

Document:-  
**A/CN.4/SR.2722**

**Summary record of the 2722nd meeting**

Topic:  
**Unilateral acts of States**

Extract from the Yearbook of the International Law Commission:-  
**2002, vol. I**

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was simply running the risk that its reservation would be considered null and void. Of the terms that could be used in French to replace *illicite*, *inadmissible* had to be ruled out, at least as a technical term; *irrecevable* was more limited than the English word “impermissible”; and *incompatible* referred only to article 19, subparagraph (c), of the Convention, whereas the problem was much broader and some members of the Commission even wanted to leave subparagraph (c) aside. The best solution might be to return to the terminology he had used in his first two reports, saying, for example, that a reservation was *valide* or *non valide*, even if the word “impermissible” was retained in the English text owing to the objections raised in the past about the use of the word “valid” in English. It would certainly be possible to try to work out a definition for the word “manifestly”, perhaps on the basis of article 46, paragraph 2, of the Convention, but, being fond of soft law, he thought there was no need to rewrite the dictionary for such an innocuous provision.

25. Some members of the Commission had proposed that the depositary should be allowed to react only to the situations dealt with in article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention. He opposed that idea because it was precisely the situations covered in article 19, subparagraph (c), that were most likely to arise in practice. He was not unsympathetic to the comments on the way the text was worded, but the provision must not be emptied of its substance by making it applicable exclusively to situations where a problem could not actually arise. It was the last part of paragraph 2 of draft guideline 2.1.7 *bis*, namely, “attaching the text of the exchange of views which he has had with the author of the reservation”, that gave rise to the greatest misgivings, however. It was true that discretion was a virtue and that the depositary was a facilitator and not a judge, but it was also true that States were frequently careless, and there was something to be said for reminding them of their duties. The exchange of views in question did not necessarily take place in writing, and the depositary did not necessarily have to attach it in its entirety. The Drafting Committee would undoubtedly find a slightly less formulaic way of describing the watchdog function of the depositary. As to the time frame, some members were concerned that the procedure might be extended indefinitely and wondered whether a time limit should be set for the exchange of views with the author of the reservation. He himself thought that, as long as a State was ready to enter into discussions, the exchange should be allowed to continue. It might then be necessary to specify in the commentary that only the State that was the author of the reservation could end the exchange and demand that its reservation should be transmitted. As to the time from which the reservation could be considered to have been formulated, draft guideline 2.1.8 (Effective date of communications relating to reservations) could not be clearer: it was when the reservation had been communicated to the State or organization to which it was transmitted. The time frame allowed for formulating objections thus ran from the date of communication, in conformity with draft guideline 2.1.8. That was the basis for the Committee’s discussions.

26. Mr. MOMTAZ explained that he had not been suggesting that States should be allowed to violate international law. He had been referring to article 20 of the 1969

Vienna Convention and had even said that States had the right to object to manifestly impermissible reservations. He thus emphasized once again that a manifestly impermissible reservation had no legal validity.

27. The CHAIR said that, if he heard no objection, he would take it that the members of the Commission wished to refer draft guideline 2.1.7 *bis* to the Drafting Committee, on the understanding that, in considering that provision, it would take account of all the views expressed in plenary.

*It was so decided.*

*The meeting rose at 11.40 a.m.*

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## 2722nd MEETING

*Tuesday, 21 May 2002, at 10.05 a.m.*

*Chair:* Mr. Robert ROSENSTOCK

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

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**Unilateral acts of States (*continued*)\* (A/CN.4/524, A/CN.4/525 and Add.1 and 2,<sup>1</sup> A/CN.4/521, sect. D)**

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPporteur  
(*continued*)\*

1. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), continuing the presentation of his fifth report (A/CN.4/525 and Add.1 and 2), recalled that it focused on a fundamental issue: the definition of the unilateral act against the background of the progress made in the work

\* Resumed from the 2720th meeting.

<sup>1</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part One).

on the draft articles. He had chosen that approach for a number of reasons, including, among others, as a response to suggestions that he should submit a recapitulation of what had already been done and as a way of starting off the new quinquennium and acquainting new members with the topic. In sections B to D of chapter I of the fifth report, certain aspects of the topic were addressed in a complementary rather than recapitulative manner. These sections dealt with the conditions of validity and causes of invalidity of unilateral acts, with interpretation of such acts and with their classification.

2. One of the comments at the previous session had been that the causes of invalidity should be considered along with the conditions of validity of a unilateral act and should be viewed broadly, not solely in terms of defects in the manifestation of will. Other causes of invalidity that might affect the validity of the unilateral act should be considered, it had been suggested, including the capacity of the author, the viability of consent and the lawfulness of the object of the unilateral act.

3. References to such issues in the literature were minimal, and relevant practice seemed virtually non-existent. Once again, however, the Vienna regime served as a valid reference point. The conditions for validity of legal acts were mentioned in a number of provisions in the 1969 Vienna Convention, specifically articles 42 to 53 and 69 to 71, although it had not been deemed necessary to incorporate a separate provision on the matter. When the Convention was being drawn up, the Special Rapporteur on the topic had submitted a draft article on validity, but it had not been adopted, having been viewed as unnecessary. Some reference should be made to the conditions of validity, however, even if no specific provision was included in the draft articles now being worked on. That was why the conditions of validity of a unilateral act, which did not differ from those for validity of a treaty, were set out in the report.

4. First, it was the State that had to formulate a unilateral act, although other subjects of international law such as international organizations were not precluded from doing so. The reason for that limitation was simply that the work on the topic had to conform to the Commission's mandate, which was restricted to unilateral acts of States. In addition, a unilateral act had to be formulated by a person who had the capacity to act, and to undertake commitments at the international level, on behalf of the State.

5. Another condition for the validity of a unilateral act, characteristic of legal acts in general, was the lawfulness of its object. The unilateral act must not conflict with a peremptory norm of international law or *jus cogens*. In addition, the manifestation of will must be free of defects. By analogy with what was done in the 1969 Vienna Convention, however, those conditions of validity of unilateral acts did not need to be set forth in a specific provision of the draft articles.

