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Summary record of the 2816th meeting

Topic:
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protest, renunciation and acquiescence would nevertheless continue to have a bearing on legal relations between States, and thus warranted due attention. Estoppel, too, deserved a place in international law. The ICJ judgment of 1974 in the *Nuclear Tests (Australia v. France)* case had recognized that declarations made by way of unilateral acts, concerning legal or factual situations, might have the effect of creating legal obligations. That ruling had been reaffirmed by the Court in its judgment in the *Frontier Dispute* case, in which it had held that it was for the Court to form its own view of the meaning and scope intended by the author of a unilateral declaration which might create a legal obligation. The Court nonetheless emphasized that the decisive element in validating the assumption of an obligation by the author State was the intention of that State. From an examination of the legal bases for the binding force of unilateral declarations, especially in the *Nuclear Tests* case, it was apparent that their binding nature was rooted in the rule of *pacta sunt servanda* and the principle of good faith. In that connection, Fiedler noted that recognition, protest, notification and renunciation had become legal institutions of international law in their own right and that their legal force was based directly upon international customary law.¹¹

49. Turning to specific aspects of the report, he said that while paragraph 19 of the report cited the 1956 Egyptian declaration guaranteeing freedom of passage for all ships through the Suez canal as a unilateral act successfully resolving the nationalization issue, Professor Alfred Rubin pointed out that the declaration had been rejected by the Suez Canal Users Association, which called into question the declaration's validity.¹² In paragraphs 89 to 179 of the report, factual descriptions of cases of protest were provided without any legal analysis. Some discussion of the legal aspects of protest would have given the Commission a sounder basis on which to continue its deliberations. The report might usefully have considered acquiescence rather than silence as a principle modifying some State acts.

50. Referring to paragraph 196, he challenged the statement by a member of the Commission that no category of acts which would constitute estoppel acts seemed to exist. There were ample instances in case law of international tribunals applying the doctrine of estoppel in their decisions, the *Temple of Preah Vihear* case being one such instance. Similarly, the conclusion in paragraph 199 that there was some doctrinal confusion about the basis and scope of estoppel was unwarranted, given the extensive references to the doctrine of estoppel by arbitral tribunals and ICJ. In that connection he drew attention to two articles in the 1957 *British Year Book of International Law* by MacGibbon¹³ and Bowett;¹⁴ Mr. Brownlie relied heavily

on the latter in the sixth edition of his *Principles of Public International Law*.¹⁵

Organization of work of the session (continued)

[Agenda item 1]

51. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of international liability for injurious consequences arising out of acts not prohibited by international law would be composed of Mr. Daoudi, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao and Mr. Yamada, with Mr. Comissário Afonso (Rapporteur) (*ex officio*).

The meeting rose at 1 p.m.

2816th MEETING

Tuesday, 13 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

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

Unilateral acts of States (continued) (A/CN.4/537, sect. D, A/CN.4/542¹)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. NIEHAUS thanked the Special Rapporteur for the seventh report on unilateral acts of States (A/CN.4/542), which represented an important contribution to the study of a particularly difficult and controversial question.

2. Although the vast majority of scholars considered that unilateral acts undoubtedly existed, that view was not shared by all. Apart from the difficulty of establishing a clear distinction between the legal and political aspects of the question, the crucial issue related to the intention or will of the State. However, the definition of a unilateral act of a State as "a statement expressing the will or consent by which that State purports to create obligations or other legal effects under international law"² did not cover

¹¹ W. Fiedler, "Unilateral acts in international law", in *Encyclopedia of Public International Law*, vol. IV, R. Bernhardt (ed.) (Amsterdam, Elsevier, 2000), p. 1018.

¹² A. P. Rubin, "The international legal effects of unilateral declarations", *American Journal of International Law* (Washington, D.C.), vol. 71 (1977), p. 6.

¹³ I. C. MacGibbon, "Customary international law and acquiescence", *British Year Book of International Law*, 1957 (London), vol. 33, p. 115.

¹⁴ D. W. Bowett, "Estoppel before international tribunals and its relations to acquiescence", *ibid.*, p. 176.

¹⁵ Brownlie, *op. cit.* (2795th meeting, footnote 6).

¹ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

² *Yearbook ... 2003*, vol. II (Part Two), chap. VII, sect. C, p. 57, para. 306 (recommendation 1).

the legal aspects of such acts or allow for the formulation of rules applicable to them. A more focused and systematic study of unilateral acts than any that had been carried out to date was therefore required. In that regard, the analysis of State practice, which was the subject of the seventh report, was of particular interest.

3. The Special Rapporteur distinguished five groups of unilateral acts recognized by scholars, the first of which was that of acts whereby States assumed obligations, especially promise and recognition. Of the numerous examples of State practice given by the Special Rapporteur in that connection, a large number were not really unilateral acts in the legal sense, but they nonetheless served to illustrate and delimit the scope of the topic. The second category related to acts by which a State waived a right or a legal claim, and the third to acts by which a State reaffirmed a right or legal claim, using protest or notification. Again, many examples were given of acts which could not necessarily be considered unilateral acts, strictly speaking, but which nonetheless served to delimit and clarify the scope of the study. Lastly, the report dealt with State conduct that might produce legal effects similar to those of unilateral acts and with silence and estoppel as principles informing some State acts.

