

Document:-
A/CN.4/SR.2401

Summary record of the 2401st meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1995, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

the various events and decisions discussed. For example, why had such renowned legal experts as Brierly, Lauterpacht and Fitzmaurice suffered defeat with their positions, whereas Waldock had immediately prevailed? Any answer to that question must be sought beyond the boundaries of law. The Special Rapporteur had rightly pointed out in his oral presentation that the problem of reservations often contained a political element. That required a further explanation, one which had not been forthcoming in the report. What was needed was an analysis of the position of States in the context of the overall world situation.

40. The problems of international law could not be resolved without bearing in mind what was happening in the world. In the discussion on international liability for injurious consequences arising out of acts not prohibited by international law, it had been stressed how important it was for the Commission to bear in mind the current and future requirements of the international community. Having personally participated in the preparatory work of the Vienna Conventions, he had been struck by the important role played by the Soviet Union in introducing changes in the texts of reservations. In the cold war context of the time, the Soviet Union had been concerned that an agreement might be imposed upon it. Today, the situation had changed, and that needed to be taken into consideration.

41. It was indeed a good idea to compile literature on the practice in relation to reservations, but there was no need to hurry to produce the bibliography promised by the Special Rapporteur. He agreed with the Chairman that it was difficult to imagine at the present time the form that the results of the Commission's work would take.

42. In his opinion, the Commission should discuss the problem of soft law, an area that had taken on growing importance. Perhaps the focus could be on soft law, thereby making it another of the Commission's fields of endeavour in regard to international law and international practice.

43. It seemed to be agreed that there was no need to contest the Vienna Conventions. In any event, he was convinced that the report of the Special Rapporteur was a firm foundation for further study of the problem of reservations in the international community today.

44. Mr. PAMBOU-TCHIVOUNDA, confining himself to preliminary comments, thanked the Special Rapporteur for his exhaustive and interesting report, one in which a great deal of time had obviously been invested. It was also particularly gratifying to see that, for the first time, a Special Rapporteur had taken the trouble to translate into French those passages of his report that he had cited in the original English.

45. The Special Rapporteur was right to refer to the political difficulties associated with the topic. In his view, it was important to bear in mind considerations of political expediency. Telephone calls exchanged between Heads of State or Ministers had an enormous impact on the final decisions regarding the form of reservations. A second consideration was the time factor. The Special Rapporteur had referred to the ambiguity be-

tween "interpretative declarations" and reservations which under positive law were nothing more than declarations. The three Vienna Conventions were silent about the time at which an interpretative declaration could be made, and it might be useful to attempt to draw a clearer distinction between those two categories. He agreed with the Special Rapporteur that the Commission must remain within the spirit of the Vienna Conventions.

46. He questioned whether the General Assembly, whose delegates were not necessarily experts, would understand the preliminary study in its present form. The Special Rapporteur should revise his position on the results to be sent to the General Assembly, so that they could be rendered in a more accessible form.

47. He experienced some hesitation about simplifying the title of the topic. It might then be argued that there was, for instance, also a need for a treaty on signatures or a treaty on ratification, both of them areas which likewise posed problems.

The meeting rose at 11.50 a.m.

2401st MEETING

Friday, 16 June 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Bowett, Mr. de Saram, Mr. Elaraby, Mr. Fomba, Mr. He, Mr. Kabatsi, Mr. Lukashuk, 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. ROSENSTOCK said that the Special Rapporteur's excellent work was precisely tuned to what was needed at the current stage of the consideration of the topic. The first report (A/CN.4/470) provided the background to the question, gave a review of the problems posed and made a number of suggestions as to how the

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

Commission might deal with those problems. Although the current regime of reservations, including complete gaps in its coverage, had not at first appeared to have resulted in a large number of inter-State disputes, the theoretical and practical problems that had arisen were very complex and numerous. The Special Rapporteur had wisely advised against engaging in a discussion of the substance of the issues at the present time. In any event, he was inclined to question whether there was any justification for devoting much time to problems relating to reservations to bilateral treaties or to the "succession" aspect of the topic (Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention")), for which a few general principles might meet the basic needs once some order had been established with regard to reservations relating to the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"). In any case, it was to be hoped that, as the Commission's work on the topic progressed, the problems and gaps would diminish and there would be less temptation for bodies such as the Human Rights Committee to overreach in response to what would prove to be less of a vacuum than it seemed.

