

Document:-
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Summary record of the 2631st meeting

Topic:
Law and practice relating to reservations to treaties

Extract from the Yearbook of the International Law Commission:-
2000, vol. I

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64. Referring to the substance of Part I of the report, particularly alternatives to reservations and interpretative declarations, he said that, to his knowledge, no study on alternatives to reservations had ever been carried out systematically, except for a rather brief study submitted by Virally at a seminar held at the Catholic University of Louvain, Belgium, in 1978, on escape clauses in international human rights instruments.²¹ That was the idea on which the part of his report under consideration was based: reservations were one means of limiting the binding effect of a treaty on the State or international organization which formulated them. They were, however, not the only means and it was quite interesting and instructive to compare reservations with other means of achieving the same objectives, if only, moreover, in order to tell them apart and see whether there was a lesson to be learned from those other means as far as the legal regime of reservations was concerned. It was in that spirit that he was proposing nine new draft guidelines for the Commission's consideration.

65. He had, in paragraphs 71 to 103, first given a general idea of the different procedures for modifying or interpreting treaty obligations and had then dealt with each one more specifically. He recognized that that method was not very rigorous, but it had the advantage of highlighting an idea which seemed unimportant, but was quite basic: reservations were not the alpha and omega of the flexibility of treaty obligations. There were many other procedures which had the same or comparable effects as reservations and which were probably better and easier to use, at least in some cases. That idea was reflected quite straightforwardly in draft guideline 1.7.1, which was reproduced in paragraph 94 of the report and read:

1.7.1 Alternatives to reservations

In order to modify the effects of the provisions of a treaty in their application to the contracting parties, States and international organizations may have recourse to procedures other than reservations.

He was entirely aware that such a provision would be unusual and probably quite open to criticism if it appeared in a treaty, but the point was that the proposed Guide to Practice was not and did not claim to be a treaty. It was intended to provide States with general guidelines on which they could base their conduct. From that point of view, a guideline of that kind would be useful because it would have the advantage of drawing the attention of diplomats and leaders to the fact that there were other procedures which might have the same virtues as reservations without necessarily having the same drawbacks in a particular case. As it stood, the draft guideline was perhaps a bit elliptical, if not esoteric, and that was why he proposed draft guideline 1.7.2 by way of illustration, in paragraph 95. Of course, it might be considered that such a provision did not belong in a treaty, if only because it was quite likely that the proposed list was not and could not in any case be complete. It was naturally always possible for examples illustrating a general proposition to be included in the commentary, but he was rarely convinced by that procedure, the easy way out, and he was even less so in the

current case, since the Guide to Practice would then become much less "practically readable". Draft guideline 1.7.2 therefore non-exhaustively listed various procedures which permitted modification of the effects of the provisions of a treaty and which were grouped under two headings, one on procedures provided for in the treaty itself and the other on procedures not provided for in treaties. As indicated in paragraphs 86 to 92 of the report, that classification of the alternatives to reservations seemed to be the most logical and operational. The point was that, for practical purposes, negotiators who found it impossible to agree on a reservation had to be reminded that there might be escape clauses that could, for one reason or another, be easier to use, while, at the same time, producing similar results comparable to those of reservations. Those institutions, which existed side by side with reservations, might be combined under the single heading of "options", bearing in mind, however, that they were extremely varied and often operated in very different ways and that was why they were useful.

66. He proposed that the Commission's discussion should focus on general comments and on draft guidelines 1.7.1 and 1.7.2, in the hope that they would be referred to the Drafting Committee. Once the fate of those draft guidelines had been decided, he would introduce draft guidelines 1.7.3, 1.7.4 and 1.1.8 together, draft guidelines 1.4.6 to 1.4.8 and then draft guideline 1.7.5.

The meeting rose at 1.05 p.m.

2631st MEETING

Friday, 2 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Reservations to treaties¹ (continued) (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4², A/CN.4/L.599)

[Agenda item 5]

²¹ M. Virally, "Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme* (Brussels, Bruylant, 1982), p. 5.

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook* . . . 1999, vol. II (Part Two), para. 470.

² Reproduced in *Yearbook* . . . 2000, vol. II (Part One).

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KATEKA said that the introduction to the fifth report (A/CN.4/508 and Add.1–4) contained a useful summary of the Commission's earlier work on the topic. The information in paragraph 5 that only 33 Member States and 24 international organizations had answered the Commission's questionnaires on reservations to treaties was a matter for concern. The fact that no replies had been received to date from any African country was particularly disturbing. Such failure to respond was, in his view, due to lack of capacity rather than lack of interest. Urgent action was needed to strengthen the capacity of the legal departments of ministries of foreign affairs in developing countries. In the case of other topics, too, replies to questionnaires tended to be received from only one geographical region, which was not a healthy state of affairs.

2. As to the Special Rapporteur's view in paragraph 17, that it would be pointless at the current stage to reopen discussion on the preliminary conclusions adopted by the Commission at its forty-ninth session,³ some treaty bodies had apparently felt emboldened to request the Commission to adjust its preliminary conclusions in line with the approach reflected in general comment No. 24 of the Human Rights Committee. Endorsing the view reported in paragraph 16 that human rights treaty bodies should remain strictly within the framework of their mandate, he said that attempts were being made by treaty bodies to make use of the Special Rapporteur's reports in their efforts to persuade State parties to withdraw or modify their reservations, as evidenced in paragraph 15. It was an unusual procedure, to say the least.

