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Summary record of the 2815th meeting

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meet until 4.30 p.m., when the informal consultations on unilateral acts of States would begin under the chairmanship of Mr. Rodríguez Cedeño.

The meeting rose at 3.10 p.m.

2815th MEETING

Friday, 9 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, 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. Sepúlveda, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued)* (A/CN.4/537, sect. C, A/CN.4/540,¹ A/CN.4/543,² A/CN.4/L.661 and Corr.1, A/CN.4/L.662)

[Agenda item 4]

REPORT OF THE WORKING GROUP

1. The CHAIRPERSON invited the Special Rapporteur to report on the outcome of the deliberations in the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law.

2. Mr. Sreenivasa RAO (Special Rapporteur) said that the outcome of the Working Group's deliberations on the draft principles contained in his second report (A/CN.4/540), in the form of eight revised draft principles, was to be found in document A/CN.4/L.661 and Corr.1. The revised principles represented the fruits of an intensive collaborative effort on the part of the Working Group.

3. No preamble had yet been drafted. In order to expedite the proceedings, the Working Group recommended that the draft principles should be sent to the Drafting Committee with the instruction that they should be returned to the plenary together with a preamble. While the twelve principles that he had originally recommended had been compressed into eight, their essence had been retained and their clarity enhanced.

4. The eight revised draft principles read:

⁴ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

⁵ *Ibid.*

* Resumed from the 2809th meeting.

"1. Scope of application"

"The present draft principles apply in relation to damage caused by activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

"2. Use of terms"

"For the purposes of the present draft principles:

"(a) 'Damage' means significant damage caused to persons, property or the environment; and includes:

"(i) Loss of life or personal injury;

"(ii) Loss of, or damage to, property, including property which forms part of the cultural heritage;

"(iii) Loss or damage by impairment of the environment;

"(iv) The costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

"(v) The costs of reasonable response measures;

"(b) 'Environment' includes: natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; and the characteristic aspects of the landscape;

"(c) 'Hazardous activity' means an activity that has a risk of causing significant harm;

"(d) 'Operator' means any person in command or control of the activity at the time the incident causing transboundary damage occurs;

"(e) 'Transboundary damage' means damage caused in the territory or in other places outside the territory but under the jurisdiction or control of a State other than the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in principle 1 are carried out.

"3. Objective"

"The present draft principles aim at ensuring prompt and adequate compensation to victims of transboundary damage, including damage to the environment.

"4. Prompt and adequate compensation"

"1. States should take necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within their territory or in places under their jurisdiction or control.

"2. These measures should include the imposition of liability on the operator or, where appropriate, other

person or entity. Such liability should not require proof of fault but may be subject to appropriate legally prescribed conditions, limitations or exceptions, consistent with the objective of the present draft principles.

“3. The measures should also include the requirement on the operator to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

“4. In appropriate cases, the measures should include the requirement for the establishment of industry-wide funds at the national level.

“5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, States should also ensure that additional financial resources are allocated.

“5. Response action

“States, if necessary with the assistance of the operator, or, where appropriate, the operator, should take prompt and effective response action to any incident involving activities falling within the scope of the present principles with a view to minimizing any damage from the incident, including any transboundary damage. Such response action should include prompt notification, consultation and cooperation with all potentially affected States.

“6. Remedies

“1. States should provide appropriate procedures to ensure that compensation is provided in furtherance of draft principle 4 to victims of transboundary harm from hazardous activities. This may include recourse to international procedures or forms of settlement.

“2. To the extent necessary for this purpose, States should ensure that their domestic administrative and judicial mechanisms possess the necessary competence and provide effective remedies to such victims. These remedies should not be less prompt, adequate and effective than those available to their nationals and would include appropriate access to information necessary to pursue such remedies.

“7. Development of specific international regimes

“1. States should cooperate in the development of appropriate international agreements on a global or regional basis in order to prescribe arrangements regarding the prevention and response measures to be followed in respect of a particular class of hazardous activities as well as the compensation and insurance measures to be provided.

“2. Such agreements may include industry- and/or State-funded compensation funds to provide supplementary compensation in the event that the financial resources of the operator, including insurance, are insufficient to cover the losses suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

“8. Implementation

“1. States should adopt any legislative, regulatory and administrative measures that may be necessary to implement the present draft principles.

“2. The present draft principles and any implementing provisions should be applied without discrimination based on nationality, domicile or residence.

