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**Summary record of the 2721st meeting**

Topic:  
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bers considered that the expression of will must always be clear and comprehensible, and that if it was equivocal and could not be clarified by ordinary means of interpretation it did not create a legal act. The term in any event remained in the definition which was now before the Drafting Committee.

68. The excessively broad term “publicity” had been replaced by the word “notoriety”, since “publicity” was seen as having been used exclusively in the case of a unilateral act formulated *erga omnes*, whereas the key element was that the act should be known to the addressee.

69. The fact that the definition gave States alone the capability to formulate unilateral acts—the matter covered by the Commission’s mandate—should in no way be construed as meaning that other subjects of international law, particularly international organizations, could not do so. The notion of addressee was seen in broad terms, such that a unilateral act could be directed not only at one or more States, but also at an international organization. Some members of the Commission believed that other international legal entities, including liberation movements, could be the addressees of such acts. That raised a number of issues that deserved measured consideration, including international responsibility and international capacity in the event of a dispute, but the draft as it stood remained limited expressly to States and international organizations.

70. The definition of unilateral acts was now before the Drafting Committee and it was crucial that it be adopted at the present session to permit progress on other draft articles. Extensive consideration had been given to the definition, and its conception had evolved on the basis of comments by members of the Commission and by Governments. A recapitulation of the progress made and the reasons why certain concepts and terms had been changed had been provided in response to suggestions made the previous year. While all unilateral acts were similar in formulation and common rules could be elaborated for them, some acts differed in their legal effects. The structure of the draft would therefore have to be divided into two or three parts, depending on the classification made of unilateral acts. He recalled that the Commission had considered that work could be focused in the next stage on international promise and other acts by which States assumed unilateral obligations.

71. With those remarks, he commended the introductory portion of his fifth report to the members of the Commission, on the understanding that at the next meeting he would submit additional aspects of the topic for their consideration.

72. Mr. PELLET said the recapitulation of the Commission’s work presented by the Special Rapporteur was interesting, especially for new members, but there were no new elements or new draft articles for discussion. What were members being asked to speak about in the upcoming meetings on the topic?

73. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said it had been Mr. Pellet himself who had suggested that

a recapitulation be presented, for which he was grateful, since it would help new members of the Commission to assess the progress made. True, there was little that was new for other members, but paragraphs 44 and 45 of the report raised certain points on which he would welcome comments: the application to unilateral acts of the general rule of *pacta sunt servanda*; the application of the unilateral act in time, which raised the issue of retroactivity; the application of the unilateral act in space; and determination of the moment when the unilateral act began to produce its legal effects.

*The meeting rose at 1 p.m.*

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## 2721st MEETING

*Friday, 17 May 2002, at 10.05 a.m.*

*Chair:* Mr. Robert ROSENSTOCK

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kateka, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

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

[Agenda item 2]

1. Mr. YAMADA (Chair of the Drafting Committee) announced that, taking into account the wishes of the members of the Commission and the need to ensure an equitable distribution of geographical regions and languages, it had been decided that the Drafting Committee on the topic of reservations to treaties would be composed of the following members: Mr. Pellet (Special Rapporteur), Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kamto, Mr. Kemicha, Mr. Koskenniemi, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue and Mr. Kuznetsov (Rapporteur of the Commission, *ex officio* member). He understood that the Chair of the Commission was willing to take part as an *ex officio* member. The Committee was open to the participation of all the

other members of the Commission who wanted to attend its meetings.

**Reservations to treaties<sup>1</sup> (continued) (A/CN.4/526 and Add.1–3,<sup>2</sup> A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)**

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

2. Mr. MANSFIELD said he was surprised that draft guideline 2.1.7 *bis* (Case of manifestly impermissible reservations) proposed by the Special Rapporteur in his seventh report on reservations to treaties (A/CN.4/526 and Add.1–3) should be a matter of concern to some members of the Commission. In that draft guideline, the Special Rapporteur had clearly attempted to deal only with cases in which the reservation formulated posed an obvious problem. The provision would certainly not apply in situations in which there was a margin of appreciation as to whether a particular reservation was or was not compatible with the object and purpose of the treaty. The Drafting Committee might consider whether that could be made clearer in the wording. But the work of the depositary always contained an element of judgement which was not qualitatively different from any other judgements it was required to make in other situations, such as whether a reservation had been formulated in due and proper form. One could be reasonably confident that, in any case, the depositary would carry out his communications with the reserving State with discretion. It was in the interest of the depositary as well as the State concerned that the matter should be resolved in that fashion.

