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Summary record of the 2545th meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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ments by some members indicating that their national constitutions went a long way towards recognizing the right of nationals to diplomatic protection by their State. The Working Group had thought that a reference to such practices might be useful, but had wanted to stress its purely domestic scope.

40. In reply to a question by Mr. GOCO, concerning paragraph 2 (f), he said the suggestion was not that the Commission should seek comments from Governments. It should only ask for certain relevant documents on national legislation and practice.

41. Mr. MELESCANU said that the wording of the first sentence of paragraph 2 (e) was less than perfect and an effort should be made to find a better formulation to reflect the lengthy discussion that had taken place. However, he would be reluctant to accept the proposal made by Mr. Pambou-Tchivounda, which would seem to reopen the whole delicate issue of the discretionary nature of the right of the State to exercise its diplomatic protection.

42. Mr. CRAWFORD, supported by Mr. ROSENSTOCK, said that, at the current preliminary stage of the consideration of the topic, the Commission should refrain from entering into a substantive debate on the point raised in paragraph 2 (e).

43. Mr. GALICKI said that, speaking as a citizen of one of the countries referred to in the paragraph as having recognized the right of their nationals to diplomatic protection by their Governments, he fully accepted the Working Group's formulation.

44. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to maintain paragraph 2 (e) as it stood and to refer the report of the Working Group to the Drafting Committee with a view to formally adopting it on Friday, 12 June.

It was so agreed.

The meeting rose at 11.35 a.m.

2545th MEETING

Wednesday, 10 June 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Reservations to treaties (*continued*)* (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 (*continued*)*

GUIDE TO PRACTICE (*continued*)*

DRAFT GUIDELINE 1.1.2 (*concluded*)*

1. The CHAIRMAN invited the Commission to resume its consideration of draft guideline 1.1.2, "Moment when a reservation is formulated", as proposed by the Special Rapporteur in ILC(L)/INFORMAL/12.

2. Mr. HAFNER recalled that article 23 of the 1969 Vienna Convention, which dealt with the procedure regarding reservations, provided that a reservation could be formulated at the time of the signature of the treaty and then must be confirmed when the reserving State expressed its consent to be bound by the treaty. He therefore suggested that the beginning of draft guideline 1.1.2 should be amended to read: "The reservation may be formulated or confirmed by a State".

3. Mr. PELLET (Special Rapporteur) said that the text under consideration was based on what was commonly called the Vienna definition, which did not refer to confirmation. However, the amendment proposed by Mr. Hafner was entirely acceptable and the Drafting Committee would probably agree with it.

4. Mr. ECONOMIDES said that the draft guidelines did not refer to the relatively frequent case of late reservations. It could happen that a State forgot to deposit the reservation it had intended to formulate, even though it had been approved by its parliament. Experience showed and the Treaty Section of the United Nations Office of Legal Affairs confirmed that, in such a case, all contracting parties were asked whether they agreed to consent to a kind of "catch-up" procedure. That was a useful solution which existed in practice. Perhaps it should be formalized in the Guide to Practice.

5. Mr. PELLET (Special Rapporteur) confirmed that the situation referred to by Mr. Economides did exist and referred to the case of Egypt, which had forgotten to formulate the reservation it had intended to make when it had signed the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Two years later, it had wanted to remedy that oversight, but by making a "statement",² and that had caused an outcry from the other States parties. The case thus deserved to be taken into account in the Guide to Practice, but it should probably be settled not in the context of definitions, but in the part which would follow on procedures for the formulation of reservations.

* Resumed from the 2542nd meeting.

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

² See *Multilateral Treaties* . . . (2542nd meeting, footnote 3), p. 924, footnote 5.

6. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.1.2 to the Drafting Committee.

It was so agreed.

DRAFT GUIDELINES 1.1.3 AND 1.1.8

7. Mr. ECONOMIDES said that, since draft guidelines 1.1.3 and 1.1.8 dealt with the same subject matter and had the same title, “Reservations having territorial scope”, they should perhaps be considered at the same time.

8. Mr. PELLET (Special Rapporteur) said that the two provisions were quite close. He had submitted them separately for pedagogical reasons to show that the first should be seen from the *ratione temporis* point of view and the second, from the *ratione loci* point of view.