4. Following such a detailed presentation of unilateral acts, the Commission's task must be to draw up a definitive definition of a unilateral act, as the Special Rapporteur had suggested, on the basis of the working text quoted above, which had been adopted at the previous session.³ It would be useful to set up a working group to that end, whose task would include clarifying the concepts of subjectivity, will and intention. In that context, the examples given by Mr. Kolodkin in the 2813th meeting were most significant. Apart from establishing a definition of a unilateral act *stricto sensu*, the working group should also map out the course of action to be followed and determine the methodology to be used in drawing up rules applicable to unilateral acts of States.

5. Mr. KATEKA commended the Special Rapporteur on the quality of his report and on his perseverance over the years. The Special Rapporteur had always honoured the Commission's requests: he had produced draft articles on unilateral acts, dealt with the classification of unilateral acts in his fourth report,⁴ devoted his sixth report⁵ to the unilateral act of recognition and, in his seventh report, carried out a survey of State practice. He had always faithfully discharged his duty. The Commission should therefore ask itself why, after seven years, it was still grappling with the question of the definition of a unilateral act. Working groups had been set up for that purpose. Although the first had considered that the topic of unilateral acts was appropriate for consideration because it was well delimited and had not been studied by any international body, the Commission had failed to circumscribe the parameters for the scope and content of the topic. Part of the problem was that the members of the Commission

had not properly followed up the reports of previous working groups. For example, the report of the Working Group of the previous session should, together with the survey of State practice detailed in the seventh report, be the starting point for the development of an acceptable definition of unilateral acts. The Working Group should be convened to prepare draft articles with commentaries. It should also deal with the question of unilateral acts *stricto sensu*, namely acts, declarations or statements and forms of conduct intended to produce legal effects. It was not possible to deal with all unilateral acts.

6. The Commission should avoid duplicating the 1969 Vienna Convention. It should also avoid getting bogged down in classifications. The seventh report showed the pitfalls of such an exercise. For example, with regard to the assumption of obligations by means of promise, the portrayal of grants or credit between States as promises was misplaced. Where States gave or received assistance, it was usually preceded by preliminary contacts and discussions of a bilateral nature. Some "unilateral acts" were mere policy statements that did not amount to unilateral acts *stricto sensu*. In the case of the examples mentioned in the footnotes to paragraphs 24 and 32 of the report concerning Spain and concerning Belgium's apology following the assassination of Patrice Lumumba, respectively, there had been no promises. The Special Rapporteur sometimes also wandered into a political minefield, as illustrated by the footnotes to paragraphs 24 and 32 relating to Taiwan Province of China and to Zimbabwe, respectively. Furthermore, so-called negative guarantees by nuclear-weapon States to non-nuclear-weapon States had already been considered by the Special Rapporteur. Some members had been of the view that negative guarantees were mere political statements with no legal content.

7. The situation was more complicated in the case of recognition. The Special Rapporteur observed in his conclusions (para. 205) that recognition constituted the most frequent form of unilateral act, and that observation was borne out by the fact that over 20 pages of the seventh report were devoted to such acts, mainly in connection with European Union practice on the recognition of the new States of Central and Eastern Europe. Although the Special Rapporteur cited examples from Africa, he had not included the latest position of the African Union concerning the non-recognition of regimes that had come to power through extra-constitutional means. Despite their frequency and the interest to which they gave rise, however, it would be best not to include acts of recognition in the scope of the topic, given their controversial and political nature.

8. In the part of the report relating to protest, the Special Rapporteur dealt with the question of maritime areas, for which he was to be commended since those were examples of unilateral acts par excellence. The Special Rapporteur should not, however, deal only with protest against such acts, but also with actual declarations concerning the limits of maritime zones, some of which had been made before the special regime of the law of the sea had come into being. Paragraph 169, however, recognized that protest was in a different category from promise or recognition.

³ *Ibid.*

⁴ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519, p. 115.

⁵ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/534, p. 53.

9. There was a reference in paragraph 174, in the section dealing with notification, to the question of State succession to treaties, which was a matter covered by the Vienna Convention on Succession of States in Respect of Treaties. It would be interesting to recall famous unilateral declarations by leaders of newly independent African States in the 1960s, which had made a great contribution to the progressive development of international law in that regard and subsequently to the Vienna Convention on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

10. Despite the comments in paragraph 188 of the report, however, silence was important. For example, where a treaty was silent on reservations and where a State raised no objection, the notifying State might proceed with the proposed measure.

11. Lastly, although he had based his comments on the categories of acts as classified by the Special Rapporteur, he was not in favour of following them strictly; they should be merely illustrative. The most important question for the Commission was to decide how to proceed with the topic of unilateral acts. Whether it opted for a draft convention or for a mere expository study, the Commission should embark on the topic seriously and expeditiously.