3. He agreed with Mr. Koskenniemi that an inactive, letter-box-type depositary was not the same thing as a neutral depositary. The activity referred to in draft guideline 2.1.7 *bis* would be for the benefit of all, including that of the reserving State. A notification of an exchange of views between the depositary and the reserving State could at least draw the attention of the legal departments of the ministries of foreign affairs of the other States parties, but that did not suggest that they would agree with the concerns raised by the depositary or endorse the standpoint of the reserving State. For those reasons, he was in favour of referring the draft guideline to the Drafting Committee, which could reformulate the text to take account of the concerns raised in the discussion.

4. Mr. CANDIOTI said that, as draft guideline 2.1.7 *bis* contained a useful proposal from the practical point of view, he agreed that it should be referred to the Drafting Committee, on the understanding that the Committee would take due account of all the views expressed on ensuring that the depositary's functions and powers remained within the context of the system defined in the 1969 Vienna Convention.

<sup>1</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

<sup>2</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part One).

5. He suggested that, in the Spanish text, the word *ilícita*, which was not very appropriate, should be replaced by the word *inadmisibile*.

6. Mr. ADDO recalled that the legal basis of a reservation depended on the content of the treaty. Some treaties permitted reservations, while others prohibited them; some permitted only specified reservations, and still others remained silent on the issue. In his view, draft guideline 2.1.7 *bis* was applicable to the situations covered by article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention, which distinguished between permissible and impermissible reservations. At times, States used a declaration as an attempt to make reservations to treaties that prohibited them. That was the case of the Philippines with regard to the United Nations Convention on the Law of the Sea, article 309 of which prohibited reservations: its declaration, which seemed to have the effect of a reservation, had been manifestly impermissible, and several States had in fact formulated an objection. In such a case, the depositary had every right to bring the prohibited reservation to the attention of the reserving State to enable it to withdraw it and, if the latter insisted, to communicate the text of the reservation and the exchange of views which he had had with the reserving State to the other signatories of the treaty, as draft guideline 2.1.7 *bis* provided. The same applied to situations covered by article 19, subparagraph (b), of the 1969 Vienna Convention, namely, when a State made a reservation which was not one of those specifically permitted by the treaty.

7. On the other hand, a reservation incompatible with the object and purpose of the treaty, although impermissible, could not be qualified by the word "manifestly" because it was not simple to identify the object and purpose of a treaty. That was a subjective question which each State party had to decide. A reservation that violated a principle of customary international law which had been codified would be manifestly impermissible. For example, a State could not reserve the right to engage in slavery. In that case, the depositary was not bound to accept such a reservation because it would be ineffective. However, he might draw the author's attention to its impermissibility, thereby enabling the author to abandon it and thus obviate the need to communicate it to the other States parties.

8. In closing, he said that draft guideline 2.1.7 *bis* was useful and that he was in favour of referring it to the Drafting Committee with the caveat that it did not cover reservations incompatible with the object and purpose of a treaty within the meaning of article 19, subparagraph (c), of the 1969 Vienna Convention.

9. Mr. GAJA, commenting on Mr. Addo's remark that another category of impermissible reservations might be those made with regard to a provision of a treaty that corresponded to a rule of customary international law, pointed out that, when a State made such a reservation, it did not necessarily deny the existence of the rule; it simply wished not to add to the customary international law obligations incumbent on it under the treaty and thereby to avoid the supervision mechanism for which the treaty might provide. He did not think that such a reservation could *per se* be considered impermissible.

10. Mr. PELLET (Special Rapporteur) said he agreed that there was nothing to prevent a State from making a reservation to a provision of a treaty that corresponded to a rule of customary law. By so doing, it remained bound by the rule but had a right to refuse to be subject to it in the context of the treaty.

11. Mr. SEPÚLVEDA congratulated the Special Rapporteur on the quality of his reports, which did not go unnoticed and whose thought-provoking nature always inspired many comments.

12. He drew attention to the lack of consistency in the Spanish text of guideline 2.1.7 *bis*, which used two different words to qualify reservations: *inadmisibles* in the title and *ilícita* in paragraph 1; the problem should be remedied.

