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Summary record of the 2509th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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or provisions could apply to situations created even by an illegal State succession. Another problem altogether, although as it was purely a matter of legal logic it would call into question the Conventions, was whether there was such a thing as illegal State succession.

66. Mr. MELESCANU said that neither the logic nor the system was the same as those of the 1978 Vienna Convention, in which articles 39 and 40 dealt with State responsibility and the outbreak of hostilities and certain cases of military occupation. They were absent from the current draft. There was in the current instance a difference of mechanism and structure compared with the 1978 Vienna Convention. Thus, the proposal should be watered down.

67. Mr. ECONOMIDES said the only compromise proposal acceptable was that of Mr. Al-Baharna and Mr. Candioti. Mr. Brownlie's proposed text, with the words "*Recognizing* that" inserted at the beginning, could be moved to the preamble, before the paragraph on human rights, which would read: "*Emphasizing* that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected in all cases and to the greatest extent possible."

68. He disagreed with the assertion that, as the draft articles concerned nationality in relation to the succession of States, they were different from the 1978 and 1983 Vienna Conventions. The proposed solution would enable the provisions of the Conventions to be retained intact, while at the same time indicating the need to ensure respect for human rights as much as possible and in every instance. The results of such a provision would be apparent only in future practice.

69. Mr. GALICKI said he fully supported both the Rosenstock/Brownlie formula and the Chairman's suggestion to delete the word "only", for both substantive and logical reasons.

70. Mr. HE said that, logically, the preamble should precede the draft articles and therefore Mr. Brownlie's proposed article should appear in the body of the text rather than in the preamble.

71. Mr. BROWNLIE said he preferred Mr. Simma's proposal to Mr. Rosenstock's.

72. Mr. ROSENSTOCK said his original proposal had been "Without prejudice to the rights of persons concerned as set out in these articles", whereas Mr. Simma's proposal was "Without prejudice to the right to a nationality of persons concerned". He would, however, go along with the consensus.

By a show of hands, the Commission voted to insert Mr. Simma's proposed text before Mr. Brownlie's formulation, to delete the word "only" and to adopt the new draft article.

The new article, as amended, was adopted.

Part II, as amended, was adopted.

The meeting rose at 1.10 p.m.

2509th MEETING

Thursday, 10 July 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

later: Mr. João Clemente BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, 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. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

Nationality in relation to the succession of States (*concluded*) (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,[1] A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE[2] (*concluded*)

1. The CHAIRMAN said that, before continuing its consideration of the second part of the report of the Drafting Committee on the draft articles on nationality of natural persons in relation to the succession of States (A/CN.4/L.535 and Corr.1 and Add.1), the Commission should decide where it wished to insert the new article adopted at the previous meeting. It might perhaps form the first article of a Part III.

2. Mr. GALICKI said that he endorsed the Chairman's suggestion, for the article could not logically be inserted anywhere in the two parts that had already been adopted. Furthermore, the Commission had only just completed the first reading of the draft and it might add further articles later on. They would naturally fall in a Part III.

3. Mr. ROSENSTOCK said it did not seem essential to open a Part III at that stage. A more simple solution would be to insert the new article after article 26 and to insert three dots between them. The commentary would make it clear that the article had been adopted after the event and that its final place in the draft had not yet been decided.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Rosenstock's proposal.

It was so agreed.

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[1] Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

[2] For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4; for draft articles 19 to 26 of Part II, text of a preamble and the revised title of Part I of the draft articles, see 2504th meeting, para. 28.

TITLES OF PARTS I AND II

5. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the original title of Part I proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1),[3] namely "General principles concerning nationality in relation to the succession of States", had been deemed inappropriate by the Commission, which had taken the view that they were not in fact "principles". In the circumstances, the Drafting Committee had therefore suggested the title "General provisions".

6. The CHAIRMAN added that that title had the advantage of being based on the one in existing conventions, such as the 1983 Vienna Convention. He said that, if he heard no objection, he would take it that the Commission agreed to adopt the titles of the two parts of the draft to read: "Part I. General provisions" and "Part II. Provisions relating to specific categories of succession of States".

The titles of Parts I and II were adopted.

