Document:-

A/CN.4/SR.2695

Summary record of the 2695th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

64. Mr. PELLET (Special Rapporteur) said that he had remained silent throughout a discussion that he had found shocking. During the adoption of the report of the Drafting Committee, it was perfectly natural for its members to outline the positions they had taken. On the other hand, it was not at all acceptable for the discussion to be reopened after the Commission had unanimously referred a text to the Committee. The draft guidelines had emerged intact from the work of the Committee, but, when they had been referred back to the Commission in plenary, they had been treated much differently than during their initial consideration. To take revenge at the current stage for an earlier failure of minority views showed a lack of fair play.

65. For reasons he had given in detail, he believed that the Commission should exercise caution and not decide once and for all that conditional interpretative declarations came under the legal regime of reservations. It was wrong to affirm, as some members did, that the Commission had not accepted the idea of conditional interpretative declarations. They were the subject of a draft guideline that had been adopted with no objection.

66. It might come as a surprise to the members of the Commission to hear that he entirely agreed with those who thought that the late formulation of reservations was a deplorable practice. He was also not fully convinced that, because the practice existed, it should be accepted. But that position was at variance with the very clearly stated policy of the Secretary-General, to which no country had objected. He would be surprised if, when the Sixth Committee was asked what it thought about guideline 2.3.1, many States would object to the established practice of the Secretary-General.

67. In his report, he stated not that the late formulation of reservations was a practice, but that it was a new procedure, which was in keeping with the law because no one could dispute the fact that the States parties to a multilateral treaty were entitled to derogate from the Vienna definition. That meant that, in some specific cases, States agreed to consider that a reservation could be formulated late, even though that was normally prohibited. The only valid point raised during the discussion was that it was open to question whether the late formulation of reservations should be included in the Guide to Practice. He considered that the Commission should not bury its head in the sand, but should firmly state that the practice should be subject to certain limitations. He disagreed with Mr. Simma about the lack of normative content in guideline 2.3.1. A double negative had been used precisely to show that the practice must not be considered as anything more than an exception and to indicate that the Commission was not at all happy about it.

68. In any event, the draft guidelines were only at the stage of the first reading and a different approach could be adopted at the next stage. It was rather irritating to hear that a position could not be taken until the entire text had been made available because the entire text was never available on first reading, by definition. It was unreasonable to say that the Special Rapporteur, who himself was discovering more about reservations as he went along, should hand over the entire text right away.

69. He thanked the Chairman of the Drafting Committee for his excellent report, which accurately reflected the discussions of the Committee.

70. Mr. SIMMA, noting that the Special Rapporteur had disagreed with his earlier comments, recalled that what he had said about conditional interpretative declarations had simply been that the last word had not yet been spoken, something with which the Special Rapporteur would surely agree.

71. Mr. LUKASHUK said that he could not fail to take up the accusation of the lack of fair play on the part of the critics of some of the draft guidelines. There was no impropriety in the way the Commission had proceeded. During the discussion in the Commission in plenary, some provisions in the draft guidelines had been criticized. The draft guidelines had been referred to the Drafting Committee, which had failed to take account of those criticisms and had returned the draft guidelines to the Commission virtually unchanged. The fact that members who had made critical remarks earlier had repeated them at the current time was in no way an instance of improper procedure.

72. Mr. TOMKA (Chairman of the Drafting Committee) pointed out that the opinions expressed by the members of the Commission during the discussions of the Special Rapporteur's fifth and sixth reports and of the report of the Drafting Committee would be reflected in the report of the Commission to the General Assembly, in accordance with the usual practice.

The meeting rose at 1 p.m.

2695th MEETING

Wednesday, 25 July 2001, at 10 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. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Unilateral acts of States (*continued*)* (A/CN.4/513, sect. C, A/CN.4/519[1])

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. Mr. PELLET said that he would confine his comments to problems of the interpretation of unilateral acts of States. Unfortunately, he was not sure that he had properly understood the object of the developments covered by the Special Rapporteur's observations contained in chapter II of the fourth report (A/CN.4/519). The Special Rapporteur seemed to be sticking stubbornly to a distinction between unilateral acts that were autonomous and those that were not and, surprisingly, excluded the latter from his study. Indeed, at the previous session the Special Rapporteur appeared to have said that the distinction could be set aside. Personally, he had mixed feelings about the proposed classification of unilateral acts. The Special Rapporteur envisaged a dualist differentiation between acts whereby the State undertook obligations and acts whereby the State reaffirmed a right or a legal position or claim. That seemed to him to be rational and intellectually satisfactory, but on condition the study was not limited to autonomous unilateral acts because the second category of acts would then be in danger of being reduced to very little. Also, why should one limit oneself to reaffirmation when it very frequently happened that a State attempted unilaterally to affirm or seek to have a right or legal claim recognized? Those were what were usually called hetero-normative acts, but the category was of little interest if consideration was given only to autonomous acts. When a State affirmed a right it was generally because a fairly precise norm of empowerment existed which authorized it to claim the right unilaterally. Either the draft should limit itself to autonomous acts and therefore also to auto-normative acts or the distinction suggested by the Special Rapporteur in paragraph 98 of his report must be adopted, but that would mean renouncing the exclusion of non-autonomous unilateral acts.

2. As for problems of the interpretation of unilateral acts, he wished to make three observations in order of increasing importance. First, he was rather concerned by the frequent mention of the "authors" rather than the "author" of a unilateral act. It was quite possible for unilateral acts to have multiple authors, but it was a marginal phenomenon and there would be a case for treating them separately. Unilateral acts could have several States as authors but there was a danger of confusion and unnecessary complication when the singular and plural forms were dotted around in the text. The notion of a unilateral act with multiple authors was not easy to define and there was a danger that it would frequently be very difficult to distinguish them from treaties creating non-reciprocal obligations.

