Document:-
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Summary record of the 2501st meeting

Topic:
Law and practice relating to reservations to treaties

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

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.

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 Commission to continue its discussion on chapter II of the second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478).

2. Mr. PAMBOU-TCHIVOUNDA said that he again commended the Special Rapporteur on the quality and depth of his work, which had been unanimously applauded. There was no denying, however, that, even if chapter II was meant to be more specific than chapter I, which had been introduced at the forty-eighth session,[2] it was so dense and technical that it did not make for clarification of what was rightly regarded as a complex topic. The task of the members of the Commission would perhaps have been facilitated if the Special Rapporteur had tried to summarize more.

3. In order not to complicate matters himself, he would follow the discussion plan the Special Rapporteur had advocated (2487th meeting) and would focus his comments in particular on the question of the unity or diversity of the Vienna rules on reservations, having regard in particular to the special nature of normative treaties. On that question, he wondered whether the framework adopted by the Special Rapporteur was really appropriate and whether he had been right to exclude from the scope of his study the so-called "limited" treaties which were covered by article 20, paragraph 2, of the 1969 Vienna Convention and which he considered should be the subject of separate treatment so far as reservations were concerned. Although those treaties were "limited" to a small circle of parties, they were nonetheless not bilateral treaties, but genuine multilateral treaties like some of the major disarmament treaties, which could in fact lay down general and objective regulations. In that connection, it should be noted that, in article 20, paragraph 2, the 1969 Vienna Convention linked the criterion of the limited number of parties directly to the criterion of the object and purpose of the treaty by using the conjunction "and". The second criterion was therefore certainly regarded as the complement of the first and it might be asked whether it did not rank above it. It was therefore not certain that the provisions of the 1969 Vienna Convention settled once and for all the question of reservations in the case of treaties of a limited nature and it would probably be a good idea to clarify, if not supplement, them in that regard. The Commission seemed to be the appropriate framework in which to deal with the matter and, from that standpoint, chapter II, section A.1, of the report would perhaps have benefited had it been more subtle.

4. It was also regrettable that the Special Rapporteur had not further developed his analysis of the role of international organizations, which was dealt with belatedly in chapter II, section B.2. From a triple standpoint—because they could equally well be parties to a normative multilateral treaty as authors of reservations or "administrators" of reservations entered by other parties—international organizations were actors which had to be reckoned with so far as a possible breakdown in the Vienna rules was concerned. The grounds that determined their policy in the matter of reservations differed, of course, from those by which States were guided, for their attributes were not the same. Consequently, international organizations would appear to be a factor of relativization in the apparent "homogeneity" of the Vienna rules.

5. Furthermore, as multilateral treaties were a very heterogeneous group, the Vienna regime could very well turn out, when it was tested in practice, to be unsuited to some of them, even if it had originally been designed for general application.

6. It was, of course, clear from the preamble to the 1969 Vienna Convention that, in the thinking of the authors, the codified rules, even if still residual, had been deemed to have normative value. The object was to regulate the international treaty as a genre having regard to its "fundamental role . . . in the history of international relations". But that formal approach concealed the fact that treaties, whether normative or synallagmatic, were and remained the product of a balance of power which had an effect on all their clauses, including the most substantive ones. Even if that balance was not immutable (hence article 62 on fundamental change of circumstances), it was always there in the background and it was that balance which gave a definite meaning and content to the elastic notions of the object and purpose of the treaty. Bearing in mind that there were as many "objects" as treaties, and in the matter of human rights as well, the protection of those "objects"—which was naturally a key element in the reservations regime—called, in his view, for the development of differential regimes. Given their residual character, the Vienna rules obviously did not stand in the way, but, if it was hoped to retain their value as a reference regime, they should perhaps be developed with due account for the alarm signals that had been raised, in particular by the human rights monitoring bodies.

7. Different solutions could be envisaged. For instance, should quantitative thresholds be provided for the purpose? Should the discretion of the parties in defining the content of reservations be restricted? Probably, States jealous of their sovereignty would find it hard to consent to that. Or should that twosome—the object and purpose of the treaty—be dissociated? He did not know the answer to those questions, but believed it was useful to ask them.

8. Mr. PELLET (Special Rapporteur), summing up the debate on sections A and B of chapter II of his second report, said that the reactions of the members of the Commission had been very instructive even if some of the comments seemed to him to relate more to chapter I than to chapter II.

9. With regard, first, to questions of method, he wished to reassure Mr. Lukashuk: far from being rent apart by the criticisms of his work, he appreciated the fact that the members of the Commission shed a different light on problems he perhaps no longer viewed with sufficient

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

[2] See 2487th meeting, footnote 3.

detachment because he had examined each detail of them closely.

10. He had therefore been only too willing to start altering his views somewhat in the light of the comments made. He could not, however, agree to Mr. Lukashuk's request (2500th meeting) that he should expedite his work and undertake to finish it in four years at the most. The documentation on the topic was vast and it was impossible to proceed more quickly. Mr. Dugard (ibid.) had in fact reproached him for not having given sufficient details on the positions of the competent human rights bodies and Mr. Pambou-Tchivounda (2487th meeting) would have liked him to analyse the question of limited treaties in greater depth.