2. Concerning the options available to the Commission to grapple with those problems and gaps, he fully shared the Special Rapporteur's analysis that there was no reason to reopen the texts that had emerged from the second session of the United Nations Conference on the Law of Treaties² and in particular to rewrite articles 2 and 19 to 23 of the 1969 Vienna Convention. He agreed that the Commission should simply try to fill the gaps and remove ambiguities while retaining the versatility and flexibility of the key articles of the 1969 and 1978 Vienna Conventions 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 drafting of protocols or of a "consolidated" set of articles in a separate instrument might turn out to be as risky as going back to the drawing board, a temptation that should be resisted not only by the Special Rapporteur, but also by the Commission as a whole and by the Sixth Committee, as well as in Government comments, if only because of the hazards of a codification conference. He was therefore in favour of either guidelines with attendant commentary and model clauses, with the Commission still retaining the option of shifting to a bolder approach involving draft treaty articles, or a draft instrument if it turned out that such a change was necessary and prudent. Lastly, the Commission and the Sixth Committee should not waste any time agonizing over the title of the topic. If the Special Rapporteur's reservations about the current title were serious, the Commission should decide right away whether it should be changed.

3. Mr. TOMUSCHAT said that the report under consideration was a model of clarity and detail that boded well for future reports on the topic. The Special Rapporteur gave a good description of the state of the question

² See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6).

in all its complexity and had a definite view—and rightly so—on only one specific issue: that the Commission should refrain from inventing the world anew. The decisive turning-point in the development of the law of reservations had been the advisory opinion of ICJ on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,³ which the Commission had eventually endorsed after much hesitation, and there was no reason to dismantle the legal edifice built upon that foundation. But the gaps and cracks must be filled, not by a formal legal instrument, but by an expository guide, together with a number of model clauses. At the current preliminary stage of work on the topic, four points could be made on: the nature of a reservation; problems associated with interpretative declarations; reservations to bilateral treaties and institutional aspects of control over reservations.

4. Concerning the first point, the drafters of the term "reservation" in article 2, paragraph 1 (d), of the 1969 Vienna Convention had exercised great care, but an important element was missing from their definition, namely, that, by virtue of a reservation, a State party could only reduce the scope of its obligations towards other States parties and under no circumstances unilaterally increase rights not set forth in the treaty. That could be illustrated by two examples. If a treaty providing for certain joint activities of a group of States laid down a scale of assessment for expenditure relating to those activities, a State party could very well declare that it did not agree to the share assigned to it. The intention would certainly be to reduce the scope of the obligations set forth in the treaty and it would thus be a real reservation, regardless of whether such a reservation was permissible and accepted by the other States parties. On the other hand, a State could not claim a greater voting power than that foreseen by the treaty for the administration of joint activities. Another example: if freedom of movement as defined in a treaty of economic union encompassed the right to acquire homes for vacation purposes, a State wishing to prevent its coastal regions from being bought up by its rich neighbours might attempt at an appropriate time to enter a reservation to that effect. On the other hand, if the right in question was not covered by the treaty's regime on freedom of movement, the rich neighbouring State could not formulate a reservation granting its citizens the right to buy property for any purpose whatsoever in the territory of the other States parties. In sum, as confirmed by a study of relevant practice, States made use of reservations in order to evade or avert certain burdensome obligations, but rarely to arrogate new rights or more extensive rights than those provided for by the treaty concerned.

5. With regard to the second point, it was not always easy to draw a distinction between reservations and interpretative declarations, but, in general, a reservation specified the scope of the declaration accepting the treaty's obligations, whereas interpretative declarations did not affect that scope, which was determined by the sole content of the treaty, and their only purpose was to influence the process of treaty interpretation without committing other States parties. Reservations made use

³ See 2400th meeting, footnote 5.

of a State's sovereign treaty-making power, which might conflict with the will of the community that had agreed on the text of the instrument in question. However, there were quite a number of borderline cases. The Commission might therefore establish, if not a clear and distinct rule, at least a presumption that States were bound by their public statements and that there was no need to inquire at all costs into their unspoken intentions. That approach would also be useful in situations in which a treaty prohibited reservations. One would then assume that the declarations in no way affected the scope and meaning of the instrument of ratification, which were exclusively determined by the treaty itself.

