responsible for regulating it. It was for States to make sure that, in such cases, chaos was avoided. State succession was sufficiently problematic already; to allow individuals a right of option would simply be adding to the problems. The exercise of such a right should therefore be made subject to very strict conditions. Its beneficiaries would have to be determined and it would have to be circumscribed in time; in so advocating, he had in mind the question of dual nationality. Also, the report, curiously, introduced the concept of secondary nationality—a concept that should be dropped. Nationality either existed or it did not. Any other elements would be added on account of dual or multiple nationality, not of main or secondary nationality.

64. Thirdly, some thought should be given to such higher considerations as whether it was rules or guidelines that international law should place at the service of States. There was also the question of the relationship between human rights and sovereignty. If it were possible for the matter to be settled by individuals themselves, international law—the law made by States for States—would probably not assume responsibility for it. Another consideration concerned emotional and even material ties; and it was in that respect, it seemed to him, that the two questions, namely, State succession in the case of natural persons and State succession in the case of legal persons, converged. He also wondered whether the title of the topic should perhaps not refer to the "fate" of natural and legal persons. Moreover, the report should have raised the question of the nationality of companies' directors, which would have helped to define the limits of the topic and, in particular, it should have indicated more clearly what the prospects were, bearing in mind, on the one hand, the different categories of State succession, and, on the other, State practice.

The meeting rose at 1.15 p.m.

2412th MEETING

Thursday, 6 July 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN said he extended a warm welcome to Mr. Oda, a Judge of the International Court of Justice for some 20 years and, prior to that, an outstanding scholar and professor and a negotiator at the United Nations Conferences on the Law of the Sea. Mr. Oda symbolized the great Asian tradition that combined intelligence, wisdom and discipline. He invited Mr. Oda to address the Commission.

2. Mr. ODA recalled that the last time that he had attended a meeting of the Commission had been in 1960, as the assistant of Mr. Yokota, Japanese member of the Commission.

3. He drew two conclusions from his experience as a judge of ICJ. The first was of a personal nature. Although the spirit of contradiction was not one of his personality traits, it was a fact that, in the discharge of his tasks as judge, he often found himself in the minority, and that had led him to draft many dissenting or separate opinions. The second concerned the general list of the Court, one of whose characteristics was that, when international disputes arose, it could not exercise its jurisdiction unless the matter had been brought before it. As it happened, States seemed to be increasingly inclined to refer cases to the Court because its general list, which had contained only one entry in 1976, was today very long.

4. On 30 June 1995, the Court had delivered a judgment in the East Timor (Portugal v. Australia) case. On 30 October, it would open oral proceedings on the question of the Legality of the threat or use of nuclear weapons (request for advisory opinion), which might well be time-consuming, because more than 40 States had submitted statements and many of them had indicated their intention to invite experts or witnesses to testify. The Court would then have to decide in which order it would examine the other cases ready for hearing.

5. The CHAIRMAN expressed his thanks to Mr. Oda for his remarks and congratulated him on his eminent contribution to the case-law of ICJ and to the development and dissemination of international law.


[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (concluded)*

6. Mr. AL-BAHARNA said that he would like to make a number of general observations before considering the proposals of the Special Rapporteur.

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* Resumed from the 2407th meeting
3 Reproduced in Yearbook... 1995, vol. II (Part One).
7. He began by stressing that reservations occupied a central place in the law of treaties. Indeed, they had become an important way, as Sir Humphrey Waldock had said, “to promote the widest possible acceptance” by States of multilateral treaties. Without the facility of reservations, it was doubtful whether so many States would have become parties to the multilateral conventions adopted under the auspices of the United Nations. The rationale for reservations to multilateral treaties remained as true as ever; it would continue as long as the State system existed and multilateral treaties remained an instrument for enacting “international legislation”. Consequently, nothing should be done which would be detrimental to the present system of reservations to treaties.

8. Secondly, the regime of reservations contemplated by the Vienna Convention on the Law of Treaties (hereinafter referred to as the “1969 Vienna Convention”) had served the international community of States well, notwithstanding the ambiguities in the lex scripta, and it would be imprudent, to say the least, to change the basic rules contained in the regime of reservations. Short of that, the Commission could make improvements in the law and practice in that area.

9. His third comment pertained to the “trends” in reservations to treaties. Analysing the preparatory work on the provisions relating to reservations to treaties in the 1969 Vienna Convention, the Special Rapporteur had stated in his first report (A/CN.4/470) that, despite resistance and hesitation, the history of these provisions showed a definite trend towards an increasingly stronger assertion of the right of States to formulate reservations. Whether that “trend” could be arrested by clarifying the existing provisions in the 1969 Vienna Convention was difficult to say. However, there seemed to be a need to clarify the law governing reservations to treaties.

