

Chapter VI

UNILATERAL ACTS OF STATES

A. Introduction

282. In the report of the Commission to the General Assembly on the work of its forty-eighth session, in 1996, the Commission proposed to the Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.³⁶⁵

283. The General Assembly, in paragraph 13 of resolution 51/160, *inter alia*, invited the Commission to further examine the topic “Unilateral acts of States” and to indicate its scope and content.

284. At its forty-ninth session, in 1997, the Commission established a working group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.³⁶⁶

285. Also at its forty-ninth session, the Commission appointed Mr. Víctor Rodríguez Cedeño Special Rapporteur for the topic.³⁶⁷

286. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission’s decision to include the topic in its agenda.

287. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur’s first report on the topic.³⁶⁸ As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

288. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of a unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.³⁶⁹

289. At its fifty-first session in 1999, the Commission had before it and considered the Special Rapporteur’s sec-

ond report on the topic.³⁷⁰ As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

290. The Working Group reported to the Commission on issues related to (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group established guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring 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.

291. At its fifty-second session, in 2000, the Commission considered the third report of the Special Rapporteur on the topic,³⁷¹ along with the text of the replies received from States³⁷² to the questionnaire on the topic circulated on 30 September 1999. The Commission at its 2633rd meeting on 7 June 2000 decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

292. At its fifty-third session, in 2001, the Commission considered the fourth report of the Special Rapporteur³⁷³ and established an open-ended working group. At the recommendation of the Working Group, the Commission requested that a questionnaire be circulated to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.³⁷⁴

B. Consideration of the topic at the present session

293. At the present session the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/525 and Add.1 and 2) and the text of replies received from

³⁶⁵ *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, pp. 97–98, para. 248 and annex II.

³⁶⁶ *Yearbook ... 1997*, vol. II (Part Two), pp. 64–65, paras. 194, 196 and 210.

³⁶⁷ *Ibid.*, pp. 66–71, paras. 212 and 234.

³⁶⁸ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486.

³⁶⁹ *Ibid.*, vol. II (Part Two), pp. 58–59, paras. 192–201.

³⁷⁰ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1.

³⁷¹ *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/505.

³⁷² *Ibid.*, document A/CN.4/511.

³⁷³ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519.

³⁷⁴ *Ibid.*, vol. II (Part Two), pp. 19 and 205, paras. 29 and 254. The text of the questionnaire is available at <http://untreaty.un.org/ilc/sessions/53/53sess.htm>.

Governments (A/CN.4/524) to the questionnaire on the topic circulated on 31 August 2001.

294. The Commission considered the fifth report of the Special Rapporteur at its 2720th, 2722nd, 2723rd, 2725th, 2726th and 2727th meetings on 15, 21, 22, 24, 28 and 30 May 2002, respectively.

295. At its 2727th meeting, the Commission established an open-ended informal consultation, to be chaired by the Special Rapporteur, on unilateral acts of States.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS FIFTH REPORT

296. The Special Rapporteur indicated that, in response to suggestions made during the previous session, his fifth report provided a recapitulation of the progress made on the topic and the reasons why certain concepts and terms had been changed.

297. The introduction referred to previous consideration of the topic, consideration of international practice, the viability and difficulties of the topic and the recapitulative nature of some parts of the fifth report.

298. Chapter I dealt with four aspects of the topic considered by the Commission at its previous sessions: definition of unilateral acts; conditions of validity and causes of invalidity; rules of interpretation; and classification of unilateral acts.

299. Chapter II examined three questions that might make possible the drafting of common rules applicable to all such acts, regardless of their material content and their legal effects: the rule regarding respect for unilateral acts, the application of the act in time, and its territorial application.

300. Chapter III dealt briefly with the equally important subject of determination of the moment at which the unilateral act produced its legal effects, and would encompass three extremely important and complex issues: revocation of the act, modification and suspension of its application, and its termination.

