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**Summary record of the 2402nd meeting**

Topic:  
**Law and practice relating to reservations to treaties**

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Peace and Security of Mankind, followed by a meeting of the Drafting Committee on the same subject.

*The meeting rose at 10.45 a.m.*

## 2402nd MEETING

*Tuesday, 20 June 1995, at 10.10 a.m.*

*Chairman:* Mr. Pemmaraju Sreenivasa RAO

*Present:* Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer.

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

[Agenda item 6]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. RAZAFINDRALAMBO said the Special Rapporteur's first report on the law and practice relating to reservations to treaties (A/CN.4/470) was a model of logic and precision. The Special Rapporteur had stressed that, for the time being, it was his intention to provide an essentially descriptive and neutral review of the topic. In drafting his first report, he had, fortunately, not kept strictly within those self-imposed limits. In particular, he had expressed a preference for preserving the treaty rules adopted in the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention") and confirmed in the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention"). In respect of the final form of the work on the topic, he was in favour of elaborating draft protocols to existing conventions.

2. Aware that the report had been distributed somewhat late and that members did not always have easy access to previous summary records on the topic, the Special Rapporteur had taken pains to cite in full extracts from reports of earlier Special Rapporteurs on the topic and

the relevant provisions from the 1969, 1978 and 1986 Vienna Conventions. In addition, rather than use extensive footnotes, he had incorporated in the body of the report doctrinal views and the appropriate passages from the yearbooks of the Commission. Thus, for the moment, there was no need to annex a complete bibliography to the report, but it would be useful for the Secretariat to update the study of the practice of the Secretary-General in respect of reservations to multilateral conventions.

3. It was widely acknowledged that the question of reservations to treaties was complex and controversial. Accordingly, he was in favour of establishing a working group at the Commission's next session. In that way, the Special Rapporteur would be able to complete his work on the topic within the prescribed time-limit and it would ensure that the Commission respected the five-year deadline for submitting draft articles.

4. The Special Rapporteur had provided a lucid discussion on the validity of reservations, citing in his first report Mr. Bowett's concerns in that regard. Personally, he shared the Special Rapporteur's view that the expression "validity of reservations" was neutral and comprehensive enough to encompass both the "permissibility" and the "opposability" of a reservation. At the same time, he agreed with Mr. Bowett that a reservation prohibited by a treaty or contrary to the treaty's object and purpose, even if it was accepted by all the other parties, should be considered impermissible and, under such circumstances, the question of the opposability of the particular reservation could not be raised. That approach was more consistent with the terms of article 19 of the 1969 Vienna Convention.

5. The Commission should not, however, spend its time trying to resolve the doctrinal differences between "permissibility" and "opposability" schools. An additional ambiguity arose from the confusion between "permissibility" (*permissibilité*) and what was termed in French *licéité*. The former corresponded to the "exercise" of the reservation, whereas the latter seemed to relate more to the actual "existence" of the reservation. The distinction between the two was very subtle and merited further study.

6. The most difficult problems lay in the case of a vague and general reservation or one which was contrary to the object and purpose of a treaty. The 1969 and 1986 Vienna Conventions contained no indications with regard to the meaning or scope of the expression "object and purpose of the treaty". The working group might usefully concentrate on that matter. It might also consider the legal consequences of the impermissibility of a reservation, as enumerated in the report. Such consequences could only be elucidated in the light of the practice of States and international organizations. Information on the practice of international organizations was probably relatively scarce, and could even be difficult to find. For instance, to his knowledge there was only one case in which a reservation had been formulated to the Constitution of the International Labour Organisation. It had occurred in 1953, at the time of the request by the former Soviet Union for readmission to ILO. Under article 1, paragraph 3, of the Constitution of the International Labour Organisation, the Director-General regis-

<sup>1</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

tered the formal acceptance by the requesting State of the obligations arising from the Constitution. In the case in point, the Director-General had notified the Soviet Union that its acceptance of the obligations did not permit of any reservations. As a result, the requesting State had formulated a new request, not accompanied by any reservations. That example helped to answer the question of what, in the practice of international organizations constituted the competent authority to determine the permissibility of a reservation to a constituent instrument.

