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Summary record of the 2818th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

2004, vol. I

2818th MEETING

Friday, 16 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

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

Unilateral acts of States (*continued*) (A/CN.4/537, sect. D, A/CN.4/542[1])

[Agenda item 5]

Seventh report of the Special Rapporteur (*concluded*)

1. Mr. KOSKENNIEMI thanked the Special Rapporteur for his detailed overview of State practice in respect of unilateral acts and recalled that there was no analysis in the report (A/CN.4/542) of that practice because that had been the Commission's wish. He also expressed his sympathy for the Special Rapporteur, who had been pushed in different directions by the Commission and had attempted to adapt by changing the thrust of his work without ever seeming to satisfy all the members. He had started off with an abstract codification, had then come up with a hybrid between codification and analysis and, thereafter, had adopted a purely descriptive approach. Mr. Pellet had wanted a contextual analysis of practice and Mr. Brownlie had wanted to dispense with recognition because recognition was such a specific notion. He wondered how the Special Rapporteur could take all those suggestions into account. In view of those difficulties, he was of the opinion that the best solution for the Commission was to present its work on unilateral acts as an expository study, as Mr. Matheson had suggested at earlier meetings: it was not possible and perhaps not desirable to codify such a topic.

2. To begin with, he repeated the comment that he had made at the last session: the problem with the topic was that it did not describe a legal institution. That was more or less what several members had said at earlier meetings. Both Mr. Pellet and Mr. Daoudi had drawn attention to the absence of a *régime légal* on unilateral acts and the need to have one, while Mr. Brownlie had said what was lacking was a unitary concept. A legal institution existed in terms of facts and concepts because it brought together a set of facts that would otherwise have nothing in common. At the national level, marriage and contract, and similarly, at the international level, State succession, treaties, State responsibility and the right of innocent passage were legal institutions. Codification consisted in formulating relevant concepts. In its work on unilateral acts, the Commission did not describe any set of concepts; it merely referred to facts without organizing them, without establishing links between them. In that respect, its approach was different from the one adopted for topics such as State succession, and from what should be done for some institutions that did come under the topic of unilateral acts, such as promise, waiver, recognition and estoppel. Those were institutions in the sense that he had indicated. In principle, it should be possible to codify them separately, but, in fact, that was not desirable. For instance, in the case of promise, there was nothing to codify: a promise was binding by its very nature, but there was no need for codification to say that if one made a promise one was bound by it. It was true that the Commission might itself establish a legal institution by extracting from State practice a limited number of elements classified as binding and with common legal effects, under the heading of "unilateral acts". To that end, it might use two criteria: the first would be the will of the author State of the act or the declaration that the act should produce legal effects or, as ICJ had pointed out in the *Nuclear Tests* cases, a non-will-related criterion such as good faith, legitimate expectations and so on. There were three good reasons for not adopting the first criterion. Firstly, no State would agree to be legally bound by its actions or its declarations without a quid pro quo, but, if seen from that point of view, the topic would fall outside the framework of unilateral acts. Secondly, it was often difficult to determine the will of States. In the *Nuclear Tests* cases, when French officials had stated that France no longer needed to carry out its test programme, none of them had thought that they were binding the country by such statements; and, what was more, everyone had vehemently denied that that had been France's will. Thirdly, the will of States fluctuated over time. If a State was to change its mind, then a purely voluntarist view of unilateral acts would no longer be able to explain why it should be held bound.

3. The second criterion the Commission might adopt to create a legal institution was that of unilateral actions which produced effects irrespective of the will of their authors. In the *Nuclear Tests* cases, ICJ had been faced with an awkward situation: it had seemed that the French officials had not been thinking about the law when they had made the statements in question, but the fact was that Australia and New Zealand had needed to know what to expect and the Court had therefore considered that France was bound by its statements regardless of what it might subsequently want because it was necessary to maintain confidence and protect legitimate expectations for the smooth running of international relations. If the Commission followed that second approach, it would not succeed for the simple reason that the "legitimate expectations" of a State *vis-à-vis* another State were difficult to grasp and in a state of constant flux.