10. With those perspectives in view, he would refer to some of the Special Rapporteur’s ideas and recommendations for the future. The first issue that the Special Rapporteur considered in his report related to the doctrinal controversy as to whether reservations should be considered from the point of view of “permissibility” or “opposability” (that is to say whether a reservation could be invoked against another party). According to the former thesis, an impermissible reservation nullified a State’s acceptance of a treaty and, according to the latter, the validity of a reservation depended solely on the acceptance of the reservation by another contracting State. As the Special Rapporteur pointed out in his report, the so-called permissibility school on reservations would raise a number of questions, such as whether the impermissibility of the reservation affected the consent of the State to the treaty or merely affected its validity and, more importantly, whether the impermissibility of the reservation produced effects independently of objections by States. In his view, those questions might well revive some of the complex issues that had more or less been laid to rest by the pragmatic stance adopted in the 1969 Vienna Convention and he was therefore against any approach or study that was inconsistent with that pragmatism.

11. The second issue examined by the Special Rapporteur concerned the regime for objections to reservations, on which the doctrinal controversy referred to earlier had a bearing. The “permissibility school” took it for granted that an impermissible reservation was not opposable to other contracting States, while those advocating the thesis of “opposibility” argued that the validity of the reservation depended on whether the reservation was accepted and not on its compatibility with the object and purpose of the treaty. In that connection, the Special Rapporteur outlined a number of questions which were said to arise from the “gaps” and “ambiguities” in the regime of reservations. The Special Rapporteur posed four fundamental questions: What was the precise meaning of the expression “compatibility with the object and purpose of the treaty”? Was an impermissible reservation null and void regardless of the objections that might be made? Could the other contracting States or international organizations accept an impermissible reservation? What exactly were the effects of an objection to a permissible reservation, on the one hand, and an impermissible reservation, on the other? Given the primarily academic nature of those and other questions, he doubted whether the Commission would be able to arrive at a consensus, even on some of them, and he urged the Commission to be extremely circumspect in its approach to the topic.

12. The Special Rapporteur then considered the distinction between “reservations” and “interpretative declarations”, which once again was more of academic than of practical relevance. The definition of reservation in the 1969 Vienna Convention was sufficiently clear and, in any case, it would be pointless to assume that interpretative declarations could be prevented by streamlining the definition of “reservation”. As long as they facilitated wider acceptance of treaties, they could not be faulted.

13. The fourth important issue analysed by the Special Rapporteur related to reservations to human rights treaties, which, by definition, were of a special nature. As noted by the Special Rapporteur, who cited a general comment of the Human Rights Committee in his report, “The principle of inter-State reciprocity has no place” and “the operation of the classic rules on reservations is inadequate”. Two questions arose in that connection: first, could an objecting State release itself from the obligation to respect the human rights of the citizens of the reserving State and, secondly, could the Human Rights Committee determine whether or not a specific reservation was compatible with the object and purpose of the International Covenant on Civil and Political Rights?

14. The Special Rapporteur raised a host of other issues, some of which were more of academic than of practical value, such as questions concerning “codification conventions”.

\footnote{Yearbook . . . 1962, vol. II, p. 65, paragraph (7) of the commentary to articles 17, 18 and 19.}

\footnote{See 2400th meeting, footnote 9.}
15. With regard to the Special Rapporteur's proposal in his report to change the title of the topic to “Reservations to treaties”, he was not opposed to it.

16. As to the type of approach the Commission should adopt, he supported what the Special Rapporteur called the “modest approach”, which would consist in filling in the gaps and removing the ambiguities in the regime of reservations embodied in the 1969 Vienna Convention.

17. Turning to the form of the Commission's recommendations, he would be prepared to support the third solution proposed by the Special Rapporteur, namely, to prepare a guide to the practice of States and international organizations on reservations which presented an article-by-article commentary on existing provisions. Notwithstanding its unorthodox nature, that solution appeared to be the most sensible. For one thing, it did not tinker with the regime on reservations, which had proved its worth, and, for another, it constituted, as it were, a restatement of the law of reservations to treaties.

