

Document:-
A/CN.4/SR.2499

Summary record of the 2499th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1997, vol. I

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82. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the Drafting Committee had linked the words "shall not be arbitrarily" more to the phrase "denied the right to acquire the nationality of the successor State" than to the preceding phrase "deprived of the nationality of the predecessor State". If there was a problem of syntax, the formulation could be reworded by the Drafting Committee.

83. The CHAIRMAN said he thought that Mr. Crawford's problem was of a more substantive nature.

84. Mr. MIKULKA (Special Rapporteur) said that the purpose of the article was to obviate the risk that some persons might not be covered by legislation or a treaty and hence be deprived of the right to acquire a nationality. Moreover, a law or treaty might be fully consistent with the article yet be applied in an arbitrary fashion. Article 15 was intended to address such cases and might be applied, for example, to action by an individual bureaucrat.

85. Mr. SIMMA drew attention to the saying *lex posterior derogat priori*, which meant in essence that a later legislator might be wiser than an earlier one. The same could be true of the members of the Commission, even within such a short period as the current session. He shared Mr. Crawford's concern regarding an issue of possibly fundamental importance that could not be resolved simply by drafting. He asked the Special Rapporteur whether the bureaucrat he had had in mind could deprive a person with a right to a nationality of that entitlement in a non-arbitrary way. Surely, there was a general prohibition on depriving somebody of a nationality to which he or she had a right. Arbitrariness would constitute an additional element of illegality.

86. The CHAIRMAN said he understood that the point being made by Mr. Crawford and Mr. Simma was that prohibition of the arbitrary exercise of State powers implied recognizing that such powers existed notwithstanding the rights of the persons concerned.

87. Mr. BENNOUNA, speaking on a point of order, said that he objected to the way in which the discussion was being conducted. All members of the Commission should be afforded the opportunity to express their views on a subject before the presiding officer offered his comments.

88. The CHAIRMAN said that he took note of the point of order.

89. Mr. CRAWFORD said that he fully understood and accepted the Special Rapporteur's explanation of the purpose of article 15. He suggested that the following rewording of paragraph 1 might preclude any misinterpretation:

"In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State or denied the right to acquire the nationality of the successor State, to which they are entitled in relation to the succession of States."

The emphasis would then be shifted to the application of laws or treaties.

90. Mr. BENNOUNA said that, as a jurist, he experienced difficulty with the idea of prohibiting "the arbitrary", which appeared to be a great discovery. Indeed, arbitrary acts were prohibited in all circumstances, as a fundamental legal principle. The same procedure should be followed as in the case of article 11 as proposed by the Special Rapporteur: the content of article 15 should be reformulated as a paragraph of the preamble which would emphasize the need to refrain from any arbitrary acts. Even that was labouring the point.

91. To his mind, the article related to a limited discretionary power offered to the State rather than a State's right exercised pursuant to the provisions of a law or treaty. If it related to a right, Mr. Crawford's comment was perfectly justified. If it referred to a limited discretionary power, such power could and should be exercised when certain conditions were fulfilled, but the State could not exercise it arbitrarily. The wording of the article might therefore be improved by introducing that notion.

92. Mr. PAMBOU-TCHIVOUNDA said that Mr. Ferrari Bravo, in speaking of wrongful acts, had drawn attention to what should have been the object of article 15. The acts in question were undoubtedly illegal. However, he was unhappy with the word "arbitrary". Legally speaking, the term "arbitrary" referred not only to what was contrary to the law but also to what was not substantiated. Where the State considered that the conditions for non-attribution of nationality existed and it substantiated its decision, who was to say whether its action was arbitrary or not. The underlying idea was to prohibit and punish wrongful and illegal acts in situations covered by specific laws and international treaties. He added that it would be logical, in his view, to move article 15 and place it immediately after article 10, on respect for the will of persons concerned.

The meeting rose at 1.05 p.m.

2499th MEETING

Wednesday, 25 June 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

later: Mr. João Clemente BAENA SOARES

Present: Mr. Addo, Mr. Al-Bahama, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco,

Mr. Hafner, Mr. He, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma.

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE² (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr.1).