3. Secondly, he was rather troubled by the fact that the Special Rapporteur referred, in paragraphs 105, 127 and 136, to the warning of ICJ in the *Fisheries Jurisdiction* case but drew no firm conclusions from it in the proposed draft articles.

4. Thirdly, and most seriously, he was concerned about the entire chapter of the report on interpretation. The Special Rapporteur dealt with two quite distinct aspects. On the one hand, he discussed the question of the determination of the existence of a unilateral act, and on the other hand he referred to interpretation *stricto sensu*. He did not distinguish between the two, and largely amalgamated them. With determination of the nature of unilateral act, it was a matter of determining whether a given instrument met the definition, and in particular whether the author had the intention of being bound by it. Interpretation in the strict sense was about clarifying the meaning of a provision, for example, determining whether articles 31 and 32 of the 1969 Vienna Convention were transposable to unilateral acts. There was a case for clearly introducing that distinction in the draft articles and devoting a specific provision or provisions to the determination of unilateral acts. How was one to determine the fact that a unilateral act met the definition that the author had the intention of producing legal effects? Articles (*a*) and (*b*) concerned the problems of interpretation *stricto sensu* once the determination had been made but there were many examples in the report itself which concerned determination rather than interpretation. The two aspects were so interwoven in the report that it was very difficult to sort them out.

5. As to the draft articles themselves, he did not consider the expression "the terms of the declaration" in article (*a*), paragraph 1, to be particularly useful. In his view, it would be sufficient to refer to "its terms", all the more so because a large number of members had expressed concern in the past at the idea that unilateral acts were necessarily "unilateral declarations". There should also be a paragraph 1 bis that should spell out the principle of restrictive interpretation that applied not only to auto-normative acts but also *a fortiori* to hetero-normative acts if they were included in the draft. As for paragraph 2, he remained unpersuaded, despite the Special Rapporteur's efforts in paragraphs 139 to 141 of the report, that it was legitimate to transpose to unilateral acts the notion of a "preamble". On the other hand, the context must be understood in a broader way in the case of unilateral acts than in the case of treaties. He himself was convinced that in the *Nuclear Tests* cases it was in reality not one declaration by the French authorities that had led ICJ to consider that France was legally committed, but a bundle of declarations. The Special Rapporteur was silent regarding the serious question of the relevance of the notion of a bundle of declarations, which seemed to him to be relevant both for determining the existence of a unilateral act and for its interpretation in the strict sense. In paragraph 3, the words "or States" should be deleted, and one or more provisions should be inserted elsewhere concerning unilateral acts with multiple authors.

6. As for article (*b*), he had serious doubts about the value of speaking of "the preparatory work" in connection with the interpretation of unilateral acts. In the case of treaties it was difficult to judge the exact role of preparatory work in the interpretation and the impossibility of access to some such work often meant that in practice

* Resumed from the 2693rd meeting.

[1] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

it had to be disregarded. That was even more true with regard to unilateral acts, not only because the preparatory work did not always exist, or was not accessible, but also and chiefly because when it was accessible it was unequally accessible. In the case of treaties all the States which took part in their negotiation or adoption had an equal opportunity to have recourse to the preparatory work, but that was not the case with the preparatory work of a unilateral act, which only the author and not the addressee could in general know about. If one insisted on the role of preparatory work, one was introducing an inequality in the event of divergent interpretation between author and addressee. Express mention of it in a draft article concerning the interpretation of unilateral acts was excessive and could lead to flagrant inequalities between interested States. It would be best to speak only of circumstances in which the act had been formulated, even if that meant stating in the commentary that preparatory work could be taken into consideration.

7. Lastly, he continued to regard the topic as important and interesting, and since the Drafting Committee had not yet considered any of the draft articles there was still time for the Special Rapporteur to present a consolidated draft at the next session in the light of discussions held in the Commission in plenary and in the open-ended working group.

8. Mr. GOCO, congratulating the Special Rapporteur on a thoroughly researched, impressively logical and imaginative fourth report, said that he could not but sympathize with him about the difficulties he had been encountering in developing such a complex topic. Since the first report[2] it had been clear that the process of identifying and harnessing the various acts of States and bringing them within the confines of the present study was a great challenge. Several Governments had in fact expressed doubts as to whether rules could be adopted that would be generally applicable to them. While there was recognition of the important role unilateral acts played in international relations, the objective of crafting rules to regulate them was no easy undertaking. At the beginning of the study the Commission had had difficulty in distinguishing what constituted political acts and what constituted legal acts: what was political and what was legal escaped clear delineation.

9. Certainly there were rulings that were pertinent to the subject of unilateral acts, but they were not cut and dried rulings and offered no useful guide. What was evident in all those rulings was the intention of the States concerned, although, as the Special Rapporteur pointed out in his report, it was difficult to ascertain true intention. Determination of intention and the structure of that intention involved careful scrutiny of all the facts of a case. That was apparent from the *Nuclear Tests* cases.

10. The fourth report was a vast improvement on its predecessors in terms of presentation, coherence and understanding. He welcomed the proposed draft articles and regarded the suggested rule of interpretation as cogent and valid for it highlighted the need for observance of good faith.

[2] *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/486.

11. Mr. GAJA congratulated the Special Rapporteur on his efforts to work out the classification of unilateral acts and to establish general rules on their interpretation. One might not always agree with his conclusions, but his analysis was helpful and interesting.

12. If one wished to state, with regard to unilateral acts, a rule analogous to the basic rule established for treaties by article 31, paragraph 1, of the 1969 Vienna Convention, one would have to say that an act should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the act in that context and in the light of its object and purpose. That rule could be expressed irrespective of the role to be played by intention.