18. Mr. PELLET (Special Rapporteur) thanked the members of the Commission not only for receiving his report favourably, but also for expressing their views on a number of difficult and controversial substantive questions and for making proposals which would be extremely useful to him in his later work. As he had not had any set ideas on most of those problems, the debate had enabled him to have a better picture of where the real difficulties lay, to order the questions according to their importance and to begin to discern the main trends within the Commission. He would thus devote his statement to the lessons he had learned from the debate and the conclusions that, as he saw it, could be drawn for the future.

19. With regard to substantive problems, he noted that a number of questions raised in the report had not attracted the attention of any of the speakers. He had in mind in particular the effects of reservations on the entry into force of a treaty and the effects of an objection when the objecting State was not opposed to the entry into force of the treaty between itself and the reserving State, as well as problems resulting from parallel, competing treaty techniques. His conclusion was not that the members of the Commission wanted those questions left out definitely, but that they did not have any set ideas, but the discussion had definitely helped him get a clear idea of the details of that unorthodox nature, that solution appeared to be the most sensible. For one thing, it did not tinker with the regime on reservations, which had proved its worth, and, for another, it constituted, as it were, a restatement of the law of reservations to treaties.

20. The question of defining reservations had been discussed mainly, but not exclusively, in relation to, or in opposition to, that of defining interpretative declarations. Thus, for one member of the Commission, the definition contained in article 2, paragraph 1 (d), of the 1969 Vienna Convention was inadequate because it did not expressly state that a reservation could not be for the State party which had formulated it as a means of acceding rights to itself which are not provided under the treaty. He himself had not looked at the question from that point of view, which was not irrelevant to the question of the relationship between reservations and customary general international law. It nevertheless seemed to him that there was good reason to examine that problem and he would do so in a forthcoming report, although the problem was perhaps less related to the question of the definition of reservations than to that of the legal regime of reservations, or more precisely the effects of reservations, and gave rise to another question: could a State, by means of a reservation, accord itself rights which were not provided for either by the treaty to which the reservation was made or by general international law? To put it more simply: was a reservation by which a State intended to accord itself certain rights permissible? At first glance, it would seem that the answer to such a question must be in the negative, but, as another member of the Commission had pointed out, matters were not that simple.

21. That being said, it was interpretative declarations, on which 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”) were silent, that had given rise to the most statements and discussions. The Commission was faced with a legal enigma: did interpretative declarations, whose practical reality was not open to question, come within the scope of the law and, if so, were they relevant only to the interpretation of a treaty or could they have effects on the scope and nature of the commitments of the declaring State? On that point, two theories which looked as though they would be difficult to reconcile had been put forward: some thought that what counted was the expressed intention of the declaring State which said that it was not formulating a reservation, while others maintained that it was necessary to be realistic and that, if, under the cover of a declaration, a State was in fact formulating a reservation, it should be treated as such. Those in favour of the first theory had the principle of good faith and a certain conception of international morality on their side. Advocates of the second theory could point to the recent jurisprudence of international human rights bodies, although that argument was not necessarily decisive. It could in fact be asked, first, whether those bodies were entirely correct and, secondly, whether their positions should not, in any case, be limited to the specific field of human rights. There as elsewhere, he still did not have any set ideas, but the discussion had definitely helped him get a clear idea of the details of that important problem, which he hoped to be able to deal with as fully as possible in his next report.

22. The most complete and detailed comments had naturally related to the difference between the “permissibility school” and the “opposability school”. The issues in that debate were formidably complex, as every speaker had been well aware. It was not his intention to
elucidate every issue at the present preliminary stage, but, before summing up the situation as completely and objectively as possible in a later report, he wished to make three points in that regard. First, he would a priori be quite taken with the idea put forward by several members of the Commission that the tenets of the "permissibility" school were probably correct in theory, but those supported by the advocates of "opposability" reflected the practice of States, dominated by a rather strict spirit of consensus. He could not say with certainty at present what conclusions could be drawn from that finding.

23. Secondly, one member of the Commission had expressed the fear that attempts to look more closely at the concept of the object and purpose of a treaty would make the Commission stray too far from the topic. Despite the overall "neutrality" he was maintaining at the present stage, he considered it quite obvious that an elucidation of that concept would be particularly useful if the aim was to help States take legally correct positions in respect of reservations. To that end, there did not appear to be any reason not to rely on the provisions of the 1969 and 1986 Vienna Conventions, which did not relate directly to reservations, since those provisions and the corresponding practices of States and international organizations might prove useful. That usefulness had, of course, not been tested, but that was something else that required further thought.

