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Summary record of the 2735th meeting

Topic:

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solution presented by the wording of draft guideline 2.5.X seemed to cover all eventualities.

The meeting rose at 11 a.m.

2735th MEETING

Wednesday, 24 July 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, 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. Kabatsi, Mr. Kateka, Mr. Kemi-cha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Tomka, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² 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*)

1. Mr. GAJA congratulated the Special Rapporteur on the very detailed analysis in his seventh report (A/CN.4/526 and Add.1–3). It sometimes happened, however, that he asked the Commission to take a position on proposals that were too obvious or to enter into areas that it would be wiser to leave aside. Such was the case, for example, with draft guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), paragraph 1 of which stated the obvious. It was for the reserving State to withdraw a reservation, and a finding of impermissibility could therefore never constitute withdrawal. A finding of impermissibility could either have the effect of requiring the reserving State to withdraw the reservation or of recommending that it should withdraw it. The text seemed to favour the first possibility. It was by no means certain, however, that a monitoring body had the inherent competence to require the reserving State to withdraw its reservation. The Commission had dealt with the competence of monitoring bodies in a very different way in the preliminary conclusions

¹ 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.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

on reservations to normative multilateral treaties, including human rights treaties, it had adopted at its forty-ninth session.³ At that time, it had considered that, where treaties were silent, the monitoring bodies established thereby were competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States.

2. In his view, whether such bodies had the competence to create obligations or to make recommendations depended on the interpretation of the treaty in question. Any general rule on the subject would thus be of limited value. Hence there was no need to spell out the consequences of a finding of impermissibility, at least as far as the withdrawal of reservations was concerned. A question that might arise in some cases, however, related to competence to invalidate a reservation that had been found impermissible.

3. He did not think that draft guideline 2.5.4 as a whole should be referred to the Drafting Committee, because the first paragraph was self-evident and the second was unnecessary.

4. Ms. ESCARAMEIA, congratulating the Special Rapporteur on the approach adopted in his report, said that she especially appreciated his explicit presentation of his doubts.

5. Referring to section C of the report, which focused on the Commission's relations with the human rights treaty bodies, among others, she said that the Commission should have as many contacts as possible with the other bodies that were dealing with the issue of reservations. That was all the more important in that the fragmentation of international law had been recognized by all as a primary concern. It would be undesirable for the Commission to adopt a regime for reservations that differed from the one that would be arrived at by the Sub-Commission on the Promotion and Protection of Human Rights. She therefore thought the Commission should seek the views of other bodies working in the same field.

6. Turning to the draft guidelines on withdrawal of reservations proposed by the Special Rapporteur in his seventh report, she said that she favoured the retention in draft guideline 2.5.1 (Withdrawal of reservations) of the words "Unless the treaty otherwise provides", even if they might seem superfluous. They did serve a purpose in the Guide to Practice, and in the present instance it was better to err on the side of excess than on that of insufficiency. She fully endorsed draft guideline 2.5.2 (Form of withdrawal), since the written form provided the certainty that was necessary in international law. Concerning draft guideline 2.5.3 (Periodic review of the usefulness of reservations), she welcomed the creative approach adopted by the Special Rapporteur and endorsed the draft guideline, although wondering whether there was any need for expired reservations to be withdrawn since they did not apply anyway. In paragraph 2, it might be useful to refer also to appeals by treaty-monitoring bodies, since internal legislation was sometimes rather ambiguous and scholars did not always agree.

³ See 2734th meeting, footnote 7.

7. While she subscribed to the main elements of draft guideline 2.5.4, she believed that the various types of situation that might arise should be taken into account. The provision could cover not only the bodies set up by treaties but also judicial bodies. Those bodies had differing competences: some only had recommendatory powers, while others had compulsory powers. There seemed to be a problem of logic in paragraph 2, at least in English: if the State or international organization “must act accordingly”, then the reservation must be withdrawn, something that was not made clear by the phrase “it may fulfil its obligations ... by withdrawing the reservation”. In short, it was good that the provision was in the Guide to Practice, but a distinction had to be made among the different kinds of situations that might arise.

8. Mr. PAMBOU-TCHIVOUNDA said he agreed with Ms. Escarameia that the Commission should be available and open to bodies dealing with the same matters as it was.

9. Draft guidelines 2.5.1 and 2.5.2 raised interesting points, since they dealt with the time of withdrawal and the initiative for withdrawal, both of which were within the discretionary power of States. Clearly, a reservation, like its withdrawal, was unilateral in nature. It was therefore open to question whether there was any purpose in including those provisions in the Guide to Practice, since they reproduced the wording of article 22, paragraph 1, and article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions. In his view, the Guide to Practice could simply incorporate a reference to those provisions.

