Document:-
A/CN.4/SR.2594

Summary record of the 2594th meeting

Topic:
Unilateral acts of States

Extract from the Yearbook of the International Law Commission:-
1999, **vol. I**

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

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

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

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

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

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

The meeting rose at 1 p.m.

2594th MEETING

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

Chairman: Mr. Zdzislaw GALICKI

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

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

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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

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

second report on unilateral acts of States (A/CN.4/500 and Add.1).

2. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) proposed that, since the topic under consideration was so complex, as shown by the constructive debate on the day before, a working group on unilateral acts of States should be set up, as at the fiftieth session, to define the scope of the topic and provide guidelines for the Commission's work, particularly with a view to the drafting of the next report. He would like to know the opinion of the members of the Commission on that point.

3. Mr. KAMTO said that, instead of referring in draft article 1 (Scope of the present draft articles), as the Special Rapporteur had done, to "unilateral legal acts formulated by States which have international effects", it would be preferable to be less categorical and refer to "unilateral acts which purport to have legal effects", thus using the definition of a reservation, which was also a unilateral statement. That clarification should help to distinguish between unilateral legal acts and what the Special Rapporteur called acts of a political character. In fact, when the Special Rapporteur described such acts as those which, while also unilateral and legal, do not produce international effects, he was running the risk of a contradiction with the situation following the formulation of the act, for no one ever knew beforehand whether such acts would have legal effects and a judge could arrive at such a conclusion only a posteriori through analysis and interpretation.

4. The definition of "unilateral legal acts" and the commentaries thereto called for at least two substantive observations. First, the Special Rapporteur rightly noted that, since the scope of unilateral acts was far-reaching and extremely complex, the Commission should not try to cover all its diverse aspects. It would therefore be advantageous to include in the draft (either in the form of an article following the definition or a second paragraph of draft article 2 (Unilateral legal acts of States)) a provision based on article 3 of the 1969 Vienna Convention and indicating that the definition did not affect the legal force of any other unilateral acts (or unilateral statements). Secondly, the definition, in draft article 2, referred to "will, formulated publicly". The word "publicly" gave rise to both theoretical and practical problems, particularly as the Special Rapporteur did not provide any cogent argument in favour of its use. For example, in paragraph 50 of his second report, he quoted a passage from the 1974 judgment of ICJ in the *Nuclear Tests* cases which was not relevant. The Special Rapporteur emphasized that publicity was a necessary part of a unilateral act and that the addressee State must be made aware of it, stating, that otherwise, the act would be without legal force. Such a statement conflicted with the idea of the autonomous nature of a unilateral act, for, if that act could exist and produce effects without the consent of the addressee being necessary, it was hard to see why its validity should be conditional on publicity. Moreover, at the theoretical level, that approach recalled the voluntarist doctrine, which maintained the fiction that a unilateral legal act would exist only subject to the addressee's tacit consent, which could be given only if the addressee was aware of the act. Since the distinctive feature of a unilateral legal act was that will was expressed in a statement, according to the Special Rapporteur's approach, the notification of an act to its addressee seemed in practice to be the logical, inevitable consequence. In his own opinion, the word "publicly" would be warranted only in the event of an oral unilateral act, but, as it happened, the Special Rapporteur ruled out that hypothesis. For example, at the end of one of its meetings, the group of seven major industrialized nations (G7) could conceivably cancel the entire debt of the developing countries without backing its statement up by a written act. If that were to happen, should no legal consequence be attached to a statement of that kind because it was unwritten? On the other hand, publicity would be useful in that case, because the public statement would be the only means of acknowledging the existence of the act. Such a requirement was less warranted when a statement was written.

5. Two comments should be made on the expression of consent. The first related to the status of silence, which the Special Rapporteur did not discuss in his second report, and the second had to do with the consensual link which resulted from a unilateral act, in other words, the legal offer contained in such an act and the response to it in the form of the addressee's consent.

6. The Special Rapporteur should make a detailed study of the status of silence, as, in some situations, the expression of will seemed to be an obligation which was not compatible with silence. In the San Juan River case (Costa Rica, Nicaragua),[2] the arbitrator had found that the Government of Nicaragua had remained silent when it should have spoken. Admittedly, he had reached that conclusion in respect of a treaty, but it was transposable mutatis mutandis to unilateral acts. Furthermore, protest against a unilateral act which a State condemned was known to play a significant role in international law. In the *Delagoa Bay Railway* case, the arbitrator had found that Portugal's acts of occupation had been tacitly accepted by the United States of America and the United Kingdom which had never raised a protest. Conversely, in the *Minquiers and Ecrehos* case, France had interpreted its absence of any protest as not being indicative of tacit assent.

7. The legal effect of consent on the legal nature of a unilateral act and whether it created a new legal situation in which the unilateral act and the addressee's consent constituted an exchange of wills forging a contractual, consensual link would require clarification by the Special Rapporteur, at least in the commentary.

8. The Special Rapporteur should also examine the legal consequences of a co-author State's opting out of a collective unilateral act, for example, in the above-mentioned case of a statement by the G7. He should amend the wording of draft article 7 (Invalidity of unilateral acts) to bring it more into line with the provisions of articles 48 to 53 of the 1969 Vienna Convention, on which it was obviously based.

[2] See award of 22 March 1888 by Grover Cleveland, President of the United States of America, as arbitrator (J. B. Moore, *History and Digest of international arbitrations to which the United States has been a party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. 2, p. 1964; and H. La Fontaine, *Pasicrisie internationale 1794-1900* (The Hague, Kluwer Law International, 1997), p. 299).

9. Mr. PELLET noted that, in the second report, the Special Rapporteur considered the comments of Governments made in the Sixth Committee of the General Assembly at its fifty-third session and went back over the scope of his topic from three main points of view: the unilateral acts of international organizations, international responsibility and estoppel.