24. There was also the question whether or not a presumption of the permissibility of reservations existed. The statement of that presumption in his report was endorsed by some members, but another member had expressed disagreement with it. He would be tempted a priori to maintain his position, it being understood, first, that that was a doctrinal analysis which was perhaps not of much practical importance, but which might be important in terms of the burden of proof, and, secondly, that the disagreement was perhaps not a real one in the sense that, whatever the outcome of a more in-depth examination of the question, it went without saying that, if such a presumption existed, it was certainly not irrefutable, and that was probably the meaning of article 19 of the 1969 and 1986 Vienna Conventions.

25. The third set of problems had to do with the settlement of disputes. Clearly, the ambiguities and uncertainties of the legal regime of reservations made recourse to third party settlement and, probably, to an arbitral tribunal or ICJ particularly desirable, although it was unusual for inter-State disputes on reservations to "degenerate". In a field as important as that of human rights, moreover, there were judicial or quasi-judicial bodies which met the concerns of the members of the Commission who had stressed the problem of dispute settlement and experience in that regard was not entirely convincing. In general, he was not at all certain that it was necessary, in connection with any topic, to formulate an additional set of draft articles relating to dispute settlement. The alternative was to solve the problem once and for all by supplementing the Model Rules on Arbitral Procedure and by preparing a set of draft articles on the settlement of disputes to which reference would systematically be made. The "model clause" solution might prompt States to provide in a treaty for appropriate settlement mechanisms without necessarily calling into question the positive law principle of the free choice of settlement methods. The same would apply to the a priori monitoring of the permissibility of reservations by a panel, as suggested by one member of the Commission.

26. The fourth issue was succession of States in respect of reservations and objections to reservations. He had discussed the issue in his report solely for the purpose of providing an overall view and he generally agreed with the members of the Commission that it was far from urgent. The very insightful comments by the Special Rapporteur on State succession and its impact on the nationality of natural and legal persons had highlighted a whole set of interesting problems and unresolved difficulties and had made him think that it would be unfortunate to leave that aspect aside altogether, even though it was marginal in relation to the "basic" reservations regime and should therefore not be examined until the Commission had a comprehensive and clear picture of that regime.

27. The fifth set of issues related to the problem of the unity or diversity of the reservations regime or regimes. The problem might simply be a matter of the need to maintain the flexibility of the current reservations regime, a point with which he fully agreed, but it might also involve a difference between those who, on the basis of the Commission's earlier work, were very much against a regime that would vary according to the field with which the treaty dealt and those who were, rather, in favour of diversified regimes, at least with regard to reservations to human rights treaties. He admitted that so many contradictory considerations prevented him from making definite proposals, which did not, moreover, seem necessary at the present stage.

28. A point in favour of a variable regime was the generally accepted view that human rights treaties were not based on the idea of reciprocity, which was, however, at the heart of the reservations regime. There was also the very widespread feeling that reservations in that field were often shocking and even intolerable. Lastly, there was the fact that those treaties usually established implementation and monitoring mechanisms which had, rightly or wrongly, assumed power to check or cancel out or at least "neutralize" which had led them to promote innovative solutions. It must, however, be acknowledged that such jurisprudence was strongly contested by States and that, while reservations were probably unfortunate in connection with human rights, a ratification with reservations was better than no ratification at all in that area as in others. A less clear-cut solution was certainly possible, at least for any human rights treaties to be concluded in the future and the Commission would be doing something useful if it proposed specific model clauses for those treaties.

29. In addition to human rights, mention had been made of environment and disarmament treaties, for which it might be necessary to consider the possibility of special clauses or even a special regime. The same was true of the other, very special category of the constituent instruments of international organizations, to which

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some members of the Commission had referred. One member nevertheless seemed to want to exclude that category from the scope of the topic, perhaps because it was simply too particular. As pointed out, however, article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions already made special provision for those instruments, just as article 20, paragraph 2, made special provision for treaties concluded among a limited number of States, a category which another member had suggested should also be excluded from the scope of the topic. All those instruments did, of course, give rise to special problems, but it would be difficult to exclude them if only because it was important to determine which criteria would enable them to be distinguished from other treaties. The outline of special regimes sketched out for them in the Vienna Conventions would have to be investigated and analysed.

30. Before going on to questions of method and form, he wished to make three comments on points which had been raised by some speakers. First, he had taken Mr. Barboza’s very good point (2404th meeting) that he had not placed enough emphasis on the role played by the Latin American States in establishing the current reservations regime, which was undeniably based on their practice. He accepted that friendly reproach, but noted that the inadequacies of his presentation did not in any way imply that he underestimated the contribution of those States in that area.

