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Summary record of the 2404th meeting

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been taken. He had noticed that a list of supposedly interested members had been circulated and the first meeting had been attended by a number of persons, some of whom had not even known that the meeting had been scheduled. The document in his possession spoke of "informal consultations on State responsibility". He repeated that it was an extraordinary procedure and he could only wait to see what would come of it. Considering the known brevity of his absence, he wondered how it came about that the meeting should be proposed before he came back: unless, of course, the meeting represented an attempt to remove article 19 of part one beforehand.

21. The CHAIRMAN said it went without saying that the Commission's informal consultations were open to all members. If names had been circulated, it had been only to make sure that at least a few members would be available on that day. A decision had to be reached on an important matter, hence the need to take a position that was unanimous in every respect. There could be no talk of an extraordinary procedure; the idea was merely to review the question and to decide together how to proceed.

The meeting rose at 10.55 a.m.

2404th MEETING

Thursday, 22 June 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer.

The law and practice relating to reservations to treaties (*continued*) (A/CN.4/464/Add.2, sect. F, A/CN.4/470,[1] A/CN.4/L.516)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. de SARAM thanked the Special Rapporteur for an excellent introduction to what was a very specialized field and for setting out in his first report (A/CN.4/470) the modern and convoluted history of reservations.

2. As to the question of overall direction, in his opinion the preparation of a consolidated draft convention on reservations to take the place of the reservations provisions in the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"), the Vienna Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention"), and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention"), and to deal with other matters deemed of relevance would be far too formidable an undertaking. Moreover, in the real world of inter-State treaty negotiations, it was unlikely that a consolidated convention would be judged worthwhile, and such an instrument might very well make matters more confusing than they already were. Nor, for similar reasons, did the preparation of draft protocols to the above-mentioned Vienna Conventions seem justifiable. Furthermore, as the Special Rapporteur had noted, the parties to a treaty and the parties to an additional protocol might not be the same, and many States would then find themselves at cross-purposes, thus creating even more confusion.

3. As the Commission knew, the subject of reservations to treaties lay in a grey zone between, on the one hand, a desire for complete logical consistency (the simplest expression having been the original "unanimity rule" prescribing that a reservation proposed to a multilateral convention required the consent of all States parties) and, on the other hand, the concept that every State, in its sovereignty, was entitled to make the reservations it wished and to become party to a convention subject to such reservations, regardless of any objections made. The uncertainties of the reservation provisions in the 1969 Vienna Convention and the many difficult technicalities experienced in their application were a measure of the problems faced in treaty negotiations when the compulsion for logical symmetry encountered the concern that a State's sovereign discretion to determine the extent of its binding commitments should not at any stage be overly constrained. Accommodating those two opposing factors in the higher interests of "international cooperation" was not at all easy, as those provisions showed.

4. Consequently, guidelines and model clauses would seem to be a reasonable objective. That would enable the Commission to examine and fully appreciate the technicalities involved and broaden the focus of attention to include not only what could transpire after, but also what should transpire before, the adoption of a treaty.

5. Before the Commission began the actual drafting of guidelines and model clauses, it must have a clear view of all the inconsistencies and uncertainties in the articles of the 1969 Vienna Convention, much as the Special Rapporteur had done in the list in his report. It was doubtful, however, whether the Commission should immerse itself in "doctrine" or "doctrinal" materials, apart from Mr. Bowett's pioneering article.[2]

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[1] Reproduced in *Yearbook... 1995*, vol. II (Part One).

[2] See 2400th meeting, footnote 2.

6. It seemed to him that once the Commission had a listing of the points of inconsistency and uncertainty in the provisions of the 1969 Vienna Convention, it must examine each point thoroughly and consider how they were all interrelated. To that end, it would be useful to have, for each such point, the relevant chapter, articles and commentaries that the Commission submitted to the United Nations Conference on the Law of Treaties,[3] as well as any amendments proposed to the Commission's draft articles, whether or not finally adopted. The adoption or non-adoption at the Conference of some of the proposed amendments had probably caused much of the inconsistency or uncertainty in the articles of the 1969 Vienna Convention. Examples that came to mind were the failure to adopt a proposed amendment to the definition of a reservation—in what had come to be article 2, paragraph 1 (*d*), of the Convention (and which, had it been adopted, would have dispelled much of the resulting uncertainty as to what was and what was not a "true" reservation)—and the eleventh-hour amendment adopted to what had become article 20, paragraph 4 (*b*), which had been inconsistent with the overall balance that the Commission had tried to establish in the articles on reservations submitted to the Conference.