7. The report presented a clear overview of the regime for objections to reservations, in particular the rules applicable in the case of impermissible reservations. In fact, the study of objections was warranted only within the framework of the "opposability" doctrine. That was, moreover, the approach used by the Special Rapporteur in his report. The answers to the questions raised therein would depend on the information provided by Governments and international organizations on their legislation and practice.

8. One of the most interesting parts of the report dealt with gaps in the provisions relating to reservations in the 1969 Vienna Convention and the 1986 Vienna Convention. In that connection, States tended to resort to "interpretative declarations" for two purposes: to try to amend a treaty at the time of ratification or to bypass the prohibition on reservations to a treaty whereby they expressed their consent to be bound. In the first instance, arbitration bodies and other tribunals had held that "interpretative declarations" must be taken to be reservations if they were consistent with the definition in the conventions concerned. Declarations accompanying accession to a convention, ratification of which could not be accompanied by reservations, as in the case of ILO conventions, were exemplified in the "considerations" or "understandings" found in ILO practice. For example, at the time of its ratification of ILO Convention No. 147, concerning minimum standards in merchant ships, the United States had elaborated "understandings" with regard to certain clauses of the Convention. The Director-General of the International Labour Office had not deemed those "understandings" to be contrary to the Convention, reasoning that some "understandings" accurately reflected the meaning of the Convention while others did not directly affect the terms of the Convention.

9. The ILO approach could help clarify the question of whether reservations and objections could be made to human rights instruments. While ILO conventions were designed to defend the material and moral interests of individuals, some of them, such as Conventions No. 29, concerning forced or compulsory labour, and 105, concerning the abolition of forced labour, and Conventions No. 87, concerning freedom of association and protection of the right to organize, and 111, concerning discrimination in respect of employment and occupation, were among the most significant of human rights instruments. In principle, ILO conventions could admit of no reservations, since any reservation would be considered incompatible with their object and purpose. Nevertheless, some ILO instruments, known as "promotional" conventions, contained flexible clauses designed to fa-

cilitate ratification by all member States regardless of their level of economic and social development. He believed that each State was free to make an "interpretative declaration" at the time of its ratification of an international labour convention. The Director-General would then assess the meaning and scope of the declaration, according to three criteria: the terms of the convention, the *travaux préparatoires* and the practice of the ILO monitoring bodies, more especially the Committee of Experts on the Application of Conventions and Recommendations. If the declaration did not meet those criteria, the ratification would be rejected. In short, the "interpretative declaration" was considered equivalent to a reservation which was incompatible with the object and purpose of the convention. In the light of ILO practice, the Commission might be able to find, with regard to human rights instruments, a mechanism which corresponded to that of the Human Rights Committee on general comment No. 24 which prohibited reservations to human rights treaties.<sup>2</sup>

10. Like the Special Rapporteur, he was in favour of preserving the treaty rules which had been adopted between 1969 and 1986. With regard to the final shape of the work, he endorsed the Commission's traditional practice of making that decision at the final stage. The Special Rapporteur would no doubt appreciate more precise indications in that regard, for the content of the work might vary depending on the final form to be given to the topic. In that connection he would point out that at the time of deciding on the final form for the draft articles on relations between States and international organizations, Reuter had wisely suggested that the Commission should choose the more elaborate form of a draft convention, which might even subsequently be transformed into a "soft law" text. That implicit philosophy of "he who can do more can do less", to which he fully subscribed, should also apply in the present instance. Lastly, he agreed with the Special Rapporteur that the title of the topic should be shortened to "Reservations to treaties".

11. Mr. ROBINSON said that it was clear from the report that the Special Rapporteur was continuing the tradition of scholarship, intellectual rigour and dedication of his predecessors working in the area of the law of treaties. The report provided a comprehensive outline of the major issues relating to reservations to treaties.

