Document:-
A/CN.4/SR.2487

Summary record of the 2487th meeting

Topic:
Law and practice relating to reservations to treaties

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

one hand, and the international opposability of nationality, on the other. As far as the question of validity was concerned, a State attributed its nationality, by law, to whomsoever requested it, and the conditions could not be fixed in advance. That being so, how could a third State be expected to have control over the conditions in which the nationality of another State was attributed? International opposability, on the other hand, and more specifically as it applied to the criterion of genuine link, was an issue that arose only in relationships or disputes between two or more States. In the context of opposability, the scope of the genuine link requirement should perhaps therefore not be exaggerated. The words in paragraph 1 "other States do not have the obligation to treat persons as if they were nationals of the said State" raised the question of the possibility of interference of third States in the internal affairs of another State or, even, of a violation of the principle of the sovereign equality of States.

80. The construction of paragraph 1 of the article was good, but the whole effect was destroyed by the last phrase "unless this would result in treating those persons as if they were de facto stateless" because once persons had acquired the nationality of a State the question of genuine link mattered little. What did matter was the State that granted nationality and was in a position to specify on what conditions it did so. Care should be taken not to strip those in search of a new nationality from the security they currently enjoyed. Above all, third States should not be vested with the power to destroy what another State could do on behalf of "victims".

81. He was struck by one passage in particular in paragraph 2, which read: "owing to the disregard by that State of the present draft articles". But was the Commission drafting recommendations that States were free to apply or not, or was it elaborating a convention that would be subject to acceptance by States? The phrase "are not precluded from treating such persons as if they were nationals" also raised a question in his mind. Since when was a State prepared to treat as nationals of another State persons who could not prove they were in fact nationals of that State? The Commission should be very clear as to what it was elaborating and how it proposed to proceed.

82. The CHAIRMAN, noting that the Commission had concluded its debate on Part I of the draft articles on nationality in relation to the succession of States, said that, if he heard no objection, he would take it that the Commission wished to refer articles 15 and 16 to the Drafting Committee.

It was so agreed.

The meeting rose at 1.15 p.m.

2487th MEETING

Tuesday, 3 June 1997, at 10.05 a.m.

Chairman: Mr. João Clemente BAENA SOARES

Present: Mr. Addo, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, 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, Mr. Yamada.

Reservations to treaties (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

1. The CHAIRMAN invited the Commission to begin its consideration of the topic "Reservations to treaties", on the basis of the Special Rapporteur's second report (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PELLET (Special Rapporteur) reminded the Commission that he had introduced his second report at its forty-eighth session together with a draft resolution,[2] which, owing to lack of time, the Commission had been unable to examine in detail; it had deferred the debate on both until the current session.[3] Since the Commission's composition had just undergone a significant change, however, he proposed, for information purposes, to make an overall presentation of the topic—recalling the broad lines of the first report[4], the discussion to which it had given rise and the decisions taken by both the Commission and the Sixth Committee—and of chapter I of the second report. He would, however, defer the introduction of chapter II to later in the session. The members of the Commission had the right to react, of course, should they deem it useful, though it was to be hoped that the decisions already taken would not be called into question at the current stage.

3. As he had explained when introducing his first report, the topic of reservations to treaties was far from being *terra incognita* in international law: there was a wealth of doctrine in the matter and the Commission itself had considered the question on a number of occasions, taking a very definite stand which had had a major influence on

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

[2] See *Yearbook . . . 1996*, vol. II (Part Two), para. 136 and footnote 238.

[3] Ibid., para. 137.

[4] *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/470.

State practice and, on the whole, continued to do so. Originally, a study[5] had been carried out in 1951 at the express request of the General Assembly.[6] The Special Rapporteur, Mr. Brierly, followed by the Commission, had taken a view that had run counter to the solution adopted by ICJ in the advisory opinion handed down the same year on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide[7] abiding by the old strict consensual system of unanimous acceptance—or at any rate of the absence of objection—as proof of the permissibility of reservations. Faced with that disagreement between the Court and the Commission, the General Assembly had prudently refrained from taking a clear-cut position.[8] There had then been a fairly confused period during which the law had remained unsettled. It had been only in 1962, with the first report on the law of treaties by the Special Rapporteur, Sir Humphrey Waldock,[9] that the trend in the Commission had been reversed and the flexible system advocated by ICJ in 1951 had found favour with the Commission. And that was the system which, based on Latin American practice, had finally been codified in articles 19 to 23 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"), article 2, paragraph 1 (*d*), of which defined the word "reservation". Those provisions were, in fact, repeated, virtually word for word and with the same numbering, *mutatis mutandis*, in 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"), while article 20 of the 1978 Vienna Convention simply took account of the lessons implicit in the provisions of the 1969 Vienna Convention relating to reservations.