7. He agreed with those who believed that it would not be very helpful at the present time to embark on a study of State practice. However, at an early stage in the work, the principal depositaries of treaties within and outside the United Nations system should be asked for information on their experience, in particular how they resolved in practice some of the uncertainties and inconsistencies that the Commission would have to examine, and on what main subjects States commonly deposited unilateral statements at the time of signature, ratification or accession.

8. In his report, the Special Rapporteur, in discussing the effects of reservations on the entry into force of a treaty, referred to "doctrinal criticism" of the practice followed by the Secretary-General in his capacity as depositary. Surely, the Secretary-General's practice as depositary scrupulously conformed to General Assembly resolution requirements. There again, the Commission would need to know what the relevant General Assembly requirements were and what consequences they might have with regard to the establishment of treaty relations between the parties and respect to a treaty's date of entry into force.

9. He sympathized with the Special Rapporteur's view that the title of the topic should be changed to "Reservations to treaties", but the title had been established by the General Assembly and he was inclined to feel that it ought to be maintained unless change was essential. Modifying the title now would almost certainly lead to an unpredictable debate in the Sixth Committee, in which the incorrect impression might be gained that the proposed change reflected a shift in the Commission's substantive approach to the topic. That might distract the Sixth Committee from more important issues.

10. Like Mr. Tomuschat, he preferred to exclude "reservations" to bilateral treaties from the Commission's work or at least to confine matters to reservations to multilateral treaties as a first stage, taking up reservations to bilateral treaties later if it was deemed necessary. The context in which bilateral and multilateral treaties were negotiated and concluded was completely different and if the Commission was to be working towards guidelines and model clauses there would be no practical need to cover bilateral treaties, or indeed treaties establishing international organizations, which were of a very specialized nature.

11. Again, the Commission might have to leave aside the provisions of article 20, paragraph 2, of the 1969 Vienna Convention, dealing as they did with treaties whose reservations required the consent of all States parties, because of the limited number of States parties and because the nature of the treaty's object and purpose made it essential that all the parties consent. The Commission's commentaries in 1966 showed that the question of how to determine what was a small group of States had been examined in the light of comments by Governments, and the wording of article 20, paragraph 2, had been considered an appropriate solution at that time.[4]

12. As to the categorization of reservations according to problems connected with the specific object of certain treaties or provisions, a general legal aspect had to be carefully considered in connection with the Commission's 1966 draft articles and commentaries, which had served as the basis of the work at the United Nations Conference on the Law of Treaties. The commentaries appeared to show that in the 1960s the Commission had in fact examined whether provision should be made for different procedures for establishing the "permissibility" of a reservation for different kinds of multilateral treaties. Paragraph (14) of the commentary to draft articles 16 and 17,[5] corresponding to articles 19 and 20 of the 1969 Vienna Convention, stated:

> The Commission accordingly concluded in 1962 that, in the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a 'collegiate' system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned.

There then followed a puzzling sentence which the Commission would have to look into much more fully than was possible at the present session

> Having arrived at this decision, the Commission also decided that there were insufficient reasons for making a distinction between different kinds of multilateral treaties other than to exempt from the general rule those concluded between a small number of States for which the unanimity rule is retained.

13. The issue that arose from such a commentary was that, if the Commission agreed to preserve the general reservations regime established in 1969 as the general

[3] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7).

[4] *Yearbook. . . . 1966*, vol. II, p. 69, document A/6309/Rev.1, in particular, pp. 207-208, commentary to article 17.

[5] Ibid., p. 206.

international regime on reservations, it would then be very much in the area of progressive development. If it were also to proceed to establish different reservation systems according to different kinds of general multilateral treaties, those systems would in their fundamentals be at variance with the general international regime established under the 1969 Vienna Convention. That was a matter which would need to be fully considered at a later stage.

14. A final point concerned the importance that the Commission should attach to the need to look not only at how reservations were formulated under the articles of the 1969 Vienna Convention and applied after the adoption of a treaty but also at how, prior to adoption, the need for making reservations could, as far as practicable, be reduced or eliminated. He had in mind not only the procedure for stating that there were to be no reservations to a treaty or to particular articles, but also the more general consideration that all participants in treaty negotiations and their decision-making authorities back home in their capitals, were often working with a limited administrative infrastructure and in the midst of domestic pressures. They should be kept informed as early and as fully as possible of the central issues on which agreement was likely to be reached and on those on which agreement was unlikely. In addition, the Commission should give some thought to how those authorities might be advised about provisions left intentionally ambiguous because it was felt more important to have an agreement on some rather than on all matters. If that could be done, the requisite definition or redefinition of central issues could take place while a treaty was still being negotiated and could be expressed in a State's decision to become, or not become, party to that treaty, rather than expressed after the adoption of the treaty and in the confusion of unilateral statements accompanying signature, ratification or accession, when there was no easy way of determining objectively what they were intended to mean.