“3. States should cooperate with each other to implement the present draft principles consistent with their obligations under international law.”

5. The scope of application defined in revised draft principle 1 was the same as in the draft principles on prevention of transboundary harm from hazardous activities. In the definition of damage in revised draft principle 2 (a) (ii), the phrase “including property which forms part of the cultural heritage” was a significant and highly progressive addition. Revised draft principle 2 (a) (iii) referred explicitly to “loss or damage by impairment of the environment”, again an important consideration in the context of the admissibility of claims.

6. It was noteworthy that, in revised draft principle 2 (a) (iv), the environment had been defined as “including natural resources”, thus merging two concepts which were often treated separately in other instruments. Revised draft principle 2 (a) (v) referred to the costs of “reasonable” response measures, a real innovation which provided for greater flexibility when determining consequences than had earlier formulations that had lacked that reference.

7. The phrase “any person in command or control”, in the definition of “operator” in revised draft principle 2 (d), provided for greater flexibility in identifying the operator than the earlier wording “command and control”. In revised draft principle 2 (e), the definition of transboundary damage might seem somewhat circumlocutory, but had been carefully crafted to ensure that all possible bases for State jurisdiction were covered.

8. Revised draft principle 3 set out the objective of the exercise. It was a fairly concise text, but several other relevant objectives would be set forth in the commentary. The term “victims” had been used in the general sense, so as to cover States as well as victims on both sides of a geographical boundary. Damage to the environment was specifically mentioned.

9. Revised draft principle 4, paragraph 1, though recommendatory in nature, emphasized the need for States to take *necessary* measures, an important nuance that would be explained in the commentary. The reference in revised draft principle 4, paragraph 2, to “proof of fault” was an important addition that was tantamount to speaking of the applicable law and established a benchmark for the development of State practice. Likewise, the phrase “consistent with the objective of the present draft principles” was of great significance, as it meant that States did not have unlimited discretion in that regard and that the basic objectives of the draft principles had to be kept in view. The requirement set out in paragraph 3 of the same provision, that the operator should establish and maintain

financial security, was important as many operators failed to do so. The reference in paragraph 4 to the establishment of industry-wide funds at the national level was intended to ensure that the somewhat loose arrangements that now existed under international treaties were incorporated effectively into national systems. Revised draft principle 4, paragraph 5, referring to the allocation of additional financial resources to ensure that adequate compensation was provided, was an important and innovative proposition, the like of which was to be found nowhere in the literature.

10. The highly compressed revised draft principle 5, on response action, appeared deceptively simple, yet it was the product of careful consideration. In revised draft principle 6, paragraph 1, on remedies, the phrase “this may include recourse to international procedures or forms of settlement” added an important dimension to the draft. It made it clear that application to a court was only one of a number of possibilities for obtaining remedies, which must be exploited with a view to ensuring that expeditious and equitable compensation was provided, at no cost to the victims. In revised draft principle 6, paragraph 2, the notion of “effective” remedies was crucial.

11. With regard to paragraph 1 of revised draft principle 7, which covered the development of specific international arrangements, the Working Group had recognized that the draft principles must remain at a very general level, giving States all the options but urging them to make more specific bilateral or multilateral arrangements in respect of particular activities. Implementation of the instrument was addressed in revised draft principle 8.

12. Many members of the Working Group and others had felt that the Commission should produce draft articles rather than draft principles, in line with the draft articles on prevention. Others had felt that in order to expedite the work and show results to the General Assembly, the approach of presenting the ideas as draft principles should be maintained at the present stage, without prejudice to a review of the question of form on the basis of comments to be made in the Sixth Committee. Be that as it might, it was to be hoped that the draft principles could be referred to the Drafting Committee along with a request that a preamble be drafted for subsequent consideration in plenary.

13. Mr. KATEKA said that although the Working Group had expressed a preference for the elaboration of draft principles, it had also been suggested that the words “draft articles” could be inserted, in square brackets, after the words “Revised draft principles” that formed the heading of the text. That would serve as a reminder that the production of draft articles was also a possible option, without prejudice to the final form that the instrument would take.

14. Paragraph 2 of the report of the Working Group referred to a general understanding within the Working Group that issues concerning global commons were different and would require a separate mandate. It was his understanding, however, that some members had expressed the view that the global commons were indeed part of the Commission’s mandate and that it should first deal with transboundary damage within national

jurisdictions and then consider the issue of the global commons. Paragraph 2 as it stood ruled out that possibility and prejudiced the future consideration of the issue. He therefore proposed that it be revised to read: “At the outset, there was a general understanding within the Working Group that it would first concentrate on transboundary damage within national jurisdictions and then consider issues of global commons later.”

