Document:-
**A/CN.4/SR.2510**

**Summary record of the 2510th meeting**

Topic:
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-
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the Special Rapporteur himself, who would have liked to do both things at the same time.

81. If the Commission opted for "preliminary conclusions", it would be contradicting the peremptory nature of the first words of paragraph 1, namely "*Reaffirms* its attachment". Furthermore, it was not yet in a position to draw any conclusion, within the legal meaning of the term, which meant that the Commission had completed consideration of the topic.

82. Mr. DUGARD said that, if it was a question of entering into contact with the human rights monitoring bodies, either option was valid.

83. Mr. ROSENSTOCK said he wished to point out that the term "draft resolution" did not in fact designate a text that would be submitted to the General Assembly for its endorsement. The Commission was simply trying to take stock of the situation. The reactions of the human rights monitoring bodies should not be a matter for great concern: those bodies knew that the Commission was working on the topic and the circles that were concerned with human rights had already reacted. Proof of that lay in the introduction written by Mrs. Higgins to a book,[8] a member of ICJ, and in general comment No. 24 (52) of the Human Rights Committee.[9] In any event, the Commission should adopt a text in which it explained the stage it had reached in its reflections.

84. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said he too thought that the Commission should adopt "preliminary conclusions". However, at the purely formal level, it was not for the Commission to enter into direct contact with the human rights bodies: its mandate was from Member States and it was required to report to Member States.

85. Mr. HAFNER, referring to paragraphs 7, 9 and 11 of the text under consideration, noted that they envisaged various activities. Accordingly, it could be best described as "conclusions".

86. Mr. BENNOUNA, Mr. SIMMA, Mr. OPERTTI BADAN, Mr. RODRÍGUEZ CEDEÑO, Mr. HE and Mr. KABATSI said that they were in favour of "preliminary conclusions".

87. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished the text under consideration to take the form of "preliminary conclusions".

*It was so agreed.*

*The meeting rose at 1.15 p.m.*

[8] Chinkin and others, *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions*, J. P. Gardner, ed. (London, British Institute of International and Comparative Law, 1997).

[9] See 2487th meeting, footnote 17.

# 2510th MEETING

*Friday, 11 July 1997, at 10.10 a.m.*

*Chairman*: Mr. Alain PELLET

later: Mr. Peter KABATSI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Thiam.

## Appointment of special rapporteurs

1. The CHAIRMAN said that the Bureau was proposing the appointment of four special rapporteurs on topics under discussion or to be discussed by the Commission. All four persons concerned had already indicated their willingness to undertake the tasks. Mr. Crawford had agreed to serve as Special Rapporteur on State responsibility, Mr. Bennouna on diplomatic protection and Mr. Rodríguez Cedeño on unilateral acts of States. As to international liability for injurious consequences arising out of acts not prohibited by international law, Mr. Sreenivasa Rao had agreed to work initially only on prevention; subsequently, the Commission would decide whether he should also deal with liability or whether another special rapporteur should be appointed, or whether the topic should be abandoned.

2. The role of special rapporteurs was set forth in paragraphs 185 to 201 of the report of the Commission on the work of its forty-eighth session.[1] It included, among other things, the idea that future special rapporteurs should rely on input from a standing consultative group.

3. Mr. THIAM asked whether the Commission was competent to decide that a topic proposed for its consideration by the General Assembly should be split into two parts, as was evidently being proposed for international liability. The Assembly had not actually asked the Commission to deal with prevention.

4. The CHAIRMAN said that it was not the Commission's intention at the current time to appoint two special rapporteurs, but that, on the topic of international liability, it was certainly entitled to concentrate initially on prevention.

[1] See 2479th meeting, footnote 6.

*The Commission appointed the four Special Rapporteurs by acclamation.*

5. The CHAIRMAN said that with the exception of the two Special Rapporteurs appointed previously, namely, Mr. Mikulka and himself, there would be a standing consultative group for three of the newly appointed Special Rapporteurs. However, the Commission had adopted the report of the Working Group on State responsibility (A/CN.4/L.538),[2] which had proposed a slightly different procedure, consisting in establishing working groups to direct the activities of the Special Rapporteur on the more difficult subjects. That would apply to the concept of crime, countermeasures and the settlement of disputes.

