

Document:-  
**A/CN.4/2854**

**Summary record of the 2854th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**2005, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://legal.un.org/ilc/>)*

61. Lastly, he thanked the members of the Commission for their warm welcome and the interest they showed in the work of AALCO.

62. Mr. MIKULKA (Secretary to the Commission) said that the circulation of the Commission's yearbooks on CD-ROM still posed copyright problems, but it was hoped that all that documentation would be accessible on the Internet in the near future.

*The meeting rose at 1.10 p.m.*

---

## 2854th MEETING

*Wednesday, 20 July 2005, at 10.05 a.m.*

*Chairperson:* Mr. Djamchid MOMTAZ

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

---

### Unilateral acts of states (*continued*) (A/CN.4/549 and Add.1, sect. C and A/CN.4/557)

[Agenda item 5]

#### EIGHTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. FOMBA thanked the Special Rapporteur for his eighth report on unilateral acts of States (A/CN.4/557), which would serve as a useful basis for the Commission's further work. Before commenting in detail on the report, he wished to provide information on the statement made by the Head of State of the Republic of Mali, in connection with the territorial dispute between Burkina Faso and Mali, considered by the ICJ as the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, in a judgment dated 22 December 1986. He regretted that he had been unable to provide the promised input to the Working Group on the subject, owing to difficulties in obtaining the relevant documentation in his capital.

2. Following an armed conflict between the two countries, which had broken out on 14 December 1974, appeals had been launched for conciliation, notably by the President of the Organization of African Unity. In January 1975, the Organization's Mediation Commission had formed a Legal Sub-Commission whose role was to draw up an initial proposal for submission to the Mediation Commission comprising an outline solution. On 11 April 1975, the Head of State of Mali had made the following statement during an interview with Agence France-Presse:

Mali extends over 1,240,000 square kilometres, and we cannot justify fighting for a scrap of territory 150 kilometres long. Even if the Organization of African Unity Commission decides objectively that the frontier line passes through Bamako, my Government will comply with the decision. (para. 36 of the judgment)

3. On 14 June 1975, the Legal Sub-Commission had presented its report to the Mediation Commission and had suggested that the parties should accept the implementation of the principle of the intangibility of colonial frontiers; the use for that purpose of texts and maps; and specific proposals for the frontier line. On 17 and 18 June 1975, the Mediation Commission had met with the two Heads of State, and had adopted a final communiqué whereby the two States undertook to bring their dispute to an end on the basis of the Mediation Commission's recommendations, and agreed to the establishment of a neutral technical committee to determine the location of certain villages, to reconnoitre the frontier, and to make proposals for its materialization to the Mediation Commission. On 10 July 1975, the Heads of State had met again, and in a joint declaration had welcomed the efforts made and the results achieved by the Mediation Commission and had affirmed their common intention to do their utmost to transcend the results, especially by facilitating the delimitation of the frontier between the two States in order to place the final seal on their reconciliation. The technical committee had been unable to fulfil its function, and despite further contacts between the parties, that was how matters had remained until the conclusion of the Special Agreement by which the case had been brought before the ICJ.

4. With regard to the legal positions of the two parties and areas of agreement, they had agreed in the first place that the Mediation Commission had not been a jurisdictional body and had lacked the power to take legally binding decisions. In the second place, they had agreed that the Mediation Commission had never actually completed its work, since it had not formally taken note of the reports of its subcommissions, and had submitted no definitive overall solution for consideration by the parties in the context of its mediating functions.

5. As for areas of disagreement, Burkina Faso had argued that there had been acquiescence by Mali in the solutions outlined in that context, on three grounds. First, the final communiqué of 27 December 1974 setting up the Mediation Commission must be considered as a genuine international agreement binding upon the States parties. Second, while admitting that the Mediation Commission had not been empowered to render binding decisions, Burkina Faso had alleged that the report of the Legal Sub-Commission, endorsed by the summit meeting of Heads of State in June 1975, had become binding for Mali because it had proclaimed itself already bound by the report which might have been made by the Mediation Commission, by virtue of the declaration made by the President of Mali on 11 April 1975. Third, Burkina Faso had also argued that the effect of the final communiqué of 18 June 1975, which had emanated from the enlarged Mediation Commission, and had also been an international agreement which the parties were bound to observe, had been to reinforce Mali's obligations in the matter.

6. Mali had challenged that interpretation of the statement of its President on two counts. First, the Mediation Commission would have to have had a power of decision, which had not legally been the case. Second, it claimed that its President's comments had merely been a witticism of the kind regularly uttered at press conferences which had implied no more than that Mali had been anxious to consider the Mediation Commission's recommendations with good will and in good faith. Mali had also challenged Burkina Faso's interpretation of the final communiqué of 18 June 1975 on three grounds. First, the Mediation Commission had not, strictly speaking, made any recommendation. Second, the Heads of State had not accepted any predetermined line; on the contrary, in entrusting a neutral technical committee with the task of determining the position of certain villages, reconnoitring the frontier and making proposals to the Mediation Commission for its materialization, they had instructed that committee to produce new proposals, which in Mali's opinion indicated that the proposals of the subcommissions had not been final.

7. The Court's position had been that the statement of 11 April 1975 had not been made during negotiations or talks between the two parties. At most, it had taken the form of a unilateral act by the Government of Mali. Such declarations concerning legal or factual situations might indeed have the effect of creating legal obligations for the State on whose behalf they were made, but it all depended on the intention of the State in question. In the case in point there had been nothing to hinder the parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity. Since no agreement of that kind had been concluded between the parties, the Chamber of the Court had found that there were no grounds to interpret the declaration made by Mali's Head of State as a unilateral act with legal implications (para. 40 of the judgment).

8. In conclusion, he noted, first, that even if the statement was considered merely a witticism, it could not be denied that it raised the substantive issue of good will and good faith. Second, it should be borne in mind that in Mali there was a long-established cultural tradition of keeping one's word, which was considered a sacred obligation. Third, the statement was a perfect illustration of the risk of a State being entrapped by its own words, referred to by Mr. Pellet at the previous meeting. Lastly, it would have been useful to have had an opportunity to analyse the statement on the basis of the criteria identified by the Mediation Commission.

9. Turning to the report, Mr. Fomba said that the examples of State practice analysed were sufficiently representative and that the Special Rapporteur's conclusions would help to establish some basic principles. Concerning the form of the examples analysed, the Special Rapporteur had drawn two basic conclusions: first, that the examples took a wide variety of forms; second, that the form was relatively unimportant in determining whether one was dealing with a unilateral legal act of the type in which the Commission was interested, namely, one which produced legal effects on its own. However, there seemed

to be some contradiction between the statement in paragraph 170 of the report that the formality of the act had a role to play in determining the intent of its author, and the statement in the same paragraph that the form could have an impact insofar as the statement might be considered to produce legal effects. The most important conclusion to be drawn was that the variety in form established a principle based on respect for the sovereignty, will and freedom of expression of States.