10. In principle, the Special Rapporteur excluded unilateral acts of international organizations. On that point, he fully agreed with him, but, on the basis of certain paragraphs of the report, he did not seem to be sticking very closely to that position and he wondered why. One of the reasons was that the Special Rapporteur was dealing with several fairly disparate topics. There was no doubt, first of all, that the classical unilateral acts of international organizations, in other words the resolutions of bodies in which member States were represented, should not be included, for they were too dissimilar to the unilateral acts of States and raised excessively complicated issues. The Special Rapporteur then mentioned the unilateral acts of international organizations which resembled those of States, which emanated from a subject of law, which were directed at particular addressees and through which, in general, an international organization could unilaterally accept obligations with regard to other subjects of law. In the opinion of the Special Rapporteur, those acts could be formulated by the officials of organizations—a rare occurrence, in reality—but it was true that an international organization, as such, could enter into unilateral commitments with regard to both member States and third parties. Although, in all probability, such acts would have the same legal profile as the unilateral acts of States, he was sceptical about the advisability of taking such acts into account—less for entirely conceivable theoretical reasons than for practical reasons—because their consideration would introduce a further element of complexity in material which was already complicated enough. Moreover, in paragraph 36 of his report, the Special Rapporteur proposed the inclusion in the subject matter of legal acts formulated by a State in the framework of international conferences. He not only agreed with that suggestion, but thought that statements which were made by States in the framework of international organizations and which purported to produce general legal effects should also be dealt with. Like international conferences, international organizations were a forum where publicity could be given to commitments undertaken or requests made by a State through a unilateral act. The Special Rapporteur rightly attached prime importance to publicity in the legal regime governing unilateral acts and in the definition thereof. Unilateral commitments entered into by States with regard to international organizations certainly had to be covered by the draft articles, and that seemed to be the opinion of the Special Rapporteur.

11. As to the relationship between unilateral acts and international responsibility, he concurred with the Special Rapporteur that the former did not involve any responsibility which might derive from a unilateral act. There was no doubt that, if a State adopted a unilateral act conflicting with one of its obligations, it could incur responsibility, but that went beyond the scope of the topic under consideration. That did not, however, mean that no interest should be taken in the relationship between unilateral acts and other sources of international law, which could entail responsibility, especially the relationship of unilateral acts to custom and the peremptory norms of international law.

12. The same comment should be made with regard to estoppel. Admittedly, a unilateral act could give rise to an estoppel, but it was a consequence of the act and, contrary to what had been stated by the Special Rapporteur in his oral introduction, no category of acts which would constitute "estoppel acts" seemed to exist. The only thing that could be said was that, in certain circumstances, a unilateral act could form the basis for an estoppel. Contrary to what the Special Rapporteur had stated in paragraphs 13 and 14 of his report, he personally did not think that estoppel could be excluded from the field of investigation on the pretext that the acts giving rise to an estoppel were not autonomous unilateral acts. Estoppel probably was dealt with in the national procedural rules of common law countries, but it was impossible to dismiss it lightly as a mere procedural principle. In international law, estoppel was a consequence of the principle of good faith which, as Mr. Lukashuk had pointed out (2593rd meeting), governed the rules on the legal effects of unilateral acts.

13. Generally speaking, he had doubts about the Special Rapporteur's restriction of the topic to "autonomous" unilateral acts, for he still thought that there was no valid reason to rule out, for example, acts formulated under a customary or treaty rule. He therefore did not see why the Commission should not concern itself with unilateral acts whereby States defined the width of their maritime areas. Apart from their purpose, which should not be taken into consideration, such acts did come within the ambit of the topic and were, moreover, the most frequent examples of that particular concept, namely, unilateral acts in international law. In that connection, he completely disagreed with the Special Rapporteur's statement in paragraph 62 of his report that such acts went beyond the scope of strictly unilateral acts and fell within the realm of treaty relations. They were, strictly speaking, unilateral acts and gave effect to a customary or a treaty rule. Many unilateral acts did so, moreover, and he wondered whether it was not possible to consider that all unilateral acts were based on a customary norm, starting with the one which permitted States to undertake commitments. The idea that some unilateral acts ought to be excluded from the field of study on the pretext that, as in the case of maritime areas, for example, provision was made for them by a general rule of international law still seemed very strange to him. If that were the case, the topic would be much less interesting, for the study would cover only unilateral acts of the 1974 *Nuclear Tests* cases type, which were only of a marginal nature. Perhaps the Special Rapporteur's extremely narrow approach explained why his report was characterized by an almost total lack of examples. In order to stick closely to the idea of the autonomy of the acts in question, the Special Rapporteur was denying himself the possibility of describing a practice because such practice existed above all in respect of acts which the Special Rapporteur considered to be non-autonomous. That restriction, which had not been justified in a convincing manner by the Special Rapporteur in his report, was very difficult to apply because, in the final analysis, it was difficult to imagine completely non-autonomous unilateral acts and the difference between what the Special Rappor-

teur meant by autonomous acts and those he termed non-autonomous was practically imperceptible.

14. Before going on to the specific draft articles, he said that, like Mr. Kateka and Mr. Pambou-Tchivounda (ibid.), he was concerned about the Special Rapporteur's tendency to appropriate the rules of the 1969 Vienna Convention. It was perfectly legitimate to use them as a starting point, for legal acts that gave rise to somewhat comparable problems that were involved in both instances, but unilateral acts and treaties were nevertheless separate categories of legal acts and there was every advantage to be gained from giving in-depth consideration in each case to whether or not the rules of the law of treaties could be transposed to unilateral acts precisely because of the different nature of the two. What was needed was to develop a paradigm, to define a system of reference to help distinguish between the two instruments, which could not be placed on the same footing. He did not believe that the inclusion of a rule in the 1969 Vienna Convention or the 1986 Vienna Convention was sufficient justification for including a similar rule in the draft articles, contrary to what was stated in paragraphs 70 and 131 of the report. Many rules of the law of treaties were derived from the conventional nature of those instruments, i.e. from the convergence of the wills of the States parties, but that element was absent by definition from unilateral acts. In that connection, he was disturbed by what the Special Rapporteur had written on reservations at the end of his report. He did not believe, for example, that it could be stated, as in paragraph 143 of the report, that it was true that a State could formulate reservations when performing a unilateral act. In his view, the opposite was true: a unilateral act could not be accompanied by reservations. It could be modulated and supplemented by conditions, but introducing the idea of reservation in that context would create a great deal of confusion. The topic under consideration and the topic of reservations to treaties were nevertheless clearly related, primarily as a result of the fact that reservations were unilateral declarations that corresponded *grosso modo* to the definition of unilateral acts proposed by the Special Rapporteur. Unless the two topics were combined, however, and that was certainly not very realistic, he did not think that reservations should be dealt with in any way. The reason was not that reservations were not autonomous in respect of the treaty to which they applied, which would undoubtedly be the Special Rapporteur's explanation, but, rather, that reservations were governed by a specific set of rules. Hence, it would be useful to include a general saving clause somewhere in the draft articles on unilateral acts of States to indicate that the draft was without prejudice to the specific rules that could be applicable to a given category of unilateral acts in view of their nature. It seemed to him that that proposal corresponded to one made by Mr. Kamto.

