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Summary record of the 2543rd meeting

Topic:
Unilateral acts of States

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

construction work. He urged the Special Rapporteur to take that problem into consideration and to deal with it, perhaps in the commentary.

74. Mr. Sreenivasa RAO (Special Rapporteur) said he was most grateful for the initial reaction to his efforts to move the articles forward to the Drafting Committee. Many valuable comments had been made and would be studied further. He agreed with Mr. Rosenstock that no aspect of the topic was being endorsed or rejected by the mere fact of being covered in the draft and that matters which were not covered were subject to the normal application of international law. The view had frequently been expressed that many other areas impinged upon the consideration of the topic, and they must not be adversely affected by any excessively specific formulations in the draft: some constructive ambiguity was helpful. The commentaries to the draft articles had been adopted by the Working Group at the forty-eighth session, not by the Commission, and had been of great assistance, particularly in connection with article 2 (Use of terms). They would be scrutinized very carefully in the future work on the draft.

75. If the articles, which appeared to be generally acceptable, were referred to the Drafting Committee, the prospects for adoption by the Commission at the current session were excellent.

76. Mr. GOCO said he joined the chorus of congratulations to the Chairman of the Working Group and the Special Rapporteur. His only comment related to the settlement of disputes. It was apparent from the second sentence of new article 16, that an impasse would be created if one of the parties did not wish to accept the intervention of an independent and impartial fact-finding commission. That was true even though the sentence mentioned a time period of six months after which the party was obligated to accept such intervention.

77. Mr. Sreenivasa RAO (Special Rapporteur) said that the difficulty had not gone unnoticed, but the expectation was that the ultimate form of the draft would influence the way the problem was handled. If it was a convention, then certain obligations, including that of observance of an article containing provisions on dispute settlement, were immediately incumbent upon any State that became a party to the convention. If it proved to be a recommendation adopted first by a few and then by more and more States on the basis of a certain amount of practice, then it was hoped that the experience of States with fact-finding commissions would be sufficiently positive to persuade other States to submit to such machinery.

78. In response to a further question by Mr. GOCO, he said fact-finding commissions were becoming more common. Generally, the decisions of such commissions were non-binding, for they were intended to aid the parties in appreciating the facts in the same way. Disputes, it was thought, were in most cases based on an inability by States to do so, and the theory was that once the facts were established by a third party, States would be willing to accommodate each other much more quickly.

79. Mr. ROSENSTOCK added that the decision to include a reference to fact-finding institutions in the Convention on the Law of the Non-Navigational Uses of International Watercourses had been based on extensive indications in the literature that, in the environmental field, fact-finding was a particularly effective dispute-settlement mechanism. A very great many cases could be cited, including the ones between the United States and Mexico and the United States and Canada.

80. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the draft articles to the Drafting Committee.

It was so agreed.

The meeting rose at 1.05 p.m.

2543rd MEETING

Monday, 8 June 1998, at 10.15 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock.

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

[Agenda item 7]

REPORT OF THE WORKING GROUP

1. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States), introducing the report of the Working Group (A/CN.4/L.558), said that it had held two meetings and had based its work on the first report of the Special Rapporteur on unilateral acts of States (A/CN.4/486), as well as on the discussion in plenary.

2. As indicated in paragraph 7 of its report, the Working Group had agreed that, according to the Commission's usual practice, the Special Rapporteur and the Commission should prepare draft articles with commentaries, without prejudice to the final form it might decide to give

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* Resumed from the 2527th meeting.

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

to the results of the work on the codification and progressive development of the topic. Accordingly, the Working Group had looked into the content of some possible initial draft articles which would be designed, first of all, to define the scope of the draft, in accordance with the general plan outlined in the first report of the Special Rapporteur on unilateral acts of States and the discussions in the Commission, that is to say, to identify the unilateral acts that would be taken into account and those that would be ruled out and to what extent; and, secondly, to provide a definition of unilateral acts for the purposes of the draft articles (para. 8).