3. With reference to the Special Rapporteur's views on the numbering system adopted for the provisions of the Guide to Practice, in paragraph 28—a system which some members, including himself, had criticized—he failed to understand the conclusion that, now the adjustment period was over, the numbering method no longer posed any particular problem. Mere passage of time did not make a faulty situation acceptable, and silence on the part of Sixth Committee members did not signify approval. He appealed to the Special Rapporteur to simplify the numbering format, adding that he found it particularly difficult to see the purpose of the “table of concordances” appearing in the annex to the introduction to the fifth report.

4. In paragraph 30, the Special Rapporteur recalled that the sole purpose of chapter I of the Guide to Practice was to define what was meant by the term “reservations”, by distinguishing them from other unilateral declarations. In the next paragraph, while admitting to initial hesitations, he expressed the view that in subsequent chapters of the Guide to Practice it would be appropriate to define the legal regime of reservations themselves as well as that of interpretative declarations. Surely, in order to avoid expanding the scope of the topic endlessly, would it not be better to finalize the question of definitions before elaborating on future chapters? In that connection, he endorsed the views of the United Kingdom, referred to in a footnote to paragraph 37, and also drew attention to the following footnote, which was unnecessary and in which the Special

Rapporteur himself described the topic as sprawling and complex.

5. As for paragraphs 57 to 65, on the general presentation of the fifth report and the chapter on alternatives to reservations and interpretative declarations, as he understood it, the object of reservations and other similar unilateral statements was to help a treaty to achieve universality by allowing some flexibility to States and international organizations having special concerns about certain provisions of the treaty. For that purpose, reservations and interpretative declarations would seem to be enough to safeguard the essential object of a treaty while allowing the greatest possible number of States to become parties thereto. He saw no need to consider the alternative procedures cited by the Special Rapporteur, which, far from adding clarity, merely confused the issue.

6. In paragraph 93 of the report the Special Rapporteur confessed to having hesitated for a long time before proposing the inclusion in the Guide to Practice of guidelines on alternatives to reservations. The decision eventually taken to include such guidelines was to be deprecated. Notwithstanding the arguments advanced in paragraph 95, it would have been more appropriate to mention the alternatives to reservations in the commentary. Furthermore, while it was stated in the same paragraph that the Guide to Practice was not intended to become an international treaty, paragraph 36 contained the observation that the Commission had never rejected the option of a draft convention. The Commission would be well advised to deal with the question of the final form of the Guide to Practice when it had completed the elaboration of all the guidelines.

7. While guideline 1.7.1 represented an unnecessary widening of the scope of the topic guideline 1.7.2 seemed misplaced, as some of its provisions were already covered by guidelines 1.4.1 and 1.4.2. Suspension, amendments and supplementary agreements were adequately encompassed in the Vienna regime. Lastly, he emphasized the need to produce a guide that was practical and user-friendly and reiterated the view that the discussion of possible alternatives to reservations and interpretative declarations should be consigned to the commentary.

8. Mr. ROSENSTOCK congratulated the Special Rapporteur on his interesting and impressive fifth report. While sharing some of Mr. Kateka's views on the numbering system, he had found the summary, the discussion and the proposals fascinating reading. It had to be recognized, however, that the project as a whole not only seemed no longer capable of completion within one quinquennium but was actually beginning to appear endless. There again, he found himself in sympathy with Mr. Kateka's views. The Commission would not win friends by promising one thing and doing another.

9. As to the proposed inclusion of guidelines on alternatives to reservations and interpretative declarations, aside from the question of whether such a step formed part of the Commission's mandate and considerations of time, there was a risk that the alternative procedures identified would constitute something like advice on how to make a treaty less effective. Nevertheless, the schemes identified in the report, like reservations themselves, did make it

³ See 2630th meeting, footnote 17.

possible to obtain a wider area of agreement among parties with varying interests. For that reason, as well as for the reasons set out in paragraph 93 of the report, he concurred with the Special Rapporteur's decision to elaborate such a guide as part of the Commission's exercise.

10. It was questionable whether some of the items included in guideline 1.7.3 were strictly necessary. In the absence of a paragraph or guideline making it explicit that they were not reservations, were final clauses to be regarded as reservations? Guideline 1.7.4 raised similar concerns, and it was gratifying to note that the Special Rapporteur would be prepared to omit it. The concessions indicated in paragraphs 168 and 178 of the report were also to be welcomed.

11. The only point in the report which he had found unclear lay in the discussion of exclusionary clauses and reservations in paragraphs 160 et seq. Why was there no mention of the fact that the capacity of a non-reserving State to decide not to be a treaty partner of a reserving State did not exist in the case of an exclusionary clause? That question aside, he was strongly in favour of referring the consolidated text to the Drafting Committee without delay.

12. As for the question of the Commission's provisional conclusions with regard to general comment No. 24 of the Human Rights Committee, he was inclined to sympathize with the Special Rapporteur's desire to avoid a fight. Unfortunately, such a responsible approach, based on the interest of all concerned rather than of a special interest group, might not be shared by those who would seem prepared to see the law of treaties disintegrate if that served their ends. By refusing to accord weight or consequence to expressions of will on the part of States, some seemed all too ready to imperil the consent on which the entire regime of treaties necessarily rested. At some point in the future, restraint in that context would come to constitute abdication of responsibility. There again, he had much sympathy with Mr. Kateka's views. Might it be possible, as an interim measure of protection and in order to instil habits of cooperation, to explore the possibility of embarking on a joint campaign with the proponents of general comment No. 24 to encourage States to assume their responsibilities by objecting to unacceptable reservations? The goal would be to eliminate or reduce the vacuum which its proponents abhorred and which they had tried to usurp the responsibility for combating. While such an approach would not resolve the problem, it might circumscribe it and lead to better cooperation in general.

