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Summary record of the 2403rd meeting

Topic:
<multiple topics>

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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,[1] 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.

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

6. Approaching the topic from another angle, he questioned how the Commission ought to proceed in view of the different issues dealt with in the three conventions, namely, the 1969 Vienna Convention, 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"). The basic question in that regard was whether the Commission should work on those three areas at the same time or whether it should adopt the Cartesian method and divide the areas up by considering the Conventions one after another. If it decided to discuss simultaneously all the problems which related to the three Conventions and which were already complex in themselves, it might make its task more complex and, consequently, more difficult. On the other hand, if it were first to consider solutions which might be proposed for the "matrix" 1969 Vienna Convention, it would then have less difficulty dealing with the two other Conventions.

7. Referring to the question of options and guidelines to be given to the Special Rapporteur with regard to the form the Commission's work might take such as a study, model clauses or a draft convention, he said that it could, of course, be asked whether it was not premature to decide on that point at the present stage because, when the Commission started on a topic, it usually preferred to begin considering it, ask questions and draw up an inventory before the form of its work took shape. Such an approach was undoubtedly the right one in the case of a new topic, but, since the topic under consideration was one on which the Commission had already done a great deal of work, the Special Rapporteur should be clear about the form which the results of the work would take. That was why he wished to state his opinion on the relevant paragraphs of the report in which the Special Rapporteur gave the Commission several options.

8. One solution proposed in the report, which was also the most timid, consisted in preparing a detailed study or, possibly, a commentary on existing provisions with a view to clarifying the reservations regime. He personally was not strongly in favour of that solution, perhaps as a matter of principle, because he had always regarded codification as the Commission's main task under its Statute and thought that it should follow other courses of action only by way of an exception. That position was, he thought, particularly justified in the present case because a study would amount merely to identifying the existing gaps and ambiguities and would thus be a kind of exercise in self-criticism by the Commission.

9. The second solution proposed by the Special Rapporteur, which consisted in the preparation of model clauses, would be more acceptable in that the Commission would draw up a text that could serve as inspiration or a guide for States. For that reason, he might be prepared to go along with a solution of that type.

10. However, he confessed that he was somewhat more ambitious on the Commission's behalf. There was, after all, nothing to stop the Commission from setting itself the goal of drafting a set of articles on the understanding that a decision would be taken at a later stage on what should become of that draft. As the Special Rapporteur pointed out, that third solution itself was subdivided into two possible alternatives: either a draft protocol to each of the existing Conventions or a consolidated text applicable to all three Conventions, which would in a sense be a separate convention on reservations.

11. He had some hesitations about a single consolidated text, which was an ambitious, but delicate idea. In that connection, he recalled the Commission's experience in relation to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. On that occasion, the Commission had had four instruments before it: the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. At the outset, its ambition had been to codify the topic for all of those four instruments, but its work had gradually led it to adopt a more modest approach. It had therefore confined itself to a consolidated text for the first two Conventions, the problem in the case of the two others being solved, by means of protocols.

12. In view of the difficulties involved in any consolidation exercise, he would be inclined to recommend that the Commission should start by drafting a protocol that would fill the gaps and remove the ambiguities of the 1969 Vienna Convention; such a text would mark out the ground very clearly as far as problems and possible solutions were concerned.

13. In conclusion, he commented on the need, referred to several times in the report to preserve what had been achieved if the Commission adopted the idea of draft articles. He did, of course, share the Special Rapporteur's very legitimate concern to respect what had been laboriously drafted and adopted by States, but he did not think that that concern could be fully met. If an interpretation was already an amendment, how, a fortiori, could ambiguities be removed and gaps filled without at least some amendment of the provisions of existing conventions? The members of the Commission should therefore not have their hands tied, even though that might mean that caution was called for. It was far more in spirit than in letter that the Commission had to respect the existing instruments if it wanted to improve them on certain points, without, of course, calling in question their basic principles.