15. Mr. Sreenivasa RAO (Special Rapporteur) said that in his second report he had attempted to define the global commons as various areas beyond national jurisdiction that were affected not by a single activity, but by a number of activities worldwide that interacted and caused certain effects. Certain areas were not the Commission’s concern as they had already been or were being addressed by specific regimes: Antarctica, the seabed and land-based sources of pollution, for example. Given the existence of such mechanisms and the difficulty of identifying a single source for a single event and establishing a causal connection between the two, he had recommended that the issue of the global commons should not be addressed. There was one particular instance, however, in which the global commons had to be dealt with: if the source pollution was from a hazardous activity that had effects beyond national jurisdiction. The Working Group had briefly discussed that problem and had agreed that to bring in the subject would destabilize the entire structure of the draft. It had considered that the matter required further reflection and should not be ignored, but that there was no opportunity for such reflection in the present context, in view of the need to deal expeditiously with the work on the draft.

16. Mr. GAJA said that the Commission could certainly not revise the report of the Working Group but that, in taking note of it, it could reserve its position on the question of the global commons. Furthermore, the text submitted had been formulated as a series of draft principles and would have to be completely recast if it was to be transformed into a series of draft articles. On the other hand, the Commission could suggest that the Drafting Committee should give an indication of what changes might be involved if the text were to take the form of draft articles instead of draft principles.

17. Mr. GALICKI supported those comments. The set of principles that had been presented by the Working Group had been constructed in that form and could not now be transformed into draft articles. It had been decided to work on that basis, and if in future the Commission decided to present the principles as articles, the structure of the draft could then be changed. For now, however, the text should be retained as it stood.

18. Mr. KATEKA said that he begged to differ with Mr. Gaja on the status of reports by working groups. A heated debate had taken place on that subject in the first part of the session and members had said that such reports were submitted to the Commission, not merely for information, but for consideration and decision. It was therefore incorrect to say that the report in question could not now be revised. The Commission could adopt the report of the Working Group with a modification along the lines that he had suggested.

19. The CHAIRPERSON said that the Commission could undoubtedly adopt or reject a report by a subsidiary body, but that it had also reiterated the principle whereby members of working groups who had already had an opportunity to express their viewpoints should not reopen the debate in plenary. He suggested that the Commission should take note of the report of the Working Group and refer the revised draft principles contained therein to the Drafting Committee, on the understanding that all comments made during the discussion, including those relating to the global commons and the final outcome of the exercise, would be taken into account.

20. After a procedural discussion in which Mr. KATEKA and Mr. GAJA participated, the CHAIRPERSON said that he would take it that his suggestion was adopted.

It was so decided.

Unilateral acts of States (continued)
(A/CN.4/537, sect. D, A/CN.4/542³)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)**

21. Mr. FOMBA commended the wealth of information on State practice that had been brought together in the seventh report on unilateral acts of States (A/CN.4/542). In connection with the reference, in a footnote to paragraph 71 of the report, to the action taken by ECOWAS, he drew attention to article 4 (p) of the Constitutive Act of the African Union, which provided for the “condemnation and rejection of unconstitutional changes of Governments”. He also drew attention to the definition of a unilateral act as contained in the jurisprudence of ICJ. On 11 April 1975, the Head of State of Mali had made the following statement:

Mali extends over 1,240,000 square kilometres, and we cannot justify fighting for a scrap of territory 150 kilometres long. Even if the Organization of African Unity Commission decides objectively that the frontier line passes through Bamako, my Government will comply with the decision.⁴

That statement, which had not formed part of the negotiations between the two parties, had not been interpreted by the Court as being a unilateral act having legal implications. Recalling the *Nuclear Tests* cases, the Court had ruled that declarations “concerning legal or factual situations” could “have the effect of creating legal obligations” (*Nuclear Tests (Australia v. France)* and (*New Zealand v. France*), p. 267, para. 43, and p. 472, para. 46, respectively) for the State on whose behalf they were made, but it was only “when it is the intention of the State making the declaration that it should become bound according to its terms” that “that intention confers on the declaration the character of a legal undertaking” (*ibid.*). Thus it all depended on the intention of the State in question and it was for the Court to “form its own view of the meaning

and scope intended by the author of a unilateral declaration which may create a legal obligation” (*ibid.*, p. 269, para. 48, and p. 474, para. 50).