13. Mr. LUKASHUK said that, on completing with genuine regret his reading of the Special Rapporteur's masterly fifth report, he could not help asking himself whether a direct connection existed between the topic of reservations to treaties and the more general issue of treaty drafting. The conclusion he had reached was that, if such a connection did exist, it was far from direct. The definitions proposed in the draft guidelines could be classified in two groups, the first consisting of guidelines 1.1.8, 1.4.6, 1.4.7 and 1.4.8 and the second of guidelines 1.7.2 to 1.7.5. Those in the first group could be useful for a discussion in the context of treaty drafting but had no direct relevance to the topic of reservations to treaties. Those in the second group were concerned with alternatives to reservations and interpretative declarations. Taking into account the Special

Rapporteur's own admission that the number of such alternative approaches was practically unlimited and in the light of arguments adduced by Mr. Kateka and Mr. Rosenstock, he was inclined to believe that no satisfactory result could be achieved by the inclusion of the definitions in question and appealed to the Rapporteur to keep his promise that the next part of his work would be strictly confined to reservations.

14. Mr. KAMTO expressed his appreciation for the summary of the Commission's earlier work on the topic provided in the introduction to the report, which was of particular value to relatively new members of the Commission. Referring to the section on the outcome of the second report,⁴ he asked whether, in the case of a topic already under consideration in the Commission which subsequently came up in the course of the work of a human rights treaty body, it would not be appropriate for that other body to defer its work on the subject pending the completion of the Commission's draft. He agreed with other members that the link between the subject of alternatives to reservations and interpretative declarations and the topic under consideration was at best indirect. While taking into account the considerations formulated in paragraphs 66 and 68 of the report, he doubted whether it was in the Commission's interest to adopt the approach advocated by the Special Rapporteur. In the first place, was it really the role or the duty of the Commission to suggest to States a multitude of techniques designed to weaken a treaty? In his introductory comments, the Special Rapporteur had stated that diplomats and statesmen regarded non-binding obligations as the ideal. Be that as it may, he doubted whether the Commission was called upon to help in attaining such an ideal. The task of discovering ways to escape from the constraints of a treaty could surely be left to the legal departments of ministries of foreign affairs. The treaty regime was already rendered heterogeneous by the existence of reservations. The introduction of alternative methods or escape clauses could only weaken it further.

15. The suggestion in paragraph 73 of the report that treaties were "voluntary traps" was an intriguing one, but did not accurately reflect the law of treaties. It implied that States were taken by surprise, yet they were entirely free to make their wishes known throughout the process of treaty negotiation and during the formulation of reservations. It was neither reservations nor alternatives thereto that could keep States out of "traps" but, rather, the right of all States parties to a treaty to suspend or withdraw from the treaty. In the *S.S. "Wimbledon"* case, PCIJ had referred to the right of entering into an international engagement as being an attribute of State sovereignty. Accordingly, when a State formulated a reservation and another State accepted it, the State expressed its will and did not fall into a trap.

16. Lastly, he would suggest that draft guideline 1.7.1 be retained and no more should be said about alternatives to reservations, or indeed that the material in both draft guidelines 1.7.1 and 1.7.2 be deleted altogether if it was considered that such alternatives did not come within the ambit of the draft.

⁴ Ibid., footnote 20.

17. Mr. SIMMA said the fifth report made extremely interesting reading and contained the element of intellectual challenge and suspense that the Commission had come to expect from the Special Rapporteur. Unlike other members, he thought the Special Rapporteur had been right to take up the alternatives to reservations. Those alternatives actually existed in State practice, and the question of whether the Commission was well advised to suggest to States ways that they could weaken treaty obligations was meaningless. Some of the alternatives were in fact much less destructive than reservations.

18. As for the working paper on reservations to human rights treaties submitted by Ms. Françoise Hampson to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which had become the Sub-Commission on the Promotion and Protection of Human Rights,⁵ it reflected what Mr. Brownlie, in another context, had called a “trade union attitude”, namely interest groups trying to preserve their own turf against incursions by other groups. If the Sub-Commission had been interested in the issue of reservations, it could simply have encouraged the Commission to continue its work in that area. Although Ms. Hampson had expressed great willingness to work with the Special Rapporteur, it was obvious that the Sub-Commission was trying to steer its own course and develop a human-rights oriented alternative to the work of the Commission. That went against any imperatives of cost-effectiveness and rationality, of course, but that was how things worked within the United Nations.

