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Summary record of the 2887th meeting

Topic:
Unilateral acts of States

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5. The discussions in the Sixth Committee had revealed considerable differences of opinion as to the utility of the Commission's work on the topic and the form the final product should take. Some representatives had continued, at the previous session, to draw attention to the need to adopt a set of draft guidelines or principles that would define the notion of unilateral acts and at least put States on the right track. Others, however, had not believed that the Commission's work should necessarily aim for that objective, which was, moreover, virtually unattainable. In any event, the Commission needed to take a decision on the matter. He himself had followed the path set out for him, particularly at the 2003 session, by the members of the Working Group, whom he thanked warmly and whose differing positions he had always sought to reconcile.[181]

6. In preparing the ninth report, he had taken account of the opinions expressed by the members of the Commission at the past nine sessions on the need to address the question of unilateral acts as well as the conclusions of the Working Groups. The views of the representatives of the Sixth Committee had also been very useful.

7. In response to the concerns expressed by the members of the Commission, and with a view to facilitating the consideration of the topic, he had divided his report into two parts. Part One referred to the grounds for invalidity of unilateral acts and the modification and suspension of such acts, together with other related concepts. While those issues had arisen in the course of previous years' deliberations, they had not been formally presented in his reports. Part Two dealt with topics that had been considered previously, from a structural standpoint, in the Commission and in the Working Group established in 2004[182] and 2005:[183] the definition of unilateral acts in a way that distinguished them from other acts which, although apparently unilateral, actually constituted a treaty relationship and were therefore subject to the regime established by the 1969 Vienna Convention (paras. 126–139 of the report). In turn, such acts, as manifestations of will in the strict sense, were distinguished from unilateral conduct that might produce similar legal effects. On that same subject, reference was made to the addressee or addressees of a unilateral act, although that did not affect the fact that the topic was limited to unilateral acts formulated by States. In that regard, the report presented two options for principle 1 (paras. 137–139) that could form part of the definition of such acts and could determine the scope of the draft guiding principles; second, it presented proposed language related to the formulation of the act: capacity of the State (para. 140), persons authorized to act and to enter into legal commitments on the State's behalf in its international relations (paras. 142–150), and the subsequent confirmation of an act formulated without authorization; third, proposed language was suggested in relation to the basis for the binding nature of unilateral acts (paras. 153–156); and lastly, a draft guiding principle was presented in relation to the interpretation of unilateral acts (paras. 157–160). The Special Rapporteur also presented a list of all the guiding principles being proposed, including those concerning the invalidity (paras. 11–78), termination and suspension of unilateral acts (paras. 79–124), a text that could serve as the basis for the deliberations of the Working Group that was to be reconstituted at the current session.

8. He had sought to accommodate the expectations of the members of the Commission as expressed at the 2005 session by recapitulating the work accomplished to date, conducting a study on a matter that had been addressed when the topic had first been considered, namely conditions of validity and termination of unilateral acts, and proposing a set of guiding principles setting out criteria that States could utilize in the context of their international relations.[184]

9. In Part One of the document, which dealt with the validity and duration of unilateral acts, he addressed the grounds for invalidity, following the structure of the 1969 Vienna Convention while introducing the requisite nuances: invalidity on the ground that the representative lacked competence (paras. 18–34), grounds for invalidity related to the expression of consent (paras. 35–66), and invalidity of a unilateral act on the ground that it was contrary to a peremptory norm of international law or a norm of *jus cogens* (paras. 67–78). With regard to norms applicable to treaties and their relationship to the norms most likely applicable to unilateral acts, he said he had always thought that even if they could not be applied *mutatis mutandis*, a reference to them must be made. He was fully aware that unilateral acts were very different from treaty-based acts and that their particularities must be taken into account when codifying existing rules or elaborating principles or guidelines relating to them. Part One also considered in detail the termination and suspension of unilateral acts and other related concepts.

10. In Part Two he had endeavoured to recapitulate the work accomplished thus far and to explain the draft guiding principles he had presented, always relying on the Commission's deliberations and the views expressed by States in the Sixth Committee as well as on doctrine, practice and case law.

11. Addressing all those questions in a single document had been a difficult if not virtually impossible task. He had done his best in the time available to him and had taken into account the views of members of the Commission. He suggested that members should consider Part One of the ninth report on the validity and duration, and the termination and suspension of unilateral acts in plenary meeting, and leave Part Two on the definition, formulation, basis for the binding nature and interpretation of unilateral acts to the Working Group so as to expedite consideration of the topic at the current session.

The meeting rose at 4.10 p.m.

2887th MEETING

Tuesday, 4 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

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[181] *Ibid.*, vol. II (Part Two), p. 57, paras. 304–306.

[182] *Yearbook ... 2004*, vol. II (Part Two), p. 96, paras. 245–247.

