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Summary record of the 2633rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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after the words “general obligations” in the definition of escape clauses in draft guideline 1.7.2.

54. Noting that the Special Rapporteur proposed two alternatives for the title of guideline 1.7.4, he expressed the view that the second, “Agreements between States having the same object as reservations”, should be retained because it was more general, as it covered all agreements, including bilateralized reservations and amendments and protocols which might be concluded by certain parties to the treaty.

55. He agreed with the Special Rapporteur that the new guideline proposed in paragraph 143 of the report was not essential, but that, for the sake of exhaustiveness, the points it contained might be discussed in greater detail in the commentary.

56. Noting that draft guidelines 1.1.8, 1.4.6 and 1.4.7 were proposed in order to supplement the draft guidelines already provisionally adopted, he suggested that they should be referred to the Drafting Committee so that it might improve their wording and determine where they should be inserted in the Guide to Practice.

57. Mr. SIMMA, referring to declarations made under an opting-out clause, said that the reference to article 17 of the 1969 Vienna Convention in paragraph 148 of the report was misleading because that article related to accession to some parts of a treaty only and it was clear from the text of the article and from the Commission’s commentary that there was a difference under the Convention between a State which acceded only to a part of a treaty under article 17 and a State which in principle acceded to the treaty as a whole, but subject to certain reservations governed by articles 19 et seq.

58. Referring to his interpretation of article 19, subparagraph (b), of the 1969 Vienna Convention and the comment the Special Rapporteur had made in that regard, Mr. Hafner had given the interesting example of a multilateral convention which did not allow reservations, but did allow some declarations. If it was wrongly considered that such declarations were reservations, there would then be a contradiction between the various provisions of the treaty. In more general terms, he asked the Special Rapporteur what purpose it served to call a declaration a reservation if practically none of the provisions of the Convention on reservations applied to it. If the Special Rapporteur maintained his position, perhaps he could distinguish between declarations which excluded the application of some substantive provisions of a treaty and those which excluded the application of some procedures and would therefore be different from reservations.

59. Mr. PAMBOU-TCHIVOUNDA said that, unlike the Special Rapporteur, he was not sure that the fact that a treaty authorized only certain reservations meant that it prohibited all others.

The meeting rose at 1 p.m.

2633rd MEETING

Wednesday, 7 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

Reservations to treaties¹ (continued) (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,² A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ECONOMIDES said that chapter II of the Special Rapporteur’s fifth report (A/CN.4/508 and Add.1–4) dealing with alternatives to reservations and interpretative declarations deserved special praise. It was, to his knowledge, the first time that such a brilliant and comprehensive study of a difficult and unfamiliar subject had been undertaken and it would doubtless serve as an invaluable reference tool.

2. Referring to the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties which the Commission had adopted at its forty-ninth session,³ he said he had always viewed the Commission’s initiative in that regard as premature, not to say hasty. But he agreed with the Special Rapporteur’s proposal in paragraph 18 of his report to re-examine the preliminary conclusions as soon as the Commission had completed consideration of all the substantive questions concerning the regime for reservations.

3. With regard to the objective of the draft guidelines, it was generally agreed that the reservations regime established by the 1969 and 1986 Vienna Conventions should not be modified. Nevertheless, any errors, ambiguities or omissions in that regime detected by the Commission should, in his view, be rectified by means of the draft guidelines, which should not only simply clarify and refine the subject matter, which was rapidly evolving, but also provide practical solutions to existing problems and make good any omissions.

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).

³ See 2630th meeting, footnote 17.

4. A major problem that had not yet been satisfactorily resolved was that of the definition of reservations, especially in the light of certain new proposals by the Special Rapporteur. According to the definition in the 1969 and 1986 Vienna Conventions, a reservation was a unilateral statement that purported to exclude or modify the legal effect of certain provisions of a treaty. However, the verb "modify" could be understood in two ways, one restrictive and the other extensive, while a reservation was always viewed as restrictive, a characteristic emphasized in draft guidelines 1.1.5, 1.1.6, 1.4.1 and 1.4.2. The Special Rapporteur himself noted in paragraph 118 of his report that reservations could only limit their author's treaty obligations. He therefore believed that the definition in the Vienna Conventions should be altered to bring out more forcefully the fact that reservations were always restrictive.

5. The procedures described in draft guidelines 1.7.1 to 1.7.4 had nothing to do with reservations, although they sometimes played a similar role. Furthermore, most of the new guidelines did not concern unilateral statements but treaty clauses or supplementary agreements between the parties to treaties. Clearly, therefore, they were not covered by the Commission's terms of reference.

6. The question arose, however, whether they served a useful purpose. With regard to introductory guideline 1.7.1, entitled "Alternatives to reservations", he joined Mr. Pambou-Tchivounda in objecting to the verb "modify", which was open to several interpretations: restrictive, extensive or intermediary. It should be replaced by a verb with restrictive connotations such as "limit", "restrict", "reduce" or "diminish".

7. The third subparagraph of the first part of draft guideline 1.7.2 concerning optional clauses should be deleted. It contradicted the very notion of a reservation, since the parties concerned actually consented to be bound by obligations that were not imposed on them, thereby increasing rather than limiting their obligations. Such clauses could not, therefore, be described as alternatives to reservations.