6. Matters appeared clearer with regard to the third point: there could be no reservations to bilateral treaties. In a bilateral relationship, either the two parties agreed on the actual scope of their mutual obligations and rights or they did not.

7. Lastly, as to the question of the permissibility of reservations and means of control in that regard, it ought to be relatively easy to ascertain whether an attempt was being made to evade a clear-cut prohibition on reservations contained in the instrument in question, such as in the United Nations Convention on the Law of the Sea or the Marrakesh Agreement Establishing the World Trade Organization.⁴ On the other hand, it was much more difficult to assess whether a reservation was incompatible with the object and purpose of a treaty because, in such cases, there would need to be agreement on what constituted the "core" provisions of the treaty, those without which a treaty would lose its essential thrust. In any event, with regard to the preservation of the integrity of international treaties, it did not seem that the system set up by the 1969 Vienna Convention had stood the test of time. Apparently, States considered that it was not of any concern to them, so much so that hardly any reservation had ever given rise to more than eight objections. The solution certainly did not lie in the creation of a new institutional mechanism, but in seeking to strengthen the controlling function of the treaty's depositary. It should certainly not be demanded of the depositary to reject instruments of ratification containing a reservation clause that he considered incompatible with the object and purpose of the treaty, but he might draw the attention of other States parties to reservations that he regarded as "questionable" in that regard. In any event, the depositary could be asked not to accept any instrument of ratification containing reservations prohibited by the treaty in question.

8. Mr. BOWETT said that he was not certain about the absolute validity of two points made by Mr. Tomuschat. First of all, it was not clear that a reservation could only reduce the obligations, and never increase the rights, of its author. In the 1977 arbitration between the United Kingdom of Great Britain and Northern Ireland and France with regard to the Channel Islands,⁵ France had entered a reservation to article 6 of the 1958 Convention on the Continental Shelf to the effect that those islands were covered by the special circumstances exception in

the said article 6. In the view of the United Kingdom, it had been an interpretative declaration, but the arbitral tribunal had ruled that it had been a reservation. That reservation, by allowing France not to apply the median line, but another boundary line based on the special circumstances, had in fact increased the rights of its author.

9. Likewise, it seemed to be something of a simplification to say that the problems of the permissibility of reservations really only arose in terms of incompatibility with the object and purpose of the treaty, matters being clearer for the prohibition of reservations. Treaties permitted reservations for some of their articles and not for others, hence the possibility—and the actual practice—of reservations which were formally attached to an article for which they were allowed, but which were worded in such a way that their substance related to an article for which reservations were prohibited. Thus, difficulties were not confined solely to the problem area of incompatibility.

10. The CHAIRMAN asked Mr. Tomuschat to comment on the following example: if as was often the case, a treaty codified rights derived from rules of customary international law and, in so doing, reduced somewhat the rights that certain States parties had enjoyed in the past, would a reservation with which one of those States sought to preserve those previous rights be regarded as "increasing" rights in respect of the treaty and perhaps be considered impermissible?

11. Mr. TOMUSCHAT said that, in the example cited by the Chairman, the problem had to do not with the rights and obligations derived from a treaty, but with the situation with regard to customary law. In principle, the conclusion of a treaty had no effect on rights and obligations under customary law. States could decide to "modernize" and to make a clean sweep of past law, but, in the case of the rules of diplomatic relations, for example, the Vienna Convention on Diplomatic Relations contained in its very preamble a clause on reservations stipulating that the rights, and even the practice, predating its entry into force were not affected. The examples given by Mr. Bowett all related to situations in which it was difficult to draw a distinction. There was, however, no reason not to be clear in the case of prohibited reservations. If a State that ratified the United Nations Convention on the Law of the Sea declared that the Convention had no effect on its rights under its Constitution or internal law, that declaration must be considered invalid, and a judge did not need to examine whether it was a reservation. By accepting a treaty that prohibited reservations, a State accepted the treaty in its entirety, regardless of what it stated elsewhere. The Commission might, if the Special Rapporteur so agreed, suggest that such rigour should be the rule.

Organization of the work of the session (continued)*

[Agenda item 2]

12. The CHAIRMAN said that informal consultations would be held on the draft Code of Crimes against the

⁴ GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (Sales No. GATT/1994-4), pp. 5 *et seq.*

⁵ See 2400th meeting, footnote 7.

* Resumed from the 2393rd meeting.

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.4/470,¹ 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-

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