[183] *Yearbook ... 2005*, vol. II (Part Two), p. 62, paras. 327–332.

[184] *Ibid.*, pp. 60–62, paras. 301–316.

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/560, sect. F, A/CN.4/569 and Add.1, A/CN.4/L.703)

[Agenda item 6]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA, after commending the report, which would provide a good basis for the deliberation of the Working Group, said she would briefly address three issues: the procedure that the Commission should adopt; the substance of the draft guiding principles; and the submission of the principles to the Working Group. On the question of procedure, she regretted that not enough time had been allocated in plenary to a proper discussion of the many issues raised in the report that had not been discussed before. It was a pity that the Commission had not adopted the Special Rapporteur's suggestion that Part Two of the report should be referred to the Working Group for further consideration, while Part One was considered in plenary session, after which a decision could be made on which draft guiding principles would be referred to the Working Group. On the other hand, she acknowledged that the topic might involve intense negotiation and might therefore be better suited to treatment by the Working Group than to statements of position in plenary session.

2. As for the substance of the draft guiding principles, she had always felt that the topic was worth pursuing, since the intensive recourse to unilateral acts by States could be put on a sound theoretical footing. The legal effects of unilateral acts had been recognized by case law, as exemplified by the judgment of the ICJ in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda) case*, which, incidentally had related to the actions not of the Minister for Foreign Affairs of Rwanda, as might have been expected, but to those of the Minister of Justice. She had reservations, however, as to the applicability to the topic of the 1969 Vienna Convention, even though the Special Rapporteur had spoken of using it only for structural purposes and not in respect of its content. She was doubtful about the legitimacy of applying the 1969 Vienna Convention to such areas as suspension or validity. Indeed, the Commission had considered unilateral acts that had produced legal effects but were contrary to domestic law, such as the renunciation by Jordan of the West Bank territory in breach of article 40 of the country's Constitution, which imposed specific procedural requirements on the King. She also had doubts about the extent of *jus cogens*, especially if, as seemed to be suggested in paragraph 62 of the report, Security Council decisions based on Articles 25 and 103 of the Charter of the United Nations were deemed to constitute *jus cogens*. In that connection, she did not understand why unilateral acts formulated as a result of the threat or use of force, covered by paragraph 5 of draft guiding principle 7, were not already covered by paragraph 6 of that principle, since they too constituted acts in breach of *jus cogens*. Further, she noted that there was no available mechanism or entity to decide on the invalidity, termination or suspension of a unilateral act; the solution suggested in paragraph 75 of the report, that the author of the act should also rule on its validity, was far from satisfactory. Lastly, she felt that in several cases, the draft guiding principles—for example, those relating to the termination (para. 107) or the suspension (para. 124) of unilateral acts—did not logically follow from the preceding argumentation.

3. She could agree to the referral of all the draft guiding principles to the Working Group. While she had a number of amendments to suggest, she would do so within that forum. It would be clear from what she had already said that she had reservations concerning draft guiding principle 6, parts of draft guiding principle 7, and draft guiding principle 9. She unreservedly supported the referral to the Working Group of draft guiding principles 1–5, 8, 10 and 11, and part of principle 7. Of the two options offered for part of draft guiding principle 1, she would prefer option B. She would also favour including a reference, in draft guiding principle 10, to the expectations of third States. In the Working Group, she would suggest a number of drafting amendments.

4. Mr. MATHESON said that the adoption of a brief set of general conclusions or guidelines would be a suitable way for the Commission to end its work on the topic, since the product would be of practical use to States and other international actors. The Working Group should convene to elaborate such a text. He agreed with the Special Rapporteur that no attempt should be made to produce a detailed legal code. Instead, the Commission should concentrate on a limited set of guidelines that would help States understand the overall factors that were relevant in determining the circumstances in which unilateral acts might produce legal obligations. He also agreed that the definition of unilateral acts should, for the purposes of the guidelines, be restricted to declarations that clearly manifested an intent to produce legal effects. Whilst other forms of unilateral conduct might produce legal results, they were too diverse and too dissimilar to be encompassed by any coherent set of principles. Rather, the Working Group should focus its attention on the very useful set of provisional conclusions that had been circulated by its Chairperson at the end of the previous session. In several respects, those conclusions were preferable to the draft guiding principles contained in the ninth report.

5. In particular, the Commission should not base its work on an application of the substance or structure of the 1969 Vienna Convention, which had been designed for the very different situation of agreements negotiated amongst States as an exchange of formal commitments. In that respect, he agreed with the comments by Ms. Escarameia. For example, the proposed guiding principles 8 and 9 largely applied the constraints of the 1969 Vienna Convention to restrict the ability of a State to suspend or terminate its unilateral declarations. That would be inappropriate, since, by definition, the State making such a declaration had received no consideration

for doing so and no other State had made reciprocal commitments in exchange for the declaration. In those circumstances, there was no reason to prevent a State from unilaterally changing what it had unilaterally proclaimed, unless there had been actual detrimental reliance by other States. Modification, termination or suspension of a unilateral act should therefore not be limited to the restricted grounds recognized for treaties, such as a fundamental change of circumstances, since unilateral acts by definition did not involve mutual legal commitments that could be modified or terminated by a party only under extreme circumstances.

