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Summary record of the 2693rd meeting

Topic:
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form in which simple interpretative declarations should be communicated. He wondered if, in the context of a guide intended to advise on practice, there should at least be some indication of the desirability for simple interpretative declarations to be formulated in writing.

47. The question of formal confirmation, as referred to in guideline 2.1.2, was not touched on in the context of competence to formulate or communicate a reservation. It might be useful to specify, within the framework of the Drafting Committee, that for formal confirmation it was also necessary to take into account the rules relating to competence and communication.

48. With regard to the doubts about guideline 2.1.4 expressed by Mr. Hafner, Mr. Herdocia Sacasa and other members of the Commission, which he shared, he thought that perhaps the question related more to the effects of reservations than to the subject under consideration. His own substantive objection derived from the fact that a reservation was an integral part of the consent to be bound of the State that formulated it. On that point, the spirit of article 46 of the 1969 Vienna Convention should be taken into account in order to avoid creating a derogation to that article. As Mr. Herdocia Sacasa had said, further consideration should be given to the inclusion of such a draft guideline.

49. Mr. TOMKA, referring to Mr. Candiotti's statement about article 46 of the 1969 Vienna Convention and the breach of internal rules concerning the power to formulate reservations, said that, in principle, reservations were to be made at the moment of signing or of the expression of consent to be bound or, in other words, the moment of ratification or accession. The issue of reservations was thus linked closely to that of expression of consent and to the scope of the obligation that was thereby assumed. The issue should therefore be carefully considered on the basis of the rules concerning the power of constitutional bodies to express the consent of the State to be bound. The only problem in that connection was "late reservations". They had been introduced into practice only in the 1970s, in a specific case when the Legal Counsel of the United Nations had, at the request of a State, indicated the procedure to be followed. In his view, the power to make reservations was linked to the power of the constitutional body to assume an international obligation on behalf of the State.

50. Mr. GALICKI said that he shared the doubts expressed by a number of members of the Commission about guideline 2.1.3. He had doubts as to whether representatives accredited by States to an international organization and heads of permanent missions to international organizations should have the right to formulate a reservation. It must be recalled that, in accordance with article 19 of the 1969 and 1986 Vienna Conventions, a reservation could be formulated "when signing, ratifying, accepting, approving or acceding to a treaty . . .", whereas, under article 7 of the Conventions, the persons mentioned in the draft guideline had the right to represent States for the purpose of "adopting" the text of a treaty. He therefore fully agreed with Mr. Tomka that it should be those bodies that had the competence to formulate reservations to a treaty that had the right to express the consent of the State to be bound by a treaty. He was not in favour of

copying mechanically the articles of the Conventions that dealt with full powers, not, at least, for reservations. Reservations were not included in the text of a convention but were rather included within its context. Since adopting a text and formulating reservations were two different things, those problems should be reconsidered.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission wished to refer guidelines 2.1.1, 2.1.2, 2.1.3, 2.1.3 *bis*, 2.1.4, 2.1.5, 2.1.6, 2.1.7, 2.1.8, 2.4.1, 2.4.1 *bis*, 2.4.2 and 2.4.9 to the Drafting Committee.

It was so agreed.

The meeting rose at 11.40 a.m.

2693rd MEETING

Friday, 20 July 2001, 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/508 and Add.1–4,² A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,³ A/CN.4/L.603 and Corr.1 and 2)

[Agenda item 5]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPOREUR
(*concluded*)

1. Mr. ILLUECA thanked the Special Rapporteur for his extremely valuable sixth report (A/CN.4/518 and

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook . . . 2000*, vol. II (Part Two), para. 662.

² See *Yearbook . . . 2000*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

Add.1–3) and said with reference to guideline 2.4.1 (Formulation of interpretative declarations) that “simple” interpretative declarations, like conditional declarations, should be formulated in writing.