6. Section B of chapter I of the fifth report spoke of the regime governing invalidity in international law, which was certainly one of the most complex aspects of the

study of international legal acts in general. Prior to Vienna, that regime had not been examined in great depth in the context of international law, even though it had given rise to international disputes and had been considered in the domestic sphere. A related issue raised was the effects of a unilateral act that conflicted with a previous act, whether conventional or unilateral—in other words, a unilateral act that was contrary to obligations entered into previously by the same State. Reference was also made to absolute invalidity, where the act could not be confirmed or validated, and to relative validity, where it could. In the first case, the act conflicted with a peremptory norm of international law or *jus cogens* or was formulated as a result of coercion of the representative of the State that was the author of the act; in the second, other causes of invalidity could be overcome by the parties, and the act could therefore have legal effects.

7. As was pointed out in paragraph 115 of the report, the single draft article on causes of invalidity submitted earlier had now been replaced by separate provisions, in response to comments made by members of the Commission and of the Sixth Committee. As was indicated in paragraph 116, the new version presented in brackets a reference to the State or States that had formulated a unilateral act. That alternative catered for the possibility that a State might invoke invalidity in the case of a unilateral act that had a collective origin. If the alternative was accepted, a reference to the "State or States" might be included in the definition in article 1 in order to reflect more clearly the possibility of a collective unilateral act. It would be noted that in the new version of draft article 5, the State or States that had formulated the act could invoke error, fraud or corruption of an official as defects in the expression of will, whereas any State could invoke the invalidity of a unilateral act if the act was contrary to a peremptory norm of international law (*jus cogens*) or a decision of the Security Council.

8. A number of issues remained unresolved and could be the subject of further consideration. One was the possibility, in the case of unilateral acts of collective origin, that one of the States that participated in the formulation of the act might invoke invalidity. Another was the effects that the invalidity of the act could have on legal relations between the State that invoked invalidity and the other States that had participated in the formulation of the act, and on their relations with its addressee. Did the invalidity of the act affect only the relationship of the invoking State with the addressee, or did it affect the relationship among all the States that had formulated the act and all the addressees? Consideration would have to be given, *inter alia*, to stipulation in favour of third parties, in which case, if the act that gave rise to the relationship was invalidated, the relationship with the third State was terminated. In that context it should be recalled that article 69 of the 1969 Vienna Convention set out the consequences of invalidity of an act, which differed from those posited for a unilateral act of collective origin. He would welcome comments on that point so that they could be reflected in a future provision on the subject.

9. The diversity of unilateral acts could have an impact on the capacity to invoke the invalidity of the act. In the case of promise or recognition, for example, the author State could invoke the invalidity of the act, but in the case of protest, the situation was not the same: while the author State could hardly invoke the invalidity of the act, nothing would seem to prevent the addressee State from doing so.

10. Another issue taken up in the report but not reflected in the actual wording of the draft was whether the author State could lose the right to invoke a cause of invalidity or a ground for putting an end to an act by its conduct or attitude, whether implicit or explicit. According to some of the literature, there was no defect—or almost no defect—that could not be overcome by the subsequent conduct of the State. By its subsequent attitude, the State could regularize an act that was considered invalid *ab initio*. One could take the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*, in which ICJ had ruled that Nicaragua could not challenge the award because it had applied the treaty that contained the arbitral clause (para. 109 of the report).

11. The question was raised in paragraph 110 of the report whether a State could validate any and all unilateral acts through its subsequent behaviour, or whether a distinction had to be made according to the differing legal effects of the act. Protest, for example, might be approached from a different angle. Because any provision on the subject might not be generally applicable, none was being proposed.

12. Another issue touched on in the report (para. 113) was invalidation of a unilateral act because of a violation of domestic law concerning competence to formulate unilateral acts and the particular restriction of the power to express will. According to the Vienna regime, that cause could be invoked only if the violation was manifest and if it concerned a norm of fundamental importance to the domestic law of the State.

13. The difficulties of a straightforward transposition of the Vienna regime to unilateral acts should be emphasized in that regard. There was perhaps no basis for comparison with domestic law, since constitutions generally referred to the capacity to conclude treaties without expressly mentioning unilateral acts. There was no justification for a broad interpretation assimilating unilateral acts to treaties. While the representative of a State had the capacity to act on behalf of the State and to commit it at the international level, he or she could not do so in all circumstances. For example, could a representative or even a Head of State or minister for foreign affairs, whose capacity was not open to question, make a unilateral declaration with the object of modifying borders or doing something else that normally required domestic ratification or even a national referendum? Could such a unilateral declaration produce legal effects *per se*?

14. The second matter addressed in the report was the interpretation of unilateral acts. Because expression of will was involved, rules on interpretation could be applied to all unilateral acts, irrespective of their content. Some members of the Commission and of the Sixth Commit-

tee had felt that consideration of the rules of interpretation was premature, while others, perhaps the majority, had deemed it possible to try to establish a general rule and one on supplementary means of interpretation, as in the Vienna regime. The transposition of that regime to unilateral acts must always take into account the specific features of such acts. Hence the proposed wording of draft article (a), paragraph 1, which drew on article 31 of the Vienna Conventions of 1969 and 1986 but took account also of the definition in article 1 of the draft now being worked on.

15. The draft article on interpretation did not expressly refer to the restrictive character of interpretation, but such a reference could be included if the Commission preferred. Otherwise, the commentary should reflect that concept, which had been indicated in the literature and in case law, such as in the *Nuclear Tests (Australia v. France)* case, where ICJ had been dealing with promises, and in respect of declarations of acceptance of the Court's jurisdiction.

