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Summary record of the 2407th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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in the case of some of the questions. As for the proposed systematic study of the practice of States and international organizations, such a study was necessary, even if it would not, perhaps, shed much additional light on the problem.

79. In the section on gaps in the reservations provisions in the Vienna Conventions, the Special Rapporteur raised the issue of reservations to bilateral treaties. Admittedly, in the 1969 Vienna Convention the point was left "in the dark", but the 1978 Vienna Convention was far clearer inasmuch as article 20, on reservations, was placed in the section relating exclusively to multilateral treaties.

80. With reference to the question of problems left unsolved by the 1978 Vienna Convention, the statement in one paragraph to the effect that article 20 of the Convention applied in the case of the decolonization or dissolution of States was no doubt due to a technical error, since article 20 applied only in the case of the emergence of a newly independent State resulting from the process of decolonization, including cases of newly independent States formed from two or more territories. It did not cover other categories of succession, such as cession of a part of the State territory or the uniting or separation of a State, the latter category including dissolution and secession. The fact that the 1978 Vienna Convention contained a provision on reservations for newly independent States but none for the other categories seemed to him to reflect a certain philosophy. The essential rule in the case of a newly independent State was the rule, often inaccurately described as the "*tabula rasa*" rule, set forth in article 16 of the Convention, under which "a newly independent State was not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty had been in force in respect of the territory to which the succession of States related". The act of notification of succession by which a newly independent State established its status as a party to any multilateral treaty therefore had at least some elements in common with an act whereby a State expressed its consent to be bound by a treaty. It therefore appeared entirely logical that the Convention should give a newly independent State the right to formulate its own reservations in respect of a treaty, while at the same time proceeding on the principle that reservations made by the predecessor State should be maintained except in the event of an indication of a contrary intention by the successor State (art. 20, para. 1).

81. The situation was not the same in cases of cession (transfer) of a part of a territory, where the principle of variability of the territorial limits of a treaty applied and, consequently, the problem of succession in respect of treaties did not arise (except in the case of treaties establishing frontiers and other territorial regimes). In such cases, however, the rule of continuity applied *ipso jure* and the treaty was maintained in the form in which it had existed at the date of the succession.

82. Similarly, in cases of the uniting or separation of States (including dissolution), articles 31 and 34 of the 1978 Vienna Convention confirmed the rule of continuity *ipso jure*. The situation was qualitatively different from that of newly independent States. No expression of the will of the successor State was required in order to bring the continuity rule into operation, and therefore no new reservations were called for. As for the withdrawal of the reservations of the predecessor State, the relevant rules of the law of treaties codified in the 1969 Vienna Convention applied and, accordingly, there was no need for new rules in the context of the topic under consideration.

The meeting rose at 1 p.m.

2407th MEETING

Thursday, 29 June 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law and practice relating to reservations to treaties (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/470,[1] A/CN.4/L.516)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MIKULKA said that he had already explained (2406th meeting) why it was logical to include a provision in the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") with regard to reservations applicable to newly independent States, except for States that came into being as a result of uniting, dissolution or separation. The position of those two categories of States in the case of succession to multilateral treaties was based on different principles. In the first case, a notification of succession was necessary, whereas, in the second, the rule that applied was that of automatic continuity, in other words, the successor State maintained the reservations of the predecessor State. That was why it was pointless to include an express provision on the matter.

2. That did not, however, mean—and there he agreed fully with the Special Rapporteur—that there was no gap

[1] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

in the 1978 Vienna Convention, particularly concerning the maintenance by a newly independent State of the objections formulated by the predecessor State or the possibility open to third States to object to the maintenance of a reservation by a newly independent State. One could also ask whether there was not a gap in articles 32 and 36 of the Convention applicable to States that came into being as a result of a unification or a separation, which provided for a notification of succession in respect of treaties that were not in force at the date of succession, and also in articles 33 and 37, which dealt with the succession of States that came into being as a result of a unification or a separation by treaties signed by the predecessor State, subject to ratification, acceptance or approval. In the case of treaties which had already been in force at the date of succession, the rule of automatic continuity applied. In the case of treaties which had still not entered into force at that date, however, the successor State had to make its wishes known. In principle, the successor State was entitled to make reservations at the time when it ratified, accepted or approved a treaty signed by the predecessor State, since that was what the law of treaties provided. He queried what the position was when reservations had already been formulated by the predecessor State at the actual time of signature, whether the successor State, when ratifying the treaty concerned, should maintain those reservations, and whether it could withdraw them or whether such reservations should even be deemed to be non-existent in that particular case, as it was supposedly for the successor State to settle the matter.

