

Document:-  
**A/CN.4/2859**

**Summary record of the 2859th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
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closely related matters covered in section D, in plenary session and in a working group. While he did not yet have a considered view on the issues, his preliminary reading led him to share some of the concerns raised by Mr. Gaja, Mr. Koskenniemi and others about the main guidelines proposed in the document. While he in no way questioned the value of the report, he felt that the Commission would have to give very careful consideration to the really quite fundamental underlying issues before referring any of the proposed guidelines other than the first two [3.1 and 3.1.1] to the Drafting Committee.

108. Mr. KOLODKIN said that, like many other members of the Commission who had spoken before him, he would very much have liked to extend the debate on section C in plenary. The subject matter really deserved more thorough analysis and he did not wish to limit his comments to a few sporadic remarks. He would welcome an opportunity to go over the very interesting material thoroughly and to comment on all aspects of it. The best time to do so would be at the Commission's fifty-eighth session in 2006.

109. The CHAIRPERSON noted that a number of members of the Commission had expressed the wish to have more time to digest the contents of section C of the report. He therefore suggested that the Special Rapporteur should sum up the debate thus far at the next plenary meeting. A decision could then be taken on whether to pursue the discussion of the report at the fifty-eighth session.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

## 2859th MEETING

*Thursday, 28 July 2005, at 10.05 a.m.*

*Chairperson: Mr. Djamchid MOMTAZ*

*Present:* Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

**Reservations to treaties (concluded) (A/CN.4/549 and Add.1, sect. D, A/CN.4/558 and Corr.1 and Add.1 [and Corr.1]–2, and A/CN.4/L.665)**

[Agenda item 6]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the Commission's discussion on reservations to treaties.

2. Mr. PELLET (Special Rapporteur) thanked all the members of the Commission who had taken part in the discussion, first, because it was always enjoyable to hear compliments, guilty pleasure that it was; members had not been stingy with them and he was grateful for that. There was always something soporific in opening tributes, however, as if one was anaesthetizing the patient the better to operate, sometimes even removing the vital organs and confining the invalid to a wheelchair for life. He had sometimes had that feeling while listening to Commission members, because with the exception of the first five draft guidelines, total evisceration was apparently indicated. To cite the most extreme views expressed, some speakers thought that draft guidelines 3.1.5 and 3.1.6 had to be excluded because they were too general, focusing instead on those that followed, while others felt it was in fact draft guidelines 3.1.7 to 3.1.13 that were superfluous. Those extreme views were minority opinions, however, and before giving a detailed account of the debate and outlining his conclusions, he wished to explain why he did not share them.

3. It was certainly not because he thought he was always right: in the past, he had acknowledged that some of his draft guidelines should be given the axe, and he was still very open to constructive criticism. As a matter of fact, he intended to demonstrate the extent to which certain constructive suggestions seemed to him promising. Nevertheless, some members of the Commission seemed at times to lose sight of the very purpose of the exercise. As Mr. Fomba had pointed out at an earlier meeting in connection with paragraph 61 of the report, it was not a matter of elaborating an abstract doctrinal construct, but of helping States and international organizations to determine what their conduct should be in relation to reservations while staying on the "straight and narrow" of the 1969 Vienna Convention and trying to find realistic solutions that were reasonably coherent and as widely acceptable as possible.

4. That, to him, was a first stab at a response to the brilliant doctrinal exposé made the day before by Mr. Koskenniemi, a highly stimulating intellectual exercise that was nevertheless, to his mind, brilliantly useless. As was often the case with the "new school of criticism", the analysis that Mr. Koskenniemi had undertaken had brilliantly deconstructed not the report before the Commission but the entire set of draft guidelines he had proposed, without offering any alternative solution. In the end he himself had had to turn those criticisms to positive advantage. Furthermore, there was a major contradiction in Mr. Koskenniemi's remarks: after completing his "demolition", he had concluded, against all expectations, that what he called the interpreters, meaning diplomats, arbitrators or judges, would be obliged in future to use the report as a reference. That showed that it was extremely useful for States to be guided by something, obviously not in the precise terms he himself had proposed, but at least along the lines he had endeavoured to indicate. And the voice of the Commission, which made itself heard through the guidelines it adopted after collectively evaluating them and through the commentary it attached to those guidelines, was surely more authoritative than his voice alone.

5. The brief statement by Mr. Mansfield at the previous meeting called for the same response. It might be true that the report and, even more so, the commentary to the guidelines were more useful than the guidelines themselves, but it was still necessary to anchor the commentary somewhere. The Commission was not writing a doctrinal work on reservations. As it had decided back in 1996, it was drafting a guide to practice consisting of guidelines accompanied by commentary.<sup>1</sup> The guidelines were in a sense the anchor, the introduction, the indispensable underpinnings of the commentary, and there could be no commentary without something to comment upon.

