# Chapter VI

# UNILATERAL ACTS OF STATES

## A. Introduction

496. In the report of the Commission to the General Assembly on the work of its forty-eighth session, in 1996, the Commission proposed to the Assembly that unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[157]

497. The General Assembly, in paragraph 13 of resolution 51/160 of 16 December 1996, inter alia, invited the Commission to further examine the topic "Unilateral acts of States" and to indicate its scope and content.

498. At its forty-ninth session, in 1997, the Commission established a Working Group on the topic which reported to the Commission on the advisability and feasibility of the study of the topic, its possible scope and content and the outline for the study of the topic.[158] At the same session, the Commission considered and endorsed the report of the Working Group.[159]

499. Also at its forty-ninth session, the Commission appointed Mr. Víctor Rodríguez Cedeño Special Rapporteur for the topic.[160]

500. The General Assembly, in paragraph 8 of its resolution 52/156 of 15 December 1997, endorsed the Commission's decision to include the topic in its agenda.

501. At its fiftieth session, in 1998, the Commission considered the first report of the Special Rapporteur on unilateral acts of States.[161] As a result of its discussion, the Commission decided to re-establish the Working Group on unilateral acts of States.

502. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of a unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.[162]

503. The General Assembly, in paragraph 3 of its resolution 53/102 of 8 December 1998, recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the Assembly, the Commission should continue its work on the topics in its current programme.

504. At its fifty-first session, in 1999, the Commission considered the second report of the Special Rapporteur.[163] As a result of its discussion, the Commission decided to re-establish the Working Group on unilateral acts of States.

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

506. The General Assembly, by paragraph 4 of its resolution 54/111 of 9 December 1999, invited Governments to respond in writing by 1 March 2000 to the questionnaire on unilateral acts of States circulated by the Secretariat to all Governments on 30 September 1999 and by paragraph 6 of the same resolution recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the Assembly, the Commission should continue its work on the topics in its current programme.

## B. Consideration of the topic at the present session

### 1. Documents before the Commission and meetings devoted to the topic

507. At the present session the Commission had before it the Special Rapporteur's third report (A/CN.4/505). The Commission also had before it the report of the Secretary-General (A/CN.4/511) containing the text of the replies received to the questionnaire referred to in paragraphs 505 and 506 above.

508. In his third report, the Special Rapporteur examined some preliminary issues such as the relevance of the

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

[158] Ibid., addendum 3.

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

[160] Ibid., p. 66, para. 212 and p. 71, para. 234.

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

[162] Ibid., vol. II (Part Two), p. 58, paras. 192–201.

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

topic, the relationship between the draft articles on unilateral acts of States and the 1969 Vienna Convention and the question of estoppel and unilateral acts. He then went on to reformulate articles 1 to 7 of the draft articles proposed in his second report.[164] He proposed a new draft article 1 on definition of unilateral acts; proposed the deletion of the previous draft article 1 on the scope of the draft articles and decided against the advisability of including a draft article based on article 3 of the 1969 Vienna Convention; proposed a new draft article 2 on the capacity of States to formulate unilateral acts, a new draft article 3 on persons authorized to formulate unilateral acts on behalf of the State and a new draft article 4 on subsequent confirmation of an act formulated by a person not authorized for that purpose. The Special Rapporteur also proposed the deletion of previous draft article 6 on expression of consent and, in that connection, examined the question of silence and unilateral acts. Finally, the Special Rapporteur proposed a new draft article 5 on the invalidity of unilateral acts.

509. The Commission considered the third report of the Special Rapporteur at its 2624th, 2628th to 2630th and 2633rd meetings between 19 May and 7 June 2000.

### 2. Introduction by the Special Rapporteur of his third report

510. The Special Rapporteur said that his third report consisted of a general introduction, in which he considered the possibility of basing the topic on the 1969 Vienna Convention and referred to the links between unilateral acts and estoppel, and a proposed reformulation of articles 1 to 7, as contained in his second report.

511. Unfortunately, when he had prepared the third report, he had not yet received any reply from Governments to the questionnaire (see paragraphs 505 and 506 above) on their practice in respect of unilateral acts, although some of them had replied since.

512. The Special Rapporteur pointed out that everyone recognized the important role played by unilateral acts in international relations and the need to draw up precise rules to regulate their functioning. But such codification and progressive development was made more difficult by the fact that those acts were by nature very varied, so much so that several Governments had expressed doubts as to whether rules could be enacted that would be generally applicable to them. That view must be qualified, however, because it should be possible to pinpoint features common to all such acts and thus elaborate rules valid for all.

513. As to the possibility of using the 1969 Vienna Convention as a basis, he noted that the members of the Commission had expressed very differing and even contradictory views on that question at preceding sessions. To avoid reopening an endless discussion, he favoured an intermediate approach: although simply transposing the articles of the Convention to unilateral acts was obviously not conceivable, it was not possible to ignore that instrument and its *travaux préparatoires* either. The parts of the Convention which had to do, for example, with the preparation, implementation, legal effects, interpretation and duration of the act clearly provided a very useful model, although unilateral acts did, of course, have their own features.

514. The link between unilateral acts and estoppel was perfectly clear. However, as he pointed out in paragraph 27 of his report, it should be borne in mind that the precise objective of acts and conduct relating to estoppel was not to create a legal obligation on the State using it; moreover, the characteristic element of estoppel was not the State's conduct but the reliance of another State on that conduct.

515. In view of the comments made by the members of the Commission at the fifty-first session and by the Sixth Committee, the Special Rapporteur said that he had taken special care in reformulating article 1 (former art. 2) on the definition of unilateral acts, which was very important because it was the basis of all the draft articles. The issue was not so much to give the meaning of a term as to define a category of acts in order to be able to delimit the topic. A number of elements were decisive: the intention of the author State, the use of the term "act", the legal effects and the question of autonomy or, more exactly, the "non-dependence" of the acts. All unilateral acts, whether protests, waivers, recognitions, promises, declarations of war, etc., had in common that they were unilateral manifestations of will and had been formulated by a State for an addressee (whether a State, several States, the international community as a whole or one or more international organizations) with a view to producing certain legal effects. In practice, however, the fact that unilateral acts could take various forms did not simplify matters: for example, a protest could, like a promise, be formulated by means of a written or oral declaration, but also by means of what might be called "conclusive" conduct, such as breaking off or suspending diplomatic relations or recalling an ambassador. The question was whether such acts were really unilateral acts within the meaning of the draft articles.