2. As to guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations) he agreed with Mr. Candioti and Mr. Herdocia Sacasa that it should be brought into line with article 46, paragraph 1, of the 1969 Vienna Convention. That article went further than did guideline 2.1.4 by stating that the violation of a provision of internal law must be manifest and must concern a rule of internal law that was of fundamental importance. The need for the violation to be manifest and to concern a fundamentally important rule of internal law should likewise be mentioned in guideline 2.1.3 *bis* (Competence to formulate a reservation at the internal level).

3. Mr. PELLET (Special Rapporteur), summing up the discussion of his sixth report, thanked the members of the Commission who had made interesting and useful remarks on a topic that was admittedly fairly dry and technical. The Chairman had announced (2692nd meeting) that guidelines 2.1.3 *bis* and 2.4.1 *bis* had been referred to the Drafting Committee, but that was not his own understanding: there had been little enthusiasm for them and the Committee would be best advised not to consider them. Many members had said that a draft guideline on competence to formulate a reservation at the internal level served no purpose and merely stated the obvious. He did not agree: it indicated to States that there were no rules at the international level for determining the competent body and procedure for formulating a reservation at the internal level, and that accordingly it was entirely a matter for internal law. Guideline 2.1.3 *bis* was less anodyne than it seemed, but as there was little support for including it in the Guide to Practice, he would not insist on it.

4. Most members seemed to think what was stated in guideline 2.1.1 (Written form) went without saying, but what went without saying often went even better when it was said. Mr. Tomka had asserted (2692nd meeting) that written form was typical of all declarations regarding treaties, but that was both true and false. It was probably true with respect to the law of treaties as embodied in the 1969 Vienna Convention, but the literature was unanimous in finding that verbal agreements were also possible. At the time of signature and prior to formal confirmation, a reservation could certainly be considered to be formulated in a manner other than in writing. Mr. Economides and Mr. Tomka had proposed a shorter version of guideline 2.1.2 (Form of formal confirmation) which he found quite acceptable and which the Drafting Committee could usefully consider.

5. Most members favoured the longer of the two versions proposed for guideline 2.1.3 (Competence to formulate a reservation at the international level), although Mr. Hafner had suggested amendments to the shorter version. He himself thought the guideline should incorporate the greatest amount of detail possible, to help future users of the Guide to Practice. Some members had suggested drafting changes to the longer version, but such changes would be difficult, since the wording was taken from article 7 of the 1969 Vienna Convention. Few members

had addressed the question of whether paragraph 2 (*d*) should be retained or deleted. He thought it could indeed be deleted, and Mr. Tomka had energetically endorsed that point of view. If that were done, however, the Drafting Committee must bear in mind that it would constitute selective transposition to the guidelines of article 7 of the Convention, which contained a provision similar to paragraph 2 (*d*).

6. Mr. Gaja’s comments (2691st meeting) on the terms “competence” and “formulate” in guideline 2.1.3 were extremely interesting, but had not swayed him from his own position. Mr. Gaja had rightly pointed out that the title of the guideline diverged from that of article 7 of the 1969 Vienna Convention in that it used the word “competence”. Even though the word was not used in the Convention, however, the subject was indeed competence. Could one speak of competence to formulate a reservation? He thought one could, in the sense that formulation of a reservation was a preliminary stage in the process that would render the reservation effective. The guideline dealt precisely with that: competence to formulate a reservation. Mr. Gaja objected that it was internal institutions that formulated a reservation, in which case the entire Convention should have used the word “express” instead of “formulate”. At the international level, it was in fact the plenipotentiary who formulated the reservation, in other words, who made an offer to be bound by a treaty as long as a particular article was not applied.