9. The CHAIRMAN invited the Commission to consider draft guidelines 1.1.3 and 1.1.8 at the same time.

10. Mr. PELLET (Special Rapporteur), explaining draft guideline 1.1.3, said it could happen that a treaty was not applied throughout the territory under the jurisdiction of the State which signed it. Article 29 of the 1969 Vienna Convention dealt with that case *a contrario*. However, that State could decide to extend the application of the treaty to a territory to which the treaty had not formerly applied. On that occasion, it could attach a new reservation relating to the territory in question to the notification of extension. Two examples of that situation (Macao and Hong Kong) were referred to in paragraph 25 of ILC(L)/INFORMAL/11. The practice was not only relatively frequent, but also relatively old, since it related to what had been called the “colonial clause”. Its principle had never given rise to any problem. The definition of a reservation, which could, as those examples showed, be formulated at the time of the “notification of territorial application”, as well, moreover, as at the time of the notification of succession, therefore had to be amended slightly. In that connection, he referred to the excellent article by Renata Szafarz.³

11. Draft guideline 1.1.8 was intended to answer the question whether a unilateral statement purporting to exclude part of the territory of a State from the scope of a treaty could be characterized as a reservation. Legal writers were not sure, as shown by the work of Frank Horn,⁴ who was one of the best authors on the question. In his own view, however, the answer was definitely yes.

12. The starting point for that reasoning was article 29 of the 1969 Vienna Convention. When a State excluded or limited the application of a treaty which normally applied to the entire territory of each party in accordance with that article, it was seeking “to exclude or to modify the legal effect” of the treaty, and that was the definition of a reservation. That was so obvious that it had perhaps not even

been necessary to draft a guideline on that point. There might, however, be some doubts about the words “regardless of the date on which it is made” at the end of the proposed text. That type of reservation by means of a unilateral statement of exclusion could take place only at two moments: when the State expressed its consent to be bound by the treaty and when it made a notification of territorial application. The words in question could therefore be replaced by a reference to those two moments. The Drafting Committee might look into that question.

13. Mr. BENNOUNA said that he welcomed the explanations the Special Rapporteur had given on such a fundamental aspect of the topic. Those explanations were, however, not entirely convincing.

14. In the first place, there was the fact that the limitation of the territorial application of a treaty would be characterized as a reservation. That related to a basic rule of international law according to which a State bound its population and its territory, that is to say, all its components, when it bound itself, according to the definition of international commitment. A reservation relating to a particular territory was thus not a reservation to a provision of the treaty, whose application could be modified; it was a reservation to the full commitment of the State. Such a restriction had to be negotiated at the time of the drafting of the treaty. The opposite would be dangerous because it was conceivable that, in view of the problems involved in the application of the treaty to a certain part of its territory, a State might later be anxious to formulate a reservation *ratione loci*.

15. Secondly, draft guideline 1.1.3 referred to the “territory in question”. It was not clear which territory was meant. The Special Rapporteur had explained the difference he saw between the jurisdiction and the sovereignty of a State over a territory, but, if the reservation related to a part of a territory, such as a Non-Self-Governing Territory or an overseas territory, which did not have exactly the same status as the rest of the territory of the State, then a substantive problem existed. The Special Rapporteur had referred to the “colonial clause”, but there was no longer a colonial clause because there was no longer any colonialism. If the State had jurisdiction to treat a territory in a particular way, it must be asked on what basis. In modern-day law, if a State could not bind itself internationally for part of its territory, there first had to be a discussion of the problem of that territory from the point of view of the principle of the right of peoples to self-determination. The problem thus went far beyond that of an ordinary reservation.

16. Thirdly, draft guideline 1.1.8 merely stated that the unilateral statement “purports to exclude” the application of the treaty, whereas draft guideline 1.1.3 said that it “purports to exclude or to modify”. Did the word “modify” mean that at some moment—and at which moment—a State could go back on its commitment by means of a statement excluding a particular part of its territory from the scope of the treaty as a whole? That situation could also not be regarded as an example of an ordinary reservation. It could even be considered that such a statement was “contrary to the object and purpose of the treaty”, since it modified the overall commitment by the State which was, as he had said before, the very

³ R. Szafarz, “Reservations to multilateral treaties”, *Polish Yearbook of International Law*, vol. III (1970) (Warsaw, Ossolineum, 1972), p. 293.

⁴ F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, The Hague (Amsterdam, Oxford, North-Holland, 1988).

essence of a treaty. The question was fundamental and it could not be settled so quickly and easily.

17. His conclusion was that the two draft guidelines under consideration could not be referred to the Drafting Committee as they stood. They required further work, which would explain their exact meaning.

18. Mr. HAFNER said that the two draft guidelines gave rise to more or less the same problems.

19. The basic principle was that, if an act was characterized as a "reservation", the regime of reservations automatically applied to that act. That was not the case of a statement on territorial scope which undeniably required the consent of the other States and could not be of a unilateral nature unless the treaty expressly so provided. Moreover, when a treaty actually contained such an explicit provision, the question whether a statement to that effect could be characterized as a reservation was all the more important in that, if the answer was yes, the possibility of any other reservation was, according to the provisions of the 1969 Vienna Convention, automatically ruled out. For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency was totally silent on reservations, but explicitly provided for the possibility that States might declare that they did not consider themselves to be bound by certain provisions on civil liability. There was no denying the fact that, if a State made a statement under that optional exclusion clause and it was regarded as a reservation, the possibility of any other reservation to that Convention would automatically be ruled out, although that had certainly not been the intention of its authors. The Commission must therefore clearly determine whether the statements referred to in draft guidelines 1.1.3 and 1.1.8 were intended to become reservations within the technical meaning of the 1969 Vienna Convention or whether they should be taken as establishing a regime separate from that of the reservations applicable to the treaty in question. In that connection, he shared the opinion of Horn, as referred to in the third report of the Special Rapporteur on reservation to treaties (A/CN.4/491 and Add.1-6).