6. Turning to another category of general remarks, he observed that the material in the parts of the report that the Commission had begun to consider was without doubt quite difficult, as many members had pointed out, and thus gave rise to controversy. It was natural, then, that members should express opposing viewpoints, even if they had nearly always done so in moderate terms. Some had reproached him for being too timid (he had codified only a little, and certainly not progressively developed), whereas others felt he had been too audacious, if only in having suggested that general human rights treaties raised particular problems and warranted special attention. He understood both points of view, and after extensive consultation of the literature on reservations and the *travaux préparatoires* of the Vienna Conventions, he felt that he could furnish additional arguments to both camps. However, his extensive consultation of the literature had taught him that the juridical truth of the matter was certainly more in flux and less definite than either side would like it to be. The 1969 Vienna Convention seemed to lean towards broad tolerance, rather than encouragement, of reservations. The famous Polish amendment he had mentioned when introducing his report revealed as much.<sup>2</sup> Even if one claimed to have a more “progressive” outlook, meaning a more restrictive view of the validity of reservations, that juridical reality had to be considered. As for the conservatives, who argued for broad freedom in the matter of reservations, he hoped they would be good enough to understand that the Vienna Convention did leave the door open to change and that, short of engaging in a rear-guard action, the Commission must, while respecting the Convention, show itself to be attentive to the aspirations of civil society, especially in the area of human rights, which were being relayed by a number of States and reflected in certain practices that must be taken into account. He had written his report and drafted the 14 draft guidelines, which were reproduced in the first three sections, bearing precisely that moderate viewpoint and concern for the “happy medium” in mind, and he would remain faithful to that philosophy when he responded in greater detail to the proposals made. That did not necessarily mean that he was wedded to the draft texts he had proposed, however, as he had profited from many constructive criticisms.

7. He attached great importance to the question of validity, which had rightly been described as going well beyond a mere terminological problem. In the end

it was not just a discordance between the French and English texts, even though it could more easily be dealt with in the latter language. Speakers had taken a variety of stances on the issue. A majority, including Mr. Gaja, Mr. Kamto (who had made some very interesting points), Mr. Sreenivasa Rao, Mr. Pambou-Tchivounda (who had also made interesting points), Mr. Mansfield, Mr. Fomba, Mr. Matheson, Mr. Kemicha, Mr. Economides and Ms. Xue, had rallied, or in some cases resigned themselves, to the views expressed in paragraphs 2 to 8 of the report, leaving aside Mr. Economides’s problem with permissibility. That notwithstanding, and taking into account certain comments from the majority camp which acknowledged that his own wish to refer to validity of reservations was justified, he had again changed his mind to some degree on that point. First of all, he was not prepared to accept the argument of authorities put forward by Mr. Chee: however great his respect for the British legal counsel and Sir Derek Bowett, it was not enough for those eminent practitioners to say something for them always to be right; he had examined their viewpoints at length in his report (paras. 4–7) and had nothing to alter in what he had written. Nor was he particularly receptive to the position taken by Mr. Economides and perhaps by Mr. Pambou-Tchivounda, who advocated a “hurry up and wait” approach, for he did not think that the effects of reservations had to be known before one could determine validity. The question of validity arose by definition at an earlier stage, as Mr. Kamto and Mr. Pambou-Tchivounda had pointed out. A legal text that was invalid could not produce the effects that its author expected of it. In that regard, Mr. Pambou-Tchivounda was wrong to equate validity and permissibility, the latter term harking back to the law of responsibility. The main reason he had been led to moderate the position he had taken in his report, and which had been emphasized in particular by Mr. Kamto, Mr. Fomba, Mr. Candioti and Mr. Rodríguez Cedeño, was that validity was not solely a question of substance but also of form. According to Salmon’s *Dictionnaire de droit international public*, validity was that quality of elements of a legal order that met the formal or substantive requirements for producing legal effects.<sup>3</sup> More succinctly, *Black’s Law Dictionary* defined validity as that which was “legally sufficient”.<sup>4</sup> It would therefore be necessary either to amend the title of chapter III of the Guide to Practice in order to cover only the substantive or material validity of reservations, or to adopt a draft guideline 3 recalling that a reservation was valid only if it fulfilled the formal and substantive requirements imposed by the Vienna Conventions and set out in the Guide to Practice. It was the latter solution that had won him over for the time being. The option seemed to him to be linked to the wording of the chapeau of a provision that he saw as fundamental to the law of reservations, namely article 21, paragraph 1, of the Vienna Convention, according to which a reservation was established with regard to another party in accordance with article 19, which referred to substantive requirements, article 20, referring to requirements for enforceability, and article 23, referring to procedural requirements; however, the guidelines reflecting and deriving from that provision would not be submitted until later.

<sup>1</sup> *Yearbook ... 1996*, vol. II (Part Two), pp. 79–80, paras. 105 and 112.