22. Turning to the details of the report, he expressed concern at the use of the word “may” in the title of the first chapter, which suggested that there might be some room for uncertainty, whereas in fact such acts and declarations constituted *lex lata*. Practice was not presumed, but identified, and certain legal effects flowed from it.

23. From a theoretical and philosophical point of view, the existence and importance of unilateral acts were undeniable. Indeed, as unilateral manifestations of will, whether they came from States or international organizations, whether they were expressed individually or collectively, in writing or orally, and whatever their purpose, unilateral acts set in motion a bilateral or multilateral system of relations, the intellectual, decisional and operational workings of which were not always clear and which did not always fall within an acceptable legal framework. In his view, the regulating mechanism for the whole system should be the principle of good faith, *acta sunt servanda*. If, for example, a State made a declaration promising to remit or cancel the debt of another State, the beneficiary State considered that to be not merely an intention but a legal commitment, the effects of which would amount to an acquired right. Hence the need to identify practice and to assess its scope. The Special Rapporteur had, with commendable thoroughness, followed recommendation 6 of the Working Group, which contained a list of questions to serve as the basis for an orderly classification of State practice.⁵ He looked forward to the next report, which would, in accordance with recommendation 7 of the Working Group, examine the legal rules that could be deduced from the material accumulated by the Special Rapporteur.

24. With regard to the ultimate form that the text should take, everything depended on the assessment that would be made of State practice and the lessons that could be drawn therefrom. The Special Rapporteur had drawn interesting distinctions, at both the theoretical and the practical level, between acts whereby States assumed obligations, acts whereby a State waived a right or a legal claim, acts whereby a State reaffirmed a right or a legal claim, forms of State conduct which could produce legal effects similar to those of unilateral acts and silence and estoppel as principles modifying some State acts. All those issues would, however, repay further careful attention.

25. Paragraph 32 of the report posed the question as to whether an act that had conditions attached to it could be regarded as a unilateral act *stricto sensu*. In his view, it could, at any rate at the beginning of the decision process, so long as it could be regarded as a unilateral manifestation of will attributable to a single subject of international law. After all, even a treaty could be considered the result of convergent unilateral acts. Indeed, Mr. Kolodkin had apparently gone still further, equating unilateral acts with treaty relations and thus denying the existence of such acts as a separate category.

** Resumed from the 2813th meeting.

³ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

⁷ Cited in the ICJ judgment in the *Frontier Dispute* case, p. 571, para. 36.

⁸ See 2811th meeting, footnote 2.

26. The Special Rapporteur's attempt to list the forms of State conduct that might produce legal effects was commendable and he looked forward to its further development. As for silence and estoppel, the Special Rapporteur had rightly recalled the role allotted to silence in some multilateral conventions, such as article 65, paragraph 2, of the 1969 Vienna Convention, or article 252 of the United Nations Convention on the Law of the Sea.

27. Turning to the conclusions of the report, he endorsed the suggestions contained in paragraphs 229 and 231 that a draft definition of a unilateral act should be elaborated on the basis of the draft adopted by the Working Group in 2003,⁶ with the focus on the legal effects, and that a provision should be elaborated that would reflect a State's capacity to formulate such acts. On the other hand, a far more extensive analysis of the practice was required before it could be concluded that there existed certain rules that were generally applicable to all relevant unilateral acts and forms of conduct, even though the Special Rapporteur's preliminary conclusions contained some useful indications (paras. 205–228).

28. The next step should be to analyse such legal issues as the form that a legal regime governing unilateral acts would take, for which the 1969 Vienna Convention could provide a useful model. A working group could be set up to assist the Special Rapporteur, not only in establishing a methodology, as Mr. Gaja had suggested, but also in defining the concept of a unilateral act and the capacity of a State to formulate it. The Working Group could even undertake a comprehensive critical evaluation of existing practice with a view to determining the feasibility of the topic and the approach that should be adopted, before the Commission embarked on a detailed text. Given the great complexity and sensitivity of the topic, both politically and legally, the views of the "end users"—namely, States—should be sought.