19. The approach taken by the Special Rapporteur in his fifth report was another example of the increased focus throughout the international community on the issue of reservations to human rights treaties. There was more and more concerted action on the part of States, perhaps partly in response to the principle adopted by the Commission that the responsibility for seeing whether a reserving State had gone too far when making a reservation should not be left solely to the human rights treaty bodies but must be shared by the reserving State itself and by the other States parties. In paragraph 55 of his report, the Special Rapporteur referred to efforts being coordinated by the Council of Europe, and there were other procedures in place within the European Union. The purpose of all of those methods was to guarantee greater homogeneity and enable States to overcome their hesitations about speaking out against other States. A more comprehensive description of the methods in use within European institutions could be found in the contribution by Cede to the essays in honour of Konrad Ginther.⁶

20. In addition, the so-called severability doctrine according to which, if a reservation was inadmissible, the reserving State could still be regarded as being bound by the entirety of a treaty without the benefit of the reservation, was now being applied not only by the treaty bodies of the United Nations and the European Union, but also by

States. It would be interesting to know whether there had been any reactions or protests by States to the application of the severability doctrine. In some cases, reservations deemed to be inadmissible had been withdrawn or modified, largely, he believed, in response to reactions by States. He had in mind a reservation made by the Syrian Arab Republic as well as one made by the Maldives upon accession to the Convention on the Elimination of All Forms of Discrimination against Women.⁷ Could one say that a change in the law was being observed? Was the severability doctrine now being applied by States as well as by treaty bodies? If so, the Commission might need to react to that development. He would like to hear the Special Rapporteur's opinion on that point. In all likelihood, the Special Rapporteur would take the view, as did many in the Commission, that the severability doctrine contradicted the paramount principle in treaty-making—that of consent. Perhaps severability could be reconciled with consent, however, if reserving States became aware of the risk that other States might object to their reservations and react in a manner that paralleled the application of the severability doctrine.

21. In a footnote to paragraph 30, the Special Rapporteur described an article written by the Austrian international lawyer Karl Zemanek as “insulting” to him.⁸ Zemanek's view that across-the-board reservations were not to be regarded as reservations at all certainly differed from that of the Special Rapporteur. However, it should be seen, not as “insulting”, but as an expression of intellectual disagreement. He himself sided with the Special Rapporteur, as Zemanek's approach would leave the most dangerous kind of reservations untouched by any regime at all, compared with the relatively sophisticated regime that applied to reservations.

22. The report suggested that alternative approaches to reservations should be discussed separately from reservations. It was difficult to dissociate the two. A number of States had made statements under article 28 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which, according to draft guideline 1.1.8, were reservations, as they constituted exclusionary clauses. That Convention was subject to the general regime of the 1969 Vienna Convention, article 19 of which said that, if a treaty provided for only specific reservations to be made, other reservations were inadmissible. Accordingly, a declaration made under article 28 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, i.e. a declaration of non-acceptance of one of the procedures provided for in the Convention, was the only reservation that could be made in respect of the Convention. In fact, however, quite a number of the reservations made had nothing to do with such procedures. It might be worth reconsidering whether clauses in treaties that allowed States to opt out of certain procedures should in fact be deemed reservations.

⁵ Ibid., footnote 19.

⁶ F. Cede, “European responses to questionable reservations”, *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of his 65th birthday*, W. Benedek, H. Isak and R. Kicker, eds. (Frankfurt am Main, Peter Lang, 1999), p. 21.

⁷ *Multilateral Treaties Deposited with the Secretary-General* (United Nations publication (Sales No. E.00.V.2), document ST/LEG/SER.E/18 (Vol. I)), p. 192.

⁸ K. Zemanek, “Alain Pellet's definition of a reservation”, *Austrian Review of International and European Law*, vol. 3, No. 2 (1998), pp. 295–299.

23. Mr. HAFNER said that, as he understood Mr. Simma's solution to the problem of inadmissible reservations, if a State made a reservation that other States considered inadmissible, there were two choices: either the reserving State amended its reservation, or it withdrew from the treaty. But what if the treaty was an "eternal" one and there was no way the State could withdraw from it because the treaty said nothing about termination or withdrawal?

24. Mr. PAMBOU-TCHIVOUNDA said Mr. Simma's comments shed a great deal of light on the alternatives to reservations identified by the Special Rapporteur and led him to ask what was to be their fate. Were they to be incorporated in a new, supplementary regime for all such techniques, or were they simply being put forward for information purposes? Reservations were to some extent already covered and organized in the 1969 and 1986 Vienna Conventions. What of alternatives?

25. When the alternative procedures were restrictive or escape clauses, how could they be considered reservations, since by definition, they had given rise to negotiation, to the convergence or divergence of the will of States? If they gave rise to adverse reactions, which were the reservations—the reactions provoked by the clauses, or the clauses themselves?

26. Mr. SIMMA, replying to the question raised by Mr. Hafner, said he had not been speaking of withdrawal in a technical sense but had merely been pointing to the fact that the reserving State could be regarded as conditionally adhering to a treaty, and if responses to a reservation entered at the latest at the time of accession or ratification involved the severability doctrine, the State would in effect not have become a party to the treaty.

27. Mr. PELLET (Special Rapporteur) said that he was now preparing a further chapter of his report on the formulation, not of reservations, but of reactions to reservations and interpretative declarations. The provisional title was the "Reservational dialogue". He was not sure that the approaches taken by some European institutions and the Scandinavian countries could be construed as creating new legal rules, even if they challenged to some extent the principle of non-divisibility of treaties. He was bearing the problem in mind. It would prove necessary to consider whether to include draft guidelines on what remained, for the time being, a practice limited almost exclusively to European countries.

28. Mr. BROWNLIE congratulated the Special Rapporteur on the very high quality of the research that had gone into his report, which constituted a valuable addition to the literature, something that could not be said of all reports by any means. He agreed generally with the way the material was presented and the solutions offered. He did, however, sympathize with the warnings voiced by Mr. Kateka and Mr. Rosenstock about the need to keep in mind the actual scope of the topic and the Commission's relations with the General Assembly.