15. It would be unrealistic to expect Governments not to insist on protecting their national interests even after the adoption of a treaty, in the form of reservations, as they often did in the final stages before the adoption of a treaty in statements for the record—for inclusion in the *travaux préparatoires*. Yet it also seemed reasonable to assume that Governments—being fully aware of the central issues or agreements and disagreements and, having made up their minds to become parties to a treaty—would not wish to disengage themselves from the central core of obligations within a treaty: what had been referred to in an advisory opinion of ICJ as the object and purpose of a treaty.[6] Moreover, there was no statistical or other basis for assuming that reserving States acted in bad faith. Indeed, in practice, States that were making non-permissible reservations might well be under the misapprehension that the reservations were in fact permissible or might not have looked into what were or were not permissible reservations under the treaty. If such assumptions were correct, then the Commission's future work should focus on two areas: how reservations in their intentions and effects might in practice be rendered more precise, and how decision-making authorities might in the course of a treaty's negotiation be made more fully aware of the central issues involved in the treaty.

16. Mr. PAMBOU-TCHIVOUNDA said that he had already had occasion to commend the Special Rapporteur on the calibre of his first report and his presentation, which had successfully led the Commission through the jungle of reservations to treaties. It was an examination of the law and doctrine, rather than of the law and practice, relating to reservations to treaties. On the one hand, the report was impressive in its nearly perfect architecture, which included a panorama of the relevant treaties and the context in which they had been elaborated. On the other, it produced a somewhat disconcerting reaction in that it showed how the system developed by the Commission, with its ultimate expression in the Vienna Conventions of 1969 and 1986, had quickly revealed its own limitations. It had become clear that the codification of the law of treaties was far from complete in many respects, such as reservations to and interpretation of treaties. Indeed, the edifices of the 1969 and 1986 regime were marred with cracks and fissures, with gaps and ambiguities that it was the Commission's task to remedy. Any legal structure, even the most elaborate, had limitations and could always stand to be enriched by the way it actually functioned in the real world. Every legal structure was the result of "judicious ambiguities", as the Special Rapporteur had stated in the report—ambiguities that betrayed the hidden motives which were part of every international treaty. The Commission should be grateful to the Special Rapporteur for his guidance in helping it discover those flaws.

17. With regard to the general structure underlying the law of treaties, which was set forth in detail in chapter I of the report, he noted that the Commission had been motivated by a desire for change, which had manifested itself in the substitution of a "flexible" system for what some had called the traditional regime that had been in effect up to the time ICJ had given its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in 1951.[7] The idea that the reservation had to be compatible with the object and purpose of the treaty was, seemingly, the more flexible version of the rule of unanimous acceptance. However, he did not see how the criterion of compatibility had acquired such a function. The Special Rapporteur had remained very discreet on that issue, simply placing the words "flexible" and "flexibility" between quotation marks each time they appeared in the report. He could well understand the dismay of Georges Scelle at the elevated level to which the idea of compatibility between a reservation and the object of the treaty had been raised.[8] That idea had been considered variously as a rule, a criterion, and even as a principle. Nothing about it was straightforward. It would not be minimizing the importance of the ICJ requirement of compatibility to view it not as a condition for the existence of the reservation but simply as a characteristic of the reservation, since the power to formulate reservations was not subject a priori to any control, namely, control of validity.

[6] See 2400th meeting, footnote 5.

[7] Ibid.

[8] See *Yearbook*... *1951*, vol. II, p. 23, document A/CN.4/L.14.

18. In the efforts to make the rule of unanimity more flexible and so better reflect the new realities of international life, the Commission and, later on, the Vienna conferences had not needed, for the purpose of progressive development of the law of treaties, to endorse the advisory opinion of ICJ, which had been formulated in a precise context and in reference to a specific multilateral treaty. The Commission had needed only to draw the logical conclusions from the new international realities and to decide that a reservation had to be accepted by a simple or qualified majority, because unanimous acceptance was clearly very difficult to achieve. In fact, the Court's opinion did not alter in any way the rule of unanimity; the hypothesis of unanimous acceptance had found a place in article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions, although doubts had been raised as to whether it was applicable to all multilateral conventions.

