

Document:-
A/CN.4/SR.2500

Summary record of the 2500th meeting

Topic:
Law and practice relating to reservations to treaties

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

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

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

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

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

The meeting rose at 1.05 p.m.

2500th MEETING

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

Chairman: Mr. João Clemente BAENA SOARES

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

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

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

¹⁵ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); *ibid.*, *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6); and *ibid.*, *First and Second Sessions, Vienna, 26 March-24 May 1968 and Vienna, 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

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

on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PELLET (Special Rapporteur) said that he had not originally intended to introduce chapter II of his report at that point in the proceedings, but had deferred to the views of members who wished to comment on general aspects of the report instead of proceeding section by section. He would therefore introduce the part dealing with the specific question of reservations to human rights treaties, but requested in return that members refrain from commenting on the separate and, in his view, very different issue of the competence of human rights treaty monitoring bodies until after he had introduced that item.

3. Was the Vienna regime applicable to human rights treaties and, if so, was it suited to that particular category of treaty? If it was not, special rules applicable to reservations to such normative treaties of a particular kind must be devised. He mentioned the problem as a precautionary measure, so that nothing was left in the dark, because the arguments advanced by authors and some members of human rights bodies in favour of making an exception for human rights treaties were exactly the same as those advanced in the case of normative treaties, of which human rights treaties were a particular kind. He was firmly convinced that such arguments were invalid for normative treaties in general and equally invalid for human rights treaties unless more specific arguments to the contrary were advanced, which he thought unlikely.

4. At a recent symposium on the relationship between general international law and human rights organized in Strasbourg by the Société française pour le droit international, a number of participants, including Professor Cohen-Jonathan, the eminent expert on the Convention for the Protection of Human Rights and Fundamental Freedoms, had argued forcefully for a special regime to govern reservations to human rights treaties. He had been struck by the fact that Professor Cohen-Jonathan's arguments were basically unspecific. While he had focused on human rights treaties, arguing that their particular characteristics warranted a separate reservations regime, he had in reality complained of deficiencies and ambiguities in the general reservations regime, the very deficiencies which, on a general plane, justified the exercise in which the Commission had been engaged for the past three years.

5. The point was that there were two issues which must be kept separate. The first concerned the imperfections of the existing reservations regime, which affected both human rights treaties and all other treaties, especially normative treaties. The second was more specific and concerned the supposed singularities of human rights treaties that warranted special treatment of reservations to those treaties. The Commission was concerned solely with the latter issue at that juncture. It was agreed that the Vienna regime should be refined and expanded, and the refinements and additions should include some that related specifically to reservations to human rights treaties. But what the Commission must decide was whether there were cogent arguments against applying the existing rules—however inadequate—to human rights treaties. His own reply to that question, contained in chapter II, section C.1, of his second report, was emphatically in the negative.

6. The controversy had begun with a problem concerning reservations to a quintessential human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, as noted by ICJ in its judgment of 11 July 1996 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* (see particularly paragraphs 22, 31 and 34).²

7. The authors of the 1969 Vienna Convention—and when he spoke of the 1969 Convention he included the 1986 Vienna Convention—had not neglected to include specific rules where they were warranted by a particular category of treaty. Under article 60, paragraph 5, of the 1969 Vienna Convention, a material breach by a State party of provisions relating to the protection of the human person contained in treaties of a humanitarian character did not entitle the other States parties to terminate or suspend the treaty, as was the case for other categories of treaties. The authors of the Convention had not, however, provided for a special regime in the matter of reservations. It could be inferred that that was not an oversight and they had considered that there was no decisive reason to establish such a regime for human rights treaties.

8. Judicial practice showed that neither States, as authors of and parties to human rights treaties, nor treaty monitoring bodies had ever contested the applicability of the Vienna regime to human rights treaties. Express reservation clauses in the case of many human rights treaties either referred to articles 19 et seq. of the Vienna Conventions or referred to the basic criterion of the object and purpose of the treaty. The *travaux préparatoires* of other instruments often showed that the absence of a reservation clause was to be interpreted as an implicit referral to the regime set forth in the 1969 Vienna Convention. Moreover, the monitoring bodies tended to apply the Vienna regime in such cases without questioning its adequacy. Where reservation clauses expanded on its provisions, as in the case of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Vienna regime was superimposed on such a special regime and the Council of Europe bodies made explicit reference to the object and purpose of the treaty, namely the decisive criterion set out in article 19 of the 1969 Vienna Convention. Lastly, it could be inferred from cases such as those mentioned in chapter II, section C.1, of his report, in which States parties to human rights treaties explained the reasons for their objections to reservations, that inter-State relations were based on the Vienna regime in the field of human rights as well as in other areas.

9. Nothing, therefore, in the international practice of States, courts or monitoring bodies was conducive to the view that a special regime was required for reservations to human rights treaties. Should further evidence be needed, he drew attention to general comment No. 24 (52) of the Human Rights Committee,³ in which the Human Rights Committee, despite its highly unorthodox views in several other respects, had repeatedly referred to the rules of the Vienna Conventions, viewing them as useful guidelines and a reflection of the rules of general international law.

² See 2478th meeting, footnote 3.

³ See 2487th meeting, footnote 17.

10. He therefore saw no serious obstacle to the application of the Vienna regime to reservations to human rights treaties. However, he wished to add two riders. First, it was not at all inconceivable that States parties would quite legitimately wish to make exceptions or additions to the reservations regime in the case of a particular treaty. It would therefore be a wise precaution in future, when States concluded a general human rights treaty, such as the International Covenants on Human Rights, to state expressly whether an outright denial of one of the freedoms protected by the treaty constituted a violation of the object and purpose of the treaty, since a priori he was unsure whether a clear answer to that question existed, at least in current positive law. Furthermore, a dialogue with reserving and objecting States, proposed on a number of occasions by Austria and Portugal, would probably prove particularly useful and productive in the area of reservations to human rights treaties. Special provisions could also be included for that purpose in future treaties. He suggested that the Commission should consider drafting appropriate model clauses. Such specific provisions and model clauses would be one way to help create the balance which had been advocated in the Sixth Committee during the fifty-first session of the General Assembly, in 1996, by the representative of Italy, between what he had called the unicity of the reservations regime and the specificity of human rights instruments.⁴

11. Secondly, his conclusion that there was no need to forge a special regime for reservations to human rights treaties did not concern the role of human rights treaty bodies in relation to reservations. If such bodies were required to take a decision on the matter, they must, in the absence of specific reservation clauses in the treaty for which they were responsible, apply the Vienna rules, and that was invariably what happened in practice. He would consider the conclusions to be drawn from the action of the monitoring bodies and the application of the Vienna rules at a later stage, since it was, in his view, an entirely different problem. Moreover, it was not restricted to the area of human rights inasmuch as the debate on the competence of monitoring bodies applied in the same terms to other bodies called upon to rule on the admissibility of reservations to any category of treaty.

