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Summary record of the 797th meeting

Topic:
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initially been inclined to follow the traditional doctrine that unanimity was necessary for the acceptance of reservations.

48. To enable the discussion to advance, it was necessary that a general trend should take shape in the Commission and that certain details should become clearer. It was also necessary to see whether certain points of view were still held or not. Some problems which the Commission thought had been solved, such as the problem of the reservations to the Pan-American Conventions, were open to discussion again.

49. In considering the redraft proposed by the Special Rapporteur, he had been struck by several points. For example, the new draft article 18 opened with a reference to the effects of reservations, whereas the draft articles on reservations adopted in 1962 had started from a different point.

50. With regard to drafting, he considered a number of expressions in the Special Rapporteur's new text to be unsatisfactory, in particular, the word " fewness " in draft article 19, paragraph 2.

51. The CHAIRMAN, speaking as a member of the Commission, said that if his thinking on reservations had evolved, it had done so between 1950 and 1962, and in any case not in the matter of doctrine. During that period the Advisory Opinion of the International Court of Justice on the question of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[5] had been published, an opinion which the General Assembly had taken into account in its resolution 598 (VI). He had revised his practical position in order to take account of the development of international law and because he had observed that his opinion was no longer compatible with the new positive rules of international law which had emerged from the jurisprudence of the Court and from the General Assembly resolution.

52. Mr. RUDA said that since he had not participated in the discussion on the articles on reservations at the 1962 session, he wished to state briefly his doctrinal position. The problem of reservations raised the question of how to reconcile two basic contemporary trends. The first trend was the expansion of international relations and the growth of international organizations, which involved an increasing use of multilateral treaties to regulate those relations. The second major trend was that of upholding the sovereignty of States; hence the need to preserve the integrity of treaties, pending the emergence of a world legislative organ.

53. Under the impact of those two trends, old theories which had previously seemed to be firmly established were crumbling. In particular, the theory that the unanimous consent of the parties was necessary for the validity of a reservation to a multilateral treaty could in no way be considered as existing law. On the contrary, there was every indication of a need to adopt a flexible and realistic procedure for reservations, on the premise that it was better that a State should become bound only by part of a multilateral treaty rather than that it should lose all interest in the treaty.

54. Accordingly, he favoured the very flexible formula which had been put forward by the Special Rapporteur in his first report[6] and which had been inspired by the system adopted in 1959 by the Inter-American Council of Jurists at its fourth meeting. Such a system was well suited to an international community which comprised a very large and varied membership and satisfied the need to promote international relations. In that connexion, the idea of tacit consent to a reservation by passage of time was already generally accepted; the view was also taken that an objection to a reservation lapsed if the objecting State did not become a party to the treaty.

55. The requirement that a reservation must be " compatible with the object and purpose of the treaty " had no legal foundation. It was taken from a passage in the 1951 Advisory Opinion of the International Court of Justice on reservations to the Genocide Convention, but the Court itself had expressly stated that its opinion was limited strictly to the particular Convention.[7]

56. Moreover, a formula of that type could not be adopted under existing conditions; so long as there was no international judicial organ possessing compulsory jurisdiction, it was desirable to adhere to the flexible system which had produced such excellent results in inter-American relations.

57. He would be prepared to accept the exception set forth in paragraph 2 of article 19 of the Special Rapporteur's redraft, relating to treaties with a small number of parties, subject to the exception mentioned in article 20, paragraph 3 (*b*).

58. He reserved his right to comment on the provisions of particular articles.

The meeting rose at 12.40 p.m.

[5] *I.C.J. Reports 1951*, p. 15.

[6] See *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 60-68.

[7] *I.C.J. Reports 1951*, p. 20.

797th MEETING

Tuesday, 8 June 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Welcome to Mr. Bedjaoui

1. The CHAIRMAN, on behalf of the Commission, extended a welcome to Mr. Bedjaoui, the newly-elected member of the Commission.

2. Mr. BEDJAOUI, thanking the Chairman, said that by electing him the Commission had honoured, not

only himself, but both Algeria and Africa. His predecessor had been prevented from performing his task as a member of the Commission by his many heavy responsibilities; he (Mr. Bedjaoui) would do his best to deserve the confidence which the Commission had shown in him and to make a contribution to the work which he hoped would be as fruitful as it was sincere. Wishing to ensure equitable geographic representation, the Commission had replaced one African by another African. He would endeavour to offer whatever knowledge he might have of the present problems of the African continent.

3. The Commission's task was to give juridical expression to, and so to confirm and strengthen, the major trends of all civilizations as reflected in the law of nations. More than ever, international law had to live up to its oecumenical vocation. The juridical expression which it should aim at would no longer be that of the will of a club of nations but that of the constructive, and therefore more lasting, will of a universal consensus. Since the end of the Second World War, the advent of peaceful coexistence and decolonization had characterized the development of international law, the physiognomy of which had inevitably been reshaped by the rise of the countries of Asia and Africa : a new international order had to be accompanied by a new juridical order. The Commission had a leading part to play in bringing that great and difficult task to a successful conclusion.

