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**Summary record of the 2811th meeting**

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## SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-SIXTH SESSION

*Held at Geneva from 5 July to 6 August 2004*

### 2811th MEETING

*Monday, 5 July 2004, at 3 p.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

#### Opening of the second part of the session

1. The CHAIRPERSON declared open the second part of the fifty-sixth session of the Commission and welcomed members back to Geneva.

#### Unilateral acts of States (A/CN.4/537, sect. D, A/CN.4/542<sup>1</sup>)

[Agenda item 5]

#### SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

2. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing his seventh report on the topic of unilateral acts of States (A/CN.4/542), said that, in accordance with the guidelines provided by the Commission in 2003,<sup>2</sup> his work centred on a study of the practice of States in respect of unilateral acts with a view to identifying the relevant rules for codification and progressive development. As such, it essentially constituted a compendium of State practice based on a wide range of sources. He thanked students and staff of the University of Málaga (Spain) for their valuable collaboration on the project.

3. Bibliographical material representative of the various regions and legal systems had been sifted, and major public international law journals, parliamentary texts, the statements of representatives of Governments and international organizations and decisions of international courts consulted. The comments made by Governments in the Sixth Committee had also been taken into account. Although the Commission had repeatedly requested

information from States on their practice, only a few significant responses had been received.

4. Of the many acts and declarations identified, it was primarily those that produced specific legal effects that had been selected for study. In addition, some practice in the context of international legal proceedings was presented, on the understanding that that was merely an initial overview of practice to be expanded upon in future, should the Commission deem it desirable.

5. Some criteria had had to be used to categorize the declarations and acts and, for that purpose, he had had recourse to the categories that commonly appeared in the doctrine. Three categories had thus been established: acts whereby a State assumed obligations (promise and recognition), acts whereby a State renounced a right (renunciation) and acts whereby a State asserted a right or legal claim (protest).

6. There was some disagreement as to whether notification was a unilateral act or rather an act whereby a State or other subject of international law was made aware of a situation, either *de jure* or *de facto*. From a formal standpoint it was certainly a unilateral act, although it often produced effects, not of itself, but by virtue of the situation to which it referred (promise, protest, recognition, extension of maritime boundaries, suspension of air traffic for security reasons, etc.). In many instances notification was expressly included in a treaty regime, through an obligation to give notification of certain actions.

7. State conduct that could produce legal effects similar to those of unilateral acts was dealt with separately, in view of its specific features and in accordance with the conclusions adopted in 2003 by the Commission. A brief theoretical overview of silence, acquiescence and estoppel and their relationship to unilateral acts was given, followed by a presentation of some relevant practice, chiefly of international courts.

8. Promise and recognition had been included among the acts whereby States assumed obligations. They were unilateral expressions of will formulated by a State individually or a number of States collectively whereby obligations were assumed and rights accorded to another State or States. While the focus of study was unilateral acts of States, the addressee could be either a State or another subject of international law, such as international organizations or other entities acting at the international legal level.

<sup>1</sup> Reproduced in *Yearbook ... 2004*, vol. II (Part One).

<sup>2</sup> See *Yearbook ... 2003*, vol. II (Part Two), chap. VII, sect. C, pp. 57–58, paras. 303–308.

9. In the first example given of promise (paragraph 18 of the report), which could also be characterized as recognition, the promise had been formulated by the competent Geneva authorities and the promisee had been an international organization, the United Nations. Other acts containing promises were mentioned in the report, such as the well-known declaration of 26 July 1956 by the Government of Egypt on the Suez Canal (para. 19). It had been interpreted in various ways: for some, it was an authentic unilateral act, whereas for others, including the Security Council, it ran counter to an earlier agreement whose terms could not be altered by a unilateral act. It was in any case a unilateral expression of will formulated publicly in writing by a State, with a specific intention and for a specific purpose.

10. Other examples of promise taken from international case law included the statement by Poland before PCIJ in the case concerning *Certain German Interests in Polish Upper Silesia*,<sup>3</sup> the territorial assurances given by Germany between 1935 and 1939<sup>4</sup> and the well-known statements by France relating to nuclear tests in the Pacific.<sup>5</sup>

11. An attempt had been made to show more recent practice in the form of acts containing promises relating to defence, humanitarian crises, monetary issues, the use of certain geographical areas, unilateral moratoria on the pursuit of specific activities, withdrawal from militarily occupied territories and debt forgiveness or the provision of economic assistance, among others. Another example was that of a promise by a State not to apply certain domestic regulations that might give rise to criticism or adverse effects in a third country.

12. Many promises had been excluded from the study on the grounds that the State that formulated them did not undertake legal obligations. For example, when a foreign minister expressed his Government's willingness to assist another State in making progress in regional negotiations, that was deemed to be a declaration of goodwill containing a political commitment to act in a certain manner, and, as such, was an act of a political nature that did not merit inclusion in the study.

13. Without going into the controversial question of the legal status of Taiwan—recognized as a province of the People's Republic of China by the United Nations—as an entity that engaged in certain actions in international relations, one might note the existence of promises formulated or contained in multilateral declarations, such as that adopted at the Second Meeting of Heads of State and Government between the Republic of China and the Countries of the Central American Isthmus.<sup>6</sup> Some promises elicited responses by States that considered themselves affected, responses that constituted protests or even recognition of a particular situation. Some such promises were made subject to specified conditions, which raised questions as

to whether they constituted unilateral acts *stricto sensu*. Such was the case with the statement in 2000 by the newly elected President of Taiwan that he would not declare Taiwan's independence and would not hold a referendum on the matter, provided Beijing launched no initiatives on that issue.<sup>7</sup> Beijing had later announced that it was prepared to negotiate on the question of reunification.<sup>8</sup>

14. Some declarations that were of interest for the Commission's purposes had been made in the context of disarmament negotiations: statements by China in 1971, 1972 and 1973<sup>9</sup> (paragraphs 34 to 36 of the report) and by the nuclear States in 1995 during the extension of the Treaty on the Non-Proliferation of Nuclear Weapons<sup>10</sup> (para. 37). More recent examples were the statement by the United States in 2003 in which it promised to guarantee the security of the regime of the Democratic People's Republic of Korea if that country agreed to abandon its nuclear programme<sup>11</sup> (para. 38) and declarations by the Islamic Republic of Iran on its development and use of nuclear energy (para. 39).