6. Nor should the rules of treaty interpretation extend to the content of unilateral acts, which by definition were not the result of negotiation with other parties. Rather, as suggested in the provisional conclusions circulated by the Chairperson of the Working Group, obligations should be interpreted in a restrictive manner, if there was any doubt about their meaning and scope. Other States should have the right to act in reasonable reliance only on what was clearly stated in the unilateral declaration, and should not be able to enlarge those commitments by reference to other contextual factors.

7. Mr. PELLET said that it would be most regrettable if, as some would wish, the Special Rapporteur's impending departure were to be used as an excuse to bury the topic. The Special Rapporteur had been unfairly criticized for having failed to come up with a coherent draft text after eight years' work. The truth was that the Special Rapporteur had been guilty only of following the Commission's own vague and often contradictory instructions. Moreover, on the principle of "more haste, less speed", it was better to have a good text that had been thoroughly discussed than a shoddy, ill-considered one, like some of those that the Commission had adopted in recent years. Thus the Special Rapporteur had been right to focus his attention on unilateral acts *stricto sensu*, namely declarations intended to produce legal effects under international law, as reflected in the jurisprudence of the ICJ, in, for example, the *Nuclear Tests* cases of 1974. The Special Rapporteur had been faithful to the letter and the spirit of the instructions given to him by the Commission at the previous session,[185] and also to the Commission's own mandate.

8. He felt obliged to take issue with Ms. Escarameia concerning the 1969 Vienna Convention. It was perfectly legitimate to take that Convention as the starting point for the draft guiding principles, since unilateral acts had much in common with treaties. Clearly, there were differences—in relation to reservations and modifications, for example—but they were not such as to make it unacceptable for the Working Group to consider whether transposition from the 1969 Vienna Convention was permissible in any given case.

9. He had a number of proposals for the successful completion of work on the topic at the current session. The Working Group should be reconstituted and, if possible, allocated more time for its work. Working on the basis of the ninth report and of its own work at the previous session, it should first draw up a list of the guiding principles to be adopted. Thereafter, it should act as a kind of drafting group, synthesizing the text contained in the draft guiding principles with elements of the Special Rapporteur's ninth report and comments drawn from previous reports.[186] If that was acceptable, the Special Rapporteur might be requested to prepare, with help from the Secretariat, a digest or summary of reports or parts of reports bearing on each of the 11 guiding principles. If all members of the Working Group did their homework—and it should be borne in mind that the Working Group was open-ended—it should be possible to reach agreement on both the content and the form of a set of guiding principles.

10. There remained the question of whether the principles should be accompanied by a commentary. In his view, that would be desirable, not only because such was the Commission's usual practice but also because some of the principles—and, indeed, the topic as a whole—were controversial and it would therefore be helpful to States and the academic community to see how the Commission had reached its conclusions. It would, moreover, be a pity if all the research by the Special Rapporteur and the studies conducted by the Working Group were to be lost to posterity. That, however, posed practical problems. At the current session, the Working Group should perform its task of selecting, editing and determining the future treatment of the guiding principles so that it could lay a coherent body of work before the Commission, which would, of course, take the final decision.

11. The CHAIRPERSON suggested that, in the interests of completing its work, the Working Group should retain Mr. Pellet as its Chairperson.

12. Mr. DUGARD, after commending the intellectually challenging nature of the report, said that, in 1948, Sir Hersch Lauterpacht had made a seminal study of subjects to be considered by the Commission.[187] Most of the topics that he had proposed had since been completed. He had not, however, proposed a study of recognition, a topic that the Commission had scrupulously avoided. Nor had he proposed an examination of unilateral acts; however, the fact that the topic was closely bound up with recognition might account for the Commission's reluctance to engage in the study of unilateral acts and the slow progress made over the past decade. There was no denying that the task was difficult: there were too few judicial decisions and too little State practice. There was, however, surely enough State practice and case law—as reflected most recently in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda)* case—for the Commission to be able to draft a

[185] *Ibid.*

[186] Preliminary report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, p. 325; second report: *Yearbook … 1999*, vol. II (Part One), document A/CN.4/500 and Add.1, p. 195; third report: *Yearbook … 2000*, vol. II (Part One), document A/CN.4/505, p. 247; fourth report: *Yearbook … 2001*, vol. II (Part One), document A/CN.4/519, p. 115; fifth report: *Yearbook … 2002*, vol. II (Part One), document A/CN.4/525 and Add.1–2, p. 91; sixth report: *Yearbook … 2003*, vol. II (Part One), document A/CN.4/534; seventh report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/542; and eighth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/557.