19. A second source of ambiguity was the excessive liberalism surrounding the very concept of a reservation, as embodied in the relevant instruments. According to article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions, "reservation" meant "a unilateral statement, however phrased or named, made by a State [or international organization] ... whereby it purports to...". In what manner was that a source of ambiguity? A unilateral declaration serving as a reservation could clearly be called by any name whatsoever; it was merely a question of form. In contrast, the wording of the declaration, relating to the very purpose of the reservation, was highly significant. In his view, the wording of any reservation should meet certain minimum requirements of precision with regard to three aspects: formulation, motivation and structure. Those requirements would satisfy the interests of all concerned: the State which had made the declaration, since it was motivated by the desire to become party to the treaty, and States which were already parties, since they would not wish to be accused at a later point of being arbitrary in objecting to a particular reservation. The treaty instrument itself, the scope of which it was generally hoped would be enlarged *ratione personae*, demanded a strict parallelism between the reservation and any objection to it, which implied as clear as possible a legal framework for the material elements involved. Lack of clarity in the wording of a reservation led only to confusion and disorder by giving free rein to all kinds of interpretation. One could easily imagine the torrent of interpretive declarations which could be made in reference to a reservation formulated by the State before or once it had become a party and, by implication, in reference to provisions of the treaty itself which would be considered as inapplicable because they were the subject of a reservation. In those circumstances, there were countless ways to undermine the provisions of a treaty. Difficulties arose when the reservation was vague and general, as noted by the Special Rapporteur in the report.

20. The wording of article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions also gave rise to problems with regard to the type of treaties to which it was applicable. In his report, the Special Rapporteur pointed out that, while an objection to a reservation would cause a bilateral treaty to "fall to the ground" and would exclude the participation of the State which had formulated the reservation, the situation was different with respect to multilateral treaties. In his view, the Special Rapporteur had made a distinction which could not be made under the system proposed by Sir Humphrey Waldock in his first report in 1962.[9] An objection to a reservation would not cause a bilateral treaty to "fall to the ground"; it was the reservation which nullified a bilateral treaty by rendering it inexistent both legally and materially. No objections were possible in such circumstances because no reservations were possible. That statement should therefore be eliminated from the report.

21. In reviewing the preparatory work on the reservations provisions of the 1969 Vienna Convention, the Special Rapporteur had rightly observed that the system finally adopted might be characterized more as "consensual" than "flexible" in the sense that, ultimately, the contracting States could change the system of reservations and objections as they saw fit and practically without restriction. He agreed that the system was certainly not flexible. It was, in fact, anachronistic and self-contradictory, because it was built on ultra-voluntarist foundations which had been valid for the closed societies of the sixteenth to nineteenth centuries but which might lead to conflict in a divided yet falsely egalitarian international community.

22. A doctrinal approach could not resolve that difficulty because doctrine was not the same as policy, although the two might coincide. The policies of States or international organizations with regard to reservations and objections were clearly tied in with their legal policies, which were elaborated to serve their own interests. Each State or organization naturally wished to become a party to a treaty under the most favourable conditions, at the best price, and to profit from the potential advantages of being a party. The entire system of reservations and objections was thus dominated by market forces. Moreover, a State or organization's assessment of the advantages of becoming party to a treaty was necessarily made before its consideration of the law and was thus "outside" the law. Where such an assessment of interests was not prohibited by law, the question of the validity of the reservation did not arise. It only arose in the case of prohibition or authorization of the reservation. In the first case (prohibition), the reservation was simply not admissible. In the second case (authorization), the reservation was presumed to be admissible as long as it was not subject to an objection on the grounds of incompatibility with the object and purpose of the treaty. Thus, the requirement of compatibility served as a method of proof that could be used only by those entities which were already party to the treaty in order to establish the non-validity of a reservation in the light of the legal framework of which they, by virtue of their capacity as parties, were the guardians. Those working to elaborate treaty law and codify it had never foreseen that such a role would be played by a third party, something which, in his view, was a major flaw. As a result, the regime of reservations had not received the same treatment as had the regime of nullity by the codification of international

[9] See 2400th meeting, footnote 6.

law and by the Vienna Conventions. Perhaps the time had come to redress that imbalance.