6. Mr. ROSENSTOCK said that the new Special Rapporteurs should bear in mind that the rapid progress made by the Special Rapporteur, Mr. Mikulka, on nationality in relation to the succession of States had been greatly facilitated by his excellent and constructive use of a working group.

7. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to form consultative groups for the topics, other than State responsibility, to be addressed by the new Special Rapporteurs, bearing in mind the guidelines on such groups contained in paragraphs 191 to 195 of the report of the Commission on the work of its forty-eighth session. The groups would work between sessions, should number between three and five members, and should strive for balanced composition.

*It was so agreed.*

*Mr. Kabatsi took the Chair.*

## Reservations to treaties (*continued*) (A/CN.4/477 and Add.1 and A/CN.4/478,[3] A/CN.4/479, sect. D, A/CN.4/L.540)

[Agenda item 4]

DRAFT PRELIMINARY CONCLUSIONS ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

8. The CHAIRMAN invited the Commission to continue its consideration of the texts of a draft resolution and draft conclusions adopted by the Drafting Committee on first reading (A/CN.4/L.540).

DRAFT PRELIMINARY CONCLUSIONS

*Paragraph 1*

9. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that what the Commission was in fact reaffirming in paragraph 1 was the view expressed at its previous session, namely, that the regime set out in articles 19 to 23 of the 1969 and 1986 Vienna Conventions was the one that was applicable as a treaty reservations system. The intention of the paragraph was only to note that that regime contained various criteria for determining the admissibility of reservations, the criterion of the object and purpose of the treaty being the most important. There was no disagreement among members about repeating the Commission's view and since there were no problems of substance the paragraph could be amended to say: "The Commission reiterates its views . . .". If such a form of language was included in the conclusions, it would be factual—an indication of the Commission's support for the stability of the Vienna regime.

10. Mr. AL-BAHARNA said that, since there was no disagreement over the substance of the paragraph, the Commission should not consider replacing the word "commitment". He was happy with the paragraph as it stood. However, since "commitment" had both legal and political connotations, he would agree to the wording "The Commission reaffirms its recognition of . . .".

11. Mr. ECONOMIDES said the Commission was faced with a contradiction. It was just starting its work on the topic of reservations to treaties, and did not know where that work would take it. The Special Rapporteur had said in his reports that the 1969 and 1986 Vienna Conventions contained lacunae and ambiguities and had certain shortcomings, yet had suggested that additional protocols might be proposed. He asked whether it was logical for the Commission to express its faith in that system at the current stage in its work. The first paragraph should read "The Commission reiterates its position . . .", and a footnote should explain that position, which should not be repeated in the body of the text. The Commission's opinion might change later.

12. Mr. PAMBOU-TCHIVOUNDA said that he found the word "reaffirms" inappropriate, since it implied that the Commission had "affirmed" something on a previous occasion. It was also questionable on policy grounds, as he doubted whether the Commission had any business affirming its commitment to the Vienna regime, which was exclusively the concern of States parties to the 1969 and 1986 Vienna Conventions.

13. The Special Rapporteur had made the important point in his second report (A/CN.4/477 and Add.1 and A/CN.4/478) that the Vienna regime was designed to be generally applicable, but that point had been omitted from the preliminary conclusions. He was also dissatisfied with the reference to the object and purpose of the treaty as a "criterion" for determining the admissibility of reservations. The word "condition" would be more appropriate in the context.

14. Mr. OPERTTI BADAN said he could go along with the wording proposed by the Chairman of the Drafting Committee, except for a minor detail. The opening phrase might be amended to read: "The Commission reiterates its favourable view of the reservations regime . . .". In addition to replacing the word "commitment" by "favourable view", he was in favour of deleting the words "effective application", in the light of Mr. Brownlie's argument that the underlying concept was difficult to substantiate in legal terms and had certain political connotations. The

[2] See 2504th meeting.

[3] See *Yearbook . . . 1996*, vol. II (Part One).

Commission must confine its comments to the normative framework.

15. Mr. ROSENSTOCK said that the wording proposed by the Chairman of the Drafting Committee and Mr. Opertti Badan represented a centre of gravity and an acceptable compromise. Both versions reiterated the position adopted by the Commission at the forty-seventh session to the effect that the relevant provisions of the 1969 and 1986 Vienna Conventions should remain unchanged[4] and they also avoided some of the "theological" problems raised by other members.