13. Apart from the issue of terminology, the fundamental question raised by the draft was its compatibility with the 1969 Vienna Convention and the scope that the Commission wished to give the Guide to Practice, which should, in his opinion, not exceed the limits set by the Convention. The reservation system established in articles 19 to 23 of the Convention concerned only States parties, not the depositary. Clearly, it was not for the depositary, whose functions were established in article 77 of the Convention, to determine whether a reservation was permissible or impermissible, as envisaged in guideline 2.1.7 *bis*; that was a matter to be decided by the States parties to the treaty. The depositary was simply required to communicate the text of the reservation to the signatory States and organizations. Furthermore, according to the proposed guideline, after establishing that a reservation was manifestly impermissible, the depositary was to play the unenviable role of bearer of bad tidings by communicating the text of the exchange of views that it had had with the author of the reservation to the other States parties. The Special Rapporteur did not state what the consequences of the depositary's action would be, but it could be assumed that its initial effect would be to cast a cloud of uncertainty over the reservation, which the depositary had unilaterally and perhaps arbitrarily declared to be impermissible. Some annoyance might also be expected, not only on the part of the author State, which might in good faith consider the reservation to be permissible, but also on the part of all the signatory or contracting States, which would consider that the depositary had exceeded its mandate by making a subjective value judgement on the reservation. It would seem unwise to place the depositary, who was responsible for facilitating communication between the Parties, in such a situation of potential conflict.

14. To facilitate the depositary's task, a consultation process between interested States parties should therefore be provided for in order to determine which reservations were admissible and which were not. The depositary might also draw the attention of the signatory and contracting States to the fact that a State had made a reservation which might be prohibited by the treaty, was not among the reservations authorized by it or was incompatible with its object and purpose. It would then be for each State to decide whether to accept the reservation or to object to it in accordance with article 20 of the 1969 Vienna Con-

vention. The inclusion of those elements in the guideline would ensure its consistency with the letter and spirit of the Convention; he hoped that the Drafting Committee would find appropriate wording that would reflect all the comments made.

15. Mr. RODRÍGUEZ CEDEÑO said that guideline 2.1.7 *bis* should be brought into line with the 1969 and 1986 Vienna Conventions and, in particular, with article 77 of the 1969 Vienna Convention, which set forth the functions of the depositary, and with articles 19 and 20 of that Convention. The Special Rapporteur's draft struck a balance between two points of view: that of the 1969 Vienna Convention, according to which the depositary's mission was limited to the management of treaties, and that of progressive development, which gave the depositary broader powers. Personally, however, he was concerned at the fact that draft guideline 2.1.7 *bis* gave the depositary the power to qualify a reservation as "manifestly impermissible". Therefore, while agreeing that it should be referred to the Drafting Committee, he hoped that the latter would reword it in order to take account of the different opinions expressed in plenary, particularly on that point. The inconsistent wording of the Spanish text, which he had already mentioned, should also be addressed.

16. Mr. MOMTAZ pointed out that, in most cases, States which made manifestly impermissible reservations did so in full awareness of that fact rather than through an error on the part of their legal experts, usually as a result of domestic policy issues which left them with no choice but to make impermissible reservations or not to ratify the treaty at all. It might be preferable to use the wording of article 20 of the 1969 Vienna Convention, leaving it to the other contracting States to react to such reservations; the choice was between the integrity and the universality of treaties.

17. Mr. PAMBOU-TCHIVOUNDA said that some ambiguity remained; he was not certain of the effect of the other States parties' silence regarding a manifestly impermissible reservation. Since the 1969 Vienna Convention made the acceptance of reservations tacit, he wondered whether States' silence might be a form of acceptance of manifestly inadmissible reservations or whether it should be viewed as a sign that they considered them to be null and void.

18. Ms. XUE said that, given the large number of treaties drafted in recent times, it could safely be assumed that the depositary could be trusted to exercise judgement in deciding whether a reservation was manifestly impermissible, particularly when that depositary was part of the United Nations system. However, it was most important to bear in mind that, if manifestly impermissible reservations were formulated, the States whose interests were affected would be bound to react. She wondered whether it was wise to place the depositary in a situation in which it must engage in a substantive debate with a reserving State. She was concerned that draft guideline 2.1.7 *bis* might accord the depositary wider interpretative powers than either the Commission or States desired. In the event of a State's formulating a manifestly impermissible reservation, for example, if, in the context of a genocide treaty,

a State reserved the right to conduct genocide in certain circumstances, all contracting States would object to that reservation. In any case, the depositary must remain neutral, in the interest of stable relations between States parties and in its own interest.

