Document:-

A/CN.4/SR.2817

Summary record of the 2817th meeting

Topic:

Unilateral acts of States

Extract from the Yearbook of the International Law Commission:-

2004, vol. I

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.05 p.m.

2817th MEETING

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

Chairperson: Mr. Teodor Viorel MELESCANU

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

Unilateral acts of States (*continued*) (A/CN.4/537, sect. D, A/CN.4/542[1])

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. DAOUDI said that, after a good deal of procrastination, the Commission seemed, with the submission of the Special Rapporteur's seventh report (A/CN.4/542), finally to be making some headway. That was attributable to the fact that it contained a complete presentation of State practice, in line with recommendation 4 proposed by the Working Group in 2003.[2] Noting that it had not been possible to include in the report all the information that had been compiled, he requested that it should be made available to the Commission, since it would prove useful for its future work.

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

[7] Reproduced in *Yearbook ... 2004*, vol. II (Part One).

[8] See 2811th meeting, footnote 2.

without the need for acceptance by the latter. As a result the author of a unilateral legal act was bound to honour its obligations, failing which its international responsibility could be engaged.

3. It was not the task of the Special Rapporteur or the Commission to study each institution of international law in which unilateral acts might occur. Rather, the aim was to ascertain whether, in the context of recognition, promise or other, similar institutions, a subject of international law had had the intention of assuming an international obligation by means of a unilateral act.

4. The Special Rapporteur cited examples of acts that could not be characterized as unilateral acts, questioning, for instance, whether a promise was a unilateral act when its acceptance by other subjects of international law was required. If the answer was in the affirmative, what was the difference between a promise and an offer, the first step towards concluding a contract in internal and a treaty in international law? According to ICJ in its judgment in the *Nuclear Tests* cases, as an international unilateral act, the promise did not need to be accepted by other subjects of international law in order to have legal effects. Another example of a unilateral act, often mistakenly referred to in the context of promise, was the 1956 Egyptian declaration relating to the Suez Canal regime, the circumstances surrounding the adoption of which had obscured its true nature. Acceptance had not been required in order for it to become a source of international rights and obligations.

5. Under the category of promise, the Special Rapporteur had referred in paragraph 23 to cases that were undoubtedly not relevant, even himself expressing some doubts in that connection in one of the footnotes to that paragraph. The same applied to promises relating to nuclear weapons, which, as Mr. Matheson had pointed out, had no legal value. The definition of a unilateral act should make it possible to weed out political acts that were the common coin of foreign ministries' daily work.

6. With regard to recognition, on the other hand, it was often difficult to separate legal from political aspects, particularly where recognition of a Government was concerned. That explained why States were increasingly reluctant to recognize a new Government on the grounds that they had already recognized the State. What was certain was that the act of recognizing a State produced legal effects, witness the fact that a birth certificate or marriage contract could not be recognized by the State authorities if the issuing State had not been recognized.

7. In the conclusions of his report the Special Rapporteur, endeavoured to identify rules and principles common to all the categories of acts, looking beyond recommendation 6 proposed by the Working Group in 2003 and drawing some conclusions as to the form of acts and the State bodies authorized to formulate them.

8. In summary, the Special Rapporteur should eliminate all those acts that were not unilateral acts *stricto sensu* in accordance with the definition to be adopted by the Commission or the Working Group. He should then attempt to identify rules constituting the legal regime for those acts. As Mr. Momtaz had pointed out, the entire lifespan of the act needed to be considered, on the basis of, but without transposing from, the 1969 Vienna Convention. It was still early days to speak of the final form that the project would take. A fairly wide range of possibilities could be envisaged, ranging from Mr. Brownlie's proposals to the preparation of draft articles.

9. Mr. PELLET said that he had mixed feelings about the report. On the one hand, he admired the considerable effort made by the Special Rapporteur, who could no longer be reproached for not taking State practice sufficiently into account. The report contained an impressive amount of food for thought for the Commission and States on acts and other types of conduct. It was conclusive proof that the topic warranted consideration. States were continually acting unilaterally in the international arena and their conduct could create legal effects at the international level either because it was intended to do so, implicitly or explicitly, or because other States or subjects of international law attempted to invoke those declarations. Could the authors of such acts claim to be creating legal effects thereby, to what extent and in what conditions? Were the addressees of a declaration justified in invoking them, to what extent and in what conditions? What of the rights and obligations of third parties *vis-à-vis* such acts? Those were just a few of the questions that confirmed the interest and usefulness of the topic.

