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Summary record of the 2502nd meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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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. Rodriguez 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.

contracting State should have a decisive role and that the so-called compatibility test should serve only as a guiding principle for acceptance of or objection to a reservation. On the other hand, if the human rights treaty bodies were able to question the admissibility and validity of a reservation, even years after the reservation had been formulated, that could threaten the stability of the treaty relations and create uncertainty.

3. Again, it did not seem acceptable—as had happened with some decisions of the European Court of Human Rights—for any body to have a right to decide that a State which formulated an inadmissible reservation was bound by the whole treaty. States had protested vigorously against such tendencies, even among bodies that had only recommendatory powers, as the United States of America and the United Kingdom of Great Britain and Northern Ireland had done, for example, in the case of general comment No. 24 (52) of the Human Rights Committee. Interestingly, it was a fairly rare occurrence for States that objected to reservations to human rights conventions on the ground that they were incompatible with the object and the purpose of the treaty to exclude treaty relations with the reserving States. Any activity undertaken by the treaty body retroactively in that sphere could also be questioned. In short, it could be said that, on the regional scale, bodies which monitored human rights treaties, with the consent of States, were seeking to fill a gap in the 1969 Vienna Convention—the gap being constituted by the lack of any mechanism to decide on the impermissibility of reservations and its consequences. But that approach should not be adopted at the global level. In that connection, the proposed draft resolution, which appeared at the end of the second report by the Special Rapporteur (A/CN.4/477 and Add.1 and A/CN.4/478), and which properly reflected the existing situation, was designed to strike a balance between the traditional powers of States and the newly emerging powers of international bodies.

4. Close cooperation between States and treaty bodies in determining the permissibility of reservations was highly desirable and specific clauses to that effect should be incorporated in multilateral normative treaties, including human rights treaties. That would complete the Vienna regime by filling in certain gaps in the system while preserving the regime's binding character. A good example of a solution to the difficulties stemming from lack of precision in the 1969 Vienna Convention was provided by article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, whereby a reservation was regarded as incompatible if at least two thirds of the States parties to the Convention objected to it. The advantage of such a collegiate approach was, first, that States parties were directly engaged in the process of making final decisions concerning the admissibility of reservations, and secondly, it harmonized the traditional difference of views concerning the interrelationship between the permissibility and acceptability of reservations.

5. Mr. GOCO said that he wished to extend his congratulations to Mr. He, representing the People's Republic of China, on the events of the previous day in connection with Hong Kong.

6. He commended the Special Rapporteur for his excellent work on a complicated topic, which gave rise to a wide range of concerns. They included the permissibility of reservations, their compatibility with the object and purpose of the treaty or with human rights instruments, the effect of the reservation on the obligation of the reserving State, the role of the monitoring bodies in determining questions of the permissibility of reservations and the allied question of whether or not they were performing judicial or quasi-judicial functions in that connection, and the corollary question of whether the provision to which the reservation had been made could be severed from the treaty itself. There was, however, one all-pervasive and possibly threshold issue, on which there were conflicting views, and it concerned reservations to human rights treaties which were not covered by the Vienna Conventions and which, being of a special character, perhaps called for different treatment.

7. The Special Rapporteur seemed to take the view that, because of that apparent vacuum, rules should be formulated to serve as a guide to States parties. While that might be advisable in the case of bilateral or multilateral treaties in general, to include human rights in the current study could open the floodgates to all sorts of comment and criticism not only from the established human rights monitoring bodies but also from non-governmental organizations responsible for the promotion and protection of human rights. Regardless of any justification for the inclusion of human rights in the study, and of the status the Commission enjoyed in the field of international law, such organizations would still find fault with any attempt to clarify the position concerning the provisions on reservations which many regarded as an anathema.

8. He remembered that when, as a human rights advocate under the regime of President Marcos, he had advised that the Government should ratify the International Covenant on Civil and Political Rights he had always met with the stock answer that to do so might constitute an infringement of sovereignty. Subsequently, the Government had, under pressure, agreed to ratify the Covenant, but with the proviso that it would invoke the provisions on derogation, in the interests of national security. In the event, the Covenant had been ratified not by the Marcos regime but by the new Aquino Government, which had also ratified the Optional Protocol. As Solicitor-General under the current administration he had again had occasion to reject the suggestion that the provisions on derogation should be invoked in the case of the internal problems that had arisen in the south of his country. The point was that, in the matter of human rights, derogation or reservation was a bad word. If the Commission were currently to tinker with the provisions on reservations, it could encounter many challenges. In the case of the topic at hand, therefore, it would be better to preserve what had been achieved.

9. The Human Rights Committee had adopted an intransigent stand on the issue of reservations, as evidenced by its general comment No. 24 (52) from which it was easy to sense the feeling that, notwithstanding the provisions on derogation in many human rights instruments, ratifying States should not be released from their obligations under the International Covenant on Civil and Political Rights. It was important, however, to distinguish between

the word “derogation”, on the one hand, and “reservation”, on the other. The former was used in many human rights instruments, and specifically in article 4 of the Covenant, to mean suspension of the observance by a State party of its obligations, but only for the period of a public emergency. A similar provision on derogation appeared in article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 27 of the Pact of San José, though not in the African Charter on Human and Peoples’ Rights.

10. The word “reservation”, on the other hand, as defined in article 2, subparagraph (d), of the 1969 Vienna Convention, meant a “unilateral statement” which—unlike a derogation—purported “to exclude or to modify” the legal effect of certain provisions of the treaty in their application to the State that made such a statement. It was important to bear that distinction between derogation and reservation in mind when drafting the proposed guide to practice in respect of reservations to treaties,³ and also in the case of human rights instruments. In that connection, he agreed with the statement in chapter I, section B.2, of the Special Rapporteur’s second report that the guide to practice should take the form of general rules which should be purely residual and should not be binding.

