

Document:-
A/CN.4/SR.2526

Summary record of the 2526th meeting

Topic:
Unilateral acts of States

Extract from the Yearbook of the International Law Commission:-
1998, vol. I

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area. The absence of an all-embracing, uniform and precise definition added to the difficulty of the task, since the nature of unilateral acts could be fully grasped only on the basis of the peculiarities displayed by their various types.

46. As to the grounds for the binding force of unilateral acts, it was not until the *Nuclear Tests* cases that ICJ had deduced that effect from good faith, a principle of customary international law. However, that principle concerned only some acts, such as recognition, protest, notification and renunciation, which had become legal institutions of international law in their own right whose legal force was based directly on customary international law. As the declaring State was in a position to create law unilaterally under certain circumstances and on the basis of a valid customary law, it was unquestionable that that type of act could have a considerable impact. Two questions of concern on which the Special Rapporteur should focus was that of whether a unilateral declaration was of an irrevocable nature and that of the status of the representative of a State who was able to commit the State through a unilateral act.

47. Mr. GOCO, stressing the complexity and scope of the topic, as shown by the debate, asked for some indications about the direction the Commission's study would take.

48. Mr. LUKASHUK said that, at first, the Special Rapporteur should confine himself to the topic of purely unilateral acts so as to arrive at a concrete result; otherwise, the task might be impossible.

49. Mr. PAMBOU-TCHIVOUNDA, supported by Mr. THIAM, said that, as the debate had not been concluded, the question of what direction to give to the work was premature.

50. Mr. ECONOMIDES said that there were three currents of opinion in the Commission: that expressed by the Special Rapporteur in favour of restricting consideration to formal and autonomous acts which created rights and obligations at the international level; that which called, in addition, for the consideration of other non-formal or non-autonomous acts which also made it possible to create rights and obligations in international law; and a point of view which he personally supported and which consisted in including formal autonomous acts in the topic and making the decision on the other acts contingent on a more thorough examination of the preliminary study.

51. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that it was important to give some thought to the approach the Commission should adopt. The focus of the report was the attempt to define unilateral acts or, in any case, formal acts as a mechanism for creating norms. It would be unrealistic to claim to produce an exhaustive work of codification, but it was incumbent on the Commission to decide above all whether the instrument, that is the formal declaration, could, regardless of its content, be the subject of special rules which differed from those of the law of treaties.

The meeting rose at 1.10 p.m.

2526th MEETING

Thursday, 7 May 1998, at 10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/483, sect. F, A/CN.4/486,¹ A/CN.4/L.558)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. DUGARD said that it was useful to define the topic at the outset, but definitions were always dangerous, particularly if they were intended to set strict parameters on the discussion. Presumably the definition contained in paragraph 170 of the first report on unilateral acts of States (A/CN.4/486) was not offered as an absolute statement of the law on the subject, for the definition would require modification. He shared the view that estoppel must be included in the study.

2. The doctrine of unilateral acts was based on a handful of judicial decisions, particularly in the *Nuclear Tests* cases in 1974, but hard cases made bad law. At the time, ICJ had wanted to avoid pronouncing on the issue. It had sought an escape route from what was a political case and found it in the principle of unilateral acts. Its decision was currently discussed as if it had been uncontroversial, but at the time it had been likened to the Court's 1966 judgment in the *South West Africa* cases, which had provided an example of judicial avoidance of confrontation with political authority. He could agree with the statement made by Judge ad hoc Sir Garfield Barwick on that occasion to the effect that there was nothing to warrant the conclusion that those making the statements intended to enter into a solemn international obligation and it was more natural to conclude that the statements were statements of policy (see pages 448-449 of his dissenting opinion). That view had been shared at the time by most academic writers.

3. Those considerations pointed to the difficult distinction to be drawn between legal and political acts. The Special Rapporteur had tried to define political acts in paragraph 43 of the first report. However, it was doubtful

¹ Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

whether there could ever be a satisfactory definition and the Commission would have to live with the fact that it was always hard to distinguish between unilateral acts intended to have legal consequences and those intended to be purely political, for the distinction would depend on the contexts in which the statements were made. That point had been emphasized by the Court in 1986 in the *Frontier Dispute* case in which its judgment showed a reluctance to find that Mali intended to bind itself. In contrast to the *Nuclear Tests* cases, Mali could have entered into a binding agreement if it had so wished. The same reluctance to draw legal consequences from a unilateral act was found in the earlier advisory opinion in 1950 in the *International Status of South West Africa* case, in which the Court failed to find that a statement made by South Africa before the United Nations in 1947 was legally binding. In short, the judicial decisions were confusing and needed more attention from the Commission.

4. In his definition of a unilateral act, the Special Rapporteur referred to the requirement of publicity, a factor also stressed by ICJ in the *Nuclear Tests* case when it held that an undertaking if given publicly and with the intent to be bound, even if not made in the course of negotiations, was in fact binding. The need for publicity had been confirmed in its order of 22 September 1995.² On the other hand, the statement at issue in the *Legal Status of Eastern Greenland* case had not been a public one. The element of publicity should therefore be given more attention than it had received in the first report.

5. It was not the Commission's practice to analyse judicial decisions in detail, but it should consider the handful of cases dealing with the legal consequences of unilateral acts because they provided the basis for the current study. As had already been pointed out, there was no reference to unilateral acts in Article 38 of the Statute of ICJ and the topic was not carefully developed by doctrine. In fact, the doctrine relied heavily on the few decisions of ICJ, which presented a confusing picture. The Commission's task was to make some sense out of that confusion.