11. The suggestion by Mr. Simma and Mr. Brownlie (2500th meeting) that cooperation should be established with human rights bodies in view of the importance of the problem of reservations to treaties in that field was excellent, in his view, and entirely in keeping with the spirit of article 17, paragraph 2 (*b*), of the statute of the Commission. In that connection, he would suggest that the draft resolution which appeared at the end of his second report should be transmitted to those bodies for comment after it had been duly revised by the Drafting Committee and adopted on first reading by the Commission in such form as it deemed appropriate.

12. Turning to substantive questions, he noted that Messrs. He, Ferrari Bravo, Brownlie and Crawford (ibid.) had raised the question of reservations to bilateral treaties. Even though, from the technical standpoint, one could not really speak of "reservations" in such a case, there was a problem and it required further study.

13. He also wished to reassure Mr. Addo and Mr. He (ibid.) that he had absolutely no intention of neglecting the problems raised by interpretative declarations, as, incidentally, was apparent from the provisional general outline of the study he proposed in chapter I. The question was in fact dealt with at the end of section B.2 and also in the questionnaire[3] he had addressed to States and international organizations; he trusted that Mr. Addo and Mr. He had received a copy.

14. It was gratifying that the remarks made by some members afforded him an opportunity to stand back and view matters from the angle of legal philosophy. The remarks in question related, on the one hand, to the political basis of international law and, on the other, to the relationship between general international law and regional systems.

15. So far as the political basis of international law was concerned, he had been surprised at certain remarks which implied that he had a hostile approach to that of the third world and that his report reflected a vision of international law which was typical of the major powers. That misunderstanding perhaps arose from one of the statements he had made (ibid.) on the number of reservations entered, respectively, by third world countries and by western States in connection with human rights. He had, in the interim, managed to verify, from the volume entitled *Multilateral treaties deposited with the Secretary-General*,[4] that the number was higher in the case of the former than in the case of the latter, but he wished in particular to explain what his intent had been at the time. What he had wanted to say was that human rights ideology was in the main Western in origin and that, either for ideological reasons or for reasons relating to their stage of development, the third world countries had difficulty in applying human rights instruments in their entirety; hence the use of the technique of reservations, which showed that those States took the treaties to which they acceded seriously. He would note in passing that it was not very elegant to blame a Special Rapporteur for the mistakes of his own country and would point out that, in the particular case, he was not the last to criticize France when it seemed to him to deserve it. What was more, at the fifty-first session of the General Assembly, France had probably been the State that had been most critical of his report during the discussion in the Sixth Committee.

16. Viewing the matter in more fundamental terms, he wished to express his agreement with several members about the political ulterior motives, or strategies, of States when entering reservations or drafting treaties. That also applied to the 1969 Vienna Convention, including the clauses relating to treaties, which, as Mr. Hafner had rightly pointed out (ibid.), had been adopted as part of a last-minute compromise. That compromise, called "wobbly" by one member, had nonetheless enabled the system to operate satisfactorily, as attested to by the solid consensus within the Sixth Committee, which took the view that nothing in it should be changed. That political intrusion to some extent justified the statement that articles 19 to 23 of the 1969 Vienna Convention were the reflection of international law as seen by the major powers but that statement applied equally to all the rules of international law, which were de facto engendered by the balance of power to which the previous speaker had referred. At the same time—and it was what gave law its special character—the scope of that finding should not be exaggerated since, once a norm had been adopted, it applied to all including the large and the very large powers. Lastly, it was certainly not just the major powers or industrialized countries that upheld the Vienna regime: among their ranks some doubts were expressed, whereas the third world States seemed to value the regime the most.

17. The second fundamental problem, which had been raised by Mr. Brownlie and to which he had perhaps not given sufficient attention in his report, concerned the way in which the Commission should take account of regional trends. At the general and theoretical level, general international law was enriched by the contribution of regional innovations, as, for example, in the case of Latin American practice with regard to the rules applicable to reservations. Conversely, where there was no such osmosis, it had to be recognized that the regional rules could derogate from the universal norms by virtue *mutatis mutandis* of the principle *specialia generalibus derogant*. With regard more specifically to reservations to human rights instruments, the Commission should, in his view, bear in mind the practices of regional bodies, which could, from the

[3] See 2487th meeting, footnote 16.

[4] United Nations publication (Sales No. E.97.V.5), document ST/LEG/SER.E/15.

standpoint of progressive development in particular, be of great interest. Nonetheless, so far as the substance of the applicable rules was concerned, it could not be claimed that the monitoring bodies, whether regional or universal, had in any way objected to the Vienna regime.

18. He would consider next the positions taken by members of the Commission on the matters that had been the subject of the debate, namely, the unity or diversity of the rules applicable to reservations, on the one hand, and their adjustment to reservations to human rights instruments, on the other.

19. He had first noted the firm "unitary" convictions expressed, in particular, by Mr. Addo, whose comments on the practical difficulties he encountered as legal adviser to his country's Ministry of Foreign Affairs confirmed the need to spell out, supplement and clarify rather than to change the existing rules of ordinary law and the appropriateness of including specific clauses to that effect in future treaties. He also shared in abstract terms Mr. Crawford's idea that the general regime should—and could—permit the development of specific regimes; in practice, however, he was inclined to think that such was not the case at the normative level, since the Vienna regime enjoyed, at least in broad terms, universal support, also from the human rights treaty monitoring bodies.