10. It was possible to see the point and the purpose of draft guidelines 2.1.1 (Written form), 2.1.2 (Form of formal confirmation), 2.1.6 (Procedure for communication of reservations), 2.1.7 (Functions of depositaries) and 2.4.3 (Formulation and communication of conditional interpretative declarations), which had the advantage of dealing with the function of the written mode and of setting up—on the basis of that mode—specific regimes and regimes which were related to and supplemented the regime of reservations. With regard to objections to and withdrawal of reservations, however, the requirement of written communication was already set out in the Vienna Conventions, and there was no need to spell it out.

11. Draft guideline 2.5.3 gave rise to problems because the review of the usefulness of reservations related not to procedure but to substance, whether in terms of the reasons for the review or the reasons for the reserving State to consider withdrawing reservations. The draft guideline raised two problems that the report did not go into: the conditions for withdrawal and the role of expired reservations.

12. Draft guideline 2.5.4 gave rise to yet another type of problem that would have to be considered in plenary. He endorsed Mr. Gaja’s general comments on the draft guideline, but he also had questions about the form, nature and scope of a finding of impermissibility. Should a finding of impermissibility be deemed to be binding on the reserving State? That raised the question of the nature of the monitoring body that made the finding. It could be a political body, a jurisdictional body or a *sui generis* body. Such

diversity must be taken into account in the draft guideline and the various possible situations addressed.

13. Paragraph 2 of draft guideline 2.5.4 was useful only if a finding of impermissibility was called for, entailing an obligation to withdraw the reservation; the reserving State would then have to abide by it. But if a recommendation was involved, there was no need for the second paragraph. A new provision would have to be inserted before draft guideline 2.5.4, or, alternatively, an intermediary stage would have to be envisaged and incorporated between paragraphs 1 and 2.

14. All those issues came back to the problems of the competence of the monitoring body and the opposability of a finding of impermissibility, which themselves brought up the very question of the permissibility of a reservation, one that permeated the entire discussion, in terms either of definitions or of procedure. If the Guide to Practice was to serve the purpose for which it was intended, those problems would have to be solved with a great deal of precision.

15. The CHAIR, speaking as a member of the Commission, said that he endorsed Mr. Gaja’s comment on draft guideline 2.5.4. It was true that if the State “must act accordingly”, withdrawal was necessary, but a State did not have an obligation to follow the recommendations of a monitoring body.

16. Mr. DUGARD, referring to cooperation with other bodies on the subject of reservations to human rights instruments, said that the Commission should take the initiative with some urgency, since practice was developing fast in that field. The Commission should take advantage of the fact that most human rights bodies were meeting at the same time as itself and make the necessary personal contact. He wondered whether the Chair and the Special Rapporteur could take steps to organize an informal meeting with the interested parties during the next session.

17. The CHAIR said that he had had several discussions with the people concerned, but they had led to nothing.

18. Mr. MANSFIELD endorsed the views expressed by Ms. Escarameia and Mr. Dugard that the main question was who should take the initiative. In his view, the Commission should take a proactive stance in order to move matters forward.

19. The CHAIR said that if all concerned were agreeable, he would be glad to write a brief letter to the Chairpersons of the Sub-Commission on the Promotion and Protection of Human Rights and of the Human Rights Committee, urging them to get in touch with the Commission with a view to an informal exchange of views at the next session. Frankly, he did not believe that the Commission had failed to make known its willingness for such an exchange, but the fact was that his “preliminary conclusions” had met with a deathly silence.

20. Mr. MANSFIELD said that he wondered whether it was really necessary to adopt a formal approach. It might be more sensible to make direct contact with the people

concerned and get on with the job, without standing on formality.

21. Mr. PELLET (Special Rapporteur) said that the situation was, he feared, more complicated than that. At its forty-ninth session the Commission had taken the step of adopting its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. A letter had subsequently been sent to the chairpersons of the human rights bodies, requesting them to send any comments to the Special Rapporteur. At that time, only one had deigned to send a formal reply, the Chairwoman of the Human Rights Committee, who had sent a rather dry, abrupt letter implying that the Committee was out of sympathy with the Commission. A letter had subsequently been received from the chairpersons of the human rights bodies, in which they had simply endorsed the letter from the Chairwoman of the Human Rights Committee. A short time later, Ms. Hampson, a member of the Sub-Commission, had suggested that the Sub-Commission should produce a report on reservations to human rights treaties. Over the years, however, the Commission on Human Rights had been opposed to the Sub-Commission's embarking on any work on that topic, since it did not see the need for such a study, which might duplicate the work of the International Law Commission. It had requested Ms. Hampson several times to make contact with him, as Special Rapporteur, but she had never done so. He had been in touch with her privately several times and had been given to understand that she would tell him the results of her work when it had been completed, but he was still waiting for her to do so. That was why, unlike Mr. Mansfield, he thought that the International Law Commission should adopt an official approach. The best course would be for the Chair and the Special Rapporteur jointly to sign a letter to the Chairperson of the Sub-Commission and to Ms. Hampson. It would also be a good idea to renew contact with the group of chairpersons of the human rights bodies, particularly the Chairperson of the Committee on the Elimination of Discrimination against Women, who was extremely active and had interesting ideas on reservations. It would be useful to invite representatives from each of the bodies concerned to come and participate in debates at the next session, if only because consideration of the preliminary conclusions would need to be resumed one day. From the financial point of view, it would be preferable if that could take place at a time when the International Law Commission was meeting in Geneva at the same time as the other bodies.

