Document:-
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Summary record of the 2511th meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
1997, vol. I

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).

cedure and that States which sought to confer competence on the monitoring body were urged to use it instead of leaving the practice of the body concerned to develop by itself.

4. Mr. OPERTTI BADAN said he endorsed the new wording, subject to a few small changes needed in the Spanish version. Nevertheless, perhaps it would be better to replace the words "if States seek" by "if States decide".

5. Mr. RODRÍGUEZ CEDEÑO said he fully supported the revised version of paragraph 7 proposed by Mr. Rosenstock. However, there was an omission in the last phrase of the Spanish version, which, to be brought into line with the English and French versions, should include the words *apreciar o* between *para* and *determinar.*

6. Mr. LUKASHUK said that he was wholly satisfied with the new proposal and warmly thanked Mr. Rosenstock.

7. Mr. ROSENSTOCK explained that the main difference between the revised text just circulated and the text proposed by the Drafting Committee lay in the addition of the words "if States seek". They had been included in order to go easy on the sensibility of States and meet the concerns of members who had found that the Commission had adopted a tone that was too much of an "incitement" instead of confining itself to a neutral description.

8. The word "States" had seemed more appropriate than "States parties" because the paragraph related not only to "elaborating protocols to existing treaties" but also to "providing specific clauses in multilateral normative treaties".

9. Mr. THIAM, reverting to Mr. Bennouna's objections (2510th meeting), said that the formulation *suggère d'envisager la possibilité* (suggests that consideration be given), at the beginning of the paragraph, was not clear. It was far too complicated and was redundant.

10. Mr. PELLET (Special Rapporteur) recognized that it would be sufficient in French to say *suggère d'envisager d'inclure* and delete the words *la possibilité.*

11. Mr. BENNOUNA said that that cautious phrasing at the beginning of the paragraph was pointless because of the inclusion in the revised version of the words "if States seek", which already clearly indicated that States were acting as they wanted to. It would be more elegant and more direct to say "The Commission suggests providing...".

12. Mr. PELLET (Special Rapporteur) said he had no objection to that suggestion.

13. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that Mr. Bennouna's formulation would indeed be clearer and more elegant. However, if some members thought it necessary to keep the cautious phrasing, he was not against such a course.

14. Mr. HE said that he would prefer to keep to the more prudent formulation proposed by Mr. Rosenstock.

15. Mr. LUKASHUK said that he too would prefer to keep the text that had been circulated, because it had initially been proposed in English—which was an obstacle for members of the Commission whose mother tongue was not English—and the amendments being proposed unfortunately related largely to the French version—yet another handicap for members who had no written translation of the proposal in their own language.

16. Mr. GALICKI said that, as far as he was concerned, he preferred the shorter version proposed by Mr. Thiam and Mr. Bennouna. However, in the English version, adoption in the first part of the paragraph of the proposed phrase would mean having to replace the words "or to elaborating" by "or to elaborate" in the second part.

17. Mr. ROSENSTOCK said that the formulation "suggests providing . . . or elaborating" seemed better, as it was more elegant.

Paragraph 7, as amended, was adopted.

Paragraph 8

18. Mr. BENNOUNA said it was regrettable that the French version of the paragraph was drafted in such a way as to make the text so confusing and difficult to understand. As to the substance, he wondered what meaning was to be attached to the "legal force" of the findings of monitoring bodies. Such "force" stemmed from the reaction of States and the *opinio juris* of the bodies themselves. Since paragraph 8 as a whole added nothing to the conclusions and simply restated the obvious, he proposed that it should be deleted.

19. Mr. Sreenivasa RAO (President of the Drafting Committee) said the Drafting Committee had considered the paragraph very important and the advantage was that it was a reminder of something which needed to be said, namely, that treaty monitoring bodies had specific powers which they could not exercise over and above their mandate. In fact, that reminder was a response to the attitude of the Human Rights Committee in the case of general comment No. 24 (52).[2]

20. Mr. GOCO said that the expression "cannot exceed" was likely to produce strong reactions, notably in the Human Rights Committee.

21. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 8 should be retained if only to point out that treaty monitoring bodies had limited powers.

22. Mr. OPERTTI BADAN said that he was of the same opinion.

23. Mr. LUKASHUK said he too thought that the paragraph should be retained, but also wondered about the term "legal force". So far, the bodies in question were regarded as making recommendations, performing monitoring duties, providing guidance, and so on. The idea that their findings had "legal force" was new in that context and was difficult to grasp. For that reason, he suggested that the difficulty might be circumvented by speaking of

[2] See 2487th meeting, footnote 17.

"obligatory force", which could be not only legal but also political.

24. Mr. ROSENSTOCK said that "obligatory force" and "legal force", should not be confused. The latter did not mean that the findings Mr. Lukashuk spoke about would be imposed on States and would imply anything binding. As to what was to be done with the paragraph, he recognized that the provision had some meaning only in the context of general comment No. 24 (52) of the Human Rights Committee. However, an alert reader would immediately grasp its purpose.

25. Mr. RODRÍGUEZ CEDEÑO said that he preferred to keep the paragraph.

26. Mr. ECONOMIDES said that he endorsed Mr. Bennouna's reservations regarding a paragraph that did no more than state the obvious. Moreover, there were certain drafting difficulties. The expression "cannot exceed" could usefully be replaced by "cannot be other than that" and the phrase "the powers given to them" would need to be revised, since the powers in question derived not only from their mandated powers but also their practice, as sanctioned by State more or less on a day-to-day basis. The latter expression could be replaced by "the powers at their disposal".

27. Mr. DUGARD said that he too considered that the wording of the paragraph left something to be desired and would prefer a formulation such as: "the legal force of the findings of the monitoring bodies in respect of reservations is derived from and limited by the powers given to them for the performance of their general monitoring role".

28. Mr. ADDO, Mr. AL-BAHARNA and Mr. HAFNER said they thought that paragraph 8 should be retained.

29. The CHAIRMAN said the Commission appeared to want to retain the current wording of paragraph 8. If he heard no objection, he would take it that, with a few changes of form in connection with the French version, the Commission agreed to adopt paragraph 8.

Paragraph 8 was adopted.

Paragraph 9

30. Mr. RODRÍGUEZ CEDEÑO said he wondered whether, in view of the particulars in paragraphs 7 and 8 concerning the competence of monitoring bodies, the Commission should not be more concise and delete the whole of the second part of the paragraph, from the words "that they may make . . .".

31. Mr. OPERTTI BADAN said he shared that view, especially as the second part of the Spanish version spoke of *decisiones* ("determination" in the English version). It would be better for the Commission not to venture into the terrain of *decisiones* and simply speak of "recommendations" of the monitoring bodies.

32. Mr. BENNOUNA said that, as far as he was concerned, the paragraph should simply be deleted. He was particularly disturbed by the introductory formula "The Commission calls upon States to cooperate". It was not for the Commission to dictate their conduct to States. However, if the paragraph was maintained, he distinctly preferred the shorter version proposed by Mr. Rodríguez Cedeño.

33. Mr. HE said that he too favoured the shorter version.

34. The CHAIRMAN, speaking as a member of the Commission, said that he too was disturbed by the imperious tone of the formulation "The Commission calls on States to cooperate". Moreover, he supported Mr. Rodríguez Cedeño's proposal to delete the second part of the paragraph.

35. Mr. ROSENSTOCK said that, personally, he had no objection to deleting paragraph 9. However, if the Commission decided to keep it, it did not seem judicious to delete the last part: the word "determination" echoed paragraph 7, which already envisaged that monitoring bodies should be empowered to make a determination.