[187] H. Lauterpacht, "The subjects of the law of nations", *The Law Quarterly Review*, vol. 63 (1947), p. 438–460, and vol. 64 (1948), pp. 97–119.

set of articles—as opposed to guiding principles—if only in by way of progressive development. The Commission should not shrink from taking that course: States had, after all, rebuked it for its undue caution in dealing with the topic of diplomatic protection, and there was a general tendency for the Commission to be over-cautious in its approach. While some would prefer to see the topic abandoned, to do so would be construed as failure on the part of the Commission. Although the establishment of a working group was often a ploy designed to kill off a topic, he trusted that that was not the case with regard to unilateral acts.

13. He welcomed the emphasis placed by the Special Rapporteur on the *Armed Activities in the Territory of the Congo* case, in which, for the first time, the ICJ had acknowledged the principle of *jus cogens*, holding, however, that Rwanda's reservation to the Convention on the Prevention and Punishment of the Crime of Genocide was not invalidated solely by virtue of the fact that it might conflict with a peremptory norm (paras. 64–69 of the judgment). The decision could also, of course, be invoked in support of the guiding principle proposed by the Special Rapporteur that a unilateral act could not be in conflict with a norm of *jus cogens*. He noted, however, that the Special Rapporteur made it clear in paragraph 128 of his report that he did not regard the formulation and withdrawal of reservations to treaties as unilateral acts.

14. The Special Rapporteur rightly argued that recognition was invalid where it violated a norm of *jus cogens*. More recent examples of State practice could, however, have been adduced than that of South Africa's homelands. One such was the situation of the "Turkish Republic of Northern Cyprus", where the European Union was seeking a settlement to cure the non-recognition of that territory; another was that of the Occupied Palestinian Territory, where the Government of Israel had proposed a territorial realignment that would result in the annexation of 10 per cent of Palestinian territory, with little sign that the international community was prepared to oppose the plan. In both cases, the principle *ex factis jus oritur* might well prevail over the principle *ex injuria jus non oritur*, whereby a territorial acquisition in violation of a norm of *jus cogens* would be invalid. Such recent examples of State practice illustrated the topicality of the issue.

15. He favoured the referral of the draft guiding principles to the Working Group, but his own preference would be for further work to be done on elaborating guidelines for consideration by the Commission in the next quinquennium. At that point, a decision could be made as to whether the text should take the form of guiding principles or of draft articles. In view of the importance of the topic, his own preference would be for the latter course.

16. Mr. PELLET said he wished to make two points with regard to the term "guiding principles". First, describing the contents of the ninth report on unilateral acts of States as "guiding principles" rather than "draft articles" might create the impression that the Commission was dealing with generalities, since a principle, unlike a rule, was something very general. Moreover, a reading of the guiding principles proposed by the Special Rapporteur strengthened that impression.

17. Second, it was essential to ascertain whether the reference to "guiding principles" implied that the Commission had ruled out the possibility of drawing up a binding instrument. In his opinion, that was not necessarily the case. Whereas guidelines, like those set forth in the Guide to Practice in respect of reservations to treaties, were obviously never intended to take the form of a treaty, guiding principles could well form the basis of a future treaty, although he personally was opposed to taking any steps in that direction. The debate had shown that, were it to adopt a full and coherent set of guiding principles on unilateral acts of States, the Commission would already have accomplished a Herculean task. There would be no sense in trying to convince States that the Commission should take matters further and endeavour to draft a treaty on unilateral acts of States along the lines of the 1969 Vienna Convention. Moreover, given the Commission's slow and hesitant progress and the likely reactions in the Sixth Committee, if it were to embark on that course of action, it would probably still be discussing the topic in 20 years' time. He was therefore in favour of adopting guiding principles and of then deciding whether to accompany them with commentaries.

18. Mr. GAJA said he could well understand why, in his ninth report, the Special Rapporteur had chosen to set out his views on most of the controversial aspects of unilateral acts of States, even though, with regard to invalidity for instance, that approach had obliged him to re-examine questions already considered in previous reports. The ninth report was helpful in that it provided a general overview of the Special Rapporteur's current thinking on issues relating to unilateral acts. Another welcome feature was the report's greater focus on practice. The late submission of the report meant that the Commission would not have enough time, at the current session, to adopt a text in the form of draft articles together with commentaries—although he also doubted the wisdom of adopting even the guiding principles without providing a commentary by way of an explanation of their very concise texts. The Commission had therefore been invited to comment not on the merits of the various proposals, but on the action to be taken regarding them at the current session, bearing in mind the part played over the previous two years by the Working Group chaired by Mr. Pellet.[188]