31. He had also pointed out that the members of the Commission from third world countries had particularly emphasized the virtues of reservations, which were sometimes necessary and even valuable because they enabled those States, faced with the difficulties of which everyone was aware, to “give time a little time” or, as the Chairman himself had said, to “buy time” so that they might be able to be in full conformity with the treaty in question, a solution which was entirely relevant in the present case. Moreover, such reservations allowed countries to protect their traditional, religious and cultural values against what might be termed the “steamroller” of the dominant powers. Those precisions did indeed deserve to be taken into consideration and that was one more reason to maintain the current regime’s “flexibility”, about which he was not as mistrustful as Mr. Pambou-Tchivounda had said (ibid.).

32. His third comment was that several speakers had said that political considerations sometimes lay hidden behind highly technical debates. He entirely shared that view. He noted, however, that the same was true of all legal rules, even if political antagonisms had surfaced more strikingly in the area of reservations than in others in the 1960s, and he was also not sure that it was his role and, more generally, that of the Commission to emphasize that particular aspect. It was not certain that the debate would gain in serenity or even in clarity if such political considerations were stated explicitly.

33. Those were the comments he wished to make on the substance of the extremely rich discussion which had taken place in the Commission. He had not invited that discussion when introducing his preliminary report, but welcomed it because of the help it would give him in future and because it might have prevented boredom from setting in. Mr. Arangio-Ruiz himself had admitted (2407th meeting) that the discussion had aroused his interest, although he had initially found the topic less than fascinating.

34. Turning to more specific points, he recalled that he had asked four questions when he had introduced his report. The first had related to the title of the topic, which he had proposed might be changed in view of the fact that, apart from its very academic nature, the present title implied a separation or even an opposition between law, on the one hand, and practice, on the other. He believed that all the members who had taken the floor had supported the suggestion as to its substance; some had even added additional arguments, like Mr. Barboza (2404th meeting), who had expressed his solidarity as the Special Rapporteur for a topic burdened by a title that was too long and complicated. True, other members had expressed fears of a procedural nature, pointing out that a proposal for an amendment of that kind might give rise to unpredictable discussions in the Sixth Committee. That risk nevertheless seemed minimal. He also did not think that the Commission should, as Mr. Yamada had suggested (2407th meeting), confine itself to dealing with reservations to multilateral treaties. He had already given his reasons, but he would add that reservations to bilateral treaties did not, properly speaking, exist. As Mr. Tomuschat (2401st meeting), supported by other members, had explained very well, a reservation to a bilateral treaty could in the last analysis be interpreted as a proposal for renegotiation. Furthermore, as Mr. Pambou-Tchivounda had said (2404th meeting), if the proposal was not accepted, the treaty simply did not enter into force. Subject to more in-depth consideration of the issue, he therefore did not think that it was possible to speak of “reservations” in connection with a bilateral treaty and feared that by entitling the topic “Reservations to multilateral treaties” the Commission would a contrario run the risk of creating the idea that reservations to bilateral treaties could exist. As Mr. Mikulka had pointed out (2406th and 2407th meetings), moreover, the fact that article 20 of the 1978 Vienna Conventions appeared in the section relating to multilateral treaties clearly showed that the Commission, followed by the United Nations Conference on Succession of States in Respect of Treaties, had considered that the problem of reservations arose only in connection with multilateral treaties. He therefore proposed on that point, first, that, in its report to the General Assembly, the Commission should very clearly indicate that it generally did not think it possible to speak of reservations stricte senus in connection with the conditions to which a State might make the ratification of a bilateral treaty subject; secondly, that the hypothesis should be tested and verified in one of his future reports; and, thirdly, that the Commission should, above all, indicate in its report that it

had decided, subject to the Assembly's approval, to adopt "Reservations to treaties" as the title of the topic.

35. The second and more important question he had asked had been whether the Commission agreed to consider that the rules contained in article 2, paragraph 1 (d), and articles 19 to 23 of the 1969 and 1986 Vienna Conventions and in article 20 of the 1978 Vienna Convention should not be called into question and that, in principle, it should regard those rules as unassailable and should confine itself to supplementing them and, if necessary, making them more explicit. There again, it would appear that the unanimous response of the members of the Commission had been affirmative, a fact which he noted with even greater satisfaction because he had taken a very firm position on that point in his first report. It would therefore have been very awkward for him if the Commission had adopted a contrary position, since, in his view, it would have been unreasonable and irresponsible to start all over again from scratch. He was prepared to be an "architect", as Mr. Thiam had put it (2406th meeting), but an interior architect who did not demolish what already existed, but fixed it up. It was thus agreed that the Commission would make improvements by small successive strokes with a view to enabling States to reach mutually accepted compromises, which, in the majority of cases, were constructive, it being understood that, just as freedom was not licence, so must flexibility not degenerate into anarchy. Some speakers, such as Mr. Mahiou (2403rd meeting) in particular, had, it was true, expressed doubts about the possibility of keeping strictly to that position, but, in his own view, the starting point should be the principle that the Commission would do everything in its power to preserve what already existed. That apparently unanimous position of the members of the Commission who had spoken would be reflected in the report of the Commission to the General Assembly and would be the general guideline he would try to follow. He personally believed that that was entirely possible, at any rate as far as the general regime of reservations was concerned.