301. Finally, chapter IV set out the structure of the articles already drafted and the future plan of work.

302. In his introduction of the fifth report the Special Rapporteur reiterated that the topic of unilateral acts of States was highly complex and had proved difficult to tackle. He had considered the most important jurisprudence and the extensive literature in depth, but unfortunately he had been unable to consider the full range of State practice, for various reasons, including very limited replies by States to the 2001 questionnaire. The information available on State practice being basically factual, serious difficulties arose in determining States' beliefs regarding the performance of those acts, their nature and the intended effects. He indicated that the question of whether the numerous unilateral acts by States were political or legal could be resolved only through an interpretation of the author States' intention—a highly complex and subjective issue.

303. Though treaties were the form most widely used by States in their international legal relations, unilateral acts of States were increasingly used as a means of conditioning their subsequent conduct. According to general international law, a State could formulate an act without any need for participation by another State, with the intention of producing certain legal effects, without the need for any form of acceptance by the addressee or addressees.

304. In the introduction, as a further illustration of the difficulties to which the topic gave rise, it was noted that, with the exception of a protest, the other unilateral acts considered by the Commission to be the most frequent—waiver, recognition and promise—were not always expressed through declarations and, furthermore, were not always unilateral, thus falling outside the scope of the Commission's endeavour.

305. In recapitulating the constituent elements found in the definition of unilateral acts, the Special Rapporteur explained the various modifications introduced to the draft definition presented in his first report, such as the use of the word "act", the inclusion of the phrase "unequivocal expression of will which is formulated by a State with the intention of producing legal effects" and the exclusion of the concept of "autonomy".

306. The Special Rapporteur noted that although the definition gave States alone the capability to formulate unilateral acts—the matter covered by the Commission's mandate—this should in no way be construed as meaning that other subjects of international law, particularly international organizations, could not do so. The notion of addressee was seen in broad terms, such that a unilateral act could be directed not only at one or more States but also at an international organization. In this connection he recalled that some members of the Commission believed that other international legal entities, such as liberation movements, could be the addressees of such acts and that this raised a number of issues that deserved measured consideration.

307. He also noted that the definition of unilateral acts before the Drafting Committee was the result of extensive consideration which had taken into account comments by members of the Commission and by Governments; the adoption of the definition was deemed crucial in order to permit progress on other draft articles.

308. In his introduction to sections B to D of chapter I of his fifth report, the Special Rapporteur addressed certain aspects of the topic in a complementary rather than recapitulative manner. These sections dealt with the conditions of validity and causes of invalidity of unilateral acts, as well as the interpretation and classification of such acts.

309. One of the comments at the previous session had been that the causes of invalidity should be considered along with the conditions of validity of a unilateral act and should be viewed broadly, not solely in terms of defects in the manifestation of will. Other causes of invalidity that might affect the validity of the unilateral act should be considered, it had been suggested, including the capacity of the author, the viability of consent and the lawfulness of the object of the unilateral act.

310. Though references to such issues in the literature were minimal and relevant practice seemed virtually non-existent, the Special Rapporteur was of the view that the provisions of the 1969 Vienna Convention, specifically articles 42 to 53 and 69 to 71, could serve as a valid reference point.

311. He felt that some reference should be made to the conditions of validity, even if no specific provision was included in the draft articles; this was why the conditions of validity of a unilateral act were set out in the report.

312. In this connection, he stated that the Commission's mandate was restricted to unilateral acts of States and that therefore it was the State that had to formulate a unilateral act although, as had been previously indicated, other subjects of international law were not precluded from doing so. In addition, a unilateral act had to be formulated by a person who had the capacity to act and undertake commitments at the international level on behalf of the State.

313. Another condition for the validity of a unilateral act was the lawfulness of its object. The unilateral act must not conflict with a peremptory norm of international law or *jus cogens*. In addition, the manifestation of will must be free of defects.

314. The Special Rapporteur recalled that the regime governing invalidity in international law was certainly one of the most complex aspects of the study of international legal acts in general. A related issue raised was the effects of a unilateral act that conflicted with a previous act, whether conventional or unilateral: in other words, a unilateral act that was contrary to obligations entered into previously by the same State. Reference was also made to absolute invalidity, where the act could not be confirmed or validated, and to relative validity, where it could. In the first case, the act conflicted with a peremptory norm of international law or *jus cogens* or was formulated as a result of coercion of the representative of the State that was the author of the act; in the second, other causes of invalidity could be overcome by the parties, and the act could therefore have legal effects.