15. The above examples constituted unilateral expressions of will formulated by persons authorized to represent a State in its international relations (ministers for foreign affairs, ambassadors, delegates) and raised the difficult question of whether they were acts that actually had legal effects or only political effects. Was the State that formulated them bound to undertake certain conduct? Did failure to carry out the promise contained in the declaration entail the breach of a political commitment, or of a legal undertaking, in which case it would entail international responsibility on the part of the State? To answer such questions one must take into account the context of the declaration, which might shed light on its scope and consequences.

16. A number of conclusions that might serve as a basis for identifying principles relating to unilateral acts were set out at the end of the report.

17. Recognition was included, for methodological reasons, among the acts whereby States assumed obligations. Recognition was a politically motivated act that indisputably entailed legal consequences. No attempt was made to conduct an exhaustive study of that institution. It was merely pointed out that some precedents affirmed that recognition was based on a pre-existing fact; it did not create that fact. Most authors, however, regarded recognition as a unilateral manifestation of will emanating from a subject of international law whereby that subject took note of an existing situation and expressed the intention to regard it as lawful. Recognition affected the rights, obligations and political interests of the State that formulated it. It could be formulated through explicit declaration, orally or in writing, and by conclusive acts that did not constitute unilateral acts *stricto sensu*.

<sup>3</sup> See PCIJ judgment, p. 13.

<sup>4</sup> See *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1947*, vol. I, pp. 90–91.

<sup>5</sup> See ICJ judgments in the *Nuclear Tests (New Zealand v. France)* (paras. 40–44) and *Nuclear Tests (Australia v. France)* (paras. 34–41) cases.

<sup>6</sup> See *Chinese Yearbook of International Law and Affairs*, vol. 18 (1999–2000), p. 39–43.

<sup>7</sup> See *Annuaire français de droit international* (2000), p. 826.

<sup>8</sup> *Ibid.*

<sup>9</sup> See L. Focsaneanu, "La République populaire de Chine à l'ONU", *Annuaire français de droit international*, vol. 20 (1974), pp. 116–137.

<sup>10</sup> S/1995/261–265.

<sup>11</sup> See *Revue générale de droit international public*, vol. 107 (2003), pp. 440–442.

18. It was also worth noting that the act of recognition had no retroactive effect, as shown by jurisprudence, specifically in the case of *Eugène L. Didier, adm. et al. v. Chile*, in which the court declared that it was not a principle accepted by authors on international law that the recognition of a new State related back to a period prior to such recognition.

19. The report set out some of the practice relating to recognition of States, rather than of Governments, the former being more clear-cut than the latter. Instances were cited of acts that might entail legal consequences, particularly where statehood was not clear-cut, as in the case of the establishment of official relations by Belgium with the Palestine Liberation Organization<sup>12</sup> (paragraph 45 of the report).

20. More extensive treatment was given to the recent practice relating to recognition of States, particularly of the new States of Central and Eastern Europe, in which conditional recognition came into play. Some Governments had stated the criteria for such recognition: in connection with the recognition of Croatia, for example, the United Kingdom had stipulated that a country should have a clearly defined territory with a population, a Government with a prospect of retaining control and independence in its foreign relations.<sup>13</sup> Other interesting recent examples of recognition were the efforts of the European Community to establish common guidelines on recognition of the territories of the former Yugoslavia<sup>14</sup> (paragraphs 50 to 56 of the report) and recognition by the members of the European Community of the former Soviet Republics<sup>15</sup> (paras. 57–62). Recognition by virtue of membership of an international organization was discussed in paragraphs 65 and 66 of the report.

21. Instances of recognition of Governments were fewer and less clear-cut, though equally important. A number of European States preferred to withhold recognition where there were two rival Governments, and to wait until the situation became more stable. Many States clearly indicated that they took no position on Governments. The Spanish Government had expressly stated, in connection with the situation in Peru after Mr. Fujimori's coup, that it recognized only States.<sup>16</sup> Other cases of recognition in Latin America were detailed in paragraphs 70 and 72 of the report. In 1980 the Government of the United Kingdom had expressly indicated that it did not recognize Governments but that it recognized States in accordance with common international doctrine.<sup>17</sup>

22. Acts of recognition as well as of non-recognition were manifested in decisive steps taken, either through the continuation of diplomatic relations in the former case or, in the latter, through the withdrawal of ambassadors or other conduct signifying that the State did not recognize

the new Government. An example of the former had been the continuation of diplomatic relations with the Government of the Islamic Republic of Iran by some European States after the fall of the Shah.

23. The report also dealt with formal declarations or acts by Governments with respect to disputed territories such as those by the United Kingdom, which in Parliament and during an international press conference had made statements to the effect that it did not recognize the Republic of Northern Cyprus<sup>18</sup> and Chechnya<sup>19</sup> respectively. Likewise, in 1999, the Spanish Foreign Minister had announced that Spain had never recognized the annexation by Indonesia of East Timor.<sup>20</sup>

24. Acts of recognition need not refer only to States or Governments: they could also refer to a state of war. There were also declarations relating to the recognition of a State or announcing the normalization of diplomatic relations with it, provided that certain conditions were met, such as that by the Saudi Foreign Minister in February 2002 concerning the State of Israel which was conditional on its withdrawal from all occupied territories.

