Document:-

A/CN.4/SR.2525

Summary record of the 2525th meeting

Topic:

Unilateral acts of States

Extract from the Yearbook of the International Law Commission:-

1998, vol. I

would be consistent with the General Assembly's instructions.

81. Mr. MELESCANU said that he would like to know whether Mr. Simma thought that the principle of *acta sunt servanda* was analogous to that of *pacta sunt servanda*. And did a unilateral declaration create legal effects if it was not accepted by the State to which it was addressed?

82. Mr. SIMMA, responding to the point made by Mr. Goco, said that guidelines on the topic might prove counter-productive by creating a straitjacket for States. The good thing about unilateral acts was that States were free to couch them in whatever terms they pleased, as long as they realized that they might have unwanted consequences. As to Mr. Melescanu's question, the principle of *acta sunt servanda* could not apply, because acts were binding only in the sense that the State making a unilateral statement would be held to it. Treaties, in contrast, were fully binding. A recent work on unilateral acts had in fact come up with at least six theories on the binding nature of such acts.

83. Mr. ECONOMIDES said he was not sure that ICJ was competent to create law, but it was certainly competent to state the law and it had accepted unilateral acts as a source of international rights and obligations. In fact, the discussion in the Commission could not take place unless there was some relevant case law, and it had all the material necessary for studying unilateral acts. On a technical point, he wondered whether Mr. Ferrari Bravo would agree that the law of war no longer existed in the sense that, under the Charter of the United Nations, it had no application except in the case of self-defence.

84. Mr. HERDOCIA SACASA said that the point raised by Mr. Economides about ICJ was illustrated by the *Nuclear Tests* and the *Frontier Dispute* cases, in which the legal existence of unilateral acts and their effects had been clearly established. The Court had ruled, *inter alia*, that only when the State making the declaration intended to be bound by it did that intention confer on the State's position the character of a legal commitment. Therefore, everything depended on the State's intention.

85. As to the relations between unilateral acts and other acts or the existence of sufficient case law on the autonomy of the act itself, the Court had ruled elsewhere that no counterpart was necessary for a declaration to have legal effects and that no subsequent acceptance or other reaction by another State was needed either, because that was incompatible with the strictly unilateral nature of the legal act in which the declaration had been made.

86. It was the Commission's task to develop those existing fundamental texts of international law.

87. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the initial exchange of views had confirmed the complexity of the topic and that the work of the Special Rapporteur was fundamental to the discussion. In his first report he had attempted to systematize a theory of the unilateral acts of States. The exercise was not merely an academic one: the Commission must also take account of the legal realities because unilateral acts did exist in international law. The question was whether such legal declarations created effects unilaterally or whether they entered the realm of treaties.

88. The distinction between sources of international law and sources of international obligations was interesting, because it led to the question of formal declarations dealt with in the report. Any future codification work could not be based on anything other than the formal legal act.

89. Silence or failure to react to a declaration could not itself be regarded as a unilateral act, which was a positive formal act. Just as treaties were the most usual means of providing legal effects in treaty law, in the law of unilateral acts the unilateral act was the most important means of doing so.

90. The existing material on unilateral acts could be codified; a doctrine and case law already existed on the topic, and the formal unilateral act existed in international law as an act creating legal rules. The autonomy of such acts was a very important point, on which ICJ had ruled that unilateral declarations could exist independently of other manifestations of will. The autonomy of the obligation was also important: a State could enter into a commitment without any counterpart or other basis of reciprocity.

91. The Commission would also have to consider further the difficult question of revocation of unilateral acts.

Other business

[Agenda item 11]

92. The CHAIRMAN announced that the Gilberto Amado Memorial Lecture, sponsored every other year by the Brazilian Government, would be given by Ambassador Ramiro Saraiva Guerreiro, former Minister for External Relations of Brazil, on 13 May 1998. The title was "The creation of the International Law Commission and some considerations on supposed new sources of international law".

The meeting rose at 1 p.m.

2525th MEETING

Wednesday, 6 May 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/483, sect. F, A/CN.4/486,[1] A/CN.4/L.558)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA said that the first report on unilateral acts of States (A/CN.4/486), which highlighted the multifaceted and highly elusive nature of the topic, called for three broad comments, the first of which concerned the approach to the topic. Apart from the fact that the first report could have been more concise, its main defect was that it did not contain any reflections on the actual significance of the topic, which would have been extremely helpful in clarifying it. Given the whole range of unilateral acts of States, it was difficult to see how the Special Rapporteur had come to single out declarations and had taken them as symbolic of all such acts. Nor was it particularly easy to see the extent—other than from the pedagogical or symbolic standpoint—of the contrast between legal acts and political acts in paragraphs 44 and 45 of the report—as though the social function of the law were alien to the no less social function of politics. It was not very easy to understand why no parallel had been drawn—as it might with profit have been—between the regime of unilateral acts of States in public internal law and the regime—yet to be developed—of unilateral acts of States in public international law. In both cases, the State was present as a public power, but whereas, in one, the unilateral method of intervention was the rule, in the other, it was the exception. The line of demarcation between a meeting of the minds and a unilateral expression of will should be one of the keys to the special identity of the topic.