11. Mr. HE expressed appreciation to those members who had congratulated him on the handover of Hong Kong to China. China looked forward to cooperation with other countries in promoting Hong Kong’s prosperity and stability and also to a bright future for Hong Kong.

12. He said that the establishment of bodies to monitor human rights treaties had not, of course, been envisaged at the time the 1969 Vienna Convention had been drafted. Later, when those bodies had been set up by treaty, they had not been intended to assume the role of determining the permissibility of reservations. Only in the late 1980s, and in particular with the adoption of general comment No. 24 (52) by the Human Rights Committee in 1994, had the problem risen in an acute form. It was important to remember that the role vested in the monitoring bodies by the treaties that had created them was only to monitor the implementation of the provisions of the treaty. Those bodies therefore had no power other than that conferred on them by States parties. In other words, they had to function within their mandate. In particular, they could in no circumstances determine the permissibility of reservations made by States. Accordingly, in the absence of a clause in human rights treaties allowing the monitoring bodies to make such a determination, the Vienna reservation system should be observed in its entirety. It was for the reserving State to draw any conclusions regarding the incompatibility of its reservations with the object and purpose of the treaty, and for the State objecting to the reservation to draw any conclusions regarding its decision on the maintenance of the treaty link between itself and the reserving State. The reality of international relations required that it should be left to the States parties to determine the legal value of reservations and the legal relations between States. Under the Vienna system no issue as to the severability of impermissible reservations in the context of human rights treaties would arise. That had rightly been criticized by the Special Rapporteur as contrary to

the consensual principle which lay at the very basis of any treaty undertaking.

13. The Vienna system had functioned satisfactorily and hence there seemed to be no need to introduce dualism in the form of two parallel systems for determining the permissibility of reservations, or what might be termed a “diversity in unity” system. The main elements of the latter were embodied in the core paragraph—paragraph 5—of the Special Rapporteur’s proposed draft resolution, which, on the one hand, recognized the determination function of treaty bodies in regard to the exercise of control over the permissibility of reservations but, on the other, provided that that did not exclude the traditional modalities of control by the contracting parties or, where appropriate, the settlement of disputes by the relevant organs.

14. Paragraph 5 of the Special Rapporteur’s proposed draft resolution, moreover, was connected with paragraphs 7 and 9 which, respectively, called on States to cooperate fully with the bodies responsible for determining the permissibility of reservations, and expressed the hope that the proposed principles would help to clarify the reservations regime applicable to human rights treaties. Dualism, or a combination of two reservation systems, was not really necessary or acceptable and would make it difficult for those who subscribed to such views to endorse the draft resolution despite its good intentions and carefully weighed wording.

15. Mr. CRAWFORD said it was true that treaties did not specifically confer on treaty bodies a particular determinant role with regard to reservations and objections. It was also true that the process of making reservations and formulating objections, was a matter for States parties. On the other hand, treaty bodies did have a role in monitoring the obligations of States under treaties and, in order to do that, it was absolutely necessary for them to form a view as to the extent, or indeed existence, of the obligations of States under the treaties. The position, as ICJ had said on a number of occasions, was that a body established by a treaty had at least the powers that were necessary to enable it to fulfil its role. It followed that the treaty bodies must necessarily form a view as to the obligations of States. It might be that, under international law, the way in which they did so was primarily by reference to the attitudes taken by States in responding or not responding to reservations. But that was a different question, namely, the question of what the law relating to reservations was. If he had understood correctly, Mr. He was actually denying any role to treaty bodies. That seemed to go too far, since treaty bodies, in order to perform their designated function, had to form a view about the existence and extent of obligations of the States parties under the treaty. Otherwise, they would fail to discharge their functions.

16. Mr. BENNOUNA said he concurred with Mr. Crawford. He almost regretted that the Special Rapporteur had involved the Commission in the current debate on institutional rather than normative matters, since there was a clear-cut distinction between the reservations regime and the functions of international treaty monitoring bodies. The competence of such bodies was determined by the object and purpose of the treaty whose implementation they were required to monitor and even

³ See 2500th meeting, footnote 7.

by the customary rules that they developed in the practical discharge of their duties. They were entitled to interpret the treaty within that context. The Commission should confine its discussion to the normative aspects of the reservations regime and endeavour to draft model rules under that heading for the guidance of States.

17. Mr. ROSENSTOCK said that the Commission, when dealing with the topic of reservations, could not ignore bodies which arrogated to themselves the right to determine matters relating to reservations and which reached conclusions that seemed to be inconsistent with the existing regime. The question was not whether such a body was entitled to have or express a view on reservations but whether it could make a determination and, if so, on what possible basis. There was a limit to how far the principle of effectiveness could be taken. *Ut res magis valeat quam pereat* did not justify anything and everything. It could be seen from a comparison with the formulations in the Convention for the Protection of Human Rights and Fundamental Freedoms and the Pact of San José and the structures set up thereunder that the context and basis were quite different in the case of the Human Rights Committee, which had exceeded its review function and sought to establish rules of law regarding reservations to treaties. He did not agree that the Commission should refrain from commenting on what was actually an interesting and challenging endeavour if it was well-founded and which might jeopardize the Vienna Convention process if it was not. The Commission had decided to endorse that process and its determination to do so had been approved by the General Assembly. It must exercise caution, therefore, before deciding not to deal with an aspect that had direct implications for the work it had undertaken to accomplish.

18. Mr. ADDO said that he fully agreed with Mr. Crawford. The monitoring bodies, if they were to operate effectively, must establish the extent of the obligations that had been incurred by States parties. In the event of reservations which seemed inconsistent with the object and purpose of a treaty, the monitoring bodies must be able to draw them to the attention of the States concerned. In doing so, they were not assuming dictatorial powers even if there was no explicit provision regarding such a role for them in the treaty concerned. If a State party agreed that a reservation was inconsistent with the treaty's object and purpose, it could either recast the reservation or withdraw from the treaty.

