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Summary record of the 2503rd meeting

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cedure whose implementation in practice could not be considered desirable.

The meeting rose at 1.05 p.m.

2503rd MEETING

Wednesday, 2 July 1997, at 10.05 a.m.

Chairman: Mr. João Clemente BAENA SOARES

later: Mr. Alain PELLET

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

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

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. CRAWFORD said that he was not sure about the legal nature of the procedure relating to the determination of the impermissibility of a reservation to a treaty which was either prohibited by the provisions of the treaty itself or incompatible with its object and purpose.

2. He recalled that, in the *Belilos* case,² the issue had been not whether the particular reservation was or was not incompatible with the object of the Convention, but, rather, since the Convention allowed only for certain reservations, whether the Swiss declaration had or had not been one of the permissible reservations. Under article 19 of the 1969 Vienna Convention there was no difference between impermissibility resulting from a breach of the provisions of a treaty and impermissibility as a result of incompatibility with the object of the treaty.

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

² See 2500th meeting, footnote 16.

3. The Special Rapporteur approved of the situation in which a State whose reservation had been deemed incompatible with the object of a treaty redefined its relationship to that treaty either by withdrawing its reservation or by reformulating it in order to make it compatible, or by accepting that it was not actually a party to the treaty. That was a situation, however, that called for further analysis. The 1969 Vienna Convention codified methods of formulating and withdrawing reservations, but did not provide for withdrawal from a treaty by a State which had made an impermissible reservation. A State that withdrew from a treaty was simply clarifying the attitude that it was regarded as having had at the time of its acceptance, in conformity with the underlying principle of consent. That State was thus shedding a kind of retrospective light on the position it was considered to have held at the time it had become a party. If such were indeed the case, the State could not have “*carte blanche*” to reformulate its reservation so as to rewrite its obligations. If it consented to become a party to the treaty, it then had certain obligations from which it could not unilaterally resile. By reformulating its reservation, therefore, it confirmed its status as a State party.

4. It might perhaps be useful for the Commission to reflect further on the exact modalities of that procedure, which was presumably a customary procedure not expressly provided for in the 1969 Vienna Convention.

5. The draft resolution proposed by the Special Rapporteur at the end of the second report (A/CN.4/477 and Add.1 and A/CN.4/478) should be referred to the Drafting Committee, even though, as Mr. Economides had said, it was perhaps premature to give it the form of a final resolution. The Drafting Committee must have the opportunity to come up with a generally accepted text, as it would be a shame to submit a resolution to the General Assembly on which the Commission still had divergent views.

6. Mr. ROSENSTOCK, referring to the situation of a State that formulated a reservation subsequently deemed to be invalid because it violated a specific prohibition of the treaty or because it was incompatible with the object and purpose of the treaty, as well as the legal relationship which the State would, according to Mr. Crawford, maintain with the treaty in question, said Mr. Crawford believed that the State had less latitude to react to that decision of impermissibility because it had previously been regarded as a party to the treaty. In his own view, that State was, rather, in exactly the same situation as one which had not yet taken any decision on the treaty.

7. Mr. CRAWFORD said that the situation was somewhat artificial, insofar as, upon the rejection of its reservation, the State was simply specifying what it should have specified from the outset. That was what Switzerland had done, in the *Belilos* case, formulating a reservation upon its acceptance of the Convention for the Protection of Human Rights and Fundamental Freedoms which had not been in conformity with article 64 of that Convention and then modifying the reservation when it had been challenged.³

³ See Council of Europe, *Yearbook of the European Convention on Human Rights*, vol. 31 (1988), p. 5.

8. According to the assumptions made by the Special Rapporteur, if a State's consent to a treaty was unequivocally conditioned by a reservation so that it was clear that it was becoming a party to the treaty only on that condition and the condition was unacceptable, there was no question of severing the reservation from the treaty; it was a question of interpretation of the State's intentions. At the global level, it was extremely difficult to "sever" a reservation and it was the intentions of the particular State that must be questioned: if it was seeking to become a party to the treaty, it could reformulate the terms of its consent to make them acceptable. That reformulation was, as it were, retroactive in effect. Otherwise, its initial acceptance would have to be considered void and all of the constitutional procedures required for it to participate in the treaty would have to be undertaken anew. Those procedural questions were considerably complex and should be studied further.

9. Mr. LUKASHUK said that, in the specific case of the human rights instruments, the legal position of the State whose reservation had been judged impermissible was that of a putative State party. If that State had indicated that it agreed to be bound by the obligations of the treaty, it could be presumed that it wished to participate in the treaty and that it was doing so up to the moment at which the problem of the permissibility of its reservation had been raised. If the problem was solved by excluding the reservation, the State's participation was clearly cancelled, but, before the decision was taken, the State must be considered to be a party to the treaty.

10. Mr. Sreenivasa RAO said that the enormous problem of reservations to treaties seemed to have taken on a life of its own and was leading the Commission into extremely complex areas, such as the relevance of reservations to the definition of customary international law, the competence of monitoring bodies to determine the permissibility of reservations, the legal authority and effects of the conclusions of those bodies on the position of reserving States and so forth. He wondered whether it was appropriate for the Commission at the current stage of its work to delve further into all those questions. He asked whether it would not be better to proceed with much more circumspection rather than attacking them head on.