19. The Working Group had done much to advance the study of the topic and could clearly still play a useful role by pursuing its investigation of a particularly complex issue. What had yet to be determined was the precise mandate to be given to the Working Group. Rather than examining the various proposals made by the Special Rapporteur and reporting on its findings to the Commission in plenary session, it could make a more substantial contribution by instead presenting a survey of some of the cases drawn from practice which it had analysed in depth over the previous two years and which raised issues relating to unilateral acts or similar legal situations. It could supplement that survey with a few general comments, some of them inspired by the principles

[188] See footnotes 182 and 183 above.

suggested by the Special Rapporteur. That survey, which would be included in the report following its endorsement in plenary, would represent the first tangible result of the efforts of the Special Rapporteur and the Commission and would show that the latter had examined some significant instances of practice and arrived at a number of preliminary conclusions. It would also enlighten States as to the possible direction of future work on the topic. His proposal was in line with the content of paragraph 332 of the report of the Commission on the work of its fifty-seventh session.[189]

20. Mr. ECONOMIDES said that the Commission was facing the prospect of failure with regard to the topic of unilateral acts of States: after 10 years' work, it had not produced any tangible results to present to the General Assembly. It went without saying that responsibility for that state of affairs lay exclusively with the Commission as a whole and not with the Special Rapporteur, who had made a considerable effort to master an extremely difficult topic, submitting nine reports which together constituted an invaluable contribution to the literature on unilateral acts of States.

21. Turning to the ninth report, he said he could not support the use of the expression "legal effects" in draft guiding principle 1. The expression was far too general, even after the addition of the qualifier "certain"; since any unilateral act engendered legal effects, the provision was of immense scope. The only unilateral acts which should be of concern to the Commission were those which created for the author of the act positive or negative international legal obligations *vis-à-vis* another State or States, other subjects of international law or the international community as a whole. Option A was useful, but option B added nothing to the definition of a unilateral act. Guiding principle 1 should therefore be recast in much more restrictive language.

22. He basically agreed with draft guiding principles 2 and 3. Draft guiding principles 4 and 5 should be merged in a single provision stipulating that a unilateral act formulated by a person not authorized (or not qualified) to act on behalf of a State was invalid unless the State confirmed it expressly or tacitly, as laid down in principle 4.

23. Draft guiding principle 6 should be worded in a much more flexible manner than would be the case for a principle applying to international treaties. States had to be trusted where unilateral acts were concerned. In his opinion, any unilateral act which was manifestly unconstitutional ought not to give rise to a valid international obligation. He agreed with draft guiding principle 7, on invalidity of unilateral acts. Draft guiding principle 8 should be couched in more flexible language, since a State had to be given the opportunity freely to revoke an obligation which patently did not satisfy the beneficiary State. The subject matter of draft guiding principle 9 (Suspension of unilateral acts) could be dealt with under principle 8. Principle 10 (Basis for the binding nature of unilateral acts) could be deleted: no one disputed the fact that a State could enter into a unilateral commitment, as had been made quite plain in draft guiding principle 2. While he agreed with the substance of draft guiding principle 11, he, too, believed that if the will of a State was unclear, that will must be interpreted restrictively in the interests of the author of the act.

24. He reserved his position on the lengthy addendum to the ninth report (A/CN.4/569/Add.1), since it had been issued only the previous day. In conclusion, he would be in favour of referring the draft guiding principles to a working group in a last-minute attempt to establish a draft text which could be submitted to the Sixth Committee. He fully endorsed the method of work proposed by Mr. Pellet, and especially his recommendation that the Working Group should transform itself into a drafting committee. The resulting text should be regarded as provisional. The Commission should not rule out the possibility of subsequently reverting to the idea of a codifying text consisting of draft articles. It might be advisable for the Working Group also to examine Mr. Gaja's proposal.

25. Mr. CHEE commended the Special Rapporteur's patient labours, which had culminated in the issuance of his ninth report. The chapters of the report on the definition, formulation, basis for the binding nature and interpretation of unilateral acts related to the core issues surrounding the guiding principles. On the definition of a unilateral act (paras. 126–139), he noted that, although several eminent writers on international law had discussed the substance of unilateral acts in international law, only Sir Robert Jennings had attempted to provide a brief definition of them. It should also be noted that Sir Hersch Lauterpacht had described unilateral acts as "transactions besides negotiations and treaties" in the eighth edition of *Oppenheim's International Law*.[190] The definition of a unilateral act given in draft guiding principle 1 confined such an act to a declaration, to the exclusion of notification, protest or renunciation (waiver). He preferred option A of principle 1. Draft guiding principles 2 and 3 could usefully be merged. Draft guiding principles 4 to 9 called for no comments. On draft principle 10, dealing with the binding nature of the unilateral declaration, he recalled that in the 1974 *Nuclear Tests (Australia* v. *France)* case, the ICJ had relied on the principle of the good faith of the States formulating the act, finding that:

> Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected. (p. 268, para. 46 of the judgment)

Hence the ICJ had found that a unilateral declaration by States was binding.