29. As to draft guidelines 1.7.1 and 1.7.2, he sympathized with the Special Rapporteur's methodology of specifying which practices did not constitute reservations, but was uneasy about the question of alternative strategies,

which departed from the Commission's mandate and should really be addressed in an introduction.

30. With reference to the Commission's difficult relations with the Human Rights Committee and other human rights monitoring bodies, there was a great need for caution. Mr. Simma had mentioned his analogy with demarcation disputes between trade unions, and of course there was also the general question of competition between the Commission and the human rights bodies. The human rights treaty monitoring bodies had not been set up to create law, although they might do so incidentally in the course of their duties.

31. A mild version of the same problem was the extent to which the Special Rapporteur took into account, *de jure*, so to speak, of the views of the Sub-Commission on the Promotion and Protection of Human Rights and other bodies. The Special Rapporteur could not ignore those views, nor was it his policy to do so. The real issue was one of classification: what was the nature of the problem when a monitoring body made a determination on that subject-matter? Were monitoring bodies exceeding their mandate? It was important not to treat the question as though it were an intra-United Nations constitutional issue. The Commission must look at the technicalities of the topic.

32. In considering the practices of the monitoring bodies, the Commission must bear in mind the political and diplomatic milieu in which those bodies functioned. From time to time, it must examine the policy issues that accompanied the functioning of bodies applying legal principles. For example, following the Human Rights Committee's decision on the *Rawle Kennedy v. Trinidad and Tobago* case,⁹ would States in future be much more conservative in accepting the competence of monitoring bodies? The attitude of the Council of Europe's Committee of Ministers in the context of implementing the European Convention on Human Rights was yet another matter. How those things worked in the general political and diplomatic context was a sensitive question. If the Commission was going to take a position on the attitude of the Human Rights Committee, it should not be merely a technical view: there were other relevant political and diplomatic questions to be taken into account.

33. Mr. LUKASHUK said that Mr. Simma had departed from the topic at hand. The Commission had decided to postpone consideration of reservations to international human rights instruments.

34. Mr. SIMMA reminded Mr. Lukashuk that it was entirely legitimate to discuss the substance of the introduction to the fifth report which was concerned with that very issue, as a number of members had already pointed out.

35. Mr. PELLET (Special Rapporteur) said that he had sought not only the reactions of the members of the Commission but also guidance on how to respond to the working paper of Ms. Hampson,¹⁰ whom he could approach if

⁹ See 2630th meeting, footnote 14.

¹⁰ *Ibid.*, footnote 19.

the Commission gave him the mandate to do so. He wondered why she had not tried to contact the Commission.

36. The CHAIRMAN, speaking as a member of the Commission, noted that, in paragraph 12 of the fifth report, the Special Rapporteur discussed the decision of the Human Rights Committee of 2 November 1999 in the *Rawle Kennedy v. Trinidad and Tobago* case declaring that a complaint from a Trinidad and Tobago national who had been sentenced to death had been receivable on the basis of general comment No. 24 despite the reservation excluding the admissibility of such communications entered by the Government of Trinidad and Tobago to the Optional Protocol to the International Covenant on Civil and Political Rights. He agreed with the Special Rapporteur that the Commission should not as yet review its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. However, it would be useful for the Special Rapporteur to engage in close dialogue with the human rights bodies and with Ms. Hampson in particular.

37. On 26 May 1998, Trinidad and Tobago had denounced the Optional Protocol, re-acceding to it on the same date with the reservation explained in paragraph 12.¹¹ Guyana had followed suit on 5 January 1999.¹² Those actions were tantamount to the formulation of reservations after a State had accepted the binding effect of the treaty as a whole and were thus a breach of article 19 of the 1969 Vienna Convention. Technically speaking, however, those two Governments had not violated any rules of international law. The Commission might have to discuss that undesirable practice.

38. On the other hand, he had serious doubts about the decision of the Human Rights Committee. It ignored a basic principle of international law: the requirement of consent by the sovereign State to be bound by the treaty. The Committee's decision had backfired. Trinidad and Tobago had again denounced the Optional Protocol, effective 27 June 2000. The Committee would no longer be able to receive any complaint from Trinidad and Tobago nationals.

39. Regarding draft guidelines 1.7.1 and 1.7.2, he agreed that States might have recourse to procedures other than reservations in order to modify the legal effects of the provisions of a treaty. He therefore did not oppose the list of such procedures in draft guideline 1.7.2, but he was not certain whether they should be conceptualized as alternatives to reservations. A reservation regime must strike a balance between maintaining the unity of the treaty and securing universal participation in the treaty.

40. In guideline 1.7.2, the first three procedures followed from the provisions of the treaty. For example, article 309 of the United Nations Convention on the Law of the Sea stipulated that no reservations or exceptions could be made to the Convention unless expressly permitted by other articles of the Convention. Pursuant to article 92, paragraph 1, ships must sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in that Convention, must be

subject to its exclusive jurisdiction on the high seas. That confirmed the basic principle that only flag States had jurisdiction for ships on the high seas. But paragraph 1 also allowed for an exception. For instance, to combat drug trafficking, China, Japan and the Philippines could agree to exercise joint jurisdiction over each other's ships on the high seas. Such an arrangement was an integral part of the treaty. Perhaps the Drafting Committee could clarify whether that was a restrictive clause or an alternative to a reservation.