10. The incident concerning Taiwan during the previous day's meeting was a striking illustration of that. While he did not wish to enter into the substance of the matter, the simple fact that objective references in the report to declarations made years or decades previously could spark off such vehement reactions showed how important it was to determine whether such acts did or did not have legal effects. As Mr. Niehaus had pointed out, some States—wrongly, in his personal view—recognized Taiwan Province as a State. Was that legally possible and what were the effects of such acts? Was that not rather like declaring that the earth was flat, or obliging those who "recognized" that the earth was flat to conduct themselves accordingly? Or were such acts void for lack of a lawful object or, as Ms. Xue had said in other terms, because that would run counter to a rule of *jus cogens*? Similarly, he did not agree with Mr. Matheson that solemn declarations made before the Security Council whereby States conditionally undertook not to use nuclear weapons were without legal value. However, such questions only went to show how useful and interesting the topic was, and for that reason alone he welcomed the report for having raised them.

11. However, he also had some concerns. In the introduction to the report, the Special Rapporteur stated that he would follow the recommendations of the Working Group established the previous year. The problem was that he had followed the recommendations only in part. The Working Group's report contained seven recommendations.[3] He would examine the seventh report in the light of five of those seven recommendations.

12. To begin with, the Special Rapporteur should have adhered more strictly to the definition of unilateral acts contained in recommendation 1 (paragraph 2 of the

[9] See footnote above.

seventh report). In the first place, the authors of the acts of interest to the Commission could only be States. It was not appropriate to deal in the report with declarations made by international organizations or non-State entities. He endorsed Ms. Xue's comments in that connection: declarations made by legal entities whose status was controversial did not fall within the scope of the study, unlike those made by States with regard to such entities, which certainly did. In the second place, the Special Rapporteur had several times expressed doubts as to whether all the declarations referred to came under the scope of the study. To be sure, given that the study was still in its preliminary stage, the Special Rapporteur had quite rightly cast the net wide. However, for each of the forms of conduct described, he should have adhered to the definition adopted by the Working Group. It would also have been better not to refer to acts that were not declarations, at least in the context of unilateral acts *stricto sensu* in accordance with recommendation 1, such as the referral of cases to international tribunals or bodies.

13. Moreover, if such declarations were not intended to produce legal effects—surely the crucial element of the definition adopted by the Working Group—they were not relevant to the topic. However, in order to determine whether such was the intention, it was not enough merely to cite the declarations: account must also be taken of their context, both *ex ante* (circumstances of and reasons for the declaration) and *ex post* (did the addressees consider that the author intended to make a binding declaration, or had States other than the addressees stated positions in that regard?). One of the great weaknesses of the report was that it provided next to no information of that type. That would of course have been a difficult exercise, given the very large number of examples in the report; perhaps, though, it would have been better to provide fewer examples and to describe their context in greater depth.

14. Lastly on recommendation 1, like Mr. Matheson, he was at a loss to understand why one of the Special Rapporteur's main conclusions was that the Commission should define the term "unilateral act", given that the Working Group had already provided a working definition.

15. As the Working Group's Chairperson, he congratulated the Special Rapporteur on having followed its recommendation 2 to the letter by including in the report two parts dealing respectively with forms of State conduct other than declarations which might produce legal effects similar to those of unilateral acts, and with silence and estoppel. However, it had clearly not been a good idea to take on so many tasks simultaneously, for the sections of the report on those subjects were less detailed and more superficial, and the attempt to deal with unilateral acts and forms of conduct similar to them in parallel simply gave rise to confusion. The Commission should reconsider its instructions to the Working Group, specifying that those two questions should be dealt with only once work on unilateral acts *stricto sensu* had been completed.