16. Another issue tackled in the report was the classification of unilateral acts, which, though an arduous task, could facilitate the structuring of the draft articles. It had rightly been noted that common rules that would apply to all unilateral acts could not be developed. While classification might be an academic exercise, it could help in grouping and structuring the draft articles. Even if the classification could not be done for the time being, the Commission should take a final decision on whether to develop rules for a category of unilateral acts such as promises, which signified the assumption of unilateral obligations by the author State. The next report could then address the complex issues of revocation, modification, termination and suspension of unilateral acts, which could be handled more easily if compared solely with that kind of act.

17. Clearly, the revocation of a unilateral act could not be the subject of a rule that applied to all acts. The revocation of a promise or of an act whereby a State assumed a unilateral obligation did not seem to be the same as the revocation of an act whereby a State reaffirmed a right. The situation could be and was different, depending on whether it was a promise or a protest that was being revoked. Could the author State revoke the act unilaterally in both cases, or was that power limited in one or both cases? A similar question arose in relation to the modification of a unilateral act. Could a State modify a unilateral act in a unilateral manner, in other words, without the participation of the addressee, or was the consent of the addressee required, as in treaty relations?

18. The termination and suspension of application of a unilateral act must be considered in terms of the unilateral act's specific features. Once again, the question was whether the Vienna regime could be transposed, *mutatis mutandis*, and whether it was possible to develop rules that could be applied to all unilateral acts, irrespective of their content. Rules on the termination of the unilateral act should be developed, in his view, along the lines of those laid down for treaties in articles 59 *et seq.* of the 1969 Vienna Convention, and the consequences of termination and suspension of application should be examined

on the basis of articles 70 and 72 of the Convention but with due regard for the particular features of the unilateral act. The rules on the termination or suspension of treaties owing to impossibility of performance or change of circumstances could be made applicable to unilateral acts. It would be more difficult, however, to transpose the Vienna rule on the termination or suspension of the operation of a treaty implied by conclusion of a later treaty. The same could be said of the rule on termination or suspension of the operation of a treaty as a consequence of its breach. Consideration could be given to developing rules on the termination or suspension of an act owing to the severance of diplomatic or consular relations or the emergence of a new peremptory norm of international law, matters covered in articles 63 and 64 of the Convention.

19. Such questions, which in his view could not be the subject of common rules, could be addressed by the Commission and the working group that was to be set up, and the resulting suggestions and conclusions could be taken into account for the preparation of the next report.

20. Chapters II to IV of the fifth report were soon to be circulated, and he wished simply to touch on their subject matter in order to give members of the Commission an overall perspective. It dealt with rules on respect for and application of unilateral acts, in particular a rule drawing on article 26 of the Vienna Convention that would lay down the obligatory nature of unilateral acts. The inclusion of the *acta sunt servanda* rule might be important, and perhaps the Commission could consider it during the second part of the session.

21. Chapter II of the report would also address the important subjects of the application of the unilateral act in space and time. In both cases, the principle of non-retroactivity and of application throughout a State's territory seemed transferable from treaty law to the framework of unilateral acts.

22. To date, articles had been submitted on the definition of unilateral acts, the capacity of States to formulate unilateral acts, persons authorized to formulate unilateral acts, confirmation of an act formulated without authorization, causes of invalidity, *acta sunt servanda*, non-retroactivity of unilateral acts, the application of unilateral acts in space, general rules of interpretation and supplementary means of interpretation. A draft article 6 would be submitted, on determination of the time from which the act had legal effects, which could be compared to the entry into force of a treaty. It was extremely important, since from that time the act was opposable and could have an impact on revocation, termination, modification or suspension of the application of the act.

23. He had raised a number of questions and looked forward to hearing the views of members of the Commission so that they could be taken into account in his future work on the topic.

24. Mr. GAJA, confining himself to comments on novel aspects of the texts just submitted by the Special Rapporteur, said that, under draft articles 5 (a) to 5 (h), only the State that formulated a unilateral act was regarded as en-

titled to invoke a cause of invalidity of the act. That solution did not appear to be adequately justified in the report, which to some extent even defended a different solution. According to paragraph 118, for instance, any State could invoke the invalidity of a unilateral act that was contrary to a peremptory norm. But that point was not reflected in article 5 (f), which related solely to invocation by the State that formulated the unilateral act.

25. It was questionable whether the State which was the author of the unilateral act should be the only subject entitled to invoke a cause of invalidity. Unilateral acts also produced effects for other subjects of international law which might, at least in some cases, be regarded as being entitled to invoke a cause of invalidity. Certainly their interests might be affected by the existence of the act, and they might not be responsible for the cause. Hence, one had to consider whether it would not be justified to give all these States, under certain circumstances, the possibility of invoking invalidity as well.

26. In any case, it would be preferable to use the same language as that used in articles 51 to 53 of the 1969 Vienna Convention relating to treaties affected by coercion or conflicting with peremptory norms. While articles 46 to 50 of the Convention stipulated that the respective causes of invalidity could be invoked by only one of the States parties to the treaty, namely the one affected by error or other causes of invalidity, article 51 held that a treaty was without any legal effect, and articles 52 and 53 regarded the treaty as void in the case of coercion or conflict with peremptory norms. That might be seen as implying that all States parties, and not just one, could invoke the cause, but it also implied a *droit de regard* of States other than the States parties to the treaty, given the general interest that no treaty should be in conflict with a peremptory norm. That kind of concern was also warranted in respect of unilateral acts which were tainted with the same cause of invalidity.

27. Changing the wording of the 1969 Vienna Convention to mere "invocability" in articles 5 (d), 5 (e) and 5 (f), by the State which was the author of the unilateral act would unnecessarily weaken the provisions on invalidity corresponding to those in articles 51 to 53 of the Convention.

28. The Special Rapporteur's reference in article (a) to the author State's intention for the interpretation of unilateral acts (para. 135) was a step forward, although only a half-hearted one, especially in view of what was stated in paragraph 132 on the preparatory work, which after all was the main instrument for ascertaining the author's intention. Reference to preparatory work was made only in the context of a supplementary means of interpretation and was put in square brackets in article (b) (*ibid.*), which showed that it was a minor consideration, whereas actually it was important and should be emphasized in the context of intention.