19. Mr. KABATSI said that he endorsed Mr. Rosenstock's remarks. Monitoring bodies should not be allowed to provide advice or make determinations regarding reservations unless the relevant treaties expressly conferred such powers on them. Their role consisted solely in monitoring compliance with the obligations entered into by States. Where a State made a reservation, the human rights monitoring bodies had absolutely no power to rule on an obligation which, then, was not applicable to the State concerned.

20. Mr. KATEKA said he agreed with Mr. Rosenstock and Mr. Kabatsi. As soon as treaty monitoring bodies were allowed to interpret reservations, even for the purpose of notifying States parties, the possibility arose of "creeping jurisdiction", with all its attendant dangers.

21. Mr. PELLET (Special Rapporteur) asked Mr. Rosenstock whether he recognized his views in what had been said by Mr. Kabatsi and Mr. Kateka, because his own understanding was very different from theirs.

22. Mr. ROSENSTOCK said that he detected a general commonality of approach in spite of differences on some minor details.

23. Mr. ADDO, noting that reservations to bilateral treaties must be taken into account in the study of the reservations regime, said that, in his opinion, there was not a great deal to occupy the Commission under that heading. Such reservations were straightforward and perhaps for that reason had not been dealt with under the Vienna regime. They implied either that the parties had failed to agree and that, accordingly, no treaty had come into existence, or that a modified treaty had come into being by reason of its acceptance by the other party. An attempt to modify a bilateral treaty by a reservation undermined the parties' original understanding of the agreement and amounted to a counter-offer and a reopening of negotiations. If the modification was rejected by the other party, the treaty would fail. If it was accepted, a new treaty would come into being.

24. Mr. KATEKA said he agreed that the Commission should not concern itself unduly with bilateral treaties. The Special Rapporteur should certainly examine the matter, but with a view to dismissing it as largely irrelevant to the topic under discussion.

25. Mr. GALICKI said that, while he broadly agreed with the comments made by Mr. Addo and Mr. Kateka, the problem of reservations to bilateral treaties could not be excluded since the phenomenon, particularly in the form of so-called interpretative declarations, had arisen in international relations in recent years, for example in connection with ratification of the Concordat between Poland and the Holy See. There was a need to establish the precise character of such declarations and to decide whether they actually amounted to reservations. On the whole, however, it was a matter that went beyond the scope of the Commission's mandate and related to different fields of State activity.

26. Mr. SIMMA said that his approach to the topic was influenced by the fact that he had served as a member of a United Nations human rights treaty body for 10 years. Whereas he had felt somewhat uneasy during that period with his status as a human rights generalist, in the light, or possibly darkness, of the current debate in the Commission he was beginning to feel like a human rights lawyer. He shared Mr. Bennouna's concern about the inclusion of that aspect of the topic in the Special Rapporteur's second report. The Special Rapporteur's pugnacious and impetuous character had perhaps impelled him to take up an issue that was on everybody's mind following the adoption of general comment No. 24 (52) by the Human Rights Committee, placing it under the relatively innocuous heading of the "Unity or diversity of the legal regime for reservations to treaties" (title of chapter II). In his view, such a controversial issue should have been left to the end of the Commission's study, since it was only after careful consideration of the possibility for inter-State reactions and objections to reservations that an adequate picture of

the feasibility and desirability of treaty body action such as that outlined in general comment No. 24 (52) could be formed.

27. If States parties had followed the example set by Austria and Portugal, reacting regularly and forcefully over the past 10 years to reservations by other States parties so that the objection process became a form of dialogue on the precise content of reservations, general comment No. 24 (52) might never have been adopted. It had been adopted not in a spirit of aggression but because the quantity and quality of sweeping reservations had become intolerable and State reactions to manifestly incompatible reservations had been infrequent and restrained.

28. The Special Rapporteur and others had made much of the applicability of the Vienna regime to human rights treaties and of the flexibility of that regime. But the 1969 Vienna Convention coped very poorly with the problems and challenges faced by human rights treaties. There was no regime for inadmissible reservations and the provision for objections to reservations lacked the necessary bite in the case of such treaties. If that was what was meant by "desirable flexibility", then it was preferable to opt for the ultimate flexibility of having no rules at all.

29. Article 60, paragraph 5, of the 1969 Vienna Convention, dealing with breaches of treaties, used the language of humanitarian law applicable to armed conflicts and had been inserted at a late stage in the United Nations Conference on the Law of Treaties,⁴ on the urging of Switzerland and probably ICRC. What the proponents had had in mind was not human rights treaties in general but the Geneva Conventions of 12 August 1949 and humanitarian law. It was not very convincing, therefore, to cite article 60 as evidence that the United Nations Conference on the Law of Treaties had been thinking of human rights treaties at a time when very few such treaties had existed.

30. Mr. Rosenstock had asked, in connection with the alleged usurpation of jurisdiction by human rights treaty bodies, why the latter should be supposed to know better than Governments what was good for the people of the country concerned. That was not the point. The question was whether treaty obligations had been performed adequately and whether reservations were admissible, which was a perfectly legitimate function.

31. While general comment No. 24 (52) of the Human Rights Committee contained many welcome elements, he agreed that the most controversial, namely, the severability of inadmissible reservations, was not in line with the law of treaties as embodied in the 1969 Vienna Convention. That did not, however, exclude the possibility of developing international law in the direction of the severability doctrine, a development which he would welcome and which had already occurred under the Convention for the Protection of Human Rights and Fundamental Freedoms. Since 1961, the Council of Europe bodies had been developing the doctrine of "objective duties" under the Convention, that is to say obligations that were non-reciprocal or were not only reciprocal. The doctrine of collective enforcement of the Convention had led to a series of

cases and the resulting jurisprudence had been accepted by States parties. The difference was, of course, that the monitoring bodies under the Convention could hand down binding decisions.