10. On the criterion of authorship, the Special Rapporteur noted that the authors of the acts were exclusively States; hence, it would seem advisable to establish the principle of the exclusive right of States to formulate unilateral acts, pending later consideration of the case of international organizations.

11. The addressees of such acts were also varied, with different possible combinations, which might give rise to specific problems depending on the type of addressee concerned. The instrumental consequence would be to enshrine the principle of diversity of addressees in any future legal regime for unilateral acts. He endorsed the analogy drawn by the Special Rapporteur in paragraph 172 of the report concerning the possibility of transferring the provision relating to the capacity of the State to conclude treaties, contained in article 6 of the 1969 Vienna Convention, to any legal regime on unilateral acts that might be established.

12. As indicated in paragraph 175 of the report, not all of the acts examined had a single origin; some were compound, which was important when interpreting their contents and the subjective factors associated with the consent of the State formulating the acts to be bound by them. The instrumental consequence would be to enshrine that diversity, as in the law of treaties, along with the principles of sovereignty and of unity of representation and expression of will and consent of the State.

13. On the question of who was competent to represent and to commit the State by formulating unilateral acts, the Special Rapporteur referred in paragraph 180 of the report to the Vienna treaty regime and rightly reaffirmed the capacity of the Head of State or Government and the Minister for Foreign Affairs in such matters. As for the issue raised in paragraph 181, he was in favour of the application of the 1969 Vienna Convention, *mutatis mutandis*, taking into account the specific characteristics of unilateral acts and hence the possibility of including other persons authorized to formulate them.

14. With regard to the criterion of context, the Special Rapporteur noted in paragraph 182 that almost all of the acts in question were connected in some way with negotiations on a specific issue. That underscored their importance, along with or in relation to conventions, in the peaceful settlement of disputes between States.

15. In terms of how to qualify the acts, some were clearly unilateral, while others might be considered differently, as illustrated in paragraphs 183–188 of the report. The question was to what extent the results of the analysis would help to systematically identify the nature of such acts or types of conduct.

16. In paragraph 189, the Special Rapporteur drew attention to some of the most difficult aspects of the topic: the validity of the act, its possible invalidation and the capacity and competence of the author. A comparative analysis of articles 6, 7, 26, 27 and 46 of the 1969 Vienna Convention would be useful in relation to the question of the hierarchy and distribution of competences between international and internal law in formulating and implementing international State commitments.

17. Another important question was how to determine the moment at which an act produced legal effects. According to paragraph 194 of the report, in the cases considered it seemed difficult to determine that moment, although the situation was not always very clear, as was borne out by the *Nuclear Tests* decisions.

18. As far as modification or revocation were concerned, in paragraph 198 the Special Rapporteur noted that on the whole the content of the acts examined had been maintained; however, that should not be interpreted as prejudging the issue of the right to modify or revoke such acts in future.

19. With regard to the conduct of a State that did not constitute a unilateral act *stricto sensu*, in paragraph 203 the Special Rapporteur noted that such conduct might produce relevant legal effects, based on the findings of the ICJ in the *Temple of Preah Vihear* case. However, that was a separate issue and must be treated as such.

20. On the subject of estoppel, silence and acquiescence, in paragraphs 204 and 205 the Special Rapporteur recalled the extremely close relationship between the various forms of State conduct and gave a good description of the mechanism of the legal scope of silence.

21. Lastly, he endorsed the conclusions set out in paragraphs 207 and 208 of the report.

22. Mr. CANDIOTI thanked the Special Rapporteur for his eighth report, and the Working Group for its valuable contribution to the study of the topic. He welcomed the compilation of examples of State practice provided in the report, especially given the scant response thus far by States to the Commission's repeated requests for information on the matter. The report provided a further opportunity to establish what forms of State conduct produced legal effects, *inter alia*, with a view to warning States about the risks of engaging in certain unilateral acts or types of conduct at the international level.

23. In paragraphs 168 *et seq.* of the report the Special Rapporteur highlighted the importance of determining whether the examples of unilateral acts of a State produced legal effects at the international level on their own and, if so, exactly what such effects were. He suggested that the conclusions might form the basis of a document to be prepared by the Working Group for submission to the sixty-first session of the United Nations General Assembly in 2006, reflecting a measure of consensus on the Commission's study of the topic since 1996. Such a document might be along the lines of the Commission's preliminary conclusions on reservations to treaties adopted

at its forty-ninth session and submitted to the General Assembly in 1997.<sup>1</sup>

24. In his view there were sufficient objective grounds for consensus among the members of the Commission to enable such preliminary conclusions to be drafted. He rejected the persistent assertion by certain members that unilateral acts of States did not exist. For centuries, international maritime law had recognized States' entitlement to determine unilaterally the extent of its territorial sea, conduct which must be qualified as a unilateral act that produced legal effects. Moreover, over the years the Commission had successfully dealt in the context of treaty law with certain legal acts, such as reservations, objections and denunciation, which could also be seen as unilateral acts that produced legal effects and were regulated and recognized by international law. Many of the members of the Commission and other eminent jurists exercised their profession at the ICJ, where their work was often predicated on a unilateral act—that of the acceptance of the optional clause recognizing the binding jurisdiction of the Court under article 36 of the Court's Statute. No State was obliged to accept that clause; acceptance thereof was a unilateral act in its form, content and nature, which had substantial legal consequences. Any denial of the existence of unilateral acts was therefore not borne out by the facts.

25. The discussion had possibly generated a basis for an objective consensus on some general conclusions which it might be wise to enunciate at that stage in order to structure the Commission's work, even if it might subsequently prove necessary to narrow down the study of the phenomena constituting lawful unilateral acts producing legal effects.

26. It might first be concluded that international law attributed legal effects to certain types of lawful act or conduct of States without the need for any reaction on the part of another subject of international law. Another conclusion might explain that, as shown by the examples offered by the Special Rapporteur, such unilateral conduct could consist in acts through which the State expressly manifested its will, or in other types of conduct by the State which had legal effects. The tacit acceptance of reservations under the 1969 Vienna Convention was an example of conduct of that kind. Silence and acquiescence were also recognized and regulated by international law. The absence of a manifestation of will at the time at which an act entailing legal consequences took place had frequently been recognized in international case law.

