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**Summary record of the 2855th meeting**

Topic:  
**Unilateral acts of states**

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## 2855th MEETING

Thursday, 21 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

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

### Unilateral acts of states (*continued*) (A/CN.4549, sect. C, and A/CN.4/557)

[Agenda item 5]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ECONOMIDES, deploring the fact that the Commission was still deadlocked notwithstanding the tireless efforts of the Special Rapporteur and the Working Group, said that, in his view, that situation was due to the fact that the Commission had thus far been unable to define the unilateral acts which formed the subject of its deliberations. To date it had concerned itself with any unilateral act that might produce legal effects at the international level, a sweeping category that made the subject impossible to handle, for any unilateral act could produce various types of legal effects. In order to break that deadlock, the Commission must focus its deliberations on autonomous unilateral acts creating positive or negative international legal obligations on the part of the State that was the author of the act *vis-à-vis* another State, several States, other subjects of international law or the international community as a whole. Conversely, it should not look at non-autonomous, or dependent, unilateral acts that fell within the framework of the execution of a treaty, the application of a custom or the implementation of an international organization's decision. Those acts which, as Mr. Kamto had said, were predicated on the authorization of an existing norm of international law, were already regulated: those falling within the realm of treaties by the 1969 Vienna Convention, those in the realm of customary law by customary law itself and those relating to the decisions of international organizations by the organization's constituent instrument.

2. The Commission must therefore give some structure to its work if it was to progress. It must turn its attention, at least initially, to unilateral acts of States as a source of international law that gave rise to obligations in the same way as treaties, customs and binding institutional acts. The criterion that must be used was the notion of an international legal obligation and not that of international legal effects. Yet unilateral acts as a source of legal obligations had already been defined by the ICJ in the *Nuclear Tests* and *Frontier Dispute (Burkina Faso/ Republic of Mali)* cases.

3. Every effort must be made to adopt on first reading at the current session a restrictive definition of unilateral acts as a source of international law, and to transmit that definition to the Sixth Committee. That would constitute a substantial step forward and would greatly facilitate work at the next session.

4. Mr. MATHESON thanked the Special Rapporteur for having considered in his report several important instances of State practice of direct relevance to the topic. That was precisely the kind of material the Commission needed in order to understand the complexities of the law concerning unilateral acts. Of course, Mr. Pellet was also to be congratulated for his role in organizing that effort.

5. As several members had already noted, the most obvious conclusion to be drawn from the examples cited in the report was that unilateral acts differed widely in form, substance, language, purpose and effect. Everything therefore depended on the specific circumstances of each particular case. Accordingly, it would be very difficult to create coherent rules applying to all types of unilateral acts.

6. Another obvious conclusion was that the intent of the State that was the author of the act was of overriding importance: an act's consequences differed depending on whether the State in question intended it to have legal consequences or to be purely political in character. For example, it was clear that the nuclear-weapon States that had given other States assurances in 1995<sup>1</sup> had not intended to make any legal commitments, and other States had seemed to understand that quite well. Consequently those assurances were not legally binding. In contrast, the States in the other cases cited in the report manifestly intended their statements to produce legal effects. Thus the defining factor of intention should figure prominently in whatever final form the Commission's work took.

7. It had been suggested that the form of unilateral statements was of little relevance when judging their legal effects. That was not necessarily correct, as several examples had demonstrated. The 1945 Truman Proclamation (paras. 127–137 of the report), the 1952 Colombian note (paras. 13–35), the 1988 Jordanian statement (paras. 44–54) and the 1994 Russian protest (paras. 84–105) had all indicated by their form that their authors intended them to have legal effects and that others could reasonably rely on that fact. In contrast, the form and language of the assurances given by nuclear-weapon States in 1995 had been deliberately chosen to make it clear that they were political rather than legal in character, and that was how they had been understood by others.