4. For all those reasons, he considered that the topic of unilateral acts did not lend itself to codification and that the only solution, both for the Commission and for the Special Rapporteur, was to present the work in the form of an expository study.

5. Mr. PELLET said that Mr. Koskenniemi's statement had brought the Commission back to where it had been in 1997, when it had been wondering whether to include the topic of unilateral acts in its agenda. If he had been

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

present at that time, Mr. Koskenniemi might have persuaded the members, but, now, he had to come around to the idea that the topic was on the agenda. His idea of drafting a preliminary report after seven years of study was rather odd.

6. In any event, Mr. Koskenniemi's reasoning was basically flawed. In the *Nuclear Tests* cases, France had always claimed that it had not wanted to make a binding commitment, but the Court had considered that it had. Personally, he thought that the Court's ruling had been a bad one, not because of any fierce sense of legal nationalism, but because the Court had tried to get itself out of a bad situation in a questionable way. Regardless of whether the decision was a bad one, however, the Court had taken the view that France had wanted to make a binding commitment. Mr. Koskenniemi's analysis was thus wrong.

7. Mr. Koskenniemi took the view that unilateral acts did not have enough in common to constitute legal institution. That was begging the question, however, because that was exactly what the Commission had to establish and he personally took the completely opposite point of view. While it was interesting to know how States could make binding commitments when they wanted the same thing, it was also interesting to consider how they could make binding commitments when they expressed their will unilaterally. Those two ways of expressing will corresponded to two separate legal institutions. Just as there were treaty laws, treaty-contracts, bilateral and multilateral agreements, human rights treaties, trade treaties and good-neighbourliness treaties, there were unilateral acts which could be in a different form and for a different purpose, but which produced common effects.

8. Mr. Koskenniemi had also pointed out that there was no point in codifying promise, for example, because, by definition, it expressed the will to be bound. However, the same could be said of a treaty and it was nevertheless very useful to codify treaties. It was true that there were many more treaties than unilateral acts, but one need only read the Special Rapporteur's report to realize that there was all the same a fair number of unilateral acts, too, and that in their diversity lay some unity.

9. He nevertheless agreed with Mr. Koskenniemi on one point: the Commission should not confuse acts through which States were bound because they wished to be with conduct through which States were bound without an expression of their will. The Commission would make progress if, at least initially, it admitted that the topic was indeed the way in which States could or were likely to be bound through a unilateral expression of their will.

10. Lastly, he pointed out that the French expression "*régime légal*" used by Mr. Koskenniemi was inappropriate and that reference should, rather, be made to a *régime juridique*, since *légal* referred to legislation and *juridique* to a legal system.

11. Mr. PAMBOU-TCHIVOUNDA said that, at the preceding session, he had already drawn attention to Mr. Koskenniemi's surrealistic approach, which was based on the principle of denying the existence of unilateral acts of States. The Commission might eventually allow itself to deny that existence, but it would certainly not be followed by the international community, which had endorsed the Commission's mandate on the topic of unilateral acts.

12. Mr. Koskenniemi had, moreover, got mixed up in his arguments. Having elaborated at length on the reasons why there was no cause to attempt codification, he had backtracked by stating that some aspects could be codified. "Some aspects" would need to be clearly identified, and that would not be in keeping with the idea that unilateral acts were merely a fiction. The other reason mentioned by Mr. Koskenniemi was that unilateral acts were not an institution. But what was an institution? Should it be viewed from the standpoint of a legal system, sociology, philosophy, custom or national law? There were many institutions under international law. They were procedures and techniques intended to perform a function. However, unilateral acts had an object and even a purpose. For all those reasons, he did not see how he could support Mr. Koskenniemi's views.