516. The Special Rapporteur stressed that all unilateral acts nevertheless contained a fundamental element, the intention of the author State. It was on that basis that it could be determined whether a State intended to commit itself legally or politically at the international level. If the State did not enter into such a commitment, then, strictly speaking, there was no unilateral act.

517. It was worth noting that, in new draft article 1,[165] he had replaced the words "act [declaration]" used in former article 2 by the word "act". It was usually by means of a written or oral declaration that States expressed waiver, protest, recognition, promise, etc., and, at first glance, it had appeared that that term could serve

[164] For the text of the draft articles proposed in his second report, ibid., vol. I, 2593rd meeting, para. 24.

[165] New draft article 1 proposed by the Special Rapporteur reads as follows:

"*Article 1. Definition of unilateral acts*

"For the purposes of the present articles, 'unilateral act of a State' means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization."

as a common denominator, but he had ultimately joined those who had considered that that approach was too restrictive and that the word "declaration" could not apply to certain unilateral acts. He therefore decided to use the word "act", which was more general and had the advantage of not excluding, a priori, any material act, although doubts remained as to whether certain acts or conclusive conduct, such as those envisaged in the context of a promise, could be considered unilateral acts.

518. Another question, which had already been raised, was that of legal effects. In the earlier version, legal effects had been confined to obligations which the State could enter into through a unilateral act, but, after the discussion in the Commission, it had appeared that the words "produce legal effects" had a much broader meaning and that the State could not only enter into obligations, but also reaffirm rights. According to the doctrine, although a State could not impose obligations on other States through a unilateral act, it could reaffirm that certain obligations were incumbent on those States under general international law or treaty law. That was the case, for example, with a unilateral act by which a State defined its exclusive economic zone. In so doing, the State reaffirmed the rights which general international law or treaty law conferred on it and rendered certain obligations operative which were incumbent on other States. Needless to say, that position was not contrary to the well-established principles of international law which were expressed in the sayings *pacta tertiis nec nocent nec prosunt* and *res inter alios acta* because it was clear that a State could not impose obligations on other States in any form without the consent of the latter.

519. The term "autonomous" used in former article 2 to characterize unilateral acts no longer appeared in new draft article 1 proposed in paragraph 80 of his report owing to the unfavourable reactions of several members of the Commission, which were summarized in paragraph 63 of his report. The Special Rapporteur nevertheless believed that a number of points would need to be added to the commentary to distinguish unilateral acts which depended on a treaty from unilateral acts in the strict sense. He had always considered that a dual independence could be established: independence vis-à-vis another act and independence vis-à-vis the acceptance of the unilateral act by its addressee. That was what had prompted him to put forward the idea of dual autonomy in his first report,[166] but he had not included it in the new draft, since the comments of the members of the Commission had been far from favourable. Although the word "autonomy" was not used, however, it must be understood that the unilateral acts in question did not depend on other pre-existing legal acts or on other legal norms. The question remained open and he looked forward with interest to learning the Commission's majority opinion on the issue.

520. Another question considered in the report was that of the unequivocal character of unilateral acts. As already pointed out, the State's manifestation of will must be unequivocal and that question was more closely linked to the intention of the State than to the actual content of the act. The manifestation of will must be clear, even if the content of the act was not necessarily so. "Unequivocal" meant "clear" because, as noted by the representative of one State in the Sixth Committee, it was obvious that there was no unilateral legal act if the author State did not clearly intend to produce a normative effect.

521. In a final point on new draft article 1, the Special Rapporteur said that the term "publicly", which had to be understood in connection with the State to which the act in question was addressed, which must be aware of the act in order for it to produce effects, had been replaced by the words "and which is known to that State or international organization". What was important was for the text to indicate that the act must be known to the addressee because the unilateral acts of the State bound it to the extent that it intended to commit itself legally and the other States concerned were aware of that commitment.

522. The Special Rapporteur also suggested in his report that the draft should not include an article based on article 3 of the 1969 Vienna Convention because, unlike that instrument, the draft articles covered unilateral acts in the generic sense, which included all categories of unilateral acts. The Convention had to do with a type of conventional act, the treaty, which it defined but without excluding other types of conventional acts distinct from a treaty as defined in paragraph 1 (*a*) of article 2 of the Convention, to which the rules of the Convention could be applied irrespective of the Convention itself. Account had also been taken of the opinion of the members of the Sixth Committee who did not want an article on that question to be included in the draft.

523. New draft article 2[167] was by and large a repetition of former article 3 based on the drafting changes suggested by the members of the Commission at the preceding session.

524. The report also contained a new draft article 3,[168] which had been modelled on article 7 of the 1969 Vienna Convention and followed former article 4 with a few changes. Some States had indicated that the Convention might be closely followed in the case of the capacity of representatives or other persons to engage the State. The Special Rapporteur said that paragraph 1 of the article should remain unchanged, since, during the consideration of his second report, the comments had been very similar to those made when the Commission had adopted its draft articles on the law of treaties[169] and to those made at the

[166] See footnote 161 above.

[167] New draft article 2 proposed by the Special Rapporteur reads as follows:

"*Article 2. Capacity of States to formulate unilateral acts*

"Every State possesses capacity to formulate unilateral acts."

[168] New draft article 3 proposed by the Special Rapporteur reads as follows:

"*Article 3. Persons authorized to formulate unilateral acts on behalf of the State*

"1. Heads of State, heads of Government and ministers for foreign affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.

"2. A person is also considered to be authorized to formulate unilateral acts on behalf of the State if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as authorized to act on behalf of the State for such purposes."

[169] See *Yearbook . . . 1966*, vol. II, p. 177, document A/6309/Rev.1, para. 38.

United Nations Conference on the Law of Treaties.[170] Paragraph 2 had been amended, however, and its scope expanded so as to permit persons other than those referred to in paragraph 1 to act on behalf of the State and to engage it at the international level. That text was in keeping with the specificity of unilateral acts and departed from the corresponding provision of the Convention. The point was to take account of the need to build confidence and security in international relations, although it might be thought that, on the contrary, such a provision might have the opposite effect. In his view, extending authorization to other persons who could be regarded as acting on behalf of the State might very well build confidence, and that was precisely the aim of the Commission's work on the topic. The paragraph used the word "person" instead of the word "representative" and, in the Spanish version, the word *habilitada* instead of the word *autorizada*, which had not been accepted at the preceding session for the reasons given in paragraphs 106 and 107 of his third report.