8. Different views had been expressed on the degree to which the legal effects of a unilateral statement depended on the reactions of other States. Once again, it seemed difficult to draw a general conclusion. In some cases the reactions of other States might be of marginal importance, whereas in other cases they might be quite important. For

<sup>1</sup> See the declarations of the Russian Federation (S/1995/261), the United Kingdom (S/1995/262), the United States (S/1995/263), France (S/1995/264) and China (S/1995/265) on the security assurances given to non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons.

example, the 1988 Jordanian statement had probably been effective in waiving Jordan's claim to the West Bank without the need for acquiescence by others, but its effect in promoting Palestinian claims to that territory had presumably depended to a substantial degree on the reactions of other States.

9. In the light of those difficulties, he thought that, rather than drafting articles that set forth rules governing unilateral acts, the Commission ought to produce a concise expository study or report that might give useful guidance to States, as Mr. Candioti had suggested. It should not so much focus on reaching a definitive set of conclusions, which would be neither possible nor desirable, as review various factors that determined whether or not unilateral acts had legal effects. Those factors would in essence be those identified by the Working Group at the previous session<sup>2</sup> for the purpose of the case studies that had been carried out.

10. In any event, the Commission should complete the project at the next session, at least in a preliminary form, and thus add it to the list of its accomplishments of the current quinquennium. If it persisted in its pursuit of articles, rules and definitions, it would reach the end of the quinquennium without any coherent results on the topic and with little prospect for any in the near future, and it would have wasted its own time and the Special Rapporteur's efforts.

11. Mr. DAOUDI said that the Special Rapporteur's eighth report confirmed that the subject lent itself to codification. Indeed, an analysis of the cases selected by the Working Group on the basis of the method it had chosen showed that it was possible to draw conclusions that could serve as a basis for draft articles on various aspects of the question. The Commission's method was deductive rather than inductive: it began with an analysis of State practice in the area of unilateral acts and ended up with the establishment of common denominators that constituted the principles of unilateral legal acts in international public law.

12. While no one disputed the particular features that distinguished unilateral legal acts from international treaties or denied the differences in their respective legal regimes, those differences did not preclude the use of the 1969 Vienna Convention as a reference framework.

13. In paragraph 170 of his report the Special Rapporteur noted that "form is relatively unimportant in determining whether we are dealing with a unilateral act of the type in which the Commission is interested", a statement which highlighted the difference between a unilateral act and an international treaty. The latter's distinguishing features, at least as established in the 1969 Vienna Convention, were that it was a written act concluded in accordance with a specified procedure. Thus in a treaty it was possible to determine States' rights and obligations with greater certainty, whereas a unilateral act—which could take the form of a simple verbal statement, one or more written documents or even conduct—could create

uncertainty as to its author's intention to undertake an international commitment.

14. In that context the 1969 Vienna Convention, while neither denying their existence nor disputing their importance, was silent on verbal agreements, which did not possess the formal aspect of an international treaty yet posed the problem of proving their existence in the same way that an unwritten unilateral act did.

15. What was important to pinpoint in the case of both unilateral legal acts and verbal agreements was the intent to undertake a commitment, the form they might take and all the circumstances surrounding their formulation, with the understanding that the absence of a criterion concerning form had no bearing whatsoever on intent.

16. In paragraphs 171 and 172 of his report, the Special Rapporteur limited the scope of the study to unilateral acts formulated by States and concluded that any State was endowed with the capacity to commit itself at the international level through unilateral acts, since international law did not contain any rules forbidding States to express their intention to commit themselves unilaterally, while exercise of that right meant that any unilateral manifestation of a State's intention to assume an obligation *vis-à-vis* other subjects of international law produced legal effects. The Special Rapporteur was therefore correct in suggesting that article 6 of the 1969 Vienna Convention could be transferred and applied to the capacity of States to formulate unilateral legal acts.

17. The competence of State organs to commit the State through unilateral acts and the conformity of their conduct with the domestic legal order were sensitive subjects. Prudence dictated that the pertinent rules of the 1969 Vienna Convention should be applied to them, bearing in mind that the problem of unconstitutionality raised different issues in the case of treaties.