3. With regard to the definition of scope, the Working Group considered that article 1 might be based on, and paraphrase, article 1 of the 1969 Vienna Convention, providing that the draft articles applied to unilateral acts of States. Another article might be based *mutatis mutandis* on article 3 of the 1969 Vienna Convention and refer to unilateral acts not covered by the draft articles, stating, for example, that the draft articles did not apply to unilateral acts governed by other specific legal regimes, such as the law of treaties, the law of the sea, the law of international arbitral or judicial procedure, the rules relating to neutrality and war, without prejudice to the legal force of such unilateral acts and the application to them of the rules set forth in the draft articles to which they would be subject under international law, independently of the draft articles, and to the extent that the specific regimes in question did not contain any special rules on particular aspects.

4. In considering the question of scope, the Working Group had also discussed the question whether the draft articles should relate only to unilateral acts which States issued in respect of other States or to acts intended to produce legal effects in respect of other States or other subjects of international law or, in general, to acts of an *erga omnes* nature. Views on that point had been divided and the Working Group had considered that that question had to be analysed in depth by the Special Rapporteur and the Commission and further clarified in due course (para. 6).

5. The Working Group had held a lengthy discussion on the question of the definition of a unilateral act for the purposes of the draft articles on the basis of the wording contained in paragraph 170 of the Special Rapporteur's first report. It had considered several amendments which had been proposed by its members and on the basis of which the Special Rapporteur had then submitted draft definitions to it. The discussion had shed light on various theoretical aspects of the problem, but had also shown that it would currently be difficult to give a sufficiently exhaustive and entirely satisfactory definition, it being understood, however, that, at the current initial stage, it would be a good thing to have a provisional draft definition to serve as a working hypothesis and that the definition would take shape as the substantive work on the rules applicable to unilateral acts progressed.

6. Following the discussion in the Commission, the Working Group had considered the question whether, in accordance with the mandate entrusted to it by the Commission, the draft articles should include a definition of a unilateral declaration only, as the Special Rapporteur was proposing, or a more general definition of a unilateral act. The preferences expressed in the Commission had been stated again in footnote 2 of the report of the Working Group. In any event, the Working Group had agreed on the basic constituent elements of a definition, which were the following: an autonomous expression of the will of a State, that is to say, an expression of will which stood by itself and, in order to establish the unilateral act, did not have to be accompanied by another separate expression of will for the same purpose, that is to say, consent or acceptance by another subject of international law; and the creation, by the expression of will, of international legal effects. It had considered that the unequivocal, notorious nature of that expression of will was a necessary condition for the unilateral act.

7. Paragraph 9 of the report referred to another question which had been considered by the Working Group, that is to say, whether the possible effects of a unilateral act must be stated in detail in the body of the definition or whether they should be dealt with in separate articles. The predominant idea had been that the definition must be short and contain only a general reference to the production of international legal effects or the intention of producing international legal effects and that such effects must be defined further on in the draft articles.

8. As it had indicated in paragraph 10 of its report, the Working Group had suggested, taking account of the views expressed in the Commission, that, in due course, the Special Rapporteur should consider how rules on the functioning of estoppel and perhaps also on the effects of silence could be formulated in the context of unilateral acts of States and make proposals in that regard.

9. The Working Group had also expressed the opinion that the Special Rapporteur should indicate in detail how he intended to organize his second report. The Special Rapporteur had explained that he intended to deal immediately with the question of the formulation of unilateral acts and conditions for their validity, that he might submit the outline to the Commission at the second part of its fiftieth session in New York and that, in the meantime, he would welcome with satisfaction any comments and suggestions that the members of the Working Group might make in that regard.