15. The very brief treatment given by the Special Rapporteur in paragraphs 144 to 146 of his second report to the non-existence of a unilateral act made him fear, subject to seeing the future report that was to cover that aspect, that the Special Rapporteur was mixing two very different things up under the general heading of "non-existence": wrongfulness on the one hand, and on the other, non-existence in the strict sense, which was something very particular and was not, moreover, referred to in the 1969 Vienna Convention. There might be decisive arguments for referring in the draft articles to the theory of non-existence, which was highly controversial in international law, but they were not immediately apparent and nothing in the second report gave reason to change that opinion.

16. Turning to the individual draft articles proposed by the Special Rapporteur in his second report, he said that he found the wording of draft article 1 very unsatisfactory. First, he wondered whether the draft article might be combined with draft article 2; if not, the two provisions should at the least be fully compatible. That did not seem to be the case, however, for a number of reasons. The proposed text of draft article 1 stated that unilateral acts "have international effects", whereas draft article 2 indicated, more appropriately, that unilateral acts were formulated "with the intention of acquiring international legal obligations". That was the sort of wording that should be included in draft article 1 by using the phrase "with a view to producing effects", as proposed by Mr. Kamto, for example. With regard to the definition of effects, there was no doubt that all unilateral acts aimed to create effects. States said something in order to produce an effect in the legal, political or other spheres. What was interesting and specific was that the effects sought were legal in nature, the point being to create obligations, but also rights, something about which the Special Rapporteur said nothing. It should therefore be made clear that the unilateral acts of concern to the Commission aimed to produce legal effects at the international level. That would also make it possible to avoid using the words "unilateral legal acts", which were somewhat pleonastic in the context of the Commission and were also a departure from the title of the draft articles, namely, "Unilateral acts of States". The adoption of that definition would help solve the extremely important problem mentioned by many members of the Commission (ibid.) and referred to in the footnote on State practice in the Special Rapporteur's commentary to draft article 1. If it was said that the draft articles related to unilateral acts aimed at producing international legal effects, it did not matter whether negative nuclear security guarantees produced legal effects or not. What did matter was that they aimed to produce such effects and that they could be included with no particular difficulty in the scope of the topic without prejudice to the answer to that question. That must, however, be indicated by appropriate wording in draft article 1 for the scope of the draft articles.

17. Turning to draft article 2 and leaving aside purely drafting problems, for example, the order in which the potential addressees of the unilateral act were listed or the debatable words "unilateral legal act", a number of major substantive issues remained. First, there was the one which the Special Rapporteur had clearly understood and which had made him hesitate between the term "unilateral legal act" and the term "unilateral declaration". Personally, he was firmly opposed to the replacement of the word "act" by the word "declaration", not only because that would amount to changing the very subject matter of the exercise, but also for much more important reasons. Unilateral acts, like treaties, were both *instrumenta* and *negotia*, or rather, they were *negotia*, or content, carried by instruments, something which the Special Rapporteur appeared to acknowledge in paragraph 44 of his report. If "declarations" were the centre of attention, then the focus

would be on the instrument, the formal side of things, and the *negotium* would be forgotten. It might also be asked, as the Special Rapporteur hinted in paragraph 78, whether a unilateral act was not a combination of multiple instruments in some cases. In the *Nuclear Tests* cases, for example, and, as the Special Rapporteur had pointed out, the French "declarations" formed a whole and it was probably that combination that had prompted ICJ to regard the separate declarations as a unilateral act which created a commitment for France. True, the *negotium* could be varied, but the art of that type of codification was precisely to reduce diversity to unity or at least to a few basic rules, and that was, moreover, what the proposed definition did. What all those unilateral acts had in common, their basic purpose, was that their author had the intention of producing legal effects—obligations or rights—at the international level. He was of the opinion that, instead of referring to legal obligations at the international level, it would be wiser to refer to legal effects, as in draft article 1, if his proposal was followed because it was always a pair that was established—a pair of rights and obligations. Auto-normative acts created obligations for the State making the commitment and rights for others, while the opposite was true of heteronormative acts.

18. The word "declaration" seemed very restrictive, unless it was construed very broadly to cover all possible eventualities. In actual fact, the expression of will involved could take the form of a law, for example, or, if ICJ was to be believed in the *Nuclear Tests* cases, of a press conference, a ministerial statement to the General Assembly, press releases or a combination thereof.

19. Another problem to which the proposed definition gave rise related, once again, to the use of the word "autonomous". In the commentary to draft article 2, and specifically in paragraphs 47 and 63, what the Special Rapporteur seemed to be referring to was not the autonomy of the act in relation to other rules of international law, or in relation to the customary or treaty foundations of unilateral acts, but the fact that such acts produced legal effects without requiring either the acceptance or any other conduct on the part of the addressee. In his own view, that statement was entirely premature. In some cases, a unilateral act might produce effects solely in function of the reactions of other States, whereas, in other cases, it would produce reactions ipso facto, but to say so in the definition, when the Special Rapporteur had provided no proof whatsoever, seemed very arbitrary and would probably deprive the Commission of extremely important conceptual elements. In any case, the report provided no justification for what seemed to be an unduly general statement which consequently did not seem to fall within the definition of unilateral acts.

