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Summary record of the 2630th meeting

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under Chapter VII had been missing, but he had no doubt that the Council's action, if it had not obligated, had most assuredly empowered, the stopping of the tanker. The issue was a highly complex one situated on the interface between legal and political obligations, and he did not believe that mentioning it *en passant* was a responsible way of dealing with it.

78. Mr. Sreenivasa RAO, congratulating the Special Rapporteur on his positive approach to a complex and difficult subject, said that greater focus on what was missing in terms of State practice would perhaps have made the exercise even more useful. The point on which members would expect guidance from the Special Rapporteur were the circumstances and the general rules of international law which made unilateral acts different from political acts and produced legal effects.

79. As to the definition of unilateral acts in new draft article 1, the legal effect produced by an act did not necessarily, or always, indicate the original intention of the State formulating the act. A State was a political entity whose intentions could be equivocal or unequivocal, depending on the context. In his view, the criterion of the effect actually produced had always to be assessed in order to determine the nature of the intention. A contextual examination of policy considerations played a very important role in assessing the intention underlying an act. An inductive approach taking account of policy considerations was called for.

80. With reference to the Special Rapporteur's conclusions on the subject of estoppel, there again it was difficult to separate the conduct of the State formulating a unilateral act from the effect that the act produced on the target State, especially if it was agreed that unilateral acts did not have to be characterized as autonomous. That question, too, deserved to be carefully looked at. Lastly, while the issue covered in new draft article 5, subparagraph (h), was undoubtedly related to new draft article 3, it had important aspects which meant that it was not related to that article alone. Could a State utilize the provisions of its own national law to evade international obligations it had otherwise produced by a valid unilateral act? In other words, could a State, having formulated a unilateral act, claim that its domestic law did not provide for such an act although the act had produced an international obligation? Further reflection was needed on that point.

The meeting rose at 1.05 p.m.

2630th MEETING

Wednesday, 31 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides,

Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Unilateral acts of States (*continued*) (A/CN.4/504, sect. C, A/CN.4/505,¹ A/CN.4/511²)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR³ (*continued*)

1. Mr. GOCO congratulated the Special Rapporteur for producing, despite the difficulties inherent in the subject, a coherent and detailed third report (A/CN.4/505) in which many sensitive questions were addressed and which took account of the various views expressed in the Commission and other bodies.

2. Commenting on the replies by a number of Governments to the questionnaire on unilateral acts of States that had been sent to them, which was circulated as an informal paper,⁴ he noted that, in their general comments on the issue, those States seemed to agree that unilateral acts were by nature very diverse, but they also acknowledged that they were frequently used by States in international relations. In the absence of a formal treaty, those acts were the means by which a State conveyed its wishes to another State, and that was a convenient way to conduct day-to-day diplomacy.

3. The replies also referred to specific questions. With regard to the applicability of the 1969 Vienna Convention, there seemed to be an emerging consensus that the Convention might not be applicable to unilateral acts, but could serve as a useful guide in that area. On the question of persons authorized to act on behalf of the State, the States replying to the questionnaire agreed that the Convention was relevant by analogy. With regard to the forms the unilateral act might take, both oral and written declarations were acceptable, depending on the type of act. As for the content of the unilateral act, it could be of various types and was not restricted to certain categories. However, one State, Italy, had cited three categories: that of acts referring to the possibility of invoking a legal situation, that of acts which created legal obligations and that of acts required for the exercise of a sovereign right. On the question of legal effects, the replies emphasized the creation and extinction of obligations and the creation and revocation of the rights of other States. Some States would draw a distinction between the different acts and the legal effects they purported to produce. One State, the

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

² *Ibid.*

³ For the text of the draft articles contained in his third report, see 2624th meeting, para. 35.

⁴ See 2628th meeting, para. 11.

Netherlands, held the view that unilateral acts could not produce effects that were incompatible with the general rules of international law. States appeared to agree on the importance and usefulness of unilateral acts. They also seemed to acknowledge the principle of reciprocity, particularly with regard to friendly States. On the question of which rules to apply, States accepted that the principles on interpretation in the Convention should be applied by analogy, after due account had been taken of the particular nature of unilateral acts. The question of the validity of unilateral acts could be referred to the relevant treaty bodies. On the duration of acts, States attached importance to the issue of revocability, holding that an act could be revoked if it was no longer convenient or terminated if a fundamental change had occurred. One State believed that its duration was unlimited, but that it could be ended if it was denounced by bilateral treaties. States unanimously accepted revocability, but thought that notice of revocation must be given and that the Convention could be applied by analogy after the particular circumstances of the case had been taken into account. Error, fraud, corruption, non-observance of the rules of international law and non-observance by States of a commitment under international treaties could be grounds for revocation. It was to be hoped that other States would be prepared to reply to the questionnaire. He understood that the replies had been received after the third report had been prepared. Nevertheless, they could perhaps be put to good use in further studies of the topic.

4. In paragraphs 30 to 36 of his report, the Special Rapporteur elaborated on the essential elements of a precise definition of unilateral acts of States, seeking a definitive agreement on that subject. The definition he proposed in new draft article 1 was well crafted and contained all the elements listed in paragraph 31. It included a reference to “an unequivocal expression of will which is formulated by a State with the intention of producing legal effects”. In his opinion, that meant that the declaration must be prepared, carefully studied, deliberate and calculated, as was to be expected from a sovereign State, especially in a declaration by a head of State. There was no doubt that protests, waivers, promises, recognition and any other such acts were and should be absolutely intentional. However, if unilateral declarations were limited to that kind of act, it might be asked whether the definition should include only declarations formulated by the will of the State and eliminate acts or declarations which had been formulated in a possibly incomplete way, but which were nevertheless intended to produce effects. It might also be asked whether those effects should be legal or political. Often, heads of State made public statements that departed from their prepared speeches. Public figures were exposed to the ambushes set for them by the media. It was not uncommon to hear leaders appearing on radio or television refer to threats of invasion or troop withdrawals, offer concessions or even assert claims. In that respect, the example of the Spratly Islands was striking: nobody had been interested in them until rich oil deposits had been discovered there. Since then, at least five countries had staked a claim to ownership, going so far as to threaten their competitors. Those declarations were unquestionably unilateral and produced effects, but it was open to question whether the claims and threats had legal effects as understood in the proposed definition. As clearly pointed out by one of the

States replying to the questionnaire, the effects of unilateral acts could not be incompatible with the general rules of international law. Threats, of course, were not sanctioned by international law. That point was dealt with in the context of the invalidity of unilateral acts in paragraphs 149 and 150 of the report. Another example that gave food for thought about the effects of unilateral acts was the declaration by President de Gaulle, *Vive le Québec libre*,⁵ which, years afterwards, still struck a chord with separatists in Quebec.