10. In conclusion, the Working Group was recommending that the Commission should invite the Special Rapporteur to submit draft articles in his second report on the scope of the topic and the definition of a unilateral declaration or unilateral act on the basis of the comments made at the current session in the Commission and in the Working Group; and to explore the various aspects of the topic concerning the elaboration and conditions of validity of unilateral acts of States and to submit draft articles which, in his opinion, reflected the international law on the topic (para. 11).

11. He thanked the Special Rapporteur and the members of the Commission who had taken part in the work of the Working Group for their interest and contributions; he also thanked the secretariat for its cooperation.

12. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, judging by the report of the Working Group, the work on the topic of unilateral acts of States had progressed well, both in terms of its delimitation and in terms of the preparation of a definition of a unilateral act of a

State. Apparently, the preference was for the preparation of articles with commentaries, without prejudice to the final form that the result of the Commission's work would take. The codification and progressive development of the rules applicable to that category of acts might nevertheless lead to the preparation of a draft convention, a matter on which the Commission would have to take a decision at the appropriate time.

13. The Working Group had reached the conclusion, with which he fully agreed, that a unilateral act was an autonomous and clear-cut expression of the will of a State for the purpose of producing legal effects. It was an act of a State, it being understood that the question of its addressee would be considered and settled later.

14. With regard to future work, he intended, in his second report, to submit the first three draft articles, together with commentaries; the first would deal with the definition and the others with scope of the draft articles based on the model of articles 1 and 3 of the 1969 Vienna Convention, on the understanding that, in order to avoid too broad an interpretation, the acts in question would be very specific and well defined. At the Commission's next session, he intended to submit a study on the elaboration of acts, which would relate to the attributability of an act, conditions of validity, the form of the expression of consent and the sensitive issue of reservations, that is to say, the question whether a State could or could not formulate reservations or make a unilateral act subject to conditions without actually entering the treaty sphere. He would also discuss the questions of revocability, the length of the commitment made (extinction) and the modification, suspension and nullity of an act, as well as the even more difficult question of entry into force and that of acts which a State could perform through the intermediary of officials empowered to bind it in international relations in the light of the requirements of internal law, particularly constitutional law.

15. It was true that there had been no unanimity on the question whether the formal act was the declaration, the unilateral legal act whose operation could be governed by rules, but there had been no opposition on that point either. That was why he continued to believe that a declaration as a formal act had to be a unilateral legal act. That position seemed to be justified, at least as far as the elaboration of the act was concerned. It was admittedly slightly less certain in the case of the formulation of rules on effects which had to take account of the various material acts that the unilateral act could contain and which were, for example, promise, renunciation, recognition and protest and which, without any doubt, produced different legal effects, as the Working Group had pointed out.

16. Those would be the main elements of the study he intended to submit at the fifty-first session of the Commission and on which he would like to receive guidelines from the members of the Commission.

17. Mr. GOCO, referring to the discussion in the Commission, said that he would like the difference between a political act and a unilateral act which produced legal effects to be clearly explained. He would also like the Commission to consider whether a State which had performed a unilateral act could unilaterally go back on that act or renounce it, thereby wiping out the legal effects produced. He hoped that the Special Rapporteur would clarify those two points in his second report.

18. Mr. BROWNLIE, noting that, in practice, many unilateral acts were performed by diplomats without any publicity, said that the notorious expression of the will of a State was a sufficient, but not necessary, condition for the production of legal effects.

19. Since the Special Rapporteur intended to consider the question of the elaboration and conditions of validity of a unilateral act on the basis, *mutatis mutandis*, of the law of treaties, he said that, in the latter case, the effects of acts performed by a contracting party or a potential contracting party were also directly related to the status of the acts in question in internal constitutional law. It would therefore be advisable to determine whether a given act was valid under the internal constitutional law of the State concerned, but it was very doubtful whether its international legal effects could be subject to such validity.

20. Mr. PAMBOU-TCHIVOUNDA said that he would like clarifications with regard to the term "purely non-legal nature" in the second sentence of paragraph 5 and the word "compactness" in paragraph 7.