<sup>2</sup> See 2854th meeting, footnote 7.

<sup>3</sup> *Dictionnaire de droit international public*, J. Salmon, Brussels, Bruylant, 2001, p. 1126.

<sup>4</sup> *Black’s Law Dictionary*, B. Garner (ed.), 8th ed., St. Paul (Minn.), West Group, 2004, p. 1586.

8. The fact remained that, for the time being, he had reached the following conclusions: first, and in French only, the word “*validité*” referred, in respect of reservations, to the procedural requirements in article 23 of the 1969 Vienna Convention, as explicated in chapter II of the Guide to Practice, and to the substantive requirements in article 19. A reservation that did not meet all those requirements was not “*valide*”. Secondly, the conditions set out in article 19, which were to be reproduced in draft guideline 3.1, related solely to the substantive requirements of validity. Thirdly, the machinery in article 20 governed the enforceability of a reservation, not its validity.

9. As to the Arabic, Chinese, Spanish and Russian texts, he would leave to the members who spoke those languages the task of proposing the most appropriate solutions in each, bearing in mind his report and the discussions it had engendered. He had taken due note of the comments by Mr. Kolodkin and Ms. Xue concerning the translation into Russian and Chinese of the French word “*validité*”. As for the English language, it had a convenient word, “permissible”, and like Mr. Kolodkin, he thought that it pinpointed the content of article 19. Yet when one came back to the French, a problem arose, since the equivalent of “permissible” simply did not exist. The sole translation that appeared to suit, for lack of anything better, was “*permis*”, it being understood that he was still unable to come up with an unmodified noun that could be used in French to designate the substantive, or material, validity of a reservation. He nevertheless proposed to retain in French and English the phrase “*Validité des réserves*” (“Validity of reservations”) as the title of the third part of the Guide to Practice, with the proviso, and that was his second point, that it would later be stipulated that that expression covered requirements of both procedure and substance, even if only the requirements of substance were to be elaborated in that part, since those of form and procedure were covered in the second part.

10. Thirdly, in draft guideline 1.6, “*licéité*” in the French text and “permissibility” in the English would be replaced by “*validité*” and “validity”. While Mr. Kamto was intellectually correct in pointing out that the impact of invalidity was to prevent a legal instrument from producing effects, he himself thought that that observation, however valid in itself, should not affect the wording of draft guideline 1.6, which did not link validity and effects but merely indicated that the definitions in the first part of the Guide to Practice were without prejudice either to the validity—not permissibility, since both substance and procedure were involved—or to the effects of the unilateral statements defined in the Guide. To his mind, that formulation was neutral and should be retained.

11. Fourthly, in draft guideline 2.1.8, on procedure in case of manifestly [impermissible] reservations, the penultimate word having been left in square brackets, a reference to invalidity should be incorporated. Perhaps the draft guideline could be entitled “Procedure in case of reservations manifestly lacking in validity”, with paragraph 1 to read: “Where, in the opinion of the depositary, a reservation is manifestly lacking in validity, the depositary shall draw the attention of the author of the reservation to what, in the depositary’s view, constitutes such lack

of validity.” As a drafting problem was involved, the draft guideline could be sent back to the Drafting Committee on the understanding that it was not a matter of reopening an issue that had already been decided, since the Commission would have decided to reconsider the question.<sup>5</sup> The commentary to draft guidelines 1.6 and 2.1.8 would have to be modified accordingly.

12. Fifthly, that line of reasoning raised questions about the title to be given to draft guideline 3.1. To reassure those who, like Mr. Kamto, Mr. Kolodkin and Mr. Pambou-Tchivounda, had concerns in that regard, he recalled that he had abandoned the idea of having a separate draft guideline on the freedom to formulate a reservation or presumption of validity of reservations: paragraphs 17 and 18 of the report said as much. There was thus no reason to pursue the matter further. On the other hand, he agreed with those who had criticized the title he had proposed, “Freedom to formulate reservations” (para. 20), since it emphasized only part of the question at hand, even though, as Ms. Xue had pointed out, it was an important part. Mr. Rodríguez Cedeño had proposed that the title should be “Formulation of reservations”, which had the great advantage of being the title of article 19 of the Vienna Conventions, the wording of which draft guideline 3.1 simply reproduced. He did not think that that solution could be adopted, however, since the word “formulation” had already been used, specifically in the title of draft guideline 2.1.3, and to his mind that choice of wording should not be revisited. The word “formulation” referred much more to form and procedure than to the substantive requirements that were nevertheless the essence of article 19. Although he was not radically opposed to the idea, he thought that Mr. Kolodkin’s proposal, which had been supported by Ms. Escameia and Ms. Xue, to give draft guideline 3.1 the title “Right to formulate a reservation” was somewhat problematic. The same held true for Mr. Economides’ proposal of “Limitations on the formulation of reservations”. Mr. Fomba had proposed “Formulation and validity”, and for the same reasons he was not enthusiastic about the idea of using the term “formulation” in the title. It would surely be better to go with the proposal by Mr. Kolodkin and Mr. Candiotti to say in English “Permissible reservations”, with the French equivalent to be “*Réserves permises*” or “*Validité matérielle des réserves*”. Still, that was a drafting problem, and no one appeared to oppose the referral of draft guideline 3.1 to the Drafting Committee. Mr. Gaja had given an entirely convincing reason for eliminating the reference to the time when a reservation might be made, but unless he himself was mistaken, that proposal had not been supported by other members of the Commission. Still, if the Commission considered that the third part of the Guide, and certainly draft guideline 3.1, applied solely to the material validity of reservations, then the proposal was not without merit and the Drafting Committee should consider it.