11. Equal caution should be shown in the choice of the text the Commission would eventually submit to the General Assembly, whether it was a declaration, a resolution or much more nuanced recommendations. The subject under study was very important and would certainly retain the attention of several of the large bodies that would also deal with it, such as the human rights bodies and the Assembly itself. That was why the draft proposed by the Special Rapporteur should be referred to the Drafting Committee to consider not only its content, but also the form it should take. The best solution would probably be to make it an "opinion" or "conclusions" or, ideally, "preliminary views", to which the Commission could return after hearing the comments of the Assembly and other bodies.

12. He drew attention to what he thought was a contradiction: if it were concluded that the Vienna regime was universally applicable to all treaties, human rights instruments could not be treated separately at the same time

because, at the current stage in the Commission's thinking, they did not yet constitute a separate case. Whatever the solution, it would have far-reaching effects: if the Commission considered that the human rights treaty monitoring bodies were entitled to exercise their competence to determine the permissibility of a reservation, it provided them with a confirmation which was useless, but which would certainly create a lot of excitement in the General Assembly; if it decided that they were not so entitled, it would be calling several things into question. That was also another reason why the Commission should limit itself to "preliminary" conclusions, with the possibility of returning at a later date to the problem raised by those bodies.

13. The competence of the monitoring bodies could be evaluated only in terms of the particular instrument. Those bodies had a mandate, which was to monitor the promotion and respect of the instrument from which they emanated, but also to monitor the behaviour of each State in terms of its acceptance of that instrument. It should be recalled that, in most cases, reservations did not constitute the *sine qua non* for accepting a treaty, but simply an indication of the circumstances, time periods and conditions under which a State, for reasons related to its social and political situation and so forth, would fulfil its contractual obligations. He was inclined to think that the bodies in question did an excellent job when it came to the promotion of human rights. They were competent to decide on the manner in which States parties conducted themselves with regard to the treaty, to make comments to those States and to guide them. It could be observed that States generally respected their conclusions, and that attested to the efficiency of the system.

14. He fully endorsed the conclusions set forth by the Special Rapporteur at the end of chapter II, section B, of his second report. He also endorsed those contained in the draft resolution to be referred to the General Assembly. However, it seemed to him that too peremptory an approach should be avoided, for example, with regard to general comment No. 24 (52) of the Human Rights Committee,⁴ the relevance of reservations to customary international law and various other questions which it was not for the Commission to resolve.

15. Mr. CRAWFORD said he was under the impression that, in Mr. Sreenivasa Rao's opinion, the Commission should not deal with the relationship between reservations and customary international law. He would not go into detail, but, whatever form it took, the final text should imply that, regardless of whether States became parties to a treaty or to certain of its provisions, customary international law continued to govern the subject-matter of the treaty. Any situation which suggested that the fact of making a reservation to a treaty authorized the reserving State to derogate unilaterally from customary international law should be avoided at all costs.

16. Mr. RODRÍGUEZ CEDEÑO said he wished to refer to the role that should be played by human rights treaty monitoring bodies in evaluating the admissibility of reservations to human rights instruments.

⁴ See 2487th meeting, footnote 17.

17. It would be useful for the specific nature of human rights instruments to be taken into account, particularly with regard to reservations. It was true that the Vienna regime was adaptable to those treaties, but there were lacunae in that regime which should be filled. For example, additional rules could be drawn up for those treaties, calling on the monitoring bodies to participate more or less directly in determining the permissibility and admissibility of reservations. That function should naturally be seen from a viewpoint which, while open-ended, would remain compatible with the general function stipulated in the instrument under consideration. In no case were those jurisdictional bodies that would be able to take the place of States in determining the permissibility of reservations. Their opinion would simply carry the weight of a recommendation.

18. As provided for in the draft resolution at the end of the second report, specific clauses could be included in the future instrument in order to settle the question.

19. Mr. PELLET (Special Rapporteur), summing up the discussion on chapter II, section C, of his report, said that he had not had enough time to give detailed consideration to all the extremely interesting comments made during the discussion, but he had taken note of a number of substantive issues.

20. The first issue related to the possibility that States could formulate reservations to treaty provisions that reproduced either customary norms or rules of *jus cogens*. If he had correctly understood Mr. Rosenstock's comment on the subject, while agreeing that nothing prevented a State from formulating a reservation to a customary norm, he wondered why the same was not true in respect of *jus cogens*. Upon reflection, the same principles could be found to apply in both cases, those principles being: that, while a State could not, by means of a reservation to a treaty, evade the application of a rule of international law that would otherwise be applicable to it, as Mr. Crawford and Mr. Sreenivasa Rao had quite rightly pointed out, it could object to the actual inclusion of the rule in a treaty, with the consequences that such inclusion would have, particularly with regard to the monitoring of the application of that rule by the treaty body possibly set up. It therefore followed that a State could formulate a reservation to a treaty rule embodying a peremptory norm, but that such a reservation could not apply to the substance of the law; it could apply only to the consequences of the inclusion of the rule in the treaty. The State did have a bit more latitude with regard to reservations to treaty provisions that incorporated a customary norm. There was no denying the fact that it could formulate a reservation on the actual substance of the norm if, persisting in its objection, it felt the need to make its continued objection known; and that reservation could be accepted by the other States under the same conditions to which any other acceptance would be subjected because, as he had pointed out in chapter II, section B.3, of his second report, States could always derogate from customary norms by agreement *inter se*. That was not the case of peremptory norms.