315. In the fifth report, the single draft article on causes of invalidity submitted previously had been replaced by separate provisions, in response to comments made by members of the Commission and of the Sixth Committee. By referring to a State or States, the new version also catered for the possibility that a State might invoke invalidity in the case of a unilateral act that had a collective origin.

316. It was also noted that in the new version of draft article 5, the State or States that had formulated the act could invoke error or fraud by, or corruption of, an official as defects in the expression of will, whereas any State could invoke the invalidity of a unilateral act if the act was contrary to a peremptory norm of international law (*jus cogens*) or a decision of the Security Council under Chapter VII of the Charter of the United Nations.

317. The Special Rapporteur said that a number of issues remained unresolved and could be the subject of further consideration. One was the possibility, in the case of unilateral acts of collective origin, that one of the States that participated in the formulation of the act might invoke

invalidity. Another was the effects that the invalidity of the act could have on legal relations between the State that invoked invalidity and the other States that had participated in the formulation of the act, and on their relations with its addressee. Furthermore, consideration would have to be given, *inter alia*, to stipulation in favour of third parties, in which case, if the act that gave rise to the relationship was invalidated, the relationship with the third State was terminated. In that context, the Special Rapporteur recalled that article 69 of the 1969 Vienna Convention set out the consequences of invalidity of an act, which differed from those posited for a unilateral act of collective origin. He indicated that comments on that point could be reflected in a future provision on the subject.

318. The diversity of unilateral acts could have an impact on the capacity to invoke the invalidity of the act. In the case of promise or recognition, for example, the author State could invoke the invalidity of the act, but in the case of protest, the situation was not the same: while the author State could hardly invoke the invalidity of the act, nothing would seem to prevent the addressee State from doing so.

319. Another issue taken up in the report but not reflected in actual wording was whether the author State could lose the right to invoke a cause of invalidity or a ground for putting an end to an act by its conduct or attitude, whether implicit or explicit.

320. The question was raised whether a State could validate any and all unilateral acts through its subsequent behaviour, or whether a distinction had to be made according to the differing legal effects of the act. Protest, for example, might be approached from a different angle.

321. Another issue touched on in the report was invalidation of a unilateral act because of a violation of domestic law concerning competence to formulate unilateral acts and the particular restriction of the power to express will. According to the Vienna regime, that cause could be invoked only if the violation was manifest and if it concerned a norm of fundamental importance to the domestic law of the State.

322. Another matter addressed in the report was the interpretation of unilateral acts. The Special Rapporteur was of the view that, because expression of will was involved, rules on interpretation could be applied to all unilateral acts, irrespective of their content. Accordingly, he had tried to establish a general rule and one on supplementary means of interpretation, as in the Vienna regime but taking into account the specific features of unilateral acts.

323. Although the draft article on interpretation did not expressly refer to the restrictive character of interpretation, such a reference could be included or the concept could be reflected in the commentary.

324. Another issue tackled in chapter I of the report was the classification of unilateral acts. While some might not perceive a classification to be useful, the Special Rapporteur considered that it could help in grouping and structuring the draft articles. He also stated that even if the classification could not be done for the time being, the Commission should take a final decision on whether to develop rules for a category of unilateral acts like promises,

which signified the assumption of unilateral obligations by the author State. The next report could then address the complex issues of revocation, modification, termination and suspension of unilateral acts, which could be handled more easily if compared solely with that kind of act.

325. He indicated that the revocation of a unilateral act could not be the subject of a rule that applied to all acts. The revocation of a promise or of an act whereby a State assumed a unilateral obligation did not seem to be the same as the revocation of an act whereby a State reaffirmed a right.

326. The termination and suspension of application of a unilateral act must also be considered in terms of the unilateral act's specific features. In his view, rules on the termination of the unilateral act should be drafted along the lines of those laid down for treaties in articles 59 *et seq.* of the 1969 Vienna Convention, and the consequences of termination and suspension of application should be examined on the basis of articles 70 and 72 of the Convention, but with due regard for the particular features of the unilateral act.