12. Mr. ECONOMIDES, highlighting the undeniable merits of the report, said that the question that the Commission faced was how to continue the study of the topic of unilateral acts of States. In his view, the concept of a unilateral act should first be explained more clearly than had been done in the Working Group's recommendation 1,⁶ primarily on the basis of the Special Rapporteur's seventh report. The Commission's exclusive target remained autonomous unilateral acts, brilliantly described by Mr. Pambou-Tchivounda at the 2815th meeting, as acts which were completely independent of international treaty, customary and institutional law. However, the Commission must go even further and, from among autonomous acts, limit the scope of the topic, at least initially, to those unilateral acts which could be a source of international law in the same way as treaties, custom and binding institutional acts. In that respect, the *Nuclear Tests* case must serve, as it were, as the model that would guide the Commission in its work.

13. All unilateral acts must therefore be included in the study, without *a priori* excluding conduct that might give rise to international legal obligations which were more or less flexible (such as obligations of means) or more or less strict (such as obligations of result), obligations which entailed the responsibility of the author of the act. It was the concept of an international legal obligation which must serve as the criterion for a unilateral act, and not that of the legal effects of the act, a concept which was far broader and looser and covered all unilateral acts of States, autonomous or otherwise, since all those acts produced legal effects which differed considerably. In addition to its creation, the concept of a legal obligation obviously included its subsequent development; in other

words, its modification or extinction by another unilateral act. The beneficiaries of the obligation arising out of a unilateral act could be another State, several States, other subjects of international law, including individuals, and even—quite frequently—the international community as a whole.

14. At a later stage, the Commission could, of course, take up autonomous unilateral acts, which created legal effects other than international obligations, such as those which were produced by protest or notification and were very well described by the Special Rapporteur. It would be a mistake to deal at the same time with unilateral acts as different as the recognition of States—which gave rise to legal obligations for the recognizing State and even more so for the one which was recognized—and, for instance, protests lodged for one reason or another.

15. The second step that the Commission should take was to reassure States of its intentions, while dealing with the topic accurately and scrupulously. To that end, it should first of all draw attention to the exceptional nature of unilateral acts of States as a source of international law, which was indeed the case: in general, States had no time for unilateral commitments. International relations were, rather, governed by reciprocal relationships created by treaties, whereby a benefit must be followed up by a counter-benefit. It was therefore necessary—and that was the crux of the matter—for the State's intention to bind itself unilaterally at the international level to be perfectly transparent and unambiguous or, in other words, entirely certain. The Commission was duty-bound to assist States, to protect them and to prevent them falling into traps. In the event of doubt as to the State's real intention, it was necessary, as Mr. Kolodkin had said, to rely on a restrictive interpretation, which did not limit the State's sovereignty or did so as little as possible. In that connection, the Special Rapporteur had already introduced draft article 2, which should be strengthened along those lines.

16. Priority must next be given to the question of the revocability of a unilateral act, as recommended by the Working Group in its recommendation 6 of the previous session. Any unilateral act could be freely revoked by the author State, and that followed from the very nature of unilateral acts, unlike agreements, for instance, save in two exceptional cases: firstly, when the unilateral act itself clearly and unequivocally excluded revocation, in which case the State itself waived, in advance, the exercise of that right that was inherent in a unilateral act; and, secondly, when the act was converted, before its revocation, into a treaty following its acceptance by the beneficiary of the original act.

17. The other questions recommended by the Working Group, such as that of the organs competent to bind the State through unilateral acts and that of the conditions for the validity of such acts, could easily be answered by referring, in particular, to the 1969 Vienna Convention.

18. In conclusion, he said that he was in favour of the idea that the Working Group should reconsider that issue with a view to defining clearly the programme of work for the following session.

¹⁰ See footnote 2 above.

19. Mr. MATHESON said that he associated himself with the compliments paid to the Special Rapporteur on his report, which gave a very useful overview of State practice on unilateral acts. Firstly, in the listing of “promises” contained in the report, there were many declarations which, on the face of it, seemed to be political statements or commitments that in all likelihood had never been intended to create legal obligations and had never been considered as such. For example, reference was made to several statements concerning arms control and sanctions which, as he knew from his own experience, had never been intended to have legal effects and would never have been made if that had been thought to be the likely result. Mr. Kolodkin had made the same observation in his statement (2813th meeting). Dozens of similar statements could have been cited. They were an essential part of diplomacy and relations between States and it would be a real mistake to assert that they were legally binding because that could inhibit States from making them. For example, the United States had made a number of political commitments in the area of arms control that it would probably not have made if it had thought that they were legally binding, not least because Congress would have had to approve them in advance. It was only where a State clearly and directly expressed its intention to create legal obligations that such statements could be considered as legally binding.

20. Secondly, the compilation of State practice in the report showed how difficult it would be to draw general conclusions applicable to all the different categories of acts cited. As other members of the Commission had noted, recognition was a unique field with a unique history and political context and acts of recognition had specific legal consequences that distinguished them from other categories of acts. It therefore seemed unlikely that the concepts which might be applicable to promises or waivers or protests could be sensibly applied to acts of recognition and vice versa. The Commission should therefore analyse each of those acts separately and draw different conclusions therefrom with due regard for their peculiarities.

