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Summary record of the 2460th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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provision according to which the term "State succession" covered all types of transfer of sovereignty. The draft articles should emphasize that even in the case where permanent residents of a State were not granted citizenship, they should, except in some strictly limited cases, enjoy the same fundamental social and economic rights as nationals of the State concerned.

79. Lastly, he fully agreed that the future instrument should take the form of a General Assembly resolution. He hoped that the Commission could complete the first reading of the draft articles at the next session so that it could submit them to the General Assembly for the fiftieth anniversary of the Universal Declaration of Human Rights.[7]

80. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to approve the recommendations made by the Working Group.

It was so agreed.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT OF THE PLANNING GROUP

81. Mr. ROSENSTOCK (Chairman of the Planning Group), introducing the report of the Planning Group (ILC(XLVIII)/PG/WG/1/Rev.1),[8] said that, in response to General Assembly resolution 50/45, concerning the importance of examining ways and means of improving the effectiveness and efficiency of the United Nations system, the Commission had decided to do a survey of how the Commission had been functioning and what it could do to become more effective and efficient. The survey was contained in the report of the Planning Group, which was intended to be as easy to deal with as possible. It contained an executive summary and a set of specific recommendations at the beginning to facilitate the task of those who might be unable to examine the entire report in detail. The Planning Group had gone over the contents of its report in great detail. The Commission would most likely not need to go over every chapter in detail but might wish to focus on the executive summary and the set of recommendations and then to adopt the report chapter by chapter.

82. After an exchange of views in which Messrs. EIRIKSSON, CALERO RODRIGUES, BENNOUNA, CRAWFORD, MIKULKA, GÜNEY and ROSENSTOCK took part, the CHAIRMAN said that, if he heard no objections, he would take it that the members agreed to consider the report of the Planning Group at the next meeting.

It was so agreed.

The meeting rose at 1.10 p.m.

2460th MEETING

Tuesday, 16 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

The law and practice relating to reservations to treaties (A/CN.4/472/Add.1, sect. E, A/CN.4/477 and Add.1 and A/CN.4/478[1])

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur on the topic to introduce his second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PELLET (Special Rapporteur) said that, in his second report, he had adopted a slightly different approach from the one he had announced during the introduction to his first report[2] at the forty-seventh session of the Commission. His original intention had been to deal at the current session with the definition of reservations and the legal regime of interpretative declarations. However, as a result of the new focus given to the problem of reservations by the positions recently adopted by the human rights treaty monitoring bodies, particularly the well-known general comment No. 24 (52),[3] he had

[7] See 2451st meeting, footnote 5.

[8] The report of the Planning Group was not issued as an official document. The report, as amended and adopted by the Commission, is reproduced in *Yearbook ... 1996*, vol. II (Part Two), chap. VII.

[1] Reproduced in *Yearbook ... 1996*, vol. II (Part One).

[2] *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470.

[3] General comment on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (A/50/40, annex V).

decided to give priority to the question of the unity or diversity of the legal regime for reservations to treaties.

3. The second report thus consisted of two separate chapters. The first, entitled "Overview of the study", was quite brief and drew conclusions for the future from the discussions which had been held on the topic at the preceding session. The second, which was much more detailed and specific, dealt with the difficult question whether there was unity or diversity in the legal regime for reservations to treaties.

4. The report also had three annexes. Annex I contained a bibliography to which he invited the members of the Commission to contribute, especially for works written in languages other than French and English. The questionnaire (ILC(XLVIII)/CRD.1) which the Commission had authorized him, at its forty-seventh session, to send to Member States, would be included in annex II. Fourteen Member States, which had recently been joined by Slovakia and France, had so far replied to the questionnaire and transmitted very useful information to him. Annex III, which would be issued later, would contain the questionnaire he had prepared for international organizations. For the sake of clarity, he would introduce the two chapters of the report successively.

5. In chapter I, section A, he dealt very briefly with the action taken on his first report. In section B, he tried to explain some points which, in the light of the summary records of the meetings of the preceding session, seemed to have been rather unclear in the minds of some members of the Commission and which included the concept of "model clauses" and that of the "guide to practice".