23. Mr. BARBOZA expressed his congratulations to the Special Rapporteur on an excellent and lucid report but said he had one small word of reproach: a reader unversed in the topic would have been left unaware of the historic importance of the so-called pan-American rule in the development of the topic. Admittedly, the report did make passing reference to the rule, but nowhere did it mention that the structure of the present system had been taken from the pan-American rules that had been the very first to interpret the needs of the modern international community in regard to multilateral conventions. The main priority in that connection was to ensure the widest possible participation of States, failing which those conventions would lose much of their value and force.

24. Chapter I of the report gave a historical account of the Commission's work on reservations, which had culminated in the 1969, 1978 and 1986 Vienna Conventions, and called for little comment. Chapter II contained an inventory of the problems that had arisen in practice and would have to be considered in more detail in due course. Once the Special Rapporteur had taken a closer look at those problems, had offered guidance and had proposed solutions, the Commission could make its own contribution in the form of commentaries, criticism and support. The problems involved would, given their number, obviously have to be dealt with in groups. One possibility, already suggested, was that the Commission should divide its work into three parts, according to the Convention it was dealing with. Separating the problems by groups or sub-topics and considering the elements in each group that were common to the three Conventions might also yield good results.

25. The Special Rapporteur believed that the validity of reservations was the area in which the ambiguity of the provisions of the Vienna Conventions was the most apparent and had therefore dwelt at some length on the permissibility and opposability of reservations. For instance, he had raised the important question of the effect that a reservation which seemed to be "impermissible" would have on the expression of consent by the reserving State to be bound by the treaty and also the question whether it would produce effects independently of any objections that might be raised to it. In that connection, a systematic study of the practice of States and international organizations, as proposed in the report, would be of fundamental importance, for even if such a study might prove to be a disappointment because the practice was relatively scarce and would merely reveal the uncertainties, it was the only way of knowing how the system had functioned in practice.

26. Another aspect of the matter which was of fundamental importance concerned the regime of objections to reservations, in other words, their opposability. In the report, the Special Rapporteur summed up the problems arising out of the interpretation and application of the 1969 and 1986 Vienna Conventions, listing 15 questions, all of which were relevant. Some might go rather far, such as the first question on the object and purpose of the treaty, since, as had already been pointed out, it had to do with other parts of the law of treaties, including interpretation. Yet those questions must be asked and, where necessary, clarified, something which would be to the general benefit of the 1969 and 1986 Vienna Conventions. That would not run counter to the policy of preserving what had been achieved—with which he agreed—nor would it be incompatible with shedding light on what had been achieved.

27. Chapter II identified the most important gaps in the provisions relating to reservations in the Vienna Conventions, and, in particular, in those relating to interpretative declarations (for which a definition was required), the effects of reservations on the entry into force of a treaty, reservations to human rights treaties, and reservations to provisions codifying customary rules. Subsequent consideration of the problems identified by the Special Rapporteur would undoubtedly show that he had made the right choice.

28. According to the Special Rapporteur, chapter III dealt with the more immediate concerns. Unlike the Special Rapporteur, he did not believe that one of those concerns should be the form that the results of the Commission's work should take. The Commission normally dealt with that matter only at the end of its work on a topic, when it was best able to decide what recommendation to make to the General Assembly.

29. The articles the Commission would most probably propose would clear up the ambiguities and fill in the gaps, yet respect what had been achieved. Nevertheless, the Commission must not make a fetish of such respect; otherwise it would put its draft into a strait-jacket and divest it of its *raison d'être*. If the articles, which could take the form of an additional and explanatory protocol, did not meet with general approval, there would be two systems of reservations: one with and one without a protocol. Provided that the substance of the matter was not modified, however, and that the changes proposed were valid, the existence of the two systems should not give rise to any serious problem, although clarifications would be necessary in the long run.

30. The Special Rapporteur had proposed two other solutions: a guide to the practice of States and international organizations, and model clauses. The idea of a guide was interesting. However, the codification and progressive development of international law would have benefited if, rather than codifying conventions, the Commission had adopted a system of "restatements of the law", one which was followed in the United States and was well suited to the special features of international law and the formation of what was now known as "new custom", in other words, the custom which was founded on multilateral treaties and on certain declarations of the General Assembly and which occupied an important role in the progressive development of contemporary international law. Such restatements would not only take account of the existing law, but would also include a component *de lege ferenda*. That possibility would remain unexplored if a simple guide to practice were to be issued. There was also a risk of putting out a message that the proposed instrument would be a second-class instrument. Model clauses would be useful if they were additional to the articles, as mentioned in

the report, but not if they were to be the sole outcome of the Commission's endeavour.