21. Thirdly, it was not clear from the practice analysed in the report to what extent clear legal consequences could be identified for unilateral conduct other than unilateral acts *stricto sensu*. In that respect, the practice cited in the report was limited and basically consisted of statements by Governments that might or might not have been intended to have legal effect. The acts cited in that part of the report did not have clear common characteristics: for example, they included a general policy statement made during a parliamentary debate, public statements concerning diplomatic relations, a press conference and the establishment of an economic zone. The Commission must be very cautious in formulating guidelines concerning those miscellaneous forms of conduct which did not fall within the definition of unilateral acts *stricto sensu* that it had adopted.

22. As for the direction of the Commission’s future work on the topic, he also took the view that it would be sensible to reconvene a working group to consider the matter further, but, for the time being, it should not reconsider or amend the definition adopted by consensus

at only the previous session. That would be possible only when the Commission had a much clearer idea of the results of its work. The recommendations adopted by the Working Group at the previous session would serve as a basis for considering both unilateral acts *stricto sensu* and other forms of conduct that might have similar effects, and the question should be left at that for the present. At any rate, it was not advisable to abandon the distinction made between unilateral acts *stricto sensu* and other State conduct. Rather, the working group should focus on the direction that future work should take and the methodology to be adopted. He was attracted by Mr. Brownlie’s proposal for an expository study on the subject, along the lines of what was being set up on the topic of the fragmentation of international law. Indeed, the best solution would be to adopt the methodology used for the topic of fragmentation, which essentially consisted of putting together a series of studies on the different aspects of the problem, along with the Commission’s conclusions on each of them. That would no doubt be the best way of capturing the complexity and diversity of unilateral acts while providing useful guidance to States.

23. In any event, further study of State practice was needed on some of the specific areas highlighted by the Commission the previous year. He was thinking in particular of recommendation 6 of the Working Group of 2003, with a view to compiling and analysing State practice on the question of criteria for the validity of State commitments, as well as the circumstances in which such commitments could be modified or withdrawn. Those aspects of State practice would need to be analysed before the Commission could continue its work. It would be necessary to deal not only with cases where a State’s attempt to modify or withdraw a unilateral commitment had been rejected by other States, but also those where such acts had been accepted or tolerated.

24. Ms. XUE thanked the Special Rapporteur for his efforts in preparing the report and thanked the Chairperson and other members of the bureau for rescheduling the meetings on consideration of the seventh report on unilateral acts of States so as to give her an opportunity to comment on it. After a preliminary exchange of views with the Special Rapporteur and with his consent, she wished to formally address the plenary session of the Commission about the reference of Taiwan in the seventh report presented by the Special Rapporteur to the Commission.

25. The Taiwan issue was an internal matter of China that had been left over by history and that remained unresolved owing to many factors, including external interference. The Taiwan issue concerned the national sovereignty and territorial integrity of China. Over 160 States had recognized the principle of one China and Taiwan as an integral part of the Chinese territory. In the United Nations, the matter had been clearly and definitively settled by General Assembly resolution 2758 (XXVI) of 25 October 1971, which stated explicitly that the People’s Republic of China was the sole and legitimate Government of China. On the international plane, only the People’s Republic of China carried the international personality of the State. Within the United Nations, the principle of one China should be observed in every aspect of its work and in all its documents, in accordance with that

resolution; the Commission, as a United Nations body and as a legal body in particular, should not be an exception, even though the members worked in their individual capacity in the Commission, because it was a matter that affected the fundamental principles of international law.

26. The Special Rapporteur, in his seventh report, inaccurately cited a number of cases and examples relating to Taiwan, using such terms as “the Republic of China”, “the President of the Republic of China” (footnote to paragraph 31), “the President of Taiwan” (footnote to paragraph 32), “the statehood of Taiwan Province of China” (footnote to paragraph 74) and so on. She expressed hope that such references were technical errors on the part of the Special Rapporteur and did not necessarily reflect his views on the matter, and that he would therefore be quite prepared to delete them.

27. Apart from the incorrect references to Taiwan as a State, there were also errors of substance in some passages in the report. Firstly, in citing some cases, the Special Rapporteur treated Taiwan as a *subject of international law*, placing the Taiwan authority at the highest level of an international entity. Secondly, it stated in several places that the legal status of Taiwan was still “controversial”. Since the adoption of General Assembly resolution 2758 (XXVI), the matter was not “controversial”, but unequivocally settled: Taiwan was part of China. Thirdly, the Special Rapporteur referred to the Taiwan authority and Beijing as if they were on the same level, as if they were two international subjects talking to each other. The current item related to acts of *States* only, and not internal matters. Furthermore, recognition of the People’s Republic of China was not a matter of recognition of State but recognition of government, because, when the People’s Republic of China had been founded in 1949, it was a change of government only, with the statehood of China itself remaining unchanged.

