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Summary record of the 2541st meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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siderable agreement that it would be constructive for a working group, and not the Commission, to consider what the implications would be in the draft articles of the notions he had tried to describe in paragraph 3 of the proposal.

52. The idea was that the Working Group chaired by Mr. Simma would have its mandate marginally extended to consider, currently at the Geneva, and later at the second part of the session in New York, what those implications might be. That would help him in producing his second report, which would examine the matter, *inter alia*, in the context of article 40, because there was the major question of what the terms of article 40 were to be. The Commission should first take note of all the views expressed, which the Working Group would take into account, and the Working Group should start that afternoon by considering the essential question identified in paragraph 3, on the understanding that progress could be made on the basis of the working hypothesis, without prejudice to the views expressed in the Commission about whether to retain article 19. The Commission would revert to the question in due course in the light of the results of the Working Group's work, the consideration of his second report, article 40, and so forth. In the meantime, it would proceed, first, with the work on part one and, secondly, with the work of the Working Group chaired by Mr. Simma, which would engage in the process generally indicated in paragraph 3. There appeared to be broad consensus in favour of such a course.

53. The CHAIRMAN said that it was his understanding that the Special Rapporteur's proposal was acceptable to the Commission.

54. Mr. PELLET said that he warmly supported the Special Rapporteur's proposal, but there was one small point of concern. The Working Group would basically be considering paragraph 3. At the same time, the intention was to discuss the articles in part one. The two exercises would inevitably overlap somewhat. He had always considered that article 19 was actually the cherry on the cake, but that no effort had been made, not even in part one, to give thought to its potential implications. However, if the Commission discussed obligations *erga omnes*, exceptionally serious violations or breaches of the rules of *jus cogens*, he was not sure that, for example, the provisions on circumstances precluding wrongfulness could be examined without addressing those various types of violation. The most logical approach would be to begin with the results of the Working Group's work and then see how to take them into account, including in the drafting of article 1. He asked the Special Rapporteur how he intended to deal with that problem, on the understanding that members could pose questions when they thought that a problem arose. He did not want to be told later that he did not have the right to raise certain points in plenary because it was being treated in the Working Group: problems would then be forgotten, causing a disastrous mess like the one in part two and in the absurd articles on the consequences of crimes. It was important to deal with everything at the same time.

55. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Pellet that it was possible and even probable that basic distinctions between categories of norms

rather than more, edible. In any event, it was clear that article 19 was an add-on and had been so treated in part two. It was unlikely the Commission would finish with chapter II (The "act of the State" under international law) at the current session, although it might be able to start chapter III (Breach of an international obligation) of part one. It certainly would not reach chapter V (Circumstances precluding wrongfulness), which would need to be examined, because that was an area in which notions of *jus cogens* would have an impact. However, it was not the only area, and he would refer, in introducing the chapters, to distinctions which might need to be drawn, for example in connection with article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity). He hoped that that was precisely what the Working Group chaired by Mr. Simma would begin by doing and that it would repeat, in respect of the implications of those notions, the useful task it had already performed in providing him with an initial idea of views in the Commission on problems in other draft articles.

56. Mr. SIMMA said he agreed with both Mr. Pellet and Mr. Crawford in their description of how they saw the work of the Working Group, namely, that in exploring the implications of the concepts contained in paragraph 3 of the Special Rapporteur's proposal, it was important to bear in mind the possible impact on the provisions of part one.

The meeting rose at 12.45 p.m.

2541st MEETING

Thursday, 4 June 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Reservations to treaties (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,¹ A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. PELLET (Special Rapporteur), introducing the report on reservations to treaties (A/CN.4/491 and

¹ Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

Add.1-6), said that, contrary to what he had originally thought, the topic currently seemed more and more delicate and difficult from the point of view of legal technique. That explained why the report was not yet entirely complete and why it would probably be impossible to complete all of its parts and distribute them in all the working languages of the Commission until the next session. The following documents were available, at least in French: A/CN.4/491, which was a general introduction and summary of the Commission's earlier work on the topic; A/CN.4/491/Add.1, concerning the definition of reservations in the 1969 Vienna Convention, the Vienna Convention on Succession of States in Respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention"); A/CN.4/491/Add.2, concerning the establishment of the Vienna definition in doctrine and in case law; and A/CN.4/491/Add.3, which had been issued informally as ILC(L)/INFORMAL/11 and was designed to serve as the main basis for the discussion, contained the text of eight draft guidelines which were to constitute the nucleus of the Guide to Practice planned by the Commission; as well as ILC(L)/INFORMAL/12 contained a recapitulation of the Vienna definition and the eight draft guidelines.