525. New draft article 4,[171] which had been based on the 1969 Vienna Convention, adopted the wording of former article 5 as submitted at the preceding session. That provision covered two different situations: either a person might act on behalf of the State without being authorized to do so or he could act on behalf of the State because he was authorized to do so, but either the action in question was not within the competencies accorded to that person or he acted outside the scope of such competencies. In such cases, the State could confirm the act in question. In the Convention, that confirmation by the State could be explicit or implicit, but it had been considered that, in that particular case, in view of the specificity of unilateral acts and the fact that, in certain instances, clarification must be restrictive, such confirmation should be explicit so as to give greater guarantees to the State formulating the unilateral act.

526. The Special Rapporteur's second report had contained a specific provision, draft article 6, on expression of consent, that had been considered unduly reminiscent of treaty law, i.e. too close to the corresponding provision of the 1969 Vienna Convention and hence neither applicable nor justifiable in the context of unilateral acts. As indicated in paragraph 125 of his report, if it was considered that articles 3 and 4 could, in fact, cover the expression of consent, then a specific provision on the manifestation of will or expression of consent would not be necessary. The question of manifestation of will was closely connected with the coming into being of the act, i.e. the time at which the act produced its legal effect or, in the case of unilateral acts, the time of their formulation. Under treaty law, by contrast, the coming into being of a treaty, or the time at which it produced its legal effect, was connected with its entry into force.

527. The Special Rapporteur went on to say that silence, which was linked to expression of consent, was being omitted from the study because, as recognized by the majority of the members of the Commission, it did not constitute a legal act, even if it could not be said to produce no legal effect. On the other hand, the importance attached to silence in the shaping of wills and the forging of agreements and in relation to unilateral acts themselves was well known. Nevertheless, whether or not silence was a legal act and regardless of the fact that the current study dealt with acts formulated with the intention to produce legal effects, silence could not, in his view, be considered to be independent of another act. In remaining silent, a State could accept a situation, even waive a right, but it could hardly make a promise. At all events, silence was basically reactive conduct that must perforce be linked to other conduct, an attitude or a previous legal act.

528. Lastly, the report examined the question of the invalidity of a unilateral act, an issue that had to be addressed in the light of the 1969 Vienna Convention and international law in general. New draft article 5[172] was broadly based on the provisions of the 1969 Vienna Convention and was similar to former article 7 proposed in the second report. In the new version, he had inserted an important cause of invalidity based on a comment that a member of the Commission had made at the preceding session on the invalidity of an act that conflicted with a decision adopted by the Security Council under Chapter VII of the Charter of the United Nations on the maintenance of international peace and security. Although the Council could also adopt decisions under Chapter VI on the establishment of commissions of enquiry, the cause of invalidity related solely to Council decisions adopted under Chapter VII.

[170] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968* (United Nations publication, Sales No. E.68.V.7); ibid., *Second Session, Vienna, 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.6); and ibid., *First and Second Sessions, Vienna, 26 March–24 May 1968* and *Vienna, 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

[171] New draft article 4 proposed by the Special Rapporteur reads as follows:

"*Article 4. Subsequent confirmation of an act formulated by a person not authorized for that purpose*

"A unilateral act formulated by a person who is not authorized under article 3 to act on behalf of a State is without legal effect unless expressly confirmed by that State."

[172] New draft article 5 proposed by the Special Rapporteur reads as follows:

"*Article 5. Invalidity of unilateral acts*

"A State may invoke the invalidity of a unilateral act:

"(*a*) If the act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;

"(*b*) If a State has been induced to formulate an act by the fraudulent conduct of another State;

"(*c*) If the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State;

"(*d*) If the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him;

"(*e*) If the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;

"(*f*) If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;

"(*g*) If, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council;

"(*h*) If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it."

### 3. Summary of the debate

529. Members generally welcomed the third report of the Special Rapporteur which made an attempt to bring order into a topic which presented many difficulties owing to its complexity and diversity and endeavoured to reconcile the many divergent views expressed both in the Commission and in the Sixth Committee.

530. As regards the relevance of the topic of unilateral acts of States, many members stressed the importance of unilateral acts in day-to-day diplomatic practice and the usefulness of the codification of the rules applying to them. In view of the frequency and importance of such practice, it was said, an attempt must be made to clarify and organize the general legal principles and customary rules governing such acts in order to promote stability in international relations. Although the subject was a complex one, 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. A view was also expressed in this connection that a unilateral act could even be considered a substitute for a treaty when the prevailing political environment prevented two States from concluding a treaty.

531. The view was also expressed that the relevance of the topic did not have to be raised any longer since the matter had been settled when the Commission and the General Assembly had decided to inscribe the topic on the Commission's agenda. Unilateral acts of States, as they were understood in the draft, existed in international practice and were even a source of international law, even though Article 38 of the Statute of ICJ did not refer to them. 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.

532. On the other hand, some members expressed misgivings about the fitness of the topic for codification. Thus, in one view, unilateral acts were attractive to States precisely because of the greater freedom States enjoyed in applying them, as compared with treaties. In deciding how to "codify" such relative freedom of action, the Commission was faced with a dilemma: either it applied a straightjacket *à la* 1969 Vienna Convention to a wide range of unilateral acts and the product would then be totally unacceptable to States, or it confined its work to unilateral acts for which there was at least some trace of an accepted legal regime. The outcome would then be of limited value, because it would mean prescribing them something that States did anyway. It was also pointed out in this connection that, if the attraction for States 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.

533. Some members also pointed to the great diversity of unilateral acts observed in the practice of States as a factor which rendered difficult a general exercise of codification in their regard and suggested that a step-by-step approach to the topic dealing separately with each category of act might be more appropriate.

534. In the view of other members the appropriate course of action would be to divide the draft articles into two parts: the first would establish general provisions applicable to all unilateral acts and the second, provisions applicable to specific categories of unilateral acts which, owing to their distinctive character, could not be regulated in a uniform way.