20. Mr. Simma and Mr. Dugard had certainly taken the most critical view of the Vienna regime, coming to the defence of the "voice of human rights"; while conceding that the reservations regime was uniform in positive law, they both nevertheless argued that it was unsatisfactory in the area of human rights and that uniformity "for want of a better alternative" should be questioned. Such a morally and politically generous approach was attractive, but he failed to see how its proponents hoped to translate it into practical rules of law. At the normative level, he had made three findings.

21. First, neither Mr. Simma nor Mr. Dugard seriously questioned the fact that the human rights treaty monitoring bodies applied the Vienna rules and had never challenged their soundness, first and foremost that of article 19, subparagraph (*c*), of the 1969 Vienna Convention, which stated the basic principle of respect for the object and purpose of the treaty. Secondly, it was true, as Mr. Simma had observed, that the 1969 Vienna Convention failed to solve the fundamental problem of the fate of reservations contrary to the object and purpose of the treaty—a problem to be dealt with later by the Commission, but that shortcoming did not by any means exist only in the area of human rights: the problem arose in the same terms for all other multilateral treaties. Thirdly, Mr. Simma, supported by Mr. Crawford, had argued that, by contrast, the problems raised by the application of article 21 of the 1969 Vienna Convention related specifically to human rights instruments inasmuch as the non-application of a human rights treaty provision could not entail practical consequences, since the objecting State was still obliged to comply with the provision in question. While he did not dispute that point, he felt he had provided a preliminary response in chapter II, section B.3 (*b*), of his report and in his oral introduction. Mr. Hafner had put forward a weighty additional argument, at least in explanatory terms, by showing that the article 21 mechanism established a type of reciprocity system, even for normative treaties, by depriving reserving and objecting States of the possibility of invoking the rule to which the reservation related. Even allowing, as seemed correct, that there was no possibility of reciprocity in respect of reservations to human rights instruments, the fact was that nobody wished to revert to *lex talionis* and that any attempt to amend the 1969 Vienna Convention in order to introduce some form of reciprocity would, in practice, be a step backwards.

22. With regard to the other three points raised by Mr. Hafner, he took note of the fact that the latter disputed the admittedly too general equation he had established between normative treaties and law-making treaties, just as he took note of Mr. Pambou-Tchivounda's comments on the special characteristics of limited treaties and the constituent instruments of international organizations, which he confessed to having studied somewhat too hastily. Secondly, while it was true that article 60, paragraph 5, had been included in the 1969 Vienna Convention at the United Nations Conference on the Law of Treaties,[5] it was also true that the problem of human rights instruments, raised intermittently before the Commission, had not been omitted from the *travaux préparatoires*. He acknowledged that Mr. Hafner had raised an extremely interesting and thought-provoking issue when he had said that the problem of reservations contrary to the object and purpose of a treaty arose on the same terms as that of reservations prohibited by the actual wording of the treaty; he noted, however, that the problem was not confined to human rights instruments in that case either.

23. He had listened with interest to Mr. Ferrari Bravo's statement, but was not fully convinced of the need for the ad hoc regulation of individual situations, since such an approach would be a negation of general international law.

24. In conclusion, he admitted that he had been somewhat perturbed by Mr. Simma's scepticism about the appropriateness of resorting to the model clause procedure to solve the human rights problems which he thought he had detected, because the heyday of the adoption of human rights instruments was, in his view, over. The latter opinion was probably correct, but, if the existing human rights instruments really gave rise to serious problems, they could always be amended. In any case, he did not see what kind of normative action the Commission could take with regard to the instruments in force, since, as Mr. Kateka had rightly stated (2500th meeting), treaty relations were based on the free will of the parties concerned.

25. Before introducing the last part of his second report, he was willing to listen to—and perhaps take part in—a debate on his summing-up.

26. Mr. LUKASHUK said that he was perfectly satisfied with the Special Rapporteur's clarifications, especially as to the preliminary nature of the draft resolution, which would be discussed before being transmitted to the Commission on Human Rights. He wished to provide some purely factual details about the type of compromise

[5] See 2499th meeting, footnote 14.

reached on article 19 of the 1969 Vienna Convention, which could not be described as a "package deal". The delegation of the United States of America had supported the text which had been drafted by the Commission and which amounted to a stipulation that "reservations may not be formulated unless", whereas the delegation of the former Union of Soviet Socialist Republics (USSR) had supported the wording which had become that of the 1969 Vienna Convention, namely, that "A State . . . may . . . formulate a reservation unless". In other words, the compromise had already formed part of the substance of the text.

27. Mr. CRAWFORD welcomed the Special Rapporteur's proposal on the procedure applicable to the draft resolution. If the Commission actually decided to consult the competent human rights bodies, it would be easier for him to defend his position. In general, the Commission's future work would, in his view, require closer coordination and collaboration with other United Nations bodies, many of which rightly or wrongly claimed to have a kind of monopoly in their field. One way of maintaining the integration of international law was to challenge that monopoly, especially through consultations.

28. Mr. BENNOUNA said that he had not detected an operational perspective in the Special Rapporteur's presentation of the topic. In particular, he failed to understand why the Special Rapporteur, having started out with the idea of making proposals to States to remedy certain defects in the Vienna regime, had digressed on the question of human rights instruments before proposing the quite unusual procedure of a resolution, which was tantamount to offloading the human rights issue. It was preferable to adopt a uniform approach to the topic, dropping the draft resolution and reverting to the Commission's customary procedure, consulting experts and relevant bodies, if need be, but, at all events, moving beyond the bounds of a mere doctrinal exercise.

