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Summary record of the 2726th meeting

Topic:
Unilateral acts of States

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2726th MEETING

Tuesday, 28 May 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue.

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

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. FOMBA stressed that unilateral acts were important actions and doings by States and should be so viewed under international law. He wondered to what extent that was in fact the case or could become so and in what way, and what critical appraisal could be made of such acts and to what end. He would leave it to the “poets of international law” to answer those questions.

2. It was disconcerting that, as at 14 March 2002, only three Governments had replied (see A/CN.4/524) to the questionnaire on unilateral acts of States, a fact which suggested that Governments did not find the topic of interest, that the practice was more imaginary than real, that unilateral acts were flexible and thus difficult to define or that the entire issue was fraught with risk. In any case, further information on practice was needed. States should again be urged to reply to the questionnaire, and the Office of Legal Affairs should be asked to provide information on the matter.

3. In paragraph 30 of his fifth report (A/CN.4/525 and Add.1 and 2) the Special Rapporteur pointed out that unilateral acts were not referred to in Article 38, paragraph 1, of the Statute of ICJ but that State practice and legal scholars presumed the existence of such a category of legal acts. It was important to note that case law also attested to their existence. The primary difficulty was the scope of unilateral acts, which, as De Visscher had pointed out, was characterized by uncertainties about their legal effects.² ICJ had dispelled such uncertainties by resorting

to the principle of good faith and to objective considerations that were inferred from the general interest, particularly from the need for legal certainty.³ However, in view of the difference in nature and mandate between the Court and the Commission, and without prejudice to the results of the ongoing study of practice, the Commission should be able to proceed further than the Court had done and to propose a genuine legal regime for unilateral acts.

4. Consideration of the concept of legal effects in terms of rights and obligations and from the standpoint of logic, security considerations and practice should help to establish an adequate legal framework for at least the most traditional of unilateral acts: promise, recognition, waiver and protest. Moreover, such an approach would appear consistent with the views of ICJ in the *Fisheries Jurisdiction (Spain v. Canada)* case. It was for the Commission to “decode” the Court’s “message” with intelligence, subtlety and practicality.

5. While the mechanism governing the dialectical process of the development and functioning of conventions and custom as sources of international law was relatively well understood, little or nothing was known about the link between unilateral acts and those established sources. He therefore agreed with Mr. Kamto and Mr. Pellet, who had called for a study of the matter.

6. Generally speaking, international law had had little to say on the issue of classification for reasons relating to the differences between international and domestic law. That was true of both conventions and custom. Article 38, paragraph 1, of the Statute of ICJ did not go into detail on either of those categories. The literature had often addressed the issue, but without great success, and international jurisprudence apparently had little interest in establishing a hierarchy between them. The Commission should follow those examples and refrain from forcing the issue. However, much would be gained by clarifying the legal and functional link between unilateral acts and other sources of international law.

7. As to the draft articles, there appeared to be general consensus on article 1. Some doubt nonetheless remained about the scope *rationae personae* of acts formulated by States. For example, it was not clear whether they should include national liberation movements. In his view, the answer depended on how such entities were ultimately dealt with in international law and on whether there was a practical need to include them in the framework of unilateral acts. It would have been interesting to consider the positions and behaviour, or at least the desires and intentions, of a movement such as the Palestine Liberation Organization concerning recognition, promise, protest or waiver.

8. Article 5 (g) (para. 119 of the report), on the absolute invalidity of an act which, at the time of its formulation, conflicted with a decision of the Security Council, was a wise addition to the Vienna regime from the political and legal points of view. While article 5 (h) reflected article 46 of the 1969 Vienna Convention, it did not include the concept of a “manifest” violation of the domestic law of the

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part One).

² C. De Visscher, *Les effectivités du droit international public* (Paris, Pedone, 1967), p. 156.

³ *Ibid.*, p. 157.

State formulating the unilateral act. He wondered whether the word should be included in the article or simply mentioned in the commentary.

9. Draft articles (a) and (b) (para. 135 of the report), on interpretation, were acceptable on the whole. He agreed with the Spanish Government's position in the *Fisheries Jurisdiction* case. Since unilateral acts did not always include preambles and annexes, it might be preferable for article (a), paragraph 2, to state that the context for the purpose of the interpretation of a unilateral act should comprise the text and, where appropriate, its preamble and annexes. A similar approach should be taken with regard to the reference to preparatory work in article (b).

10. Finally, he endorsed the proposal for the working group on the important topic of unilateral acts.

11. Mr. PELLET said that in his fifth report the Special Rapporteur was rather like a broken record, repeating the same things and, by so doing, forcing Commission members and representatives of States to the Sixth Committee to repeat themselves in turn. In paragraph 37 of the report, the Special Rapporteur was doubtless referring to him as the member who had asked for a recapitulative report on the status of discussions on the topic in general and on the draft articles submitted thus far. If indeed he was the member in question, he had hoped that such a report would afford an opportunity to take a new approach to the topic on the basis of the criticisms and comments made and to propose new draft articles in light of those considerations. Regrettably, that was not the course taken by the Special Rapporteur.