41. Mr. ELARABY said that, as everyone agreed, the Vienna regime did not include interpretative declarations. If it addressed that subject, the Commission must be very careful not to tilt the balance one way or the other, because that would create obstacles to the universality of treaties. It was also important to avoid making issues too complicated and detailed, and in that context he referred in passing to the numbering system.

42. As to draft guidelines 1.7.1 and 1.7.2, as a practitioner he thought that such proposals were most useful. He disagreed with Mr. Kamto's remark that such matters should be left to legal advisers. As Mr. Brownlie had noted, such guidelines could also be placed in the introduction. He endorsed the Special Rapporteur's offer to contact Ms. Hampson. It was not in the interest of the Commission for it to go in one direction and the human rights monitoring bodies to go in another.

43. Lastly, he had read Zemanek's article and he agreed with much of it, especially with regard to across-the-board reservations.

44. Mr. KAMTO said that, despite the views expressed, he had not changed his opinion about the thrust of the fifth report. One argument, presented by Mr. Simma, was that everything the Special Rapporteur tried to include in the alternatives to reservations existed in practice. A second argument, advanced by Mr. Elaraby, was that the proposals were useful. The real issue, however, was whether the subject, as addressed in that part of the report, fell within the Special Rapporteur's mandate, or in any case whether it was part of the topic of reservations. He did not think so. All the procedures listed in draft guideline 1.7.2 constituted treaty clauses. Apart from the third one, they all gave the impression of being negotiated matters that actually appeared in the final text of the treaty to be adopted, which suggested that the regime for those clauses would in fact be the treaty regime, because they were negotiated clauses accepted in the treaty. That made a legal obligation less rigorous, but did not aim to set a limit as to the scope of the effects that such an obligation could produce once the treaty was adopted. He failed to see how the Commission could mix restrictive clauses, which were treaty clauses, and reservations to treaties, which by nature were initially unilateral declarations or acts, and to which other parties to the treaty would reply in one way or another. The focus on alternatives to reservations might cause more problems than it resolved, something the Special Rapporteur himself was aware of, because he spoke of alternatives, i.e. something other than reservations. The first part already contained a guideline on statements other than reservations which partly addressed matters that did not fall within the scope of reservations. Draft

¹¹ *Multilateral Treaties* . . . (see footnote 7 above), p. 176 and p. 177, note 5.

¹² *Ibid.*, p. 174 and p. 177, note 4.

guideline 1.7.1 could be added to it and draft guideline 1.7.2 could then be deleted.

45. He had no objection if the Commission wanted to act as an advisory body that elaborated rules to help foreign ministries negotiate treaties, but that had nothing to do with the rules of reservations.

46. Mr. SIMMA wondered how much leeway a special rapporteur had in developing a topic. His impression was that the Special Rapporteur was free to explore certain alternatives.

47. Mr. ROSENSTOCK said that the Sixth Committee would not object to the Special Rapporteur stretching his mandate, but at some stage would probably point to the potential consequences of delaying the completion of the task and of confusing the issue. Hence the need for caution.

48. Mr. PELLET (Special Rapporteur), beginning with a comment by Mr. Elaraby, said that he was gratified to hear from a practitioner that his work was useful, notwithstanding its often theoretical nature. He had proposed the draft guidelines on alternatives to reservations in order to show legal advisers in foreign ministries that it was possible to make the treaty procedure more flexible in ways other than through reservations. He failed to see why that departed from the topic; on the contrary, it was at the very heart of the matter. The purpose of a reservation was to modulate the effect of a treaty. For various reasons, no agreement might be reached on reservations of a particular nature. In such cases, it was useful for legal advisers to have a set of guidelines on reservations which nonetheless told them that it was possible to achieve the same result by other means. To clear up a serious misunderstanding that seemed to have taken root among some members, he stressed that he had no intention of defining the legal regime applicable to such alternatives. In accordance with the broader mandate that he had proposed and that the Commission had approved, he would confine himself in the remainder of the draft to the subject of simple or conditional interpretative declarations. However, he was examining the alternatives at that stage because they were sometimes difficult to differentiate from reservations.

49. In response to the charge that he had included procedures in draft guideline 1.7.2 that were obviously neither reservations nor unilateral declarations but treaty clauses, he would point out that such eminent commentators on international law as Sir Gerald Fitzmaurice and Georges Scelle had called some of those procedures reservations. It was therefore worthwhile insisting that they were not, and he felt it would be a practical and intellectual error to omit the question of alternatives to reservations and interpretative declarations. He emphasized that, with draft guideline 1.7.5, on such alternatives, he had completed chapter I of the Guide to Practice, concerning definitions. It was to be hoped that the Commission would move on to consider the next chapter, on the formulation of reservations, before the end of the session.

50. He could not agree with Mr. Kamto's argument that alternative procedures tended to weaken treaties. He did defend reservations in themselves. In his opinion, reservations should not be viewed solely as a necessary evil but rather as a technique designed to make as much as possible

of a treaty acceptable, on the understanding that, owing to the 1951 Pan-American system, the treaty's core provisions remained intact. He did not think that the Commission's role consisted in strengthening binding law but rather in standardizing concepts and establishing reasonably acceptable general rules. As Mr. Simma had observed, some alternative procedures probably presented less of a threat to treaties than did reservations. In any case, alternative procedures, like reservations, were a fact of legal life and States should be in a position to weigh up their advantages and drawbacks.