327. The Special Rapporteur felt that such questions, which could not be the subject of common rules, could be addressed by the Commission and the working group that was to be set up.

2. SUMMARY OF THE DEBATE

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

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

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

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

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

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

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

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

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

337. From this perspective, no general rules could be devised, because particular relationships like those between France, New Zealand and Australia in the *Nuclear Tests*³⁷⁵ cases or between Cambodia and Thailand in the *Temple of Preah Vihear*³⁷⁶ case had been the products of a long history and a geographical situation that could not be generalized. The opposability created through unilateral acts could not be made subject to general criteria of understanding because it was outside international institutions and had to do with what was reasonable in the

³⁷⁵ *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, p. 253; (*New Zealand v. France*), Judgment, *ibid.*, p. 457.

³⁷⁶ *Temple of Preah Vihear, Preliminary Objections, Judgment*, ICJ Reports 1961, p. 17; *Merits, Judgment*, ICJ Reports 1962, p. 6.

context of human behaviour and the history of the States concerned.

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

339. Consequently, the member said, the Commission should abandon the voluntary scheme based on States' intentions and should focus on the reasonable aspects of the issue in terms of expectations raised and legal obligations incurred. It should also abandon the analogy with the law of treaties, which took an impersonal approach to the entire field of diplomacy, and should instead base its considerations on the law of social relations, where individuals exercised greater or lesser degrees of power in the complex web of relationships. The Commission might wish to formulate general principles articulating the manner in which particular relationships between States became binding, an endeavour which would be tremendously ambitious and perhaps unfeasible.

340. Alternatively, the Commission might fill the vacuum created by the absence of a legal institution by considering the institution of recognition of States, an institution which, while operating on a level different from that of treaties or custom, nevertheless served as a link between forms of behaviour and legal obligations. Some other members agreed with various aspects of the views described above.

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

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

343. Some members of the Commission voiced their disagreement with pursuing an approach according to which treaties, as an act of will, were the only means of regulating the world of diplomacy. In this connection, it was noted that the relationship between a State's will and

its intention was hard to unravel and that, furthermore, it was difficult to pinpoint the frontier between the realms of will and intention.

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

345. Doubts were also expressed regarding the validity of the submission that the category of relevant institutions for the exercise the Commission had undertaken was comprised only of treaties and custom. It was stated that, in addition to treaty obligations and obligations under customary international law, there were clearly also some international obligations stemming from unilateral acts of States. One obvious example, recognition, was a unilateral political act that also gave rise to legal effects on the international plane. Therefore it was suggested that the Special Rapporteur could focus less on the behaviour and intentions of the actor State and more on the effects of the unilateral act on other States.

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

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

348. In this connection, it was also noted that in recent State practice a dispute had in effect arisen over the question of which national body was competent to make such a promise on behalf of the requesting State: its parliament or its Government. This demonstrated that the articles proposed by the Special Rapporteur on the representation of States in the formulation of unilateral acts and on the international relevance of domestic constitutional provisions corresponded to practical needs.

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

350. In relation to the argument that unilateral acts raised only bilateral expectations, and thus did not lend themselves to codification, attention was drawn to the fact

that sometimes such acts could be more general in scope. This was true, for instance, of the protests that Portugal had presented in connection with the Timor Gap Treaty³⁷⁷ between Australia and Indonesia which had had an effect so broad as to impinge on other States and even on other entities such as multinational corporations with interests in the area. Similarly, Portugal had several times asserted that the right of self-determination of the people of East Timor had an *erga omnes* character—an assertion subsequently confirmed by ICJ in the *East Timor* case.³⁷⁸

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

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

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

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

355. The Commission also had an exchange of views on the question of whether a unilateral act constituted a source of international law of the same rank as the usual sources, namely, treaties and custom. This posed the issue of whether a unilateral act could derogate from general

international law or *erga omnes* obligations. In this connection, it was stated that a unilateral act should never take precedence over general international law or the provisions of a multilateral convention to which the author State of the unilateral act was a party. It was suggested that the Special Rapporteur study the relationship between unilateral acts and other sources of international law.