20. Mr. ECONOMIDES said that, in view of the effect of the statements referred to in draft guidelines 1.1.3 and 1.1.8, those statements constituted reservations within the legal meaning of the term, on condition that the treaty provided for a possibility of such statements. If there was no permissive clause in the treaty, there would be a wrongful act. The question whether that had to be stated in the two draft guidelines was one that should perhaps be settled by the Drafting Committee.

21. At the technical level, he was not sure whether, in the case of draft guideline 1.1.3, it was really legally impossible to exclude the application of the entire treaty, as provided for in draft guideline 1.1.8, and why it was not made clear in draft guideline 1.1.3, as in draft guideline 1.1.8, that, in the absence of such a statement, the treaty would be applicable to the entire territory. There was, moreover, a difference between the two draft guidelines in terms of the date of the act, about which the Special Rapporteur himself had expressed some doubts. He therefore wondered whether, since the two draft guidelines were very closely related to one another, the possibility of

a merger might not be considered, although he was aware that that would involve work not yet done.

22. Mr. ROSENSTOCK said he fully agreed with Mr. Economides that what the Commission was doing was not to determine whether a particular reservation was permissible, but to define the actual frameworks in which reservations could be formulated, assuming that they were otherwise valid. He could therefore not endorse the comments made by Mr. Hafner.

23. He also thought that there should be a distinction between the concepts expressed in draft guidelines 1.1.3 and 1.1.8, the first relating to "when" and the second to "what"; they could, however, be two subparagraphs of the same guideline. In draft guideline 1.1.8, the words "regardless of the date on which it is made" should be retained because, in the "what" context, the time element was not decisive.

24. Mr. MIKULKA said that he shared Mr. Bennouna's doubts about the two draft guidelines under consideration. Unlike Mr. Rosenstock, he did not understand why the problem was dealt with twice and did not see the point of the words "regardless of the date on which it is made", which came at the end of draft guideline 1.1.8 and which were totally confusing.

25. Draft guideline 1.1.8 also gave rise to other problems. For example, the fact that it referred to the exclusion of the application of a treaty as a whole, even if that exclusion related only to part of the territory, could not be reconciled with the definition of a reservation, which purported to exclude or to modify the legal effect of "certain provisions of the treaty". Moreover, even the exclusion of some of the provisions of the treaty to which draft guideline 1.1.8 referred did not come within the definition of reservations, since the provisions excluded in part of the territory continued to be applicable to the State in the rest of the territory. Only a restriction of the territorial base was thus involved. In his opinion, the Commission should first consider the regime of reservations and objections and come back later to the question of reservations having territorial scope in order to determine whether it was really the regime of reservations that should apply to the situations in question.

26. Mr. PAMBOU-TCHIVOUNDA said that he agreed with the comments by Mr. Bennouna and Mr. Mikulka. He also thought that there was a kind of precondition underlying the two draft guidelines which the members of the Commission did not all clearly understand and which the Special Rapporteur might explain more fully.

27. Like Mr. Rosenstock, he was of the opinion that the two draft guidelines should be kept separate; they might form two paragraphs entitled "Reservations having territorial scope *ratione temporis*" and "Reservations having territorial scope *ratione loci*".

28. Mr. BENNOUNA said he agreed with Mr. Hafner that, if there was a provision of the treaty providing for the possibility of splitting or changing its territorial scope, the type of statement under consideration might deserve to be characterized as a reservation. On the basis of what Mr. Mikulka had said, moreover, the Commission currently had an opportunity to think about how that type of reser-

vation worked in relation to the general system. Thus, when a reservation having territorial scope was formulated and an ordinary objection was made to that reservation, it could be asked what the scope of that objection was because, in that case, the objecting State could not apply reciprocity by also excluding part of its territory.

29. In view of the very particular nature of such reservations, he thought that it might be easier to deal with the question whether they were needed and how they fit into the general system of reservations at the end rather than at the beginning of the exercise.