PREAMBLE

7. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the purpose of the preamble was normally to set forth some of the more general principles underlying the provisions that followed, and that was what the Drafting Committee had endeavoured to do. In the first paragraph, which corresponded to the first paragraph of the preamble as proposed by the Special Rapporteur in his third report, the Committee had eliminated the temporal element to show clearly that the question of nationality arising from the succession of States was a subject of interest and concern at all times. To the extent that the draft articles were to apply to all cases of State succession in the future, it was not advisable to insist on the fact that the Commission had been inspired by recent events. However, the commentary to the preamble would place the problem not only in its historical perspective but also in the perspective of decolonization and in the context of recent events.

8. The second paragraph corresponded to the second paragraph of the preamble as proposed by the Special Rapporteur. It emphasized that, while nationality was essentially governed by internal law, international law limited the freedom of action of States in that field. The word "essentially" meant that nationality issues were largely the subject of internal law. In the second half of the paragraph, the Committee had replaced the formulation "international law imposes certain restrictions on the freedom of action", used by the Special Rapporteur, by "international law limits the freedom of action", as a better reflection of the idea that the "limitation" was not only passive but should also be exercised actively, since it placed certain obligations on States at the international plane in that respect.

9. The three paragraphs that followed dealt with the human rights aspect of the draft. The fourth paragraph, based on the last paragraph proposed by the Special Rapporteur, recalled that the Universal Declaration of Human Rights[4] proclaimed the right of every person to a nationality.

10. The fifth paragraph, which was new, referred to the International Covenant on Civil and Political Rights and to the Convention on the Rights of the Child, which recognized the right of every child to acquire a nationality. The Committee had thought it useful to mention those instruments, for children could become "persons concerned" by the State succession even if they were born after the event, a situation that was provided for in the draft.

11. The sixth paragraph corresponded to original article 11 as proposed by the Special Rapporteur. As already explained when he had introduced the articles proposed for Part I (2495th meeting), the Drafting Committee had taken the view that the idea expressed in that article, namely the need to fully respect the human rights and fundamental freedoms of persons whose nationality might be affected by a State succession, logically found a place in the preamble, after the two paragraphs referring to the relevant human rights instruments.

12. The seventh paragraph referred to the Convention on the Reduction of Statelessness and the 1978 and 1983 Vienna Conventions, as a way of indicating that the Commission had already addressed various aspects of the problem in different instruments at different times.

13. Lastly, the eighth paragraph corresponded to the third paragraph of the preamble as proposed by the Special Rapporteur. It indicated the need for the codification and progressive development of international law concerning nationality in order to ensure greater juridical security in international relations. It was patterned on a similar provision included in the preamble to the 1978 and 1983 Vienna Conventions.

First paragraph

The first paragraph was adopted.

Second paragraph

14. Mr. GOCO said that the expression "international law limits the freedom of action of States" did not seem very felicitous. The idea that they might find their "freedom" restricted could well antagonize States and it would be better to replace the word by another formulation.

15. Mr. LUKASHUK recalled that there had been some reticence about the formulation, for it was not quite true to say that international law limited the freedom of action—and hence the sovereignty—of States. Admittedly, sovereignty was not absolute and was indeed deemed to be exercised within the framework of the law, but it would perhaps have been better to emphasize not the limitation on the freedom of States but on the guarantee of the rights of the individual. He therefore proposed that the last phrase should be replaced by a formulation reading:

[3] For the text of the draft articles proposed by the Special Rapporteur, see 2475th meeting, para. 14.

[4] See 2475th meeting, footnote 8.

"international law also issues certain rules in this field so as to guarantee the rights of the individual".

16. Mr. ECONOMIDES said he had proposed another text for the paragraph reading: "*Emphasizing* that nationality is essentially governed by internal law within the limits set by international law".

17. Mr. BENNOUNA said he seemed to remember that there was a formula similar to the one proposed by Mr. Economides in the advisory opinion of PCIJ in the *Nationality Decrees Issued in Tunis and Morocco* case.[5]

18. Mr. THIAM said he wondered whether the word "essentially" was really necessary and whether it did not simply water down the text.

19. Mr. MIKULKA (Special Rapporteur), supported by Mr. BROWNLIE, said that the formulation used was in fact the one used by ICJ and in legal writings. By deleting the word "essentially", the Commission would imply that nationality was "absolutely" governed by internal law, which was not true.

20. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the amendment proposed by Mr. Economides.

The second paragraph, as amended, was adopted.

Third paragraph

21. Mr. GOCO suggested that, in the English version, the phrase "due account should be taken . . . of" should be replaced by "due regard should be given . . . to", so as to emphasize the idea of respect for the interests of States and of individuals.

22. Mr. ECONOMIDES said it would perhaps be useful to specify more clearly the scope of the paragraph, which had a place apart in the preamble, by adding the words "involved in a succession of States" at the end.

23. The CHAIRMAN said that such an addition was not perhaps essential. If the Commission did want to change the third paragraph along those lines, it should, logically, also amend the two previous paragraphs, something which could well lead to endless drafting problems.

24. Mr. BENNOUNA said that it was regrettable that the paragraph should speak solely of the interests of States and of individuals and not of their rights. He suggested that the words "as well as their respective rights" should be inserted at the end.

25. Mr. THIAM said he endorsed that suggestion.

26. The CHAIRMAN noted that one might simply speak of "the rights and interests of States and those of individuals".

27. Mr. MELESCANU pointed out that, if the Commission spoke of rights, it must also mention the corresponding obligations, and hence there was a risk of many complications.

28. Mr. SIMMA said he seemed to recall that the Drafting Committee had refrained from using the word "rights" precisely to avoid running up against that type of problem.

29. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) confirmed that what Mr. Simma had said was true. Obligations were effectively the counterpart of rights, yet the way in which rights and obligations were combined or were distinguished was very different, depending on whether the standpoint was one of inter-State relations or of relations between States and individuals. Accordingly the Drafting Committee had preferred to use the word "interests", which had the advantage of covering all situations without any need to engage in a dangerous drafting exercise. Additional explanations could, however, be given in the commentary.

30. Mr. KABATSI and Mr. ROSENSTOCK said that, in view of the explanations given by the Chairman of the Drafting Committee, it would be preferable to keep the word "interests".

31. Mr. OPERTTI BADAN said he nonetheless wondered whether the word "interests" was not too broad. In point of fact, they were not all kinds of interests, such as political interests, but the legitimate interests of States and those of individuals. He therefore suggested inserting the word "legitimate" before "interests".

32. Mr. GALICKI said he had himself proposed that formulation in the Drafting Committee.

33. Mr. MIKULKA (Special Rapporteur) explained that the Drafting Committee, after discussing the matter at length, had finally rejected the proposal. However, needless to say it was for the Commission to take the final decision.

34. The CHAIRMAN noted that such a solution, apart from the fact that it got round the problem, did not seem to raise any objections from members of the Commission. He therefore suggested that the word "legitimate" should be inserted before "interests".

The third paragraph, as amended, was adopted.

Fourth to seventh paragraphs

The fourth to seventh paragraphs were adopted.

Eighth paragraph

35. Mr. BENNOUNA noted that the text spoke of the codification and progressive development of the rules of international law, but the draft might ultimately take the form of a declaration. The Commission thereby implied that, even if the instrument was a declaration, it would codify, or contain, rules of international law.

36. Mr. MELESCANU said the wording of the eighth paragraph did not necessarily imply that the Commission regarded the declaration itself as constituting such codification and progressive development of the rules of international law. Rather, it signified the kind of objective the Commission had set for the continuation of the process.

[5] See 2475th meeting, footnote 16.

37. The CHAIRMAN pointed out that the Commission did not enter into it, since the text was one being proposed for adoption by the General Assembly.

38. Further to an exchange of views in which Mr. GOCO, Mr. BROWNLIE and Mr. OPERTTI BADAN took part, the CHAIRMAN confirmed that the expression "as a means for ensuring greater juridical security in international relations" was, in all language versions, taken from the preambles of the 1978 and 1983 Vienna Conventions.

39. Mr. LUKASHUK, emphasizing that the expression "international relations" referred to inter-State relations, said that a reference should be added to natural and legal persons. Furthermore, in the Russian version it would be better to speak of "international relationships".

40. Mr. ECONOMIDES proposed that, to take account of Mr. Lukashuk's comments and for the purposes of symmetry with the third paragraph, the last phrase should read: "as a means for ensuring States and individuals greater juridical security".