3. The Special Rapporteur's approach to the problems relating to the special object of certain treaties or certain provisions and the problems resulting from a few special treaty techniques was acceptable, in his view. A list of the main problems on which it was difficult to take a position without examining them in more detail was presented in the first report (A/CN.4/470).

4. As to the scope of the Commission's future work on the topic of reservations to treaties, he did not really have any objections to the proposal that the title of the topic should be amended by deleting the word "practice" so as not to give the impression that there might be a contradiction between law and practice. It was important not to suggest, by going into too much detail, that the Commission wanted to lay down a rigid framework for the study contemplated. At the same time, he wondered whether that amendment to the title was really necessary at the present stage of the work. The word "reservations" did not, perhaps, encompass objections and it might therefore be better not to take a decision with respect to the title and to keep the existing title for the time being. Also, he fully shared the concerns expressed by the Special Rapporteur in his report, with regard to the preservation of what had been achieved.

5. Lastly, as to the form that the results of the Commission's work might take, his own preference would be for protocols. In that connection, the Commission could learn from the experience it had acquired during its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Obviously, as the Special Rapporteur suggested, it was less risky for the Commission simply to fill in the gaps and remove the ambiguities in the existing rules than for it to embark on a revision of those rules. But even a limited exercise of that kind could lead to different regimes of reservations. For that reason, the best solution would perhaps be to carry out a study of the problems that arose in order to lay down a kind of guide to practice in the matter of reservations. That would not preclude the possibility of drafting rules in the form of articles together with commentaries and the door to the two other options referred to by the Special Rapporteur in his report would be left open, namely, the preparation of protocols and even of a convention.

6. Mr. IDRIS said he congratulated the Special Rapporteur on an excellent report which was extremely rich in its legal content. With regard to the direction the draft should take, it would not be realistic, in his view, to embark on the preparation of a draft convention. At the present time, reservations were often used to remedy the lack of a common basis on which to make an interpretation, particularly when the associated States had not been fully involved in the preliminary negotiations or were not fully acquainted with the course of those negotiations. To try to draft protocols that would amend the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"), the 1978 Vienna Convention, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention") seemed to be as difficult as it was unrealistic. The Special Rapporteur's point in that connection, namely, that the parties to the main treaty and the parties to an additional protocol could differ, was well taken. The 1969 Vienna Convention was perhaps not perfect from the technical standpoint, but how could one be certain of drafting a text that was both technically perfect and in conformity with the wishes of States? The more heated the political and legal controversy the greater the need for reservations.

7. Under the circumstances, the Commission might wish to carry out its task in two stages. First of all, it could examine the inconsistencies and ambiguities in the 1969 Vienna Convention and endeavour to reach a consensus on ways of correcting them. Consensus was important, as the proposed study might reveal, in the light of the *travaux préparatoires*, that there were factors which justified the retention of some of those inconsistencies and ambiguities. Once that study had been carried out, the Commission could then decide, if necessary, to draft guidelines or clauses on which States could draw. For that purpose, the Commission should refer to the *travaux préparatoires* of the 1969 Vienna Convention and compile information on the practice by the main depositaries of multilateral treaties.

8. While he understood the Special Rapporteur's concern about the title of the topic, he considered that, inasmuch as it had been adopted as worded by the General Assembly, the Commission would have to have very good reasons for amending it. The existing title might turn out to be unsuitable if the Commission did not undertake a complete study of State practice. Also, the Commission should not, in his view, consider the separate question of reservations to bilateral treaties or to the

constituent instruments of international organizations. Lastly, the Commission should pay special attention later on to the problems connected with the object and specific nature of certain treaties, dealt with by the Special Rapporteur in his report, in which he had explained why, in his view, those treaties called for special treatment. He himself also considered that the existing regime of reservations did not apply to that category of treaties.

9. Mr. KABATSI expressed his congratulations to the Special Rapporteur on his first report. The Special Rapporteur dealt first with the historical development of the question so as to place it in its proper perspective and to identify all the problems that arose so that the parties to treaties wishing to make reservations would have a better understanding of the applicable legal regime. The Special Rapporteur rightly devoted part of the report to identifying the ambiguities and gaps in the provisions on reservations in the 1969, 1978 and 1986 Vienna Conventions and drew up a long list of the problems encountered in that connection, to which the Commission must reply. The Special Rapporteur had examined the subject in depth, as was demonstrated by the length of his report, which thus provided an extremely useful basis for work and would enable the Commission to map out its future work on the question more effectively.