36. Mr. GALICKI said that, by deleting the second part of paragraph 9, the Commission would be concerned with the existing situation and not future possibilities. A logical solution would then be to change the order of the paragraphs and insert paragraph 7 after the shorter version of paragraph 9. In that way the Commission would meet Mr. Rosenstock's concern for consistency, by mentioning first what existed and then what might be.

37. Mr. PELLET (Special Rapporteur) said he would not like to see the end of the paragraph lopped off. The current text was balanced and set out "in black and white" a reply to observations by the United States of America, France and the United Kingdom of Great Britain and Northern Ireland, which had clearly expressed their intention of doing what they felt like doing. It was not simply a question of the current situation but also the hypothesis that the monitoring bodies would, in the future, secure recognition of decision-making powers. Both parts were logically linked and they linked in with the previous paragraphs. However, if the Commission eliminated the second part of paragraph 9, it would then have to insert it before paragraph 7, as Mr. Galicki had suggested.

38. Mr. AL-BAHARNA said he too thought that, in its current form, the paragraph struck a certain balance that should be preserved.

39. Mr. RODRÍGUEZ CEDEÑO said that he was bothered precisely by the fact that the second part prejudged the future by speaking of a power of determination (*decisiones*) which had not yet even been envisaged. The important point in the paragraph seemed to be the call for cooperation with monitoring bodies. The text might perhaps be reformulated by laying greater emphasis on such cooperation and speaking neither of recommendations nor determinations.

40. Mr. THIAM said he was also of the opinion that the Commission could do without the paragraph. The last phrase, "if such bodies have been granted authority to that effect", seemed in particular to state the obvious. It simply lengthened and pointlessly complicated the text and should be deleted.

41. Mr. CANDIOTI said that he associated himself with the comments by Mr. Thiam and with those by Mr. Opertti Badan and Mr. Rodríguez Cedeño. If the paragraph was kept in its current form, he would at least suggest replacing the words "to any recommendations" by "to recommendations".

42. Mr. PELLET (Special Rapporteur) said that if the Commission followed Mr. Thiam's proposal to delete the last phrase after the word "determination", the reader would no longer understand that the hypothesis related to the future. There was some point to indicating that monitoring bodies would have no competence other than that which States wanted in future to confer on them. Nevertheless, the last part was not perhaps very elegant and could be replaced by something along the lines of: "if such bodies have been conferred with competence to that effect".

43. Mr. OPERTTI BADAN noted that there was an obvious confusion in the tenses used in the paragraph. The statement that the Commission "calls upon States to cooperate" was quite obviously in the present. However, States could not be asked to take account "in the present" of recommendations and still less of a determination that the monitoring bodies might have the power to make in the future. The Commission was not empowered to meddle in the relations that States might establish in the future with monitoring bodies.

44. Mr. ADDO said that, if paragraph 9 was maintained, it should be maintained *in toto*.

45. Mr. GOCO pointed out that, if the Commission invited States to cooperate with monitoring bodies, it was implicitly understood that such bodies had the competence to make recommendations. Moreover, the second part of the sentence followed on logically from paragraph 7. However, it would be better to replace the word "if" by the word "whenever" in order to indicate that the phrase related to the future.

46. Mr. ECONOMIDES said that paragraph 9 was very useful and was consistent with the terms of paragraph 7. Nevertheless, to bring out more clearly the fact that the last phrase related to the future, it should be recast to read: "if such bodies are granted authority to that effect in the future".

47. Mr. THIAM said that he could agree to maintaining the whole of the paragraph, provided Mr. Goco's proposal to replace "if" by "whenever" was adopted.

48. Mr. RODRÍGUEZ CEDEÑO proposed that, in order to highlight the appeal for State cooperation, the entire paragraph should be recast to read:

> "9. The Commission calls upon States to cooperate with monitoring bodies so as to give appropriate consideration to matters relating to the formulation and admissibility of a reservation."