12. As he understood it, article 19 of the 1969 Vienna Convention set out the circumstances in which a State could formulate a reservation. Article 20 of the Convention set out the conditions for acceptance of and objections to a reservation which met the requirements for formulation under article 19. Thus, in stipulating that a reservation required acceptance by all parties to a treaty, article 20, paragraph 2, referred to a reservation formulated in accordance with the requirements of article 19, as did article 20, paragraph 3, when it stipulated that a reservation required the acceptance of the competent organ of an international organization, if the treaty was the constituent instrument of the organization.

<sup>2</sup> See 2400th meeting, footnote 9.

13. Was there, in fact, any objective way of determining whether the requirements of article 19 had been met? A more relevant approach would be to see if there was any way to determine with certainty whether those requirements had been met. Very few questions arising from treaty interpretation and application could be resolved "objectively" if that meant a unilateral, independent determination, uncoloured by the views of the parties involved, and close to mathematical certainty. Clearly, the parties would first have to make their own judgement as to whether the article 19 requirements of the 1969 Vienna Convention had been met; at a later point, recourse might be had to a dispute settlement body. It was possible to determine with some certainty whether a reservation was prohibited by the treaty and whether it was on a list of permitted reservations—subparagraphs (a) and (b) of article 19 of the Convention. However, it was notoriously difficult to evaluate objectively the question of whether a particular reservation was compatible or not with the object and purpose of a treaty—subparagraph (c) of article 19.

14. Thus, if under article 20, paragraph 2, of the 1969 Vienna Convention all parties accepted a reservation which was clearly incompatible with the object and purpose of or expressly prohibited by a treaty, the issue would first have to be determined, either by agreement among the parties (not by a unilateral determination) or by a dispute settlement body, whether the requirements for formulating a reservation set out in article 19, subparagraphs (a) and (c), had been met. If a determination was made that those requirements had been met, then a further determination must be made as to whether the reservation had, in accordance with article 20, paragraph 2, been accepted by all the parties. If, however, it was determined that the conditions of article 19, subparagraphs (a) and (c), had not been met, then no question arose as to whether the reservation had been accepted by all the parties. Yet if there was no agreement between the parties as to whether the requirements of article 19, subparagraphs (a) and (c), had been met, even in relation to a reservation obviously incompatible with the object and purpose of the treaty, the question would then have to be determined by a dispute settlement body. If that body's determination was in the affirmative, a further determination had to be made as to whether the reservation had been accepted by all parties in accordance with article 20, paragraph 2. If the dispute settlement body's determination was in the negative, then no question arose as to whether the reservation had been accepted by all the parties.

15. In the first place, that analysis could be said to make him a supporter of the "permissibility" school, to which he would say that he was a qualified supporter. He was not a supporter of that school if it implied that there was some certain method—or objective way—of determining the matters dealt with in article 19. And he was certainly not a supporter of the permissibility school if it implied—no matter how obviously incompatible with the object and purpose of the treaty a reservation might appear to be—that unilateral determination of such incompatibility sufficed to resolve the issue. The term "permissibility" must not be allowed to disguise the fact that, ultimately, a determination as to permissibility would have to be made either by agreement between the

parties or by a dispute settlement body: a reservation which was regarded by one party as patently incompatible with the object and purpose of a treaty might not be so regarded by another. In the circumstances, it would be preferable to speak of a reservation that met the requirements for formulation under article 19.

16. Secondly, the point he had wished to make in referring to a determination by a dispute settlement body was that it was not possible to conclude, from a proper reading of them, that articles 19 and 20 allowed for some unilateral, certain and objective determination as to whether the requirement of compatibility under article 19, subparagraph (c), had been met and, further, that the issue might not be settled by the parties themselves and might therefore require recourse to a dispute settlement body. In his opinion, therefore, an objection could be made to any reservation—whether permissible or impermissible—since the question whether the requirements of article 19 had been met would have to be determined either mutually by the parties or perhaps, ultimately, by a dispute settlement mechanism. It followed that the view that an objection could be made only to a permissible reservation, because an impermissible reservation was void *ab initio*, was sustainable only in theory. "Impermissible" really meant "arguably impermissible".