5. On the question of intention, he agreed with the Special Rapporteur that it was difficult to put the acts in different categories and determine whether they were purely political and therefore produced no legal effects. The intention of the author State was of course a decisive criterion, but how could it be determined? To be bound as a consequence of a unilateral act would depend ultimately on the facts obtaining and on how they were evaluated. In its rulings on the oft-quoted *Nuclear Tests* cases, ICJ had found that France was legally bound by the declaration that it would stop atmospheric nuclear testing because that declaration had been made in public, making it clear that France intended to abide by it. However, a court decision had been necessary to elicit that intention. In other words, it had been necessary for Australia and New Zealand to take the matter to court. He agreed that States might perform unilateral acts without realizing the consequences of their intentions. In the aforementioned cases, there had been some indications that President Mitterrand had not really intended to put an immediate stop to the nuclear tests. The problem with declarations that bore an obligation or commitment was that they were liable to be changed or even denied. In the meantime, their obligatory nature remained uncertain, leading to the refusal by the addressee State to take them seriously.

6. He noted the omission of the word “publicly”, as explained in paragraphs 78 and 79 of the report. It was important that the declaration should be known to the other State, and that was how he interpreted the meaning of the word “publicity”. In any event, anything declared by a head of State or Government could not but be public. It was apparent from the definition, which used the words “unequivocal expression of will”, that the underlying intention was to consider unilateral acts as official declarations which, in practice, should perhaps be made in writing. Perhaps the only case in which a State could address a non-written declaration to another State was in situations of conflict or burgeoning hostility. However, modern communication technology was such that any oral declaration was now immediately translated into writing, so that the distinction between written and spoken declarations no longer had any meaning.

7. He had no serious objections to the use of the terms “act”, “legal effects”, “autonomy” or “unequivocal” nature of the unilateral act. Perhaps the word “competence” could be added to new draft article 2 (Capacity of States to formulate unilateral acts). The discussion on silence in paragraph 126 was interesting, but it could be pointed out that silence could be tantamount to an admission in the area of the law of evidence. In a conflict

⁵ Ibid., footnote 14.

situation, if a State challenged another State to prove that it was making a false claim about an act of the other State and if the latter State remained silent, its silence could be taken as acquiescence. The article on the invalidity of unilateral acts would be better if it was entitled "Revocability of unilateral acts". The unilateral act was more flexible than a treaty and should therefore be more easily revocable, although on the same grounds as those for invalidity.

8. He believed that the five new draft articles proposed, together with the replies by Governments to the questionnaire, could be referred to the Drafting Committee or the Working Group for further consideration.

9. Mr. ECONOMIDES thanked the Special Rapporteur for his third report, which was a definite improvement over the previous one. Beginning with some general comments on the report, he said that the importance of studying the issue was self-evident. The unilateral act of a State, as it was understood in the draft, existed in international practice and was even a source of international law, although Article 38 of the Statute of ICJ did not refer to it. In certain circumstances, that source could, of course, create rights and obligations of a subjective nature for States, but it could not, in principle, create law or, in other words, generally applicable international rules. States could not legislate in a unilateral way. It was undeniably a difficult subject to deal with, in the first place because national constitutions and domestic laws generally had nothing, or very little, to say about the unilateral acts of States that might bind the latter at the international level, unlike, for example, the conventions and customary rules that were generally dealt with in the framework of the domestic legislation of States. Moreover, there was far from an abundance of international practice concerning those acts. Indeed, there were few acts by which States granted rights to other States while themselves assuming the obligations corresponding to those rights. It therefore fell to the Commission, with few tools or guidelines, to codify the rules of a little-known area with a double aim in mind: to protect States themselves from their own actions by offering them a coherent set of clear rules on the unilateral acts that could be binding on them at the international level and to serve the interests of the international community by deriving the core rules from that new source of law.

10. His second general comment concerned the relationship between unilateral acts of States and the 1969 Vienna Convention. As the Special Rapporteur had explained so well, that relationship was clear. If there was no Convention, it would be simply impossible to codify the unilateral acts of States that were binding on them under international law. The Convention had truly paved the way for the codification of the unilateral acts of States, as well as that of the acts of international organizations. However, the solutions in the Convention should not be reproduced word for word. It should be used sensibly and very carefully as a source of inspiration when the characteristics of a binding unilateral act coincided exactly with those of a treaty act. In other words, it was necessary to take the study of the unilateral act of a State as the starting point and turn to the Convention for solutions, if necessary, and not the other way round.

11. Thirdly, he would have preferred estoppel and silence, as unilateral conduct of States that might give rise

to legal effects at the international level, to be included in the draft. For the moment, however, he could agree that that question should be left aside for consideration at a later stage.