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

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

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

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

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

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

362. However, according to another view, a unilateral act could not be revoked at any time because a State which

³⁷⁷ Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (Timor Sea, 11 December 1989), *Australian Treaty Series 1991, No. 9* (Canberra, Australian Government Publishing Service, 1995).

³⁷⁸ *East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995*, p. 90.

had unilaterally expressed its will to be bound was, in fact, bound. Reference was made to the 1974 judgments by ICJ in the *Nuclear Tests* cases, where the Court had stated that the unilateral undertaking “could not be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration”.³⁷⁹ Unilateral acts, like treaties, led to situations in which States were caught against their will; once expressed, their commitment was irrevocable, yet the treaty or act had no effect unless invoked by other States. Nonetheless, the point was also made that a unilateral act could be terminated in good faith and that the technique of revocation deserved its place in the study of means of terminating unilateral acts.

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

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

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

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

and analysing information on State practice should constitute a prior step.

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

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

369. While support was expressed for the continuation of the Commission’s work, preference was voiced for extending it to include the questions of suspension and termination of unilateral acts, so as to have a comprehensive view. Another approach considered that it was extraordinarily difficult to find general rules to deal with the great variety of situations dealt with by unilateral acts, each of which was fact-based and involved long relationships between States.

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

371. Therefore, it was also suggested that, instead of seeking to subject the very wide range of unilateral acts to a single set of general rules, an expository study be made of specific problems in relation to specific types of unilateral acts.

372. The point was also made that it was not enough to compile doctrine and jurisprudence on unilateral acts. Only after the completion of a study on State practice

³⁷⁹ *Nuclear Tests* (see footnote 375 above), *Australia v. France*, p. 270; *New Zealand v. France*, p. 475.

could the Commission decide whether the work should be done on a general basis or should begin with a study of specific unilateral acts.

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

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

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

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

377. A suggestion was made to improve draft article 1 by incorporating the words “governed by international law”, as contained in article 2 of the 1969 Vienna Convention, as well as a reference to the non-relevance of the form that the unilateral act might take.

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

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

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

381. In this connection, several suggestions were made for more detailed consideration of the draft articles, with regard to both the subject matter and the need to take into account relevant State practice. It was suggested that a provision based on article 64 of the 1969 Vienna Convention on the emergence of a new rule of *jus cogens* could be included; a proposal was also put forward to enumerate the effects of the invalidity of a unilateral act rather than to stipulate which entities were able to invoke its invalidity; support was also expressed for shortening the list of causes of invalidity.

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

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

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

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

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

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

388. The view was also expressed that the concept on which draft article 5 was based—that unilateral acts could be viewed in terms of their validity or non-validity—was considered erroneous: unilateral acts should in fact be seen in terms of opposability or non-opposability. Validity was a quality of law: when parliament passed a law, it became valid, and thus binding. Unilateral acts, on the other hand, did not comply with the formal criteria that a law must meet in order to create legal consequences. Instead, they created legal consequences in particular circumstances, in which a State's conduct was interpreted as opposable by a certain number of other States.

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

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

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

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

393. With regard to draft articles 5 (d) to 5 (h) as proposed by the Special Rapporteur, the point was made that, although based on the 1969 Vienna Convention, they did not reproduce its terminology and could therefore be reformulated.

394. Regarding draft article 5 (f), it was noted that article 53 of the 1969 Vienna Convention simply stated that a treaty “is void”.

395. It was stated that invalidity should be regarded as invoked by any State, not only when a unilateral act was

contrary to a peremptory norm, but also in the case of threat or use of force. In other words, it would be preferable to reintroduce in that form the distinction between absolute invalidity and relative invalidity found in the 1969 Vienna Convention.

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

397. Draft article 5 (h) stated that the State formulating a unilateral act could invoke the invalidity of the act if it conflicted with a norm of fundamental importance to the domestic law of the State formulating it. In this connection, it was asked whether domestic law could be invoked to invalidate an act which had already produced international legal effects, and whether that entailed the international responsibility of the author State. The suggestion was made to incorporate a reference to the “manifest” nature of the conflict with a norm of fundamental importance to the domestic law of the State.