6. Mr. PELLET, taking up Mr. Dugard's point about publicity, said he was not sure that in the *Legal Status of Eastern Greenland* case the decision of PCIJ should be regarded as based on a unilateral act. It could be seen as being based on a verbal agreement. Furthermore, the publicity must work to the benefit of the party to which the unilateral statement was addressed. In the *Nuclear Tests* cases, France had been deemed to have given an assurance to the international community as a whole. In the *Legal Status of Eastern Greenland* case the unilateral statement, if it was seen to be unilateral, had been addressed to Norway. The point was that the party which drew rights from the unilateral commitment must be aware of the promise made. In the matter of publicity, Mr. Dugard was wrong to set the *Legal Status of Eastern Greenland* case in opposition to the *Nuclear Tests* cases.

7. Mr. BROWNLIE said that he would be disturbed if the Commission went in for psychological and political

analysis of decisions of ICJ. Much law did in fact emerge from cases regarded at the time as narrowly based. It was true that special circumstances had tempted ICJ to walk off stage in the *Nuclear Tests* cases, and there was reasonable scepticism about the application of the principle of good faith to the particular facts. But that was another matter, and States did currently rely on the *Nuclear Tests* cases.

8. The sources of the law on unilateral acts were very varied and included much State practice. The Commission should avoid taking the view that the law depended on a small number of maverick decisions of ICJ. As early as 1962, Erik Suy had published what was still a very useful account of unilateral acts without being attacked for having "invented" the subject.³

9. Mr. FERRARI BRAVO said that he had doubts about the scope of France's unilateral declaration in a case in which ICJ had in the end handed down a decision favourable to France. But it was possible to draw a lesson from the *Nuclear Tests* cases and from the advisory opinion of ICJ on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.⁴ It was clear that in that context unilateral acts had a different value from the value they might have in a different context. It was quite possible to create a theory of the law of nuclear weapons—an anti-law of international law, as he had called it in his declaration appended to the advisory opinion. The nuclear weapons context consisted of things which both existed and did not exist, or of acts which might not be true unilateral acts. One example was the guarantees given by nuclear-weapon States to non-nuclear-weapon States in the framework of the Treaty on the Non-Proliferation of Nuclear Weapons.

10. The Commission could probably determine whether a mini-theory of unilateral acts could be established on the basis of a consideration of the problem of nuclear weapons. But, as he had said at the beginning of the discussion of the topic, no general theory of unilateral acts existed. Specific theories could exist on certain points of international law which called for unilateral action, for example in matters connected with nuclear weapons, and it was that context which formed the existing international law on the topic. The General Assembly, however, had not authorized the Commission to deal with unilateral acts on the basis of an examination of the problem of nuclear weapons. The Assembly could, of course, be asked whether that was its wish. The Commission might be able to classify unilateral acts performed in connection with nuclear weapons, but it was unlikely that any classification could be exported beyond the bounds of that sphere.

11. Mr. GOCO said he too had doubts about the division of unilateral acts into political and legal acts. He asked whether it was the case that, when a State committed an act having international repercussions, the act created legal obligations but, in the absence of international repercussions, it was a purely political act. The Special Rapporteur defined political acts in terms of the political will of the State performing the act and argued that the binding

² Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v. France) Case*, I.C.J. Reports 1995, pp. 288 et seq., at p. 305.

³ E. Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1962).

⁴ I.C.J. Reports 1996, p. 66.

nature of the commitment lay in morality and politics. In the final analysis, it was the intention of the State which determined the nature of the act.

12. At the height of the dispute between Malaysia and the Philippines about a part of Borneo, an amendment to the Constitution of the Philippines concerning the delimitation of its national territory had included the disputed part of Borneo.⁵ The amendment was a political act and it had international implications in that it affected Malaysia, but it was not clear that it created legal obligations.

13. Mr. ECONOMIDES said he agreed with Mr. Brownlie that international case law, especially of ICJ, although very important did not play an exclusive role in connection with unilateral acts. Since that case law was so important, it would be helpful if the secretariat, in conjunction with the Special Rapporteur, could furnish, not necessarily immediately, a document listing all the decisions of ICJ on unilateral acts and reproducing the relevant passages.

14. Mr. DUGARD said that Mr. Pellet's comment focused on the crux of the issue: the conflict between the decision of PCIJ in the *Legal Status of Eastern Greenland* case and the decision of ICJ in the *Nuclear Tests* cases. PCIJ had held that legal consequences could only be attached to a unilateral act committed in the course of negotiations, whereas ICJ had been prepared to free the topic from the context of negotiations, thereby taking it one step further. Mr. Pellet was right to say that the Commission must examine the implications of the two cases. The key issue was whether a unilateral act must be made in the context of negotiations in order to have legal consequences.

15. Mr. HE said that at the forty-ninth session, the Working Group on unilateral acts of States had put forward a number of reasons why the Commission should consider the topic.⁶ It had stressed that States had frequently carried out unilateral acts with the intention of producing legal effects and that the significance of such acts had been growing as a result of political, economic and technological developments. It had argued that, in the interest of legal security and of certainty, predictability and stability in international relations, efforts should be made to clarify the functioning of that kind of act and its legal consequences and to state the applicable law.

16. On the basis of the Working Group's conclusions⁷ the Special Rapporteur had set out the purpose of studying the topic: to identify the constituent elements of a definition of unilateral legal acts. He had tried to limit the scope of the topic by excluding a number of unilateral acts. There was no problem with the exclusion of the unilateral acts of international organizations, acts connected with the international responsibility of States, or acts which were in conformity with international law but led to international liability. However, difficulties might arise with

regard to the exclusion of political acts viewed as distinct from legal acts. A clear-cut distinction between the two types of act was very difficult. Most political issues had some legal content and vice versa. For example, were the nuclear guarantees provided by nuclear Powers individually or collectively mainly political or legal in nature? Nothing in international law appeared to preclude such guarantees from producing international legal effects and thus from being regulated by international law.

17. Again, there was no problem with the exclusion of acts falling within the treaty sphere, but difficulties did arise in connection with the acts identified by the Special Rapporteur as not constituting international legal acts in the strict sense. Silence, for example, was not a legal act in the strict sense but rather an expression of will. However, by silence a State might acquire rights and assume obligations in specific cases, so that it might be regarded as a unilateral legal act, although it was difficult to equate silence with a typical unilateral act such as a declaration.