16. On estoppel, he was adamant that the concept of estoppel as found in common law could not be transferred as such to the context of international law, at least not in the very technical sense that it had in English law. Although the concept of estoppel was to some extent accepted in international law, albeit in a somewhat vague form, it in no way resembled an act, but rather was the effect or consequence of an act. It should therefore be taken up under the earlier parts of the report dealing with unilateral acts *stricto sensu* and not under the sections devoted to forms of State conduct. What was of interest to the Special Rapporteur was not the conduct of the State which reacted to the declaration, but the fact that the declaration bound the author State, which was then estoppel or precluded from taking a position contrary to its original position. In that respect, estoppel was of relevance to the Commission's purposes.

17. It would be premature to discuss recommendation 3, which concerned the results of the study. Recommendations 4, 6 and 7 concerning method could be taken together. He noted that the Special Rapporteur had touched upon the latter two only briefly, in paragraph 5 of the report. The thrust of those recommendations was that in the seventh report the Special Rapporteur should list, in as neutral a fashion as possible, all the relevant raw material without attempting to draw any conclusions concerning legal rules that might be deduced therefrom. It seemed, however, that the Special Rapporteur had taken a few short cuts. Instead of providing information that would allow for an orderly classification of acts, he had begun with a "ready-made" classification, and, moreover, had been unable to resist providing legal commentaries. He had thus mingled the deductive method requested by the Working Group with an inductive method based on a good deal of approximation, and the result was not altogether convincing.

18. What might be termed the "teleological" classification of unilateral acts drawn up by the Special Rapporteur might be useful for teaching purposes, but it could not yield useful conclusions and was more confusing than illuminating, if only because a given act could come under several categories. For example, the Belgian "apology" following the assassination of Patrice Lumumba was cited as an instance of a promise, yet he doubted whether it was a promise; it was surely more a recognition of responsibility or a renunciation of a previous position. Again, the United States "waiver" of its claim of sovereignty over a number of Pacific islands could, according to context, also be deemed a recognition or a promise. The same ambiguity was present in the frequent references in the report to forgiveness of debt, which could be regarded as a waiver, a promise or even, in the eyes of the beneficiaries, as a recognition of their rights. As for the declarations of neutrality discussed in paragraphs 176 to 178 of the report, he wondered whether they were really notifications, as the Special Rapporteur asserted, or promises (not to take part in armed conflict) or waivers (of the right of recourse to armed force). Or were they simply claims, without legal effects until they had been accepted?

19. There were no easy answers to such questions and it had been incautious of the Special Rapporteur to rely so heavily on *a priori* classifications. The Commission's task, however, was not to resolve such ambiguities; instead, it must identify what the various categories had in common in terms of the legal regime applicable to them. In that regard, he concurred with Mr. Daoudi.

20. Recommendations 4 and 6 adopted by the Working Group—and subsequently by the Commission—had requested the Special Rapporteur to include as much information as possible on the author of the act and the reactions of the other States or other actors concerned; and on the reasons for the act, the competence of the organ responsible for the act and other criteria for validity and the circumstances in which a unilateral commitment could be modified or withdrawn. In the light of those recommendations, the seventh report ought to have concentrated on—and dealt fully with—those questions alone; yet, although containing a wealth of information concerning State practice, it failed to systematically provide the contextual information that the Commission had expected. In his view, the best course of action would be to select the most topical examples, and those concerning which the relevant information was readily available, and then to draw up a comparative table, containing the following information in respect of each example: the author of the act (including the organ of the State formulating the act), its form, its object, its purpose or the reasons for it, the addressees, their reactions, the reactions of third parties, any modifications, whether the act had subsequently been withdrawn and any available information on its implementation. The point of such a table would not be to categorize unilateral acts by type, as the Special Rapporteur seemed overanxious to do, but, on the contrary, to establish the common rules applicable to such acts.

21. The Commission had become increasingly obsessed with setting up working groups. In the case of unilateral acts, the possibility was worth considering, but such a working group would need to select 20 or 30 examples, taken from the report or elsewhere, of cases that might be included in a table of the kind that he had described, each member taking on one or two cases to help the Special Rapporteur in his task, without endlessly trotting out the same general ideas. There would be no point in setting up such a group merely to mark time by drawing up yet more general guidelines. Rather than that, it would be better to abandon the topic altogether.