10. The problems raised by the gaps and ambiguities in the provisions of the Vienna Conventions were not only numerous, but sometimes so vast that it seemed virtually impossible to solve them. Initially, therefore, it might be better for the Commission to deal with those that were readily identifiable in current practice. It would not of course be so easy to make a distinction between the problems that were self-evident and those that were less so, but the Commission should make an attempt to do so, so that the confusion caused by the ambiguities and gaps in the Vienna Conventions did not get worse as time went by.

11. Reservations sometimes had their uses. Having regard to the differences between States in terms of culture and political and economic development, inevitably some States could not always, in the short term, fulfil the obligations they had entered into on becoming parties to multilateral treaties, even though they might be ready to do so at a later stage. Consequently, so long as there was compliance with article 19 of the 1969 Vienna Convention, in other words, so long as the treaty did not expressly prohibit the reservation and that the reservation was not incompatible with the object and purpose of the treaty, States were at liberty to make reservations.

12. The Special Rapporteur correctly pointed out in his report that the determination of the validity of reservations was probably the point on which the ambiguity of the provisions of the relevant Vienna Conventions was most obvious and referred in that context to the notions of permissibility of a reservation, on the one hand, and opposability of a reservation, on the other. The more logical thesis argued by Mr. Bowett in 1977,[2] that is to say permissibility in contrast to opposability, cited by the Special Rapporteur in his report might help clear up that ambiguity. The Special Rapporteur also rightly raised the problem of the determination of the compatibility of a reservation with the object and purpose of the treaty. It should be stated which authority was competent to make that determination and on the basis of which criteria.

13. Concerning gaps, the Special Rapporteur stressed the absence of indications in the Vienna Conventions concerning reservations to bilateral treaties. For his part, he thought that the Commission should confine itself to reservations to multilateral treaties. He also noted the difficulties that distinguishing between reservations and interpretative declarations posed, but considered that the latter could be treated as reservations if they were based on the same assumptions. In respect of reservations to human rights treaties, he believed that they could be necessary, especially when the implementation of certain economic, social and political rights proved difficult in the short term.

14. Turning to chapter III of the report, which dealt with the scope and form of the Commission's future work, he shared the Special Rapporteur's view that the provisions on reservations of the 1969, 1978 and 1986 Vienna Conventions had the great merit of being flexible and adaptable. Consequently, it was essential to preserve what had been achieved with those provisions, which must be improved and fleshed out. As to the title of the topic, he did not oppose retaining the shorter wording proposed by the Special Rapporteur. Lastly, he judged it premature to decide at present on the form that the results of the Commission's work might take. None of the solutions proposed by the Special Rapporteur was without interest; the most suitable one should be chosen.

15. Mr. YAMADA said that, as the Special Rapporteur had pointed out, there were two schools on the validity of reservations to treaties, the "permissibility school" and the "opposability school". The difference between the two was based on the way in which they interpreted the provisions of the 1969 Vienna Convention that related to reservations: one gave priority to article 19 on the permissibility of reservations and the other to articles 20 and 21 on acceptance of and objections to reservations and their effects. The interpretation in the "opposability school" that reservations incompatible with the object and purpose of the treaty would be valid after having been accepted by other States was not convincing, because there were no specific provisions in the 1969 Vienna Convention which made it possible to formulate such reservations notwithstanding article 19. Furthermore, based on the interpretation of the "opposability school", reservations prohibited in accordance with the treaty as referred to in subparagraphs (*a*) and (*b*) of the said article would be equally valid if they had been accepted by other parties. However, such an idea seemed apparently inappropriate. In his view, only permissible reservations could be formulated within the framework of the 1969 Vienna Convention, and impermissible reservations were not valid even if they had been accepted by other States.