12. Referring to the new draft articles, he said there were three core elements in the definition of a unilateral act in article 1. The first was the State's willingness to commit itself through that act by creating rights and obligations. He preferred to talk of rights and obligations rather than legal effects, which was a broader and fairly vague concept. The second was the autonomous, non-dependent or "non-linked" nature of the act, i.e. the fact that it was not conditioned by other sources of international law, including international treaties or existing customary rules. It was preferable—and certainly easier and safer—to look no further than the autonomous nature of the act rather than to attempt to exclude from the scope of the draft all other unilateral acts of States which did not actually concern the draft articles and which were extremely numerous and varied. The third core element was the addressees of the act, who could be other States or international organizations. In that connection, it was particularly important to ask whether the international community as a whole could also be the beneficiary of a right arising from a unilateral act of a single State, several States or all States. He believed the answer to that question was yes. He could also go along with Mr. Pellet's suggestion (2629th meeting) that a unilateral act should be subject to international law and governed by the latter, like international treaties. He also agreed with Mr. Candioti, Mr. Herdocia Sacasa and other members that the unequivocal nature of the act and its publicity were elements that did not need to be dealt with in the definition. Those elements could be dealt with in the part on the conditions of validity of an international act. On the other hand, the autonomy of unilateral acts was not sufficiently emphasized in the definition in new draft article 1, whereas he saw it as a decisive element in distinguishing between unilateral acts that gave rise to rights and obligations at the international level and other unilateral acts of States.

13. New draft article 2 reflected the provision contained in article 6 of the 1969 Vienna Convention. That provision, which followed on logically from new draft article 1, should be completed in the following way: "Every State possesses capacity to formulate unilateral acts liable to create rights and obligations at the international level".

14. Paragraph 1 of new draft article 3 (Persons authorized to formulate unilateral acts on behalf of the State), met with his approval. However, he thought that that provision would benefit from stronger and more direct wording, as had been proposed by Mr. Pambou-Tchivounda. At the least, the words "are considered as representatives" should be replaced by the words "are representatives". The words "States concerned" in paragraph 2, were out of place in that provision. That paragraph could be worded in the following way:

"A person is also considered to be authorized to formulate unilateral acts on behalf of the State if it is established, on the basis of the practice of that State

and of the circumstances in which the act was carried out, that this person is authorized to act on its behalf.”

15. He had no objection to new draft article 4 (Subsequent confirmation of an act formulated by a person not authorized for that purpose), which might well become paragraph 3 of article 3, in accordance with Mr. Pambou-Tchivounda’s judicious proposal.

16. He had the impression that new draft article 5 (Invalidity of unilateral acts) had been proposed somewhat prematurely. That provision should be considered after the provisions on the validity of unilateral acts, and, in particular, after the article on the revocation of unilateral acts, had been drafted. The conditions for validity were closely linked to the causes of invalidity and it was also clear that, if unilateral acts could be revoked, it was in the interests of the State to use that method rather than invoke a cause of invalidity. The causes of invalidity should therefore essentially concern unilateral acts that were not revocable, in other words, those linking the State formulating the act to another entity.

17. He had no objection to sending the new draft articles to the Drafting Committee.

18. Mr. KATEKA congratulated the Special Rapporteur on his excellent third report, which took into account both the views of the members of the Commission and the comments made by Governments in the Sixth Committee of the General Assembly. The replies of Governments to the questionnaire, which had unfortunately arrived too late to be included in the report, revealed a great divergence of views on the possibility of laying down general rules applicable to all unilateral acts and on the kinds of acts that would be covered by such rules.

19. It was therefore up to the Commission to provide guidance to the international community by clearly demarcating the scope of the topic and by finding a compromise between the “maximalist” approach which would involve codifying all kinds of unilateral acts, and the “minimalist” approach, under which the various “acts creating obligations” would be studied one at a time.

20. Although he had once held the contrary view, he now agreed with those who argued that it was not possible to avoid referring to the 1969 Vienna Convention, even though some considered that to do so was to acknowledge the pre-eminence of the Vienna regime. The Special Rapporteur had decided to distance himself from it in new draft article 1 and not to include a provision based on article 3 of the Convention, thereby drawing a clear distinction between unilateral acts and treaties.

21. With regard to the definition of unilateral acts, he thought that it should encompass all the unilateral acts formulated by a State in any form whatsoever (in other words, in both oral and written form). On the other hand, he did not think it necessary to specify that an “unequivocal” expression of will was involved, as that could be difficult to evaluate in practice. The last phrase of new draft article 1, according to which the act would produce legal effects only as from the time when it was known to its “addressee” (in other words, one or more States or one or more international organizations), was perhaps not very apposite, as it was tantamount to giving the author of the

unilateral act an advantage over the addressee, who could be informed only after the event.

22. New draft article 2 posed no problems. However, the wording of new draft article 3, particularly in paragraph 2, was perhaps too restrictive. It was clear from diplomatic practice and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, especially from article 12 of that Convention, that certain State representatives were implicitly authorized, in their respective areas of competence, to formulate unilateral acts on behalf of the State they represented.

23. In paragraphs 103 and 104 of the report, the Special Rapporteur raised the question whether unilateral acts—in the event, commitments—formulated by a State at a pledging conference should be considered as simply political acts or as acts that were legally binding on the State making the declaration. In theory, the author State should be considered legally bound, as it was presumed to have made a promise in good faith that created expectations among the addressees. Unfortunately, practice showed that such commitments were often not honoured. The archives of the United Nations and other international organizations were full of such examples. It would therefore be better if the Special Rapporteur were to consider those declarations as political declarations rather than as acts producing legal effects.

24. New draft article 4 was acceptable. On the question whether a State could effectively formulate a unilateral act by remaining silent, the Special Rapporteur was quite right to say, in paragraph 129 of the report, that it would appear impossible for a State to promise or offer something by means of silence. Whereas it was useful to consider introducing concepts such as consent, protest, waiver or estoppel, a provision on silence and unilateral acts did not belong in the draft articles.

25. New draft article 5 was directly inspired by part V, section 2, of the 1969 Vienna Convention. According to subparagraph (g) of the article, a conflict between the unilateral act and a decision of the Security Council was one of the causes of invalidity. In the light of Mr. Lukashuk’s comments (2629th meeting), he wondered if it might not be better to delete that provision and deal with the issue in the commentary.