6. He drew the attention of the members of the Commission to the provisional general outline of the study, which he proposed at the end of chapter I, section B. He did not claim that the plan was either perfect or final and he would, moreover, be grateful for any suggestions designed to improve it, but he had tried to indicate as specifically as possible which questions he intended to deal with and in which order. There were two particularly important paragraphs in that regard: one at the beginning of section B.3, in which he attempted to define his objectives, and the other at the end of section C, in which he suggested a programme of work for the coming years. In his view, it should be possible to complete the consideration on first reading of the draft Guide to practice within four years if the Commission completed its study, at its next session, of parts II, Definition of reservations, and III, Formulation and withdrawal of reservations, acceptances and objections, if it considered part IV, Effects of reservations, acceptances and objections, in 1998 and if it managed to complete its consideration of part V, Fate of reservations, acceptances and objections in the case of succession of States, and part VI, The settlement of disputes linked to the regime for reservations, in 1999. That programme was, of course, purely of a contingent nature.

7. In chapter II of his second report, he tried to deal as thoroughly as possible with the complex problem of the unity or diversity of the legal regime for reservations to treaties, to which attention had been drawn by several members of the Commission at the preceding session. In his opinion, the problem came down to a few simple propositions: first, the legal regime of reservations was "one"; secondly, it was "one" because it was flexible and adaptable; thirdly, as a result of such flexibility and adaptability, it was applied generally, including to normative treaties and human rights instruments; fourthly, the real peculiarity of the latter instruments, in relation to the regime of reservations, was not that they related to fundamental human rights, but, rather, that they often established monitoring bodies; fifthly, however, it would be inconceivable that those bodies should not be able to evaluate the permissibility of the reservations formulated by the States parties, as part of their monitoring functions; but, sixthly, it would also be inconceivable that they should be able to take the place of the reserving States in deciding whether or not they were bound by a particular treaty despite the non-permissibility of their reservations.

8. In order not to take up too much of the Commission's time, he would simply give a general idea of the reasoning on which those six propositions were based.

9. As he explained in chapter II, section B, of his second report, there could be no objective answer to the question whether it was appropriate or not to allow reservations to normative treaties, including human rights instruments; and the Commission's role was, moreover, not to act as a kind of "reservations court" ruling on the merits of the principle of the reservation. If it was also considered that there should be no reservations to a particular convention, that could always be decided on in the convention itself because—and that was one of the first elements of flexibility of the ordinary law regime of reservations provided for in articles 19 to 23 of the Vienna Convention on the Law of Treaties—that was only an optional residual regime that the negotiators could always reject. What had been called the "Vienna regime" contained other elements of flexibility, but the most important probably lay in the famous principle which had been established by ICJ in the Advisory Opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[4] and endorsed by article 19, subparagraph (*c*), of the Vienna Convention on the Law of Treaties, which provided that a State could not formulate a reservation "incompatible with the object and purpose of the treaty". That principle meant, first, that reservations could not change the nature of treaty undertakings and, secondly, that taking the object of the treaty into account lay at the heart of the Vienna regime. That was a very strong argument in favour of the unity of the reservations regime: since the compatibility of the reservation with the object of the treaty was the fundamental criterion on the basis of which the permissibility of the reservation would be evaluated, it became a priori unnecessary to adopt diversified regimes depending on the object of the treaty. The Commission had, moreover, already reached the same conclusion during the preparation of the draft articles on the law of treaties in 1962.[5]

[4] *I.C.J. Reports 1951*, p. 15.

[5] *Yearbook... 1962*, vol. II, document A/5209, p. 180.

10. As a result of its flexibility and adaptability, the Vienna regime was suited to all types of multilateral treaties and struck a sound balance between the two main considerations which formed the basis for any reservations regime, namely, efforts to achieve universality—since reservations enabled more States to express their consent to be bound because they could adapt such consent—and the concern to preserve the integrity of the treaty—since reservations might break up the unity of the treaty regime. Similarly, the Vienna rules satisfactorily safeguarded the will of the reserving State, which could adapt the expression of its consent, and that of the other States, which could object to a reservation and refuse, if they so wished, to be bound with the reserving State.