29. Whatever form the text ultimately took, States must, in the interests of transparency, security and efficiency, know precisely what constituted a unilateral act and what legal effects it might have. There were two possible courses of action. The ideal solution would be to draw up a convention setting out a detailed legal regime governing unilateral acts. A less ambitious possibility would be to draw up guidelines for States, based on the fundamental principle of good faith, but with all the principles clearly spelt out.

30. Mr. KOLODKIN said that he had not intended to give the impression that unilateral acts did not exist as a separate category but always related in some way to a treaty. That was not his view. Although difficult to define, unilateral acts undoubtedly existed. A clear example was provided by a unilateral act consisting of the waiver of personal or State immunity: that was an act having direct legal effects yet requiring no reaction—neither acquiescence, nor even tacit consent—from its addressee.

31. Mr. PAMBOU-TCHIVOUNDA said that the report was doubly significant. Firstly, it proved that the inclusion of the topic in the Commission's agenda was justified,

provided that it was buttressed by as many examples of State practice as possible. Careful scrutiny would then confirm that the Commission's work had not been in vain, or that some fine-tuning would dispel at least some of the doubts that had been raised. Secondly, as had been pointed out in the debate in the Sixth Committee, progress would be difficult unless further information was provided on State practice, and the report fully made up for any previous shortcomings in that respect. Indeed, the report was rich not only in examples of State practice but also in learned commentaries that clarified the key elements involved, together with a wealth of information on case law. The materials were present for the construction of a regime or regimes governing the unilateral acts of States.

32. Matters of substance were also raised, such as the question, posed in paragraph 33, of whether conditionality meant that a declaration was not a unilateral act *stricto sensu*. His response to that question was that conditionality constituted no grounds for excluding such declarations from the Commission's study. Paragraph 214, for example, showed that it was an essential feature of many unilateral declarations. He would begin by making a few remarks on the contribution of conditionality to the topic, before turning to two other key notions: the purpose and autonomy of unilateral acts.

33. The State practice cited in the report illustrated the cross-cutting nature of conditionality: not only was it present in declarations involving recognition or promise, but it might even be implicit in waivers. That, however, was not the main reason why conditionality was useful. It also had a technical role to play as it was a determining factor in the motives for the formulation of a unilateral act, in that the system of prerequisites within which it took place—whether the European Community or North–South cooperation—would deprive that act of its spontaneous character, especially when, as the system in question was not conceived unilaterally by the author of the recognition or promise, the author would be indissolubly linked thereto. Although unilateral acts, especially acts of recognition, had always been regarded as discretionary, conditionality could make recognition, or a promise to remit a country's debt, binding, with only the timing left to the judgement of the State. Since conditionality was bound up with the reasons for an act, it should thus be included in any analysis of the validity of unilateral legal acts.

34. The purpose of an act likewise had to be taken into account, because the reasons behind it were indicative of its legal or political nature. The Commission should deal solely with unilateral legal acts, even though unilateral acts were generally considered to be the standard means of entering into an undertaking which could comprise both political and legal elements. Certain *de facto* considerations which might lead a State to act, react or refrain from acting were sometimes not unrelated to notions such as "State", "sovereignty" and "territory" which already had legal definitions. Since the State was a legal construct, any act which called a State into question, or which took it into account, had to be governed by legal norms. Similarly, the rights which a State acting freely as a sovereign entity might create through the adoption of a particular stance, or even the legal status that such a position might

⁹ *Ibid.*

help to confer on another entity of a different nature, had to be assessed by reference to legal norms. The State which had taken the position in question was then obliged to conduct itself accordingly, either by acting or refraining from action. In the interests of all parties, the *quid pro quo* of the freedom to express a position therefore consisted in being bound to preserve the security of relations created by the stance taken. The fact that such relations were exclusively political highlighted the important role played by conduct—and of other attitudes of the State, only some of which were referred to in the seventh report—*vis-à-vis* unilateral legal acts of a State, or their application through the mechanism of the interpretation of that act. In order to preserve the balance between freedom of action and security of relations, any future regime should contain a provision equivalent to article 18 of the 1969 and 1986 Vienna Conventions, obliging States to refrain from any conduct or attitude that would defeat the object and purpose of the initial act.

35. Another related issue was, of course, the withdrawal of the initial act. At some point in the future, the Commission would have to turn its attention to the methods for terminating the initial act and decide if withdrawal of the initial act required the consent of the initial addressee.