26. To conclude, he recalled that experience showed that unilateral acts which seemed a priori to be contrary to the prevailing norms of international law had in fact contributed to the development of that law. One could cite by way of example the “Nyerere doctrine”⁶—named after the former Tanzanian President—of rejecting, in the case of a succession of States, the principle of automatic succession to bilateral treaties concluded by the former colonial Power. That doctrine had been heavily criticized initially, but had finally been taken into account in part III, section 3, of the Vienna Convention on Succession of States in respect of Treaties (hereinafter “the 1978 Vienna Convention”).

⁶ See the Arusha Declaration of 1967 (J. K. Nyerere, *Ujamaa: Essays on Socialism* (London, Oxford University Press, 1968), p. 13).

27. Mr. HAFNER paid tribute to the Special Rapporteur for tackling a difficult and at times seemingly impossible task: some members, such as Mr. Simma (2629th meeting), had thought it was not possible to formulate general rules applicable to all unilateral acts, while others, such as Mr. Pellet, had emphasized that there was a real need for such codification. His own view was that the Commission should at the very least make an attempt, even if codification turned out to be impossible. The Special Rapporteur had not been able to take account of the comments of Governments, which had not reached him when he had prepared his report, but the Commission should now be working with their replies to the questionnaire in mind if it wanted the articles it would draft to be acceptable to States rather than remain a dead letter. It should also take more account of the practice of States. In that connection, he took the liberty of correcting a small mistake the Special Rapporteur had made in paragraph 53 of the report. The status of permanent neutrality could not be established by a unilateral act: at the very least, a bilateral act was necessary. On the other hand, a declaration of neutrality made in wartime was a purely unilateral act that did not depend on acceptance by the belligerents. The footnote which referred to the declaration formulated by the Government of Austria in paragraph 53 had nothing to do with neutrality. The example quoted in it concerned only the notifications sent by the Austrian Government to the four signatories of the State Treaty for the Re-establishment of an Independent and Democratic Austria. However, there was a rich history of practice in the area and the Special Rapporteur could, for example, have usefully referred to the declarations made during the conflict over the Falkland Islands (Malvinas) or the Gulf war.

28. Before considering the new draft articles one by one, he wished to point out that several members of the Commission were called “Mme” in two footnotes of the French version of the report. He would like the translations generally to be more careful and precise.

29. With regard to new draft article 1, he shared the doubts already expressed about the usefulness of requiring an “unequivocal” expression of will. If the same requirement applied to treaties, all treaties with “constructive ambiguities” would be beyond the scope of treaty law, although everyone knew that that had never been the case in practice. It did not therefore seem necessary to include that detail in article 1. That did not mean that the scope of the article should not be restricted. It should be clear that the acts referred to were autonomous unilateral acts, not acts carried out in connection with a treaty. It was true that unilateral acts were by nature very diverse: by means of such acts, States could simply “trigger” rights and obligations already established under a treaty regime or even under customary law, but they could also themselves “shape” the obligations they intended to assume. He suggested that attention should be limited for the moment to acts in the second category.

30. New draft article 1 also stated that the unilateral act was formulated with the intention of producing “legal effects”, but did not specify whether those effects would be produced in domestic law or in international law. As Mr. Pellet had emphasized, it should be made clear that the unilateral acts in question were subject to international law.

31. With regard to new draft article 2, although the English translation (“formulate unilateral acts”) corresponded to the Spanish original, he pointed out that anyone could “formulate” a unilateral act. In his opinion, the verb “issue” would have been more appropriate, but that was a question that could be dealt with by the Drafting Committee.

32. He found it difficult to form a judgement on new draft article 3 until it had been definitively determined, in article 1, which acts fell within the scope of the draft articles. However, he could not support the proposal by Mr. Economides that the words “are considered as representatives” should be replaced by the words “are representatives” in paragraph 1. Apart from the fact that doing so might raise problems of incompatibility with the constitutions of some countries, the presence of the words “are considered” created a rebuttable presumption which was necessary in that article.

33. New draft article 5, which Mr. Simma had first compared with a gold mine and then with a minefield, did indeed contain too many things. The various grounds for invalidity listed should have been dealt with in separate articles, as had quite rightly been done in the 1969 Vienna Convention, as the consequences were different every time. Subparagraph (g) on the invalidity of unilateral acts that conflicted with decisions of the Security Council, thus raised more problems than it solved: as quite rightly pointed out by Mr. Simma, obligations under the Charter of the United Nations prevailed over obligations under a treaty (Art. 103). An obligation under the Charter was understood to include obligations arising from resolutions or binding decisions taken by organs of the United Nations (and not only by the Council). Moreover, it was common for only parts of those decisions or those resolutions to be binding, and so that too would need to be clarified.

34. He also believed that there was no reason to differentiate, when looking at the question of the grounds for invalidity, between unilateral acts and treaties; there was no provision in the 1969 Vienna Convention stipulating that a treaty could be declared invalid if it contravened obligations under the Charter of the United Nations. For all those reasons, subparagraph (g) seemed to him to be unnecessary.

35. The ground for invalidity set out in subparagraph (h), namely, a conflict with a norm of fundamental importance to domestic law, also posed a problem. That norm of fundamental importance could result, for instance, from the constitution of the State formulating the unilateral act. Did that mean that if a State, in formulating a unilateral act, breached a constitutional obligation, it could declare a posteriori that the unilateral act was invalid? That would amount to giving priority to domestic law, something which was not acceptable.

36. He also shared Mr. Lukashuk’s reservations about the use of the indefinite article, “A”, in the phrase introducing the article. It must be made clear precisely which State was authorized to invoke the invalidity of a unilateral act. Logic required that that possibility should be reserved solely for the State formulating the act, to the

exclusion of all others, since otherwise one might be opening Pandora's box.