12. He remained convinced that the topic of unilateral acts of States lent itself to codification and progressive development by the Commission. There was already "extensive State practice, precedent and doctrine", to use the terms of article 15 of the statute of the Commission, and it would also be useful for States to know as precisely as possible what risks they ran in formulating such acts. They were willing to commit themselves, but they did not wish to be taken by surprise, as Norway had been as a result of the Ihlen declaration [see pp. 69 and 70 of the PCIJ judgment in the *Eastern Greenland* case] or as France had been in the case of atmospheric nuclear tests.

13. It was clear from paragraphs 136 to 147 of the report that both the Sixth Committee and the Commission remained divided on the issue of classification. Some considered that unilateral acts were too diverse to be treated as a single category; promise, recognition, waiver, protest, notification and so on must be studied and codified separately. Others, including apparently the Special Rapporteur, thought that the applicable rules could be unified, at least at the level of general principles. He shared the latter position. It seemed obvious that States intended their unilateral acts to produce legal effects. In that sense, there was no difference between such acts and treaties, which were also impossible to reduce to a single homogeneous category but were nevertheless subject to the application of common rules.

14. As the co-author of a textbook on general international law, he had encountered no particular problems in writing the chapter on unilateral acts. Moreover, it was often very difficult to classify a unilateral act, for instance, the Ihlen declaration or the 1952 Colombian declaration on sovereignty over the Monjes Islands; that fact suggested that such acts were less alike than some had maintained. On the other hand, their alleged diversity might be more apparent than real. He tended to agree with the views expressed in paragraphs 138 to 140 of the report and in any event wondered whether unilateral acts could not be divided simply into two, and only two, categories, at least with regard to their effects. However, rather than the classification proposed by the Special Rapporteur in paragraph 137 of his report, it might be more useful to distinguish between "condition" acts such as notification and its negative counterpart, protest, which were necessary in order for another act to produce legal effects, and "autonomous" acts which produced legal effects, such as promise, waiver (which might be regarded as the opposite) and recognition (which was a kind of promise). In studying legal effects, a distinction would doubtless need to be made in those two categories, but it should be possible to arrive at a definition of, and a common legal regime governing, unilateral acts.

15. A major argument put forward by those who challenged the very validity of the topic was that unilateral acts did not produce effects in and of themselves, since their effects were dependent on the reactions of other States. He disagreed entirely. A promise to do something, recognition of another State or of a situation, waiver of a right or protest against the conduct of another subject or subjects of international law produced legal effects, although in some cases only if other States or an international court took the author State at its word. The statements made by the representative of France in the General Assembly and the posters on the walls of the French Embassies in Australia and New Zealand would have been of concern to nobody if ICJ had not seized on them in the *Nuclear Tests* cases. A State's recognition of another State might be equivalent to a declaration of platonic love in the unlikely event that it did not call for any reaction from the State thus recognized, but that fact would not deprive the recognition of legal effects. Similarly, if Switzerland agreed to abide by a decision of the Security Council, it was bound by that promise without the need for any formal acknowledgement.

16. Mr. Sreenivasa Rao had maintained that, unlike a treaty, a unilateral act could be revoked at any time. Again, he disagreed. A State which had unilaterally expressed its will to be bound was, in fact, bound. In its judgments in the *Nuclear Tests* cases, ICJ had stated that the unilateral undertaking "[could not] be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration" [*Australia v. France*, p. 270; *New Zealand v. France*, p. 475]. Unilateral acts, like treaties, could be traps in which States were caught against their will; once expressed, their commitment was irrevocable. And even if, as some members maintained, unilateral acts did not produce effects in the absence of an expression of will by another subject of international law, he did not see why that would prevent the Commission from taking up the topic or from codifying the acts in question.

17. At the previous meeting, he had supported Mr. Kamto's suggestion that the Special Rapporteur should study the relationship between unilateral acts and other sources of international law. Mr. Koskenniemi appeared to have been strongly opposed to such a study on the grounds that unilateral acts could not be sources of international law; they could give rise to obligations, but not to rules. It was an excessively doctrinal position, abstract and without concrete consequences. What was important was that unilateral acts produced legal effects in the same way as "genuine" sources of international law. Moreover, treaties could create *ad hoc* obligations for States parties, while unilateral acts could give rise to generalized, impersonal rules, as in the case of a State's unilateral regulation of other States' right of passage through its territorial waters or of foreigners' access to its territory. If it would please Mr. Koskenniemi, he was prepared to abandon the use of the word "sources", but he continued to maintain that it was *absolutely* indispensable, for Mr. Koskenniemi was fond of adverbs, to study the relationship between unilateral acts and other ways of creating rules and obligations in international law for the reasons outlined by Mr. Kamto. A treaty could derogate from custom. Could a unilateral act do so? Certainly, a unilateral act could not run counter to a treaty, perhaps for the reasons lyrically evoked by Mr. Koskenniemi. The Special Rapporteur should definitely consider questions of that kind.

18. As to the specific issues raised in the fifth report he welcomed the fact that the concept of "autonomy" had been excluded from the definition of unilateral acts, although he recognized that it might be relevant to the legal regime concerning them, and that the word "declaration" had been replaced by "expression of will", which left matters open. The replacement of "acquire legal obligations" by "produce legal effects" was particularly welcome in the French text, in which the former term read *créer des obligations juridiques* (create legal obligations). Unilateral acts might recognize or protest against pre-existing obligations, but they did not create them. He was opposed, however, to including the word "unequivocal" in the definition since a declaration with equivocal content could nevertheless bind a State. He also objected to the words "and which is known to that State or international organization", which posed the same problem as "unequivocal" and introduced an element of proof that complicated the definition unnecessarily.