17. Part of the problem stemmed from the fact that, since 1969, dispute settlement mechanisms had rarely been used to resolve problems relating to reservations, which, in the vast majority of cases, had been settled by reference to practice. While he agreed with the conclusion, in the report, that there was a presumption in favour of the permissibility of reservations, that presumption was rebuttable. In that connection, it was interesting to note that the positive wording of article 19 of the 1969 Vienna Convention ("A State may . . . formulate a reservation unless") contrasted with the negative wording of article 62 ("A fundamental change of circumstances . . . may not be invoked . . . unless"); and, furthermore, that, as noted in the report, the draft articles by a previous Special Rapporteur, Sir Humphrey Waldock, had reflected the presumption in more explicit terms: "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation" provided that it "shall have regard to the compatibility of the reservation with the object and purpose of the treaty".<sup>3</sup>

18. Interpretative declarations were widely, but wrongly, used by the parties to a treaty. In his judgement, no less than one third of such declarations were disguised reservations since, under the terms of article 2, paragraph 1 (d), of the 1969 Vienna Convention, reservations excluded or modified the legal effect of certain provisions of the treaty in their application to the declarant State. Even where a convention expressly provided for a distinction between a reservation and an interpretative declaration, the parties to the convention did not respect the distinction. For instance, article 309 of the United Nations Convention on the Law of the Sea prohibited reservations unless they were expressly permitted under other articles in that Convention. Article 310,

<sup>3</sup> *Yearbook* . . . 1962, vol. II, p. 60, document A/CN.4/144, art. 17, paras. 1 (a) and 2 (a).

however, provided that article 309 did not preclude a State from making a declaration

... with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations ... do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

It was apparent that the effect of some of the reservations to the United Nations Convention on the Law of the Sea was to exclude or modify the legal effect of its provisions in relation to the declarant State. There appeared to be a view that the word "purport", as used in article 310, prevented a declaration from being a reservation simply because the alleged intent of the declarant State was that the declaration should not modify the legal effects of the Convention in relation to that State. His own view, however, was that the purport of a declaration under article 310 was irrelevant if its actual effect was to alter the legal effect of the Convention in relation to the declarant State.

19. The purport of a statement was of more significance in assessing whether it constituted a reservation within the meaning of article 2, subparagraph 1 (*d*), of the 1969 Vienna Convention. In other words, if the intention of the statement was to modify the legal effect of the treaty in relation to the State making it, that statement was perhaps a reservation, even if it did not have such an effect in law. A statement that was presented as an interpretative declaration but did in fact alter the legal effect of the treaty in relation to the declarant State, however, must rank and be treated as a reservation even though it did not purport to have that effect. It would be absurd if the mere fact of calling a statement an interpretative declaration could prevent it from being characterized as a reservation when it met all the requirements for the purpose as set forth in that subparagraph. He therefore agreed with the statement made by the Special Rapporteur in his report that "nominalism must be set aside on this point" and that declarations that met the requirements of that subparagraph should be subject to the same legal regime as reservations. That approach might of course result in an increase in the number of reservations to multilateral treaties or perhaps in a decrease in the number of States becoming parties to those treaties.

20. An interpretative declaration, unlike a reservation, had no effect on the conclusion of a treaty. It was no more than a unilateral statement which, while not altering the legal effect of the treaty in relation to the declarant State, provided the other States parties with an indication of how the declarant State interpreted a particular treaty provision. Unlike a reservation under article 20, paragraph 5, of the 1969 Vienna Convention, it was not capable of having legal effects on the other parties, even if those parties raised no objection. That followed because, *ex hypothesi*, if the declaration did not alter the legal effect of the treaty in relation to the declarant State it would have no legal effect in relation to other parties.