398. Concerning the question of who was mandated to formulate a unilateral act, the view was expressed that such capacity should be limited to those persons mentioned in article 7, paragraph 2 (a), of the 1969 Vienna Convention, though another view considered it necessary to look at the relevant State practice in order to determine if other organs could bind States in specific areas.

399. The question was raised as to whether an organ that acted beyond its powers or contravened its instructions nevertheless bound the State internationally in so doing; based on article 7 of the draft articles on State responsibility for internationally wrongful acts,³⁸⁰ the answer was in the affirmative. Therefore draft article 5 (h) needed to be considered in much greater detail, since its very principle was open to question. Furthermore, it was stated that the same point was true, *a fortiori*, of the issue of specific restrictions on authority to express the consent of a State, dealt with in article 47 of the 1969 Vienna Convention; the Special Rapporteur had not provided reasons for not transposing it to the case of unilateral acts.

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

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

³⁸⁰ See footnote 263 above.

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

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

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

405. It was suggested that the retention of the words "preamble and annexes", found in article (a), paragraph 2, might not be justified in light of the fact that they were not found frequently in unilateral acts. In this connection, it was also suggested that the provision could state that the context for the purpose of the interpretation of a unilateral act should comprise the text and, where appropriate, its preamble and annexes. A similar approach should be taken with regard to the reference to preparatory work in article (b).

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

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

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

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

3. SPECIAL RAPPORTEUR'S CONCLUDING REMARKS

410. The Special Rapporteur noted that various trends had taken shape during the debate. For some members, it

was impossible to codify rules on unilateral acts. For other members, the topic was very difficult and the approach adopted would have to be reviewed if progress was to be made. Still others had said that, although they had some doubts, they thought that the subject matter was codifiable and that rules had to be established in order to guarantee legal relations between States.

411. The Special Rapporteur indicated that he shared the view of the vast majority of members who believed that unilateral acts did indeed exist, that they were a well-established institution in international law and that they could be binding on the author State, subject to certain conditions of validity. In his view, unilateral acts were not a source of law within the meaning of article 38 of the ICJ Statute, but they could constitute a source of obligations. He pointed out that there was jurisprudence of the Court on unilateral acts, for example, in the *Nuclear Tests*,³⁸¹ *Temple of Preah Vihear*³⁸² and *Fisheries Jurisdiction*³⁸³ cases.

412. Regarding the concern expressed by a member of the Commission about the lack of progress made on the topic over five years, the Special Rapporteur pointed out that no progress could be made until the Commission had reached a minimum agreement on how the topic was to be treated. This required both a theoretical and a practical approach. The Commission must consider the topic in depth and take account of the opinions of Governments. He agreed with the need to analyse relevant practice and therefore supported the proposal that a mechanism be set up to carry out a study of State practice with the possible assistance of an outside private institution. Nonetheless, he also recalled his past request for the members of the Commission to transmit information on their countries' practice.

413. While acknowledging the complexity of the topic, the Special Rapporteur agreed with the majority of the members of the Commission that work on it could continue if a consensus could be reached on certain points. His view was that the Commission could continue what had been started and go on to consider practice later. Consequently, there was no need for a pause or total abandonment of the topic, since such a decision would contradict the Commission's earlier message to the international community that the security of international legal relations was important and that the codification of unilateral acts might help build confidence in such relations.

414. He therefore proposed that a working group first try to formulate rules that were common to all acts and subsequently focus on the consideration of specific rules for a particular category of unilateral act, such as promise or recognition.

415. In relation to the possibility of drafting a provision defining a principle *acta sunt servanda*, the Special Rapporteur noted that such recognition would constitute a step forward in the codification of the rules applicable to

³⁸¹ See footnote 375 above.

³⁸² See footnote 376 above.

³⁸³ *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, ICJ Reports 1998, p. 432.

unilateral acts. The need to formulate a rule on the binding nature of unilateral acts had been discussed in chapter III of his fifth report, and he felt that the issue merited further study by a working group.