13. There had been no fundamental objection to the referral of draft guideline 3.1.1 to the Drafting Committee, although once again it had been Mr. Gaja who had released two hares and set other members of the

<sup>5</sup> *Yearbook ... 2002*, vol. II (Part Two), chap. IV, sect. C.2, p. 46, para. (7) of the commentary.



Commission running after them. Mr. Gaja had remarked, as had Mr. Mansfield, Mr. Matheson, Mr. Candioti and Ms. Xue after him, that the text was poorly drafted and that it should be made clear that the reservations covered had to fall within the categories specified in the final two indents. On that point, he thought Mr. Gaja was right. However, he was a bit less persuaded by Mr. Gaja's second "hare", even though Mr. Sreenivasa Rao, Ms. Escarameia, Mr. Mansfield and Mr. Economides had espoused his line of reasoning. According to those speakers, the possibility that reservations could be implicitly prohibited must also be mentioned, either in draft guideline 3.1.1 or in a separate text. The speakers had given only one example, however, that of the Charter of the United Nations, and he, for his part, could not see why it should be so obvious that a State could not formulate a reservation to a secondary provision of the Charter of the United Nations since it would be accepted by the Organization's competent organs. Aside from that, he, like Mr. Matheson, was far from enthusiastic about the proposition. First, it was clearly excluded by the *travaux préparatoires*, and he thought that the members of the Commission at that time had had good reason for excluding it, as he stated in his report. In addition, in relation to the Charter of the United Nations and probably also to the other treaties which might be thought implicitly to exclude reservations, namely the constituent instruments of international organizations, the requirement of acceptance by the Organization's competent organ set out in article 20, paragraph 3, of the Vienna Convention afforded perfectly adequate safeguards. Lastly, and especially, he was convinced that the problem lay not in subparagraphs (a) and (b) of article 19, but in subparagraph (c): if a reservation was implicitly prohibited, it was because it was contrary to the object and purpose of the treaty. If one assumed that there could be treaties which by their nature actually prohibited reservations, it was on account of their object and purpose, and there was no need to insert a provision on that point in the draft guideline. Nevertheless, he saw no reason why the Drafting Committee should not consider the matter, and if the Commission requested him to, he was prepared to write a note setting out the arguments for and against, although at the present stage he saw precious few arguments in favour of the proposition.

14. Draft guideline 3.1.2 (para. 49) seemed also to have been accepted insofar as the principle was concerned, and nothing seemed to prevent its referral to the Drafting Committee. Several members had nevertheless drawn attention to problems with the wording. The problem with "specified" in the English text had already been mentioned (2857th meeting, above, paras. 37–38). It might be worthwhile to clarify the phrase "and which meet conditions specified by the treaty", but it would be unfortunate to delete it, since, in his view, the reference to "specific provisions" was not in itself sufficient to enable one to speak of "specified reservations"; that would compromise the careful balance that had been achieved in the provision, which was all the more indispensable in that the concept of "specified reservations" did indeed have major practical effects.

15. Draft guidelines 3.1.3 and 3.1.4 had met with general approval, again with some suggestions regarding drafting. Those of Mr. Economides surely merited discussion. Thus

both draft guidelines could also be sent to the Drafting Committee, especially as it would be unfortunate to consider them separately from draft guideline 3.1.2.

16. The wording of draft guidelines 3.1.5 and 3.1.6 could be improved, and some of the suggestions made to that end were extremely useful. Contrary to the views of some, however, it was essential to try to define the concept of object and purpose, since it was fundamental to the law of reservations and to the law of treaties in general. Another problem that arose in connection with the two draft guidelines was that of the interpreter, in other words the person or organ that determined whether or not a reservation was compatible with the object and purpose of the treaty. In fact, five draft guidelines dealt with competence to assess the validity of reservations and an additional five, of even greater importance, covered the consequences of non-validity of a reservation.