16. Actually, in the implementation of multilateral treaties, the judgement whether a reservation was compatible with the object and purpose of the treaty was usu-

[2] See 2400th meeting, footnote 2.

ally left to each State because in many cases there were no institutions with authority to rule on such compatibility. Therefore, the assessment by each State played a decisive role in judging the object and purpose of the treaty, the content of the reservations formulated and the compatibility of such reservations with the object and purpose of the treaty. Owing to those large subjective elements, there was a case in which it looked as if an "impermissible" reservation became valid after having been accepted by other States. However, if a multilateral treaty stipulated that a given institution might decide on the validity of reservations and that institution judged that a reservation was incompatible with the object and purpose of the said treaty, such reservation became invalid as a matter of course, even though it had been accepted by the other contracting parties. In that regard, the judgement by the European Court of Human Rights in the *Belilos* case[3] showed that reservations which could have been regarded as valid under articles 20 and 21 of the 1969 Vienna Convention could nevertheless be invalid when they were considered impermissible by a competent authority. That judgement might be interpreted as confirming that article 19 on the permissibility of reservations took precedence over articles 20 and 21 on acceptance of and objection to reservations and their effects. However, as the Special Rapporteur had pointed out, the judgement in question had been made in the special context of human rights treaties and did not necessarily set a precedent for other multilateral treaties of a reciprocal nature.

17. In the case of multilateral treaties of a reciprocal nature, it must be assumed that the decision concerning the validity of reservations would in practice produce effects not only with regard to the reserving State, but also in respect of the other contracting parties. An institution, even ICJ, could hardly be expected to actively decide on the validity of a reservation in such a case, given the consequences that such a decision would have not only for the parties to the dispute, but also for all the parties to the treaty. Moreover, the reservations currently made by States were so numerous and varied that it was difficult to hear the positions of all the interested parties and to take all reservations into account in an appropriate manner. Accordingly, reservations which were considered to be impermissible from an objective point of view could continue to exist in practice with the implied acceptance of the other contracting States. In sum, the conflict between the "permissibility school" and the "opposability school" occurred because the former placed emphasis on the theoretical consistency of the rules of the 1969 Vienna Convention, while the latter attached importance to the satisfactory explanation of the practice stemming from the application of that Convention.

18. With regard to the legal effects of a decision to render a reservation invalid, some advocates of the "permissibility school" seemed to stress that the consent of a State to be bound by a treaty by ratification, acceptance, approval or accession became invalid when its reservation was declared invalid. In his view, such a position was not appropriate in the sense that it might well harm the stable present-day legal system. In an extreme case, the entry into force of the treaty itself might be compromised by such a decision. In the *Belilos* case, the European Court of Human Rights had, on the contrary, judged that the State which had formulated an invalid reservation continued to be bound by the treaty even after the reservation had been decided to be invalid. That judgement deserved to be taken into consideration because of its practical interest. However, it posed a problem in that it was detrimental to the principle of consent, that is to say, in spite of the State having expressed its consent to be bound by the treaty on the premise of a certain reservation, it was required to be bound by the treaty even after its premise to its consent was denied. The matter should be examined further so that the principle of consent was to be brought into line with the requirement of a stable legal system.

19. The question of interpretative declarations likewise called for a number of comments. Some multilateral treaties, such as the United Nations Convention on the Law of the Sea, allowed States to make declarations or statements not purporting to exclude or modify the legal effect of the provisions thereof, while prohibiting reservations or exceptions. But, in signing or concluding such treaties, many States made "declarations" which in fact were reservations. It was therefore necessary to decide whether such declarations were genuine interpretative declarations or whether they were not in fact "disguised reservations". The question remained because, in the general framework of existing multilateral treaties, there was no authoritative party to take such a decision. Depositaries of multilateral treaties were not the appropriate body to make judgement on those issues. In general, they were not given such competence by the contracting States. Specifically, the Secretary-General of the United Nations had been instructed by the General Assembly not to pass judgement, in the exercise of his functions as depositary, on the legal effects of documents containing reservations or objections and to leave it to each State to draw the legal consequences from such communications.

20. In that regard, it was perhaps worth giving thought to the idea of introducing a system of "collegiate decision" by a majority of contracting States. At the United Nations Conference on the Law of Treaties[4] for the adoption of the 1969 Vienna Convention, the proposal of introducing the "collegiate decision" system on the admissibility of a reservation had not been accepted. However, the question whether a declaration corresponds to a reservation was a precursor to the question of the admissibility of a reservation. Therefore, such a "collegiate decision" system might play a useful role in establishing a stable legal system, provided that its purpose was limited to judging the legal character of a declaration.

21. Interpretative declarations also posed a number of technical problems. With regard to a multilateral treaty prohibiting the formulation of a reservation, a disguised reservation must of course be considered invalid. On the other hand, in the case of a multilateral treaty allowing the formulation of reservations, how would an interpretative declaration be treated if a competent authority declared that it actually constituted a permissible reservation? If no express objection had been made to such a

[3] Ibid., footnote 8.