PART I (*concluded*)

ARTICLE 15 (Prohibition of arbitrary decisions concerning nationality issues) (*concluded*)

2. Mr. LUKASHUK proposed that the words “or general international law” should be added at the end of paragraph 1, since human rights issues were essentially a matter of general international law rather than of treaty law. Moreover, since the Commission was engaged in drafting a “soft law” instrument which would be incorporated in international law once its rules had been recognized as being rules of customary law, it was important to ensure that the provisions of article 15, paragraph 1, did not stand in the way of the implementation of the articles thus drafted.

3. Mr. SIMMA said that, in his view, the right of a person to acquire a certain nationality was by no means a matter of general international law and that the words “any law or treaty” were correct and should be retained.

4. Mr. ROSENSTOCK, referring to Mr. Lukashuk’s proposal, said that, in his view, it would be better to delete the words “in accordance with the provisions of any law or treaty”. One of the advantages of doing so would be that general international law would not, for the future, be expressly excluded.

5. Mr. BROWNLIE said he agreed with Mr. Simma that general international law was without relevance to the paragraph. He was not greatly in favour of deleting the last part of paragraph 1, which he considered to be useful. However, the words “any law” were too general and the Commission should request the Drafting Committee to look into ways of making them more specific.

6. Mr. SIMMA recalled that some members, including Mr. Crawford and himself (2498th meeting), had raised the question of the interpretation of the word “arbitrarily” and, in particular, had wondered whether persons could be deprived of their nationality otherwise than arbitrarily. One way of avoiding the ambiguity would be to amend the article to read: “No one shall be deprived of his or her entitlement to nationality through an arbitrary application of the provisions of any law or treaty”. In that case, the reference to the “provisions of any law or treaty” would be essential.

7. Mr. PAMBOU-TCHIVOUNDA said that, notwithstanding the general nature of the terms used, the paragraph dealt specifically with a legality directly related to the topic, in other words, to nationality or to statelessness. Retaining the reference to the provisions of laws or treaties somewhere in the paragraph might make it possible to delete the word “arbitrarily”, which he found subjective.

8. Mr. AL-BAHARNA said that any ambiguity would be removed if the last part of paragraph 1 was deleted and explanations were included in the commentary on the provisions of laws, treaties or general international law.

9. The CHAIRMAN suggested that the Commission should refer the article back to the Drafting Committee with the request that it should be reviewed in the light of the amendments proposed in plenary.

10. Mr. MIKULKA (Special Rapporteur) said that referring article 15 back to the Drafting Committee should be based on very serious reasons, whereas the problems raised were quite minor. In the first place, some of those problems arose from an imperfect knowledge of the provisions of other relevant instruments, including article 15 of the Universal Declaration of Human Rights,³ paragraph 2 of which referred to the concept of arbitrary deprivation of nationality. Secondly, as to the interpretation of the Commission’s precise intention in the article under consideration, he thought that Mr. Crawford’s proposal (2498th meeting) that the last part of the paragraph should be moved to the beginning and that the words “in accordance with” should be replaced by the words “in the application of” was acceptable. He had the impression that it had received the support of many members.

11. Mr. CRAWFORD read out the text he was proposing to replace article 15, pointing out that the new version had only one paragraph:

“In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State or arbitrarily denied the right to acquire the nationality of the successor State or any right of option to which they are entitled in relation to the succession of States.”

12. Mr. LUKASHUK said that he had no basic objection to a provision which merely proclaimed a general prohibition of any arbitrary decision on issues of nationality. The wording nevertheless chosen seemed to restrict that principle, since it could be interpreted to mean that persons concerned should not be arbitrarily deprived of nationality only “In the application of the provisions of

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

² For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.

³ See 2475th meeting, footnote 8.

any law or treaty". In his view, it would be best to delete those words.

13. Mr. ROSENSTOCK, Mr. GALICKI and the CHAIRMAN, speaking as a member of the Commission, said that they were also in favour of the deletion of those words, which were unnecessarily restrictive.

14. Mr. MIKULKA (Special Rapporteur) said that discussion on article 15 had at first focused on the question of where it was to be placed in the draft. He had explained that, unlike other provisions, article 15 dealt with the stage subsequent to the entry into force of a treaty, that is to say that of the implementation of the treaty's provisions. It was at that point that any arbitrary decision on the part of national administrations had to be avoided and that was what the words in question were designed to make clear. If they were deleted, he would have no other choice but to reproduce them, without change, in his commentary.