8. The second part of draft guideline 1.7.2 was also too far removed from the accepted definition of a reservation, especially in terms of legal techniques. It was therefore preferable to omit the procedures listed, which were in any case well known to legal advisers of States and international organizations.

9. Draft guideline 1.7.3, concerning restrictive clauses, was superfluous, since the content was already covered by the first procedure mentioned in draft guideline 1.7.2. Again, draft guideline 1.7.4 should be deleted for the same reasons as the second part of draft guideline 1.7.2. He thus shared Mr. Hafner's view that draft guidelines 1.7.3 and 1.7.4 had no place in the Guide to Practice.

10. Lastly, he proposed combining draft guideline 1.7.1 and the first two subparagraphs of draft guideline 1.7.2 in the following composite guideline:

"In order to restrict the effects of provisions to a treaty in their application to the parties, States and international organizations may make use of procedures other than reservations, such as the inclusion in the treaty of:

"(a) Restrictive clauses purporting to limit the object, scope or application of the obligations imposed by the treaty;

"(b) Escape clauses that permit the non-application of treaty obligations in specific instances and for a specific period of time."

11. The proposed guideline would, of course, be accompanied by a substantive and well-argued commentary containing all the useful material set forth in the current comments to draft guidelines 1.7.1 to 1.7.4.

12. Mr. GALICKI said that the question of the exclusively restrictive character of reservations had been thoroughly discussed in the Drafting Committee, which had noted that there were cases in which reservations were intended to extend the meaning of certain provisions, for example the reservations made by some Eastern European countries to the Convention on the Prevention and Punishment of the Crime of Genocide. The wording proposed by the Special Rapporteur was therefore preferable in that it covered all possible situations.

13. Mr. BROWNLIE said that, while he agreed that a number of reservations were intended to restrict the ambit of provisions, in analytical terms the purpose of a reservation was to modify the provisions. The use of the physical metaphor of restricting or extending was superficial and failed to describe how States behaved or to identify their motivation, which was to change the meaning of instruments in line with State interests.

14. Mr. GOCO said he agreed with Mr. Economides that the decision to adopt preliminary conclusions on the topic of reservations to treaties had seemed somewhat premature at the time. The Government of the Philippines, in its response to the preliminary conclusions, had expressed a certain amount of apprehension but would withhold judgement pending submission of the final version of the Guide to Practice.

15. Mr. ROSENSTOCK suggested that Mr. Economides should amend the opening words of his proposed new guideline to read: "In order to facilitate restriction of the effects of the provisions of a treaty."

16. Mr. ECONOMIDES said he had always considered that reservations were to be understood in a restrictive sense, since States generally entered reservations in order to remove some element from a treaty clause. During his 35 years' service in the Legal Department of the Greek Ministry of Foreign Affairs, he had never come across a reservation that went beyond the obligation contained in a treaty. Procedures said to fall into that category were generally not reservations in the strict sense but unilateral statements that went beyond the obligations provided for in the treaty, as was stated, moreover, in draft guidelines 1.4.1 and 1.4.2. The concept of restrictive reservations was thus firmly established.

17. Mr. PELLET (Special Rapporteur) said that the debate on that issue had been closed by the Commission's decision regarding draft guidelines 1.1, 1.1.6, 1.4.1 and 1.4.2.

18. Mr. BAENA SOARES said he was deeply impressed by the painstaking research undertaken by the Special Rapporteur and by the scope of the guidelines proposed. The Guide to Practice was designed to offer advice and guidance to States and its effectiveness would be enhanced by the ease with which it could be understood by the reader.

19. He wondered whether, once reservations and interpretative declarations had been defined, it was appropriate to expand the text to include draft guidelines 1.7.1, 1.7.2 and 1.7.5. It was certainly useful to examine procedures other than reservations that could be used to modify the provisions of a treaty, but if the content of those guidelines was reflected in the commentaries, the continuity of the Guide to Practice and its “utilitarian purpose”, as the Special Rapporteur put it himself, would be preserved. The report firmly established the validity of the procedures in question, whose purpose, like that of reservations, was to strike a balance between preserving the object and purpose of the treaty and attracting the greatest possible number of States parties.

20. The arguments and examples provided by the Special Rapporteur fully justified the wording of draft guideline 1.1.8, concerning reservations formulated under exclusionary clauses, proposed in paragraph 167.

21. He agreed with the Special Rapporteur’s opinion, expressed in paragraph 168, about “negotiated reservations”, namely that it would be inappropriate to include a draft guideline on the subject. He took a similar view of the draft guideline contained in paragraph 177. The point it made regarding unilateral statements formulated under an exclusionary clause after the entry into force of the treaty could be amply dealt with in the commentary.

22. As to Ms. Françoise Hampson’s working paper on reservations to human rights treaties⁴ for the Sub-Commission on the Promotion and Protection of Human Rights, he was in favour of promoting dialogue on a subject of common interest to the two bodies, provided that their work was complementary and that there was no encroachment on the Commission’s mandate. Mutual information and coordination were essential, not only in the current case but whenever other international agencies, especially United Nations treaty monitoring bodies, were addressing issues that formed part of the Commission’s programme of work.

