**Makane Moise Mbengue: Observations concerning the working method, preamble and final provisions of a legally binding instrument on the right to development**

It is a pleasure to be involved in the discussion regarding a potential future binding treaty on the right to development. I will focus my presentation on two aspects, the issue of preamble first and then the issue of final provisions.

I would like to start first with the preamble. If you allow me, Mr Chair, I would like to, to kick off the discussion regarding the preamble with an anecdote, taken from international case law. In 1995, the United States of America, adopted some regulations, in which they basically told the rest of the world how they should fish shrimps. Of course, that regulation did not please all members of the WTO. Some States, in particular Pakistan, Malaysia and Thailand, considered that the US regulation was in violation of WTO in particular, the GATT. So what those States did was to file a complaint against the US before the WTO dispute settlement system.

When the case was put before the judge in the WTO, the US explain that it basically adopted this regulation imposing to the rest of the world which type of nets they would have to use to harvest Shrimp in order to protect Turtles. That's why this case is called the Shrimp-Turtles case, it's not because shrimps have become turtles but it’s called Shrimp-Turtles, because the US basically told the rest of the world this is the type of Nets you need to use, If you want to harvest shrimps. If you do not use those nets, your shrimp products will not be allowed for import on the US market, and I am doing all that in the name of preservation protection of marine turtles. So of course when the US invoke that reason, the complaining states opposed, and basically said that this was not valid under WTO law because one provision that the US invoke in the GATT was an exception, which is article 20 G, that says that who members can restrict international trade in order to conserve exhaustible natural resources. The complaining states in that dispute consider that biological resources like turtles, cannot be considered as exhaustible natural resources. Actually in 1947 when the GATT was negotiated exhaustible Natural Resources never refer to biological resources. It was only meant to cover non biological resources but the position of the judge in the WTO was to say that there is something that has changed between the GATT and the WTO. The GATT was not referring to the objective of sustainable development, while the WTO agreement is explicitly referring in a scramble to the objective of sustainable development. So the judge consider that that explicit reference to the objective of sustainable development in the preamble of the agreement, establishing the WTO had to inform the interpretation of all the rights and obligations in different WTO agreements. So, what the judge did was to say okay since the who now is referring the preamble of the WTO is referring to the objective of sustainable development. I need to go and check into the law of sustainable development, how biological resources are perceived today. Are they perceive as exhaustible or non exhaustible? If you go and start checking into the law of sustainable development today, you will see that biological resources are considered as exhaustible as non biological resources. So this is because of that that the judge into WTO adopted what we call an evolutionary interpretation, he decided to consider that the meaning of exhaustible natural resources in 1947 has no longer the same meaning today. All that, because of the explicit incorporation of the objective of sustainable development in the preamble of the agreement establishing the WTO.

So why did I start with this is basically to show the importance the relevance of a preamble whenever governments or states engaging treaty law making. Quite often we tend to think that a preamble is just some sort of political discourse, but actually in international law, the preamble has the same value as the same legal value than any other part of an international treaty. You the United Nations Convention, that we call the Bible of treaties it's the United Nations Vienna conventions on the law of treaties of 1969, that basically codifies the important rules regarding the law of the treaties. When you check article 31 of the Vienna Convention on the Law of treaties, you will see that the Vienna Convention say that a treaty has to be interpreted in good faith in accordance with the ordinary meaning of the terms of that treaty in light of that context, and in light of the object and purpose of the treaty. The Vienna Convention, Article 31 is very clear on the fact that in order to determine the context of a treaty, you need to take into account the preamble, the text and the annexes. So the preamble has exactly the same legal value, the same legal effect than the rest of the text of the treaty. Any in consideration of binding treaty on the writer development needs to pay attention on how the preamble should be crafted how the preamble should be should be built.

Allow me not to maybe to the specific function specific function of preambles in an international law. So preambles, usually the content, two main elements to many elements. The first element is what we call considerations and the second element is what we call purposes. This is the function of most of the preamble of international treaties, dealing with considerations first and dealing with purposes in a second level.

Let me start with considerations, they are basically the raison d'être of a treaty. Why states decide decided to negotiate or have decided to conclude the specific treaty. When you look at international practice, three major types of considerations we can have in in a preamble.

The first type of considerations are the political considerations. It is usually constant practice that a treaty should start by referring or explaining the political motivations behind the negotiation and the conclusion of a treaty. For instance, but we can always come back to that in the discussion but for instance, in the context of the right to development one very important political consideration is the 2030 agenda on the Sustainable Development Goals. This is a very important political consideration that can justify today, the revival of discussions on direct deployment and that can justify also why we would need to go to the next level and have the binding treaty on the right to deployment.

Second category of considerations in preambles is what we call the institutional considerations, they refer to the work that has been achieved by certain institutions. Those institutions can be traditional international organizations, part of the United Nations system. So for instance, it can be the work or the resolutions of the Human Rights Council, or any human rights body in the system. But it can also be resolutions or meetings, summit of certain important of very relevant groups like for instance the non-aligned group in the context of the right to implement because basically obviously the non-aligned movement has been very much involved in discussions and shaping of the right to development. But basically, this is something very important to legitimate to give some sort of legitimacy to treaty law-making referring to resolution and decisive works or decisions of institutions that have been involved in questions regarding right to development.