30. Mr. SIMMA said that, like the Special Rapporteur, he was of the opinion that the reservations referred to in draft guidelines 1.1.3 and 1.1.8 constituted genuine reservations. He based that conclusion mainly on the doctrine of the Vienna School, which was represented, *inter alia*, by Kelsen and for which the territorial or personal scope of a treaty formed an integral part of the rule on the same basis as its material scope; thus, if a State modified the territorial or personal scope of the treaty by means of a statement, the rule was also modified and the statement must be regarded as a reservation.

31. The Commission would be looking at the problem the wrong way around if it considered that a statement could not be a reservation because the regime of reservations established in the 1969 Vienna Convention did not apply to that statement. The Commission should, rather, start by characterizing a statement as a reservation and then try to explain the regime. In so doing, it might find that the very modest regime provided for in the 1969 Vienna Convention was not appropriate and it would then be up to the Special Rapporteur to propose solutions. That had already happened at the forty-ninth session in the case of human rights treaties. In other words, it was not, for example, because reciprocity did not apply that the statement in question could not constitute a reservation.

32. With regard to Mr. Hafner's comment that the inclusion in a treaty of an optional exclusion clause would give rise to questions about the permissibility of other reservations, he considered it outrageous to try to apply the Vienna regime on reservations to that type of clause if it was not to be concluded that an objection could be formulated in respect of a State which used such a clause. Statements made on the basis of optional exclusion clauses must not be regarded as reservations within the meaning of articles 19 and the following of the 1969 Vienna Convention.

33. Mr. HAFNER said that, on the basis of the assumption that the Vienna regime could not be amended, the problem was to determine which acts could be characterized as reservations. Accordingly, an act could be characterized as a reservation only if it fitted in with that regime. He agreed with Mr. Simma that an optional exclusion clause was not a reservation within the meaning of the 1969 Vienna Convention, but he nevertheless noted that the statements referred to in draft guidelines 1.1.3 and 1.1.8 were very much like a statement made under such a clause because a modification of territorial application could take place only if that possibility was expressly provided for in the treaty or if the other States accepted it. The result was thus the same, whether or not reference

was made to an optional exclusion clause, and the problem was thus whether there was a unity of the regime of reservations applicable to a treaty for all statements made for the purpose of modifying its applicability, whether they related to its substance or to its geographical application.

34. Mr. SIMMA said he could not agree with the idea that, if a treaty did not provide for the possibility of a restriction of its territorial application, a unilateral statement to that effect would not be permissible. In fact, it would be necessary to resort specifically to the same criteria of permissibility as those applied to other reservations and consider whether the statement was compatible with the object and purpose of the treaty. It was entirely conceivable that statements made in accordance with draft guidelines 1.1.3 and 1.1.8 might leave the object and purpose of the treaty fully intact and not be based on any colonial motive.

35. Mr. ECONOMIDES said he thought it was wrong to say that a State could formulate a territorial limitation reservation even if the treaty did not contain a special provision to that effect; otherwise, if a State formulated such a reservation, it would have to be accepted by the other contracting States, and that would constitute an agreement amending the pre-existing agreement. If the reservation was not accepted, it would not be valid.

36. Mr. SIMMA said that, according to that reasoning, if a treaty did not contain a special provision authorizing a modification of its territorial application, a reservation to that effect would not be permissible and it would have to be authorized or accepted by the other States. Ultimately, reservations which were not permissible might become permissible if they were accepted by the other States. That point of view was hard to fit into the structure of articles 19 and the following of the 1969 Vienna Convention.

37. Mr. PELLET (Special Rapporteur) said that, first of all, the members of the Commission should not confuse problems of definition and problems of permissibility. It must be borne in mind that the Commission was defining a category entitled "reservations" and that, among the unilateral statements which it would characterize as reservations, there were some that would appear to be permissible once the Vienna rules as they would be defined had been applied to them, while there were others that would have to be found unlawful. Secondly, since the content of his report was more detailed than that of his oral introduction, he invited Mr. Bennouna and Mr. Pambou-Tchivounda to refer to paragraph 69 of ILC(L)/INFORMAL/11, which showed that the problem of Non-Self-Governing Territories was not entirely secondary and that it arose quite apart from any reference to the colonial clause.

38. With regard to the discussion between Mr. Simma and Mr. Hafner, he explained that the specific purpose of a definition and hence of the Commission's approach was to determine whether the regime of what was being defined would or would not be applicable. In that connection, Mr. Simma was right in academic and abstract terms, whereas Mr. Hafner was correct in practical terms, since the important thing was whether an act was a reservation

within the meaning of the Vienna definition, in which case the Vienna regime would apply. He was, however, not convinced by all of Mr. Hafner's arguments because, in his opinion, a complete break could not be made by asserting that all the Vienna rules would necessarily apply to all types of reservations. There were "unidentified legal objects" or "ULOs" which looked very much like reservations, but to which the legal regime of reservations was probably not fully applicable. The exercise would therefore definitely be longer and more difficult than he had thought at the beginning and, in engaging in it, the Commission would be refining the regime for the application of the various Vienna rules.