23. Mr. DUGARD suggested that the Special Rapporteur should clarify the distinction between limitations clauses and the clawback clauses referred to in the first footnote to paragraph 83 of the report. The fact that reservations could be used to restrict human rights obligations under multilateral treaties was a source of considerable concern and was the subject of Ms. Hampson’s working paper. But, as the Special Rapporteur had rightly pointed out, it was also possible to restrict such obligations by means of clauses within human rights treaties themselves. They were referred to either as limitations clauses or as clawback clauses. In that footnote, the Special Rapporteur tended to blur the two. In the case of a limitations clause, a monitoring body decided whether a party to a treaty was

entitled to restrict obligations in the interests of public health, national security, morals, etc. The clawback clause had been correctly defined not by Rosalyn Higgins⁵ but by Gittleman, who described them as provisions “that entitle a State to restrict the granted rights to the extent permitted by domestic law”.⁶ An example of such a clause, which differed fundamentally from a limitations clause, was article 6 of the African Charter on Human and Peoples’ Rights which stated that “No one may be deprived of his freedom except for reasons and conditions previously laid down by law”. It was a very serious restriction because it enabled the State itself to decide whether it was bound by the treaty obligations.

24. As reservations to human rights treaties were assuming an important role in the Commission’s debate, he thought more attention should be paid to such matters. For that reason, it was important to include draft guideline 1.7.3, which indicated that limitations clauses and clawback clauses were not reservations.

25. Mr. PELLET (Special Rapporteur), summing up the discussion, said that he would begin with a number of general points.

26. Mr. Kateka, and to some extent Mr. Lukashuk, had contended that the Commission had never taken a position on the final form of the draft. Strictly speaking, that was true. He had never wanted to force the Commission’s hand to take a formal decision on the final product. But he had always made clear his preference for a flexible codification instrument which could serve as a reference for States in their practice in the matter of reservations. That was what he had meant by a guide to practice. He had always interpreted the decision taken by the Commission at its forty-seventh session⁷ in that manner. It was not impossible that a draft protocol could be extracted from the Guide to Practice, although personally he was not in favour of such a course. In their current form, however, the draft guidelines were not suitable for inclusion in a treaty. The draft would have to be greatly revised if it was to lead to a treaty. The report of the Commission to the General Assembly on the work of its fifty-first session was clear in regard to the form the Guide to Practice would take.⁸

27. That brought him to a point, raised by Mr. Elaraby, and partly by Mr. Kabatsi, concerning the degree of detail. Given the nature of the subject-matter, the Commission was obliged to enter into more detail than in a draft convention. After all, conventions were already in force, above all the 1969 Vienna Convention, which contained provisions on reservations. His aim was to be more specific on the subject, which necessarily required a detailed treatment. Some draft guidelines merely repeated what was contained in the Convention, which seemed indispensable for practical reasons so that States could, with the

⁵ See 2632nd meeting, footnote 9.

⁶ R. Gittleman, “The African Charter on Human and Peoples’ Rights: A legal analysis”, *Virginia Journal of International Law*, vol. 22, No. 4 (Summer 1982), p. 667, at p. 691.

⁷ See *Yearbook . . . 1995*, vol. II (Part Two), p. 108, document A/50/10, para. 487 (b).

⁸ *Yearbook . . . 1999*, vol. II (Part Two), p. 89, document A/54/10, para. 457.

⁴ *Ibid.*, footnote 19.

Guide to Practice, have a complete panorama of law on reservations. But there was no point in remaining as general as the Convention. The situation was unique: the Commission had never gone back to a subject that it had already addressed in order to make it more specific. The *travaux préparatoires* of the Convention had already developed many ideas on reservations. He was simply endeavouring to develop them further. Otherwise, there seemed to be no value in the current exercise.

28. The question had been raised of cooperation with human rights bodies. As the Commission on Human Rights had not approved the decision of the Sub-Commission on the Promotion and Protection of Human Rights to appoint Ms. Françoise Hampson as Special Rapporteur,⁹ that posed a problem. He intended to ask her whether they could agree on a number of issues for discussion, although he had some doubts as to her status.

29. Regarding the state of work on the topic, he would provide more material at the second part of the session. The subject had proved much more complicated than he had initially thought. He hoped that at the fifty-third session, in 2001, he would be able to submit a complete report on the lawfulness of reservations, but it was out of the question for him to report at the next session on the effects of lawful reservations or of State succession. In other words, the topic was two years behind schedule, and it would not be possible to make up for lost time. It was worth noting that some of the problems posed by the law of reservations to treaties were not included in the list of his first report,¹⁰ in particular the question of the interpretation of reservations to treaties. He would need to find a way of including it, perhaps in the chapter on the effects of reservations.

30. A number of members had the impression that he was hostile to reservations, whereas others thought that he was their firm supporter. In actual fact, he was totally neutral on the question. Reservations represented a step forward for international law, because they enabled States to endorse a treaty as a whole while retaining a certain freedom of action. He disagreed with Mr. Kamto: it was not for the Commission to preserve the integrity of treaties; instead, it should promote reasonable solutions so that the law of reservations functioned as well as possible without doing harm to the essence of a treaty.