21. Could an interpretative declaration have any consequence for the interpretation of a treaty within the meaning of article 31 (General rule of interpretation) of the 1969 Vienna Convention? If it was a unilateral act and was not accepted by the other parties, it was unlikely to have any greater significance than as a clear indication

of how the declarant State viewed a particular provision in a treaty, which treaty must itself ultimately be construed in accordance with article 31. If, on the other hand, it was accepted by one or more parties to the treaty, it would provide not only an indication of how those parties and the declarant State viewed the treaty but could perhaps also be regarded, under article 31, paragraph 2 (*b*), as part of the basis for interpretation. To that extent, in his view, an interpretative declaration formed part of the legal regime governing treaty interpretation.

22. One point of such importance that it might warrant exceptional treatment by the Commission, concerned the relative incompatibility between the concept of reservations, based as it was on reciprocity, and human rights treaties.

23. As to the scope and form of the Commission's future work, he would draw attention to a number of facts. First, it was pointed out in the report that disputes had been fewer in number than the uncertainties of the law might suggest. Further, it was stated that the rules regarding reservations had come to be seen as basically wise and to have introduced desirable certainty; that the 1969 Vienna Convention was seen as having introduced "calm"; that, whatever their defects, the rules adopted in 1969 had proved their worth, and that difficulties had never degenerated into a serious dispute and had always been reconciled in practice (although he personally was inclined to regard that view, reflected in the report, as over-generous); and, lastly, that in the assessment of one study, albeit dating back to 1980,<sup>4</sup> the 1969 Vienna Convention had not led to an increase in the formulations of reservations and also that, on the whole, those which had been formulated had concerned relatively minor points. In view of those laudatory comments and of the residual character of the existing rules on reservations, it might be thought that a case had been made out not only for preserving what had been achieved but also for concluding that what had been achieved should not be disturbed at all. Nevertheless, to reach such a conclusion would be to exaggerate the achievements of the 1969 Vienna Convention and its provisions on reservations. The question to be answered was, rather, how to fill the gaps and clarify the ambiguities in the existing law so clearly indicated in the report. For his part, he favoured the modest approach advocated by the Special Rapporteur, which would consist in providing a commentary on the relevant articles in the various Conventions. However, while supporting that method as the general approach and while recognizing that any deviation from the general approach could be disruptive, he would not rule out the adoption of some special method to deal with human rights treaties.

24. Mr. LUKASHUK said that the problem of reservations to treaties was, in the last analysis, related to the character of, and especially the degree of unity prevailing within, the international community. That was why the problem had been exceptionally acute during the years of the cold war, and it accounted for the cautious

<sup>4</sup> J. K. Gamble Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", *American Journal of International Law*, vol. 74, No. 2 (1980), pp. 372-394.

position adopted by the Soviet Union and its allies at the sessions of the United Nations Conferences on the Law of Treaties<sup>5</sup> as well as for the large number of works on the subject of reservations published in the Soviet Union at that time. The ending of the cold war and the strengthening of links with the Western Powers had resulted in a diminution of interest in the problem of reservations in Russia as well as in most other countries. That did not mean, however, that the problem had lost its significance or was likely to lose it in future. Each one of the world's 200 or so States formed a complex socio-political entity with specific interests of its own; yet the rules established by treaties were the same for all parties. The idea of reservations was to ensure a unified rule of international law so far as essentials were concerned, while, on the other hand, offering States a possibility of safeguarding their special interests subject to specific conditions. Practice showed that in actual fact reservations to treaties were formulated in relatively few cases, but that was no reason to overlook their significance. The institution of reservations to treaties expressed the idea of respect for the legitimate interests of States.

25. Those considerations went some way towards explaining the nature of State practice in respect of reservations. The Special Rapporteur was right to note in the report that State practice in the area was relatively scarce and that there were *prima facie* uncertainties.

26. With regard to the questions raised in the report, the satisfactory conclusion of a study largely depended on the right questions being asked at the outset. In his opinion, the Special Rapporteur had performed that task very creditably. In view of the report's preliminary nature which the Special Rapporteur had been at pains to emphasize, his own answers to the questions raised would likewise be preliminary in character.