16. Mr. LUKASHUK stressed the importance of paragraph 1 as a statement of the general concept that the Commission had adopted as its point of departure. Clearly, the Commission was not committed to the "application" of the reservations regime but rather to the regime itself. He supported the version of the paragraph proposed by the Chairman of the Drafting Committee and Mr. Opertti Badan.

17. Mr. CANDIOTI said he supported the version of paragraph 1 proposed by the Chairman of the Drafting Committee. A reference should be made to paragraph 105 of the report of the Commission on the work of its forty-eighth session,[5] setting forth the view it proposed to reiterate.

18. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), responding to a request by the Chairman, read out his version of paragraph 1, seeking to incorporate Mr. Opertti Badan's suggestions:

> "The Commission reiterates its view that articles 19 to 23 of the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations."

19. Mr. OPERTTI BADAN noted that the Chairman of the Drafting Committee had omitted the word "favourable" in the phrase "reiterates its view". What remained was little more than a statement of the fact, rather than the expression of a favourable view of the reservations regime.

20. Mr. KATEKA, supported by Mr. AL-BAHARNA, said the word "favourable" was inappropriate. The Commission had no business passing judgement on the Vienna regime.

21. Mr. ROSENSTOCK, supported by the Chairman of the Drafting Committee, suggested inserting the words "and should be retained" after "regime of reservations to treaties" in order to reflect Mr. Opertti Badan's point, which was a valid one.

22. Mr. MIKULKA said he agreed with Mr. Opertti Badan and supported Mr. Rosenstock's proposal as a minimum guarantee that the message after two years of debate in the Commission, namely that certain established principles must be preserved, would not be lost.

23. Mr. GOCO said he was unhappy with the proposed new wording of the paragraph. The paragraph was a syllogism and, as Mr. Lukashuk had noted, the anchor point of the preliminary conclusions. The key idea was the importance attached by the Commission to the reservations regime and to the criterion of the object and purpose of the treaty for determining the admissibility of reservations. He saw no reason to state a "view" that was unsolicited. The opening phrase should state the Commission's position in positive terms: "The Commission attaches importance to the reservations regime . . .".

24. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the phrase "reiterates its view" was a form of shorthand for the Commission's recognition on previous occasions of the importance of the reservations regime.

25. Mr. KATEKA said that the Commission's endorsement of the Vienna reservations regime was separate from the singling out of the criterion of object and purpose as being of special importance in determining the admissibility of reservations.

26. The CHAIRMAN said that note had been taken of Mr. Goco's reservation.

27. Mr. AL-BAHARNA said that much of the substance of the original version of paragraph 1 had been lost in the reformulation process. Mr. Goco's view might be accommodated by rewording the opening phrase of that version to read "The Commission reiterates its recognition of the effective application . . ." and replacing "particularly to" by "particularly of".

28. Mr. BENNOUNA proposed that the Commission should reproduce the text of paragraph 105 (*d*) of the report of the Commission on the work of its forty-eighth session, with the necessary editing changes, as paragraph 1 of the preliminary conclusions. He requested an indicative vote on his proposal.

29. The CHAIRMAN, noting that the same idea was contained in the version of paragraph 1 read out by the Chairman of the Drafting Committee and amended by Mr. Rosenstock, put that version to the vote.

*Further to the indicative vote, paragraph 1, as amended, was adopted.*

*Paragraphs 2 and 3*

*Paragraphs 2 and 3 were adopted.*

*Paragraph 4*

30. Mr. ECONOMIDES said he doubted whether the establishment of monitoring bodies by human rights treaties invariably gave rise to legal questions and therefore suggested replacing the words "gave rise" to either "may give rise" or "sometimes give rise".

[4] See 2501st meeting, footnote 11.

[5] See 2479th meeting, footnote 6.

31. Mr. PELLET (Special Rapporteur), supported by Mr. AL-BAHARNA, said he agreed with Mr. Economides, but would prefer the wording "gave rise to certain legal questions".

32. Mr. THIAM said that the paragraph should remain unchanged, since the idea of "certain legal questions" was implicit in the original wording.

*Paragraph 4 was adopted.*

*Paragraph 5*

33. Mr. OPERTTI BADAN said that the paragraph posed a serious difficulty. Some human rights monitoring bodies, such as, for example, the Inter-American Commission of Human Rights, included members from countries which had not ratified the treaty instituting the monitoring body in question. It was completely unacceptable for a body partly formed of States not parties to a treaty to have the right to comment upon and express recommendations with regard to the admissibility of reservations by States which were parties. The objection, as he saw it, was insurmountable, and unless the paragraph was thoroughly revised he would be compelled to oppose the adoption of the text as a whole. The point he was raising was a matter not of drafting but of substance and it should not be dealt with in a perfunctory manner with, as it were, an eye on the clock.