31. As Special Rapporteur for the topic with the longest title in the history of the Commission (International liability for injurious consequences arising out of acts not prohibited by international law), he could not fail to agree that the title of the present topic should be changed to "Reservations to treaties".

32. Mr. FOMBA expressed his congratulations to the Special Rapporteur on the high quality of his preliminary report, and said the main question was to determine whether and to what extent the present general legal regime of reservations constituted a sufficiently clear and comprehensive body of legal rules, and to what extent it represented a valid compromise between two requirements that were difficult to reconcile: respect for the State's freedom to express consent, and the need to preserve the integrity of the treaty. Should the conception of those two requirements be absolute and rigid or relative and flexible? And was it possible to avoid divesting the treaty of its substance?

33. Depending on whether a *de lege lata* or a *de lege ferenda* approach were adopted, the practical consequences would not be the same in terms of the actual operation of a treaty that was vital for international relations. The Special Rapporteur, in an unerring diagnosis, had pinpointed the precise nature of the problem and had demonstrated the limits of positive international law. Those limits were set by the ambiguities and gaps in the 1969, 1978 and 1986 Vienna Conventions and they had been identified by the Special Rapporteur in a series of questions that was entirely adequate, quantitatively and qualitatively, for the purposes of the topic. As to the cure, the Special Rapporteur had taken care not to reply, at that stage, to the substance of those questions. He had, however, marked out the path to be followed and indicated the various areas that merited reflection. For his own part, he merely wished at that point to endorse much of the general philosophy underlying the report and to support the Special Rapporteur's preliminary conclusions. He had also listened to Mr. Mahiou's comments with great interest.

34. Mr. ELARABY said he paid tribute to the Special Rapporteur for his well-articulated report, which reflected the calibre of his scholarship and his masterly grasp of the subject-matter. The report provided the Commission with a sound basis for revisiting a topic that had rightly been described as one of baffling complexity.

35. The Vienna Conventions of 1969, 1978 and 1986, prepared by the Commission, had not clarified the ambiguities inherent in the question of reservations, and the many problems and unanswered questions remained. Sometimes, the solutions afforded by practice and jurisprudence had merely complicated the issue or, at best, papered it over. That was not surprising, since reservations to treaties now formed an integral part of the contemporary international legal order in a world that was witnessing an unprecedented trend towards the codification and progressive development of the rules of international law affecting many areas of life throughout the world—the oceans, outer space, the global environment itself. The general framework for the regime of reservations was introduced in article 19, subparagraphs (*a*) and (*b*), of the 1969 Vienna Convention which, in subparagraph (*c*), also provided a safety net by laying down the concept of incompatibility with the object and purpose of the treaty. To a large extent, and in so far as the realities of the 1960s had permitted, the 1969 Vienna Convention regime had managed to reconcile two fundamental requirements: the importance of attracting the widest possible participation in treaties, and the need to recognize that in certain cases—whether due to religion, culture, deep-seated traditions, or even political expediency—a State would be willing to be bound by all the obligations under a treaty if its position on a specific issue were reflected. In a sense, reservations were the price paid for broader participation.

36. Modern political realities confirmed that States would not discontinue that practice. Indeed, the Special Rapporteur had pinpointed that fact with the statement that the history of the provisions of the 1969 Vienna Convention showed a definite trend towards an increasingly stronger assertion of the right of States to formulate reservations. That explained the practical importance of the topic and the need to re-examine certain issues with a view to attaining a more consistent, a clearer and, it was to be hoped, a more stable reservations regime.

37. In the final analysis, it might not be possible to remove all the ambiguities and fill in all the gaps referred to by the Special Rapporteur. However, one area for further elaboration was the determination of the criterion of the compatibility of a reservation with the object and purpose of the treaty. The 1969 Vienna Convention was a product of the 1960s and of the era preceding it. The intervening years had brought significant changes which should have a direct bearing on the international codification process. In disarmament, for example, the Treaty on the Non-Proliferation of Nuclear Weapons concluded in 1968 and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction did not provide for any verification or fact-finding mechanism, whereas the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction did include an elaborate verification system. States were perhaps giving certain indications pointing to the possible emergence of a trend towards exploring third-party modalities in multilateral treaties, a trend which, although it might not yet represent a conscious conceptual recognition of the need to promote the progressive development of international law, stemmed from a de facto pragmatic approach designed to ensure a more satisfactory functioning of treaties. Such limited indications should be seized, further refined and elaborated to help provide clarifications of the many ambiguities referred to in the report and in particular, the ambiguity mentioned in the report, where the Special Rapporteur stated that the 1969 Vienna Convention "doctrinally" paid tribute to the criterion of the reservation's compatibility with the object and purpose of the treaty but failed to draw any clear-cut conclusions therefrom. In considering the question of the compatibility criterion, the Commission should be guided by recent State practice in that area.