22. Mr. CANDIOTI said that he supported the Special Rapporteur's proposal and his idea of a letter to be signed by him and the Chair. The proposal should be recorded in the Commission's report to the General Assembly on its work.

23. The CHAIR said he took it that there was general support for the approach suggested by the Special Rapporteur in response to the Commission's expressed desire to have contact with the bodies in question. He also took it that a letter officially asking for opportunities for consultation during the next session in Geneva would be a solution that was responsive to the views of the Commission. He and the Special Rapporteur would draft a letter, which

would be distributed to the Commission and sent to the relevant parties in order to stimulate some exchange.

24. Mr. PELLET (Special Rapporteur), introducing draft guidelines 2.5.5 to 2.5.6 *ter* relating to the procedure to be followed for withdrawing a reservation, said that the most striking aspect of the 1969 and 1986 Vienna Conventions was their silence on the whole issue. It was therefore not possible to proceed in the same way as for draft guidelines 2.5.1 and 2.5.2, which had been introduced at the preceding meeting, or for many other draft guidelines already adopted: the Vienna Conventions were of no help, and they could not be paraphrased.

25. He had therefore decided that the best approach would be to model the procedure for the withdrawal of reservations on that relating to their formulation, even though it had to be recognized that the rule of parallelism of forms, which was usually observed in internal law, was not necessarily transposable to international law, partly because there was less formalism in international than in internal law. The rules relating to the procedure for formulating reservations could, however, be taken as a starting point. It could then be seen whether they might be applicable to withdrawal, given that, even for the formulation of reservations, the 1969 and 1986 Vienna Conventions were not very detailed and that, in a number of cases, he had been forced to use as models draft guidelines already adopted by the Commission for the Guide to Practice. In that context, he pointed out that he had drafted the seventh report before the Commission adopted the relevant draft guidelines arising out of his sixth report.⁴ He would therefore be proposing a few minor amendments to the draft guidelines contained in the seventh report so as to bring them into line with the draft guidelines on the formulation of reservations adopted at the preceding session.

26. Draft guideline 2.5.5, which he had entitled "Competence to withdraw a reservation", was a case in point. For draft guideline 2.1.3, which was the counterpart and the model for draft guideline 2.5.5, the Commission had preferred the title "Formulation of a reservation at the international level". For the sake of consistency, it would therefore be preferable to give draft guideline 2.5.5 the title "Formulation of the withdrawal of a reservation at the international level".

27. Since the Commission had preferred the long version of draft guideline 2.1.3, it would also be logical to take as a point of departure for draft guideline 2.5.5 the long version which appeared in paragraph 139 of the report. The suggested alternative was thus no longer appropriate: the Commission should deal with withdrawal as it had with formulation and adopt the longer version, unless guidelines specifically relating to the procedure for withdrawal were omitted from the Guide to Practice altogether and there was simply a guideline 2.5.5 referring the reader, *mutatis mutandis*, to guidelines 2.1.3 and 2.1.4 relating to the procedure for formulation, which had been adopted at the previous session.

28. Paragraphs 141 and 142 of the report set out the possibility of including such abbreviated draft guidelines,

⁴ See 2719th meeting, footnote 10.

but he was bound to say that he was not in favour of that approach, for two reasons: first, merely reproducing a provision did not seem to address the practical needs that the Guide to Practice was intended to meet. Users of the Guide had to be able to easily find all the guidelines they needed in the place where they were looking for them; and, for that purpose, it was better to repeat than to refer the reader elsewhere. Moreover, and above all, “*mutatis mutandis*” did not mean “word for word”. The Guide to Practice could not simply transpose to the withdrawal of reservations the rules contained in draft guideline 2.1.3 on the formulation of reservations. Broadly speaking, the procedures for withdrawal and formulation had to be similar but not necessarily identical, and some adaptation was necessary.