49. Mr. PELLET (Special Rapporteur) said that he failed to see anything new in that proposal. However, he agreed with the proposal by Mr. Goco and, even more, with that by Mr. Economides. The latter proposal removed any ambiguity yet respected the logic of the text and was in keeping with the wishes of a number of members. The text of paragraph 9 would thus read:

> "9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future."

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 9 with the wording read out by the Special Rapporteur.

Paragraph 9, as amended, was adopted.

Paragraph 10

51. Mr. ECONOMIDES said he had three comments in connection with the second sentence. First, the word "may" should be replaced by "shall", for in the case of a reservation incompatible with the object and purposes of the treaty the shift was from the optional to the mandatory. He even wondered whether the expression "for example" should be retained. Secondly, the various solutions offered to the State should be enumerated more logically: first, to modify the reservation so as to keep the part that was acceptable; if that was not possible, to withdraw the reservation; lastly, if such a course proved impossible, to forego becoming a party. The latter course should, moreover, be supplemented—and that was the object of his third comment—for instances in which the State was already a party to the treaty, in which case it should "cease to be a party". The text, recast in the light of those comments would read: "This action should consist in the State either modifying the reservation so as to eliminate the incompatibility, or withdrawing it, or foregoing becoming a party or ceasing to be a party."

52. Mr. HAFNER said that, since the Commission had stated in paragraph 1 of the draft conclusions that compatibility with the object and purpose of the treaty was only one of the criteria for determining the admissibility of reservations, it was not justifiable for paragraph 10 to cover only the case of incompatibility. It might imply the Commission had tried to institute for such a case a regime that was different from the other cases of inadmissibility set out in article 19 of the 1969 Vienna Convention. He therefore proposed that the first sentence of paragraph 10 should be recast to read: "The Commission notes also that, in the event of the inadmissibility of a reservation, it is primarily the reserving State that has the responsibility for taking action."

53. With reference to Mr. Economides' proposal, he would point out that the second sentence was far-reaching and already tended to prejudge the outcome of the Commission's discussions at the next session. The Drafting Committee had cited four examples and had used the verb "may" and not "shall" so as not to exclude other possibilities of reactions to an allegation of inadmissibility.

54. Mr. GOCO said he endorsed Mr. Economides' idea of reversing the order of the solutions set out in the second sentence. As to the substance, he agreed with Mr. Hafner's proposal to replace the notion of incompatibility

by that of inadmissibility. On the other hand, he wondered why the word "primarily" was used in the first sentence.

55. Mr. LUKASHUK said that he supported both of Mr. Hafner's proposals, namely referring to inadmissibility and maintaining the verb "may". However, since the sequence of paragraphs could convey the impression that inadmissibility would be determined by monitoring bodies, it should be emphasized that inadmissibility would be determined in a due and proper manner.

56. Mr. ROSENSTOCK said that he completely agreed with Mr. Hafner. The word "primarily" had been inserted in the first sentence in order to lead into the second sentence, while taking into account the fact that, apart from the reserving State and the State or organization having objected to the reservation, other States might want to move in and secure withdrawal of the reservations. However, the word was not essential and it could be omitted. The thrust of the paragraph was that it was not for monitoring bodies to determine admissibility and, if they did pronounce on admissibility, it certainly was not their task to take part in any discussion about severability. The idea would be properly expressed, even if the Commission decided to do away with the word "primarily". However, he would prefer to keep the word "may", rather than use "shall", for a State was not under a duty to do anything. Furthermore, replacing the idea of incompatibility with that of inadmissibility largely removed the need to reverse the order of the possibilities set out in the second sentence, since modifying a reservation was of value only in cases of incompatibility with the object and purpose of the treaty.

57. Mr. OPERTTI BADAN said that there was a difference between the Spanish and French versions of the end of the first sentence. In his opinion, the Spanish text wrongly implied that the reserving State had the responsibility for adopting measures. It would be better to speak of "competence".