11. Did that perfectly balanced general regime give rise to particular problems as far as human rights instruments were concerned? Such treaties did, of course, have very definite characteristics. First of all, they were designed to establish a single legal framework applicable not only as between the States parties, but also in the territory of the States parties themselves; secondly, individuals were the direct recipients and beneficiaries; and, thirdly, as a result of the preceding proposition, they were not based on the reciprocity of the undertakings entered into by States, but were designed to embody shared values. It was obvious that such specific features of human rights treaties called for a number of explanations which he had tried to provide in his report, but it could not be concluded for all that that the ordinary reservations regime was not applicable to them. Apart from the fact that the possibility of prohibiting reservations to a particular treaty still existed, the principle established by article 19, subparagraph (*c*), of the Vienna Convention on the Law of Treaties, which prohibited reservations incompatible with the object and purpose of the treaty, was a safeguard that was equally valid in the area of human rights. ICJ had established that rule in 1951 in the Advisory Opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, which, in its judgment of 11 July 1996,[6] it had characterized as a human rights treaty par excellence. A reservation could therefore not deprive a human rights treaty of its object or divert it from its purpose any more than it could in the case of any other kind of treaty.

12. Moreover, human rights treaties often stated rules of *jus cogens* and a prohibition on reservations to those peremptory norms of general international law was yet another guarantee as far as they were concerned.

13. Two arguments had nevertheless been put forward in favour of the non-applicability of the Vienna regime to reservations to normative treaties and, in particular, to human rights treaties. It had been maintained that the application of the common regime would undermine the equality of the parties and the principle of non-reciprocity. Those arguments were analysed in chapter II, section B.3, of the second report. It could be asked whether the equality of the parties was threatened more in the case of a State party which did not formulate reservations and a State party which did or in the case of a State party and a non-State party. In addition, a State party always had the possibility of objecting to a reservation and thus preventing the treaty from entering into force as between itself and between the reserving State, thereby re-establishing the equality that the reservation might have threatened. An objection based on non-reciprocity was in fact virtually meaningless in the context of human rights. In agreeing to be bound by a human rights treaty, a State was obviously not expecting any reciprocity on the part of other States.

14. If the Commission looked at what happened in practice, it would see, first of all, that it was quite rare that human rights instruments prohibited reservations; secondly, that, if they contained provisions on the possibility of reservations, they often used the criterion of the object and purpose of the treaty (art. 75 of the American Convention on Human Rights went so far as to refer specifically to the provisions of the Vienna Convention on the Law of Treaties on reservations); and, thirdly, that, when they had to evaluate the permissibility of reservations to the instruments setting them up, human rights treaty bodies applied that same basic criterion, when such instruments were silent, of the compatibility of the reservation with the object and purpose of the treaty, whose relevance was reaffirmed by general comment No. 24 (52) of the Human Rights Committee.

15. There was thus no doubt that the Vienna regime was not only applicable to human rights treaties, but that it was actually applied to them in inter-State practice. There was, however, still the more difficult, if not more burning, issue of the competence of human rights treaty monitoring bodies to evaluate the permissibility of reservations and the consequences to be drawn from such an evaluation. That twofold problem, which was a matter of concern both to monitoring bodies themselves and to ministries of foreign affairs, was dealt with at some length in chapter II, section C, of the report, in which he had tried to explain the two positions.

16. It was only a slight exaggeration to say that the most extreme positions were the following: some considered that monitoring bodies had no power to evaluate the permissibility of reservations, which they would have to accept. They would then have to apply them without asking any questions, since the evaluation would be the responsibility of the traditional inter-State machinery. Others took the opposite view that, since monitoring bodies existed, they had sole responsibility for evaluating the permissibility of reservations and they alone could draw conclusions from a finding that a reservation was not permissible and decide that the reserving State was bound by the treaty as a whole, including the provisions to which the impermissible reservation related.

17. Although he did not systematically advocate middle-of-the-road solutions, he was convinced in the present case that an objective analysis of the problems under consideration, without any of the "anti-legal" passion that too often fired up the persons taking part in the discussion, would inevitably lead to a happy medium contained in the two propositions he had already stated,

[6] Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), I.C.J. Reports 1996.*

namely, that the monitoring bodies in question must be able, in the exercise of their functions, to evaluate the permissibility of reservations formulated by States and that States alone could decide whether they intended to be bound in the absence of reservations that had been found to be impermissible or whether they preferred not to be parties in such conditions.