21. As to substance, he agreed with the idea stated in paragraph 8 that the Special Rapporteur might already be in a position to produce a number of draft articles and thought that he should be encouraged to do so. In that connection, the Special Rapporteur should probably start at the beginning and consider the question of the various bodies which were empowered to perform unilateral acts on behalf of the State. That raised the question of competence and of capacity to bind the State unilaterally at the international level, which was one of the most basic issues that the Special Rapporteur should look into, together with the other aspect of the topic on which the Commission expected him to make proposals, namely, the scope of a unilateral act.

22. Mr. CANDIOTI (Chairman of the Working Group) said that the second sentence of paragraph 5 referred to acts which had no legal effects and were not of a legal nature; the word "purely" was therefore unnecessary. In paragraph 7, the word "compactness" duplicated the term "conciseness" that preceded it and was actually superfluous.

23. As to the substantive comments, the question of which State organs were competent to bind a State unilaterally at the international level was one of the most difficult, but also one of the most important to be decided.

24. Mr. CRAWFORD said that he was worried about the possible restrictive effect of the phrase "for the purpose of producing international legal effects" in the first sentence of paragraph 5. If the Commission restricted the topic to acts which were intended for the purpose of producing international legal effects at the time they were issued, it would be excluding most of the sensitive issues and its work, which was modelled on that relating to the law of treaties, would be only of limited interest. The members of the Commission who wanted the topic also to apply to unilateral acts which produced international legal effects, such as estoppel, did not intend to accept that

narrow interpretation. It might well be, of course, that, when it issued a unilateral act, a State could expressly indicate that that act was a purely political declaration on which no one could rely and it was then justifiable to say that that act would not produce legal effects. However, when a State merely issued an act during negotiations, without expressly ruling out the possibility that that act might produce legal effects, it could not subsequently claim that it had not intended to enable other States to base themselves on that declaration. The topic of the study should therefore be defined more objectively because, although, as the Chairman of the Working Group had said, the exclusion of political acts from the scope of the topic could be justified, that is to say, of those which were objectively incapable of producing legal effects, the corollary of that decision must be that the topic should include acts which were objectively capable of producing legal effects, either because of the intention of their author at the time when they had been issued or because of other relevant circumstances.

25. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the comments which had been made showed how important the nature of the act was above all, at the beginning. It was, however, correct that, in many cases, it was initially not clear whether a declaration by a State was of a legal or of a political nature and that the intention of the State could be established only subsequently, after the declaration had been interpreted. It was at that point that the rules which were to be formulated and would be applicable to that declaration would come into play. The limitation of the topic to legal acts, that is to say, acts whose purpose was to produce international legal effects, was nonetheless important if the Commission was not to get bogged down in uncertainty.

26. Mr. CANDIOTI (Chairman of the Working Group) said he agreed with the Special Rapporteur and with Mr. Crawford that the basic elements studied by the Working Group had been the expression of the autonomous will of the State and the production of legal effects. It was, however, correct that the intention of the State might not be apparent at the time the act was performed, but could become apparent afterwards, when its effects could be objectively analysed.

27. Mr. BROWNLIE, referring to the point rightly raised by Mr. Crawford and to the question of the relevance of the internal validity of a unilateral act, said the underlying principle was that the act in question could not be "self-characterized" by the author State. As to the validity of the opinion that a political act could not have legal effects, his own view was that, in any event, it was not up to the author State to take the final decision on the characterization of its own act.

28. Mr. GOCO said that the Special Rapporteur's second report should contain some guidelines for States because unilateral acts would probably take on considerable importance in international law as a result of their legal consequences or effects. In that connection, intention was a decisive factor and warranted the extra caution a State exercised when it formulated its declaration. In the *Nuclear Tests* cases, for example, ICJ had attributed to France a public declaration for which it had had to assume responsibility. It would therefore be extremely useful if States could have some guidelines for avoiding mistakes and having the unfortunate surprise of having to assume responsibility for a declaration made unwisely.