4. Thus it was that the hallowed "flexible system", whose very essence was expressed in article 19 of both the 1969 and 1986 Vienna Conventions, had come into being. The principle was that a State "*may* . . . formulate a reservation" except in three cases:

(*a*) If the reservation was "prohibited by the treaty"—which immediately signified that the general legal regime of reservations was of an exclusively residual character even for the States parties to the treaty (in other words, it was a security net for States);

(*b*) If the treaty authorized only certain specified reservations, the other reservations being prohibited;

(*c*) In all other cases, a reservation was prohibited if it was, in the words used by the Court in 1951, "incompatible with the object and purpose of the treaty".[10]

5. It had to be recognized that, on the whole, that flexible system, which reflected current positive law in the matter, worked very smoothly. The question therefore was whether there was really any point in returning to it, with the risk of undermining it. The answer was less simple and straightforward than was immediately apparent and it called for a brief historical review of the circumstances that had led the Commission to include the topic on its agenda.

6. During the discussions in the Sixth Committee at the forty-fifth session of the General Assembly, in 1990, the representatives of two States had made a similar suggestion by pointing out that the implementation of the legal regime governing reservations as provided for in the 1969 Vienna Convention had raised problems and that it would be useful to ask the Commission to review it. The working group appointed by the Planning Group at the forty-fourth session, in 1992, to decide on topics for inclusion in the Commission's agenda had taken the view that that suggestion, which responded to practical concerns, should be adopted.[11] At the forty-fifth session, in 1993, the Special Rapporteur had prepared a general outline,[12] briefly indicating the main problems that had been raised, the relevant instruments, existing doctrine and the advantages and disadvantages of codification.

7. After the working group, and then the Commission, had endorsed the conclusion that a detailed study of the topic was justified, the General Assembly had, in paragraph 7 of resolution 48/31, endorsed the Commission's decision to include in its agenda the topic "The law and practice relating to reservations to treaties" and had requested it to undertake a preliminary study. That study comprising the first report of the Special Rapporteur, was divided into three chapters. Chapter I referred to the Commission's earlier work on the 1969, 1978 and 1986 Vienna Conventions, while chapter II contained a brief inventory of the problems posed by the topic, on the basis of which he had noted that the "Vienna regime" was riddled with ambiguities and lacunae.

8. So far as the ambiguities were concerned, in particular regarding the question or rather the questions connected with the lawfulness of reservations and their opposability, the main problem was the following: was a reservation null and void *ipso facto* simply because it was contrary to the object and purpose of the treaty or, on the contrary, did the only criterion for the validity of a reservation lie in the position taken by the other co-contracting States? According to one part of doctrine, known as the "opposability" school, the validity of a reservation depended solely on its acceptance by another contracting State, whereas the opposing school, the so-called "permissibility" school, took the view that a reservation which was contrary to the purpose and object of the treaty was null and void in itself, irrespective of the position the other contracting parties might have on the question. Admittedly, that was a doctrinal disagreement, but the actual consequences were significant and could not be dealt with under the terms of the 1969 Vienna Convention. The result was great uncertainty, particularly regarding the effect and acceptance of reservations that were contrary to the object and purpose of the treaty and regarding objections to reservations the legal regime for which, under existing positive law, was highly uncertain. As for lacu-

[5] Report on reservations to multilateral conventions (*Yearbook . . . 1951*, vol. II, p. 1, document A/CN.4/41).

[6] General Assembly Resolution 478 (V) of 16 November 1950, para. 2 (*a*).

[7] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

[8] General Assembly resolution 598 (VI) of 12 January 1952.

[9] *Yearbook . . . 1962*, vol. II, p. 27, document A/CN.4/144.

[10] *Reservations . . .* (footnote 7 above), p. 19.

[11] See *Yearbook . . . 1993*, vol. II (Part Two), p. 96, paras. 427-429.