31. Mr. Lukashuk, Mr. Pambou-Tchivounda and Mr. Rosenstock had misinterpreted his proposals, all of which, apart from draft guideline 1.1.8, aimed to get rid of intriguing problems, of “things” that resembled reservations. Some of them, difficult to identify in international law, were unilateral statements that could have been addressed at the same time as the “catch-all” sections of the previous years. He had not done so, because he had had in mind the idea of the opting-in and opting-out clauses, and it was difficult to separate the two. Pursuant to those two clauses, States made unilateral statements. In his view, if those unilateral statements were reservations, they had to be placed in section 1.1 of the draft, hence draft guideline 1.1.8. If it

was thought that they were not reservations, they must be put in the “catch-all” section, that is to say, section 1.4. But procedures had remained which could not be entirely left out of the Guide to Practice and which were not unilateral statements. One, at least, was very similar indeed to reservations, namely bilateralized reservations (draft guideline 1.7.4). Actually, bilateralized reservations were agreements and had to be addressed somewhere in the Guide. He did not for one moment believe that those who would be using the Guide would systematically refer to the commentary, just as those who used the 1969 Vienna Convention did not systematically refer to the Commission’s commentary.¹¹ Hence, he was opposed to putting everything in the commentary.

32. The other reason why draft guideline 1.7.3 had been prepared on restrictive clauses was that such clauses, which aimed to limit the scope of the treaty, were included in the treaty and thus were obviously not reservations, had been called reservations in the past, for instance by Fitzmaurice, Scelle and Judge Zoricic. The current terminological usage was still very ambiguous; terms such as “national competence” or “non-arbitrability reservations” continued to be used, and so he had made provision for a special draft guideline in 1.7.3. That was why he had distinguished between restrictive clauses and bilateralized reservations, which were merely illustrations of draft guideline 1.7.2. For Mr. Gaja’s benefit, he would reiterate that the “strange animals” he had spoken of were simply restrictive clauses that came solely under draft guideline 1.7.3, which was a development of the first subparagraph of draft guideline 1.7.2. He assured members that the draft guidelines which began with 1.4 and with 1.7 were designed to rid the Commission of all that, once and for all. In the part of his fifth report which members would take up in the second part of the session, they would see that it was sometimes necessary to revert to those alternatives. For example, a State could not use an alternative in order to go back on the prohibition of a late reservation. Hence, the definition of those alternatives would be useful later on. The next part of his report included a draft guideline which said that a State could not, by means of certain alternatives to reservations or an interpretation of earlier reservations, go back on the rule whereby a reservation could not be made after the expression of final consent to be bound. That showed that the draft alternatives to reservations were not pointless, as they would be of value later.

33. With regard to comments by Mr. Simma and Mr. Rosenstock, he said that, pursuant to article 19, subparagraph (b), of the 1969 Vienna Convention, reservation clauses must exclude all other reservations apart from those permitted. It was very common for treaties to specify that certain reservations were allowed and that all others were prohibited. He was thinking in that context of many Council of Europe reservations. That clearly was a matter covered by article 19, subparagraph (b). Mr. Rosenstock seemed to think that it was possible to object to such reservations. He disagreed. Although it was not expressly specified in article 20 of the Convention, once a reservation was expressly allowed in a treaty, it could no longer be objected to. The matter might become clearer

⁹ See *Official Records of the Economic and Social Council, 2000, Supplement No. 3 (E/2000/23)*, chap. II, sect. B, decision 2000/108, and paras. 467–468.

¹⁰ See 2632nd meeting, footnote 6.

¹¹ *Yearbook . . . 1966*, vol. II, pp. 187 et seq.

when he came to consider the question of objections to reservations.

34. In response to a question by Mr. Hafner, he said that he excluded neither reservations *ratione personae* nor reservations *ratione temporis*. He was somewhat disturbed, however, because he had thought that reservations of non-recognition excluding application with a non-recognized entity were reservations, whereas Mr. Hafner had said that they were not. His proposal had been changed accordingly; thus, he did not quite know what to think for the time being.

35. Mr. Simma had wanted to introduce a distinction between exclusionary clauses by saying that unilateral statements made under an exclusionary clause concerning the substance were reservations, whereas unilateral statements under an exclusionary clause concerning procedure were not. He experienced difficulty in following Mr. Simma. The distinction could be made, but why conclude in the affirmative in one case and in the negative in another? What was the reasoning behind that proposal? He had nothing against compromises, provided they had a logical basis.

36. Ultimately, the only real opposition to his proposals had concerned draft guideline 1.1.8, but he had yet to hear a cogent objection, and he did not see how the Commission could say that a unilateral statement made by virtue of an exclusionary clause was not a reservation. Some might argue that, if they were reservations, they might be subject in certain respects to a particular legal regime; that was already the case in part in article 20 of the 1969 Vienna Convention, and he agreed on that point. Nevertheless, no member had offered a convincing argument to show why they were not reservations. Perhaps the Drafting Committee could tone down draft guideline 1.1.8.

37. The CHAIRMAN noted that the Commission had completed its debate on the Special Rapporteur's fifth report. As there were divergent views on how to treat some of the draft guidelines, he suggested that all of them should be referred to the Drafting Committee.

38. Mr. ROSENSTOCK said he took it that such a decision would be without prejudice to members' positions on whether particular guidelines should be included.

