of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) to report on the work of the Group.

2. Mr. Sreenivasa RAO (Chairman of the Working Group) said that, in order to have a better understanding of the Working Group's activities, it was worth briefly recalling the main stages of the consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law since the forty-ninth session of the Commission, in 1997. At that session, the Commission had decided to focus first on the question of prevention under the subtitle "Prevention of transboundary damage from hazardous activities"[4] and had appointed him as Special Rapporteur for that part of the topic. At the fiftieth session, in 1998, he had submitted a first report on prevention of transboundary damage from hazardous activities,[5] as well as 17 draft articles for a future convention on the prevention of significant transboundary harm. He had sought to map out the subject in those draft articles, which had been adopted by the Commission on first reading and sent to the General Assembly for consideration by the Sixth Committee at the end of the fiftieth session.

3. Article 1 (Activities to which the present draft articles apply) provided that the activities covered by the future convention were those which involved a risk of causing significant transboundary harm. Those activities were not only—as originally planned—those which could be called "ultrahazardous", such as nuclear activities, but all activities likely to cause significant harm as a result of their consequences for the population, property, the environment, etc., thereby enlarging somewhat the scope of the draft convention.

4. On the other hand, it had been decided to leave out a number of areas which had so far been regarded as coming within the framework of the topic. The future convention would not cover activities causing harm to the global commons, i.e. to resources or geographical regions which did not fall within the exclusive jurisdiction of a particular State. Activities which caused harm that was not significant in the short term and which could not be attributed to a well-defined source (such as pollution of various origins which had harmful cumulative effects in the long term) had also been excluded from the scope of application.

5. The Commission and the Sixth Committee had endorsed that approach, while stressing that it should not be interpreted as a lack of interest in the above-mentioned questions, which might be considered subsequently in other contexts.

6. The scope of the topic having thus been clearly delimited, the question had arisen whether the draft articles should include a list of the activities covered. That question had already been discussed by the Working Group established at the forty-ninth session, which had concluded that, in view of developments in technology, it was not possible to draw up such a list. It had also appeared that that "crystallization" was neither useful nor desirable in a framework convention. Ultimately, it had thus been deemed preferable to leave it to the States parties to the future convention to decide for themselves to which activities the rules would apply, a solution which he endorsed wholeheartedly.

7. Was it also necessary for the draft to define what was meant by a "significant transboundary risk"? There was no satisfactory definition of that concept in the doctrine. In the context of the non-navigational uses of international watercourses, it had been considered that a significant risk was one which was not negligible or *de minimus* and which might be appreciable or detected or identified on the basis of agreed criteria or standards. Although there was a possibility that, in the context of the future convention on the prevention of significant transboundary harm, a permissible or tolerable "risk level" would be set, for example, by a relevant international organization or by negotiation, it had been considered that, given the uncertainty surrounding the question, it was better, there again, to leave it to the States parties to the convention to decide.

8. On that basis, the Working Group had undertaken to review the first 17 articles with a view to adopting them on second reading. Article 3 (Prevention) provided that States must take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm. Everyone agreed that States had the obligation in that respect to exercise due diligence. However, the question remained whether a State which had not exercised such diligence must be considered responsible. It had initially been argued that, if the absence of due diligence had not resulted in any harm, there was no reason for it to give rise to liability. That position had been abandoned in 1998. Since then, it had been considered that the State likely to be affected by the absence of the diligence of another State would at the very least have the possibility of seeking consultations. That solution, which he personally supported, had unfortunately caused another problem, that of the linkage between article 3 and article 12 (Factors involved in an equitable balance of interests) calling for an equitable balance of interests of concerned States. Achieving that equitable balance presupposed that States discussed and negotiated solutions which, it was apprehended, might be at variance with their obligation to exercise the due diligence required: it had been argued that, after imposing a mandatory rule in article 3, the Commission could not suggest in article 12 that the same was open to negotiation among concerned States to ensure the protection of a certain equitable balance of interests. After discussing the question at great length, the members of the Working Group had concluded that the possibility given to States in articles 10 to 13 of the future convention to consult and negotiate would in no way dilute the duty of diligence provided for in article 3; on the contrary, it would help the clarification of the obligation involved.