535. Many members stressed the importance of a good survey of State practice in any attempt to codify the topic and encouraged the Special Rapporteur to reflect extensively such practice in his reports and to anchor his proposed draft articles on it. In this connection, the hope was expressed that Governments in their replies to the questionnaire would not only express their views but also send materials of their State practice.

536. Many members referred to the relationship between the draft articles on unilateral acts and the 1969 Vienna Convention and supported the concept of "flexible parallelism" developed by the Special Rapporteur in paragraphs 15 to 22 of his report. It was pointed out in this connection that the treaty law norms codified in the Convention served as a useful frame of reference for an analysis of the rules governing unilateral acts of States. Treaties and unilateral acts were two species of the same genus, that of legal acts. It followed that the rules reflecting the parameters and characteristics shared by all categories of legal acts should be applicable both to bilateral legal acts—treaties—and to unilateral legal acts. But the existence of parallel features did not warrant the automatic transposition of the norms of the Convention for the purpose of codifying the rules governing unilateral acts of States. There were important differences and that was why the Special Rapporteur had wisely recommended "a flexible parallel approach". It was also said that if there was no 1969 Vienna 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. 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 unilateral acts of the State as the starting point and turn to the Convention for solutions, if necessary, and not the other way around.

537. Some members advocated caution on this matter. Thus, in one view, it was essential to avoid taking analogy with treaty law too far because it might lead to confusion. According to another view it would be inadvisable to follow closely the 1969 Vienna Convention since there were essential differences between treaty law and the law on unilateral acts.

538. With specific reference to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention"), and its possible relevance for unilateral acts the view was expressed that it was still unclear whether the draft covered the effects of unilateral acts by States vis-à-vis international organizations and of acts by international organizations when their conduct was comparable to that of States. International organizations were mentioned only in draft article 1 and then only as the addressees, not the authors, of international acts. Although the Commission had wisely decided to exclude resolutions adopted by international organizations from the draft, the word "resolution" did not cover the whole range of acts undertaken by such organizations. International organizations, above all regional integration organizations, could also enter into unilateral commitments, vis-à-vis States and other international organizations. The issues raised by such acts must therefore be addressed mutatis mutandis in the light of the Convention.

539. Several members referred to paragraphs 23 to 27 of the report in which the Special Rapporteur deals with the issue of estoppel and its relationship to unilateral acts.

540. In one view, the fundamental factors in the case of estoppel was the conduct of the addressee whereas, conversely in the case of a unilateral act the addressee's conduct added nothing, save in exceptions, to the binding force of the act. It was also noted in this connection that estoppel was not, as such, either a unilateral or bilateral legal act, but a situation or an effect which was produced in certain circumstances in the context of both legal and ordinary acts and which had a specific impact on a legal relationship between two or more subjects of international law. It could therefore be omitted for the time being from the general study of unilateral acts and taken up later to determine its possible impact in particular contexts.

541. Some other members adopted a somewhat more active approach towards the possibility that the Commission take up the question of estoppel within the context of unilateral acts of States. Thus in one view, the basic idea concerning estoppel in international law seemed to be that a State or international organization must not vacillate in its conduct vis-à-vis its partners and thereby mislead them. Any unilateral act could probably give rise to estoppel. Estoppel could result from a unilateral act when that act had prompted the addressee to base itself on the position expressed by the State that was the author of the act. Estoppel formed part of the topic in that it constituted one of the possible consequences of a unilateral act. It should therefore be addressed when the Special Rapporteur dealt with the effects of unilateral acts. Along the same lines, the view was also expressed that estoppel was not in itself a legal act, but, rather, a fact that produced legal effects and consequently it should be considered within the framework of the effects of unilateral acts.

542. Also addressing general issues relating to the topic one view pointed out 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 was the possibility of an overlap with the case where the conduct of States constituted an informal agreement. For example, the *Eastern Greenland* case,[173] 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. According to this view, the subject of estoppel also involved the reaction of other States to the original unilateral act. In the *Temple of Preah Vihear* case,[174] 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. In this view, it was important to make 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. 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. According to this view, 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.

[173] *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22.

[174] *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6.

543. Speaking generally on article 1, several members welcomed the new wording proposed by the Special Rapporteur which was a simplified version of his previous proposals. They noted with satisfaction that it incorporated many of the suggestions made in the Commission and in the Sixth Committee and considered it as an improvement over previous versions, even if it could still perhaps be further refined.

544. Several members welcomed in particular the deletion of the word "declaration" from the definition and its replacement by the word "act", since in their view, the word "declaration" was both ambiguous and restrictive.

545. It was observed that the main differences between the previous and the new definition of unilateral acts consisted of the deletion of the requirement that such acts should be "autonomous", the replacement of the expression "the intention of acquiring international legal obligations" by the expression "the intention of producing legal effects" and the replacement of the requirement of "public formulation" by the condition that the act had to be known to the State or international organization concerned.

546. Some members expressed some reservations on the definition. In one view, the definition did not take into account the formal aspects of unilateral acts. In another view, a general and unified definition on all unilateral acts was not appropriate given the variety of unilateral acts to be found in State practice.

547. Some other members preferred to abstain from expressing a view on the definition until the Commission made a final decision on the kind of acts to be included under its study. This was particularly the case of some members who opposed the deletion of former article 1 dealing with their scope (see paragraph 563 below).

548. Several members addressed more specifically the element of the proposed definition consisting in the "expression of will . . . with the intention to produce legal effects". The fundamental importance of the "intention" of the author State in the formulation of the act was underscored by those members who recalled in this connection the judgment of ICJ in the *Nuclear Tests* cases.[175] The author of a unilateral act, it was said, had to have the intention to make a commitment and impose upon itself a certain line of obligatory conduct.

549. While some members felt that there might be an overlap or tautology between the words "expression of will" and "intention", other members did not think that this was the case.