39. The CHAIRMAN confirmed that Mr. Rosenstock's understanding was correct. If he heard no objection, he would take it that the Commission wished to refer all the draft guidelines to the Drafting Committee.

It was so agreed.

Unilateral acts of States (concluded)* (A/CN.4/504, sect. C, A/CN.4/505,¹² A/CN.4/511¹³)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR¹⁴
(concluded)*

40. Mr. GALICKI, after congratulating the Special Rapporteur on his efforts to take into account as many as possible of the different views expressed by members of the Commission and of the Sixth Committee, said that it was regrettable that the third report (A/CN.4/505) could not reflect the replies to the questionnaire sent to Governments in September 1999.¹⁵ The relatively small number of replies received was also a matter for regret.

41. As to the observations and proposals contained in the third report, the main difference between the previous and the new definition of unilateral acts consisted of the deletion of the requirement that such acts should be "autonomous". Furthermore, the requirement of "the intention of acquiring international legal obligations" was replaced by "the intention of producing legal effects" and the requirement of "public formulation" by the condition that the act had to be known to the State or international organization concerned. Lastly, the concept of "multilateral" unilateral acts had been abandoned, which was a step in the right direction. He approved of the deletion of paragraph 3 of former article 4 from the text of new draft article 3; the inclusion of a formula taken from article 7 of the 1969 Vienna Convention did not seem appropriate in that context. The decision to delete former article 6 on expression of consent, as explained in paragraph 125 of the report, seemed entirely acceptable, although it left aside the question of silence as a means of formulating a unilateral legal act.

42. The approach adopted in reformulating articles 1 to 7 proposed in the second report¹⁶ had the serious drawback that, in almost every case, the Special Rapporteur had felt obliged to side with only one group of views expressed in the Commission and the Sixth Committee. That difficulty was already apparent in connection with the proposed definition of unilateral acts. Neither in State practice nor in the doctrine was a precise and unified definition to be found of unilateral acts, and international judicial decisions on the matter were limited in number and not particularly helpful. The main reason for that situation seemed to be a tendency, likewise reflected in some of the replies to the questionnaire, to lump together too many categories of different acts under the same heading. The replies by El Salvador and Italy, in particular, covered too wide a spectrum to be of any practical help. The truth of the matter, as the Special Rapporteur recognized in paragraph 41 of his third report, was that unilateral acts could take a variety of forms. Accordingly, a definition of the scope of the draft articles seemed absolutely necessary and he could not agree with the Special Rapporteur's decision simply to replace it by an article purporting to contain a definition of unilateral acts. Such a definition placed at the beginning of the draft and containing a full list of acts excluded from its scope, for instance, acts of international organizations, plurilateral

* Resumed from the 2630th meeting.

¹² See footnote 2 above.

¹³ Ibid.

¹⁴ For the text of the draft articles contained in his third report, see 2624th meeting, para. 35.

¹⁵ See 2624th meeting, para. 36, and 2628th meeting, para. 11.

¹⁶ See 2624th meeting, footnote 4.

acts and acts under treaty regimes, would eventually make it easier to define what unilateral acts of States actually were.

43. A variety of conflicting opinions had been expressed about the desirability of retaining the concept of “autonomy” in the definition of unilateral acts. While the term “autonomy” might not be entirely satisfactory, the idea of non-dependence as a characteristic of unilateral acts did not, in his view, deserve to be dismissed altogether. That problem, too, could perhaps be resolved by the inclusion of an appropriate provision defining the scope of the draft articles.

44. The difficulties in connection with the definition of unilateral acts and with the formulation of the subsequent articles were not incidental. As Mr. Simma had pointed out (2629th meeting), they stemmed from the fact that by using unilateral acts States hoped to achieve a greater measure of freedom than they would enjoy under the more rigid and well-established rules of international treaty law. If such were indeed the intention — if the attraction of unilateral acts lay precisely in their relative flexibility and informality—then the question as to whether there was a need and a legal background for the codification of rules governing unilateral acts called for reconsideration. In his view, a definitive answer to that question was still outstanding.

45. The questionnaire had invited Governments to indicate to what extent they believed that the rules of the 1969 Vienna Convention could be adapted *mutatis mutandis* to unilateral acts. The most well-balanced reply to that question, recognizing that many of the rules of the Convention could be so adapted but also warning against their automatic transferral, had come from Argentina. The changes made to former article 4 (new article 3), on persons authorized to formulate unilateral acts on behalf of the State, were consistent with such an approach and he therefore accepted the article.

46. On the other hand, new draft article 5 required further careful consideration as regards the extent to which existing rules on invalidity of treaties were applicable to unilateral acts. For example, should an error, traditionally included among the grounds for invalidity of treaties, be treated in the same way in the case of unilateral acts? As illustrated by the debate in the Commission at the current session, the introduction of subparagraph (g), concerning unilateral acts conflicting with a decision of the Security Council, called for more detailed elaboration. In any event, it should be made clear that the provision related only to decisions taken under Chapter VII of the Charter of the United Nations. He had serious doubts about subparagraph (h) of new draft article 5; in the context of article 46, paragraph 1, of the 1969 Vienna Convention, the expression “a rule of its internal law of fundamental importance” had an entirely different meaning.