27. A third conclusion could convey the idea that unilateral acts of States might be in written or unwritten form and comprise one or more actions or omissions. A further conclusion might be that the legal effects of the unilateral act or unilateral conduct of a State could consist in a State's acceptance of an international obligation, the preservation or affirmation of a right, the waiver of a right by that State or the recognition of a right of another subject of international law. The State could perform all those acts of itself, without another State's assistance and irrespective of another State's will.

<sup>1</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

28. A fifth conclusion could be that, given the great variety of lawful unilateral conduct by States which might produce legal effects, the characterization of conduct by a State as a unilateral legal act would, in each case, depend crucially on the specific circumstances in which that conduct had taken place. For that reason, it would be advisable to follow Ms. Escarameia's proposal to provide a list of examples of the main factors and circumstances which had to be borne in mind for the purposes of characterizing that unilateral conduct as an act capable of producing legal effects.

29. One last conclusion might be that, in accordance with the principle of good faith and in the interests of international stability, security and cooperation, States must maintain a position which was compatible and consistent with their unilateral legal acts, honour the obligations they might have assumed by virtue of those acts, and respect the trust and legitimate expectations created thereby.

30. After 10 years of debate, the time had come for the Commission to present some results to the General Assembly. A set of general preliminary conclusions along the lines of those Mr. Candioti had just suggested would help to decide what direction the treatment of the topic should take in the future.

31. Mr. BROWNLIE said that, while he agreed with many of Mr. Candioti's suggestions regarding the Commission's possible approach to the topic in the future, he had raised a canard in asserting that many of his colleagues denied the existence of unilateral acts. He himself was the author of a textbook which since 1966 had contained a chapter on such acts.<sup>2</sup>

32. The phrase "unilateral acts" was a useful way of referring succinctly to the subject matter and that was why it had been included in the Commission's agenda in that form. It was not, however, a very helpful analytical model because, obviously, although a unilateral act was a necessary threshold, it was not sufficient; a State could not create relations with other States off its own bat. States' freedom of action was subject to the rights of other States. Obligations could not be imposed on other States by a unilateral act. A unilateral act was therefore a mechanism triggering the possibility that, in the right context, that act might have legal consequences for other States. No act was ever, strictly speaking, unilateral, otherwise it would have no legal effect; it would be a non-entity. That was what he meant when he said that unilateral acts, as such, did not exist.

33. The whole culture of unilateral acts was politically and qualitatively very different from that of treaties. With a few rare exceptions, when a treaty was concluded, a State knew that it had made a treaty in a political and legal milieu in which that instrument would be readily recognized. Problems of interpretation might arise but, by and large, the act had taken place within a recognized legal milieu. In the case of unilateral acts, with the possible exception of forms of renunciation, no such milieu existed. It was therefore not surprising that States had not provided examples of State practice, because until

some third-party determining body dealt with the regulation and recognition of the putative unilateral act, it was unclear whether it existed or not. Hence the examples given involved *ex post facto* validation of unilateral acts: until the third-party authority took such action, the unilateral act went unrecognized. The subject matter was completely different from that of the law of treaties. If the Commission confused the two, it would not contribute to the progressive development of international law.

34. Mr. PELLET observed that the debate seemed to be going round in circles. Mr. Brownlie was mistaken on two important points: first, it was not true that States could not impose obligations on other States by means of unilateral acts. Mr. Candioti had provided the excellent example of the determination of the extent of the territorial sea. Those were unilateral acts in accordance with international law and they produced effects applicable to all States, even though, in order for them to do so, special authorization was required. Nevertheless, in the absence of such authorization, States could themselves enter into an obligation *vis-à-vis* other specified States or the international community as a whole, as had been confirmed by the judgments in the *Nuclear Tests* case and the *Frontier Dispute (Burkina Faso/Mali)* case to which Mr. Fomba had referred. That obligation was a legal effect, whatever Mr. Brownlie might say. Hence unilateral acts existed and produced effects.

35. Second, Mr. Brownlie had contradicted himself by saying that the topic did not lend itself to codification although he regarded unilateral acts of States as a threshold. The fundamental purpose of discussing the subject was to decide how to determine that threshold and at what point in time the unilateral conduct of a State bound that State and imposed obligations on it and, possibly, on other States. The subject existed, if only because it was necessary to try to find that threshold.

36. Mr. CANDIOTI said he wished to make it clear that he had never implied that unilateral acts should be equated with the law of treaties. On the contrary, it would be completely wrong to try to use the law of treaties as the basis for establishing rules on unilateral acts. Nor did he believe that the law of treaties was the sole branch of international law in existence, or that a unilateral act produced legal effects only when it was recognized by another subject of international law. Customary international law and the general principles of international law indeed attributed legal effects to some kinds of unilateral conduct.

37. Mr. BROWNLIE explained that his previous statement had not applied to everything that Mr. Candioti had said, but only to his analysis of what was meant by the affirmation that unilateral acts did not exist. In response to Mr. Pellet's reference to the law of the sea and a State's ability to bind other States by extending its territorial sea or creating a new economic zone, he wished to point out that a State could not adopt measures of that nature unilaterally, since such action was subject to international law. The judgment in the *Nottebohm* case had drawn an important analogy with the territorial sea in the context of nationality law. Similarly, the *Fisheries (United Kingdom v. Norway)* case had established that it was possible to extend the territorial sea only subject to and in keeping

<sup>2</sup> Brownlie, *op. cit.* (2846th meeting, footnote 8).

with the conditions of general international law (p. 143 of the judgment).

38. The CHAIRPERSON, speaking as a member of the Commission, drew attention to the fact that the content of treaties, like that of unilateral acts, had to be in accordance with international law, for example with *jus cogens*.

39. Mr. KOSKENNIEMI, responding to Mr. Pellet's comments on the circular nature of the debate, said that he personally felt it was moving forward. He agreed with Mr. Brownlie that unilateral acts did exist in some sense, and emphasized that he himself had never asserted that unilateral acts did not exist. It was therefore legitimate for lawyers to discuss them. He would, however, hesitate to go so far as to assert that they were a kind of legal institution.

40. While all the members of the Commission seemed now to agree that unilateral acts did exist, they were unable to agree on the existence of a threshold making it possible to identify in international legal reality and in the behaviour of States those types of conduct which constituted unilateral acts. In some sense it was possible to say that a threshold existed. It was constituted by good faith, equity and reasonableness, which were covered in German jurisprudence by the term *Vertrauensschutz* (the protection of legitimate expectations).

41. Why, then, was it not possible to codify that threshold? The threshold in the law of treaties had been codified, but when it came to unilateral acts such a process would necessarily involve using language that was completely indeterminate and open-ended. If the Commission wished to describe the situation with regard to the Ihlen Declaration and the *Nuclear Tests* and *Temple of Preah Vihear* cases in terms of a threshold, the result would be a threshold that was so open-ended as to be useless.