13. Mr. FOMBA said that he begged to differ with Mr. Koskenniemi. Even if unilateral acts were not a legal institution, there was nothing to prevent the Commission from turning them into such an institution.

14. Mr. DAOUDI said that the Commission should not adopt too rigid a view of legal institutions because they could change: some could come into being, while others could disappear. The Special Rapporteur had provided an exhaustive survey of the extremely diverse practice of States and it would appear that Mr. Koskenniemi feared that the codification of the topic might spark a negative reaction from States. It might, but that must not stop the Commission from carrying out its mandate in respect of a concept that was firmly anchored in legal theory. The framework for further investigation of the topic which Mr. Pellet had proposed at an earlier meeting should be helpful to the Special Rapporteur, who could tell the Commission at its next session whether there was a rough draft of a legal regime governing unilateral acts.

15. The CHAIRPERSON, speaking as a member of the Commission, said that he was unable to share Mr. Koskenniemi's opinion that a unilateral act was not an institution of public international law. His view was, rather, that it was an institution which was essential to the functioning of many areas of public international law. The ratification of an international treaty was a good example in that regard. Without unilateral acts, moreover, there would be no customary international law.

16. In fact, the real problem was whether a unilateral act was an autonomous act as defined by Mr. Economides or whether it derived its legitimacy and its effects from an exogenous instrument or institution, such as a treaty, custom or the principle of good faith. In other words, did a unilateral act exist as a source of public international law or was it necessary to study the various unilateral acts frequently encountered in virtually all fields of international law, such as the law of treaties, the law of the sea (for example, declarations demarcating maritime zones), the law of war (declarations of war) and diplomatic and consular law (declaration of a diplomat as persona non grata)? He suggested that more research should be conducted in

a working group in order to ascertain whether some common features of unilateral acts could be codified.

17. Mr. BROWNLIE said that Mr. Koskenniemi's statement had the merit of having brought to light the marked differences of opinion within the Commission. According to one position, that of Mr. Koskenniemi, the topic of unilateral acts did not exist. The rational outcome of such an argument would be for the Commission to make a statement to that effect, noting that the topic was non-existent. According to the opposite school of thought, which was roughly that defended by the Chairperson, there were many categories of unilateral acts which had been duly recorded by legal writers and confirmed by case law. He personally was in favour of a position midway between the two. Somewhere in the middle was something which was more difficult to label and that was why the only modus operandi offering some hope of progress would be to conduct a thematic study or group of studies.

18. Mr. CHEE said that he had been startled by Mr. Koskenniemi's comments. The existence of unilateral acts as an institution was attested by some leading cases, such as the *Nuclear Tests* cases and the *Frontier Dispute* case; by the case law of arbitral tribunals, as expounded in an article written by Bowett,[2] who had also cited Lauterpacht and the work of Jennings; and, of course, by State practice, as the Special Rapporteur's seventh report showed. He wondered whether Mr. Koskenniemi knew anyone apart from himself who thought that the institution of unilateral acts did not exist.

19. Mr. MOMTAZ said that Mr. Koskenniemi had to be thanked for triggering a broad debate which should enable the Commission to take a decision; for example, to set up a working group to decide what direction the work on the topic should take, as the Chairperson had proposed. It would seem that the members of the Commission agreed on two points: firstly, that unilateral acts existed and, secondly, that not all unilateral acts produced legal effects. In those circumstances, the Commission's work should consist in identifying criteria for distinguishing between unilateral acts which had legal effects and those which did not, the basis for such work being the case law of ICJ and State practice. For example, in the *Frontier Dispute* case, ICJ had found that unilateral acts which did not have a clearly defined addressee were not binding upon their authors.

20. Mr. PAMBOU-TCHIVOUNDA said that he agreed with Mr. Brownlie on the need for a midway position and supported the approach that he had proposed.