29. The Special Rapporteur made a case for the restrictive interpretation of unilateral acts. But, as he himself noted in paragraph 134, that view was not reflected in the text of the draft articles, and no reason was given. The

Special Rapporteur had only suggested that a working group should draft a text on restrictive interpretation, but as such a text would affect articles (a) and (b), a proposal in that regard would have been useful.

30. For the fourth year running, he wished to reiterate his conviction that only the availability of a larger body of practice relating to unilateral acts and an analysis of that practice would allow the Commission to make reasonable progress on the topic.

31. Mr. PELLET said that at first he had gained the impression that Mr. Gaja was wrongly criticizing the Special Rapporteur, because in the French version of articles 5 (f) and 5 (g), it was not indicated that it was the author State or States of a unilateral act that could invoke the absolute invalidity of a unilateral act if there was a conflict with *jus cogens*. The absence of a reference to the author State was contrary to the intention expressed in paragraph 116 of the report. For its part, the English text contained the phrase “State [or States] that formulate[s] a unilateral act may invoke” and so on. What did the Special Rapporteur want to say? In any case, the French version was preferable to the English version. In other words, he agreed with Mr. Gaja; in the event of absolute invalidity of the act, any State could invoke it. But if the French version of articles 5 (f) and 5 (g), which did not restrict themselves to the author State, was correct, he did not think that it was only when a unilateral act was contrary to a peremptory norm or a decision of the Security Council that invalidity could be invoked by any State: it should also be the case with the threat or use of force. In other words, the Commission should probably reintroduce in that form the distinction between absolute invalidity and relative invalidity in the 1969 Vienna Convention.

32. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the Spanish version was of course the reference text; its translation was the work of the translators. He was trying to distinguish between absolute and relative invalidity. Articles 5 (f) and 5 (g) were cases involving absolute invalidity which went beyond the interest of the State that was formulating the act and could naturally be invoked by any State. The Commission might also want to consider Mr. Pellet’s comment about the threat or use of force.

33. Mr. PAMBOU-TCHIVOUNDA, referring to Mr. Gaja’s remark on preparatory work, wondered about the possibility of obtaining access to preparatory work when a unilateral act was involved. Imagine an important declaration for which there was no written record but which the addressee must refer to and take note of. Was there really room in such a case for preparatory work? How could access be obtained to a State’s private archives? Was that a simple matter? Could any practical examples be cited?

34. Mr. KAMTO said that, according to the Special Rapporteur, the formulation of article 5 (f) was based on the 1969 Vienna Convention. Yet article 53 of the Convention simply stated that a treaty “is void”. The point of introducing the concept of “invocation” was to affirm the absolute invalidity of the unilateral act when it was in contradiction with *jus cogens*, and not to create a possibility of invocation for any State.

35. Mr. TOMKA said he agreed with Mr. Gaja that a distinction must be made between cases of invocation of invalidity of unilateral acts and cases in which an act was void because it conflicted with a peremptory norm of international law. In the latter case, the sanction of international law made the act void, and not the fact that the State which had formulated the act or any other State had invoked that cause. Mr. Pellet had said that that right should be given to other States. He personally thought that an act which was contrary to peremptory norms of international law was void, irrespective of whether any State invoked invalidity or not.

36. Mr. GAJA said he apologized to the Special Rapporteur because he had not looked at the Spanish text and had not been able to distinguish between articles 5 (d) and 5 (e), where the reference was to *el Estado* [“The State”], the State which was the author of the act, whereas article 5 (f) and 5 (g) spoke of *un Estado* [“A State”]. But, as had also been pointed out by Mr. Kamto and Mr. Tomka, it was preferable to use the term “void”, as in the Vienna Convention, and not say that any State could invoke the invalidity of the act.

37. As to Mr. Pambou-Tchivounda’s comment, the Commission had discussed the question of preparatory work at the previous session, and new members would doubtless express their views. One of the clear conditions for the use of preparatory work was its accessibility.

38. Mr. KOSKENNIEMI said that as a new member of the Commission he had a number of general comments on both article 1 and article 5.

39. He had fundamental doubts about the direction and content of the work. To begin with, the oddness of the language of article 1 and article 5 was indicative of fundamental problems. For example, article 1 spoke of unilateral acts as acts “with the intention of producing legal effects”. Article 5 used the odd phrase “formulation of a unilateral act” and referred to the conditions of validity of unilateral acts as well as their interpretation. That suggested that a unilateral act was to be taken as a fully voluntary scheme or law, a kind of promise or unilateral declaration.

40. Initially, the topic had been conceived in terms of unilateral declarations. Following discussions in the Sixth Committee and the Commission, it had then been changed to “unilateral acts” to ensure that they would not be regarded as promises given by States to each other on a unilateral basis. Such promises were exceedingly rare, and from his 17 years in the Ministry of Foreign Affairs, he had difficulty recalling a single case in which a State had *unilaterally* made a promise and had held itself legally bound by it without expecting reciprocity on the part of any other State. He thus had doubts about the phrase “formulate[s] a unilateral act”.

41. In the relevant jurisprudence, namely the previously mentioned *Nuclear Tests*, *Temple of Preah Vihear* and *Arbitral Award Made by the King of Spain on 23 December 1906* cases, the actor State itself had never conceived of acting in terms of a “formulation” in order to create legal effects. On the contrary, it had found itself bound by

the way it had acted or failed to act or what it had said or failed to say, irrespective of any formulation that it might have made about how it had acted or what it had said.