2. The introduction to the third report did not require lengthy comment. It was divided into two sections. In section A, he described the earlier work of the Commission on the topic, as well as its previous decisions as he had interpreted them, and referred to the two main decisions. First, in principle and subject to an unlikely "state of necessity", the Commission would not call into question the provisions of the 1969, 1978 and 1986 Vienna Conventions on reservations to treaties and would simply try to fill the lacunae and, if possible, remedy the ambiguities and clarify the obscurities in them. Secondly, the work would lead to the preparation of a Guide to Practice, a set of guidelines which would be grafted on to the existing provisions and would, if necessary, be accompanied by model clauses on reservations which the Commission would, as appropriate, recommend to States for inclusion in treaties or in certain categories of treaties they would conclude in future. ILC(L)/INFORMAL/11 illustrated his concept of a "positive" definition of reservations: a definition of reservations as such, separate from the unilateral statements that States could make when expressing their consent to be bound by a treaty.

3. In section A.2 of the introduction, he reported as fully as possible on the action taken on the second report on reservations to treaties² and on the principal reactions to its conclusions, which were not revolutionary, but certainly innovative.³ The debate in the Sixth Committee showed that States did not a priori and in advance close their minds off to all innovations (A/CN.4/483, sect. B). The result was less clear-cut as far as the substance was concerned. In that connection, he recalled that, at its forty-ninth session, the Commission had been divided on the

preliminary conclusions on reservations to normative multilateral treaties including human rights treaties⁴ and that there had been two schools of thought.⁵ All members of the Commission had endorsed the preliminary conclusions, which had been adopted without a vote, but some members—indeed, a clear majority—had felt that the Commission had gone as far as it could and that, in recognizing that human rights monitoring bodies were competent to comment on and express recommendations with regard to the permissibility of reservations by States (para. 5 of the preliminary conclusions) and in calling on States to cooperate with monitoring bodies and to give due consideration to their recommendations (para. 9 of the preliminary conclusions), it had already taken a big step forward. The other members of the Commission would have liked the Commission to go even further and recognize that those monitoring bodies had the right to draw conclusions from their findings, as the European Court of Human Rights had done in the *Belilos v. Switzerland* case.⁶

4. The views of States in the Sixth Committee had also been divided, but along quite different lines. Among the 50 or so States which had expressed their views on that point, about half had approved the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, while the other half had expressed reservations on the ground that only States were competent, not only to draw consequences from the possible impermissibility of a reservation, but even to find a reservation to be impermissible. He said that no State had clearly expressed the wish that the Commission should go further in any direction. Like others, however, he was convinced that it was part of the Commission's role to suggest progressive alternative solutions to States if those solutions corresponded to trends that were desirable and had already taken reasonable shape. He nevertheless drew the attention of the Commission and, more particularly, of those members who had regretted what they regarded as his excessively timid approach, to the opposition shown by almost all States to the breakthroughs being recommended in respect of human rights treaty bodies. The Commission would have to take that fact into consideration when it resumed its consideration of that point. It would be in a good position to do so because it would by then have received the reactions of the bodies in question, which had also been consulted and which would perhaps adopt different positions. The persons chairing the human rights treaty bodies had considered the Commission's preliminary conclusions at their ninth meeting, convened at Geneva from 25 to 27 February 1998, but had not yet officially announced the results of their work.⁷ Only the Chairperson of the Human Rights Committee had sent in her preliminary comments in a letter dated 9 April 1998, in which she referred only to paragraph 12 of the preliminary conclusions. The essential passage from those comments was reproduced in paragraph 16 of the third report: in substance, the Human

⁴ For the text, *ibid.*, para. 157.

⁵ *Ibid.*, paras. 148-156.

⁶ European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *judgment of 29 April 1988* (Registry of the Court, Council of Europe, Strasbourg, 1988).