4. At one time it had not even been necessary to identify the rules of international law, for in so far as they had not simply reflected the internal law of a dominant nation, they had originated almost exclusively in treaties. During the last few decades, different views had arisen as to the foundation and sources of international law, which was no longer confined within the strict limits of conventions and treaties. The shrinking of the earth's dimensions had provided more varied sources of inspiration for law, while adapting it to the deep-seated aspirations of mankind, peace and progress. Law was becoming more and more the spontaneous product of an international community which was becoming less and less anarchical, and events had given birth to the new phenomenon of international solidarity. Only by the strengthening of that trend would the rule of law prevail.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

5. The CHAIRMAN invited the Commission to resume its consideration of section III of the draft articles.

ARTICLE 18 (Formulation of reservations)[1]

6. Mr. ROSENNE said that, as he had already indicated, the Special Rapporteur's new approach to the articles on reservations was in general acceptable and his own comments would be directed to the Special Rapporteur's new text for article 18 rather than to the old. The Special Rapporteur was to be congratulated on his skill in reducing a complicated series of provisions to an orderly presentation of the material, and the Commission, being now engaged in its second reading, must scrutinize the new text in the light of the considerable volume of new material before it, particularly in the Secretary-General's report on " Depositary Practice in relation to Reservations "[2] and also in the context of the draft articles as a whole.

7. At its fourteenth session, the Commission had been troubled, and mention of that fact had been made in its report, about the application of the so-called flexibility principle to reservations, in the absence of compulsory adjudication in some form or another, and that point had been taken up by some of the governments which had sent in comments. But since the fourteenth session, article 51 had been formulated, and in due course the Commission might consider extending the scope of that article so as to cover disputes that might arise out of the application of whatever provisions concerning reservations were finally incorporated in its draft; that might help to allay the apprehension of certain governments and of some members of the Commission that otherwise the value of the draft as a whole as a contribution to the development of international law would be seriously impaired.

8. If the flexibility principle were adopted as a starting point, it would be logical to shift the focus of attention away from the question of whether or not the treaty was " in force " and whether, or for what purposes and under what conditions a State making a reservation was " a party ", to the consequences of admitted or admissible reservations for the application of the treaty. Such a change of presentation might meet some of the pertinent observations made by Mr. Briggs at the previous meeting.[3] That might be a more positive approach to the problem as a whole and, indeed, the Special Rapporteur appeared to have been working on those lines, though perhaps his new text had not been sufficiently explicit.

9. The suggested changes in the title of section III were acceptable but the whole section might be better placed after article 29 so as to form a bridge between that part of the draft that dealt with the formal aspects of the law of treaties, and that dealing with application, observance and interpretation, in accordance with the scheme outlined by the Special Rapporteur himself in the introduction to his fourth report (A/CN.4/177). That would also help to bring out the exceptional nature of the problem of reservations and at the same time to emphasize the practical issue of the consequences of admitted reservations for the application of the treaty.

10. Regarding article 18, paragraph 2 of the Special Rapporteur's new text, he was not yet quite convinced by the author's view, if he had understood it correctly, that it would be going too far, in framing rules regarding the parties' intentions, to contemplate applying the

[1] See 796th meeting, paras. 32 and 33, for the 1962 text and the Special Rapporteur's reformulation of articles 18, 19 and 20.

[2] Document A/5687.

[3] See 796th meeting, paras. 34-43.

compatibility test to those reservations which were not covered by, or were outside the scope of, the reservations clause of a treaty. The very great variety of formulas used in reservation clauses must be borne in mind. There was no problem when a reservation clause clearly applied to the whole of a treaty, but it was fairly common for it to refer only to specific articles and to be entirely silent concerning the remainder of the text; in the latter case there would be some ground for incorporating the compatibility test as restricting the right to make reservations in respect of those parts of the treaty not expressly covered by the clause. At all events he failed to see why that particular right should be broader than in the case when a treaty was completely silent.

11. The phrase " the established rules of an international organization " must be interpreted as referring only to the rules about reservations, if any, applicable to the treaty in question. The point might seem an obvious one, but the phrase was used frequently in the draft and not always with quite the same shade of meaning; it was probably a matter of terminology that could be taken up later when the text as a whole was being polished.

12. He had been struck by the Special Rapporteur's use in paragraph 2 (*b*) of the phrase " the treaty expressly authorizes the making of specified reservations ", because the case was rare. Admittedly, article 39 in the Revised General Act for the Pacific Settlement of International Disputes[4] did contain a clause according to which States could make their acceptance of the treaty conditional upon the reservations " exhaustively enumerated in the following paragraph "; normally, however a treaty could not and did not authorize specified reservations but either permitted or prohibited reservations to specified articles, sometimes without particularizing further. Other treaties, however, contained complex reservations clauses which defined the kind of reservations that could be made, and such clauses were often drawn up in negative form. That was perhaps just another drafting point which could be left for the consideration of the Drafting Committee.

13. Mr. CASTRÉN said that he had suggested that the Commission should take the Special Rapporteur's redraft as the basis for its discussions on the question of reservations, but several members had preferred to discuss at the same time the texts adopted by the Commission in 1962. Following Mr. Briggs's example, he would take, as the starting point for his own comments, the Special Rapporteur's new text which seemed to him superior from the drafting point of view, though he would also refer to the 1962 text.