416. With regard to the issue of whether or not reciprocity was required, the Special Rapporteur said that, according to doctrine and jurisprudence, the main characteristic of unilateral acts was that, in order to be valid, they did not require acceptance or any other reaction by the other party in order to produce legal effects. Reciprocity must, moreover, be distinguished from the interest of the author State. In this connection, he also noted that reciprocity was not always present even in the conventional sphere, since a treaty could involve commitment without reciprocity.

417. In reply to the suggestion to restrict the study to two unilateral acts, namely, promise and recognition, due to the fact that general rules could not be formulated because the variety of possible subject matters was far too great, the Special Rapporteur felt that it was possible to draft common rules on the formulation and interpretation of unilateral acts; a unilateral act was a unilateral expression of will, which was the same in all cases, irrespective of its content or legal effects.

418. In relation to the view that attributed greater importance to the effects produced rather than the intention, he noted that in order to determine the legal effects of an act, it was first necessary to determine its nature and, accordingly, to determine the intention of the author of the act, and that involved an interpretation.

419. The Special Rapporteur said the members of the Commission generally agreed that the definition of a unilateral act contained in draft article 1 could apply to all the acts in question; some doubts voiced regarding the use of the term “unequivocal” or the need for a unilateral act to have been “known”, as well as the proposal to broaden the category of addressees of a unilateral act, could be dealt with in the Drafting Committee.

420. With regard to the persons authorized to act on behalf of the State and bind it at the international level, two trends of opinion had taken shape. One wanted to limit the capacity to formulate a unilateral act to very specific persons, including those referred to in article 7 of the 1969 Vienna Convention, while the other considered that such capacity had to be extended to other persons, if not every person authorized by the State to formulate unilateral acts likely to affect other States. In this connection, he noted that the reference made, in paragraph 93 of his fifth report, to articles 7 to 9 of the draft articles on State responsibility for internationally wrongful acts meant that the extension of responsibility provided for in those articles or in article 3 was not valid or applicable in the case of unilateral acts because the two subject matters had evolved differently in international law and the considerations to be taken into account were also different.

421. Some members had indicated a preference for not distinguishing between absolute invalidity and relative invalidity of unilateral acts, while others had been of the opinion that such a distinction might be useful. In his opinion the concept of “absolute” or “relative” invalidity

played an important role in determining who could invoke the invalidity of an act.

422. With regard to draft articles 5 (a) to 5 (h) on causes of invalidity of unilateral acts, he agreed with members who had rightly pointed out that the word “consent” referred to the law of treaties and therefore did not belong in the context of unilateral acts, as well as with the suggestion that account should also be taken of article 64 of the 1969 Vienna Convention, which related to the emergence of a new peremptory norm of general international law. Referring to the invalidity of a unilateral act as a result of non-conformity with a decision of the Security Council, he suggested that perhaps only those decisions adopted under Articles 41 and 42 of the Charter of the United Nations should be taken into account.

423. Some members of the Commission had referred to the invalidity of a unilateral act as a result of non-conformity with an earlier obligation assumed by a State either conventionally or unilaterally. In his view, that would not be a case of the invalidity of the act or of a defect of validity, but a case of conflict of rules, which was governed by the Vienna regime in provisions that were different from those relating to the invalidity of treaties.

424. Noting that the use of the word “invoke” in the text of the draft articles had been considered unnecessary, he recalled that that term appeared in the corresponding provisions of the 1969 and 1986 Vienna Conventions. In the text under consideration, it referred to the possibility that a State could invoke a cause of invalidity, the invocation of invalidity being something different.

425. Contrary to the opinion of some members, the Special Rapporteur was of the view that the rules of interpretation were essential and should be considered at the present stage. Only interpretation made it possible to determine whether an act was unilateral, whether it was legal, whether it produced legal effects and thus bound the author State, and whether it was not covered by other regimes such as the law of treaties. Moreover, it had been emphasized in the Commission and in the Sixth Committee that common rules of interpretation could apply to the unilateral acts.