25. The second category of acts dealt with in the report was those whereby a State waived a right or legal claim. Some waivers involved abdication whereas others simply involved transfer. An example of the latter was King Hussein's announcement in 1988 that he was breaking legal and administrative ties between Jordan and the West Bank, a territory that Jordan no longer held, to make way for the Palestinians.<sup>21</sup> That declaration had been followed by measures including the dismissal of 21,000 Palestinian civil servants in the territory.<sup>22</sup>

26. International courts that had dealt with such cases had concluded that a State could not be presumed to have waived its rights. Waivers must be explicit, as indicated in the *United States Nationals in Morocco* case, where silence or acquiescence were not considered sufficient for a waiver to produce legal effects. A tacit waiver was deemed acceptable only where it arose from acts which were, or appeared to be, of an unequivocal nature, as was borne out by the statement of the French Government's representative in the *Free Zones of Upper Savoy and the District of Gex* case.

27. A recent example was the waiver of appeal by the Spanish Government in January 2002 against the British Government's decision not to extradite General Pinochet on humanitarian grounds.<sup>23</sup> Spain's subsequent conduct had been consistent with the terms of its statement.

28. The third category of acts described in the report was protest, namely unilateral declarations by States through

<sup>12</sup> *Ibid.*, vol. 84 (1980), p. 664.

<sup>13</sup> See *British Year Book of International Law*, 1992 (Oxford), vol. 63, pp. 636–637.

<sup>14</sup> See *Bulletin of the European Communities*, vol. 24, No. 12 (1991), p. 119.

<sup>15</sup> *Ibid.*, p. 121.

<sup>16</sup> See *Spanish Yearbook of International Law*, vol. II, 1992, p. 152.

<sup>17</sup> See *British Year Book of International Law*, 1980 (Oxford), vol. 51, p. 367.

<sup>18</sup> See *British Year Book of International Law*, 2000 (Oxford), vol. 71, p. 539.

<sup>19</sup> *Ibid.*, p. 536.

<sup>20</sup> See *Spanish Yearbook of International Law*, vol. 7 (1999–2000), p. 84–85.

<sup>21</sup> See *Revue générale de droit international public*, vol. 93 (1989), p. 141.

<sup>22</sup> *Ibid.*, p. 142.

<sup>23</sup> See *Spanish Yearbook of International Law*, vol. 7 (1999–2000), p. 96.



competent bodies not to recognize a given claim as legitimate or to challenge the validity of a given situation. A protest had the opposite effect to that of recognition and its purpose was to prevent a situation from becoming opposable to the protesting State. A protest consisted of reiterated acts reflecting a State's non-acceptance of a given situation and might be inferred from the bringing of a dispute before an international body or court. In all protests, explicit or otherwise, the protesting State and the object of the protest must be specified, except in the case of breaches of international obligations with serious consequences for the international community as a whole or of serious breaches of obligations under peremptory norms of general international law.

29. The report provided examples of cases examined by international courts including the *Fisheries* and the *Land, Island and Maritime Frontiers Dispute* cases. In the former, ICJ had stressed the need for a protest to be lodged with immediacy. Many protests were political in nature and thus did not fall within the scope of the study. However, some of the many protests lodged by the People's Republic of China concerning Taiwan had legal implications too. Following protests by China concerning the sale of arms by the United States to Taiwan, the two parties concerned had signed a joint communiqué reflecting the United States' intent to cease its long-term policy of arms sales to Taiwan. China had subsequently lodged protests about the continuation of that policy, which was not in line with the joint declaration. China had also protested against acts that might be construed as recognition or as a step towards it, as when the United States had granted privileges and immunities to the representatives of Taiwan, which China viewed as a flagrant breach of the agreements entered into upon the establishment of diplomatic relations with it.<sup>24</sup>

30. The invasion of Afghanistan had sparked numerous protests by Governments and groups of countries. Israel's proclamation of Jerusalem as the State capital had been protested against by Germany, France and the United States on the grounds that it was contrary to international law.<sup>25</sup> Egypt had protested against Israel's plan to construct a canal linking the Mediterranean to the Dead Sea, since it crossed part of the West-Bank occupied territory and was thus not in the spirit of the Camp David agreements.<sup>26</sup>

31. Some protests related to the consolidation of the legal situation in a given territory, as in the *Island of Bulama* and the *Chamizal* cases between the United Kingdom and Portugal and the United States and Mexico respectively, both of which had been resolved through arbitration. Many such protests related to the sovereignty of maritime areas, islands and archipelagos, as detailed in paragraphs 133 to 163 of the report. Other protests concerned disputes that had yet to be resolved, such as those concerning the Falklands Islands (Malvinas) and South Sandwich Islands between Argentina and the United Kingdom.

<sup>24</sup> See *Revue générale de droit international public*, vol. 85 (1981), pp. 118–119 and 388–389.

<sup>25</sup> *Ibid.*, pp. 182–183.

<sup>26</sup> *Ibid.*, pp. 866–867.

32. The last category dealt with in the report was forms of State conduct which might produce legal effects similar to those of unilateral acts. Some forms of conduct resulted in recognition or non-recognition, protests and even waivers, but seldom in promises; and had important legal effects in international relations, particularly in relation to the delimitation of areas (space, water, land). The report provided various examples of conduct protesting against the claims of another State that did not take the form of oral or written declarations. The report also contained some considerations on silence and estoppel which were closely related to unilateral acts. Some held that silence did not constitute a unilateral act because it did not produce legal effects *per se*, for which another prior act was required. For others, silence reflected tacit will.

33. Given that forms of conduct might result in recognition, protest or waiver, implicit recognition could be deduced from the establishment of diplomatic relations or the conclusion of an agreement with an entity not yet recognized as a State. Such acts of a legal nature might be characterized as forms of conduct expressing the State's consent to recognize the entity. The same could be said of the delimitation of a boundary.