9. The Working Group had also focused on the title of the study of prevention and had suggested, although not unanimously, that the words "from hazardous activities" should be deleted, since an activity which caused significant harm was by definition hazardous. Some members of

[4] *Yearbook . . . 1997*, vol. II (Part Two), p. 59, para. 168.

[5] *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/487 and Add.1.

the Working Group had also gone back over the word "acts" in the English version of the title of the topic and said that they preferred "activities". But most members of the Working Group had taken the view that that distinction, which was more of technical or intellectual than of practical interest, did not warrant amending a title which had not posed any problem for more than 20 years, especially as the discussions in the Sixth Committee had shown that States regarded the question as marginal.

10. The Working Group had carefully considered articles 1 to 17 and the proposed amendments. The proposals would be reflected in the third report on the topic (A/CN.4/510), which he would submit to the Commission at the beginning of the second part of its session.

**Unilateral acts of States (*continued*)* (A/CN.4/504, sect. C, A/CN.4/505,[6] A/CN.4/511[7])**

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR[8] (*continued*)*

11. The CHAIRMAN said that, to assist the Commission in its work, the secretariat had distributed an informal paper in English containing the text, presented in the form of general observations and specific observations, of replies received to date to a questionnaire on the subject of unilateral acts of States sent to Governments pursuant to a decision taken by the Commission at its fifty-first session.[9] Eleven States had thus far replied and the text of any replies received subsequently would also be distributed in the form of an informal paper and incorporated in the final version of the replies from Governments to the questionnaire (A/CN.4/511).

12. Mr. HERDOCIA SACASA said that the work the Special Rapporteur had done and his third report on unilateral acts of States (A/CN.4/505) deserved special praise in view of the fact that unilateral acts were more and more frequently used expressions of will for which no clear-cut normative framework yet existed. The writings of jurists and judicial decisions, however useful, were only beginning to describe the personality of that new actor which was coming forward, alone, on the international obligations scene, without knowing quite where it was going. The Special Rapporteur had succeeded in refining the terminology of unilateral acts, introducing elements of certainty, security, stability and confidence that served the interests not only of those who formulated them, but also those who invoked or rejected them.

13. He noted that at least 6 of the 11 Governments that had replied to the questionnaire had referred to the difficulty of answering certain questions because it seemed impossible to draft or define common rules governing all unilateral acts, which were very numerous, complex and diverse. One had the same impression from the discussion in the Sixth Committee at the fifty-fourth session of the General Assembly, one group of States having advised the Commission to proceed on a step-by-step basis, beginning with declarations that created obligations rather than with those designed to obtain or preserve rights. The concerns thus expressed stemmed, perhaps with some justification, from two problems. First, was it possible to establish rules applicable to all categories of unilateral acts? Secondly, should the Commission decide at the outset whether only general rules or also specific rules should be formulated? In his view, those problems were not really insurmountable. The Commission must simply proceed cautiously, adopting a forward-looking approach.

14. The final solution might consist in falling back on the Commission's tried and tested working methods and dividing the draft articles into two parts: the first would establish general provisions applicable to all unilateral acts and, the second, provisions applicable to specific categories of unilateral acts which, owing to their distinctive character, could not be regulated in a uniform way.

15. Like other members of the Commission, he considered that articles 1 to 5, which would constitute Part One of the draft articles, felicitously embodied a general set of rules applicable to all unilateral acts and posed no really fundamental problems.

16. Referring briefly to specific aspects of the report, he said he agreed with the Special Rapporteur, in paragraphs 19 and 20 of the report, that the provisions of the 1969 Vienna Convention could not be automatically transposed to unilateral acts of States: they could be applied only by analogy and serve as a flexible frame of reference.

17. With regard to new draft article 1 (Definition of unilateral acts), he noted with satisfaction that the Special Rapporteur had replaced the term "declaration" by the term "act", which was much broader in scope. The concept of "intention" was welcome as a key ingredient of the subject, since the State should be aware that, when it formulated a unilateral act, it was entering into a legal commitment. Indeed, that was one of the main characteristics that differentiated political acts from unilateral acts. He also agreed with the use of the term "known to", which was preferable to "publicly". He also agreed that the adjective "unequivocal" describing the State's expression of will should probably be deleted. He furthermore noted that the concept of autonomy of a unilateral act had not been included as such in the definition proposed by the Special Rapporteur despite the fact that it was an essential means of clarifying matters by establishing a distinction between treaty-based acts and unilateral acts.