38. Other aspects of the legal regime for reservations which needed to be addressed included the "permissibility theory" discussed at some length in the report, a theory which raised a host of legal issues regarding the obligations of reserving States as well as those of objecting States and, more generally, of third parties which had a clear interest in the outcome. Mr. Bowett had made several valid points in that connection.

39. The regime governing acceptance of and objections to reservations was set forth in article 20, paragraph 4, of the 1969 Vienna Convention, which provided for multiple legal regimes between parties to the same treaty. On the other hand, the Vienna Conventions were, as pointed out in the report, silent on the question of the distinction between reservations and interpretative declarations. When, by whom, and by what majority of contracting States was a declaration to be considered a genuine reservation? As noted in the report, it was extremely difficult to make a distinction between "qualified interpretative declarations" and "mere interpretative declarations". The question of declarations and their legal effects should be further examined, especially since, as rightly pointed out, States seemed to resort to them with increasing frequency.

40. As to the scope and form of the work on the topic, it was true that the Vienna Conventions had not frozen the law, yet it would be a mistake at the present early stage to go back to the drawing board so as to remove the ambiguities at one go. Instead, he favoured the more modest and realistic approach proposed by the Special Rapporteur. It would be remembered that in the late 1960s and early 1970s the international community had been confronted with similar choices in two areas, that of the law of the sea, where the four international conventions covering the territorial sea, the high seas, the continental shelf and fishing and conservation of living resources had eventually been replaced by the United Nations Convention on the Law of the Sea, and that of the Geneva Conventions of 1949, where it had ultimately been decided on grounds of realism to retain the existing instruments while updating them through additional protocols. He was inclined to think that the circumstances facing the Commission were somewhat similar to those that ICRC had faced in the latter of those two instances. For the moment, the Committee would be well advised to confine itself to a similarly realistic approach.

41. It would not be appropriate now to envisage the preparation of a set of draft articles, either in the form of a draft protocol or of a consolidated convention, but he was attracted to the idea of a guide to the practice of States and international organizations on reservations. He attached considerable importance to the note of caution sounded in the report, where the Commission was advised to proceed "prudently and with due regard for the flexibility that facilitates the broadest possible participation in multilateral conventions while safeguarding their basic objectives". That balance should always be carefully maintained in any guiding principles that might be elaborated. Lastly, he was persuaded by the arguments for changing the title of the topic to "Reservations to treaties".

42. The CHAIRMAN, speaking as a member of the Commission, said he had no difficulty in accepting the Special Rapporteur's suggestion for a shorter title. Furthermore, the Commission should not concern itself at the present stage with the question of reservations to bilateral treaties, but should focus exclusively on those to multilateral treaties. He agreed with previous speakers that the objective of the Commission's study of the topic should be to produce guidelines and model clauses.

43. While the study should show a healthy awareness of the doctrinal setting in which the subject of reservations was examined, any attempt to reopen the various lines of argument should be eschewed as it could only lead to further confusion or controversy. A certain constructive ambiguity was demanded by the political process that inevitably enveloped the legal process, and the framers of the Vienna Conventions had in all likelihood been aware of that fact. An inquiry into the reasons and the contextual factors that had led to such constructive ambiguity would have been most interesting and instructive, and the Special Rapporteur might give the matter some consideration in a future report.

44. Some of the factors involved were not difficult to identify. At the fundamental level, they included the diversity of historical, political, economic and cultural backgrounds—a point also made by Mr. Elaraby—as well as differences in the judicial and legal systems adopted by States and the differing interests involved, which the treaties sought to reconcile. A number of questions also arose at a secondary level of the process of negotiating a treaty, such as whether the proposal for a treaty made by a State or States was timely or necessary or whether it had been properly and fully prepared; in what forums, and through what process, should the proposal be allowed to mature; what was the level of participation of all the States targeted as potential parties; how thoroughly was a consensus on the basic objectives and purpose of the treaty allowed to develop; what methods were adopted in concluding the treaty; and, lastly, at what stage were those methods adopted? Those and other factors were central and even crucial to assessing why and in what form reservations or declarations to a treaty were formulated by States parties.