550. Several members supported the reformulation of the article which now made it clear that the object of the intention was the production of legal effects. This distinguished the unilateral acts under the Commission's study from merely political acts. Some members however felt that the definition did not go far enough in determining the kind of legal effects produced by the act. Thus, in one view, a distinction should be drawn between unilateral acts that had legal effects immediately upon their formulation and irrespective of the action taken by other States, and unilateral acts that had legal effects only upon their acceptance by other States. Not all acts that put into effect the rules of law required the acceptance of other States—within the limits of the law, States could unilaterally realize their own rights. According to this view, the Special Rapporteur had been able to pinpoint the main issues that needed to be resolved at the initial stage of work, but the whole spectrum of unilateral acts could not be covered in general rules. He should identify those unilateral acts that deserved study and then determine the legal characteristics of each. An analysis of doctrine and State practice revealed that in most cases, promises, protests, recognition and renunciation were considered to be unilateral acts. According to this view, unilateral acts could be divided into a number of categories. First there were "pure" unilateral acts, those that truly implemented international law and required no reaction from other States. Then there were acts whereby States took on obligations. They were often called promises, although the term was a misnomer as it referred to moral, not legal, imperatives. When recognized by other States, such acts created a form of agreement and, as such, could give rise for other States not only to rights, but also to obligations. Finally, there were acts corresponding to a State's position on a specific situation or fact—recognition, renunciation, protest—which were also purely unilateral in that they required no recognition by other States. In another view, the very broad character of the expression "producing legal effects" made it in practice impossible to formulate common rules for acts as disparate as promise, recognition, protest or waiver. A step-by-step approach seemed preferable.

551. Some members pointing to the vagueness of the distinction between political and legal acts stressed the difficulties often associated with determining the true intention of a State when formulating an act. It was said in this connection that often the intention needed the ruling of an international tribunal for it to become clear. It was also said in this connection that a State was a political entity whose intentions could be equivocal or unequivocal depending on the context. 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 the act. For these members it was unfortunate that the Special Rapporteur had not sufficiently stressed in the definition the idea of context on which, for example, ICJ had relied in the case concerning the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.[176] In another view, the fact that a State decided to perform an act invariably meant that it found some interest in doing so. The idea of interest should therefore be incorporated in an objective definition of a unilateral act, not to replace the idea of intention, but as a way of giving meaning and context to that idea which was more difficult to define.

552. As regards the phrase "in relation to one or more other States or international organizations" which in the proposed definition qualified the words "legal effects", it

[175] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253, and *(New Zealand* v. *France)*, ibid., p. 457.

[176] *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, and ibid., *I.C.J. Reports 1995*, p. 6.

was queried why the Special Rapporteur wished to limit the effects of unilateral acts to relations with the other States and international organizations since peoples, national liberation movements or individuals could also be beneficiaries of legal commitments. It was suggested that the definition of treaties in article 2, paragraph 1 (*a*), of the 1969 Vienna Convention should serve as a guide in that regard. According to the Convention, a treaty was an international agreement governed by international law. For those members it was essential to apply the same terms to unilateral acts stating that a unilateral act was first and foremost an act governed by international law and then placing the author of the act squarely within the ambit of international law rather than domestic law. These members suggested replacing the words "in relation to one or more other States or international organizations" by the phrase "and governed by international law".

553. As regards the word "unequivocal" which in the proposed definition qualified the words "expression of will" some members found it acceptable since in their view it was hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions or how it could be easily and quickly revoked.

554. Other members, however, were strongly opposed to the inclusion of the word "unequivocal" and recalled that in the definition elaborated by the Working Group on unilateral acts of States re-established at the fifty-first session of the Commission, the word "unequivocal" had not been included.[177] It was said in this connection that it should be understood that the expression of will must always be clear and comprehensible; if it was equivocal and could not be clarified by ordinary means of interpretation it did not create a legal act. It was also pointed out that the ideas of clarity and certainty that the Special Rapporteur was trying to convey by means of the word "unequivocal" was a question of judgement which was traditionally for the judge to decide and did not belong in the definition of unilateral acts. It was also said against the inclusion of the word "unequivocal" that the *Nuclear Tests* cases showed that "lack of ambiguity" could result not from a formally identifiable act but from a combination of oral declarations that dispensed with the need for formal written confirmation.

555. Some members supported the decision of the Special Rapporteur not to include the notion of "autonomy" in the proposed definition of a unilateral act. It was noted in this connection that a unilateral act could not produce effects unless some form of authorization to do so existed under general international law. The authorization could be specific, for example where States were authorized to fix unilaterally the extent of their territorial waters within a limit of 12 nautical miles from the baseline. Or it could be more general, for example, where States were authorized unilaterally to enter into commitments limiting their sovereign authority. But unilateral acts were never autonomous. Acts that had no basis in international law were invalid. It was a matter not of definition but of validity or lawfulness.

556. Other members had mixed reactions to the deletion of the notion of autonomy from the definition. Thus, in one view the need to exclude from the definition acts linked to certain legal regimes such as acts linked to treaty law made it necessary to include the notion of autonomy in the definition. In another view, while the term "autonomy" might not be entirely satisfactory, the idea of non-dependence as a characteristic of unilateral acts did not deserve to be discussed altogether.

557. In yet another view, the deletion of the word "autonomous", included in previous definitions of unilateral acts, created certain difficulties. It would mean that unilateral acts included acts performed in connection with treaties. In view of the insistence of some members of the Commission on deleting the word, however, a compromise might be found by inserting the word "unilaterally" after "intention of". It would be construed in that context to refer to the autonomous nature of the act.

558. Several members referred to the words "and which is known to that State or international organization". These words were the object of criticism on various accounts.

559. Some members expressed concern that the Special Rapporteur, in his proposed definition, had departed, without justification, from the definition agreed upon at the fifty-first session by the Working Group. Whereas in the definition adopted by the Working Group the act was to be notified or otherwise made known to the State or international organization concerned, the only requirement now was that it should be known to the State or international organization. That wording was misleading because it could give the impression that the knowledge might have been acquired, for example, through espionage or the activities of intelligence services. But the State that was the author of the act must take some step to make it known to its addressee(s) or to the international community. Given the fact that paragraph 131 of the topical summary of the discussion in the Sixth Committee (A/CN.4/504) stated that the expression adopted in the Working Group had gained the support of delegations these members wondered why the Special Rapporteur had proceeded to change it. It was also noted that the reference to "State or international organization" failed to correspond to the words "one or more States or international organizations" used in the preceding clause, and it created confusion.

560. In another view, the addressee of a unilateral act must obviously know about it if the act was to produce legal effects. Yet the idea of knowledge raised questions regarding the point at which knowledge existed and how to determine whether the addressee possessed such knowledge. A State might obtain knowledge of the act only after a certain period of time. In that case, the question arose whether the unilateral act came into being only from the time of acquisition of the knowledge or from the time when the addressee State indicated that it had obtained knowledge of the act. Knowledge was, in this view, a concept that raised many more problems than it solved. There was no justification for eliminating the idea of the "public formulation" of the act. What counted, for both practical and theoretical reasons, was publicity of the formulation of the act rather than its reception.