19. It was not clear that "conditions of validity" and "causes of invalidity" were equivalent terms; the latter would seem more appropriate. He did not agree with those who maintained that the Special Rapporteur had followed the 1969 Vienna Convention too closely. Like treaties, unilateral acts were expressions of will intended to produce legal effects. Thus, it was logical to use the law of treaties, *mutatis mutandis*, as a basis for the codification of such acts and to proceed empirically by considering whether the various causes of invalidity enumerated in articles 46 to 53 of the Convention could be used as a basis for the treatment of the question in the draft articles. He did not think that the Special Rapporteur had made a genuine effort to study the list of causes; once that was done, the Commission would be in a position to consider whether there were any factors other than those mentioned in the Convention that were specific to unilateral acts.

20. For example, article 46 of the 1969 Vienna Convention dealt with the provisions of internal law regarding competence to conclude treaties, but he was convinced that there were no such provisions regarding competence to formulate unilateral acts. Any State official, from the most ordinary police officer to the President of the Republic, could bind the State in such matters. Unlike the Special Rapporteur, he was not of the opinion that articles 7 to 9 of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session⁴ were especially germane to the topic. Article 4, which established that the conduct of any State organ should be considered an act of that State under international law, was more relevant. The main question was whether an organ that acted beyond its powers or contravened its instructions nevertheless bound the State internationally in so doing. According to article 7 of the articles on State responsibility for internationally wrongful acts, the answer was in the affirmative. He was thus inclined to think that article 5 (*h*) needed to be considered in much greater detail before it could be referred to the Drafting Committee, since not only its wording but also its very principle were open to question. The same was true, *a fortiori*, of the issue of specific restrictions on authority to express the consent of a State, dealt with in article 47 of the 1969 Vienna Convention, which the Special Rapporteur proposed not to transpose to the case of unilateral acts—without, however, giving any real reasons for that decision.

21. As for the provisions concerning error, fraud, corruption and coercion, transposition of those grounds for invalidity seemed to pose fewer problems. Nonetheless, further thought should be given to their formulation, with fuller account taken of State practice. Like the great majority of other members who had spoken, he considered that the Special Rapporteur had not devoted sufficient attention to the wealth of practice that was available in that area. It was not uncommon for States to claim that they had not made a valid commitment in entering into some unilateral commitment that they had subsequently lived to regret. Even the case law seemed to have been accorded insufficient attention by the Special Rapporteur: the oral and written pleadings in the *Eastern Greenland* and *Temple of Preah Vihear* cases, in which Norway and Thailand respectively had vigorously denied having bound themselves, were readily accessible and could have offered valuable lessons in that regard. Only when a proper study had been conducted would it be possible for the Commission to take an informed decision on the desirability of referring those provisions to the Drafting Committee.

22. He endorsed the view that the Special Rapporteur had not been sufficiently rigorous in drawing the distinction between absolute and relative invalidity. Irrespective of the use to which it was put, however, the question arose whether such a distinction, which was valid in connection with the law of treaties, could be transposed to the field of unilateral acts. The main reason for drawing such a distinction in the law of treaties was to ensure that States did not jeopardize legal security by calling reciprocal commitments into question. No such reciprocity of wills existed in the case of unilateral acts. Accordingly, two lines

⁴ See 2712th meeting, footnote 13.

of reasoning were possible. Either it could be concluded that invalidity was always relative, and that only the author State could invoke it; or else the view could be taken that all States to which the act was addressed could invoke its invalidity. He was inclined to favour the latter view, since in the case of unilateral acts, unlike that of treaties, the other States had not participated in the formation of the rights or obligations that, by definition, affected them. There, again, further study was needed.

23. There seemed to be one case in which the absolute invalidity of the unilateral act was incontestable, not only in the sense that any State could invoke it, but also in that it was invalid *ab initio* with respect to all of its consequences. That was the case, referred to in article 5 (f), of an act which conflicted with a peremptory norm of international law. On the other hand, he was not convinced of the absolute invalidity of an act that conflicted with a decision of the Security Council, dealt with in article 5 (g). Not only was that case not covered by the 1969 Vienna Convention, but the problem was also one, not of invalidity, but of conflict between instruments of a different nature. That led him back to the question of the relationship between unilateral acts and other sources of international law, or between obligations stemming from unilateral acts and those stemming from other acts in international law. The Commission should await the outcome of a comprehensive study of the question, rather than hastily adopt an isolated provision that seemed to him to have no place in the section of the draft on invalidity. Furthermore, it was worth noting in passing that article 5 (g) postulated the universality of the United Nations—a state of affairs that, while true in the contemporary world, might not persist indefinitely.

24. In short, he did not advocate referring articles 5 (a) to 5 (h) to the Drafting Committee, partly because of his reservations concerning the subject matter of some of those provisions, but also for more general reasons. In his view, the Special Rapporteur did not take sufficient account of the extreme complexity of the problems, and of State practice in that area. Should a majority of the Commission favour referring the articles to the Committee at the present session—which, however, seemed unlikely—the Committee would be faced with the heavy task, not only of harmonizing the various provisions, but also of dealing with a number of substantive problems that did not form part of its mandate. If, however, the Committee was nevertheless called upon to deal with articles 5 (a) to 5 (h) as now drafted, it would be well advised to abandon the plural form “[or States]”, perhaps also adopting a general provision to the effect that there could be such a thing as collective unilateral acts, or else explaining the matter in the commentaries, as suggested by the Special Rapporteur in paragraph 116 of the report. In his view, however, article 5 was not yet ripe for referral to the Committee.