7. Guideline 2.1.4 had attracted the greatest number of comments. Some members had regretted the absence of a reference to competence to object to or accept a reservation, but it was an entirely different matter that would be addressed at the next session. He was beginning to get a little worried, in fact, as it appeared that there would have to be as many draft guidelines on objection to and acceptance of reservations as on formulation thereof. Mr. Gaja had made a provocative comment: that the consequences of a violation of internal rules on the reservation were less important than the consequences of the violation of internal rules on the consent of the State to be bound. The Latin American members of the Commission had supported that view, leading him to wonder if there were precedents from that region of which he was not aware. The problem was not the same for formulation of reservations as for imperfect ratification, however, for the very practical reason that the internal institutions that had the competence to conclude treaties were not identical to those which had the competence to formulate a reservation. A parliament, for example, could have nothing to say in the formulation of reservations, although it was very closely involved in the expression of consent to be bound by a treaty. The notion of substantial, formal, evident violation that was at the root of imperfect ratification was virtually impossible to transpose to the formulation of reservations.

8. He was grateful to Mr. Lukashuk for pointing out problems with the Russian language version of guideline 2.1.5 (Communication of reservations) and encouraged members of the Commission to draw to his attention any additional deficiencies in languages other than French. A number of members had agreed with Mr. Gaja that what was most important for reservations was the date of their communication, not to other States, but to the depositary.

He had grave doubts about the idea of placing the starting point for a very important time period—the one in which a State could react to a reservation by accepting or objecting to it—at the moment of notification of a third party, namely the depositary, which was not necessarily a party to the treaty concerned. It seemed almost shocking, from the standpoint of logic.

9. No clear answer had been given to his question whether the phrase “States . . . entitled to become parties to the treaty” should be clarified, which merely confirmed his inclination not to do so, since it would ultimately entail rewriting the entire law of treaties. Mr. Hafner had asked who would decide whether a State or international organization had become a party to a treaty. It was often international organizations that posed the hardest problem to resolve. In the final analysis, it was the depositary that took the decision, but that was better left unsaid. The commentary should address that issue and the others raised by Mr. Hafner relating to the exclusive or concurrent competence of economic integration organizations and the European Union.

10. Most members had seemed intrigued by the notion of a “deliberative organ” while feeling ill at ease, as he did, with the expression. He had used it because of the precedent in the handling by the Secretary-General of the reservation by India,⁴ mentioned in paragraph 120 of his report. Mr. Hafner, he believed, had proposed speaking of a “treaty organ”. The Drafting Committee should give serious consideration to the question.

11. He thanked Mr. Herdocia Sacasa for a very clear response—in the negative—to his question of whether a reservation must be communicated to the head of the secretariat of the organization concerned. He, too, did not think that it was necessary. Mr. Herdocia Sacasa had gone on to say that the reservation must be communicated to the competent organ, but there he was less inclined to agree. It would raise major difficulties, including whether it was for depositaries to determine which organ was competent.

12. Many members of the Commission had misunderstood his question regarding paragraph 2 of guideline 2.1.5. There was no doubt whatsoever that a reservation to a treaty which was the constituent instrument of an international organization must be communicated to the international organization in question. But must it also be communicated to the States parties or States entitled to become parties to the treaty? The answer was by no means self-evident. One could say that it was sufficient to communicate the reservation to the organization, which must then take charge of notifying the States concerned. He would propose a different approach, implicit in the word “also” in paragraph 2 of guideline 2.1.5: reservations to constituent instruments must be communicated to all States concerned in the normal fashion, as if the instrument concerned was an ordinary treaty, as well as to the organization. That approach might prevent an avalanche of communications that would only delay matters. Mr. Herdocia Sacasa had agreed with him and had pro-

vided useful information on Latin American practice in that regard.

13. With regard to Mr. Economides’s remarks, he saw there a reversion to an old theme, namely that the 1969 and 1986 Vienna Conventions were poorly drafted. He did not agree and, in any case, it would be risky to try to make improvements piecemeal. If necessary, the Guide to Practice could include supplementary provisions, but he hoped that such a course would prove unnecessary and the Commission could continue to use the Conventions as a basis, unsatisfactory though they might be.

14. As to guideline 2.1.6 (Procedure for communication of reservations), most members—especially Mr. Kateka and Mr. Melescanu—mistrusted the provision relating to the use of modern technology, although he would prefer to see what the benefits would be of allowing communications relating to reservations to be made by electronic mail or facsimile. He was also uncertain as to whether the Commission considered facsimile to be equivalent to a communication in writing. He was inclined to think it was.

