Document:-
A/CN.4/SR.2783

Summary record of the 2783rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2003, vol. I

Rapporteur's proposal on that point for the reasons given in paragraph 55 of his report. With regard to the modification of interpretative declarations, since the modification of conditional interpretative declarations was equated with the late modification of reservations, draft guideline 2.4.10 proposed by the Special Rapporteur was practically based on draft guideline 2.4.8 adopted by the Commission at its fifty-third session, in 2001,[12] and relating to the late formulation of those declarations. In paragraph 62 of his report, the Special Rapporteur submitted a revised text of guideline 2.4.8 which would obviate the need for the proposed new provision, which should perhaps be retained until the Commission had resumed its consideration of the draft Guide to Practice as a whole when it completed its work on the topic.

53. The addendum to the eighth report, in which the Special Rapporteur began to consider the formulation of objections to reservations and interpretative declarations, gave rise to three questions. First, the element of intention was essential and must therefore be included in a definition of objections, particularly as the 1969 Vienna Convention expressly referred to intention in article 20, paragraph 4 (*b*). Second, the definition of objections must reflect State practice, and, if the consideration of State practice showed that the definition contained in the Convention should be departed from, that could be done, provided that care was taken not to generalize a regional practice or the practice of a particular small political group of States. The "reservations dialogue" which the Special Rapporteur intended to study in greater depth in chapter II, section 2, was a useful tool because it would help make the position of the reserving State or the objecting State more flexible, but it would have no legal effect and might sometimes be a dialogue of the deaf, particularly when the reservation related to religion or ideology. The recommendation made by the Special Rapporteur in paragraph 106 of his report was intended to promote the reservations dialogue and could only be endorsed. The draft guideline could therefore be referred to the Drafting Committee, which would certainly ensure that the content of the discussion was taken into account.

The meeting rose at 12.30 p.m.

[12] See 2780th meeting, footnote 8.

2783rd MEETING

Thursday, 31 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Reservations to treaties[1] (*concluded*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,[2] A/CN.4/L.630 and Corr.2)

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. PELLET (Special Rapporteur), summing up the debate on his eighth report (A/CN.4/535 and Add.1), said that the discussion had been interesting and often fruitful; 22 members had participated, and he trusted that for the others silence indicated agreement.

2. Some speakers, including Mr. Kolodkin, Mr. Al-Baharna, Mr. Rodríguez Cedeño, and Mr. Matheson, had found fault with paragraphs 57 and 59 of the report—which he himself had come to consider clumsy—concerning the difficulty of determining whether, when a State returned to an interpretative declaration, whether conditional or not, it intended to lessen or enlarge its scope. He had therefore not pursued the suggested distinction between the partial withdrawal and the enlargement of an interpretative declaration. He had, however, called on his critics to provide examples of practice that would contradict his position, and, to his disappointment, none had been forthcoming. He therefore took it that his position, however hesitant, had been accepted: Mr. Chee, Mr. Al-Marri, Mr. Daoudi and Mr. Melescanu had all recommended that draft guidelines 2.4.9 and 2.4.10 should be referred to the Drafting Committee.

3. Of far greater importance was what had occurred following Mr. Economides' statement at the 2780th meeting (paras. 24–26): Mr. Al-Baharna and, to a lesser extent, Ms. Escarameia, Mr. Pambou-Tchivounda and Mr. Chee had vigorously contested draft guideline 2.3.5. He had been astounded—not because the content was beyond dispute but because his colleagues had not conformed to the unwritten rule that, in discussing one guideline, another that had already been adopted should not be called into question. Yet that was what had happened in connection with draft guidelines 2.3.1 to 2.3.3, concerning late formulation of reservations. Mr. Economides, Ms. Escarameia and Mr. Addo had taken pains to stress the difference between such late reservations, which could be made in good faith, and late enlargement of the scope of reservations. When considering the draft guidelines on late formulation of reservations, however, the Commission had determined that a State might decide that circumstances had changed and that it could no longer accept a specific provision of a treaty that was not essential to the purpose

[1] For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook … 2002*, vol. II (Part Two), para. 102, pp. 24–28.

[2] Reproduced in *Yearbook ... 2003*, vol. II (Part One).

of that treaty. Moreover, States should not be lightly accused of acting in bad faith. Mr. Addo had challenged him to provide an example of such a change of circumstances, and in that regard he would refer Mr. Addo to paragraphs 43 and 44 of the report. The enlarged scope of the reservation by Maldives to the Convention on the Elimination of All Forms of Discrimination against Women[3] might, as Germany had claimed,[4] have been questionable—as might have been that of Finland in enlarging the scope of its reservation to the Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals concluded at Vienna on 8 November 1968 (with annexes)[5]—but neither could be accused of acting in bad faith. Both countries had considered that their initial reservation had created too many problems. Moreover, it was surely unreasonable to require a State to denounce a treaty and then to ratify it again with new reservations. That had been the Commission's position regarding late formulation of reservations.