42. One difference between the topic of unilateral acts and some of the other topics the Commission had successfully considered in the past was that those other topics had dealt with legal institutions which could be defined and set off from the rest of the legal order: the concept of treaty, responsibility, succession of States and diplomatic protection all referred back to legal institutions in which there were rules, principles and considerable practice that lawyers recognized as being an aspect of a whole. Unilateral acts were not like that: they did not refer to any particular legal institution. Instead, they were a catch-all term to describe ways in which States sometimes were bound other than through the effects of particular institutions, or in which States acted in special ways so as to create legal effects. It was a source of some of the difficulties; the Commission was trying to codify something which did not exist as a legal institution and was at a loss as to how to define it so as to make it a legal institution.

43. A second difficulty was that the very concept of a unilateral act was fundamentally ambivalent. It described two different things. On the one hand, it was a sociological description of States acting. States undertook thousands of acts, and they did so in a unilateral way in the sense that they decided to act as individual identities. They were persons in the great marketplace of diplomacy who then encountered each other in the most varied circumstances, sometimes undertaking obligations, sometimes not. On the other hand, the concept also referred to a legal mechanism whereby States' acts created legal effects or, to put it differently, whereby the legal order projected norms and obligations on the way those States acted and attached legal consequences to their actions. It was a mechanism in which the legal order acted irrespective of the actors themselves. By acting, the legal order attached consequences to States' actions.

44. When States came together in the world of diplomacy, they created expectations, which good faith demanded that they not disappoint. That process was impossible to describe in terms of a voluntary scheme in which States had the intention of creating legal effects and in which they formulated actions to that effect. One could take the example of the *Nuclear Tests (Australia v. France)* case. There, ICJ had ruled that France was bound by certain unilateral statements made by French officials for two reasons. First, lip service was paid to the traditional voluntary scheme of diplomacy by the assertion that, when it was a State's intention to be bound by the statements it had made, it should be so bound. Then, two paragraphs later in the judgment, the Court contradicted itself by saying that good faith and trust in international relations and the need for confidence required States not to go back on their word, irrespective of whether they wanted to be bound. Of course, French lawyers had immediately seized upon that by saying that politicians had simply made some statements, but that there had been no intention of creating legal effects or being bound. That showed the significance of the second aspect of the Court's ruling. France had been bound because of the intention behind its action,

irrespective of what the President, the Minister for Foreign Affairs or diplomats had been thinking about when they had made their statements. Thus, States were bound by the fact that through their unilateral actions, they created expectations in other States. The expression of will could not be decisive for two reasons: it was impossible to know what the will of States was, and, more importantly, nothing prevented States from changing their minds and deciding one fine day that they no longer wanted to be bound by earlier statements. At that point, the significance of the second aspect of the Court's ruling in the *Nuclear Tests (Australia v. France)* case became clear: good faith and the need for trust and confidence required that, if a State created an expectation of how it would behave, it would be bound by that expectation, irrespective of whether or not it wanted to be bound.

45. Thus, something other than a promise was involved. A State might be obligated by any kind of action. The Special Rapporteur had outlined the four standard types of unilateral acts, but there were others. A State might be bound because it remained silent, because of what it did or refrained from doing and so on, irrespective of how it thought that it was acting. The *Nuclear Tests*, *Temple of Preah Vihear* and *Arbitral Award Made by the King of Spain on 23 December 1906* cases were not instances of States' being bound because they had promised, because they had intended to be bound or because the ministry of foreign affairs had formulated a unilateral act in the way diplomatic notes or promises were formulated to other Governments on the basis of which treaties and contracts then became binding. They had behaved in a particular way and then found themselves bound because that was the logic of the situation.

46. The simple conclusion was that the legal order attached obligatory force to some actions in a manner different from treaties or other legal institutions, inasmuch as it was a question of creating not universal law but contextual law, a bilateral opposability that existed between the acting State and States in which expectations had been created through particular action. The cases in question, even the *Fisheries Jurisdiction* case, did not have to do with the creation of general law but with bilateral or perhaps trilateral obligations, because the expectations were bilateral or trilateral, and because good faith involved the need to contextualize the effect. Whichever the countries involved in each instance, there had been an opposability in which the legal order did not interpret an action, but the whole context. What had been the message of the actor State, irrespective of what it had wanted to say? How had it been received by others? What did reasonableness and good faith expect to be performed in order to interpret what had transpired in that particular relationship? No general rules could be devised, because particular relationships like those between France, New Zealand and Australia in the *Nuclear Tests* cases or between Cambodia and Thailand in the *Temple of Preah Vihear* case had been the products of a long history and a geographical situation that could not be generalized. The opposability created through unilateral acts could not be made subject to general criteria of understanding, because it was outside international institutions and had to do with what was reasonable in the context of human behaviour and the history of the States concerned.

47. Hence, any analogy with the 1969 Vienna Convention was inappropriate. That could be seen in the odd, artificial reference in the articles to the “validity” of unilateral acts. An act was an act; it did not live in the sphere of validity but in the world of sociology. It was the legal order which projected an obligation upon the act, and the way the act was interpreted gave an idea of whether there was obligation or not. The fundamental ambiguity at the heart of the unilateral act might be compared to a common-law marriage; although the relationship had not been formalized, the parties had acquired certain duties by behaving as they had, and those duties could not later be refused solely because one of the parties no longer wished to be bound by the commitments made.

48. Consequently, the whole exercise was on the wrong track, as was to be seen in the odd nature of the language used, and he did not think the problem could be corrected simply by tinkering with the draft articles. While sympathizing with the Special Rapporteur, Mr. Pellet and other members who had been considering the question of unilateral acts for the past five years, he believed that the topic would benefit from being reformulated as a legal institution.

49. The Commission should abandon the voluntary scheme based on States’ intentions and should focus on the reasonable aspects of the issue in terms of expectations raised and legal obligations incurred. It should also abandon the analogy with the law of treaties, which took an impersonal approach to the entire field of diplomacy, and should instead base its considerations on the law of social relations, where individuals exercised greater or lesser degrees of power in the complex web of relationships. Finally, it should restrict the topic to historical legal institutions that practising lawyers would recognize, such as the recognition of States and of Governments. In that regard, he agreed with Mr. Gaja that a more thoroughgoing review of State practice would be useful.