58. Mr. ROSENSTOCK suggested that, if the Spanish and French versions spoke of "competence", the English text should do the same.

59. The CHAIRMAN confirmed that the secretariat would make the requisite changes. He said that, if he heard no objection, he would take it that the Commission agreed to adopt the first sentence, reading: "The Commission notes also that, in the event of the inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action.

It was so agreed.

60. Mr. HAFNER pointed out that the word "incompatibility" in the second sentence should also be replaced by "inadmissibility".

61. Mr. GALICKI said that, in that case, the reference to "modifying" the reservation posed a problem. The 1969 Vienna Convention itself did not allow for such modification and the Commission had agreed to that possibility solely in connection with incompatibility with the object and purpose of the treaty. As Mr. Rosenstock had pointed out, it was inconceivable for a State to be able to modify a reservation in the case of inadmissibility for reasons other than that of incompatibility with the object and purpose of the treaty. Accordingly, he was not in favour of changing the order of the possibilities set out in the second sentence. The Commission first spoke of the general rules deriving directly from the Convention and then introduced a possibility based on State practice, namely modification of the reservation, which was confined solely to the case of incompatibility with the object and purpose of the treaty.

62. Mr. PELLET (Special Rapporteur) said that he did not agree with Mr. Galicki. In his view, the possibilities in paragraph 10 could be applied in cases other than incompatibility with the object and purpose of the treaty. He therefore thought, like Mr. Hafner, that if inadmissibility could be substituted for "incompatibility" in the first sentence, the same should be done in the second sentence.

63. Mr. HAFNER said that he endorsed the comment by the Special Rapporteur. The 1969 Vienna Convention did not expressly provide for the possibility of modifying a reservation. Therefore the logical thing was either to admit such a possibility for all the cases covered by article 19 of the Convention or to refuse it for all cases. Actually, practice had shown that it was possible to interpret a modification of a reservation as partial withdrawal, something that was not prohibited by any provision of the Convention.

64. Mr. LUKASHUK said he agreed with the comments by the Special Rapporteur, and Mr. Hafner had pointed out that, inasmuch as States were entitled under the relevant terms of the 1969 and 1986 Vienna Conventions to make and to withdraw reservations, they were also entitled to modify them.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 10, which would read:

> "10. The Commission notes also that, in the event of the inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or foregoing becoming a party to the treaty."

Paragraph 10, as amended, was adopted.

Paragraph 11

66. Mr. KATEKA said that the word "principles" was too strong and should be replaced by another term.

67. Mr. ROSENSTOCK, supported by Mr. DUGARD, Mr. Sreenivasa RAO and Mr. OPERTTI BADAN, proposed that the words "principles enunciated above" should be replaced by "above conclusions".

Paragraph 11, as amended, was adopted.

Paragraph 12

68. Mr. HAFNER said that he could accept paragraph 12 on three conditions. First, it should be understood that the paragraph could not be interpreted as

authorizing States to establish a reservations regime different from the one in the 1969 Vienna Convention. The application of the Convention in the different regional contexts could, admittedly, produce different results, but the basics of the regime must be the same. States could naturally adopt particular provisions within a regional context, but failing such provisions, it was the Convention that applied.

69. Secondly, paragraph 12 should not be construed as permitting States to develop in a regional context reservations regimes that departed from the 1969 Vienna Convention in regard to treaties of a universal character and, in particular, human rights treaties. That would simply open the door to different interpretations of the object and purpose of such treaties and defeat their universality.

70. Thirdly, he did not believe that a regime already developed by monitoring bodies in a regional context could be separated from universal developments. General comment No. 24 (52) of the Human Rights Committee and the practice of the Committee on the Elimination of Discrimination against Women followed the decisions in the *Belilos*[3] and *Loizidou*[4] cases, which meant there was, at the universal level, a development that was parallel to and in conformity with practice at the regional level.