20. He was less bothered than Mr. Kamto by the word "publicly". It might not be the best choice, but the problem was not whether the unilateral act was formulated in public. What had to be made clear at the definition stage was that the addressee must be aware of the act. Publicity was absolutely essential vis-à-vis the addressee, but not necessary vis-à-vis the rest of the international community if it was not addressed to each of the elements making up that community. The problem was merely one of terminology and he agreed with the Special Rapporteur on the substance. To put it simply, there was hardly any need to "broadcast" a unilateral act if it was intended only for one other State. In the *Legal Status of Eastern Greenland* case, the Ihlen declaration [see pages 69 to 70 of the judgment] had been made behind the closed cabinet doors of the Norwegian Minister for Foreign Affairs.

21. The fact that the Special Rapporteur defined a unilateral act as an expression of will that could come from a number of States could be disconcerting, as it might appear at first glance that there was a contradiction in terms. He did not think that there was and he agreed with the Special Rapporteur on that point, but it had to be explained why such unilateral acts could nevertheless be collective acts and paragraph 58 of the commentary to draft article 2 did not do so; it simply paraphrased the proposed definition. He believed that what was meant was acts such as the decisions of the four occupying Powers in Germany between the end of the war and reunification or even certain instruments which looked like treaties, but operated like unilateral acts, for example, the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis setting up the International Military Tribunal at Nürnberg.[3] The commentary would have to explain that it was by no means easy to distinguish a collective unilateral act from a treaty. Collective unilateral acts could perhaps be excluded from the draft articles, but that would have to be made clear in the article on the scope of the draft. In any event, the question should be given serious consideration. For the time being, the Special Rapporteur had included collective unilateral acts and he tended to agree with that approach, but thought that the explanations given in paragraph 58, which were inadequate, would have to be expanded.

22. With regard to draft article 3 (Capacity of States), he found that the commentary, which was based on article 6 of the 1969 Vienna Convention, was inadequate. The draft article itself seemed acceptable, but he would like to have more information on which to base an opinion.

23. Starting with draft article 4 (Representatives of a State for the purpose of formulating unilateral acts), the French version of the report frequently used the words *accomplir des actes unilatéraux* or *exprimer* unilateral acts. The word *formuler* was far better in all cases and should be used systematically.

24. Draft article 4 should be reviewed carefully to take account of the particular characteristics of unilateral acts because the transposition from the law of treaties was too obvious and without convincing justification. That was also true for the commentary. Even with the precautions taken by the Special Rapporteur in paragraph 97 of his second report, full powers could hardly be referred to in connection with unilateral acts, which had absolutely nothing to do with full powers. The Special Rapporteur was undoubtedly right in paragraph 90 to stress the fact that international practice in the field covered by draft article 4 had not been examined in great detail. That was why the absence of any description of that practice in the report was all the more regrettable. Without knowing the practice, he found it difficult to take a definite position on whether draft article 4 was well founded.

[3] United Nations, *Treaty Series*, vol. 82, No. II-251, p. 279.

25. That comment also applied to draft article 5 (Subsequent confirmation of a unilateral act formulated without authorization). The lack of a description of practice, except for a few examples of case law, was just as striking in the commentary to draft articles 6 (Expression of consent) and 7. But even without knowing the precedents, draft articles 6 and 7 appeared to give rise to a number of problems, some of them quite serious.

26. First, he did not think that reference could be made to "consent to be bound by a unilateral act" or *consentement unilatéral* and, as in the case of draft articles 4 and 5, he had doubts about the word "representative". Those terms, which were too closely associated with treaties, did not adequately reflect the specific features of the unilateralism that characterized the instruments under consideration. In more general terms, draft article 6 could quite simply be deleted, since it largely duplicated draft article 4, the only new element being the need for the act to be unvitiated, as was made clear in draft article 7. If draft article 6 was retained, a number of drafting problems would have to be considered, particularly the use of the words "consent to acquire" [an obligation], "representative", a very awkward term in the context of unilateral acts, and "declaration". Draft article 6 was restricted to "auto-normative" acts by referring exclusively to the "obligations" assumed when formulating a unilateral act, whereas heteronormative unilateral acts could and did exist. Lastly, the phrase referring to addressees of the act at the end of the draft article did not correspond to the wording of draft article 2. In any event, there would be no harm in deleting draft article 6.

27. He was afraid that draft article 7 was too mathematically, arbitrarily and mechanically aligned on the corresponding provisions of the 1969 Vienna Convention. It also gave rise to a number of drafting problems in French, including the repetition of the word *consentement*, which was used six times, and the terms *accomplir* or *accomplissement*, which were used four times. It might be better to split the draft article up into separate articles for each subparagraph.

28. Each subparagraph deserved fairly lengthy comments, but he would restrict himself to a number of observations on subparagraph (*f*) relating to the unilateral act which, "at the time of its formulation", conflicted with *jus cogens*. For once, it would be useful to transpose the wording of article 53 of the 1969 Vienna Convention, but carefully weighing every word. The word *accomplissement* gave rise not only to a problem of drafting, but, first and foremost, to one of substance. It was not at the time of its formulation—or performance—that the unilateral act that conflicted with a peremptory norm of general international law became null and void, but, rather, at the time of its adoption. It was void *ab initio*, ipso facto. If a State indicated that it was going to commit aggression against another State, it was the declaration itself that must be considered invalid on the day it was made, not at the time when it was implemented, but the word "formulation", seemed to indicate the contrary.

29. Moreover, in paragraph 116 of his report, the Special Rapporteur quoted Skubiszewski's assertion that unilateral acts could not derogate either from general international law, meaning customary international law, or from the obligations assumed by their authors.[4] Curiously, that idea on an extremely important point, which the Special Rapporteur appeared to endorse, was not reflected in the draft article itself. That seemed to call for very careful study based not only on an assessment of the practice, limited as it was, but also on an examination of the consequences of every position adopted, one way or the other. In any case, the problem could not be passed over in silence and it made no sense to consider the problem of non-conformity with a rule of *jus cogens* without considering that of non-conformity with general international law plain and simple. Also, the problem did not arise in the same terms as under the law of treaties.