27. In the first place, he fully endorsed the Special Rapporteur's view that, in its future work on the topic, the Commission should proceed on the basis of the provisions of the Vienna Conventions, which established the right of States to formulate reservations. The first question concerned so-called impermissible reservations, or reservations prohibited by the treaty. In theory, such reservations were invalid *ab initio*, and that, too, was the view held by Mr. Bowett. In practice, however, since only the States parties to a treaty could decide whether or not a reservation was prohibited by the treaty, the acceptance of a reservation by other contracting States was evidence of its permissibility. That point had already been made by Mr. Robinson.

28. The answer to the question whether the will of the contracting parties as embodied in the text of the treaty prevailed over their will as embodied in the practice of the treaty's actual implementation was, to some extent, to be found in the provisions on interpretation of treaties in article 31, paragraph 3 (b), of the 1969 Vienna Con-

vention, according to which "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" was to be taken into account, together with the context. That position was the right one, for legal rules that were not free to develop in accordance with the demands of reality would be incapable of regulating situations which, like everything else in life, were subject to change. The same principle applied in the matter of reservations: both the text of the treaty and the will of the parties, as reflected in their practice, had to be taken into account, but the latter of those two factors was decisive. In that connection, he endorsed the idea expressed in the report that it would be appropriate for the Commission to undertake a study of the concept of the "object and purpose of the treaty".

29. If a majority of States parties to a treaty considered a reservation "impermissible", the reservation was thereby rendered invalid from the outset. If it was considered impermissible by only a few contracting States, the provisions of article 21, paragraph 3, of the 1969 Vienna Convention applied. In the absence of objections on the part of States parties, the "impermissibility" of a reservation did not entail any legal effects. Article 20, paragraph 5, of the 1969 Vienna Convention was clear on that point. In the event of doubts about the "permissibility" of a reservation, the depositary could draw the parties' attention to that rule, but the final decision lay with each individual contracting State.

30. With reference to the question of formulating objections, contracting States were certainly free to formulate objections to both permissible and so-called impermissible reservations, provided, of course, they did so within the framework of the law. The question appeared to relate only to cases where, in accordance with article 20, paragraph 1, of the 1969 Vienna Convention, a reservation expressly authorized by a treaty did not require any subsequent acceptance by the other contracting States. As a general rule, no objections should arise in such cases. That did not, however, deprive a contracting State of the right to declare that, in its view, the reservation was not "expressly authorized by a treaty". Moreover, exceptional cases could arise where a permissible reservation might enter into conflict with the specific yet legitimate interests of a contracting State, which would then be entitled to formulate an objection indicating its grounds for doing so.

31. As to the question of whether the contracting States must or should indicate the grounds for their objections, the obligation or otherwise to do so was a matter for *comitas gentium* rather than for international law. On the other hand, a remark about the desirability of indicating the grounds for objections could perhaps be included in the future draft.

32. The answer to the question of whether the objecting State could exclude the applicability of treaty provisions other than those covered by the reservations would be for the objecting State to formulate a reservation of its own distinct from the first reservation formulated by the reserving State. Such a procedure would be in conformity with article 21, paragraph 3, of the 1969 Vienna Convention.

<sup>5</sup> See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); and *ibid.*, *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6); and *ibid.*, *First and Second Sessions, Vienna, 26 March-24 May 1968 and Vienna, 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