18. By its very nature a unilateral legal act produced effects from the time of its formulation by its author, since it did not have to be accepted by the addressee. The Special Rapporteur seemed to confirm that thesis in paragraphs 195 and 196 of his report, but it would be worthwhile ascertaining that the same held true for those unilateral acts dealt with in earlier reports that had not been analysed in the eighth report.<sup>3</sup>

19. The opinions expressed by Commission members regarding the possibility of codifying the topic of unilateral acts revealed an ongoing lack of agreement that was impeding the debate's progress. While no member disputed the existence of unilateral acts, some were highly sceptical about the success of the undertaking. Yet if the Commission's deliberations should prove fruitless, States could do as they pleased. Codification of the topic would ensure the security of international legal relations,

<sup>2</sup> See *Yearbook ... 2004*, vol. II (Part Two), p. 96, para. 247.

<sup>3</sup> See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486; *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1; *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/505; *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519; *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/525 and Add.1–2; *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/534; and *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/542 [and Corr.2–3].

for States needed to know what acts could produce legal effects and obligate them to other subjects of international law. Whatever form the Commission's final document took, it would have the merit of preventing States from finding themselves unintentionally bound by unilateral acts.

20. The Commission must stop procrastinating and adopt a constructive attitude. The time had come for the Special Rapporteur to propose draft articles on the capacity of States to formulate unilateral acts, the competence of State organs and other aspects of the topic.

21. Mr. ECONOMIDES said that for mainly political reasons it would be difficult to begin work by considering the capacity of a State and by defining unilateral acts. First of all, States' confidence had to be built; to that end the Commission should begin by looking at the conditions that had to be met in order for them to be bound. The priority subject must therefore be the State's intention to assume legal obligations by means of a unilateral act. Naturally for a State to commit itself the act in question must be extremely clear, unambiguous and indisputable. If there was any doubt as to the State's intention, the method of restrictive interpretation should be employed to protect its interests.

22. The second issue to consider was the revocability of the act. He believed that any unilateral act could be freely revoked by its author, save for two exceptions: when the unilateral act itself stipulated that it could not be revoked and when, after the addressee had accepted it, the unilateral act became a conventional act, which was then governed by the law of treaties.

23. Mr. Sreenivasa RAO said that unilateral acts were of crucial importance to international relations because States' ministries of foreign affairs had frequent recourse to them. That explained why the subject was of interest not only to the academic community, but also to practitioners of international law and to Governments themselves. Similarly, when ministers met they often issued joint statements; when natural disasters occurred offers of assistance were made; and States made offers to promote the objectives of international organizations, for example in the field of peacekeeping operations. Most of the time, however, written agreements were signed, and so such declarations or offers could not be treated as part of the topic.

24. The report under consideration also provided numerous examples of protest notes which purported to preserve rights, at least in the context of competing claims, and prevent the other party from consolidating its claims.

25. From the outset, the Special Rapporteur had emphasized the "autonomy" of unilateral acts, a term borrowed from the "French school". An autonomous unilateral act was one that did not impose obligations on other States or oblige them to perform certain acts for it to come fully into effect, and whose effects were not contingent upon certain factors.

26. The numerous examples given in the report under consideration were very useful, and the Commission must

be grateful to the members who had supplied them and to the Chairperson of the Working Group and its members for having provided a framework for examining that information. Ms. Escarameia had noted that the Special Rapporteur could have devoted more space to the examination of those examples and the conclusions that could be drawn from them. Although that was true, after seven years of deliberations, it was incumbent upon the members of the Commission to make their contribution to the study undertaken by the Special Rapporteur. The time had come to end doctrinal debates and to establish a modest framework based on the results of the work done since the topic had first been placed on the agenda; such a framework should be set out in a statement addressed to the Sixth Committee of the General Assembly, as Mr. Candiotti had suggested. The Commission must collaborate in the drafting of a document setting out the following conclusions, which could be drawn from the examples of unilateral acts cited in the Special Rapporteur's eighth report and in previous reports.