30. The Special Rapporteur would be aware of his great interest in the subject. The report constituted a useful and rich basis for discussion. It raised many interesting and important concerns, and left open a number of questions relating to the points it addressed. He therefore warmly welcomed the Special Rapporteur's proposal that the draft articles should be referred not to the Drafting Committee, since it would be too early for that, but to a working group that could, by agreement with and under the guidance of the Special Rapporteur, review the outstanding problems, suggest new ways of considering them and, above all, try to present the issues in a way which clearly demonstrated that the approach used with the law of treaties could not simply be transposed. On the basis of those reflections, the Special Rapporteur could shape and further refine the draft articles in a third report to be discussed by the Commission.

31. Mr. LUKASHUK thanked Mr. Pellet for his well-justified statement, which raised many questions in his mind. First, Mr. Pellet had identified very clearly the most difficult aspect of the second report of the Special Rapporteur, its Achilles heel as it were—the very small number of examples taken from practice which it contained. The declaration made by Egypt in 1957[5] was perhaps the sole classic illustration of a unilateral act. In the absence of practice, it was extremely difficult to codify the corresponding rules. That essential point required further consideration.

32. Mr. Pellet had raised a second issue, namely unilateral acts adopted by States within the framework of the implementation of international treaties. That concerned the case in the third report on reservations to treaties in which a State assumed additional and more extensive obligations.[6] The question to be considered then was what degree of autonomy those acts had. If a State related a unilateral act directly to the existence of a treaty, it was difficult to speak of autonomy, even when there was no doubt that a unilateral act was involved. If, on the other hand, the State did not cite such a connection, a purely autonomous unilateral act was clearly involved. Moreover, he himself believed that a State could also take such unilat-

[4] K. Skubiszewski, "Unilateral acts of States", *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991), pp. 221-240, at p. 230, para. 44.

[5] Declaration (with letter of transmittal to the Secretary-General of the United Nations) on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957), United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299.

[6] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.16, paras. 208-212.

eral legal acts within the framework of the implementation of ordinary rules of international law. They would certainly be unilateral acts.

33. He regarded Mr. Pellet as someone closely associated with the subject of reservations to treaties. Accordingly, he would like to ask him the following question: did he believe that it was possible to formulate reservations and interpretative declarations in respect of a unilateral act? He himself believed that, if a State acknowledged a unilateral act by expressing a reservation to it, i.e. by accepting it on certain conditions, and the State author of the unilateral act raised no objection, that act was valid. A unilateral act established not only rights for States, but also corresponding obligations. Acceptance of the arrangements for the operation of the Suez Canal implied an obligation to observe the rules established by it, but that did not mean that interpretative declarations or reservations concerning the latter could not be formulated.

34. As to the problem of estoppel, which the Special Rapporteur viewed unfavourably, his opinion was that estoppel was acceptable, but only in respect of other unilateral legal acts. A case in which a State gave a position statement and another State took that statement into account, although it was not lawful raised an important and complex issue. From that viewpoint, it was clear that estoppel must be reflected in the draft articles.

35. Mr. ECONOMIDES, said that, having listened to the statements by Mr. Kamto and Mr. Pellet, he felt that the most important consideration was to define the scope of the topic. However, before doing so he would like to make some general comments. First, it was clear that unilateral acts of international organizations should be left out of the reckoning for the moment, not because it was difficult to deal with them or because the issue had not yet reached a sufficiently advanced stage, but simply because it had been decided to concentrate first on unilateral acts of States. Once that objective had been achieved, the Commission could, on the basis of earlier experience, return to unilateral acts of international organizations, an issue of obvious importance.

36. Secondly, with regard to the use of the term "declaration", what counted was not so much the designation of a unilateral act, but its content and, in particular, the legal effects that that act produced or purported to produce.

37. Thirdly, there could be no doubt that the 1969 Vienna Convention was a highly valuable model and an indispensable tool in the context of the Commission's work. However, where unilateral acts of States were concerned, efforts must be made, to the extent possible, to find more appropriate criteria that were more relevant to such acts than those on treaty acts provided for in the Convention. He therefore shared the opinion expressed by Mr. Pellet and other members in that regard.

38. He therefore wondered, for example, whether it was necessary to retain provisions such as those in draft article 3, which stated "Every State possesses capacity to formulate unilateral legal acts".

39. With regard to draft article 1, which was highly important as it helped define the scope of the topic, he felt that the Commission would be well advised to adopt a restrictive approach and set itself the objective of considering unilateral acts of States which either were not related to other sources of international law, namely, treaties, customs or decisions of international organizations, or which themselves directly established rights and obligations at the international level on an autonomous basis. The point was to determine when, in what circumstances and under what conditions a unilateral act of a State might constitute an autonomous source of international law which, at the normative level, produced the same effect as other sources of international law. According to that approach, the first step would be to delete the term "legal" in draft article 1 because it was absolutely pointless to discuss the difference between political acts and legal acts. The main thing was that an act could establish rights and obligations; if it did, it was always a legal act. The second step would be to substitute a more exact term for the word "effects". As it stood, draft article 1 covered a large number of unilateral acts, for example, those relating to other sources of international law, which should be excluded from the scope of the draft articles. In the case of unilateral acts relating to treaties, it was clear that a reservation, the withdrawal of a reservation, an objection to a reservation, the ratification of a treaty, its denunciation or its registration or an interpretative declaration clarifying or explaining an ambiguous treaty provision were just as much unilateral acts which had effects at the international level, but, in general, they came within the scope of treaty law. Likewise, acts which gave effect to customary rules were related to international custom and acts which related to the implementation of decisions of international organizations belonged to "international institutional law": which was the case, for example, of an internal act giving effect to a European Community directive. Such acts were in fact concerned with the implementation of international law at the internal level. They were thus internal acts subordinate to other sources of international law.

40. In concrete terms, that should lead the Commission to amend the wording of draft article 1, which would thus read: "The present draft articles apply to unilateral autonomous acts of States which establish rights and obligations at the international level."

41. With the scope of the topic thus defined, the Commission still had to bear in mind that the corresponding practice was very limited, and that made the issue an extremely difficult one and provided further justification for establishing a working group on the subject. The group would have the task of examining the entire issue, in particular the delimitation of the topic, and also of drawing up a programme of future work that would enable the Commission to complete the first reading of the draft articles before the end of the quinquennium.