21. Mr. Crawford, Mr. Rosenstock and Mr. Lukashuk, *inter alia*, had had an interesting exchange of views on whether a State that had made a reservation that ultimately proved to be impermissible or contrary to the pur-

pose or object of the treaty should nevertheless be considered to be bound by that treaty from the outset. In his view, only the State itself could answer that question. If the State acknowledged a posteriori that it had made an impermissible reservation and agreed to withdraw or modify it, it was fully entitled to consider itself as being bound by the treaty from the outset, but, if it considered that its acceptance of the treaty was conditional on its reservation and that reservation had not been accepted, it could take the view that it had never been bound by the treaty, without prejudice to the attitude it would ultimately adopt. In any event, it was for the State and the State alone to decide, and not for the experts, either in the Commission or in ICJ.

22. Another point of which he had taken note was the question whether a compromise had been reached at the United Nations Conference on the Law of Treaties,⁵ on the issue of reservations. He would not take sides in the discussion that had pitted Mr. Lukashuk and Mr. Rosenstock against Mr. Hafner, the two sides perhaps having seen the problem from different angles. The proceedings of the United Nations Conference on the Law of Treaties seemed to indicate that there had been no public "bargaining" on reservations and that it had been at the very last minute that the Union of Soviet Socialist Republics (USSR) had finally won the inclusion of the extraordinary paragraph 3 of article 21 which had the paradoxical result that an objection could have the same effect as acceptance. Like Mr. Hafner, however, the view could be taken that it had essentially been to avoid destroying the balance in a structure that had been built up so painstakingly that many States, particularly the Western countries, had refrained at that time from challenging the reservations regime.

23. As to the already much discussed issue of the specific nature of human rights treaties, he came back to Mr. Simma's comment (2502nd meeting) that article 60, paragraph 5, of the 1969 Vienna Convention did not refer to human rights instruments. Not only did he think that was incorrect, for the wording of that provision was broad enough to include such instruments, but he also found it *strange to wish to confine those instruments to a narrow category from which humanitarian conventions would be excluded*. The problem of reservations arose in exactly the same way in respect of human rights treaties *stricto sensu* and of humanitarian treaties, since any form of reprisals was obviously excluded in both cases. In his opinion, and, on that point, he shared Mr. Rosenstock's views, the main conclusion that could be drawn from article 60, paragraph 5, as well as from article 20, paragraphs 1 and 2, of the 1969 Vienna Convention was that, when the authors of the Convention had found it necessary to establish a separate regime for treaties with a specific object, they had not hesitated to do so.

24. Those considerations brought him to the question of the unity of the reservations regime. While no one appeared to have questioned such unity, at least in general terms, the opinions of the members of the Commission had been more divided on the need for or advisability of establishing a special regime for human rights instru-

⁵ See 2499th meeting, footnote 14.

ments. Although some members, such as Mr. Kateka and Mr. He, who could hardly, in as much, be accused of hostility to human rights, had been categorically opposed to doing so, others, including Mr. Simma and Mr. Dugard, were very clearly in favour of allowing such specificity. In order to do so, however, they had to move from the normative to the institutional level for lack of normative arguments, something which two members had not failed to point out.

25. Even if that was an institutional problem, the Commission must not refrain from discussing it, if necessary. The consideration of the issue was required by the machinery of the Vienna regime, which established a system to "monitor" reservations by means of objections. One of the biggest problems raised by the involvement of human rights bodies in that area was to determine whether "their" system, that is to say the system they wanted to have States accept, could and should replace the one established by the instrument concerned, for that was precisely the implication of general comment No. 24 (52) of the Human Rights Committee. For reasons he had gone into at length in his second report, he did not think that that was acceptable.

26. However, he did not think that the monitoring bodies could be prohibited from giving their opinion on the permissibility of reservations, even if certain members of the Commission seemed shocked by that possibility. He had gone into that question as well at length in his second report, but was grateful to Mr. Lukashuk for having provided him with additional arguments based, *inter alia*, on the general law of international organizations.

27. He wished to open a terminological parenthesis on that very subject of the treaty bodies. In English, the term was "treaty bodies", literally meaning or "bodies established by the treaties", which seemed to be an excellent name. It did not, moreover, apply only to human rights instruments and helped to define the elements of the problem.

28. As many speakers, including Messrs. Bennouna, Crawford, Hafner, Kateka, Pambou-Tchivounda, Sreenivasa Rao and Rosenstock had pointed out, the term meant that the "treaty bodies" could not be said to have greater powers in respect of reservations than those they had been given to carry out their primary function of monitoring the implementation of a treaty. As indicated in the conclusion of chapter II, section C, of the report, the legal force of the findings made by these bodies in the exercise of that determination power cannot exceed that resulting from the powers given them for the performance of their general monitoring role. In other words, while those bodies were indeed entitled to determine the permissibility of a reservation within the framework of their mandate, their findings had binding force only if they had been accorded decision-making powers in one way or another. To his knowledge, however, and even if certain passages in general comment No. 24 (52) of the Human Rights Committee seemed to imply the opposite, no international human rights body had been given such powers.