39. In such a complicated area, he was not sure that he had been able to foresee every possible detail of the outcome of decisions on a definition, but he had had to start somewhere.

40. Unlike Mr. Mikulka and Mr. Bennouna, he was of the opinion that, instead of putting aside the problem of reservations having territorial scope, the Commission should try to adopt a position and see what the implications would be, on the understanding that, since it was on the first reading, it would always be able to make the necessary adjustments. If it put the problem aside, it might forget it altogether and not take the trouble to get back to work on it when the time came.

41. The main thing he had learned from the discussion was that, at least in terms of form, if not in terms of substance, he had mixed up two types of unilateral statement having territorial scope, namely, a statement by which a State decided not to apply a particular treaty to a particular territory—or a notification of exclusion of territorial application—and the reservations that a State could make in relation to a particular territory on the occasion of a notification of territorial application. In the first case, the question was whether such a statement was or was not a reservation. In Mr. Hafner's opinion, the answer was definitely no; in his own opinion, the answer could not be so clear-cut and there could be some doubts. For example, if Denmark stated that it did not want to apply a particular treaty to the Faeroe Islands, he thought that that would be a reservation, in the sense that, if that unilateral statement had not been made, the treaty would probably apply to the Faeroe Islands. He had some doubts about Mr. Hafner's comment that, if it was agreed that that was indeed a reservation, even though it was provided for by the treaty, that would mean that, under article 19 of the 1969 Vienna Convention, all other reservations would be prohibited. On the basis of the argument he had put forward earlier, he said that, if the Commission agreed that that was a reservation, it would then systematically have to ask, in reviewing the other related provisions of the 1969 Vienna Convention, whether or not those provisions were applicable. It would then have to recognize that a mere exclusion of territorial application—which was, in his opinion, a reservation because it corresponded to the Vienna definition in all other respects—could not be considered as excluding reservations in the other sense. That appeared to be in keeping with the spirit of the 1969 Vienna Convention. In the second case, for example, Denmark made a notification that it was prepared to apply a treaty to the Faeroe Islands, with the exception of one article. In his view, that was undeniably a genuine reservation because

the purpose of that notification was to modify the application of a provision of a treaty in respect of a particular territory. That was a reservation which changed the application of the treaty as far as Denmark was concerned and which corresponded exactly to the Vienna definition. He noted that, on that point, the members of the Commission tended to share his view.

42. In reply to Mr. Mikulka's comments on the words "or some of its provisions", which were contained in draft guideline 1.1.8 and which he would like to maintain in full, he pointed out that draft guideline 1.1.4, on which his heart was set, came between draft guidelines 1.1.3 and 1.1.8, which the Commission had requested him to submit together. The Commission could therefore not adopt a position on the above-mentioned words before it had considered draft guideline 1.1.4.

43. He would like the two draft guidelines under consideration on reservations having territorial scope to be referred as they stood to the Drafting Committee, to which he might submit drafting changes.

44. Mr. MIKULKA said that, following the statement by the Special Rapporteur, he no longer had any problems with draft guideline 1.1.3. However, he continued to believe that draft guideline 1.1.8, particularly the notification of the exclusion of part of the territory of a State from the application of a treaty, was not in keeping with the Vienna definition. Even if it was agreed that such an exclusion should be interpreted as modifying the legal effects of some of the provisions of the treaty in question, it definitely modified all of the provisions of the treaty. According to the definition proposed in draft guideline 1.1, which was based on the definition contained in the 1969 Vienna Convention, a reservation was a statement which purported to exclude or to modify the legal effect of certain provisions of a treaty. He realized that his approach was formalistic and rigid and that, if the authors of the 1969 Vienna Convention had had to deal with that problem, they would have opted for slightly different wording, but he recalled that the Commission had agreed never to touch the provisions of the 1969 Vienna Convention. It currently seemed to be moving away from that agreement.

45. With regard to the comments by Mr. Simma, who believed that assuming automatically that the general regime of reservations might possibly not apply in full to that type of unilateral statement meant looking at the problem the wrong way around, he recalled that, at its forty-ninth session, the Commission had established the principle of the existence of a single regime of reservations and he was therefore surprised that, at the current session, it was taking as a working hypothesis the possibility that some categories of reservations, particularly those which related to the territorial application of a treaty, might be subject to a different regime.

46. In the light of those explanations, he accepted the Special Rapporteur's proposals as working hypotheses.

47. Mr. ECONOMIDES said that the Commission had to proceed with great caution in respect of reservations. For example, the Special Rapporteur had said that, in his opinion, the statements referred to in draft guidelines 1.1.3 and 1.1.8 were reservations in the true sense of the

term. In treaty practice, however, there were treaties which expressly prohibited any reservation: that was frequently the case of human rights instruments and even of the United Nations Convention on the Law of the Sea. Must it be concluded that exclusions of the territorial application of such instruments were automatically prohibited because they were reservations? The fact was that treaties of that kind contained special clauses on their territorial application, thus proving that notifications of territorial application or of territorial exclusion were not treated as reservations.