22. With regard to the question of the autonomy of unilateral acts, to which Mr. Pambou-Tchivounda and Mr. Economides continued to attach importance, he reiterated his view that there was no need for that criterion, which, furthermore, did not figure in the working definition adopted the previous year. No unilateral act was completely autonomous: its legal effects were always based on a pre-existing legal rule or principle; a "habilitation", in the Kelsenian sense of the term. A State might seek to create legal effects by its declaration precisely because it was authorized to do so by a general or special rule of international law. To insist that unilateral acts must be autonomous would raise a host of problems of delimitation. He would prefer an approach less dependent on preconceptions.

23. Mr. Brownlie had urged the Commission to exclude the question of recognition of States from the scope of the topic. While recognizing that it posed its own problems—as he had said during discussions on the sixth report,[4] which had been largely devoted to recognition—he felt that to exclude completely what was probably the most frequent and the most significant example of a unilateral act was somewhat drastic. Certainly, it would be premature to do so at what was still, after eight years, only a preliminary stage of the Commission's deliberations. His suggestion would be to include one or two controversial examples of recognition of States in the proposed table and to see whether those acts were of such a nature as to justify their exclusion. Mr. Brownlie's suggested approach was based on *a priori* assumptions and would militate against the "naive" approach that he himself advocated. He agreed, however, that the Commission must take care not to focus unduly on such acts: although they were the most numerous and accessible examples of unilateral acts, there was a risk that, in concentrating on recognition of States, the Commission might be unable to see the wood for the trees.

24. The Commission had two options: it could roll up its sleeves and strive collectively to assist the Special Rapporteur, or it could acknowledge that it was failing to make any progress and could abandon the topic. He would greatly regret the latter outcome, both because it would be an admission of defeat and because he persisted in thinking the topic useful and interesting. However, the Commission must sometimes recognize its limitations. The time had come for it to face up to its responsibilities.

25. Mr. PAMBOU-TCHIVOUNDA said that he would gladly roll up his sleeves, and take off his jacket, too, to save the Commission's work. The seventh report persuasively argued the case for not abandoning the topic. Nor should recognition of States be excluded; he endorsed Mr. Pellet's remarks in that regard.

26. Mr. ECONOMIDES said that in his view, the definition contained in recommendation 1 of the Working Group covered all unilateral acts, whether autonomous or not, including acts formulated by virtue of a treaty; however, the Commission obviously did not need to duplicate its work on treaty or customary law in the context of the present topic. The aspect of unilateral acts that was of interest to the Commission was that they could play a role similar to that of treaty provisions or customary law, in that they created legal obligations. The Commission should therefore restrict itself to autonomous unilateral acts as sources of international law, excluding all those acts that were linked to treaties, custom or the acts of international organizations.

27. Mr. PELLET said that while he saw some merit in Mr. Economides's comments, to study unilateral acts as sources of law was to beg the question. The whole point was to determine whether unilateral acts were or were not sources of law. There seemed little point in straying into topics such as reservations to treaties, although the jurisprudence of ICJ concerning declarations of acceptance of its jurisdiction as compulsory might perhaps need to be closely considered. Above all, the Commission should be pragmatic; it should not rule out considering specific unilateral acts such as notifications concerning the delimitation of a territorial sea or of an exclusive economic zone. An examination of State practice would serve the Commission better than any preconceived model.

[1] See 2816th meeting, footnote 5.

28. Mr. MOMTAZ said he regretted that the topic was not to cover the subsequent practice of treaties. At the United Nations Conference on the Law of Treaties, a draft provision relating to subsequent practice of treaties had been deleted in order to retain the integrity of treaties. Treaty provisions were not, however, always clear, with the result that they were open to interpretation, often in the form of a unilateral act that gave an extensive interpretation of the treaty, and sometimes in the form of a protest. Such acts led to the progressive development of international law. It would be a pity if the Commission failed to take advantage of the opportunity to consider subsequent practice in the context of the topic.