21. Mr. KEMICHA said that he wished to adopt an ideological position: unilateral acts not only could be codified, but must be codified in order to avoid situations in which diplomats said that, although the highest authorities of a given State had indeed made a declaration, they did not deem it to have any legal value. It would be wise to put an end to the irresponsibility which prevailed internationally and, to that end, a body such as the Commission had to codify the subject matter so that the addressees of unilateral acts would know where they stood.

22. Mr. GALICKI reminded the Commission that, at the preceding session, it had adopted recommendations on the scope of the topic and the method of work.[3] As far as scope was concerned, the Commission had decided to confine itself to unilateral acts *stricto sensu*. As for the method of work, it had been agreed that the Special Rapporteur would produce as complete a presentation as possible of State practice in respect of unilateral acts. Moreover, recommendation 7 had requested the Special Rapporteur in his seventh report not to submit the legal rules which might be deduced from the material submitted, as they would be dealt with in later reports, so that specific draft articles or recommendations might be prepared.

23. Obviously, the way forward had been clearly mapped out and the Special Rapporteur had followed the Commission's recommendations. The members of the Commission should therefore be patient and more logical in their criticism and they should give the Special Rapporteur an opportunity to continue his work.

24. Mr. KOSKENNIEMI said that, although he had used the word "institution", he could equally well have spoken of a "*régime juridique*"; whatever the term used, unilateral acts did not lend themselves to codification. The subject might be suitable for progressive development, but codification was neither possible nor desirable.

25. While he appreciated Mr. Kemicha's desire to keep a tighter rein on diplomacy, he personally did not agree with that position. On the contrary, diplomacy had to be allowed as much flexibility as possible.

26. Mr. ADDO said that the seventh report on unilateral acts matched the instructions that the Commission had given the Special Rapporteur. He personally had the impression that no one really had a precise idea of the way forward.

27. In 1997, when the Commission had first taken up the topic, he had been one of the few members who had maintained that it was not ripe for codification. Of course unilateral acts existed. Protest, recognition, estoppel, waiver and notification were all unilateral acts which were often in evidence in State practice, but they did not lend themselves to codification. If the Commission met with difficulties in studying the topic, that was the fault not of the Special Rapporteur, but of the Commission, which, in 1997, had regarded the subject as fit for codification and progressive development. It was therefore incumbent on the Commission to help the Special Rapporteur draw up a set of rules on unilateral acts, but, so far, it had scarcely done so, notwithstanding all its deliberations of the matter in a succession of working groups.

28. The Special Rapporteur and the Commission had frequently drawn attention to the complexity of the topic and to all the problems to which it gave rise. It was time for the Commission to agree on the mandate of the new working group that it was about to establish. Yet opinions were extremely divided on the scope of the subject matter. Mr. Brownlie, for example, considered that recognition should be excluded from the study, while Mr. Pellet,

[1] Bowett, *loc. cit.* (2815th meeting, footnote 14).

[2] See 2811th meeting, footnote 2.

Mr. Pambou-Tchivounda and, to a lesser extent, Ms. Xue thought the opposite. Divergent views also existed with regard to estoppel, acquiescence and silence. The Commission seemed to have become stuck in a quagmire. He had been tempted to propose that the Commission should abandon the subject, but, out of consideration for Mr. Pellet, who thought that such a decision would be premature, he would hold his peace.

29. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), summing up the debate on unilateral acts of States, said that the declarations assembled in his seventh report were classified according to how far they illustrated the existence of a unilateral act, the way it was formulated and its effects. He acknowledged that the task had not been straightforward and that the seventh report was no more than a preliminary outline of the relevant State practice, which should be followed up by a consideration of the subsequent development of some of the acts mentioned in the report and of others yet to be identified. As several members of the Commission had rightly observed, it was not enough to list the various unilateral acts; attention should also be paid to their development, their subsequent history and their validity. That could be one of the themes of the next report, which would have to attempt to answer the questions contained in recommendation 6 adopted by the Working Group established in the previous session.

30. Some members had commented on the structure of the report, which was based on a classification of State acts and conduct according to the precepts of current theory. Obviously, the report's classification system was not the only one possible; it had been adopted largely for practical reasons.