15. Mr. GOCO proposed that articles 14, 15 and 16 should be combined in a single article which would be entitled "Non-discrimination, prohibition of arbitrary decisions and processing of applications without delay". For reasons of clarity, he would also have preferred that the words expressing the idea that persons concerned were entitled to nationality in relation to the succession of States should appear at the beginning of the paragraph.

16. Mr. CRAWFORD said that the best solution would be to redraft the paragraph completely so as to state that nationality could not be arbitrarily denied to persons concerned who were entitled: (a) to the nationality of the predecessor State; (b) to the nationality of the successor State; or (c) to the choice of their nationality.

17. Mr. ADDO said that it would not be wise to make such a change.

18. Mr. PAMBOU-TCHIVOUNDA said that he also had doubts about the words "In the application of the provisions of any law or treaty", whose meaning he did not understand in the current context. He had reservations about the ambiguity of the vague concept of legality.

19. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with Mr. Pambou-Tchivounda: he also did not see what exactly was meant by "provisions of any law".

20. Speaking as Chairman, he said that, as he understood it, the Commission had not taken up Mr. Goco's suggestion that articles 14, 15 and 16 should be combined; did not wish to delete the words "In the application of the provisions of any law or treaty" from the text proposed by Mr. Crawford; and, if he heard no objection, he would take it that the Commission agreed to adopt the new text of article 15 as proposed by Mr. Crawford.

Article 15, as proposed by Mr. Crawford, was adopted.

ARTICLE 16 (Procedures relating to nationality issues)

21. Mr. PAMBOU-TCHIVOUNDA said that, unless the title of Part I of the draft was amended, articles 16 and 17

(Exchange of information, consultation and negotiation) were out of place because they were not principles.

22. The CHAIRMAN, speaking as a member of the Commission, proposed that the words "administrative or judicial" should be deleted because he was not sure whether the word "or" was appropriate.

23. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that the result of a review might sometimes be legally not binding. The qualifying phrase "administrative or judiciary" at least had the merit of clearly circumscribing the review as a process whose result was enforceable in internal law.

24. The CHAIRMAN said that his problem was with the word "or", which implied that the two kinds of review were mutually exclusive, whereas it ought to be possible, where necessary, to carry them out successively.

25. Mr. BROWNLIE said that he was in favour of retaining the current wording, which attempted to combine common law modes of review with those of civil law. The essential point, in his view, was that the review mechanism should be directly invocable by the person concerned.

26. The CHAIRMAN said that that point was already covered by the word "effective".

27. Mr. GOCO proposed that the end of the article should be reworded to read: "shall be open to appeal and/or review" because the word "review" implied that there had been an abuse of discretion amounting to lack of jurisdiction, whereas the word "appeal" referred to a process in internal law that did not necessarily have that connotation.

28. The CHAIRMAN pointed out that that proposal introduced a new element.

29. Mr. ADDO said that he supported the idea of retaining the words "administrative or judicial" for the reasons put forward by the Chairman of the Drafting Committee and also because the person concerned should be given a choice between the two types of review or should be able to use them consecutively.

30. Mr. RODRÍGUEZ CEDEÑO said he supported the text proposed by the Drafting Committee, but thought that, in Spanish, the word *revisión* should be replaced by the word *recurso*.

31. The CHAIRMAN confirmed that, in Spanish, *recurso* was the most suitable term.

32. Mr. PAMBOU-TCHIVOUNDA said he hoped that the Commission would retain the two adjectives to describe the nature of the remedies, but proposed that the word "effective" should be deleted. It was meaningless, since the article dealt with a possibility that could not be effective until it had been realized.

33. Mr. HAFNER said that he was in favour of retaining the text as it stood, for the reasons put forward by the Chairman of the Drafting Committee. The solution of replacing the word "or" by the word "and" would be even less acceptable. It would be better to retain the word "or"

and to explain in the commentary that that was not to be taken as an exclusive alternative. An explanation of the meaning between “review” and “appeal” could be given in the commentary. The word “effective” had to be kept in order to cover the case brought up by Mr. Brownlie.

34. The CHAIRMAN, supported by Mr. Sreenivasa RAO (Chairman of the Drafting Committee), said the proposal that the text should be left as it stood and that it should be explained in the commentary that the word “or” did not involve any exclusion was a reasonable solution.

35. Mr. GOCO referred again to the need to draw a distinction between an appeal, which raised questions of law, and a review, which did not necessarily do so.