37. In that context, the proposal by Mr. Economides to focus initially on the conditions for "revoking" unilateral acts before turning to the question of invalidity was quite interesting, as such an approach would probably have the advantage of being more practical.

38. In view of all those comments, he believed that only new draft articles 1 to 4 as proposed by the Special Rapporteur could be sent to the Drafting Committee. New draft article 5 required a complete rethink.

39. Mr. KAMTO said that the Special Rapporteur's third report was a significant step forward as he had obviously been careful to take into account the discussions in the Commission and the views expressed by States in the Sixth Committee. As had been said more than once, the subject was a complex one, but that did not mean that it could not be codified. At issue was a category of acts which were very important in international relations, at least as old as treaties and, like the latter, a source of contemporary international law. It was the task of the Commission to urge the Special Rapporteur, who had not had the benefit of the comments by Governments in their replies to the questionnaire when he had drafted his report, to make further efforts to seek information on practice in the matter. That being the case, the Special Rapporteur was taking a broad approach in order to have an overall view of all the acts in question and that approach was relevant insofar as it allowed him to put his subject firmly into context and to define precisely the scope of unilateral acts. Proposals from various quarters, including the Sixth Committee, that the study should be limited to certain kinds of acts such as promises and recognition were overly restrictive, since their adoption would leave to one side a good proportion of the unilateral acts of States.

40. With regard to the preliminary questions considered by the Special Rapporteur, it was of course essential to avoid taking any analogy with treaty law too far because it might lead to confusion. As for estoppel, it was not itself a legal act, but, rather, a fact that produced legal effects and he agreed with Mr. Pellet that it should be considered within the framework of the effects of unilateral acts.

41. Those effects themselves should be studied in depth, and that could not be done without considering the attitude or reaction of the addressees of the act. Two comments were called for in that respect. First, in some cases, a unilateral act could become an essential element in an international agreement. It was logical, as borne out by practice, that, once there had been a meeting of two wills expressed simultaneously or successively, whether in a single document or in different documents, there was an international agreement as understood in the 1969 Vienna Convention. The Special Rapporteur should study the question in order to better define which acts fitted into the category of unilateral acts as such, as opposed to "treaty" unilateral acts. That question did not necessarily have to be dealt with in a draft article and could be addressed in the commentary.

42. Secondly, he was not convinced that silence should be excluded out of hand. Silence could indeed constitute a real legal act, as accepted by the doctrine. Silence indicat-

ing acquiescence could in some situations allow the initial unilateral act to produce all its legal effects, particularly when that act was intended to create obligations on the part of one or more other States. In some cases, a State could express its consent through silence, even though consent must be explicit in treaty law. In any case, it was worth studying the question of silence. With regard to the Special Rapporteur's proposal for new draft article 1, he would have preferred to keep the traditional definition of the unilateral legal act as an expression of will intended to produce legal effects. From the legal point of view, it was tautological to speak of intention as the Special Rapporteur did in draft article 1, since intention was inseparable from the expression of will and if there was an expression of will there was bound to be intention. As for the term "unequivocal", which had already been criticized by several members of the Commission, the Special Rapporteur was using the term to try to express the ideas of clarity and certainty developed in paragraphs 73 and 76 of his report. That was a question of judgement that was traditionally for the judge to decide and it did not belong in the definition of unilateral acts. The emphasis should rather be on the idea of the necessary precision of the unilateral act. He agreed with Mr. Economides that the final proposition in article 1, "and which is known to that State or international organization", was more of a condition for the validity of the unilateral act. He also supported Mr. Economides' proposal that a separate provision should be drafted on the conditions for the validity of a unilateral act to precede the one on the invalidity of a unilateral act.

43. Still on the question of new draft article 1, the Special Rapporteur made a distinction between political declarations and unilateral acts intended to produce legal effects. In that connection, he did not understand what the criterion for the distinction might be. Was it a formal criterion or a criterion involving the contents of the act, which could be linked to the *negotium*? While the nature of certain acts was clear from their form, that of other acts could be determined only through an analysis of the context. In that respect, it was unfortunate that the Special Rapporteur had not sufficiently stressed the idea of the context, on which, for example, ICJ had relied in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* when it concluded that a joint communiqué constituted an international agreement. The context could be just as decisive a factor in determining the nature of a unilateral act.

44. He had no problems with new draft article 2, but new draft article 3 called for a comment. The Special Rapporteur had rightly brought up the example of domestic legislation having extraterritorial effects, in the shape of the Helms-Burton Act.⁷ Could one leave aside those internal acts having extraterritorial effects and, if so, on what grounds? If, on the other hand, they should be considered as falling within the scope of the study, draft article 3 should perhaps be revised to include parliament, for example, among the "persons authorized to formulate unilateral acts on behalf of the State". It was doubtful whether that category of authors of unilateral acts was covered by the current paragraph 2 of the draft article.

⁷ See 2629th meeting, footnote 10.

45. New draft article 4 did not call for any particular comment, but new draft article 5 could be looked at closely only once the conditions for the validity of the unilateral act had been studied.

46. In conclusion, he said that new draft articles 1 to 4 could be sent to the Drafting Committee.

47. Mr. PELLET said that the problem of domestic unilateral acts having extraterritorial effects mentioned by Mr. Kamto was extremely important and had certainly not been resolved at the current stage. He recalled that, concerning the Helms-Burton Act, in his opinion in that case, the United States Congress had not intended to move into the field of international law. He considered that for unilateral acts to fall within the scope of the study they must be governed by international law.

48. As to the idea of mentioning the necessary precision of unilateral acts, he disagreed totally with Mr. Kamto. Obligations could be precise or imprecise, but that did not stop them from being obligations, and the same was true of those arising from unilateral acts of States. To introduce the concept of precision in the definition seemed to jeopardize the outcome of the work.

49. Mr. KAMTO said he was afraid that he had not been properly understood: he would only like it to be said in the commentary that, in some cases, the degree of precision of a unilateral act could allow it to produce its full effects.