50. Mr. SIMMA said that he agreed to a very large extent with both the underlying philosophy and the content of Mr. Koskenniemi’s remarks. At the Commission’s previous session, he had maintained that the topic in its present form was not really suited for codification. However, he thought that Mr. Koskenniemi had gone rather too far and could not agree with his diagnosis of the problem. The Commission’s current course would succeed in capturing a certain type of unilateral act, one which did exist in the manner envisaged by the Special Rapporteur and the majority of the members but represented only a small portion of the broader topic set forth by Mr. Koskenniemi.

51. True, a State would not normally formulate a unilateral act without some benefit to itself, but such benefits did not necessarily constitute reciprocity. For example, Germany had recently refused to grant a Turkish request for extradition of the alleged leader of an Islamist movement without a binding promise that, if convicted, the person would not be subject to the death penalty. A dispute had arisen over the question of which national body was competent to make such a promise; Turkey maintained that it was Parliament, while Germany considered that only the Turkish Government itself was so empowered.

52. That example showed there was a logical basis for the draft on the representation of States in the formulation of unilateral acts, something not discussed in the Special Rapporteur’s fifth report. Initially, he had wondered whether such situations would ever arise, but he now saw that, while uncommon, they did in fact occur. Furthermore, while the Turkish case involved a benefit to the Turkish Government—the extradition of the individual in question—it would be inaccurate to speak of reciprocity. In the past, the Commission had never considered unilateral acts in which a State intentionally bound itself by a declaration through which no benefit accrued to it. Furthermore, he saw no contradiction between the intention to be bound as a factor underlying unilateral acts, on the one hand, and a declaration creating legitimate expectations, on the other; the two concepts were complementary in nature. And, as his example had shown, the 1969 Vienna Convention applied to unilateral acts in certain cases.

53. During the fifty-third session of the General Assembly, the Special Rapporteur on reservations to treaties, Mr. Pellet, had submitted to the Sixth Committee a draft guideline on States’ declarations that accession to a given treaty did not imply recognition of another State. As a professor of law, he found such cases fascinating; however, Member States had immediately objected that the issue was political in nature and should not be addressed by the Commission. He therefore feared that, contrary to the draft programme of work prepared by Lauterpacht in 1949, the Commission was not the place to deal with human rights or highly political issues like the recognition of Governments. With the new membership, that situation might change.

54. Mr. PELLET said that international law was not based entirely on the expression of the will of States but that it was plain that, insofar as they were bound by treaty obligations and by unilateral acts, it was by their own individual or collective wish. In the *Nuclear Tests* cases, ICJ had taken a logical, coherent stance by refusing to accept the French position; it had ruled that France had entered into a binding commitment not to carry out further atmospheric nuclear tests in the South Pacific region and was in good faith bound to respect it. Thus, he saw no difference between the two paragraphs which Mr. Koskenniemi considered contradictory. Why were States bound under the treaty mechanism? It was because they wished to be bound and limit their freedom of action. The same was true when States formulated unilateral acts. It was indispensable to orderly relations between States that they should be bound by the expression of their will; he saw no difference between Mr. Koskenniemi’s statement that States might at some point no longer wish to be bound by a unilateral act which they had formulated and the fact that States parties to a treaty remained bound by that instrument even if they later came to regret their accession. Furthermore, the assertion that States did nothing without reciprocity was not true. Admittedly, States always had some self-interest, but reciprocity had a specific meaning in international law. With regard to Mr. Simma’s example, Germany was not the only State to place conditions on extradition—the problem had arisen in the case of requests for extradition of Europeans to, *inter alia*, the United States—and, while it might be improper to speak of reciprocity, there was

certainly a balance of interests involved. But to speak of reciprocity was to confuse matters to some extent.

55. Under the guise of contextuality, Mr. Koskenniemi's words were far too abstract. There was a form of legal reality that could be assimilated to social reality with the former as superstructure and the latter as infrastructure, to use somewhat outdated Marxist terms. Mr. Koskenniemi seemed to be saying that he was not interested in the superstructure because it could not be separated from the infrastructure. However, that was of no importance to jurists; what mattered was to identify the rules.

56. Mr. Koskenniemi's position implied a reconsideration not only of the topic of unilateral acts but of international law as a whole, but the Commission's task was merely to bring order to complicated problems. It was perfectly possible to establish a set of minimum general rules governing unilateral acts; the Special Rapporteur's work might be open to criticism in its details, but international law was a reality and nothing would be gained by diluting it with what were, in his view, extralegal considerations.

57. Mr. DUGARD said that the issues raised by Mr. Koskenniemi lent themselves to broader discussion. It was true that the topic of unilateral acts was unlike any other the Commission had dealt with in the past. For example, in the case of diplomatic protection, for which he was Special Rapporteur, there was a wealth of authority, and the task was to choose between competing and inconsistent rules emerging from State practice. There was no such body of authority on the topic of unilateral acts, a fact which made the work of the Special Rapporteur for this topic more difficult. But rules and State practice on issues such as the recognition of States did exist, and he believed that the Commission could engage in a blend of codification and progressive development in such areas. Mr. Simma had rightly noted that the Commission had scrupulously avoided the question of recognition of States, but he did not agree that the issue must be avoided because it was too politically sensitive; if the Commission was to have a function, it must be prepared to deal with such matters.

58. The replies from Governments (A/CN.4/524) to the questionnaire on unilateral acts<sup>2</sup> were extremely interesting. In particular, Portugal's remarks concerning the Timor Gap Treaty<sup>3</sup> had an application broader than that of relations between Portugal and Australia, since they conveyed the Portuguese Government's position on the status of East Timor.

59. He agreed that the 1969 Vienna Convention could not be taken over in every respect, but it could provide guidance and give rise to fruitful debate on the extent of its applicability to unilateral acts. For example, unlike the Special Rapporteur, he believed that it was possible for the Commission to look at the object and purpose of unilateral acts as a guide to their interpretation.