[4] See 2402nd meeting, footnote 5.

declaration, did the silence of the other States mean acceptance of that reservation provided for in article 20, paragraph 5, of the 1969 Vienna Convention? In that case, the other contracting States might have remained silent either because they had regarded the declaration as a genuine interpretative declaration or because they had accepted it, even though they had regarded it as a reservation. It was very difficult to differentiate between the former and the latter cases and the question arose whether the provisions of article 20, paragraph 5, applied to the former case.

22. The treatment of interpretative declarations, which lacked express provisions in the 1969 Vienna Convention, was thus of great importance for the practical implementation of multilateral treaties.

23. Concerning the four methodological questions raised by the Special Rapporteur at the end of his report, he was in favour, first, with regard to the title of the topic, of adopting the wording—"Reservations to treaties"—proposed by the Special Rapporteur. However, he did not think that the Commission should deal with reservations to bilateral treaties, because even if they were to exist, they were, in fact, amendments to those treaties and did not require the formulation of general rules. The Commission should confine its efforts to reservations to multilateral treaties, giving preference to those that were open to universal participation. The title of the topic should precisely reflect the scope of the Commission's work on the topic.

24. On the second question whether to challenge the rules on reservations contained in the 1969 Vienna Convention, he said that although those rules had many gaps, their ambiguity and flexibility had served their purpose well and States had developed a broad practice based on those provisions. If the Commission challenged them, it might well create chaos and confusion. The Commission should preserve what had been achieved and build on the existing rules of the Vienna Convention.

25. As to the third question, which concerned what form the results of the Commission's work might take, he would state his position once the discussion of the topic had progressed.

26. With regard to the fourth question raised by the Special Rapporteur, he believed that the Commission should examine reservations by category of treaties, which might each require different rules.

27. Mr. ARANGIO-RUIZ said that he still remembered from his university days a particular problem on reservations with regard to which he had had to do a considerable amount of research. Since that time, however, he had continued to study, with regard to reservations, only what every professor of international law should know about that matter, strictly in order to perform his teaching duties: in particular the advisory opinion of ICJ on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide[5] and the corresponding doctrine. It had been without enthusiasm that he had greeted the Commission's decision to consider the topic.

28. Today, however, he was glad that the task had been entrusted to Mr. Pellet, whose original thinking and great capacity for work he appreciated. In his first report, the Special Rapporteur gave a lively and stimulating overview of the question, which had piqued his own interest and curiosity. He was eager to hear more of the Special Rapporteur's ideas on the inconsistencies and gaps in the 1969 Vienna Convention and his suggestions on how to solve the problems raised. He was particularly interested by the distinction made in the report between reservations and interpretative declarations. In terms of method, he agreed with the Special Rapporteur on the advisability of preserving, above all, what had already been achieved.

29. Mr. EIRIKSSON said that, for the time being, he did not wish to engage in a substantive debate. He would focus his remarks on the four questions raised by the Special Rapporteur in his oral introduction to the report.

30. First, he endorsed the Special Rapporteur's suggestion that the title of the topic should be shortened to "Reservations to treaties". In fact, studying State practice in disputed areas did not appear to be useful because such practice was, at the very least, confusing. A recent effort by European jurists, himself among them, to resolve the ambiguities in very recent practice had failed. What, then, could be expected from an analysis of even earlier precedents? In that field, States needed the Commission more than it needed them.

31. Secondly, as to the relationship between the topic under consideration and the Vienna Conventions, the Special Rapporteur had raised the question whether the relevant provisions should be considered as "sacrosanct". While the term itself was probably too strong, he recognized that the Commission should clarify and complete the rules set forth in the Vienna Conventions only as necessary, seeking to resolve any ambiguities. As an illustration, he mentioned the question of reservations to constituent instruments of international organizations, to which the 1969 Vienna Convention devoted an entire paragraph with incomplete results, as in the case of the corresponding paragraph of the 1986 Vienna Convention.

32. Thirdly, with regard to the form that the Commission's work should take, he proposed that it should adopt "guidelines on certain issues relating to reservations to treaties", on the understanding that the number of those issues would be limited. First, bilateral treaties should be excluded. Secondly, without spending any more time discussing the legal nature of "interpretative declarations", it should simply be stated that the question whether or not a declaration constituted a reservation depended on its content rather than on what it was called. The guidelines should deal primarily with objections to reservations and the resulting consequences. The Commission might consider as lesser issues the effect of State succession on reservations and the question of reservations to constituent instruments of international organizations. At some point or other, it would probably be necessary to determine whether reservation regimes differed between specific fields of activity, such as

[5] See 2400th meeting, footnote 5.

human rights or the environment. His own prejudice was against having specific reservations regimes for different fields.