25. On the question of interpretation, he had little to add to what he had said at the previous session, since the Special Rapporteur appeared not to have heeded criticisms of his fourth report,⁵ instead simply reproducing articles (a) and (b) word for word in his fifth report. For the reasons he had given at the previous session, he continued to have

reservations about the desirability of referring those articles to the Drafting Committee.

26. To conclude on a more general note, he could see no reason for the Commission to refer to the Drafting Committee at the present session articles on interpretation and on invalidity which it had decided not to refer to the Committee at previous sessions. While article 5 admittedly incorporated a few amendments to the article 7 proposed by the Special Rapporteur in his second report,⁶ no real changes of substance had been made; and, above all, the draft articles were still not grounded in a proper study of State practice. While he was not one of those who wished to see the topic abandoned, he wondered whether it would not be appropriate to suspend consideration of it for the time being, and to request the Secretariat to conduct a study of State practice in unilateral acts, perhaps in collaboration with some members of the Commission, such as Mr. Simma, who, indeed, had already volunteered his services. That study should be conducted on the basis of the definition contained in article 1, which the Committee could perhaps consider at the current session, and in cooperation with the Special Rapporteur. On the basis of that study the Special Rapporteur could evaluate, modify and expand his existing draft. A working group could be set up, as a matter of urgency, to establish, in the course of one or two afternoon meetings, the precise purpose of the study to be undertaken. While such a course would entail suspending work on the topic for a year, much time would thereby be saved in the long run.

27. Mr. KOSKENNIEMI said he felt obliged to defend himself against Mr. Pellet's perfunctory dismissal of the distinction he had drawn between sources of law and sources of obligation, and against accusations that he was excessively preoccupied with academic abstractions. In his view, the distinction between sources of law and sources of obligation, and between the notions of validity and opposability, lay at the heart of the difficulties facing the Commission with regard to article 5 and was essential to a proper understanding of the distinction between those unilateral acts that produced legal consequences and those that did not.

28. He conceded that the distinction between sources of law and sources of obligation was theoretical. As such, it could have been dispensed with, but for the fact that it led on to the further distinction between validity and opposability. The drafting of article 5 revealed that the Special Rapporteur saw unilateral acts in terms of their validity or non-validity. Such a conception was, in his view, erroneous: unilateral acts should in fact be seen in terms of opposability or non-opposability. Validity was a quality of law: when parliament passed a law, it became valid, and thus binding. Unilateral acts, on the other hand, did not comply with the formal criteria that a law must meet in order to create legal consequences. Instead, they created legal consequences in particular circumstances, in which a State's conduct was interpreted as opposable by a certain number of other States.

⁵ See 2723rd meeting, footnote 2.

⁶ See *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1, para. 109, p. 100.

29. So much for academic abstractions. At the lowlier level of practice, during a visit to Norway in 1977, the President of Finland had informed his Norwegian hosts that Finland accepted Norway's claim to the continental shelf from the Norwegian coastline as far north as Jan Mayen. Ever since then, not a year had passed without Norway's reminding Finland that it had accepted that exorbitant claim. And, in terms of legal analysis, that was indeed correct: Finland was no longer in a position to contest Norway's claim, although any other State was certainly entitled to do so. In other words, while opposable, the statement by the President of Finland did not enjoy the kind of validity enjoyed by a law. The same applied, *mutatis mutandis*, to the legal transactions between France, Australia and New Zealand in the *Nuclear Tests* cases.

30. The relevance of that to article 5 was that, on the basis of his assumption that unilateral acts enjoyed validity, the Special Rapporteur went on to list certain conditions for invalidity, such as coercion, the threat or use of force, or a conflict between the act and a peremptory norm of international law. What was missing from the list was the most evident condition for invalidity—or rather opposability—of an act, namely, the simple case of a wrongful act, one contrary to law and to the State's obligations in the sphere of State responsibility. That omission was attributable to the fact that the Special Rapporteur was thinking in terms of law creation; by placing unilateral acts on the same level as law, the Special Rapporteur had concluded that a unilateral act could not constitute a wrongful act. That was a mistake. Clearly, a unilateral act could be non-opposable—or “invalid”, to use the Special Rapporteur's term—because it was a wrongful act under a general system of law that was valid and that gave meaning to particular actions of States by projecting upon them the quality of opposability.

31. While he was far from obsessed with academic distinctions, it should be recognized that they could sometimes throw light on some aspects of State behaviour and provide grounds for interpreting that behaviour in particular ways. The conceptual framework of unilateral acts was useful inasmuch as it indicated that in particular circumstances States might become bound irrespective of their wishes. The notion of validity, however, had no place in that conceptual framework. Furthermore, the Special Rapporteur's approach was also fundamentally flawed in that it considered only the role of the author State, ignoring the broader context. For all those reasons, he had serious doubts as to the suitability of the topic for codification.