29. Mr. PELLET (Special Rapporteur), introducing chapter II, section C.2, of his second report, said that, although the role of the treaty monitoring bodies in respect of reservations was certainly the most controversial issue dealt with in his second report, he would nevertheless try to be fairly succinct and confine himself to a brief overview of the broad lines. In doing so, he would focus on certain changes of emphasis in relation to his report that he wished to make in the light of his reading and, more importantly, the discussions of the Commission at its forty-eighth session, in 1996, and those of the Sixth Committee, an observation that also applied to the draft resolution he was proposing.

30. As he had said at the forty-eighth session, there were two opposite views on the topic. One side held that the human rights treaty monitoring bodies had no authority to assess the permissibility of reservations. When a reservation was formulated, they must accept the consequences without querying its permissibility or validity. That was the position of the three States which had criticized general comment No. 24 (52) of the Human Rights Committee[6] and it was also the traditional position of the Legal Counsel of the United Nations and of the human rights bodies themselves until the early 1980s in the case of the European and inter-American regional bodies and until the early or mid-1990s in the case of the international bodies. It was also the position adopted by certain authors. The other side and, in particular, the competent bodies more recently and authors specializing in human rights held that the bodies concerned had the right and duty not only to assess the permissibility of reservations, but also to take whatever action was indicated, even if it meant deciding that a State whose reservation was impermissible was bound by the treaty as a whole, including the provision or provisions to which the reservation related.

31. In his view, neither of the extreme positions was satisfactory, not on grounds of appropriateness—in that respect, he would opt for the position of the human rights experts—but on the basis of a strictly legal argument. The "right" answers in legal terms seemed to him to be the following. First, the human rights bodies had the authority and even the duty to assess the permissibility of reservations formulated by States on the basis of treaty reservation clauses where they existed or the Vienna regime where they did not; on that score, he unhesitatingly shared the by now virtually unanimous positions of the bodies themselves, which had met with a favourable response on the part of some States, particularly Germany and Austria, during the debate in the Sixth Committee. Secondly, he nevertheless remained convinced that the jurisdiction of those bodies went no further and that they could not arrogate to themselves the right to decide that a State which had entered an impermissible reservation was bound by the treaty as a whole.

32. Before proceeding with the argument which, in his view, justified his position, he felt he should explain why the problem related specifically to reservations to human rights instruments. On the one hand, it was human rights instruments which most frequently established supervisory and monitoring bodies, and, on the other, it was human rights bodies which had provided the main setting for the problem in recent years. That did not mean, however, that the problem related specifically to reservations to human rights instruments. The problem did not arise because human rights were at issue, but because those instruments established bodies responsible for monitoring their enforcement. The same thing could happen in other fields, for example, disarmament, arms control or the environment.

33. One could even go a step further: where a dispute arose between States concerning the application of a treaty, the question whether a reservation by one party to the treaty was valid could arise, although it was not the ground for the dispute; a case in point was the dispute between France and the United Kingdom of Great Britain and Northern Ireland in the *English Channel* case.[7] The question on that occasion seemed to be couched in much the same terms as in the current instance. Could the body responsible for settling the dispute, which might have decision-making powers, as, for example, in the case of ICJ when it ruled on a dispute or in the case of an arbitral tribunal, or might not have such powers, as in the case of

[6] See 2487th meeting, footnote 17.

[7] *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decisions of 30 June 1977 and 14 March 1978 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3 and 271).

a conciliation or mediation commission or ICJ in an advisory capacity, assess the permissibility of the reservation? In his view, the answer was clearly affirmative. The body to which the case had been referred could and should, pleading exceptional circumstances created by inadmissibility, assess the regularity of the reservation, since, otherwise, it would be unable to perform its task of settling the dispute in accordance with international law, that is to say in accordance with the treaty, in the form in which it had been ratified, of course, but on condition that the ratification, including reservations, was in conformity with international law and hence that the reservations were permissible.

34. That argument could be applied, *mutatis mutandis*, to the jurisdiction of human rights bodies or, more generally, to the jurisdiction of bodies responsible for monitoring the implementation of any treaty whatever. The bodies were established by the parties, voluntarily and consciously, to ensure that States actually fulfilled their obligations under a treaty, in the form in which it applied to them, including reservations. The reservations must be permissible, however, because, otherwise, they could not be applied unless international law was to be regarded as a big joke.

35. The monitoring bodies therefore clearly should not have broader jurisdiction for determining the permissibility of reservations than they had in their main areas of responsibility. If, like ICJ, they had decision-making power in respect of disputes, they could determine whether a reservation was permissible or not and act accordingly for the purposes of the settlement of a dispute submitted to them. If they had only advisory or recommendatory powers, however, they could adopt a position on the permissibility of the reservation, but that position would not be binding on the reserving State—or, for that matter, on the other States parties; those States would have to give sincere consideration to the opinion handed down or the recommendation made, but that opinion or recommendation would not be binding on them. Nothing in the practice of arbitral tribunals (the *English Channel* case), ICJ or the human rights bodies, either at the regional or international level, including general comment No. 24 (52) of the Human Rights Committee, contradicted that position and he himself agreed with it. It was subsequently, at a later stage, that he had more difficulty understanding their position, although, as he had indicated at the beginning of his statement, he had refined his position slightly compared with that of the previous year.