14. He approved the Special Rapporteur's idea of dealing first with the treaties permitting or prohibiting reservations, then with the cases where the treaties were silent. In the Special Rapporteur's redraft the provisions relating to prohibited reservations were expressed in simpler and more concise terms than in the 1962 draft; the excessively elaborate provisions in sub-paragraphs (*b*) and (*c*) of paragraph 1 of article 18 had been replaced by a single short phrase in sub-paragraph (*b*) of paragraph 2. From the point of view of the form, however, the drafting might perhaps be improved even further by making the provision start with the words: " the treaty expressly authorizes only the making of specified reservations . . . ".

15. The revised version of article 18 was also an improvement in that it expressly provided that even a reservation which was inadmissible, according to the provisions of the treaty, could be accepted if all the other States agreed to make that concession. The only displeasing feature, in that as in some other articles, was the expression " interested States " which occurred twice in article 18. In that respect, the 1962 text was more precise, since it spoke of States parties or States to which it was open to become parties to the treaty. But, as some governments had criticized that wording as being too broad, as far as the rights of States in the second category were concerned, the Special Rapporteur had chosen another expression which was very vague.

16. Mr. YASSEEN said he was glad that the comments by governments had corroborated the attitude which he had taken in 1962 in support of the freedom to make reservations. Clearly, the phenomenon of multilateral treaties had affected the institution of reservations and upset the presumption. As far as multilateral treaties were concerned, the general principle was that the making of a reservation was permitted unless it was prohibited by the treaty.

17. In his opinion, the Special Rapporteur's redraft was better because less cumbersome from the point of view of drafting, but it was not satisfactory from the point of view of the principle, for it did not make it clear that the principle was that of freedom to make reservations. The article adopted in 1962 had emphasized the right of the State to formulate a reservation, which, in his opinion, was in accord with the recent trend towards recognizing in principle the admissibility of reservations to multilateral treaties.

18. In any event, both the article adopted in 1962 and the revised version proposed by the Special Rapporteur left something to be desired, for they were too elaborate. The key being the treaty itself, it was enough to state: " Unless the making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization . . . ". In other words, in paragraph 1 of the 1962 draft, sub-paragraphs (*b*) and (*c*) were not necessary since the first meant that the reservation was prohibited and the second that it was directly excluded, because the treaty authorized only certain specified categories of reservations and the reservation referred to in sub-paragraph (*c*) was in a different category.

19. In paragraph 1 (*a*) of the 1962 draft the words " the terms of " *(expressément)* could be deleted and it could read simply: " [unless] the making of reservations is prohibited by the treaty . . . ". For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly.

20. Sub-paragraph (*d*) was indispensable. It was an essential point in the new law on reservations that, in the case where the treaty was silent on the question,

[4] United Nations *Treaty Series*, Vol. 71, p. 122.

the reservation regarded as inadmissible had to be incompatible with the object and purpose of the treaty.

21. Mr. TUNKIN said that in considering section III, the Commission must bear in mind that the institution of reservations was a feature of contemporary international law and that the reasons for its existence were manifold. One was that it was not always possible at an international conference to reach a solution that was acceptable to all States—they now numbered over a hundred—and reservations provided a means for the minority to defend its position and interests. For obvious reasons the institution was of greater significance for attaining the universality of multilateral treaties but it was also an inducement for States to negotiate an agreement acceptable to all. That being so, the Commission should recognize the existence of the institution and admit that it served a useful purpose.

22. After all, States resorted to reservations only in exceptional circumstances and unwillingly, as he knew from personal experience. Whenever he had been called upon to formulate one on behalf of the Soviet Union Government, he had always been hesitant and had given the matter very careful thought.

23. At the fourteenth session, certain members of the Commission, more particularly Mr. Gros, now a judge of the International Court, had emphasized that reservations destroyed the unified régime provided for in a treaty. Of course there were certain drawbacks in the institution, but then nothing in life was free of some inconvenience and if applied reasonably and within certain limits, reservations were beneficial and contributed to the progressive development of international law. Those limits had been laid down by the Commission in its 1962 text, when it had stated the general principle that reservations incompatible with the object and purpose of the treaty were inadmissible. There could be no doubt that the advantages of the institution greatly outweighed the disadvantages.

24. When the provisions of a treaty were consonant with the true requirements of human society, in course of time certain reservations usually fell to the ground by sheer desuetude, as had been the case with the United Kingdom Government's reservations to the 1928 General Treaty for Renunciation of War as an Instrument of National Policy.[5] They had been important and, as the Soviet Union Government had pointed out, to a great extent undermined the very purpose of the treaty: their fate was a matter of common knowledge and the rules laid down by that Treaty prohibiting aggressive war had prevailed.

25. Owing to the special significance of general multilateral treaties in the complex system of international law, it was highly desirable to lay down a general rule permitting reservations provided they were not incompatible with the object and purposes of the treaty, the reason being that general multilateral treaties were intended to be universal, and so long as reservations were not aimed at modifying elements of substance, they were useful and important as a means of extending the sphere of application of the treaty. For other types of multilateral treaty, the formula worked out at the fourteenth session might do.