[177] See *Yearbook . . . 1999*, vol. II (Part Two), p. 138, document A/54/10, para. 584.

561. Some other members felt that the clause under consideration did not belong in the definition since knowledge of the act was a condition of its validity.

562. Some members expressed support for the deletion of former article 1 on the scope of the draft articles. It was agreed, in this connection, that new draft article 1 contained the elements relating to the scope of application of the draft and, consequently, a specific article on the scope was unnecessary. It was also said, in connection with the scope of the draft, that there was no need for a provision along the lines of article 3 of the 1969 Vienna Convention concerning the legal force of international agreements not within the scope of the Convention and the provisions of international law which apply to them. The draft under consideration referred to unilateral acts and this term was broad enough to cover all unilateral expressions of will formulated by a State.

563. On the other hand, some members were of the view that a set of general provisions of the draft should also include a provision on scope. A typology of various categories of unilateral acts, not merely designated but accompanied by their respective definitions could be introduced at that point. It was added in this connection that some categories of unilateral acts should be excluded from the draft, for example those pertaining to the conclusion and application of treaties (ratification, reservations, etc.). A detailed list of acts to be excluded would have to be compiled and that called for the reintroduction of a draft article concerning scope comparable to articles 1 and 3 of the 1969 Vienna Convention. It should be specified that the draft articles were applicable only to unilateral acts of States, and not to acts of international organizations.

564. It was also suggested by some members that new article 1 could somehow be supplemented by a reference to the form in which a unilateral act could be expressed, along the lines of article 2, paragraph 1 (*a*), of the 1969 and 1986 Vienna Conventions. The article should make it clear that a unilateral act of a State may take the form of a declaration or otherwise any other acceptable form, orally or in written form. In such a manner, the diversity of unilateral acts of States revealed by State practice would be fully covered.

565. New draft article 2 was generally supported. It was said in this connection that the provision undoubtedly formed part of the general provisions of the draft. It recalled the inherent link between the State and the unilateral act. The expression of will reflected the legal personality of the State; it meant that, whatever its size or political importance, a State remained a State and that all States were each others' equals. The concept of legal personality was akin to the concept of equality of States. The capacity of the State to formulate unilateral acts was therefore inherent in the nature of the State.

566. Some drafting suggestions were made. One of them consisted in adding the words "in accordance with international law" at the end of the provision. Another suggestion was to add the words "liable to create rights and obligations at the international level". Still another suggestion was to replace the verb "to formulate" by the verb "to issue".

567. Speaking generally on new draft article 3, support was expressed for the article as a whole and for the fact that the Special Rapporteur had deleted paragraph 3 of former article 4 which dealt with the same subject matter and had now become new draft article 3. It was said in this connection that the inclusion of a formula taken from article 7 of the 1969 Vienna Convention did not seem appropriate in the context of the present draft.

568. According to one view, one issue which had been omitted but needed to be added was analogous to that dealt with in article 46 of the 1969 Vienna Convention, namely competence under internal law to conclude treaties. New draft article 3 specified the persons who were authorized to formulate unilateral acts on behalf of the State, but said nothing about whether, under constitutional or statutory provisions, some other organs of State had to be involved for the act to be validly formulated. The fact that a Head of State could ratify a treaty did not mean that there were no constitutional rules requiring prior authorization by parliament. In this view, it should first be established whether there were constitutional rules applicable to unilateral acts and, if not, to what extent the constitutional rules applicable to treaties could be applied by analogy, under constitutional law, to some of the unilateral acts being dealt with by the Commission. It should then be established whether infringement of the constitutional rules had implications for the validity of unilateral acts.

569. In another view, it would be more appropriate to defer a final judgement on new draft article 3 until it had been definitely determined, in article 1, which acts fell within the scope of the draft articles.

570. Support was expressed, in general, for paragraph 1 of new draft article 3. In one view the words "are considered as representatives" should be replaced by the words "are representatives". In another view, however, the presence of the words "are considered" created a rebuttable formulation which was necessary in the paragraph. Furthermore, the proposed change might create problems of incompatibility with the constitutions of some countries.

571. While in one view "technical ministers" should perhaps be included in the paragraph as representatives capable of formulating unilateral acts, in another view the very notion of "technical ministers" was not an appropriate one.

752. In one view, governmental institutions, especially plenary bodies and legislative organs should also be entitled to formulate unilateral acts. This view referred specifically to 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.

573. In this connection, the observation was made that if parliament were to be considered among the persons authorized to formulate unilateral acts on behalf of the State, it was doubtful whether it was covered by the present formulation of paragraph 2 and perhaps an express mention in paragraph 1 was necessary.

574. Referring to the written comment by one Government to also include in paragraph 1 heads of diplomatic missions, doubts were expressed as to whether they could perform unilateral acts without specific authorization.

575. Paragraph 2 was supported in general but a number of drafting observations were made in its regard. It was suggested to replace the words "a person" by the words "another person". It was also suggested that the words "practice of the States concerned" should be amended to reflect the fact that the practice referred to was that of the State author of the unilateral act in question. In one view, the words "other circumstances" might require further clarification, since that concept was relative in time and space. The formulation "circumstances in which the act was carried out" was suggested. In another view, the reference to "other circumstances" was very useful. In this view, assurances given by a State's agent or other authorized representative in the course of international court proceedings might perhaps be given specific mention in that regard in the commentary to article 3. The example of the *East Timor* case[178] was recalled in this connection.

576. According to one view, paragraph 2, in its present form, was too broad. Nobody could investigate the practice and circumstances of each State to decide whether a person who had formulated a unilateral act was authorized to act on behalf of his State. That would leave the door open for any junior official to formulate a unilateral act that would more than likely be invalidated subsequently. According to this view, the Commission should restrict the category of persons who could formulate unilateral acts under paragraph 2 to heads of diplomatic missions and other State ministers who had full authorization to do so for specific purposes only. In that way, it could draw the line between the general authority attributed to the three categories of persons in paragraph 1 and more limited authority attributed to the category of persons in paragraph 2.