27. Unilateral acts were highly diverse in nature and it was hard to categorize them. The study must focus on autonomous acts, or "legal acts", to echo a term from French doctrine, which could have legal effects without requiring any action on the part of other States. That definition included the recognition of States or Governments, unconditional offers of aid or assistance, renunciation of claims or titles to territory, undertakings to abstain from particular action or the renunciation of rights established under international law. Such acts produced legal effects when performed by persons with suitable authorization to formulate them, the notion of authorization being very important in that regard. The study could also cover unilateral acts that were not strictly autonomous, but which gave rise to international rights and obligations, such as unilateral acts which created rights and obligations when they were associated with subsequent unilateral acts of a similar nature. No matter whether they were fully or partially autonomous acts, their validity and legal effects, as well as the international commitment they entailed, would depend upon several factors, to wit the authority of the agent, the latter's authorization or presumed authorization, the form and content of the statement, the nature of the act, its objective, specified conditions, its context, the reaction of addressee States or States directly affected, and international obligations stemming from the imperative norms involved. Of course, not all of these factors would be relevant in every case.

28. The CHAIRPERSON, speaking in his personal capacity, said that he wished to make two comments. First, he believed that it would be better to speak of India's offer, rather than its commitment, not to develop nuclear weapons. So long as the addressee States had not accepted that offer, India was free to withdraw it. On the other hand, once that offer had been accepted, it would become irrevocable.

29. As far as the Truman Proclamation was concerned, he did not think that a unilateral act could create *ipso facto, ab initio*, rights for the author State. The Truman Proclamation had not encountered any opposition, and a number of States had even incorporated provisions from the Proclamation in their national legislation, which had

not been the case with acts such as those by which Chile and Peru had created territorial seas with a breadth of 200 nautical miles,<sup>4</sup> a move that had prompted objections from the States concerned.

30. Mr. PELLET said that he wished to make a terminological clarification with regard to expressions currently used in French legal theory. Firstly, it should be pointed out that, on the one hand, acts could be either autonomous or non-autonomous, while on the other, they could be either “*autonormateur*” or “*hétéronormateur*”.

31. Acts that were autonomous had no pre-existing specific legal basis of any kind. For example, when Truman had made his proclamations in 1945, no rule of international law authorized the United States to claim a fishing area or a continental shelf. Similarly, when France had suspended its atmospheric nuclear tests in 1973, it had done so autonomously. Conversely, when a State set the breadth of its territorial sea at 12 nautical miles, that was not an autonomous act, since a rule of international law provided that States might act unilaterally in that respect.

32. If the character of an act was “*autonormateur*”, that simply meant that the author of the act imposed obligations on itself: for example, a State that undertook not to conduct nuclear tests did not impose any obligation on other States. An act that was “*hétéronormateur*”, meanwhile, imposed or purported to impose obligations on other States. That was the case of acts whereby States set the breadth of their territorial sea at 12 nautical miles.

33. Returning to the example of India’s commitment, which the Chairperson had described as an offer, he considered that in order for that to be the case, the commitment in question would have had to be conditional. If India had pledged not to resort to nuclear weapons provided that Canada supplied it with the technology it needed, that would have been an offer. But if India had merely stated that it was foregoing nuclear weapons without further clarification, it would have undertaken a commitment and, in its disappointment that Canada had not granted it the anticipated benefits, had reneged on that commitment.

34. It was not certain that the act in question was an offer, nor was it certain that a State could go back on a statement. Consequently as Chairperson of the Working Group, he wished to request Mr. Sreenivasa Rao to conduct a brief study of the Indian commitment. Such a study would usefully complement the examples the Commission already had with regard to a fundamental issue, that of the revocability of unilateral acts.

35. In conclusion, he was pleased to see signs of a consensus emerging around Mr. Candioti’s proposal. Personally he was prepared to accept that the Commission, while reserving the possibility of undertaking a more precise codification, should for the time being endeavour to adopt preliminary conclusions. Although he was in favour

of the method proposed by Mr. Candioti, he was much less convinced by the examples cited, since they were a mixture of unilateral acts proper and acts that fell within the realm of State conduct, which raised a quite different set of issues.