32. Mr. SIMMA, referring to Mr. Pellet's criticisms of comments made by Mr. Koskenniemi at the previous meeting, criticisms that he found excessively dogmatic, said he fully subscribed to Mr. Koskenniemi's view that unilateral acts could be sources of obligation but not sources of law. On the other hand, he could not agree that the essential distinction between unilateral acts and sources of law was one of opposability versus validity. “Validity” was a word whose meaning differed from language to language, and the issue was, in his view, one of *Begriffsjurisprudenz*. He himself could see nothing wrong in describing a solemn promise made by a head of State in contravention of certain constitutional provisions as “invalid”.

33. He also had some reservations about Mr. Koskenniemi's criticism of article 5 (*h*). The problem seemed to stem from Mr. Pellet's use of the word *engager*. It was true that, in the broadest sense, any act of a State organ could entail the responsibility of the State: if a police officer beat a foreign diplomat to pulp, his State would be *engagé*. On the other hand, if a German police officer were to make a promise that Germany would never acquire nuclear weapons, the German State would clearly not be *engagé*. What the Special Rapporteur had in mind in article 5 (*h*) was the contractual or unilateral *engagement* of the State as a result of its statements, rather than as a result of acts entailing State responsibility.

34. As to the concern expressed by Mr. Koskenniemi about the absence of any reference in article 5 to the case of illegality of the unilateral act, it should be borne in mind that illegality in international law was still overwhelmingly a relative or bilateralist concept. Were State A to make a promise to State C, thereby violating some commitment entered into by States A and B, he would be loath to say with any confidence that the unilateral act in question was invalid. That raised the question of the distinction in international law between bilateral obligations and obligations *erga omnes*, which were themselves closely akin to *jus cogens* obligations, a category which the Special Rapporteur had already addressed in his original draft.

35. Finally, with regard to his earlier proposal concerning the desirability of undertaking a comprehensive study, it had not been his intention to involve an already overburdened Secretariat in such a study. What he had envisaged was that the Special Rapporteur, perhaps with assistance from other members, should draft a research project, on the basis of which private-sector researchers could be commissioned to produce a compilation of practice, possibly with funding from some non-political foundation.

36. Mr. PAMBOU-TCHIVOUNDA said he was deeply distressed. The Commission had just heard a plea for it to call a halt to its work on the topic. It was a bit too late for such a plea, however. The Commission was now at the stage when it had to decide whether it could and should fill in the row it had collectively hoed. He did not think it should. It could be argued that nothing had been accomplished, but that was not his impression. He agreed with Mr. Pellet that an analysis of means of revoking unilateral acts should be part of the Commission's future work. Did that mean that the analysis already carried out of means of elaborating unilateral acts should be thrown out with the bathwater? He did not think so.

37. Mr. Pellet had disputed Mr. Sreenivasa Rao's argument that a unilateral act could be revoked at any moment. In his own view, that was both true and not true. Under the law of treaties, the technique of denunciation was not unknown, but neither the 1969 nor the 1986 Vienna Convention indicated when a denunciation must be made in order to be considered admissible. It was the author of the denunciation who had the unilateral, sovereign capacity to determine the moment at which the denunciation was made. That was all the more true with a unilateral act: the author State might subsequently realize that the act should not have been formulated. Was the author State then in

bad faith in denouncing it? If the act had been formulated in good faith, the author State could be in equally good faith in recognizing that it should not have formulated the act. The key to the entire puzzle, reaching back to the *Nuclear Tests* cases, was good faith, and he thought a unilateral act could be terminated in good faith. The technique of revocation deserved its place in the study of means of terminating unilateral acts.

38. A second reason for his distress was the coupling of the regime for unilateral acts with the regime for State responsibility. The *Nuclear Tests* cases and the Ihlen declaration went up in flames when one contemplated the idea that a minor police official who roughed someone up was engaging France's responsibility. There was a difference, after all, between the White House taking action against an individual and someone in Harlem beating up that individual. The institution that had competence to engage a State's responsibility had to be seen in relative terms: one could not put the President of France and a French postal employee, for example, on an equal footing. The topic was difficult and complex enough without such unhelpful reasoning.

39. Another problematic issue was who could invoke invalidity in the context of unilateral acts. Was it open to any and all individuals to do so once there had been a declaration or an expression of will?

40. For his part, he thought that lessons should be drawn from all the work done and the discussions held so far on a topic that the Commission itself had not properly understood. Some things could be salvaged from the work on individual issues: for example, parts of the definition in article 1 should be deleted, but that did not mean the entire article should be expunged. Interesting things had been brought out about interpretation, and they too should be preserved. That was the work the Commission could now take up.

41. Mr. BROWNLIE said the topic was colossally difficult and the Special Rapporteur deserved every consideration for his efforts. He himself thought, and apparently a number of others agreed, that an expository study could be done on unilateral acts. The Government of his own country, in its reply to the questionnaire on unilateral acts of States, had said it considered that any approach which sought to subject the very wide range of unilateral acts to a single set of general rules was not well-founded and had suggested that an expository study be made of specific problems in relation to specific types of unilateral acts. In his opinion, it was a very good suggestion that should be pursued.