577. In one view, new draft article 3 should be supplemented by a third paragraph consisting in the new draft article 4, on subsequent confirmation of an act formulated by a person not authorized for that purpose. According to this view, new draft article 3, further to this addition, could also be reformulated in the light of the following three principles: First, the transposition of the categories of authority identified by the law of treaties (Head of State, prime minister, minister for foreign affairs) to the law of unilateral acts was acceptable. Secondly, if the set of authorities qualified to engage the State unilaterally was to be extended, that should not bring in to play certain techniques specific to the law of treaties, such as full powers, but should be based on the position of the author of the unilateral act within the State apparatus or, in other words, on the way political power was exercised within the State and on the specific technical field in which the author of the unilateral act operated, subject to confirmation in both cases. Thirdly, the extension of the set of authorities to heads of diplomatic missions or permanent representatives of States to international organizations would be acceptable under the same conditions. As a result, in paragraph 1, the phrase "are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf" should be replaced by "are competent for the purpose of formulating unilateral acts on behalf of the State". In the French text of paragraph 2, the phrase *Une personne est considérée comme habilitée par l'État pour accomplir en son nom un acte unilatéral* was unwieldy and should be replaced by *Une personne est présumée compétente pour accomplir au nom de l'État un acte unilatéral*.

578. New draft article 4 was generally supported. Reservations were expressed however by some members on the word "expressly" relating to the confirmation. These members wondered why a unilateral act might not be confirmed tacitly since the confirmation of a unilateral act should be governed by the same rules as its formulation. The view was expressed in this connection that a unilateral act could be confirmed *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.

579. In the view of some members the contents of new draft article 4 could be incorporated as a third paragraph of new draft article 3.

580. The observation was made that in the French version the words *effets juridiques* should be placed in the singular.

581. On the other hand, there was one view which did not support the article because it was not sufficiently restrictive. In this view, if a person formulated a unilateral act without authority to do so, his State subsequently could not approve his unlawful action. Under the law of obligations, such a person acted illegally, and his action was therefore void *ab initio*. Accordingly, a State could not give subsequent validity to conduct that was originally unauthorized.

582. Support was expressed in the Commission for the deletion of former article 6, on the expression of consent.

583. On the question of silence and unilateral acts, which in his third report the Special Rapporteur dealt with in connection with the deletion of former article 6, differing views were expressed.

584. In the view of some members, silence could not be regarded as a unilateral act in the strict sense since it lacked intention which was one of the important elements of the definition of a unilateral act. Consequently, the question of silence and unilateral acts did not belong in the draft articles.

585. Other members were of a different view. They stressed that while some kinds of silence definitely did not and could not constitute a unilateral act, others might be described as an intentional "eloquent silence" expressive of acquiescence and therefore did constitute such an act. The *Temple of Preah Vihear* case[179] was recalled in this connection. It was further noted in this connection that silence could indeed constitute a real legal act, as

[178] *East Timor (Portugal* v. *Australia)*, *Judgment, I.C.J. Reports 1995*, p. 90.

[179] See footnote 174 above.

accepted by the doctrine. Silence indicating 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 modern times, it was also said, silent agreement played a major role in the development of general international law, including *jus cogens*. In numerous instances the Security Council had adopted resolutions, including those establishing ad hoc international tribunals, in an exercise of powers that were not accorded to it under the Charter of the United Nations—and the Member States had given tacit recognition to those decisions, which had consequently acquired force. Furthermore, silence could be tantamount to an admission in the area of the law of evidence. In a conflict 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.

586. Speaking generally on new draft article 5 some members stressed its relationship with a necessary provision on the conditions of validity of the unilateral act, which had not yet been formulated. A study on the conditions determining the validity of unilateral acts, it was said, would call for an examination of the possible material content of the act, its lawfulness in terms of international law, the absence of flaws in the manifestation of will, the requirement that the expression of will be known and the production of effects at the international level. Once those conditions had been identified and decided in detail, it would be easier to lay down appropriate rules governing invalidity.

587. The connection with a possible provision on revocation of unilateral acts was also pointed out. The point was made that if a unilateral act could be revoked, it was in the interest of the State to use that method rather than to invoke a cause of invalidity. The causes of invalidity, it was said, should essentially concern unilateral acts that were not revocable or, in other words, those linking the State formulating the act to another entity.

588. It was also suggested that 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 new draft article 5, 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*) of the draft article 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.

589. In this connection, it was also suggested that the draft should contain a provision on the incapacity of the State formulating a unilateral act. Any unilateral commitment of a State that was incompatible with the status of that State would 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.

590. Also speaking generally on new draft article 5, a view was expressed to the effect that the invalidation of a treaty or a unilateral act was the most far-reaching legal sanction available. There were other less extreme ways in which a legal system could condemn an act, for example, through inopposability. If the Security Council imposed an arms embargo and certain States concluded an agreement or formulated a unilateral act to the contrary, the agreement or act would not be invalidated but would simply not be carried into effect. If rule A prevailed over rule B, it did not necessarily follow that rule B must be invalid. According to the jurisprudence of the European Court of Justice, where a rule of domestic law was incompatible with a rule of Community law, the domestic rule was not held to be invalid but was merely inapplicable in specific cases.

591. As a matter of drafting, some members suggested that each ground of invalidity should be the object of a separate article accompanied by its own detailed commentary.

592. Regarding the *chapeau* of new draft article 5, a suggestion was made to make it clear that the State invoking the invalidity of a unilateral act was the one that formulated the act.

593. On subparagraph (*a*), attention was drawn to the need for drafting the provision in such a manner as to disassociate it from treaty terminology under the 1969 Vienna Convention. It was suggested in this connection not to use the word "consent" because of its treaty connotations.

594. Subparagraph (*c*) was welcome. Corruption, it was said, was being combated universally by legal instruments, such as the Inter-American Convention against Corruption. It was pondered, however, whether it was necessary to narrow down the possibility of corruption to "direct or indirect action by another State". The possibility could not be ruled out that the person formulating the unilateral act might be corrupted by another person or by an enterprise.

595. As regards subparagraph (*d*), the observation was made that the use of coercion on the person formulating the act 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 other subparagraphs were cases of *negotium nullum*, the subparagraph in question was a case of *non negotium*.

596. Concerning subparagraphs (*e*) and (*f*), the observation was made that they embodied causes of absolute invalidity stemming directly from the general international law and consequently acts falling under those two subparagraphs were invalid *ab initio*.