18. He agreed with the Special Rapporteur that the main thrust of the topic should be concerned with declarations, the most common formal unilateral acts of a State. Other substantive unilateral acts, such as recognition, promise, renunciation and protest, should however also be addressed since they too were relevant to any study of the matter. The general approach to the study should therefore be much broader than that advocated by the Special Rapporteur.

19. The existing title of the topic, "Unilateral acts of States", which covered a variety of unilateral acts as reflected in the legal writings, was more appropriate than "Unilateral legal acts of States". It was a little early to decide on the form of the outcome of the Commission's work, though he personally would favour a guideline or doctrinal study. Regardless of the ultimate form, however, nothing could detract from the value of the current study on such a difficult and sensitive aspect of international law.

20. Mr. HAFNER, commenting first on various points raised during the discussion, said that reference had been made, in connection with Austria, to negative security guarantees. In the case in point, Austria had never accepted any such guarantees but had only made a statement indicating that it considered them to be binding. Notwithstanding Mr. Ferrari Bravo's views, he was not sure that the Commission should not take up the issue of nuclear weapons, for the subject of the topic was unilateral acts, irrespective of their content. Mention had also been made of the Russian Federation's withdrawal from certain declarations made by the former Union of Soviet Socialist Republics (USSR). His understanding was that the Russian Federation had taken that course on the ground that there had been a change of circumstances and that, consequently, it had no longer been able to maintain what had been a unilateral promise. The incident in question was not therefore necessarily proof that unilateral declarations were not binding. It might, however, be wise to take a closer look at the actual circumstances in which the withdrawal had been made. He shared Mr. Brownlie's view as to the relative nature of the statements made in ICJ and had some doubts about the judgments in the *Nuclear Tests* cases. If those judgments were applied in

⁵ Republic Act No. 5446 of 18 September 1968, section 2 (United Nations, Legislative Series, *National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and to Fishing and Conservation of the Living Resources of the Sea* (Sales No. E/F.70.V.9), p. 111).

⁶ *Yearbook* . . . 1997, vol. II (Part Two), p. 64, para. 196.

⁷ See 2524th meeting, footnote 3.

diplomatic practice, it would place a burden on States which they might not be prepared to accept in their daily practice. Also, he fully supported Mr. Economides' request for a document setting forth the various international decisions made with regard to unilateral acts.

21. The Special Rapporteur, who was to be commended on an excellent first report in a most complicated area of international law, had endeavoured to pinpoint the basic theory underlying unilateral acts. The problem, however, was that theories never went unchallenged. Also, they could not be subject to, but could only be the result of, rules. Yet it would be difficult to agree on certain rules in the absence of a generally accepted theory. The Special Rapporteur should therefore explain the theory on which his conclusions were based, but should go no further. In the light of the foregoing, he would himself refrain from discussing theoretical assumptions and would rather concentrate on the practical legal consequences.

22. The first substantive issue discussed in the first report concerned acts that should be excluded from the scope of the study. He was convinced that the Commission should not deal with the unilateral acts of international organizations since, as rightly pointed out in the Sixth Committee, such acts differed substantially from the unilateral acts of States. It was inconceivable that the Commission was meant to discuss the legal effect of, say, the resolutions and directives that emanated from the European Union, the decisions of its Court of Justice or regulations of the European Commission, or that it should, for example, endeavour to assess the legal basis of the most recent Security Council draft resolution on a third ad hoc tribunal.

23. Again, it would not be wise to deal with political acts of States or to seek to define them, since the Commission's task was to define legal acts, in other words, acts having legal consequences. He fully agreed that acts contrary to international law should be excluded from the study, but great caution must be exercised. For instance, it was doubtful whether the Truman Proclamation,⁸ made after the Second World War, was in conformity with international law. The same applied to the Declaration on the maritime zone by Chile, Ecuador and Peru⁹ concerning the extension of the territorial sea up to 200 nautical miles, although that Declaration had subsequently acquired a certain legal effect through the reaction of other States. It was necessary, rather, to determine the effect of all such acts, since very often their object was to change the obligations imposed on the State. That had occurred in Austrian practice not only in regard to neutrality but in other cases as well. For instance, at a given moment, a circular note had been addressed to all the embassies in Vienna about the admissibility of screening diplomatic bags at the airport. That could be said not to have been in conformity with international law, though it certainly fell within the scope of any discussion of unilateral legal acts.

⁸ M. M. Whiteman, *Digest of International Law*, vol. 4 (Washington, D.C., U.S. Government Printing Office, 1965), pp. 756-757.

⁹ Signed at Santiago on 18 August 1952 (United Nations, *Treaty Series*, vol. 1006, p. 323).

24. Silence should not, however, be included among unilateral legal acts, and for a reason that differed from the one adduced by the Special Rapporteur, namely, silence did not of itself create a legal obligation but produced a legal effect only if it was a reaction to a certain allegation or activity. It should be dealt with on that basis.

25. He entirely agreed with the Special Rapporteur that the topic was concerned with legal acts as a source of international obligations and not as a source of international law. Hence there was no need to elaborate on paragraphs 100 to 104 of the first report, which dealt with the formation of customary law.

26. Joint declarations raised a specific legal point, though he doubted whether the joint declaration by the Presidents of Venezuela and Mexico,¹⁰ which was referred to in paragraph 83 of the first report, and seemed to amount to an agreement between two States containing provisions in favour of third States, was a good example of the kind of joint declaration relevant to the topic as a legal or political nexus was created between the two States issuing the declaration. It might be worth while to compare the provisions of the 1969 Vienna Convention which related to stipulations in favour of third States with unilateral declarations. He doubted whether paragraph 124 of the first report corresponded to the actual wording of the 1969 Vienna Convention, according to which the irrevocability of such a stipulation depended not on acceptance by the third State but on the intention of the author of the stipulation to provide a clause of such a nature.