36. Similarly, when a duly ascertained breach of international law harmed the essential interests of a State, it was logical that the reaction to that breach should be subjected to legal scrutiny in order to safeguard the interests that were in jeopardy. The *de facto* and *de jure* circumstances determining an act of recognition, protest or promise, or even a claim to estoppel, could help to reveal whether, irrespective of its purpose, the act could be qualified as a unilateral legal act of a State. The report had the virtue of presenting a mixture of *de facto* and *de jure* situations, careful comparison of which would make it possible to say if legal or political issues were at stake and, on that basis, to specify which unilateral acts were political in nature and which were legal in nature.

37. Furthermore, as paragraph 213 of the report indicated, the purpose of an act could be a factor making for its autonomy which, in turn, was a vital consideration when it came to qualifying it as a unilateral act of a State. Was the legal purpose of the act a criterion for autonomy? In his opinion, the answer to that question depended on the domain involved and, in that respect, the range of legal issues within which it could be said that a State acted autonomously had not yet been clarified. However, practice showed that the autonomy of a unilateral act also depended on it having a sole purpose, which in turn explained why it was considered necessary to emphasize the unequivocal character of unilateral acts of States.

38. He also wondered whether another criterion for autonomy was the fact that the act stemmed from an individual initiative of a State. In his view, autonomy meant that a unilateral legal act was not linked in any way with consultations prior to its formulation. It emanated from a State and was formulated by a State acting individually and expressing its will through bodies which had the power under international law to engage the State in its external relations. The Commission should deal only

with expressions of will that had nothing whatsoever to do with joint communiqués, joint declarations, joint acts or final acts. By extension, autonomy signified that, *a fortiori*, unilateral legal acts were not in any way connected with the process of elaborating or applying international treaties. Unilateral legal acts, as a means of entering into a commitment or creating a right therefore constituted a mechanism which was sufficient in itself.

39. The specific nature of a unilateral act as a source of international law depended on four criteria: the status of the author State as a subject of international law, the status of the addressee as a subject of international law, the status as institutions of international law of the modalities whereby and the framework within which the act was formulated and the legal nature of the matter covered by the unilateral act of a State. Those indicators made it possible to distinguish between political and legal acts. Unilateral political acts should be excluded from the scope of the rules that the Commission should draft forthwith. That future regime should include an introduction devoted to a number of clauses defining recognition, promise and other concepts. It would be helpful if those definitions were to be included in the draft rules in order to make them part of positive codified law. The introduction should also contain a clear exposition of the scope of application of the rules. A first part should be devoted to common or general rules and common denominators. A second part should comprise specific and particular rules and a third part should tackle, *inter alia*, the classic methods of dispute settlement. The eight existing draft articles should not be set aside, but updated.

40. Mr. MOMTAZ said that the information compiled on State practice would serve as an invaluable reference source and basis for the further study of unilateral acts, making it possible to identify the rules applicable to them *stricto sensu* with a view to the preparation of draft articles. It would also be extremely useful in considering the scope of unilateral acts and the question as to whether, under international law, they constituted a formal source of rules, in the same way as treaties and customary law. To that end some information could usefully have been provided not only on how unilateral acts came into being, but also on the reactions that they provoked, particularly in the case of promises. For instance, what was the reaction of States when promises made to them, whether positive or negative, were not honoured? Were there cases in which the responsibility of the offending State had been invoked? The existence of such practice would confirm or invalidate the hypothesis that unilateral acts could give rise to international legal obligations for the author State. It would also confirm the legal status of promises addressed not to one State in particular, but to the international community as a whole.

41. ICJ had considered the legal status of such acts in the *Military and Paramilitary Activities in and against Nicaragua* case, in connection with a communication sent by the Junta in power in Nicaragua to OAS in which it had promised to organize free elections.⁷ After examining

⁷ See Report on the Situation of Human Rights in the Republic of Nicaragua, Inter-American Commission on Human Rights (OEA/Ser.L/V/II.53, document 25, introduction).

the communication, the Court had been unable to find anything therein from which it could be inferred that any legal undertaking had been intended. That was undoubtedly an example of a unilateral political act. It would be interesting to know what the criteria were for drawing a distinction between unilateral acts of a political nature and those of a legal nature which gave rise to an obligation for the author State.

42. In the *Frontier Dispute* case, the Court's judgment had been clearer, to the effect that there were no grounds for interpreting the declaration by the Head of State of Mali as a unilateral act with legal implications, pointing out that even greater caution must be shown in the case of a unilateral declaration not directed to any particular recipient.