2. The second broad comment related to method. In that connection, the Special Rapporteur should try, in future reports, to avoid two pitfalls. First, he should not focus on the period of the current quinquennium, so as not to find himself obliged to forgo a study of State practice—a necessary work of research in any codification. Secondly, the Special Rapporteur should take care not to simplify the topic by eliminating from its scope certain types, such as silence, acquiescence and notification, which could turn out to be essential at a later stage in the work on the topic. From that standpoint, the codification and progressive development of international law formed an indivisible pair.

3. As to the substance of the topic, the question was how the formal criterion of the attribution of the act to the State or States which formulated it, discussed in paragraphs 133 to 135 of the report—and which itself depended on both the external and the internal validity of the act—would serve to define only a "purely" unilateral act—a declaration—and not the other acts, which were, wrongly, marginalized. The limiting nature of that criterion did not stand up to analysis, for what was involved was, on the contrary, a common denominator. The same applied to the criterion derived from the autonomy of the obligation, which could serve only to magnify significantly the variety of situations covered and hence the diversity of the regimes to be elaborated. To take but one example, in the case concerning *United States Diplomatic and Consular Staff in Tehran*, ICJ had inferred a whole series of consequences on the question of refraining from acting which could, in proper form, constitute a special regime governing inaction. From that standpoint, the law of treaties could only enrich the law relating to unilateral acts of States.

4. Whatever the scenario, the regime governing the performance of a unilateral act was closely linked to the initial nature of that act, namely, its validity. And the regime governing enforcement and functioning was linked to the object of the act. Accordingly, a deciding factor as to content and intent in the law relating to unilateral acts of States would correspond to the deciding factor of object and purpose in the law of treaties. Much of the regime governing opposability and public knowledge would turn out to be linked to the scope of the act. The dialectic of obligations and interests and corresponding rights involved time factor considerations which prompted a question as to the repercussions in the law relating to unilateral acts of States. Capacity to act was another consideration to be taken into account. When unilateral acts were directed at the international community as a whole, who would assert the rights of that community as inferred from the position taken by a particular State? Which State had the capacity to act and which organized international community was involved? Bearing all those considerations in mind could only enhance the strength of those minimal rules whose preparation would be most in keeping with the Special Rapporteur's task and would give the topic its true meaning.

5. Mr. SIMMA said he considered that the Special Rapporteur's task depended to a large extent on how the codification of the topic was conceived. The form of draft articles seemed very difficult to envisage, as there would then be numerous definitions and very general, and hence ineffective, substantive rules. At best, one could envisage warnings, as it were, to heads of State and politicians against the possible consequences of unduly explicit intentions. The only realistic form therefore seemed to be an expository study of the topic. For that purpose, it would be necessary first to identify what should be included in, or excluded from, such a study. The vast number of unilateral acts of States in no way precluded their systematization and classification. Thus, three major categories could be identified. The first concerned acts to which international law attributed no special and uniform consequences other than those deriving from the specific situation. Warning shots fired by one vessel against another could, depending on the given situation, fall within the terms of a Security Council resolution or constitute a breach of Article 2, paragraph 4, of the Charter of the United Nations. That first category would certainly not come within the scope of the study, no more than silence would, even if international law did attribute certain consequences to the latter. The second category concerned unilateral acts to which international law itself attributed consequences. It covered, for instance, occupation of *terra nullius*, giving up territory or a *negotiorum gestio*. The case of declarations was not so clear, although a declaration of war undeniably fell into that category. There was, of course, no longer any *terra nullius* and Arti-

[1] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

cle 2, paragraph 4, of the Charter prohibited recourse to war, but acts that came within that second category, which should also be excluded from the scope of the study, still occurred.

6. The third category related to unilateral acts which were deemed by the State from which they emanated to have the legal consequences desired by that State or intended to have such consequences. That category could itself be divided into two subcategories. The first involved unilateral acts which could be termed "dependent", namely, acts whose effects would depend on a corresponding act by one or more other States. One could cite as examples of such acts offer and acceptance in the context of the law of treaties as well as accession, ratification, formulation of reservation and denunciation, and declarations made pursuant to Article 36, paragraph 2, of the Statute of ICJ. The second subcategory related to acts which, to produce their effects, did not require a response in the form of a corresponding act emanating from another State. Such acts did not have to be accepted, but merely received in the sense that they had, obviously, to be brought to the attention of other States. That applied to recognition, protest, renunciation of rights and unilateral promises. It was the acts that fell into that category of autonomous unilateral acts which the Special Rapporteur should study further and which called for certain immediate comments.