17. With regard to draft guidelines 3.1.7 to 3.1.13, he emphasized that he had not chosen the categories of reservations used as "illustrations" randomly, but had done so on the basis of the principle that the main function of the Guide to Practice was to help States determine their position on a problem relating to reservations. He had therefore focused on the most challenging and frequently encountered problems. One could add other categories, but no credible proposals had been made so far. It had been rightly pointed out that a single treaty could have several objects and purposes, and that its provisions could fall into several of the categories identified. All that needed to be done, then, was to take the various applicable guidelines as a basis and to apply them together, although nothing prevented each situation from being codified separately. He wished to point out that draft guideline 3.1.12 related not to reservations to human rights treaties, and even less so to reservations to human rights provisions, but only to reservations to general human rights treaties, a particular category of human rights treaty that seemed perfectly unambiguous.

18. Lastly, concerning the proposal for consultation with human rights bodies (the six treaty-monitoring bodies and the Sub-Commission on the Promotion and Protection of Human Rights), he said it would be fairly difficult, although not impossible, to find a common date, probably towards mid-May 2006, and that it would undoubtedly be necessary to finance the travel of members of the treaty bodies that were not meeting in Geneva at that time. Any suggestions on that matter would be welcome.

19. Mr. KOSKENNIEMI said that he always tried to offer constructive criticism, in other words criticism that contained a specific proposal, because negative criticism was sterile. He wished to return briefly to the point he had made, namely that the categories proposed in the section C of the report on reservations to treaties were useful but inadequate. They were at once too comprehensive since they covered reservations that the Commission did not wish to address, such as vague and general reservations to secondary provisions, and incomplete, as they left out other important reservations such as reservations to human rights treaties. That was why it seemed appropriate to provide explanations with the categories to guide future users of the guidelines. In particular, it should be made

clear that a reservation was incompatible with the object and purpose of a treaty if it went against what the parties expected of the treaty when they became parties or if the reservation went against the common undertaking that the treaty expressed.

20. Mr. PELLET (Special Rapporteur), speaking on a point of order, said that the discussion could not be reopened at the present stage.

21. Mr. CHEE, referring to the possibility mentioned by the Special Rapporteur of formulating reservations to the Charter of the United Nations, noted that Article 108 of the Charter related to amendments, not reservations.

22. Concerning “validity”, he wished to recall that Part V, section 2, of the Vienna Conventions was entitled “Invalidity of treaties”, as opposed to “validity”. The Special Rapporteur described the word “validity” as neutral, but according to the dictionary, a word that was neutral must be so from all standpoints. In the interests of averting confusion, he intended to bring the subject up again at the next session.

23. The CHAIRPERSON recalled that the Special Rapporteur had proposed that draft guidelines 3.1, 3.1.1, 3.1.2, 3.1.3, 3.1.4, 3.1.6 and 3.1.8 should be referred to the Drafting Committee.

24. Mr. GAJA said he had understood that only the first five of those draft guidelines were to be referred to the Drafting Committee, since there were still a number of problems with the other two (3.1.6 and 3.1.8).

25. Mr. MATHESON agreed with Mr. Gaja, stressing that, in his opinion, draft guidelines 3.1.6 and 3.1.8 should be considered at the next session in plenary meeting.

26. Mr. PELLET (Special Rapporteur) explained that he had not intended to refer those two draft guidelines to the Drafting Committee; his proposal had related only to draft guidelines 1.6 and 2.1.8 (see paragraph 10 above) as well as to draft guidelines 3.1 and 3.1.1 to 3.1.4.

27. The CHAIRPERSON suggested that draft guidelines 1.6, 2.1.8, 3.1, 3.1.1, 3.1.2, 3.1.3 and 3.1.4 should be referred to the Drafting Committee, on the understanding that the discussion on the other draft guidelines would be continued at the fifty-eighth session.

*It was so decided.*

**Unilateral acts of states (concluded)\*  
(A/CN.4/557 and A/CN.4/549 and Add.1, sect. C)**

[Agenda item 5]

REPORT OF THE WORKING GROUP

28. The CHAIRPERSON invited Mr. Pellet, as Chairperson of the Working Group on Unilateral acts of States, to make a presentation on its work.

29. Mr. PELLET said that the Working Group had held four meetings in 2005. The first three meetings had been given over to an analysis of specific cases according to the grid established the previous year and to the conclusions to be drawn from them; the final meeting had covered preliminary or general conclusions, or “proposals” (no decision had been taken regarding the future document’s title), that would reflect the outcome of the Commission’s nine years of work on the topic.

30. An initial exchange of views had uncovered common ground on which a consensus might emerge. Members of the Working Group had generally agreed on the “format” and form of the document. On substance, they appeared to agree on the need to proceed from the principle that the unilateral conduct of States could produce legal effects, however they might be manifested, but that one could differentiate between unilateral conduct and unilateral acts *stricto sensu*. In its report on the work of its fifty-fifth session the Commission had drawn a clear distinction between unilateral conduct and unilateral acts and had decided to give priority to the latter, defined as “a statement expressing the will or consent by which [a] State purports to create obligations or other legal effects under international law”.<sup>6</sup>

31. The Working Group had also considered questions relating to the diversity of unilateral acts and their effects, the importance of the surrounding circumstances in assessing their nature and effects, their relationship to other commitments under international law undertaken by their authors, and the conditions for their revision and revocation.