43. He would have welcomed greater detail on the reasons given by States protesting against unilateral acts. A case in point, one with which he was familiar, was the protest by the United States against the Islamic Republic of Iran's maritime claims,⁸ referred to in paragraph 158 of the report. The protest, like many others lodged by the United States, was a response to State practice based on the interpretation of certain provisions of the United Nations Convention on the Law of the Sea that the United States deemed excessive and harmful not only to its own interests but to those of the international community as a whole. It concerned the way in which the Islamic Republic of Iran had drawn straight baselines to measure the breadth of the territorial sea. However, it was to be noted that the relevant provision was very vague and laid down no objective criterion for drawing straight baselines, merely stating that the drawing of such baselines must not depart to any appreciable extent from the general direction of the coast. Such acts might be taken into consideration when identifying State practice, both for the State drawing the straight baseline and for the State protesting against it on the grounds that it was not in conformity with the provisions of the Convention. Against that background one would have to study unilateral acts not as existing international law but as sources of law. While it was indisputable that those unilateral acts depended on a treaty, the fact remained that they must be considered from the standpoint of State practice, thereby contributing to progressive development of international law.

44. Such concerns could be allayed by providing answers to the questions contained in the Working Group's recommendation 6 for an orderly classification of State practice. It was important to understand the reasons for the unilateral act, particularly in the case of promises and protests. Greater attention should also be paid to the circumstances in which a unilateral commitment could be modified or withdrawn. That, he reiterated, would entail considering the entire "lifespan" of the unilateral act, including the reactions it provoked. It was for the Special Rapporteur to find the answers to those questions by reference to the practice described in the report. Only thereafter, in accordance with recommendation 7, should he begin to identify legal rules applicable to unilateral acts.

45. Mr. KEMICHA said that the report contained a wealth of information on State practice which would serve as a basis for an interesting codification exercise. Pursuant to recommendations 6 and 7 of the Working Group, the Special Rapporteur had organized the acts into three main categories, as described in paragraph 8 of the report. Some indication should now be given to the Special Rapporteur as to whether the Commission endorsed that classification.

46. Without wishing in any way to belittle the great effort made, he noted that the information contained in paragraphs 13 to 178 on the three different categories was above all factual and documentary, since the unilateral acts listed did not give rise to any particular objections. The discussion should be extended to include an in-depth study of forms of State conduct which might produce legal effects similar to those of unilateral acts, as well as of silence and estoppel as principles modifying some State acts. The Special Rapporteur had taken care to mention those forms of expression by States without qualifying them as unilateral acts, as if to encourage discussion. Perhaps the Commission should go beyond the restrictive approach whereby a legal concept was often linked to a particular school of thought and legal practice, given that international arbitral and judicial case law had long since abandoned such artificial distinctions. Likewise, it would be a mistake to confine the study to unilateral acts *stricto sensu* and to ignore State conduct that might produce far more important legal effects. In that connection he endorsed the Special Rapporteur's conclusion that the term "act" would have to be defined in relation to its legal effects rather than in terms of its formal aspects.

47. Mr. CHEE congratulated the Special Rapporteur on the wealth of information contained in a report on a difficult subject that had been tackled with scholarly objectivity. A particular problem was the definition of the term "unilateral act". In the literature, Jennings and Watts referred to acts performed by a single State, which nevertheless had effects upon the legal position of other States, particularly—but not exclusively—in their relations with the actor State, and noted that a unilateral act might take the form of State conduct.⁹ While there was widespread agreement that protest, notification and renunciation were categories of unilateral acts, promise, recognition, acquiescence, revocation and declaration also had their advocates. While some authors held that a unilateral act was revocable, Tomuschat maintained that some were irrevocable.¹⁰ That was an indication of the difficulty of providing a standard definition of a unilateral act.

48. Moreover, the changing structure of international law caused by the evolution of international relations discouraged unilateralism on the part of States. Yet, even allowing for the growing trend towards international cooperation and the growing influence of the United Nations on the preservation of peaceful inter-State relations, unilateral acts such as declaration, notification,

³ R. Y. Jennings and A. D. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. I, *Peace* (Harlow, Longman, 1992), p. 1188.

⁴ C. Tomuschat, "International law: Ensuring the survival of mankind on the eve of a new century", *Collected Courses of the Hague Academy of International Law*, vol. 281 (The Hague, Martinus Nijhoff, 1999), p. 346, para. 58.