27. Another issue of concern related to internal legal acts. Paragraph 110 of the first report suggested that they had international legal effect if they were in conformity with international law, though probably what was really meant was that they would have international legal effect only if that effect was especially provided for under international law. What was actually involved therefore was what Mr. Pellet had called an *habilitation* (2525th meeting), and what he personally would term an "entitlement", whereby a unilateral act had international legal effect only if such entitlement existed by virtue of general customary international law or, as frequently occurred, of a bilateral treaty. It was thus a matter of determining the basis for such entitlement under general international law.

28. The question then arose as to whether the concept of entitlement made it necessary to understand unilateral acts and certain transactions, in the sense of *negotia*, such as recognition and renunciation. There were two arguments against that procedure. In the first place, if only transactions in the sense of *negotia* were to be dealt with, then acts other than declarations would have to be considered inasmuch as recognition, for instance, could be performed implicitly and so did not require a formal declaration. An example of that was furnished by the recognition of the former Yugoslav Republic of Macedonia by a number of States. It had been said that the Republic had been recognized not by formal declaration but by the conduct of the relevant States as evidenced in the General

¹⁰ Agreement on Energy Cooperation Program for the Countries of Central America and the Caribbean, done at San José on 3 August 1980 (ILM, vol. XIX, No. 5 (September 1980), p. 1126).

Assembly when it had been admitted to membership in the United Nations.¹¹

29. The second argument was that such an approach would lead to the conclusion that States could perform transactions only if they were explicitly entitled to do so under international law. In other words, this would mean that any competence enjoyed by States to act at the international level derived from international law. There was no denying that there was a tendency to move in that direction but, in his view, international law had not reached that point yet. Thus, what had to be proved by a State was not the entitlement to perform a certain activity but whether an activity was prohibited by international law. That concept also characterized the relationship between general international law and specific regimes relating to unilateral acts.

30. Similarly, internal legal acts did not give rise to international obligations unless the obligation resulted from a general rule of international law to that effect. In other words, it could have legal effect only under the conditions which ICJ, for instance, required for unilateral acts: there must be evidence of an intention to be bound. An internal legal act did not of itself reflect such an intention, which must therefore be proven. For instance, if a State by law, opened a university to students from all over the world, that did not mean it was unable to revoke that law. The State could at any time close access to the university unless it had made a declaration or legal act with a specific intention to be bound. But that had to be proved.

31. Moreover, he did not share the view set out in paragraph 114 of the first report, namely, that the study should exclude unilateral acts which produced legal effects only when the addressee State(s) accepted the offer made in the acts. For example, in a clearly political act—in connection with the declarations made by the members of the Soviet Government¹²—the Austrian delegation had undertaken to ensure that Austria would make a declaration of neutrality and obtain a measure of international recognition. To that end, Austria had enacted the Constitutional Law on the Neutrality of Austria¹³ which, it was the common view, had had no effect at the international level. Such effect had been produced only by the notification of the legal act to all States with which Austria had had diplomatic relations at the time, with a request for recognition. Recognition had then been given, explicitly or implicitly. The question was whether the explicit recognition changed the unilateral nature of the initial Austrian act. In his view, it did not and the issue currently at hand was under which circumstances could Austria revoke its neutrality. Two views had been advanced. One was that it was not possible to revoke Austria's neutrality because of the second act, namely the recognition, unless the other States consented to the revocation. The other view was

that recognition did not amount to acceptance of Austrian neutrality and, accordingly, Austria was free to revoke its neutrality at an appropriate time.

32. It had also been said in this context that notification together with recognition amounted to a quasi-contract under international law. In his opinion, all such theories merely indicated that it was no easy matter to distinguish a unilateral act; in any event, almost all such acts had a certain bilateral element. If he remembered rightly, Iceland had once made a declaration¹⁴ in an attempt to become a neutral State but, in the absence of any reaction from other sources, the general view was that it had not become a neutral State. Consequently the acts referred to in paragraph 114 of the first report should not be excluded from further work on the topic, otherwise the majority of unilateral acts would be excluded as they nearly all contained a bilateral element. The Special Rapporteur also referred to the bilateral nature of promises by citing, in paragraph 159 of his report, Grotius and Pufendorf, who stated that an expression of will of the addressed State was also necessary.

33. To his mind, three different approaches for dealing with unilateral acts should be distinguished: dealing only with legal declarations or legal acts in the narrow sense; with unilateral activities of States; and with what he would term transactions. The Commission therefore had to decide whether it wished to consider the procedures by which a legal obligation or legal effect could be produced or whether it should concentrate on the kind of legal transaction, for instance, on recognition, renunciation, protest, objections and so on. If it decided to consider the various kinds of transaction, it must go beyond declarations and include, for example, silence, which could cause some difficulty. The other question the Commission should ask itself was whether the kinds of unilateral act described in various legal textbooks were exhaustive or declaratory and whether there were other kinds of transactions that it should take up.

34. Another possibility was to concentrate on procedure as proposed by Mr. Brownlie, which brought him to the question of estoppel. It could be argued that estoppel was merely the effect of a particular activity. Neither in the literature nor in judicial awards was there any unanimity on that institution. The judicial awards sometimes even referred to estoppel as something like *venire contra factum proprium* or *allegans contraria non audiendus est*. There was, of course, also a narrower understanding of the matter. At all events, it seemed to be in the nature of a certain legal consequence or effect and as such escaped precise regulation. Furthermore, if the Commission dealt with estoppel it might also be asked to deal with institutions like acquiescence or perhaps even acquisitive prescription. Estoppel, it would be remembered, had already been dealt with, for instance, in article 45 of the 1969 Vienna Convention, relating to loss of the right to invoke a ground for invalidating a treaty. It might be possible to extend the application of that clause by providing that a State could no longer invoke the legality of the act of

¹¹ See General Assembly resolution 47/225.