26. With regard to the actual text of the articles on reservations, he was concerned at the apparent ease with which the Special Rapporteur seemed to be contemplating modifying what had been accomplished with great difficulty in 1962. Members would not have forgotten how arduous a task it had been for the Drafting Committee to arrive at an acceptable formula after lengthy discussions in the Commission itself and, if his memory served him, the compromise had been finally approved without any dissentient voice though not giving entire satisfaction to anyone. Nothing in the observations submitted by governments led him to think that, drafting changes apart, there was any need for the Commission to recast completely the 1962 scheme with its logical arrangement of successive provisions on formulation, acceptance of, and objection to reservations, their effect, their application and finally their withdrawal which was still preferable to the revised text proposed by the Special Rapporteur in which that logic had in part been lost.

27. Paragraph 1 of the Special Rapporteur's revised text for article 18 should not be placed at the head of a section dealing with reservations as a whole and belonged to a later article.

28. Paragraph 2 was inconsistent and unnecessary. No such rule had been included in the 1962 draft. If he understood it rightly, that paragraph meant that, even if the terms of a treaty or the established rules of an international organization prohibited reservations, they could nevertheless still be made, but the State concerned would have to ascertain whether all other interested States would be in favour or against. That would entail a most complicated procedure for which there was no need whatever.

29. At that juncture he would confine his comments to the way in which article 18 of the 1962 text should be modified. He agreed with Mr. Yasseen that paragraphs 1 (*b*) and (*c*) could be dropped if paragraph 1 (*a*) were suitably redrafted so as to make clear in what circumstances either no reservations at all were permissible or reservations were permissible only to certain parts of a treaty.

30. Paragraph 2 could be considerably abbreviated while retaining the essence of the original and paragraph 3 should be dispensed with altogether, as it merely dealt with certain procedural details.

31. Sir Humphrey WALDOCK, Special Rapporteur, said that, as he had tried to explain in his introductory remarks on section III, he had no particular pride of authorship or preference for either of the two drafts, but was bound to point out to Mr. Tunkin that, of the two versions of article 18, that of 1962 was the more stringent because it must be interpreted as totally prohibiting even the formulation of, or a proposal to make, a reservation, when the treaty either expressly or impliedly did not allow it, whereas his new draft of article 18, while giving full effect to the provisions of the treaty, did not wholly exclude the possibility of a reservation being proposed. While not intended to alter

[5] League of Nations *Treaty Series*, Vol. XCIV, p. 59.

in any way the general spirit of the original, none the less his new text was less rigorous.

32. He also felt bound to point out that, although it was true that the compromise worked out at the fourteenth session had not been achieved without some difficulty, much of the discussion had turned on paragraphs 1 (*b*) and (*c*) which Mr. Tunkin was now suggesting should be discarded. One of the bases of the agreement reached in 1962 had been the somewhat detailed provisions concerning the making of reservations to be found in the old paragraphs 1 (*a*), (*b*) and (*c*). His own approach to the problem of redrafting the articles, in the light of certain well-founded critical comments by governments on some points, had been to try and retain the general agreement reached at the fourteenth session, but to recast the articles in simpler form.

33. Mr. TUNKIN explained that he was not opposed to sub-paragraphs (*b*) and (*c*) in paragraph 1 but had only wished to suggest that their content could be covered by suitable modifications to sub-paragraph (*a*). If that were not feasible the sub-paragraphs could be retained.

34. Mr. ELIAS said that unless the Commission discussed articles 18, 19 and 20 together and members confined themselves to the essential issues, leaving the actual drafting to the Drafting Committee, it would never be able to keep to the time-table it had set itself for the present session. By restricting their comments to article 18, members were not considering the structure of the Special Rapporteur's new text for section III as a whole. Personally, the more he examined government comments the more he realized the justice of the Special Rapporteur's claim to have rearranged the subject matter while leaving the substance intact. A careful comparison of the two versions revealed that, apart from one or two points, the second was a distillation of the essence of the first. That did not mean of course that comparisons should be barred, but he did urge members to concentrate on deciding which elements must be retained and not to recapitulate general arguments already developed at length in 1962.

35. The CHAIRMAN said that he had considered the Special Rapporteur's practice of separating articles 18, 19 and 20 to be useful, because the three provisions related to completely different questions. Since, however, there appeared to be some uncertainty as to how best to proceed, he would ask the Commission to vote on the question whether or not to discuss articles 18, 19 and 20 separately.

It was decided by 5 votes to 4, with 10 abstentions, to continue to consider articles 18, 19 and 20 separately.

36. Mr. VERDROSS said he wished first to pay a tribute to the Special Rapporteur's efforts and to his redraft, which took account of comments by governments. However, like Mr. Tunkin, he thought that the Commission should maintain the articles which it had adopted at the first reading after a long discussion and which constituted a compromise between differing opinions. By constantly starting the discussion again *ab initio*, as though no text existed, the Commission was, like Penelope, undoing its earlier work. The Commission's members should limit themselves to proposing such changes as had become necessary as a result of comments by governments.