7. The first comment was that the question of the binding force, or obligatory nature, of such autonomous acts was different in each case. In the case of recognition, the main question would be whether the act was revocable. In the case of protest, it would be mainly a matter of determining the circumstances in which a State was required to protest in order to avoid certain consequences, for example, to avoid being bound by an emerging rule of international customary law.

8. The most interesting problem, however, concerned the binding force, for the States from which they emanated, of unilateral promises—a term which, in his view, was to be preferred to "unilateral declaration", which was too formal and so capable of encompassing very different acts. Indeed, it had been from a promise by France not to continue nuclear tests that ICJ had inferred certain consequences in the *Nuclear Tests* cases. In what circumstances, therefore, was a unilateral promise binding on the State from which it emanated? There were at least six theories about the matter, which could be placed in two groups: subjective theories and objective theories. According to the former, it was the intention of the State which made the promise that created the obligation, on the basis, it seemed, of the *pollicitatio* of Roman law. In his view, the subjective element, albeit necessary, was not sufficient; an objective element must also be present. The objective theories appeared to rest on the concept of estoppel or on broader notions such as good faith. That had been very clearly explained by Reuter, who had stated that the affirmation (of the binding nature of a unilateral promise) was based on the principle of good faith and more particularly on the obligation to abide by the convictions born of its conduct.[2]

9. One last distinction seemed necessary, for the idea of relying on a promise could be understood in the concrete sense, and the principle was then that a unilateral promise was binding if, in the light of the concrete circumstances, its addressee had relied on it and it was then that the concept of estoppel would come into play; but it could—and in his view must—also be taken in a more abstract sense: a unilateral promise was binding if, in the light of the circumstances, its addressee, or even the community of States, could legitimately rely on it. A first example was that of the negative security guarantees formulated on various occasions by nuclear-weapon States. For instance, in 1978, at the Tenth Special Session of the General Assembly, devoted to disarmament, the Union of Soviet Socialist Republics (USSR) had declared that it would never use nuclear weapons against States that refrained from producing or acquiring such weapons and had none on their territories.[3] Two years later, Austria had declared that it considered that the respective declarations of the Governments of nuclear-weapon States, including the USSR, were binding on the nuclear Powers concerned, under international law.[4] Mr. Brezhnev had reiterated that promise in 1982, but in 1993, the Russian Federation seemed to have distanced itself from it. That example showed that it was preferable for a State that wished to rely on a unilateral promise to have it incorporated into a treaty. That was what had happened in 1990, when in the context of the negotiations that had led to German reunification, the Federal Republic of Germany had unilaterally promised to limit the strength of the federal army to 370,000; a few months later, an obligation to the same effect had been set forth in the "2 + 4" Treaty.[5]

10. In that context, promises that seemed at first sight to be unilateral often turned out to be an element in a negotiation or a bilateral process. The famous Ihlen declaration (see *Legal Status of Eastern Greenland*, pages 69-70), for example, had been made in response to a Danish démarche and had thus been made in a context of reciprocity. Conversely, it was not unusual for unilateral declarations merely to reiterate an obligation entered into previously: the Declaration made by the Government of Egypt on the Suez Canal in 1957[6] could thus be regarded as founded on the Convention respecting the Free Navigation of the Suez Maritime Canal (Constantinople Convention of 1888). He also noted that unilateral acts of States were not a source of law, but they created legal obligations and the principles and rules on the basis of which they created such obligations formed part of the general principles of law or of international customary law.

11. Mr. BROWNLIE referring to the statement by Mr. Simma, said that the members of the Commission owed it to the Special Rapporteur to consider carefully the

[2] P. Reuter, *Droit international public*, 5th ed. (Paris, Presses universitaires de France, 1976) (*collection* "Thémis"), p. 142.

[3] Department for Disarmament Affairs, *The United Nations General Assembly and Disarmament 1984* (United Nations publication, Sales No. E.85.IX.7), annex to chapter VIII, p. 119. See also *Official Records of the General Assembly, Tenth Special Session, Plenary Meetings*, 5th meeting, para. 44.

[4] *Official Records of the General Assembly, Thirty-fifth Session, First Committee*, 40th meeting (A/C.1/35/PV.40), p. 70.

[5] Treaty on the Final Settlement with respect to Germany (Moscow, 12 September 1990), ILM, vol. XXIX, No. 5 (September 1990), pp. 1187 et seq., art. 3, para. 2.