42. Mr. PAMBOU-TCHIVOUNDA, referring to the second report on unilateral acts of States, said that the aim of the report should be to present in quintessential form the law relating to what was a highly complex category, as everyone recognized. In that regard, the work by the Special Rapporteur was worthy of consideration, even though, in other respects, it was open to criticism.

43. In general, there was no doubt that a great deal of time could probably be spent discussing the Special Rap-

porteur's choice of the declaration as the prototype of a unilateral act of State on account of its supposed propensity to remain autonomous amid the tangle of different ways of producing law. The discussion was potentially inexhaustible, for, among the unilateral expressions of will formulated by States in relation to other States or other subjects of international law, the declaration was one of a kind and even an unknown quantity, if not both at once.

44. The controversy over the elusive demarcation line between "politically unilateral" and "legally unilateral" threatened to go on forever, or at least for the time being because, in both cases, a formal criterion for retaining a unilateral legal act and excluding a unilateral political act from the scope of the study was itself fraught with ambiguity. Did "formal criterion" mean the organic aspect or the instrumental aspect? Those were issues which had not been fully clarified as far as a means of differentiation was concerned.

45. At first sight, the declaration *Vive le Québec libre!* made by General de Gaulle[7] in Quebec was political. However, in French law, the head of State was a political institution whose status also permitted him to formulate legal rules. Immediately after that speech, in fact Quebec, a component and member State of the greater Federation of Canada, had opened up to the world and begun concluding international agreements. There was no doubt that, even if only tacitly, most of Quebec's partners had endorsed that declaration as being appropriate. Behind the slogan lay a unilateral legal act, which it might be wrong to portray in overly abstract terms.

46. The Commission had to look at what States did and, on that basis, at whether they communicated or not, come to an agreement based on the fact that unilateral legal acts, especially those which created rights and obligations, belonged to all types. Singling out a declaration, particularly one which could only be legal, as opposed to other types of declaration that were political, would thus be arbitrary to say the least, and that was one of the first problems the Commission must try to solve when it gave the Special Rapporteur new guidelines.

47. For the Special Rapporteur, the declaration's reductionist paradigm was surely convenient for the edifice which he had decided to build and was delivering in his second report, paragraph 17 of which contained the structure. That paragraph was the key to the organization of the report and, in that regard, he felt that a number of clarifications were called for.

48. Thus, in subparagraph (*c*), which dealt with capacity to formulate unilateral acts, he would be tempted to replace the word "formulate" by the word "issue".

49. In subparagraph (*d*), on "Representatives of a State who can engage the State by formulating unilateral acts", much simpler wording should be adopted. Instead of "capacity", what was meant was the competence of organs to engage States unilaterally. Subparagraph (*d*) should read: "Competence to engage the State by formulating unilateral acts."

50. In the French text of subparagraph (*e*), he proposed that the words *sans autorisation*, which were not legal, should be replaced by the words *sans habilitation*. In all Governments, only heads of State and ministers had the competence, as defined in general texts, to engage a State at the international level. However, there was a whole circle of people who, without having that constitutional legal capacity, were permitted to express a position in one forum or another. If such views were considered important by the country concerned, the central authorities confirmed what their official had said *sans habilitation*. In the same subparagraph, he proposed that the word "subsequent", should be deleted because it served no purpose, as the confirmation always followed the act chronologically.

51. In subparagraph (*g*), it might be better to avoid the possible risk of confusion in the title by reversing the order, namely, by beginning with conditional unilateral acts, should there be any, and then going on to reservations, the purpose being to show that, although a reservation was a unilateral act which was not autonomous because it followed on from an agreement, its most characteristic form of expression was unilateralism. In the context of the Commission's efforts to delimit the topic, it would be difficult to leave out reservations, which in turn raised the problem of expanding the topic to other categories of "conduct" or "attitudes" on the part of certain State organs which advocated the same method of expression, namely, unilateralism. The Commission would then be forced to find a middle way between the Economides approach, which was relatively focused, and the Pellet approach, which would tend much more towards expansion. A balance would have to be struck and that was the task of the working group whose re-establishment was being proposed.

52. On a general point, he was concerned about the method which the Special Rapporteur had used in the rest of the second report and which was based on a parallel with the Vienna approach. Whereas the logic of unilateralism could be transformed into the logic of bilateralism or multilateralism, the opposite was impossible. The question, then, was how to apply the same methods to two ways of, and indeed two systems for, producing law. Moreover, nothing guaranteed, at least not at first glance, that, in the adaptation effort which would need to be made, the unilateral act would not be distorted or that the exercise would not expose for all to see the many cracks running through the edifice of the 1969 Vienna Convention. If those cracks were made visible, would the Commission be prepared to propose to the General Assembly the revision of its work? Would not the law of treaties, as codified, not then seem to be an unfinished—or at least an imperfect—work? And, if so, why was that not true for other topics which had already been codified? That lesson was worth thinking about because there was modesty to learn from it.

53. With regard to draft article 1, he said that, in paragraph 22 of his second report, the Special Rapporteur had in mind the ambivalence of unilateral acts when he stressed that they could be either individual or collective. In fact, it was in draft article 2 that that idea was expressed. Hence, the Special Rapporteur must make a clear choice: either develop the idea in the commentary to draft article 2 or retain it in the commentary to draft

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

article 1, to which a paragraph 2 must then be added to take that fact into account. In no way would that be prejudicial to the key role played by the Special Rapporteur's formal criterion, which would be given greater prominence. At the same time, in order to avoid any confusion and ambiguity, paragraph 22 might be recast, the words *aux actes unilatéraux qui sont le fait d'États* in the French text being replaced by the words *aux actes unilatéraux émis par les États*.

54. Draft article 2 showed the first limit of the Special Rapporteur's method, i.e. following the parallel with the law of treaties. He wondered why that draft article contained only a definition of unilateral acts of States, whereas there were many other terms which were directly related to the topic or which in any case would be related to the regime of unilateral acts, such as "declaration", "representatives of the State", or "the non-existence of the legal acts", which would be better spelled out in a separate provision that might be entitled "Use of terms". If it was decided that article 2 should contain a set of definitions, the word "declaration" in parentheses would have to be deleted. Also, in both draft article 2 and draft article 3, the word *formuler* in the French version should be replaced by the word *émettre*. In draft article 3, the word "legal" should be deleted because, once it had been decided that unilateral acts should be defined on the basis of their effects, i.e. their legal effects, it would be tautological to continue to speak of "unilateral legal acts".