42. In the law of treaties, there was a matrix governing certain types of relationship and segregating them into treaty relations. That simply could not be done with unilateral acts: indeed, the phrase "unilateral act" was a very superficial description. All unilateral acts involved long relationships between States. In the *Temple of Preah Vihear* case, the relationship had prevailed for 50 years. The unilateral act had only had legal consequences there because of the ongoing relationship of the States concerned. Similarly, the Ihlen declaration had been made against a

background, in a particular situation, and some very respectable commentators thought it had not been a unilateral act at all but an informal agreement. The problematic outcome of the *Nuclear Tests* cases had startled everyone, and it was well known that ICJ had been avoiding the problem of dealing with a permanent member of the Security Council by casting about for grounds of inadmissibility. Even in that instance, there had been a relationship, namely litigation between the States concerned. It was extraordinarily difficult to find general rules to deal with such a variety of situations, each of which was fact-based.

43. Mr. TOMKA said he had understood Mr. Pellet to say that a unilateral act could be at the origin of an international rule. There was a difference, however, between being at the origin of a rule and being the source of a rule. Were unilateral acts truly sources of rules, vessels for the creation of rules of international law? If so, then a unilateral act was the start of a process of State practice which, in the form of custom, resulted in the creation of a rule of international law. But should any single State be able to create rules for others? He did not think many States would agree to that, as it would mean that the State was elevated to super-State status.

44. In the matter of causes of invalidity, a misunderstanding seemed to have arisen owing to disparities in the English and French versions of article 5 (f). The French text stipulated that the State that could invoke the invalidity of a unilateral act was the author of the act, whereas in the English text, the reference to the author was missing. To his way of thinking, it would be extraordinary if the author of an act had to invoke its invalidity: if it did not do so, did that mean the act was valid? Yet if the act conflicted with a peremptory norm of international law, it was null and void *ab initio*. Article 5 (f) would have to be reformulated.

45. Mr. PELLET said he agreed with Mr. Tomka that a single State should not be able to create rules for all others, not even if it was a super-State, which could and did exist, or at least one did, but that was a socio-political, not legal, phenomenon. He had already cited the example of a State's regulation of the right of passage through its territory, something which, he was convinced, was a unilateral act. But the validity depended on the relationship with a customary or treaty rule, namely another rule of general international law that authorized the State to act unilaterally. That was what had to be investigated, the validity and the effects of the unilateral act, and the Special Rapporteur had not yet done so.

46. He maintained his position that unilateral acts could create rules. Derivative rules, to be sure, but what rule in international law was not derivative? He did not much like Kelsen, but Kelsen was right about one thing: all legal acts presupposed an authorization of some kind, an enabling principle such as *pacta sunt servanda*, and unilateral acts were no exception.

47. As to Mr. Pambou-Tchivounda's remarks about States modifying unilateral acts whenever they chose, as ICJ had said in the *Nuclear Tests* cases, this was the very

opposite of the rule of good faith. Again, concerning the relationship of the topic with the regime of State responsibility, it was the Special Rapporteur who had raised the issue, and he himself thought it was worth pursuing rigorously. Did the fact that a State *could* engage its responsibility mean that it *did* engage its responsibility? As for the example of the police officer given by Mr. Pambou-Tchivounda, there were undoubtedly limits on the extent to which a State's responsibility could be engaged under unilateral acts. In fact, the Special Rapporteur raised that question but failed to respond adequately. He had never suggested that the work on the topic should be abandoned: on the contrary, he wanted to keep on trying to determine general rules rather than taking a case-by-case approach as suggested by the Government of the United Kingdom.

48. Mr. Koskenniemi was obsessed with the imprudent statement by Finland to Norway, but all States, not just Finland, did stupid things. In the *Frontier Dispute* case, Mali's Head of State imprudently declared that it did not matter where the boundary between Burkina Faso and Mali was placed. ICJ had ruled that such statements were not made with the intention of engaging oneself, and that Mali had accordingly not expressed a will to engage itself. He agreed with the Court: justice would not have been served if Mali's Head of State had been taken at his word. The Head of State had been speaking without the intention of engaging the State's responsibility, which was often the case with diplomatic and political discourse. Hence there had been no unilateral act because there had been no intention to produce legal effects. What should be investigated, however, was the point at which diplomatic discourse became something more and turned into an expression of will to engage a State. The Court looked at such questions, and there was no reason why the Commission should not do so also and seek to develop criteria.

49. In the case of the Ihlen declaration, Finland had made an untenable statement and could not be deemed to have engaged its responsibility. In any event, the statement had been addressed to Norway alone. The situation was thus entirely different from that of the *Nuclear Tests* cases, when ICJ had clearly ruled that a promise had been made to all States of the world, and that there had been a real expression of will that created an obligation for France, not *vis-à-vis* a given State but in general terms. Mr. Koskenniemi could not pick and choose what suited him among the decisions of the Court.

50. He did agree with Mr. Koskenniemi, however, that some unilateral acts of States were addressed to a single interlocutor. But there were also treaties that were binding and involved only one interlocutor. The effect of bilateral treaties on third parties was an extremely interesting question. ICJ was now reflecting on it in the context of the *Land and Maritime Boundary between Cameroon and Nigeria* case, in which Cameroon argued that it could invoke a commitment by Nigeria to a third State, Equatorial Guinea. Such were the problems posed by unilateral acts addressed to a single interlocutor, but they were also posed in the case of treaties, whether bilateral or multilateral with limited participation. He could not see why Mr. Koskenniemi wished to insist on the fact that unilateral acts were not law-making. Even if one used his highly re-

strictive definition of law, however, there were still times when unilateral acts were the origin of real rules.