12. He would reiterate his request to members of the Commission to defer their comments on that aspect of the topic until a later meeting. He very much hoped that the discussion would deal initially and exclusively with the three basic conclusions that he had presented so far: first, the Vienna regime had been conceived as uniform rules to be applied to all treaties, save for the two exceptions carefully defined in the 1969 Vienna Convention after thorough reflection; secondly, there were no convincing grounds for shattering that uniformity for reservations to "normative" treaties; and thirdly, there were no conclusive grounds for making an exception for reservations to human rights treaties. While some writers had expressed opinions to the contrary, neither human rights bodies nor the vast majority of States had done so. That was borne out both by the response of members of the Commission during the brief debate on the subject at the forty-eighth session of the Commission and by the reaction of State

representatives in the Sixth Committee at the fifty-first session of the General Assembly in 1996. Of the 11 States that had addressed the issue, one only—Venezuela—had raised the possibility of a special regime for human rights treaties.⁵ All the others had opposed the idea, noting that the flexibility of the Vienna rules afforded sufficient guarantees. He suspected that even Venezuela was thinking more in terms of reservation clauses than of a specific derogation regime.

13. At all events, there was no reason why the Commission should not discuss the issue, since a review of the grounds leading to those conclusions would assist the Special Rapporteur in his future work, as the problems taken up from the specific standpoint of reservations to human rights treaties touched on wider problems relating to treaties in general.

14. Mr. KATEKA said that the reservations regime established by the 1969 and 1986 Vienna Conventions had worked reasonably well, despite problems created by lacunae and ambiguities. The Commission should therefore refrain from taking any action that might upset the balance thus established. The Special Rapporteur had noted that reservations to treaties were a fact of life, a view that was borne out by State practice.

15. He did not wish to become involved in doctrinal disputes between the opposability and permissibility schools of thought nor would he take sides on the equality and reciprocity issues raised by reservations. He would merely restate the fact that treaty relations were based on the free will of the parties concerned. States could not be bound by treaties without their consent. The flexibility of the Vienna regime allowed them to make reservations that facilitated their accession to treaties. The regime struck a balance between the integrity of treaties and the desirability of universal accession.

16. Whether or not reservations were in conformity with the object and purpose of a treaty was a matter for States parties to decide, unless they had agreed or provided otherwise. He found it difficult, therefore, to accept the powers assumed by the monitoring bodies established under human rights instruments. Unless a particular instrument clearly mandated the treaty body to interpret the applicability and validity of reservations, he strongly felt that such bodies should not arrogate to themselves powers they did not possess.

17. He agreed with the Special Rapporteur's conclusion at the end of chapter II, section B, of the second report that the Vienna reservations regime applied to all multilateral treaties, whatever their object, and was suited to normative treaties, including human rights instruments, the only exception being restricted treaties and constituent instruments of international organizations.

18. There were too many United Nations treaty bodies dealing with human rights. He had counted at least eight. Their proliferation and unjustified assumption of powers not included in their mandate could create even more confusion than already existed in the reservations regime. A role comparable to that of regional treaty bodies was

⁴ *Official Records of the General Assembly, Fifty-first Session, Sixth Committee, 41st meeting, para. 44.*

⁵ *Ibid.*, 39th meeting, para. 22.

unacceptable in the absence of clear and explicit authorization by specific provisions of international human rights treaties. The European Court of Human Rights and the Inter-American Court of Human Rights had interpreted the legal effects of reservations to the respective regional human rights conventions. The States parties concerned—albeit under protest in some cases—had accepted the role of those courts. That was not true of, for example, the Human Rights Committee, particularly following its general comment No. 24 (52). The Committee was a political rather than a legal body. His fears were borne out by the comment on the legal effect of some reservations made by the chairpersons of the human rights treaty bodies and mentioned by the Special Rapporteur in chapter II, section C.1, of the second report. He asked who had given them the mandate to make such remarks.

19. The monitoring bodies in question ought to request the competent organs of the United Nations, under Article 96 of the Charter of the United Nations, to ask ICJ for an advisory opinion on the permissibility of reservations. Such a procedure would be more amenable to States than an approach that discouraged them from acceding to treaties.

20. To make matters worse, some treaty bodies invoked the concept of the “severability” of a reservation, on the grounds that it was undesirable to exclude States parties. In purporting to separate the offending reservations, treaty bodies called into question a State’s consent, which was a *sine qua non* of treaty relations. It had even been suggested in chapter II, section C.2 (b), of the report that the binding force of the findings of a monitoring body would depend on the powers with which the body was invested. It was not desirable for treaty bodies to make findings that were merely of persuasive value. The so-called “intermediate solution” of treaty bodies asking a State party to modify or withdraw its reservation amounted to interference with a State’s sovereign rights, which was totally unacceptable. Monitoring bodies should tread carefully in dealing with reservations to treaties in view of the serious legal consequences for States parties and the ensuing disruption of treaty relations. It was for States parties themselves or dispute settlement mechanisms to decide on the validity of reservations.

21. The draft resolution proposed at the end of the report was premature, since the Commission and Member States had not yet discussed the topic of reservations in depth. It telescoped many issues in a manner likely to prejudice their future consideration by the Commission. Paragraphs 5 and 7 of the draft resolution made highly controversial assumptions and paragraph 9 was unduly optimistic, expressing the hope that the principles set forth in the resolution would help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights. Even if the Commission agreed on the substance of the draft resolution, it would be for the General Assembly, and not the Commission, to adopt it. Paragraph 10, which suggested to the General Assembly that it “should bring the . . . resolution to the attention of States and bodies which might have to determine the permissibility of such reservations”, was greatly mistaken.

22. Further to comments by Mr. KABATSI, Mr. SIMMA and Mr. LUKASHUK, the CHAIRMAN

said that he would invite speakers to make general statements before opening the floor for debate.

23. Mr. ADDO, after congratulating the Special Rapporteur on his excellent work, said that since he had not had the opportunity to express his views on chapter I of the second report, he would comment on it briefly. Noting that, regrettably, none of the States with a national in the Commission had replied to the questionnaire addressed to them by the Special Rapporteur,⁶ he said the reason why Ghana had not replied to the questionnaire was simply that a copy had not reached his desk. He was the legal adviser to his country’s Foreign Ministry and all matters relating to treaties were handled by the department he headed. The topic of reservations to treaties was therefore of special interest to him. If the Special Rapporteur could arrange to provide him with a copy of the questionnaire, he would ensure that most if not all of the questions would be promptly answered so far as the practice of Ghana was concerned.