18. Those conclusions were based solely on the following strictly legal reasoning. As far as the first conclusion was concerned, it was enough to note that the possibility for monitoring bodies of evaluating the permissibility of reservations formulated by States derived from the very functions of those bodies. By definition, under their terms of reference, they were responsible for monitoring compliance by States parties with their obligations under the treaty establishing them. However, they could not carry out their functions without being sure of the exact extent of their jurisdiction in respect of the States that submitted cases to them and they could do so only globally on the basis of the treaty itself, any reservations which might have been formulated by the State concerned and general international law, which laid down the conditions to which such reservations were subject. Like any jurisdictional or quasi-jurisdictional body, moreover, they had the power to determine their own jurisdiction. Contrary to what some individuals said, it was thus not the originality of those bodies that justified their jurisdiction, but, rather, their ordinariness. Being established by treaties, they derived their jurisdiction from such treaties and had to determine the extent of that jurisdiction on the basis of the consent of the States parties as seen in the light of the general rules of the law of treaties, including in respect of reservations, since the general reservations regime was applicable to human rights treaties.

19. Naturally, and consequently, the other ordinary mechanisms for the control of the permissibility of reservations existed at the same time. Such control could be exercised, first, by States themselves in accordance with the Vienna regime and, in relation to human rights instruments, States did exercise their right to formulate objections to reservations. It was also quite conceivable that the dispute settlement bodies which might be seized either in first or second instance of a dispute between two States over the permissibility of a reservation formulated by one of them might make a ruling on that point. In an area other than that of human rights, that was what had happened with the arbitral tribunal in the *English Channel* case in 1977[7] and also coincidentally, with ICJ in some rare cases referred to in the second report. As recent Swiss practice showed, moreover, national courts themselves could also determine the admissibility of reservations under international law.

20. The power of human rights monitoring bodies, as part of their functions to evaluate the permissibility of reservations formulated by States parties did not, of course, authorize them to go beyond their general powers in the sense that the binding force of the findings they might make in that regard was the same as that of other findings they might make: if they had decision-making power, a State was bound on the basis of their findings, but, if they had advisory or recommendatory power, their findings were only indications which the State must consider in good faith, but which had no binding force for it. In between those two cases, slight differences were possible and everything depended on the statutory jurisdiction of the "control organs", the term used in the second report to cover both monitoring bodies and dispute settlement bodies.

21. However—and that was the second conclusion—he was convinced that, as part of its powers, a human rights monitoring body could rule on the permissibility or impermissibility of a reservation, but that it could not take the place of a sovereign reserving State to determine the consequences of a possible finding of impermissibility. By its very nature, a treaty was a conventional instrument whose compulsory nature was based exclusively on the willingness of each State to be bound. In the case where a State had made its consent contingent on a reservation, that reservation was perhaps, in its opinion, a sine qua non condition or might, on the contrary, be only of an accessory nature, but, in any event, only the reserving State could say so and it was unthinkable and inadmissible that it could be bound without having wanted to be. Otherwise, the very essence of the treaty and the conventional form would be called into question.

22. That limitation on the powers of monitoring bodies, which he believed was not open to discussion, could give rise to considerable specific problems in that monitoring bodies determined impermissibility, but, once they had put the ball back in the State's court, it was up to the State to say whether or not it accepted the treaty without the reservation, and that might take some time, if only because, in some cases, parliamentary proceedings might have to be resumed. That element showed, moreover, that it was absurd to want to force a State to be bound without its reservation if the reservation had been the condition for ratification, either by the parliament or by a constitutionality monitoring body. Those problems were, however, not insurmountable in practice, since that was a kind of "reverse preliminary issue" and preliminary issues had never prevented justice from ultimately being done.

23. He was not unaware that the proposition he was putting forward might come up against another objection that was both theoretical and practical. The finding that areservation was impermissible might take place long after the reservation had been formulated and it might be dangerous for the stability of legal situations to allow a State to be released from its treaty obligations. That objection was not irrelevant, but, apart from the fact that the lesser of two evils must be chosen, it could be considered that such a concern would be a factor that the State would take into account in finally deciding whether to stay within the circle of contracting States or to withdraw. It was quite likely that a State would be more inclined to remain a party without its reservation because such a situation might give rise to great problems for it as well. The State might also choose an in-between solution, which would be to reformulate its reservation in

[7] *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decisions of 30 June 1977 and 14 March 1978 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3 and 271).

such a way as to correct its defects and make it permissible. It should not be forgotten that, where a reservation was impermissible, the State had never been validly bound and it was thus only by "regularizing" its reservation that it would be properly expressing its consent to be bound. In practice, moreover, quite apart from any problem of the permissibility of reservations, it did happen that States amended earlier reservations, by restricting them of course, and that that did not give rise to any objections.