33. As to the method of work, he hoped that, for the areas which the Commission finally selected, the Special Rapporteur could prepare a comprehensive report indicating the difficulties encountered. The draft guidelines could, following the debate in plenary, be submitted to a working group created for that purpose. He hoped that the work could be finished within three sessions, submitted to Governments and fully completed by the end of the next quinquennium.

34. Fourthly, he did not think that the Commission should prepare draft model clauses.

Cooperation with other bodies (*concluded*)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

35. The CHAIRMAN welcomed Mr. Eduardo Vío Grossi, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

36. Mr. VÍO GROSSI (Observer for the Inter-American Juridical Committee) said that he was honoured to take part, on behalf of the Inter-American Juridical Committee (IAJC), in the Commission's meeting. He would later have the privilege of submitting the Commission's conclusions to the next session of the Committee, to be held at its headquarters in Rio de Janeiro, Brazil, in August 1995.

37. There had always been close ties between the Commission and IAJC as a result, no doubt, of the similarity of the functions assigned to them. It thus seemed entirely natural that some members of IAJC should later become members of the Commission. That had been the case with Mr. Vargas Carreño and Mr. Villagrán Kramer, who were well acquainted with the work which IAJC, the oldest body in the inter-American system, had been doing since 1906 on the codification and progressive development of international law.

38. At its first regular session in 1995, held at Washington, D.C., headquarters of OAS, of which it was a principal organ, IAJC had adopted one decision and eight resolutions.

39. The decision related to the International Law Course held each year in August, at the same time as the Committee's session, at Rio de Janeiro in cooperation with the Getúlio Vargas Foundation, Rio de Janeiro. The decision established a working group to organize the course, with the participation of the OAS Secretariat for Legal Affairs. The importance of that decision, which was apparently administrative, lay in its implications. The international law course had been offered for just over 20 years. The persons participating as students were foreign affairs officials from OAS member States and academics from various universities in the Americas. The course was taught not only by members of IAJC, but also by guest professors, as well as representatives of other international organizations. The course offered an update on various topics, rather than an in-depth study of particular subjects of international law. With experience, it had been considered necessary to appoint a working group to evaluate the situation and to take appropriate steps to improve the course so that it would be more relevant to the development of international law in the Americas. The cooperation which the Commission provided in that regard through the participation of Mr. Calero Rodrigues and Mr. Vargas Carreño in the next international law course was sincerely appreciated.

40. The resolutions could be divided into two groups, those relating to the follow-up of topics and those expressing views on those topics.

41. With regard to the first type of resolution, IAJC reviewed studies on the topics considered and indicated the direction that, in its view, those studies should take. The resolutions dealt with topics which were of great interest to the Americas and to general international law, such as the right to information, international cooperation to combat corruption, inter-American cooperation to combat international terrorism, legal aspects of foreign debt and improvements in the administration of justice in the Americas.

42. The resolutions in the second group reflected the views of IAJC and dealt with the prohibition of transboundary abduction, the legal dimension of integration and international trade, and democracy in the inter-American system.

43. In its resolution on the ban on transborder kidnapping, IAJC, taking note of the treaty signed on 23 November 1994 by the Governments of Mexico and the United States of America, which expressly bans that type of kidnapping, stressed the importance of that instrument, which clearly demonstrated the international law principle of international law which imposes respect and preservation of the inviolability of the territorial sovereignty of States, and which also accurately defined transboundary kidnapping as an internationally wrongful act.

44. In that connection, IAJC recalled in the same resolution—and that was extremely important—that it had ruled in a juridical opinion, of 15 August 1992, on the international juridical validity of a decision handed down by the Supreme Court of the United States of America. In its opinion, IAJC had held that transboundary kidnapping, even when not expressly banned in the extradition treaties in effect between the countries involved therein, was in violation of the norms of international law.

45. In its resolution on the juridical dimension of integration and international trade, IAJC, after studying various mechanisms for integration and free trade in the region, noted that everything seemed to be moving in the direction of continental integration based on converging and interlocking systems; in that framework, it concluded that dispute settlement methods in regional and subregional integration and free trade systems must

* Resumed from the 2391st meeting.

reflect the needs and realities of each system, be clearly structured, give individuals access to local courts and tribunals, be in harmony with the mechanisms provided for within the framework of the GATT/WTO, be applicable to disputes between States parties to the mechanism and States which were not, and apply to the system of foreign investments.