13. In paragraphs 131 and 137 of the report, the Special Rapporteur revealed mixed feelings about the object and purpose criterion, first approving, then disapproving of it, and ultimately not including it in article (*a*). That criterion was admittedly an elusive one that had a slightly subjective flavour when applied to treaties, and even more so when applied to unilateral acts. If, for unilateral acts, some role was to be attributed to intention that went beyond the role of intention for treaties, a reference to object and purpose should not be omitted. He himself could not see any decisive reason for such an omission. As Mr. Pellet had recalled, a State's intention when engaging in a unilateral act was relevant in two situations: in determining the existence of a unilateral act, a question that had been central to the *Nuclear Tests* cases, and in determining how the act was to be interpreted, although ICJ had not always made a clear distinction between the two questions.

14. In the *Fisheries Jurisdiction* case, ICJ had held that "due regard" should be given to intention for the purposes of interpretation of a unilateral act, but that was not the same as saying that a unilateral act should be interpreted in the light of intention, as the Special Rapporteur proposed to do in article (*a*), paragraph 1. The draft article was somewhat contradictory in that it posed intention as a primary criterion yet placed among the supplementary means of interpretation the main ways in which intention could be ascertained, namely, preparatory work and the circumstances at the time of the act's formulation. He would hesitate to give paramount importance to intention and agreed with the Court that, while due regard should be given to it, unilateral acts did not have to be interpreted in the light of intention. The intention of an author was difficult to deduce from objective elements. In the event of a dispute, a State was likely to give selective evidence of what its intention had been. States other than the author of the unilateral act were entitled to rely on the act in many situations, for instance, in order to carry out a certain action for which consent was required. It was therefore necessary to reconcile the importance to be given to intention with the need to protect other States.

15. The circumstances in which the act had been carried out had been given great weight in the interpretation by ICJ of the Canadian declaration of acceptance of the Court's jurisdiction in the *Fisheries Jurisdiction* case. When referring to the circumstances, the Court had quoted Canadian ministerial statements, parliamentary debates, legislative proposals and press communiqués. Some of those could be qualified as preparatory work

more than as circumstances, however, and it would be extremely difficult for a State to consult all those sources to find out how a unilateral act should be interpreted. The Court had also made reference to all the factual circumstances in which the act had occurred in its determination of the existence of a unilateral act in the *Frontier Dispute* case between Burkina Faso and Mali.

16. A more direct way of establishing intention would be to resort to preparatory work. With treaties, preparatory work generally involved all the negotiating States, while some protection of non-negotiating States had been elaborated in the case law. Preparatory work for unilateral acts mainly consisted of unilateral materials of which only the author of the act could have knowledge. When other States were entitled to rely on unilateral acts, it would seem logical to limit the relevance of preparatory work to materials that were reasonably accessible to the other States, as Mr. Pellet had suggested.

17. To sum up, he would prefer to consider the circumstances in which the act had occurred as elements to be taken into account when applying the basic rule corresponding to article 31, paragraph 1, of the 1969 Vienna Convention. Preparatory work could likewise be taken into account, with the proviso that they were reasonably accessible to the States entitled to rely on the act.

18. Mr. MOMTAZ congratulated the Special Rapporteur on the impressive work he had done to highlight the role of doctrine and judicial decisions, including those of ICJ, in the classification of unilateral acts.

19. He wished to address three issues raised by the Special Rapporteur in his report: the scope of the definition of unilateral acts, their classification and their interpretation. In paragraph 38, the Special Rapporteur stated that unilateral acts should be those expressly formulated with the specific intention of producing legal effects in a non-dependent manner on the international plane. He was thus proposing two criteria that should be applied in a cumulative or simultaneous manner, namely that the author of the act should have the intention of producing legal effects and that the act should take place independently of any treaty relations. The second criterion raised a number of difficulties.

20. The Special Rapporteur stated in paragraph 42 that unilateral acts whereby a State applied countermeasures must be placed outside the context of treaty relations. Personally, he could not see why countermeasures, which were considered unilateral acts in the context of treaty relations, should not be so considered if they were adopted in response to a breach of a rule of customary international law. Did the Special Rapporteur intend not to consider countermeasures in the context of unilateral acts? The same question could be raised with regard to interpretative declarations: should those adopted prior to the entry into force of the treaty or convention to which the unilateral act was a response be considered unilateral acts? As for declarations in which States undertook commitments that went beyond those provided for in a treaty, he agreed with the Special Rapporteur that they must be included because they were independent.

21. As to the classification of unilateral acts, on the basis of a detailed analysis of the literature the Special Rapporteur had concluded that none of the definitions proposed so far were adequate. He wondered, however, to what extent the authors in question had truly wished to provide examples to fit into the categories they had defined: most of the classifications mentioned in the report were unsupported by examples. It was likewise unclear whether additional authors had supported the classifications reviewed in the report. In the final analysis, unilateral acts appeared to be generally unamenable to classification. Did that mean any attempt at classification should be abandoned? He was inclined to think so, but bowed to the tenacity of the Special Rapporteur, especially in view of the very appropriate proposal in paragraph 97 of his report and the fact that classification could facilitate compilation of the applicable rules.

22. The proposal was to classify unilateral acts according to their legal effects either as acts whereby the State undertook obligations or acts whereby the State reaffirmed a right. He could support that proposal, except that in some cases unilateral acts did not lend themselves to such a distinction. A declaration of neutrality was considered by the Special Rapporteur to be a unilateral act *par excellence*, but in those made in recent years, the authors had assumed obligations while also reaffirming rights under international humanitarian law. Similarly, a declaration of war could not always be placed in only one of the two categories proposed by the Special Rapporteur.