33. With regard to “interpretative declarations”, it was difficult to accept the view expressed by the Commission in its commentary to article 2 of the draft articles on the law of treaties<sup>6</sup> to the effect that a declaration made by a State could in some cases amount to a reservation. A reservation was a legal act whose effects were determined by law, whereas a declaration was a political act without any legal effects under the law of treaties. At the same time, a declaration fell within the category of “State practice” and, for that reason, could—if accepted—introduce changes in standards of international law (*opinio juris*). In answer to the question relating to reservations to a bilateral treaty raised in the report, he drew attention to the statement contained in paragraph (1) of the introduction to the commentary to article 20 of the draft articles on the law of treaties<sup>7</sup> to the effect that a reservation to a bilateral treaty amounted to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. That view had been supported by the participants in the United Nations Conferences on the Law of Treaties, and the resulting Conventions did not refer to the possibility of reservations to bilateral treaties, although they did not expressly prohibit them. Such instances that did exist of States formulating reservations to bilateral treaties when ratifying the treaties did not present a significant problem. Of more substantial interest was the question of what became of reservations to multilateral treaties when the provisions of the treaties became standards of general customary law. A persistent objection to a rule in the process of becoming customary was certainly possible, but could a reservation be formulated in such a case? In his opinion, since general international law was not subject to reservations, a rule of treaty law to which a reservation had been formulated became a rule not subject to that reservation once it became part of customary law. The point might perhaps be given some consideration by the Special Rapporteur.

34. On the other hand, interpretative declarations by States parties to a bilateral treaty were admissible and, if accepted by the other party, were taken into account in the interpretation of the treaty in accordance with article 31, paragraphs 2 (b) and 3 (b), of the 1969 Vienna Convention. Any attempt to equate declarations with reservations could inject an element of uncertainty into treaty relations. In that connection, he referred to a work by Henkin, which pointed out that a reservation usually required renegotiations.<sup>8</sup>

35. Mr. HE, expressing appreciation to the Special Rapporteur for the invaluable contribution his report made to the topic, said he was particularly pleased to see that the way in which the various problems had been arranged would reduce much of the difficulty inherent in an extremely complicated issue.

36. The question of reservations to treaties was, of course, one of the most controversial in contemporary international law. The many differences, both doctrinal and political, had been significantly reduced over a long

process of compromise between the traditional approach and the approach that favoured more freedom with regard to the formulation of reservations. The final text of the 1969 Vienna Convention pertaining to reservations had been based on proposals made by the Commission, which had abandoned the rule of unanimity in favour of a flexible system. Such flexibility would probably result in an increase in the number of parties to multilateral treaties and hence also in the number of reservations to those treaties; that could in turn undermine the integrity of multilateral treaties and cause them to split into a series of bilateral treaties of uneven content, thus hindering the establishment of a unified system of international law. In order to achieve a balance between opposing views on reservations to treaties, the relevant provisions in the 1969 Vienna Convention were couched in ambiguous terms and contained many gaps which required clarification and completion, as the Special Rapporteur had pointed out in his report.

37. Under the terms of the 1969 Vienna Convention, a reservation could be made to a treaty only if it was consistent with the object and purpose of that treaty. The key issue, therefore, was to clarify the precise meaning of the expression “compatibility with the object and purpose of the treaty” but also to determine who would be in a position to decide whether a reservation was compatible with the object and purpose of the treaty. The answer to that question, and to the others listed in the first report, would depend mainly on the approach adopted to reservations in the light of a comparative study of doctrine and State practice in the matter, particularly since the time of the 1969 Vienna Convention. Accordingly, a more flexible approach would make for a broader understanding of the issues raised in the report, while a stricter approach would result in a narrower understanding of those issues. In the case of “interpretative declarations”, for instance, the question was whether to treat them simply as declarations or as reservations that were subject to the legal rules applicable to reservations. State practice pointed in both directions. The term “declaration” was used either as the equivalent of, or as different from, the term “reservations”. According to the records of the United Nations Secretariat, while some States filed a “declaration” along with their reservations, others filed simply a “declaration”, couched in unequivocal terms, with a view to excluding or modifying the legal effects of certain provisions of the treaty as those provisions applied to them.

38. A problem would also arise if a treaty remained silent on the question of reservations. In that connection, the Special Rapporteur had cited Reuter’s view that, if the treaty was silent, the only prohibited reservations were those that would be incompatible with its object and purpose.<sup>9</sup> Once again, that raised the question of the precise meaning of the expression “compatibility with the object and purpose of the treaty”. It might also lead to a situation involving different and even conflicting interpretations of a treaty.

39. Yet another problem arose where a treaty contained wording that was open to different interpretations

<sup>6</sup> *Yearbook* . . . 1966, vol. II, pp. 189-190.