36. What happened if and when a reservation was found to be impermissible? The human rights bodies basically took the view that the State whose reservation had been declared impermissible must be deemed to be bound by the treaty as a whole, notwithstanding the reservation. He did not think that position was tenable. A treaty, by definition, was a consensual instrument that derived its force solely from the will of the State as the State had expressed it "by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed", as provided for in article 11 of the 1969 Vienna Convention. Of course, however, reservations were consubstantial with the expression of consent. A State accepted a treaty, but with the reservation or reservations to which it subordinated that consent and which could be the absolute precondition for such consent that could be imposed by its Parliament, by its Constitution or by pressing domestic policy reasons.

37. Only the State could know that, however, and since treaty monitoring bodies did not, in principle, know that, they claimed the right to impose a treaty on a State that the State, when all was said and done, did not "want", and it thus became, not a treaty, but a piece of international legislation. He did not believe that the international community was ready for that and he was not even sure that it was desirable: why should experts, however distinguished they might be, know better than Governments what was good for States and peoples? What legitimacy would such decisions have? Although it might be regrettable, it was also a fact that there was no world government. Was bureaucratic despotism on a world scale preferable?

38. He had indicated at the beginning of his statement that he had somewhat changed his views after having written his report and on a matter of some importance: it might well be true, as Mr. Brownlie had maintained (2500th meeting), that the foregoing comments did not apply to regional human rights bodies, at least when they had the power to make binding decisions. Solidarity within the European and inter-American frameworks was stronger than international solidarity and the States of those regions had established mechanisms reflecting that "extraordinary" solidarity by giving the mechanisms extensive powers which States seemed, in practice, to accept. Even in such contexts, however, one might question the grounds for the solution used by the European Court of Human Rights in respect of Turkey in the *Loizidou* case.[8] Even Switzerland had consented, after much hesitation, to remain a party to the Rome Convention after the *Belilos*[9] and *Weber*[10] cases, and that showed that the situation was still evolving. In the final analysis, however, the problem was not or was no longer the same at the European and inter-American regional levels and paragraph 6 of the draft resolution at the end of the second report would probably have to be amended slightly.

39. On the other hand, he was convinced that regional solutions could not be transposed to the international level and to bodies such as the Human Rights Committee, which did not have compulsory jurisdiction vis-à-vis States. Nothing justified the assertion in paragraph 18 of general comment No. 24 (52) of the Human Rights Committee that, if the Committee determined that a reservation was impermissible, that reservation must be considered "severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation". In the absence of a customary exception on a regional basis that was accepted as law, such an assertion was contrary to general international law. If a reservation was impermissible, it was up to the reserving State to consider the consequences. Those consequences were referred to at the end of chapter II, section C.2 (*b*), of the

[8] See 2500th meeting, footnote 17.

[9] Ibid., footnote 16.

[10] European Court of Human Rights, *Judgments and Decisions, Series A*, vol. 177, *judgment of 22 May 1990* (Registry of the Court, Council of Europe, Strasbourg, 1990).

report and could be summed up in the following way. First, the reserving State could do nothing if, as was the case with nearly all existing international bodies, such bodies had no binding power, but a law-abiding State could be expected not to behave that way, even in the absence of a legal obligation *stricto sensu*. Secondly, it was obvious that a State could quite simply withdraw its reservation, thereby solving the problem. Thirdly, the State could also terminate its participation in the treaty, to which it had never actually been a party because its consent had been invalidated by the impermissibility of its reservation. Fourthly, another possibility which seemed more satisfactory and justifiable from the legal point of view, despite some difficulties, was that the reserving State could "regularize" its situation by replacing its impermissible reservation by a more limited, permissible one. That was nothing new and had been done by Switzerland and Liechtenstein after the judgment in the *Belilos* case. There were other examples of "reservation substitution" as a result, *inter alia*, of objections by States.

40. One last comment was called for on that point. There was an aspect of general comment No. 24 (52) of the Human Rights Committee with which it was hard, in good conscience, to agree, namely, the naturally quite excessive claim by the Committee that it was the sole judge of the permissibility of reservations. There was no doubt that it could have an opinion about permissibility, but it did not have a monopoly in that area. Like the other human rights instruments, the International Covenant on Civil and Political Rights was and continued to be a treaty among States; they could, and did, formulate objections to reservations and he did not see any disadvantage to that dual monitoring system. On the contrary, it effectively guaranteed the monitoring of the permissibility of the "necessary evil" represented by reservations; for the time being, at least, the objections of States were more effective than monitoring by the Committee, inasmuch as, for the reasons given by Mr. Hafner (2500th meeting), objections led to a certain reciprocity that could perhaps constitute another not insignificant means of exerting pressure. They could also serve as useful guidelines for the Committee itself because, while States parties must certainly take the Committee's views duly into account, the opposite was also true.

41. Turning to the draft resolution at the end of his report, he said he did not think it would be helpful to comment on the substance in detail, since it reflected the main conclusions that could be drawn from the report itself. Paragraph 1 restated a conclusion reached by the Commission in 1995.[11] Paragraphs 2 and 3 reaffirmed the principle of the unity of the reservations regime and paragraph 4 referred to specific problems arising out of the establishment of human rights bodies and should perhaps be supplemented by an indication that such problems could also arise in other areas. Paragraphs 5, 6 and 7 reflected the comments just made on the competence of those bodies, while paragraph 8 invited States to include reservation clauses in the treaties they concluded in order to dispel any ambiguity in future.