4. He put forward a hypothetical case in which Ghana, where cars drove on the left, decided, as Sweden had done in the 1960s, to change to driving on the right. The country would need to make temporary reservations to road traffic agreements, but it would be unreasonable to ask it to denounce such agreements as a whole. He urged those of his colleagues who had taken up a rigid stance on draft guideline 2.3.5 to reread paragraphs 279–332 of his fifth report,[6] from which it would be clear that late formulation of reservations did not constitute an example of good or bad faith. Although negligence might be involved, more often it was due to a country's subsequent reassessment of its circumstances, and the same applied in every way to enlargement of the scope of existing reservations. States should be allowed some leeway, if the rights and interests of other States were not affected. Yet, as matters stood, an objection by just one State or international organization would prevent a late reservation from producing an effect.

5. Some opponents of his approach had cited an official of the Council of Europe, who had stated that the Council was opposed to late enlargement of the scope of reservations of which the Council Secretary-General was the depositary. In that connection, Mr. Addo had said that if the procedure was not good for Europeans, it was not good for the rest of the world. That sentiment should be turned on its head, however; if the procedure was good for the rest of the world, as attested to by the practice of the United Nations Secretary-General as depositary, why should it not be good for Europe? In his view, which had been upheld by Mr. Momtaz and Ms. Xue, draft guideline 2.3.2 fully and expressly preserved the possibility of a more restrictive practice at the regional level. In fact, the practice of the Council of Europe was less rigid than the official concerned had claimed: as recently as June 2003, South Africa had been allowed to make a reservation to the European Convention on Extradition[7] after it had deposited its instrument of accession with the Secretary-General of the Council. Moreover, the approach adopted by the Council of Europe in relation to the late formulation of reservations had not prevented the Commission from adopting a more flexible provision in that regard. It was therefore difficult to see why the same should not apply to the enlargement of the scope of reservations.

6. Apart from the specific issue, he strongly felt that a question of principle was involved; the Commission simply could not function if, in discussing one draft text, it called into question a provision that had already been adopted. He himself was not wholly in favour of all previous decisions, but he put up with them. Thus, although he had been firmly opposed to the distinction drawn between objections to reservations and opposition to the formulation of late reservations, not only had he resisted any temptation to use the eighth report as a means of reviewing what he considered an unfortunate decision, but he had drafted a guideline—2.6.1 *bis*—which followed logically on that decision. Some members of the Commission, including Ms. Escarameia, Mr. Galicki and Mr. Fomba, had supported his position, but he had not suggested going back on what had been decided. For the same reason, he would not press for the amalgamation of draft guidelines 2.4.9 and 2.4.3 or of draft guidelines 2.4.10 and 2.4.8, despite support from Mr. Kolodkin and others. On the contrary, having listened to the comments made by Mr. Gaja and Mr. Al-Baharna, he had proposed a wording for draft guidelines 2.4.9 and 2.4.10, to which he had heard no opposition. As for draft guideline 2.3.5, he urged that the text should be sent to the Drafting Committee. Failure to do so would betray a lack of rigour and of continuity. Ms. Xue, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Gaja, Mr. Fomba, Mr. Rodríguez Cedeño, Mr. Al-Marri, Mr. Mansfield, Mr. Kemicha and Mr. Daoudi had spoken in favour of that course of action. Mr. Gaja, Mr. Koskenniemi, Mr. Matheson and Mr. Opertti Badan had not spoken on the issue at all. The Drafting Committee might well make improvements, but he hoped that it would bear in mind the need for overall consistency in the Guide to Practice. A decision would be needed on whether to retain the square brackets, on which there had been conflicting views, and a number of useful suggestions should be considered, such as Mr. Rodríguez Cedeño's preference for the word *ampliación* over the word *agravación* to convey the meaning of "enlargement". Another suggestion, by Mr. Galicki, had been that guideline 2.3.3 could simply be transposed to the question of enlargement of the scope of a reservation; and the question was whether such a transposition should appear in draft guideline 2.3.5 itself or in the commentary.

7. Dissension of a quite different kind had arisen in the case of draft guideline 2.6.1. Although the Commission had been polarized, no issues of principle or methodology had been at stake, and he had therefore been anxious to listen and to accommodate as many opinions as possible, always in the hope that, once a decision had been reached, all would abide by it.

8. There had been some support for the draft guideline on the definition of an objection; Mr. Melescanu, Mr. Galicki, Mr. Fomba, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Mr. Al-Marri, Mr. Kemicha, Mr. Daoudi and Ms. Xue had recommended that it

[3] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), p. 231.

[4] *Ibid*., p. 240.

[5] *Ibid*. See 2781st meeting, footnote 12.

[6] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4.