45. A major policy which had always guided the law-making process at the international level was that, in view of the character of international society, legal principles and obligations had generally to be based on a consensual approach, for the sake of wide and voluntary adherence. That alone was the guarantee for the development of universal principles of international law. Accordingly, in order to encourage such adherence to treaty obligations, it was necessary to respect—and even, perhaps, to systematize—a certain diversity in unity, as opposed to unity in diversity. Hence it was not difficult to understand why the regime of reservations to treaties practised so far had followed the principle that, as long as the basic object and purpose of the treaty were served, reservations were permissible. It was, of course, expected that a State opposed to the object and purpose of the treaty would not consider becoming a party at all. But once that was not an issue, the manner and method, and sometimes the time-frame, in which a State party wished to implement the treaty obligations were not of central importance to the unity of the treaty's purpose or the integrity of the obligations it incorporated.

46. Such wishes, then, were expressed in the form of reservations, declarations or statements of understanding. Any ambiguities perceived from either a theoretical or a practical perspective could be resolved by the time-honoured method whereby the depositary circulated the reservation, declaration or statement of understanding, without attaching any value judgement, to the other States parties. It was then for the States parties to determine the legal value of the reservation, declaration or statement and hence to determine the legal relationship that could exist as between the reserving State and themselves.

47. There was, no doubt, a certain fluidity in such a position, but it was a fluidity that could be tolerated and that was better suited to the promotion of widely subscribed and implemented treaty obligations. Any other system imposing a cut-and-dried formula would only break, because of its brittleness, under the weight of the variety of different interests and stages of economic development of States.

48. It was also important that the Commission should not, in its study, isolate various categories of multilateral treaties in an attempt to establish different standards within a universal regime of reservations to treaties. As noted by Mr. de Saram, that so-called discriminatory approach had been considered earlier and had not been accepted. Considerations that had prevailed in the 1960s and 1970s when only 120 to 130 sovereign States had existed were all the more relevant and important now that there were nearly 200 such States and the gaps between them in terms of economic, political and other factors had grown wider. In the circumstances, the Commission's task was to guide and help States in expressing their intent more methodically and in a legally consistent manner. Its objective was not to suppress reservations as a method but, where they were otherwise permitted by a treaty, to allow them to be made in a certain format within a certain degree of acceptable flexibility.

49. As for the difference between interpretative statements and reservations, the key would seem to lie in what was permitted or not permitted under a State's domestic law and to what extent that State was prepared or able to change its domestic law in the prevailing political, economic, social or religious conditions. A declaration, in his view, was more a matter of the time-frame needed for the full acceptance of the treaty by the State in question. It was not a reservation and could not be prohibited on the same grounds as a reservation.

50. In conclusion, he wished to congratulate the Special Rapporteur on his first report, which had commendably guided the Commission in its deliberations, and said that he looked forward to the future reports on the topic.

Organization of the work of the session (*continued*)

[Agenda item 2]

51. The CHAIRMAN, recalling that the Commission had not yet referred to the Drafting Committee the issue of wilful damage to the environment, which the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind had proposed for inclusion in the list of crimes against the peace and security of mankind, said that, after consultations, he wished to recommend the establishment of a small working group to examine the possibility of covering that issue in the draft Code in an appropriate way. There would be no time for the working group to hold any meetings at the present session, but it could hold four meetings over a period of two weeks at the beginning of the next session. If the working group succeeded in producing an acceptable formula, the formula could then be briefly considered in plenary and referred to the Drafting Committee. Alternatively, given the greater priority assigned to completing the work on the draft Code within the quinquennium due to expire in 1996, the working group might decide to do no more than think about the problem. The group would be chaired by Mr. Tomuschat and would, of course, include Mr. Thiam *ex officio* in his capacity as Special Rapporteur. The decision as to the remaining membership of the group would be left to Mr. Tomuschat and Mr. Thiam.

52. Mr. THIAM (Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind) said that he had no objection to the suggestion, but feared that the Drafting Committee would have no time at the next session to consider the results of the proposed working group's deliberations. Would it not be possible, in the circumstances, to omit the Drafting Committee stage?

53. The CHAIRMAN said that if the working group felt, after initial deliberation, that it could come up with a satisfactory text, he saw no reason why the text should not be considered quickly in plenary and then transmitted to the Drafting Committee. If that was not possible, the issue should be allowed to mature within the working group. The precise mechanics could be considered at the next session. If he heard no objection, he would take it that the Commission agreed to the establishment of a working group on the issue of wilful damage to the environment.

It was so agreed.

The meeting rose at 1 p.m.

2405th MEETING

Tuesday, 27 June 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Ro-