36. The problem was whether "general regime" should be taken to mean one single legal regime applicable to reservations and it was that problem which had led him to ask a third question, namely, whether the Commission was in principle in favour of the idea of drafting model clauses that might be proposed to States for inclusion in future multilateral conventions, depending, in particular, on the area in which those conventions had been concluded. He believed that the Commission could be said to have replied almost unanimously in the affirmative. All speakers had in fact adopted a position to that effect, with the exception of Mr. Eiriksson (2407th meeting), who had given no explanation of the reasons for his opposition. For his own part, he considered that such a technique offered great advantages. The essential reason which would militate in its favour and which he had already mentioned in his first report was that, whatever the form of the Commission's future work, the rules that would be established would be merely residual in nature, and that meant that States would always be able, by mutual agreement, to derogate from them, as they could derogate from the present provisions of the three relevant Vienna Conventions.

37. In some fields, such as that of human rights, the general feeling in the Commission seemed to be that such derogation should be possible without prejudging the separate and more difficult question whether there was a special regime of reservations to treaties concluded in that field. It would be useful to draw the attention of States to the possibilities open to them for changing and varying the general regime of reservations through the inclusion in future treaties of certain provisions of which the Commission could and even should provide examples in the form of model clauses.

38. It was probably overambitious to impose on States compulsory methods for the settlement of disputes or a priori monitoring of the validity of reservations. On the other hand, it was by no means absurd or outside the Commission's mandate to try to encourage States voluntarily to establish suitable monitoring and dispute settlement mechanisms relating to reservations by including in conventions provisions to that effect based on model clauses. That would certainly have a definite pedagogical advantage and would enable the Commission gently to play its role as the international community's legal mentor without being abrupt and unrealistic. To his mind, however, the Commission would obviously only be opening up possibilities for States, but it could not stop at that and the model clauses should only supplement what ought to be the main result of its work.

39. What should the result of its work be? In other words, what form should the results of the Commission's work take—a draft convention, a protocol or protocols, a guide to practice or a systematic commentary? That had been the fourth question he had asked in introducing his report. The replies given had been rather disappointing and not at all clear. It seemed to him, however, that several speakers had taken refuge behind the Commission's usual practice and had said that the question was premature—and the answer even more so—and that there would be time to adopt a position once the work on the topic had been completed. Such an attitude was, however, not in keeping with General Assembly resolution 48/31, which clearly stated that a preliminary study should be presented to the General Assembly on precisely, the form to be given to the work on the topic. Some members, particularly Mr. Mahiou (2403rd meeting), had fortunately recognized that the problem was of a very special nature because, unlike most topics, that of reservations was not a "first night", but a "repeat performance", and had agreed that he could not be left without guidelines, for which he was grateful to them. Unfortunately that was of little help because of the rather heterogeneous nature of the suggestions made. That was perhaps his own fault, as he had left the question completely open, not having any very decided idea about it, except that a decision ought to be taken forthwith.

40. The opinions expressed had unfortunately been rather diverse, although they had fortunately not been too categorical. A small number of members had not ruled out the possibility of a convention and had said that they were at any rate in favour of draft articles which might possibly lead to a convention, pointing out that such was the Commission's usual practice and that the status of the text could always be "lowered" at a later stage if a convention seemed unattainable. How-
ever, he was not entirely convinced by those arguments and also had doubts about the idea of preparing draft articles leading to protocols to each of the 1969, 1978 and 1986 Vienna Conventions. Contrary to what was true of most other topics, it was not at all certain that, in the case of the topic under consideration, it was desirable to draft univocal articles that would take the form of rigid rules or "commandments" to States, even if States would be bound by them only after expressing their consent. He feared that, if it did so, the Commission would be making the present system, which had its flexibility in its favour, far too rigid. He therefore greatly preferred guidelines to "commandments" and suggestions for conduct to compulsory rules. Consequently, he would rather join what he thought was, if not the majority opinion in absolute terms, then at least the opinion most frequently expressed, in favour of a guide to practice. While recognizing that he did not have a clear idea of exactly what such a guide to practice might be, he felt that, by giving the matter some thought and combining some of the suggestions made, he should be able to give that idea shape.