29. As was indicated by the Secretariat in the latest edition of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, “withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty”.⁵ In the past, the Secretary-General had had a slightly more flexible approach, but he himself thought that the new clear and unequivocal formula quoted in paragraph 128 of the report was well-founded. After all, the withdrawal of a reservation signified that the reserving State accepted the content of the treaty more fully than it had previously; and it seemed logical enough that the withdrawal could be made only by authorities entitled to represent the State or international organization in expressing consent to be bound by the treaty. The Secretary-General’s practice, which had become firmly established, was not, however, followed so strictly by other international organizations of which the secretaries-general were major depositaries of international treaties. In particular, such strictness was not favoured by the Council of Europe, which allowed the withdrawal of a reservation to be notified by the permanent representative of the reserving State to the Council.

30. For all those reasons, therefore, there was no reason not to adopt for withdrawal the terminology used in draft guideline 2.1.3 for the formulation of reservations: “Subject to the customary practices in international organizations which are depositaries of treaties”, the withdrawal could be formulated by the same persons as those entitled to express the consent of the State to be bound and to formulate reservations. Two amendments to the text of draft guideline 2.1.3 were necessary, however, as was explained in paragraph 140 of the report. First, a plenipotentiary would need to produce powers specifically applying to withdrawal and not full powers to adopt or authenticate a treaty or to express consent to be bound, if only because a withdrawal might take place several years later and, in most cases, the person withdrawing the reservation on behalf of the State would be different from the person who had expressed the State’s consent to be bound. Even if the individual was the same, the withdrawal of the reservation meant that his instructions had changed and that new full powers were required. That was the reason for the proposed change to draft guideline 2.5.5, paragraph 1 (a),

which appeared in paragraph 139 of the report, from the corresponding provision in guideline 2.1.3. Second, draft guideline 2.1.3, paragraph 2 (b), provided that “representatives accredited by States to an international conference” were competent to formulate “a reservation to a treaty adopted at that conference”. While that applied to the formulation of reservations, however, it did not to their withdrawal: in virtually every case, the international conference that had adopted the text of the treaty was obviously no longer in session at the time when the State wished to withdraw its reservation. He therefore considered that the text of guideline 2.1.3, paragraph 2 (b), should not be reproduced in guideline 2.5.5. On the other hand, since the Commission had decided, despite his own doubts, to retain draft guideline 2.1.3, paragraph 2 (d), he thought that the corresponding provision of draft guideline 2.5.5 (para. 2 (c)) should also be retained and the square brackets currently enclosing it deleted. He therefore proposed that the provision, without square brackets and with the change of title he had mentioned earlier, should be referred to the Drafting Committee.

31. Draft guideline 2.5.5 *bis* (Competence to withdraw a reservation at the internal level), which also appeared in paragraph 139 of the report, had been envisaged as separate from guideline 2.5.5 *ter* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations). Again, he believed that it was advisable to align those guidelines on the texts adopted on the formulation of reservations; on the one hand, the two draft guidelines on the formulation of reservations proposed originally had been merged into a single draft guideline (2.1.4), and, on the other, the latter was entitled “Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations”. The two draft guidelines 2.5.5 *bis* and 2.5.5 *ter* should therefore be merged, and the resulting guideline should be given the title selected for the latter. As to the content, a simple transposition could be made by substituting the word “withdrawal” for the word “formulation” that appeared in draft guideline 2.1.4. Indeed, practice regarding withdrawals of reservations was doubtless as diverse as practice regarding their formulation, and international law had nothing to say on that score; that explained the proposed text for draft guideline 2.5.5 *bis*, which could become the first paragraph of the new single guideline. However, other States could not be required to know the internal rules applicable to withdrawal; that explained the proposed text for draft guideline 2.5.5 *ter*, which could become the second paragraph of the new single guideline. In order to bring the text of the new guideline into line with that of draft guideline 2.1.4, the last part of guideline 2.5.5 *bis* should be amended to read “is a matter for the internal law of each State or the pertinent rules of each international organization”.

32. Similar reasoning had been used with regard to the communication of the withdrawal of reservations, which was dealt with in draft guidelines 2.5.6, 2.5.6 *bis* and 2.5.6 *ter*. There again, a single guideline could be included that referred to the rules used to communicate reservations, which were set out in draft guidelines 2.1.5, 2.1.6 and 2.1.7, adopted at the preceding session. Contrary to the case of the formulation of a withdrawal, when the rules on the formulation of reservations could not simply be

⁵ United Nations publication (Sales No. E.94.V.15), document ST/LEG/7/Rev.1, para. 216.