32. At all events, the regional international law thus developed was difficult to square with the traditional law of treaties and the same was true of European Community law. Indeed he perceived a convergence between law and practice under the Convention for the Protection of Human Rights and Fundamental Freedoms and European Community law. Judgments by the European Court of Justice had shocked member States in much the same way as the Commission was shocked by general comment No. 24 (52). Mr. Brownlie had asked (2500th meeting) how the Commission should react to those developments. For his own part, he considered that they should not be censured by a United Nations body. The European approach was undeniably more progressive and more effective than the Vienna regime and the Council of Europe institutions did not need a recipe on how to deal with reservations. He therefore proposed that in chapter II, section C.2, the first paragraph of the subsection on "The reactions expected from the reserving State" should be deleted from the Special Rapporteur's second report, because it simply was not the Commission's business.

33. It had been suggested that the Commission should challenge the monopoly of treaty bodies. To date, the Commission had dealt with human rights issues only incidentally. Human rights law had been developed by other bodies and there were many other voices of international law which deserved a hearing, particularly the United Nations human rights institutions. The Commission's response to general comment No. 24 (52) should not strike an antagonistic note but set out to be helpful and cooperative. Consultations with human rights treaty bodies were desirable and feasible. Chapter III of the Commission's statute was devoted to cooperation with other bodies. He endorsed the Special Rapporteur's statement that he would welcome such consultations and that the Committee on the Elimination of Discrimination against Women (CEDAW) had already expressed a wish for dialogue.

34. To sum up, the Commission should not behave like a bull in the china shop of human rights law, which was fragile and permanently under threat, not least from false friends. The Commission should tone down the title, form and substance of the product of its discussion. It should transmit an opinion rather than a draft resolution to the General Assembly and its content should be based on the suggestions made by the Special Rapporteur.

35. Mr. ROSENSTOCK suggested that the proposed draft resolution should be referred to the Drafting Committee for a review of its form and content. No decision was necessary for the time being on whether it should be presented in the form of a conclusion, recommendation or resolution. Although amendments and deletions were necessary, there was a certain basis for common ground.

36. He had not implied that Governments knew more about human rights than did the Human Rights Committee. The question was who possessed authority under

⁴ See 2499th meeting, footnote 14.

existing legislation. The unwarranted arrogation of authority was unlikely to enhance respect for international law in the long run or to advance the cause of human rights as protected by international law.

37. It was debatable whether the Commission should discuss the adequacy of existing treaty mechanisms at the beginning or the end of its work on the topic. However, it could be argued that if such bodies had decision-making authority, the problem of reservations might be alleviated and it might no longer be necessary to recommend, for example, that Governments should consider drafting a protocol to existing covenants expressly granting such power. The Commission would be ignoring the magnitude of the problem involved in achieving the results advocated by Mr. Simma if it postponed its discussion of the adequacy of existing mechanisms until the end of its work. It must first scrutinize those mechanisms, determine whether it could support existing action by them and, if not, seek alternative ways of achieving the desired goal. Accordingly, it would be better to look at the matter earlier than later.

38. Article 60 of the 1969 Vienna Convention had not been cited as evidence of an attempt to deal definitively with human rights treaties but as evidence that the United Nations Conference on the Law of Treaties had been fully aware of the possibility of making special provisions if it was so desired. Failure to make such provisions was not a sign of incompetence or ignorance but rather of a determination that a special provision was not necessary for areas that were not expressly mentioned.

39. Mr. KATEKA said that he wanted to dispel any false impression that might have arisen to the effect that some members of the Commission were against human rights. That was far from the truth, at least as far as his own position was concerned. Like Mr. Rosenstock, he thought the point at issue was the legality of the body determining the permissibility of reservations. Regional bodies, particularly in Europe and Latin America, might of course be more advanced than international ones; some such bodies had undoubtedly made great strides in recent years and their decisions had been accepted by countries in their region. If at some stage they achieved similar acceptance at the international level, he would consider changing his position. It was to be hoped, however, that long before that time, the vagueness about the interpretative powers of international treaty bodies would have been cleared up.

40. Mr. CRAWFORD said he agreed broadly with Mr. Simma, but would simply point out that the Special Rapporteur was free to say what he liked in his reports and could then be criticized, appropriately or inappropriately, on the floor of the Commission.

41. Mr. GALICKI said that, while he appreciated Mr. Simma's experience in regard to regional systems of protection of human rights, he could not share his optimism as to the operation of regional human rights bodies, especially in connection with the admissibility of reservations to treaties. It should not be forgotten that in the *Belilos* case,⁵ a most unhappy situation in the European family of nations, namely, the denunciation of the Con-

vention for the Protection of Human Rights and Fundamental Freedoms by Switzerland, had been avoided by just one vote in the Swiss Federal Council. Even within a regional system, the interventions of human rights treaty bodies could give rise to serious conflicts between States. He agreed with the Special Rapporteur that regional systems should not be left outside the range of the Commission's observation and evaluation. Experiences of that kind should not be overlooked in the endeavour to produce a set of global guidelines interpreting the Vienna regime.

42. Mr. BENNOUNA said that he tended to agree with Mr. Simma. The existing reservations regime should not be elevated to the status of a sacrosanct rule. It was, in fact, no more than a technique employed to make up for the lack of another. If, in the matter of reservations, the Convention for the Protection of Human Rights and Fundamental Freedoms was more advanced as well as more progressive than the 1969 Vienna Convention, that was surely no reason to mistrust it. He failed to understand the strong feeling apparently running within the Commission on the question whether the views of human rights treaty bodies were to be sought. The power of States to draw whatever consequences they wished from those views was not in doubt, but neither was the right of international or regional bodies to develop their own practices and create their own precedents. If that right was universally accepted in the case of the Security Council, then he asked why it could not also be recognized in the case of human rights bodies.