¹² See "Memorandum concerning the results of the conversations between the Government delegation of the Republic of Austria and the Government delegation of the Soviet Union" (Moscow, 15 April 1955) (*Supplement to the American Journal of International Law* (Washington, D.C.), vol. 49 (1955), pp. 191-194).

¹³ Adopted by the Nationalrat, Lower House of Parliament, 26 October 1955, text in G. Stourzh, "Austrian neutrality: its establishment and its significance", *Internationale Spectator Jaargang XIV*, No. 5, 8 Mrt. 1960.

¹⁴ See "Declaration between Denmark, Finland, Iceland, Norway and Sweden Establishing Similar Rules of Neutrality, with Rules" (Stockholm, 27 May 1938), *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 32 (1938), pp. 150-154.

another State which prejudiced its rights if it had acquiesced in the legality of that act. But then it would prove necessary to define acquiescence and perhaps also good faith, which could not be regulated.

35. He was not altogether clear what the General Assembly expected of the Commission in that respect, but if it did decide to make a change, the Commission should make it very clear that it was concerned not with the traditional view of the different kinds of transactions but with the procedure for the transactions. The Special Rapporteur had already stated that he would deal not with the content but with the form of unilateral legal acts and then concentrate on declarations. Personally, he could go along with that on condition that the Commission dealt with declarations as something that went beyond pure promise. If it did so, then it could perhaps become necessary to revert to the question of the different kinds of transactions. Thus, the Commission should first study the question of declarations and, could then discuss the question of estoppel, with a view to securing the reaction of the General Assembly.

36. Mr. LUKASHUK said that he wished to comment on Mr. Hafner's remarks concerning the declaration of the USSR on the non-use of nuclear weapons. His own position, which should not necessarily be taken as reflecting the views of his Government, was that as a successor to the USSR, the Russian Federation was bound by that declaration. Mr. Hafner had rightly said that the situation had changed so greatly that the Russian Federation would be entitled to review its obligations where necessary and appropriate. That, however, was mere theory and it had to be pointed out that there was a huge number of unilateral and bilateral instruments that were politically binding but no norms existed—or were likely to exist in the near future—to govern their operation. Regulation was certainly necessary, since there was the question of legal succession and of the cessation of obligations. All such issues concerning political obligations would be resolved by the application of the norms of treaty law *mutatis mutandis*. That was the only way to address such a complicated problem.

37. Mr. PELLET said that he strongly supported Mr. Hafner's remarks concerning political declarations: the idea of something being politically obligatory seemed legally incorrect.

38. He utterly failed to see how silence could be regarded as an act. It was conduct and the very opposite of an act. Any study of conduct would amount to an anti-topic so far as he was concerned. When the Commission had codified the law of international responsibility¹⁵ it had chosen its terms very carefully and an "internationally wrongful act" (*fait internationalement illicite*) was deemed to mean both acts and omissions, including silence. Silence might be used as a point of reference, as a comparison, but it was not an act. It was the opposite.

39. As to the relationship between the content and the form of transactions, the Commission was not starting out properly. It was obvious that different forms could lead to the same content. Silence, which was not an act but a

form, could lead to recognition, and a treaty could lead to recognition. He did not see why, simply on the pretext that there were transactions which could be the subject also of unilateral acts, they should be studied as such. The Special Rapporteur's topic was not recognition but the special procedure known as unilateral acts which could lead to recognition, just as another procedure like silence or another procedure like a treaty could. The same applied to estoppel. Estoppel could result from a unilateral act, from silence or from a treaty, but it was time to call a halt to the emphasis being placed on it. Whether it actually formed part of the topic was not an acceptable way of posing the problem. It was not because of the Anglo-Saxon fondness for estoppel that it was the topic: it was but one element in the topic and could arise out of it. Different forms could lead to the same content, norm or transaction; conversely, identical forms could obviously result in different transactions. A unilateral act could lead to recognition, estoppel and so on. Again, by confining matters to universal declarations, stress was being placed on the form. The Commission should arrive at a balanced definition of a unilateral act, which was a manifestation certainly, but a manifestation of will.

40. Mr. ECONOMIDES said that, *pace* Mr. Hafner, unilateral acts of international organizations very closely resembled unilateral acts of States as far as their effects were concerned. An act of an international organization could be a source of international law analogous to treaties. For example, any binding act of an international organization, such as the European Union's regulations and binding resolutions, was at the current time a source of international law. So too were unilateral acts of States such as the French declaration in the *Nuclear Tests* cases, which had been an act creating rights and obligations and which must be considered a source of international law.

41. A distinction was being drawn between sources of international law and acts that simply created rights and obligations at international level without constituting formal sources of that law. That distinction was entirely erroneous, at least at the theoretical level—unless one accepted that in order for an act to be a source of international law it must be an exclusively normative act, thereby excluding all synallagmatic acts under the old distinction between law-making treaties, which constituted international law, and contractual treaties, which did not. That approach was wrong, because international law also governed contractual treaties.

42. A second resemblance was that acts of international organizations could be elements in the creation of international custom. Examples were General Assembly resolutions of a normative character, and even the Manila Declaration on the Peaceful Settlement of International Disputes.¹⁶ But at the same time unilateral acts, too, could contribute to the formation of international custom. Moreover, acts of international organizations could play the role of an auxiliary source—one analogous to doctrine and jurisprudence. Examples were the judgments of PCIJ and ICJ and also some normative recommendations of the Assembly. The same was true at the level of domestic law: some judgements of domestic courts treated ques-

¹⁵ See 2520th meeting, footnote 8.

¹⁶ General Assembly resolution 37/10, annex.

tions of international law in such a way as to serve as an auxiliary source.

43. There were thus many resemblances between the two types of unilateral act, and as the law of international organizations was far more developed than that of unilateral acts, one could to some extent draw inspiration from the former. But he agreed with Mr. Hafner that the Commission should not take up the question, if only for the reason that it did not fall within the Commission's mandate.