71. Mr. OPERTTI BADAN said the wording of paragraph 12 conveyed the idea that rules were being established in a hierarchy in which those developed at the regional level were of higher value than those set out by the Commission in the document under consideration. To say that the practices and rules developed within regional contexts should be maintained even if they were inconsistent with the Commission's conclusions, the object of which was to improve the reservations regime on a world basis, seemed somewhat inconsistent. It would therefore be preferable to delete paragraph 12.

72. Mr. ROSENSTOCK said he shared Mr. Hafner's view and thought, as did Mr. Opertti Badan, that paragraph 12 should be deleted. To take proper account of its underlying concerns, it would be enough for the Chairman of the Drafting Committee to explain in general terms that, in its conclusions the Commission was in no way criticizing the activities of regional bodies on which competence had been expressly conferred.

73. Mr. PELLET (Special Rapporteur) said that deletion of paragraph 12, which would be all the more disturbing in that it was a safeguard clause, would make the presence of the conclusions in paragraphs 4, 5 and 6 incomprehensible. For that reason, he was opposed to deleting it.

74. Mr. ECONOMIDES, supported by Mr. Sreenivasa RAO, said that paragraph 12 was essential and was a prerequisite for the consensus which seemed to have emerged in the Commission. It meant quite simply that the Commission's conclusions in no way affected the practices and rules instituted by the decisions of human rights treaty monitoring bodies.

75. Mr. LUKASHUK said the differences of views concerning paragraph 12 did not seem fundamental and the Commission could very well keep the paragraph. Perhaps, to meet Mr. Hafner's concerns, which were not without some merit, it might be possible to indicate that the practices and rules developed by monitoring bodies at the regional level could depart from the regime established by the 1969 and 1986 Vienna Conventions only on minor points.

76. Mr. ROSENSTOCK said that nothing in the first 11 paragraphs of the draft conclusions could be construed as a criticism of the practices and rules of any regional monitoring body, and for that reason paragraph 12 was pointless. Even if some decisions by regional bodies could be criticized at the universal level, they could be justified at the regional level, as far as the provisions of the treaties in question and the practice of the monitoring bodies were concerned, by consent between States that did not necessarily exist at the universal level. Nevertheless, if some members wanted to keep paragraph 12 as a kind of guarantee, he would not press for it to be deleted, on the understanding that the Commission was not encouraging the fragmentation of international law or the introduction of practices that were not in keeping with the 1969 and 1986 Vienna Conventions.

77. Mr. BENNOUNA pointed out that the provisions on reservations in the 1969 Vienna Convention were not binding, whereas human rights instruments were. Obviously, States could waive the technical provisions of the Convention on reservations and, in that regard, he was in agreement with the Special Rapporteur and Mr. Economides: regional practices and rules should be maintained, particularly when they went further than did the provisions of the Convention. In any event, paragraph 12 was a savings clause and, as such, had no normative effect.

78. Mr. PELLET (Special Rapporteur) said he too thought that the provisions of the 1969 Vienna Convention on reservations did not have the character of *jus cogens* and that *lex specialis* could derogate from *lex generalis*. Even though he had some hesitations about the grounds for the jurisprudence of some European monitoring bodies, in his view paragraph 12 had the merit of not prejudging decisions the Commission might take in the future and enabling everyone, by its "constructive ambiguity" to keep his opinion. Moreover, in the French version, he would like the word *élaborées* to be replaced by *mises en oeuvre*.

79. Mr. OPERTTI BADAN said that he endorsed Mr. Rosenstock's comments and would not press for paragraph 12 to be deleted, on the understanding that the practice and rules developed by monitoring bodies within regional contexts respected the rules on reservations set forth in the 1969 and 1986 Vienna Conventions.

80. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 12, with the proposed change to the French version and with the replacement of the words "principles enunciated above" by "above conclusions".

Paragraph 12, as amended, was adopted.