24. He entirely agreed with the Commission’s decision at its forty-seventh session to draw up a guide to practice in respect of reservations⁷ and also shared the view that there were insufficient grounds for amending the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. He also agreed with the Special Rapporteur’s proposal concerning the final form the guide to practice should take. In his view, the Vienna regime on treaties should be left intact and be allowed to apply to all treaties without distinction, including those relating to human rights. Any departure from that principle would be impractical and would not necessarily enhance the prospects of wider acceptance. It should be recalled that the 1969 Vienna Convention had taken 11 years to enter into force, while neither the 1978 nor the 1986 Conventions had as yet attracted the number of parties needed for them to become operative. To add to the existing predicament by creating a new special reservations regime for human rights treaties, thus importing confusion into an already confused area of the law, might not be wise.

25. Whatever the weaknesses or drawbacks of the Vienna system, there were surely ways of dealing with them without opening the Pandora’s box of a completely new regime, one such way was the guide to practice in respect of reservations being contemplated. A special regime for human rights treaties might well be succeeded by another dealing with the no less important category of arms control treaties, and before long there would be a proliferation of special regimes that would undermine the achievements of the Vienna system. In his view, prudence dictated that the current Vienna regime be left as it stood.

26. As all members were aware, reservations to treaties had been in use since the emergence of the great multilateral treaties towards the end of the nineteenth century. Thus, France had entered a reservation when it had signed the General Act of the Brussels International Conference, dealing with the abolition of slavery in 1890,⁸ and the

⁶ See 2487th meeting, footnote 16.

⁷ See *Yearbook . . . 1995*, vol. II (Part Two), p. 108, para. 487 (b).

⁸ France, Ministère des affaires étrangères, *Conférence internationale de Bruxelles, 18 novembre-2 juillet 1890, Protocoles et Acte final* (Paris, Imprimerie nationale, 1891), Protocole n° 33, p. 468 et seq.; see also *British and Foreign State Papers, 1889-1890*, vol. LXXXII, pp. 55 et seq.

practice of making reservations had also been generally adopted at The Hague Peace Conferences of 1899 and 1907.⁹ Today, reservations were, of course, regulated by articles 19 to 23 of the 1969 and 1986 Vienna Conventions and article 20 of the 1978 Vienna Convention which reflected the advisory opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,¹⁰ the human rights treaty par excellence.

27. The great question was whether the test of permissibility provided in article 19 of the 1969 Vienna Convention could be maintained in the absence of an authoritative means of determining whether or not the reservation was compatible with the object and purpose of the convention or treaty. State parties were, in effect, left to judge whether or not a reservation was so compatible, and if they reached different conclusions the unity of the treaty was in danger of being destroyed. In the absence of compulsory judicial settlement or of an alternative third-party dispute settlement mechanism, the test of permissibility was in danger of losing what practical significance it possessed. Those were some of the problems that bedevilled the current reservations regime, and it was to be hoped that the projected guide to practice in respect of reservations would address some of them with a view to making the situation clearer.

28. Furthermore, the rules on reservations contained in the Vienna Conventions were difficult to understand and interpret. As an illustration, one could take a hypothetical case of a multilateral treaty with a large number of States parties and with no prohibition regarding reservations. If State A sought to ratify the treaty with a reservation modifying article 10 of that treaty, what would be the treaty relations of State A if State B accepted the reservation, State C rejected it but did not object to State A becoming a party, and State D objected to the reservation and did not want the treaty to enter into force between it and State A? Under the Vienna Conventions, the result would be as follows: between States A and B the treaty would be in force as modified by State A's reservation to article 10; between States A and C, the treaty would be in force but article 10 would be inapplicable; between States A and D the treaty would not be in force; and the treaty relations between States B, C, D and all other parties and their obligations *inter se* would be unaffected by State A's reservation. The situation would become still more complicated if many of the other States parties in turn made other reservations. In other words, under the existing rules, reservations could transform a multilateral treaty into a complicated network of interrelated bilateral agreements.

29. The example he had chosen showed that, although the Vienna regime had functioned well in the past, the rules were not altogether satisfactory, first, because they made it far too easy to make reservations, and, secondly, because they were complex and opaque. Accordingly, States concluding new multilateral treaties would appear to be well advised to regulate the question of reservations by means of special provisions incorporated in the treaty

itself. The reservations provisions contained in articles 309 and 310 of the United Nations Convention on the Law of the Sea were a case in point. He was not advocating, of course that all multilateral treaties should prohibit reservations as did the United Nations Convention on the Law of the Sea; his point was that the technique of adopting a reservations regime at the negotiating stage was preferable to seeking to establish a special reservations regime for whole categories of treaties, such as those dealing with human rights.

30. He could not agree with the Special Rapporteur's statement (2487th meeting) that currently, reservations were used mainly by third world countries on human rights issues. He did not know what statistics the Special Rapporteur had to back up that assertion, but recalled that, as far back as 1890, when signing the General Act of the Brussels Conference—in essence, a human rights treaty—France had entered a reservation excluding the right to search ships¹¹ and, in more recent times, France's instrument of ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, submitted 21 years after the entry into force of that instrument, of which France had been one of the original signatories, had been accompanied by reservations relating to two articles and a declaration of interpretation relating to two further articles of the Convention.¹² As for the International Covenant on Civil and Political Rights, the United Kingdom of Great Britain and Northern Ireland had entered a reservation to article 1,¹³ which set forth the right of peoples to self-determination. On the other hand, no reservations had been appended by any of the 42 States parties to the African Charter on Human and Peoples' Rights, which had come into force on 21 October 1986.

31. The truth was that reservations often served purely political ends and were made by States of all categories to protect what they considered to be their interests. The interests of States differed enormously, as did their status in terms of wealth, size, population and resources, not to mention ideology. Major differences of outlook and different attitudes towards the content of international law and the nature of the international system were therefore to be expected. To make a reservation was not in itself a bad thing; what was bad, to put it simply, was to make a reservation which was inconsistent with the object and purpose of the treaty.

32. As to the question of the power of treaty monitoring bodies to determine the permissibility or otherwise of reservations to the treaties in question, he shared the Special Rapporteur's view that treaty bodies must of necessity have such power in respect of the treaties they were monitoring, even if that power had not been expressly vested in them by a provision of the treaty. Otherwise, if one State made a reservation, some of the existing States parties might accept it and consider the reserving State to be a party to the treaty, while other existing parties might

¹¹ France, Ministère des affaires étrangères, *Conférence internationale de Bruxelles. Documents diplomatiques, juillet-décembre 1891* (Paris, Imprimerie nationale, 1891), document No. 12, pp. 22-23.

¹² Council of Europe, *Yearbook of the European Convention on Human Rights, 1974* (The Hague, Martinus Nijhoff, 1976), pp. 2-6.