37. He himself wished to comment on the idea advanced by the Japanese Government (A/CN.4/175), and developed by the Special Rapporteur, concerning the interpretative declaration by which a State, when signing or ratifying, indicated how it construed a particular provision. The Special Rapporteur stated in his observations on the three articles (A/CN.4/177/Add.1) that the problem was governed by articles 69 and 70 concerning the interpretation of treaties. In his (Mr. Verdross's) opinion, that was not the case : what those articles were concerned with was either the joint will of the parties or their common practice. But in the case of an interpretation given unilaterally by a State when signing or ratifying, the State declared unilaterally how it understood a particular article, and was consequently making a reservation within the meaning of article 1, paragraph 1 (*f*). It was therefore sufficient to state in the commentary that, if a State made a unilateral declaration as to the interpretation it attached to a particular article, it was in fact making a reservation which was governed by the articles on reservations.

38. Mr. AGO said that reservations were an institution which existed in practice and could not be eliminated, but the Commission should beware of treating it as an innovation representing an advance in international law. It was a necessary evil, but still an evil, for what an instrument gained in scope through the number of signatory States it lost in depth from the fact that, as a result of the reservations to it, it stated fewer rules. While, therefore, he was convinced that the Commission should do nothing to indicate hostility towards reservations, he was firmly opposed to the Commission's showing itself favourable towards them.

39. The Commission would be well advised not to depart too radically from the compromise achieved in 1962, which was probably the only solution likely to receive majority support in so delicate a matter. But he felt some concern about those general multilateral treaties whose purpose was to codify international law. He hoped that, where the Commission codified general rules that already existed, no far-reaching practice of reservations would be instituted since it could only mean a step back. He would not like doubt to be cast on the existence of a given customary rule through reservations made to it in its new form as a conventional rule.

40. The essence of article 18 was its paragraph 1; the remainder of the article related to application and procedure. If the Commission took the text adopted in 1962 as the basis, he would welcome the separation of paragraphs 1 and 2 into two separate articles. While the 1962 text and the redraft proposed by the Special Rapporteur both had their advantages, the earlier text was perhaps preferable in that it stated the principle directly by indicating all the circumstances in which a State had the right to formulate a reservation. The new text was rather more descriptive and would perhaps facilitate academic explanation. But it was not very easy to follow the Special Rapporteur's scheme entirely, for whereas he had headed the article " Treaties permitting or prohibiting reservations ", he had had to

refer in the text to cases where the treaty was silent but where the reservation was nevertheless prohibited by the rules of the international organization within which the treaty was concluded. For the time being, therefore, he favoured the text adopted by the Commission in 1962.

41. In one respect, however, he preferred the redraft proposed by the Special Rapporteur; he was referring to the idea embodied in paragraph 2 of the Special Rapporteur's new article 19. That expressly specified the principle that, if the treaty was silent, the making of a reservation incompatible with the object and purpose of the treaty was prohibited; the new text also took account of a slightly different case—that where, the treaty being silent, it appeared from the nature of the treaty, the fewness of its parties or the circumstances of its conclusion that all possibility of making reservations was excluded, even on points which were not related to the object and purpose of the treaty. The wording was perhaps somewhat clumsy and could be simplified, but he thought the newer idea should be adopted.

42. With regard to drafting, he thought that the formula " A State may " used at the beginning of article 18 as adopted in 1962 should be avoided, because that phrase gave the impression that the provision decided which States had the right to make reservations, whereas in reality it determined which reservations could be made. It might be better to say " A reservation may be formulated by a State . . . ".

43. It was not necessary to discuss at length paragraphs 1 (*a*), (*b*) and (*c*) of article 18 as adopted in 1962. Members were in agreement on the substance. There were three cases in which the making of a reservation was prohibited: first, if it was prohibited by the terms of the treaty itself; secondly, if the treaty expressly prohibited the making of reservations to specified provisions and the reservation sought related to one of those provisions; and, thirdly, if the treaty authorized the making of reservations to certain provisions and the reservation related to another provision. If those three cases could be dealt with satisfactorily in one paragraph, the text would be simplified; if not, it would be better to deal with them in three separate paragraphs.

44. Since members were in agreement on the principles, it ought to be possible, with a modicum of goodwill, to find a satisfactory form of words.

45. Mr. PAL said that none of the members appeared to favour any departure in substance from the 1962 draft. The Special Rapporteur, in proposing his new formulation, had made it clear that there was no intention to make any change of principle or substance, and had explained his reasons for proposing a rearrangement of the material.

46. The Commission had originally had before it, on the subject of reservations, articles 17-19 of the Special Rapporteur's first report.[6] The discussion on those articles in 1962 had been long and strenuous and the texts had had to be referred more than once to the Drafting Committee; ultimately, a compromise had been reached in the form of articles 18-22 in the 1962 report.[7] The Special Rapporteur had said that the new texts he now proposed were merely a rearrangement of the 1962 material with consequential verbal changes; the Commission would have to be satisfied on that point. For the time being, he would confine his remarks to the proposed new article 18.

47. Paragraph 1 of the Special Rapporteur's text purported to replace the provisions of paragraph 1 (*a*) of article 20 of the 1962 text. However, the words " expressly or impliedly " had been omitted before " permitted "; also, the proviso " unless the treaty otherwise provides " had been added at the end. The Drafting Committee would have to examine whether any change in substance was involved and, if not, whether the proposed changes made the text any clearer.