34. Mr. PELLET (Special Rapporteur) drew attention to paragraph 12, which made it very clear that the principles set forth were without prejudice to the practices and rules developed by monitoring bodies within regional contexts. As to the procedural aspect of the matter raised by Mr. Opertti Badan, he continued to find it difficult to acquiesce to debates being reopened by members who had been absent on the numerous earlier occasions for discussing their points of concern. He did not, of course, challenge the right of any member to be absent from a meeting or to say that he would have opposed a decision had he been present; what he did challenge most forcefully was the right of members who had been absent to reopen the debate on which a decision had been taken.

35. Mr. ROSENSTOCK expressed the hope that careful consideration of paragraph 12 would resolve or mitigate any difficulty and permit agreement on paragraph 5.

36. Mr. PAMBOU-TCHIVOUNDA said that the wording of the paragraph was confusing. The words "in order to carry out the functions assigned to them" implied that commenting upon and expressing recommendations with regard to the admissibility of reservations was not included among those functions.

37. The CHAIRMAN said that he understood the thrust of the paragraph to be that, in order to discharge their functions, monitoring bodies were entitled to comment upon and express recommendations on matters which included the admissibility of reservations by States, the object of such recommendations being to advise States rather than to oppose them.

38. Mr. LUKASHUK said that, notwithstanding the Special Rapporteur's reference to paragraph 12, he shared Mr. Opertti Badan's position. In the paragraph under consideration, the Commission stated that it considered the monitoring bodies competent not only to comment but also to express recommendations on questions of the admissibility of reservations by States. That amounted to a presumption and he, for one, did not think that the level commensurate with such a presumption had yet been reached in positive international law. The right to express recommendations on the admissibility of reservations belonged to the States parties, not the monitoring bodies. The paragraph would be acceptable if the words "and express recommendations with regard . . . to" were deleted.

39. Mr. MIKULKA suggested replacing the words "are competent" by the less categorical expression "may be competent".

40. Mr. ROSENSTOCK said that he would be prepared to accept either of the amendments proposed by Mr. Lukashuk and Mr. Mikulka. If, however, they were rejected by the majority of members, he would also be prepared to accept the paragraph recommended by the Drafting Committee, which represented a compromise between two widely divergent views on the implied powers of human rights monitoring bodies. To speak of "commenting" and "expressing recommendations" was already very different from the idea, defended by some members, that human rights monitoring bodies were competent to "determine" the admissibility or otherwise of reservations by States.

41. Mr. OPERTTI BADAN, replying to the Special Rapporteur, said that he had no intention of reopening the debate, but was under the impression that the precise point he was raising had not been discussed previously. The paragraph could be made acceptable by a slight amendment replacing the concept of competence by that of a faculty. The middle part of the paragraph would then read: "the monitoring bodies established thereby may make comments upon, *inter alia*, the admissibility".

42. Mr. RODRÍGUEZ CEDEÑO supported that suggestion. It was not appropriate to speak of the competence of monitoring bodies to express recommendations on the admissibility of reservations.

43. Mr. BROWNLIE said that he was in favour of maintaining the paragraph as it stood. If the paragraph could be criticized at all, it was on the ground that it stated the obvious, but the integrity of the draft demanded that it should be maintained. If a monitoring body, say the European Court of Human Rights, which had as its only stated applicable law a multilateral standard-setting convention like the Convention for the Protection of Human Rights and Fundamental Freedoms, found in the normal course of its business that it had to address incidental issues of general international law—say, treaty law or State responsibility—then it was not acting *ultra vires* if it supplemented its expressed applicable law with the application of general principles of international law.

44. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the wording of the paragraph represented a compromise. The freedom of States to react to the monitoring bodies' recommendations in whatever way they wished remained unrestricted. Competence to comment upon and make recommendations on, *inter alia*,

the admissibility of reservations was a useful and important aspect of the monitoring bodies' work. Removing the reference to recommendations would destroy the balance of the compromise that had been reached. As Chairman of the Drafting Committee, having taken careful note of all the views expressed, including the specific point raised by Mr. Opertti Badan, he recommended that paragraph 5 should be adopted in its current form, in the interests of the harmony of the text as a whole.