29. Mr. BROWNLIE said that an approach centring on unilateral acts of States as sources of international law would be ill-advised; he also cautioned against dealing with treaty relations and against the facile use of treaty analogies. More progress might be achieved if the distinction drawn some years earlier by Mr. Simma between acts creating obligations and acts reaffirming rights were borne in mind. He agreed to a great extent with what Mr. Pellet had said about classification, although it was in any case unclear on what basis such a classification should rest, because no unitary concept of unilateral acts existed in either doctrine or practice and there was therefore no single, all-inclusive rationale behind unilateral acts. The subject matter of unilateral acts could encompass overlapping issues, as had been demonstrated with respect to the *Nuclear Tests* cases, where ICJ had invoked the principle of good faith, whereas the Special Rapporteur, in his sixth report, had seen those cases as turning on the question of promise. Such overlapping was not, however, a matter for concern.

30. While it would indeed be appropriate to study recognition within the context of unilateral acts, he personally took the view that recognition of States and Governments should be excluded, involving as it did not only the concept of recognition, but also the criteria of statehood, a nice question which the Commission did not have the leisure to investigate. Moreover, since the General Assembly had not yet asked the Commission to take up the subject of the recognition of States and Governments, it would be overstepping its mandate were it to do so.

31. He was in favour of conducting an expository study, possibly using the same methodology as had successfully been employed in the field of the fragmentation of international law. Firstly, rather than Mr. Pellet's proposal for a table, he favoured selecting a menu of topics by extracting certain principles and sub-principles from case law. They might include: the concept of an assurance or promise intended to create legal relations with a particular State or States, the rationale for which was the principle of good faith and the example the *Nuclear Tests* cases; an assurance or conduct creating a situation involving reliance by another State—i.e. estoppel—which ICJ had recognized as forming part of international law in the *North Sea Continental Shelf* case and the *Gulf of Maine* case; claims to legal rights; acceptance or acquiescence by conduct including silence and protest (the *Temple of Preah Vihear*, *Arbitral Award Made by the King of Spain* and *Great Belt* cases); and, lastly, express acts of renunciation or disclaimer, of which the Ihlen declaration[5] would be a possible example. Emphasis should be placed on the rationale behind each separate type. One of the benefits of focusing on cases heard by ICJ was precisely that the Court was interested in the rationale.

32. A typology consisting of an *ad hoc* list of sub-principles which should each be studied separately might overcome the one remaining difficulty occasioned by the fact that, while the precipitating event was the only truly unilateral aspect of the acts in question, context and antecedents were also legally significant.

33. Ms. XUE, addressing the question of whether recognition of States and Governments should form a special topic for study, said that although it was an issue which was very frequently encountered in practice, an unduly legalistic approach to the recognition of States had been adopted in the past, with the stress placed by such eminent authors as Lauterpacht and Chen on the criteria for *de facto* or *de jure* recognition. While the theory of recognition was extremely complex, she noted that the Government of the United Kingdom had recently moved towards the practice of establishing diplomatic relations with a new State or Government without giving it formal recognition. The trend in State practice was therefore to treat recognition primarily as a political decision. However, that political decision produced legal effects in international law and, for that reason, the question which often faced a Government was not what criteria it should apply in order to decide whether to recognize an international entity, but what the legal effects of recognition or non-recognition would be. Even when constitutive theory had prevailed, political considerations had sometimes made recognition impossible, although all the theoretical criteria had been met. In her view, the Commission should therefore examine the legal effects of recognition or non-recognition.

34. Mr. Sreenivasa RAO said that because, at the previous session, the Working Group had instructed the Special Rapporteur to concentrate on State practice, he had merely listed a series of acts, which he had not had time to sort according to relevance. The proposal to focus on the autonomous nature of unilateral acts was a barrier to further progress; the Commission should concentrate instead on the effects of the acts in question and on the circumstances in which they would give rise to legal obligations for the author and legal rights for the addressee. It should focus, not on the stone thrown, but on the ripples it created. An expository study would be the most effective method of dealing with the topic.

The meeting rose at 11.30 a.m.

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[2] See 2812th meeting, footnote 2.