¹³ For the declarations and reservations made upon signature by the United Kingdom, see United Nations, *Treaty Series*, vol. 999, p. 287.

⁹ J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition (New York, Oxford University Press, 1918).

¹⁰ See 2487th meeting, footnote 7.

object to the reservation and consider the reserving State not to be a party. The applicability of the treaty's provisions would thus be thrown into doubt, as also would the question of which States were parties and which were not, a matter that could give rise to problems with regard to the entry into force of the treaty.

33. In order to fulfil its functions properly, the State or organization designated as the depositary of the treaty, which was also responsible for maintaining the official list of the parties thereto, had to know the exact scope of the obligation undertaken by a party to the treaty. Where the depositary determined that a reservation was not compatible with the object and purpose of the treaty and was therefore void, the reserving State had to be given an opportunity either to withdraw the reservation or to reformulate it in a manner compatible with the treaty's object and purpose, or, if it was unwilling to be bound by the treaty without the benefit of its reservation, to terminate its adherence to the treaty. Since depositaries or monitoring bodies generally decided on the permissibility of reservations after the reserving State had been a party to the treaty for some time, the question arose whether the withdrawal of a State would take effect *ex nunc* or *ex tunc*. That was an issue the Special Rapporteur might wish to address. A mechanism for enabling the reserving State to reformulate its reservation, or even to enter a new reservation after ratification, might have to be established.

34. Inasmuch as compatibility with the treaty's object and purpose was the essential criterion of permissibility, the concept of "object and purpose" needed to be clarified. He had no doubt that the Special Rapporteur would give due consideration to that question in his future work.

35. As for the question of interpretative declarations, he firmly believed that the problem should not be excluded from the Commission's study. In a hypothetical case in which a State attached an interpretative statement to its ratification which showed that the State would become a party to the treaty only if its interpretation was accepted, and if that interpretation appeared to be inconsistent with the treaty's provisions, he wondered what the other States parties were to do: whether they were to consider the interpretative statement to be a reservation and to reject it if they did not agree. He asked if an interpretative statement was not accepted by other parties, whether it excluded the provision in question or prevented the treaty from entering into force between the State making the declaration and the States objecting to it. It was to be hoped that the Special Rapporteur would delve in greater detail into those and similar pressing questions.

36. The guide to practice in respect of reservations, accompanied by a commentary and model clauses, would undoubtedly prove a valuable tool and a point of reference for all practitioners of international law, especially those in the foreign ministries of States whose duty it was to interpret and apply treaties on a daily basis. It would fill the gaps in the current regime and would, in the course of time, become a *locus classicus* on matters left unaddressed or unsaid in the 1969 Vienna Convention. The project was undoubtedly worthwhile and he wished to lend his support to the Special Rapporteur's endeavours to bring it to fruition. While endorsing the principles set forth in the draft resolution at the end of the second report,

he was not sure that a draft resolution was the best way of conveying the Commission's views to the General Assembly. The correct practice was surely for the Commission to submit a report on the conclusions reached during the current session and for the General Assembly to adopt a resolution on that report. But there might be good reasons for departing from that procedure, and if he could find one such reason he would be prepared to go along with the idea of a draft resolution.

37. Mr. LUKASHUK said that, in defiance of traditional practice, he proposed to open his remarks with an expression of disagreement with the Special Rapporteur. In his introductory remarks, Mr. Pellet had described himself as a "bad professor". His brilliant presentations, both oral and written, of the topic under consideration surely refuted that uncomplimentary view. On the subject of Mr. Pellet's character he was, perhaps, a little more inclined to agree, albeit with some reservations.

38. Before proceeding any further, he wished to raise as a matter of principle the question of the role of a special rapporteur and members' relations with him. In his view, the special rapporteur was a central figure in the Commission and, as such, had a claim to due respect both for his personality and the results of his work. After all, what a special rapporteur placed before the Commission was like a child long carried in the mother's womb and born in torment. It sometimes seemed as if torture, although prohibited by international law, was authorized within the Commission. In one particular case he could remember, it had driven a special rapporteur to the verge of nervous collapse. He appealed to his fellow members to be more humane, not by refraining from making criticisms, but by making their criticisms more thoughtful and constructive.

39. As for the report before the Commission, speaking as someone who had been concerned with the topic of reservations to treaties for many years, he felt bound to say that nothing he had come across in the past few years came up to the level of Mr. Pellet's excellent and impressive work, whose blend of detail and profound thought he particularly admired.

40. Leaving aside for the time being the question of the competence of treaty bodies to determine the permissibility of reservations, some issues of a more theoretical nature should be raised. The view was widely held in academic circles that human rights treaties did not regulate relations between States but, rather, those between a State and the people living on its territory. The point was touched upon in chapter II, section B.3 (b), but it was to be hoped that the Special Rapporteur would state his position more clearly when replying during the debate. While endorsing the structural plan outlined by the Special Rapporteur, he agreed with Mr. Kateka that the proposed procedure of dealing with a highly complex specific problem—that of reservations to human rights treaties—before considering the problem as a whole was somewhat unusual. The Special Rapporteur explained that procedure by the urgency of the matter, and he was inclined to agree as far as the sequence of the discussion was concerned. He doubted, however, whether the Commission—which, unlike the Special Rapporteur, had not yet studied the whole topic and whose views, as the Special Rapporteur himself recognized, could change in the course of the

debate—had the moral right to adopt a draft resolution on a specific aspect of the topic.

41. He had no objections of principle to the contents of the draft resolution. Like other members, he wished to underscore the central provision reaffirming the general applicability of the Vienna regime. As a participant in the United Nations Conference on the Law of Treaties,¹⁴ he could confirm that no one present had considered, either in writing or verbally, the possibility of allowing reservations to treaties of a normative character.

42. He said that, noting that the Special Rapporteur was proposing to complete his work within four years, the Commission would thus have spent a total of seven years on the topic. That was not a particularly long time considering that some of the Commission's drafts had taken decades to complete. However, in view of the rather special position in which the Commission found itself currently, and notwithstanding the complex nature of the draft, he wondered whether other members would agree to join him in appealing to the Special Rapporteur to do his utmost to speed up the work so as to enable the Commission to submit a draft to the General Assembly as soon as possible.

43. Mr. SIMMA, noting that the third paragraph of the preamble of the draft resolution proposed by the Special Rapporteur in his second report spoke of the voice of international law being heard in the discussion, said that his own wish was for the voice of human rights law to be heard rather more loudly than in the statements just made. First of all, however, he fully agreed with Mr. Addo that the use of reservations was not a North/South issue and that there was no reason for Western States or Western international lawyers to be complacent and point a finger in any other direction.