[6] See 2524th meeting, footnote 17.

categories of acts that he defined for the purposes of the study and that it was not enough to propose other categories at the outset. The Special Rapporteur had made a respectable intellectual attempt to find an area already well mapped out by doctrine and jurisprudence and paragraph 57 of his first report was apposite in that regard, as was paragraph 56 on the analogy with the procedure adopted in respect of the law of treaties. He himself accepted the fundamental category identified in those paragraphs, namely, formal unilateral acts of States, although he thought that other institutions should also be studied, beginning with estoppel, which occupied a prominent place in the jurisprudence of international courts.

12. Mr. ELARABY, referring to Mr. Simma's comments on the negative security guarantees formulated by nuclear-weapon States, said that non-nuclear-weapon States were not really satisfied with those guarantees and would have preferred nuclear-weapon States to sign agreements containing similar commitments. With regard to the nuclear-weapon-free zones that had been created, most recently in Africa in 1996,[7] negative security guarantees could be regarded as having legal effects and had been accepted as such.

13. Mr. SIMMA, replying to Mr. Brownlie, denied having rejected the Special Rapporteur's categories at the outset and said it was only with a view to helping the Special Rapporteur that he had proposed some further categories. Estoppel, which was indeed a concept well established in public international law, came into play only after the unilateral act and was not in itself a unilateral act. He also fully endorsed the comments by Mr. Elaraby, which supported his view that it was always preferable to confirm a unilateral promise in the framework of a treaty.

14. Mr. MIKULKA said he thought that, while the categories proposed by Mr. Simma were satisfactory on the theoretical level, the frontier dividing them was not always clearly demarcated and it was necessary to have some idea of what acts could in no circumstances produce legal effects so as to determine *a contrario* what acts did produce legal effects. On the other hand, he agreed with the distinction drawn between dependent acts and autonomous acts, but wondered whether the former really fell within the scope of the study and whether, given that their legal consequences arose from a meeting of wills, they did not in fact constitute agreements in a very rudimentary form.

15. He also agreed with Mr. Simma that there were some unilateral acts to which international law attributed certain specific legal consequences, sometimes in existing instruments such as the 1961 and 1969 Vienna Conventions. It might nevertheless be asked whether it served any useful purpose to list all the acts in question, although one must also avoid going to the other extreme and excluding them from the study at the outset. A critical analysis of what had already been codified, with a view to finding some common features, would facilitate the current study. Lastly, he thought the Commission should also consider the extent to which unilateral acts of bodies or subdivisions of the State were indeed attributable to the State, for, in some fields, such as violations of international obligations, the State was defined much more broadly than in other fields such as the law of treaties.

16. Mr. Sreenivasa RAO, referring to the question of estoppel, said that it was the unilateral act that created a conviction on the basis of which other States would found their conduct and that, in that respect, the institution fell within the scope of the study.

17. Mr. SIMMA said he was surprised that anyone could regard estoppel as a scenario falling within the scope of the Commission's study: it was hard to see how it could constitute a unilateral act, as it resulted from a situation in which State A, reneging on a previous attitude, caused harm to State B. There could be estoppel only if at least two States were involved.

18. Mr. Sreenivasa RAO said that Mr. Simma was concentrating on the consequences of the unilateral act, whereas his own intention had been to speak of the initial act, which had legal consequences from the outset, for it could give rise to a situation of estoppel from the outset. Seen from that standpoint, estoppel came within the scope of the topic.

19. Mr. GALICKI said he congratulated Mr. Simma on his systematizing efforts. The Commission should be grateful to him for those efforts, as it would in any case be obliged to define the various types of unilateral act.

20. As Mr. Mikulka had said, it would be a very delicate operation to distinguish between the first two categories of unilateral act proposed by Mr. Simma. Nor would it be easy to delimit the third category, which was founded on the principle that the author of the act specified the legal consequences he wished to attach to that act. It was the latter category that was at the core of the topic. But the example of a declaration of neutrality would suffice to show the ambiguity of that category, since such a declaration could also belong to the second category, according to the circumstances. The Commission should thus endeavour to define what distinguished the situation in which international law attached certain legal consequences to an act from the situation in which it was the author of the act who intended it to entail certain legal consequences. As the two situations could be superimposed in practice, the distinction between the one and the other category would be all the more difficult to determine.

21. With regard to Mr. Simma's comment that unilateral acts of States were not a distinct source of international law according to the classification applied, but instead created obligations in law, it would be recalled that an obligation in law was not formed in a vacuum and that it only ever existed vis-à-vis a partner, several partners or even *erga omnes*. The partner thereby created acquired to a certain degree the right to act in a certain manner. A situation thus arose in which rights and obligations emerged in the sphere of international law, from which it was concluded that they were international obligations and rights. In his view, that distinction between sources of international law and sources of international obligations should be further developed. The study being

[7] African Nuclear-Weapon-Free-Zone Treaty (Pelindaba Treaty) (Cairo, 11 April 1996) (A/50/426, annex).

undertaken by the Commission provided a timely opportunity to do so.

22. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that Anglo-Saxon jurists tended to see estoppel as a device in the procedure for production of evidence in a trial. The Commission was dealing with the unilateral legal acts of States, so that it must exclude from its analysis attitudes, forms of conduct and activities of States that were not strictly speaking acts, even if they produced legal effects. But estoppel could be invoked with respect to acts, forms of conduct, and so on, having legal effects and, against that background, it was interesting to study it in relation to unilateral acts of States.

23. Mr. HAFNER, referring to the example of negative security guarantees, said that, in evaluating the legal validity of the declaration made by the nuclear Powers, Austria had relied on the decision by ICJ in the *Nuclear Tests* cases. In the light of the criteria used in that decision, it had concluded that the declaration was binding for the States that had made it. The nuclear Powers had been extremely surprised: to hear them tell it, that had not at all been their intention.

24. He saw the problem in the following way: the declaration could be assumed to have had the effect of being binding, in other words, it was for other States, where appropriate, to prove that that assumption was false. In this case, it could be argued that, if the declaration of the nuclear Powers was deemed to be binding for its authors, it was difficult to see why those Powers would have continued to negotiate a denuclearization treaty, an undertaking which showed that they had had no intention of being internationally bound by their declaration. The expression of will, the criterion identified by ICJ, had not been manifest in their case.

25. Mr. BROWNLIE said that he too wondered whether or not estoppel was part of the topic. In his opinion, the Commission must not be overly theoretical. In practice, many international lawyers considered that estoppel was indeed part of the field of unilateral acts of States. It was inconceivable that the Commission should leave aside a legal device of such importance, and for purely doctrinal reasons at that.

26. In addition, the Commission must draw a clear-cut distinction between classical unilateral acts and self-characterizing acts: the Declaration made by the Government of Egypt on the Suez Canal had been deposited with the Secretary-General of the United Nations and had clearly explained the intentions of its authors. In general, however, the unilateral acts of States did not contain a definition of what they were. The specific problem raised by the oral Ihlen declaration, cited in paragraph 88 of the first report, was that it had not been self-characterizing and had been characterized only in the course of contentious proceedings. Many of the examples given by various members of the Commission were similar in nature, referring as they did to acts that were not considered to have effects *ab initio* because they had not been ratified by Parliament, for example, whereas the Constitution provided for that procedure. Such acts did not declare what they were at the time they were committed: their meaning became a relevant consideration only a posteriori. The Commission could therefore not leave them out of its thinking solely on the grounds that their formulation was directly analogous to the conclusion of a treaty or other instrument which stated what it was from the very moment it was concluded.

27. Mr. HERDOCIA SACASA welcomed the attempt at classification made by Mr. Simma, but thought the Special Rapporteur had been basically right in singling out certain acts which were placed by doctrine in the realm of unilateral acts of States, but were in reality based on treaty law. His work had been to uncover the constituent elements of what ICJ had described in many of its decisions as a purely unilateral legal act. In the *Nuclear Tests* cases, it had indicated that that type of act called for no counterpart, not even subsequent acceptance by another State, because—and that was a fundamental consideration—to require a reaction from a State other than the author of the unilateral act would be to go against the strictly unilateral nature of the original act. The Special Rapporteur had tried to remain within those closely circumscribed limits.

28. He nevertheless believed that the Commission should give more detailed consideration to other types of unilateral acts and situations, such as silence, acquiescence and estoppel, to which other members had already referred. It was only after such an analysis that the Commission would have an overall view of its topic.

29. Mr. ECONOMIDES said he thought Mr. Simma was being excessively pessimistic. A treaty act, that is to say, an agreement between States, was a situation that was not entirely easy to arrive at, since it involved the will of two parties. That could be seen very well in the case of the Ihlen declaration, which ICJ had regarded only as a unilateral declaration that had certain legal consequences, although Mr. Simma seemed to believe that it had elements of a treaty.

30. It could be said that the acceptance by Austria of the declaration made by the USSR in 1978 (see paragraph 9 above) was not enough to transform the Soviet Union's act into a treaty act by which it would be internationally bound in respect of Austria. If a State offered its port facilities to its neighbour and that neighbour declared that it accepted that offer, that did not establish a treaty-based international commitment. The first State could easily have concluded an agreement, but precisely because it had not wanted to bind itself at the international level, it had reserved the right to reverse its initial position. A unilateral act was thus an easy, useful step which was frequently resorted to by States that did not wish to enter into commitments at the international level and which could subsequently move in the direction of an agreement or a treaty. That technique in international relations was widely used in State practice and the Commission would be wrong to limit its study to a simple analysis of the doctrine.