51. Mr. Koskenniemi was very interested in the distinction between opposability and validity, but the two concepts came from two completely different areas. With regard to validity, one asked the question whether an act was in fact capable of creating obligations. Once that question was answered, one could ask for whom the act created obligations, and that could be termed opposability. A unilateral act would always be opposable to the party that had validly formulated it, but the question arose whether it was also opposable to other entities. Opposability was in vogue at present and could certainly be covered in the work on the topic, but he did not see how that would prevent the Commission from looking into the causes of invalidity.

52. On the Secretariat study referred to by Mr. Simma, he recalled that the Legal Counsel had clearly indicated that the Commission was entitled to request such studies. The Special Rapporteur was experiencing difficulty in finding examples of State practice, and the Secretariat had already shown on a number of occasions that it was capable of doing so remarkably well, for example in the areas of international liability and watercourses. The one caveat he would make was that the subject of the study must be clearly delineated, perhaps by a working group.

53. Mr. BROWNLIE, referring to Mr. Pellet's argument in favour of developing a general concept and his opposition to a sectoral approach, said that he failed to see what the force field could be that would provide a real basis, and not just a concept, for a general, unitary study of the subject of so-called unilateral acts. The phrase "unilateral acts" was hopeless. It was a sort of short form for describing the impossible, whereas it would be much more useful and realistic to have a description of what was in fact the conduct of States. The Commission was not talking about unilateral acts, or, rather, it *was* to some extent, for the *Temple of Preah Vihear* case had involved not a single unilateral act but a whole pattern of acts lasting 50 years. To use the phrase "unilateral acts" was to stop well below the threshold of decent analysis. Sometimes no act at all was involved. Most cases involved the conduct of States, including silence, always within a particular context of the relations of the States concerned. Even in the event of a one-off promise in the academic context in which there were no previous questions raised between the two States, once the promise was made there would probably be some development of a relationship.

54. One form of conduct consisted of evidence of a State's attitude. A large number of decisions by international tribunals existed in cases in which the attitude of the State constituted decisive evidence. The attitude might include conduct, statements or silence on certain matters. It was very common for a court to note that a State had remained silent or had not denied a particular fact. In the *Corfu Channel* case, the decision of ICJ on Albania's means of knowledge regarding the mines in the Bay of Saranda had been based in part on Albania's attitude. Thus, it was very difficult to find a unitary subject, and

even the sectoral approach would be problematic to apply in practice.

55. Mr. Sreenivasa RAO said that he had always been in favour of the topic of unilateral acts and appreciated the Special Rapporteur's effort to pinpoint its basic thrust. Unilateral acts were a very important means of expressing States' attitudes and behaviour. Even though by themselves they might not be fully realized legal acts, unilateral acts were certainly a major element in the eventual creation of an international obligation: by response, reaction, silence, and in other ways. As long as the Special Rapporteur focused solely on the formulation of the act—in other words, its initiation—he was confining himself to one side of the question and not showing when the unilateral act, alone or with something else, could be treated as a legal obligation. Mr. Pellet had seemed to indicate that there were a number of ways that could be done. But the draft articles had not yet provided the opportunity to see what the other side of the story was before it could be said that a unilateral act had become a legal obligation. In considering whether a unilateral act could create a legal obligation, it was also important to ascertain how a legal obligation could be terminated.

56. It had been asserted that obligations arising out of unilateral acts were no different from those arising out of treaties. Both could be terminated by various means. If that was the case, a unilateral act without any other constraint upon the State, such as estoppel or acquiescence, could easily be terminated by the State. A unilateral act must be addressed in context, which would help in determining whether the act gave rise to a legal obligation. However, the legal obligation did not arise automatically. Some countries sincerely believed that when they made a statement, it entailed certain obligations. But that was still unilateral in the sense that States were free to rescind it as they wished. Unless all the above factors were also considered, a unilateral act would remain an interesting act, but that would be the end of it.

57. Mr. GAJA said that Mr. Pellet might have overstated his case in arguing a distinction between validity and opposability. He appeared to be saying that once a State intended to be bound, a valid unilateral act existed, even if the act was only opposable to that State. In his own view, a unilateral act could not be seen in total isolation from other States. Without at least bilateral relations in the sense of the act's producing consequences in relation to another State, there was nothing that could be considered binding under international law. That did not mean that issues of validity could not be distinguished from those of opposability. The example given by Mr. Simma of a head of State who made a statement without having the required competence would raise questions of validity, while the opposability might depend on the circumstances, might affect just one other State or more States, and so on. If an act was not opposable to any State, then there was no need to bother about validity.