41. Mr. GALICKI said he endorsed Mr. Economides' proposal, which was in keeping with the 1978 and 1983 Vienna Conventions yet emphasized the particular features of the Commission's draft.

42. Mr. SIMMA and Mr. OPERTTI BADAN said they expressly supported the proposal by Mr. Economides.

The eighth paragraph, as amended, was adopted.

Ninth paragraph

43. The CHAIRMAN, speaking as a member of the Commission, asked why the word "declares" had not been preferred to "proclaims", which tended to emphasize the novelty of the text, whereas "declares" was a better reflection of the idea of codification and progressive development.

44. Mr. DUGARD, supported by Mr. ROSENSTOCK, explained that the Drafting Committee had adopted the term after considering other relevant declarations and had concluded that the word "proclaims" was the one most commonly employed.

45. Mr. THIAM, Mr. BROWNLIE and Mr. KATEKA said they preferred the word "declares", which was less solemn and more neutral than "proclaims".

46. Mr. OPERTTI BADAN said that, from a legal standpoint, the word "declares", was preferable to "proclaims" which was more rhetorical.

47. Mr. MIKULKA (Special Rapporteur) said that the use of the word "proclaims" in previous declarations could be explained by the fact that it was immediately followed by the title of the declaration in question, the General Assembly's purpose having been to avoid any unfortunate repetition. As long as the Commission omitted the title and replaced it with "the following", there was no reason not to employ "declares".

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to replace the word "*Proclaims*" by "*Declares*".

The ninth paragraph, as amended, was adopted.

49. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said he wished to point out a few drafting changes suggested by comments by the Special Rapporteur in establishing the commentaries. The first change consisted in replacing the word "laws" in the English version of article 5 by the word "legislation". The second change was to replace the expression "related issues" in article 17 by "connected issues". The third change was to recast the title of section 4 so as to read "Separation of part or parts of the territory".

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the drafting changes proposed by the Chairman of the Drafting Committee.

It was so agreed.

The draft articles as a whole, as amended, were adopted.

51. The CHAIRMAN emphasized the considerable work done by the Commission, which, for the first time, had at one single session adopted an entire set of draft articles on first reading. In keeping with tradition, the secretariat would note any proposals for changes of mere form that members of the Commission would like to make to the different language versions.

Mr. Baena Soares took the Chair.

Reservations to treaties (*continued*)* (A/CN.4/477 and Add.1 and A/CN.4/478,[6] A/CN.4/479, sect. D, A/CN.4/L.540)

[Agenda item 4]

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

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

53. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the Drafting Committee had held two meetings, on 2 and 3 July, to consider both the draft resolution, contained at the end of the second report of the Special Rapporteur (A/CN.4/477 and Add.1 and A/CN.4/478), referred to it and the form that it might take. After settling substantive issues, the Drafting Committee had prepared two different drafts, one in the form of a resolution and the other in the form of conclusions. On the question of form, different views had been expressed in the Drafting Committee as in the Commission. One view had

* Resumed from the 2503rd meeting.

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

supported the preparation of a resolution to be adopted by the Commission. According to another view, the Commission should adopt conclusions and incorporate them in its report to the General Assembly. Another solution proposed was to adopt a draft resolution enabling the Commission to enter into a dialogue on that very important issue without taking a final position until it received feedback from other relevant bodies. In the absence of an agreement, the Committee had decided to leave the matter for the Commission to decide.

54. Introducing the two drafts proposed by the Drafting Committee, he pointed out that the texts of the resolution and the conclusions were identical, the only difference being in style. Both sought to reflect the Commission's view, as was indicated in the respective introductory words.

55. The three paragraphs of the preamble of the resolution, corresponding to the opening paragraph of the conclusions, were of a general character and briefly stated the background and reasons for the proposed text. The express reference to the forty-ninth session, in the first paragraph of the preamble, was intended to emphasize the temporal element of the Commission's view, something which would allow a measure of flexibility pending progress on the topic and feedback by other organs. The second paragraph of the preamble referred specifically to "normative multilateral treaties", the expression employed by the Special Rapporteur in the draft resolution contained at the end of his second report and used during the discussion in the Commission. Although the Special Rapporteur had explained in detail in his second report what that formulation meant and there had been a general understanding in the Commission, no consensus had emerged on an exact definition of the expression. The Drafting Committee, considering that the matter could be taken up at a later stage in the Commission's work, had therefore deemed it prudent not to attempt to define such treaties.