44. As to the central question raised by the Special Rapporteur, that of the unity or diversity of the juridical regime for reservations, he agreed that the Vienna regime had no alternative in *lex lata*, but unlike the Special Rapporteur, he considered such unity to be a case of *faute de mieux*, the regime being, in his view, far from satisfactory, particularly with regard to human rights treaties. For one thing, the question whether the Vienna regime was applicable only to reservations which were permissible—in other words not incompatible with the object and purpose of the treaty—or applied to impermissible reservations as well was not answered in the Convention itself. In the former case, it had to be recognized that the 1969 Vienna Convention contained no rule on how to counter an impermissible reservation. It was surely a major lacuna and he refused to be satisfied with such a state of affairs. If, on the other hand, the regime set out in article 21 of the 1969 Vienna Convention applied to inadmissible reservations as well, the resulting situation would be like that described in Mr. Addo's example. In other words, the system would be premised on multilateral treaties consisting of bundles of bilateral legal relationships or inter-State obligations between pairs of States. Such a system worked quite satisfactorily in the case of a multilateral treaty which was really bilateral in application. If, say, the Vienna Convention on Diplomatic Relations had an arti-

cle on the inviolability of the diplomatic pouch, and if a State made a reservation saying that it would X-ray the diplomatic luggage of other States, such an impermissible reservation could be countered reciprocally by another State on a bilateral basis.

45. In the case of human rights treaties, however, the system was utterly unworkable, first, because it was legally impermissible, since reciprocal non-application of a clause of a human rights treaty could not be limited to relations with the reserving State and constituted a treaty violation vis-à-vis other States which had not made the reservation, and secondly, because such a course of action would be factually absurd. If, for example, a State refused to grant women the right to vote, another State could hardly counter that impermissible reservation by endeavouring to follow a similar course.

46. He had therefore concluded that, while the Special Rapporteur was right in saying that a unitary regime of reservations currently existed, it was far from satisfactory. The Special Rapporteur had emphasized (2499th meeting) that the Vienna regime was a residual one, that State parties to particular treaties could replace it with a custom-made system, and had asked, rhetorically, why States had not done so. According to the Special Rapporteur, it was because they were satisfied with the existing regime. The proposed draft resolution reflected complete satisfaction with the 1969 Vienna Convention and indicated, in paragraph 4, that it was the human rights treaty bodies that had created problems. In his own view, it was the unsatisfactory applicability of the Convention to human rights treaties that had created the problems, and the comparative silence of States and the absence of *leges speciales* in human rights treaties were attributable to causes other than satisfaction with the legal solutions of the Convention.

47. Until the late 1980s, the activities and effectiveness of the treaty bodies had been hampered by the Cold War. It was only in the last few years that United Nations treaty bodies had been able to steer a more courageous course. Only then had an alternative come into view, demonstrating that the inter-State mechanism of reservations to treaties and objections to such reservations was unsatisfactory. The real reason for the apparent complacency among States was a lack of initiative and energy. In the words of Rosalyn Higgins: "one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged."¹⁵

48. The situation cried out for a better solution. The Special Rapporteur and Mr. Addo, among others, had mentioned the desirability of establishing custom-made regimes in the form of model clauses. He favoured such an approach, but thought the usefulness of such clauses might be minimal in practice. There was a consensus within the human rights community that the time to adopt standard-setting treaties was currently past and that the emphasis should be rather on implementation and enforcement of those already in place. If no new human rights treaties were to be adopted, then there would be no call for model clauses to incorporate in them.

¹⁴ See 2499th meeting, footnote 14.

¹⁵ "The United Nations: still a force for peace", *The Modern Law Review*, vol. 52, No.1 (January 1989), p. 12.

49. He asked about amendments to the existing human rights treaties. The time factor mentioned by Mr. Addo came into play. Such treaties took years, even decades to come into force, and amending them was likely to be an equally lengthy process. He asked why use was not made, instead, of the means already available, namely the treaty bodies. They could be engaged in a dialogue on how to find a solution that was acceptable both to sovereign States and to the human rights community.

50. The CHAIRMAN reminded members of the Commission that the Special Rapporteur had not yet introduced either chapter II, section C, of his second report, concerning treaty monitoring bodies, or the proposed draft resolution. He urged members to refrain from commenting on those parts of the report until they had been introduced.

51. Mr. HE said he joined in expressing appreciation to the Special Rapporteur for his cogent views on the extensive background material concerning the important issue of reservations to treaties. Chapter II of the second report, concerning unity or diversity of the legal regime for reservations to treaties, displayed particularly well the Special Rapporteur's insight into the subject.

52. He agreed with the conclusion that the Vienna system had been applied in a satisfactory and uniform manner to all treaties, irrespective of their purpose, and that there was no reason to encourage a proliferation of regimes. The Special Rapporteur had rightly pointed out that the basic characteristics of the Vienna regime were flexibility and adaptability. The regime struck a good balance between two apparently contradictory interests: broadening the acceptance by States of the 1969 Vienna Convention and maintaining its integrity. It met the particular needs of all types of treaty provisions and ruled out exceptions, excluding only certain conventions among a limited number of parties and the constituent instruments of international organizations. Its flexibility was thus suited to the particular characteristics of normative treaties and human rights treaties.

53. That regime must not be abandoned in favour of the positions adopted by some international human rights bodies, which emphasized that human rights treaties were a special case. Admittedly, there were ambiguities and lacunae in the 1969 Vienna Convention, but not in respect of normative treaties and human rights treaties, and the gaps could be filled within the existing system. The positions of the human rights treaty bodies deviated too sharply from generally accepted rules of international law and might hamper the development of protection of human rights through treaties by discouraging States from becoming parties to them. In any treaty negotiations, it had always been possible to make sure that essential rights and obligations were not subject to derogation. If the view was taken that reservations must be prohibited, the parties to the treaty were entirely free to rule them out by including an express clause in the treaty, a procedure that was perfectly compatible with the Vienna system. Accordingly, there was no need to draw distinctions between human rights treaties and other treaties, and it was neither necessary nor desirable to establish a special reservation regime for human rights treaties.

54. Another problem raised by the Special Rapporteur was the possibility of formulating reservations to bilateral treaties. The 1969 Vienna Convention did not prohibit such reservations, nor had the Commission reached any unanimous conclusion on whether reservations should be limited to multilateral treaties alone. In view of the new trend towards reservations to bilateral treaties, as mentioned by Mr. Lukashuk, and since the topic was entitled "Reservations to treaties", implying both multilateral and bilateral treaties, the issue should be dealt with as suggested by the Special Rapporteur, namely, to proceed deductively, raising questions and seeing what the answers should be.

55. He agreed that the issue of interpretative declarations should be addressed by defining such declarations and distinguishing them from valid reservations under the Vienna regime. States were resorting to interpretative declarations more and more often, particularly when a treaty prohibited reservations, but they should be given no excuse to use such declarations as disguised reservations.