48. He also believed that a notification of the full exclusion of a territory from the application of a treaty was not a reservation, but a clause which had a different status. As the Special Rapporteur had indicated, however, a notification of the exclusion, limitation or modification of a particular provision of a treaty in respect of a territory was indeed a reservation.

49. Mr. BENNOUNA said that, having heard the Special Rapporteur's explanations on draft guideline 1.1.3, he could agree that it should be referred to the Drafting Committee, provided that the words "of a treaty" in the second line were replaced by the words "provided for by a treaty".

50. Draft guideline 1.1.8 raised a matter of principle, which only the Commission could decide and which could not be settled by the Drafting Committee. In substance, article 29 of the 1969 Vienna Convention provided that the territorial application of a treaty could not be modified unless that was provided for in the treaty itself, and it was not by chance that that article was contained in the section entitled "Application of treaties" and not in the section entitled "Reservations". The rule of international law, which was of course not a peremptory rule, was that a treaty applied to a territory in its entirety unless otherwise provided. Thus, before deciding whether to refer draft guideline 1.1.8 to the Drafting Committee, the Commission had to settle the matter of principle whether, in the absence of provisions to that effect in the treaty in question, a contracting State could exclude part of its territory from the application of the treaty.

51. Mr. PELLET (Special Rapporteur), referring to Mr. Mikulka's comment on the borderline between the interpretation and the modification of a treaty, said that there was, of course, no question of changing the Vienna regime. That did not, however, prevent the Commission from modernizing it and supplementing it constructively by way of interpretation, because its text had to be interpreted in the light of the development of international law and the needs that had arisen and, if it was too formalistic, the Commission would be depriving the exercise it was currently engaged in of much of its substance.

52. With regard to the different problem raised by Mr. Economides and Mr. Bennouna, he believed that there was a rather broad consensus within the Commission that reservations accompanying notifications of territorial application were genuine reservations. That was the spirit of draft guideline 1.1.3, whose wording the Drafting Committee might look at again. He continued to believe that it was the Commission's task to decide on matters of principle and the Drafting Committee's task to draft. That

being said, Mr. Bennouna had not properly stated the matter of principle underlying draft guideline 1.1.8, which was that of the exclusion of territorial application. If he had understood correctly, Messrs Bennouna, Hafner and Economides considered that exclusions of territorial application were not reservations. Mr. Hafner had explained that, if an exclusion of territorial application was provided for by the treaty, article 19 of the 1969 Vienna Convention applied and all other reservations were therefore unacceptable. In his own view, that was a problem of a special regime and, on that particular point, it must be considered that that exclusion of territorial application did not prohibit the formulation of other reservations if such reservations were compatible with the spirit of the treaty. As to Mr. Economides' plea in favour of caution, he said that he did not know of any treaty which excluded reservations, but provided for the exclusion of territorial application. He nevertheless recognized that that was not reason enough to dismiss Mr. Economides' objection because the problem could arise. Even if it did actually arise, however, it would not really be a problem because the parties to a treaty could modify the regime of reservations if they so wished. That would be a case of modification of consent to be bound to a treaty to which the future guidelines would not apply because it was the treaty itself that would so provide. That was why he was of the opinion that the arguments put forward were not so decisive as to make a case for considering that exclusions of territorial application were not reservations. He continued to believe that clauses excluding territorial application modified the effects of a treaty in their application to the State in question.

53. In reply to Mr. Bennouna, who had stressed that an exclusion of territorial application could be admitted as a reservation if it was provided for by a treaty, he said that that was self-evident, but that that was as true as it was by the rules of general international law, whose existence the Commission could not prejudice. Mr. Bennouna's counter-argument based on article 29 of the 1969 Vienna Convention and the fact that the Commission was dealing only with the consent of the parties to be bound by a treaty—consent to which reservations were related—was not entirely correct: the definition of reservations given in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention also referred to the problem of the application of treaties. It would therefore be better if the Commission did not set aside the problem of exclusions of the territorial application of treaties.

54. Mr. BROWNLIE said that he fully supported the Special Rapporteur's position on the classification of restrictions of territorial application. In his view, it was better to regard them as reservations because he did not see what considerations of public order or of public policy could be put forward to explain why they should be regarded as a separate category.