**Programmes, procedures and working methods of the Commission and its documentation (A/CN.4/L.675 and Corr.1)**

[Agenda item 10]

REPORT OF THE PLANNING GROUP

32. Mr. PAMBOU-TCHIVOUNDA (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.675 and Corr.1), said that during its four meetings the Planning Group had considered, among other things, cost-saving measures, the documentation of the Commission, an interim report by the Working Group on the long-term programme of work, and the date and place of the fifty-eighth session of the Commission.

33. Pursuant to paragraph 8 of General Assembly resolution 59/41 of 2 December 2004 and in the light of the Commission’s programme of work, the Planning Group had considered the question of cost-saving measures, and on its recommendation the Commission had reduced the duration of the second part of the current session by one week.

34. Having also considered the question of the Commission’s documentation and the timely submission of reports by the Special Rapporteurs, the Planning Group

\* Resumed from the discussion at the 2855th meeting.

<sup>6</sup> Yearbook ... 2003, vol. II (Part Two), Recommendation 1, p. 57, para. 306.

had recalled that if the dates originally indicated were not observed, the timely availability of reports might be jeopardized, which could have adverse consequences for the Commission's work. The Group had formulated a recommendation on that subject in paragraph 4 of its report.

35. The Chairperson of the Working Group on the long-term programme of work had reported orally to the Planning Group. The Working Group would submit its final report in written form to the Commission at its fifty-eighth session, in 2006. The Working Group was open to the consideration of any topic that might seem relevant, especially as the Commission urgently needed to include new topics on its agenda. Any member having a proposal should submit it to the Working Group in the form of a short preliminary report.

36. The Planning Group had recalled that at its fifty-sixth session, the Commission had decided to include in the agenda of its current session the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)", which had already been included in the Commission's long-term programme of work.<sup>7</sup>

37. The Planning Group recommended that the views expressed in the Commission's report on the work of its fifty-sixth session with regard to honoraria for members of the Commission should be reaffirmed in full in the report on the work of its fifty-seventh session.<sup>8</sup>

38. Lastly, the Planning Group had taken note of a proposal that the Planning Group to be established at the fifty-eighth session should consider as a priority question the Commission's methods of work and rules of procedure with a view to enhancing the its effectiveness and transparency.

39. Mr. ECONOMIDES, who had been the author of that proposal, said that it would be more accurate to say "The Planning Group had given a favourable reception to a proposal...". In fact, the exact wording of his proposal had been "...relating to the establishment of a working group which, with the assistance of the secretariat, would examine the Commission's methods, rules and practices in order to enhance its effectiveness and transparency". He suggested that his proposal should be transmitted to the Sixth Committee to show that the members of the Commission were sensitive to the climate of reform prevailing throughout the United Nations and because it would be interesting to know what the Sixth Committee thought about the proposal.

40. The CHAIRPERSON said that a decision on the proposal would be taken when the Commission's report was considered in the General Assembly.

41. Mr. KABATSI said that he fully endorsed the idea of trying to improve the Commission's working methods but thought that that was perhaps an internal matter for the Commission alone and that it might not be appropriate at the present stage to transmit it to the Sixth Committee.

42. Ms. ESCARAMEIA pointed out that the Commission was in the process of adopting the report of the Planning Group, not its own report to the General Assembly. She endorsed Mr. Economides's comment about the way paragraph 8 was currently worded and suggested that the proposal he had just made should be adopted, or else that the phrase should be amended to read: "The Planning Group took note of a proposal ... and recommended that it should be considered as a priority question by the Planning Group...".

43. Mr. YAMADA, supported by Mr. PELLET, said that the fact that the plenary Commission was endeavouring to amend a report already adopted by the Planning Group was not irregular.

44. The CHAIRPERSON explained that the plenary Commission was merely taking note of the report of the Planning Group and that the questions and recommendations contained therein would be considered when the Commission's report was considered in the General Assembly.

45. Ms. ESCARAMEIA said that the Planning Group had never seen paragraph 8 of the report in its current form.

46. Mr. PAMBOU-TCHIVOUNDA (Chairperson of the Planning Group) confirmed that that was the case.

47. Mr. ECONOMIDES said that the plenary Commission could not be deemed to be correcting the text in question since he himself had made no written proposal. On the other hand, there had been an exchange of views, and his proposal had met with no objection.

48. Mr. PAMBOU-TCHIVOUNDA (Chairperson of the Planning Group) said that he could ask the Planning Group to include in paragraph 8 of its report a reference to the consensus that had emerged concerning Mr. Economides's proposal.