36. Mr. DUGARD pointed out that the problem arose from the fact that different legal systems had differing approaches to what constituted an appeal or a review. Rather than amending the article, however, it would be better to provide an explanation in the commentary.

37. Mr. HE said that he wished to place on record his reservations about the word “effective”.

38. The CHAIRMAN pointed out that, in the English text of the Convention for the Protection of Human Rights and Fundamental Freedoms, the term used was “review”. He suggested that the Commission retain that term in article 16, it being understood that its meaning would be explained in the commentary.

39. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 16.

Article 16 was adopted.

ARTICLE 17 (Exchange of information, consultation and negotiation)

40. The CHAIRMAN said he took it that the Commission agreed to adopt article 17 as proposed by the Drafting Committee.

Article 17 was adopted.

ARTICLE 18 (Other States)

41. The CHAIRMAN, speaking as a member of the Commission and supported by Mr. PAMBOU-TCHIVOUNDA, said that, in paragraph 1, he would like to see the word “genuine” deleted because it was inappropriate: it was enough to describe the link as “effective”. The Chairman of the Drafting Committee had explained that the word had been taken from the judgment of ICJ in the *Nottebohm* case,⁴ but only the word “effective” was used in the French language version of that judgment, which was the original text.

42. Mr. RODRÍGUEZ CEDEÑO, supported by Mr. CANDIOTI, said that the same problem arose in the Spanish text. The word *efectivo* would be enough.

43. Mr. LUKASHUK said that the terminology used in Russian was also deficient. A single word would suffice, as in French and Spanish.

44. Mr. BROWNLIE said that the *Nottebohm* case had been one of abuse of the right to grant nationality or of fraudulent naturalization, hence the use in English of the words “genuine and effective”.

45. Mr. ADDO said that those two words were perfectly clear in English and he did not see why one of them should be deleted.

46. The CHAIRMAN said he had checked the terminology used in the *Nottebohm* case: the word *effectif* had been translated variously, as “genuine”, “genuine and effective”, “real and effective” and “effective”. He asked the English-speaking members of the Commission whether they would have any objection to the use of the word “effective” alone.

47. Mr. MIKULKA (Special Rapporteur) said the Commission could indicate in the commentary that the word “effective” referred to the concept dealt with by ICJ in the *Nottebohm* case.

48. Mr. BROWNLIE said that the use of the word “effective” alone was entirely satisfactory and that a link that was not “genuine” would not be “effective”.

49. The CHAIRMAN said he took it that the Commission agreed to use only one adjective to qualify the word “link” in article 18, paragraph 1, namely, *effectif* in the French version, “effective” in the English and *efectivo* in the Spanish, and the corresponding term in the other languages, it being understood that it would be made clear in the commentary that the term covered all the words used cumulatively by ICJ in its judgment in the *Nottebohm* case.

It was so decided.

50. Mr. CRAWFORD said that, in paragraph 2, he urged that the words “for the purposes of their domestic law” should be deleted because they implied, *a contrario*, that States were not allowed to treat the persons concerned as nationals of any State for any purposes other than those of their domestic law. Yet it was precisely for the purposes of international law that States needed to be able to treat such persons as nationals of a given State. For example, residents of bantustans had been considered by States to be nationals of South Africa for the purposes, not of domestic law, but of international law, under which the policy of apartheid had been illegal. The paragraph as currently drafted privileged a State that did not treat certain persons as nationals when it ought to, or vice versa, over States that acted in conformity with international law.

51. Secondly, the cases in which such issues had arisen in the past had almost always involved a conflict of laws, for example, when the courts of one State had applied the racially discriminatory laws of another State. That had not been a purely domestic issue.

52. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) pointed out that an underlying theme of the text was that nationality had essentially to be provided for in internal law, that internal law must be in accordance

⁴ *Ibid.*, footnote 6.

with certain international standards and principles and that States did not have total discretionary power in that regard. If the words were deleted, paragraph 2 could be interpreted as authorizing third States to adopt a position contrary to that of the State concerned on a matter of nationality, and, in the absence of any qualifications or explanations, that would mean that internal law would be entirely subordinated to international law, something that States would never accept.