28. At paragraph 97, the report was wrong to state that in 1978 the United States had given dual recognition to China and Taiwan. The fact was that the United States had recognized only the People’s Republic of China as the sole and legitimate Government of China, and, upon that recognition, had established diplomatic relations with China. The Taiwan issue was only part of the negotiations between the two countries. Again, in the footnote to paragraph 97, the references to “continental China” and “Taiwan Province of China” carried the same implication of two Chinas.

29. She expressed hope that those inaccuracies were not the views of the Special Rapporteur, who could correct them without altering the tenor of the report. As international lawyers, the members of the Commission had to ensure that their presentation of facts and situations was correct before they addressed related legal issues. As it stood, the Special Rapporteur’s report was likely to have serious political and legal consequences, since it was distributed as an official United Nations document. The Commission was not an ordinary academic institution, and its members must bear in mind how important its opinions were for Governments, international organizations, international lawyers and the legal community at large on matters of international law.

30. The mistakes relating to the Taiwan issue pointed to problems with the basic approach of the report. While having collated many cases for study, the Special Rapporteur had failed to address adequately the legal effects of unilateral acts of a State in international relations and to make clear which acts by States would produce legal effects under international law. If the Special Rapporteur had focused on that aspect, the cited cases would not have been mentioned in the first place.

31. Mr. PELLET said that, although he had come to a meeting of a body which was wholeheartedly devoted to the cause of international law and made up of independent experts, in accordance with its Statute and its terms of reference, he felt more as if he were in an eminently political committee where one member had just given another member a lesson in political correctness. While he had his own opinion on the status of the Chinese province of Taiwan, he had no intention of joining in the debate and he considered it completely inappropriate and unacceptable that a member of the Commission should try to censure the Special Rapporteur’s report, for that was exactly what had been done. Any member of the Commission was fully entitled to believe that another member was wrong and even Special Rapporteurs were not infallible. It was entirely legitimate for a member of the Commission to challenge the validity of certain references and to try to have changes made in the Commission’s report, but dictating changes to, or deletions from, a Special Rapporteur’s report was unacceptable and even outrageous.

32. Since Ms. Xue had taken it upon herself to refer to the members of the International Law Seminar, he wondered what impression of debates in the Commission and of the Commission’s purpose and function her statement had made on those young minds. Such an approach was contrary to the very principle of a free exchange of views and ideas and was tantamount to censure, or even intellectual terrorism.

33. Mr. DUGARD said that, basically, Ms. Xue was fully entitled to criticize the Special Rapporteur’s report. Nevertheless, the question of the status of Taiwan gave rise to major controversy among international lawyers and it was necessary to bear in mind the fact that some 20 States regarded the Taiwanese Government as the lawful Government of the whole of China, even if some were unclear about whether they recognized Taiwan as a separate State. The Special Rapporteur’s report merely reflected that ambivalence and uncertainty. It was not the first time that a Special Rapporteur had mentioned entities of doubtful character. That was the case of the Turkish Republic of Northern Cyprus, which was recognized only by Turkey, and of South Africa’s Bantustans, which had never been recognized by any State. No member of the Commission had been moved to protest. While it was therefore possible to criticize the Special Rapporteur for the way in which he had referred to Taiwan, it was out of the question to require him to delete certain passages. Mr. Pellet had been right to speak of “political correctness”; the members of the Commission sat as independent experts, not as representatives of their Governments.

34. Mr. PAMBOU-TCHIVOUNDA said that, although Ms. Xue’s statement had understandably caused some

surprise and no little astonishment, especially as her human qualities and savoir faire were unanimously recognized within the Commission, the subject should not be further complicated by a gale of emotional reactions. Many members had called for greater clarity of vision at the current session. The Commission worked with facts and so it could not ignore certain facts on the grounds that they were fraught with political implications; on the contrary, they must face those facts as rationally as possible. The manner in which Ms. Xue had expressed her criticism of the Special Rapporteur's report and demanded that he delete some passages from it was therefore unacceptable.

35. Mr. NIEHAUS said that some 20 States entertained diplomatic relations with Taiwan and the Special Rapporteur could not be reproached for having noted that fact. As Mr. Pellet had said, care had to be taken not to politicize the debates of the Commission, whose members were independent experts sitting in their individual capacity. There could be no question of demanding that a special rapporteur should alter particular points of his report.

36. Mr. BROWNLIE, supporting the comments by Mr. Pellet and Mr. Dugard, recalled that, in the 2812th meeting, he had said that great caution must be exercised in connection with the recognition of States or Governments, quite simply because, when it had supported the inclusion of unilateral acts of States in the Commission's work programme, the General Assembly had most certainly not thought that the subject embraced the recognition of States or Governments. That was a politically delicate question, because it also involved the criteria that a State must fulfil in order to qualify as a State. The Commission must take a decision of principle to exclude recognition from its field of study.

37. Mr. Sreenivasa RAO said that he entirely sympathized with Ms. Xue's feelings, especially as some of the acts mentioned in the report were taken out of context and were unrelated to the conclusions drawn by the Special Rapporteur at the end of his report. Personally, he would prefer not to discuss the subject raised by Ms. Xue in plenary, as it did not come within the Commission's mandate.