43. Mr. DUGARD stressed the importance of the question of the extent to which the Security Council and other bodies of the United Nations and other institutions were entitled to interpret their own charters so that the law might evolve to take account of new problems and practices. It would be recalled that, in connection with the interpretation of Article 27, paragraph 3, of the Charter of the United Nations, the Security Council had, for reasons of effectiveness, developed a practice whereby abstentions were not treated as a veto. That practice had continued informally until it had received the imprimatur of ICJ in 1971.⁶ The situation which the Commission was facing currently was to some extent a similar one, some human rights monitoring bodies having, as it were, asserted their implied powers in order to cope with serious problems arising with regard to human rights treaties. It was common knowledge that States made far-reaching reservations to such treaties without a response from other States and the monitoring bodies in question had sought to respond to that situation by developing new rules and practices. The Commission thus had before it the difficult jurisprudential question of how to address a problem largely concerned with the implied powers of human rights monitoring bodies. The point raised by Mr. Simma was indeed an important one: he asked whether it was the Commission's function to put back the clock or was it to acknowledge the new situation and seek to recognize it within the framework of the Vienna regime. The draft resolution proposed by the Special Rapporteur addressed

⁵ See 2500th meeting, footnote 16.

⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 22, para. 22.*

that difficult issue, one which the Commission should not sidestep, yet should accept that it was broader than the matter of reservations to treaties.

44. Mr. GOCO said that he felt reassured by the statement in chapter I, section B.2, of the report to the effect that the rules to be incorporated in the future guide to practice would be purely residual and non-binding. With those parameters, the Commission was on safe ground in deciding to proceed with the study of the topic. He was also attracted to the draft resolution proposed by the Special Rapporteur at the end of the second report and impressed by Mr. Simma's argument invoking article 25 of the Commission's statute. However, since certain decisions had already been taken by other, sometimes intransigent, bodies, the Commission would have to accept those decisions and procedures if it cooperated with the bodies in question. He asked whether it would be possible to adopt the draft resolution without venturing into such a dangerous area as human rights. He did not doubt that some areas of the Vienna regime needed to be addressed, but asked whether it was appropriate for the Commission to enter into communication with human rights treaty bodies before defining its own position. A more independent approach would perhaps be preferable.

Mr. Kabatsi took the Chair.

45. Mr. ECONOMIDES warmly congratulated the Special Rapporteur on his remarkable work. Needless to say, he shared the central concern of preserving what had been achieved by the 1969 Vienna Convention, but he also recognized that the Vienna regime had lacunae and inconsistencies which deserved thorough consideration by the Commission. For example, article 19 of the 1969 Vienna Convention said nothing about the effects of prohibited reservations. In particular, it was, of course, quite illogical that a reservation should have the same consequences for a State which accepted it as for the State which did not and which made an express objection.

46. It would be premature to adopt the draft resolution proposed by the Special Rapporteur before the Commission had considered the crucial matter of the legal effects of impermissible reservations, a point not dealt with in the 1969 Vienna Convention. The proper time to adopt a position on the substance of the problem would be after completing the consideration of that important issue of customary international law.

47. His second reason for hesitating to support the draft resolution related to the substance of the problem. The rules of the 1969 Vienna Convention were, of course, purely residual in nature. States were entirely free to enter reservations in regard to some categories of treaties, particularly those in the human rights field, where the element of the "integrity" of the treaty clearly prevailed over that of universality, at least at the regional level. In such cases, strong systems could be—and were—established and bodies could be given implicit powers to deal with reservations considered to be unlawful and could do so on the basis of regional law or of customary international law. He did not see, however, why the invalidity or "separability" of a reservation would not be an appropriate sanction, if the sanction was ordered by a body that had jurisdiction to do so. Another reason for hesitating to

support the draft resolution was that it was rather unusual for a subsidiary body like the Commission to take the initiative of addressing a resolution to the General Assembly, especially on a difficult and delicate matter which, moreover, was not devoid of political significance.

48. Lastly, the draft resolution might be seen by some, including many human rights theoreticians, as flowing against the stream, namely towards granting greater respect for human rights. He shared the views expressed in that connection by Mr. Bennouna, Mr. Simma and Mr. Dugard and, for all the reasons stated, he could not support the draft resolution, at least for the time being.

49. Mr. PELLET (Special Rapporteur) said that, while members of the Commission had the right, on the one hand, to express their views and, on the other hand, to be absent from meetings, he felt that those who availed themselves of the latter right should be reasonable in exercising the former. He could not help feeling irritated by those who, like Mr. Bennouna and Mr. Economides, adopted positions without taking any account of what the Special Rapporteur had said.

50. The CHAIRMAN said that the Special Rapporteur was entitled to criticize members of the Commission as much as they were entitled to criticize him.

51. Mr. PAMBOU-TCHIVOUNDA said that the theoretical discussion about the implicit powers of treaty bodies seemed to him to leave a great deal unsaid. He asked what the precise nature was of the bodies in question; whether they were consultative bodies, or political ones; if they adopted political positions; and what their position was within the framework of the United Nations. After all, the United Nations itself was not a State, still less a super-State. He asked why then should the Human Rights Committee and other similar bodies be treated as if they were more important than a State. He did not in the least want to see the human rights treaty bodies silenced, but only reduced to their true proportions. As to Mr. Economides' comments, he found it difficult to go along with the remarks about current trends in jurisprudence and customary law.

52. Mr. BENNOUNA said that he agreed with the remarks addressed by the Chairman to the Special Rapporteur. The right to criticize was a fundamental one, and Mr. Pellet's remarks constituted a reservation incompatible with the object and purpose of the statute of the Commission.

53. Mr. ECONOMIDES said that it was true that he had been absent earlier and had had no previous opportunity to express his views, but if he had irritated the Special Rapporteur he wished to present his excuses.