29. The situation was perhaps different in certain regional systems, such as the inter-American system or the European one. But those cases were too specific to

serve as valid examples, for the solutions adopted at those levels to be transposable to the international level or for the Commission to use them as models. That did not mean, however, that such trends should not be taken into account, even if, as Mr. Galicki had quite rightly pointed out (2502nd meeting), the trends were not always as well defined as some members affirmed.

30. Most members of the Commission seemed to agree with him that it would not be wise to get bogged down in regional human rights rules.

31. Some speakers had also taken the view that the Commission must likewise not concern itself with the problem at the international level, while other speakers had indicated that they had some doubts in that regard. The first of the two main arguments given was that such an exercise would be premature as long as there was still a great deal of uncertainty about the legal regime of reservations. He did not dispute the fact that that question was well founded and he was entirely in agreement with members of the Commission such as Messrs. Galicki, Economides, Hafner and Lukashuk, who had rightly emphasized that the relationship between article 19 and articles 20 and 21 of the 1969 Vienna Convention was not at all clear. It was, after all, the crux of the debate about permissibility and opposability, which would be the subject of the fourth report that he intended to submit later on. All throughout the second report, however, he had carefully avoided taking a position on that issue because he sincerely believed that that was not essential at the current stage of analysis for the purposes proposed in the draft resolution. Whatever system was adopted, the Commission was currently concerned with the power of the treaty bodies to make findings, and its limitations; it was on that aspect that he would like the Commission to focus its thinking. Since a start had to be made somewhere, he had, with the approval of nearly all members of the Commission, thought that the Commission could adopt a position on that aspect without necessarily making a final pronouncement on the entire issue. The second major argument against the idea of taking positions was that that would be a blow to the excellent progress currently being made on the initiative of the monitoring bodies. That view had been defended primarily by Mr. Simma and Mr. Dugard, who both seemed to be in favour of the idea of the draft text, but, like Mr. Economides, had reservations about the content.

32. While he agreed that nothing must be done to strike a blow against human rights, he did not think that that meant the Commission, which was responsible for the codification and progressive development of international law, should play Pontius Pilate in a debate of which it could not but be aware and not be fully involved in that debate or, most importantly, that, by issuing a reminder that human rights instruments were treaties, that is to say instruments based on the consent of States, something which was self-evident, the Commission was doing any harm to the noble cause of human rights. Quite the contrary, by adopting a position that was too intransigent and rigid, the monitoring bodies risked discouraging well-disposed States and dissuading reticent ones. He would have no objection, however, if the Drafting Committee considered ways of improving the text so that the future would be secure and he was ready to take part in that effort.

33. One of the final points was whether the text should take the form of a resolution, a draft resolution—and, if so, whether it should be a draft resolution of the Commission or addressed to the General Assembly—a recommendation, conclusions or even a preliminary opinion, as Mr. Sreenivasa Rao had suggested. In introducing the last part of his second report, he had explained why he thought that nothing prevented the Commission from adopting a resolution and some members had supported that point of view. Nevertheless, he had no fixed ideas on the matter; what was important was not so much the name the Commission would give to the text, but the fact that it would be taking a position. A resolution simply offered the advantage of stressing how much importance the Commission attached to the topic.

34. Furthermore, for reasons connected with his last point, he did not think it very urgent for the Commission to take a decision on that question. As he had indicated when introducing the last part of the report, it would, in his view, be wise if the Commission formally consulted the competent human rights bodies because, while it was certainly involved in the debate and had a duty to adopt a position, as those bodies themselves expected it to do, it was not the only party concerned and therefore had to establish a dialogue with the other parties. His answer to the fear repeatedly expressed by Mr. Goco that the Commission would run into the intransigence of those bodies was, first, that that was a risk to be taken and that refraining from consulting those bodies would not make them any less intransigent and, secondly and more importantly, that he did not think their intransigence was as radical as some people claimed. If the Commission's arguments were sound, the bodies in question would study them and, in trying to respond to them, would perhaps realize that they had to some extent gone a little astray; they might also be all the more receptive if the position the Commission took was a balanced one, that is to say as far removed from the excesses of general comment No. 24 (52) of the Human Rights Committee as from those of the States which had indignantly criticized the positions adopted by the Committee, the United States of America, France and the United Kingdom of Great Britain and Northern Ireland foremost among them. He therefore believed that the Commission had to try to obtain the reactions of the human rights bodies operating within the framework of the United Nations which Mr. Kateka had listed so painstakingly in his first statement (2500th meeting).

35. As to whether the Commission was empowered to do so, he said that article 16, subparagraph (e), article 17, paragraph 2 (b), and article 26 of its statute obviously implied that it was and that, as Mr. Simma had pointed out, article 25 expressly provided that it was. Article 25, paragraph 1, read:

The Commission may consult, if it considers it necessary, with any of the organs of the United Nations on any subject which is within the competence of that organ.