[12] Ibid., vol. II (Part One), document A/CN.4/454.

nae—and they were the same in the 1969 and the 1986 Vienna Conventions—they were extremely numerous, starting with the definition of the word "reservation" itself and the legal regime of interpretative declarations on which the 1969 Vienna Convention was silent.

9. In his conclusions contained in chapter II, sections A and B, of his first report, he had endeavoured to summarize the main ambiguities and gaps in the texts of the 1969, 1978 and 1986 Conventions, the long list of which amply justified the detailed study of the subject which the Commission had been requested to undertake. That, moreover, had been the tone of the debate the Commission had devoted to the matter at its forty-seventh session: all those members who had spoken on the subject had acknowledged the existence of many gaps and areas of uncertainty, some of which, moreover, had been clearly highlighted.[13]

10. That debate had also dealt at length with chapter III of the first report, entitled "The scope and form of the Commission's future work", in which he had dealt, first, with the question of the relationship between that work and the provisions of the 1969, 1978 and 1986 Vienna Conventions, and, secondly, with the question of the form that the results of the Commission's work might take. He had indicated in that chapter that the then title of the topic, "The law and practice relating to reservations to treaties", was not satisfactory, particularly because it was rather academic and might—no doubt wrongly and in any case a priori—give the impression that there might be some opposition between "the law" and "practice" in that area. With regard to the relationship between the Commission's work and the 1969, 1978 and 1986 Vienna Conventions, in his first report he had come out very firmly in favour of preserving what had been achieved: taken as a whole, despite their numerous shortcomings, the 1969, 1978 and 1986 Vienna Conventions worked well and their provisions constituted rules of reference which, irrespective of their nature at the time of their adoption, could be regarded as having acquired a customary value. Consequently, it had seemed to him that it was not necessary, in order to remove existing ambiguities and fill existing gaps, to reconsider a system which had proved its worth, particularly in view of the fact that to call the existing principles into question would place States that had ratified the 1969 and 1978 Vienna Conventions in an extremely delicate position: there was no guarantee that they would all rally to a new regime and the result would be an inextricable legal muddle.

11. On the other hand, he had adopted no clear-cut position in his first report on the form the results of the Commission's work might take, confining himself to pointing out that there were a fairly large number of possibilities, ranging from a draft convention to a mere study, by way of additional protocols to the existing conventions, a guide to practice, a set of "consolidated" draft articles, that is to say, one including the provisions of the existing conventions, model clauses or a combination of those various solutions.

12. Called upon to draw conclusions from the debates in plenary, he had summarized them as follows:

(*a*) The Commission considers that the title of the topic should be amended to read "Reservations to treaties";

(*b*) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(*c*) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

(*d*) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[14]

13. Those conclusions had been adopted in their entirety by the Sixth Committee at the fiftieth session of the General Assembly and the Assembly, in paragraph 4 of resolution 50/45, had taken note thereof and had invited the Commission "to continue its work . . . along the lines indicated in the report". Most, if not all, representatives who had spoken on the subject at the fiftieth session of the Assembly had stressed the need to preserve what had been achieved and some had reverted to the question at the fifty-first session, pointing out, *inter alia*, that the Vienna regime had established a satisfactory balance between the need to preserve the integrity of the treaties and the desirability of enabling the largest possible number of States to become parties thereto.

14. It was thus on those bases that he had drafted his second report, which consisted of two chapters, the first of them devoted to an overview of the study and the second to the unity or diversity of the legal regime for reservations to treaties, particularly human rights treaties—a fundamental problem that had been much discussed both in the Commission itself and in the Sixth Committee, as well as in human rights bodies, universities and scientific forums.

15. Chapter I of the second report dealt with the outcome of the first report and its consequences for the future work of the Commission on the topic. In that chapter, he summed up the main questions which had been taken up by the Commission at its forty-seventh session and which very largely coincided with those dealt with by the Sixth Committee at the fiftieth and fifty-first sessions of the General Assembly. It was in many respects comforting to note that the independent experts in the Commission were not out of touch with reality and that they had the same views as representatives of Governments about the order of importance of the problems. Those key problems were: the question of the definition of reservations; the distinction between them and interpretative declarations, and the legal regime governing the latter; the effect of reservations which clashed with the purpose and object of the treaty; the effect of objections to treaties; and the unity or otherwise of the legal regime of reservations. While it was true that those problems were indisputably at the root of the most serious questions raised by the topic, the Commission could not content itself with trying to come up with answers to them because those questions formed part of a broader set of problems and the Commission would

[13] See *Yearbook . . . 1995*, vol. II (Part Two), paras. 436-487.