56. Mr. FERRARI BRAVO said it was a great pleasure to join with members who had congratulated the Special Rapporteur on the clarity and relevance of his report which gave an accurate view of international law on the topic from the standpoint of the big Powers. But should the Commission confine itself to summarizing the current state of international law, or should it rather try to chart a course for the future? Up until now, articles 19 to 23 of the 1969 Vienna Convention had been the definitive texts, but they had their defects and represented a compromise further to the well-known advisory opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. They reflected the atmosphere of the Cold War, a time fraught with insurmountable difficulties. The ringing "nyet" of one State had obviated the need for many other States to say "no", and now that the "nyet" was no longer audible, or was more subtle, the "no's" of other Powers were being pronounced in connection with certain positions adopted in the field of human rights. It was no coincidence that the issue of reservations had resurfaced in the Commission as a result of certain occurrences within human rights bodies.

57. He agreed to some extent with Mr. Simma's remark about whether the existing regime was really the most appropriate one. Another question was whether reservations to bilateral treaties should be addressed. Again, interpretative declarations, the effect of intervention by national parliaments, and so on, all deserved to be explored, even if they were not specifically part of the topic.

58. ICJ had adopted the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* because of reservations concerning the Convention's jurisdictional provisions and, subsequently, those reservations were withdrawn. Articles 19 to 23 of the 1969 Vienna Convention, which had been adopted in the shadow of the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, which had still existed at that time, were a baroque construct. In them, the United Nations Conference on the Law of Treaties had expanded upon ICJ's

position, taking into account some inter-American experience. But a nearly unanimous judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* betrayed ICJ's great discomfort with the issue. The Court had had no choice but to apply an article from the Convention which was probably not suited to the actual problem before it. The Convention had envisaged a system comprising, alongside ICJ, an international court for war crimes. Yet such a court had not existed when the judgment had been handed down. As a result, the scope of the clause on the Court's jurisdiction had been expanded. If in future the Court were called upon to rule on the substance of the issue, it would be going beyond the limits of the jurisdiction envisaged for it in the Convention, and would rule on war crimes per se. That was only one of the real problems that arose with regard to reservations in connection with human rights.

59. Since attempts were being made to establish regimes stronger than traditional treaty regimes, it might prove necessary to consider whether ad hoc regulation of reservations to such regimes was required. If model clauses were elaborated, their application to several different regimes might be problematic. The Convention for the Protection of Human Rights and Fundamental Freedoms, for example, provided for a "horizontal" system of human rights protection through rules applicable to all States under the umbrella of the Council of Europe, the European Commission of Human Rights and the European Court of Human Rights. The fact that the jurisdiction was muscular, and the relevant obligations particularly weighty had been illustrated by France's understandable yet long-standing resistance to joining the system. When an international organization "administered" human rights rules, it inevitably created a strong system. Did the Convention for the Protection of Human Rights and Fundamental Freedoms system actually establish a special regime for reservations? He did not think so, but believed that it operated in parallel with, and more intensively than, the general rules on reservations.

60. The Commission should study the topic of reservations from every angle. However, instead of setting out a single rule on reservations applicable throughout the world and adopting a nice resolution—which would simply bury the matter—it should look into what had to be added to the existing regimes.

61. Mr. HAFNER said the topic of reservations to multilateral treaties was one of the most fundamental issues of international law, touching on such principles as *pacta sunt servanda*. He was therefore grateful to the Special Rapporteur for such an extensive report, which obviated the need to search through the relevant literature for practice and decisions.

62. It could be argued that the 1969 Vienna Convention was not able to cope with all the complexities of multilateral treaties and reservations to them, for the former were a fairly recent phenomenon. He shared the view expressed by Mr. Addo and others that the issue of reservations, particularly to human rights treaties, did not fall into the category of North-South opposition. Many northern States, for example, had made reservations to the International

Covenant on Civil and Political Rights. Some had made reservations to human rights treaties that could to some extent be considered inadmissible, while the content and scope of others, particularly those invoking the priority of constitutional provisions, were difficult to pinpoint.

63. Various categories of multilateral treaties undoubtedly existed, for example, treaties of a synallagmatic nature, instruments such as human rights treaties which obliged States to observe a certain legal standard and other treaties in which an obligation had to be carried out in respect of all other parties, *erga plures*. There were even differences among those categories. However, the second and third of those categories could be combined under the common designation of normative treaties. But he did not share the view that the category of normative treaties was identical to that of law-making treaties, which could also be of a synallagmatic nature, like the Vienna Convention on Diplomatic Relations. The obligations under that Convention were, however, owed to certain other States and he would therefore hesitate to call it a normative treaty. Furthermore, treaties that were provided with a body to monitor implementation, to which the report also referred, undoubtedly formed a special category of treaty whose efficiency was likely to be affected by the existence of a compliance mechanism. Yet that difference was not relevant for the purpose of deciding whether or not such treaties should be subject to the same reservation regime as any other multilateral treaty.

64. The report also dealt at some length with the question of reciprocity under human rights treaties and the Special Rapporteur had concluded that article 21, paragraph 3, of the 1969 Vienna Convention did not apply to such treaties. It was not altogether certain that that conclusion was correct. Different functions of a norm had to be distinguished. First, a norm prescribed the attitude to be adopted by the States bound by that norm. But account also had to be taken of a further function of a norm, for the purposes of State responsibility, since it provided the basis for claiming that a violation had occurred and defined when a course of conduct was unlawful. That was where reciprocity came into play. Thus, if State A excluded the operation of a certain provision by entering a reservation, State B, as a party to the relevant treaty, was no longer entitled to allege a breach of that norm by State A. At the same time, by virtue of the principle of reciprocity, State A was itself not entitled to invoke a breach of the norm by State B, even though State B had made no reservation. From that standpoint it was arguable that the principle of reciprocity had a say even in the case of normative treaties. And State B would, of course, remain bound in relation to all other States. The conclusions reached in at the end of chapter II, section B, of the report were correct, therefore, only insofar as they related to the immediate effect of reservations, namely, to the exception from the duty to observe a certain norm.

65. He subscribed to most of the conclusions set forth at the end of chapter II, section B, of the report. With regard to the second conclusion, however, he was not certain that it was possible to speak of the flexibility of the Vienna regime, since that would mean the regime could be adapted to different categories of treaties except for those mentioned in article 20, paragraphs 2 and 3. It was interesting to note in passing that article 60, paragraph 5, of the

1969 Vienna Convention, which referred expressly to treaties of a humanitarian character, had been included not by the Commission but only at the plenipotentiary conference, so that it was doubtful whether a conclusion could be drawn therefrom with regard to their absence in the regime on reservations.