54. Mr. HAFNER said that the idea that the Vienna regime had formed part of a package deal made at the United Nations Conference on the Law of Treaties had been contested. On the basis of that view, it could even be concluded that the existing regime did not form a politically motivated compromise. Yet one had to acknowledge that the existing regime reflected to a large degree the Soviet position on reservations, according to which reservations were strictly unilateral acts derived from the sov-

ereignty of States. That idea had been put forward in the proposal by the Union of Soviet Socialist Republics,⁷ which had combined draft articles 16 and 17 in a single provision and had completely transformed the meaning of objections to reservations. The idea had also been related to the purely politically motivated notion of the principle of universality. The authors of Soviet textbooks on international law in the 1950s and 1960s had expressed the opinion that the right to make reservations was not restricted by the imperatives of compatibility with the object and purpose of a treaty. Obviously, their view was that any reservation was permitted, and the compromise represented by articles 19 et seq. of the 1969 Vienna Convention reflected that view. The central provision of draft article 17, which had later become article 20, had been adopted only at the second session of the United Nations Conference on the Law of Treaties in 1969,⁸ since in 1968 it had not proved possible to adopt the whole package of which it was part. He therefore stood by the views he had already expressed on the matter.

55. On the other hand, he concurred with Mr. Rosenstock and Mr. Crawford about the lack of effect of reservations so far as proof of the existence of a norm of customary international law and *jus cogens* was concerned. He would merely add that a reservation would not exclude the applicability of a norm of customary international law to the reserving State, provided that State had not acted as a persistent objector. Accordingly, the existence of reservations to a provision of a codification treaty could hardly serve as proof of the non-existence of such a norm—a matter that had once been extensively discussed in the literature.

56. It was regrettable that the chapters of the report which were to follow were not available for the current discussion. Consensualism as the basic concept behind the draft and similar matters deserved further consideration for the purposes of the matter at hand.

57. In chapter II, section C, the Special Rapporteur dealt with the object and purpose of the treaty, a notion that escaped any definition. Any attempt to establish one would lead nowhere. It would certainly not suffice to refer merely to the interpretation of the treaty, since such interpretation presupposed the object and purpose of the treaty that one was trying to define. It would be better to follow the practice of replacing substantive rules by procedural ones, or at least, to place greater emphasis on procedural rules as the device whereby States defined the treaty's object and purpose. That meant following the path chosen by the Special Rapporteur: the procedural device could be decentralized or centralized, the former resulting from the individual reactions of individual States to a given reservation, and the latter being reflected in some centralized or monitoring body. The Special Rapporteur had been right to refer in that connection to environmental law, which did offer a parallel.

⁷ A/CONF.39/C.1/L.115.

⁸ *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6), eleventh plenary meeting, pp. 36 et seq.

58. The Special Rapporteur described the decentralized procedure as the ordinary law inter-State system, as reflected in article 20 of the 1969 Vienna Convention. But the connection with article 20 did not seem to be correct in all cases. One illustration was to be found in the reactions of States to Chile's reservation,⁹ later withdrawn, to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Two States out of those that had considered the reservation to be incompatible with the treaty's object and purpose had formulated their reaction in such a way as to give no indication of what they deemed to be the consequences. Fourteen of those States had declared that the objections to the reservation should not prevent the establishment of treaty relations, and three of them had declared that the reservation had no legal effect at all and did not affect the obligations incumbent upon Chile. Austria had been one of the three and its declaration had been made by the Head of State further to a decision by the Government.

59. That approach did not rely on article 20 of the 1969 Vienna Convention, which was deemed to apply only to admissible reservations, but sought to make it clear to the reserving State that a decision to ratify a treaty must be taken not only for the benefits to be derived from becoming a party but also out of a willingness to assume the essential obligations under the treaty. In other words, the approach was intended to avert situations where States could hope to derive only benefits from being a party to the treaty, for example by participating in the treaty's administration, without being obliged to carry out the corresponding obligations. The approach already constituted the practice of States; accordingly, in chapter II, section C.2 (a), of the report, the subparagraph concerning the ordinary law mechanism was incorrect. The case of the Chilean reservation was remarkable in that, of all the conclusions reached by objecting States none had excluded a treaty relationship with Chile, even though its reservation had been qualified as being incompatible with the object and purpose of the treaty. Hence, there was still no proof that such a reservation could be considered to affect the existence of a legal nexus between the relevant States.

60. When reservations were more general, relying on notions such as the Shari'ah or on constitutional provisions, without further details, approaches like the one pursued by Austria towards Chile could no longer be used, since the real meaning of the reservation was uncertain. In such cases, Austria lodged a preliminary objection, stating that the reservation was inadmissible, unless the reserving State, by providing additional information or through subsequent practice, ensured that the reservation was compatible with the provisions essential for the implementation of the treaty's object and purpose. Austria thus sought to escape the risk of acquiescence to the reservation and tried at the same time to establish communication with the reserving State, which should also be afforded an opportunity to withdraw its reservation. Denmark had taken a similar position and asked the Governments of Djibouti, the Islamic Republic of Iran, Pakistan and the Syrian Arab Republic to reconsider their reserva-

⁹ *Multilateral Treaties Deposited with the Secretary-General* (see 2501st meeting, footnote 4), p. 189 and p. 198, footnote 11.

tions to the Convention on the Rights of the Child.¹⁰ So far, there had been no reaction from any of the reserving States. Nevertheless, that kind of procedure had been endorsed by a group of States which had looked into the matter, although they had been unable to come to agreement on the legal consequences of inadmissible reservations.

61. Although desirable, it was questionable whether the various centralized bodies could be considered as being empowered to decide on the admissibility of a reservation. It was highly unlikely that a system that was appropriate in the European context could be transposed to a global level. As in environmental law, the various existing and possible compliance mechanisms might differ substantially. They could consist of independent experts or representatives of States, act only if requested by a State or on the complaint of an individual, or even *proprio motu*. In all those cases, their pronouncements would have differing effects. For example, if an individual brought a case before an institution and it adopted a binding ruling on the admissibility of a reservation, that ruling could be said to have an *erga omnes* effect. But if a State resorted to such an institution, the ruling would have effect only for the parties to the dispute, according to rules like those embodied in Article 59 of the Statute of ICJ, and an inadmissibility ruling would have a bilateral effect. If the possibility of endowing monitoring bodies with similar powers were to be accepted, it nevertheless remained highly debatable whether their findings would have any legal effect and it was unlikely that they would be able to generate a harmonized position on the part of States.