[14] Ibid., para. 487.

not fully perform its task, namely, the preparation of a guide to practice in respect of reservations, if it did so. That was why the provisional general outline of the study, set out in chapter I, section B, of the second report and briefly analysed at the end of the chapter, summarized the topic as a whole as completely as possible. As the informal working group established by the Planning Group had indicated at the preceding session, and as contained in the report of the Planning Group adopted by the Commission,[15] it seemed normal and legitimate that a special rapporteur should indicate as precisely as possible the questions he planned to deal with in future and, if possible, the order in which he planned to deal with them. That was what he himself had tried to do in the current case, aware as he was of the perilous nature of the exercise, for it was not possible to foresee every eventuality. As his work progressed, he was discovering the complexity and technicality of the topic and also the politically sensitive nature of some of its aspects. He thus did not claim that the outline was definitive, or even complete. Any suggestions for additions or changes would be welcome.

16. He said he wished to draw the Commission's attention to the paragraphs of his second report in which he had tried to define the objectives of the general outline of the study and the spirit in which he had conceived it and which was more pragmatic than doctrinal, still less doctrinaire. In the last paragraph of chapter I, he set out his plan of work for the years ahead, which was a little overambitious because he had had to abandon his intention of submitting a third report on parts II (Definition of reservations) and III (Formulation and withdrawal of reservations, acceptances and objections), as it had not been possible to consider his second report at the forty-eighth session. That being said, his work on the analysis of those topics was already well advanced and he thus hoped to be able to submit two reports to the Commission at its fiftieth session, namely, the one he would have submitted at the current session if his second report had been considered at the forty-eighth session and the report on "Effects of reservations, acceptances and objections" that he had planned for the fiftieth session. However, it was clear that, as pointed out in the last sentence of the last paragraph of chapter I, those indications were only and could be only of a purely contingent nature.

17. Chapter I also set out to give further details of the form the proposed study would take. It was indeed a question of further details, for the matter had already been decided by the Commission, and its decision had been adopted by the General Assembly. It would thus be necessary to preserve what had been achieved by the 1969, 1978 and 1986 Vienna Conventions with regard to reservations, and that meant that those Conventions would be the starting point for the study. The idea was then to draw up a guide to practice in respect of reservations, which presupposed the establishment of a set of draft articles. In that regard, he did not intend to make innovations, except perhaps in one area that was also connected with the desire to preserve what had been achieved, in that he planned to preface the new draft articles with the provisions on reservations already included in the 1969, 1978 and 1986 Vienna Conventions, first, to give the guide to practice a comprehensive nature and, secondly, to ensure that it was consistent with what already existed. The draft articles would be accompanied not only by commentaries, but also by "model clauses", in other words, model provisions that States could insert in the treaties they concluded in the future if they needed to have recourse to special clauses derogating from ordinary law in certain specific areas.

18. In closing, he said that annex I to the second report contained the bibliography on the topic and was available to all members of the Commission who did not have it and would like to obtain it. It was a long document which, however, certainly had gaps as concerned not only works published in languages which he did not know, but also new material on a topic on which there had been many writings. He urged all members of the Commission to draw any omissions to his attention so that the bibliography could be completed.

19. The other two annexes, which also had not been distributed at the current session, but which were available, contained the two questionnaires which the Commission had authorized him to send, through the secretariat, to States and international organizations.[16] The questionnaires, which were very long, did not solicit the opinion of States and international organizations on the problems to which the topic gave rise, but inquired into their practice in respect of reservations.

20. He had received replies from 18 international organizations, but not, unfortunately, from certain specialized agencies, such as WHO, or from the European Communities, and also from 30 States, including third world countries, whose effort deserved to be noted. Some of the States with a national in the Commission had not replied and he urged his colleagues to prompt their States to do so. As the replies had been very long, it had not been possible to circulate them and he would thus try to produce a summary in his future reports. The results were very encouraging because they reflected the interest of States and international organizations in the topic of reservations to treaties and he hoped that his work would be useful to them. To his mind, that was an additional reason to ask all members of the Commission to help him in his task through their comments, advice and criticism. The debates would probably focus on chapter II of the second report, but he was prepared to respond to any questions to which chapter I might have given rise.