66. In his view, the reason why the regime could be applied to all the different categories of treaties was that it was formulated in broad, indeed unclear, terms that permitted application to normative treaties. Moreover, since human rights treaties were treaties within the meaning of the 1969 Vienna Convention, the latter applied to them and also to the reservations made to them. It would be difficult to devise a solution for human rights treaties that departed from the Vienna regime and hence there was no choice other than to fill in the lacunae in that regime.

67. Again, he was not inclined to agree with the unequivocal statement in subparagraph (b) of the conclusions contained at the end of chapter II, section B, of the report that normative treaties "are not based on reciprocity of the undertakings given by the parties". Certainly, reciprocity was not so important in the case of those treaties as in that of synallagmatic treaties. On the other hand, he agreed fully with subparagraph (e), though, in the European context, some ideas had been advanced with a view, for instance, to restricting the period of the validity of reservations or the obligation to review them after a given time. Such matters should be left to the international bodies under whose auspices certain conventions were drawn up or to the authors of the individual conventions. The Commission's task was to formulate rules of general application to resolve either anticipated or existing conflicts of a legal nature and to provide States with guidance on the settlement of situations for which there was no clear legal regime. Such a situation was exemplified by the modern practice of reservations to human rights treaties.

68. Lastly, he would ask the Special Rapporteur whether the conclusions reached in regard to reservations to human rights treaties that were inadmissible because they were contrary to the object and purpose of the treaty would also apply to reservations that were inadmissible by virtue of article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention, whereby the reservation was prohibited by the treaty or the treaty provided that only specified reservations, not including the reservation in question, might be made.

69. Further to a query by the CHAIRMAN, Mr. PELLET (Special Rapporteur) said that he would prefer to answer all questions raised by members at the end of the discussion. He found the turn of the debate somewhat disturbing, however. In his capacity as Chairman, he had tried to encourage a more lively approach in the Commission with a view to developing a dialogue on specific points. It was a great pity that was not happening in the current case.

70. The CHAIRMAN said that, while he agreed with the idea of lively discussions, in some cases a more traditional approach was indicated.

71. Mr. DUGARD, commending the Special Rapporteur on an excellent second report, said that there was an

evident need for a review of the Vienna system. In the first place, both Mr. Hafner and Mr. Ferrari Bravo had already highlighted the historical context in which the 1969 Vienna Convention had been adopted and ICJ had delivered its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, when the influence of the Cold War was to be detected. Secondly, it was not possible to ignore the jurisprudence of the European Court of Human Rights in decisions such as those in the *Belilos*¹⁶ and *Loizidou*¹⁷ cases, nor the impact of general comment No. 24 (52) of the Human Rights Committee, which had undoubtedly given rise to expectations among non-governmental organizations and in the human rights community that had to be considered.

72. The main reason for a review, however, was that, although the Vienna system might seem excellent in theory, the fact had to be faced that it had proved a failure in the case of human rights treaties. It was necessary to take account of the fact that States frequently and deliberately made reservations that were contrary to the object and purpose of the treaty, knowing that other States would not challenge those reservations. In that way, they were able to create the impression that they were supporters of human rights. As Mr. Addo had rightly observed, such behaviour was not confined to States from the South, but applied to States from all regions. Another factor was that there was no sanction in respect of such reservations because States, not wishing to disturb good relations with other States, did not object to them. Thus the inter-State system simply did not work in the case of human rights treaties, at either the regional or the universal level. Insofar as the enforcement of human rights treaties had succeeded, it was largely because of the right of individual petition. There had been very few inter-State disputes, even under the European system, and none whatsoever under the universal human rights system. He therefore suggested that the Commission should study the practice of States under human rights conventions before drawing conclusions about the success or failure of the Vienna system: if he had any criticism of the Special Rapporteur's second report it was that he had failed to examine adequately the evidence of human rights monitoring bodies or human rights reservations.

73. As a matter of policy, it would be very unwise for the Commission simply to endorse the Vienna system, since that would send a clear message to the international community that the European Court of Human Rights, the United Nations Human Rights Committee and other monitoring bodies had exceeded their powers. In other words, it would be construed as a rebuke. It was a matter that required very careful consideration and the Commission could not escape its responsibility.

74. Given the extensive debate on the Vienna system as it applied to human rights conventions it was essential for

¹⁶ European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *judgment of 29 April 1988* (Registry of the Court, Council of Europe, Strasbourg, 1988).

¹⁷ *Ibid.*, vol. 310 (*Preliminary Objections*), *judgment of 23 March 1995* (Registry of the Court, Council of Europe, Strasbourg, 1995) and *judgment of 18 December 1996 (merits)*, *Reports of Judgments and Decisions 1996-VI* (Registry of the Court, Council of Europe, Strasbourg, 1996).

the Commission to consider adopting a resolution. He did not agree with all the elements in the Special Rapporteur's proposed resolution but nonetheless considered that, together with the background material furnished by the Special Rapporteur, it would provide a sound basis for discussion. He would also suggest that the secretariat should make available to members of the Commission the various reservations entered to the human rights treaties. The Commission would thus be able to embark on a study that, hopefully, would guide the international community in the matter of reservations, while making an important contribution to the progression of development of international law.

75. Mr. BROWNLIE said he wished to join other members in congratulating the Special Rapporteur on his excellent work, which reflected high professional standards.

76. The topic, which was concerned with clarification of the Vienna system, was of obvious practical value and he agreed with much of what Mr. Addo had said on that score. If the Commission was to go into the business of distinguishing between reservations, properly so called, and interpretative declarations, there might be a substantial overlap with the topic of unilateral acts of States. He saw no harm in that, although possibly some cooperation in the work on the two topics was indicated. Also, he very much sympathized with what Mr. He and Mr. Ferrari Bravo had said about not ignoring bilateral treaties, of which there was an astonishing variety—those dealing with frontier regimes being but one example. It would be a little artificial to exclude such experience.

77. On the question of the relationship between the topic as a whole and human rights instruments, the Special Rapporteur had rightly placed considerable emphasis on recent experience. There was, however, a certain ambivalence about the way in which that relationship was treated in different parts of the report—an ambivalence reflected in the very varied views of members of the Commission on the subject. The Special Rapporteur, especially in his conclusion of chapter II, section C, on the coexistence of monitoring mechanisms, tended to be rather bland, taking the general line that there was such coexistence and that there was no negative relationship between the work of the monitoring bodies and the general approach underlying the Vienna regime. At the same time, there was a considerable amount of what he would term coat-trailing, in that the second report seemed to imply something should perhaps be done in response to developments, rather than just say they were compatible with the Vienna regime.