34. The end of the report contained conclusions designed to facilitate consideration of the topic and to establish principles applicable in general and to particular cases. The report had been reduced to half its original size by selecting relevant acts and declarations and an effort had been made to comply with the request made by the Commission at its fifty-fifth session to provide examples of State practice relating to unilateral acts, based on the generally accepted categories of promise, recognition, protest and waiver. He suggested that a new definition should now be prepared by a working group, on the basis of the working definition adopted during the fifty-fifth session, taking into account forms of State conduct which produced legal effects similar to those of unilateral acts.

35. Mr. Sreenivasa RAO asked whether there was any assessment in the report of the legal effects produced by the acts enumerated, or whether that would be part of the further study suggested by the Special Rapporteur.

36. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that while an effort had been made to explain the context of the acts and to characterize them, the question of whether they produced legal effects was somewhat complex and required interpretation of the follow-up to the acts in question. That would be a matter for the Commission to determine in the course of the present session.

#### Statement by the Acting Legal Counsel

37. The CHAIRPERSON invited Mr. Ralph Zacklin, Acting Legal Counsel, to brief the Commission on the latest legal developments in the United Nations.

38. Mr. ZACKLIN (Acting Legal Counsel) said that in its resolution 58/77 of 9 December 2003, the General Assembly had taken note of the report of the Commission on the work of its fifty-fifth session and had recommended that it should continue work on the topics in its current programme, taking into account the comments

of Governments. He had been regularly briefed on the progress of the Commission's work during the first part of the current session, and had been pleased to learn of the likely completion of the first reading of draft articles on diplomatic protection during the current session. That would be an important achievement and, indeed, a notable effort, since work on the topic would have been completed in a relatively short period of time. He was confident that the efforts of the Special Rapporteur and the work of the Commission as a whole would receive well-deserved appreciation from Member States.

39. He had also followed with interest progress made during the first part of the session on the topics of responsibility of international organizations, international liability for injurious consequences arising out of acts not prohibited by international law, shared natural resources and fragmentation of international law. The interaction with Governments, and particularly the essential role played by their comments and views in the Commission's work, was of primary importance. General Assembly resolution 58/77 had reiterated the invitation to Governments to provide information on the topics of unilateral acts of States and shared natural resources and had also requested the Secretary-General to invite States and international organizations to submit information concerning their practice on the topic of responsibility of international organizations. The Office of Legal Affairs had already provided information on United Nations practice in that field. He looked forward to discussion in the second part of the session on the topics of unilateral acts of States and reservations to treaties.

40. Turning to administrative matters, he recalled that the United Nations continued to operate under strict financial constraints, which meant that many organs must function with fewer resources at their disposal. The Commission was no exception. General Assembly resolution 58/77 invited the Commission to continue to take measures to enhance its efficiency and productivity and cut costs at future sessions. He had no doubt that in conducting its meetings, planning its weekly programmes and considering the duration of its next session, the Commission would bear that appeal constantly in mind. However, the General Assembly had approved the Commission's conclusions regarding its documentation, which reflected its understanding of the specific nature of the Commission's work and needs. From the previous year's report of the Commission to the General Assembly on the work of its fifty-fifth session, he noted that the Commission and the Special Rapporteurs were fully aware of the need to achieve economies wherever possible in the overall volume of documentation. In that effort, it could count on the Secretariat's full support.

41. Pursuant to General Assembly resolution 58/269 of 23 December 2003, the Organization was preparing a strategic framework for the period 2006–2007 bearing in mind that much needed to be done to make the Organization more efficient and to ensure that its reports, meetings and other activities reflected changing global priorities. The strategic framework included the statement of the objective of each subprogramme, the appropriate strategy to obtain the objective, expected accomplishments and indicators of achievement. The part of the strategic

framework concerning the codification and progressive development of international law had been distributed to the Commission for review. It might wish to discuss relevant elements of the strategic framework in its planning group; he would welcome any comments in that connection.

42. Referring to developments in two areas in which the Commission had made an important contribution, he said that in March 2004 the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property had successfully resolved all outstanding issues relating to the draft United Nations convention on jurisdictional immunities of States and their property,<sup>27</sup> which it had recommended for adoption by the General Assembly. The adoption of the convention would bring to fruition the progressive development and codification of one of the very first topics selected for codification by the Commission in 1949,<sup>28</sup> and would undoubtedly contribute to legal certainty in the conduct of commercial relations in the globalized world. The five main outstanding issues—the concept of a State, determination of the commercial character of a contract, the concept of a State enterprise, problems related to contracts of employment and measures of constraint against State property—had finally been resolved thanks to the willingness of delegations to compromise. That had included reaching understandings in respect of certain articles and it was proposed that an annex containing those understandings should form an integral part of the Convention.

43. The second area concerned the International Criminal Court and the Assembly of States Parties to the Rome Statute of the International Criminal Court, an historic endeavour that from the outset had fully engaged the efforts of the Commission, which had prepared the first draft of its Statute.<sup>29</sup> With 94 States Parties to the Rome Statute, the International Criminal Court was now operational in The Hague. The second session of the Assembly of States Parties held in September 2003 had, *inter alia*, elected the Deputy Prosecutor, the Board of Directors of the Victims Trust Fund and the remaining members of the Committee on Budget and Finance. It had adopted the staff regulations of the Court and the 2004 budget, and had also established a secretariat and a trust fund for the participation of least-developed countries in the activities of the Assembly. On 31 December 2003, the United Nations Secretariat had ceased to act as the secretariat of the Assembly of States Parties and, pursuant to General Assembly resolution 58/79 of 9 December 2003, the Office of Legal Affairs had assisted in the smooth transition of work to the Assembly's own secretariat. The United Nations had played a crucial role in creating the institution and was concluding a relationship agreement to guide future cooperation between the United Nations and the Court. On 7 June 2004, the text of the negotiated draft relationship agreement had been initialled in The Hague and now required approval by the General Assembly and the Assembly of the States Parties before it could be signed and enter into force.