55. Mr. HAFNER said that his problem in considering statements relating to territorial application as reservations was the result of the fact that he was starting from the assumption that "reservation" meant only a statement that fitted into the single regime established by the 1969 Vienna Convention and the fact that article 19, subparagraph (*b*), to which the Special Rapporteur had referred, then definitely gave rise to a problem, which was, more-

over, the main problem. He would like the Special Rapporteur to see whether it might not be possible to understand the first phrase of article 29 of the 1969 Vienna Convention as referring to a special regime that was separate from the regime of reservations or, in other words, to indicate what the content of that article would be if the words "Unless a different intention" had been left out, bearing in mind that article 26 did not contain a similar provision.

56. Mr. SIMMA said that the existence of the single regime established by the 1969 Vienna Convention did not mean that that regime was applicable or effective to the same extent in all cases. Thus, no one denied that reservations to human rights treaties gave rise to particular problems. In his opinion, the Vienna regime allowed some leeway in determining the treatment to be applied to such treaties and the same was true of reservations relating to territorial application. Some of the rules set forth in articles 20 and the following of the 1969 Vienna Convention were applicable to them, whereas others were not or were not relevant.

57. Mr. BENNOUNA drew Mr. Brownlie's attention to the fact that a rule of public order was obviously opposed to restrictions on the territorial application of a treaty, since that rule was that the Government of a State bound itself in respect of all of its territory and could not exclude one component or another. That general rule was, however, not peremptory and there could thus be derogations from it, but there had to be a basis therefor. If the Special Rapporteur provided that basis by proposing to include wording such as "in the event that the treaty or another rule of international law so provides", thereby conforming to the spirit of article 29 of the 1969 Vienna Convention, nothing would prevent statements situated in that context from being regarded as reservations.

58. Mr. PELLET (Special Rapporteur) said Mr. Brownlie had indicated that, although, in principle, a treaty applied to all of the territory of a State, there was no rule of public order, no peremptory norm, prohibiting a State from excluding the application of the treaty to part of its territory. That was what article 29 implied without saying so, contrary to what Mr. Bennouna thought, since there was no reference to rules of international law, but only to intention otherwise expressed. Mr. Bennouna's argument was therefore not entirely convincing. If an intention could be expressed, that meant, rather, that there was no rule prohibiting such a restriction. In that connection, he was thinking of the reservations made by a number of Western countries excluding the application of the Convention on the Prevention and Punishment of the Crime of Genocide to their colonies.⁵ Such reservations were entirely indefensible not only on moral grounds, but also on legal grounds, because they were contrary to the object and purpose of that Convention. Such reservations could, moreover, be declared unlawful for various reasons and he intended to come back to that point during the consideration of the question of the permissibility of reservations.

⁵ See *Multilateral Treaties . . .* (2542nd meeting, footnote 3), p. 91 and United Nations, *Treaty Series*, vol. 124, p. 318, vol. 713, p. 400 and vol. 732, p. 288.

59. He was still in favour of referring the problems to which draft guidelines 1.1.3 and 1.1.8 gave rise to the Drafting Committee, although he was aware that a great deal of redrafting work would have to be done.

60. Mr. BENNOUNA stressed the fact that States could not be allowed to modify the territorial application of a treaty if the treaty was silent on that point or it was not otherwise provided for. He therefore proposed, since agreement seemed to exist, that the guidelines should include a reference to, or use the wording of, article 29 of the 1969 Vienna Convention. He nevertheless continued to believe that a question of legal principle was involved and that agreement should be reached on a text in the Commission and not in the Drafting Committee.

61. Mr. SIMMA noted that article 29 of the 1969 Vienna Convention said something different from what Mr. Bennouna had indicated. Parties which did not intend to apply the treaty in question to their entire territory did not have to formulate reservations, since an interpretative declaration to that effect would be more than sufficient.

62. Mr. HAFNER said he wondered whether it was not possible to look at the regime of the 1969 Vienna Convention from the viewpoint of article 26 on the principle *pacta sunt servanda*, from which States parties could derogate only by way of reservations. On the basis of the principle "*ut res magis valeat quam pereat*", the first part of article 29, which gave rise to a problem, might be interpreted as excluding the regime of reservations from the scope of that article.

63. Mr. ECONOMIDES said that Mr. Bennouna's interpretation of article 29 was entirely correct. There was no doubt that that article established the rule that any treaty applied to the entire territory without any exclusion or limitation unless the parties had agreed on such a limitation, either in the treaty itself or possibly in a collateral agreement. In the absence of any implied or express agreement, it was therefore unacceptable that a State should be able to limit the territorial application of a treaty simply by means of a unilateral statement. In the present case, he wondered whether it should be assumed that the guidelines as a whole were to be taken as meeting the conditions laid down in the 1969 Vienna Convention or whether each one should emphasize that it was in conformity with the provisions of the 1969 Vienna Convention. That was a question of legal technique and, in his preceding statement, he had therefore implied that draft guideline 1.1.3 was in conformity with the 1969 Vienna Convention.