50. Mr. TOMKA said that the Special Rapporteur had been at pains to take into account the criticisms expressed at the previous session by members of the Commission by extending the scope of his study to all unilateral acts producing legal effects. However, he had not been able to take into account the written comments submitted by Governments in reply to the questionnaire and he pointed out in that connection that quite a few of the replies expressed doubts about the overall approach taken, considering in particular that it was not wise to try to subject different kinds of unilateral acts to a single set of general rules. For one State the exercise was pointless, while, for another, the best the Commission could do was to prepare an academic study on the characteristics of different unilateral acts.

51. The major problem with the definition proposed in new draft article 1 was the phrase "producing legal effects in relation to one or more other States". The result was a very broad definition of unilateral acts, making it impossible in practice to formulate common rules for a variety of acts as disparate as recognition, on the one hand, and an act establishing an exclusive economic zone, on the other. The latter example, which the Special Rapporteur looked at in paragraph 54 of his report, showed that, in the case in point, a unilateral act could be an instrument for activating the rights provided for in a treaty or under general international law. In that particular case, the legal consequences of the act in question were determined by the United Nations Convention on the Law of the Sea or, for States which were not parties to that Convention, by general international law, and not by the rules on unilateral acts being drafted by the Commission. What would be the relevance, for example, of new draft article 3 in the case of an act formulated by a parliament? What the Italian Government, in its reply to the questionnaire, called "unilateral acts required for the exercise of a sovereign right" should

therefore be excluded from the scope of the study. It seemed difficult to draft common rules for other acts such as recognition, protest or waiver. He recalled that the recognition of States and Governments was one of the possible topics submitted by the Secretariat to the Commission at its first session, in 1949,⁸ and that the latter had never seen fit to include it in its programme of work. The warnings by certain States had to be taken very seriously and a step-by-step approach seemed preferable. In that respect, the category of unilateral acts that created obligations was undoubtedly the most suitable for the identification and formulation of rules. When the Special Rapporteur studied such notions as the intention of the author State or the legal effects, he was almost always referring to obligations or commitments, as pointed out in paragraph 35 of his report.

52. As far as new draft article 1 was concerned, he preferred to refrain from commenting on it at the current stage, as its wording would depend on the scope of the draft articles and on a decision the Commission would have to take if it wished to make progress in its work and if the outcome of that work was to have a chance of not being rejected or "shelved" by States in the Sixth Committee.

53. New draft articles 2 and 3 posed no particular problems and were acceptable. As for new draft article 4, a unilateral act formulated by a person not authorized for that purpose could be confirmed not only expressly, as proposed by the Special Rapporteur, but also *per concludentiam*, when the State did not invoke the lack of authorization as grounds for invalidity of the act, but fulfilled the obligation it had assumed.

54. New draft article 5 was the provision that gave rise to the most problems and should probably be reformulated. A distinction should be drawn between cases where an act could be invalidated only if a ground for invalidity was invoked by a State (relative invalidity) and cases where the invalidity was a sanction imposed by law or stemmed directly from international law (absolute or *ex lege* invalidity). Error, fraud and corruption, which were the subjects of subparagraphs (a), (b) and (c) respectively of the draft article, could be invoked by States as causes of invalidity of unilateral acts formulated on their behalf. The same was true of the situation that subparagraph (h) was intended to cover, namely, that of the unilateral act conflicting with a norm of fundamental importance to the domestic law of the State formulating it, although that provision should not be interpreted as giving priority to domestic law over commitments under international law. In his view, subparagraph (h) should have been formulated differently, in such a way as to bring out the fact that, when the unilateral act had been formulated, a norm had been breached that was of fundamental importance to domestic or constitutional law concerning the capacity to assume international obligations or to formulate legal acts at the international level.

55. The threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations to obtain the formulation of the act and the

⁸ See *Yearbook* . . . 1949, p. 280, para. 15.

conflict between the unilateral act and a peremptory norm of international law, which were the subjects of, respectively, subparagraphs (e) and (f) of new draft article 5, were cases of absolute invalidity stemming directly from law, and those acts were invalid *ab initio*.

56. The use of coercion on the person formulating the act, provided for in subparagraph (d) of new draft article 5, was a special case, since, in those circumstances, the person involved was not expressing the will of the State he was supposed to represent, but that of the State using coercion. Without a will, there was no legal act and, if there was no act, there was nothing to be invalidated. Whereas previous cases had been cases of *negotium nullum*, the case in question was one of *non negotium*.

57. Lastly, with regard to subparagraph (g) of new draft article 5, he reiterated the doubts he had expressed (2629th meeting) and said that he shared the views on that subject expressed by Mr. Hafner.

Reservations to treaties⁹ (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,¹⁰ A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

58. Mr. PELLET (Special Rapporteur), introducing his fifth report on reservations to treaties (A/CN.4/508 and Add.1–4), said that it consisted of two parts: Part I which contained the introduction and a revised and updated version of the fourth report,¹¹ which he had submitted at the fifty-first session and which the Commission had been unable to consider for lack of time; a chapter which dealt with alternatives to reservations and interpretative declarations; and an annex containing the consolidated text of all draft guidelines dealing with definitions adopted on first reading or proposed in the fifth report, including nine new draft guidelines in italics and provisionally numbered 1.1.8, 1.4.6 to 1.4.8 and 1.7.1 to 1.7.5. Part I would be followed during the second part of the session by Part II on the procedure relating to reservations and interpretative declarations, which would be divided into two chapters on the formulation, modification and withdrawal of reservations and interpretative declarations and on the “reservations dialogue”, i.e. the formulation and withdrawal of acceptances of and objections to reservations and interpretative declarations.