There could naturally be no question of bypassing the General Assembly and it went without saying that the text which the Commission would adopt would have to be included in its report and that the comments of Governments in the Sixth Committee would, as always, be most useful and welcome. He saw no reason why the Commission should forego the opinion of the bodies which had set

the debate in motion or why it should be so arrogant as to fail to consult them when its statute invited it to do so or to fail to meet their expectations concerning a possible review of the whole issue. On the question of form, he was prepared to go along with any solution except that of draft articles accompanied by commentaries, to which the topic really did not lend itself. In his view, the discussion on the question of form could wait, but the Commission did have to take a prompt decision on whether to refer the text to the Drafting Committee, failing which it would find itself unable to consult anyone about anything.

36. The CHAIRMAN said that, as it neared the end of an intense and frank debate on chapter II of the Special Rapporteur's second report, the Commission was called upon to make observations and reach certain conclusions on the topic of reservations to treaties. Those observations and conclusions would, of course, be only of a provisional nature. Given that the Commission had had the Special Rapporteur's first report on the topic before it since the forty-seventh session in 1995, it would seem timely to present some interim results to the General Assembly and the draft resolution prepared by the Special Rapporteur provided a suitable working basis. There were, of course, substantial differences of opinion among members on both the content and the form of the proposed draft, but, in his view, it contained the elements necessary for the continuation of the Commission's work. He therefore proposed that the Commission should refer the draft resolution to the Drafting Committee as a working basis. The Drafting Committee would be expected to reflect on and ponder all the views expressed in plenary, decide what observations could be made and conclusions drawn at the current stage and consider a suitable form in which those observations and conclusions might be drafted. The Drafting Committee would submit its report to the Commission, which would then be in a position to take a decision.

37. Mr. BENNOUNA noted with interest the Chairman's suggestion that, if the Commission referred the proposed text to the Drafting Committee, it would be up to the latter to decide on the question of its form. It was apparently not certain that the form of a draft resolution would be finally maintained. He recalled that, except in the case of the resolution on confined transboundary groundwater attached to the draft articles on the law of the non-navigational uses of international watercourses,⁶ the Commission had never followed such a procedure. While he had doubts about the question of form, he endorsed the proposal that the Commission should adopt a position on the topic.

38. Mr. PELLET (Special Rapporteur) said that it was not for the Drafting Committee to determine the form the draft should take and, in fact, the Commission itself did not need to adopt a final decision in that regard at the current session. It would be up to the Drafting Committee to adopt a position on a text which would in any case represent an opinion of the Commission. The Commission would decide later what it wanted to do with the text.

39. Mr. SIMMA said that it would be difficult for the Drafting Committee to arrive at a result in the absence of

⁶ *Yearbook* . . . 1994, vol. II (Part Two), p. 135.

any preliminary decision on the form of the text. The type of wording used would depend largely on that decision; the wording of a conclusion would be more restrained, that of a resolution more emphatic. That meant that the outcome of the first consideration in the Drafting Committee would have to be referred back to it later to enable it to take account of the final decision the Commission would have taken on the form of the text.

40. Mr. HE said that he wished to place on record his reservations, based on his disagreement on certain paragraphs, about the proposal that the text should be referred to the Drafting Committee.

41. Mr. ROSENSTOCK said that, although he did not agree with certain paragraphs, the resolution seemed to him to provide an excellent possible format. There were, however, other possibilities and, recognizing that the substance was somehow related to the form, some measure of balance would perhaps need to be struck to encompass all the views expressed. He agreed that the text should be referred to the Drafting Committee as a working basis and believed that, in the light of the discussion in plenary, the Drafting Committee would have a sense of where the centre of gravity lay.

42. Mr. LUKASHUK, noting the very strong objections raised by several members to parts of the proposed draft resolution, appealed to Mr. He and the Special Rapporteur, in particular, to try to reach a compromise.

43. Mr. ECONOMIDES reminded the Commission of his reservations about referring the matter to the Drafting Committee. As the draft resolution markedly favoured the so-called "State" approach, moreover, he pointed out that the Commission might eventually reach the conclusion that the institutional approach was more conducive to the progressive development of international law. In the case of the conventions related to the law of the sea, for example, the institutional approach could be considered more positive than the classical State approach. He therefore thought that the Drafting Committee should keep open the possibility of such a change of emphasis.

44. Mr. ADDO said that, in his view, the Commission should give the Drafting Committee the mandate of determining what the form of the text should be.

45. Mr. KATEKA said that, by and large, he endorsed the content of the draft text, but had doubts about the proposed form of a draft resolution of the Commission; a draft recommendation to the General Assembly, or conclusions of the Commission would be acceptable, however.

46. The CHAIRMAN, replying to a question by Mr. GOCO, confirmed that the draft text that would be sent to the Drafting Committee was a working basis for the Committee, which would devote two or three meetings to it in order to enable the Commission to adopt a final decision the following week.

47. Noting that there were no serious objections to his proposals, he said that he would take it that the Commission decided to refer the draft resolution to the Drafting Committee.

It was so decided.

Mr. Pellet took the Chair.

Cooperation with other bodies (concluded)*

[Agenda item 9]

VISIT BY A MEMBER OF THE INTERNATIONAL COURT OF JUSTICE

48. The CHAIRMAN welcomed Mr. Shi Jiuyong, a Judge of the International Court of Justice, who had come to visit the Commission as a representative of the Court in the absence of its President, Judge Schwebel, who was unable to travel for health reasons. He recalled that Mr. Shi Jiuyong had previously been a member and Chairman of the International Law Commission.