<sup>27</sup> See 2791st meeting, footnote 3.

<sup>28</sup> See 2791st meeting, footnote 4.

<sup>29</sup> *Yearbook ... 1994*, vol. II (Part Two), p. 26, para. 91.

44. The United Nations was also actively involved in the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. In its second year of operations, the Special Court for Sierra Leone had continued to lay the groundwork for the start of trials. On 16 September 2003, it had issued its latest indictment and arrest warrant against Santigie Borbor Kanu, thus bringing the number of indictments approved by the Court to 13. Two indictees—Johnny Paul Koroma and Charles Taylor—remained at large. On 28 January 2004, the Trial Chamber had decided that the cases of the nine accused currently in custody would be heard in three, rather than nine, separate trials. Hearings in the trial of Samuel Hinga Norman and others had started on 3 June 2004. The trial of Issa Hassan Sesay, Morris Kallon and Augustine Gbao, who were alleged to have held leadership positions in the Revolutionary United Front, had just begun.

45. The progress of the Special Court for Sierra Leone had been achieved against a background of constant funding insecurity. The US\$ 19 million needed for its first year of operations had come entirely from voluntary contributions, but pledges and contributions from States had not been sufficient to fund it for the whole of its projected lifespan, which would be a minimum of three years. The Secretary-General had therefore been obliged to seek a subvention of US\$ 40 million from the General Assembly to enable the Court to complete its work; and, in April 2004, the General Assembly had authorized up to US\$ 16.7 million from the regular budget for the period 1 July to 31 December 2004. That subvention would enable the Court to operate with less financial uncertainty during the present crucial trial phase.

46. After only two years of operation, the Special Court for Sierra Leone was already working on its completion and exit strategies, which would involve winding down its core activities, devising mechanisms to continue necessary residual activities and leaving behind a legacy of accountability for violations of international humanitarian law. It also hoped to contribute to legal reform efforts in Sierra Leone.

47. As for the situation in Cambodia, he recalled that, on 6 June 2003, the United Nations and Cambodia had signed an agreement on the establishment of Extraordinary Chambers in the existing courts of Cambodia for the prosecution of serious violations of Cambodian and international law committed during the period when the country had been known as Democratic Kampuchea.<sup>30</sup> Work had then begun on putting in place all the necessary arrangements for the agreement to enter into force. In September 2003, a full-time coordinator had been appointed, with the job of planning, securing and organizing the assistance that the United Nations would have to provide to Cambodia under the agreement. Two planning missions had visited Phnom Penh, in December 2003 and March 2004. Agreement had been reached on a range of key planning parameters and suitable premises had been identified, both for the Chambers themselves and for the Prosecutors' Office, the co-investigating judges and the support staff. Detailed budget estimates were currently

being prepared. The Secretary-General would report in depth to the General Assembly at its fifty-ninth session and would then launch an appeal for funds.

48. Unfortunately, Cambodia had not yet ratified the agreement. Following the elections in July 2003, the country's political parties had not been able, until the previous week, to overcome their differences, so it had not been possible to form a new Government. The Cambodian authorities had given the Secretary-General repeated assurances that, once the new National Assembly was operational, ratification of the agreement would be a priority.

49. With regard to the activities of *ad hoc* bodies and special committees dealing with specific aspects of the codification of international law and its development, he said that the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel had met for a week in April 2004 to discuss the Secretary-General's recommendation that the scope of the Convention should be extended to all United Nations operations. It had examined the implications and looked at different modalities for implementation, the possibilities being various short-term measures or a protocol, a revised text of which had been proposed by New Zealand. The draft protocol sought to eliminate the requirement of a declaration of exceptional risk by the Security Council or the General Assembly as a trigger for the application of the Convention to operations that did not automatically fall within its scope. The Committee had further addressed the definition of United Nations operations, the relationship between the draft protocol and the Convention, and the question of the responsibilities of host States and United Nations personnel. In its discussions on the relationship between the protective regime of the Convention and international humanitarian law, the Committee had had before it a proposal by Costa Rica that the application of the Convention should be limited to areas in which international humanitarian law did not apply. In its report, the Committee had recommended to the General Assembly that its mandate should be renewed for 2005.

50. Building on the results of a working group of the Sixth Committee, the Ad Hoc Committee on Terrorism, which had met the previous week, had succeeded in bringing closer together the divergent opinions on the elaboration of a comprehensive convention on international terrorism and an international convention for the suppression of acts of nuclear terrorism. Outstanding issues still to be resolved centred on the question of whether a comprehensive definition of terrorism was required. Discussions were also continuing on the scope of the draft comprehensive convention, and particularly on whether it should apply to parties to an armed conflict other than armed forces and the extent to which the activities of the military should be excluded. The core of the problem was, of course, the political issue of the limits to the exercise of the right to self-determination. Delegations were also considering whether the draft convention should stipulate that the provisions of sectoral anti-terrorism conventions prevailed over the provisions of the comprehensive convention.

<sup>30</sup> General Assembly resolution 57/228 B of 13 May 2003, annex.



51. The main remaining issue with regard to the draft international convention for the suppression of acts of nuclear terrorism was whether the activities of the armed forces of States should be excluded from its scope. Some delegations had expressed concern that an explicit exclusion might be viewed as a recognition of the legality of the use of nuclear weapons.