56. Paragraph 1 used the wording which had been proposed by the Special Rapporteur in the draft resolution contained at the end of his second report, with some drafting changes. For example, in order not to minimize the role of other important criteria for determining the admissibility of reservations, the Drafting Committee had described the object and purpose of the treaty as "the most important of the criteria", an expression it had used instead of the original "fundamental criterion". Again, it had thought it advisable to change the word "permissibility" to "admissibility", as a more neutral legal term. Paragraphs 2 and 3 corresponded to paragraphs 2 and 3 as proposed by the Special Rapporteur, with a single minor drafting change at the end of paragraph 3, where the words "fully applicable to" had been replaced by "govern".

57. Paragraph 4 corresponded to paragraph 4 proposed by the Special Rapporteur, but was slightly amended to take account of the fact that in plenary many members had objected to the statement that the establishment of monitoring machinery by human rights treaties created special problems. The Drafting Committee had been of the view that it was not the monitoring bodies that gave rise to problems but that the establishment of those bodies gave rise to legal questions that had not been envisaged at the time the treaties had been drafted. The Drafting Committee had also replaced the expression "determination of the permissibility of reservations" by "appreciation of the admissibility of reservations", to reflect the reality and the competence of the monitoring bodies, which, in the opinion of the Drafting Committee, did not actually "determine" or pronounce upon the admissibility of reservations but, because of the nature of their function, evaluated the reservation involved with a view to appreciating its true purport and effect. The word "appreciation" better captured the idea of that function and gave a more balanced perspective of the powers and functions of the monitoring bodies with respect to reservations.

58. Paragraphs 5 and 6, corresponded to paragraph 5 proposed by the Special Rapporteur, which the Committee had found too long and thought that the ideas it contained should be spelt out separately in two new paragraphs. Paragraph 5 was a factual statement and, in that regard, he would draw the Commission's attention to the words "these treaties", which were intended to indicate that the paragraph dealt only with existing human rights treaties referred to in paragraph 4. Paragraph 6 stressed that the competence of the monitoring bodies did not exclude the traditional modalities of control by the contracting parties, on the one hand, in accordance with articles 19 to 23 of the 1969 and 1986 Vienna Conventions and, where appropriate, by the organs settling any dispute that might arise with regard to the implementation of the treaties. Those two points had been accepted in the discussion in plenary.

59. Paragraph 7 corresponded to paragraph 8 proposed by the Special Rapporteur. Unlike the two previous paragraphs, which concerned existing treaties, it suggested that consideration should be given to providing specific clauses in normative multilateral treaties including, in particular, human rights treaties, to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation.

60. Paragraph 8 was new, it was factual and was not contested. It stressed that the bodies in question could not assume competence that was not vested in them by the treaties at the time of their establishment.

61. Paragraph 9 corresponded to paragraph 7 proposed by the Special Rapporteur, with some drafting changes for the purposes of consistency. It called upon States to cooperate with monitoring bodies and give due consideration to any recommendations they might make or to comply with their determination if such bodies had been granted authority to that effect.

62. Paragraph 10 was a revised version of paragraph 6 proposed by the Special Rapporteur, which had provided that, in the event of incompatibility, only the reserving State had the responsibility for taking appropriate action. The Drafting Committee had found the wording too restrictive, taking the view that, while the reserving State was primarily responsible for taking the requisite action, it was not the only one and other contracting parties could do so. The second sentence of the paragraph enumerated some of the actions that a reserving State could and should take. Paragraph 11 corresponded to paragraph 9

proposed by the Special Rapporteur, with no changes. Paragraph 12 was new and was a savings clause that reflected the idea expressed in plenary that the text proposed by the Commission should not affect practices which had developed in the regional context.

63. Mr. BENNOUNA said he had reservations about the very idea of the Commission adopting conclusions or a resolution at the current stage. It was premature, for the Commission had not examined the topic sufficiently to come to a proper decision. Moreover, by adopting the resolution the Commission appeared to be telling States which legal policy they should follow, something it was not entitled to do. Lastly, the Commission should refrain from engaging in polemics with monitoring bodies established under human rights treaties.

64. Mr. THIAM said that he endorsed Mr. Bennouna's comments.

DRAFT RESOLUTION

PREAMBLE

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the preamble.