44. Mr. HAFNER said he had tried to make it clear that the Commission must decide whether, on the one hand, it wished to approach unilateral acts from the standpoint of procedure, form or *modus*, or whether it wanted to tackle them from the standpoint of transactions, by which he meant something corresponding more to the Latin word *negotium*, namely, their content. If the Commission wished to adopt the former approach, should it include only procedures intended to create a legal effect, or should it include other activities of a State? He had raised doubts as to whether the latter course would be possible, as a problem of demarcation would then emerge. For those reasons he had favoured starting with a consideration of declarations. However, the problem had then arisen that he had been unable to find features common to all the various kinds of declarations with regard to their legal effect. If a common feature could be found, then there would be no need to consider the different kinds of transactions.

45. As to the question raised by Mr. Economides, in his view there were substantial differences between unilateral acts of international organizations and those of States. He did not think it was currently possible to deal with the effects of European Union directives, as elaborated by judgements of the Court of Justice of the European Communities: that area was too complex and had reached a more advanced state of development. It was difficult to draw general conclusions applicable to all unilateral acts of international organizations. The task was far more difficult than the one that had faced the Commission when it had attempted to discuss the treaties of international organizations. Even then, the outcome had been that the United Nations Conference on the Law of Treaties had decided to exclude such treaties from the ambit of the 1969 Vienna Convention.¹⁷ Thus, despite the fact that unilateral acts of States and of international organizations shared some common features, the differences outweighed the similarities, and the time was not ripe to deal with the latter category.

46. Mr. PELLET said that when the European Union made a declaration in the framework of its universally recognized competence, it substituted itself for its member States and when it acted purely on the international level it conducted itself as a State. In fields such as international trade, the "old" States were at the current time

effectively a thing of the past. It was the European Union that acted. Thus, if the European Union as such made a unilateral declaration at the international level, that declaration was ultimately no different in nature from one made by a State. However, the European Union's internal resolutions posed problems very different from those with which the Commission was concerned.

47. He was still unable to understand Mr. Hafner's obsession with drawing a distinction between the concepts of *instrumentum* and *negotium*. A treaty was both, being an *instrumentum* resulting in a *negotium*. He did not see how a unilateral act could be regarded purely and simply as an *instrumentum*, as it led inevitably to a *negotium* indissociable therefrom. That was why he had expressed some reservations regarding the Special Rapporteur's expressed intention to confine himself to the declaration form in his study.

48. Mr. SIMMA said he entirely shared Mr. Pellet's views regarding the distinction between an *instrumentum* and a *negotium*, and concerning the effects of declarations of international organizations such as the European Union on third parties. He had already given it as his view that the term "declaration" could be a receptacle for a variety of legal acts.

49. Mr. Economides had spoken of unilateral legal acts as sources of international law. In that regard, it was important not to become involved in *Begriffsjurisprudenz*. He had taken the view (2525th meeting) that unilateral legal acts could be sources of obligations but not sources of law. But, of course, everything depended on how one defined "law". If, rejecting Kelsen,¹⁸ one considered that concrete judgements were not norms, and that only general rules were norms, then unilateral acts would not be norms, but they could create binding effects on the basis of certain norms and general principles, or of customary law.

50. Mr. MIKULKA said he fully supported the Special Rapporteur's proposal to re-establish a working group on unilateral acts of States. It was important to start by establishing perimeters for such a broad topic. In that context, he agreed that unilateral acts of international organizations should be set aside, since, despite some grey areas, they did not fall within the Commission's mandate. The problem of wrongful acts resulting in international responsibility should also be set aside. However, certain formal unilateral acts of States in the framework of the law of responsibility—for example, a claim for reparation as a precondition for recourse to countermeasures—did of course fall within the scope of the Commission's study. He thus endorsed the two principal limits to the topic proposed by the Special Rapporteur. Like other members, however, he felt that too restrictive an approach would be undesirable.

51. He had already touched on the question of the distinction between political acts and legal acts in the strict sense, when responding to Mr. Simma's remarks (2525th meeting). He could accept the Special Rapporteur's proposal not to deal with political acts, provided that proposal was interpreted as excluding the strictly political

¹⁷ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); *ibid.*, *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6); and *ibid.*, *First and Second Sessions, Vienna, 26 March-24 May 1968 and Vienna, 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

¹⁸ See 2525th meeting, footnote 11.

effects of unilateral acts of States: for certain unilateral acts could produce both political and legal effects, and only the latter were of interest to the Commission. The proposal should thus be expressed in rather different terms.

52. There were several branches of international law in which the legal effects of certain unilateral acts were already well defined: the law of treaties, of immunities and of armed conflicts, for example. The Commission might take those areas as the starting point for an analysis of the conditions for validity and opposability—the conditions in which unilateral acts produced legal effects—so as to ascertain whether a common basis really existed which could also serve for a study of the effects of unilateral acts in spheres other than those that had already been codified. He was not very optimistic as to the outcome of the exercise: it might lead to the conclusion that there were very few elements common to all those forms of legal act. What was interesting was the specific effects in different spheres of international law. The legal effects of a declaration made in the context of the law of treaties—a declaration of withdrawal of a reservation, for example—were entirely different from those of a declaration of neutrality, made in a different branch of international law.

53. As to the form the Commission's work should take, it might be best for the Special Rapporteur initially to confine himself to a comprehensive analytical study of the problems, in the light of which the Commission might then decide that the topic was ripe for the formulation of draft articles accompanied by commentaries.

54. Mr. CANDIOTI said that the first report raised various questions that the Commission must resolve at the current session in order to be able to continue its work in accordance with the tentative schedule established at its forty-ninth session.¹⁹ Thus, the Special Rapporteur proposed excluding various categories of act from the scope of the study so as to focus on what he called strictly unilateral legal acts. That approach was useful, but it must not be followed too rigidly. Some unilateral acts falling within the ambit of the law of treaties, the formation of custom or judicial procedure had characteristics in common with autonomous unilateral acts, and the similarities could serve better to illustrate and distinguish the characteristics of the latter.