21. Mr. KATEKA said that he had doubts about the Commission's procedure for considering the second report because it might create confusion, particularly for the new members of the Commission like himself. It was not logical to submit the two chapters of the report separately and to return in the interim to another topic. At that rate, he was not certain that the consideration of the question could be completed by the fifty-first session of the Commission, in 1999.

22. As to the substance of the topic, he too felt intimidated by its complexity and its highly political nature. Although he agreed that the objective must be to fill any

[15] *Yearbook . . . 1996*, vol. II (Part Two), paras. 144-250.

[16] ILC (XLVIII)/CRD.1 and ILC (XLIX)/CRD.1.

gaps and dispel any ambiguities in the 1969, 1978 and 1986 Vienna Conventions, he wondered whether drafting a non-binding guide was the best way to do so. He would like the Special Rapporteur to provide clarification on that point. It also appeared that such a guide would be very voluminous because it would contain draft articles together with commentaries and model clauses as well. It was to be hoped that the guide would really help improve the situation and not add to the confusion which already reigned in the system established by the 1969, 1978 and 1986 Vienna Conventions.

23. Lastly, it would be very useful if the Special Rapporteur could summarize all the replies he had received to the questionnaires so that all members of the Commission could have a clear idea of the situation in that regard.

24. Mr. LUKASHUK said he agreed entirely with the Special Rapporteur that the topic under consideration was very concrete. He pointed out that when the 1969, 1978 and 1986 Vienna Conventions had been adopted, it had been the socialist countries, supported by the developing countries, which had insisted on the right to make reservations, whereas recently it had been the western countries which had made use of that right. He nevertheless endorsed the Special Rapporteur's method of starting with the consideration of the provisions and principles embodied in the Conventions. The question of reservations was of vital importance and must be studied in depth. Attention should also be given to the particular regime of treaties which had established rules to reflect the interests of the international community as a whole, an aspect which the Special Rapporteur had rightly underscored. From a practical point of view, the procedure chosen for the adoption of reservations and the formulation of objections would be essential, as would the way in which the permissibility of reservations was determined, those all being elements which currently gave rise to considerable difficulties.

25. He noted that, although the practice of formulating reservations was in general on the decline, the question of reservations to bilateral treaties had assumed greater importance. The Senate of the United States of America had taken the initiative in the area and other States had followed. A new trend in that direction had even appeared in the Russian Parliament. The Commission had already focused on the question, but there had not been any unanimity on whether only reservations to multilateral treaties should be regarded as acceptable. Admittedly, the 1969 Vienna Convention itself did not prohibit reservations to bilateral treaties. The question therefore warranted more in-depth consideration.

26. Mr. PAMBOU-TCHIVOUNDA said, first, that there was nothing new about the idea that the practice of the States parties to the 1969, 1978 and 1986 Vienna Conventions had itself created customary rules. It was clear that custom preceded codification and that the latter had neither transformed nor added anything in terms of substance, apart from making a "sole outline" widely available.

27. Secondly, with regard to the doctrinal quarrel referred to by the Special Rapporteur between the permissibility and opposability schools, he wondered whether permissibility was not a condition for opposability and whether it would not be possible to reconcile the two points of view, since both operations functioned within the same system.

28. His third comment had to do with reservations and interpretative declarations, which were related categories. In his opinion, it might be possible to go beyond the usual criterion of distinction, which usually concerned the subject, and focus on the function of those two techniques, which of course was what they were. It would be necessary to determine the function of each one in relation to a system which a State either planned to join while retaining its own views and defending its own interests or of which it was already a part, but which it would like to improve.

29. Fourthly, he noted with interest that, in his introduction, the Special Rapporteur had taken account of a highly political dimension, namely, the basis of a reservation by a State or an international organization. If a State planned to become part of a whole while making its intention to join conditional on a "yes, but", it was not the joining which determined entry, it was the reservation so expressed. In other words, by drawing the attention of the members of the Commission to the political context which was the basis of the reservation procedure, the Special Rapporteur was asking them to assess the place of the instrument which existed in relation to the reservation and the role of the reservation in relation to the instrument which existed. That required a diachronic evaluation of the relationship between the reservation, which was the expression of the political approach of its author, and the legal instrument, which itself served political interests. In the nineteenth century, the treaty had been considered above all in its formal dimension; the waning twentieth century would be one in which international law appeared as increasingly reduced to essentials in that the international treaty was recognized as an act which was not neutral, but which promoted interests.