52. The fact that the United Nations Convention on the Law of the Sea, which had been in force for almost 10 years, had nearly 150 parties demonstrated the considerable progress made towards universal participation. The Convention and its two implementing agreements provided a firm foundation for considering how to tackle problems posing significant challenges for the law of the sea and for inter-agency cooperation and how to elaborate a management regime for new discoveries. In recent years, interest in ocean affairs had increased substantially, owing to concerns regarding ship-source pollution, the depletion of fishery resources in many areas of the world, the effects of destructive fishing practices and mounting threats to biodiversity, especially in areas beyond the limits of national jurisdictions. At the same time, new scientific discoveries relating to the biological resources of the oceans had led to the commercial development of pharmaceuticals and other products.

53. The fifth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, held from 7 to 11 June 2004, had discussed what action could be taken to address such issues. During the same week, the Global Marine Assessment International Workshop had considered proposals for a scientific evaluation of the state of the oceans, which would serve as a basis for decision-making on how to address issues such as degradation of the marine environment and the conservation and sustainable use of marine biodiversity. Despite the lack of agreement on how to deal with such issues, inter-agency cooperation and coordination would be enhanced by the establishment of the Oceans and Coastal Areas Network, which would serve as the general mechanism for inter-agency cooperation in ocean affairs.

54. The Commission on the Limits of the Continental Shelf had, in April 2004, refined its rules of procedure and merged its *modus operandi* with its internal procedure, the result being a single document annexed to the rules of procedure. It had also responded to a letter from the Russian Federation concerning its recommendations with regard to the Russian submission dated 20 December 2001 relating to the proposed outer limits of its continental shelf. On 17 May 2004, Brazil had become the second State party to submit information to the Commission on the Limits of the Continental Shelf concerning the establishment of the outer limits of its continental shelf. That submission would be considered at its fourteenth session, which would be held in August 2004.

55. In June 2004, after several years of deliberations, the Fourteenth Meeting of States Parties had reached agreement on a new agenda item, entitled "Report of the Secretary-General under article 319 for the information of States Parties on issues of a general nature, relevant to States Parties, that have arisen with respect to the United Nations Convention on the Law of the Sea". The item

could serve as the basis for the consideration of substantive issues relating to the Convention at future meetings.

56. With regard to UNCITRAL, as a result of enlargement, the International Trade Law Branch of the Office of Legal Affairs, which was located in Vienna and served as the UNCITRAL secretariat, had become the International Trade Law Division within that Office.

57. The main achievement of the thirty-seventh session of UNCITRAL, held from 14 to 25 June 2004, had been the adoption of the legislative guide on insolvency law, which was intended to assist national authorities and legislative bodies in establishing an efficient and effective legal framework to address the financial difficulties of debtors. UNCITRAL had also decided to undertake a revision of its 1994 Model Law on Procurement of Goods, Construction and Services in the light of new issues and practices that had arisen since the adoption of the Model Law, particularly in the area of electronic procurement. Its current work programme covered not only public procurement but also commercial arbitration, transport law, electronic commerce and security interests.

58. A number of activities had been undertaken by the International Trade Law Division in implementation of the UNCITRAL mandates on cooperation and coordination, the dissemination of information relating to international trade law, and the promotion of awareness, understanding, wider adoption and uniform interpretation and application of UNCITRAL legislative texts. In particular, the Division had organized training and technical assistance missions in several developing countries and countries in transition; held a colloquium on international commercial fraud, which had brought together experts from different countries and international organizations; and completed work on the digest of case law on the United Nations Convention on Contracts for the International Sale of Goods.

59. An important part of the mandate of the Office of Legal Affairs was to encourage and facilitate the dissemination and wider application of international law. Not only did it organize, in cooperation with UNITAR, courses and seminars on various topics of international law, but it prepared and issued numerous legal publications and kept the websites constantly updated. It was also expanding the United Nations audio-visual library in international law.

60. The International Fellowship Programme included courses and seminars on different topics of international law for young government officials and teachers of international law, in particular from developing countries. The programme was held in The Hague concurrently with The Hague Academy of International Law so as to enable the fellows to benefit from the courses offered at the Academy. Organizing such courses depended on a limited annual budget, but, thanks to cost-saving measures, together with contributions by some States which had agreed to host the event, it had been possible to organize a regional seminar in Quito in February 2004. The courses, taught in English and Spanish, had dealt with such topics as "International law in the new millennium", "The Inter-American system of human rights", "International humanitarian law", "Disputes resolution", "Recent developments in international criminal law", "Law of the sea"



and “The Multilateral trading system”. Consultations on the organization of regional courses in Africa or Asia were currently taking place, with the focus on areas of international law of direct relevance to the region for which the course was organized.

61. He welcomed the presence of the participants in the international law seminar, which was holding its fortieth session from 5 to 23 July 2004. The willingness of many members of the Commission to address the seminar was greatly appreciated.

62. Considerable progress had been made with publications issued by the Office of Legal Affairs. The backlog in the publication of the *United Nations Juridical Yearbook* having been finally eliminated, the focus was on accelerating the process of editing and translating. The volumes for 1998, 1999, 2000 and 2001 had already been edited and were in the process of publication. Volume I of the Index of the *Yearbook* had been available since 1999, while volume II (covering the years 1987 to 1999) was in preparation.

63. The Commission had already received copies of the sixth English edition of *The Work of the International Law Commission*. The previous edition, published in 1996, had been updated with a summary of the latest developments in the Commission’s work and the texts of new drafts and a new convention. The book also contained an updated and expanded bibliography, including references to relevant web sites. The other language versions would appear shortly. The *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice* had just been published and volume 23 of the *Reports of International Arbitral Awards* would appear shortly.

64. In the context of a larger computerization project being undertaken in the Office of Legal Affairs, the Codification Division had been converting several United Nations publications into electronic format for eventual dissemination over the Internet. In the case of the *Repertory of Practice of United Nations Organs*, the process had nearly been completed and the various volumes were available on the Internet, organized by study. Work was currently in progress on the *Yearbook of the International Law Commission* and it was expected that the English version would be made available in full-text search format on the Commission’s web site later in the year, with other language versions following in due course. Attention would then be turned to the *United Nations Juridical Yearbook* and some other publications, such as the proceedings of major international law conferences and the *Reports of International Arbitral Awards*.