48. The opening sentence of paragraph 2 would have the effect of reintroducing an idea contained in paragraph 1 (*b*) of article 17 as originally proposed by the Special Rapporteur in 1962. In the text adopted in 1962, the Commission had omitted that idea and it would be appropriate for the Drafting Committee to examine whether its reintroduction might involve any point of substance. Further, the words, " unless expressly agreed to by all the interested States " were in apparent variation from the substance of article 20, paragraph 2 (*a*) of the 1962 text. The Drafting Committee would have to satisfy itself that there was no real variation in substance. Paragraph 2 (*a*) of the Special Rapporteur's new article 18 represented a condensation of the contents of paragraphs 1 (*a*) and 1 (*b*) of article 18 as adopted in 1962. The Drafting Committee would have to examine whether the substance remained unaffected thereby. The position was similar with regard to the new paragraph 2 (*b*), which was said to embody the idea contained in paragraph 1 (*c*) of article 18 as adopted in 1962; it would have to be scrutinized in that respect.

49. In the circumstances, he suggested that the Commission decide that no change in substance should be made to the 1962 articles on reservations and that the Drafting Committee examine whether the proposed new text of articles 18 to 20 represented any departure in substance from the corresponding material in the 1962 draft articles.

50. Mr. CADIEUX said that, as one of those who had been hesitant in approving the compromise formula worked out in 1962, he had looked at the new formula proposed by the Special Rapporteur to see if it was in keeping with the spirit of that compromise and had finally decided that it was. He had also considered whether the Special Rapporteur had heeded the objections and suggestions which had been made, some of which were penetrating or constructive. In that respect, too, his impression was that the Special Rapporteur had succeeded brilliantly and had facilitated the Commission's work.

51. He welcomed the suggestion for simplifying article 18; he realized, in particular, that those members who supported the system of reservations would like that group of articles to begin in a way favourable to

[6] See *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 60-68.

[7] *Ibid.*, Vol. I, 651st-654th, 656th, 663rd, 664th, 667th and 672nd meetings.

their position. In trying to condense, the Commission should, however, be careful not to upset the balance established in 1962. For example, it was slightly forcing the 1962 text to say that reservations were permitted in cases where the treaty was silent on the subject. The Drafting Committee would have to consider that point very carefully. What Mr. Ago had called the "descriptive" method made it possible to avoid that trap. To adopt an abstract approach and postulate a principle would be straying beyond the scope of article 18 to deal with matters which, in the Special Rapporteur's new version, were governed by article 19, on "Treaties silent concerning reservations".

52. He was convinced that the Commission as a whole did not want to change the text adopted in 1962 and that it would ask the Drafting Committee to work out a formula which would be slightly more condensed but which would be in keeping with the spirit of the text accepted by the majority at the time.

53. Mr. AMADO said he endorsed all that Mr. Pal and Mr. Cadieux had said. Even before Mr. Tunkin had spoken, he had decided to continue his support of the 1962 text. It was a good text. It was not perfect, but perfectionism was fraught with grave risks. He had opposed the use of expressions such as "small group of States" but, noting that governments had not expressed any objection, could resign himself to agreeing to that also.

54. On one point, however, he did have serious misgivings: the concept of the compatibility of a reservation with the object and purpose of the treaty, which left a great deal of room for subjective judgement by States and on which several governments had commented. The Special Rapporteur proposed an even more far-reaching formula in paragraph 2 of article 19. The question was connected with that dealt with in article 9, which was full of substance and concerning which there was still so much uncertainty.

55. He was very particular so far as drafting was concerned; he did not like vague expressions such as "in the case where the treaty is silent concerning the making of reservations". Such wording was not appropriate in the text of a treaty.

56. Mr. YASSEEN said he wished to elaborate on his earlier remarks in the light of Mr. Ago's statement. He had not said that reservations should be encouraged, for the good reason that in his view reservations should not be either encouraged or discouraged. Freedom to make reservations was in conformity with the development of the law relating to general multilateral treaties. He would hesitate to assert that reservations were an evil, whether necessary or not. Reservations filled a need in international relations; they were the counterpart of the new majority rule for the adoption of the text of general multilateral treaties.

57. The signature, ratification or approval of a treaty with many reservations was better than the absence of signature, ratification or approval. If there remained in a treaty only two articles accepted by all the parties, while some twenty articles were the subject of reservations. the result would be better than no treaty at all. Many States tended not to sign or ratify a treaty if the possibility of making reservations was not permitted within reasonable limits, and in his opinion the only reasonable limits were those laid down by the provisions of the treaty itself and by the rule of compatibility with the object and purpose of the treaty. If those two limits were laid down very clearly, there was no danger in recognizing freedom to make reservations; in that way participation in the international community and the formulation of treaty law would be encouraged.

58. Mr. AGO said that to his regret he could not agree with Mr. Yasseen at all. If a treaty codifying rules of international law were accepted only with many reservations relating to most of the articles, it would be a real disaster, the very negation of the work of codification. It would have been better not to have undertaken the work at all, since it would mean that customary rules had been jettisoned and that nothing whatsoever was left.

59. Mr. Yasseen's argument might be tenable in the case of a treaty creating new rules, but was very dangerous where treaties codifying international law were concerned.