23. In regard to interpretation, he wished to emphasize the distinction drawn in paragraph 114 of the report between the declared will and the true will of the State. The Special Rapporteur explained that the 1969 and 1986 Vienna Conventions, judicial decisions and the literature all militated in favour of the criterion of declared will. Personally, he thought that the true will of the author should be the decisive factor in interpreting unilateral acts. States often undertook commitments by adopting unilateral acts under pressure by other States or international public opinion. The circumstances in which the unilateral act was adopted therefore played an extremely important role. In many cases, the contents of the unilateral act did not correspond to the State's true will, since it was adopted under strong pressure and committed the State in a manner that went beyond what it might really consider necessary. The preparatory work could, of course, shed light on the subject, but unfortunately it was often very difficult to gain access to it, especially when a State had adopted a unilateral act for political reasons. There was thus a dichotomy between the true will and the declared will of the State which would make it difficult to transpose to unilateral acts the rules in the Conventions concerning reliance on preparatory work.

24. Mr. KAMTO asked how a distinction was to be drawn between a State's declared will and its true will if access to the preparatory work was so difficult. It was normally through the preparatory work that a State's intentions were determined and, when pressure by other States induced the State to express only its declared will, as in the example suggested by Mr. Momtaz, that will alone was accessible to those to whom the unilateral act was addressed.

25. Mr. MOMTAZ said he shared those concerns about how the true will of the author of a unilateral act could be discovered and interpreted when the preparatory work was inaccessible. The circumstances surrounding the act remained the sole means of discovering the author's true will. That was precisely why he thought a restrictive interpretation should be given to the unilateral act, as there was a dichotomy between the State's true will and its declared will in terms of the legal commitment undertaken.

26. Mr. SIMMA said he strongly endorsed the comments by Mr. Momtaz. Comparison of the true will of the State with its declared will was far more important for unilateral acts than for international treaties, and the preparatory work alone would not suffice for that purpose. The whole context must be taken into account; for instance, what degree of pressure had been exercised on a State to induce it to make a unilateral statement or promise? The circumstances of the formulation of the act was a much broader notion than the preparatory work and that was really what had to be taken into account.

27. Mr. ELARABY said that Mr. Momtaz's statement had been thought-provoking, but his own feeling was that the declared will of the State must be used for the interpretation of unilateral acts, for it was to the declared will that other States would react. There was a difference with treaty interpretation, where the preparatory work was available for consideration. Any unilateral act was the product of a set of circumstances, and those circumstances were more relevant to the interpretation of unilateral acts than was the preparatory work.

28. Mr. HERDOCIA SACASA congratulated the Special Rapporteur on the wealth of documentation mentioned in his report. With so many authors cited, including members of the Commission, one would have hoped to see common denominators, but unfortunately that was not the case, and it demonstrated the complexity of the topic.

29. In response to the Special Rapporteur's inquiries about the structure to be adopted for the draft articles, he recalled that, in the Sixth Committee of the General Assembly at its fifty-fourth session, he himself had advocated using as a basis general rules applicable to all unilateral acts and specific rules based on the features and legal effects of unilateral acts. The classification of unilateral acts was also a challenge. As Mr. Pellet pointed out in his published work, the spectacular growth of such acts was linked to the proliferation of subjects of international law. Major progress had been made, however, with the application of a distinction between form and content, substance and instrument, notification and written procedure, which, as Combacau pointed out, could have any type of content.[3]

30. What criteria should be the basis for the classification of unilateral acts? After reviewing the literature, the Special Rapporteur concluded that the basis should be the legal effects of the act. There was certainly much justification for such a classification, which reverted to the very definition of the unilateral act as being formulated with the intention of producing legal effects, which themselves varied. The Special Rapporteur proposed two types of legal effects, acts whereby the State undertook obligations and acts whereby the State reaffirmed a right or a legal position or claim. It was not only promises that established duties: other unilateral acts, with the exception of protests, did so also. The structure proposed at the current time had been built up patiently on land that remained largely uncharted, even though some ground had been developed and some tracks laid down.

31. The Special Rapporteur also asked the question "When did the legal act come into being?" In the *Nuclear Tests (Australia* v. *France)* case, in relation to unilateral acts, ICJ had indicated that "nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act [by which the pronouncement by the State was made]" [p. 267, para. 43]. It had further indicated that "to have legal effect, there was no need for [these statements] to be addressed to a particular State, nor was acceptance by any other State required" [p. 269, para. 50]. Everything thus seemed to confirm what the Special Rapporteur said in paragraph 112 of his report, namely that a unilateral act produced effects at the time when it was formulated.

32. The definition in article 1 at the previous session spoke of a unilateral act as being known to a State or international organization. Such knowledge could be other than immediate, however, which raised an interesting issue that could be examined by the Special Rapporteur. One possible answer was given in paragraph 112 by the assertion that the act was opposable to the author State and enforceable by the addressee State. At all events it seemed correct to say that the bilateral nature of the relationship did not affect the unilateral character of the act. The time when the act began was thus of great importance with regard to the revocation, modification or revision of a unilateral act and might form the basis of new provisions.

33. Another complex problem was the interpretation of unilateral acts in relation to the 1969 Vienna Convention. In the *Fisheries Jurisdiction* case, ICJ referred to "a declaration of acceptance of the compulsory jurisdiction of the Court" as "a unilateral act of State sovereignty" [p. 453, para. 46]. That statement recalled Mr. Pellet's question of whether only those unilateral acts characterized as autonomous, strictly unilateral or acts derived from a conventional source should be covered by the topic. The Court had accorded acts derived from a conventional source such as its Statute full and distinct validity in comparison with the regime applicable under the Convention by stating in its judgment that "The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties" and that "the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction" [ibid.]. That seemed to justify the Special Rapporteur's desire expressed in paragraph

[3] J. Combacau and S. Sur, *Droit international public* (Paris, Montchrestien, 1993), p. 94.

108 of the report to determine whether the Vienna rules could be transposed to the interpretation of unilateral acts based on a flexible parallel approach, whether they were applicable *mutatis mutandis* or could be taken as a valid reference for elaborating rules in that area, as stated in paragraph 102.