19. Mr. CHEE reverted to the formulation of draft guideline 2.1.7 *bis*, which seemed to him to contravene article 77 of the 1969 Vienna Convention, on the functions of depositaries. Nothing in article 77, paragraph 1, subparagraphs (a) to (h), gave the depositary the power to determine the permissibility or impermissibility of a reservation. Subparagraph (d) accorded it the task of “examining whether [...] any [...] communication [...] [was] in due and proper form”—a task that clearly concerned only the procedural aspects. He was concerned about the use of three expressions in draft guideline 2.1.7 *bis*, namely: “in the opinion of the depositary”, “manifestly impermissible” and “in the depositary’s view”. It seemed to him that those expressions went beyond the limits imposed by article 77 of the Convention, as well as exceeding the function of the depositary as recognized by customary international law.

20. Mr. KAMTO said that, irrespective of the various points raised, such as the neutrality of the depositary or domestic policy issues influencing States’ behaviour, there was also a legal problem of the definition of the role of the depositary, in the light of positive law, including the 1969 Vienna Convention, and the subsequent evolution of international practice. The provisions of articles 19, 77 and 20 of the Convention should be respected while taking account of the practical need to confer a more important role on the depositary. He was in favour of referring draft guideline 2.1.7 *bis* to the Drafting Committee, but hoped that the Committee would avoid the French term *illicite*, which belonged to the realm of State responsibility, by instead using a term such as *admissibilité* or by reproducing the provisions of article 19 to specify those types of reservation to which the depositary could react and referring to article 77, paragraph 1, subparagraph (d). The depositary might draw the attention of the reserving State to the fact that the reservation contravened subparagraph (a) or (b) of article 19, in a communication that it would not be necessary to make public. If the reserving State persisted, the depositary could then draw the reservation to the attention of the other contracting States. As for the point dealt with in article 19, subparagraph (c), that matter fell solely within the competence of States.

21. Mr. PAMBOU-TCHIVOUNDA noted with concern that the first paragraph of draft guideline 2.1.7 *bis* began with the words “Where, in the opinion of the depositary, a reservation is manifestly impermissible...”. An opinion, however well-founded from the technical and legal standpoints, could not bind a sovereign State, which remained free to accept or reject any reservation formulated by another State. The Commission would thus seem to be becoming needlessly alarmed.

22. Ms. ESCARAMEIA said that nothing in draft guideline 2.1.7 *bis* contravened article 77 of the 1969 Vienna Convention, which provided a deliberately non-limitative definition of the depositary’s functions. As for the ques-

tion of political choice, she did not think it was a question of the integrity of the treaty versus the universality of the treaty. In practice, it was not the treaty that was universal but some of its provisions, and, furthermore, it was not possible to predict which provisions would be universal. If a State formulated a reservation that was not authorized under article 19 of the Convention, that State was committing an illegal act, and the depositary must not be encouraged to ignore the fact. In practice, the silence of other States amounted to an acceptance of the reservation because, as between the State that had not objected and the reserving State, the treaty was effective and the reservation applicable. Finally, it was inaccurate to say that States could always do what they wanted. In practice, small or medium-sized States often hesitated to compromise their good relations with the reserving State. Within the European Union, objections were often formulated jointly, and small European Union member States were very glad to be able to avail themselves of that possibility. The modest watchdog function conferred on the depositary in the draft guideline would serve a similarly useful purpose.

23. Mr. PELLET (Special Rapporteur) said he was surprised that the debate on draft guideline 2.1.7 *bis* had taken on such proportions, as the provision was purely procedural, useful to be sure, but ultimately innocuous, a middle-of-the-road stance in the range of sometimes extreme positions stated in the Sixth Committee. It meant that, when a depositary considered that a reservation was manifestly impermissible under article 19 of the 1969 Vienna Convention, he should be able to say so to the author of the reservation. That State would then react and, if a compromise was not reached, the parentheses would be closed and the procedure would resume, meaning that the depositary would transmit the reservation to the other States and they would either object or not. What was not innocuous, however, was the argument that the State had the right to raise domestic policy problems to the international level by means of a manifestly impermissible reservation. If a State formulated a manifestly impermissible reservation, i.e. one prohibited by a treaty or one that was fundamentally incompatible with the object and purpose of the treaty, there was no way domestic policy problems could exempt it from abiding by the rules of international law, which were all the more important in that they established a very acceptable balance between the principles of integrity and universality.