60. Mr. EL-ERIAN said that he accepted the Special Rapporteur's proposed new title for the section, "Reservations to multilateral treaties", for which there was a precedent in the report submitted in 1951 by Mr. Brierly, the first Special Rapporteur on the law of treaties.[8] He also accepted the Special Rapporteur's position with regard to interpretative declarations.

61. Like some other members of the Commission, he preferred the 1962 formulation to the new text proposed by the Special Rapporteur. The 1962 text had been reached after considerable difficulty and represented a compromise which reconciled the two major aims, that of securing for a treaty the widest possible acceptance, and that of preserving the integrity and uniformity of the treaty obligations.

62. During the 1962 discussion, Mr. Bartoš had said that the Commission "should steer a middle course between two extremes: rejection of reservations unless accepted by all the signatory States, and absolute freedom to make reservations".[9]

63. The 1962 formulation represented a practical and conciliatory approach to a difficult and delicate subject. It had the merit of commencing the section by stating the basic principle in the matter in paragraph 1 of article 18. The Special Rapporteur had indicated that the 1962 text was rigorous in some respects, but its advantages certainly outweighed any shortcomings. It was particularly gratifying to note the generally favourable character of the government comments on the difficult section on reservations. The Danish Government, for example, had welcomed the Commission's proposals "as a constructive attempt to solve the intricate problem of reservations", while at the same time suggesting a simplification of the wording (A/CN.4/177/Add.1).

64. He fully agreed with Mr. Tunkin that governments did not make reservations lightly, and could give a

[8] *Yearbook of the International Law Commission, 1951*, Vol. II, p. 1.

[9] See *Yearbook of the International Law Commission, 1962*, Vol. I, 651st meeting, para. 44.

recent example taken from his experience as Legal Adviser to the Ministry of Foreign Affairs of the United Arab Republic. Ratification of the 1963 Vienna Convention on Consular Relations was under consideration and he had submitted to the Foreign Affairs Committee of the National Assembly certain objections by the Customs Department to the provisions dealing with the customs privileges of members of the household of a consular official. At the behest of the Customs Department, it had been suggested that a reservation be made to the effect that only persons below the age of twenty-one should be regarded as members of the household of an official and the Chairman of the Committee had been very concerned that no reservation should be made unless it was really indispensable. There could be no doubt that governments considered a treaty with great care before entering reservations. Reservations served a useful purpose because they sometimes constituted the only way to ensure the participation of a country in a general multilateral treaty.

65. So far as the text was concerned, he favoured that of 1962, subject to drafting improvements.

66. Mr. RUDA said that he had already expressed his general views on the subject of reservations; he would therefore confine his present remarks to article 18 and to the title of the section. On the latter point, he preferred the title " Reservations " because some of the provisions of the 1962 articles 18 to 22, such as paragraph 2 (*b*) of article 18, could apply both to bilateral and to multilateral treaties. The proposed new title " Reservations to multilateral treaties " would therefore be unsuitable.

67. In reformulating articles 18 to 22, the Special Rapporteur had made a great effort to simplify the wording, but had departed from the system of the 1962 articles. Personally, he found that the 1962 text conformed more to the canons of strict legal logic, and he would therefore comment on article 18 of that text.

68. Paragraph 1 stated the basic principle in the matter of reservations. That principle was not stated in the Special Rapporteur's new text and he urged that it should appear at the beginning of the section.

69. With regard to paragraph 1 (*d*), he agreed with Mr. Amado that the notion of compatibility with the object and purpose of the treaty, although it had been adopted by the International Court of Justice in its ruling on a particular case, tended to inject a subjective element which presupposed the existence of a judicial body to adjudicate on it. In the absence of any such body, it was impossible to determine whether a particular reservation was or was not compatible with the object and purpose of the treaty, so although the compatibility concept was a valuable one from the theoretical point of view, he could not support paragraph 1 (*d*).

70. He agreed with those members who thought that the contents of paragraphs 1 (*b*) and 1 (*c*) could be omitted; those concepts were already contained in paragraph 1 (*a*), which might require some verbal adjustment to make that fact clear.

71. Sub-paragraphs (i), (ii) and (iii) of paragraph 2 (*a*) dealt in detail with the question of the various moments at which reservations could be formulated; those details could be dispensed with, since the essential provision was already contained in paragraph 1, which stated " A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation . . . ".

72. Lastly, he agreed with Mr. Tunkin that paragraph 3, which dealt with minor matters, could be dropped.

73. The CHAIRMAN, speaking as a member of the Commission, explained that originally, in his system of international law, he had been hostile to reservations and had thought that every reservation took away something of the treaty's certainty. From the theoretical point of view he was still of that opinion, which he had expressed at the General Assembly in 1949 and in 1950.

74. He had, however come round to the view that, if reservations were accepted, the Latin-American system was preferable, for it admitted the possibility of formulating reservations in such a way that the reserving State was bound only with respect to the States which accepted those reservations. That system gave the treaty a partial validity which was not unimportant. After the General Assembly's adoption of resolution 598 (VI) on reservations to multilateral conventions, he had recognized that his position was no longer realistic and he had conceded that reservations could be made provided that they were not incompatible with the object and purpose of the treaty. He even thought that reservations to certain non-essential provisions in the treaty could be accepted, even if they were not provided for in the treaty itself. In other words, he remained a supporter of the formula adopted in 1962.