42. It might be useful to recall why it seemed appropriate to adopt such a resolution and to explain the choice of that form. In the second and third paragraphs of the preamble and in paragraph 9, he had tried to explain the need for and usefulness of such a resolution. PCIJ and, subsequently, ICJ had defined themselves as "the international law body" and, although he did not want to rob the Court of that title, he thought that, while the Commission was not "the" international law body, it was at least, in its own way, "one" of the international law bodies. It would be unfortunate if the Commission were to remain silent in the debate currently going on on the question of reservations to normative treaties and, more specifically, to human rights treaties, when the topic of reservations to treaties was part of its programme of work and it could thereby contribute to the codification and progressive development of international law by showing an interest in a topical issue that was clearly within its jurisdiction.

43. Certain specific events made it necessary and urgent for the Commission to consider the matter; they were referred to at the beginning of chapter II of the report and there was perhaps no need to refer to them again. In January 1997, moreover, the Committee on the Elimination of Discrimination against Women had considered a report by its secretariat on reservations to the Convention on the Elimination of All Forms of Discrimination against Women whose implementation it was responsible for monitoring; the report referred to the Commission's work. The Committee had refrained from adopting a position on the question precisely because it was waiting for the final text of the Commission's resolution. He had reason to believe, although his information had not been confirmed, that the chairpersons of the human rights treaty bodies had also decided not to resume the consideration of the issue of reservations to those instruments until the Commission's position was known. That position was being awaited and the Commission must take care not to disappoint those who were waiting. The discussion in the Sixth Committee also showed that States took an interest in the matter.

44. Turning to the question of form, he recalled that the idea of drafting a resolution had been supported at the forty-eighth session and by some members of the Commission (2500th meeting), whereas others, without being categorically opposed, had expressed doubts as to whether the form chosen for the proposal was well founded. He was maintaining his proposal, but did not consider it to be of overriding importance. It was true that the Commission was not in the habit of expressing itself through resolutions and that it would be the first time that it had done so. Habit was not a valid argument, however. It was not because the Commission had never done something that it should refrain from doing so for evermore. For example, it had never invited the President of ICJ to visit, but it had done so in 1997, and that was a good thing.

45. In his view, the issue of reservations was particularly well suited to that form of "communication", but it did fit into the usual mould of draft articles accompanied by commentaries. It was not a matter of establishing rules, but of adopting positions on fairly general problems of "legal policy". Nevertheless, if the word "resolution" scared some members, he was not attached to it enough to fight a lengthy battle on its behalf. He was in favour of it for the reasons he had given and was convinced that it would be good for the Commission's image. But if a

[11] See *Yearbook . . . 1995*, vol. II (Part Two), para. 487 (*d*).

majority of members preferred that the Commission should adopt "recommendations" or "conclusions", he would bow to their wishes with good grace. In any event, the question did not seem to warrant a lengthy discussion and the best thing might be to take an indicative vote on the issue after the members had had a chance to express their views if there were any objections to that approach.

46. Whatever form the Commission adopted, he repeated the proposal he had made earlier in response to the informal suggestions by Mr. Simma and Mr. Brownlie: the Commission must act rapidly, but without undue haste, and in consultation with the human rights bodies, simply adopting on first reading at the current session a draft that it would send for comments, not only to the General Assembly, as usual, but also to the bodies in question. It was only after having heard their reactions that it would take a final decision. It went without saying that the Commission would have to append an explanatory note to the draft. He would be prepared to submit a draft note once the text of the draft resolution had been considered by the Drafting Committee.

47. Mr. ROSENSTOCK said that, for the most part, he endorsed the reasoning and conclusions of the Special Rapporteur. Thus, he entirely shared the view that rules applicable to reservations to treaties were applicable to all treaties, whatever their object. He was puzzled, however, by some of the Special Rapporteur's comments about reservations to bilateral treaties, as he did not think it plausible to speak of a reservation to a bilateral treaty. That point might have to be discussed further at a future date.

48. With regard to the draft resolution proposed in the report, he did not consider it necessary for the Commission to reach agreement on all the points raised by the Special Rapporteur or any other member. That was true, for example, of General Comment No. 24 (52) of the Human Rights Committee. The simplest solution would perhaps be to delete paragraphs 5 and 7, as well as a part of paragraph 4, from the draft resolution and to endorse the rest, possibly amending paragraph 6 to take account of the specific role of regional organizations. It should therefore be possible to adopt a resolution which had appeared in the report of the Commission on the work of its forty-eighth session[12] and on which the human rights bodies had had plenty of time to reflect.

49. There were, however, two points on which the Special Rapporteur did not seem to have followed his premises and reasoning to their logical conclusion.

50. First, the Special Rapporteur argued persuasively that States could not make reservations on provisions of a treaty which simply restated a rule of customary law. States could reject certain procedural provisions, but such a reservation did not of itself constitute a unilateral decision to opt out of the rule or, if accepted, an agreement to such a decision. It was difficult to see why the same analysis would not apply a rule of *jus cogens*. While it was true that a State could not opt out of such rules, that did not mean that a State could not make a reservation to a rule of *jus cogens* expressed in a treaty. There was nothing inherent in the nature of a rule of *jus cogens* that required a State to agree to its inclusion in any and every procedural context. It was doubtless true that there were not likely to be many instances when reservations to a peremptory norm would not be contrary to the object and purpose of the treaty. But such a reservation, one that was contrary to the object and purpose of the treaty, would be invalid because of article 19, subparagraph (*c*), of the 1969 Vienna Convention and not because a peremptory norm was involved.