31. The acts considered in the report were difficult to characterize. Some acts could clearly be characterized in a number of different ways. Thus, a declaration of recognition could signify both waiver and promise. Regardless of the characterization of the act or the declaration, however, what was important was that some State conduct could produce legal effects. It followed that legal action could be taken against the author of declarations having legal effects, if such declarations were formulated with the intention of producing legal effects and if certain validity criteria were met. In his view, certain principles could be drawn from international practice as reflected in the report. As some members of the Commission had suggested, it would be useful to analyse about 30 carefully selected cases and see what criteria and principles could be drawn from them.

32. The discussion at the current session had certainly once again highlighted the complexity of the topic and the difficulty involved in the codification and progressive development of rules applicable to unilateral acts. It was too soon to discuss the final form that the Commission's work should take, but the topic nonetheless deserved in-depth examination, given its growing importance in international relations.

33. The Commission had once again been faced by the problem of determining the nature of a declaration, act or conduct by a State. The question was whether such acts or declarations produced legal effects, or, to be more specific, whether they were of a legal or a political nature. In that regard, it had been observed that the most important factor in determining the nature of an act was the will of the State to undertake a commitment. That could be done only by using an interpretation based on restrictive criteria, as ICJ had emphasized in several of its decisions.

34. There was no doubt that any act was unilateral at the moment that it was formulated, but it could exist only in the context of bilateral or multilateral relations, even if they could not be characterized as treaty relations. In formulating a unilateral act, a State assumed an obligation or reaffirmed a right and the addressee acquired a right, yet the unilateral nature of the act was unaffected.

35. Some members of the Commission had said that a definition of a unilateral act was unnecessary for the time being and that the Commission should proceed on the basis of the working definition adopted by consensus at the preceding session. Certain members had again raised the question of the autonomy of unilateral acts as a criterion determining their definition. One member had expressed the view that such a criterion partook of the very nature of the act, while another had said that the autonomy of the act depended on the uniqueness of its purpose. Yet another had stated that the Commission had been right to exclude the criterion from the working definition adopted in 2003, given that any legal act was necessarily linked to a pre-existing rule, whether a treaty or a customary rule.

36. It had, however, been generally agreed that a unilateral act, *stricto sensu*, was an act that produced legal effects, although some members considered that legal acts were sources of international law, while others considered them sources of international obligations. Either way, the ultimate effect was the creation of international law.

37. Indeed, one member of the Commission had expressed the view that it would be possible to identify, from the practice described in the seventh report, the principles and rules applicable to unilateral acts, which could themselves be divided into common or general rules and specific or particular rules.

38. In the view of another member, the legal regime of unilateral acts should be based on the State's freedom of movement and the security of legal relations. As another member had said, reassurance should be given to States that were apprehensive about adopting an excessively broad regime which might limit their room for manoeuvre in the context of international relations.

39. Another comment had been that it was important to determine the circumstances or conditions in which a unilateral act might be amended or withdrawn. It had been pointed out, in that context, that all acts could be revoked, unless the author State decided otherwise. Another member, meanwhile, considered that some acts were irrevocable, such as those relating to recognition of borders.

40. Some members of the Commission had reiterated the view that the Commission should, for the time being, focus on unilateral legal acts *stricto sensu*, ignoring State conduct that could produce similar legal effects. In that regard, the importance of estoppel and acquiescence, and

their relationship with unilateral acts, had once again been emphasized.

41. With regard to recognition, he explained that when turning to State practice with a view to preparing the seventh report, he had decided to devote several pages of the report to declarations of recognition, on the grounds that the study of the question would have been incomplete if the act of recognition, related acts and the many problems that they raised had not been considered. Admittedly, as had been pointed out, that question did not form part of the mandate conferred on the Commission by the Sixth Committee. However, the task was not to consider recognition as an institution, but to study the acts or declarations of a State whereby it recognized a *de facto* or *de jure* situation. There could be no doubt that those declarations produced legal effects in inter-State relations and that they were, furthermore, those most commonly encountered. The reference to acts of recognition could facilitate the study of conditional unilateral acts and of the various questions relating to the life of the act—its application, modification and withdrawal—questions which would, as some members had pointed out, have to be dealt with at a later stage.