53. Mr. CRAWFORD pointed out that paragraph 2 was a savings clause. It would be odd if States, the majority of which wanted to do what the provision gave them the right to do, should disarm themselves in the face of unlawful conduct on the part of the State concerned. As a savings clause, the paragraph struck a reasonable balance, leaving open broader issues which in any event were outside the scope of the draft articles because they involved fundamental illegality, while reserving, and rightly so, the right of other States to respond for the purposes of their domestic law.

54. Mr. BROWNLIE pointed out that, since the draft articles dealt with nationality in relation to the succession of States, they were not directly related to acts that were fundamentally invalid under international law. That was the real problem to which the paragraph gave rise. The fact was that some conferments of nationality were invalid because they were contingent on invalid acts by States affecting other States. Although paragraph 2 did not deal with that type of problem, there seemed to be some confusion. Perhaps another proviso should be incorporated in the text to take care of that specific issue.

55. Mr. ROSENSTOCK said that he would have no objection if it were made clear in the preamble that the draft articles dealt only with legitimate State succession. Also, as paragraph 2 was a savings clause, the Commission need not be afraid to delete the words "for the purposes of their domestic law".

56. Mr. GALICKI said his concern was that the effect of Mr. Crawford's proposal would be to widen the scope of the savings clause in paragraph 2. He would therefore prefer to keep the text as drafted. Although the paragraph embodied a savings clause, it invited States to undertake certain activities that could be regarded as "unfriendly" and might therefore cause problems. As the Commission had stressed that questions of nationality were a matter mainly for internal law, it should limit the effect of acts carried out by other States in that area to the domestic law of those States. If such acts had international effects, the paragraph might not be accepted by States.

57. Mr. CRAWFORD said that Mr. Galicki's view could be reflected in the commentary. The Commission should not, however, avoid taking positions of principle, particularly on first reading, out of concern that they would be unacceptable to States. It was of course true, as Mr. Brownlie had said, that it was not a matter of looking at the validity of the State succession, but, even in the case of valid succession, fundamentally unlawful acts could be carried out: a State could, for instance, deny its nationality to certain persons on ethnic or racial grounds. Third States should not be defenceless in the face of such a situation.

58. Mr. MIKULKA (Special Rapporteur) said that he naturally endorsed Mr. Crawford's proposal: the restrictive clause in question had not appeared in the original draft article he had proposed in his third report (A/CN.4/480 and Add.1).⁵ The problem was that, as it stood, the paragraph could be misinterpreted so that it limited the possibility of completely lawful action by third States in the face of unlawful situations created by the State concerned.

59. As to those who opposed the proposed deletion on the ground that paragraph 2 could authorize States to intervene in the domestic affairs of the State concerned, that paragraph provided for the situation of stateless persons and so did not come within the jurisdiction of that State; accordingly, there could be no intervention in the domestic affairs of a State that should have granted its nationality, but had not done so.

60. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that he was entirely in agreement with Mr. Crawford. States must have the right to assess when wrong was done by other States and, in such a case, there must be a remedy. If the expression in question was deleted, the article would mean that a State could substitute its discretion for the discretion of another State that had wrongfully denied its nationality to persons concerned.

61. Mr. BROWNLIE proposed that paragraph 2 should be deleted in its entirety. It was an inefficient provision and could even have damage in it. It dealt with the problem of the invalidity of acts of State in international law—a problem the Commission had decided to leave on one side.

62. Mr. GALICKI, Mr. ADDO and Mr. RODRÍGUEZ CEDEÑO said they too considered that paragraph 2 should be deleted.

63. Mr. DUGARD said he considered, on the contrary, that it was important to keep the paragraph. The Commission had debated at some length the principle whereby the nationality of no person could be removed on racial or ethnic grounds. If the paragraph were deleted, that would dispel the consensus reached on the matter, which in fact had never been closely examined and on which State practice remained uncertain. The Commission must have the courage to deal with it in its draft.

64. The CHAIRMAN, having sounded out the Commission, noted that it was in favour of retaining paragraph 2 of article 18 and of deleting the words "for the purposes of their domestic law". He said that, if he heard no objection, he would take it that the Commission agreed to adopt article 18, as amended.

Article 18, as amended, was adopted.

Part I, as amended, was adopted.

Mr. Baena Soares took the Chair.

⁵ For the text of the draft articles proposed by the Special Rapporteur, *ibid.*, para. 14.