26. Mr. KOSKENNIEMI said that the ninth report on unilateral acts of States was useful in that it showed that, while the Commission's position on the topic had changed

[189] *Yearbook ... 2005*, vol. II (Part Two), p. 62.

[190] "Transactions besides negotiations and treaties", *in* H. Lauterpacht (ed.), *International Law: A Treatise,* vol. I, *Peace*, 8th edition, Harlow, Longmans, 1955, p. 872, para. 486.

from year to year, the Special Rapporteur had held fast to his opinion that unilateral acts could and should be codified in a text in some respect analogous to the 1969 Vienna Convention.

27. He refused to be tempted by Mr. Pellet into launching into yet another lengthy disquisition on the reasons why he believed that there was no topic to codify and that there was no point in endeavouring to produce a normative text. Nevertheless, he wished to explain how his thinking had evolved over the previous five years. From the outset, he had maintained that there was no topic to codify because unilateral acts were non-existent as a legal institution; some of the literature had merely discussed certain cases in which courts had held that States were bound by declarations of State representatives or by acts of States. Secondly, as far as diplomatic practice was concerned, he was unable to recollect a single situation where a State had engaged in the kind of activity described by the Special Rapporteur. Nor could he recall any instance of an expression of a will to be bound irrespective of a *quid pro quo*, or regardless of the existence of a legal framework conferring legal meaning on an action or a statement, such as the framework of treaty law or customary law in the case of reservations to treaties or recognition of new States.

28. Over the years he had, however, come to realize that the Commission had done some useful work in describing practice in respect of unilateral acts and of outlining situations in which outside observers had found that a State was bound as a result of its formulation of a unilateral act. The examination of such cases by the Working Group at the previous session had been extremely useful. In his summary of the Working Group's deliberations, its Chairperson, Mr. Pellet, had stated that the Working Group had studied specific cases in accordance with the analytical grid established in 2004[191] and that some conclusions could possibly be drawn from its deliberations.[192] For that reason, he personally had expected the Special Rapporteur's ninth report to elaborate on the practical examples contained in the grid. Instead, the Special Rapporteur had decided to hold his ground, to produce a report in the tradition of its predecessors, which had used the deductive method of presupposing that unilateral acts could be codified in a text along the lines of the 1969 Vienna Convention, and had to draw up a set of principles.

29. He was therefore at a loss to understand why the Commission had taken one direction, while the Special Rapporteur had taken another. How could the two paths be made to converge? In view of the position of principle that he and many other members of the Commission had adopted, namely that the 1969 Vienna Convention could not be used as a model to codify unilateral acts of States, it would be very difficult to embark on a discussion of the guiding principles contained in the ninth report, since they looked like a first step towards the formulation of a set of codifying draft articles modelled on the Vienna Convention. He objected to such a move not only on principle, but also because it ran counter to the direction of the Commission's collective approach to date. Although that had been the approach consistently adopted by the Special Rapporteur, it had not met with the approval with the majority of the Commission members.

30. Moreover, as there was in any case no time to formulate draft articles, the best way forward would be for the Working Group to continue the previous year's useful exercise of working on the analytical grid of cases and to provide a set of comments explaining the implications of cases in which States had become bound by their words or actions. That exercise would offer some valuable lessons concerning good faith, equity and legitimate expectations in international law. The Commission could perform a useful service by drawing attention to situations in which unilateral statements or actions, whether or not of a formal nature, had entailed legal consequences. The Working Group should be reconstituted, not in order to kill off the topic, but to enable it to pursue and complete its study of practical cases on the basis of its analytical grid.

31. In sum, the Commission should not refer the draft guiding principles to the Working Group in the expectation that it would transform itself into a drafting committee. That would be an unacceptable course even if it was practically feasible, which it no longer was. Second, the Working Group should continue the survey of cases begun in 2005 and come up with conclusions based on specific cases, on which the diplomatic community could draw whenever States found themselves involved in situations where they might be bound, willingly or otherwise.

32. Mr. DUGARD said he agreed with Mr. Koskenniemi's proposals but was unclear whether the conclusions were to be submitted to the Sixth Committee at the end of the Commission's current session or referred to the newly constituted Commission in 2007. No attempt to rush the project through, however determined, would enable it to be completed satisfactorily at the current session. Logically, therefore, the conclusions to which Mr. Koskenniemi referred should be taken up by the new Commission in 2007.

33. Mr. KOSKENNIEMI said that ideally the Working Group should produce its conclusions by the end of the current session, for transmission to the new Commission and to the Sixth Committee at the sixty-first session of the General Assembly.

34. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that some members of the Commission seemed to be in such a hurry to produce results that they were prejudging the whole question of the Working Group's mandate. Most members wanted the Working Group to be reconstituted under Mr. Pellet's chairpersonship in order to consider the draft guiding principles now available. In the weeks remaining before the end of the session, the Working Group would have ample time to accord the matter the attention it deserved and decide whether conclusions were to be adopted.

35. Mr. FOMBA congratulated the Special Rapporteur on his tireless efforts to rescue the topic from the present impasse. Unilateral acts were a fact of the diplomatic,

[191] *Yearbook ... 2004*, vol. II (Part Two), p. 96, para. 247, footnote 516.

[192] See footnote 183 above.

political and legal life of States. Accordingly, the question of what should be the legal regime for unilateral acts, as opposed to treaties, must be addressed. Unilateral acts fell into two categories: those whose fate was linked to that of treaties—whose legal regime should logically be aligned with that of treaties; and those that were autonomous, whose fate was not linked to that of treaties. It was with the latter category that problems arose. Whether it was possible or desirable to codify the law on that subject was very far from clear; neither doctrine, jurisprudence, nor State practice shed sufficient light on the subject. Hence, any attempt at a codification exercise should be abandoned. He therefore supported the idea of elaborating guiding principles, even though that approach left questions such as the current and future legal scope of the principles in abeyance. If States subsequently accorded some legal or moral weight to them, then the Commission would have done useful work. The Working Group should therefore be given a mandate to elaborate guiding principles. The approach proposed by Mr. Pellet seemed excellent, providing as it did an opportunity to contribute to the discussion in the Working Group as well as in plenary.

36. Mr. Sreenivasa RAO congratulated the Special Rapporteur for remaining true to his initial assumptions concerning a difficult topic, one on which, even after nine years, the Commission was still not able to take a clear position. Unilateral acts abounded in State practice, but few were formulated in such a manner as to become the exclusive basis for legal obligations and rights; unilateral acts had always been read in conjunction with other contextual factors. While the ICJ had on occasion looked upon them with some degree of serious interest, and while they sometimes added weight to other deliberations and negotiations, their intrinsic value was minimal. Given that factual situation, unilateral acts did not lend themselves to codification in a formal structure such as that created by the 1969 Vienna Convention.

37. The crux of the matter was that a unilateral statement by a highly placed State authority had an effect on the State's conduct and options but could be terminated by the formulating State in the absence of any detrimental reliance on it by other States. That being so, there was no need to go into the issues of invalidity, termination or suspension of unilateral acts based on an analogy with the 1969 Vienna Convention. The Working Group should consider those draft principles that did not address invalidity, termination or suspension and develop some conclusions in that regard. The general conclusions drawn from the practical studies conducted by the Working Group could usefully be disseminated, always bearing in mind, however, that to pronounce upon such cases would be tantamount to passing judgement in the absence of adversarial proceedings.

38. The net result of the Special Rapporteur's intrepid efforts over the years had been to go some way towards establishing which acts did not qualify as unilateral acts within the meaning of draft guiding principle 1. The Commission could now see clearly that recognition, reservations to treaties and declarations under optional clauses, to cite just three categories, were not unilateral acts for the purposes of its study. However, the goal of pinpointing those unilateral acts that produced the intended legal effects remained elusive. The Working Group should be authorized to continue its task of assisting in that quest under the able chairpersonship of Mr. Pellet.

39. Mr. CANDIOTI thanked the Special Rapporteur for his latest contribution to a deeper understanding of the topic, in the form of new precedents and an analysis of the validity, invalidity, duration, suspension and termination of unilateral acts. At the previous session, he himself had suggested that after 10 years of debate, the time had come for the Commission to present to the General Assembly, in its report on its fifty-eighth session, some general conclusions accompanied by illustrative examples of State practice, as envisaged in paragraph 332 of the Commission's report on the work of its fifty-seventh session.[193] However, the Working Group had instead sought to flesh out a definition of and rules applicable to formal unilateral declarations, which it had baptized "unilateral acts *stricto sensu*". In the light of past discussions on the topic, however, his preference would have been for a more general document setting forth a number of conclusions on the function and consequences of unilateral acts and other forms of unilateral conduct in international law, conclusions that could command consensus within the Commission.

40. The Special Rapporteur was now proposing a set of what he referred to as "guiding principles" on unilateral acts *stricto sensu*, couched in prescriptive language that went well beyond what would have been the tenor of general conclusions. Were that new approach to meet with the Commission's approval, he could agree to their referral to the Working Group for review. Without prejudice to the final wording and content of the draft to be produced, he wished to make a few preliminary comments that might be useful to the Working Group.