14. Mr. VILLAGRÁN KRAMER recalled that American jurists had undertaken as early as 1956 to codify inter-American rules on reservations to treaties and that the codification work done in the framework of the 1969 Vienna Convention had introduced enough flexibility so that they were able to endorse the solutions proposed on that occasion. He did not think the topic had undergone any significant change since then in terms of the development of international law. It was nevertheless useful for the members of the Commission to try to spell out their ideas on the topic and make some suggestions. The Special Rapporteur should also continue his efforts, as his comments were very pragmatic and interesting. ICJ

had stated at least twice that the 1969 Vienna Convention codified the law of treaties. Contrary to the view expressed in the report, there was therefore no presumption in favour of the permissibility of reservations, since articles 19 and 20 of the Convention were rules of international law in force. However incomplete it might be, the applicable legal regime was very real. Both PCIJ and ICJ had declared that States could restrict the exercise of their sovereign rights, either by self-limitation or through international agreements. Reservations being the expression of a sovereign right of States, the latter could impose limits on themselves either through an international policy decision by the Government or by accepting restrictions within the framework of an international agreement. The practice in that respect, of which the United Nations Convention on the Law of the Sea and the human rights conventions were examples, showed that solution to be satisfactory: in the exercise of their sovereign rights, States decided on a case-by-case basis whether or not they accepted reservations to a particular instrument. Extending the codified regime by opting for the second limb of the alternative set out by the Special Rapporteur in his report was a course of action that deserved to be considered by the Commission, but it was not necessarily the solution to be adopted in the last analysis.

15. There were, of course, areas in which reservations were not recommended. The exercise of the right to make reservations must unquestionably be restricted in certain very particular cases, for example, in connection with the human rights conventions. But it was worth recalling that, thanks to the admissibility of reservations to the inter-American human rights conventions, those instruments had gradually been accepted and then applied in all countries in the region, States having progressively renounced the reservations formulated in the 1960s. Legal experts in developing countries in particular ought to consider whether there was not cause for some flexibility with regard to reservations to human rights instruments or other difficult and important questions. The Special Rapporteur should also look more closely at how reservations were handled in the constituent instrument of the International Labour Organisation, i.e. the fact that they could be accepted or rejected at the time of ratification. The solution chosen by ILO was interesting and showed that States were prepared to accept the regulation of reservations in a treaty context in sufficiently clear terms and in such a way as to guarantee an instrument's adoption and implementation. As to the practice of making declarations containing reservations to a treaty, the criterion of admissibility should not be form, but substance. If a declaration contained a reservation and the treaty prohibited it, the declaration was inadmissible, since it was for the authority responsible for registering the instrument to make that determination. The Special Rapporteur should therefore give closer study to all matters relating to mechanisms for settling the disputes to which reservations might give rise. The distance travelled since ICJ had discussed the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide indicated that States had learned to make the most of the current regime of reservations, but that regime was not uniform and, with the help of the settlement of disputes, it might be possible to specify the most important aspects of the question in order to move towards the greatest possible uniformity.

16. In closing, he said that he endorsed the Special Rapporteur's proposal to change the title of the subject and was in favour of doing so as quickly as possible. He also supported what the Special Rapporteur, in his report, had termed a "modest" approach, which, to his mind, was realistic, not modest, because it was by stating the existing rules that most problems could be overcome. Furthermore, a clarification of past practice in respect of reservations would allow such practice to be set forth as rules, something that would in part involve codification and in part the progressive development of international law. For the time being, he was opposed to any changes in the 1969, 1978 and 1986 Vienna Conventions. Lastly, the interesting idea of model clauses proposed by the Special Rapporteur was worth adopting. In short, the current regime of reservations was satisfactory, but should be made more specific and be enlarged, although that did not mean that the amendment of existing texts, in particular articles 19 and 20 of the 1969 Vienna Convention, should be encouraged.

Organization of the work of the session (*continued*)*

[Agenda item 2]

17. The CHAIRMAN proposed that the meeting should be adjourned to allow informal consultations to be held.

18. Mr. ARANGIO-RUIZ asked what the subject, nature and purpose of such consultations were.

19. The CHAIRMAN said that the purpose of the proposed consultations was essentially to allow an exchange of views on the follow-up to the consideration of the topic of State responsibility. Should the draft articles be referred to the Drafting Committee or should the Commission refrain from doing so if the Special Rapporteur and other members regarded that second alternative as preferable? Many members of the Commission thought that proposals should not normally be referred to the Drafting Committee unless accompanied by sufficiently clear instructions and that the Drafting Committee could not very well consider draft articles on which the Commission remained divided in plenary. Thus, the point was to review the situation in order to help the Drafting Committee in its work if the decision was taken to refer the draft articles to it.