46. In its resolution on democracy in the inter-American system, IAJC, after taking note of the reports issued on that question, Inter-American practice, the rules of the Charter of OAS[6] and the interpretation of those rules by the Organization itself, noted that the OAS and its member States respected a number of principles and norms relating to the effective exercise of representative democracy.

47. First, every State of the inter-American system was required to ensure the effective exercise of representative democracy as part of its political organization. It had the right to choose the forms and means it believed to be suitable for that purpose.

48. The principle of non-intervention and the right of every State of the inter-American system to choose its political, economic and social regime without outside interference and to organize itself in the manner best suited to it could not justify a breach of the obligation to ensure the effective exercise of representative democracy within the framework of that regime or that organization.

49. OAS was empowered to encourage and strengthen representative democracy within each of its member States. In particular, it was incumbent upon OAS, through ad hoc meetings of Ministers for Foreign Affairs or of its General Assembly convened in special session, to determine, within the framework of the resolution on representative democracy,[7] those cases in which one of the member States had breached its obligation to ensure the effective exercise of representative democracy or had failed in the fulfilment of that obligation.

50. The abrupt or irregular interruption of the democratic institutional political process or of the lawful exercise of power by a democratically elected Government or the overthrow by force of a democratically constituted Government was equivalent, in the inter-American system, to a breach of the obligation to ensure the effective exercise of representative democracy.

51. Any State of the inter-American system which failed in its obligation to ensure the effective exercise of representative democracy was required to remedy that failure. The resolutions which OAS adopted in such a case had to be aimed at achieving that objective.

52. It would be seen from his statement that IAJC had a highly topical agenda which corresponded to the concerns of the Americas as well as to the present state of general international law. In addition, it included two other topics which formed the subject of additional studies and which related to the peaceful settlement of disputes and to environmental law.

53. The agenda and the way in which IAJC tackled it would seem to indicate that the Committee today was less concerned with trying to codify international law than with promoting and improving the progressive development of the legal system in the Americas. The explanation for that was perhaps to be found not so much in the absence of new customary rules between American States as in the novelty of the topics under consideration. The globalization of some social phenomena and scientific and technological development had given rise to pressing problems which made it necessary for legal standards to be created as a matter of urgency, without the slow process required in order to constitute a rule of customary law. In that sense, IAJC would seem to be an efficient and useful collaborator of international lawmakers in the Americas—i.e., the American States acting within the framework of OAS—rather than a codification body. Its task was, more than ever, to provide and suggest innovative solutions to new and formidable problems.

54. In conclusion, he said he was convinced that the traditional ties between IAJC and the Commission would make for increasingly intensive and fruitful collaboration between the two bodies.

55. Mr. de SARAM, speaking on behalf of the members of the Commission from the Asian countries, thanked Mr. Vío Grossi for being present in the Commission and for his remarkably interesting statement. Hearing it had made him realize that IAJC had been in existence for almost a century and that it was closely integrated in OAS. He had also been very interested to learn how the Committee functioned. Its annual course in general international law, which provided an occasion for practitioners and academics of the Americas to study together topics of general interest and current importance was certainly a sophisticated model of cooperation in the field of international law which countries of the Asian region might usefully follow. Some of the subjects studied by IAJC, such as the peaceful settlement of disputes and certain matters relative to environmental law, were very close to those under consideration by the Commission. It was also interesting to learn how IAJC functioned virtually as a specialized international organization for the codification and progressive development of international law.

56. Mr. TOMUSCHAT, speaking on behalf of the members of the Commission from the Western European and other States, said that, while the work of IAJC could be said to run parallel to that of the Commission, its scope of action was broader, since, in addition to general international law, it also dealt with matters such as human rights and was sometimes even called upon to issue an opinion on a specific case. Its pronouncement on the abduction, by emissaries of one State, of individuals in the territory of another State, for example, was of particular interest in that it related to an act which clearly constituted a serious violation of the basic rules of international law. The Committee had also studied the question of democracy in the American States and had for-

[6] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (ibid., vol. 721, p. 325).

[7] Resolution AG/RES.1080 (XXI-0/91) adopted by the General Assembly of OAS on 5 June 1991 (*Proceedings, Volume I, Twenty-First Regular Session, Santiago, Chile, June 3-8* (OEA/Ser.P/XXI.0.2), pp. 4 *et seq.*).

mulated a number of proposals in that connection which clearly reflected the idea of the "right to democratic government". Its work on the subject had a bearing on questions of direct interest to the Commission's Special Rapporteur on State responsibility: was it an international crime within the meaning of article 19 of part one of the draft currently before the Commission to topple a democratically-elected Government? Was there an international obligation for States to practice democracy? Where precisely did the borderline between crimes and delicts run? In the human rights field, international law obviously had some specific features which distinguished it from the traditional law of State relations.