29. Mr. Sreenivasa RAO said that he would like some clarifications, by way of examples, with regard to the words "Opinions . . . *erga omnes*" at the beginning of paragraph 6. Although he fully trusted the Special Rapporteur's judgement, he was not sure whether, in dealing with a very general and complex topic, it might not be premature to prepare draft articles and whether it would not be more productive to formulate some conclusions that could later be turned into draft articles. In the third sentence of paragraph 8, the word "notorious" was quite likely to give rise to misunderstandings and he was sure that the Commission could find a more appropriate term. In the second sentence of paragraph 9, the words "opposability or not opposability" should be explained, perhaps in a footnote.

30. Mr. CANDIOTI (Chairman of the Working Group) said that the reference in paragraph 6 to a distinction between the addressees of a unilateral act could be explained by the rather unexpected turn taken by the discussion in the Working Group, in which some members had been of the opinion that such a distinction should be drawn, while others, including himself, had been of the opinion that the distinction was not possible. In any event, it had been asked whether unilateral acts of States issued in respect of subjects of international law other than States belonged in the Commission's study or not and the question had still not been answered. That was unimportant, however, because everything depended on the concrete and specific circumstances of each act, but, since the matter had been raised, it should be referred to in the report.

31. As to whether it was enough at the current stage to arrive at some conclusions in the Working Group, the dominant opinion had been that, despite the difficulty of the task and the rather abstract nature of the concept, some draft articles had to be put down in black and white, even on a very preliminary basis, so as to delimit the scope of the definition and then derive rules applicable to unilateral acts from customary law and the general principles of law.

32. The word "notorious" had been used because the validity of a unilateral act did not always depend on it being public; the important thing was that it should be known to the addressee. Since the term had that meaning in Spanish and in English, according to the English-speaking members of the Working Group, it had been considered appropriate, even if, as Mr. Lukashuk had indicated, it should be avoided in the English text because it also had another meaning. Any proposal for more suitable wording would be welcome, provided that it made the meaning clear.

33. With regard to "opposability" and "non-opposability", the aim was to characterize the particular effect of unilateral acts. In some cases, a State declared that some legal situations or some conditions were "opposable" to it, that is to say, that it recognized them and they had a legal effect for it, whereas, in others, it could say that they were not "opposable" to it, as, for example, in the case of pro-

test. Those were the two categories of unilateral acts to which reference was being made.

34. Mr. CRAWFORD, referring to the question of the addressee of a unilateral act, said that some such acts obviously had specific addressees and could even be intended for a single addressee, whereas others could simply be declarations, whether public or not, which did not contain any indication that no claim could be made in respect of them. If they were made in the context of the international relations of a State, they could, in his opinion, have legal effects and should therefore come within the scope of the topic under consideration, which should, as already stated, not be confined to declarations having specific States as addressees. However, the legal effects of such declarations could be taken into account only if they concerned other States. Like the Chairman of the Working Group, he was also of the opinion that the problems involved would become clear only during drafting and he therefore urged the Special Rapporteur to start that process, despite the problems to which some wording would give rise.

35. The term "notorious" was frequently used in common law legal systems and it meant both "known" and "public". It should therefore be enough, as Mr. Brownlie had indicated, since some unilateral acts could be issued during negotiations and thus be known only to their addressee.