15. In connection with guideline 2.1.7 (Functions of depositaries), Mr. Gaja had made a very concrete suggestion, even if it was limited in scope, that the Commission should give its imprimatur to the usual practice whereby depositaries refused to accept a reservation that was prohibited under the terms of a treaty. The suggestion, which had been supported by Mr. Hafner and Mr. Herdocia Sacasa, seemed straightforward enough. Mr. Sreenivasa Rao also favoured the idea, provided that the scope was limited to that matter alone. Mr. Melescanu’s suggestion was more difficult, since it involved going against the usual practice of refusing to accept such reservations. If the Drafting Committee could find a specific wording that would incorporate Mr. Gaja’s proposal without opening a Pandora’s box and changing the overall thrust of the guideline, he would be well pleased. As for Mr. Hafner’s suggestion that the phrase “due and proper form” should be defined, he concurred but he considered that such a definition should appear in the commentary, not in a guideline.

16. On guideline 2.1.8 (Effective date of communications relating to reservations), Mr. Lukashuk had a problem that he personally was unable to resolve because it concerned the Russian text. As for Mr. Herdocia Sacasa’s comment about the benefits of the depositary acknowledging receipt of a communication relating to a reservation, he could not agree: the crucial time was when the ultimate addressee received the communication, since that was when any reaction might be observed.

17. Mr. Gaja had drawn attention to a point of difficulty concerning interpretative declarations, suggesting that, when a State formally sent such a declaration to the depositary, the latter must notify the States concerned. That would be effective up to a point, but only if it occurred at the time of the expression of consent to be bound or at the time of the authentication of the text. It was hard to envisage that when a State suddenly decided to make an interpretative declaration—even though it could be made at any time—the depositary had to proceed without further ado and send out more paper. Mr. Gaja’s suggestion,

⁴ See 2690th meeting, para. 56.

which had been supported by several members, including Mr. Economides and Mr. Melescanu, should be referred to the Drafting Committee, but he was afraid that any amendments might lay a further burden on the depositary or encourage the formulation of interpretative declarations. As for Mr. Candioti's question about how the guideline would work, he confessed himself uncertain on that point. It was a complicated subject. In answer to Mr. Tomka's pertinent question about why guideline 2.4.1 was not entitled "Competence to formulate interpretative declarations", in consonance with guideline 2.1.3, he would have to give further thought to the matter. He had taken note of Mr. Illueca's comment, that simple interpretative declarations should be formulated in writing, but it was surely not in conformity with the position so far adopted by the Commission.

18. He was most unwilling to consider any changes to guideline 2.4.2 (Formulation of conditional interpretative declarations). Although conditional interpretative declarations were clearly different from reservations in terms of definition, they operated identically and the same rules should apply to both. It would be a waste of the Commission's time to contemplate new provisions, although changes might be necessary later if it was found that the effects of the two differed substantially. The Drafting Committee would, of course, scrutinize the text, and he would welcome any suggestions for editing changes in versions other than the French.

19. Mr. ECONOMIDES said that the aim of the Guide to Practice was to perform a useful function. It should therefore supply any necessary clarifications or explanations of the 1969 and 1986 Vienna Conventions; otherwise it would leave doubts in the mind of the user. Indeed, if possible without betraying the letter and the spirit of the Conventions, supplementary provisions should be provided. Thus, for example, as the Special Rapporteur himself had pointed out, there were no criteria on how to identify which States were entitled to become party to a treaty. Such uncertainties should be eliminated. The Commission would be failing in its duty if it did not seek solutions to any ambiguities, even though within the framework of the Conventions.