24. The Commission appeared to have no objection to referring draft article 2.1.7 *bis* to the Drafting Committee, but it had to give the Committee guidelines based on the lessons to be learned from the debate, which had focused primarily on four issues: terminology; whether manifest impermissibility related only to article 19, subparagraphs (a) and (b) of the 1969 Vienna Convention or also to subparagraph (c); the end of paragraph 2 of the draft guideline; and the problem of the time frame, which in his opinion was a non-problem. The terminology problems related to the words “impermissible” and “manifestly”. The words *illicite* and *ilícita* posed problems in French and Spanish, whereas there had been no objection to the word “impermissible” in English. The word *illicite* did give rise to a problem because in international law it related to State responsibility. However, a State that made a reservation that was *illicite* was not incurring any responsibility and

was simply running the risk that its reservation would be considered null and void. Of the terms that could be used in French to replace *illicite*, *inadmissible* had to be ruled out, at least as a technical term; *irrecevable* was more limited than the English word “impermissible”; and *incompatible* referred only to article 19, subparagraph (c), of the Convention, whereas the problem was much broader and some members of the Commission even wanted to leave subparagraph (c) aside. The best solution might be to return to the terminology he had used in his first two reports, saying, for example, that a reservation was *valide* or *non valide*, even if the word “impermissible” was retained in the English text owing to the objections raised in the past about the use of the word “valid” in English. It would certainly be possible to try to work out a definition for the word “manifestly”, perhaps on the basis of article 46, paragraph 2, of the Convention, but, being fond of soft law, he thought there was no need to rewrite the dictionary for such an innocuous provision.

25. Some members of the Commission had proposed that the depositary should be allowed to react only to the situations dealt with in article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention. He opposed that idea because it was precisely the situations covered in article 19, subparagraph (c), that were most likely to arise in practice. He was not unsympathetic to the comments on the way the text was worded, but the provision must not be emptied of its substance by making it applicable exclusively to situations where a problem could not actually arise. It was the last part of paragraph 2 of draft guideline 2.1.7 *bis*, namely, “attaching the text of the exchange of views which he has had with the author of the reservation”, that gave rise to the greatest misgivings, however. It was true that discretion was a virtue and that the depositary was a facilitator and not a judge, but it was also true that States were frequently careless, and there was something to be said for reminding them of their duties. The exchange of views in question did not necessarily take place in writing, and the depositary did not necessarily have to attach it in its entirety. The Drafting Committee would undoubtedly find a slightly less formulaic way of describing the watchdog function of the depositary. As to the time frame, some members were concerned that the procedure might be extended indefinitely and wondered whether a time limit should be set for the exchange of views with the author of the reservation. He himself thought that, as long as a State was ready to enter into discussions, the exchange should be allowed to continue. It might then be necessary to specify in the commentary that only the State that was the author of the reservation could end the exchange and demand that its reservation should be transmitted. As to the time from which the reservation could be considered to have been formulated, draft guideline 2.1.8 (Effective date of communications relating to reservations) could not be clearer: it was when the reservation had been communicated to the State or organization to which it was transmitted. The time frame allowed for formulating objections thus ran from the date of communication, in conformity with draft guideline 2.1.8. That was the basis for the Committee’s discussions.

26. Mr. MOMTAZ explained that he had not been suggesting that States should be allowed to violate international law. He had been referring to article 20 of the 1969

Vienna Convention and had even said that States had the right to object to manifestly impermissible reservations. He thus emphasized once again that a manifestly impermissible reservation had no legal validity.

27. The CHAIR said that, if he heard no objection, he would take it that the members of the Commission wished to refer draft guideline 2.1.7 *bis* to the Drafting Committee, on the understanding that, in considering that provision, it would take account of all the views expressed in plenary.

*It was so decided.*

*The meeting rose at 11.40 a.m.*

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## 2722nd MEETING

*Tuesday, 21 May 2002, at 10.05 a.m.*

*Chair:* Mr. Robert ROSENSTOCK

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Kuznetsov, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

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**Unilateral acts of States (*continued*)\* (A/CN.4/524, A/CN.4/525 and Add.1 and 2,<sup>1</sup> A/CN.4/521, sect. D)**

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPporteur  
(*continued*)\*

1. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), continuing the presentation of his fifth report (A/CN.4/525 and Add.1 and 2), recalled that it focused on a fundamental issue: the definition of the unilateral act against the background of the progress made in the work

\* Resumed from the 2720th meeting.

<sup>1</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part One).