[7] United Nations, *Treaty Series*, vol. 2223, p. 193.

should be referred to the Drafting Committee, whereas Mr. Gaja, Mr. Kolodkin, Ms. Escarameia, Mr. Koskenniemi, Mr. Addo, Mr. Mansfield, Mr. Kateka and—if he understood correctly—Mr. Momtaz and Mr. Chee had opposed that course of action. Although the reasons put forward by opponents of the draft guideline were diverse, he had given them considerable thought. He wished to express his disagreement with one particular aspect of the criticism: Mr. Kolodkin and Mr. Koskenniemi had criticized the analysis of negative reactions to reservations appearing in paragraphs 88, 89 and 91 of the report, which could involve a temporizing approach, a conditional objection or *a minima* interpretations. However, the "Model response clauses to reservations" appended to Recommendation No. R (99) 13 of the Council of Europe (which was not, of course, a global legislator) invariably contained the word "objection", which was not true of the cases cited in paragraphs 88, 89 and 91. Incidentally, the wording of the Finnish statement[8] cited in paragraph 87 of the report left the reader in no doubt that it involved a genuine objection. It would nonetheless be a mistake to regard any negative reaction as being an objection, even if the author used vague or ambiguous language, as was shown by the 1977 Franco-British Arbitral Award in the *Continental Shelf between the United Kingdom and France* case. A State might consider that its purpose might not be best served by objecting to a reservation; withdrawal or modification of the reservation in question might be more successfully achieved by a "softly, softly" approach. The word "objection" need not be used, therefore, but the meaning must be clear. If the State had been deliberately vague, it did a disservice to legal security and honesty between States. One State should not seek to deliberately mislead another.

9. In drafting guideline 2.6.1, he had followed the letter and the spirit of the 1969 and 1986 Vienna Conventions, not out of any fetishistic respect but because the Commission and the Sixth Committee had always emphasized the need not to call into question the Vienna regime. On one point, at least, there had been fairly wide agreement: most speakers had agreed that the State's intention was what really counted. The divergences had related to what that intention applied to. Mr. Gaja, supported by Mr. Kolodkin, Ms. Escarameia, Mr. Matheson, Mr. Addo and Mr. Kateka, had said that the effect of an objection was obscure and uncertain; however, that was no reason to reject the draft text. Even if it was ambiguous, such effects were provided for under the Conventions, so there was no reason not to take account of them in the definition of an objection, as long as the Commission specified such effects at a later stage.

10. He was more shaken by another argument: Mr. Koskenniemi had referred to objections with "supermaximum" effects, consisting of statements whereby some States—very few, and only recently—assumed the right to set aside a reservation and to decide that the reserving State was bound by the treaty concerned in its entirety. Although he persisted in doubting the validity of that approach, he acknowledged that he had not been sufficiently rigorous when he had stated, in paragraph 97 of the report, that such statements were not objections, on the grounds that the authors' clear intention had been to go beyond the effects provided for by the 1969 and 1986 Vienna Conventions. In striving not to confuse the definition of reservations with that of their permissibility, he had, it seemed, fallen into the same error where objections were concerned. What was to be done to ensure that such statements were not ignored or excluded from the definition of objections? The wait-and-see attitude preferred by some speakers was ill-advised, if only because it would be impossible to discern the effects of an institution unless the Commission plainly identified the institution in question beforehand. In fact, that overcautious stance was rather like quibbling about what came first, the chicken or the egg. Moreover, procrastination was not a good idea, and indeed another solution was possible.

11. Several members who had categorically rejected his definition had advocated a wider and more flexible definition that took account of common tendencies. The perspicacious comments of Mr. Kolodkin and Mr. Pambou-Tchivounda had helped him to identify such a tendency. Mr. Kolodkin had rightly contended that the basic criterion for an objection was the intention of its author to ensure that the reservation could not be applied to it in the future, while Mr. Pambou-Tchivounda had defined objections as reservations to reservations, or barriers to reservations. It therefore seemed that many difficulties might well be resolved by a generally acceptable definition stating: "Objection means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the reservation having any or some of its effects."

12. The wording would have to be discussed in detail, and some improvements might be needed, but it should answer most of the concerns and objections to his initial proposal, which admittedly had invited criticism. Since some measure of agreement did exist, it might prove possible to refer guideline 2.6.1 to the Drafting Committee, which could be instructed to direct its thoughts along the path he had just indicated. If that course of action appeared to be premature, he was prepared to give a more detailed presentation of the amended draft guideline at the next session. At all events, the fate of guidelines 2.6.1 *bis* and 2.6.1 *ter* depended on that of 2.6.1.

13. No general criticism had been levelled against the other draft guidelines, but he had noted the various improvements that had been suggested, including the inclusion in guideline 2.3.5, or in the commentary thereto, of a definition of "enlargement of a reservation".

14. As far as conditional interpretative declarations were concerned, although Mr. Mansfield had said that if an animal looked like a horse it must be a horse, he had not yet seen the whole animal and should therefore wait before he adopted a final position. Mr. Melescanu's qualms about conditional interpretative declarations as a legal institution were misplaced in view of guideline 1.2.1. Perusal of that guideline made it clear that the definition of conditional interpretative declarations was quite different from that of reservations. The animal in question was not a horse, but it could be treated as a horse.

[8] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (see 2780th meeting, footnote 9), pp. 557–558.

15. He did not interpret consensus within the Commission as denial of the fact that, in addition to reservations, there were declarations whereby a State or international organization subordinated its consent to be bound by a treaty to a specific interpretation thereof. On the contrary, that consensus signified that, if the Commission found that a certain legal institution was subject to the same legal regime as reservations, which was quite probable, it was unnecessary to devote specific draft guidelines to the legal regime governing that institution; reference could simply be made to the guidelines applicable to reservations. Such a finding presupposed, however, that all the requisite groundwork had been done in order to determine that the two regimes were identical.