58. Ms. ESCARAMEIA said that she saw a need for some general theory on unilateral acts. If the Commission confined itself to the four acts referred to by the Special Rapporteur, it might miss many others that could also be

regarded as unilateral acts of States. A unilateral act of a State was one whereby the State wanted to produce certain effects, but she found it troubling that those effects had to be obligations. She also questioned the suggestion that there had to be a bilateral or trilateral relationship: the relationship could be *erga omnes*. To cite an example, the President and the Minister for Foreign Affairs of Portugal had made repeated declarations in favour of the right to self-determination for East Timor. It was a unilateral act by a State in an international forum by which it sought to produce effects. It was not really a question of opposability; some unilateral acts were addressed to the international community as a whole in order to reassert or interpret existing law. Hence her misgivings about contextualized situations. Many acts fell within the general category of unilateral act, but they were not covered by promise or waiver. That was an additional reason why a general theory was needed. It was possible because there were rules that applied whenever a State wanted to formulate a unilateral act—questions such as who could formulate such an act, how it could be considered valid, how to ensure that it did not contain any defects, and so on. Many other rules could also be applied. If the Commission simply took a straightforward view of what a unilateral act was, it could go quite far with a general theory. Some rules applied to all situations. If the Commission became involved in a discussion of whether or not unilateral acts were sources of international law, a question which was not necessary for its work, it would cause enormous problems, which could be avoided to some extent.

59. Mr. KAMTO said that he fully agreed with Mr. Pellet's comments on validity and opposability. An act that was not valid resulted in the non-opposability of that act. Thus, it could be said that the two were linked, although conceptually there was a difference.

60. It was the first time the Commission was dealing with a subject on which so much jurisprudence existed. Reference had been made to the *Eastern Greenland* and *Nuclear Tests* cases, as well as others in which the question of unilateral acts was touched upon. The Commission had not invented the concept. At the present stage, the Commission should be constructive and express its view on Mr. Pellet's proposal. How could it move ahead with the topic? Mr. Simma had made suggestions a few days earlier, which he endorsed: to define a body of general rules on unilateral acts concerning their formulation and their validity—in other words, conditions for a unilateral act in the legal order.

61. The question of effects was another aspect which, owing to the great diversity of unilateral acts, might focus on the four categories in the report. In so doing, the Commission would render great service to the international community. The point was to decide what could be considered a unilateral act and what could not, for not all declarations of States were unilateral acts. The proposals deserved to be examined. He endorsed the suggestion for a study of practice, which should probably be undertaken by a working group, and shared the view that not everything produced by the Special Rapporteur so far needed to be abandoned. Some draft articles and criticism were drafting matters rather than problems of general orienta-

tion, for example the tautology of speaking of both will and intention. The Commission could then focus on the specific categories of effects.

62. Mr. BROWNLIE said that it was fine to sound constructive, but it was another matter to *be* constructive. None of the previous speakers had produced any solid evidence of the existence of general principles. Mr. Kamto had invoked the case law of ICJ in support of the idea that there was a general concept of unilateral acts. But that was not so. Each case was fact-related. The Court did not rely on a general theory of unilateral acts. The *Temple of Preah Vihear* case, for instance, made no reference to such a theory.

63. Mr. PELLET pointed out that, in the *Nuclear Tests (Australia v. France)* case, ICJ had clearly said, "It is well-recognized" [para. 43]. That itself was a generalization, and an interesting one.

64. If it was not possible to generalize, this meant that everything depended on the circumstances. That was true, of course, but it did not release the Commission from the task of seeking to identify a small number of legal rules that made it possible to say that, in specific circumstances, States committed themselves through their unilateral expressions of will. He failed to see how the opposite could be affirmed. It was the very function of law and of those who codified it to try to unite what appeared to be diverse. It was pointless to assert from the outset that the goal could never be reached. A small number of principles would be open to interpretation, but that was a job for jurists. Thus, he agreed with Mr. Brownlie's point of departure but was in full disagreement with his conclusions.

65. Mr. BROWNLIE said that the *Nuclear Tests* cases were usually cited in respect of the principle of good faith. Perhaps the Commission should be studying *that* principle.

66. The CHAIR, speaking as a member of the Commission, said he hoped that the Special Rapporteur would address the ideas presented by Mr. Simma.

67. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, owing to time constraints, he would address only some of the comments made in the discussion and would revert to all the issues in greater detail in his reply later on. To start with Mr. Brownlie's last point, he did not think that unilateral acts could be confined to the decisions of ICJ on the *Nuclear Tests* cases. The *Frontier Dispute* case and many other decisions should also be taken into account, as well as unilateral declarations in general. The Commission could not disregard existing jurisprudence and doctrine on unilateral acts or the views of Governments, which had expressed their positions both in a questionnaire and in the Sixth Committee. Questioning the existence of such an international legal act as a unilateral act would not be appropriate within a broad concept of international law in which a State could assume international commitments,

not just in the usual way (through a convention) but also through a unilateral act.

68. The suggestion of leaving the topic in abeyance might be considered, but he did not think the Commission should change its course, because that would introduce uncertainty and create legal and political confusion regarding whether unilateral acts did in fact exist in international law. If the Commission were to restrict itself to a study, would it not be possible to arrive at a definition and develop an overall theory of unilateral acts, or at least rules applicable to them? Of course, the Commission could not attempt to regulate unilateral acts, because they were very diverse and produced different legal effects; they could not all be lumped together. It was possible to draw up rules, but perhaps not to regulate the legal effects in all cases.

69. The Commission would need to comment on the rest of the chapter and decide what to refer to the Drafting Committee: presumably the definition and the first two articles. The Working Group could then address issues related to interpretation and other aspects.

The meeting rose at 1 p.m.

2727th MEETING

Thursday, 30 May 2002, at 10 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

Organization of work of the session (*continued*)*

[Agenda item 2]

1. The CHAIR said that, following informal consultations, it was being proposed that the functions of Special

* Resumed from the 2721st meeting.