49. It would be noted that, while judges of ICJ had sometimes honoured the Commission with personal visits, Mr. Shi Jiuyong's visit was a first because he was representing the Court. The idea that the two institutions should create opportunities to meet and exchange views had seemed useful and worthwhile. By virtue of its Statute, ICJ was the principal judicial organ of the United Nations; more modestly, the Commission was a subsidiary organ of the General Assembly, but one of its oldest organs. The Court had celebrated its fiftieth anniversary in 1996; that of the Commission, whose establishment dated back to 21 November 1947,⁷ would be celebrated in 1998.

50. Recalling that the Commission was the organ through which the General Assembly principally, although not exclusively, discharged its functions under Article 13 of the Charter of the United Nations, namely, that of the progressive development and codification of international law, and that, while ICJ applied international law, the Commission tried to contribute towards crystallizing it, he said he was convinced that the two "international law bodies" could engage in a fruitful dialogue. In that connection, he expressed two hopes. The first was that the visit would have a follow-up and that, in particular, informal and mutually useful exchanges would be planned in the form, for example, of suggestions by the Court on the topics which the Commission intended to include in its agenda and symposia or workshops on subjects of common interest or concern. The second was that the exchanges would not be confined to mere formalities, but would pave the way for a genuine dialogue.

51. Mr. SHI (Judge at the International Court of Justice), extending his best wishes to the members of the Commission, explained that the President of ICJ, who was unable to travel for reasons beyond his control, had requested him to represent him. As a former member of the Commission, he was glad to be thus reunited with his former colleagues and friends.

52. In the past five years, ICJ had been busier than ever before in its history. It had recently had as many as 13 cases on its docket and it currently had 9. That figure might sound modest, but it was not when it was recalled

* Resumed from the 2495th meeting.

⁷ General Assembly resolution 174 (II).

that only States could be parties to contentious cases before the Court and that the potential pool of litigants therefore did not exceed 190. To that should be added the United Nations and its specialized agencies, which could request advisory opinions of the Court; they had done so on 23 occasions over the years, the most recent and most important being the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,⁸ in response to a question of the General Assembly. Moreover, as the members of the Commission were well aware, the contentious jurisdiction of the Court was consensual; the parties had to agree or to have agreed to the Court's jurisdiction. In many international legal disputes, they did not accept it. Despite those limitations, the Court's current docket was substantial and the nine cases on the list were important ones related to many different areas.

53. The first case, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*,⁹ involved problems of the delimitation of maritime boundaries and the resolution of territorial claims, questions in which the Court had specialized with outstanding success. The second, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*,¹⁰ and the third, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*,¹¹ dealt with the interpretation of the 1971 Montreal Convention in relation to the alleged involvement of the Libyan Arab Jamahiriya in the Lockerbie air disaster. They raised questions of the powers of the Security Council in relation to treaty rights of a party to a multilateral treaty and questions of extradition and terrorism.

54. In the fourth case, *Oil Platforms (Islamic Republic of Iran v. United States of America)*,¹² the Islamic Republic of Iran alleged that the United States had violated a bilateral Treaty of Amity, Economic Relations and Consular Rights by destroying Iranian oil platforms during the Iran/Iraq war. It raised questions not only of treaty interpretation, but of aggression, self-defence, neutrality and the law of war.

55. The fifth case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*¹³ stemmed from allegations by Bosnia and Herzegovina that Yugoslavia had violated the Convention on the Prevention and Punishment of the Crime of Genocide by directing and promoting acts of "ethnic cleansing" in Bosnia and Herzegovina.

56. The sixth case, *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*,¹⁴ which had been referred to the Court as a compromise, concerned the termination by Hungary on environmental grounds of a treaty with

Czechoslovakia, to which Slovakia claimed to be the successor, providing for the construction of dams on the Danube in Slovakia and Hungary. The case raised questions of the law of treaties, State responsibility, State succession and environmental law.

57. The seventh case, *Land and Maritime Boundary between Cameroon and Nigeria*,¹⁵ concerned sovereignty over the peninsula of Bakassi and the demarcation of the boundary between Cameroon and Nigeria.

58. The eighth case, *Fisheries Jurisdiction (Spain v. Canada)*,¹⁶ related to Canada's seizure of a Spanish fishing vessel on the high seas in an area in which Canada claimed the right to take protective measures to preserve fish stocks.

59. In the ninth case, *Kasikili/Sedudu Island (Botswana/Namibia)*,¹⁷ referred to the Court on the basis of a compromise, the latter had been asked to determine the legal status of a fluvial island.

60. In 1996, the Court had issued a judgment upholding its jurisdiction in the *Oil Platforms* case, a judgment upholding its jurisdiction in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and an order of provisional measures in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*. It had also handed down two advisory opinions, one finding that WHO lacked authority to request an advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*,¹⁸ and the other dealing in terms that could not be summed up in one phrase with the complex and sensitive question of the *Legality of the Threat or Use of Nuclear Weapons*. It was currently working on the complex *Gabčikovo-Nagymaros Project* case, for which the oral hearings had recently been completed. For the first time since PCIJ had visited the banks of the Meuse 60 years previously, the Court had paid an on-site visit to the disputed dam sites on the Danube.