42. He noted that, like himself, a substantial majority of the members of the Commission was concerned about the future direction of work on the question. Some had made the useful suggestion that a working group could be set up with the task of formulating guidelines for the preparation of the next reports. The Commission was faced with two, possibly complementary, options. The first would be to conduct a more thorough study of practice, investigating specific questions such as the author of the act; the form, object or subject matter of the act; the effect intended by the State in formulating the act or its reason for so doing; the addressee; reactions, both on the part of the addressee and of third States; the conduct of the author State; and subsequent developments with respect to the act, namely its modification, withdrawal or implementation. Such a study might, it had been suggested, enable rules governing the functioning of such acts to be identified. That approach presupposed a decision that the final outcome of the work would be the formulation of a set of draft articles with commentaries. The Commission might also study certain particular aspects of the question, drawn chiefly from court decisions and arbitral awards, such as guarantees or promises based on good faith; guarantees or conduct instilling confidence in another State; estoppel (for example, the *North Sea Continental Shelf* and *Gulf of Maine* cases); claims concerning rights (right of passage, exclusive economic zones); acceptance of or acquiescence in certain acts (silence); and express acts of renunciation or abandonment. As one member of the Commission had suggested, such an approach would lead to an expository study on the question. In his view, those two proposals were not contradictory, but would have differing objectives: without prejudice to the final form that the result of the Commission's work on the topic would take, both proposals could be envisaged as a means of continuing the study of practice, to which his eighth report could be devoted, with due account taken of all the comments expressed on the seventh report, for which he thanked the members.

43. Despite its complexity and all the problems that it raised, the topic was amenable to closer consideration so that its content and significance could be further defined, regardless of the form that the final product was to take. He proposed to prepare a new report, taking into account any guidance to be offered during the debate on the question or the conclusions or recommendations that might be formulated by a working group, if the Commission decided to establish such a group during the present session. In that case, the working group might have the task of drawing his attention to examples deemed to be of interest for purposes of analysis.

44. The CHAIRPERSON suggested that the Commission should establish an open-ended working group, with three basic tasks: firstly, to select significant examples of unilateral acts taken from the seventh report; secondly, to analyse those examples in depth, in the light of their characteristics, with a view to establishing an analytical chart; and, thirdly, to assist the Special Rapporteur in pursuing his study of the topic. The working group would be chaired by Mr. Pellet.

45. Mr. SEPÚLVEDA, expressing agreement with that proposal, said that the working group's terms of reference had to be defined more precisely. A distinction should be drawn between bilateral acts that were primarily political in nature and those that were primarily legal in nature. The working group should focus on the latter. In his opinion, the working group's main concern should be to define the legal effects produced by unilateral acts, since those effects had not yet been determined.

46. The CHAIRPERSON proposed that the working group's terms of reference should be amended accordingly so that it would be clear that it was to select significant examples of unilateral acts of a primarily legal nature.

47. Mr. ECONOMIDES said that two criteria must be taken into account in selecting the examples to be studied. The first was the degree of autonomy of the act. A non-autonomous unilateral act—an act performed in accordance with a treaty or the law of an international organization—therefore did not come within the scope of the working group's discussions because its effects were governed either by the law of treaties or by the law of each international organization. The second criterion concerned the legal consequences of the act. It was necessary to ascertain whether a unilateral act created an independent legal obligation or whether it had other effects. Those effects, separately from the obligations, should also be clearly defined.

48. The distinction between political and legal acts was of no great significance, since every legal act encompassed political aspects. Since that distinction depended mainly on the State's intention and was bound up with the manifestation of its will, it was in principle hard to draw.