55. Like the Special Rapporteur, he believed that unilateral acts of international organizations, albeit a topic of great interest, were outside the scope of the Commission's mandate and should form the subject of a separate study at a later stage in its work.

56. Silence, acquiescence and estoppel were really bilateral rather than unilateral phenomena, but were of interest for the effects they could have with respect to unilateral acts, and should therefore be taken into account insofar as they were relevant to clarifying the way in which unilateral acts functioned.

57. The Special Rapporteur had sensibly proposed focusing attention on unilateral declarations as the normal mechanism for giving form to classic unilateral acts such

as promise, recognition, renunciation and protest. A declaration was the most usual, though not of course the only, means of formulating unilateral acts, regardless of their content. The Commission could usefully make that its starting point, but bear in mind that the form was not a rigorous requirement and that in some categories of unilateral act, such as recognition, international law recognized the mere conduct of States, without need for a declaration or notification, as a valid form of expression of the will to accept a particular situation or right as opposable. Notification, too, could be assimilated to declaration, and some internal acts of States which had international legal effects were also possible forms of unilateral act recognized by international law.

58. The Special Rapporteur also deemed it necessary to identify or develop a rule or principle expressing the binding nature of unilateral acts, to take the form of *acta sunt servanda* or *promissio est servanda*. His own reaction was that such a development, albeit unobjectionable, was also unnecessary. He preferred to abide by the ruling of ICJ in the *Nuclear Tests* cases, that the binding force of those acts was to be found in the principle of good faith.

59. The definition of a strictly unilateral declaration contained in paragraph 170 of the first report could be the starting point for the Commission's work, without prejudice to its being refined thereafter, as the study progressed. Clearly, attention would have to be paid to the jurisprudence, and especially to State practice, analysing how unilateral acts were formulated, what purposes they served, when they were considered legally binding rather than mere declarations of policy, and what were the perceptions and attitudes of other States vis-à-vis those forms of conduct. A compilation of data on State practice and a list of cases would be useful adjuncts to the Commission's work on the topic. That material would assist in ascertaining to what extent international law recognized certain forms of State conduct as binding unilateral legal acts, what elements they must exhibit in order to be recognized as such, who could formulate them on behalf of the State in order for them to be attributable to the State, the circumstances in which they were valid, what form they could—or in some cases must—take, what effects they produced, how they could be terminated, revoked or modified, and so forth.

60. It should be recalled that the Commission had invited Governments to provide it, *inter alia*, with information on the practice and experience of each State in that regard.²⁰ Pending their replies, the Special Rapporteur, possibly assisted by the secretariat and members of the Commission, would perhaps also have to take on that additional task of research and classification.

61. The Commission had proposed submitting the Special Rapporteur's first report for consideration at the fifty-third session of the General Assembly, indicating how the work should continue and stating its views on what the outcome might be.²¹ The Commission must also come up with at least a preliminary opinion on that question at its current session. Though it was too soon to take a decision on the final form of the work, the complexity of the topic

¹⁹ *Yearbook* . . . 1997, vol. II (Part Two), pp. 66-67, paras. 211-216.

²⁰ *Ibid.*, p. 67, para. 215.

²¹ *Ibid.*, pp. 66-67, para. 214.

seemed to call for a study leading to conclusions concerning the rules of international law applicable to unilateral legal acts. As was the Commission's custom, those rules could then take the form of draft articles.

62. A mandate for the working group proposed by the Special Rapporteur should be formulated before the Commission concluded its plenary debate on the topic. One immediate task that could be assigned to the working group would be to analyse the definition of a unilateral declaration proposed by the Special Rapporteur in paragraph 170 of his first report and to transform it into a draft article. The working group could also draw up a general schema for the draft articles, dividing the material into chapters and making preliminary proposals concerning the content of each article. The outline contained in the report of the Commission on the work of its forty-ninth session could be used as a basis for that task.²² The Commission must not lose sight of the plan of work for the quinquennium it had adopted at its previous session. On the basis of that plan, the working group and the Special Rapporteur could also consider an outline of the content of his future reports and transmit their conclusions to the plenary for consideration. Participants in the working group should be chosen so as to be representative of the various schools of thought revealed in the debate.

63. Mr. PAMBOU-TCHIVOUNDA endorsed the suggestion about the preparation of a compilation of State practice and pointed out that all the members of the Commission could assist the secretariat and the Special Rapporteur in that endeavour. They could each, upon returning to their countries of origin, draw up a list of court decisions relevant to the topic and transmit the list to the Special Rapporteur.

64. The CHAIRMAN, speaking as a member of the Commission, said he, too, thought that preparing a compendium of State practice would be a good idea.

65. Mr. YAMADA commended the Special Rapporteur on an excellent first report which contained comprehensive findings and an outstanding analysis of a difficult topic. He had no difficulty with any of the Special Rapporteur's main conclusions: that the Commission should deal with strictly unilateral acts, the criteria for which were "a single expression of will" and "autonomy", and that the legal basis for the binding nature of such acts was the principle of good faith. He would appreciate clarification, however, on three points.

66. First, while he agreed that the unilateral act of a State did not have to be accepted by other States, what about the reactions of other States? Did they have no role in determining the legal effect of the unilateral act? Could they be totally disregarded? The *Nuclear Tests* cases had been a clear-cut instance of an autonomous unilateral act, but in most instances, and especially in the volatile financial and economic fields of recent years, a unilateral act was followed by a series of reactions by other States.