Then last category of considerations are the Legal considerations. The treaty is first and foremost a legal instrument. So of course it's very important to have mentioned legal considerations when engaging in in treaty law-making and, of course, in the context of the right to development. But the negotiators have to be selective on what would be the main consideration that would explain why governments are engaging into the conclusion of binding treats on the right to development. I think, the most obvious legal consideration when we talk about the right to development is surely the 1986 Declaration on the right development is the most obvious the most direct legal consideration. But there might be some other important legal considerations to put on the table, but it's of course, always very sensitive because the more the more you refer to legal considerations, the more you might have states that would tell you "If it is already covered in so many legal instruments, why do we need, then, to engage into a new treaty on the web development?". So it's important to refer to legal considerations that would justify the need to complement the legal regime regarding the right to development.

Besides considerations preambles also refer to purposes. They refer to what we want to achieve. Consideration are "why do we conclude?" and purposes they refer to "what we want to achieve by a given binding treaty?" in this case on the right to development. We have 3 categories of purposes in international practice in the preambles of the treaties. The first category of purposes are the functional purposes. This relation to the objectives that a given treaty is pursuing. In the context of a future treaty binding treaty on the right to development this functional purposes are very important because there might be a lot of disagreement on what is even the objective behind the development. Is it about eradication of poverty? Is it about reducing inequalities? Is it about good governance? Is it about SDGs? So it's very important in a future treaty to be very clear about to those functional purposes so those objectives. The objective can be very specific, so narrowed down as much as possible. But of course, the more you narrow it down and the less you have states that might, subscribe to the approach. Or you can have a more inclusive approach to the object is because an inclusive approach can bring more compromise between different point of views on what should be the functional purposes of the right to development.

Second category of purposes could be called qualifying purposes. It's about the legal stages that when we want to give to certain principles, when engaging into law making. So, if I take the concrete example of a future Treaty on the right to development, negotiators might want to qualify, if they want to give specific stages to the right to development in the preamble by for instance clarifying that the purpose of the treaty is to make the right development binding. The purpose of this treaty is to acknowledge that RTD is a binding right and the international law on the customary international law that could be one qualifying purpose. However, sometimes the qualifying purpose can be softer. In a context like the RTD, the negotiators might conclude that they elaborated a treaty to create a framework so to put the basis of cooperation just declare the general principles.

Last but not least, the third category of purposes that we find in international practice is what we call the systemic purposes. If you take the concrete specific example of RTD. The RTD has gone beyond human rights law. If you take Investment law, we talk about RTD. You take Trade law, we talk about RTD. Even climate change law talks about RTD. In the preamble of the Paris Agreement, you have the next an explicit reference to the right to development. If governments are going to engage into the future Treaty on the right to development, the preamble has to acknowledge the linkages that the treaty on the RTD, would have to develop with other legal instruments that are connected to the RTD. So for instance, a future treaty on RTD development might want to refer explicitly to the Paris Agreement. As Mr Chair was saying, we need to be forward looking and climate change is as become a real issue that can affect the RTD. So a preamble might take into account or be mindful of the Paris agreement on climate change and what it said about RTD. So those systemic issues have to be also addressed in a very concise manner, because a preamble has to take into account the fact that there are some other relevant instruments that would inform the treaty that is being concluded specifically on the RTD. When you have the systemic approach it allows you not to have to have specific provisions dealing with Investment law or Climate change law, but at least we know that the future treaty on RTD by referring to those as instruments is basically acknowledging that it will have to be interpreted in light of those relevant instruments. So this is what I wanted to say about the function of a preamble to just to introduce the topic of course I would be happy to go into more details if that questions or comments about it.

To conclude quickly on this on this aspect, the crafting of a preamble would most of the time depends on which type of Treaty, we want to adopt, If the idea is to have a very binding Treaty. Usually the preamble has to be as short as possible because you have already a lot of binding obligation, rights and procedures into the text. Usually if the approach is to be very hard-law approach, then we have to be more narrowed down. If the idea is to have a more of a framework approach, a framework convention, which I think might be the right path go for a future Treaty on the RTD, than in framework conventions, usually preambles are a bit longer because the content of the convention is not that strict. So you take opportunity of the preamble to enunciate, as many purposes as possible as many considerations as possible.

For the final provisions, they are part of the text as such. In treaty practice, you have two approaches, sometimes you have a part explicitly called final provisions, sometimes you have treaties that are just not clearly saying final provisions but when you read them, you know, it's about final provisions, but without isolating them as final provision. This is something that negotiators have to discuss if they want to have different titles in different parts of the treaty. But what do we find in treaty law-making when it comes to final provisions?