31. Mr. ELARABY said he agreed with Mr. Sreenivasa Rao that the more light the Commission could shed on the unilateral acts of States and their consequences, the clearer the case of estoppel would be. That legal device, by which a State expressed its reaction to a unilateral act that had legal effect was clearly part of the topic under consideration. It would be unacceptable, for example, if a

declaration before the Security Council or the General Assembly whose legal consequences were not necessarily foreseen by the author placed the State from which it emanated in a situation of estoppel. For many countries, a simple general policy declaration could not be viewed as having legal effect such that the declaration put them in a situation where estoppel might come into play.

32. Mr. CRAWFORD said he also thought that estoppel must not automatically be excluded from the scope of the Commission's study. It was a device that was widely accepted by international courts. It could be analysed from the standpoint of the circumstances in which a State could not revoke a unilateral act. From that point of view, estoppel was clearly part of the topic under consideration.

33. Mr. PELLET said that he agreed with the view expressed by the Special Rapporteur in paragraphs 59 to 131 of the first report: unilateral acts of States did indeed exist. The doctrine spoke of them. Case law was based on some of them and, above all, States performed them and invoked, or protested against, those of other States. The problem was that States performed unilateral acts without knowing it, since they were not clearly defined and the regime applicable to them was still vague. That was why the topic was of such importance and why the Commission had done well to include it in its agenda.

34. In order to codify the subject matter and, ultimately, engage in the progressive development of the law governing it, the Commission did not have to decide at the outset what final form its conclusions would take, but it was clear that the topic lent itself to the formulation of draft articles and commentaries which must obviously begin with definitions. That was the purpose of the report under consideration and he endorsed the approach adopted by the Special Rapporteur.

35. He did have a question, however, about methodology: were unilateral acts of States to be defined in general or simply for the purposes of the Commission's study? That question must be answered from the outset, since different definitions could be arrived at according to the approach adopted, and it must be established from the very beginning whether there was a generally accepted definition of unilateral acts of States. There was obviously no such definition. As the Special Rapporteur and a number of other members of the Commission had pointed out, unilateral acts of States were not among the sources of international law listed in Article 38 of the Statute of ICJ and no court had ventured to provide a general definition. Even ICJ had referred only to a unilateral "declaration" in the *Nuclear Tests* cases.

36. The work on a definition must start from the fact that there was an act, that is to say, the expression of the will of a subject of law aimed at producing legal effects, or, according to Jacqué's classical definition, "the expression of will which is attributable to one or more subjects of international law and intended to create a norm to which international law attaches the creation of rights and obligations".[8] Those characteristics would distinguish unilateral acts from the other acts which the Special Rapporteur had rightly excluded from the scope of the study, although for reasons that were not entirely convincing.

37. That was the case of what he called "political acts". For a jurist, a political declaration could not be an act because, even if it was international, it was not intended to produce effects in law for the simple reason that its author did not wish it to do so, as the Special Rapporteur explained very well in paragraph 44 of the first report. A political declaration was to unilateral acts what a gentleman's agreement was to treaties: it resembled those acts, because it emanated from a single State, but it did not create rights or obligations within the legal meaning of those two terms. Whether they were unilateral or concerted, however, political declarations had an effect: they could result in estoppel and they could, again like unilateral acts, contribute to the formation of rules of customary law. But they did not directly create subjective rights and were not binding on their authors. In that connection, he disagreed with the Special Rapporteur, who referred to the "obligatoriness" of political acts in paragraphs 43 and 45 of his report. Political acts were, by definition, not binding for anyone, not even for the State that had made the declaration, and that was precisely what made them different from unilateral acts. That did not mean that States took no account of them or even that they did not give them precedence over the law, since the law was not everything: politics, morals and religion played their part, too.

38. Referring solely to the definition given, the views which appeared in paragraphs 48 to 57 and 95 of the report seemed at once too vague and too complicated. It was easier to explain why silence or conduct were not part of the topic: neither was an expression of will meant to have legal effects. The Special Rapporteur was, however, wrong to rule out what he called acts relating to the international responsibility of States. Such acts were not a particular category of unilateral acts: they constituted what the draft on State responsibility[9] referred to as "internationally wrongful acts" and, in the framework of the topic under consideration, raised the essential question whether they were valid or not. But it was not because they entailed the responsibility of a State that they must be excluded. He was also surprised at the importance which the Special Rapporteur and several members of the Commission attached to the question of estoppel, which had nothing to do with the definition of a unilateral act. The real question was whether a unilateral act could give rise to a situation of estoppel and in what conditions. The answer was that it probably could, but that involved the effects of unilateral acts and not their definition, and it would be premature at the current stage to take a position on that point and even more so to eliminate the problem entirely.