42. The point was not that there was no such thing as unilateral acts, or that they were impossible to codify, but that such action would be inadvisable, because that category of acts was not defined in a way that lent itself to such predetermination. That was probably what Mr. Brownlie had meant when he had held that unilateral acts were identified *ex post facto* by courts. When Mr. Ihlen had made his unfortunate declaration, he had not been formulating an act, he had been saying something off the top of his head, but later on, when the dispute arose, his words had been interpreted in such a way that Norway could no longer retract the declaration. Nonetheless, when Mr. Ihlen had uttered those words, there had been no predetermined threshold. That they were regarded as a unilateral act was an *ex post facto* construction of a court.

43. Mr. CHEE recalled that the *Fisheries (United Kingdom v. Norway)* case had involved a crucial issue, as the use of the straight baseline method had led to a substantial expansion of the territorial sea into an area where British fishermen had been operating, so that their vital interests were at stake. Nevertheless the Court had ruled in favour of Norway's practice, *inter alia* on the grounds that the United Kingdom had not entered a protest and that the practice had long been tolerated by the international community. He therefore considered that the

wider implications of the case should be borne in mind, namely, that the Court had upheld a unilateral act (p. 139 of the judgment).

44. Mr. PELLET welcomed the newly enlightened position adopted by Mr. Koskenniemi and said that the very purposes of discussing unilateral acts were to prevent a situation where the determination of a threshold occurred *ex post facto* in a haphazard fashion and also to provide States and courts with guidance as to when persons such as Mr. Ihlen were likely to be entrapped by their words, which would subsequently be treated as an expression of a State's will. He was personally not convinced that a unilateral act could be determined only *ex post facto*. That was the current situation only because international law as yet provided no other mechanisms. The solution was therefore to codify the case law in the matter.

45. He was puzzled by Mr. Brownlie's understanding of the term "unilateral". It did not mean "autonomous". It meant that one State or one side took an initiative. That did not signify that such action did not come within the realm of international law. Clearly unilateral acts produced legal effects because there was a rule of international law allowing them to do so. As the Chairperson had pointed out, the same was true of treaties in accordance with the principle of customary international law that *pacta sunt servanda*, under which treaties were binding. Similarly there was a rule that *acta sunt servanda*, even if the conditions applying to such acts were harder to grasp.

46. He failed to follow the Chairperson's reasoning when he had said that treaties must comply with *jus cogens*. That was a question of content, whereas the Commission was considering the basis for unilateral acts. Unilateral acts must certainly comply with *jus cogens*, but the key issue was why they were binding. The reason was that there was a rule or rules, for example, those of the law of the sea, which made them binding in the same way as treaties; that was known as a rule of authorization.

47. Mr. KAMTO said that the longer the debate progressed, the more confused it became. While he welcomed the fact that some members of the Commission had come round to recognizing the existence of unilateral acts, they seemed to have done so only in order to prove that they could not be codified. The existence of unilateral acts had, however, been sufficiently demonstrated. It was time to structure the Commission's work by distinguishing in international law between unilateral acts validated by authorization and autonomous unilateral acts where the State formulated the act without the authorization conferred by another international legal act. When a State determined the external limits of its territorial sea, it did so upon the authorization of a treaty or convention. On the other hand, the Ihlen Declaration was an example of an act which had not been solicited by the other party, yet which had been made by the representative of a State. It was a unilateral declaration not based on any other international legal act making that declaration possible.

48. On the basis of that distinction, it might be possible to say that, in the first case, the issue raised was one of validity. If one act depended on another, it would be necessary to ascertain the validity of the second act

in the light of the first and of general international law. Had the act been formulated in accordance with the rules or criteria laid down by the act authorizing it? Were the effects it produced consonant with that act or with general international law?

49. In the second case, it seemed that the issue turned on whether it was a legal act and on its validity. In order to reply to those questions, it was necessary to define the criteria for legality of the act, and that was what the Special Rapporteur was trying to do. Had the act been formulated by a person with the capacity to do so under international law? Had that person formulated the act with the intention to bind the State? Had he expressed the will of the State? Once those questions had been answered and it had been ascertained that the act in question might indeed be a legal act, the next issue was whether it was valid under international law by virtue of respecting other principles of international law, whether general or specific to the area in which the unilateral act had been formulated. Of course, there were many other criteria, such as the addressee of the act, but if the Commission's work could be structured along the lines he had suggested, perhaps more rapid progress could be made in its deliberations.

50. Mr. BROWNLIE said that Mr. Chee had drawn a conclusion which was not borne out by the *Fisheries (United Kingdom v. Norway)* case. The United Kingdom, as applicant State, had asked for a declaratory judgment as to whether the Norwegian State baseline system was or was not in accordance with general international law. The Court had found that it was indeed valid in accordance with the principles of general international law. Judge Hackworth had been the only member of the Court to hold, in a separate opinion, that the system's compliance with international law depended on British recognition (p. 144 of the judgment).

51. While he greatly appreciated Mr. Kamto's analysis of the question, it was built on the metaphor of a threshold. In fact, what he had said earlier was that an original unilateral act—a trigger mechanism—was a necessary but not a sufficient element. The main question was, what were the sufficient elements producing a legal result, in other words an act which was not only necessary, but sufficient. There were a huge variety of such elements. International law did not require a particular form and great uncertainty prevailed. If the Commission tried to legislate in that sphere, it could make matters worse.

52. Ms. ESCARAMEIA said it had become clear, particularly from the latest comments by Mr. Brownlie, that the issue was whether a unilateral act produced legal effects of itself, or whether it was simply a trigger mechanism. Reactions by third parties were necessary before one could determine that legal effects had been produced. It would then be the trigger mechanism, in addition to the reactions of third parties, that produced legal effects, something that would become apparent only *ex post facto*, and probably only in a decision by a court.

53. It was true, as Mr. Brownlie had pointed out, that treaties sometimes predetermined what the reactions of States would be: on the extent of a territorial sea, for example, or the exploitation of an exclusive economic

zone. On the other hand, case law revealed that whenever courts dealt with a unilateral act, the date they assigned to it was not the date on which the legal effects had been produced, but rather the date on which the act had been formulated. Accordingly, in the practice of the courts, a legal act existed whenever a State expressed its will unilaterally. The next step was to find out what factors conferred the status of a unilateral act on the expressed will of the State. That was what the Commission was attempting to do. Some members thought it would be useful to look at how treaties predetermined such factors, while others thought that approach a waste of time.

54. Ms. XUE said that although the topic of unilateral acts of States had been on the Commission's agenda for some time, the current discussion showed that it was still debating the very basic issue of whether the topic was necessary or suitable for codification. Doubts had been expressed as to whether unilateral acts existed as a legal institution or concept in the international legal order. While it might be true that, unlike the situation with treaties, diplomatic protection or State responsibility, the concept of unilateral acts of States did not clearly connote a legal context, that did not mean that there was no need for a meaningful legal study of the concept.