First provisions regarding the institutional mechanism and institutional mechanisms upon which the treaty is going to operate. For instance, is the treaty going to have a conference of the body or a mechanism that has to be dealt with in the final provision? What would be what would be the secretariat of the treaty? Is it going to be new secretariat? Or is it going to be an existing secretary, or existing United Nations body that would play the role of the of the secretariat? What would be the subsidiary buddies? Because sometimes you might also consider that, in addition to a secretary, the treaty might put in place some subsidiary buddies, that would be maybe, for instance, in charge of thinking about future protocols. If it's going to be a framework convention, you need to think about the future. But definitely first type of final provisions towards dealing with the institutional mechanism.

The second type of final provision provisions dealing with the signature, and ratification. A treaty of international law can only be binding upon states it is signed, acceded and then ratified. It is very important to say that the treaty will be open to signature, sometimes it might be if it's open for signature for a year or for 10 months. After that time, for those states that have not signed it, they might accede to the treaty, this what we call accession in the law of treaties. If you have not signed it during a certain period of time, then you are an acceding state. Of course, for the treaty to be binding upon states, it has to be to be ratified. So you need any binding treaty a provisions dealing with signature and ratification. If I can make a little quick remark on a treaty on the right to development, we might have to think about an original approach that would allow not only states to sign but also regional economic integration organizations because the right development today is being dealt with by many regional economic integration organizations. At least I know that in Africa, the regional economic communities, they specifically deal with the right to development, so we might have an approach where signature can be open to regional economic organization. So for instance, the Paris Agreement provides for the possibility for regional economic integration organization to sign it. In the context of RTD, this is very relevant. Some types of final provisions regarding the entry into force, states are supposed to start implementing a treaty after it entry into force. If you have five states ratifying a treaty, but the truth is not yet enforced, then there is no obligation and the international law to implement that treaty. So it's very important in the future treat on the right to deployment is to think about the number of required ratification for the treaty to enter into force. Of course, there are a lot of strategies, if you come with a very high number, you might jeopardize the future. But then the problem is what does what is the meaning of high number? If you think about the United Nations Convention on the Law on the law of international water courses in 1997, it only required 35 ratification and it 17 years to come into force. Sometimes, negative negotiators saying that by putting 30 ratifications, it might accelerate, but it's not necessarily the case but sometimes playing with the number can also bring compromise. For those plates that are a bit oppose to a treaty. If they see that the number of ratification is 50, they might not block the negotiation of it because they might just hope that it will take many year to the Treaty to come into force.

A fourth category of final provisions that are the provisions regarding the amendments to a treaty. A treaty is a living instrument, international law is always developing is always progressing. So it's very important in a given treaty, particularly on RTD to think about potential amendments and it's important to think about flexible rules on amendments. Because some pretty sometimes they have very strict rules of amendments. So even when you amend them, there's no there's no impact. Like if you think about the Kyoto Protocol, for instance, it was amended in 2012, we are still waiting for to enter into force of the amendment, because the rules of amendments were just too stringent. So it's very important to think about flexible rules of amendment. the Montreal Protocol, Montreal Protocol on substances that damage the Ozone Layer. This is a very interesting model of how you can have flexible amendments that would allow states that want to move further to do so, and it also allows the ones that want to remain backward to do the same, all this in a very flexible manner. But this is a very important strategy to think about.

A fifth category of final provisions are the rules regarding reservation. Under General international law, if a treaty is silent on reservations, it means that the reservations are permitted, this is for any type of Treaty. Even the Genocide Convention, the Genocide Convention of 1948 was silent on reservations and then the position of the International Court of Justice was to say silence means it is possible to make reservations. So it's very important for the treaty on right to development to have a clear position on that. My personal position is that in a treaty of that sort, reservations should not be allowed but this has to be said explicitly, particularly in the treaties is a framework convention because then you make it even softer. If the treaty very binding, then the reservations might be the way to convince those states that have certain objections yet to join the regime knowing that they have the flexibility to make reservations to certain positions. So it all depends on the nature of the the type of treaty you have in mind.

A sixth category of final provisions is the one regarding withdrawal or the denunciation of a treaty. The treaty should always allow states to be able to get out. In fact this has become a matter of strategy. In the context of the Paris Agreement, that the provision was very smart, because the Paris Agreement says that you can withdraw from it only three years after the entry into force of it, and your denunciation will take effect only one year after those three years, so it means that for four years you are in. It was a good move, because we know that there is a country, which has said I'm out, but the country's still in for four years, because of the provision I don't want to mention the countries’ name in the United Nations context.

The seventh type of final provisions are the ones on the authentic languages of the treaty. I know that today English dominates the negotiations. In the UN, we have five official languages, so ideally the right approach is to consider that all these languages are authentic languages but it happens it happens that some treaties decided that the authentic language of the treaty will be English or will be both English and French. It is very important to take that into account because there are always discrepancies between treaties when they are translated in different language, and then when you have states disagreeing on the meaning of a provision, because in Russian it goes in one direction and in English, it goes in another direction. The way to solve that is to be clear on what are the authentic languages and if all the languages are authentic language, then we the interpretation would have to find some reconciliation between the different languages. But if the land authentic languages is only English case of the divergent language was the not an authentic official language of the UN than the English version will prevail. It's not the most important final provision, but it is a position to take into account.