45. Mr. DUGARD also emphasized the compromise nature of the paragraph. The idea that monitoring bodies were competent to "determine" the admissibility of reservations had been dropped in deference to the school of thought which held that those bodies had no such powers. He appealed to members to adopt the paragraph as it stood.

46. Mr. AL-BAHARNA said he, too, supported the Drafting Committee's text, which had to be read in conjunction with paragraphs 6, 8 and 10.

47. Mr. RODRÍGUEZ CEDEÑO said that he would not oppose adoption of the paragraph, but wished to place on record his doubts as to whether the Commission was competent to determine the competence of monitoring bodies. He continued to believe that it would be preferable to avoid speaking of competence.

48. The CHAIRMAN said that, if he heard no objection, and taking note of the suggestions made by Mr. Opertti Badan, Mr. Rodríguez Cedeño, Mr. Lukashuk and Mr. Mikulka, he would take it that the Commission agreed to adopt paragraph 5 without change.

49. Mr. CANDIOTI requested a vote on Mr. Mikulka's proposal to replace the words "are competent" by "may be competent".

50. Mr. PELLET (Special Rapporteur) said that, while he could not stand in the way of a vote being taken, he was very strongly opposed to the proposal. As Mr. Brownlie had put it, the paragraph merely stated the obvious. It had formed the subject of a very long discussion in the Drafting Committee, where the conclusion had been reached that competence to comment upon and express recommendations with regard to the admissibility of reservations was inherent in the functions assigned to human rights monitoring bodies.

51. Mr. LUKASHUK said that he supported the Special Rapporteur's position. Replacing the words "are competent" by "may be competent" would make the paragraph meaningless. It went without saying that States could confer any competence they wished upon the bodies they established.

52. Mr. ADDO said he agreed with the Special Rapporteur and Mr. Lukashuk.

53. Mr. BENNOUNA suggested that an indicative vote should be taken on the paragraph as a whole.

54. Mr. OPERTTI BADAN said that he would not insist on an indicative vote, on the understanding that his reservations were duly recorded.

*Paragraph 5 was adopted.*

55. Mr. PELLET (Special Rapporteur) assured members that an extensive summary of the debate on the draft conclusions, reflecting all views, would be incorporated in the report.

*Paragraph 6*

56. Mr. HE proposed that the word "exclude" should be replaced by "challenge", since the monitoring bodies merely had the competence to offer comments and make recommendations. The word "traditional", before "modalities", should be deleted.

57. Mr. LUKASHUK proposed that the words "between States" should be inserted after "any dispute"; otherwise the impression might be created that the reference was to disputes involving a monitoring body. Alternatively, it could be made clear in the commentary that the disputes in question were disputes between States.

58. Mr. BROWNLIE suggested that Mr. He's concerns might better be met by replacing the words "does not exclude" by "is compatible with", which was a slightly more elegant formulation.

59. Mr. PELLET (Special Rapporteur) said Mr. Lukashuk's proposal was a good one and accurately reflected the Drafting Committee's understanding. In French it would read *entre les États parties*. He had no objection to deleting the word "traditional", but could not accept amending "exclude" to "challenge", which would entirely change the meaning of the paragraph. He could, however, agree to the wording proposed by Mr. Brownlie.

60. Mr. ECONOMIDES said he endorsed Mr. Brownlie's proposal and pointed out that the phrase customarily used with reference to treaties, "interpretation or implementation", had been inadvertently truncated. He therefore proposed that the words "interpretation or" should be inserted before "implementation".

61. Mr. ROSENSTOCK pointed out that paragraph 6 provided a counterweight to paragraph 5. Adoption of Mr. Brownlie's amendment would destroy the balance, and that was something he could not accept. Implicit in paragraph 5 was the idea that the monitoring bodies could not take decisions, but that they could make recommendations, while paragraph 6 indicated that they could not circumvent what the 1969 and 1986 Vienna Conventions established with regard to the role of States and of other dispute settlement bodies. He would prefer to see the phrase "does not exclude" remain unchanged, but suggested that the words "or otherwise affect" could be inserted after it. He had no objection to deleting "traditional", but another solution might be to replace it with the word "established", which indicated the regime that already existed.