20. Mr. ARANGIO-RUIZ, speaking as Special Rapporteur on the topic of State Responsibility, pointed out that it had always been the Commission's practice not to decide on referral to the Drafting Committee until after the final summing-up by the Special Rapporteur on the topic in question. Hence, the Commission was clearly in the presence of an extraordinary procedure. He did not know who had taken that initiative, of which he personally had been completely unaware, having even been absent a few days from Geneva when the decision had

* Resumed from the 2401st meeting.

been taken. He had noticed that a list of supposedly interested members had been circulated and the first meeting had been attended by a number of persons, some of whom had not even known that the meeting had been scheduled. The document in his possession spoke of "informal consultations on State responsibility". He repeated that it was an extraordinary procedure and he could only wait to see what would come of it. Considering the known brevity of his absence, he wondered how it came about that the meeting should be proposed before he came back: unless, of course, the meeting represented an attempt to remove article 19 of part one beforehand.

21. The CHAIRMAN said it went without saying that the Commission's informal consultations were open to all members. If names had been circulated, it had been only to make sure that at least a few members would be available on that day. A decision had to be reached on an important matter, hence the need to take a position that was unanimous in every respect. There could be no talk of an extraordinary procedure; the idea was merely to review the question and to decide together how to proceed.

The meeting rose at 10.55 a.m.

2404th MEETING

Thursday, 22 June 1995, at 10.15 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. Güney, 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,[1] A/CN.4/L.516)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. de SARAM thanked the Special Rapporteur for an excellent introduction to what was a very specialized field and for setting out in his first report (A/CN.4/470) the modern and convoluted history of reservations.

2. As to the question of overall direction, in his opinion the preparation of a consolidated draft convention on reservations to take the place of the reservations provisions in the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"), 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"), and to deal with other matters deemed of relevance would be far too formidable an undertaking. Moreover, in the real world of inter-State treaty negotiations, it was unlikely that a consolidated convention would be judged worthwhile, and such an instrument might very well make matters more confusing than they already were. Nor, for similar reasons, did the preparation of draft protocols to the above-mentioned Vienna Conventions seem justifiable. Furthermore, as the Special Rapporteur had noted, the parties to a treaty and the parties to an additional protocol might not be the same, and many States would then find themselves at cross-purposes, thus creating even more confusion.

3. As the Commission knew, the subject of reservations to treaties lay in a grey zone between, on the one hand, a desire for complete logical consistency (the simplest expression having been the original "unanimity rule" prescribing that a reservation proposed to a multilateral convention required the consent of all States parties) and, on the other hand, the concept that every State, in its sovereignty, was entitled to make the reservations it wished and to become party to a convention subject to such reservations, regardless of any objections made. The uncertainties of the reservation provisions in the 1969 Vienna Convention and the many difficult technicalities experienced in their application were a measure of the problems faced in treaty negotiations when the compulsion for logical symmetry encountered the concern that a State's sovereign discretion to determine the extent of its binding commitments should not at any stage be overly constrained. Accommodating those two opposing factors in the higher interests of "international cooperation" was not at all easy, as those provisions showed.

4. Consequently, guidelines and model clauses would seem to be a reasonable objective. That would enable the Commission to examine and fully appreciate the technicalities involved and broaden the focus of attention to include not only what could transpire after, but also what should transpire before, the adoption of a treaty.

5. Before the Commission began the actual drafting of guidelines and model clauses, it must have a clear view of all the inconsistencies and uncertainties in the articles of the 1969 Vienna Convention, much as the Special Rapporteur had done in the list in his report. It was doubtful, however, whether the Commission should immerse itself in "doctrine" or "doctrinal" materials, apart from Mr. Bowett's pioneering article.[2]

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

[2] See 2400th meeting, footnote 2.