39. A second feature of a unilateral act was that it must emanate from a sole subject of law and, as the Special Rapporteur put it, constitute a single expression of will. It should first be pointed out that, as the Special Rapporteur acknowledged, the author of the act might be "composite". He was thinking, for example, of the decisions of

[8] J.-P. Jacqué, *Eléments pour une théorie de l'acte juridique en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1972), p. 181.

[9] See 2520th meeting, footnote 8.

the four allied Powers in Germany, which had often taken a treaty form, but which, from the point of view of the German people, and, later, the two Germanies, had appeared as unilateral acts. It was probably unnecessary to dwell on that phenomenon, but it deserved to be borne in mind. Secondly, it should be noted that some unilateral acts contained bilateral or synallagmatic elements. Those were acts, such as offers, which, by virtue of the fact that they were accepted, took on a different legal value. As Mr. Ferrari Bravo had pointed out (2524th meeting), any acceptance by the party to which an act was addressed might make it impossible for the author of the act to withdraw or amend it. That was also a point to which it would be necessary to return.

40. The fact that a State acted unilaterally was not sufficient to constitute a unilateral legal act from the point of view of international law. Depending on the definition, such an act must also express the intention of creating rights and obligations, and that raised the important question of who those rights and obligations were created for, a point on which the report was not very clear. Yet a basic distinction must be drawn between auto-normative acts, for example, those which created obligations for the party issuing those acts and rights for the party to which they were addressed or, where applicable, for the international community as a whole, as had been the case of the 1957 Declaration made by the Government of Egypt on the Suez Canal in which Egypt had committed itself to respect the freedom of navigation in the Suez Canal, and hetero-normative acts, whose purpose was to create obligations for States or subjects of international law other than the party which had issued such acts. Although touched on occasionally in the report, that basic distinction was not made explicit even though it seemed essential.

41. As far as auto-normative acts were concerned, many technical problems arose with regard to their legal regime, but, as the Special Rapporteur pointed out in paragraphs 152 to 162 of his report, the justification for their binding nature was to be found in the principle of good faith, which supported not only the principle of *pacta sunt servanda* embodied in article 26 of the 1969 Vienna Convention, but also the *acta sunt servanda* rule which the Special Rapporteur had taken from the outline prepared at the forty-eighth session.[10] However, that principle was of no use when the purpose of the unilateral act was to create obligations not for its author, but for other subjects of international law, in most cases other States.

42. Although the principle of the equal sovereignty of States meant that no State, regardless of how powerful, had the general right to impose obligations on other States in the international sphere, there were, in particular cases, unilateral acts of a hetero-normative nature, such as the act by which a State freely set the boundaries of its territorial waters at 12 nautical miles. Although the Special Rapporteur did not deal directly in his report with the question of the justification for the binding nature of that type of act, he outlined a response by asserting that such an act, the principle of which was based on a rule of customary international law concerning the law of the sea, was not purely unilateral or, to use another expression, autonomous, and was therefore outside the scope of the study. That response was not convincing because the rule or justification thus enunciated was not by nature different from the principle of *acta sunt servanda* or *promissio est servanda*; in both cases, there was an *habilitation* ("entitlement"), in the sense which Kelsen had given to that term.[11] Hence, it was possible to formulate a general principle valid for all unilateral acts: they had binding effect provided that and insofar as there was an entitlement rule conferring such effect on them. Contrary to what some had maintained, the question of the justification for the binding nature of unilateral acts was essential and lay at the very heart of the mystery that was international law, which, first and foremost, linked sovereign entities that could, in the international sphere, only exercise jurisdiction, that is to say, powers delimited by law. He greatly hoped that the Commission's future work on the topic would stress that essential and self-evident fact.

43. With regard to which subject should be chosen for the purposes of the future draft articles, he did not think that the Special Rapporteur's idea of confining the study to autonomous unilateral acts of States was wise. The Commission, which wanted to produce a general system of unilateral acts and not a list of special regimes, could leave aside certain unilateral acts, such as ratification or reservations, because they were governed by special rules, but not because of their lack of autonomy. Just as, when it had codified the law of treaties, the Commission had not dwelled on the particular features of the rules characterizing human rights, disarmament or environment treaties but had taken them into consideration, where appropriate, as examples or counter-examples, so it must, in the area of unilateral acts, take note that particular regimes existed, consider whether they could, after all, be of use in identifying general rules and try to explain their distinctiveness.