55. As State practice, court decisions and arbitral awards had demonstrated time and time again, under certain circumstances some unilateral acts of States were seen as having produced binding effects, both on the acting State itself and, in some cases, on other States as well. As they were taken by the acting State itself, such acts could not be regarded as involuntary. On the other hand, their consequences might result in a situation where the acting State was bound by its own acts. Such consequences might be anticipated by the acting State or might take it by surprise. Hence the belief that it was necessary to spell out the conditions under which binding effects might be produced in order to avoid such surprises and make State relations more stable and predictable. If a State did not intend to produce binding effects, it should avoid certain acts or take action to prevent such legal effects from being produced. Against that background, the present study was useful.

56. Of course, a policy consideration was also involved. As the Special Rapporteur pointed out in paragraph 3 of his report, during the discussions in the Sixth Committee Member States had emphasized that “[t]he Commission should offer a clear definition of unilateral acts of States capable of producing legal effects, with sufficient flexibility to leave States a timely margin for manoeuvre in order to be able to carry out their political acts”. As Mr. Brownlie had remarked, the effects of unilateral acts were *ex post facto*: sometimes they were intended by States but often they were not. In the latter situation, the question arose to what extent States should be given a “timely margin” for political manoeuvre. In that sense, every State's interests were at stake.

57. While unilateral acts had so far been deemed to produce legal effects, thus involving the assumption of legal obligations, the cases presented in the report revealed another type of situation, in which the effects produced were not legal but were nonetheless binding on the acting

State. Commitments by nuclear-weapon States not to use nuclear weapons against non-nuclear-weapon States, for example, were undertaken intentionally without legal effects. They were political in nature and made as part of an agreement in the context of the Nuclear Non-Proliferation Treaty process. The Commission might opt to exclude that type of case from the scope of its study, targeting only those with legal effects, but such a policy direction might miss the objective that the Commission was aiming at. After all, the whole issue of unilateral acts was about good faith and predictability based thereon.

58. Concerning the form, she shared the doubts expressed by some members over the Special Rapporteur's conclusion that the form was relatively unimportant in determining whether the unilateral act was one that could produce legal effects on its own without the need for its acceptance or for any other reaction on the part of the addressee. The *Nuclear Tests* case adduced in support of that conclusion was neither conclusive nor exhaustive. Other cases could be found in which the binding effects of the unilateral act of a State might depend on the response of the addressee. Since the analysis of unilateral acts was mostly contextual and circumstantial, the form for carrying out such acts and the relations between the author and addressee could vary considerably from case to case, proving decisive in some cases but not in others for determining the binding effects of the acts concerned. Of 11 cases outlined in the report, three—those of Colombia (paras. 13–35), Jordan (paras. 44–54) and the Truman Proclamation (paras. 127–137)—involved domestic legal procedure, but the relevant practice pointed in three different directions. While it was impossible to say which was normal and which was exceptional, one thing was clear: political circumstances played a decisive role regarding the effects of the acts in each case. Thus, the Commission was faced with contextual uncertainty.

59. As to the second conclusion drawn by the Special Rapporteur, namely, that the authors of unilateral acts were States, she said that by the very nature of the topic, it was acts of States and not of other entities that were being considered. It was somewhat surprising that it had taken the Commission so long to reach that conclusion. Her concern was not with the conclusion itself but rather with the analysis that followed, which gave the general impression that the Special Rapporteur's approach was still very much affected by treaty regimes (para. 171 *et seq.*). The core issue with unilateral acts was whether an obligation or binding effects were created, not to whom such an obligation could and should be owed, although that issue was not totally irrelevant.

60. In short, the study of unilateral acts could provide useful guidance for States in conducting their foreign relations. In considering the issues involved, the Commission must not lose sight of the political context within which legal rules operated. As to the next step to be taken, she understood the reservations expressed concerning the Special Rapporteur's proposal that the Commission should consider some of the draft articles separately from the study of practice, and thought that the suggestion made by Mr. Candioti regarding the preparation of a set of general preliminary conclusions deserved serious consideration.

**Reservations to treaties (continued)\* (A/CN.4/549 and Add.1, sect. D, A/CN.4/558 and Corr.1 and Add.1 [and Corr.1]–2, and A/CN.4/L.665)**

[Agenda item 6]

TENTH REPORT OF THE SPECIAL RAPPORTEUR

61. Mr. PELLET (Special Rapporteur), introducing his tenth report on reservations to treaties (A/CN.4/558 and Corr.1 and Add.1 [and Corr.1]–2), said he owed the Commission both explanations and apologies. The document before the Commission constituted only a portion of his tenth report, and it had initially been intended to form an even smaller portion. Brimming with good intentions, he had planned to submit a report with three separate components: an introduction which, in the usual way, would have summed up the reception given to the previous report and recent developments concerning reservations to treaties; a first part, which would have dispatched once and for all the problem of formulation, in other words how to define the form and procedure for objections to and acceptance of reservations; and a second part, on the validity of reservations.

62. He had launched into the work with vigor, beginning with the formulation of objections, a logical extension of his previous two reports devoted wholly or partly to the definition of objections. A new development had intervened, however: in the context of an article-by-article commentary on the 1969 Vienna Convention undertaken by the Université Libre de Bruxelles, he had had to give priority to a major academic work involving commentaries on several articles dealing with reservations. He had commented in particular on article 19 of the 1969 Vienna Convention and of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which dealt with the validity of reservations, the very problem to which he had proposed to devote the second part of his tenth report.

63. The Commission was not a university, and he could hardly serve it up a warmed-up version of his commentary on article 19 in lieu of a report. He had accordingly chosen to adapt those commentaries, an exercise that had proved more time-consuming than he had expected. He had finally had to admit that he would be unable to respect the ambitious deadline he had set himself and had had to choose between completing his work on the formulation and acceptance of objections and leaving for happier times the more interesting question of validity of reservations, or giving priority to the validity of reservations, with the danger that nothing would be ready in time.

64. He had gambled on the second course of action, but had lost his bet: not only had he been unable to finish either the introduction or the first part of his report, but he had also left the submission of the second part until too late, with the result that only sections A and B had been translated into all working languages of the Commission. He was informed by the Secretariat that section D would not become available in all languages until after the end of the session. Even though the Secretariat had adopted

\* Resumed from the 2842nd meeting.

the laudable policy of furnishing documents in their original language—in the present case, French—in advance of their issuance in all other languages, it would obviously be impossible to discuss the report in its entirety at the current session, for while English was a working language for nearly all members of the Commission, the same was not true of the native language of Molière, Georges Scelle and Paul Reuter.