67. Secondly, a unilateral act had the legal effect of limiting the policy options of the author State. It could, however, often limit the policy options of other States—

particularly those targeted by the act. What was the legal effect of the unilateral act in such cases? Did it remain intact, regardless of the implications for third States? For example, by becoming a party to the Treaty on the Non-Proliferation of Nuclear Weapons, Japan had undertaken a legal obligation neither to manufacture nor to possess such weapons. But it had also repeatedly made a public pronouncement about not allowing the introduction of such weapons into its territory that remained a unilateral declaration and the Government had given no public indication of whether it intended to undertake a legal obligation in that regard. If one assumed, for the sake of argument, that such an intention had been expressed, then the pronouncement would have a number of implications for nuclear-weapon States.

68. Under a mutual security treaty signed with the United States of America,²³ that country was authorized to station its forces in Japan for the defence of Japan and security and stability in the Far East. Could the United States' policy option of nuclear deployment for United States forces in Japan be limited by Japan's unilateral action? The matter had in fact been dealt with by an exchange of notes providing for prior consultation. Many other nuclear-weapon States followed the United States policy of neither confirming nor denying the existence of nuclear weapons, which was a crucial element in nuclear deterrence. Would the naval fleets of the United Kingdom of Great Britain and Northern Ireland and France, for example, have to abandon that policy and declare that they were not equipped with nuclear weapons before making friendly calls in Japanese ports? What about the right of innocent passage of nuclear-powered naval vessels in the Japanese territorial sea?

69. His third question revolved around the notion that unilateral acts must have legal effects in order to maintain the legal order of international society, and accordingly, that they could not be arbitrarily amended or withdrawn. But if no amendment or withdrawal was permitted, States would hesitate to make unilateral acts. Consideration should be given to the procedures by which amendment and withdrawal could be effected.

70. Mr. ECONOMIDES, following up on the final point, said the question of whether unilateral acts were a source of international law was of great importance. If they were, then they had the same force and validity as all other sources of international law, including treaties and agreements and customary law. If they were not, if they constituted strictly internal acts of a State, then all other sources of international law would take precedence over them.

71. Mr. HAFNER said he agreed that the Commission would inevitably have to revert to the issue of revocability of unilateral acts. The State's intent should be the factor determining the act's revocability. In such circumstances, the conditions set out in the law of treaties for the termination of an obligation would apply.

²² *Ibid.*, chap. IX, sect. B.3, pp. 65-66.

²³ Security Treaty (San Francisco, 8 September 1951) United Nations, *Treaty Series*, vol. 136, p. 216.

72. Mr. YAMADA said his comment had been intended to draw attention to the need for consideration of the procedures and circumstances which might justify the revocation or amendment by States of their unilateral acts.

73. Mr. GOCO, taking up Mr. Hafner's comment, questioned whether the expression of an intention had to be considered as a decisive factor in determining the existence of a unilateral act. If so, then the State would in all instances be bound by a declaration of intention. In the *Nuclear Tests* cases, France had had no intention, when making its declaration, of engaging in a unilateral act. But the declaration had been made publicly and ICJ had interpreted it as being binding upon France. No intention had existed at the outset, yet because of the act's effects in international law, a unilateral act had been deemed to have been performed.

74. Mr. HAFNER said that any act not accompanied by the intention that it should be binding would produce such a legal effect only under certain circumstances that had to be spelled out in international law. It could be done by estoppel.

75. Mr. GOCO pointed out that a declaration made unilaterally could not be unilaterally revoked because of the consequences of such revocation for third States. On the other hand, a State might argue that it had not intended to make a unilateral declaration and wished to revoke what had subsequently been construed as one because of the consequences of such a declaration for third States.

76. Mr. PAMBOU-TCHIVOUNDA said he agreed that the fundamental issue of when and how revocation was possible would have to be taken up by the Special Rapporteur as it was an integral part of the regime to be established. He believed revocation was indeed possible: what a political entity did, it could also undo. But what was the minimal threshold for acceptance of the discretionary use of the State's capacity to undo an act? The notion of reasonableness found in the law of treaties should come into play in the regime to be established for withdrawal of unilateral acts.

77. Mr. HERDOCIA SACASA said the judgments of PCIJ and ICJ showed that it was indeed possible for States to amend or revoke unilateral acts, but he agreed with Mr. Pambou-Tchivounda that certain limits had to be established. In the *Nuclear Tests* cases, ICJ had indicated that a unilateral undertaking could not be interpreted as being based on an arbitrary—in other words, unlimited—power of reconsideration (see paragraph 51).

78. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ had stated that, although the United States had the right inherent in any unilateral act of a State to modify the contents of a declaration it had made in 1946 or to terminate it, it had nevertheless assumed an inescapable obligation to carry out the terms and conditions of the declaration, including the six months' notice proviso.²⁴ Nicaragua could therefore oppose the actions of the United States because the six

months' notice period was an undertaking that was an integral part of the instrument that contained it.

79. Mr. MIKULKA urged the Commission to reflect on the difficulty of engaging in an abstract discussion of forms and procedures in isolation from the specific legal environment and content of specific unilateral acts. Acts were of differing effect, depending on whether they were performed as part of military activities or in the context of the law of the sea, for example. Declarations and protests were entirely different actions, and revoking them had entirely different legal consequences—yet they were both unilateral acts.

80. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said it was true that the discussion of revocation and amendment was premature so long as a definition of unilateral acts themselves had not yet been developed. It was the legal act, whether formal or substantive, that should be analysed, not the expressed or implicit intention, although the act was, of course, grounded in the intention of the State.

81. Mr. GOCO, recalling the Special Rapporteur's suggestion that a working group be established, pointed out that the Working Group established at the forty-ninth session could perhaps be reconstituted.

82. Mr. CANDIOTI said that the Working Group established at the forty-ninth session could indeed be used as the basis for the one to be established at the current session. It was important, however, to ensure that all three schools of thought outlined by Mr. Economides were represented. He would also suggest that the Special Rapporteur should produce an outline of the conclusions that could be drawn from the Commission's initial discussion of the topic.

The meeting rose at 1.05 p.m.

2527th MEETING

Friday, 8 May 1998, at 10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

²⁴ *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 392 et seq., at p. 419.