24. Human rights instruments did, of course, have particular characteristics, but, like any other treaty, they were subject to the basic principle of consent. That was the principle which formed the basis of his two propositions: the State which had consented to a human rights treaty establishing a monitoring body could not unduly restrict that body's functions by denying it the right to decide on the permissibility of the reservations which it had formulated, but, at the same time, that body could not "chop up" the State's consent and declare that it was bound by a treaty to which it had consented only subject to the express condition of a reservation.

25. The draft resolution contained at the end of chapter II of the second report summed up the main thrust in relatively simple terms. He considered that it would be useful if, after discussion, amendment and improvement, the Commission adopted a text of that kind in an area within its jurisdiction to which it had already given a great deal of time and effort in the more general framework of the law of treaties and which was a general topic that had the twofold characteristic of being both a matter of major controversy and an item on its agenda. He hoped that the Commission would be able to consider that resolution at its next session.

26. Mr. ROSENSTOCK said that the second report, whose content he agreed with for the most part, was remarkable. He nevertheless considered that the comparison which the Special Rapporteur had drawn between regional organizations and a universal organization in referring to the implicit powers of monitoring bodies might be a bit hasty. It would, moreover, be most regrettable if, for lack of time, the Commission was unable either to consider or to adopt the draft resolution contained at the end of chapter II of the report.

27. Mr. LUKASHUK said that he agreed with the very sound and well-substantiated elements contained in the Special Rapporteur's second report, which rightly emphasized the role that the Soviet delegation had played in broadening the right of States to formulate reservations at the United Nations Conference on the Law of Treaties.[8] Since that time, however, the cold war, which had forced the Soviet Union to be "on its guard", had ended and there had been a process of harmonization within the international community. As a result of such changes, there should be some restriction of the right of States to formulate reservations. He therefore fully endorsed the Special Rapporteur's idea that the right to formulate reservations was of a residual nature.

28. It was important that the Commission should focus its attention on questions such as the respective rights of the reserving State and the international community in relation to the formulation of reservations. It also had to consider the question of reservations to bilateral treaties, on which both it and the United Nations Conference on the Law of Treaties had been silent, but which the expanded role of parliaments in the field of foreign policy might well bring up again.

29. The rather complex concept of the object and purpose of the treaty should also be discussed at greater length, as should the question of the practical effect of reservations on the entry into force of treaties, since the provisions of the Vienna Convention on the Law of Treaties on that point were contradictory and precision and clarification were essential.

30. With regard to the question of reservations to additional protocols that was also raised in the report, it appeared that, since the principal treaty and the additional treaty were a single legal norm, reservations should be compatible with the purpose and object of the whole formed by the treaty and the protocol thereto. Another very interesting question was that of the nature of reservations to treaties which codified customary rules. If a convention embodied generally accepted rules, any reservation seemed impossible, but the question could be more complex if the convention embodied a customary rule in the making.

31. As far as the entirely new question of the role of monitoring bodies established by a treaty was concerned, he fully endorsed the compromise approach adopted by the Special Rapporteur. The very widespread idea that any reservation to normative agreements and, in particular, agreements in the area of human rights should be refused had not only been adopted by jurists and theoreticians, but had also been reflected in court decisions. The Special Rapporteur had, however, rightly recalled that the legal regime established by such treaties was based on the consent of the State, just as he had been right to say that the general system of reservations was also applicable in the case of human rights instruments. In conclusion, he hoped that the Special Rapporteur would continue to give the Commission the benefit of contributions that were as original as those contained in his second report.