44. Lastly, he was deeply convinced that the undertaking on which the Commission had embarked was realistic. Although there were undeniable differences between setting the limits of territorial waters, the recognition of a State, notification of the occupation of a territory, a declaration of war or a commercial promise, such differences were no greater than between a bilateral air freight treaty and the Charter of the United Nations or the European Convention on Human Rights. Those differences had not prevented the law of treaties from being codified in a way which everyone agreed was, on the whole, satisfactory. The same exercise was therefore possible for unilateral acts, provided that the Commission considered generally applicable rules, their creation, validity, interpretation and application—what some might call secondary rules—without dwelling on the content of unilateral acts or the particular legal regime characterizing some of those acts.

45. Mr. ADDO said that, as the topic did not lend itself easily to codification, it might be wise for the Commission, as proposed by Mr. Brownlie, to confine itself for the time being to an expository study of the topic before proceeding to a possible restatement of the law in that

[10] *Yearbook . . . 1996*, vol. II (Part Two), p. 141, document A/51/10, annex II, addendum 3.

[11] H. Kelsen, "Théorie du droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1953-III* (Leiden, Sijthoff, 1955), vol. 84, pp. 1-201, in particular, pp. 10-12.

area. The absence of an all-embracing, uniform and precise definition added to the difficulty of the task, since the nature of unilateral acts could be fully grasped only on the basis of the peculiarities displayed by their various types.

46. As to the grounds for the binding force of unilateral acts, it was not until the *Nuclear Tests* cases that ICJ had deduced that effect from good faith, a principle of customary international law. However, that principle concerned only some acts, such as recognition, protest, notification and renunciation, which had become legal institutions of international law in their own right whose legal force was based directly on customary international law. As the declaring State was in a position to create law unilaterally under certain circumstances and on the basis of a valid customary law, it was unquestionable that that type of act could have a considerable impact. Two questions of concern on which the Special Rapporteur should focus was that of whether a unilateral declaration was of an irrevocable nature and that of the status of the representative of a State who was able to commit the State through a unilateral act.

47. Mr. GOCO, stressing the complexity and scope of the topic, as shown by the debate, asked for some indications about the direction the Commission's study would take.

48. Mr. LUKASHUK said that, at first, the Special Rapporteur should confine himself to the topic of purely unilateral acts so as to arrive at a concrete result; otherwise, the task might be impossible.

49. Mr. PAMBOU-TCHIVOUNDA, supported by Mr. THIAM, said that, as the debate had not been concluded, the question of what direction to give to the work was premature.

50. Mr. ECONOMIDES said that there were three currents of opinion in the Commission: that expressed by the Special Rapporteur in favour of restricting consideration to formal and autonomous acts which created rights and obligations at the international level; that which called, in addition, for the consideration of other non-formal or non-autonomous acts which also made it possible to create rights and obligations in international law; and a point of view which he personally supported and which consisted in including formal autonomous acts in the topic and making the decision on the other acts contingent on a more thorough examination of the preliminary study.

51. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that it was important to give some thought to the approach the Commission should adopt. The focus of the report was the attempt to define unilateral acts or, in any case, formal acts as a mechanism for creating norms. It would be unrealistic to claim to produce an exhaustive work of codification, but it was incumbent on the Commission to decide above all whether the instrument, that is the formal declaration, could, regardless of its content, be the subject of special rules which differed from those of the law of treaties.

The meeting rose at 1.10 p.m.

2526th MEETING

Thursday, 7 May 1998, at 10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/483, sect. F, A/CN.4/486,[1] A/CN.4/L.558)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. DUGARD said that it was useful to define the topic at the outset, but definitions were always dangerous, particularly if they were intended to set strict parameters on the discussion. Presumably the definition contained in paragraph 170 of the first report on unilateral acts of States (A/CN.4/486) was not offered as an absolute statement of the law on the subject, for the definition would require modification. He shared the view that estoppel must be included in the study.

2. The doctrine of unilateral acts was based on a handful of judicial decisions, particularly in the *Nuclear Tests* cases in 1974, but hard cases made bad law. At the time, ICJ had wanted to avoid pronouncing on the issue. It had sought an escape route from what was a political case and found it in the principle of unilateral acts. Its decision was currently discussed as if it had been uncontroversial, but at the time it had been likened to the Court's 1966 judgment in the *South West Africa* cases, which had provided an example of judicial avoidance of confrontation with political authority. He could agree with the statement made by Judge ad hoc Sir Garfield Barwick on that occasion to the effect that there was nothing to warrant the conclusion that those making the statements intended to enter into a solemn international obligation and it was more natural to conclude that the statements were statements of policy (see pages 448-449 of his dissenting opinion). That view had been shared at the time by most academic writers.

3. Those considerations pointed to the difficult distinction to be drawn between legal and political acts. The Special Rapporteur had tried to define political acts in paragraph 43 of the first report. However, it was doubtful

[1] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).