62. The precedence of bilateralism in respect of the inadmissibility of reservations was confirmed by the fact that not even instruments aimed at harmonizing the reactions of States to reservations to multilateral treaties were functioning in practice, so that, even in such cases, the ultimate decision lay with individual States. At the global level, it would be too progressive to rely on those bodies to determine the admissibility of reservations with an *erga omnes* effect. That did not mean, however, that the granting of such competence was undesirable.

63. The draft resolution proposed by the Special Rapporteur should be submitted to the General Assembly as a draft recommendation in order to test its acceptability. Paragraph 5 seemed to go too far, particularly in regard to the attribution of competence, something that also applied to paragraph 7. However, paragraph 5 could be reformulated so as to become more acceptable. The second sentence of paragraph 6 should take into account the practice of certain States which regarded an inadmissible reservation as having no effect at all. Paragraph 8, which rightly sketched out a future-oriented approach, should also refer to the fact that a determination concerning the permissibility of reservations made by a treaty monitoring body should have an effect on all States parties.

64. One fundamental item was not addressed, but presumably it would be dealt with at length at the fiftieth session, namely, what was to be done if States did not follow the advice set out in the draft resolution. Mr. Simma had already pointed out that the time for the adoption of

human rights conventions was past, and he shared that view. It was also unlikely that the existing conventions would be given stronger compliance mechanisms. It was therefore necessary to live with the existing instruments and to find solutions in them to the problem of inadmissible reservations. Such solutions would undoubtedly be advanced at the Commission's next session. For that reason, it should be made perfectly clear that the draft resolution or recommendation was not the Commission's final word on reservations, but that it addressed only part of a very complex subject.

65. Mr. LUKASHUK said that he had come to two basic conclusions in the light of the discussion. First, the competence of treaty bodies merited consideration in connection with the topic of reservations to treaties. Secondly, the general position adopted by the Special Rapporteur was a balanced one, reflecting a common denominator among the views expressed by various members of the Commission.

66. The competence of treaty bodies should be studied not in isolation, but as an aspect of the law of international organizations. Taken from that standpoint, many elements fell into place. After an arduous debate at the United Nations Conference on International Organization, held at San Francisco in 1945, it had been decided that every United Nations organ should determine its own competence. Indeed, any other solution would have been impossible, since such bodies could not function if the scope of their competence was not defined. The treaty bodies themselves frequently stressed that fact, as had been the case in general comment No. 24 (52) of the Human Rights Committee. He could therefore agree with the statement by the Special Rapporteur in chapter II, section C.2 (a), of the report that general international law gave treaty bodies the right to determine their own competence. He would even add that that right fell in the category of an essential rule: *jus necessarium*.

67. The problem was not whether treaty bodies had the right to determine their own competence, but rather where the limitations of such competence should lie. What were the boundaries beyond which a decision by a treaty body was illegal and an act *ultra vires*? It was the treaty that should set out those boundaries, but not all of them did so. In practice, treaty bodies sometimes acted outside those boundaries, and such non-compliance was not always deemed an act *ultra vires*. By way of example, one could cite the adoption by the Security Council of the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as the "International Tribunal for the Former Yugoslavia").¹¹ and the statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (hereinafter referred to as the "International Tribunal for Rwanda").¹²

¹⁰ *Ibid.*, pp. 205-212 and p. 220, footnote 17.

¹¹ Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

That had represented great progress in the development of international law, but the Charter of the United Nations could not be said to provide the justification for such action. Indeed, the relevant report by the Secretary-General¹² advanced arguments on the Security Council's competence in that area that were not entirely convincing, with the exception of one: that there had been no alternative. Unless the Security Council had established the International Tribunals, they would never have come into being.

68. In his view, the juridical basis for the Security Council's decision was the consent of States: by their silence, they had acknowledged the legality of the Security Council's action. That view was corroborated in article 31, paragraph 3, of the 1969 Vienna Convention which indicated with regard to the interpretation of treaties that, together with the content, account should be taken of any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation.

69. The Special Rapporteur appeared to concur when he stated that the extent of the competence of the monitoring bodies should be verified on the basis of the consent of the States parties and of the general rules of the law of treaties—and, he himself would add, of the law of international organizations. The situation was complicated where there was no general consent or where sharp criticism was levelled by a number of States parties. It seemed to him that in such circumstances, States parties must have the final say, and in that connection he agreed with Mr. Galicki and Mr. He. In view of the specialized nature of human rights treaties, there should be a special regime under which it would be obligatory for a majority, or at least a relative majority, of States parties to consent to the decisions made by the monitoring bodies. A precedent could be seen in article 20, paragraph 2, of the Convention on the Elimination of All Forms of Racial Discrimination, which provided that a reservation was to be considered incompatible with the object and purpose of the Convention if at least two thirds of the States parties to the Convention objected to it. Objection by two thirds of the States parties could thus be used as a solution, both for reservations to treaties and for objections to such reservations.

70. Those who sought to justify the elaboration of special provisions concerning reservations to human rights treaties usually argued—as had the Government of France, for example—that, if the right to make reservations was restricted, a great many States would simply not become parties. Though that argument seemed convincing at first glance, States would in practice be encouraged to make reservations that would effectively nullify the effect of the treaties. Examination of the reservations to the International Covenant on Civil and Political Rights, for instance, revealed that, using such reservations, States assumed absolutely no obligations under the Covenant, even while formally adhering to it.

¹² Security Council resolution 955 (1994) of 8 November 1994, annex.

¹³ Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), *Official Records of the Security Council, Forty-eighth Year, Supplement for April, May and June 1993*, document S/25704 and Add.1.