34. In the *Nuclear Tests (Australia* v. *France)* case, ICJ had attributed an intrinsic value to intention by stating that "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound . . . is binding" [p. 267, para. 43]. As the Government of Austria had pointed out in its reply to the questionnaire on unilateral acts of States,[4] the Court attaches much higher interpretative significance to the subjective element than would be permissible under the rules of "objective" treaty interpretation.

35. In the *Temple of Preah Vihear* case, ICJ had stated that the only relevant question was whether the wording of a given declaration clearly revealed an intention. Another important rule of interpretation, which arose out of the *Nuclear Tests* cases, was that when States made declarations that limited their future freedom of action, a restrictive interpretation was required. Mr. Pellet had made much the same point. In the *"Lotus"* case, PCIJ had stated that "restrictions upon the independence of States cannot be presumed" [p. 18]; and in 1995, after the resumption of underground nuclear tests on Mururoa, the Court had repeated its decision, in the *Nuclear Tests (New Zealand* v. *France)* case, in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case*, concluding that New Zealand had no basis for invoking a violation of the commitment made by France, since the new tests had not taken place above ground. Thus, although a State was bound by its unilateral declaration, there could be no presumption of restrictions on its freedom of action. It was important to establish a text reflecting that approach.

36. He welcomed the fact that the proposed draft articles on interpretation paid due attention to intention, thus reflecting the recent developments in international law. The element of good faith was also fundamental, as ICJ had indicated when it had said, in the *Nuclear Tests (New Zealand* v. *France)* case, that the binding nature of an international commitment assumed by a unilateral declaration was based on good faith. On the other hand, as Mr. Elaraby and Mr. Momtaz had said, the "circumstances" factor was not simply supplementary. In the *Free Zones of Upper Savoy and the District of Gex* case, the Court had stated that, given the circumstances in which the declaration had been made, it was binding on Switzerland. Whether a declaration was made in the course of negotiations or not had considerable relevance in the *Nuclear Tests* and the *Minquiers and Ecrehos* cases. Article (*a*), paragraph 2, would, however, be clarified by adding the words "if any" after the word "annexes". He also commended the suggestion of taking into account any subsequent practice followed in the application of the act. The relevance of that was pointed up by the case concerning *Military and Paramilitary Activities in and against Nicaragua*, in which the Court had stated that, as Mr. Brownlie had said, Nicaragua's constant acquiescence in various public statements, showed that it was bound by its 1929 declaration of acceptance of the Court's jurisdiction.

37. With regard to context, in the *Fisheries Jurisdiction* case ICJ had said that the intention of a State could be concluded not only from the text of the relevant clause but also from the context in which the clause might be read.

38. He could not agree with the omission of the phrase "in light of the object and purpose", appearing in article 31, paragraph 1, of the 1969 and 1986 Vienna Conventions. On that point, he agreed with Mr. Gaja. The ruling just quoted stated that the intention of a State could be concluded from the purpose that was to be served. In the *Nuclear Tests* cases, reference was made to the specific object of the obligation assumed by France. Although the reference to preparatory work did not seem appropriate, in the *Fisheries Jurisdiction* case ICJ had stated that the State's intention could be concluded from an examination of the evidence relating to the circumstances of its preparations, referring in particular to diplomatic exchanges, public statements and other relevant evidence.

39. With regard to countermeasures, the Special Rapporteur had raised the question of whether they could be conventional acts or whether they constituted unilateral acts subject to a specific regime. The Special Rapporteur cited the case of Law No. 325[5] adopted by Nicaragua in response to the ratification of the Maritime Delimitation Treaty between Colombia and Honduras, of 2 August 1986. Nicaragua had requested the Central American Court of Justice to declare that the treaty violated the obligation to safeguard the patrimonial interests of Central America under the Framework Treaty on Democratic Security in Central America. The Court had ruled that the ratification procedure should be suspended. In that case Nicaragua had applied a countermeasure. As for the statement, in paragraph 42 of the report, that countermeasures should be excluded from the scope of the study of unilateral acts, he would point out that in the *Fisheries Jurisdiction* case ICJ had ruled that a unilateral act could be far more than simply an autonomous act and was thus the expression of the right not to be injured by an unlawful act and to require its cessation.

40. Mr. SIMMA said that, while he was deeply impressed by the Special Rapporteur's heroic efforts to cope with a subject which was surely unfit for codification, he was sometimes left with the impression that the Special Rapporteur was tilting at windmills. The Commission had had considerable difficulty in reaching the necessary degree of agreement on what the subject matter of the topic should be and what the research should concentrate on. If the same highly theoretical issues were taken up

[4] *Yearbook . . . 2000*, vol. II (Part One), document A/CN.4/511.

[5] See *La Gaceta* (official journal of the Republic of Nicaragua), No. 237, 13 December 1999.

time and again, the relative and fragile clarity achieved might be lost.

41. Among the issues that had no place in the report were interpretative declarations and countermeasures. It was understandable, in view of the lengthy debates on those topics at the fifty-second session of the Commission that the Special Rapporteur should have seen some relevance to his own topic but any such apparent relevance was misleading. In that context, he had found it difficult to understand the sense of the long last sentence of paragraph 39 of the report. As for the action taken by Nicaragua *vis-à-vis* Colombia and Honduras, he agreed with Mr. Herdocia Sacasa that it was more in the nature of a countermeasure than a unilateral act. In that regard, the jurisprudence of the Central American Court of Justice, as indicated in the footnote to paragraph 41, was most interesting and he requested a detailed reference to the judgement quoted.