32. Mr. YANKOV, paying a tribute to the Special Rapporteur's remarkable work, said that human rights treaties were not the only area in which reservations must be subject to a special regime. The Special Rapporteur had, of course, mentioned the rules of *jus cogens* as well, but reference should also be made to other types of treaties, as defined by the nature of the negotiations which had preceded their adoption. He was thinking in particular of peace treaties, disarmament treaties and perhaps treaties relating to the environment. The United Nations Convention on the Law of the Sea was a good example of that type of treaty: a look at the *travaux préparatoires* showed why it did not allow any reserva-

[8] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); ibid., *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6); and ibid., *First and Second Sessions, Vienna, 26 March-24 May 1968* and *Vienna, 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

tions. Most of the issues with which it dealt had been regarded as indissociable and delegations had feared that reservations to a particular provision might destroy the entire edifice, regarded as a whole. He therefore suggested that the Special Rapporteur should consider the practice of States in respect of multilateral treaties of a global character.

33. The Special Rapporteur's treatment of the role of human rights treaty monitoring bodies was generally satisfactory, but more detailed consideration should be given to it, both by the Special Rapporteur and by the Commission.

34. He was not in principle opposed to the idea that the Commission should submit to the General Assembly the resolution at the end of the Special Rapporteur's second report on the question of reservations to multilateral normative treaties, including human rights treaties, but he thought it premature. He pointed out, in particular, that the first preambular paragraph did not faithfully reflect the situation, since the Commission had not yet considered the question. However, if most of the members supported that initiative, he would not object to it. He would nevertheless like a working group to be set up to consider the draft resolution proposed by the Special Rapporteur.

35. Mr. IDRIS congratulated the Special Rapporteur on his clear presentation and the extensive research he had done in preparing his second report. The bibliography it contained was very useful, although it could be improved. It was the practice of States that must serve as a basis for the work on the topic, particularly the regime of the Vienna Conventions (Vienna Convention on the Law of Treaties, Vienna Convention on Succession of States in Respect of Treaties, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations), whose applicability to human rights treaties must be studied in greater depth. Clarifications on that point were still necessary. The idea of the work plan proposed in chapter I, section C, of the report was not bad, but there should be some flexibility as to scheduling and substance.

36. Mr. PAMBOU-TCHIVOUNDA said he regretted that the Special Rapporteur's introduction to his report would not be of much help in enabling the members of the Commission to find their way around the maze of the question of reservations to treaties. He would have liked the Special Rapporteur's teaching abilities to show the way.

37. He had already made two comments at the preceding session. The first had been that, when dealing with the question of reservations to treaties, the Commission might have to consider other areas of treaty law and thus rewrite or recodify it. It had to be very careful if it worked in a piecemeal way.

38. Secondly, with regard to the "rival" institutions of reservations referred to in chapter I, section B, of the report, he doubted that they could prove useful alternatives to the employment of reservations, which they did not resemble either in theory or in legal or political terms.

39. As the Special Rapporteur stressed, moreover, the question of the permissibility of reservations was of a highly political nature. It was dealt with primarily at the political level, during the negotiation of treaties, and, if it was considered later in some cases, that was because that was how politicians wanted it and because they had also wanted to place restrictions on such consideration.

40. As far as human rights monitoring bodies were concerned, a distinction should perhaps have been made between political bodies and jurisdictional bodies. In any event, the question whether such bodies were or were not competent to rule on the permissibility of reservations arose in both cases.

41. It would be advisable for the Special Rapporteur to think about how much importance should be attached to the guide to practice to be prepared. Would it be an inevitable tool made available to States and, if so, how should the Commission go about preparing it in terms of method?

42. Mr. CALERO RODRIGUES said that, like Mr. Rosenstock, he found that the report was not only rich and well documented, but also very easy to read. It contained a five-part outline and then went straight into the consideration of part I, which was of immediate interest, since it related to reservations to human rights treaties. The Special Rapporteur demonstrated his complete mastery of the subject and a concern for its practical aspects. He also made a suggestion which might help to solve the problem that could arise when human rights instruments had established monitoring bodies. The Special Rapporteur recognized that those bodies definitely had powers, but he considered—and he had a solid grounding in international law for that purpose—that a body of that kind could declare that a reservation was not permissible, although it was for the State which had made that reservation to decide what should be done.

43. The only doubt there might be about the report as a whole related to the draft resolution proposed at the end. He did not think that the Commission should start deciding on resolutions or recommendations and, if he was present at the next session, he would not be able to support that proposal.