62. Mr. KATEKA said he endorsed the amendments proposed by Mr. Rosenstock, Mr. Lukashuk and Mr. Economides.

63. Mr. HAFNER said he could not agree to Mr. Lukashuk's proposal, concerning disputes "between States parties", because it would rule out a monitoring body which had decision-making power to which individuals were entitled to resort.

64. Mr. PAMBOU-TCHIVOUNDA said the logic behind the paragraph seemed to be defective, for it equated two incompatible elements, namely monitoring bodies and modalities. He would suggest that the phrase "does not preclude the traditional modalities" should be replaced by "is without prejudice to the normal control exercised". He supported the proposal made by Mr. Economides.

65. Mr. PELLET (Special Rapporteur) said he liked the first part of Mr. Pambou-Tchivounda's proposal, "is without prejudice to", but not the second part, because the words "traditional modalities of control" implied competence. He could also accept the wording proposed by Mr. Rosenstock. Mr. Hafner's comments were based on a misconception: the disputes referred to in paragraph 6 were indeed disputes between States. The monitoring bodies before which individuals could bring cases were covered in paragraphs 5 and 7. The Drafting Committee had been trying to indicate that international monitoring bodies had never had decision-making powers, but even so, they had had the right to make comments and recommendations, and that in future they might be given decision-making powers in cases brought before them by individuals.

66. Mr. ROSENSTOCK said he strongly preferred his own amendment to the clause suggested by Mr. Pambou-Tchivounda, which implied the existence of competing mechanisms. He agreed that the words "between States" would not adversely affect the right of individuals to bring cases before the monitoring bodies, but recalled that Mr. Lukashuk, in an earlier discussion, had also indicated he would be content with a written explanation that the disputes in question were between States. Perhaps that might be the safest way out, rather than amending the text.

67. Mr. BENNOUNA said he regretted that the Commission was working on the text in the guise of an extended Drafting Committee. The linguistic complications with which it was currently grappling reflected an underlying uncertainty about what the text should actually say. The Commission wanted it to say two apparently contradictory things: that the monitoring bodies had competence, but that that competence did not in any way affect the traditional modalities of control. Indeed, it might be best to use the formulation "does not affect", an idea that was similar to the one behind Mr. Rosenstock's proposal.

68. Mr. ECONOMIDES said all the proposals went in the same direction, but since Mr. Rosenstock had a definite position on the matter, perhaps the Commission could simply adopt his amendment. In the French version, the words *n'est pas exclusive* would be replaced by *n'affecte pas*.

69. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 6 as amended by Mr. Rosenstock.

*Paragraph 6, as amended, was adopted.*

*Paragraph 7*

70. Mr. OPERTTI BADAN said his concerns about paragraph 7 were the same as those he had expressed on paragraph 5. It was not appropriate to suggest that specific clauses establishing the competence of monitoring bodies to determine the admissibility of a reservation should be incorporated in normative multilateral treaties, particularly in the field of human rights, when such bodies could comprise States that were not parties to the treaty to which a reservation had been entered.

71. Mr. LUKASHUK said he experienced difficulty with the phrase "elaborating protocols to existing treaties to confer competence on the monitoring body". It seemed to imply that the Commission was pressing for such competence to be accorded, and he would prefer the words "confer competence on" to be replaced by "define the competence of".

72. Mr. HAFNER said the words "to appreciate" were out of place and contradicted the wording of paragraph 5. Nevertheless, he could agree to the current formulation.

73. Mr. RODRÍGUEZ CEDEÑO said that, for greater clarity, the words "to be concluded in future" should be inserted after "normative multilateral treaties".

74. Mr. ROSENSTOCK said the reference to treaties concluded in future was implicit in the current formulation but he would have no objection to the proposed change. He could not, however, accept amending "confer" to "define", as that would change the aim and balance of the text and destroy the compromise that underlay it.

75. Mr. BENNOUNA said the wording of the paragraph was extremely convoluted and a simpler and clearer way must be found to express the idea. Moreover, the references to specific clauses and protocols were superfluous; the vehicle to be used was a matter of legal technique, to be decided on by the States signing the relevant instrument.

76. Mr. MIKULKA said he agreed with Mr. Lukashuk and Mr. Bennouna that the aim was precisely to encourage States to specify where certain competences lay, not to confer on monitoring bodies the competence to become involved in matters relating to the law of treaties. He asked, for example, why the monitoring bodies should be given competence instead of the depositaries.