42. As to the question of classification of unilateral legal acts, he doubted whether the distinction drawn in paragraph 97 of the report was as clear-cut as suggested. States often wanted to do more than merely reaffirm a right, as Mr. Pellet had said. In many cases, they wanted to establish rights. Mr. Momtaz had rightly pointed out that it was important to distinguish between different types of unilateral legal acts. When the Government of Austria had made its declaration of neutrality,[6] it had wished to establish not only obligations but also the rights that accrued to a permanently neutral State under international law. The distinction offered by the Special Rapporteur was not helpful. When he came across words like "hetero-normative" or "auto-normative", he felt all the more need for a simpler, more pragmatic approach. Unilateral promises, waivers, protest, recognition and the like were obviously central to the topic, but the distinction made in the report simply led to a reduction in its scope.

43. With regard to chapter II, the word "interpretation" was used in two ways, both as signifying the methodology of inquiring into whether a given act was unilateral and only secondarily in its usual sense. The Special Rapporteur had, however, come up with an extraordinarily impressive range of case law on the topic. It was surprising how many judicial pronouncements there had been on unilateral acts. Nonetheless, the assertion in paragraph 129 that the rules of interpretation on unilateral acts must be based on the consolidated rules laid down in the 1969 and 1986 Vienna Conventions went too far. There was no reason why article 31 of the Conventions should not be used as a starting point, but, on the other hand, its provisions were almost too general to be of use.

44. The Special Rapporteur had drawn attention, albeit in varying degrees, to the features of the interpretation of unilateral acts. First, they must be strictly interpreted, with no presumption of any limitations on freedom, an approach that was confirmed by the jurisprudence. If that maxim were not accepted, the unfortunate consequence would be that diplomats would need to be muzzled. Secondly, the subjective element assumed greater significance. The interpretation of international treaties, like the best literary works, took on a life of its own, transcending the author's intent, and therefore objective interpretation carried great weight. The objective approach must nonetheless be used with great caution in the case of unilateral acts. As other members had observed, there should be greater emphasis on the true will of the State concerned, not just what was disclosed. In that respect, it was unnecessary to devote a separate provision to preambles and annexes, as article (*a*), paragraph 2, sought to do. Very few unilateral acts were so comprehensive that even their preambles and annexes were significant. Thirdly, unlike Mr. Elaraby, he considered that extraneous elements had particular significance in the formulation of a unilateral act; they might even be more important than the actual terms of the act. The practical difficulty of locating *travaux préparatoires* and other sources did not justify the low priority given to extraneous elements in article (*b*). Hence there should be some reshuffling in articles (*a*) and (*b*). As Mr. Gaja had said, supplementary means of interpretation and, perhaps, some other elements should be included in the basic rule on interpretation.

45. The topic, although simple in some respects, led to the interesting question of the relationship between the pragmatic and the semantic levels of language, as linguists said, or between the textual and the contextual approach to interpretation, as the lawyers had it. The Commission would need to balance carefully the various considerations of good faith as against the subjective or contextual element that played such a prominent role in the interpretation of unilateral acts.

46. Mr. AL-BAHARNA said that, although the Special Rapporteur stated that the fourth report would take up various issues, giving due weight to the comments made by members of the Commission and by the delegations of States in the Sixth Committee, it lacked clarity and organization in respect of the issues on which common or general rules might be formulated. For example, the Special Rapporteur proposed to undertake the classification of unilateral acts, yet that principle had already been recommended by the Working Group,[7] approved by the Commission in the report on the work of its fifty-second session[8] and supported by the majority of States in the Sixth Committee. In paragraphs 97 and 98, the Special Rapporteur set out the basis on which he had determined that there were two major categories and the form the draft articles would take, adding in paragraph 99 that he would begin by concentrating on the first part, which would relate to acts whereby the State undertook obligations. However, it was disappointing that, even at the present late stage of the topic, chapter I of the report dealt only with the principle of classification and the extent to which general rules of international law were applicable to unilateral acts, without proposing any draft articles to embody that principle. Instead, the Special Rapporteur dashed the hopes raised by chapter I and moved on to the unrelated issue of the interpretation of unilateral acts, culminating in proposed articles (*a*) and (*b*).

47. In paragraph 48 of the report, the Special Rapporteur commented on the impossibility of establishing rules

[6] See Federal Constitutional Law of 26 October 1955 on the Neutrality of Austria.

[7] See *Yearbook . . . 2000*, vol. II (Part Two), para. 621.

[8] *Ibid*., para. 622.

common to all material unilateral acts. In fact, however, his analysis and conclusions in chapter I were such as to suggest, on the contrary, that it was indeed possible to establish rules applicable to all unilateral acts or, at least, to a specific category of such acts. Drawing on doctrine, State practice and international case law, the Special Rapporteur examined various groups of unilateral acts, before stating, in paragraph 78, that other manifestations of will could produce legal effects but were outside the scope of the current study. They included such topics as silence, acquiescence, estoppel and declarations made in connection with the acceptance of the optional clause under Article 36 of the Statute of ICJ, when made within the context of treaty law. The unilateral act of reservation might also be added to that category. He could not, however, share the view expressed in paragraph 71 that it was impossible to draw up a restrictive list of unilateral acts from a material point of view and that the grouping of rules was thereby complicated; he would revert to the matter later. Indeed, to the "classic" acts, the Special Rapporteur added what appeared to be a third group, comprising unilateral declarations of neutrality and of war and negative security guarantees in the context of nuclear disarmament. The Special Rapporteur's difficulties in classifying the various categories were understandable, but he could have been expected to find a way through and to put forward draft articles along the lines suggested in paragraph 98 of the report. The time had been ripe for such draft articles, following the comprehensive analysis carried out. Yet the Special Rapporteur confined himself to a mere recommendation for future work on the issue.

48. The reply to the questionnaire on unilateral acts of States by the Government of Italy,[9] contained in paragraph 63 of the report, would be extremely valuable for the Special Rapporteur's further consideration of the topic. The Governments of El Salvador and Georgia, quoted in paragraph 65, listed a number of different unilateral acts as the ones they considered the most important. Indeed, examples were not lacking throughout the report.