65. All that was by way of explanation and apology for the rather abrupt opening of the document before the Commission, which had originally been intended as the concluding part of a much longer report. The Commission would nevertheless have grist for its mill.

66. In sections A and B now before the Commission, he had first sought to defend the expression “validity of reservations” before addressing, in section A, the principle derived from the chapeau of article 19 of the 1969 and 1986 Vienna Conventions, namely, presumption of validity of reservations, and going on to discuss the problems raised by the express or implicit prohibition of reservations, covered in subparagraphs (a) and (b) of that article.

67. Section C of his report related to the absolutely crucial requirement of compatibility of reservations with the object and purpose of the treaty, as called for in article 19 (c). That also provided an opportunity for an in-depth discussion of several difficult issues, including the validity or invalidity of reservations relating to the application of internal law, vague and general reservations, and reservations relating to provisions embodying customary rules or setting forth rules of *jus cogens*. In section D of his report, he addressed such questions as how to determine the validity of reservations and the consequences thereof; who was able to assess that validity; and what were the consequences of a reservation that, once formulated, was found to be invalid.

68. Returning to sections A and B and to the sometimes disputed phrase that he had chosen as the title, namely, “Validity of reservations”, he recalled that in view of the difficulties raised by the expression, he had proposed that the Commission should request the views of States in the Sixth Committee on the matter. The Commission had done so,<sup>3</sup> but as was often the case, the results of that consultation were not particularly illuminating for two reasons.

69. First, the responses from States had shown that they were nearly evenly split between those that had doubts about the word “validity” and those that accepted it. Second, delegates had taken advantage of the opportunity to review the entire legal regime for reservations (A/CN.4/549, paras. 101–112), an exercise that was not without interest but went beyond the confines of the work which, to his mind, consisted in finding the most neutral formulation, one which prejudged in no way, or as little as possible, the legal regime to be applicable to reservations or to the various categories thereof, should the Commission resign itself to the fact that several categories existed.

70. That was precisely why the words “validity/invalidity” and “valid/invalid” were infinitely more acceptable than their rivals, “admissibility/inadmissibility”, “permissibility/impermissibility” and “opposability/non-opposability”. The reason he sought to revert to the terminology he had initially used, namely, “validity”, was that it was entirely neutral, whereas the three rival expressions had strong doctrinal connotations and were thus unnecessarily assertive.

71. The great doctrinal battle on the question of reservations pitted the proponents of permissibility, who thought a reservation could be intrinsically invalid by being contrary to the object or purpose of the treaty, against the advocates of opposability, for whom the reservations regime was governed in its entirety by the reactions of other States. One could speak of the objective and subjective schools. It thus seemed obvious that in using one or the other of those expressions, the Commission would be taking a position in favour of one or the other of those schools, a state of affairs that was not terminologically necessary, since a more neutral term, “validity”, existed. There was some truth in the arguments for its equivalents, although neither did justice to the complex reality of the legal regime of reservations.

72. Sir Derek Bowett, the undisputed leader of the “permissibility” school, had urged the Commission to use that terminology. For his own part, however, he was not sure that the Commission had been right in following Bowett’s lead and adopting the term “permissible” to describe reservations that raised no problems in terms of validity and the term “impermissible” for those that did (see paragraphs 4–5 of the report). A reservation could be valid or invalid on grounds of permissibility but also for other reasons, and it did not seem wise for the Commission to tie its own hands by resorting to doctrinally partisan terminology.

73. “Permissible” was translated into French as “*licite*” and “impermissible” as “*illicite*”, or rather, vice versa, since the Special Rapporteur’s working language was most emphatically French. The terminology was equally unsatisfactory in French, however. First, because there was a big difference between “permissible”, which was most accurately rendered in French as “*recevable*”, and “*licite*”, which corresponded to “lawful” in English, as opposed to “wrongful”. Second, the terminology, which hinged on the permissibility of reservations, was misleading. The Commission had realized as much when Mr. Tomka had very rightly pointed out that the terminology had an unfortunate tendency to hark back to the topic of responsibility of States. It was not reasonable to affirm that a reservation not valid for reasons of form or substance, whether of permissibility or of opposability, entailed the responsibility of the State or international organization that had formulated it, and in any event it was totally unreasonable to suggest that such was always the case. There was in any event absolutely no precedent to that effect, and if some writers, albeit very few, had sometimes contended that an impermissible reservation engaged the responsibility of its author, that singular notion had, to his knowledge, never been maintained by any State in any specific case. The worst fate that could befall a reservation was for it to be null and void, impermissible or not opposable—but it

<sup>3</sup> See *Yearbook ... 2004*, vol. II (Part Two), paras. 33–37.

could not engage the responsibility of its author. If there was a dispute in that regard, it was about legality, but certainly not about responsibility.

74. For want of anything better, he returned to the very neutral idea that some reservations were valid, and others not, regardless of the cause or effects of that validity or invalidity. That, then, was the title of that part of his report, and it was for that reason too that he suggested that the Commission stick to that terminology in its future work and adopt it in the cases left open in 2002, which concerned the draft guidelines already adopted, namely 1.6 and 2.1.8, in which the words “impermissible” and “impermissibility” were used.<sup>4</sup> The Commission should revert to the much more neutral terms “validity” and “non-validity”. That did not mean that there were no “impermissible” or “permissible” reservations, but that in the context of article 19 it was unduly partisan to speak of permissibility or admissibility.

75. Section A of his tenth report (“Presumption of validity of reservations”) called to mind the principle stemming from the chapeau of article 19 of the 1969 and 1986 Vienna Conventions, pursuant to which a State or an international organization could formulate a reservation, which, as the Commission had explained in its commentary of 1962 and 1966, amounted to “the general principle that the formulation of reservations is permitted”. That principle was clearly at odds with the proposals made by the special rapporteurs who had preceded Sir Humphrey Waldock, and with past practice,<sup>5</sup> at any rate according to the 1951 advisory opinion of the ICJ on Reservations to the Convention on Genocide. However, the entire structure of article 19 showed that the presumption of validity of reservations was far from absolute, and the power to formulate a reservation was obviously not unlimited. In the first place, it was limited in time, since a reservation could be formulated only when signing a treaty or when definitively expressing consent to be bound by it. Furthermore, by its nature a treaty could require that a reservation be unanimously accepted, failing which the reservation would, as clearly specified in article 20, paragraph 2, have been formulated, but not “made” or “established”. Moreover, States could in any event limit the power to formulate reservations in the treaty itself, a possibility envisaged in article 19, subparagraphs (a) and (b), but those paragraphs did not cover all instances of treaty limitations on the power to formulate reservations, and in any case, it clearly emerged from article 19, subparagraph (c), that a reservation incompatible with the object and purpose of the treaty could not be formulated.