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

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

65. The CHAIRMAN reminded members that 1997 was the fiftieth anniversary of the establishment of the International Law Commission and that the Sixth Committee was all the more likely to pay much more attention to its work. It would therefore be desirable to reach some concrete, albeit provisional, conclusions, on the basis of the Special Rapporteur's second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).

66. He would suggest that the Commission should proceed to discuss that report in four stages and, in that connection, he invited the members of the Commission to focus on each of the four parts in turn and to refrain from speaking on other matters. He would also draw attention to the fact that the Commission was short of time. The discussion should end on 1 July.

67. Mr. KATEKA said he regretted that the Commission had to discuss such a rich report in haste. Rather, it should reflect at leisure on a vast problem that it had barely started to consider. Also, while the idea of examining the report in four stages was perhaps interesting, that mode of procedure should not prevent members wishing to make a general statement from being heard by the Commission. It had before it not a set of draft articles that could be analysed article by article, but a general study on which he for one intended to make general comments in the near future.

68. Mr. ROSENSTOCK and Mr. ADDO said they too trusted that members of the Commission would not be deprived of the possibility of making a general statement if they considered it useful.

69. The CHAIRMAN said that his suggested way of proceeding had been proposed by the Special Rapporteur and approved by the Commission. He was therefore surprised that what had been agreed with regard to the arrangements for the discussion was being questioned. In any event, all members were always free to make the comments they wished.

70. Mr. PELLET (Special Rapporteur), introducing chapter II of his second report, said that, unlike chapter I, which had contained solely background information, chapter II dealt with two substantive, and closely linked, questions that were highly sensitive and controversial; first, the question of the unity or diversity of the rules applicable to reservations to treaties and, secondly, the more specific question, which was actually covered by the first question, of reservations to human rights treaties.

71. For reasons he would return to later, he very much hoped that the Commission would not simply comment

on that part of the report, but that it would infer from that chapter conclusions which were as firm and clear as possible and which he had tried to summarize in the draft resolution that appeared at the end of the second report.

72. The "old" members of the Commission would remember that he had already introduced the same report in 1996.⁷ In the introduction he proposed to make for the new members, he would endeavour to take account of the reactions to which his statement had given rise in the Commission itself and in the Sixth Committee and also to express a few new ideas. In that connection, he again invited all members of the Commission to indicate any oversights they may have noted in the bibliography, in annex I to the second report, and which prompted one remark of interest: out of the some 300 titles it included, approximately 60 titles of works or articles related to reservations to conventions on human rights or humanitarian law. That showed, if indeed it were necessary to do so, how important and topical the question of reservations to treaties in that field was. There were many recent works on the matter, including an excellent study by a former member of the Commission, Mr. B. Graefrath, entitled "Reservations to human rights treaties—new drafts, old issues".⁸ Also, Mr. Crawford had organized a seminar in Cambridge in March 1997 in collaboration with Professor Philip Alston⁹ and an even more recent symposium of the Société française pour le droit international had been held on relations between general international law and human rights.

73. The human rights treaty monitoring bodies had not been inactive, even though they had recently shown more circumspection following the irritation their vehemence had caused some States. That was attested to, for example, by the fact that, in January 1997, the Committee on the Elimination of Discrimination against Women had considered a report of the Secretariat on reservations to the Convention on the Elimination of All Forms of Discrimination against Women.¹⁰ The Committee had, however, not taken any decision on that report, pending the Commission's work on the matter.

74. States had also continued to take a stand in the matter, both in their treaty relations and in their relations with the competent human rights bodies: the relative abundance of replies he had received to the questionnaire¹¹ he had addressed to them was evidence of their interest. He extended special thanks to all those who had provided him with detailed information about their practice in that regard.

75. Those new elements had, however, not caused him to make any radical change in his initial analysis and the reactions of the members of the Commission and of rep-

⁷ See 2487th meeting, footnote 3.

⁸ Freely translated from the German ("Vorbehalte zu Menschenrechtsverträgen—Neue Projekte und Alte Streitfragen", *Humanitäres Völkerrecht*, vol. 9 (1996), No. 2, pp. 68-75).

⁹ The seminar was co-sponsored by the European University Institute and the Research Centre for International Law, Cambridge University.

¹⁰ See Report of the Committee on the Elimination of Discrimination against Women (Sixteenth and seventeenth sessions) (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 38 (A/52/38/Rev.1)*), para 353.

¹¹ See 2487th meeting, footnote 16.