51. The other matter on which he disagreed with the Special Rapporteur was the latter's apparent acquiescence in the view that monitoring bodies had the competence to "determine" the permissibility of reservations formulated by States. The bodies in question could indeed express a view, they could deplore something, but that was not tantamount to "determining" the permissibility of a reservation. The determinative role of such bodies *de lege ferenda* was debatable, but to suggest that such a role could be asserted *de lege lata* was simply wrong. The conclusion that the Human Rights Committee could not "determine" the permissibility of a reservation flowed, *inter alia*, from the conclusion reached by the Commission two years earlier[13] that there was no need to challenge the regime established by articles 19 to 23 of the 1969 Vienna Convention.

52. Remarks about the Vienna regime being a failure could not be endorsed. The adoption of the key human rights instruments predated that of the 1969 Vienna Convention. Article 20, paragraphs 2 and 3, of the Convention even provided for the possibility of fine-tuning the reservations regime for some types of treaties. The absence of a special provision applicable to human rights instruments was a conscious omission, but to attribute it to the fact that the Convention had been drafted during the cold war and to suggest, as had been done, that it was part of a political deal was misleading. On the other hand, the regime that had been enshrined in the 1969 Vienna Convention had been known to States at the time of the adoption of the human rights instruments. Thus, the absence of special provisions in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights had been deliberate, as had been made abundantly clear *a contrario* by the presence of a special regime concerning the compatibility of a reservation with the object and purpose of the International Convention on the Elimination of All Forms of Racial Discrimination. The flexibility of the Vienna regime was seen by some as an element which could work to the detriment of the integrity of a treaty. It would surely be no less useful to recognize that the flexibility of the Vienna regime permitted States to innovate in the treaties concerned, as they had done in the case of the International Convention on the Elimination of All Forms of Racial Discrimination. It followed that, when States had not done so, it was not because they had been barred by the 1969 Vienna Convention or by ignorance of its contents. Special regimes could, of course, exist, as Mr. Crawford had said (2500th meeting). It was up to States whether or not to create such regimes. So far, they had refrained from doing so.

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

[13] See footnote 11 above.

53. In his report, the Special Rapporteur dismissed too lightly the authoritative 1976 opinion of the United Nations Legal Counsel[14] that it was for States parties, and not for a monitoring body, to determine the validity of a reservation. The results in the *Temeltasch*,[15] *Belilos* and *Loizidou* cases did not affect the strength of that opinion or in any other way provide a basis for finding that the Human Rights Committee had a right to make "determinations". Those cases were invalidated as precedent inasmuch as, according to article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the purpose of the mechanism created by that Convention was to "*ensure* the observance of the engagements undertaken". No such language was to be found in the global treaties establishing such bodies. Moreover, the Convention for the Protection of Human Rights and Fundamental Freedoms created a court, and it was plausible to conclude that States which consented to the establishment of a court implicitly consented to a committee with extensive authority. In such a context, it was plausible to argue, as the European Commission did in the *Temeltasch* case, that "the very system of the Convention"[16] conferred competence upon it.

54. In addition to those differences which deprived the European precedents of weight in the global context, it was far more likely that members of a regional system such as the European Community, the Council of Europe or the inter-American system would be more willing—in the regional context—to assign sovereign rights, such as the right of consent to be bound by a regional instrument or of consent to a reservation to such an instrument, than members of the international community as a whole.

55. The fundamental issue to which it was necessary to return again and again, the pivot upon which the law of treaties turned, was the consent of States. To ignore the role of consent in the decision of States to be bound by an instrument was to undercut the principle of *pacta sunt servanda* and to ignore the role of consent in the decision of States to object to a reservation as being contrary to the object and purpose of the treaty, but, at the same time, to accept the reserving State as a party to the treaty was to ignore the practice of States and thus the will of the international community.

56. Even assuming that the Human Rights Committee had the authority to determine the inadmissibility of a reservation—an authority he did not believe it had—it was quite another matter to assert that it had authority to determine, not that the reserving State was not a party because its consent was invalid, but, rather, that it could ignore those elements of the State's consent which it did not like and, in effect, treat the counter-offer as an acceptance. The approach of borrowing the notion of severability from the relationship between a reservation and the treaty itself and trying to apply it to the relationship between a reservation and the elements by which the reserving State intended to consent to be bound was very unconvincing. Paragraph 6 of the draft resolution proposed by the Special Rapporteur and the reasoning behind it were entirely persuasive.

57. Going on to refer to an article in which Redgwell discussed various ideas on how States could bring existing divergent State practice into line with the Vienna regime,[17] which itself recognized the possibility of individual treaty regimes explicitly departing from its residual rules, he said that, in its future work on the topic, the Commission would be well advised to build on the suggestions by Catherine Redgwell and others in considering what instruments, model clauses or provisions States could use, if they so wished, to enhance the "integrity" of the regime of human rights and other treaties while respecting the rights of States and the integrity of the system itself, and thus the force of the fundamental principle *pacta sunt servanda*. Would the elaboration of protocols be as labourious as it was if States were willing to legitimize or endorse a determinative role for the report-receiving bodies? Everything possible should, of course, be done to strengthen the regime of human rights treaties and the rights of the individual against the State, but to do so at the expense of the law of treaties was likely to do more harm than good.