76. Admittedly, States had the power to formulate reservations, but that was not an absolute right; moreover, that power concerned the formulation of reservations, and the word “formulation”, which appeared in the very title of article 19, had not been chosen by chance. It stressed what a State could do as author of a reservation, but as Waldock and the Commission had rightly pointed out, that did not mean that the reservation would be “made”, i.e.

that it would actually produce the effects intended by its author. For that to be the case, it was necessary—to cite a phrase which was fundamental yet too often disregarded and which appeared in article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions—for the reservation to be “established with regard to another party in accordance with articles 19, 20 and 23”. In other words, compliance with article 19 was one of the conditions for a reservation to be made or established, so that the reservation could produce its effects, but it was not the sole condition, and it therefore seemed that neither the permissibility school, which focused on article 19 to the exclusion of all other considerations, nor the opposability school, which was interested solely in article 20 and the reaction of other States, provided a complete and faithful account of the legal regime of reservations in all its enormous complexity.

77. The conditions posed in article 19 were necessary for establishing a reservation, but they were not sufficient. They were, nonetheless, at the start of the chain which enabled the reservation to produce the effects that its authors expected, and thus the elements of article 19 were essential to the validity of reservations. In the presence of a reservation, the first thing to be done was obviously to ask whether the reservation passed the test of article 19 before proceeding any further.

78. That said, the freedom to formulate reservations was the basic principle. Other relevant considerations merely qualified the principle, which was that States could formulate reservations. He thus asked in paragraph 16 whether it might be useful to make the principle of the presumption of the validity of reservations the subject of a separate draft guideline, because that presumption was one of the fundamental guides of the regime of reservations as a whole. However, he had decided not to, less for reasons of substance than of method. As he explained in paragraphs 17 and 18, isolating the chapeau of article 19 of the 1969 and 1986 Vienna Conventions would have had the serious disadvantage of splitting article 19 over two or more separate draft guidelines. It was preferable to avoid taking such a step so as to keep the Guide to Practice user-friendly. As had been done many times in the past—and he had cited most of the relevant examples in that regard in footnote 39 in paragraph 17—it would be better to reproduce article 19 of the 1986 Vienna Convention in its entirety in a single draft guideline 3.1 (para. 20 of the report). As usual, he preferred to use the 1986 Vienna Convention, because it was more complete than the 1969 Vienna Convention, since it included international organizations.

79. It was no secret that the mere reproduction of article 19 in draft guideline 3.1 was not ideal, for a reason which he set out in paragraph 19 of the report. Article 19 was poorly drafted in that it merely repeated what had been stated in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and which he had used in the definition of reservation in draft guideline 1.1, because those three provisions (article 2, paragraph 1 (d), article 19 and guideline 1.1) specified in a not entirely complete fashion the cases or moments in which a reservation could be formulated. As it was already in the definition it did not have to be repeated when speaking of the

<sup>4</sup> See *Yearbook ... 1999*, vol. II (Part Two), p. 126, and *Yearbook ... 2002*, vol. II (Part Two), p. 45, respectively.

<sup>5</sup> See *Yearbook ... 1962*, vol. II, document A/5209, pp. 175–181, and *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 202–209.

conditions of validity of reservations. However, the methodological flaw in the Vienna Conventions was not a sufficient reason to correct them, which might unnecessarily confuse the users of the Guide to Practice. It would be vastly preferable to reproduce the entire text of article 19 in draft guideline 3.1. It was better to repeat oneself than to contradict oneself.

80. In sections B and C of the report, it had seemed legitimate to distinguish between article 19, subparagraphs (a) and (b), on the one hand, and subparagraph (c), on the other, even though in section D, in which he spoke of the determination of validity, he had thought it necessary to bring together the three cases again in connection with the determination of the validity of reservations and the consequences of said determination, since nothing whatsoever in article 19 itself or in articles 20 to 23 suggested that it was necessary to distinguish reservations prohibited by the treaty or reservations contrary to the object and purpose of the treaty with regard to the applicable legal regime. That was the subject of section D.

81. In section C, he planned to give lengthy consideration to the very difficult question of the compatibility of a reservation with the object and purpose of the treaty, and section B was devoted to reservations prohibited by the treaty, either expressly or implicitly, which corresponded to article 19, subparagraphs (a) and (b), of the Vienna Conventions. Those cases were simpler than the ones considered under subparagraph (c), albeit not perhaps as simple as his predecessor Paul Reuter had claimed.<sup>6</sup>

82. While he would spare the Commission the detailed description of the *travaux préparatoires* for those provisions contained in paragraphs 23, 24, 31 and 35–37 of the report, a reading of those paragraphs showed that the matter was not as simple as it might seem and that the two cases addressed in article 19, subparagraphs (a) and (b), did not take by any means all possible cases into account. The starting point was that the Commission was in the presence of treaties which contained reservation clauses—that was the joint chapeau of article 19, subparagraphs (a) and (b). Subparagraph (a) covered the case in which the treaty prohibited the reservation, but that could in reality result from two categories of reservation clauses which were actually rather different. A treaty containing a reservation clause could prohibit all reservations, or only certain reservations. In the situation in which the reservation clause prohibited all reservations, for example in the Rome Statute of the International Criminal Court, the United Nations Convention on the Law of the Sea or the 1989 Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, matters were simple, but only relatively so, since it was still necessary to decide whether or not a unilateral declaration constituted a reservation, because a unilateral declaration was still possible in principle and even expressly provided for, as in the United Nations Convention on the Law of the Sea. However, in the first place that

was a problem of the definition of reservation, and not of validity *stricto sensu*, and in the second place, if the declaration was a reservation and not a simple interpretative declaration, then clearly the reservation could not be formulated, and if it was formulated, it was not valid. He would discuss later on, in section D, what that word meant, because it was not sufficient to say that a reservation was not valid; it was also necessary to understand what exactly that meant.

83. That being said, treaties that simply prohibited all reservations were rather rare. More often, the prohibition was partial and concerned only certain reservations. But such cases must in turn be divided into at least two further subcategories. For example, a treaty might prohibit reservations to specific provisions of the treaty, which were usually referred to by their article or paragraph number. He cited examples in paragraph 29 of the report. However—and that was a much more complicated situation—sometimes the prohibition did not concern specified provisions but categories of reservations, some clearly defined, others less so.