⁷ See A/53/125, paras. 17-18.

² *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478.

³ *Yearbook . . . 1997*, vol. II (Part Two), chapter V.

Rights Committee felt that regional bodies should not be given a special place and that universal monitoring bodies also contributed to the development of practice and of applicable rules.

5. The members of the Commission were, of course, free to react as they wished to the information on that point which appeared in the third report, but he considered it premature to reopen the debate on the substance of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted at the forty-ninth session. They were only preliminary in nature and the Commission would have to consider them again, but, before doing so, it would do well to await the comments from human rights bodies and States which it had requested, even if that meant reiterating the request in the report of the Commission to the General Assembly on the work of its current session. It should also wait until the consideration of the question of the permissibility of reservations and of the question of reactions to reservations had been completed before going back to the preliminary conclusions.

6. With regard to requests for comments and observations on the preliminary conclusions, he said that he was worried by the wording of General Assembly resolution 52/156, in which the reference in paragraph 4 to "treaty bodies set up by normative multilateral treaties . . . , including human rights treaties", was, at first glance, ambiguous. That wording was esoteric and had been laboriously negotiated at the insistence of Tunisia, which had argued that, in addition to human rights monitoring bodies, the Commission should also consult monitoring bodies set up under other multilateral instruments. He was not intellectually opposed to that approach, but he did not see exactly which treaties and bodies were meant and would appreciate it if the members of the Commission could enlighten him.

7. He had nevertheless been very favourably impressed by the apparent interest which States had shown in the Commission's work on the topic of reservations to treaties and which was illustrated not only by the large number of statements made in the Sixth Committee, but also by the work done on the subject by the Asian-African Legal Consultative Committee, whose Secretary-General, Mr. Tang Chengyuan, had addressed the Commission (2537th meeting), and by the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, which had established a group of specialists on reservations to international treaties (paras. 27 to 30 of the third report).⁸ The relatively large number of replies to the questionnaires⁹ received from States and international organizations and of comments on the preliminary conclusions which some States had already transmitted to the Secretariat were also proof of such interest. He would, however, like an even larger number of international organizations and States to reply to the questionnaires. As far as the former were concerned, he regretted the silence of the European Communities, which

were not only depositaries of treaties, but also parties to quite a few multilateral treaties on which they had made unilateral statements; he intended to keep after them. As for States, 32 of the 185 Member States had replied, and that was a more than honourable result compared to the average, but still short of the mark. Although he was aware that the members of the Commission did not represent their Governments, he invited them, where necessary, to draw their Governments' attention to the importance of replying to the questionnaires.

8. Before he went on to introduce chapter I, which dealt with new problems of a much more technical nature, he would appreciate any comments that the members of the Commission might wish to make on the introduction.

9. Mr. HAFNER, referring to the Special Rapporteur's comment on the failure of the European Communities to respond, asked whether the Chairman could get in touch with them personally in order to request the desired information.

10. The CHAIRMAN said that he could indeed, especially since a representative of the European Communities would be present in New York in August.

11. Mr. LUKASHUK, noting that the definition of reservations proposed by the Special Rapporteur (ILC(L)/INFORMAL/12) was based on conventions that had been drafted at a time when the critical issue of reservations had resulted in a certain lack of precision and a considerable degree of latitude, suggested that the words "or named" in draft guideline 1.1 should be deleted. When a State formulated a reservation, it should state clearly that it constituted a reservation. That would make it possible not only to resolve the very complex issues relating to the difference between an interpretative declaration and a reservation, but also to bring greater clarity into legal relationships between States.

12. Mr. Sreenivasa RAO asked, without pressing the point, whether it might not also be desirable to get in touch with national human rights bodies and organizations which were doing admirable work in the countries where they existed and enjoyed considerable credibility.

13. Mr. SIMMA said that, while he was sure that national human rights bodies would welcome the opportunity to comment, he feared that they would be unable to provide legal answers to the questions with which the Commission was concerned, namely, whether domestic or international monitoring bodies were competent to decide either on the validity of a reservation or on the divisibility of a multilateral treaty.