61. It could be gathered from the description of its role and most recent decisions that ICJ had a heavy workload. In recent years, disputes from every continent had been referred to it. But the General Assembly and the Secretary-General had cut the Court's budget for the 1996-1997 biennium so sharply that its functioning was impaired. In particular, it lacked sufficient funds to translate pleadings and provide interpretation for hearings, although, under the terms of its Statute, the Court, its members and parties to cases could work either in English or in French. The root cause of the slashing of the Court's budget—which was of the order of US\$ 10 million a year—was the financial crisis in the United Nations due to the failure of a number of Member States, led by the United States of America in terms of the scale of its arrears, to pay their assessed contributions. The Court, as the principal judicial organ of the United Nations whose budget was entirely funded by the latter, had suffered, like the Organ-

⁸ See 2496th meeting, footnote 8.

⁹ Order of 1 February 1996, *I.C.J. Reports 1996*, p. 6.

¹⁰ Order of 22 September 1995, *I.C.J. Reports 1995*, p. 282.

¹¹ *Ibid.*, p. 285.

¹² Preliminary Objection, Judgment, *I.C.J. Reports 1996*, p. 803.

¹³ See 2478th meeting, footnote 3.

¹⁴ Order of 20 December 1994, *I.C.J. Reports 1994*, p. 151.

¹⁵ Provisional Measures, Order of 15 March 1996, *I.C.J. Reports 1996*, p. 13.

¹⁶ Order of 8 May 1996, *I.C.J. Reports 1996*, p. 58.

¹⁷ Order of 24 June 1996, *I.C.J. Reports 1996*, p. 63.

¹⁸ Advisory Opinion, *I.C.J. Reports 1996*, p. 66.

ization, from financial deprivation and was working intensively with the Secretary-General and his colleagues to mitigate its financial difficulties. If the Court was adequately funded, it could deal more effectively with certain problems. The publication of judgments and advisory opinions, and especially of pleadings, was very much behind schedule. The Court was short of staff to give its work due publicity. When the written pleadings in a case had been completed, the parties were sometimes kept waiting too long for the oral argument; the hearings were also affected by disquieting delays. The judges of the Court, unlike those of other international courts and some national courts, had no clerks and little personal legal assistance. The legal staff of the Court's Registry was small and assisted the Court as a whole, not the individual judges. Even the judges of the International Tribunal for the Former Yugoslavia¹⁹ were assisted by a clerk, who was paid, of course, by the European Union.

62. At the same time, the Court's working methods were not speedy. They were rightly designed to enable a universal court of 15 judges, representing the world's principal legal systems and civilizations, to deal with cases in such a way as to ensure that the views of all 15 judges were taken into account. Some of those working methods should be reviewed to enhance the Court's productivity without impairing the quality of its work. It was another challenge that the Court was trying to address and, like most of its problems, might not be easy to resolve.

63. On 21 November 1997, the International Law Commission would celebrate the fiftieth anniversary of its establishment. On behalf of the Court, he associated himself with that celebration and paid tribute to the members of the Commission. The Commission's work was of a legislative nature and it had made truly remarkable contributions over the years to the codification and progressive development of international law. A number of law-making or codification conventions adopted under the auspices of the United Nations had been based on drafts prepared by the Commission, in particular the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the 1969 Vienna Convention. The Geneva Conventions on the Law of the Sea were also based on drafts prepared by the Commission and many of their provisions were included in the United Nations Convention on the Law of the Sea.

64. ICJ had always held the Commission's work in very high esteem. It viewed the draft articles produced by the Commission and the reports prepared for it as sources at least as authoritative as the writings of the most eminent publicists. In its decisions in either contentious or advisory cases, the Court often referred to the draft articles formulated by the Commission, the commentaries to the draft articles and sometimes even the reports prepared for the Commission and the records of its plenary meetings. All of them bore witness to the excellent quality of the Commission's work and the fact that the Court viewed the products of that work as evidence of the state of international law.

65. It was also well known that the members of the Court were frequently drawn from the Commission and that the membership of the two bodies was often interchangeable. Mr. Ferrari Bravo, for instance, a former judge of the Court, was currently a member of the Commission. In addition, many members of the Commission often served as counsels for the parties in proceedings before the Court. They were all well acquainted with the procedure and jurisprudence of the Court so that relations between the Court and the Commission were excellent and based on mutual respect. It was to be hoped that the excellent relations between the two would be further strengthened in the years ahead.

66. Mr. FERRARI BRAVO said that he had been a member of the Court for a relatively short period, adding that he had usually voted in the same way as Mr. Shi; he recalled in particular the adoption of the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, which had been such a divisive case in the Court. The influence of ICJ extended far beyond its judgments or advisory opinions in that, even when it ordered preliminary measures or indicated provisional measures, it shaped the action taken by States, encouraging them in some cases to continue and in others to discontinue the proceedings. There were instances in which preliminary requests and objections were designed to test the Court, one such case probably being the *Oil Platforms* and another that concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. The latter case could be viewed as an attempt to extend the scope of the Convention and to place the Court on the same footing as a war crimes tribunal. However varied the cases referred to the Court and the questions it was called upon to answer, the work of the Commission had always been a source of inspiration. That was undoubtedly the most important aspect of cooperation between the Court and the Commission.