36. Mr. MIKULKA said that, contrary to what Mr. Brownlie had said, the last sentence of the report of the Working Group referred not to the validity of unilateral acts of States under constitutional law, but, rather, to their validity under international law. In his opinion, what was involved were questions such as defects of consent, since it could be asked whether a unilateral act performed by the representative of a State who had been subjected to pressure by another State had legal consequences, as, for example, in March 1939, when the Czechoslovak head of State had had to declare the submission of the Czechoslovak lands as a result of threats by the German Reich.[2] An act could, moreover, be issued on behalf of a State, but by persons who had no authority to do so, an example being the famous letter sent to the representative of the former Union of Soviet Socialist Republics (USSR) in 1968 by some Czechoslovak Communist Party leaders inviting the Warsaw Pact armies to intervene in Czechoslovakia.[3]

37. Mr. ECONOMIDES said he agreed with Mr. Mikulka that "conditions of validity of unilateral acts" meant "conditions of validity under international law". However, those conditions included the condition that the act should be lawful under internal law, as provided for in the 1969 Vienna Convention. That difficult question, which, as Mr. Brownlie had rightly pointed out, might not be relevant in all cases of unilateral acts, should therefore be discussed, but speedy progress should not be expected because of its extreme complexity.

38. Mr. CANDIOTI (Chairman of the Working Group) said that account would be taken in subsequent work of the very pertinent comments made, *inter alia*, by Messrs Brownlie, Mikulka and Economides and that the Special Rapporteur would try to structure the study of the various conditions of validity by classifying them according to their nature, since they could, for example, relate to the capacity of State organs to perform unilateral acts, to the possibility of an abuse of power, to the purpose of the act—its lawfulness—and to defects of consent.

39. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he welcomed the suggestions and indications on such a complex topic and would take them into account. In his view, draft articles with commentaries might be an interesting solution for the work to be done for the fifty-first session. In his second report, he would submit proposed texts on conditions of validity of unilateral declarations, as well as the first two or three draft articles.

40. Mr. GOCO said that, in order to avoid any ambiguity, the word "notorious" should be replaced by the words "open and public", on the basis of the distinction between action *in personam* and *action in rem*, which could be likened to declarations addressed to the whole world.

41. Mr. CRAWFORD said that he would object to any limitation of the topic to "open and public" acts.

42. Mr. CANDIOTI (Chairman of the Working Group) said that, regardless of the term to be used, the idea to be expressed was that the will of a State had to be made clear and susceptible of being known to the addressee, according to modalities suited to the circumstances of each act.

43. Mr. ADDO said that "notorious" was a very precise legal term and should therefore be maintained.

44. Mr. ECONOMIDES said that the word "notorious" could be replaced by the word "public" in the case of a general declaration and by the words "known to its addressee" in the case of a special declaration of a bilateral nature; the words "public or known to its addressee" would thus cover all possibilities. The question was nevertheless of entirely relative importance because it had to be considered in greater depth.

45. Mr. HAFNER said that he did not agree with the wording which had been proposed by Mr. Economides to replace the term "notorious" and which would give rise to problems. The term "notorious" had been chosen for the sake of conciseness to express the fact that such a declaration must not be issued secretly and must be known to all or to its addressee if it was intended for a particular State. It would therefore be better to refer to a declaration addressed to all (*erga omnes*) or to a particular State.

46. Mr. ROSENSTOCK said that, in view of the problems that had been referred to, it might be better to keep the term "notorious" for the time being and leave it to the Special Rapporteur to look at that question more closely when conditions were considered in depth.

47. Since the Special Rapporteur had also expressed some concern about reservations, he thought that that question was sufficiently non-autonomous to be excluded from the scope of the study. The question of reservations to treaties could probably be dealt with in connection with

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[2] See "The end of Czecho-Slovakia: A day-to-day diary", *The Bulletin of International News* (The Royal Institute of International Affairs, London), vol. XVI, No. 6 (25 March 1939), pp. 255 et seq.

[3] See "Exchange of letters between certain Warsaw Pact countries on the situation in Czechoslovakia—Warsaw, 15th-19th July, 1968", in particular, No. 2, "Czechoslovak Communist Party to five Warsaw Pact Countries, 19th July, 1968" (*British and Foreign State Papers, 1967-68*, vol. 169 (London, H. M. Stationery Office, 1976), pp. 982 et seq.).

the concept of estoppel, but that would make the scope of the topic too broad.