75. One question arose with respect to paragraph 2 (*b*) of article 18 in the Special Rapporteur's reformulation. If the treaty expressly authorized reservations to certain articles, did it necessarily follow that reservations to the other articles were prohibited? In his opinion, if the treaty specified that reservations were authorized *only* with respect to certain articles, then reservations to the other articles were expressly barred. Apart from that case, he was inclined to think that reservations to the other articles were subject to the general rule.

76. The words " or by the established rules of an international organization ", in paragraph 2 (*a*) of the same article in the Special Rapporteur's revised text, raised the question whether that provision referred only to treaties concluded under the auspices or within the framework of the organization, or whether it meant that States members of an organization which prohibited certain reservations had not the right to make reservations of the same kind in their international relations in general. The question had arisen in the International Labour Organisation, certain States members of which had accused other States members of concluding bilateral treaties which were incompatible with certain rules of the ILO.

77. An example was the convention establishing the International Civil Aviation Organization (ICAO). Certain States, including Turkey, had ratified the Chicago Convention on International Civil Aviation[10] without any reservations, but had stated that for a time

[10] United Nations *Treaty Series*, Vol. 15, p. 296.

they would not grant overflying rights over their territory in conformity with article 5 of that Convention. The Organization had taken note of their ratification as a ratification without reservations. Other States, on the contrary, had made express reservations to article 5 and the Council of ICAO had refused to consider their instruments of ratification valid. Yugoslavia had decided to act similarly with respect to Turkey, without restricting the right of the aircraft of other States to fly over Yugoslav territory. That example showed that it was possible for reservations to have only a technical and secondary scope; the essential thing had been to accept the existence of an organization, to collaborate with it and not to contravene the system which it had established.

78. He was therefore inclined to consider reservations necessary in practice in international relations, but he agreed with Mr. Ago that it was sufficient to tolerate them without going so far as to make publicity in favour of reservations, for such publicity might destroy the principle *pacta sunt servanda.*

Membership of the Drafting Committee

79. Mr. AGO said that, in the absence of Mr. Jiménez de Aréchaga, Mr. de Luna sat on the Drafting Committee as the Spanish language member. Since Mr. de Luna was now himself absent, he proposed that the Commission appoint Mr. Ruda to replace him.

80. Mr. PAREDES proposed that, in order to relieve Mr. Jiménez de Aréchaga, who was Chairman of the Drafting Committee, and also in order to ensure a more equitable representation of the Spanish language in the Committee, Mr. Ruda be appointed a permanent member of the Drafting Committee.

It was so agreed.

The meeting rose at 6 p.m.

798th MEETING

Wednesday, 9 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L/107)

(continued)

[Item 2 of the agenda]

ARTICLE 18 (Formulation of reservations) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 18.

2. Mr. TSURUOKA said that the uniform world order should be defined in democratic terms and that each State should democratically agree to some sacrifices to safeguard it, since the idea of democracy was based on the principle of the equality of independent States in international law. The general multilateral treaty, which was discussed and adopted by an international conference by the requisite majority, normally a two-thirds majority, was part of the world order defined in democratic terms. The majority rule was a democratic institution and placed a moral duty on all States which had participated in the conference to preserve the treaty, whether they belonged to the majority or the minority, even at the cost of some special interest.

3. In the case of reservations, the Commission was expected to devise a democratic formula which would respect the will of the majority rather than proclaim the individual freedom of States. He preferred the so-called " unanimity " formula to that described as " flexible ", as well as to the collegiate formula, although the latter was closer to the majority rule.

4. An individualist solution in cases where the treaty was silent was deplorable, for it conflicted with the democratic principle and its effects were all the more serious because silence, in a general multilateral treaty, was often the result of the manœuvres of what was called the " blocking minority ".

5. The unanimity rule, on the other hand, had the virtue of simplicity and was by no means obsolete, since it safeguarded the decision which had been reached democratically, nor was it conservative. Rather, it was progressive, if " progressive " was understood as meaning whatever furthered the interests of the majority, which in modern times was composed of the newly independent States and the small and medium-sized countries.

6. The unanimity rule was rigid in appearance only. If reservations were reasonable, the common sense underlying the democratic principle would oblige all States to accept them, and only unreasonable reservations would be rejected. Moreover, the unanimity rule might well co-exist with the presumption in favour of acceptance, after a relatively short time, in cases where the treaty said nothing about reservations.

7. The unanimity formula had the further advantage of being objective, for it would make it possible to dispense with the test of the compatibility of a reservation with the object and purpose of the treaty, which was a vague and subjective criterion, inasmuch as it would leave it to each State individually to judge whether a particular reservation satisfied the test.

8. The draft submitted by the Government of Japan (A/CN.4/175, section I) was based on the ideas he had mentioned. It could easily be made even more flexible. It certainly deserved the Commission's attention if the purpose of the second reading was not merely to make a few minor drafting changes and if it was also intended to improve, where possible, the draft adopted at the first reading. He hoped that his reflections would help the Commission to a small extent to gain a better understanding of the Japanese draft, from which it could undoubtedly derive some benefit.

[1] See 796th meeting, paras. 32 and 33, for the 1962 text and the Special Rapporteur's reformulation of articles 18, 19 and 20.