64. Mr. MELESCANU said that article 29 stated the principle of the application of treaties to the entire territory, but provided for two exceptions. On the basis of the first exception, the treaty itself provided for the possibility of the limitation of its application and, on the basis of the second and more interesting one, it was assumed that a different intention was otherwise established. The Special Rapporteur's examples of the colonial clause and the special legal status of some parts of the territory of a State were classical and came under the second exception provided for in article 29 because, in any other situation, that would mean giving the State excessive discretionary

power, and it was, moreover, not easy to see how it could apply.

65. Mr. PELLET (Special Rapporteur) said he reserved his position on everything that had just been said about the interpretation of article 29. With regard to the definition of reservations, he thought it had been agreed that there was no question of changing article 29 and the arguments put forward by Mr. Bennouna and Mr. Melescanu were not relevant for the purposes of the exercise the Commission was engaged in because the aim was to prepare a guide to practice in respect of reservations, not in respect of the application of the Vienna Conventions. He did not think that too much importance should be attached to the first part of article 29 simply because it was at the beginning. He was not even sure how important the current discussion was because the only argument being put forward was that the definition of reservations must not jeopardize the general Vienna regime, and that was something the Commission had already agreed on. He understood the concerns expressed, but they were beside the point.

66. Mr. HE said that he also reserved his position on the very complex question of interpretation. Since there was so little time available, the discussion should continue at the second part of the session in New York.

67. The CHAIRMAN said that, in view of the differences of opinion, it would be better to refer only draft guideline 1.1.3 to the Drafting Committee and continue the consideration of draft guideline 1.1.8 in plenary in New York.

68. Mr. ROSENSTOCK said that the problem could be solved immediately if the words “if otherwise permissible” were added to draft guideline 1.1.8., thereby making it clear that statements of exclusion of that kind were normally not permissible, but that, when they were, they constituted reservations. If that proposal was acceptable, draft guideline 1.1.8 could be referred to the Drafting Committee.

69. Mr. PELLET (Special Rapporteur) said that he fully agreed with the idea expressed in Mr. Rosenstock’s proposal because it was obvious that the statement in question had to be permissible, but he was strongly opposed to saying so in draft guideline 1.1.8 because that applied to nearly all the other draft guidelines. He therefore proposed that, in order to avoid making the text unnecessarily heavy, a draft guideline 1.1.9 could be added, to state basically that all the above-mentioned definitions were without prejudice to the permissibility of reservations.

70. Mr. MELESCANU said that such a draft guideline would have to be prepared by reference to the 1969 Vienna Convention because it would have to be in conformity with article 29 and some of the other articles of that Convention.

71. Mr. BENNOUNA said that permissibility was not the issue under consideration and the Special Rapporteur himself had indicated that there must be a clear-cut distinction between the problems involved in the definition of reservations and those of permissibility. In the present case, what was being discussed was the possibility of characterizing such a restrictive statement as a reserva-

tion; the issue was thus admissibility, not permissibility. The solution proposed by Mr. Rosenstock was entirely acceptable, but, since the Special Rapporteur objected to it, he himself could agree with Mr. Melescanu’s proposal that the Commission should opt for wording indicating basically that the definitions—that is to say, the Guide to Practice—were fully in keeping with the provisions of the 1969 Vienna Convention, possibly with an indication of the relevant articles. In any event, the Commission had to agree on what it would refer to the Drafting Committee.

72. Mr. ECONOMIDES said that, in considering draft guideline 1.1.3, the Drafting Committee might take account of some elements of draft guideline 1.1.8 that would help make things clearer without necessarily prejudging the matter of principle that had to be settled.

73. Mr. PELLET (Special Rapporteur) said that he continued to be opposed to the referral to the Drafting Committee of draft guideline 1.1.8 together with the proposed amendment. It would be better to reflect the idea expressed in that proposed amendment in a more general draft guideline 1.1.9, which he would prepare and which the Commission should, in his opinion, consider in plenary in New York. As to Mr. Melescanu’s proposal, he was not sure that it was only the 1969 Vienna Convention that had to be applied and he would like States which had not ratified that Convention to take a close look at the draft Guide to Practice.

74. After a discussion in which Mr. BENNOUNA, Mr. FERRARI BRAVO, Mr. PELLET (Special Rapporteur) and Mr. ROSENSTOCK took part, the CHAIRMAN suggested that the Commission should refer draft guidelines 1.1.3 and 1.1.8 to the Drafting Committee and inform it that the Special Rapporteur would prepare a general provision on the relationship with the 1969 Vienna Convention in order to clarify the part of the Guide to Practice on definitions.

It was so agreed.

The meeting rose at 1.15 p.m.

2546th MEETING

Thursday, 11 June 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Thiam, Mr. Yamada.