The preamble was adopted.

OPERATIVE PART

Paragraph 1

66. Mr. OPERTTI BADAN said he did not understand what exactly was meant by the expression "*Reaffirms* its commitment to the effective application of the reservations regime". The proper formulation would be "*Reaffirms* its attachment to the need effectively to apply the reservations regime".

67. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), supported by Mr. BROWNLIE, proposed that the phrase in question should be recast to read: "*Reaffirms* its attachment to the promotion of the reservations regime".

68. Mr. BENNOUNA said that the word "*Reaffirms*" was much too strong and conveyed the impression that the Commission was speaking as a political body. Since it was difficult to see, moreover, what was being reaffirmed, the paragraph should be deleted.

69. Mr. ECONOMIDES said he too thought that the word "*Reaffirms*" was out of place. It would be better to say "*Recognizes* the usefulness of the application of the reservations regime".

70. Mr. RODRÍGUEZ CEDEÑO and Mr. OPERTTI BADAN, referring to the Spanish version of the draft, proposed the use of the expressions *Reafirma su adhesión* or *Reafirma la conveniencia*, which would have the advantage of doing away with the political connotations mentioned by Mr. Bennouna.

71. Mr. ROSENSTOCK explained that the Commission would be "reaffirming" what it had already said in paragraph 105, subparagraph (*d*), of its report to the General Assembly on the work of its forty-eighth session,[7] namely that it considered that there should be no change in the provisions of the 1969 and 1986 Vienna Conventions.

72. Mr. SIMMA said that he was persuaded by that explanation and thought that the word "*Reaffirms*" should be retained.

73. Mr. FERRARI BRAVO said that the Commission was not in a position to reaffirm anything. It could only take note of, and then discuss, the rules of general international law. He too wondered whether paragraph 1 was really necessary.

74. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the Commission was in the process of reopening the debate on a very important matter of substance. The point was to emphasize that there was no question of changing the regime instituted in articles 19 to 23 of the 1969 and 1986 Vienna Conventions. In the light of Mr. Rosenstock's explanations, he proposed that the paragraph should read:

> "1. *Recalls* the view that articles 19 to 23 of the Vienna Conventions [...] provide for effective application of the reservations regime and that the criterion of the object and purpose of the treaty is the most important for determining the admissibility of reservations."

75. Mr. HE said he thought paragraph 1 should be kept, inasmuch as it simply reproduced a conclusion the Commission had already reached at the previous session.

76. Mr. GOCO, supported by Mr. KABATSI, said that the discussion would be much more to the point if the Commission knew whether it had a draft resolution or draft conclusions before it.

77. The CHAIRMAN invited the Commission to decide on the form and the purpose of the text under consideration.

78. Mr. PELLET (Special Rapporteur) said that the choice between "resolution" and "conclusions" did not really make any great difference. In point of fact, the Commission had three solutions. It could adopt a resolution which would be transmitted to the General Assembly and in which it would give its view on the question of reservations to treaties, which was of a quite urgent character. It was the solution he had himself proposed in his second report. It could also, as a number of members had advocated, enter into a dialogue with the human rights treaty monitoring bodies and await their reaction and, to that end, adopt a draft resolution. Lastly, it could adopt draft conclusions, which were less formal in character but had also less authority than a resolution. Personally, he would emphasize that the Commission should not fear making innovations; he would prefer a draft resolution.

79. Mr. THIAM said that he tended to be in favour of "provisional conclusions".

80. Mr. BROWNLIE said that the alternative lay in two different objectives: either the Commission wanted to be useful in the short term and provide guidance for human rights monitoring bodies or it wished to continue orderly consideration of the subject that was before the Commission and take all opinions into account. That tension between the two objectives reflected in fact the attitude of

[7] See 2479th meeting, footnote 6.

the Special Rapporteur himself, who would have liked to do both things at the same time.

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

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

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

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

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

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

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

It was so agreed.

The meeting rose at 1.15 p.m.

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

[9] See 2487th meeting, footnote 17.

2510th MEETING

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

Chairman: Mr. Alain PELLET

later: Mr. Peter KABATSI

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

Appointment of special rapporteurs

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

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

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

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

[1] See 2479th meeting, footnote 6.