55. Mr. SIMMA said that he fully endorsed Mr. Pellet's analysis, except that he was not convinced that the topic under consideration was really ripe for codification; neither a reading of the second report nor the comments of his colleagues had persuaded him otherwise.

56. He was sceptical about the Special Rapporteur's approach, which consisted in following the 1969 Vienna Convention. That might restrict the Commission's scope by placing certain questions in a straitjacket. The idea of applying the approach in the Convention to unilateral acts was based on a hypothesis that would not necessarily seem relevant once State practice had been assessed—something which still remained to be done.

57. As to the introduction to the second report, he had nothing to add to the comments by Mr. Pellet, who had admirably analysed the relationship between unilateral acts and estoppel. However, he had a major criticism to make concerning draft article 1 proposed by the Special Rapporteur: it should be harmonized with draft article 2 because, as it stood, it gave the impression of having a much broader scope. Since the Special Rapporteur had taken the 1969 Vienna Convention as a model, he pointed out that article 1 of that instrument merely stated that "The present Convention applies to treaties between States", without entering into related considerations.

58. Draft article 2 gave rise to a number of terminological problems. He did not see why the Special Rapporteur maintained that the State which expressed its will by means of a unilateral act must do so "unequivocally". Judging by State practice, the opposite seemed to be the case. Even if that idea was to reappear later when the Commission considered how declarations must be formulated as unilateral legal acts, it did not belong in a definition. In that context, he observed that paragraphs 126 and 128 of the commentary to draft article 7 were somewhat "equivocal" or even contradictory because the former stated that "lack of clarity does not signify lack of intention" whereas the latter said that "the intention ... must always be clear if it is to be the basis of the engagement made by the State".

59. Another awkward terminological problem was the use of the word "autonomous" in draft article 2. For the layman, an "autonomous expression of will" might be understood as having a psychological connotation, like the "free expression of will". Hence, if the Commission wished to retain the element of autonomy in the definition in draft article 2, it should place it elsewhere in the sentence. The idea of an autonomous unilateral legal act referred to in paragraph 46 had never seemed very clear to him because it presupposed that States were in some kind of "vacuum". The question had been discussed at length by Mr. Pellet.

60. The word "publicly" in draft article 2 did not seem appropriate either. In reality, it was sufficient for declarations to be heard and received by those to whom they were addressed without it being necessary for them to be formulated publicly. In the English version, the last words of the draft article, "with the intention of acquiring international legal obligations", were unsatisfactory, and the verb "to assume" was preferable to "to acquire". Also, for the last part of the sentence, the Commission should perhaps adopt Mr. Pellet's proposal to speak of "legal effects" rather than "legal obligations" so as not to exclude the eventuality of "rights". Similarly, could it really be said, as the Special Rapporteur maintained in paragraph 51 of the commentary to draft article 2, that the author really had the power to "create a juridical norm" by making a unilateral declaration? A State could create rights and obligations, but not norms. The Special Rapporteur had perhaps been thinking of the old distinction between concrete norms and abstract norms, but, if that was the case, he should explain it.

61. Concerning norms, he said that there was a discrepancy between the English and French versions of paragraph 139, the first sentence of the English text speaking of "a State's own previous norms", a phrase which the French text had fortunately omitted.

62. Draft article 3 was as bare as article 6 of the 1969 Vienna Convention and, although it did not call for any comments, it made little sense.

63. Draft article 4 had a very formal aspect which did not necessarily fit the reality of unilateral acts. Moreover, he was not sure whether it was a good idea to specify that unilateral acts could be formulated only by heads of State, heads of Government or ministers for foreign affairs. History had unfortunately proved that those persons were not always best qualified to do so; they should confine themselves to a ceremonial role and let others draft their declarations.

64. He had no comment to make on draft article 5, but draft article 6 was awkwardly worded. As stressed by Mr. Pellet, the phrase "The consent of a State to acquire an obligation" was not very felicitous. As to the word "unvitiated", it had the same drawback as "unequivocal" in

draft article 2, i.e. it was an important qualifier, but did not belong in an initial definition. All in all, draft article 6 could very well be deleted without any loss to the draft as a whole.

65. In draft article 7, the phrase "the expression of the State's consent to formulate the act" was even less felicitous than the words "the consent ... to acquire an obligation" in draft article 6. As to the different grounds of invalidity, such as error and fraud, he wondered whether the Special Rapporteur had not gone too far by assuming that they applied to unilateral acts in the same way as to treaties. Would a State which made an error in formulating a unilateral declaration which it then wanted to go back on encounter the same difficulties as a State which wanted to do so in respect of a declaration made during the conclusion of a treaty? Nothing at the current stage proved that that would be the case. Concerning, for example, the idea referred to in paragraph 136 that fraud could even occur through omission, was it not an art of foreign policy for a State which thought that it had a better idea of the actual situation to bring other States to adopt a certain line of conduct?

66. With regard to invalidity resulting from a conflict with a "peremptory norm of international law", he agreed with the previous speakers and wondered whether the reference to a norm of domestic law, which was based on a similar phrase in article 46 of the 1969 Vienna Convention, should not be formulated in a more flexible manner in the case of unilateral acts.

67. Likewise, the Special Rapporteur had perhaps gone too far in stating in paragraph 112 that in case of invalidity, a unilateral act could be declared void and would therefore be without legal effect. He was thinking in particular of a unilateral act which might lead to a situation of estoppel.

68. In closing, he said that he had two comments to make on paragraphs 142 and 146 of the second report. If he understood correctly, in paragraph 142, the Special Rapporteur stated in substance that, if a State formulated a reservation or added certain conditions to a unilateral act, it was no longer in the sphere of unilateral acts, but that of treaties. That assertion seemed too dogmatic: he did not see why unilateral acts were themselves not subject to conditions. He agreed with Mr. Pellet's analysis on that point. It also seemed a great exaggeration to say, as the Special Rapporteur had in paragraph 146, that an act was non-existent if not formulated in the proper manner.