18. He supported new draft article 2 (Capacity of States to formulate unilateral acts), according to which every State possessed that capacity, but suggested that the words "in accordance with international law" should be added at the end of the article. With regard to new draft article 3 (Persons authorized to formulate unilateral acts on behalf of the State), he expressed approval of paragraph 1. Paragraph 2 somewhat expanded the scope of article 7 of the 1969 Vienna Convention, doubtless in the light of precedents, such as the judgments of ICJ in the *Nuclear Tests* cases, and of practice. However, the Commission should be particularly prudent on this point. He accepted new

* Resumed from the 2624th meeting.

[6] See footnote 2 above.

[7] Ibid.

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

[9] See *Yearbook . . . 1999*, vol. II (Part Two), pp. 138–139, para. 594.

draft article 4 (Subsequent confirmation of an act formulated by a person not authorized for that purpose). With regard to new draft article 5 (Invalidity of unilateral acts), he suggested that the Spanish, English and French versions should include an introductory phrase indicating the cases in which a unilateral act was invalid. He agreed with the similarities to the corresponding provision of the Convention, to which had been added a supplementary ground of invalidity relating to the incompatibility of a unilateral act and a decision of the Security Council, in subparagraph (*g*). He proposed that the reference in subparagraph (*a*) to "consent" should be omitted because it tended to be associated with treaty terminology. He had some doubts about the relevance of subparagraph (*h*), which stated that a unilateral act was invalid if it conflicted with a norm of fundamental importance to the domestic law of the State formulating it. The provision referred to the constitutional law of States, but, in a democracy, unilateral acts did not necessarily have to be ratified by national parliaments. The unilateral acts covered by the study were acts which had been formulated in some cases by the executive and could have an impact on legislative acts or on coordination between the different branches of government.

19. Lastly, he thought that the Commission should be very careful in its use of terms such as "creation of rights" or "confirmation of rights". In that connection, paragraph 49 of the report required some clarification. In any case, it should be borne in mind that the principle of the relativity of treaties was applicable to unilateral acts. Article 34 of the 1969 Vienna Convention clearly stated the principle that "[a] treaty does not create either obligations or rights for a third State without its consent". It followed that the principle *res inter alios acta*, to which the Special Rapporteur had drawn special attention, was highly pertinent in the context: it ensured that international law was respected and, above all, that no rights were created vis-à-vis third States without their consent.

20. Mr. GAJA said that the Special Rapporteur's third report made significant progress in its analysis of the topic and in proposing draft articles that could provide an adequate legal framework. However, he had hoped for greater progress and was somewhat disappointed. But the fault did not lie solely with the Special Rapporteur. The third report had been written prior to the receipt of the replies from the 11 States that had thus far responded to the Commission's questionnaire. It should be noted that the purpose of the questionnaire was to request materials from Governments and inquire about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.[10] While the replies received thus far contained some interesting material for the Commission's work, they said nothing about the practice of the States concerned in the area of unilateral acts. There seemed to have been a communication problem or perhaps a misunderstanding because the Commission had not received what it had asked for, namely, materials and information on the practice of States. As a result, the Special Rapporteur's third report and the secretariat's informal paper concerning the replies received from States contained very little information on State practice. That was a serious concern because, until such time as the Commission had collected and analysed sufficient data on State practice, it would be hard to identify the characteristic elements of different unilateral acts and to ascertain whether and to what extent common rules could be proposed.