47. In conclusion, he said that both the draft articles and the report would have been greatly improved by an in-depth analysis of existing State practice with regard to unilateral acts. The Special Rapporteur’s future work would benefit from further efforts to research that area, possibly with some external assistance. In short, he had no objection to referring new draft articles 1 to 4 to the Drafting

Committee, but felt that new draft article 5 required further work, preferably in the Working Group.

48. Mr. BROWNLIE, while acknowledging the Special Rapporteur’s efforts to adapt his original approach to the views expressed in the Commission, said that the major problem with the methodology adopted thus far arose from the fact that non-dependent or autonomous acts could not be legally effective in the absence of a reaction on the part of other States, even if that reaction was only silence. The reaction could take the form of acceptance—either express or by implication—or rejection. Another problem, which he did not propose to pursue at the current stage, was the possibility of an overlap with the case where the conduct of States constituted an informal agreement. For example, the *Eastern Greenland* case, which some authors saw as a classic example of a unilateral act, could also be described as a case of an informal agreement between Norway and Denmark. Such problems of classification could generally be solved by a saving clause.

49. The subject of estoppel also involved the reaction of other States to the original unilateral act. In the *Temple of Preah Vihear* case, for example, Thailand had been held by her conduct to have adopted the line on the annex I map. Whilst the episode undoubtedly involved a unilateral act or conduct on the part of Thailand, that country’s conduct had been considered opposable to Cambodia. In other words, there had been a framework of relations between the two States.

50. Those considerations brought him to a general point concerning the definition of the topic and, in particular, the nature of the precipitating conduct or connecting factor. The concept of declarations had now been discarded, but the very expression “unilateral acts” was also probably too narrow. Everything depended on the conduct of both the precipitating State and other States—in other words, on the relationship between one State and others. The related general issue of the evidence of intention was a further reason for defining the connecting factor or precipitating conduct in fairly broad terms. The concept of “act” was too restrictive. The legal situation could not be seen simply in terms of a single “act”. The context and the antecedents of the so-called “unilateral act” would often be legally significant.

51. In that context, the references made to the effect of silence might also involve a failure to classify the problem efficiently. What had to be evaluated was silence in a particular context and in relation to a certain precipitating act, not silence *per se* or in isolation.

52. A general difference between the topic under consideration and the law of treaties was that, in the case of treaties, there was a reasonably clear distinction between the precipitating conduct—the treaty—and the legal analysis of the consequences. In the case of unilateral acts or conduct, it was often very difficult to separate the precipitating act or conduct and the process of constructing the legal results. That observation, too, could be illustrated by the *Temple of Preah Vihear* case.

53. Mr. MOMTAZ, after congratulating the Special Rapporteur on his readiness to grapple with the extremely complex topic under consideration, said that the difficulty

experienced by many countries in replying to the questionnaire arose from the great variety of universal acts and from the fact that State practice in that field had never yet formed the subject of systematic review. In that connection, he suggested that States which had not yet replied to the questionnaire might be invited to give more examples of their own practice. There could be no doubt that such information, especially from addressee States, would be of great value to the Special Rapporteur in his future work.

54. With reference to the substance of the third report, in his references to doctrine the Special Rapporteur might perhaps have given greater attention to the views of authors writing in French, and in that connection he mentioned an article by Mr. Economides.¹⁷

55. The unilateral act was an instrument of day-to-day diplomacy which served as a useful substitute to commitment under a treaty. As a means of circumventing the ideological and political obstacles which often stood in the way of the conclusion of treaties between States, it was irreplaceable. That being so, it was both opportune and judicious to identify the customary rules governing State practice and to advocate them with a view to ensuring greater stability in international relations.

56. Replies to the questionnaire so far received confirmed the existence of a strong relationship between the draft articles under consideration and the 1969 Vienna Convention. In particular, that Convention could serve as a basis for provisions relating to the interpretation of unilateral acts and to their validity. At the same time, as the Special Rapporteur rightly pointed out, there was a difference between the nature of a treaty and that of a unilateral act. In that connection, it was appropriate to recall that ICJ in the *Nuclear Tests* cases had given up the idea that a unilateral act had a consensual basis. That being so, with the exception of the interpretation and the validity of unilateral acts any reference to the Convention should be made with great caution and flexibility. With regard to the subject of estoppel, he referred to the view expressed by Jacqué to the effect that, contrary to a unilateral act, the fundamental factor in the case of estoppel was the conduct of the addressee. Conversely, in the case of a unilateral act the addressee's conduct added nothing, save in exceptions, to the binding force of the act.¹⁸ The same author developed the issue of third party stipulations, a point which deserved further attention.

57. The Special Rapporteur was right to distinguish between a simple legal event and a legal act. An international legal event was something to which the international order attached legal consequences, whereas a legal act, or unilateral act, was an expression of the will of a subject of international law, whether a State or an international organization. As for the definition of unilateral acts in new draft article 1, he entirely agreed with the view expressed in paragraph 36 of the report concerning the validity of the criterion of the intention of the author State. In that con-

nection, he again referred to the judgments of ICJ in the *Nuclear Tests* cases, in which the Court emphasized the intention of the author of the act to be bound.