57. IAJC also focused on other, equally interesting subjects such as environmental law or the formulation of legal rules relating to the fight against corruption, terrorism and drug trafficking. The Committee's work on environmental law had a bearing on the international liability topic; its work in connection with action to combat terrorism could help the Commission in its search for a definition of that term and the Committee's analysis of reservations to multilateral treaties could be of use to the Commission in its consideration of that topic. It was desirable that the Commission should henceforth have better access to the Committee's documentation and studies on all those subjects.

58. Mr. VARGAS CARREÑO, speaking on behalf of the members of the Commission from Latin America, said that the extensive and important work of progressive development and codification of international law performed by IAJC—of which he had been a member—had earned it the right to be known as the "legal conscience of Latin America". The work of regional bodies could not be contrary to universal standards; rather, those standards had to be taken into account in the instruments which regional bodies proposed. Thus, the initiatives taken by OAS, with IAJC assistance, in order to establish judicial cooperation between countries of the region in action to combat terrorism, drug trafficking and corruption, for example, could be enriched by the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind, but the Commission, in its turn, could not overlook the contributions of the Committee and other regional juridical bodies to the elaboration of the Code. The Commission had to take account not only of the practice of States, but also of the contributions made by regional bodies, which were far from negligible. For example, the Convention on Treaties, the Convention regarding Diplomatic Officers, the Convention regarding Consular Agents and the Convention on Rights and Duties of States had served as important precedents for the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Vienna Convention on the Law of Treaties. The influence on inter-American standards was clearly apparent in the case of other instruments in whose drafting the Commission had not participated. The wording of the General Assembly resolutions on the principle of non-intervention was, for example, practically identical to that of the Charter of OAS. The United Nations Convention on the Law of the Sea itself embodied concepts, such as the exclusive economic zone, which had their origin in decisions adopted by the Committee. That reciprocal influence between the United Nations system and regional bodies should be maintained and developed; that would require closer and more efficient cooperation between the international and regional levels.

59. Mr. YANKOV, speaking on behalf of the Eastern European members of the Commission, recalled that some years before he had represented the Commission at a meeting of IAJC. On that occasion, he had been greatly impressed by the informal and free nature of the discussion, which had covered a very wide range of subjects of topical interest, as well as by the Committee's flexible working methods and the importance it attached to the dissemination of international law, doctrine and jurisprudence through its courses and publications. He had also been struck by the volume and wealth of documentation which had been placed at the disposal of the members of the Committee, which bore comparison with that of The Hague Academy of International Law and which would be of great use to anyone interested in the development of the doctrine, jurisprudence and practice of international law, not only within the Latin American framework, but also in terms of the Latin American perception of world problems. The concise but very rich report just given by the observer for IAJC showed that the great legal tradition of the Americas was being maintained at a very high level. The Commission would do well to meditate on the example of efficiency which the Committee provided in dealing within relatively short time-limits with important and topical issues relating to human rights, finance and trade, improvements in the administration of justice and cooperation between member States in judicial matters. Cooperation between the Commission and IAJC therefore deserved to be improved, not only at the level of ritual exchanges of annual reports and observers, but through a richer, more efficient and pragmatic exchange of information and documents.

60. Mr. RAZAFINDRALAMBO, speaking on behalf of the African members of the Commission, said that American jurists, and especially those from Latin America, were seen by their opposite numbers in Africa as pioneers and models whose work had always been a valuable source of inspiration in the elaboration of principles and rules corresponding to the state of economic, social and political development of Africa in the throes of democratic change. The Committee's many and varied achievements could not but contribute to the Commission's current discussions and studies. African jurists therefore welcomed the traditional and fruitful cooperation between the two bodies.

61. The CHAIRMAN said that all those who had been privileged to be personally involved in the work of IAJC knew to what extent that work represented a source of pride for the American continent and the world at large, as well as a definite contribution to the establishment of a world legal system. In expressing the hope that the fruitful cooperation which had existed between the Commission and the Committee for so many years would not only grow still stronger and deeper, but also assume more practical forms, he wished the Inter-American Juridical Committee every success in its future endeavours.

The meeting rose at 1 p.m.