14. Mr. GOCO, referring to the reply of the Chairperson of the Human Rights Committee to the "preliminary conclusions" that had been communicated to the human rights treaty monitoring bodies, said he thought that it was important to await the reaction of regional bodies.

15. Mr. BROWNLIE pointed out that the nature and functions of the monitoring bodies varied considerably: the European Court of Human Rights, for example, was an independent judicial organ vested with at least implied power to assess the validity of a reservation and the divisibility of a treaty, whereas other bodies were little more

⁸ See Council of Europe, Committee of Ministers, 612th meeting of the Ministers' Deputies, document CM(97)187, para. 15; and decision 612/10.2 (16 December 1997).

⁹ See *Yearbook . . . 1997*, vol. II (Part Two), pp. 44 and 46, paras. 48 and 64.

than joint committees representing the parties to the treaties in question. The Commission should therefore be careful not to generalize. In addition, while it was desirable to consult such bodies, it should be borne in mind that, in many cases, the majority of their elected members were not specialists in international law.

16. Mr. PELLET (Special Rapporteur), replying to the comments by the members, said he thought that the question raised by Mr. Lukashuk was premature, since it was a point that he intended to take up in detail in due course. With regard to Mr. Sreenivasa Rao's comment on the possibility of consulting national human rights monitoring bodies, the observations of such bodies, as well as those of non-governmental organizations, would certainly be welcome, but the Commission should, in his view, avoid "short-circuiting" Governments by making direct contact with them. With regard to Mr. Goco's remark, regional bodies had already been approached, but no official reply had as yet been received. As to Mr. Brownlie's comments, he agreed that human rights monitoring bodies varied considerably, but vigorously challenged the assertion that the European Court of Human Rights had authority to assess the divisibility of the European Convention on Human Rights. It was an authority that it had arrogated to itself, but that any of the States concerned could legitimately challenge. Moreover, the fact that the majority of the members of human rights treaty monitoring bodies were not international lawyers made their reaction all the more interesting, since they could inform the Commission of their practical requirements.

17. Turning to chapter I of his third report, he drew attention to its general structure, as summarized in paragraphs 47 to 49. As the sections dealing, respectively, with "reservations to bilateral treaties" and "alternatives to reservations" were not available in all working languages, they could not be considered until the second part of the session in New York. He would therefore concentrate on section A, which was also the most significant in terms of quantity and quality and dealt with the definition of reservations and of interpretative declarations, that is to say, both with the definition contained in the three Vienna Conventions of 1969, 1978 and 1986 and with the shortcomings and ambiguities of that definition.

18. In accordance with the working method on which there seemed to be broad agreement, he had taken as his starting point the definition of reservations in the three Vienna Conventions and, to begin with, that contained in article 2, paragraph 1(d), of the 1969 Vienna Convention, which he read out. The *travaux préparatoires* which had led to the adoption of that definition and which were summarized in paragraphs 50 to 67 of the report, called for only three comments. First, the question of the definition of reservations had not given rise to lengthy discussion and had cropped up only at distant intervals both in the Commission and at the United Nations Conference on the Law of Treaties itself.¹⁰ Secondly, having taken as its point of departure, with the Special Rapporteur, Mr. James Brierly, a contractual definition of reservations,¹¹ which were understood as "offers" to other contracting

parties, the Commission had proceeded rapidly and with little discussion to the idea of a unilateral statement. Thirdly, whereas reservations had initially been defined in relation to interpretative declarations and reactions to such declarations, the latter had eventually been dropped and the last Special Rapporteur of the period, Sir Humphrey Waldock, had omitted them deliberately on the grounds that they belonged in the chapter relating to interpretation and not in that relating to reservations.¹² That was actually one of the reasons why he himself had decided to deal with the "positive" definition of reservations first and separately and to leave the question of interpretative declarations for a later stage.

19. However, the 1969 Vienna Convention had deliberately left aside certain problems, including the question of treaties concluded by international organizations and, as explicitly stated in article 73, that of State succession. But it had come to light, when those two subjects were being codified, that they had implications for the definition of reservations itself. That was fairly obvious in the case of treaties concluded by international organizations, since it had been recognized that international organizations were entitled to formulate reservations to treaties to which they were parties and that was why article 2, paragraph 1(d), of the 1986 Vienna Convention had taken that possibility into account, adding "formally confirming" to the excessively long list of circumstances in which reservations could be formulated, since formal confirmation was equivalent in the case of international organizations to ratification in the case of States.