* Resumed from the 2487th meeting.

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

representatives of States in the Sixth Committee had tended to strengthen the positions he had taken at the forty-eighth session, save perhaps for some minor points which related to the competence and role of the monitoring bodies and which he had decided to alter slightly.

76. As he had already explained (2487th meeting), he had tried to answer the following two key questions: first, should the reservations regime be adapted to take account of the object and/or nature of the treaty concerned (a question dealt with in chapter II, sections A and B) and, secondly, should specific rules regarding reservations be applied in the case of human rights treaties (section C)?

77. If the first question was answered in the negative, that is to say, if it was felt that the reservations regime was and should remain homogeneous, the answer to the second question seemed to follow as a matter of course: there was no reason to exempt human rights instruments from the general rules governing reservations. It would perhaps be wise, however, to establish that such was really the case and to investigate whether there might not be grounds for making an exception in that area, as advocated by human rights specialists. But that still left an aspect of the problem unsettled since, even if the second question was answered in the negative, the extent and limits of the powers vested in the growing number of bodies established to monitor the implementation of those instruments must still be determined.

78. He said that, on the question whether the legal regime applicable to reservations to treaties was and should remain homogeneous, he noted that the legal regime was based on the 1969 Vienna Convention, the provisions of which were reproduced in the 1986 Vienna Convention. It sufficed to read articles 19 to 23 of the 1969 Vienna Convention to conclude that there was no categorical answer to the question because the Convention stipulated that special rules were applicable to certain treaties. Thus, article 20, paragraphs 2 and 3, laid down specific conditions governing the validity of reservations to treaties concluded by a limited number of States or to the constituent instruments of international organizations. That clearly indicated that the authors of the 1969 Vienna Convention had not been unaware of the problem of the unity or diversity of the applicable rules, since they had not hesitated to differentiate the reservations regime where it was deemed to be appropriate. It was interesting to note, however, that they had found it unnecessary to make an exception for non-synallagmatic treaties such as codification conventions and human rights instruments, which he would refer to for convenience sake as "normative treaties". When they had looked into the question whether the non-contractual nature of such treaties should have implications for the legal regime applicable to reservations, they had obviously concluded that it did not. The only article of the 1969 Vienna Convention that provided for special treatment for humanitarian treaties was article 60 on termination or suspension of the operation of a treaty as a consequence of its breach.

79. The problem had, however, resurfaced in the meantime and a number of authors had argued that the "Vienna regime" (as established by articles 19 to 23 of the 1969 and 1986 Vienna Conventions) was not suited to normative treaties in general and to codification conventions and

human rights instruments in particular. The idea of a separate reservations regime had gained ground, especially in human rights bodies, and, in that context, the Commission could not possibly fail to discuss the subject. He had therefore decided to devote the bulk of chapter II of his second report to the subject. In chapter II, section A, he noted that the "normative treaties" category, which broadly corresponded to the former "law-making treaties" category, was extremely diverse. Not only did "normative treaties" exist in a variety of different fields (human rights instruments, but also codification conventions, private international law conventions establishing uniform law, ILO conventions, conventions on the law governing armed conflicts, certain technical treaties), but it was also unusual for a treaty to be entirely normative or entirely synallagmatic: in most cases, a single treaty contained both "contractual clauses" in which States recognized mutual rights and obligations and "normative clauses". That was also true in the area of human rights, even in the case of the Convention on the Prevention and Punishment of the Crime of Genocide, which most authors—and ICJ, judging by its advisory opinion of 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*¹² and its judgment in 1996 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*¹³—viewed as the quintessential normative treaty. The term "normative treaty" must therefore be understood as referring in reality to treaties in which normative provisions, that is to say provisions that were neither contractual nor reciprocal, prevailed in quantitative and qualitative terms.

80. Those findings led the Special Rapporteur to conclude that, if a special regime should be applied in the normative field, it would actually be applicable to "normative provisions" because the notion of a "normative treaty" was not very convincing in legal terms.

81. The problem was therefore whether the Vienna regime governing reservations to treaties was suited to "normative provisions" as opposed to contractual or synallagmatic provisions. That was the question to which he had endeavoured to reply both *de lege lata* and *de lege ferenda* in chapter II, section B.