71. In chapter II, section C, of the report concerning the competence of treaty bodies, one central aspect of the problem had not been addressed, namely, the degree to which States could justify their reservations on the basis of internal law. The majority of reservations to the International Covenant on Civil and Political Rights cited such law. The 1969 Vienna Convention prohibited States from invoking internal law, but the question arose as to whether that prohibition applied to reservations.

72. An affirmative response was given in the objection by the Government of Finland to reservations to the International Covenant on Civil and Political Rights made by the United States of America,¹⁴ where Finland had referred to the general principle of treaty interpretation according to which a party could not invoke the provisions of its internal law as justification for failure to perform a treaty. There was a distinction, nevertheless, between failure to perform treaty obligations and the will of a State to modify a provision in a treaty. In the two instances, different rules and criteria should be adopted. The report, however, failed to discuss that very complex issue.

73. A number of writers and Governments considered recourse to internal law to be entirely unacceptable. In its objection to the reservations made by the United States of America to the International Covenant on Civil and Political Rights, the Government of Portugal¹⁵ had stated that reservations in which a State limited its responsibilities under the Covenant by invoking general principles of national law could create doubts on the commitments of the reserving State to the object and purpose of the Covenant and, moreover, contribute to undermining the basis of international law.

74. While it was unlikely that reservations would be made to the provisions of treaties setting out rules of general international law, such a possibility could not be excluded. He agreed with Mr. Hafner that such reservations might be permissible. A State might decide that a rule of general international law, as used in a given treaty, was unacceptable. If other States acknowledged the reservation, then that would signify consent, which made possible derogations *inter se* from the rules of general international law, as long as they were not rules of *jus cogens*.

75. The draft resolution proposed by the Special Rapporteur could be adopted only on a preliminary basis. He would favour the deletion of paragraph 4, because it was at variance with the statements in paragraphs 1 and 2 about the applicability to all treaties of the Vienna regime.

76. Finally, members of the Commission might be interested to learn that under the Russian Federation's law on international treaties, reservations and objections by the Russian Federation to reservations by foreign States must be formulated as a law. The adoption of that sort of legislative provision was unprecedented and suggested a pro-

¹⁴ *Multilateral Treaties Deposited with the Secretary-General* (see 2501st meeting, footnote 4), pp. 130-132.

¹⁵ *Ibid.*, p. 133.

cedure whose implementation in practice could not be considered desirable.

The meeting rose at 1.05 p.m.

2503rd MEETING

Wednesday, 2 July 1997, at 10.05 a.m.

Chairman: Mr. João Clemente BAENA SOARES

later: Mr. Alain PELLET

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, 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 (concluded)

1. Mr. CRAWFORD said that he was not sure about the legal nature of the procedure relating to the determination of the impermissibility of a reservation to a treaty which was either prohibited by the provisions of the treaty itself or incompatible with its object and purpose.

2. He recalled that, in the *Belilos* case,² the issue had been not whether the particular reservation was or was not incompatible with the object of the Convention, but, rather, since the Convention allowed only for certain reservations, whether the Swiss declaration had or had not been one of the permissible reservations. Under article 19 of the 1969 Vienna Convention there was no difference between impermissibility resulting from a breach of the provisions of a treaty and impermissibility as a result of incompatibility with the object of the treaty.

3. The Special Rapporteur approved of the situation in which a State whose reservation had been deemed incompatible with the object of a treaty redefined its relationship to that treaty either by withdrawing its reservation or by reformulating it in order to make it compatible, or by accepting that it was not actually a party to the treaty. That was a situation, however, that called for further analysis. The 1969 Vienna Convention codified methods of formulating and withdrawing reservations, but did not provide for withdrawal from a treaty by a State which had made an impermissible reservation. A State that withdrew from a treaty was simply clarifying the attitude that it was regarded as having had at the time of its acceptance, in conformity with the underlying principle of consent. That State was thus shedding a kind of retrospective light on the position it was considered to have held at the time it had become a party. If such were indeed the case, the State could not have “carte blanche” to reformulate its reservation so as to rewrite its obligations. If it consented to become a party to the treaty, it then had certain obligations from which it could not unilaterally resile. By reformulating its reservation, therefore, it confirmed its status as a State party.

4. It might perhaps be useful for the Commission to reflect further on the exact modalities of that procedure, which was presumably a customary procedure not expressly provided for in the 1969 Vienna Convention.

5. The draft resolution proposed by the Special Rapporteur at the end of the second report (A/CN.4/477 and Add.1 and A/CN.4/478) should be referred to the Drafting Committee, even though, as Mr. Economides had said, it was perhaps premature to give it the form of a final resolution. The Drafting Committee must have the opportunity to come up with a generally accepted text, as it would be a shame to submit a resolution to the General Assembly on which the Commission still had divergent views.

6. Mr. ROSENSTOCK, referring to the situation of a State that formulated a reservation subsequently deemed to be invalid because it violated a specific prohibition of the treaty or because it was incompatible with the object and purpose of the treaty, as well as the legal relationship which the State would, according to Mr. Crawford, maintain with the treaty in question, said Mr. Crawford believed that the State had less latitude to react to that decision of impermissibility because it had previously been regarded as a party to the treaty. In his own view, that State was, rather, in exactly the same situation as one which had not yet taken any decision on the treaty.

7. Mr. CRAWFORD said that the situation was somewhat artificial, insofar as, upon the rejection of its reservation, the State was simply specifying what it should have specified from the outset. That was what Switzerland had done, in the *Belilos* case, formulating a reservation upon its acceptance of the Convention for the Protection of Human Rights and Fundamental Freedoms which had not been in conformity with article 64 of that Convention and then modifying the reservation when it had been challenged.³

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

² See 2500th meeting, footnote 16.

³ See Council of Europe, *Yearbook of the European Convention on Human Rights*, vol. 31 (1988), p. 5.