20. It had been less obvious, however, that the preparation of the 1978 Vienna Convention would have an impact on the definition of reservations, but that was what had happened. In considering the matter the former Special Rapporteur, Sir Humphrey Waldock, had realized that, when a successor State expressed the desire to be bound by a treaty, it could and should be able to formulate reservations to or to modify those of the predecessor State.¹³ Hence the explanation in article 2, paragraph 1(j), of the 1978 Vienna Convention that the expression "reservation" meant a "unilateral statement . . . made by a State . . . when making a notification of succession to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty . . .".

21. In his view, the result of the various contributions was that none of the three Vienna Conventions gave a comprehensive definition of reservations and that, in order to arrive at such a definition, those contributions must be combined or, in other words, a composite text must be drafted, and that was what he had tried to do in paragraph 81 of his report. It was what he called, for convenience's sake, the "Vienna definition" and it was, of course, based on the text of the 1969 Vienna Convention, although the law of treaties was not limited to it. The proposed composite definition appeared to have the advantage of taking that into account. If the members of the Commission so agreed, it was the text of that definition which he intended to put at the beginning of chapter I of

¹⁰ See 2526th meeting, footnote 17.

¹¹ *Yearbook . . . 1950*, vol. II, pp. 238-239, document A/CN.4/23, para. 84.

¹² See *Yearbook . . . 1965*, vol. II, p. 49, document A/CN.4/177 and Add.1 and 2, para. 2.

¹³ See *Yearbook . . . 1970*, vol. II, p. 50, document A/CN.4/224 and Add.1, commentary to article 9, particularly paras. (9) et seq.

the Guide to Practice on definitions, the first section of which was contained in ILC(L)/INFORMAL/12.

22. The Vienna definition had been adopted without significant doctrinal or political debates and was very widely accepted, as indicated in chapter I, section B, concerning the definition of reservations tested in practice, judicial decisions and doctrine. True, the three Vienna Conventions did not provide a general definition to be applied in all cases and their respective articles 2 were all entitled "Use of terms" rather than "Definitions" to show clearly that the definitions were used "for the purposes of the present Convention", as indicated in the *chapeau* of paragraph 1 of each of those articles. But the fact remained that judicial decisions and State practice had confirmed that definition without establishing a direct link with the Vienna Conventions. In other words, States, international courts and arbitral tribunals had used the definition as a basis without worrying whether the 1969 and 1978 Vienna Conventions were actually applicable in the situations in which they used that definition. In the case of the practice of States and international organizations, it was a fact that not only had the definition in the 1969 Vienna Convention been used *mutatis mutandis*, with hardly any discussion, in 1978 and 1986, but also that States sometimes invoked it explicitly in their practice *inter se*, particularly when converting an interpretative declaration into a reservation. Some States had also done so in their pleadings in contentious cases. Judicial decisions were entirely unambiguous and, to his knowledge, in every case when the problem of the definition of reservations had arisen, the court or the judges had always, implicitly or, more often explicitly, relied on the Vienna definition. That had been the case, for example, with the arbitration tribunal in the Franco-British dispute of 1977 in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (English Channel case)*;¹⁴ with the European Commission on Human Rights in 1982 in the *Temeltasch* case;¹⁵ and with the Inter-American Court of Human Rights in its 1983 advisory opinion.¹⁶

23. With regard to judicial decisions, writers, or at least those who had written monographs on reservations to treaties, never failed to give qualified approval to the Vienna definition of certain reservations, whereas international law "generalists" simply reproduced the Vienna definition, as demonstrated by the fairly long list of references contained in the last footnote to paragraph 103 of the report. The "specialists" discussed, but did not dispute, the fact that the Vienna definition had currently acquired its letters of nobility and constituted the obligatory starting point for any consideration of the definition of reservations. Contemporary doctrine was very differ-

ent from that which had prevailed before 1969 and which was summarized in paragraphs 90 to 98 of the report. At the time, the definition had usually varied from one author to another. Today, the Vienna definition had on the whole silenced any doctrinal differences and, while some writers, particularly Imbert,¹⁷ proposed their own definition, they were nevertheless taking as a basis the definition contained in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention.