36. Mr. CANDIOTI recalled that he had criticized the use of the term “autonomous” in the context of the study on unilateral acts in the past, as it could only generate more confusion. In his view, the Truman Proclamation and the French statements on nuclear tests were not autonomous acts because they were based on rules of law, and particularly on the principle of State sovereignty. He was therefore opposed to the use of the term “autonomous”, since it would only cloud the debate.

37. Mr. CHEE said that the term “autonomous” was not to be found in English doctrine. He wished to note first of all that the text of the 1945 Truman Proclamation clearly indicated that the United States had rights *ab initio*. It also used the term “opportunism”. To his way of thinking, those two factors had helped to expand the concept of the continental shelf. It should be recalled that in 1945 no other country had had the necessary capacity to exploit the continental shelf. Subsequently other declarations had been added to the Truman Proclamation which had ultimately crystallized and given rise to the law of the sea.

38. Mr. ECONOMIDES, replying to Mr. Candioti, said that the term “autonomous” had to do with the basis of the action, the legal justification for the act, which could lie in a treaty, customary law or a request by an international organization. Any acts for which such a legal justification existed were not autonomous. Conversely, if the State formulated an act in order to assume a legal obligation on the basis of nothing more than its will, then that act was autonomous.

39. Mr. DUGARD said that, like earlier reports, the eighth report on unilateral acts of States provided evidence of the difficulties inherent in the topic but also of the topic’s importance. The Special Rapporteur had examined, with the help of several colleagues, certain unilateral acts that had received the attention of international tribunals, Governments and scholars. The studies carried out had to do with the nature and consequences of unilateral acts, the prescribed form of such acts, the persons who were authorized to make them and the Vienna regime. Some authors even described unilateral acts as a new source of international law.

40. He drew attention, by way of example, to the recent case brought before the ICJ by the Democratic Republic of the Congo against Rwanda (*Armed Activities on the Territory of the Congo (New Application: 2002)*). The Democratic Republic of the Congo had argued that the ICJ had jurisdiction by virtue of the Convention on the Prevention and Punishment of the Crime of Genocide. Rwanda had indicated that it had formulated a reservation in that regard, to which the Democratic Republic of the Congo had replied that the Rwandan Minister for Foreign Affairs had announced that his country intended to withdraw that reservation. That example showed that unilateral acts were an established part of international law and that they could not be ignored. It might be difficult to

<sup>4</sup> For the Chilean Presidential Declaration of 23 June 1947 and the Peruvian Presidential Decree of 1 August 1947, see *Laws and Regulations on the Regime of the High Seas*, vol. I (ST/LEG/SER.B/1) (United Nations publication, Sales No.: 1951.V.2), pp. 6 and 16, respectively.

codify them, but the Commission should at least engage in the progressive development of international law. It must do so because States needed guidance on the subject.

41. The debate that had been taking place between several members of the Commission had focused more on the function of the Commission than on unilateral acts. In that connection, he disagreed profoundly with Mr. Brownlie's position on the matter. Unilateral acts were an important subject, and if the Commission admitted failure it would have been derelict in its duty. Nevertheless, he did not think it would be possible to complete the work on the topic by 2006, as Mr. Candioti had proposed. The Commission should not only seek a definition of unilateral acts, but should also look into the possible consequences of such acts.

42. Mr. KATEKA said that he found it puzzling that the Commission was still debating the existence of unilateral acts. Irreconcilable philosophical and ideological differences separated Commission members on the issues of the definition and scope of unilateral acts. The debate at the previous meeting and even at the current meeting had revealed that certain members saw the notion of autonomy as being the foundation of the study, while others denied the very existence of such a concept. The question of capacity to formulate and revoke unilateral acts and the constitutional procedures involved had also given rise to controversy, as had the question of the threshold or trigger mechanism.

43. At that rate it was likely that the Commission would spend the next 10 years on the topic. The Commission would therefore be wise to accept Mr. Candioti's proposal.

44. In his most recent report, in which he had considered 11 cases on the basis of the Working Group's guidelines, the Special Rapporteur had endeavoured to differentiate between unilateral acts of a legal nature and unilateral acts that did not produce legal effects, although the distinction was still dubious.