49. Mr. PELLET said that it was totally unrealistic to ask the Planning Group to amend its own report. It was true that the proposal had been adopted by consensus, but that was true of most of the decisions or recommendations adopted by the Group. There was no need to spell that out, especially as "consensus" simply referred to the absence of objection, not to an enthusiastic unanimity.

50. Mr. CHEE fully endorsed the comments by Ms. Escarameia and Mr. Economides.

51. Mr. KEMICHA, who had been a member of the Planning Group, confirmed that the reaction to Mr. Economides's proposal had been closer to a favourable response than to the simple act of taking note. While he acknowledged that it was unusual for the plenary to amend a report of that nature, he saw no reason why the members of the Group, almost all of whom were present, could not take the opportunity to meet with Mr. Pambou-Tchivounda as their Chairperson and amend their report.

52. Mr. MATHESON proposed that the plenary Commission should simply invite the Chairperson of the

<sup>7</sup> *Yearbook ... 2004*, vol. II (Part Two), chap. XI, p. 120, paras. 362–363, and annex.

<sup>8</sup> *Ibid.*, pp. 120–121, para. 369.



Planning Group to amend the report of the Group to better reflect the agreement reached orally.

53. Mr. PAMBOU-TCHIVOUNDA (Chairperson of the Planning Group) proposed that the idea that a favourable reception had been given to the proposal made by Mr. Economides should be incorporated in paragraph 8 of the Group's report, after the words "took note".

54. Mr. MATHESON said that he would prefer the wording suggested by Ms. Escarameia. It was not correct to say that the Group had given a favourable reception to Mr. Economides' proposal, since it had not considered it in detail. On the other hand, the Group had endorsed the idea that the proposal should be considered as a priority question at the fifty-eighth session.

55. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to take note of the report of the Planning Group, as amended by Ms. Escarameia.

*It was so decided.*

**Fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/549 and Add.1, sect. E, and A/CN.4/L.676 and Corr.1)<sup>9</sup>**

[Agenda item 9]

56. The CHAIRPERSON invited Mr. Koskeniemi to introduce his briefing note on the work of the Study Group on Fragmentation of international law.

57. Mr. KOSKENNIEMI (Chairperson of the Study Group on Fragmentation of international law: Difficulties arising from the diversification and expansion of international law) explained that his briefing note was an informal document whose sole purpose was to promote an exchange of views between members of the Commission who had participated in the Study Group and those who had not. The document was thus intended primarily to provide information.

58. He recalled that when the Study Group had been established, great confusion had reigned as to what it was supposed to do.<sup>10</sup> While the Commission regularly set up working groups or drafting committees, the format of the Study Group was entirely new. In 2004 the Study Group's objective had been decided on and endorsed by the Commission as well as by many representatives of States in the Sixth Committee. As the outcome of its work, the Study Group was to prepare a collective document on fragmentation consisting of two parts. One would be a relatively large analytical study of conflicts and the overlap between rules of international law, composed on the basis of the outlines and studies submitted by individual members of the Study Group during 2003–2005. The other part would consist of a condensed set of approximately 40 conclusions, guidelines or principles (the Commission had not

yet decided which) emerging from the studies and the discussions in the Study Group and designed to help in thinking about and dealing with the issue of fragmentation in legal practice.<sup>11</sup> The objective was to provide guidance for lawyers, judges, arbitrators and members of international committees in resolving problems created by conflicts or overlap between the various rules in the different systems of international law. A draft of both documents would be submitted in 2006 to the Commission, which still had to determine the form in which it would adopt them. He suggested that the Commission might wish to take note of the substantive study and endorse the conclusions.

59. Turning to the basic approach, he said that the Study Group had focused on the substantive aspects of fragmentation, leaving aside institutional considerations such as conflict of jurisdiction of particular bodies. It had looked at the relevant issues from the standpoint of the 1969 Vienna Convention, an approach that seemed justified in view of the Commission's special relationship with the Vienna Convention and regime. It was therefore necessary to determine what resources were available under the Vienna Convention for the resolution of actual or potential conflicts between norms applicable in the same circumstances.

60. The Study Group had concentrated on the following five types of approaches to the resolution of conflict of norms in international law:

(a) the function and scope of the *lex specialis* rule and the question of "self-contained regimes" (a study he himself had carried out);

(b) the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31, paragraph 3 (c), of the Vienna Convention) (study by Mr. Mansfield);

(c) the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention) (study by Mr. Melescanu);

(d) the modification of multilateral treaties between certain of the parties only (article 41 of the Vienna Convention) (study by Mr. Daoudi); and

(e) hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations (study by Mr. Galicki).

On each of the five topics, the Study Group had received a report by one of its members. It had held extensive substantive discussions on items (a), (b) and (e) and preliminary debates on items (c) and (d).