20. Mr. TOMKA, referring to the Special Rapporteur's feeling of a lack of support over the use of facsimile or electronic mail, as referred to in guideline 2.1.6, said that in fact States hardly ever availed themselves of either practice. Full powers electronically mailed to the United Nations were accepted only provisionally and had to be confirmed later in writing. The same applied to the treaty bodies and ICJ. Paragraph 2 of the draft guideline should be amended to read: "Where a communication relating to a reservation to a treaty is made by electronic mail or facsimile, it must be confirmed by regular mail." Diplomatic channels, of course, were another possibility.

21. Mr. HAFNER asked, in connection with guideline 2.1.3, about which he was in any case uncertain, whether it would not be appropriate for the Guide to Practice to contain a provision on the competence to confirm a reservation, for in some cases confirmation was required under the 1969 and 1986 Vienna Conventions.

22. Mr. GAJA said he feared that he had not expressed himself clearly enough in defence of the 1969 Vienna Convention. Guideline 2.1.8 was, he believed, not in conformity with article 78, subparagraph (b), of the Convention. The answer to the problem mentioned by the Special Rapporteur regarding the time limit for objections could be found in article 20, paragraph 5, of the Convention. It was important not to confuse the two issues. If the existing wording of guideline 2.1.8 were retained, there was a risk of derogation from the Convention on a point that was not important enough to merit such a course of action.

Unilateral acts of States (A/CN.4/513, sect. C, A/CN.4/519⁵)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

23. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing his fourth report (A/CN.4/519), drew attention to two questions that, in his view, were fundamental to the work of the Commission. The first was the classification of unilateral acts, for which he had sought first to establish a criterion on how to group the rules governing the operation of the various unilateral acts. The second question discussed in the fourth report, in the context of the rules applicable to all unilateral acts, regardless of their material content, related to interpretation, on which he had tried to clarify whether the rules of the 1969 and 1986 Vienna Conventions should be followed to the letter or whether specific rules applicable to unilateral acts should be established. The report also considered whether the rules on interpretation applied to all acts, regardless of their content.

24. In preparing the report, he had considered a wide range of literature, comments by members of the Commission and by Governments, a certain amount of case law and also some State practice. He stressed the importance of the opinions of Governments, which, after an initial period of scepticism, had largely come to be in favour of the work. That was due to the way the discussions in the Commission had developed and the progress made in harmonizing moderate yet sound criteria, which also confirmed that the topic was ripe for codification and progressive development, as the Commission had decided at its forty-eighth session.⁶ Paragraph 8 of the report, for example, quoted the views of several representatives in the Sixth Committee of the General Assembly, as well as an important statement of doctrine that gave grounds for believing in the possibility of developing international law on unilateral acts.

25. Admittedly, the progress made had been relative, the basic reason being that until substantial agreement was reached on the general part of the draft—the structure, in particular—it would be neither possible nor appropriate to move forward on other fronts. One way forward was to decide what general rules were applicable to all acts,

⁵ See footnote 3 above.

⁶ See *Yearbook . . . 1996*, vol. II (Part Two), annex II, para. 2 (e).

in other words, the rules applicable to the formulation of all such acts, whatever their material content. At its fifty-second session, the Commission had made progress on the definition of unilateral acts, the capacity of the State, of persons authorized to formulate such acts on behalf of the State, as well as subsequent confirmation of an act formulated by a person not authorized to do so. Those draft articles were currently with the Drafting Committee. The Commission had also, at its previous session, discussed a draft article on invalidity, or, more precisely, defects of consent, which had been transmitted to an open-ended working group due to meet the following week.

26. Paragraph 19 of the report stated that he would take up in a preliminary way a study of the causes of invalidity, an issue which was closely related to the conditions of validity, but unfortunately the pace of the work of the Commission had prevented him from including the study in the fourth report, since he had intended to develop the question on the basis of the results of the discussions in the working group. The group could perhaps consider a number of questions, such as whether the regime of invalidity was applicable to all acts, whether the work should be restricted to rules relating to defects of consent or whether, as some had suggested, a provision should be drafted on the conditions of validity. It should also consider whether or not to include other provisions applicable to treaties under the Vienna regime, without necessarily applying those rules unchanged to unilateral acts. Such provisions would include those relating to the validity and continuity of an international act, the obligations imposed by international law regardless of the unilateral act, the divisibility of the act and the loss of the right to claim a cause of invalidity, which were all recognized and applicable under the 1969 and 1986 Vienna Conventions.