44. Mr. VARGAS CARREÑO, recalling that, at the preceding session, he had criticized the Special Rapporteur for not having taken sufficient account in his first report[9] of inter-American practice, said that that shortcoming had been corrected in the second report which the Special Rapporteur had just introduced. The Special Rapporteur had, moreover, rightly taken as his point of departure the Vienna Convention on the Law of Treaties, as supplemented in 1978 with the Vienna Convention on Succession of States in Respect of Treaties and in 1986 with the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. There was no question of changing the Vienna regime or of replacing it with another regime. The aim was simply to fill the gaps that had been created as a result of the development of international law and, in particular, the drafting of human rights instruments, even if those treaties were not the only ones in connection with which reservations give

[9] See footnote 2 above.

rise to problems, as Mr. Yankov had pointed out. The idea of submitting a draft resolution to the General Assembly was a good one and he was in favour of the establishment of a working group which might rapidly consider the draft resolution and possibly amend it.

45. Mr. BENNOUNA, supported by Mr. THIAM, said that he shared Mr. Calero Rodrigues' doubts about the draft resolution. Even if the issue was an important one, there was no justification for singling out one aspect of the topic in the form of a resolution addressed to the General Assembly.

46. Mr. HE said he agreed with Mr. Yankov that it was too early to submit a resolution to the General Assembly because the Commission had not yet considered the report.

47. Mr. PELLET (Special Rapporteur) said that he would have no objection to the establishment of a working group, provided that it had a very specific mandate, such as that of deciding whether a resolution should be submitted to the General Assembly or considering the draft resolution contained at the end of his second report. Otherwise, it would be a waste of time to set up a working group.

48. Mr. MIKULKA, paying a tribute to the Special Rapporteur, said that he was not in principle opposed to the idea that the Commission should take a decision in the form of a resolution. That innovative proposal related to working methods and there was nothing to say that innovations might not help the Commission to perform its functions better. If a working group was set up, he agreed with Mr. Pellet that it should be given very specific terms of reference. The purpose of a working group was to solve technical problems and it was essential that the discussion of the Special Rapporteur's second report should take place in plenary.

49. Mr. AL-BAHARNA said he did not see how the Commission could adopt the draft resolution proposed by the Special Rapporteur because it had not yet considered his second report. The first paragraph of the preamble of the draft resolution began with the words "Having considered, at its forty-eighth session, the question of the unity or diversity of the juridical regime for reservations". It would certainly be better to wait at least until the following session.

50. He also wondered whether it was the Commission's practice to submit resolutions to the General Assembly. Would it not be better for it to prepare a "declaration of principles", as it usually did? It could include the very clear general outline of the study contained in chapter I, section B, of the report and also refer to the end of section C, which was no less clear-cut.

51. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission decided to examine the second report of the Special Rapporteur on reservations to treaties at its forty-ninth session.

It was so agreed.

Programme, procedures and working methods of the Commission, and its documentation (*continued*) (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT OF THE PLANNING GROUP (*continued*)

52. The CHAIRMAN, recalling that the report of the Planning Group (ILC(XLVIII)/PG/WG/1/Rev.1)[10] had been introduced by the Chairman of the Planning Group (2459th meeting), suggested that the Commission should consider it section by section.

PART I (Executive summary and principal conclusions)

Part I was adopted.

PART II (Detailed analysis)

SECTION I (Introduction) and SECTION II (The scope for continuing codification and progressive development)

Sections I and II were adopted.

SECTION III (The relations between the Commission and the General Assembly (Sixth Committee))

53. Mr. HE, referring to paragraph 36, said that, although the Sixth Committee usually took a very keen interest in what the Commission was doing, it could happen that it might be less interested in a topic and that the corresponding text was not postponed, but shelved. The words "rather than being postponed" should therefore be replaced by the words "rather than being shelved".

54. Mr. CRAWFORD said that paragraph 36 was designed mainly to make the General Assembly understand that, if it did not find a text to be useful, it should say so as soon possible, before the completion of the study. The paragraph might give an impression of reticence because the Planning Group did not want to offend the Sixth Committee. An amended text would be submitted later.

Section III was adopted on that understanding.