transposed, there was no reason to differentiate between the communication of a reservation and the communication of a withdrawal. It was very clear from the *travaux préparatoires* of the 1969 Vienna Convention that the members of the Commission at the time had considered that the depositary should use the same procedure for the communication of reservations and for the communication of their withdrawal. That point had been confirmed by practice. Consequently, transposing the text of guidelines 2.1.5, 2.1.6 and 2.1.7 to three different draft guidelines simply by replacing the words “communication of reservations” with the words “communication of withdrawal of reservations” could seem unnecessary, although perhaps justified by a concern for comprehensiveness and readability; the two options were nevertheless presented in paragraphs 150 and 151 of the report. However, a problem arose owing to the merger into a single guideline (2.1.6) of guidelines 2.1.6 and 2.1.8, which were contained in the sixth report. Although paragraphs 1 and 2 of draft guideline 2.1.6 were directly transposable, paragraph 3, which was the result of an amendment proposed by Mr. Gaja (2733rd meeting, para. 43) and referred to article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions, could not be transposed because it referred only to the time limit for raising objections. Draft guideline 2.5.9, which would be dealt with later, made paragraph 2 relating to the effective date of a communication unnecessary. Guideline 2.5.6 could, however, refer to guideline 2.1.6, either by providing the foregoing explanation in the commentary or by limiting the cross-reference to paragraphs 1 and 2 of guideline 2.1.6; that would probably be preferable. In any event, the Commission had to decide whether it preferred the short version contained in paragraph 150 of the report or the long version, consisting of three different guidelines, contained in paragraph 151. He preferred the former solution.

33. Mr. KATEKA, referring to draft guidelines 2.5.5 and 2.5.6, said that he preferred the long version in both cases because he considered that cross-references should be avoided. He also doubted whether a communication of withdrawal of a reservation could be made by facsimile, as indicated in guideline 2.5.6 *bis*. The use of a facsimile posed the problem of the identity of the sender, which called for the use of special codes. Apart from that, he agreed with the text of the draft guidelines.

34. Mr. PELLET (Special Rapporteur), continuing with the presentation of his seventh report, referred to draft guidelines 2.5.7 and 2.5.8 on the effect of withdrawal of a reservation and on the time at which the withdrawal of a reservation became operative; those matters were covered in paragraphs 152 to 184 of the report. He admitted that it might seem illogical for the draft guidelines on the effect of withdrawal to appear in the section of the Guide to Practice on the withdrawal procedure, but, since the effect of the withdrawal of a reservation was far less complex than the effect of the reservation itself, it was more appropriate to include all of the questions relating to the withdrawal of reservations in a single section. The question of the time at which the withdrawal became operative was resolved by article 22, paragraph 3, of the 1969 and 1986 Vienna Conventions, which established a rule that could simply be stated again. The effect of the withdrawal was obvious, and, at the Commission's 1968 session, the

proposal to include a provision to that effect in the draft guidelines had been rejected. However, that position, which could be justified in the case of a framework treaty such as the 1969 Vienna Convention, was not appropriate in the Guide to Practice, in which it was necessary to include provisions on the consequences of the withdrawal of a reservation. As was indicated in paragraphs 179 and 183 of the report, a distinction should be made between three situations. In the first, which corresponded to paragraphs 1, 4 (a) and 5 of article 20 of the 1969 and 1986 Vienna Conventions, the reservation was simply accepted; in that case, once the withdrawal had taken place, the reserving State or organization and the State or organization that had implicitly or expressly accepted the reservation were bound by the whole provision to which the reservation related. In the second case, which was set out in the first part of paragraph 4 (b) of article 20 of the Conventions, a State or an international organization had objected to the reservation without objecting to the entry into force of the treaty between itself and the reserving State or organization. The effect of the withdrawal was also that the former reserving State or organization and the former objecting State or organization would be bound by the relevant provisions. In the third case, as dealt with in the last part of paragraph 4 (b) of article 20 of the Conventions, where the objecting State or organization had clearly expressed its intention of objecting to the entry into force of the treaty between itself and the reserving State or organization, the treaty did not bind those States or organizations in their relations *inter se*, so that, if the reservation was withdrawn, the treaty would enter into force between them. The last case was covered in draft guideline 2.5.8, while the first two cases were dealt with in draft guideline 2.5.7 (para. 184 of the report). However, the wording of draft guideline 2.5.7 was not satisfactory. It stated: “The withdrawal of a reservation entails the application of the treaty as a whole...”, but that was not necessarily the case because there could be other reservations which had not been withdrawn and which continued to prevent the application of the treaty as a whole. The matter could be clarified in the commentary, but it would probably be better to amend draft guideline 2.5.7, which might read: “The withdrawal of a reservation entails the application of the entire provision of the treaty to which the reservation related”; the rest would remain unchanged. That explanation was not necessary in draft guideline 2.5.8 because, in that case, what was important was the entry into force of the treaty itself, even if other reservations might remain in force. That point could be clarified in the commentary. The question of the date on which the effect was produced was covered in article 22, paragraph 3 (a), of the 1986 Vienna Convention, which read as follows: “The withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.” That rule, which had been stated during the Commission's discussions at its fourteenth session, in 1962, was not self-evident. The sudden entry into force of a treaty as a whole with a former reserving State could give rise to problems for certain States whose internal law was not adapted to the new situation, particularly in the field of private international law. The Commission was aware of that and had consequently indicated in its commentary that it must be accepted that the other parties might need a short period of time to bring their internal law into line