61. The Study Group had endorsed the principle of *lex specialis* but had stressed that the special law did not necessarily make the general law inapplicable, but merely set it aside provisionally. It should also be noted that the concepts of "special law" and "general law" were interdependent and had to be understood in relation to one

<sup>9</sup> Reproduced in *Yearbook ... 2005*, vol. II (Part Two), chap. XI, sect. C.

<sup>10</sup> *Yearbook ... 2002*, vol. II (Part Two), chap. IX, p. 97, para. 493.

<sup>11</sup> See *Yearbook ... 2004*, vol. II (Part Two), chap. X, pp. 111–112, para. 302.



another. In practice, treaties often acted as *lex specialis* in relation to customary law and general principles. The Study Group had analysed “self-contained regimes” and had concluded that no treaty was isolated from others, from customary law or from general principles, and that therefore no regime was entirely “self-contained”. The term had been seen as a misnomer, since no set of rules was completely isolated from general international law. In that connection, the Study Group had also discussed cases in which general law filled in gaps or lacunae in special regimes.

62. With regard to article 30 of the 1969 Vienna Convention, the Study Group had found that the principle that subsequent treaties overrode previous ones was generally unproblematic, apart from the case where the parties to the later treaty were not identical to the parties to the former treaty. The mere conclusion of a treaty incompatible with an earlier treaty was not a breach of international law. Article 30 did not address the issue of validity but only that of priority.

63. With regard to article 31, paragraph 3 (c), of the Vienna Convention, the Study Group had stressed the need to operationalize that provision, which had been generating considerable interest but had not often been applied in the past. The “other obligations” to be taken into account in the interpretation of a treaty included not only other treaties, but also customary law and general legal principles. The Study Group had also discussed whether the parties to the treaty to be interpreted needed also to be parties to the “other obligations”. It had also reviewed the question of intertemporality, in other words whether the obligations used in the interpretation of a treaty needed to have already been in force at the time the treaty had been concluded. The Study Group had endorsed certain conclusions on that subject.

64. In its consideration of article 41 of the 1969 Vienna Convention, the Study Group had highlighted the fact that that provision was aimed at reconciling the need to preserve the integrity of the treaty as originally concluded, with the need to take into account or to agree to the taking into account of modifications subsequently introduced under an *inter se* agreement. The Study Group had emphasized that *inter se* agreements raised questions similar to those raised by *lex specialis* and that the impermissibility of a modification might follow from the *pacta tertiis* rule or the fact that the modifying agreement might otherwise undermine the original treaty.

65. With regard to the question of hierarchy in international law, the Study Group had agreed that there was no general hierarchy of sources. The three notions (*jus cogens*, obligations *erga omnes* and Article 103 of the Charter) also operated largely independently of each other. Only *jus cogens* and Article 103 of the Charter had to do properly with normative hierarchy. Obligations *erga omnes* had to do with the scope of application of the relevant norms. The Study Group had decided that the understanding of *jus cogens* and *erga omnes* norms adopted under the draft on State responsibility must be followed. It had also decided that it was not its task to identify specific rules under either of the two categories but to highlight how they might be used as “conflict rules”

in order to deal with fragmentation. The issue of normative hierarchy governed the permissibility of particular agreements as *leges specialis*, as subsequent agreements or as *inter se* modifications of multilateral treaties.

66. In conclusion, he said that the Study Group had tried to avoid taking fixed positions. Its study of practice showed that conflicts and overlap between various rules of international law had always existed and had been resolved by applying a variety of techniques. The objective must thus be to show practitioners of the law that the difficult problems they faced were not new ones and that courts had already overcome them successfully in the past.

67. The CHAIRPERSON thanked Mr. Koskenniemi and announced that volume XXIV of the Reports of International Arbitral Awards had just been issued.<sup>12</sup>

*The meeting rose at 12.55 p.m.*

## 2860th MEETING

*Friday, 29 July 2005, at 10.05 a.m.*

*Chairperson:* Mr. Djamchid MONTAZ

*Present:* Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comisário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Opetti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

### Cooperation with other bodies (concluded)\*

[Agenda item 11]

#### VISIT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed Mr. de Vel, Director-General of Legal Affairs of the Council of Europe and Mr. Benítez, Deputy Head of the Public Law Department of the Directorate General of Legal Affairs of the Council of Europe and invited Mr. de Vel to address the Commission.

2. Mr. de VEL (Council of Europe) said it was an honour to attend a meeting of the Commission in order to inform it of developments at the Council of Europe since the Commission's previous session. Such meetings had become a welcome tradition.

3. The Council's political life over the past year had been marked by the Third Summit of Heads of State

\* Resumed from the discussion at the 2853rd meeting.

<sup>12</sup> United Nations publication (Sales No.: E. F. 04.V.18), July 2005, 380 pages.