45. For example, with regard to the Colombian note of 22 November 1952, the Special Rapporteur wrote that it had produced effects from the time it had been formulated and then, in the same paragraph, said that it had not produced effects until the addressee, Venezuela, had received it. Under a third scenario the note had begun to produce effects only after the addressee had acknowledged receipt. In his view, the case involved a typical exchange of notes that had amounted to the conclusion of a bilateral agreement between Colombia and Venezuela. Similarly, he did not see how the exchanges of notes between Cuba and Uruguay concerning the supply of vaccines advanced the study of unilateral acts. On the other hand, Jordan's waiver of any territorial claims to the West Bank was of legal interest and should be considered in greater detail. That was the case also with the Egyptian declaration of 24 April 1957 concerning the Convention between Austria-Hungary, France, Germany, Great Britain, Italy, the Netherlands, Russia, Spain and Turkey respecting the Free Navigation of the Suez Canal (Constantinople Convention) that sought to guarantee free use of the Suez Maritime Canal. He had in fact been surprised

to learn that that declaration had been published in the United Nations *Treaty Series*.<sup>5</sup> Unilateral acts should not be registered or published by the United Nations because they were not treaties in the sense of Article 102 of the Charter of the United Nations.

46. The commentary by the Special Rapporteur concerning the Egyptian declaration led him to note that a multilateral treaty could not be abrogated by a party that purported to replace it with a unilateral declaration. A party to a multilateral treaty could certainly withdraw from the treaty, but the unilateral annulment of a treaty by one party would render the principles of the law of treaties, such as good faith and *pacta sunt servanda*, meaningless.

47. As for examples of the so-called "security guarantees" given by nuclear-weapon States to non-nuclear-weapon States, the Special Rapporteur had already considered them in his second report; they were acts that had propaganda value and were thus political statements that had no legal content.<sup>6</sup>

48. The Ihlen Declaration and the Truman Proclamation were unilateral acts in the strict sense of the term. The Truman Proclamation in particular had had a major impact on the development of the law of the sea. The Special Rapporteur should look at those examples more closely and also at the conduct of Thailand and Cambodia in the *Temple of Preah Vihear* case.

49. In conclusion, he said that the Commission should try to adopt general principles on unilateral acts of States that could guide States and should complete its work on the topic in 2006.

50. Mr. CHEE said that the topic of unilateral acts of States had been with the Commission for a long time, and it was time for the Commission to wind up its work on the subject and adopt guidelines or a convention.

51. It had come to be generally accepted that unilateral acts were a source of international obligations additional to the other sources under general international law set out in article 38 of the Statute of the ICJ. Unilateral acts had been the subject of several detailed studies. Éric Suy, for instance, had classified them in five categories: (a) protest; (b) notification; (c) promise; (d) renunciation; and (e) recognition.<sup>7</sup> Jennings-Watts had put them in four categories: (a) declaration; (b) notification; (c) protest; and (d) renunciation or waiver,<sup>8</sup> as had Cassese, who had classified them as: (a) protest; (b) renunciation; (c) notification; and (d) promise.<sup>9</sup> Jennings-Watts also provided another definition of unilateral acts: "Acts performed by

<sup>5</sup> United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299.

<sup>6</sup> See *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1, para. 23, footnote 11. See also the seventh report of the Special Rapporteur, *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/542 [and Corr.2–3], paras. 34–47.

<sup>7</sup> E. Suy, *Les actes juridiques unilatéraux en droit international public*, Paris, Librairie générale de droit et de jurisprudence, 1962.

<sup>8</sup> *Oppenheim's International Law* (see 2852nd meeting, footnote 1), p. 1188.