16. His suggestion in paragraph 106 of the report that the Commission should recommend that States and international organizations should state the reasons for their objections had received strong support, and he would thus propose a draft guideline to that effect next year. He suggested that all the draft guidelines in his eighth report should be referred to the Drafting Committee, it being understood that, if the Commission so wished, he was prepared to give a more detailed presentation of his proposal for guideline 2.6.1 at the next session, in which case referral of draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter* could be deferred.

17. Mr. ECONOMIDES said that, while he had great respect for the patience of Penelope, he was wary of Pandora's box. He disagreed with the substance of guideline 2.3.5 because it manifestly infringed article 19 and article 2, paragraph 1 (*d*), of the 1969 Vienna Convention and he was therefore against including it in the Guide to Practice.

18. In his opinion, the Commission had made a mistake with respect to late reservations, one that should be rectified during the second reading by limiting the scope of the application of such reservations, which should be permitted only before the instrument of ratification or acceptance had been sent to the depositary.

19. Guideline 2.3.5 should not be referred to the Drafting Committee until it had been considered by the Sixth Committee.

20. Ms. ESCARAMEIA said that she agreed with Mr. Economides. The Special Rapporteur had expressed shock over the position adopted on guideline 2.3.5 by eight members of the Commission. Those members nevertheless maintained that it was a matter of principle that the 1969 Vienna Convention should be followed, especially when practice was contradictory. Why should priority be given to the practice adopted by only a few depositaries?

21. What made the Special Rapporteur's attitude all the more inconsistent was the fact that, as far as objections were concerned, he was adamantly opposed to departing from the 1969 Vienna Convention or to retracting the Commission's previous decisions. In her opinion, the issue at stake could not be treated in the same way as late reservations and should be dealt with by analogy to guideline 2.3.4, which made it clear that an earlier reservation could not be interpreted in such a way as to exclude or modify the legal effects of provisions of the treaty concerned. The Special Rapporteur's proposal, by permitting enlargement of the scope of a reservation, would exclude or modify some legal effects, and hence it conflicted with guideline 2.3.4. She therefore advised against referring guideline 2.3.5 to the Drafting Committee before the guidance of States had been sought.

22. Mr. KATEKA said he trusted that the Special Rapporteur did not regard the members who were speaking after Mr. Economides as weathervanes that constantly changed direction. On the contrary, they had their principles, and their position had been one of consistent opposition to late reservations. It therefore followed that he was against the enlargement of reservations.

23. He hoped that the Special Rapporteur would show the same flexibility with regard to guideline 2.3.5 as he had displayed in respect of draft guideline 2.6.1. The views of the Sixth Committee and Member States on enlargement of the scope of a reservation should first be obtained and then the Commission should reconsider the draft guideline next year.

24. Mr. GAJA said that he was in favour of guideline 2.3.5. While guideline 2.6.1 as proposed during the present meeting went in the right direction, it might be wise to reflect further on it before it was referred to the Drafting Committee.

25. The text of the 1969 Vienna Convention made no provision for the intention to which the Special Rapporteur referred. The proposal, which had been read out, had not completely resolved the problem of defining objections. For instance, the purpose of some objections might be to exclude the application of a whole section of a treaty, as was done with regard to some reservations that had been entered to article 66 of the Convention. Since the Special Rapporteur intended to submit the question to the Sixth Committee, it would be advisable to wait and see how States reacted. It might then be possible to produce a text which might not be very different from that proposed by the Special Rapporteur, but which would not attempt to establish a formal link between intention and the effects provided for in the Convention in order to turn an objection into a unilateral act *stricto sensu.* The debate had shown that objections could be prompted by a wide variety of intentions. He therefore proposed that more information should be gathered and that the Special Rapporteur should study the question in greater depth before guideline 2.6.1 was referred to the Drafting Committee.

26. Mr. ADDO said that he stood by the position he had adopted earlier and that he endorsed the comments made by Mr. Economides.

27. Mr. CHEE said that while, on the whole, he supported the Special Rapporteur's brilliant study, he wished to take issue with just three points. In his opinion, a revision that would change the character or scope of the original reservation would not be permissible.

28. As to paragraph 86 of the report, the Commission was not engaging in an academic exercise, but was striving to codify and progressively develop international law so that it could be used by States in their diplomatic relations. The assertion that an objection to a reservation was a conditional acceptance would baffle practitioners. As

for conditional interpretative declarations, he still upheld the view he had already expressed and which was based on the decision of the European Court of Human Rights in the *Belilos* case.

29. Ms. XUE said that she fully agreed with the Special Rapporteur's summary. If he intended to amend his proposal for guideline 2.6.1 in the way he had suggested, which would make an objection a means for preventing the effect of a reservation, the Commission should postpone its discussion of the effects of an objection to a reservation until it held its substantive debate on the admissibility of reservations. When she had read the report, she had gained the impression that the Special Rapporteur intended to address the questions of form and procedure. The original draft guideline 2.6.1 had, however, touched on a fundamental element, to wit, the intentions of both parties in terms of the legal effects in their contractual relations.