51. When he described treaties as "voluntary traps", he meant that, once a State acceded to a treaty, it was trapped inside. Mr. Kamto had referred to the right of suspension or withdrawal under the 1969 Vienna Convention, but that right was severely circumscribed. The only real possibility of withdrawal recognized by the Convention was that of *rebus sic stantibus*, a fundamental change of circumstances. Reservations allowed a State to indicate that, while it broadly accepted the trap, it wished to retain an escape hatch because of certain problems presented by the treaty. Whilst he had already explained the scope of his proposals, Mr. Pambou-Tchivounda's comments nonetheless seemed to form a plea for the inclusion of alternative procedures in the draft.

52. Mr. Brownlie's idea of undertaking a socio-political study of the state of mind of diplomats and politicians when they entered reservations to a treaty was certainly very interesting but would require a whole army of research assistants.

53. The Chairman considered that the measures taken by Trinidad and Tobago constituted a violation of the spirit but not of the letter of article 19 of the 1969 Vienna Convention. His own approach was not quite so categorical since, in his view, the law of treaties contained certain loopholes that might be applicable in the case in point. The human rights treaty bodies, on the other hand, were playing with fire. The Human Rights Committee's decision in the *Rawle Kennedy v. Trinidad and Tobago* case had led to the State party's denunciation of the Optional Protocol and deprived its nationals of the possibility of submitting individual petitions. The Committee had adopted too rigid a position and the outcome had been an instance of human rights law being pushed too far in public international law. He would address issues of the kind raised by the Chairman in the next chapter, on the formulation of reservations.

54. In response to Mr. Elaraby, he said that he had not intended to be provocative but constructive. He had gone into considerable detail because the subject was very specific and, in his view, of major importance. It was not enough simply to restate the provisions of the 1969 Vienna Convention.

55. He was somewhat frustrated by the lack of suggestions as to how he should respond to Ms. Hampson, but he took it the Commission broadly agreed that some arrangement should be made for collaboration. He observed, however, that she had not yet been given the green light by the Commission on Human Rights, which had drawn attention to the fact that the International Law Commission was working on the topic. Perhaps the Commission

could arrange for some form of dialogue with Ms. Hampson in a working group at the next session or invite her to address the Commission so that the Special Rapporteur could ensure that her concerns were not neglected.

56. Mr. BROWNLIE said that the study he had in mind would not need to be particularly complex. The Chairman had provided an example of the kind of information that could be compiled: how States responded when monitoring bodies acted in a certain way.

57. Mr. DUGARD said that the Special Rapporteur's suggestion for a meeting with Ms. Hampson was so eminently reasonable that the Commission's silence should be interpreted as consent.

58. Mr. LUKASHUK said he thought the Special Rapporteur had misinterpreted the Commission's reaction to his report. His theoretical contribution to the subject was highly appreciated and the controversial provisions were of considerable practical value. However, the Commission was not preparing a textbook or even instructions for practitioners but something more like a standard-setting document. The alternative procedures should therefore be covered in the commentary and not in the draft guidelines.

59. Mr. PELLET (Special Rapporteur), introducing draft guidelines 1.7.3, 1.7.4 and 1.1.8, said that, as indicated in draft guideline 1.7.2 and the commentary thereto, a wide variety of procedures that were not reservations could be used to produce the same effects as reservations. Paragraphs 104 to 210 of the report examined those procedures, highlighting the characteristics they shared with reservations and those that set them apart, it being understood that the appellation they were given in a treaty was never sufficient to determine their nature. If a treaty provided for a procedure permitting modification of its effects, it was not possible to determine whether it was a reservation from the way in which it was designated because, in accordance with the 1969 Vienna Convention definition reflected in draft guideline 1.1, the phrasing or naming of a unilateral declaration was never sufficient to define the procedure. It could do little more than serve as a clue to the character of the procedure, as noted in some of the draft guidelines already adopted.

60. In some cases, however, the procedures whereby contracting parties modified the effects of a treaty were quite obviously not reservations as defined by draft guideline 1.1 or the 1969 and 1986 Vienna Conventions, for instance clauses in a treaty designed to modify its effects, in other words, treaty provisions that limited, on behalf of certain parties or categories of parties, the obligation resulting from the treaty. A number of examples were given in paragraphs 111 to 113 of the report and in the corresponding footnotes. It was clear from the 1969 Vienna Convention definition that such clauses were not reservations for the very obvious reason that they were not unilateral declarations but components of the treaty itself. He therefore proposed that they be addressed in draft guideline 1.7.3, set out in paragraph 116.

61. Some members had already charged him with stating the obvious in the draft guideline. However, it was a subject that had ensnared even the leading authors cited in paragraphs 114 and 115. In particular, Judge Zoricic, had

stated in his dissenting opinion to the judgment of ICJ in the *Ambatielos* case that a reservation was a provision agreed among the parties to a treaty with a view to restricting the application of one or more of its clauses. The authors in question were calling a reservation what was in reality a treaty clause. The notion of a reservation was commonly used in that sense, e.g. a national jurisdiction reservation, an exclusive jurisdiction reservation or a non-arbitrability reservation. He therefore strongly recommended the inclusion of draft guideline 1.7.3 in the Guide to Practice.