24. Chapter I, section B.2, which was currently available as ILC(L)/INFORMAL/11, was much more important than the purely descriptive chapter I, section B.1, since its aim was to describe "persistent problems". It was in that area that the Commission could do useful work by refining and supplementing the Vienna definition, something that would also lead it to engage in drafting work and thus to re-establish the Drafting Committee. It was striking to note that, since the 1920s, nearly all writers had taken the view that any definition of reservations must include both formal and substantive components. The Vienna definition itself contained three positive formal components: *primo*, the "unilateral statement"; *segundo*, the "moment when the State or international organization expresses its consent to be bound by the treaty"; *tertio*, "its wording or designation"; and a substantive element, which was that the reservation was intended to "exclude or to modify the legal effect of certain provisions of the treaty". He would analyse each of those components.

25. A reservation did not necessarily have to have the formal nature of a unilateral statement. The first Special Rapporteur on the topic, Mr. Briery, had had what might be termed a "conventional" or "contractual" conception of reservations, believing that they represented an agreement among the parties through which they limited the effects of the treaty in its application to one or some of them. That conception was obviously incompatible with the Vienna regime and had been rightly omitted from the definitions given in the conventions. Curiously, the relevant articles were silent on the form that the statement must take, but there was no doubt that it had to be written, and article 23 common to the 1969 and 1986 Vienna Conventions said as much. An unduly formalistic approach to the "unilateralism" of reservations was not appropriate, however. In the first place, even when formulated unilaterally, reservations were often "coordinated". States with special ties of solidarity among themselves formulated identical or very similar reservations. The former Eastern European countries had habitually done so and that continued to be the practice in the Nordic countries and among the member States of the European Union. The procedure presented no problem whatsoever and it seemed unnecessary to devote a guideline to it, but there was also the case when a reservation was formulated jointly by several States. That possibility was currently taking shape in the European Union, for example, whose member States had already made, if not reservations, at least interpretative declarations and joint objections. It would undoubtedly be useful to indicate in the Guide to Practice that that was not incompatible with the definition of reservations. And that was the purpose of draft guide-

¹⁴ Decisions of 30 June 1977 and 14 March 1978 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3-271), in particular p. 40, para. 55.

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, in particular p. 146, para. 69.

¹⁶ *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of 8 September 1983, Series A: Judgments and Opinions, No. 3, para. 60.

¹⁷ P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pédone, 1978), p. 18.

line No. 1.1.1, as contained in document ILC(L)/INFORMAL/12.

26. The second formal component of the Vienna definition, namely, the moment when a reservation was formulated, was reflected in a long list (“when signing, ratifying, accepting, approving or acceding . . .”) that was hardly felicitous. It had been pointed out that a reservation could be made at other moments. That was true if the treaty so provided, but there was no need to mention that, since the Guide to Practice as well as the Conventions themselves had only a residual function and States were perfectly free to depart from them. Perhaps that could simply be mentioned at the end of the Guide to Practice. The very fact that the information had been included in the definition had been criticized. It was true that that procedure was not very rigorous and that there was an element in it that related more to the legal regime of reservations than to their definition, but the Commission had established the principle that it would modify the Conventions only if it found a serious hidden defect in them. Even if the wording used was not very logical, it placed the emphasis within the definition itself on the moment when a reservation could be made and, accordingly, it had a legitimate function, which was to prevent the potential parties to a treaty from formulating reservations at any time at all, something that would not work in practice and would make the depositary’s task impossible.

27. The expression used was, however, cumbersome, long and awkward. Still worse, the list corresponded neither to the “means of expressing consent to be bound by a treaty”, which was the subject of article 11 of the 1969 and 1986 Vienna Conventions, that phrase being much broader and more general in that it also provided for the exchange of instruments of ratification; nor to the likewise broader reference to “any other means if so agreed”, which was also contained in article 11. There was no indication that a specific problem had already arisen in that connection, but, to be safe and to ensure consistency, it would undoubtedly be useful to mention in the Guide to Practice that the list in article 2, paragraph 1 (*d*), was the same in spirit as that in article 11. That was the purpose of draft guideline No. 1.1.2.