82. In chapter II, section B.2, of his second report, he believed he had demonstrated that, although the authors of articles 19 to 23 of the 1969 Vienna Convention were aware of the fact that a general rule was probably not applicable under ideal circumstances to all treaties, they had conceived those articles as being applicable to all treaties that did not contain contrary provisions (except for limited treaties and constituent instruments of international organizations). Early in its proceedings, the Commission had itself recognized the desirability of formulating a rule that would be applicable to the largest possible number of cases and had concluded in its report to the General Assembly on the work of its fourteenth session that the rules it proposed referred to all multilateral treaties except those between a small number of States for which unanimity was the rule.¹⁴ The United Nations Con-

¹² See 2487th meeting, footnote 7.

¹³ See 2478th meeting, footnote 3.

ference on the Law of Treaties¹⁵ had endorsed those views for excellent reasons that he had endeavoured to set forth in chapter II, section B.3 (b) of his report. The main reason was that the Vienna regime, influenced by Latin American practice, was highly flexible and adaptable: firstly, by prohibiting States from formulating a reservation that was incompatible with the object and purpose of the treaty, article 19, subparagraph (c), of the 1969 Vienna Convention guaranteed that a State could never deform a treaty by means of a reservation. The pitfall of rigidity had been avoided through the decision to make the admissibility of a reservation dependent on a treaty's object—hence on its very essence rather than its integrity. Article 20, paragraphs 4 and 5, as well as articles 21 and 22, also established a liberal system, allowing States parties to remain “unaffected” by the reservation, since they could decide to object to it and to adjust the extent of their objection. Lastly and most importantly of all, it should be noted that the Vienna regime was strictly residual and applicable *only if* the negotiators had not made provision for different rules or supplementary filtering mechanisms in the text they had drafted. It followed that the regime should be viewed not as a yoke, but as a safety net providing assurances that, even in the absence of specific provisions, the rule applicable to a particular case would be clear. The regime could be set aside by States which so wished, *inter alia*, in the light of the particular nature of the treaty concerned. But the fact that that option was rarely used, even for human rights instruments, seemed to indicate that the Vienna rules were not only adaptable, but also well suited to existing needs. The appropriateness of adding “model clauses” to the draft articles in all cases where the Commission saw fit to suggest possible variations on the Vienna rules was thereby confirmed.

83. The two major conclusions to be drawn from that analysis were, first, that the endless debate on whether or not reservations to treaties should be allowed served no useful purpose: reservations to treaties were a fact of life that must be endured and, with all due respect to the pessimists, a reserving State that accepted part of a treaty was preferable to a State that simply refrained from signing. After all, the Vienna regime preserved the vital elements while guarding against any deformation of the treaty. The second conclusion was that there was no reason why the Vienna regime should not be applied to so-called “normative” treaties. There again, even if the existing rules authorized breaches of the integrity of the treaty, they did not on any account allow a breach of its object or its purpose and it was always permissible to derogate therefrom if, in a particular case, it was considered that the integrity of the treaty must be preserved at all costs. The argument that the Vienna rules were incompatible with the—by definition—“non-reciprocal” nature of normative treaties was peculiar to say the least, since the chief criticism levelled against reservations was that they negated reciprocity, a paradoxical line of argument in the case of commitments which were by their very nature non-recip-

rocal. In any case, it was not quite true to say that there was no element of reciprocity whatsoever in normative treaties, which were predicated at the very least on two States consenting to the same rules and hence applying them to their nationals. Lastly, the argument based on the supposed breach of equality between the parties to a normative treaty was equally specious: the degree of inequality was incomparably more pronounced between, on the one hand, a State party to a normative treaty and a State that was not a party thereto and, on the other, between two States parties one of which had entered a reservation, particularly since the “other” State could always restore the original balance by objecting to the reservation or by taking action under article 20, paragraph 4 (b), of the 1969 Vienna Convention to prevent the treaty from entering into force between itself and the reserving State.

84. He therefore upheld the position he had taken in the conclusion to chapter II, section B, of his second report: he was convinced that the Vienna regime was homogeneous and could and should remain so and that, by virtue of its flexibility, it was perfectly suited to the particular characteristics of normative treaties.

The meeting rose at 1.05 p.m.

2500th MEETING

Thursday, 26 June 1997, at 10.05 a.m.

Chairman: Mr. João Clemente BAENA SOARES

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

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

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to continue his introduction of chapter II of his second report

¹⁵ 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); *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).

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