62. Amendments were another procedure that could be used to modify a treaty or diversify its effects, but they entered into effect only vis-à-vis certain parties. Unlike the restrictive clauses he had just mentioned, to his knowledge they had not given rise to confusion, so that a draft guideline was superfluous.

63. The same applied to declarations whereby a State or an international organization sought to suspend a treaty or some of its provisions. As indicated in article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions, such procedures constituted unilateral declarations. When applied to the State making the declaration, they had an impact on the legal effect of the treaty or some of its provisions but left the treaty intact. Although such suspensive declarations thus seemed at first glance to resemble reservations, in fact they came into being when the treaty was already in force and not at the time of the expression of consent to be bound. They were therefore subject to a separate regime from that governing reservations under the Conventions. Moreover, nobody had ever suggested that a unilateral declaration made under an escape clause or a waiver could be assimilated to a reservation. Hence it was unnecessary to include a draft guideline on the subject and the guideline presented in paragraph 143 was merely intended to illustrate his argument or, if the Commission so wished, for inclusion in "catch-all" section 1.4, entitled "Unilateral statements other than reservations and interpretative declarations".

64. The same could not be said of the extremely interesting phenomenon of "bilateralization" of reservations described in paragraphs 120 to 130 of the report and addressed in draft guideline 1.7.4, of which two versions were proposed in paragraph 129. The more restrictive version of the draft guideline would read:

"An agreement, concluded under a specific provision of a treaty, by which two or more States purport to exclude or to modify the legal effect of certain provisions of the treaty or of the treaty as a whole in their application to their relations *inter se* does not constitute a reservation within the meaning of the present Guide to Practice."

65. The technique of bilateralized reservations had been given a theoretical basis and systematic form during the elaboration of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters at The Hague Conference on Private International Law. It involved the insertion in a treaty of clauses making the treaty's entry into force for two signatory States subject to the conclusion of a bilateral agreement

between those States. The parties to the bilateral agreement could introduce clarifications or amendments to the basic treaty applicable to relations between them. The subordination of the entry into force of the basic treaty to the conclusion of such an agreement was of no relevance to the study of reservations. On the other hand, the arrangement whereby two States could change the legal effect of a treaty bore a closer resemblance to the subject of the study. In reality, however, such bilateral agreements could not be viewed as reservations since they did not constitute unilateral declarations.

66. In view of its distinctive character, he felt that the bilateralization procedure should be mentioned in the Guide to Practice as falling outside the definition of a reservation. The broader wording of draft guideline 1.7.4 would cover not only the bilateralization phenomenon in the strict sense but also agreements among States that were not envisaged in the basic treaty and that had the same object as reservations. Obviously, as he had pointed out, such agreements did not qualify as reservations because they did not constitute unilateral declarations. The second version of the draft guideline would read:

“An agreement by which two or more States purport to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in their application to their relations *inter se* does not constitute a reservation within the meaning of the present Guide to Practice.”

67. As he had doubts about the desirability of addressing two different categories of procedure in a single guideline, he was inclined to opt for the narrower version of draft guideline 1.7.4 that focused on bilateralized reservations but would like to hear members' views in that regard.

The meeting rose at 1 p.m.

2632nd MEETING

Tuesday, 6 June 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

Reservations to treaties¹ (*continued*) (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,² A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KABATSI joined other members in commending the Special Rapporteur on his excellent fifth report (A/CN.4/508 and Add.1–4) and thanked him in particular for his update on work carried out in various quarters on the subject under consideration, which had been useful in putting the subject into perspective. All of that work had helped the Special Rapporteur in his research and had allowed the Commission to adopt important preliminary conclusions on a number of key issues: for example, there was no question at the current stage of undermining the integrity of the Vienna regime on reservations to treaties or of amending the relevant provisions of the 1969, the 1978 or the 1986 Vienna Conventions. Moreover, a guide to practice would be prepared for States and international organizations, containing guidelines with commentaries and, if necessary, model clauses. It also seemed virtually certain that the title of the topic would remain “Reservations to treaties”.

2. Nonetheless, as far as the format was concerned, like other members of the Commission, he had trouble following the numbering system used by the Special Rapporteur. The two explanations given in paragraph 28 of the report were unconvincing.

3. With regard to the views, positions and work of other bodies, especially those established pursuant to United Nations human rights instruments, he thought that the Commission should take due note of them before reaching a definite decision. Those bodies did have expertise in their respective areas of competence and were generally well equipped to tackle the issues involved. Moreover, they were usually well placed to analyse and determine State practice in the matter. It would therefore be useful for the Special Rapporteur to continue to cooperate with them.

4. Turning to the proposed guidelines on alternatives to reservations and interpretative declarations, he said that the Special Rapporteur had been right to draw attention to the procedures sometimes used by States to modify the application of the provisions of treaties to which they were parties without necessarily referring to them as “reservations” and also to provide the necessary details on such procedures in paragraph 80. Noting that the Special Rapporteur admitted in paragraph 93 that he had hesitated for a long time before proposing the inclusion of draft guidelines on alternatives to reservations in the Guide to Practice under consideration, he said he assumed that the hesitation was basically due to the fact that it was not always easy to distinguish those alternatives from reservations and so he wondered how potential users of the Guide to Practice could be expected to follow them. A

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook* . . . 1999, vol. II (Part Two), para. 470.

² Reproduced in *Yearbook* . . . 2000, vol. II (Part One).