65. In addition, the Codification Division maintained a series of websites devoted to the various bodies involved in the codification of international law, including the Sixth Committee, the International Law Commission and other *ad hoc* or special committees. Those websites offered immediate free access to a range of information relating to the activities of the bodies concerned, and official documentation in any of the six official languages could be downloaded.

66. The website maintained by the Treaty Section had become an integral part of the procedure adopted by the Office of Legal Affairs in carrying out many of the Secretary-General’s depositary functions. As a service to member Governments and other interested parties, the site provided instant online access, not only to the authentic texts of treaties deposited with the Secretary-General and the status of the signature and ratification of those treaties but also to all the depositary notifications that formed part of the daily work of government departments and permanent missions.

67. The website maintained by the Division for Ocean Affairs and the Law of the Sea contained, in addition to the wealth of information and documents already available, important new reports by the Secretary-General, including the annual reports on oceans and the law of the sea and the report of the Consultative Group on Flag State Implementation, which dealt with international requirements regarding ship safety, labour conditions, fisheries conservation and protection of the marine environment. The website of the International Trade Law Branch in Vienna had also become an important repository of information on activities in that field.

68. Such developments deserved detailed description, given that the development and codification of international law were central to the United Nations, which, while preserving the essential pillars of its purposes as laid down in its Charter, had also evolved greatly through its practice. All those who worked in the Office of Legal Affairs were conscious of the fact that they formed part of a common endeavour to establish and enhance the role of law in international relations.

69. The CHAIRPERSON thanked the Acting Legal Counsel for his statement and invited members to make comments and put questions.

70. Mr. MANSFIELD thanked the Acting Legal Counsel for his interesting and comprehensive survey. While he personally welcomed the attempt to draw up a strategic framework for the period 2006–2007, he wondered if it would not be advisable to look beyond the objective set out in the document and to examine the rationale behind the subprogramme. The time had come to explain why it was important to progressively develop and codify international law and why it was essential that interaction between States should be based on rules rather than power.

71. One of the difficulties encountered in devising strategies in complex areas with long-term objectives was ensuring that particular activities would contribute to the attainment of those objectives and that the indicators chosen were a true reflection of progress. In his opinion, it would be unwise to attach too much weight to specific indicators of achievement.

72. He welcomed the creation of the highly informative website on the law of the sea. Given that oceans were a cross-cutting issue, he wondered whether the Acting Legal Counsel could comment on any progress made in coordinating work among all the various agencies in the United Nations system which dealt with the law of the sea.

73. Mr. MOMTAZ wished to know whether the new instrument to extend the scope of legal protection under the Convention on the Safety of the United Nations and Associated Personnel would cover operations under Chapter VII of the Charter of United Nations, or whether coercive action by the United Nations would be excluded from the scope of application.

74. Mr. MATHESON asked whether the Acting Legal Counsel could say when the International Tribunal for Rwanda and the International Tribunal for the former Yugoslavia were likely to complete their work.

75. Mr. GALICKI said that he was pleased that the mandate of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel had been extended for a further year, as the work of that Committee appeared to be more complex and to require lengthier deliberation than that of the committee which had drafted the Convention.

76. Given the costs entailed by the multiplicity of judicial bodies acting in the sphere of international law, he requested the Acting Legal Counsel's opinion as to the advisability of supporting the creation of further courts or tribunals. He would also be grateful for an indication of the likelihood of imminent progress in efforts to elaborate a draft comprehensive convention on international terrorism or a draft international convention for the suppression of acts of nuclear terrorism, which appeared to have made little headway in the past year. The outcome of the work of the United Nations Ad Hoc Committee on Terrorism was very important for regional bodies such as CODEXTER of the Council of Europe.

77. Mr. CHEE asked what developments were taking place with regard to the United Nations Convention on the Law of the Sea and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Was conservation or utilization currently the predominant concern? Had States been persuaded that conservation was vital, given the scarcity of fishery resources? He believed that the solution lay in regional cooperation to safeguard fish stocks. Was such cooperation taking place?

78. Mr. ZACKLIN (Acting Legal Counsel), responding to Mr. Mansfield, said that while in principle it was a good idea to produce a strategic framework, in practice it had proved difficult to elaborate it in the language of the coordinating bodies of the United Nations system. Grave difficulties had been experienced in describing what accomplishments were expected and in deciding on indicators of achievement. Indeed, many members of the Committee for Programme and Coordination had expressed a preference for the language contained in the previous strategic framework. That was a sign that the bodies responsible for those matters were uncertain about specific aims. Controversy even surrounded the seemingly innocuous statement in paragraph 5.19 of the Medium-term plan for the period 2002–2005 that the objective of Programme 5, Subprogramme 3, was “to facilitate the progressive development and codification of international law and

to promote universal acceptance and implementation of instruments emanating from codification efforts undertaken by the United Nations”,<sup>31</sup> whereas Article 13, paragraph 1 a., of the Charter of the United Nations spoke merely of “encouraging the progressive development of international law and its codification”. The Office of Legal Affairs would, however, have to conform to the strategic framework, so the more it could be refined in terms of objective, strategy, expected accomplishments and indicators of achievement, the better it would be. To that end, the Office of Legal Affairs would be grateful for the Commission's comments on the rationale for its programme of work, so that they could be conveyed to the Committee for Programme and Coordination and the Fifth Committee of the General Assembly.

79. He thanked members for their praise of the law of the sea website. Referring to the question about progress in coordinating all of the agencies in the United Nations system which dealt with the law of the sea, he concurred with the view that the law of the sea was a cross-cutting area. The Division for Ocean Affairs and the Law of the Sea was only one part of the United Nations system dealing with those matters. Difficulties of coordination did not arise so much within the United Nations Secretariat as within the broader system. Under its new Director, the Division was, however, devoting much attention to the question of coordination and the subject was being considered in various inter-agency bodies.