with the situation resulting from the withdrawal of the reservation; that was sensible but hardly satisfactory because it contradicted the text of the 1969 Vienna Convention, which established that the withdrawal became operative when notice of it had been received. However, the 1965 commentary provided an answer to the problem by indicating that it should be left to the parties to settle the matter by a specific provision in the treaty. This was reflected in article 22, paragraph 3, of the Vienna Conventions, which began with the words “Unless the treaty otherwise provides, or it is otherwise agreed”. Such wording, which he usually objected to because it applied to all the rules of the Vienna Conventions, seemed justified in the case of the withdrawal of a reservation if it was regarded as an invitation to negotiators to include a special clause in treaties to deal with the problem that might arise as a result of the application of the rule embodied in article 22, paragraph 3, of the Vienna Conventions in the event of a sudden withdrawal of a reservation. He therefore considered that it would be useful to include model clauses in the Guide to Practice that States should insert in the treaties they concluded in case the sudden withdrawal of a reservation caused problems for the other contracting parties. He recalled that, in its report to the General Assembly on the work of its forty-seventh session, the Commission had stated that the Guide to Practice would be presented in the form of draft articles that would constitute guidelines, accompanied, when necessary, by model clauses;⁶ however, when he had formulated model clauses on the late formulation of reservations, the Commission had rejected them on the grounds that “late reservations” should not be encouraged. He very much hoped that model clauses A, B and C, proposed in paragraphs 164 to 166 of his report, could be referred to the Drafting Committee, provided that they did not give rise to the same objection. If they did, it would have to be decided whether those clauses should be reproduced after the text of draft guideline 2.5.9, to which they corresponded, should be included in the commentary or should even appear in an annex to the Guide to Practice, with an indication to that effect in the commentary. The latter solution was the most appropriate. In summary, model clause A referred to deferment of the effective date of the withdrawal of the reservation, while model clause B shortened the effective date of the withdrawal and model clause C allowed a State that had withdrawn its reservation to set the effective date of the withdrawal itself. Those model clauses were based on clauses that existed in treaties in force, which were referred to in paragraph 163 and in the footnotes that accompanied model clauses B and C in the report.

35. In conclusion, he considered, first, that the provisions of article 22, paragraph 3 (*a*), of the Vienna Conventions should be included in the Guide to Practice, without changing the text, even though it departed from general principles of law in this respect and even though ICJ had taken the contrary position with regard to the acceptance of compulsory jurisdiction. On the one hand, insofar as possible, it was necessary to avoid questioning the rules established in the Vienna Conventions, and, on the other, those rules, which set the effective date of the withdrawal of a reservation at that on which each State had received notice of it, did, of course, leave the State making the

withdrawal in some doubt, but prevented the other contracting parties from being taken by surprise. In any case, the period of time normally amounted to only a few days. Second, States should be helped through the proposal of model clauses by which they could, as necessary, temper the strictness of the principle embodied in draft guideline 2.5.9, which was taken from article 22 of the Vienna Conventions.

36. Third, even in the absence of model clauses, it was not impossible that there would be, or could be, exceptions to that principle. To begin with, nothing prevented the reserving State or international organization from making the effective date of the withdrawal one subsequent to the date of receipt of the notification. In the interests of comprehensiveness, that was recalled in subparagraph (*a*) of guideline 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation), in paragraph 169 of the report. Subparagraph (*b*) of that guideline referred to a rather more complicated situation, in which the withdrawal did not alter the obligations of contracting States or international organizations in the case of “integral” obligations. One such example was that of the reservation formulated by Barbados when signing the International Covenant on Civil and Political Rights. The Government of Barbados had reserved the right not to apply in full the guarantee concerning legal assistance without payment, referred to in article 14, paragraph 3 (*d*), of the Covenant.⁷ If, going back on that position, the Government of Barbados considered that it could accept article 14 in its entirety, even with regard to pending cases, it could address to the Secretary-General a notification of withdrawal concerning all cases that had arisen as of a date prior to the withdrawal, which could then have retroactive effect. A reservation of that type affected only the relations of the reserving State with private individuals under its jurisdiction and had no effect on other States parties in their relations with the reserving State; and it seemed to go without saying that its withdrawal could cause no inconvenience to the other States parties and could indeed only be welcome to them, as it manifested the will of the State withdrawing the reservation to apply the treaty more completely. Accordingly, there was no reason why, in such a case, the withdrawal should not have immediate or retroactive effect, and that was expressed in subparagraph (*b*) of guideline 2.5.10.