30. The proposal the Special Rapporteur had just made might cause major difficulties in that such an objection would affect the contractual relations between the parties. Under international law neither the reserving State nor the objecting State was permitted to alter the terms of the treaty by a unilateral act, yet, as the new proposal stood, the objecting State, by its unilateral act, would be doing just that. She was therefore in favour of retaining the original draft and discussing the substantive issue later.

31. Mr. MANSFIELD said his main concern had been to ensure that statements like that of Sweden in reaction to Qatar's reservation to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,[9] referred to in paragraph 96 of the report, would not be excluded from the definition of objections. On the face of it, it was an objection, and indeed that was its purpose. That had been the point of his horse analogy. He welcomed the Special Rapporteur's redrafting because it broadened the definition appropriately. It might, however, be advisable to study it more closely before it was referred to the Drafting Committee. Formulating a definition before the Commission had scrutinized the effects of an objection was tantamount to putting the cart before the horse.

32. Mr. KOLODKIN said that he was grateful to the Special Rapporteur for his thought-provoking summary. He still failed to understand the reasoning in paragraph 57 of the report, but perhaps the difficulty lay in the Russian text, which was muddled. In any case, paragraph 59 covered and enlarged upon paragraph 57.

33. More importantly, he agreed with proposed guideline 2.4.9, which could be referred to the Drafting Committee. The new definition of an objection to a reservation that had just been proposed by the Special Rapporteur was on the right tack, but the Commission should give itself and the Special Rapporteur plenty of time to reconsider the definition and ascertain States' reaction to it in the Sixth Committee.

34. Mr. GALICKI said that, although he found some fault with specific aspects of guideline 2.3.5, he was generally in favour of including it in the Guide to Practice. During the discussion of the seventh report on the topic,[10] modifications which reduced the scope of the reservation had been addressed, and it was only logical now to take a position on those which enlarged the scope, especially since there was some State practice, even though it was not homogeneous. Enough analysis and information on draft guideline 2.3.5 was provided for it to be referred to the Drafting Committee, although that did not preclude addressing questions to States if the Commission so desired.

35. The rule on enlargement of the scope of reservations was closely bound up with the guidelines adopted previously on late formulation of reservations. As the Special Rapporteur had pointed out, guideline 2.3.3 was not fully applicable to enlargement, but guidelines 2.3.1 and 2.3.2 were formulated in such a way that they could be applied with no detrimental effect.

36. The definition of objections to reservations in guideline 2.6.1 was incomplete, and he therefore agreed with those who wished to postpone a final decision pending additional material from the Special Rapporteur on the effects of objections. Unlike Ms. Xue, he did not believe that the definition of an objection should be purely formal. A comprehensive definition should be developed, by analogy with the definition of a reservation in the 1969 Vienna Convention and addressing substantive aspects, particularly the question of purpose. The guideline should thus be elaborated further on the basis of all the comments made and of the next report to be submitted by the Special Rapporteur.

37. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on an excellent analysis and on his considerable efforts to offer an alternative to guideline 2.6.1. The new version added to the merits of the first by taking account of the comments made in plenary, and he would be hard put to choose between the two versions.

38. The Special Rapporteur was refusing with some obstinacy to reopen debate on guidelines 2.3.1 to 2.3.3 on late formulation of a reservation, but the fact remained that guideline 2.3.5 raised problems, as those who had spoken out against its referral to the Drafting Committee had indicated. The provision contained two elements that had to remain separate, the late formulation of a reservation and the enlargement of the scope of an earlier reservation, and it was the latter that was problematic. A late reservation could enlarge the scope of a late reservation made earlier, but who was to say that yet another late reservation might not be formulated, enlarging the scope of the former? Where would it all end? And who was entitled to enlarge the scope of a reservation? Perhaps a provision could be included indicating that a late reservation that enlarged the scope of an earlier one could not be supplemented by additional late reservations that likewise enlarged the scope, or else time limits could be envisaged instead of quantitative limits.

39. The Special Rapporteur's remark that sovereign States were incapable of acting in bad faith was faintly amusing. Alas, since time immemorial, sovereign States

[9] See 2781st meeting, footnote 3.

[10] See 2780th meeting, footnote 3.

had acted in bad faith, precisely because they were sovereign.

40. Mr. KOSKENNIEMI said he could agree with everything said by the Special Rapporteur in his summary and found his proposed reformulation of guideline 2.6.1 to be a welcome step showing remarkable flexibility. He might have been inclined to recommend that it be referred to the Drafting Committee but now agreed that the Commission needed to reflect more on the issue. It would indeed be useful to have the comments of delegations in the Sixth Committee, and the Commission should accordingly revisit the provision at its next session.

41. Mr. AL-BAHARNA said that consideration of guideline 2.6.1 should be postponed and the comments made during the discussion taken into account by the Special Rapporteur, who had already indicated that he favoured such a course of action and would submit a new text to the Commission at its next session. He himself objected to the wording of guideline 2.3.5, on enlargement of the scope of a reservation. Members of the Commission seemed to be evenly divided on that issue, and it might be best, as several had suggested, to formulate a question for submission to the Sixth Committee, and perhaps even to transmit the draft guideline itself for the Committee's consideration.