67. Mr. Sreenivasa RAO said that, just as the Court, according to Mr. Shi, sometimes based certain decisions on the Commission's work, the Commission in turn frequently referred in its own work to the Court's judgments and opinions. The mutual respect felt by the two institutions could be attributed to common interests, the consensual element in the work of both, the persuasion that they used to secure the recognition and application of international law and the culture of promotion of the rule of law and justice that they shared.

68. Mr. HE, thanking Mr. Shi for his statement, said that he deserved particularly warm congratulations on his role in the negotiations between China and the United Kingdom on the return of Hong Kong to China. He commended the major legal contribution that had been made to the success of the transfer.

69. Noting the recent creation of the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda²⁰ and the establishment of the International Tribunal for the Law of the Sea,²¹ he inquired about future relations between the Court, which had often considered law of the sea cases in the past, par-

¹⁹ See 2502nd meeting, footnote 11.

²⁰ *Ibid.*, footnote 12.

²¹ See SPLOS/14, paras. 13-31.

ticularly in relation to maritime demarcation, and the International Tribunal for the Law of the Sea.

70. Mr. SHI (Judge at the International Court of Justice) said that the United Nations was working on an agreement with the International Tribunal for the Law of the Sea that would govern relations between the two institutions and hence between the Court and the Tribunal. With regard to contentious cases, it was for States themselves to decide whether they wished to refer cases to the Court or to the Tribunal. However, the Tribunal would have jurisdiction in all cases relating to the seabed.

71. Mr. CRAWFORD, noting that parties were really kept waiting a long time for oral pleadings after the written pleadings before the Court had been completed, a problem that was not only the result of matters of translation, asked how was the Court proposing to solve the problem.

72. Mr. SHI said that the Court was faced with a heavy order of business and a shortage of legal staff. Aside from those problems, its nature was such that it was difficult for it to work at a faster pace. The Court heard cases involving sovereign States and the pace of proceedings depended to a large extent on the reactions of those States. For example, the Court must request the views of the parties, await the submission of memorials and counter-memorials, consult one party when the other requested an extension of the deadline and, if the extension was granted, give the same extension to the former. Moreover, all 15 judges expressed their views and very lengthy discussions were sometimes necessary, for example in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, before a majority opinion was reached. The judges came from different countries, different cultures and different systems and mutual respect was essential.

73. It should also be noted that the judges had no legal assistance, which represented a major handicap. In other courts, judges' assistants carried out research and wrote opinions and drafted judgments, whereas judges at the Court must do their own research and read all pleadings, which sometimes ran to thousands of pages. The Court was nevertheless trying to improve its internal procedures and, as its Rules Committee was currently engaged in the task, he was unable to be more specific until the Committee had completed its work.

74. Mr. BENNOUNA said he regretted that the Court's working conditions were so difficult and noted that the Commission suffered the consequences because it referred to the Court's jurisprudence. He therefore proposed that Mr. Shi's comments on the Court's financial difficulties should be transmitted to the Secretary-General, who was scheduled to attend a meeting of the Commission the following Friday. He hoped that the Secretary-General could himself transmit those comments to the Member States of the United Nations that were in arrears so that they would in turn transmit them to their parliaments for appropriate action.

The meeting rose at 1.10 p.m.

2504th MEETING

Thursday, 3 July 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Roscnstock, Mr. Simma.

State responsibility (A/CN.4/479/Add.1, sect. A, A/CN.4/L.538)

[Agenda item 2]

REPORT OF THE WORKING GROUP

1. Mr. CRAWFORD (Chairman of the Working Group on State responsibility), introducing the report of the Working Group (A/CN.4/L.538), said that the Commission had been considering the topic of State responsibility for nearly the whole of its existence. Some of the issues addressed in the early years, when Mr. García Amador had been Special Rapporteur from 1956 to 1961, were currently to be handled under the topic of diplomatic protection. The topic as dealt with more recently had essentially been defined by the Sub-Committee on State Responsibility, chaired by Mr. Ago in 1962 and 1963, as covering in principle the secondary rules of general international law in relation to the responsibility of States.¹ The Commission had eventually produced a complete set of draft articles at its forty-eighth session in 1996.² The work on them had proceeded rather sporadically over three main periods. The draft articles in part one had been adopted with Mr. Ago as Special Rapporteur, from 1973 to 1980 the first five articles of part two with Mr. Riphagen from 1983 to 1985, and the remaining articles of parts two and three with Mr. Arangio-Ruiz from 1992 to 1996. The respective Special Rapporteurs had also submitted reports in years other than those mentioned.³ From that history of the Commission's consideration of the topic, the Working Group had drawn certain conclusions relevant to the work in the current quinquennium. It was obvious that discontinuities in the consideration of the

¹ See Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, *Yearbook . . . 1963*, vol. II, document A/5509, annex I, p. 227.

² For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), chap. III, sect. D.

³ For the historical review of the work, *ibid.* paras 51-64.