² *The Law of the Sea: Current Developments in State Practice No. IV* (United Nations publication, Sales No. E.95.V.10), pp. 147–149.

protest, renunciation and acquiescence would nevertheless continue to have a bearing on legal relations between States, and thus warranted due attention. Estoppel, too, deserved a place in international law. The ICJ judgment of 1974 in the *Nuclear Tests (Australia v. France)* case had recognized that declarations made by way of unilateral acts, concerning legal or factual situations, might have the effect of creating legal obligations. That ruling had been reaffirmed by the Court in its judgment in the *Frontier Dispute* case, in which it had held that it was for the Court to form its own view of the meaning and scope intended by the author of a unilateral declaration which might create a legal obligation. The Court nonetheless emphasized that the decisive element in validating the assumption of an obligation by the author State was the intention of that State. From an examination of the legal bases for the binding force of unilateral declarations, especially in the *Nuclear Tests* case, it was apparent that their binding nature was rooted in the rule of *pacta sunt servanda* and the principle of good faith. In that connection, Fiedler noted that recognition, protest, notification and renunciation had become legal institutions of international law in their own right and that their legal force was based directly upon international customary law.¹¹

49. Turning to specific aspects of the report, he said that while paragraph 19 of the report cited the 1956 Egyptian declaration guaranteeing freedom of passage for all ships through the Suez canal as a unilateral act successfully resolving the nationalization issue, Professor Alfred Rubin pointed out that the declaration had been rejected by the Suez Canal Users Association, which called into question the declaration's validity.¹² In paragraphs 89 to 179 of the report, factual descriptions of cases of protest were provided without any legal analysis. Some discussion of the legal aspects of protest would have given the Commission a sounder basis on which to continue its deliberations. The report might usefully have considered acquiescence rather than silence as a principle modifying some State acts.

50. Referring to paragraph 196, he challenged the statement by a member of the Commission that no category of acts which would constitute estoppel acts seemed to exist. There were ample instances in case law of international tribunals applying the doctrine of estoppel in their decisions, the *Temple of Preah Vihear* case being one such instance. Similarly, the conclusion in paragraph 199 that there was some doctrinal confusion about the basis and scope of estoppel was unwarranted, given the extensive references to the doctrine of estoppel by arbitral tribunals and ICJ. In that connection he drew attention to two articles in the 1957 *British Year Book of International Law* by MacGibbon¹³ and Bowett,¹⁴ Mr. Brownlie relied heavily

¹¹ W. Fiedler, "Unilateral acts in international law", in *Encyclopedia of Public International Law*, vol. IV, R. Bernhardt (ed.) (Amsterdam, Elsevier, 2000), p. 1018.

¹² A. P. Rubin, "The international legal effects of unilateral declarations", *American Journal of International Law* (Washington, D.C.), vol. 71 (1977), p. 6.

¹³ I. C. MacGibbon, "Customary international law and acquiescence", *British Year Book of International Law*, 1957 (London), vol. 33, p. 115.

¹⁴ D. W. Bowett, "Estoppel before international tribunals and its relations to acquiescence", *ibid.*, p. 176.

on the latter in the sixth edition of his *Principles of Public International Law*.¹⁵

Organization of work of the session (*continued*)

[Agenda item 1]

51. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of international liability for injurious consequences arising out of acts not prohibited by international law would be composed of Mr. Daoudi, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao and Mr. Yamada, with Mr. Comissário Afonso (Rapporteur) (*ex officio*).

The meeting rose at 1 p.m.

2816th MEETING

Tuesday, 13 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/537, sect. D, A/CN.4/542¹)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. NIEHAUS thanked the Special Rapporteur for the seventh report on unilateral acts of States (A/CN.4/542), which represented an important contribution to the study of a particularly difficult and controversial question.

2. Although the vast majority of scholars considered that unilateral acts undoubtedly existed, that view was not shared by all. Apart from the difficulty of establishing a clear distinction between the legal and political aspects of the question, the crucial issue related to the intention or will of the State. However, the definition of a unilateral act of a State as "a statement expressing the will or consent by which that State purports to create obligations or other legal effects under international law"² did not cover

¹⁵ Brownlie, *op. cit.* (2795th meeting, footnote 6).

¹ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

² *Yearbook ... 2003*, vol. II (Part Two), chap. VII, sect. C, p. 57, para. 306 (recommendation 1).