21. The Working Group on unilateral acts of States re-established at the fifty-first session of the Commission[11] had tentatively adopted as a starting point for the gathering of State practice a definition of unilateral acts[12] which he viewed as preferable to that proposed by the Special Rapporteur in new draft article 1 on two counts. First, as noted by Mr. Candioti (2624th meeting) and Mr. Herdocia Sacasa, the adjective "unequivocal" was superfluous. Secondly, whereas in the initial definition the act was to be notified or otherwise made known to the State or international organization concerned, the only requirement now was that it should be known to the State or international organization. That wording was misleading because it could give the impression that the knowledge might have been acquired, for example, through espionage or the activities of intelligence services. But the State that was the author of the act must take some steps to make it known to its addressee(s) or to the international community. In his view, therefore, the definition adopted at the fifty-first session by the Working Group should be restored. The Commission must now try to identify the different types of unilateral acts to which the draft articles would be applicable, whether or not they were subject to common rules or to a special regime. It might be useful to give some indication in article 1, without, of course, attempting to be exhaustive, of the kinds of acts contemplated, including their effects, bearing in mind that opinions were divided about the character of unilateral acts such as consent or protests.

22. In his third report, the Special Rapporteur dealt with a number of issues relating to the formulation of unilateral acts and their validity. He had no firm views for the time being on many of those issues, given the need to collect and analyse State practice and to examine the extent to which rules modelled on the 1969 Vienna Convention were applicable to all or only some unilateral acts.

23. One issue that had been omitted but needed to be addressed was analogous to that dealt with in article 46 of the 1969 Vienna Convention, namely competence under internal law to conclude treaties. New draft article 3 (Persons authorized to formulate unilateral acts on behalf of the State), which corresponded to article 7 of the Convention, specified the persons who were authorized to formulate unilateral acts on behalf of the State, but said nothing about whether, under constitutional or statutory provisions, some other organs of State had to be involved for the act to be validly formulated. The fact that a head of State could ratify a treaty did not mean that there were no constitutional rules requiring prior authorization by parliament. It should therefore first be established whether there were constitutional rules applicable to unilateral acts and, if not, to what extent the constitutional rules applicable to treaties could be applied by analogy, under constitutional law, to some of the unilateral acts being dealt with by the Commission. It should then be estab-

[10] Ibid., para. 593.

[11] Ibid., p. 137, paras. 577 et seq.

[12] Ibid., p. 138, para. 589.

lished whether infringement of the constitutional rules had implications for the validity of unilateral acts. Draft article 5, subparagraph (*h*), appeared to refer to the content of the act rather than to competence to formulate the act.

24. Mr PAMBOU-TCHIVOUNDA said that he would comment on some of the criteria adopted in the draft general definition of unilateral acts of States, not questioning their relevance, but merely considering their relative merits.

25. With regard to the criterion of intention, he wondered whether the decision to focus exclusively on the intention of the author State was not tantamount to adopting a purely doctrinal approach and overlooking practical considerations. A unilateral act was obviously an act motivated by self-interest and it was thus above all an act carried out in pursuit of a goal. It was a self-interested act from the point of view of its purpose and its context. By analysing the intention behind the act, it was no doubt possible to identify the nature of the interest and the goal to be achieved, but the fact that a State decided to perform an act invariably meant that it found some interest in doing so. The "expression of will" referred to in the draft definition was, in fact, an action. In formulating the expression of will, the State took the initiative to act—in other words, to contract obligations or reaffirm rights. In order to take such an initiative, however, the State had to believe it to be in its interest; otherwise, it would certainly not dare to do so. The idea of interest should therefore perhaps be incorporated in an objective definition of the unilateral act, not to replace the idea of intention, but as a way of giving meaning and content to that idea which was more difficult to define. Therefore, while the idea of interest could be implicit, as it were, "upstream" of the expression of will, it should be included as clearly as possible among the determining factors of the unilateral act rather than simply be hinted at. In the first place, if the interest was founded in law, it became a legal interest, and a legal interest of that kind was at the heart of the legal effects sought by the State in taking the initiative of formulating a unilateral act. Secondly, the inclusion of the concept of interest obviated the need for a debate on the idea of unequivocal expression of will; a well-defined interest was, of necessity, unequivocal; it necessarily corresponded to the legal effect of the decision or the act. The definition proposed by the Special Rapporteur was, of course, neither unintelligible nor inadmissible, but it would gain in clarity by being refocused on the idea of interest.