27. Before turning to his two main topics, he drew attention to a number of other factors. Paragraph 18 contained some thoughts on an issue that would need further consideration and on which he sought the comments and guidance of the Commission, namely the determination of the moment when the legal effects of a unilateral act came into being. That in turn would lead to determining the moment at which it was opposable or enforceable. It was a fundamental question, particularly when it came to dealing with the revocation, suspension or amendment of the unilateral act: all those procedures could differ, depending on the material unilateral act in question, in accordance with the classification attempted in the report. It was important to distinguish the moment at which the act came into being, producing legal effects while still retaining its unilateral nature, and the moment at which it materialized, thereby taking on a bilateral element though never losing its strictly unilateral nature.

28. States generally pursued their international relations through unilateral acts which were frequently more akin to conduct, attitudes, or even reactions like silence. The study of legal acts had made it possible to identify the kind of unilateral act of interest to the Commission, namely a unilateral act that produced legal effects. A legal act was not simply a process designed to give rise to rights and obligations, but was also an express manifestation of the will to produce legal effects. Although will certainly had to be manifest, it did not necessarily have

to be couched in a declaration, and consequently silence was an implicit manifestation of will.

29. Writers were not unanimously agreed whether silence was a legal act or simply conduct producing legal effects. Some maintained that, without an express declaration, there was no legal act, while others contended that express manifestation was not essential in determining the existence of a legal act. The active and passive conduct of States had been carefully examined by international courts on several occasions, for example in the *Grisbadarna* case or the *Temple of Preah Vihear* case.

30. Silence was of relevance to the material unilateral acts being considered by the Commission. Absence of protest in the form of silence was passive conduct that definitely produced legal effects; the findings of the arbitrator, Max Huber, in the *Island of Palmas* case had confirmed that. Yet while protest, the undertaking of an obligation or recognition might be unspoken, it was difficult to see how waiver and still less a promise could be tacit. As the report pointed out, serious doubts had been raised as to whether silence could be treated as a legal act, let alone as the sort of unilateral legal act which was to be covered in the draft articles. It had to be emphasized that silence was always a reaction and, as such, came within the scope of treaty relations. Moreover, in practice many international disputes brought before courts or tribunals had arisen because neither silence nor active conduct consistently reflected the real or presumed will of a State. Accordingly, it was very difficult to treat silence as a manifestation of the will of a State and, as paragraph 31 noted, that meant that it did not come within the general definition of a legal act contained in the draft articles currently before the Drafting Committee.

31. In paragraphs 33 to 43 of the report he examined interpretative declarations and unilateral acts related to international responsibility. Interpretative declarations were indisputably unilateral acts from a formal standpoint. They were generally linked to a pre-existing text connected with a previous manifestation of will and logically came within the framework of treaty relations. The situation was, however, different in the case of interpretative declarations that went beyond the stipulations of the treaty and became independent acts under which the State could accept international obligations. Similarly, the report examined acts related to the international responsibility of States, and countermeasures in particular, but did not propose any definitive answers. The conclusion reached in paragraph 43 was that, while interpretative declarations that went beyond the terms of a treaty might be among the unilateral acts of interest to the Commission, unilateral acts involving countermeasures had to be placed outside the context of the current topic.

32. The classification and the interpretation of unilateral acts were two questions of fundamental importance. The two draft articles on interpretation that had been proposed at the preceding session would serve as a basis for deliberations by the Commission. The classification of unilateral acts was not just an academic exercise and, as Mr. Economides and Mr. Herdocia Sacasa had suggested, it should take account of the diversity of such acts. One of the criticisms voiced by Governments and members of the Commission was that no distinction had been

drawn between the various material acts. It had further been pointed out that it was impossible to apply the same rules to promise, waiver, recognition and protest which, from a formal standpoint, were all unilateral acts but, in practice, had different legal effects.