30. His fifth comment had to do with the form which the result of the Commission's work would take. As there was agreement on the principle of retaining the achievements of the 1969, 1978 and 1986 Vienna Conventions, it might be asked whether the guide to practice which the Special Rapporteur proposed to draft would have the same authority as the "Vienna system" and become part of the binding logic of that system. That was an essential question.

31. Mr. DUGARD suggested that, since the Commission was in all likelihood about to enter into an in-depth debate on the relationship between the Vienna regime and reservations to human rights instruments, the secretariat should prepare a compendium of the reservations to the major human rights conventions and make it available to the members of the Commission. The secretariat should also obtain copies of general comment No. 24 (52) of the Human Rights Committee,[17] on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,[18] as well as the reactions or objections to general comment No. 24 (52) by certain

[17] See *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), annex V.

[18] Ibid., annex I.

Governments.[19] He wished to know whether the draft resolution at the end of the second report was still to be considered at the current session.

32. Mr. MIKULKA congratulated the Special Rapporteur on his brilliant second report and endorsed the method of referring to a number of issues which the Commission had practically settled and on which it would be unfortunate to reopen the debate. He fully agreed that the Commission needed to preserve the aspects of the 1969, 1978 and 1986 Vienna Conventions that represented successful achievements in the codification of international law and try to remove the ambiguities and gaps in those instruments. With regard to the provisional general outline of the study, contained in chapter I of his second report, he had two questions about part II. On the legal regime of interpretative declarations (item (*d*)), he had understood that the intention was primarily to define such declarations in order subsequently to exclude them from the study. He would like to have assurances from the Special Rapporteur on that point. As to reservations to bilateral treaties (item (*e*)), he had the impression that the Commission had already taken a decision not to study such reservations and that would mean that item (*e*) could be deleted. He also asked the Special Rapporteur whether 1999 was still the date of the completion of the study or whether he intended to push the time limit back one year.

33. Mr. SIMMA congratulated the Special Rapporteur on his excellent second report and on the questionnaire, which attested to in-depth knowledge of the topic. He fully endorsed the Special Rapporteur's proposals on the form of the draft articles and the work to be done on it. He nevertheless wished to know why the Special Rapporteur was planning to submit two reports to the Commission at its fiftieth session rather than a single report combining parts II and III of the provisional general outline of the study. He endorsed the requests by other members of the Commission that the secretariat should compile documentation containing at least excerpts or summaries of replies by States to the questionnaire, copies of reservations to human rights instruments and the full text of the reactions by States to general comment 24 (52) of the Human Rights Committee.

34. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his remarkable work on an important topic. He regretted that, owing to lack of time, the Commission had been unable to begin its discussion of the topic at its preceding session, but he nevertheless agreed with the conclusions reached during the preliminary consideration. The way the Special Rapporteur had approached his task by starting with extensive background analyses augured well for the quality of his future reports. Despite the magnitude of the task still to be accomplished, the Commission could be confident that, under the guidance of the Special Rapporteur, who had shown that he was open-minded and objective, it was not in danger of going astray or of neglecting any aspect of the topic.

35. Mr. HAFNER, congratulating the Special Rapporteur, said that he had two questions. First, since he shared Mr. Mikulka's view about reservations to bilateral treaties, but had noted that other members were of the opposing view, he wondered whether, as a compromise, it might not be possible to draft part II, item (*e*), of the provisional general outline of the study as a question. Secondly, referring to the documentation to be compiled by the secretariat, he wondered whether it might not also be possible to obtain the reactions of States to reservations to human rights instruments.

36. Mr. PELLET (Special Rapporteur) said that he would reply briefly to the comments made. With regard to Mr. Kateka's and Mr. Pambou-Tchivounda's concerns about the preparation of a guide to practice, he pointed out that, although a decision had been adopted it was not immutable because the decisions taken by the Commission and by the General Assembly in 1995 had left a way out. At the current stage, however, there was no reason to reconsider that decision, which had been fairly well received by States. As to the authority of such a guide to practice, he explained that, as an advocate of "soft law", he did not view international law as a succession of obligations and prohibitions, but was convinced that, if well designed, directives and guidelines could have an impact on the conduct of States. In the current instance, if the members of the Commission were able to reach agreement as part of a consensus or near consensus on important explanations about the Vienna regime, those explanations would undoubtedly carry a great deal of weight with States.