41. In draft guiding principle 1, more emphasis should be placed on the unilateral manner in which legal effects were produced, in other words, the fact that there was no need for the involvement of any other subject of international law. Of the two options offered with regard to addressees, he preferred the more general formulation in option B, although the entire subject might be left unmentioned in the principles and elucidated in the commentary.

42. The order of draft guiding principles 4 and 5 should be reversed, or the two combined into one. The title of draft guiding principle 7 could be made more specific, like those of principles 5 and 6, with a reference to invalidity resulting from defects affecting the expression of unilateral will. Paragraphs 5 and 6 of draft principle 7, which dealt with the substance and content of the unilateral act, should perhaps be separated from defects of will and set out as separate principles. In point of fact, paragraph 6 subsumed the contents of paragraph 5.

43. The order of draft guiding principles 8 and 9 might be reversed, as suspension preceded termination both logically and chronologically. He agreed with others that the conditions of revision and revocation of a unilateral act by its author should be made more flexible. Draft

[193] See footnote 190 above.

guiding principles 10 and 11 could possibly be placed at an earlier point in the draft, perhaps before draft guiding principle 5.

44. Once the Commission adopted those and possibly other guiding principles, they should be set out in its report on its current session, if possible accompanied by commentaries. In concluding, he supported the reconstitution of the Working Group under the chairpersonship of Mr. Pellet.

45. Mr. MANSFIELD said he agreed with others that the Commission's work had taken a useful turn when the Working Group and the Special Rapporteur had turned their attention to specific case studies. It had been instructive to see that there were very few such cases, and that there were many differences between them. What they revealed was that the unilateral actions of States could undoubtedly produce legal effects, and that in some, probably unusual, circumstances, States could end up being bound by those actions, even when such had not been the intention of those responsible. What the cases also illustrated very clearly, however, was that unlike the situation with treaties, unilateral acts raised two considerations of policy or public good between which there was some degree of tension. Clearly, it was desirable for Government ministers to be able to make political statements and carry out actions that contributed to international peace and security without being concerned about being legally bound by some aspect of such statements or actions. It was equally important, however, that they should not lightly make statements or undertake actions on which other States might reasonably be expected to rely: they should do so only in good faith and abide by those statements or actions.

46. The Working Group had made a useful start at the previous session by preparing broad conclusions or comments on the basis of the case studies, which took some of those competing policy considerations into account. Like Mr. Gaja, he believed that the way forward was for the Working Group to carry on that work and complete some general comments, based on the case studies, that would provide useful guidance for foreign ministries and others involved in dealing with statements made by Government ministers. The work should now focus, not on the draft principles, which were far too detailed and took the Commission back to a dubious analogy with the law of treaties, but rather on the broad conclusions mentioned in the report of the Working Group at the fifty-seventh session.[194]

47. Mr. GALICKI said that the Special Rapporteur's ninth report summed up both the positive and negative aspects of the work done over a period of nearly 10 years. Discussion of the content of the report in the Working Group would be an extremely useful exercise. One aspect of the topic that should be taken into consideration was the interrelationship between the draft guiding principles and the 1969 Vienna Convention. The Commission remained too dependent on the Convention, and the Working Group should elaborate a more independent position. The Special Rapporteur sometimes seemed to be a slave to the provisions of the Convention, transposing certain phrases into the draft that did not fit comfortably in that context. For example, the term used in the title of draft guiding principle 8, "Termination of unilateral acts", should perhaps be reconsidered. On the other hand, one of the grounds cited for the termination or revocation of a unilateral act was a fundamental change of circumstances. In paragraph 115 of his report, the Special Rapporteur explained his reasons for departing from the "negative and conditional" wording of article 62 of the 1969 Vienna Convention; however, in his own view, that wording should be retained in draft guiding principle 8.

48. In conclusion, he would be in favour of referring the draft guiding principles to the Working Group for further consideration.

The meeting rose at noon.

2888th MEETING

Wednesday, 5 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/560, sect. F, A/CN.4/569 and Add.1, A/CN.4/L.703)

[Agenda item 6]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur, Mr. Rodríguez Cedeño, to summarize the debate on his ninth report.

2. Mr. RODRÍGUEZ CEDEÑO thanked the members of the Commission for their comments and recalled that at the previous meeting they had discussed how to proceed in order to move the work on the topic forward and had made comments on the substance of the report, some of a general nature and others relating to the draft principles presented in A/CN.4/569.

3. With regard to the procedure to be adopted, Mr. Pellet had proposed reconstituting the 2005 Working Group to consider the draft guiding principles introduced by the Special Rapporteur. The Working Group, which would be open-ended in composition, could consider the draft guiding principles and adopt those that they thought had the broadest support for submission to the plenary Commission. They might also adopt other draft guiding

[194] *Yearbook ... 2005*, vol. II (Part Two), p. 62, paras. 327–332.