77. Mr. HAFNER said he could not agree with Mr. Mikulka. The balance between paragraphs 5 and 7 was based on a difference of competence. The word "appreciate" in paragraph 7 confused the matter, and that was why he had raised the point. Paragraph 5 related to the competence of monitoring bodies merely to comment upon and make recommendations concerning the admissibility of reservations, while the subject of paragraph 6 was the determination of such admissibility, something that went beyond the competence outlined in paragraph 5. In paragraph 7, it was a question, not of defining or making more explicit the competence referred to in paragraph 5, but of adding another competence, and that was why the word "confer" was used. He believed the text must be kept as it stood.

78. Mr. PELLET (Special Rapporteur) said he agreed with Mr. Hafner: paragraph 7 was of no consequence unless it added something to the current situation and with a view to the future. In response to Mr. Bennouna's comments, he explained that the Drafting Committee had

worked on the text in English and had had no hand in the versions in other languages. He, too, found the French version ponderous.

79. Mr. MIKULKA said he had understood paragraphs 5 and 7 in exactly the way Mr. Hafner had just described. That was precisely why he thought paragraph 7 should say to States that the Commission would like them to indicate explicitly whether or not they wanted the bodies responsible for monitoring the implementation of treaties on human rights to become involved, in addition, in determining the admissibility of reservations. But of course, the Commission must not encourage them to take one or another position on that matter.

80. Mr. OPERTTI BADAN said the discussion of paragraph 7 reflected on a smaller scale the debate on the entire draft preliminary conclusions, which would give the monitoring bodies competence approaching that which in the past had been the exclusive preserve of States, namely to determine the scope of reservations. He was entirely in agreement with Mr. Mikulka and proposed that paragraph 7 should simply be deleted. There was no reason for the Commission to suggest to States what they ought to do.

81. Mr. ROSENSTOCK said he could accept deletion of paragraph 7, even though that would probably affect the overall balance. Alternatively, Mr. Mikulka's concerns might be met by adding the words ", if they seek to" after "existing treaties".

82. Mr. PELLET (Special Rapporteur) said that, unlike Mr. Opertti Badan, he thought the Commission was doing its job when it made suggestions, which was exactly what it had done on reservations in 1951. It had adopted positions not in regard to human rights bodies but with regard to ICJ.[6] He was not entirely unmoved by Mr. Mikulka's position and thought that Mr. Lukashuk's proposal to replace "confer competence" by "define the competence of" had the merit of attenuating paragraph 7. Another possibility would be to ask States to specify the monitoring systems, including the competence of the monitoring bodies in general. He would not be opposed to any of those solutions, but thought it would be unfortunate to delete the entire paragraph. The Commission should not fail to adopt a position when it experienced some hesitations.

83. Mr. BENNOUNA, replying to a question from Mr. ROSENSTOCK, said further consideration of the paragraph should be deferred until the various amendments were placed before members of the Commission in writing.

*The meeting rose at 1.10 p.m.*

[6] See *Yearbook ... 1951*, vol. II, document A/1858, pp. 125-131.

# 2511th MEETING

*Monday, 14 July 1997, at 10.05 a.m.*

*Chairman*: Mr. Peter KABATSI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Thiam.

## Reservations to treaties (*concluded*) (A/CN.4/477 and Add.1 and A/CN.4/478,[1] A/CN.4/479, sect. D, A/CN.4/L.540)

[Agenda item 4]

DRAFT PRELIMINARY CONCLUSIONS ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft conclusions contained in the texts of a draft resolution and draft conclusions adopted by the Drafting Committee on first reading (A/CN.4/L.540).

DRAFT PRELIMINARY CONCLUSIONS (*concluded*)

*Paragraph 7* (concluded)

2. The CHAIRMAN drew attention to a revised text of paragraph 7 proposed by Mr. Rosenstock (ILC(XLIX)/Plenary/WP.4) to replace the current wording of paragraph 7 which read:

> "7. The Commission suggests that consideration be given to providing specific clauses in multilateral normative treaties, including in particular human rights treaties, or to elaborating protocols to existing treaties, if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;"

3. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the main change compared with paragraph 7 proposed by the Drafting Committee lay in the insertion of the formulation "if States seek". It was intended to emphasize the fact that "providing specific clauses in multilateral normative treaties" was a new pro-

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