<sup>7</sup> *Yearbook* . . . 1962, vol. II, pp. 176-177.

<sup>8</sup> L. Henkin, “Foreign affairs and the Constitution”, *Foreign Affairs*, vol. 66, No. 2 (Winter 1987/88), pp. 284-310.

<sup>9</sup> P. Reuter, *Introduction to the Law of Treaties* (Pinter Publishers, London, 1989), p. 63.

as, for example, where the International Covenant on Civil and Political Rights provided that, in the case of certain provisions, there could be no derogations. It was not clear whether reservations could be made to such provisions. In practice, a number of States did declare certain "derogations" from the application of those provisions, but they did so under the heading of "reservations".

40. The result of the Commission's work on the topic could take a number of forms, in his view, but it was too early to make any firm prediction on that score. He did, however, agree with the Special Rapporteur about the title of the topic.

*The meeting rose at 11.40 a.m.*

## 2403rd MEETING

*Wednesday, 21 June 1995, at 10.05 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer.*

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

[Agenda item 6]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MAHIOU said that, in terms of quantity and quality, the first report of the Special Rapporteur (A/CN.4/470) was already more than a preliminary report because of the inventory it contained, the questions it raised and the analyses it suggested. The Special Rapporteur's concern to provide full information and facts and his clear and rigorous reasoning combined with a dialectical or adversarial approach that at times led him to break down questions and problems, not without some mischievousness. Thus, while he stated that the report endeavoured to enumerate the main problems raised by the topic and, in the title of chapter II, that it would present a brief inventory of the problems of the topic, he

raised 15 questions in a certain paragraph and 17 in another, for a total of 32 questions, in addition to those raised at various other points in the report. The Special Rapporteur had thus pushed to the limit the Cartesian method, whose first maxim, from the viewpoint of method, was to divide problems into as many parts as possible and necessary to solve them properly. That gave some indication of the richness of the "preliminary" report, which had more than enough to keep the Commission busy, not to mention the Special Rapporteur, who would certainly not fail to give his colleagues food for thought during the debate.

2. The aim at the present stage was not to engage in a substantive debate, even though the Special Rapporteur seemed to be inviting the reader of the report to do just that by drawing attention to many developments and providing supporting evidence. For instance, he discussed at great length the controversy, in respect of the validity or "lawfulness" of reservations, between those in favour of opposability and those who advocated permissibility. It was true that the controversy was perhaps more than a doctrinal one and that significant consequences might well be attached to each alternative. That problem, and many others, showed that the Commission was dealing with a highly technical and very complex issue because there was a whole set of principles and rules that it had to try to dovetail. The question of practice was, of course, also important: the Commission had to be able to find solutions which were acceptable to States and which would fill the gaps and clear up any obscurities in already adopted texts.

3. In that respect, the report went a long way towards elucidating earlier works. It had rightly been described as standing on its own, since it gave the members of the Commission all the information they needed to take decisions and, as appropriate, suggest guidelines for the Special Rapporteur.

4. Many of the numerous questions asked by the Special Rapporteur were interrelated so that the answer to one often provided the answer to others. None the less, some questions needed clarification because they might lead the Commission a bit too far away from the topic. Three examples were worth mentioning.

5. First, the Special Rapporteur stated that it would no doubt be appropriate for the Commission to undertake a study of the very notion of "object and purpose of the treaty". That notion went beyond the question of reservations and touched on other aspects, including the interpretation of treaties and, of course, even their application. A second example was where the Special Rapporteur indicated that it should be asked, *inter alia*, when a convention should be regarded as a limited multilateral treaty, by reference to article 20, paragraph 2, of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"). The third example, which was perhaps less clear, was one which related, among the problems which might arise, to the issue of the body which was competent to accept reservations to constituent instruments of international organizations. By those three examples, he wished to emphasize that the Commission must avoid any extension of creeping jurisdiction.

<sup>1</sup> Reproduced in *Yearbook . . . 1995*, vol. II (Part One).