<sup>2</sup> See 2720th meeting, footnote 7.

<sup>3</sup> Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (Timor Sea, 11 December 1989), *Australian Treaty Series 1991, No. 9* (Canberra, Australian Government Publishing Service, 1995).

60. The Commission had virtually exhausted the list of more traditional topics of the type Lauterpacht had proposed in 1949. It was therefore obliged to embark upon new studies that presented a challenge, but also an opportunity for innovative and progressive development and codification.

61. Mr. FOMBA said that, while the issues raised by Mr. Koskenniemi—law, sociology, institutions and mechanisms—posed epistemological problems, there was a dialectical link between them. Whether unilateral acts were an institution depended on one's definition of that term. Certainly, they were important events and actions by States that deserved to be considered in the context of international law. Under article 15 of its statute, which defined the concepts of codification and progressive development of international law, it was the Commission's task to create institutions where they did not yet exist and to clarify them where needed. Unilateral acts were not a myth, and the analogy with the 1969 Vienna Convention was, *mutatis mutandis*, inescapable.

62. Mr. PAMBOU-TCHIVOUNDA said he had serious doubts about the pertinence of the over-simplistic approach propounded by Mr. Koskenniemi in the course of his apocalyptic indictment—an approach according to which treaties, as an act of will, were the only means of regulating the global marketplace of diplomacy. The relationship between a State's will and its intention was hard to unravel and, both from the logical and from the chronological standpoint, it was difficult to pinpoint the frontier between the realms of will and intention.

63. Recognition of the validity of Mr. Koskenniemi's approach would involve refashioning many of the working tools used by legal practitioners and theorists in their daily work. It would require ministers of foreign affairs to fly in the face of facts by conducting a nation's affairs solely on the basis of international treaties and ignoring all other acts on the grounds that, according to Mr. Koskenniemi, those acts did not exist. Yet a State's silence could be as eloquent as an oral or written declaration.

64. Recognition of that approach would involve drastically rewriting article 38, paragraph 1, of the Statute of ICJ so as to provide that the Court, whose function was to decide in accordance with international law such disputes as were submitted to it, was to apply only international conventions in deciding such disputes. It would involve rewriting all those sections of the textbooks dealing with the sources of international law. Mr. Koskenniemi was right to call into question the analogy with the law of treaties. Unfortunately, he was proposing no viable alternative approach, other than the highly questionable assertion that the topic simply had no place in international law.

65. Ms. ESCARAMEIA congratulated Mr. Koskenniemi on his radical and brilliantly expounded proposals, with whose conclusions and many of whose preconditions she unfortunately could not agree. The gist of Mr. Koskenniemi's argument seemed to be, first, that unilateral acts were not an appropriate topic for consideration by the Commission, since they concerned a social rather than a legal relationship and could thus not be codified; and, second, that no general rules could be formulated, as such acts created only bilateral expectations and needed

to be contextualized. His proposed solution was for the Commission to abandon the voluntary scheme based on States' intentions and the analogy with the law of treaties, and instead to focus on certain areas of practice such as recognition of States or of Governments.

66. On the first point, she could not agree that unilateral acts were an area not open to regulation. While there might ultimately prove to be more exceptions than rules, some rules did exist, and they offered the only viable basis on which to proceed. Nor did she agree that unilateral acts raised only bilateral expectations and thus did not lend themselves to codification. Sometimes such acts could be more general in scope. For instance, the protests that Portugal had presented in connection with the Timor Gap Treaty between Australia and Indonesia had had an effect so broad as to impinge on other States and even on other entities such as multinational corporations with interests in the area. Similarly, Portugal had several times asserted that the right of self-determination of the people of East Timor had an *erga omnes* character—an assertion subsequently confirmed by ICJ in the *East Timor* case.

67. As to the question of how the Commission should proceed, while the proposal to abandon the voluntary scheme had its attractions, no better alternative to the analogy with the law of treaties was currently available. The Commission should resist the temptation to be over-ambitious and should try to come up with some general minimum rules governing unilateral acts before proceeding to consider one or more of the four specific types of act listed by the Special Rapporteur. Of those acts, recognition seemed to her to offer the most potential as a topic for discussion.

68. Ms. XUE said that the Special Rapporteur was to be congratulated on the progress he had made on the topic of unilateral acts of States, one that did not lend itself readily to the formulation of rules. As a practitioner, she shared many of Mr. Koskenniemi's reservations on that score. However, again as a practitioner, she was also well aware of the great importance of unilateral acts in international relations. In that respect she agreed with Mr. Simma that Mr. Koskenniemi should guard against "throwing out the baby with the bathwater". In addition to treaty obligations and obligations under customary international law, there were clearly some international obligations stemming from unilateral acts of States. One obvious example, recognition, was a unilateral political act that also gave rise to legal effects on the international plane. The Special Rapporteur should perhaps focus less on the behaviour and intentions of the actor State and more on the effects of the unilateral act on other States.

69. Other examples could be added to Mr. Simma's example concerning extradition and the death penalty. The Joint Declaration on the Question of Hong Kong<sup>4</sup> concluded by the Governments of China and the United Kingdom and the Joint Communiqué of China and the United States on mutual recognition, though considered as treaties, in fact contained some unilateral declarations by each of the two parties, entailing binding obligations undertaken by the one party and recognized as such by the other party.

70. The Commission should start by considering examples of unilateral acts such as recognition and promise, in order to ascertain whether any general rules could be laid down. It was a challenging but potentially rewarding task. While too close an analogy with the law of treaties seemed to pose problems, certain treaty provisions could, in her view, usefully be analysed.

71. The CHAIR, speaking as a member of the Commission, said that the Commission should guard against watering down "hard" obligations under the law of treaties by drawing analogies between such obligations and weaker obligations undertaken in the context of unilateral acts.

72. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), responding to Mr. Koskenniemi's comments, said that unilateral acts were a fact of international law. Reciprocity need not be a necessary element in unilateral acts, for it was sometimes absent in the treaty context. The Vienna regime was also a necessary point of reference, constituting a common denominator between the two systems. Practice, while admittedly hard to identify, pointed to the existence of some categories of legal act. Furthermore, as had been pointed out in the context of the debate on reservations to treaties, the formulation of rules often stimulated the evolution of practice in a given area.

73. Mr. KOSKENNIEMI said he wished to clarify the question of the relationship between acts, institutions and obligations. Unilateral acts existed as a phenomenon in the social world. Those acts were sometimes linked to legal institutions such as treaties and customary law. Thus, through the institution of a treaty, a set of acts could create legal obligations. Custom worked in a similar way: when isolated instances of State conduct became sufficiently general in character for the fiction of *opinio juris* to be projected onto them, the end result was an obligation. In the case of unilateral acts, however, it was not apparent what institution converted an act into an obligation. According to one thesis, no such institution existed, so that unilateral acts simply fell outside the realm of legality. Sometimes, however, as in the case law he had cited, an invisible institution created a link between an act and an obligation. That invisible institution was an amorphous conception of what was just and reasonable in a particular circumstance. The Commission might wish to formulate general principles articulating the manner in which particular relationships between States became binding. To attempt to do so would be a tremendously ambitious, albeit extremely worthy, project; as a practitioner he doubted that it was feasible.

74. Alternatively, the Commission might fill the vacuum created by the absence of a legal institution by considering the institution of recognition of States, an institution which, while operating on a level different from that of treaties or custom, nevertheless served as a link between forms of behaviour and legal obligations. If, however, the Commission wished to take the other, more ambitious route, that would entail moving beyond the existing system of international law, in which diplomatic relations were based on voluntary acts, to a system in which States, like individuals in society, were bound by a kind of welfarism, perhaps in order to go beyond Sir Henry Sumner Maine: from status to contract to justice.

<sup>4</sup> United Nations, *Treaty Series*, vol. 1399, No. 23391, p. 33.

75. Mr. PELLET said that the reason why treaties must be respected was encapsulated in the adage *pacta sunt servanda*. One interesting aspect of the codification exercise proposed by the Special Rapporteur was the idea that, *mutatis mutandis*, the same was true of unilateral acts: in other words, that *acta sunt servanda*. The precise conditions under which the latter adage was applicable would of course need to be determined. However, it was not for the Commission to delve into the recondite reasons underlying that principle. One thing was sure: if the Special Rapporteur were to heed the siren calls of those advocating such a course, any attempt at codification and progressive development in that area would be doomed to failure.

76. Mr. TOMKA said that the first and last elements of Mr. Koskenniemi's scheme based on acts, institutions and obligations were uncontroversial. In his view, however, much of the confusion surrounding the present debate was attributable to the second element in that scheme, namely, institutions. In Mr. Koskenniemi's submission, that category comprised only treaties and custom. He suspected that several members of the Commission entertained some doubts about the validity of that view.

77. Mr. KABATSI expressed appreciation for the opportunity to participate yet again in the Commission's work. He particularly welcomed the fact that, for the first time, the membership included women. Such a historic achievement would counter accusations that the Commission lacked sensitivity to gender issues and would enhance its debates.

*The meeting rose at 1.05 p.m.*

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## 2723rd MEETING

*Wednesday, 22 May 2002, at 10.05 a.m.*

*Chair:* Mr. Robert ROSENSTOCK

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

## Unilateral acts of States (*continued*) (A/CN.4/524, A/CN.4/525 and Add.1 and 2,<sup>1</sup> A/CN.4/521, sect. D)

[Agenda item 5]

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

1. Mr. AL-BAHARNA paid tribute to the Special Rapporteur for his excellent fifth report (A/CN.4/525 and Add.1 and 2). In chapter I, the Special Rapporteur recapitulated some of the fundamental issues in the light of the discussions of the topic in both the Commission and the Sixth Committee. The question most frequently raised in the Sixth Committee had been the classification of unilateral acts. Some delegations had favoured giving priority to the classification of unilateral acts before developing rules on the topic, while others had thought that the classification of unilateral acts was not necessarily useful or important for States and that what really mattered was whether the unilateral act had binding effect on the author State and whether other States could rely on the binding nature of the unilateral act.

2. In his fourth report,<sup>2</sup> the Special Rapporteur had expressed agreement with the idea of the classification of unilateral acts on the basis of their legal effects and had proposed to divide them into two major categories, the first relating to acts whereby the author State undertook obligations and the second to acts whereby the author State reaffirmed a right or a claim. The plan had been to deal first with the first category by formulating common rules applicable to all the unilateral acts in that category and then to formulate specific rules in respect of the second category. As the fifth report clearly revealed, however, the Special Rapporteur had shifted from his original plan. He explained why in paragraph 138 of the report and referred the issue of the classification of unilateral acts to the Commission for its opinion, through the intermediary of a working group. Paragraph 145 of the report gave the impression that the Special Rapporteur continued to believe that the classification of unilateral acts was important.

3. In paragraph 144 of the report, the Special Rapporteur confirmed that, in the light of the replies to the questionnaire on unilateral acts of States prepared in 1999,<sup>3</sup> the Commission had held that the most important unilateral acts were promise, recognition, waiver and protest. In his statement on the topic at the preceding session, he had expressed the view that some types of unilateral acts such as promise, recognition and waiver fell into the first category of unilateral acts, those whereby a State undertook obligations, and could thus be covered by a general rule. Draft article 1, on the definition of unilateral acts, would therefore apply to them. Protest, on the other hand, fell into the second category, acts which reaffirmed a right or a claim. In all cases they were unilateral acts which, when correctly formulated for a specific purpose and notified to

<sup>1</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part One).

<sup>2</sup> See *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519.

<sup>3</sup> See *Yearbook ... 1999*, vol. II (Part Two), p. 138, para. 593.