78. His own feeling was that the Commission must take such recent experience into account with a view to ascertaining the extent to which it influenced the content of the proposed draft resolution. There were certain dangers, however. What, for instance, was the Commission supposed to do when the European Court of Human Rights adopted a certain approach in the *Loizidou* case, referring to the public order of Europe and refusing to deal with the problem of the Turkish reservations in a general framework? It could not really tell the European Court of Human Rights, either expressly or by implication, that it did not have the power to do that and it would be equally

presumptuous of the Commission to tell the European Court of Human Rights or other similar bodies, that it approved—if indeed it did. He agreed with Mr. Simma that those were important developments and the Commission must not be seen to upstage them, as it were, or criticize them. He was not hostile to the *Loizidou* case: indeed he had been counsel for the successful applicant on the merits. But the question was what could the Commission do in the case of what were, to some extent, self-contained regimes. The Commission, after all, was not the “European Law Commission” but the International Law Commission.

79. Again, he disagreed somewhat with the Special Rapporteur, who had said in his presentation, that the monitoring bodies normally applied the Vienna regime. The fact was that what they had done tended to be compatible with the Vienna regime. However, it was not really true that, in decisions like those in the *Chrysostomos* and *Loizidou* cases,¹⁸ the European Court was applying the Vienna regime: it was really proclaiming that the Convention for the Protection of Human Rights and Fundamental Freedoms was in a number of respects a self-contained regime and it was applying rather special standards. Hence the express reference by the European Court of Human Rights to the public law of Europe. In his opinion, the Commission should be rather neutral in regard to the doings of the monitoring bodies. They were autonomous and the Commission should proceed with caution. Nevertheless, such an approach was not incompatible with the need to look at such experience and see to what extent it influenced views on the general regime of reservations.

80. Mr. CRAWFORD said that the provisions on reservations in the 1969 Vienna Convention were among the least satisfactory in one of the major post-war law-making treaties. He agreed entirely, however, that nothing better would be achieved and that any attempt to amend those provisions would simply make matters worse. For all that, the unsatisfactory nature of those provisions should at least be acknowledged within the framework of a study that was designed not to amend them but rather to make them more workable. They were unsatisfactory, for example, in their failure to deal with reservations to bilateral treaties. It was because no one really thought it possible to have reservations to bilateral treaties that the issue had not been addressed, although that was in keeping with a convention that hardly attempted to draw distinctions. The word “bilateral”, for instance, occurred only once in the 1969 Vienna Convention, in article 60, paragraph 1, in the context of termination. It should be made clear that a reservation, properly so called, to a bilateral treaty was a refusal to enter into that treaty and that certain consequences would ensue. Certainly, nothing should be done to encourage the practice of making reservations, properly so called, to bilateral treaties in the guise of interpretative statements.

¹⁸ Council of Europe, Application Nos. 15299/89, 15300/89 and 15318/89, *Metropolitan Chrysostomos, Archimandrite Georgios Papachrysostomou and Titina Loizidou v. Turkey*, decision of 4 March 1991 on the admissibility of the application, *Yearbook of the European Convention on Human Rights*, 1991, vol. 34 (Dordrecht, Martinus Nijhoff Publishers, 1995), pp. 35-60.

81. The 1969 Vienna Convention was also unsatisfactory in its treatment of multilateral treaties. It failed completely to make clear whether the conditions on the formulation of reservations as set forth in article 19 were to be resolved through the procedure of acceptance of and objection to reservations laid down in article 20 or whether they were threshold legal requirements after which the procedures of acceptance and objection had a place in respect of reservations that passed through the threshold. His own opinion was that article 19 was a threshold requirement, which placed him firmly in the permissibility rather than the opposability school. There were a number of reasons why he took that view. In the first place, article 21, paragraph 1, referred to reservations established in accordance *inter alia* with article 19, implying that article 19 established independent conditions for the admissibility of reservations in addition to articles 20 and 23.

82. Secondly, article 19 of the 1969 Vienna Convention drew no distinction between reservations that were incompatible with the object and purpose of the treaty and reservations that were prohibited by the treaty itself. It seemed to him inconceivable that a State which, for some reason or other, remained silent in the face of a prohibited reservation was nonetheless deemed to have accepted it. Often, States did not express their views on that, and other matters, but in international law silence was not consent. Consequently, a State that did not express a view, for whatever reason, on a prohibited reservation must nonetheless be taken to have reserved its rights under general international law as formulated in article 19. If that was true of prohibited reservations, it must also be true of reservations that were incompatible with the object and purpose of the treaty (art. 19, subparagraph (c)).

83. A third reason for his view was that when in the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ paved the way for reservations, it did so subject to the condition that reservations must pass the threshold test. Practice since that time had not established any broader view of the "permissibility", as it were, of impermissible reservations. On that view of things, the procedure of acceptance and objection still had a considerable role to play in the context of permissible reservations and the procedures laid down in articles 20 et seq. of the 1969 Vienna Convention had ample room to operate. Hence there was an objective question that would have to be determined concerning the threshold question of admissibility.

84. The rather embryonic character of the regime laid down in the 1969 Vienna Convention and its failure to address such critical issues meant that, while there was only a single general law regime of reservations to multilateral treaties, that regime, because of its general and residual character, must allow for special regimes to develop within particular frameworks. It would be very odd if the result of the Commission's work was a finding that States could do anything they liked in the context of reservations save accept a system in which their reservations were subject to judicial review. If States parties to the Convention for the Protection of Human Rights and Fundamental Freedoms saw fit to accept the procedures applied by the European Commission of Human Rights

and the European Court of Human Rights, then that was all part of the system of flexibility. It was not possible to accept a theory of reservations in which States could react only permissively but could not react in the context of accepting the special regime which Europe at least, and the American system as well, was coming to embody.

85. Human rights treaties were different in one critical respect, anyway: when States accepted a human rights treaty they were agreeing not to engage in certain conduct with reference to individuals and it was nonsense to say that they had agreed that such conduct could be divided up as against one State or another. ICJ had not accepted that States would be allowed to commit genocide in regard to State A but not in regard to State B. They were simply not allowed to commit genocide: not because genocide was a norm of *jus cogens*—which concept had not been invented at the time—but simply because it was the nature of the obligation. The nature of reservations to human rights treaties was therefore preliminary. It was a question of defining the obligation a particular State might have assumed and whether other States might or might not have the standing to object in respect of those obligations. The underlying obligation of a human rights character had to be unitary; it simply could not be divided up in the way in which obligations with regard to the treatment of diplomats, diplomatic bags and other inter-State apparatus could be divided up. That particular feature of a human rights treaty might well have a role to play in the way in which the general system of reservations evolved.

The meeting rose at 1.05 p.m.

2501st MEETING

Friday, 27 June 1997, at 10.05 a.m.

Chairman: Mr. João Clemente BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, 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.