38. Ms. XUE said that she had been very surprised by the comments from some members. Even though the Taiwan issue bore important political implications as it touched on China's sovereignty and territorial integrity, she had tried to set out her views from a purely legal perspective. To call it "intellectual terrorism" was politicizing the matter. The Commission was a subsidiary body of the United Nations and should abide by its resolution. Intellectual freedom and independence must not go against fundamental rules of international law. Contrary to exercising so-called "censorship", she had made it clear that it had been the Special Rapporteur who had asked her to suggest specific corrections to his report in the plenary meeting. The reactions of some members were most regrettable.

39. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the Commission had requested him to study State practice in respect of unilateral acts and that that practice related to situations which were often the subject of international controversy, such as that of Taiwan, Western Sahara, Cyprus and other regions of the world.

Numerous documents and sources had been consulted, but never, at any time, did the report express any opinion whatever about the legal status of the Chinese province of Taiwan. Of course, as he had told Ms. Xue, he was prepared to correct any erroneous citation or reference in his report, in accordance with the Commission's practice.

40. Mr. BROWNLIE, speaking on a point of order, requested that the Commission should take a decision on whether the recognition of States or Governments formed part of the topic of unilateral acts of States.

41. The CHAIRPERSON said that the Commission would come back to that question later.

Cooperation with other bodies (*continued*)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

42. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization—AALCO) said that AALCO attached enormous importance to its ties with the Commission. In fact, one of its primary functions, as envisaged by its statutes, was examining questions being considered by the Commission and arranging for the views of its member States to be placed before the Commission. The two organizations had thus forged closer bonds over the years and each was represented at the other's annual sessions.

43. At its forty-third session, which had been held in Bali, Indonesia, from 21 to 25 June 2004 and where Mr. Momtaz had represented the Commission, AALCO had considered the items on the Commission's agenda and had mandated Mr. Kamil, its Secretary-General, to bring the views expressed by AALCO to the Commission's attention.

44. There was a general appreciation of the Commission's work on diplomatic protection. One representative had said that the draft articles⁷ in essence reflected customary international law on diplomatic protection and were satisfactory on the whole. The same person had wished that the complete commentaries to the draft articles, which would make the articles easier to understand, could be finalized as early as possible and that the Commission would complete its second reading of the draft articles in 2006 in accordance with its quinquennial work programme.

45. One representative had said that the ICJ judgment in the *Barcelona Traction* case had represented an accurate statement of customary international law on the diplomatic protection of corporations, and that current rules and practices in the field of foreign investment had undeniably been built on that decision.

46. One representative had expressed his opposition to diplomatic protection of a ship's crew by the flag State. He had said that any reference to the ITLOS judgment

* Resumed from the 2813th meeting.

⁷ See 2791st meeting, footnote 8.

in the *Saiga* case should be viewed in the context of the United Nations Convention on the Law of the Sea, article 292 of which ensured the prompt release of vessels and crews. As a *lex specialis*, however, it did not expand or modify the rules embodied in the institution of diplomatic protection.

47. Another representative had said that the right to exercise diplomatic protection did not imply a duty on the part of the State to extend such protection. Diplomatic protection was a right given to States and not to nationals or corporations and it was up to the State concerned to decide, based on its own reasons, which might include foreign policy considerations, whether to extend diplomatic protection and what the nature of such protection should be.

48. Representatives had also made observations on specific aspects of the topic. One had emphasized that there should be a link of nationality between the corporation and the State exercising diplomatic protection. He had supported the wording of article 17, paragraph 2, of the draft articles on diplomatic protection provisionally adopted by the Commission, but had considered that the second criterion, placed in brackets, should be deleted. The State of nationality of a corporation should be the State in which the corporation was incorporated. He was aware that ICJ had referred to the criterion of the place of the registered office and the place of incorporation. The latter criterion was gaining dominance in other areas of the law, but, in his view, the criterion of the place of the registered office was superfluous because most registered corporations were located in the territory of the State in which they were incorporated. While it was important to maintain a balance between the interests of the State and those of investors, there was need for caution about including a reference to the State of nationality of shareholders.

49. One representative had been of the view that the State of incorporation was entitled to exercise diplomatic protection with respect to injury to the corporation. However, he believed that there was no need for a “genuine link” or any other requirement that implied economic control. The genuine link was one of the factors that the State might consider in deciding whether to take up the claims of a corporation in exercising its discretionary power. The same representative had supported the Commission’s decision to include three exceptions to the principle that the State which was to exercise diplomatic protection was the State of incorporation. As ICJ had stated, the State of nationality of the shareholders should be entitled to exercise diplomatic protection if the corporation had ceased to exist, if the injury to the corporation had been caused by the State of incorporation or if the shareholder’s own rights had been directly injured.

50. Commenting on article 17, another representative had said that his delegation agreed with the Commission that the State in which the corporation was incorporated was entitled to exercise diplomatic protection. That solution was in conformity with the ICJ judgment in the *Barcelona Traction* case. However, to avoid having “States of convenience” or “tax haven States”, an effective or genuine link between the corporation and the State of nationality should be required. The text in brackets in

article 17, paragraph 2, might be retained and the brackets accordingly removed. The delegation had also noted with appreciation that the Working Group had agreed to look for a new formulation for article 17.