81. Mr. PELLET (Special Rapporteur), supported by Mr. BENNOUNA, said that the word *inadmissibilité*, used in a number of provisions in the French version, posed a problem and should be replaced by a word such as *illicéité*.

[3] See 2500th meeting, footnote 16.

[4] Ibid., footnote 17.

82. The CHAIRMAN said that the Special Rapporteur and Francophone members of the Commission would agree with the secretariat on making the requisite change.

The text of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, as a whole, as amended, was adopted.

The meeting rose at 1.10 p.m.

2512th MEETING

Monday, 14 July 1997, at 3.10 p.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

Unilateral acts of States (A/CN.4/L.543)

[Agenda item 7]

REPORT OF THE WORKING GROUP

1. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States), introducing the report of the Working Group (A/CN.4/L.543), said that it had held three meetings from 22 May to 26 June 1997, at which it had considered the report of the Commission on the work of its forty-eighth session,[1] particularly the general outline set out in annex II, addendum 3. It had also taken into account the written comments by the Chairman, submitted in that capacity and also as a member of the Commission. The Working Group had received other useful contributions, one of which had been on the use of terms to designate unilateral acts, prepared by one of the members of the Working Group itself, as well as preliminary bibliographies and lists of judicial decisions and arbitral awards compiled by the secretariat.

2. The Working Group's discussions had been aimed at responding to the request in General Assembly resolution 51/160, paragraph 13, that the Commission should indicate the scope and content of the topic, and account had been taken of the views expressed by Governments during the discussion in the Sixth Committee (A/CN.4/479, sect. E.6). A number of conclusions and recommendations had emerged from the Working Group's deliberations.

3. As the Commission had suggested in annex II of the report on the work of its forty-eighth session, it was indeed proper and timely to conduct a study of unilateral acts of States with a view to the codification and progressive development of the relevant rules. That conclusion was based on the growing importance of such acts in international relations and the existence of important doctrinal works and judgments of ICJ and other courts that shed light on the matter. A clear statement of the rules of international law applicable to unilateral acts would help bring certainty, predictability and stability to international relations and thus help to strengthen the rule of law in the international community.

4. As for the scope of the study, the Working Group had considered that the unilateral acts to be covered were those that States carried out with the intention of producing legal effects, and creating, recognizing, safeguarding or modifying rights, obligations or legal situations. Emphasis was placed on the importance of the element of intent, the content and the legal effect of such acts, which were essential for them to be characterized as lawful and to be clearly differentiated from other acts and actions, particularly internationally wrongful acts, that were part of the study of international responsibility. The scope of the topic was defined in terms of the unilateral nature of the acts by a single or several subjects of international law acting as a single party, without the participation of other counterpart(s) in the form of acceptance or consent. It was that elementary characteristic that differentiated such acts from bilateral or pluri-lateral legal acts, in other words, treaties.

5. It had been recognized that within the framework of the law of treaties, as in the context of international justice, States carried out many acts which were, prima facie, unilateral, but which, because they were based on a treaty, were not strictly unilateral. It had also been borne in mind that the 1969 Vienna Convention was a highly important precedent for the harmonization and formulation, *mutatis mutandis*, of the rules applicable to unilateral legal acts. It was also agreed that the study should at the current stage focus on unilateral legal acts of States, although later on the Commission could decide to extend the topic to cover rules applicable to the unilateral legal acts of international organizations.

6. With reference to the content of the study, the Working Group had considered the outline in annex II, addendum 3, to the report of the Commission on the work of its forty-eighth session as a useful basis. That outline was redrafted, as shown in section III of the Working Group's report, to include the following chapters: chapter I, Definition of unilateral legal acts of States, and determination of their basic elements and characteristics; chapter II, Criteria for classifying unilateral legal acts of States; chapter III, Analysis of the process of creation, the characteristics and the effects of the most frequent unilateral acts in State practice; chapter IV, General rules applicable

[1] See 2479th meeting, footnote 6.