84. The first thing that the Commission should do was to indicate that the three above-mentioned cases were covered by article 19, subparagraph (a). That would be a useful clarification, all the more so because the *travaux préparatoires* of article 19 had shown just how much uncertainty had persisted on that point, as was shown by the comments of a number of former members of the Commission, who had considered that only some cases of prohibition were covered, while others were not. In his own view, the provision covered all cases of prohibition, even though it did not always automatically have the same effect. Thus, that was what he proposed to do in draft guideline 3.1.1, which should not pose major problems, because it merely specified what was meant by “prohibited reservation”.

85. However, it was important to state clearly, although probably not in the text of the draft guidelines, but instead in the commentary, that all the cases covered in article 19, subparagraph (a), of the Vienna Conventions concerned express prohibitions only and not, despite what had been written, implicit prohibitions. It could be seen from the *travaux préparatoires* that Waldock and the Commission had clearly ruled out the idea that certain treaties excluded reservations by their very nature, even though a special regime had been retained for two particular categories of treaties, namely treaties concluded between a limited number of parties and the constituent instruments of international organizations, but in those two cases, those distinctions had been allowed under article 20 and not at all under article 19. The Commission had rightly decided not to consider that certain multilateral treaties excluded reservations by their very nature. Article 20 had distinguished particular categories of treaties because it was a problem of opposability and not of permissibility.

86. On the other hand, article 19 did make reference to a form of implicit prohibition of reservations, but that did not have to do with the nature of treaties, but with an *a contrario* reasoning when a treaty allowed only specified reservations. That implicit prohibition was the subject of article 19, subparagraph (b). However, logical

<sup>6</sup> See P. Reuter, “Solidarité et divisibilité des engagements conventionnels” in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht, Nijhoff, 1989, p. 625; also reproduced in P. Reuter, *Le développement de l'ordre juridique international: Écrits de droit international*, Paris, Economica, 1995, p. 363.

as the idea underlying subparagraph (b) might be, the prohibition which it envisaged was rather complex and assumed, as he had pointed out in paragraph 34 of his report, that three conditions had been fulfilled: the treaty must permit the formulation of reservations; the reservations permitted must be “specified”; and it must be specified that “only” those reservations “may be made”. Actually, those three conditions were so restrictive, especially the latter two, that they were rarely fulfilled. The third condition had been inserted by the Drafting Committee of the United Nations Conference on the Law of Treaties following an amendment proposed by Poland which had certainly been less innocuous than it had seemed, because it had reversed the presumption made by the Commission, whose draft had quite logically accepted that, if certain reservations were permitted by the treaty, then others should be regarded *a contrario* as prohibited.<sup>7</sup> However, the tendency in the mid- and late-1960s had been to accept reservations liberally, and he had no intention of asking the Commission to go back on the Polish amendment, which had been incorporated in the Vienna Conventions, although he personally thought it most regrettable. The Commission should, however, specify whether a reservation which was neither expressly permitted nor implicitly prohibited must observe the criterion of compatibility with the object and purpose of the treaty. He had no doubt that the answer to that question must be in the affirmative, but he would return to the question when he introduced section C to the tenth report. The same applied when the other condition imposed by subparagraph (b) was not fulfilled, namely, when the reservations permitted were not specified. The word “specified” might seem innocuous, and the reader might think that the Commission had had in mind specified reservations in the same way that it might have said that the treaty must permit “certain” reservations or “specific” reservations. It must be said that no decisive argument to the contrary could be derived from the *travaux préparatoires*. However, in the *English Channel* case, a dispute between France and the United Kingdom concerning the continental shelf, the Arbitral Tribunal, in its award of 30 June 1977, had interpreted article 12 of the Geneva Convention on the Continental Shelf, which permitted the parties to make reservations to all the provisions of the Convention other than articles 1 to 3 inclusive, as not entailing the obligation for the other parties to accept them, because they were not “specified”. It also followed that reservations formulated by virtue of an unspecified reservation clause, i.e. which did not specify what reservations were permitted, were unquestionably subject to the test of compatibility with the object and purpose of the treaty.

87. For all those reasons, it was very important for the Commission to attempt to define in draft guideline 3.1.2 what was meant by “specified reservations”. That was no easy task. He had tried to do so, seeking to avoid being either too lax—the word “specified” must mean something—or excessively strict, because subparagraph (b)

must not be deprived of all practical effect by too narrow a definition of “specified reservation”. If the definition was too strict, it would be tantamount to likening the notion to “negotiated reservations”, i.e. those whose content was provided for in advance by the treaty following negotiations between parties. The expression “negotiated reservations”, as had been seen during the consideration of his fifth report,<sup>8</sup> had a very specific meaning, and he did not think that the definition of the expression “specified reservation” should be limited to such an extent. The definition which he proposed in paragraph 49 struck an acceptable balance between those two pitfalls, but it went without saying that any definition could be improved, and to that end, he hoped that the Commission would agree to refer draft guideline 3.1.2 together with draft guidelines 3.1 and 3.1.1 to the Drafting Committee.

88. He had two remarks to make in closing. First, he urged members to read the document entitled “The practice of human rights treaty bodies with respect to reservations to international human rights treaties”.<sup>9</sup> It was regrettable that its very useful appendices were in English only. He would discuss the document in greater detail at a later stage, time permitting, but wished to point out that, at the end of paragraph 30, the human rights secretariat had ascribed to him an opinion which was not his and which he did not think he had ever voiced, at any rate in the form indicated.

89. Second, the Commission had met with members of the Committee against Torture, the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child and, on two occasions, the Sub-Commission on the Promotion and Protection of Human Rights, to discuss the question of reservations. Those meetings had been very interesting and instructive. For budgetary and scheduling reasons the Commission had not been able to have direct contact with members of the Committee on the Elimination of Discrimination against Women, which was unfortunate, since that body had been among the most active in the area of reservations. The time had come to organize a seminar or a one- or two-day joint study meeting, of a more formal and systematic nature than in the past, with the human rights treaty bodies, to focus on the subject of reservations to human rights treaties. He had been calling for such a meeting for several years and hoped that it would be possible to hold one in 2006; the treaty bodies had also endorsed the idea. The Commission could then review its preliminary conclusions of 1997,<sup>10</sup> to which Mr. Candioti had referred. It would be for the Planning Group to discuss the necessary arrangements.

90. The CHAIRPERSON said that the Commission had taken note of the Special Rapporteur’s proposal regarding a meeting with the human rights treaty bodies.

*The meeting rose at 1 p.m.*

<sup>7</sup> *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), document A/CONF.39/11, 70th meeting, p. 415, para. 16. See also, *ibid.*, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, *Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), document A/CONF.39/14, p. 134.

<sup>8</sup> *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4, pp. 174–175, paras. 164–165 and 169–170.

<sup>9</sup> HRI/MC/2005/5.

<sup>10</sup> See footnote 1 above.