51. With regard to article 18, the representative had said that it did not reflect existing customary international law, since paragraph 2 introduced an exception to the rule embodied in article 17. That exception was highly controversial and had the potential to jeopardize the principle of the equal treatment of shareholders regardless of their nationality. His delegation had also had some sympathy for the suggestion by some members of the Commission that article 19 should be incorporated in article 18.

52. Referring to article 8, one representative had been of the view that the stipulation in paragraph 2 that a refugee must be a habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim made it difficult to provide refugee protection. Regarding article 8, paragraph 3, the representative had asked whether paragraph 1 of that article was similarly applicable if the injury had taken place in a third State; for example, while the refugee had been in transit.

53. Concerning article 21, one representative had expressed the firm belief that its inclusion would serve the purpose of the draft articles and the existing legal regime on investments.

54. With regard to article 22 concerning diplomatic protection of legal persons other than corporations, one representative had expressed concern that problems might arise in the article’s practical implementation. Legal persons other than corporations varied in both their nature and their functions. In quite a number of cases, they were not recognized by the State in whose territory they performed their activities. Thus, the application of a legal regime that had originally been established for the protection of corporations to different categories of legal persons would give rise to legal problems. The Special Rapporteur had commented on the lack of State practice in that area and had proposed to proceed by analogy or as a matter of progressive development. In that delegation’s view, article 22 was not a simple analogy or a matter of progressive development, but a case of *lex ferenda* and an abstract prediction.

55. As to the topic of reservations to treaties, one representative had welcomed the definition of objections which had been proposed by the Special Rapporteur in his eighth report⁸ and was sufficiently broad-based as to alleviate any uncertainty on the divergent practices among States. He favoured guidelines that encouraged States to give reasons for their objections, as that would encourage transparency and certainty in international relations.

56. Another representative had welcomed the consensus within the Commission not to depart from the relevant provisions of the 1969 and 1986 Vienna Conventions. The Special Rapporteur’s intention to submit draft guidelines

² *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1.

on the reservation dialogue to the Commission at its fifty-sixth session had also been well received.

57. As to objections with “super-maximum” effects, the new wording proposed by the Special Rapporteur for draft guideline 2.6.1 could strike a proper balance between the consent of sovereign States and the integrity of treaties.

58. With regard to the topic of unilateral acts of States, one delegation had supported the Working Group’s recommendations on the methods of work⁹ and had welcomed the Commission’s intention to focus on unilateral acts *stricto sensu* and on State practice. While supporting efforts to prepare guidelines on cases when unilateral acts created legal obligations, another representative had considered that the formulation of legal rules should be deferred until State practice could be fully analysed, including the conduct of States that could lead to legal effects similar to those of unilateral acts.

59. Referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, one representative had been of the view that the conclusions and principles drawn up by the Special Rapporteur in his first report¹⁰ were conducive to further work on the topic, during which, it was to be hoped, the controversial issues involved could be resolved.

60. In connection with responsibility of international organizations, one representative had said that the study of the topic required in-depth research into the practices of international organizations. In addition, the Commission should investigate the relationship between responsibility of international organizations and responsibility of States, two issues which should be independent.

61. Another representative had suggested that the Commission should take fully into account the institutional and legal diversity of international organizations when adapting the articles on State responsibility to the topic. The scope of the topic should perhaps be limited to international organizations and, accordingly, the term “other entities” in draft article 2 would require further clarification.¹¹

62. On the fragmentation of international law, one representative had said that the Commission had been right to not deal with institutional proliferation and to focus the study on three types of conflict: conflict between different understandings of general law, conflict between general law and special laws and conflict between two specialized fields of law. The 1969 Vienna Convention provided an appropriate framework for the study of fragmentation.

63. A number of general observations had been made on the topic of shared natural resources. One representative had given solid support to the Commission’s efforts to formulate a legal definition of “shared” natural resources, emphasizing that such resources should be

managed and exploited in a sustainable manner for the benefit not only of present, but also of future generations. Another representative had highlighted the urgent need for preventive measures to combat the contamination of groundwater resources. Another representative had welcomed the approach taken in the first report by the Special Rapporteur.¹² He had shared the doubts of members of the Commission about the applicability to the topic of the principles contained in the Convention on the Law of the Non-navigational Uses of International Watercourses and had expressed the view that the principles that should guide the Commission were those set out in General Assembly resolution 1803 (XVII) of 14 December 1962 concerning the permanent sovereignty of States over their natural resources.

64. In a resolution adopted at its forty-third session, AALCO had urged member States to communicate to the Commission their response on issues of special interest to it.