41. Mr. Barboza had mentioned (2404th meeting) the possibility of a restatement, as it were, of the law. That was indeed some of what would be involved, but, to "restate" the law, one had to be sure that established rules existed and they did not, really, apart from the relevant provisions of the three Vienna Conventions. In terms of substance, therefore, it did not seem possible to follow the example of the restatements that found favour in the United States of America; in terms of form, however, it was indeed a rewarding area. Several speakers, and Mr. Thiam in particular (2406th meeting), had none the less pointed out that it would not be in accordance with the Commission's statute if articles were not drafted. That was a somewhat narrow and traditionalist interpretation of the Commission's mandate, nevertheless a restatement de lege ferenda could easily be presented as a set of draft articles. It would, however, be drafted in the form of recommendations, in terms that were persuasive rather than compulsory and binding, so as to guide State practice; but, if States so wished, there was no reason why it could not be transformed into a convention on reservations or into a set of protocols. He had to confess that that was not the clear-cut solution that he had been hoping for and that would simplify his task, but, as no consensus had emerged in favour of such a solution, as he had no definite preconceived idea on the matter and as his report had to take some form, that solution seemed to him to be, if not the best, at least not the worst. There was no reason why it could not be improved on and refined as work progressed. It should be noted, however, first, that the draft would be accompanied, where necessary, by model clauses, on which there was a virtual consensus and which could, depending on the case, be of either an illustrative or a derogatory nature, and, secondly, that there should be no misunderstanding about the expression "guide to practice": it was not a question of summarizing the past and present practice of States, but, rather, of directing and guiding their future practice.

42. Some members had touched only partially on the question of the method to be followed for the future work. Some had referred to the order of priority of the questions to be examined, others had raised the question of the "material" to be used and still others had expressed their support for the establishment of a working group.

43. He was opposed to a working group, as he saw no point, at the present stage, in appointing one. So far as the form of the work was concerned, his proposals should be acceptable to most members as they safeguarded the future and left the door open to all possible developments. So far as substance was concerned, unless there was some unexpected difficulty requiring special treatment, there seemed no need to depart from the normal procedure whereby the Special Rapporteur introduced a report and his proposed draft articles were debated in plenary and amended, where necessary, by members and then referred to the Drafting Committee to be finalized.

44. As to the "material" to be used, no matter what several members had said, an examination of practice and doctrine was indispensable, in his view. To those who would object that practice was inconsistent, he would reply, first, that one should ensure that it was in fact inconsistent and, secondly, that it should be studied in sufficient detail to see how the problems arose for States in practical terms. That too was why he proposed to send a questionnaire to States and international organizations for their views on the problems encountered. None the less, while practice could not be entirely disregarded, it was certainly not the only element to be taken into consideration—and that, incidentally, was one of the reasons he had suggested that the reference to practice in the title should be deleted. It would be useful to give serious and detailed consideration to the system of rules laid down in the 1969 and 1986 Vienna Conventions and, to a lesser extent, in the 1978 Vienna Convention with a view to determining the logical consequences that flowed or should flow from them.

45. With regard to the order in which the various problems raised by the topic should be dealt with, the following points had been made during the debate. First, the Commission would not, in principle, deal with "reservations" to bilateral treaties; secondly, the problems of reservations and objections to reservations linked with State succession should not be left out of the topic, but should be the subject of a separate examination at the end of the exercise; thirdly, the starting point for any discussion was the provisions of the 1969 Vienna Convention, called "the matrix Convention" by Mr. Mahiou (2403rd meeting).

46. Although none of the members had raised the matter, he wished to make two further remarks concerning method. In his view, it would be better for the special questions that arose with regard to reservations to treaties concluded by international organizations to be studied as each of the problems was examined: their "specificity" was, after all, only relative and, if it were decided to deal with them separately, one might in the end have to return to all the problems already dealt with. Similarly, it seemed logical to him, in the case of each problem that arose—for instance, interpretive declarations, effects of reservations and regime of objections—to look at matters not only from a general viewpoint, but also from the angle of derogatory or special regimes.
47. In the light of the foregoing, he proposed to proceed in the following manner. He would first try to specify individual categories or groups of problems. For each of them, he would then attempt to pinpoint general guidelines which would be presented in the form of flexible draft articles, on the understanding that, in addition to the basic articles, there would be other articles relating more particularly to reservations to treaties concluded by international organizations or, otherwise, to treaties concluded in a particular field. Model clauses concerning each problem would accompany the draft articles to which they corresponded and would be included in, or at the end of, the commentary. It should be possible to complete the draft as a whole in four years’ time unless any serious and unexpected problems arose.