42. Mr. CHEE drew attention to the definition of a reservation in article 2, subparagraph (*d*), of the 1969 Vienna Convention as a statement made "when" signing, ratifying, etc. a treaty. "When" in that context meant "at the time of"; there was therefore no connection with the late formulation of a reservation mentioned in guideline 2.3.5.

43. Mr. MATHESON said that he could go along with either of the two courses of action proposed with regard to guideline 2.3.5, but, whichever was adopted, the Commission must keep in mind the close logical relationship between guidelines 2.3.5, on modifications to reservations, and 2.4.10, on modifications to conditional interpretative declarations. The need for consistency in the treatment of reservations and conditional interpretative declarations had frequently been mentioned, and the Drafting Committee's mandate should include looking into that and making the necessary adjustments. If guideline 2.3.5 was referred to States for further comment, the same should be done for guideline 2.4.10.

44. Ms. XUE suggested that in the Special Rapporteur's reformulation of draft guideline 2.6.1, after the phrase "purports to prevent the reservation from having any or some of its legal effects", the words "in their contractual relations under the treaty" should be added. That, after all, was a very important aspect, for a treaty system was a contractual framework. When one person offered to sell a black horse and another agreed to buy it, that person could not demand that a white horse be provided—not under contractual relations, in any case.

45. Mr. MELESCANU said that, on the contrary, if the parties agreed to replace the black horse with a white horse, there was no difficulty. That example illustrated the problem with the modification of late reservations: it was a very limited case in which all parties agreed that a State could either formulate a reservation late or modify it. It would be a huge mistake not to acknowledge that there was a reasonably large amount of State practice, and he thought the Commission should look into it more closely. The positions adopted by members should be taken into account, of course, but dialogue and solutions should be sought. The guideline should be referred to the Drafting Committee, and if such was the desire of a majority of the Commission's members, the Sixth Committee could be consulted as well.

46. Mr. KEMICHA said he endorsed guideline 2.3.5 but was somewhat shaken by the discussion about it, in which legitimate apprehensions had been expressed that it might be seen by States as encouraging enlargement of the scope of a reservation. That concern could be raised, perhaps in the commentary, and States urged not to engage in that practice. As to guideline 2.6.1, he had endorsed the original version and continued to support it, although the alternative version was also acceptable. Nevertheless, it would be preferable to take a closer look at the new text at the next session, rather than to adopt it now, with some lingering doubts.

47. Mr. DAOUDI said that guideline 2.3.5 was an innovation as far as the 1969 Vienna Convention was concerned. State practice could not be ignored, even out of unshakeable loyalty to the Convention, but while it was substantial, it was somewhat contradictory. He agreed with the Special Rapporteur that guidelines 2.3.1 to 2.3.3 should not be revisited, but on the other hand they did not constitute holy writ. Nothing prevented the Drafting Committee from considering them in tandem with the new provisions, with a view to achieving a comprehensive approach. As to the definition in guideline 2.6.1, additional elements should be introduced, and he was not opposed to referring it to the Drafting Committee on the understanding that it would seek to fill in the gaps. The proposal just made by the Special Rapporteur was an excellent step towards a solution, but he would prefer to see consideration of the matter postponed.

48. Mr. PELLET (Special Rapporteur) said that, for the reasons he had already outlined, he continued to advocate the referral of guideline 2.3.5 to the Drafting Committee. Only Ms. Xue had expressed strong opposition to his alternative text for guideline 2.6.1. He understood her concerns well and wished to reassure her that his intention in proposing the new version was by no means to prejudice any solution that the Commission might adopt regarding the legal effects of objections. Indeed, he had taken Mr. Koskenniemi's remarks on that subject to heart. He was not opposed to the addition she had just suggested, emphasizing contractual relations between States. He proposed that draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter* be reconsidered at the next session.

49. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to postpone until its next session the discussion of draft guidelines 2.6.1, 2.6.1 *bis* and 2.6.1 *ter*.

It was so decided.

50. The CHAIR recalled that an intensive discussion had taken place on draft guideline 2.3.5 but the majority of members seemed to favour referring it to the Drafting Committee. It had also been suggested that in Chapter III of the Commission's report to the General Assembly on the work of its fifty-fifth session, which drew attention to specific issues on which comments would be of particular interest to the Commission, a request should be made for the views of States on draft guideline 2.3.5.

51. Mr. ECONOMIDES said that, before deciding whether the draft guideline should be referred to the Drafting Committee, the Commission must take up the procedural motion to postpone its consideration and draft a question for submission to members of the Sixth Committee. That motion took precedence over any other decision, and he requested that it be decided by an informal vote.

52. Mr. PELLET (Special Rapporteur) called for a formal vote on whether or not to refer the draft guideline to the Drafting Committee. He had no objection to consulting the Sixth Committee, on the understanding that the Commission would take account of the views of States only when the draft guidelines were considered on second reading. If it were to reverse its decision on draft guideline 2.3.1, the Commission would have to find a new Special Rapporteur.

53. The CHAIR, noting that there was no consensus among members of the Commission on whether to refer draft article 2.3.5 to the Drafting Committee, suggested that the matter should be decided by a show of hands.

The proposal to refer draft guideline 2.3.5 to the Drafting Committee was adopted by 15 votes to 7.

54. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to refer draft guidelines 2.4.9, 2.4.10, 2.5.12 and 2.5.13 to the Drafting Committee.

It was so decided.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/529, sect. G, A/CN.4/L.645)

[Agenda item 10]

Report of the Planning Group

55. Mr. MELESCANU (Chair of the Planning Group) introduced the report of the Planning Group (A/CN.4/L.645), which summarized the Group's discussions on seven different items. The Working Group on the long-term programme of work had made an oral recommendation to the plenary to the effect that, as of the next session, it should study not only possible agenda items but also working methods, given the difficulties in discussing such matters within the Planning Group. That oral recommendation had not been mentioned in the report since no consensus had been reached on it. With regard to the documentation of the Commission, the Planning Group had concluded that the very strict recommendations made by the Secretary-General of the United Nations and the General Assembly regarding the length of the reports of subsidiary bodies were not acceptable. It had highlighted the fact that the work of the Commission was different from that of other United Nations bodies, as was the purpose of its documentation, which increased in importance over time, unlike that of the political bodies. Hence the request that the Commission should continue to remain exempt from page limitations, as endorsed by previous General Assembly resolutions, while bearing in mind the need to achieve economies whenever possible in the overall volume of documentation.

56. Owing to lack of time, the Planning Group had been unable to discuss procedures and methods of work, although two relevant proposals had been submitted. He suggested that the details of those proposals should be included under chapter III of the report of the Commission to the General Assembly on the work of its fifty-fifth session so as to facilitate their consideration at the fifty-sixth session. The relations of the Commission with the Sixth Committee were very important for the Commission's work. However, the relationship had to work both ways: it was not only the responsibility of the Commission to find the best way of encouraging the dialogue. Furthermore, in order to enhance the usefulness of Chapter III of the report, the Planning Group proposed that, in preparing issues on which the views of Governments were sought, Special Rapporteurs should provide sufficient background material and substantive elaboration to assist Governments in preparing their responses.

57. With respect to honoraria, the Planning Group recommended that the General Assembly should review its decision in resolution 56/272 of 27 March 2002, which had been taken without consulting the Commission. The spirit of public service with which members contributed their time to the Commission should be duly recognized. The decision affected above all Special Rapporteurs, especially those from developing countries, whose work required considerable research, which they could not conduct alone. A text along those lines would be included in the report. In conclusion, he thanked all those who had contributed to the work of the Planning Group, which had held a record number of meetings, seven in all. He looked forward to the continuation of the work of the Planning Group at the next session.

58. The CHAIR invited the Commission to take note of the report of the Planning Group. In accordance with established practice, the relevant parts of the report would be included in due course in the report of the Commission.

59. Mr. ECONOMIDES said that, in connection with the work of the Planning Group, he wished to submit a proposal drafted by eight members of the Commission. In the light of recent events, which had shaken the international legal system, he, Mr. Addo, Mr. Baena Soares, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Pambou-Tchivounda and Mr. Rodríguez Cedeño proposed that the following text should be inserted in the report of the Commission to the General Assembly:

> "The International Law Commission wishes to express its deep concern in the light of certain events which have severely tested the fundamental principles of international law that are indispensable in protecting the essential interests of the international community. Recalling the peremptory and hence non-derogable nature of the principles aimed at guaranteeing peace, security, order and stability in international relations, it underlines the absolute and universal need to uphold them."

As an independent body dealing with international law, the Commission must emphasize in its report the need to observe the fundamental principles of international law, in particular to refrain from the use of force and the threat of the use of force in international relations. The Commission must also make itself available in efforts to strengthen those principles, which were of vital importance to all States and the international community as a whole. He hoped that the Commission would agree to the proposal, with minor amendments, if necessary.

60. Mr. PELLET said he did not endorse the proposed text, as it was too weak. It merely alluded to events, when clearly a super-Power—the United States—had carried out an armed invasion of another State, thereby contravening the provisions of the Charter of the United Nations and international law. Given the situation, there was every reason to be very concerned about the future of international law. However, if the proposal was put to the vote, he would abstain. It was not for a subsidiary body of the General Assembly to take a stance on such matters—something that the General Assembly itself could and should have done on the basis of Articles 10 and 11 of the Charter. So, even though he agreed with the substance of the proposed text, he was against its adoption by the Commission.

61. Mr. KATEKA said that, while he understood the sentiments of those submitting the proposal, the Commission had no competence to deal with such an issue in that manner. If it had been a topic for study, it could have been dealt with under normal procedures. However, to submit such a statement, which on the face of it was vague, ambiguous and innocuous, would merely be counterproductive; that was the business of political bodies such as the General Assembly and the Security Council. Many events took place at the international level that were contrary to international law, and if the Commission were to pronounce itself on each and every one, it would be diverted from its mandate. He could not, therefore, endorse the proposal.

62. Mr. BROWNLIE said he agreed with Mr. Pellet and Mr. Kateka. Although he had great respect for the concern of other members for the rule of law, he did not consider it appropriate for the Commission to take up such issues. Even if the Commission were to broach such issues in some way or another, one would have expected greater consideration from the members concerned by way of notice and for preparation.