59. In the introduction, he had briefly referred to the Commission’s earlier work on the topic and its outcome and had described some developments that had taken place since the consideration of the third report,¹² starting with a summary of the replies to the questionnaire sent to States and international organizations.¹³ Although the response

rate was satisfactory by comparison with the usual one, it was not entirely so because only 33 of the 188 States Members of the United Nations had replied and those which had not done so included many States with a national who was a member of the Commission. The response rate for international organizations was better, since it stood at 40 per cent, but international integration organizations, especially the European Communities, whose practice and positions would be extremely important to know, were conspicuous by their silence. It was regrettable that the European Communities, which were wealthy, well-endowed with competent staff and had no financial problems, had adopted such an attitude, whereas they increasingly frequently asked to be parties to multilateral treaties on an equal footing with States.

60. He drew the Commission’s attention to the decision of 2 November 1999 which the Human Rights Committee had taken in the *Rawle Kennedy v. Trinidad and Tobago* case,¹⁴ of which he had included lengthy excerpts in paragraph 12 of his report. To his knowledge, that was the first time that the Committee had applied the doctrine of its general comment No. 24, on issues relating to reservations made upon the ratification of or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,¹⁵ in a specific case. The basic question in that case had been whether a reservation by Trinidad and Tobago which ruled out the possibility for persons under sentence of death to apply to the Committee was admissible. The Committee had decided, rightly or wrongly, that the reservation was not admissible and had concluded that: “The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol”.¹⁶ That position was in keeping with general comment No. 24, but it was obviously incompatible with paragraph 10 of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, which the Commission had adopted at its forty-ninth session, in 1997¹⁷ and in which it had noted that it was up to the reserving State to draw the appropriate conclusions from the inadmissibility of a reservation determined by a human rights treaty monitoring body whose competence was recognized in paragraph 5 of the preliminary conclusions. In other words, in the case in question, the Committee had maintained its position by upholding its general comment No. 24, and as he mentioned in paragraphs 10 to 15 of his report, as had been done by most of the human rights treaty monitoring bodies which had commented on the preliminary conclusions. The Committee and the Commission thus seemed to agree on the possibility that human rights treaty monitoring bodies could appreciate the validity of a reservation, but disagreed on the consequences of the determination of the inadmissibility of a reservation. It therefore had to be decided what

⁹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), para. 470.

¹⁰ See footnote 1 above.

¹¹ *Yearbook . . . 1999*, vol. II (Part One), documents A/CN.4/499 and A/CN.4/478/Rev.1.

¹² *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6.

¹³ See *Yearbook . . . 1995*, vol. II (Part Two), p. 108, para. 489.

¹⁴ *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, p. 258.

¹⁵ *Ibid.*, *Fiftieth session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

¹⁶ *Ibid.*, *Fifty-fifth session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, p. 266, para. 6.7.

¹⁷ *Yearbook . . . 1997*, vol. II (Part Two), p. 56, para. 157.

fate the Commission should set aside for its preliminary conclusions, which it had adopted at its forty-ninth session. He gathered that some members of the Commission thought that the question should be discussed again at the current session or, in any event, at the next session at the latest. As he indicated in paragraph 18, he did not think that it should be discussed again; it had been wise for the Commission, as a body composed of general internationalists, to give what he regarded as the right solution in international law. However, he saw no point in again crossing swords with the human rights treaty monitoring bodies at the current stage. The conclusions were only preliminary in nature and the Commission would have to come back to them, but, for that purpose, two conditions would have to be met. The human rights treaty monitoring bodies and States first had to have reacted to the preliminary conclusions. However, as indicated in paragraph 16, the former had not done so seriously and only five of the latter had done so and the replies were not representative enough to be able to say that a meaningful trend was taking shape. Secondly, the Commission had to have completed its consideration of the core of the draft Guide to Practice, particularly in respect of the admissibility of reservations and the effects of reservations. Only then would it be able to test the soundness of the preliminary conclusions in terms of human rights. At best, however, it would be able to do so only at its forthcoming session, in 2001, or, more probably, at the fifty-fourth session, in 2002. He therefore believed that it would be better to see how things went. After all, the objective was not to win out over the human rights treaty monitoring bodies, but to try to find the most reasonable solution that was most in keeping with the general interest.

61. He drew attention to another major development in relation to the topic of which he had not been aware when he had prepared his fifth report. At its fiftieth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities had, in its decision 1998/113 of 26 August 1998, entitled "Reservations to human rights treaties", decided to request one of its members, Ms. Françoise Hampson, to prepare a working paper on the question of reservations to human rights treaties.¹⁸ Accordingly, Ms. Hampson had submitted a fairly brief working paper¹⁹ in paragraph 3 of which she had referred only to "some of the relevant issues", but which was interesting and could be distributed to the members of the Commission. She had apparently referred to the second report on reservations to treaties,²⁰ but not to the Commission's preliminary conclusions. Her starting point had been the principle of the "singularity" of human rights treaties and, after asking good questions that she had left unanswered, she concluded that a more in-depth study should be carried out primarily on the basis of replies to detailed questionnaires which would be sent to States. In paragraph 34 of her working paper, she stated that: "Such a study would have financial implications. The person undertaking the study would require research assistance, probably two full-time assistants to ensure comprehensive coverage". He could not help noticing that Sub-Commission Rapporteurs had more require-

ments than Commission Special Rapporteurs and referred in that regard to the footnote in paragraph 37 of his report. In its resolution 1999/27 of 26 August 1999, the Sub-Commission, which had become the Sub-Commission on the Promotion and Protection of Human Rights, had taken note of the working paper, decided to appoint Ms. Hampson as Special Rapporteur and requested the Secretary-General to provide her with all the assistance necessary to enable her to accomplish that task. By its decision 2000/108 of 26 April 2000, the Commission on Human Rights decided to request the Sub-Commission to request Ms. Hampson to submit to the Sub-Commission at its fifty-second session revised terms of reference for her proposed study on reservations to human rights treaties, further clarifying how the study would complement work already under way on that topic, in particular by the Commission. He therefore intended to contact Ms. Hampson, who had not thought to contact him, and wondered whether he should simply ask her what her intentions were or whether he should go further and suggest closer cooperation with her. Personally, he was convinced that it was entirely in the Commission's interests to remain open to a mutually beneficial dialogue with the human rights treaty monitoring bodies. For example, it might invite the Sub-Commission Special Rapporteur to one of its public or closed meetings at its next session in order to hold an exchange of views with her. There were, however, other possible types of cooperation and he would be grateful to the members of the Commission for letting him know what they thought and what suggestions they might like to make. In his view, that was yet another reason not to hurry to "lock up" the preliminary conclusions. It would be unfortunate if the Commission gave the impression of wanting to force the issue without waiting to see what human rights experts had to say about it.