33. It had proved impossible to group together the rules applying to the diverse acts and legal writers tended to give the same act different names and even include action like notification, which was not generally considered to be a unilateral act, or declarations, which were the means by which most unilateral acts, regardless of their content, were formulated.

34. If acts were to be classified in groups with specific rules for each group, it would first be necessary to establish a criterion and doctrine would have to be studied to that end. The material criterion had to be discarded, since it was inconclusive. For example, as the report showed, in the *Legal Status of Eastern Greenland* case, the Ihlen Declaration [see pages 69 and 70 of the judgment], which some considered to come within the realm of treaty relations, although for the majority it was a unilateral act as understood by the Commission, could be seen as containing a promise, a waiver or recognition. In some cases, declarations were clear and contained an international promise to follow a particular line of conduct in the future and hence they were obviously a unilateral act.

35. The most appropriate criterion for classification was that of legal effects, according to which acts could be placed into two groups: acts whereby States assumed obligations and acts whereby States reaffirmed their rights or legal claims. The many and various unilateral acts fell into one or other of those categories. That classification made it possible to draw up two separate sets of rules. If the Commission so wished, the general part of the draft containing the rules applicable to all acts and relating to the formulation of the act and the rules for acts whereby States accepted obligations to third parties could be completed at the next session.

36. Paragraphs 101 *et seq.* were about the interpretation of unilateral acts. The first question in that context was whether the rules of the 1969 and 1986 Vienna Conventions were applicable *mutatis mutandis* to unilateral acts. Some Government representatives had thought they were, while others had rightly taken the view that no such transposition was possible, given the obvious differences between a conventional act and a unilateral act which, moreover, justified the formulation of two sets of rules. In short, a conventional act resulted from concerted wills, whereas a unilateral act was the expression of the will of one or more States, in individual, collective or even concerted form, but in the “elaboration” of which third States took no part. In fact, a unilateral act created rules or produced legal effects on subjects other than the author State, whereas a conventional act produced effects among the parties that took part in elaborating it.

37. The second question was whether those rules applied to all unilateral acts irrespective of their content. The answer was that the rules of interpretation on the expression of consent and the will of the State generally applied. A unilateral act whereby a State assumed an obligation or

reaffirmed a right or claim could be interpreted according to the same rules, since interpretation was an operation through which the interpreter endeavoured to determine the will of the State, as expressed in the unilateral act. He wondered whether those rules should be placed in the general part or repeated each time in the section dealing with the particular category of acts.

38. As far as the very complex operation of interpreting unilateral acts was concerned, reference should naturally be made to the 1969 and 1986 Vienna Conventions, but an attempt must be made to adapt them to the specific features of unilateral acts. Paragraphs 114 *et seq.* had explained that articles 31 and 32 of the Conventions referred to the principle of declared will, which took priority when interpreting an act. Nevertheless, in the event of any uncertainty, the context, object and purpose of the treaty would be taken into consideration, together with supplementary agreements and subsequent practices, preparatory work and the circumstances in which the treaty had been concluded. A semantic interpretation of a unilateral act was of course an essential part of the operation and he had demonstrated its importance by a reference to the *Aegean Sea Continental Shelf* case, where ICJ had scrupulously examined even the grammar of a conventional act in order to determine the will of the parties.

39. As for doubts whether declarations accepting the jurisdiction of ICJ formulated under article 36 of its Statute were conventional or unilateral, although formally speaking they were obviously unilateral, the Court had determined that the restrictive criterion had to be applied and that such declarations were material unilateral acts. Like promise, they came within the scope of the current study by the Commission. Paragraphs 118 to 120 mentioned several cases in which the Court had analysed and interpreted a number of unilateral declarations.