63. The CHAIR suggested that the proposal should be taken up again in connection with the report of the Commission.

64. Mr. DUGARD wished to know when exactly the matter would be discussed again, so that those members who were deeply concerned about it could make sure they would be present.

65. The CHAIR suggested that it should be discussed in connection with chapter XI of the report of the Commission to the General Assembly, entitled "Other decisions and conclusions of the Commission".

It was so decided.

Unilateral acts of States (*concluded*) (A/CN.4/529, sect. C, A/CN.4/534,[11] A/CN.4/L.646)

[Agenda item 5]

Report of the Working Group

66. Mr. PELLET (Chair of the Working Group on Unilateral Acts of States) said that he felt ill at ease about introducing the report of the Working Group (A/CN.4/L.646) in the absence of the Special Rapporteur on the topic. The report comprised two parts: the report proper, dealing with the scope of the topic and the method of work, and an annex containing commentaries on the scope of the topic. In trying to define the scope, the Working Group, like the Commission as a whole, had been divided into two main schools of thought. Some members of the Working Group had been in favour of an extremely strict definition of a unilateral act as a statement which gave rise to obligations for the party invoking it, while others had preferred a slightly broader definition, namely that a unilateral act created not only legal obligations but also legal effects. The latter had favoured a broader definition covering conduct which, without necessarily being a formal expression of will, had similar or comparable effects to that of a strictly defined unilateral act. In the end the Working Group had decided that, even if a unilateral act was defined as a statement expressing the will or consent by which a State purported to create obligations or other legal effects under international law, there was no reason why the conduct of States should not also be studied, as was indicated in Recommendations 1 and 2 (para. 6). In relation to unilateral acts, draft articles accompanied by commentaries would be proposed, while with respect to conduct State practice would be examined and, if appropriate, guidelines might be adopted, as was indicated in Recommendation 3 (*ibid*.).

67. As far as the method of work was concerned, owing to time restrictions the Working Group had merely made suggestions which the Special Rapporteur might wish to take into account at the next session. He should submit as complete a presentation as possible of State practice on unilateral acts or equivalent conduct. The material assembled should make it possible to identify rules applicable to them with a view to the preparation of draft articles accompanied by commentaries according to an orderly classification of State practice, as was indicated in Recommendations 4 to 6 (para. 8). Later reports would deal with more specific articles, as was indicated in Recommendation 7 (*ibid*.). Recommendations 1, 2 and 3 had been adopted verbatim by the Working Group. However, due to lack of time, that had not been the case with

[11] See footnote 2 above.

Recommendations 4 to 7, although they did accurately reflect the views of the Working Group. The commentaries on the scope of the topic had been set out in the annex to the report for similar reasons. It would be useful for the Commission to endorse the recommendations, which should be followed by the Special Rapporteur and Commission as a whole in the future, thereby bringing an end to the unhealthy habit of continually plaguing the Special Rapporteur with the subject of working methods. Admittedly, it was a compromise solution and was not entirely satisfactory, but it was one which had been the subject of consensus within the Working Group. The Special Rapporteur had indicated to him that he lent his full support to the recommendations, for which he was largely responsible.

68. Mr. KOSKENNIEMI said that he fully understood the need to find a direction for the topic and hence the compromise solution proposed. However, before being definitively adopted such a method of work should be tried out to see what results it brought.

69. Mr. PELLET (Chair of the Working Group on Unilateral Acts) said the Special Rapporteur would need to be left in peace to work on the compromise solution until the Commission could see what results it would yield. The method of work would need to be properly defined at the next session. The Working Group had by no means completed its work, but he hoped it would be reconvened at the next session with a new chair.

70. The CHAIR said that, if he heard no objection, he would take it the Commission wished to adopt the recommendations contained in the report of the Working Group on Unilateral Acts of States.

It was so decided.

The meeting rose at 1.05 p.m.

2784th MEETING

Monday, 4 August 2003, at 10.15 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño.

Draft report of the Commission on the work of its fifty-fifth session

1. The CHAIR invited the members of the Commission to consider chapter IV, sections A and B, of the draft report of the Commission on the work of its fifty-fifth session, on the responsibility of international organizations.

CHAPTER IV. *The responsibility of international organizations* (A/CN.4/L.636 and Add.1)

A. Introduction (A/CN.4/L.636)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 11

Paragraphs 3 to 11 were adopted.

2. Mr. GAJA (Special Rapporteur) proposed that the following new paragraph should be added:

> "Bearing in mind the close relationship between this topic and the work of international organizations, the Commission, at its 2784th meeting, on 4 August 2003, requested the secretariat to annually circulate the relevant chapter of the report of the Commission to the General Assembly on the work of its session to the United Nations specialized agencies and some other international organizations for their comments."

3. The CHAIR said he took it that the Commission agreed to that proposal.

It was so decided.

The new paragraph 12 was adopted.

Section B, as amended, was adopted.

4. The CHAIR invited the members of the Commission to consider chapter IV, section C, of the draft report.

C. Draft articles on the responsibility of international organizations provisionally adopted so far by the Commission

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIFTH SESSION (A/CN.4/L.636 Add.1)

Commentary to article 1 (Scope of the present draft articles)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.