<sup>9</sup> A. Cassese, *International Law*, Oxford University Press, 2001, p. 150.

a single State, which nevertheless have effects upon the legal position of other States particularly, but not exclusively in their relation with the actor State.” Jennings-Watts had gone on to state that:

[t]here are other kinds of unilateral acts, however, which are treated separately. These include: recognition, the conferment of nationality, certain acts in relation to conclusion of treaties such as signature, accession, approval, and ratification, as well as the making of reservations. It may also be noted that a unilateral act may take the form of state conduct, and need not be in the form of or be accompanied by any written document.<sup>10</sup>

52. Georg Schwarzenberger had catalogued three types of unilateral acts: (a) those that produced legal effects in accordance with their intent; (b) those that produced legal effects contrary to their intent; and (c) those that were irrelevant from the standpoint of international law. He had also described six categories: recognition, reservation, notification, acquiescence, renunciation and protest. He had concluded his study by observing that unilateral acts had come to be governed by the *ius aequum* rule and, in particular, by rules that underlined the principle of good faith.<sup>11</sup>

53. Wilfried Fiedler classified unilateral acts in six categories: recognition, protest, renunciation, notification, acquiescence and revocation.<sup>12</sup> The Special Rapporteur defined a unilateral act as “an act that can produce legal effects on its own without the need for its acceptance, or for any other reaction on the part of the addressee” (para. 170), a definition that was somewhat similar to Jennings-Watts’s. The Commission might wish to apply that formula while dealing with other types of unilateral acts on an exceptional basis. In addition, the conduct of States should be combined with unilateral acts, as they were frequently interrelated where the producing of legal effects was concerned.

54. With reference to the debate in which he and Mr. Brownlie had engaged concerning the *Fisheries* case (*United Kingdom v. Norway*), he said that a passage of the judgment showed the obvious acquiescence of the United Kingdom to Norway’s act with regard to the use of baselines:

Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. [...] The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it. [p. 138 of the judgment]

55. Mr. MANSFIELD said that he had not been optimistic about the direction of the Commission’s work on unilateral acts; however, in the light of the current debate he had begun to believe that it could conclude its work

<sup>10</sup> *Oppenheim’s International Law* (see 2852nd meeting, footnote 1), p. 1188.

<sup>11</sup> G. Schwarzenberger, *International Law: International Law as Applied by International Courts and Tribunals*, vol. I, London, Stevens and Sons, 1957, p. 548–550.

<sup>12</sup> W. Fiedler, “Unilateral acts in international law”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. IV, Amsterdam, Elsevier, 2000, pp. 1018–1022.

on the topic after all. The cases that the Special Rapporteur and the Working Group had studied were very useful. In particular, they were very different and provided clear illustrations of the essential point of the topic, which was that unilateral acts could produce legal effects and bind a State even though that may not have been its intention. That raised two policy considerations: on the one hand, it was desirable that States should continue to make political statements or carry out actions that contributed to international peace and security without being concerned that they might be legally bound; on the other hand, it was important that they should not make statements or undertake actions on which other States might reasonably rely unless they did so in good faith and lived up to their statements and actions.

56. As Mr. Candioti had rightly stressed the day before, there was no point in attempting to reach agreement on definitions or rules that were comparable to those of the 1969 Vienna Convention. Instead, the Commission should seek to draw up, on the basis of the cases studied, some reasonably broad guidelines that would set out for States the factors that determined whether or not a unilateral act might produce legal effects. That seemed to be a sound and useful objective for the coming quinquennium.

57. The CHAIRPERSON invited the Special Rapporteur to summarize the debate and present his conclusions thereon.

58. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) thanked the members of the Commission for their valuable comments on his eighth report on unilateral acts of States. He noted first of all that everyone was in agreement that such acts did exist, even if they were difficult to identify and certain cases were not worth codifying. Not all acts bound a State legally; a number of elements made it possible to determine whether a unilateral act produced legal effects, particularly the competence and capacity of the author, the author’s intention, the context, circumstances, the reaction of the addressee or a third party, subsequent conduct of the State and so forth. A unilateral act could be involuntary; it had been seen, for example, in the *Nuclear Tests* case that even though France had believed its declarations to be non-binding, the ICJ had held that the Government had assumed an obligation in formulating them and was obliged to conduct itself accordingly.