37. With regard to Mr. Lukashuk's comments, he said that he had doubts about the statement that it was mainly western States that used reservations because, in his view, the situation was a bit more complex and nuanced. It was true that, during the cold war period, some treaties had been imposed on the western States, which had been on the defensive to some extent and, on some issues, had used the technique of reservations to protect themselves against clauses that they had not wanted. Statistically, however, he believed that reservations had been very often made by the States that were then called socialist. Currently, reservations were used mainly by third world countries on human rights issues, with western countries acting as fairly consistent and increasingly vigilant objectors in an effort to preserve the integrity of human rights.

38. On the question of reservations to bilateral treaties, he did not think that the Commission had already taken a decision. Part II, item (*e*), of the provisional general outline of the study should be understood as a question and not as a statement; in that connection, he referred to the relevant paragraph of his first report. He intended to proceed deductively, by asking questions and, through a study of practice, doctrine and jurisprudence, seeing what the answers should be. It would therefore be unfortunate for the Commission to prejudge the issue. Incidentally, having received no reply by Russia to the questionnaire, he would be very interested in any information that could be provided on the practice of the Russian State Duma to which Mr. Lukashuk had referred.

39. With regard to Mr. Pambou-Tchivounda's suggestion that there might be a reconciliation between the permissibility and opposability schools, he recalled that he had considered such a possibility in his first report, but had greater and greater doubts about achieving any

[19] Ibid., annex VI, and *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), annex VI.

results, since each of the schools had its own way of looking at the problem.

40. Replying to the question asked by Mr. Dugard, he confirmed that the consideration of the proposed draft resolution would be one of the main objectives of discussion of the topic at the current session.

41. He was opposed to the exclusion of interpretative declarations from the study and believed, rather, that the problem must be looked at in greater depth, even if it was obvious that interpretative declarations were not reservations. He therefore intended to consider the legal regime for such declarations in the context of part II of the provisional general outline of the study.

42. As to whether 1999 was still a valid date for the completion of work on the topic, he confirmed that he intended to meet that deadline as long as he was able to cover parts II, III and IV of the provisional general outline of the study at the fiftieth session of the Commission. In reply to the question asked by Mr. Simma, he explained that he had always intended to submit parts II and III of the outline in a single report, but that the idea of devoting a separate report to part IV of the outline was based on considerations relating to the Commission's working methods and was intended to prevent the Commission from having to consider a very voluminous report all at once.

43. Referring back to the comment made by Mr. Sreenivasa Rao, he said he was convinced that the extensive background analyses that he was trying to carry out would enable the Commission to move forward more rapidly and be more consistent in its approach to the topic. He hoped that the discussion on chapter II of the second report would confirm that viewpoint.

The meeting rose at 11.55 a.m.

2488th MEETING

Thursday, 5 June 1997, at 10 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRMAN announced that, since the Drafting Committee was progressing faster than expected in its work on the draft articles on nationality in relation to the succession of States, it had been decided to give priority to the consideration in plenary of the entire text, with a view to adoption on first reading before the end of the session. That decision would have no effect on work on the topic of reservations to treaties, which would not be neglected.

2. He invited the Commission to commence its consideration of Part II of the draft articles.

PART II (Principles applicable in specific situations of succession of States)

3. Mr. MIKULKA (Special Rapporteur), introducing Part II, said it comprised articles 17 to 25, setting out principles applicable in specific situations of succession of States, in contrast to the articles in Part I (General principles concerning nationality in relation to the succession of States), which applied generally to all cases of State succession. The specific cases envisaged were: transfer of part of the territory (sect. 1, art. 17); unification of States (sect. 2, art. 18); dissolution of a State (sect. 3, arts. 19 to 21); and separation of part of the territory (sect. 4, arts. 22 to 25). Only sections 3 and 4 incorporated articles dealing with the scope of application of those sections. That was purely for editorial reasons: the articles served as *chapeaux*, obviating the need for repetition of phrases and at the same time defining the context in which the terms "predecessor State" and "successor State" were used.

4. In most cases of States succession, the States concerned should negotiate in order to settle any problems that might arise, negotiations that would normally culminate in the conclusion of a treaty. In that regard, it should be emphasized that the principles set out in Part II were residual in character. States would not be bound to fully apply the principles, which would simply aid them in their negotiations, but in the event of no agreement being

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* Resumed from the 2486th meeting.

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