26. Turning to the criterion of autonomy, he said that it indisputably raised certain problems. In order to be a determining factor, a legal interest had to be derived from a legal regime. Certain legal interests were inherent in the very nature of a State without there necessarily having to be a treaty provision or legal rule to establish them as a source of obligations. For example, it was in the interest of a State to maintain good-neighbourly relations with another State because its very existence was at stake. In such a case, political interest bordered on legal interest. Such interests, inherent in the very nature of the State, did not necessarily derive from an international law regime; sometimes, indeed often, they stemmed from a domestic law regime. The problems underlying the dialectic between domestic law and international law generally arose, both in theory and in practice, in terms of validity or international opposability. Once the prerequisite of validity or international opposability had been met, however, the borderline between the two regimes became more flexible or even permeable. The problem of the legal basis for the interest in question arose in terms of source rather than of regime, which, depending on the circumstances, might be customary law, treaty law or general international law. The obligation to maintain good-neighbourly relations could justify the formulation of an act. But that was an obligation in general international law. If autonomy were maintained as a criterion for the definition of a unilateral act of the State in relation to other regimes, it should be handled with a great deal of caution. As the Special Rapporteur said in paragraph 61 of his third report, such a criterion could not be interpreted "too broadly"; the point was to exclude, by means of that criterion, acts linked to other regimes, such as all acts linked to treaty law. Yet directly afterwards, in paragraph 62 of the report, the Special Rapporteur confirmed that the unilateral act arose at the time it was formulated. From what did it arise? For what reason? To what end? No attempt was made to answer those questions.

27. He would comment on the criterion of "publicity", and especially the determination of methods of ensuring it, i.e. the way in which the act was brought to the knowledge of the addressee, and the form of a unilateral act, i.e. proof that the addressee was indeed aware of the act. Those questions did not appear to have been sufficiently taken into consideration in the proposed definition of unilateral acts. The Special Rapporteur had decided to concentrate on substance, but the formal aspects of the unilateral act would have gained from being highlighted in a comprehensive and complete picture of the unilateral act. Such a picture did not appear in the draft. A more balanced approach to the topic was desirable, particularly in view of the possible structuring of the regime that would necessarily have to be distinguished from the general provisions. Mr. Herdocia Sacasa had spoken of the possibility of following the approach adopted in the preparation of the draft articles on nationality of natural persons in relation to the succession of States[13] by drafting some general provisions first and then some specific provisions. He was not opposed to the idea, but his own suggestion would rather be that the Special Rapporteur should, while maintaining his current approach, incorporate at least one set of general provisions in the draft, such as those that were rightly proposed in new draft article 1.

28. An article 1 on definition was undoubtedly needed, but the definition proposed by the Special Rapporteur had two drawbacks. The first had to do with the questions arising from the Special Rapporteur's decision to ignore the formal aspects of unilateral acts and the second, with the uncertainty of a definition based on a criterion, that of "the intention of producing legal effects", which could be described as tendentious. Intention was a tendency, a viewpoint. To draw up a definition on the basis of a viewpoint did not seem adequate because the rule thus obtained would be merely indicative rather than peremptory. He feared that preference was being given to "soft law" and that the need to produce "hard law" in the draft articles was being neglected.

[13] For the text of the draft articles, ibid., p. 20, para. 47.

29. New draft article 2 undoubtedly formed part of the set register of general provisions. The draft article recalled the inherent link between the State and the unilateral act. The expression of will reflected the legal personality of the State; it meant that, whatever its size or political importance, a State remained a State and that all States were each others' equals. The concept of legal personality was akin to the concept of equality of States. The capacity of the State to formulate unilateral acts was therefore inherent in the nature of the State and the Special Rapporteur was right not to make any specific comments on draft article 2 because they would have been superfluous.

30. The set of general provisions should perhaps include two new elements. First, a draft article designed to affirm the diversity of designations and forms of unilateral acts of States would be welcome. Such a draft article would supplement draft article 1, somewhat in the manner of article 2, paragraph 1 (*a*), of the 1969 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention"), which read: " 'Treaty' means an international agreement . . . whatever its particular designation". A reference to designation would reassure all those members who had rightly raised questions about the diversity of unilateral acts of States revealed by practice. The first set of general provisions could also include provisions relating not only to the designation but also to the scope of the draft articles. A typology of various categories of unilateral acts, not merely designated, but accompanied by their respective definitions, could be introduced at that point. The draft would then boast a first part which, instead of being rather skimpy, would have the substance that it could in all fairness be expected to possess.