426. With regard to rules of interpretation, comments had been made on the reference to the intention of the author State. He repeated that its interpretation must be done in good faith and in accordance with the terms of the declaration in their context, namely, the text itself and its preamble and annexes. The determination of the intention of the author State was indispensable and could be deduced not only from the terms of the oral or written declaration, in the particular context and in accordance with specific circumstances, but also, when it was not possible to determine the meaning according to the general rule of interpretation, from additional means, such as the preparatory work. To address the concerns expressed by some members regarding the difficulties involved in having access to preparatory work, the Special Rapporteur suggested inserting the phrase “when that is possible” in the draft article.

427. Some members had drawn attention to the need to refer explicitly in the text to the restrictive nature of interpretation; doing so might dispel fears that any act at all could be binding on the State or that the State might be bound by any act formulated by one of its representatives.

428. In the view of the Special Rapporteur, the draft articles on causes of invalidity and on interpretation should be referred to a working group so that it might determine

whether provisions common to all acts could be formulated and then deal with the substantive questions raised.

429. In relation to the issue of whether a State could revoke a unilateral act which it had formulated, such as the recognition of a State, the Special Rapporteur was of the view that, although the act was unilateral, the legal relationship established obviously was not, and therefore a State which formulated an act of recognition would not be able to revoke it.

Chapter VII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

A. Introduction

430. The Commission, at its thirtieth session, in 1978, included the topic “International liability for injurious consequences arising out of acts not prohibited by international law” in its programme of work and appointed Robert Q. Quentin-Baxter Special Rapporteur.³⁸⁴

431. The Commission, from its thirty-second session (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur.³⁸⁵ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur’s third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur’s fifth report to the thirty-sixth session of the Commission. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

432. The Commission, at its thirty-sixth session, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, among other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline,³⁸⁶ and a study prepared by the secretariat entitled “Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law”.³⁸⁷

³⁸⁴ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150–152.

³⁸⁵ For the five reports of the Special Rapporteur, see the following: (preliminary report) *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/334 and Add.1 and 2, p. 247; (second report) *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/346 and Add.1 and 2, p. 103; (third report) *Yearbook ... 1982*, vol. II (Part One), document A/CN.4/360, p. 51; (fourth report) *Yearbook ... 1983*, vol. II (Part One), document A/CN.4/373, p. 201; (fifth report) *Yearbook ... 1984*, vol. II (Part One), document A/CN.4/383 and Add.1, p. 155.

³⁸⁶ *Yearbook ... 1984*, vol. II (Part One), document A/CN.4/378.

³⁸⁷ *Yearbook ... 1985*, vol. II (Part One), Addendum, document A/CN.4/384. See also the survey prepared by the secretariat on liability regimes relevant to the topic “International liability for injurious consequences arising out of acts not prohibited by international law”, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/471, p. 61.

433. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh session to its forty-eighth session (1996).³⁸⁸

434. At its forty-fourth session, in 1992, the Commission established a working group to consider some general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.³⁸⁹ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting, on 8 July 1992, decided to continue the work on this topic in stages—to first complete work on prevention of transboundary harm and then proceed with remedial measures.³⁹⁰ The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic dealt with “activities” and to defer any formal change of the title.

435. At its forty-eighth session, in 1996, the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission, and to make recommendations to the Commission.

436. The Working Group submitted a report³⁹¹ which provided a comprehensive picture of the topic as it related to the principles of prevention and of liability for compen-

³⁸⁸ For the 12 reports of the Special Rapporteur, see the following: (preliminary report) *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/394; (second report) *Yearbook ... 1986*, vol. II (Part One), document A/CN.4/402; (third report) *Yearbook ... 1987*, vol. II (Part One), document A/CN.4/405; (fourth report) *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/413; (fifth report) *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/423; (sixth report) *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1; (seventh report) *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/437; (eighth report) *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/443; (ninth report) *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/450; (tenth report) *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/459; (eleventh report) *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/468; and (twelfth report) *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/475 and Add.1.

³⁸⁹ See *Yearbook ... 1992*, vol. II (Part Two), document A/47/10, p. 51, paras. 341–343.

³⁹⁰ For the Commission’s detailed recommendation see *ibid.*, paras. 344–349.

³⁹¹ *Yearbook ... 1996*, vol. II (Part Two), annex I.