40. Paragraph 123 of the report also noted that the rules laid down in the Vienna Conventions had also been applied when interpreting arbitral awards and the *Laguna del Desierto* case pointed out that under international law there were rules which were used “for the interpretation of any legal instrument, whether it be a treaty, a unilateral act, an arbitral award or a resolution of an international organization” [p. 44, para. 72]. The Court had maintained that the rules of interpretation applied in general to legal acts irrespective of whether the parties to the dispute were parties to the 1969 Vienna Convention. The restrictive criterion applied in the interpretation of a unilateral act, because of the way the act was formulated, even if it was unilateral solely from a formal standpoint.

41. All the Vienna rules had to be considered carefully and transposed to unilateral acts where necessary. For example, if a treaty had to be interpreted in good faith, that was equally true of a unilateral act. International case law had constantly upheld that position and paragraph 132 of the report quoted the findings of ICJ in the *Nuclear Tests (Australia v. France)* case in that respect. In the sphere of conventional acts and unilateral acts, interpretation included consideration of the context, since in the *Anglo-Iranian Oil Co.* case and more particularly the *Fisheries Jurisdiction* case the Court had taken the view that intention could be deduced not only from the terms of a

declaration, but also from the context in which it was to be read.

42. In contrast, the Vienna rules on object and purpose could not be transposed to the interpretation of unilateral acts because, in his opinion, they were terms specifically applicable to treaty relations.

43. A further interesting question was whether reference to any preamble or annexes was possible in the context of unilateral acts. Personally, he saw no reason why a unilateral declaration should not be accompanied by a preamble and annexes, which could be clearly identified in written declarations. Broader consideration might also be given to the introductory or preambular sections of successive or simultaneous oral declarations like those made by France and considered by ICJ in the *Nuclear Tests* case. The report also spoke in paragraph 141 of the Declaration on the Suez Canal made by Egypt.⁷ Subsequent conduct could also be a useful guide in interpreting a unilateral legal act, but no mention had been made of subsequent agreements in the draft articles in paragraph 154 of the report, as they were essentially of a treaty nature.

44. Two further aspects reflected in the draft articles were supplementary means of interpretation, in particular preparatory work and the circumstances in which a unilateral declaration was formulated which, as Mr. Pambou-Tchivounda had explained, came into play only at a later stage when the interpreter wished to confirm the results of the interpretation or his efforts to make a determination on the basis of priority elements had led to a result that was uncertain or manifestly absurd or unreasonable. Resort to preparatory work was certainly a difficult task. Could notes, internal memorandums and other forms of internal communication be regarded as preparatory work? In that connection he cited in paragraph 148 an interesting statement by the arbitral tribunal in the *Eritrea/Yemen* case. As for circumstances, paragraph 149 mentioned two decisions of ICJ that had dealt with that subject.

45. In his opinion, any doubt as to whether the rules on interpretation applied to all unilateral acts were dispelled in paragraph 152, which concluded that, irrespective of the material content of an act, those rules always applied. Paragraph 153 went on to explain the reason for the wording of the draft articles contained in paragraph 154. He looked forward to hearing the comments by the members of the Commission on his report.

The meeting rose at 12.45 p.m.

⁷ Declaration (with letter of transmittal to the Secretary-General of the United Nations) on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957), United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299.

2694th MEETING

Tuesday, 24 July 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosestock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (concluded) (A/CN.4/508 and Add.1–4,² A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,³ A/CN.4/L.603 and Corr.1 and 2)

[Agenda item 5]

DRAFT GUIDELINES PROPOSED BY THE
DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft guidelines adopted by the Drafting Committee (A/CN.4/L.603 and Corr.1 and 2), the titles and texts of which read:

2.2.1 Formal confirmation of reservations formulated when signing a treaty

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3]* Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

* The number between square brackets indicates the number of the draft guideline in the report of the Special Rapporteur. Guideline 2.2.2 proposed by the Special Rapporteur was deleted.

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook . . . 2000*, vol. II (Part Two), para. 662.

² See *Yearbook . . . 2000*, vol. II (Part One).

³ Reproduced in *Yearbook . . . 2001*, vol. II (Part One).