31. Once that had been done, the draft would go on to the set of provisions devoted to the regime, the first of which would be new draft article 3. It should be entitled "Competence to formulate unilateral acts on behalf of a State" instead of "Persons authorized to formulate unilateral acts on behalf of a State" so that it would stay within the limits of fundamental concepts of law, in line with the concept of capacity. The draft article, which had two paragraphs, should be supplemented by a third consisting of new draft article 4, which actually belonged in draft article 3. The question of competence would thus be considered comprehensively, thereby doing justice to a general principle of law, that of lawfulness. The consequences of a unilateral act formulated by an incompetent authority would then be incorporated in a chapter on invalidity.

32. Draft article 3 should be reformulated, not just to include draft article 4, but also in the light of the following three principles. First, the transposition of the categories of authority identified by the law of treaties (head of State, prime minister, minister for foreign affairs) to the law of unilateral acts was acceptable. Secondly, if the set of authorities qualified to engage the State unilaterally was to be extended, that should not bring in to play certain techniques specific to the law of treaties, such as full powers, but should be based on the position of the author of the unilateral act within the State apparatus or, in other words, on the way political power was exercised within the State and on the specific technical field in which the author of the unilateral act operated, subject to confirmation in both cases. Thirdly, the extension of the set of authorities to heads of diplomatic missions or permanent representatives of States to international organizations would be acceptable under the same conditions.

33. The reference to the concept of "other circumstances" in draft article 3, paragraph 2, might have some relevance on the basis of those differentiating factors, but, without them, it was hard to see what the concept meant. The concept of "practice of the States concerned" was accepted in international law, whereas that of "other circumstances" was relative in time and space.

34. In conclusion, he said that draft article 3 should be reformulated in the following way. The title should be amended as indicated previously. In paragraph 1, the phrase "are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf" should be replaced by "are competent for the purpose of formulating unilateral acts on behalf of the State". Since no one could challenge the competence of the authorities referred to in that paragraph, the more direct wording would do away with a useless contortion. In the French text of paragraph 2, the phrase *Une personne est considérée comme habilitée par l'État pour accomplir en son nom un acte unilatéral* was unwieldy and should be replaced by *Une personne est présumée compétente pour accomplir au nom de l'État un acte unilatéral*. What was involved was a presumption of competence to formulate a particular act. Paragraph 2 should end with the words: "unless the practice of the States concerned or other circumstances make it impossible to establish his incompetence". In such cases, either the authority was competent or it was not and the paragraph indicated that, in the final analysis, States were free to have themselves represented by the authority of their choice. Someone who was neither a head of State, nor a head of Government nor a minister for foreign affairs was considered competent unless practice or other circumstances established his incompetence. To say that in such a simple, streamlined manner would make the paragraph more intelligible. It would then be followed by a third paragraph, reproducing the content of draft article 4.

35. Those drafting proposals would certainly be decided on in the Drafting Committee, to which the draft articles should be referred. He had deliberately refrained from taking up new draft article 5, which raised serious and complex issues that could not be addressed without a great deal of material on State practice. Those problems certainly did not detract from the quality of the work done by the Special Rapporteur in his third report.

36. Mr. GOCO, referring to the issue of intention, said he had taken note of what was stated in paragraph 34 of the report, but did not see how intention could be determined until the stage of arbitration had been reached. Even in the *Nuclear Tests* cases, when President Mitterrand had stated that nuclear tests by France would end, the intention had become clear only once ICJ had ruled that the statement had been made publicly and was unambiguous and therefore binding on President Mitterrand even if there had not really been any intention of halting the tests. The statement attributed to President Clinton that a part of the former Yugoslavia would not be entitled to any aid as long as President Milosevic remained in power fell into

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

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

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

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

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

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

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

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

*The meeting rose at 1.05 p.m.*

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## 2629th MEETING

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

*Chairman*: Mr. Chusei YAMADA

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

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

[Agenda item 7]

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

[15] See 2624th meeting, footnote 4.

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

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

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

[2] Ibid.