28. He referred in passing to draft guideline 1.1.3, which covered the much more specific, but very practical problem, of a “territorial reservation” which could be made at the time of the notification that the application of a treaty extended to a territory. There again, specific wording that would do no more than to establish a practice that had so far not given rise to any objection would be welcome.

29. The third and final formal component of the Vienna definition related to the condemnation of “legal nominalism” reflected in the phrase “however phrased or named”. In fact, neither States nor judicial decisions took heed of it, which proved that the Vienna definition had been established in practice. There was therefore no reason to revise or supplement the definition on that point. However, it went without saying that that component should have a counterpart in interpretative declarations, which also could not be defined on the basis of the name that their authors tacked on to them.

30. Referring to the fourth component of the Vienna definition, the substantive element, which he considered to be the most important and complex, namely, that the reservation of a State or an international organization “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization”, he said that a detailed analysis was contained in paragraphs 27 to 108 of ILC(L)/INFORMAL/11, but it was important to stress the technical, and hence arid, aspect of the question, which made it interesting not only for legal experts, but also, concretely, for States which wanted a detailed clarification of the regime of reservations, including their definition. Putting it simply, it might be said that that substantive element was “teleological” because it related to the purpose of the reservation. It gave rise to two sets of problems.

31. The first set of problems was created by the expression “certain provisions”. A well-known public law specialist had criticized the use of the word “provisions” and had proposed that it should be replaced by the word “obligations”. To be sure, a reservation, which was a unilateral instrument, did not change the provision or provisions to which it referred, but “their effect” according to the Vienna definition. The term “certain provisions” lent itself to a discussion and was not without ambiguity. Taken literally, it was not consistent with practice, as in the case of “transverse” reservations, that is to say, reservations which related not to any particular provision, but to the way the State or international organization which had formulated it intended to implement the treaty as a whole. That type of reservation was very common and did not give rise to any objections, a circumstance which it would be useful to indicate in the Guide to Practice and which was the purpose of draft guideline 1.1.4.

32. The second set of problems created by the teleological aspect of the definition was much more difficult. From a general point of view, case law and legal doctrine both recognized that the expression “to exclude or to modify the legal effect” of a treaty meant that, by definition, a reservation had an invalidating effect. That was what distinguished it from an interpretative declaration and from statements presented as reservations, but which were in reality neither interpretative declarations nor reservations, such as certain “reservations relating to non-recognition”, which were very common when States signed or ratified a convention. They were not interpretative declarations quite simply because they did not interpret anything and they were still not reservations because sometimes the State formulating them did not aim to produce any kind of effect on the treaty itself. That was the case when the State confined itself to recalling that its participation in the treaty did not imply any recognition of another contracting party which it did not recognize, but nevertheless did not rule out the application of the treaty in relations which it might have with that other party, even when it expressly agreed to it.

33. A statement did, however, constitute a genuine reservation when the State formulating it stated that consequently, it did not accept any contractual relation with the entity it did not recognize because such an act then had a direct impact on the application of the treaty as between the two States. That practice also posed, albeit marginally, the problem of the formulation *ratione temporis* of reser-

vations, since such statements must be able to be, and indeed were, formulated when the non-recognized entity became a party to the treaty, that is to say, often after the expression by the formulating State of its definitive consent to be bound. That was what draft guideline 1.1.7 tried to express, although perhaps too succinctly, because it should be specified that such a reservation relating to non-recognition could not, after all, be formulated at any time once the non-recognized entity became a party to the treaty. The Drafting Committee might therefore be instructed to consider more precise wording.

34. Unlike many authors, he thought that the statements which had been considered at some length in paragraphs 63 to 71 of ILC(L)/INFORMAL/11, under the heading "Reservations having territorial scope", were genuine reservations and he was therefore submitting draft guideline 1.1.8 to the Commission for its consideration.

35. With regard to the more general and very sensitive problem of the precise contours of the expression "to exclude or to modify" in the Vienna definition, he referred the members of the Commission to paragraphs 72 to 78 of ILC(L)/INFORMAL/11, which contained many examples of reservations intended to *exclude* the application, not of the treaty as a whole, of course, but certain of its provisions. In paragraphs 79 to 88, he had attempted to identify the main types of reservations intended to "limit" the effect of the treaty's provisions for the State or international organization formulating it. Although the classification might lend itself to controversy and the interpretation of those reservations was sometimes difficult, there was no doubt in his mind that they were in fact reservations within the meaning of the Vienna definition.