69. In view of the work which remained to be done on the topic, the proposal to re-establish the working group on unilateral acts was an excellent idea and he would be pleased to take part in it.

70. Mr. HAFNER said that Mr. Simma's remark on "conditions" applied to those which were set out in the declaration itself and were thus part of its content, whereas the conditions to which the Special Rapporteur referred in paragraph 142 were outside the act.

71. Mr. SIMMA said that he did not see why the comment he had made should not be applicable in both cases.

72. Mr. HAFNER said that, when a condition was formulated outside the act, the initial content of the latter remained unchanged, whereas a condition laid down in the declaration itself already reduced its content.

73. Mr. LUKASHUK said that he agreed with Mr. Simma on the use of the word "unequivocal" in draft article 2. In fact, it was the intention which should not be equivocal.

74. Regarding the reservations referred to in paragraph 142 of the second report, he took it that the Special Rapporteur meant reservations made not by the State which was the author of the act, but by other States; that would fall within the sphere of treaty relations.

75. The most important point stressed by Mr. Simma was, however, that the Commission must draft articles which were perfectly comprehensible to the layman; it must be borne in mind that, as far as international law was concerned, diplomats were basically laymen.

76. Mr. PELLET, referring to the question of "conditions", said that it was important to distinguish between the case in which the author of the unilateral act formulated it in a conditional manner—it was perfectly entitled to do so and that was obviously not a "reservation"—and that in which the State or States to which the unilateral act was addressed accepted a particular condition. The latter case was obviously closer to the idea of reservation. However, for reasons of terminological clarity, it might be better to avoid speaking of "reservation" in the context of unilateral acts so as not to mix up the two topics. At issue was a unilateral act which was in response to another unilateral act; at some point, that "dialogue" would have to be taken into account in the draft articles.

77. Mr. KAMTO said that he wondered whether it was possible to settle the problem of the legal nature of what some called conditional acceptance and others "reservation" as long as the problem had not been solved of the consensual link that was established between the State which formulated a unilateral act and the State which responded to it. It would be necessary to determine the nature of that consensual link and, if it was of a contractual or treaty nature, the Commission would have to resign itself to using "reservation".

78. The CHAIRMAN, noting that the proposal by the Special Rapporteur that the working group on the topic should be re-established seemed to meet with the support of the members, suggested that the Commission should take a decision on that matter. If he heard no objection, he would take it that the Commission wished to re-establish the working group on unilateral acts of States.

It was so decided.

79. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the debate had been very instructive, although he sometimes had the impression that the Commission was backtracking. For example, Mr. Simma had questioned whether the topic under consideration was ready for

codification, whereas he himself had no doubt whatsoever on the matter.

80. The decision to re-establish the working group was a very good thing and he announced that, apart from himself, the Working Group on unilateral acts of States would be made up of the following members: Mr. Baena Soares, Mr. Gaja, Mr. Hafner, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock and Mr. Simma. Needless to say, any other members of the Commission who wished to join were welcome.

81. In its task of defining unilateral acts of States, the Working Group should focus in particular on what had been called "dual autonomy" in view of the fact that, first, if a State acquired a right by means of a unilateral act, in so doing, it imposed an obligation on other States and, secondly, it might be necessary at some stage to tie unilateral acts in with the existing norms of customary international law or with treaty rules.

The meeting rose at 1.05 p.m.

2595th MEETING

Tuesday, 29 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GOCO said that the law of treaties did not contain strict requirements as to form. In fact, in the *Legal Status of Eastern Greenland* case, PCIJ had held to be valid and binding the oral statement by the Norwegian Minister for Foreign Affairs on Norway's acceptance of Denmark's claim to the whole of Greenland. There were also other kinds of "transactions" which were acts of conduct of Governments that might not be directed towards the formation of agreements and yet were capable of creating legal effects. They included unilateral acts of States. In preparing his second report on the topic (A/CN.4/500 and Add.1), the Special Rapporteur had taken into account the many comments of representatives of States in the Sixth Committee. While not ruling out in the future legal acts which States might formulate within the framework of international organizations, draft article 1 (Scope of the present draft articles) clearly stipulated that the draft applied only to unilateral acts formulated by States.

2. By speaking of unilateral acts, the draft article underscored the fact that the draft was not meant to cover political acts which did not produce international legal effects, or other acts which, although legal, might be considered to fall within the treaty sphere. He wondered, however, whether draft article 1 in its present form could totally eliminate declarations by heads of State which, in reality, were acts of States and had their underpinning and obligatory nature in morality and politics.

3. Draft article 1 was modelled on article 1 of the 1969 Vienna Convention, which expressly provided that the Convention applied only to treaties between States. In the same way, draft article 1 referred exclusively to unilateral acts of States, no doubt in order to exclude other unilateral acts from its scope. He suggested that the following should be added to the article: "It is understood that the present draft articles shall not apply to other subjects of international law or international organizations. Acts of a political character and other acts, although unilateral, do not produce international effects." It would then be clear what was not included in the draft.

4. Admittedly, there was little State practice in regard to unilateral acts of States. The report acknowledged that, in order to ascertain the nature of such State acts, it was fundamental to determine the intention of the State formulating them. In other words, to be bound as a consequence of a unilateral act would to a large extent depend on the specific facts and, more importantly, the subsequent assessment. For example, in the *Nuclear Tests* cases, ICJ had held that France was legally bound by its declaration to cease conducting nuclear tests in the atmosphere. The Court had cited France's public declaration to abide by that obligation. In the *North Sea Continental Shelf* cases, however, the Court had held that unilateral assumption of the obligation by conduct was not likely to be presumed and that a very consistent course of conduct was required in such a situation. In the *Nuclear Tests* cases, the Court had found that the criteria were the State's intention to be bound by the terms of its declaration and that the undertaking be given publicly. There was no requirement of a *quid pro quo* or other subsequent acceptance. In any event, the principle recognized by the Court in the *Nuclear Tests* cases had been applied in the *Military and Paramilitary Activities in and against Nicaragua* case and also by one chamber of the Court in the *Frontier Dispute* case.

5. The question whether a particular unilateral act would have the consequence of blurring the international obligation of the declarant State would depend on the specific facts of each case, notwithstanding the definition of the scope in draft article 1.

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