48. Mr. BROWNLIE said that the explanations that the Chairman of the Working Group had given about the term "notorious" showed that the problem was of a drafting nature because the word "notorious" was very strong and meant not only "public", but also "widely known". It would be regrettable to use a term such as "public", as had been proposed, because that would unjustifiably restrict the scope of the study. The fact that a declaration was public could be sufficient, but, as practice currently stood, it was certainly not necessary.

49. Mr. HE said that, at the current stage, the word "declaration" in square brackets in paragraphs 8 and 11 should be deleted.

50. Mr. BENNOUNA said that the biggest problem was the limitation of the scope of a unilateral act in the legal sense of the term. Paragraphs 8 and 9 should be regarded as a provisional conclusion and a preliminary approach to the sensitive issue of delimitation. The words "autonomous and notorious expression of the will of a State" did not refer to just any expression of the will of a State because, when it took part in a treaty, a State also expressed an autonomous will. If the Commission was to stay within the realm of a unilateral act, it should have used the words "autonomous expression of the will of a State intended in itself to produce international legal effects". When there was a meeting of wills, what was involved was no longer a unilateral act, but an agreement, even if it could be reached by means of the meeting of two unilateral acts in terms of form. That was apparently the question with which the Special Rapporteur should deal in his second report.

51. Distinguishing between a unilateral act *stricto sensu* and agreement and custom was an extremely complex task because custom could, as case law had shown, also be bilateral and restricted and there could also be conduct and customary acts of concern to only two or three States. He did not think that the theory of estoppel should have been referred to at the current stage because it was a principle borrowed from a particular legal order, that of the common law, even though it had been interpreted by international legal decisions on many occasions, particularly in the *North Sea Continental Shelf* cases.[4] No one knew exactly whether estoppel was a kind of adaptation of custom. The theory of estoppel must in any event be handled with a great deal of care in order to be adapted to the international level. In paragraph 10 of its report, the Working Group cautiously stated that the Special Rapporteur should examine the question of estoppel and the question of silence; the wording was very vague and it should be taken for what it was, namely, as not involving any kind of commitment because, in his view, silence had no place in the study of unilateral acts, except as the tacit conclusion of an agreement, when it was characterized.

52. The CHAIRMAN said that, despite the comments made and doubts expressed on some specific points, the Commission appeared to endorse the report of the Working Group on unilateral acts of States and should therefore be able to adopt it.

The meeting rose at 11.40 a.m.

2544th MEETING

Tuesday, 9 June 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

Nationality in relation to the succession of States (A/CN.4/483, sect. A, A/CN.4/489,[1] A/CN.4/L.557 and Corr.1)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR AND REPORT OF THE WORKING GROUP

1. Mr. MIKULKA (Special Rapporteur), said he wished to introduce briefly his fourth report on nationality in relation to the succession of States (A/CN.4/489), which had served as the basis for the discussions of the Working Group on nationality in relation to the succession of States. Though titled "Fourth report on nationality in relation to the succession of States", the report dealt only with the second part of the topic, namely the nationality of legal persons. The Commission had decided that that part would be taken up once its work on the first part, the nationality of natural persons, had been completed.

2. The General Assembly, in paragraph 5 of resolution 52/156, had invited Governments to submit comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons in order to assist the Commission in deciding on its future work on that portion of the topic. It might therefore be useful for the Commission to give preliminary consideration to the directions for its future work on the second part of the topic. That was why he was submitting his fourth report, which summed up the debate on the second part of the topic in the Commission and in the General Assembly. He drew attention to chapter II, which set out a number of issues the Commission might explore. Paragraph 30 of the report contained a recommendation that the Commission should assign preliminary examination of those issues to the Working Group.

3. Speaking as Chairman of the Working Group on nationality in relation to the succession of States, he said he also wished to introduce the report of the Working

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