62. Coming back to the introduction to the fifth report, he said that paragraphs 22 to 31 recalled the conditions in which the Commission had considered the third report. In paragraphs 31 to 49, he had described the Sixth Committee's consideration of the corresponding chapters of the Commission's reports. In so doing, he had tried to be sensitive to and to take account of the reactions of States, even though he did not intend to be servile in that regard. The Commission and the Sixth Committee had different functions, but they must listen to one another, and the Commission did not systematically have to give in without trying to put forward the law's point of view. He had thus also been able to draw attention to the most problematic or the most useful aspects of the reactions of States.

63. In paragraphs 51 to 56 of the report, he summed up the initiatives taken by other bodies, such as the Asian-African Legal Consultative Committee and the Group of Experts on Reservations to International Treaties (DI-E-RIT) of the Council of Europe, which was particularly active in that regard and had invited him to take part in September 2000 in a meeting of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) on reservations to treaties. Paragraphs 57 to 65 contained a brief general presentation of the fifth report, the main points of which he had referred to in his oral introduction. The annex to the introduction to the fifth report contained a table showing concordances between the draft guidelines he had proposed and those adopted by the Commission on first reading.

¹⁸ See E/CN.4/1999/4-E/CN.4/Sub.2/1998/45, p. 84.

¹⁹ E/CN.4/Sub.2/1999/28 and Corr. 1.

²⁰ *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478.

64. Referring to the substance of Part I of the report, particularly alternatives to reservations and interpretative declarations, he said that, to his knowledge, no study on alternatives to reservations had ever been carried out systematically, except for a rather brief study submitted by Virally at a seminar held at the Catholic University of Louvain, Belgium, in 1978, on escape clauses in international human rights instruments.²¹ That was the idea on which the part of his report under consideration was based: reservations were one means of limiting the binding effect of a treaty on the State or international organization which formulated them. They were, however, not the only means and it was quite interesting and instructive to compare reservations with other means of achieving the same objectives, if only, moreover, in order to tell them apart and see whether there was a lesson to be learned from those other means as far as the legal regime of reservations was concerned. It was in that spirit that he was proposing nine new draft guidelines for the Commission's consideration.

65. He had, in paragraphs 71 to 103, first given a general idea of the different procedures for modifying or interpreting treaty obligations and had then dealt with each one more specifically. He recognized that that method was not very rigorous, but it had the advantage of highlighting an idea which seemed unimportant, but was quite basic: reservations were not the alpha and omega of the flexibility of treaty obligations. There were many other procedures which had the same or comparable effects as reservations and which were probably better and easier to use, at least in some cases. That idea was reflected quite straightforwardly in draft guideline 1.7.1, which was reproduced in paragraph 94 of the report and read:

1.7.1 Alternatives to reservations

In order to modify the effects of the provisions of a treaty in their application to the contracting parties, States and international organizations may have recourse to procedures other than reservations.

He was entirely aware that such a provision would be unusual and probably quite open to criticism if it appeared in a treaty, but the point was that the proposed Guide to Practice was not and did not claim to be a treaty. It was intended to provide States with general guidelines on which they could base their conduct. From that point of view, a guideline of that kind would be useful because it would have the advantage of drawing the attention of diplomats and leaders to the fact that there were other procedures which might have the same virtues as reservations without necessarily having the same drawbacks in a particular case. As it stood, the draft guideline was perhaps a bit elliptical, if not esoteric, and that was why he proposed draft guideline 1.7.2 by way of illustration, in paragraph 95. Of course, it might be considered that such a provision did not belong in a treaty, if only because it was quite likely that the proposed list was not and could not in any case be complete. It was naturally always possible for examples illustrating a general proposition to be included in the commentary, but he was rarely convinced by that procedure, the easy way out, and he was even less so in the

current case, since the Guide to Practice would then become much less "practically readable". Draft guideline 1.7.2 therefore non-exhaustively listed various procedures which permitted modification of the effects of the provisions of a treaty and which were grouped under two headings, one on procedures provided for in the treaty itself and the other on procedures not provided for in treaties. As indicated in paragraphs 86 to 92 of the report, that classification of the alternatives to reservations seemed to be the most logical and operational. The point was that, for practical purposes, negotiators who found it impossible to agree on a reservation had to be reminded that there might be escape clauses that could, for one reason or another, be easier to use, while, at the same time, producing similar results comparable to those of reservations. Those institutions, which existed side by side with reservations, might be combined under the single heading of "options", bearing in mind, however, that they were extremely varied and often operated in very different ways and that was why they were useful.

66. He proposed that the Commission's discussion should focus on general comments and on draft guidelines 1.7.1 and 1.7.2, in the hope that they would be referred to the Drafting Committee. Once the fate of those draft guidelines had been decided, he would introduce draft guidelines 1.7.3, 1.7.4 and 1.1.8 together, draft guidelines 1.4.6 to 1.4.8 and then draft guideline 1.7.5.

The meeting rose at 1.05 p.m.

2631st MEETING

Friday, 2 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Reservations to treaties¹ (continued) (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4², A/CN.4/L.599)

[Agenda item 5]

²¹ M. Virally, "Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme* (Brussels, Bruylant, 1982), p. 5.

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), para. 470.

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