65. The member States of AALCO had commended his own initiative in convening a joint AALCO–ILC meeting in conjunction with the AALCO legal advisers’ meeting held in New York in October 2003. They had been pleased with the exchange of views that had taken place on that occasion and had asked for such meetings to continue to be convened in order to enhance cooperation between the two institutions. In addition to its consideration of the work of the Commission, AALCO had had before it at its forty-third session a whole range of other matters, which he listed. At the same session, AALCO had adopted its new statutes, under which its Secretary-General could hold office for two terms of eight years instead of six years. South Africa had become the forty-seventh member State of AALCO, which was striving to extend its membership, including to French-speaking countries of Asia and Africa.

66. In conclusion, he invited the members of the Commission to participate in the forty-fourth session of AALCO, to be held in Kenya in 2005, during which it would consider an item entitled “Report on the work of the International Law Commission at its fifty-sixth session”. He expressed the hope that there would be even closer collaboration between AALCO and the Commission in future.

67. Mr. MOMTAZ thanked the Observer for AALCO for his statement and said that he had greatly appreciated having been invited to participate in the work of the forty-third session of AALCO. On that occasion, he had been impressed by the broad range of issues discussed, some of which had also been discussed by the Commission, and that was why exchanges of views between the two organizations were particularly interesting. He nevertheless regretted the fact that the very useful viewpoints described by the Observer had not been brought to the Commission’s attention before the start of its session, since all of those matters had been discussed during the first part of the session held in May 2004. He hoped that steps would be taken to prevent that problem from occurring again.

³ *Ibid.*, vol. II (Part Two), chap. VII, sect. C, pp. 57–58, paras. 307–308.

⁴ See 2804th meeting, footnote 4.

⁵ See 2800th meeting, footnote 1.

⁶ See 2797th meeting, footnote 4.

68. Mr. Sreenivasa RAO, paying tribute to AALCO, which was about to celebrate its fiftieth anniversary, said that it was unique because it offered a framework for discussion among the States of Africa and Asia, two continents which had undergone the experience of colonialism and were going through similar problems in the area of development.

69. The law was now taking on a growing role in international relations. It would be helpful for AALCO to go back to its original brief, which had been to assist countries of the two continents in arriving at common positions on issues of common interest so as to give them a stronger voice in the development of international law. AALCO, which would soon move into new facilities and should be given a larger budget, could devote more resources to training and theoretical work.

70. He had noted and approved of the intention of the Observer for AALCO to bring in French-speaking countries. In that connection, he stressed the need to develop financing mechanisms to do away with the language barrier so that those countries might participate in the work of AALCO.

71. Mr. YAMADA paid tribute to Mr. Kamil, under whose leadership AALCO had become very active. He was awaiting with interest the meeting to be held between the Commission and AALCO on 5 November 2004 in New York, on the occasion of the meeting of AALCO legal advisers.

72. Noting that the next sessions of AALCO would be held in Kenya in 2005 and in Sudan in 2006, he expressed the hope that countries of French-speaking Africa would participate in their work.

73. Ms. XUE, endorsing the comments made by Mr. Momtaz, said that it was unfortunate that the documents setting out the views of the members of AALCO on the topics studied by the Commission had been received by the Commission only after the relevant items had been discussed. She, too, believed that it would be desirable to give greater emphasis to the meeting of AALCO legal advisers, who generally represented ministers of justice.

74. Since AALCO was the only legal body that brought the most disadvantaged continents together in the area of law, it was important that it should address issues of common interest for the two continents and thereby make a fruitful contribution to international law.

75. Mr. KAMIL (Observer for AALCO), referring to the comments by Mr. Momtaz and Ms. Xue, said that he had proposed that the AALCO session should be organized early enough for its work to be completed in April and the results communicated to the Commission in May, just before the opening of the first part of its session. He had likewise proposed that his organization should spend more time on the study of items of concern to the Commission, some members of which could participate in its session and enrich the discussion.

76. As to the AALCO–ILC meeting referred to by Mr. Yamada, he hoped that it could be organized before the meeting of legal advisers. He had no doubt that the expansion of AALCO activities would enable it to take up additional questions of common interest to Africa and Asia.

77. As to the composition of AALCO and the participation of French-speaking countries, he noted that French interpretation services had been made available to delegations at the sessions held in the Republic of Korea and Indonesia. He hoped that the same would be true in Kenya and that that would encourage French-speaking countries to participate in the work of AALCO.

The meeting rose at 1.05 p.m.

2817th MEETING

Wednesday, 14 July 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

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

Unilateral acts of States (*continued*) (A/CN.4/537, sect. D, A/CN.4/542¹)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. DAOUDI said that, after a good deal of procrastination, the Commission seemed, with the submission of the Special Rapporteur's seventh report (A/CN.4/542), finally to be making some headway. That was attributable to the fact that it contained a complete presentation of State practice, in line with recommendation 4 proposed by the Working Group in 2003.² Noting that it had not been possible to include in the report all the information that had been compiled, he requested that it should be made available to the Commission, since it would prove useful for its future work.

2. Agreement must now be reached on a clear definition of a unilateral act and its distinguishing criteria. If it was agreed that a unilateral act was a source of international law in the same way as treaties and customary law, it could be analysed only as an international legal act formulated by a subject of international law, which of itself gave rise to obligations for its author and rights for its addressees

¹ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

² See 2811th meeting, footnote 2.