59. Certain unilateral acts, such as reservations or interpretative declarations, fell within the realm of treaties and were already governed by the law of treaties. They were therefore excluded from the work of the Commission. Unilateral acts were distinguished from conventional acts in that they produced legal effects from the time they were formulated and not from a time decided by the parties. One member of the Commission had recommended that declarations of acceptance of jurisdiction should also be considered, along with domestic legislation and case law.

60. The Commission’s task was thus to define the elements that characterized unilateral acts capable of producing legal effects and, as a first step, to come up

with a definition of such acts. That question had given rise to a number of controversies ever since work on the topic had begun in 1997, and some common ground would have to be found. Likewise, some members felt that the conduct of States must be included, while others thought that it had nothing to do with the topic. Yet State conduct could not be overlooked entirely, since it produced indisputable legal effects that were often similar to those of unilateral acts. In any event, the Commission's definition should not be too precise. The definition proposed by one member seemed to be sufficiently flexible: "an act emanating from the authority of a State that produces legal effects in international law" (2853rd meeting, above, para. 4).

61. It appeared from the debate that the 1969 Vienna Convention could not be transposed to unilateral acts but could serve as a useful reference, particularly in establishing the competence of the authors of unilateral acts, provided, of course, that the relevant criteria were expanded.

62. With regard to his eighth report, he had voluntarily limited his conclusions, as it had seemed to him preferable for the Commission to draw its own conclusions at the close of the debate. In addition, as some members appeared to have found a contradiction as to the irrelevance of form in identifying a unilateral act, he wished to note that he himself drew a distinction between form and formalism: a statement delivered before the General Assembly of the United Nations, for example, was surely not comparable to a press statement.

63. In conclusion, he proposed that work should continue within the Working Group with a view to drawing up the outlines of a new report. In 2006 the Commission should be in a position to submit a document containing preliminary conclusions, or rather general guidelines that would allow States to determine when and how they might become legally bound by the formulation of an act, and what the consequences under international law would be.

64. Mr. Sreenivasa RAO said that any examples he gave in his earlier statement were referred to only by way of raising some underlying issues and not for opening up any discussion on their merits.

65. The CHAIRPERSON thanked the Special Rapporteur for his summary. He believed that the Commission should continue its work on unilateral acts of States and suggested that the Working Group, chaired by Mr. Pellet, should consider the elements that would be discussed during the debate.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

## 2856th MEETING

*Friday, 22 July 2005, at 10.05 a.m.*

*Chairperson:* Mr. Djamchid MOMTAZ

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Candiotti, 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. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

### **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 (*continued*)

1. The CHAIRPERSON invited the members of the Commission to comment on sections A and B of the Special Rapporteur's tenth report on reservations to treaties.
2. Mr. GAJA said that the tenth report on reservations to treaties was a remarkable work which covered an important area of the topic of reservations. Mr. Pellet's analysis was in many respects more far-reaching than any that could be found in the extensive literature on the question.
3. On the problem of terminology, he had no objection to the choice of terms proposed. In French, the term "*invalide*" (invalid) clearly indicated that a reservation did not have the necessary character to achieve the result intended by the State that formulated it, namely, as stated in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention on the Law of Treaties, "to exclude or to modify the legal effect of certain provisions of the treaty in their application to [the reserving] State". However, it must be made clear that if the fact that a reservation was invalid prevented the reservation from producing the effects intended by the State formulating it, that invalidity also affected the ratification or equivalent act that the reservation accompanied, which in principle should then also be regarded as invalid. Only in exceptional cases could just the invalid reservation be regarded as null and void. If that point was not highlighted, the term "invalid" might suggest that the reservation could be disregarded and that the treaty was accepted *in toto*, which was probably not what the Special Rapporteur had in mind.
4. With regard to draft guideline 3.1 (para. 20 of the report), his preference would be to indicate only those conditions for validity which had to do with the content of reservations. There was little point in reproducing the entire text of article 19 of the 1969 Vienna Convention in the draft. Article 19 also dealt with the moment at which a reservation could be formulated, which, as the Special

\* Resumed from the 2854th meeting.