49. The Special Rapporteur had before him abundant material relating to the various forms and categories of unilateral acts, which could be classified and properly formulated in draft articles. He thus disagreed with the Special Rapporteur's conclusion in paragraph 71 of the report that the diversity referred to earlier made it impossible to draw up a restrictive list of unilateral acts. In his view, that task was feasible. To take the example of a declaration, there were many different types of declarations, whether relating to a unilateral promise, within the context of the *Nuclear Tests* cases, or of the optional clause under Article 36 of the Statute of ICJ. Those various declarations, as revealed in State practice or in international case law, could be classified and grouped under one or more categories to which a general or a specific rule might apply, within the broader framework of the first category of acts referred to in paragraph 97 of the report, whereby the State undertook obligations.

50. In paragraph 81, the Special Rapporteur rightly referred to the *Nuclear Tests (Australia* v. *France)* case, in which ICJ had indicated that a promise could bind its author on condition that it was given publicly and that its intention was clear. The Court had also specified that a promise that gave rise to a legal obligation would constitute a strictly unilateral act without any form of *quid pro quo*, acceptance, reply or reaction. Consequently, it was his view that, on the basis of decisions of the Court, international arbitration awards, State practice and doctrine, the Special Rapporteur could provide the Commission with a set of draft articles dealing with a specific category of unilateral acts to which general rules might be applicable, in accordance with chapter I of the report.

51. A prominent example of such acts was a unilateral promise. Other specific categories of unilateral acts as classified in the fourth report, including those categories referred to in paragraph 63, could also be elaborated in the form of draft articles along those lines. On the other hand, acts such as silence, acquiescence, estoppel, acts involving countermeasures, interpretative declarations and declarations in respect of the application of the optional clause under Article 36 of the Statute of ICJ, which, for various cogent reasons, were considered to be outside the context of the topic could also be drafted, defined and classified in a separate category of their own, and the reasons for their exclusion from the scope of the study stated.

52. What was perhaps needed was an exercise similar to the one relating to the draft guidelines on reservations to treaties. Consequently, each specific example of a unilateral act to which reference had been made in chapter I of the fourth report needed to be specifically defined within the separate category to which it belonged. Accordingly, the Special Rapporteur might wish to give serious consideration to drafting separate guidelines defining the regime of the various unilateral acts, showing specifically to which category of acts a general rule might be applicable, and to which category a specific rule might be applicable. The category of formal unilateral acts considered to be outside the context of the topic should be separately mentioned in the guidelines. The Special Rapporteur should seriously consider drawing up a restrictive list of unilateral acts along the lines suggested.

53. As for the two proposed draft articles on the rules of interpretation of unilateral acts, the approach they involved was premature, since the Commission still had no clear idea of the form that the draft articles relating to the two categories of unilateral acts referred to in paragraph 97 of the report would take. The drafting of articles on general rules of interpretation applicable to unilateral acts should be undertaken only at a later stage, perhaps after the drafting of the substantive and procedural articles had been completed. However, notwithstanding those general reservations concerning chapter II of the report, he hoped to be able to comment on the proposed draft articles later in the current session.

54. In conclusion, unlike Mr. Simma, he was optimistic as to the possibility of producing a set of draft articles on the topic. In short, the best way forward would be to classify the topic according to three categories: a first and a second category, to which general and specific rules might be applicable respectively; and a third category, of unilateral acts which for various reasons, including their relationship to treaty texts, could not be dealt

[9] See footnote 4 above.

with in the context of the topic. Within the framework of that classification, the Special Rapporteur could deal with the category referred to in paragraph 97 of his report that was supported both by the Commission and by the Sixth Committee, namely, acts whereby the State undertook obligations. As to rules relating to interpretation, the 1969 Vienna Convention did not apply *stricto sensu*, and even articles 31 and 32 should be applied cautiously, on the basis of deduction and analogy only.

55. Mr. BROWNLIE said that, having listened carefully to the interesting debate stimulated by the Special Rapporteur's comprehensive but somewhat ill-organized fourth report, he was moved to make a few preliminary remarks on the problem of classifications. If the Commission was to make progress on the topic, it must first solve that problem. The response of Mr. Al-Baharna and others to the problem was to call for more and better classification. He could not concur with that view.

56. The classification problem had two aspects. First, it was extremely important to segregate discrete subjects that had only a superficial resemblance to unilateral acts of the types that were to be covered. Examples were unilateral acceptances of the optional clause under the Statute of ICJ, and countermeasures.

57. Secondly, the Commission should in any case eschew classification. It was a striking fact that ICJ and courts of arbitration never classified unilateral acts into protests, promises and the like, but only, if at all, into binding and non-binding unilateral declarations. That had been the point at issue for ICJ in the *Nuclear Tests* cases.

58. Mr. ILLUECA said that unilateral acts of States were indisputably a source of international law and as such constituted a prime candidate for progressive development and codification. *Pace* Mr. Simma, while acknowledging that the topic was a labyrinth, he was confident that the Special Rapporteur would eventually reach his goal, having emerged unscathed from the maze.

59. The fact that the unilateral declaration might be oral or in writing was an important point that needed to be stressed. In the *Eastern Greenland* case, for example, it had been accepted that an oral declaration had the characteristics of an international obligation. Furthermore, in interpreting a unilateral act, account must be taken, not only of the words or text used, but also of the intention, determination of which was a highly subjective matter. Meanwhile, once consolidated, the contents of the Special Rapporteur's fourth report would provide a sound basis for deciding on the form the draft articles might ultimately take.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/513, sect. F)

[Agenda item 7]

Report of the Planning Group

60. Mr. HAFNER (Chairman of the Planning Group), introducing the report of the Planning Group, said that the Group had held three meetings. It had had before it section F of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session (A/CN.4/513), entitled: "Other decisions and conclusions of the Commission", and Assembly resolution 55/152 of 12 December 2000, on the report of the Commission on the work of its fifty-second session.