48. As to the chapter of the Commission’s report concerning reservations which was to be submitted to the Sixth Committee in the current year, he noted that General Assembly resolution 48/31 stated that “the final form to be given to the work on [this topic] shall be decided after a preliminary study is presented to the General Assembly”. The Commission must respond to that expectation, and that was why he suggested that the part of the report devoted to reservations should be submitted as the preliminary study which had been requested in the hope that it would prompt interesting comments on the part of the Sixth Committee.

49. The CHAIRMAN, summing up the Special Rapporteur’s proposals, suggested that, in the first place, the Commission should take note of the Special Rapporteur’s intention to prepare a questionnaire addressed to States and, secondly, the chapter of the Commission’s report that reflected the debate on the topic and the conclusions drawn by the Special Rapporteur should be submitted as “the preliminary study” requested by the General Assembly. That study would therefore not have to be submitted as a separate document. He asked the members of the Commission whether that procedure was acceptable to them.

50. Mr. BENNOUNA said that he had no objection to the debate in the Commission and the Special Rapporteur’s conclusions being reflected in the report transmitted to the General Assembly. The suggestion that a questionnaire should be addressed to States also did not seem to pose any problem. It should, however, be made quite clear that, at the current stage, no decision had been taken on the final form to be given to the Commission’s work on the topic.

51. Mr. ROSENSTOCK said he had a sense of where the Special Rapporteur would like to go, but considered that his suggestions had not been formulated clearly enough. It would be helpful if he could draft a conclusion that it might be useful to transmit to the General Assembly. There would be no need at the current preliminary stage in the work for unanimity on the conclusion. It would also be advisable if the questionnaire the Special Rapporteur was thinking of preparing could be approved by the members of the Commission already in the current year so that it could then be sent to States and the information received in return could be taken into account at the next session.

52. Mr. YANKOV said that, on the whole, he supported the remarks by Mr. Bennouna and Mr. Rosenstock, but would like to add two points. If the title of the topic was to be changed, that should be done straight away. Also, even if the members of the Commission were very open-minded about the question of form, the Special Rapporteur’s conclusions should be expressed in terms of specific suggestions to provide the Sixth Committee with a basis for discussion.

53. Mr. ERIKSSON said that it would be difficult for the Commission to continue its work on the topic at its next session if it did not take an immediate decision on four points: first, the possible change to the title of the topic; secondly, the final form to be given to its work—and he understood that the Special Rapporteur favoured guidelines; thirdly, the advisability of returning or not returning to the existing rules; and, fourthly, sending a questionnaire, though he had doubts about its effectiveness.

54. Mr. THIAM said that he had the same questions as the previous speakers. In particular, he would like to know in what form the Special Rapporteur expected to submit his next report: as draft articles, as a guide to practice or even as model clauses?

55. Mr. de SARAM said that he had proposed (2404th meeting) that a questionnaire should also be sent to the depositaries of the principal multilateral treaties with a view to ascertaining the nature of the difficulties they experienced. That seemed to be important since the topic under consideration concerned a very technical question which should be studied not from the standpoint of doctrine, but rather from a practical point of view. He would be pleased to discuss with the Special Rapporteur the kind of questions that should appear in the questionnaire.

56. Mr. PELLET (Special Rapporteur), agreeing that the Commission’s report should be drafted with the utmost precision, said that he had not formulated more specific proposals, first, because the members of the Commission had not given him any guidelines and, secondly, because he had no definite ideas and remained open to all suggestions. For greater clarity, he would summarize his proposals in the following manner: he would suggest that the Commission’s objective should be to formulate guidelines that should be drafted in a sufficiently flexible manner. Such guidelines would be presented in the form of draft articles together with commentaries. Model clauses could also be drafted where special problems so required. That form would not be definitive and there was no reason why it could not be modified as work progressed. All the options would remain open, including, where appropriate, the drafting of a convention, even if the members of the Commission and he himself were not, at the current stage, very much in favour of such a solution.

57. The CHAIRMAN said that, to allow the members of the Commission time to ponder the matter, he would suggest that a decision should be deferred until a later meeting.

The meeting rose at 1.10 p.m.