58. In a study, Charpentier pointed out that when one spoke of the autonomy of a unilateral act or commitment, what was meant was that the juridical value could be determined only by reference to the normative intention of the author.¹⁹ In other words, the author of a unilateral act must have the intention to make a commitment and impose on itself a certain line of obligatory conduct. In the *Nuclear Tests* cases, ICJ had identified autonomy as an important component of unilateral acts, and in paragraph 63 of his report the Special Rapporteur did so as well. The existence of intention on the part of the author of the unilateral act thus sufficed for an act to produce legal effects, and the binding character of commitments made under a unilateral act was based on the autonomy of the author's will. It seemed unnecessary to rely on concepts like estoppel and good faith to justify the binding force of unilateral acts.

59. He agreed with the Special Rapporteur that the author of a unilateral act could not impose obligations on another State. The example given in paragraph 58, that of the Helms-Burton Act,²⁰ was very apposite, and the Iran and Libya Sanctions Act of 1996 (D'Amato-Kennedy Act)²¹ could also be cited in that context. As the Special Rapporteur pointed out in quoting from a study by Skubiszewski in paragraph 52 of his report, a unilateral act merely activated certain duties incumbent on States under international law.²² Examples included a declaration of war or an act whereby a State announced the start of an international armed conflict, following which neutral States were obliged to permit warships of the belligerent State to inspect their commercial vessels on the high seas in order to verify that they were not carrying war contraband for delivery to enemy territory.

60. He experienced no difficulty with new draft articles 1 and 2. He agreed with Mr. Kamto's comments (2630th meeting) on new draft article 3 and wished again to ask why governmental institutions, especially plenary bodies and legislative organs, should not be entitled to formulate unilateral acts. He had in mind parliaments, and bodies and councils that sprang up spontaneously following periods of domestic instability, which consolidated power in their own hands and were capable of exercising sovereignty pending the establishment of permanent institutions. The Revolutionary Council had played such a role in the Islamic Republic of Iran after the fall of the old regime and had formulated numerous unilateral acts during the interim period.

¹⁹ J. Charpentier, "Engagements unilatéraux et engagements conventionnels: différences et convergences", in *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski*, J. Makarczyk, ed. (The Hague, Kluwer Law International, 1996), pp. 367–380, at p. 371.

²⁰ See 2629th meeting, footnote 9.

²¹ ILM, vol. XXXV, No. 5 (September 1996), p. 1274.

²² K. Skubiszewski, "Unilateral acts of States", *International Law: Achievements and Prospects*, M. Bedjaoui, ed. (Dordrecht, M. Nijhoff, 1991), p. 233.

¹⁷ C. Economides, "Les actes institutionnels internationaux et les sources du droit international", *Annuaire français de droit international*, vol. 34 (1988), p. 131.

¹⁸ See J.-P. Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1972).

61. With reference to new draft article 5, he endorsed Mr. Economides's idea that it should be preceded by a provision specifying the conditions under which unilateral acts were valid. In addition, a provision should be introduced on the incapacity of the State formulating a unilateral act. Any unilateral commitment of a State that was incompatible with the objective status of that State would obviously be devoid of legal validity. For example, if a neutral State formulated a unilateral act that was not consistent with its international obligations concerning neutrality, the act would be invalid.

62. Mr. PAMBOU-TCHIVOUNDA said he admired Mr. Momtaz's remarkable description of the unilateral act as an instrument of day-to-day diplomacy, but was uncomfortable when he went on to say that it could take the place of a treaty commitment. The two techniques were entirely unrelated in terms of efficacy, practical utility and even chronology. They existed in tandem, but one did not condition the other in any way or in any sense replace it.

63. Mr. MOMTAZ said a unilateral act could be considered a substitute for a treaty commitment when the prevailing political environment prevented two States from concluding a treaty.

64. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), summing up the discussion, thanked members for their comments. The importance of the topic had been clearly reaffirmed and the fact that unilateral acts were being used more and more frequently in international relations had been generally acknowledged. Some doubt had been expressed, however, both in the Commission and in Government replies to the questionnaire, about whether common rules could be elaborated for all unilateral acts. To some degree he shared those doubts. Yet the definition and general rules on the formulation of unilateral acts contained in the report applied to all unilateral acts of States. He would attempt to categorize specific rules for the various unilateral acts in his next report. One category might be acts whereby States assumed obligations, while another would be acts in which States acquired, rejected or reaffirmed a right. Such categorization of acts had been suggested by one member. As another had said, after the acts had been categorized, the legal effects and all matters pertaining to the application, interpretation and duration of acts whereby States contracted obligations could be considered.

65. Draft articles 1 to 4 should be referred to the Drafting Committee for consideration in the light of the comments made on each article, whereas the Working Group should continue its in-depth study of new draft article 5, including the idea that it should be preceded by provisions on the conditions for validity.

66. As to new draft article 1, some saw that there had been an evolution from the restrictive approach taken in the first report²³ to the current, much broader formulation. It had been a necessary transition, but because of it, the reaction of States to the article might differ from the position they had taken in the questionnaire. It had been suggested that he was hewing too closely to the Commission's

line of thinking. Naturally, he had had his own ideas from the outset, but to try to impose them would be unrealistic. The effort to achieve consensus, no matter what he himself thought, was what counted. For example, in deference to the majority opinion, he had removed certain terms from the definition that he had seen as worth keeping.