80. The sense of urgency that had impelled the rapid drafting and adoption of the Convention on the Safety of United Nations and Associated Personnel had resulted in a text which had proved hard to implement. Consequently, the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel had the task of redressing the problems, so that the Convention could be widely ratified and properly implemented. Recent events had underscored both the need for the Convention and the obstacles to its implementation. Although the Ad Hoc Committee was discussing some very thorny issues, he hoped that a protocol could be adopted before long.

81. In response to the question concerning the International Tribunals for Rwanda and the former Yugoslavia, he said that the intention was to complete all prosecutions by the end of 2004, all first-instance trials by the end of 2008 and all appeals by the end of 2010. However, he was not sure that that calendar would be respected, despite assurances from the Presidents of the Tribunals that they intended to comply with it. It was in the nature of such tribunals that unforeseen circumstances, including financial problems, always arose. Although assessments for the two Tribunals in question were assessed contributions to the United Nations regular budget, arrears of some US\$ 90 million had built up, a situation which had led the United Nations Controller to freeze recruitment across the board. In response to that action, the Presidents of the Tribunals had announced that, although they would do their best to meet the above-mentioned deadlines, it would be virtually impossible to do so if some very important posts

<sup>31</sup> *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 6 (A/55/6/Rev.1), p. 29.*

remained vacant. Some slippage was therefore probably inevitable.

82. With regard to the multiplication of judicial bodies, he took the view that the establishment by the United Nations of tribunals in the fields of international criminal law and the law of the sea reflected perceived needs. There was a certain logic, but no strategy, behind their creation. Some members of ICJ believed that multiplication carried risks, but it had to be remembered that the United Nations was an organization which evolved over time. Nevertheless the Security Council and the General Assembly had some reservations about *ad hoc* and mixed criminal tribunals and an analysis of the lessons learnt from the establishment of the International Tribunals for Rwanda and the former Yugoslavia made it well-nigh inconceivable that the Security Council would set up another *ad hoc* tribunal. Other mechanisms must be found to address those needs. In the near future, the Secretary-General would be submitting what promised to be an interesting report to the Security Council on justice and the rule of law, which would describe the lessons learnt from the tribunals.

83. He was personally of the opinion that no progress was likely in the foreseeable future on a draft comprehensive convention on international terrorism, because of the extent to which the question was bound up with a number of political issues which could not be solved by drafting a universal convention. On the other hand, agreement on a convention on the suppression of acts of nuclear terrorism might be possible.

84. He regretted that his knowledge of fisheries was insufficient to answer Mr. Chee's detailed questions. He personally thought that the focus should be on conserving, rather than using, fish stocks. Member States might, however, take a different view, and he was confident that they would find a way of reconciling conservation and utilization. The International Seabed Authority had been in existence for almost 10 years and there was no doubt that new scientific advances and discoveries had prompted renewed interest in developments relating to the law of the sea beyond the limits of national jurisdiction. That impetus would probably have quite an impact on future developments in the law of the sea.

85. The CHAIRPERSON thanked the Acting Legal Counsel for his frank answers and for his historic announcement that a full-text search version of the *Yearbook of the International Law Commission* would be available on the Internet later in the year.

*The meeting rose at 5.50 p.m.*

## 2812th MEETING

*Tuesday, 6 July 2004, at 10 a.m.*

*Chairperson:* Mr. Teodor Viorel MELESCANU

*Present:* Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha,

Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Mr. Yamada.

### Unilateral acts of States (*continued*) (A/CN.4/537, sect. D, A/CN.4/542<sup>1</sup>)

[Agenda item 5]

#### SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BROWNLIE said that the Special Rapporteur's seventh report on unilateral acts of States (A/CN.4/542) showed that the Commission really had been inspired when it had asked him to concentrate on State practice; the result had been a very meaty and highly instructive report. Nevertheless, one unresolved difficulty was that the notion of a unilateral act had not yet been rigorously analysed. Secondly, a number of Commission members and Governments which had spoken in the Sixth Committee were far from convinced that the Commission's aim should be to draw up a set of draft articles. The United Kingdom, for example, would prefer an expository study picking out particular areas or aspects of State practice and the applicable law. Personally, he believed that such a study was a good idea and he was pleased that heavy reliance on analogies with the law of treaties seemed to have been abandoned.

2. Some categories of acts, like that of promise, were still problematical and the term used by States to describe their conduct should not always be accepted because categories were not sharply delimited. The very term unilateral "act" was too restrictive, as it also covered silence. Furthermore, extraordinary caution was required in including recognition: recognition of States or Governments should be excluded from the scope of the study, quite simply because the General Assembly certainly did not consider that that sensitive issue touching on the criteria of statehood formed part of the agenda on unilateral acts.

3. Mr. ECONOMIDES said that the Special Rapporteur was to be thanked for his report, which was probably the fullest and most informative document that existed on unilateral acts of States. He nevertheless had the impression that the Commission was turning in circles because the key concept it had chosen, the legal effects of unilateral acts, was unsuitable. The criterion that it should have selected was the international legal obligations assumed by the State making the unilateral declaration towards one or more States or the international community as a whole. In other words, it should be studying unilateral acts as a source of international law, although it must be admitted that practice was far from abundant. The decision handed down by ICJ in the *Nuclear Tests* case was an isolated case and the institution of unilateral acts creating international legal obligations was likely to remain uncommon, as States disliked it.

4. Mr. CHEE said that, since there seemed to be some confusion about the scope of the topic, some brainstorming

<sup>2</sup> Reproduced in *Yearbook ... 2004*, vol. II (Part One).