49. Mr. DAOUDI said that the two criteria outlined by Mr. Economides were extremely important. In order to select meaningful examples of unilateral acts from the seventh report, the working group would have to conduct an in-depth study, which presupposed the adoption

of certain criteria drawn from the definition of unilateral acts as it appeared in recommendation 1 made by the 2003 Working Group. The recommendation suggested that there were two avenues to be explored: on the one hand, acts which generated obligations and, on the other, treaty-based acts. The working group should therefore be given the task of re-examining the definition. A working group chaired by Mr. Pellet would undoubtedly be able to pick out the most appropriate examples.

50. He wondered whether the working group would have enough time for a thorough examination of those examples during the current session. Furthermore, recommendation 6 already spelled out the legal framework for international unilateral acts.

51. Mr. MATHESON said he agreed that the working group should choose only those examples which, generally speaking, matched the definition adopted at the previous session. Moreover, there was no question of asking the working group to determine whether each specific act really created legal obligations and what those obligations were, for that was more the responsibility of the Special Rapporteur.

52. Mr. CHEE said that the definition of unilateral acts had been under consideration ever since he had joined the Commission. The definition given in recommendation 1 did not pose any problems as far as he was concerned. The issue should be approached by referring to the judgments of ICJ and of tribunals, as well as to the opinions of distinguished writers. The working group should have some leeway and should strive to determine the method to be followed rather than the substance of the issue.

53. Mr. KEMICHA said that the plenary should endorse the proposal to set up a working group chaired by Mr. Pellet. In cooperation with the Special Rapporteur, it would be responsible for submitting proposals to the Commission on the course to be followed with regard to further consideration of the topic. He believed that it should build on the work which had been done at the previous session and which was partially reflected in the seventh report. He, too, thought that the working group should be allowed some leeway and should offer the Commission guidance in the very near future.

54. Mr. PELLET said that, having discussed the matter with the Special Rapporteur, he had agreed to assume the task of chairing the working group, although he was not really a candidate for it. In his view, the working group must be open in all senses of the term—both in its composition and in its attitude—and it must give itself guidelines. Moreover, it must not have any preconceptions; it must select examples to be studied according to the documentation available and the likelihood of finding information on the *ex ante* and *ex post* context. That meant that its task would consist of an in-depth analysis of those acts, since it was only thus that it could be decided whether they were of a political or a legal nature. In short, the working group must adopt an empirical approach and not start with preconceived ideas.

55. He considered that the working group must be open to all members, although he stressed that it should be a study group and not a discussion group. The members who decided to be part of it must therefore be ready to do some extra research based on the preceding year's report, rather than starting from scratch. With that in mind, the working group could deal first of all with acts intended to produce legal effects, without calling into question the conclusions reached at the preceding session. It should also meet as soon as possible in order to decide on its working methods. Like Mr. Daoudi, he considered that it would be unrealistic to hope for definitive results during the current session. The working group should therefore continue its work after the end of the session by electronic means so as to help the Special Rapporteur draft a report which, in his view, would give full effect to recommendation 4, something the seventh report did only partially.

56. The CHAIRPERSON suggested that a working group should be set up and chaired by Mr. Pellet; its task would be to select and analyse examples of unilateral acts on the basis of work done so far by the Commission, the Special Rapporteur's reports and ideas put forward in plenary. The working group, which should have the necessary scope to perform its task, should also be responsible for providing the Commission with information on how to continue the study of the topic. If he heard no objection, he would take it that the proposal was acceptable to the Commission.

It was so decided.

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

[Agenda item 1]

57. Ms. XUE (Chairperson of the Planning Group) announced that the Planning Group would be composed of Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda and Mr. Yamada. Members whose name had not been mentioned could, of course, take part in the work of the Planning Group.

The meeting rose at 1.10 p.m.

2819th MEETING

Tuesday, 20 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

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

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* Resumed from the 2815th meeting.