597. With special reference to subparagraph (*f*), the suggestion was made that it should take into account not only article 53 of the 1969 Vienna Convention, but also

article 64 of that Convention and that the definition of *jus cogens* could well be inserted into the draft.

598. Divergent views were expressed in connection with subparagraph (*g*) on unilateral acts which conflicted with a decision of the Security Council.

599. Some members supported the subparagraph although, in their view, it did not go far enough. Thus, in one view, the subparagraph should make it clear that a unilateral act should be invalid not only if it conflicted with a decision of the Security Council, but also if it went against the Charter of the United Nations. Furthermore, according to this view, an act should be invalid if it went against the rulings of international tribunals. In another view, a unilateral act could be invalidated not only if at the time of its formulation it conflicted with a decision of the Council, but also, at a later stage, if the Council's decision conflicting with the act was adopted after the formulation of the act. According to another view, Article 103 of the Charter stating that the obligations of the Charter would prevail was applicable not only to conflicting treaty provisions, but also to unilateral acts conflicting with obligations under the Charter.

600. Some members, although in principle supporting the subparagraph, were of the view that its scope should be limited to unilateral acts conflicting with a decision of the Security Council adopted under Chapter VII of the Charter of the United Nations.

601. On the other hand, a number of members were strongly opposed to the inclusion of subparagraph (*g*). In their view, there was no reason why a distinction should be made in this area with the 1969 Vienna Convention which kept a prudent silence on the matter. In their view, while it was true that under Article 103 of the Charter of the United Nations, obligations under the Charter would prevail over other treaty obligations, that did not mean that the treaty in question would be invalidated but only that specific provisions conflicting with the Charter would not be applicable. These members stressed that it had not been the intention of Article 103 to invalidate obligations under treaties. Those obligations might be suspended when a Charter obligation was activated by a Security Council decision but the treaty remained in force and became operative again once the Council decision was revoked. In the view of those members, the same should apply to unilateral acts.

602. Most members expressed doubts about subparagraph (*h*), on unilateral acts conflicting with a norm of fundamental importance to the domestic law of the State formulating it. These doubts were increased by what some members termed as a lack of an appropriate commentary explaining the subparagraph. In one view, it referred to the constitutional law of States, but, in a democracy, unilateral acts did not necessarily have to be ratified by national parliaments. The unilateral acts covered by the report were acts which had been formulated in some cases by the executive and could have an impact on legislative acts or on coordination between the different branches of government. In the view of some members, the subparagraph, as drafted, might be interpreted as giving priority to domestic law over commitments under international law, and this would be unacceptable. Some members also wondered whether the subparagraph might not lend itself to a situation whereby a State would utilize the provisions of its own national law to evade international obligations which it had assumed by a valid unilateral act.

603. A suggestion was made to formulate the subparagraph in such a way so as to bring out the fact that, at the time of the formulation of the act, an internal norm of fundamental importance to domestic or constitutional law had been breached concerning the capacity to assume international obligations or to formulate legal acts at the international level.

### 4. Special Rapporteur's concluding remarks

604. The Special Rapporteur, summing up the debate, stated that 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 his report applied to all unilateral acts of States. Subsequent reports would comprise specific rules for the various unilateral acts, which he would attempt to categorize 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.

605. The Special Rapporteur proposed that new draft articles 1 to 4 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.

606. As to new draft article 1, some saw that there had been an evolution from the restrictive approach taken in the first report[180] to the present, 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 of opinion, he had removed certain terms from the definition that he had seen as worth keeping.

[180] See footnote 161 above.

607. 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.

608. "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.

609. 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 further examined by the Working Group.

610. Although a majority of members had suggested that the word "unequivocal" should be deleted, the Special Rapporteur 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.

611. 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.

612. 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 present definition of unilateral acts was sufficiently broad.

613. There had been no substantive criticisms of article 2.

614. New draft article 3, paragraph 2, was an 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".

615. 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.

616. New draft article 5 would be considered in depth by the Working Group. Some members 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.

617. 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 the Special Rapporteur would cover the legal effects of acts.

618. In response to the question whether any pattern could be discerned from the replies of Governments to the questionnaire the Special Rapporteur said that some of the replies had been critical of the treatment of the topic, but had been very useful, and the suggestion to provide an addendum to the commentaries would be taken into account in subsequent reports.

619. As a result of the debate, the Commission decided to reconvene the Working Group on unilateral acts of States. It also decided to refer draft articles 1 to 4 to the Drafting Committee and draft article 5 to the Working Group for further consideration and study.

### 5. Establishment of the Working Group

620. The Working Group on unilateral acts of States held two preliminary meetings during the first part of the session on 19 and 20 May 2000. Because of the time needed for the advancement of other topics, the Working Group was not in a position to hold further meetings and, in particular, could not consider draft article 5 referred to it.

621. The Working Group reported that while, in the light of the above-mentioned circumstances, no final conclusions could be drawn from the meetings held, there was a strong measure of support in the Working Group for the following points concerning further work on the topic:

(*a*) The kind of unilateral acts with which the topic should be concerned are non-dependent acts in the sense that the legal effects they produce are not pre-determined by conventional or customary law but are established as to their nature and extent, by the will of the author State;

(*b*) The draft articles could be structured around a distinction between general rules which may be applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts;

(*c*) The Special Rapporteur could initiate the study of specific categories of unilateral acts by concentrating first on those acts which create obligations for the author State (promises), without prejudice to recognizing the existence of other categories of unilateral acts such as protest, waiver and recognition, which could be addressed at a later stage;

(*d*) Further efforts on the topic should pay particular attention to State practice. The Special Rapporteur and the Secretariat could, to the extent possible, continue efforts in gathering examples of State practice. Furthermore, in the light of the fact that only 12 States had replied to the questionnaire sent to Governments by the Secretariat in 1999 and that the replies received contain mostly views on the various points of the questionnaire but not enough materials on State practice, the Secretariat could renew its appeal to Governments which had not yet done so to reply to the questionnaire, stressing, in particular, the request that they furnish materials on their State practice.

622. The Commission did not have time to consider the report of the Working Group. However, the Commission agreed that it would be useful to seek the views of Governments on points (*a*), (*b*) and (*c*) above and that the Secretariat should proceed along the lines suggested in point (*d*) above.