37. On a different matter, he said that at the previous session he had protested vigorously on noting that the cover page of his report bore, beneath the date, the classification “Original: English/French”, whereas, like all his other reports, it had been drafted wholly in French. While he was grateful to the secretariat for refraining from prefacing the seventh report with that inaccurate, indeed, downright false description, he had, unfortunately, another grievance, again relating to language problems.

38. In paragraphs 180 and 181 of the original text of his report, he had cited an article from the literature in its original language, Italian, with a French translation of the quotation appended in brackets. However, when editing the report, the secretariat had seen fit to delete the Italian original, retaining only the French translation. That

⁶ *Yearbook ... 1995*, vol. II (Part Two), para. 487 (*b*).

⁷ United Nations, *Treaty Series*, vol. 999, p. 288.

was unacceptable, for reports by special rapporteurs were not the responsibility of the secretariat, but solely of their authors. That a serious work of scholarship should cite a text in translation, without enabling the reader to refer to the original, was contrary to all scientific practice. He recalled that, the previous year, he had been told that his complaints at the suppression of the original of an English quotation were not justified, since the original was to be found in the English version of the report. Whatever the merits of that argument, it was not true in the case of a quotation in the original Italian, to which there was no way of referring since Italian was not an official language of the United Nations. Thus, those initiatives taken by the secretariat without his knowledge called into question his academic and scientific credibility, and he wished to protest formally against such unacceptable bureaucratic practices, which smacked to him of censorship.

39. Mr. MIKULKA (Secretary of the Commission), replying to the Special Rapporteur's comments, said that addenda 2 and 3 of the French version of the report were headed with a "Note" which read: "This report was drafted entirely in French, although some quotations (translated into French by the Special Rapporteur, for which he is wholly responsible) are reproduced in their original language." That note should clarify matters.

40. However, the fact that addenda 2 and 3 to the seventh report were classified as "Original: French" resulted from a technical error: the classification should be "Original: English/French", as the document contained passages in English, albeit not written by the Special Rapporteur and consisting of quotations. The Special Rapporteur's interpretation of the original language classification was not the one applied by the United Nations. The classification: "Original: English/French" indicated that when the text was translated into the other official languages of the United Nations, the quotations in English would be translated, not from the French, but from the English. It was a technical indication addressed to the technical services of the Organization, not an indication of the Special Rapporteur's official working language.

41. As for the deletion of the quotation in Italian, official documents of the United Nations could not include text in languages other than the Organization's official languages. It would be recalled that in the past the Commission had requested a special rapporteur, Mr. Arangio Ruiz, who had been in the habit of including long quotations in Italian in his reports, to discontinue that practice or to provide a translation of his quotations in an official language.

42. In conclusion, he said that, if the Special Rapporteur continued to incorporate passages in languages other than the official languages of the United Nations in his reports, the Organization's technical services would continue systematically to delete them.

43. Mr. PELLET (Special Rapporteur) said that his inclusion of quotations in Italian and German in previous reports had not given rise to any problems and that he was at a loss to understand the secretariat's sudden inflexibility in that regard. Furthermore, all quotations in his reports given in non-official languages were always accompanied by a translation made by himself. The issue was one of

scientific rigour, and if quotations in non-official languages were deleted from his future reports, those reports would be withdrawn.

44. Mr. GAJA said that it would be useful for the Commission to have the text of the draft guidelines, as amended by the Special Rapporteur since the publication of the report, in French and English and, if possible, in other official languages.

45. With regard to guideline 2.5.10, its subparagraph (b) provided that "The withdrawal does not alter the situation of the withdrawing State in relation to the other contracting States or international organizations." In his opinion, however, even with regard to treaties imposing obligations *erga omnes*, the withdrawal of a reservation did indeed alter the situation of the withdrawing State and also the rights and obligations of the other contracting States or international organizations towards the withdrawing State. What the withdrawal did not alter was the content of the obligations of the other States, and the immediate or even retroactive effect of the withdrawal could thus not inconvenience them in any way.

46. Mr. PELLET (Special Rapporteur), replying to Mr. Gaja's first comment, said he was not sure that the course advocated by Mr. Gaja was really necessary, as the matter was basically one for the Drafting Committee. However, if the secretariat wished to undertake that task, he would of course have no objection.

47. As for the comments on the seventh report, he would refrain from commenting on guideline 2.5.4, which raised important problems, until more members of the Commission had given their views on it. He nevertheless wished to state at the outset that Mr. Gaja, and to a lesser extent Ms. Escameia, had misrepresented the wording of the guideline and, consequently, his own words. Mr. Gaja had said that "it was by no means certain that the monitoring body had the inherent competence to oblige the reserving State to withdraw its reservation". That, however, was not what the guideline said: it simply stated that, among the possibilities available to a reserving State to act in accordance with a finding by a monitoring body, one possibility was that of withdrawing its reservation.