SECTION IV (The role of the Special Rapporteur)

55. Mr. BENNOUNA, proposing some changes to the text, said that paragraph 38 should indicate very clearly that the distribution of special rapporteurships among members from different regions was not a rule, but a practice that the Commission followed. The third sentence of that paragraph should be deleted because it was quite clumsy to say that a special rapporteur "could be less suitable". In paragraph 39, moreover, the words "a 'proprietary' approach to 'their' topic" were not at all appropriate and should be deleted. The idea that those words were supposed to convey had already been made clear enough in the rest of the paragraph.

56. Mr. CRAWFORD said that he agreed with Mr. Bennouna about the words 'proprietary' approach to 'their' topic" in paragraph 39. He suggested that paragraph 38 should be shortened to remove the impression of clumsiness to which Mr. Bennouna had referred. The second sentence would read: "The system has many advantages, provided that it is applied with flexibility".

[10] See 2459th meeting, footnote 8.

57. Mr. PAMBOU-TCHIVOUNDA said that he had no doubt about the need for the Standing Consultative Group referred to in paragraphs 43 to 47, but he would like to know what its status, powers and working methods would be. In his view, the Commission would have to be much more specific and define how the work of the Group would fit in with that of the Codification Division and how it would cooperate with members of the Commission other than the Special Rapporteur when the Commission was not in session. In paragraph 47, he did not think that there was any need for the words "without regard to the distinction between codification and progressive development".

58. Mr. ROSENSTOCK (Chairman of the Planning Group) said that the distinction between the codification and progressive development of international law was embodied in the statute of the Commission, but, with the completion of the traditional topics and historical change, it was becoming a handicap that would have to be removed from the statute if it was amended one day. The wording criticized by Mr. Pambou-Tchivounda referred to that possibility.

59. Mr. PELLET said that he agreed with Mr. Rosenstock's reply and pointed out that the wording in question corresponded to what was stated in paragraph 43. He had never been in favour of the idea of a standing consultative group because it seemed too rigid. Now it was to be a statutory requirement. Some topics of study did not, moreover, lend themselves to such a system. Having expressed those reservations, he could go along with the consensus on that part of the report.

60. Mr. CRAWFORD said that the proposed text placed enough emphasis on the flexibility that should be guaranteed for the mechanism of the Standing Consultative Group. Paragraph 46 was devoted entirely to that point. The objective at present was simply to state the principle of the existence of that new body, with its functions and working methods to be discussed later.

61. The CHAIRMAN said that the written text of the amendments proposed orally and other changes to the document under consideration would be made available later.

The meeting rose at 1.10 p.m.

2461st MEETING

Tuesday, 16 July 1996, at 3.40 p.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

Programme, procedures and working methods of the Commission, and its documentation (*continued*) (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT OF THE PLANNING GROUP (*concluded*)

1. The CHAIRMAN invited the Commission to continue its consideration of the report of the Planning Group (ILC(XLVIII)/PG/WG/1/Rev.1).[1]

PART II (Detailed analysis) (*concluded*)

SECTION IV (The role of the Special Rapporteur) (*concluded*)

2. Mr. CALERO RODRIGUES said that paragraph 51, on the important question of commentaries to draft articles, contained an excellent and innovative idea, namely that once the Drafting Committee had approved a particular article, the commentary to that article should be circulated either to members of the Drafting Committee or to the members of the consultative group for the topic. Thus, before going to the plenary, the commentaries prepared by the special rapporteur and the secretariat would have been reviewed by other members of the Commission.

3. The last sentence of paragraph 51 stated that "Draft articles should not be finally adopted without the Commission having approved the commentaries before it." In his view, such a procedure led to an impasse: the Commission could not approve the commentaries unless it had already adopted the corresponding articles. The sentence should be amended to read: "As the statute makes clear, draft articles should not be considered finally adopted without the Commission having approved the commentaries before it."

4. Mr. LUKASHUK said that it might be useful in some cases to appoint not only a special rapporteur but also one or two co-rapporteurs, duly representative of other legal systems, who could collaborate between sessions.

5. The CHAIRMAN said it might not be appropriate at that stage to introduce matters which had not been previously debated by the Planning Group or the corresponding working group. Those questions should be postponed until the next session.

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[1] See 2459th meeting, footnote 8.