61. The Planning Group had had three items on its agenda: the date and place of the fifty-fourth session of the Commission; a proposal by Mr. Pellet concerning elections to the Commission; and other matters, including a report on the International Law Seminar.

62. The Planning Group had considered that the possible dates for the fifty-fourth session of the Commission would be 6 May to 7 June and 8 July to 9 August 2002. They seemed to be the most appropriate, in view of the organizational arrangements for other meetings and the schedule of conference services, and the Planning Group had decided to recommend them to the Commission.

63. The proposal by Mr. Pellet contained in document ILC(LII)/PG/WP.1 had been formulated at the end of the fifty-second session but had not been considered, owing to the lack of time. It had consisted of three parts: the first aimed at establishing a rotating election system; the second concerned the non-eligibility for re-election of members who, over the period of their term of office, had not attended at least half the plenary meetings; while the third concerned measures to be taken to secure representation of women in the Commission. The debate had focused mainly on the first of those matters.

64. The Planning Group had considered the possible advantages and disadvantages, especially from the viewpoint of the implications for the work of the Commission. For those reasons, after a useful discussion, the Group had taken the view that it was not advisable to take a decision in an election year, and that the matter required further careful consideration. It might be taken up at a subsequent session, after a thorough review.

65. Under the item "Other matters", the Planning Group had expressed an interest in being informed in detail about the International Law Seminar taking place during the current session of the Commission. The information had been duly provided. The Group had also noted that the Commission had made efforts to implement cost-saving measures by organizing its work plan so as to be able to allocate the first week of the second part of the session to the Working Group on the commentaries to the draft articles on State responsibility. The Working Group was composed of only 12 members of the Commission. The Commission had therefore complied with the request of the General Assembly contained in paragraph 13 of its resolution 55/152.

66. Regarding the long-term programme of work, the Planning Group had taken note of paragraph 8 of General Assembly resolution 55/152 and, with a view to the efficient use of time, suggested that the Commission give priority, during the first week of its fifty-fourth session, to the appointment of two special rapporteurs on two of the five topics that the Commission had decided to include in its long-term programme of work.[10] The Group

[10] See *Yearbook . . . 2000*, vol. II (Part Two), para. 729.

had been of the view that one of those topics should be "Responsibility of international organizations", while the other should be decided as early as possible during the first week of the fifty-fourth session. That last element did not need to be reflected in the report of the Commission to the General Assembly.

67. After a procedural discussion in which Mr. HAFNER (Chairman of the Planning Group), Mr. KAMTO, Mr. KATEKA, Mr. PELLET, Mr. SIMMA and Mr. TOMKA took part, the CHAIRMAN said that it would be for the incoming membership to select an additional topic or topics to be taken up by the Commission at the next session. Accordingly, he took it that the Commission wished merely to take note of the report of the Planning Group.

It was so agreed.

The meeting rose at 1.05 p.m.

2696th MEETING

Thursday, 26 July 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

later: Mr. Gerhard HAFNER

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, 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. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/513, sect. C, A/CN.4/519[1])

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. LUKASHUK congratulated the Special Rapporteur on his detailed fourth report (A/CN.4/519) on the complex topic of unilateral acts of States. He welcomed his intention, expressed in paragraph 38 of the report, to limit the scope of the draft to acts expressly formulated with the specific intention of producing legal effects in a non-dependent manner on the international plane. Such acts included, as the Special Rapporteur rightly pointed out, promise, waiver, recognition and protest; estoppel was also to be given due consideration. Estoppel had basically entered international law from the Anglo-Saxon legal system and had yet to be clearly delineated or properly regulated. Hence the great practical and theoretical value of the intended study of that institution.

2. He had some doubts about certain ideas put forward by the Special Rapporteur. The first was that interpretative declarations in respect of a treaty that included commitments going beyond those provided for in that treaty came under the regime of unilateral acts. Such declarations certainly were in the nature of a unilateral act and gave rise to additional obligations on the part of States, but they were linked to a treaty and therefore differed from purely unilateral acts. Without a treaty, they did not exist. In that context, many aspects of the judgment handed down by ICJ in the *South West Africa* case were relevant. Unlike the third report,[2] the fourth did not pay enough attention to the crucial issue of unilateral acts that gave rise not to legal undertakings (obligations), but to moral or political undertakings (commitments).

3. In considering the question of interpretation contained in paragraph 116 of the fourth report, the Special Rapporteur rightly emphasized the importance of the subjective element, the intention, but that did not appear to have been adequately reflected in the draft articles. Under the 1969 Vienna Convention, the interpretation of a treaty did not in any way require the legal validity of a text to be established. It was a treaty, and that was that. But the situation with unilateral acts was entirely different and the first task in interpreting them was to establish the legal validity of the text.

4. The Special Rapporteur's idea of not including the object and purpose of the treaty among the factors used for interpretation, in paragraphs 137 and 153, did not appear to be sufficiently well grounded. Object and purpose played a leading role in the interpretation of any legal act in its entirety and in its individual provisions. They were the basis for effectiveness, which was one of the main rules of interpretation and whose importance had repeatedly been emphasized by ICJ. According to that rule, the furtherance of the purpose of a legal act or provision must be an element of its interpretation.

5. Article (*a*), paragraph 2, contradicted the 1969 Vienna Convention, article 31, paragraph 2 of which stipulated that the text of a treaty included its preamble. The preamble was indeed an integral part of any treaty and as such had major legal significance and force. It was of particular importance to interpretation, since it usually set out the purpose of the instrument. Such general legal provisions were also of real significance for unilateral acts.

[1] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

[2] *Yearbook . . . 2000*, vol. II (Part One), document A/CN.4/505.