36. There was, however, some doubt about whether the expression "to modify the legal effect of certain provisions of the treaty" could cover an "extension" of that effect and justify the existence of "extensive reservations". On that point, the debate in the literature was rather obscure because all writers did not have the same understanding of that notion. If it was taken in the strict sense of a unilateral commitment entered into by the formulating State to go beyond what was imposed on it by the treaty, such a commitment was valid, but it did not constitute a reservation within the meaning of the Vienna definition because its possible binding force was not based on the treaty and was in no way linked to it. In actual fact, ratification, signature or accession were merely an opportunity for the State which made the statement to enter into a unilateral commitment and, if it was bound, it was only for the reasons put forward by ICJ in the *Nuclear Tests* cases. That idea was reflected in draft guideline 1.1.5, whose objective was to put an end to a controversy which dated back to the early 1950s and which had come to light on a number of occasions in the Commission itself, including at the forty-seventh session. The purpose of draft guideline 1.1.6, which was its counterpart, was to make it very clear, however, that there was nothing wrong with a State or international organization seeking, by means of a reservation, to limit the obligations imposed on it by the treaty and, as a corollary, to limit the rights which the other contracting parties derived from the treaty. Although a State could not unilaterally impose obligations on other States and, in the current instance, could not impose a new obligation in respect of

the obligations of general international law on other parties to the treaty, through its reservation, the reserving State could nevertheless certainly revert to the general rule, namely, to deny other States parties to the treaty the rights which they had, not under general international law, but solely by virtue of the treaty. That was very common practice and did not constitute an "extensive reservation". On the other hand, the State could not "legislate" and attempt, by means of a reservation, to impose obligations on other States which did not stem from general international law. That conclusion, which was expanded on in paragraph 108 of ILC(L)/INFORMAL/11, was the reason for the title of draft guideline 1.1.6.

37. In closing, he proposed that, if it found them interesting, the Commission might refer the eight draft guidelines of the Guide to Practice in ILC(L)/INFORMAL/12 to the Drafting Committee; that did not appear to be necessary for the consolidated Vienna definition.

38. Mr. GALICKI said that he wondered about the Special Rapporteur's very conservative and somewhat "casuistic" approach to the definition of reservations, especially with regard to the definition's "time" elements. In particular, he did not see why, instead of adding elements taken from the 1978 and 1986 Vienna Conventions to the long catalogue of the 1969 Vienna definition, he did not replace that list with the more general wording "when the State expresses its consent to be bound by the treaty". The advantage of that "progressive" solution was that it would avoid new additions to the list in future.

39. Noting that the definition did not say anything about the form, whether in writing or oral, that a reservation could take, he thought that it would be wise to include the condition laid down in article 23 of the 1969 Vienna Convention, namely, that a reservation must be formulated in writing. The advantage of that was that it would create a balance of sorts between the reservation and the treaty, which was, pursuant to article 2, paragraph 1 (a), of the 1969 Vienna Convention, "concluded... in written form", and would make a clearer distinction between reservations and certain interpretative acts.

40. Mr. PAMBOU-TCHIVOUNDA noted that, on the basis of the notion of "joint reservations", the Special Rapporteur focused on the role of solidarity between States and the political context of any initiative in respect of reservations. The Special Rapporteur having spoken of composite statements and coordinated reservations, he wondered what might have been the point of taking that aspect of practice into consideration in the definition. Referring to the Special Rapporteur's criticism of "legal nominalism", he said that such flexibility, which he welcomed, was the extension and reflection of the flexibility allowed in respect of the designation of treaties in article 2, paragraph 1 (a), of the 1969 Vienna Convention. In his view, however, the previous speaker's proposal that States should be directed towards the standardization of reservations in written form might help channel that flexibility so as to avoid any confusion.

41. The CHAIRMAN said that, for the further consideration of the topic, he planned to organize the discussion on a "guideline-by-guideline" basis.

The meeting rose at 1.05 p.m.