58. Mr. CRAWFORD said that Mr. Rosenstock had introduced an interesting point by referring to the special case of rules of *jus cogens*. According to his argument, reservations had meaning only in relation to treaty law. That was so, perhaps, because treaty law was related to customary international law. But the effects of a reservation which was accepted by another State could override customary law between the two States concerned. That was the case, for example, with the treatment of diplomats; the manner in which two States agreed to treat their respective diplomats was a matter of *jus dispositivum*. The same was obviously not the case with human rights or with *jus cogens*. The rules of *jus cogens* remained peremptory whatever States might say or do under a treaty. In most cases, the restatement of a rule of *jus cogens* in a treaty was formulated in such a way that any attempt to vary from it would be incompatible with the object of the treaty in question. General norms of customary international law had the same status. Human rights norms, which formed part of customary international law, could not be applied relatively or selectively and two States could not agree between themselves that they would not comply. For example, they could not agree between themselves to practise torture, even with respect to their own nationals. It followed that what Mr. Rosenstock had said of the rules of *jus cogens* was equally true of rules of general international law which were not *jus dispositivum* as between the two States concerned.

59. Mr. Sreenivasa RAO said that he endorsed most of Mr. Rosenstock's well-constructed and well-documented statement and shared most of its conclusions, in particular, that a reservation relating to a rule of *jus cogens* was null and void because of the mere fact that it was inconsistent with the object of the treaty and not because it varied from customary international law. The question still remained, however, as to what constituted customary

[14] United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), pp. 219-221, at p. 221.

[15] Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, *Temeltasch* v. *Switzerland*, vol. 31 (Strasbourg, 1983), pp. 138-153.

[16] Ibid., p. 145, para. 65.

[17] "Reservations to treaties and Human Rights Committee general comment No. 24 (52)", *International and Comparative Law Quarterly*, vol. 46 (April 1997), Part 2, p. 390.

international law. Some rules were unanimously accepted by States, while others were accepted by some States and rejected by others. As an example, he cited the case of the law of the sea, where opinions on the subject of the delimitation of the continental shelf were far from unanimous and where many of the applicable rules did not fall in the category of customary law properly speaking, but, rather, in that of the progressive development of international law. In fact, it could be said that reservations were a reflection of doubts as to what constituted customary international law.

60. Mr. LUKASHUK said that he found Mr. Rosenstock's and Mr. Sreenivasa Rao's comments on the subject of customary international law extremely interesting and took the opportunity to recommend that the Commission should place that highly important topic on its agenda.

61. Mr. ADDO said that he entirely agreed with the comments just made by Mr. Crawford. He doubted whether a reservation which was incompatible with the object of a treaty could be accepted by another State party. Such a reservation was inadmissible and, in his view, consent by the other State party was null and void for that reason.

62. Mr. ROSENSTOCK said that, as he saw it, a reservation was not prohibited by the mere fact that it concerned a rule of *jus cogens*. It was prohibited because it was incompatible with the object of the treaty in question. To some extent, that applied to reservations to human rights treaties; such a reservation did not give the reserving State the right to ignore the rule, but only the right not to apply it as a rule of treaty law.

63. Mr. GOCO said that he shared what he understood to be Mr. Rosenstock's position on the proposal to consult the human rights treaty monitoring bodies. He felt that the Commission should steer its own course and arrive at its own formulations. The bodies in question had already adopted a very intransigent position on reservations. To consult them would not be useful in practical terms.

The meeting rose at 1.10 p.m.

2502nd MEETING

Tuesday, 1 July 1997, at 10.10 a.m.

Chairman: Mr. João Clemente BAENA SOARES

later: Mr. Peter KABATSI

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

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. Mr. GALICKI expressed appreciation for the Special Rapporteur's work and for his introduction to a difficult topic and said he agreed with the conclusion that, mainly because of its flexibility, the Vienna regime was suited to the requirements of all treaties, whatever their object or nature. As the Special Rapporteur had also recognized, however, account had to be taken of certain new developments since 1969 which had created special problems in regard to reservations. The main problem undoubtedly lay in the machinery established to monitor many human rights treaties and especially certain specific activities gradually developed by treaty bodies in determining the permissibility of reservations formulated by States. Although that determination function had not been expressly entrusted to the treaty bodies under the relevant treaties, it could be deemed to derive from such instruments as the Convention for the Protection of Human Rights and Fundamental Freedoms and the Pact of San José which stipulated that the jurisdiction of the European Court of Human Rights and the Inter-American Court of Human Rights extended to all cases pertaining to the interpretation and application of both Conventions. The exercise of such a function, moreover, formed part of the developing practice of those bodies. That was, however, a regional practice and it should not become global. Despite general comment No. 24 (52) of the Human Rights Committee,[2] the Committee's competence was not, generally speaking, mandatory in character and, in any event, its functions in regard to the permissibility of reservations were not comparable to those of the regional courts.

2. One question appeared to be the extent to which the functions of the treaty bodies in determining the permissibility of reservations could replace the relevant powers of States under the 1969 Vienna Convention. The matter was further complicated by another problem, not solved by that Convention, namely, the mutual inter-independence between the permissibility and the acceptability of reservations, under articles 19, subparagraph (*c*), and 20, paragraph 4, of the Convention. He tended to favour the opposability doctrine whereby the final decision rested with the true masters of the treaties, the States parties. It seemed that the acceptance of reservations by another

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

[2] See 2487th meeting, footnote 17.