67. Some members had pointed to the possible tautology of "expression of will" and "intention" in new draft article 1, but there was a clear-cut difference between the first term, which was the actual performance of the act, and the second, which was the sense given by the State to the performance of that act. The two were complementary and should be retained.

68. "Legal effects" was a broader concept than the "obligations", referred to in his first report, which failed to cover some unilateral acts. Some members had stated, however, that the concept was too broad and that the words "rights and obligations" should be used. That could be discussed in the Drafting Committee.

69. The draft articles referred to the formulation of unilateral acts by States, but that did not signify it was impossible to direct them, not only at other States or the international community as a whole, but also at international organizations. It had consequently been asked why they could not be directed at other entities. It was an interesting question, though he was somewhat concerned by the tendency throughout the United Nations system, and not just in the Commission, to include entities other than States in international relations. In reality, the responsibility regime applied solely to States, and it was perhaps not appropriate for entities other than States and international organizations to enjoy certain rights pursuant to obligations undertaken by a State. That point could be examined by the Working Group in the second part of the session.

70. Although a majority of members had suggested that the word "unequivocal" should be deleted, he continued to believe it was useful and should be retained, if only in the commentary, to explain the clarity with which the expression of will must be made.

71. The phrase "which is known to", used in preference to the earlier reference to publicity, was broader and more appropriate, but it had been challenged on the grounds that it was difficult to determine at what point something was known to a State. It had been suggested that the final clause containing that phrase should be replaced by wording drawn from the 1969 Vienna Convention to indicate that the act was governed by international law.

72. Some members had mentioned the possibility of reinserting an article on the scope of the draft, as he had proposed in the second report, and if the majority of members so agreed, such an article would have to be elaborated by the Drafting Committee in full conformity with article 1, on the definition of unilateral acts. It had also been suggested that the saving clause in former article 3, which had been intended to prevent the exclusion of other unilateral acts, could be reincorporated. He believed, however, that the current definition of unilateral acts was sufficiently broad.

73. There had been no substantive criticisms of new draft article 2. New draft article 3, paragraph 2, was an

²³ See 2624th meeting, footnote 6.

innovation, representing some progressive development of international law, in that it spoke of persons other than heads of State, heads of Government and ministers for foreign affairs, who could be considered authorized to act on behalf of the State. It seemed to have been generally accepted, although the Drafting Committee could look into the queries raised about the phrases “the practice of the States concerned” and “other circumstances”.

74. The use of the word “expressly” in new draft article 4 made it more restrictive than its equivalent in the 1969 Vienna Convention. It had led to some comments, the majority of members being in favour of a realignment with that instrument. That point, too, could be examined in the Working Group.

75. New draft article 5 would be considered in depth by the Working Group. One member had made the very interesting suggestion that subparagraph (g) of the article should refer not just to a decision of the Security Council but to a decision taken by that body under Chapter VII of the Charter of the United Nations. He had deliberately avoided including that specification because, without it, the subparagraph also covered decisions by the Council when it established committees of enquiry under Chapter VI. That, too, could be discussed. One member had referred to the need to indicate who could invoke the invalidity of an act and therefore to distinguish between the various causes of invalidity.

76. A number of comments had been made about estoppel and silence. While there was perhaps little cause to include them in the materials on the formulation of unilateral acts, he believed they had to be covered in the context of State conduct and should therefore be included in a future report when he would cover the legal effects of acts.

77. Without entering into detail about the coverage in his next report, he wished to say that the Working Group had carefully examined unilateral declarations in which States offered negative security guarantees, some of which were considered by some States to be legal acts and by others to be political acts. While many such acts were documented, it was hard to know how States interpreted them. State practice was therefore difficult to analyse. It had been said that State practice had not been adequately collected and catalogued, and an effort would be made in future to do so, so that it could be used for reference purposes in the next report.

78. Mr. GOCO, noting that about 10 States had responded to the questionnaire and that those replies would assist in refining the work on the topic, asked whether any pattern could be discerned from them.

79. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that some of the replies had been critical of the treatment of the topic. That was due to the current stage of consideration; as the topic was developed, States might find it easier to accept. In some replies, States, reflecting their own practice, recognized the existence of such acts. Other replies had been more doctrinal and academic, referring to the various categories of unilateral acts. In any case, the replies had been very useful, and the suggestion to provide an addendum to the commentaries would be taken into account at a later stage.

80. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to the Special Rapporteur’s proposal.

It was so agreed.

The meeting rose at 1.05 p.m.

2634th MEETING

Thursday, 8 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: 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. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

State responsibility¹ (*continued*)* (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

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

1. The CHAIRMAN invited the members of the Commission to resume their consideration of the topic of State responsibility on the basis of chapter I, section B, of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. CRAWFORD (Special Rapporteur) said that, in accordance with the approach agreed upon by the Commission, chapter II of Part Two of the draft articles dealt with the different forms of reparation from the point of view of the obligations of the State which had committed the internationally wrongful act. In the text adopted on first reading, in addition to assurances and guarantees against repetition, three forms of reparation had been envisaged, namely, restitution in kind, compensation and

* Resumed from the 2623rd meeting.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook* . . . 1996, vol. II (Part Two), p. 58, chap. III, sect. D.

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