48. Mr. Kateka had said that he preferred the "long version" of guidelines 2.5.5 and 2.5.6. It would be helpful for other members to indicate their preference so as to offer guidance to the Drafting Committee. He stressed, however, that the two guidelines should not be dealt with in the same manner, as they referred to different problems. In the case of guideline 2.5.5, the words "*mutatis mutandis*" were essential, as it was not possible to apply the provisions referred to simply as they stood; in guideline 2.5.6 there was no need for that expression, a fact which made all the difference. As for Mr. Kateka's other comment, that he did not favour making the withdrawal of a reservation effective on the date of its communication by facsimile or electronic mail, the Commission had decided at the preceding meeting that that should be the case for the formulation of reservations, and he did not see how it could take a different position in the case of their withdrawal.

49. Regarding subparagraph (b) of guideline 2.5.10, he fully endorsed Mr. Gaja's comment and asked how Mr.

Gaja proposed amending the text to take account of that comment.

50. Mr. GAJA said that reference should be made in the provision to “the content of the obligations”.

The meeting rose at 1 p.m.

2736th MEETING

Thursday, 25 July 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Tomka, Ms. Xue, Mr. Yamada.

Reservations to treaties¹ (*continued*) (A/CN.4/526 and Add.1–3,² 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*)

1. Mr. FOMBA said that draft guideline 2.5.1 (Withdrawal of reservations) gave no particular cause for concern. He thus welcomed the Commission’s decision of principle that there must be cogent reasons for any departure from the relevant provisions of the 1969 and 1986 Vienna Conventions in the draft Guide to Practice, and he supported the Special Rapporteur’s proposal simply to adopt without change the wording of article 22, paragraph 1, of the 1986 Vienna Convention. On the basis of a proper analysis of the various issues, such as the definition and nature of the reservation, its social function, its legal scope and its limitations, there was no good reason to adopt any other course.

2. Again, guideline 2.5.2 (Form of withdrawal) posed no particular problems. Accordingly, he endorsed the Special

Rapporteur’s view, expressed in paragraph 90 of the seventh report (A/CN.4/526 and Add.1–3), that the guideline could safely follow the text of article 23, paragraph 4, of the Vienna Conventions, on the understanding that objections to reservations would form the subject of a separate section. On the question of implicit withdrawals, his position of principle was that the withdrawal of a reservation was not to be presumed. Yet the question—discussed in paragraphs 93 to 103 of the report—of whether certain acts or conduct could not be characterized as the withdrawal of a reservation merited further consideration.

3. Guideline 2.5.3 (Periodic review of the usefulness of reservations) was, as the Special Rapporteur pointed out in paragraph 105 of his report, no more than a useful recommendation. In his view, the issue was ultimately one of logic and political responsibility.

4. Guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty) raised three questions, namely the impermissibility of reservations; the right to declare a reservation impermissible; and the entitlement to act on such a finding. He reserved his position on the first question pending a more thorough examination of the matter, probably at the next session. On the right to declare a reservation impermissible, he would likewise refrain at the present stage from pronouncing on the question whether the treaty-monitoring bodies should be entitled to exercise that right. Suffice it to point out that the position of the human rights bodies set forth in paragraph 108 (a) of the report had been endorsed by the Commission at its forty-ninth session, in 1997.³ However, he had some doubts about the validity of those bodies’ position regarding their entitlement to act on their findings, as set forth in paragraph 108 (b) of the report, even though, on the face of things, that position seemed logical. He therefore endorsed the prudent approach adopted by the Commission at that session.

5. He agreed with the Special Rapporteur that the Commission could not pass over in silence the question whether a reservation declared impermissible was automatically “withdrawn from duty” as a result of whether it should or could be withdrawn by the reserving State (para. 107 of the report). In his opinion, first, a finding did not *ipso facto* equate to a withdrawal; second, from the teleological standpoint, the reserving State had not merely the option but the duty to withdraw an impermissible reservation; third, withdrawal was, albeit the main and most logical, not the only possible action, as was illustrated in paragraph 109 of the report.

6. In conclusion, paragraph 1 of guideline 2.5.4 had the virtue of clarifying the nature of the relationship between a finding of impermissibility and withdrawal. Paragraph 2 was consistent with the main purpose of the Guide to Practice, namely, to plead the cause of the integrity and full effectiveness of the treaty. Thus, unlike Mr. Gaja, he thought guideline 2.5.4 should be referred to the Drafting Committee, for it must not be forgotten that the Guide to

¹ 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.

² Reproduced in *Yearbook ... 2002*, vol. II (Part One).

³ Paragraph 5 of the preliminary conclusions adopted by the Commission on reservations to normative multilateral treaties, including human rights treaties (see 2734th meeting, footnote 6).