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Summary record of the 2736th meeting

Topic:

Extract from the Yearbook of the International Law Commission:-
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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. Escarameia, 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 treaties[1] (*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).

Practice was to be addressed to all States, and that not all aspects of practice were equally self-evident to all countries' legal services and practitioners.

7. He had no particular substantive difficulty with guideline 2.5.5 (Competence to withdraw a reservation at the international level), since it had been demonstrated that a modified version of guidelines 2.1.3, 2.1.3 *bis* and 2.1.4 could be applied to the withdrawal of reservations. His own preference was for the first option set out in paragraph 138 of the report. *A contrario*, a mere cross-reference to other guidelines was undesirable, since, as was pointed out in paragraph 142, the Guide to Practice was not a treaty but a "code of recommended practices" which users should be able to consult directly, easily and rapidly.

8. Finally, concerning guideline 2.5.6 (Communication of withdrawal of reservations), it appeared that a modified form of guidelines 2.1.5 to 2.1.7, on communication of reservations, could be applied to communication of withdrawal of reservations. Here, of the two options, namely, simply to refer to those guidelines or to reproduce them in their entirety, the first clearly had fewer drawbacks. Nonetheless, he favoured the latter solution in the interests of ease of reference and of consistent methodology. He also favoured the recommendation concerning the words "in writing", to be found in the footnote of the report that corresponded to draft guideline 2.5.6.

9. Mr. MOMTAZ congratulated the Special Rapporteur on his tireless efforts to advance the Commission's work on a somewhat intractable topic. The Special Rapporteur's useful summary of the *travaux préparatoires* which had led to the adoption of the 1969 Vienna Convention would give the Commission a better understanding of the reasons for the gaps in that instrument with regard to the procedure for withdrawal of reservations, and would confirm that there was no incompatibility between the spirit of the Convention and the draft guidelines.

10. Referring briefly to the question of cooperation between the Commission and the Sub-Commission on the Promotion and Protection of Human Rights, he expressed the hope that the Commission had taken note of the interesting suggestion made by Mr. Candioti, and that its report to the General Assembly would contain express mention of the decision taken by the Commission in that regard at its previous meeting.

11. As to the Special Rapporteur's seventh report, guideline 2.5.1 posed few difficulties, for it simply reproduced the text of article 22, paragraph 1, of the 1986 Vienna Convention. It might well be asked whether it was a valuable exercise simply to reproduce certain provisions of the 1969 and 1986 Vienna Conventions word for word in the Guide to Practice. His reply was emphatically in the affirmative, for a practical reason: the Guide must be self-contained and usable without the need for additional reference to the Conventions, a consideration that outweighed any concerns regarding duplication.

12. Guideline 2.5.2 was welcome, as formulation in writing of withdrawal of a reservation would indisputably safeguard the security and transparency of treaty relations. Likewise, the periodic review of the usefulness of reservations recommended in guideline 2.5.3 would undoubtedly reduce the number of reservations which had been formulated in a specific political context and which had subsequently ceased to have any valid *raison d'être*. Nonetheless, he had some doubts about the usefulness of the last phrase of paragraph 2 of the guideline, namely, "and to developments in that legislation since the reservations were formulated". If internal legislation had been modified in such a way as to render the reservation redundant, little seemed to be gained by requiring States to review those legislative developments. The phrase added nothing to the guideline and should be deleted.

13. He welcomed the clarifications provided by the Special Rapporteur in response to the comments by Mr. Gaja and Ms. Escarameia on guideline 2.5.4. It went without saying that the reserving State was in no way obliged to withdraw a reservation declared impermissible by a treaty-monitoring body. Such findings were eminently political in character and could not be binding on States, which retained control over the reservations they had formulated. In his view, the misapprehension that had arisen was attributable to the wording of the second subparagraph of paragraph 110 of the report, which read "The reserving State (or international organization) cannot, nonetheless, ignore the finding and has the duty to take action;", and to that of the third subparagraph, which stated that the reserving State "must eliminate the causes of the inadmissibility…". The over-emphatic wording of those two subparagraphs had no doubt given rise to the confusion. Thus, in paragraph 2 of draft guideline 2.5.4, the words "must act accordingly" should be amended to read "should act accordingly", so as to better reflect the Special Rapporteur's intention.

14. The draft guidelines concerning the procedure for withdrawal of reservations were welcome, inasmuch as they filled the gap left by the 1969 and 1986 Vienna Conventions. Since it was in the interests of the treaty community as a whole to reduce the number of reservations to a minimum, the rules concerning formulation of reservations should not simply be transposed to the case of their withdrawal. While the procedure for formulation of reservations should be made as complex as possible, the procedure for their withdrawal should be made as simple as possible. To judge from paragraph 89 of his report, that seemed to be the Special Rapporteur's own conclusion. Thus, while his own preference with regard to competence to formulate a reservation at the international level was for guideline 2.1.3, in the case of withdrawal of reservations he favoured the "long version" of guideline 2.5.5. That formulation had the great advantage of enabling accredited representatives or heads of permanent missions to an international organization to withdraw a reservation to a treaty adopted in that organization without the need for the exercise of plenipotentiary powers.

15. For similar reasons, guidelines 2.5.5 *bis* (Competence to withdraw a reservation at the internal level) and 2.5.5 *ter* (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations) were welcome, both being such

as to make the procedure for withdrawal of reservations easier and reduce formalities to a minimum.

16. Finally, he saw no reason why the model clauses contained in paragraphs 164 and 166 of the seventh report should not be referred to the Drafting Committee, as they would undoubtedly reduce the difficulties encountered by States parties to a treaty following the sudden withdrawal of a reservation.

17. Mr. TOMKA said he had nothing to add to the discussion with regard to guidelines 2.5.1 and 2.5.2, since the texts simply reproduced the relevant provisions of the Vienna Conventions, on whose *travaux préparatoires* the Special Rapporteur had commented extensively and usefully. The question of implicit withdrawal was, in his view, purely academic and theoretical, since a reservation could not be presumed if in practice it must be withdrawn in writing.

18. Guideline 2.5.3 proposed a solution to the problem of "forgotten reservations". Despite being couched in the conditional, the formulation proposed by the Special Rapporteur seemed to imply that States were under an obligation to engage in a periodic review of their reservations. Particularly in view of the Special Rapporteur's own opinions on the question, it might be better to recast the guideline so as to begin with the words "It is recommended that…", so as to dispel any suspicion that there might be an obligation in that regard.

19. As to guideline 2.5.4, while treaty-monitoring bodies were entitled to assess the extent of States' compliance with their obligations under the treaty, they could not impose an obligation on a State to withdraw a reservation, even where the reservation conflicted with the object and purpose of the treaty. Where a treaty-monitoring body found a reservation to be impermissible, it was for the State concerned to draw its own conclusions. While he was not opposed to the Special Rapporteur's proposal that guideline 2.5.4, paragraph 1 of which was uncontroversial, should be referred to the Drafting Committee, paragraph 2 could usefully be amended by deleting the second sentence, which read: "It may fulfil its obligations in that respect by withdrawing the reservation."

20. Mr. PELLET (Special Rapporteur) said he reserved the right to return to draft guidelines 2.5.4 and 2.5.11 *bis* once he had heard all members' comments on them. Several members had pointed out that a State had no obligation to withdraw a reservation held to be impermissible by a treaty-monitoring body. That would not, however, be true if the body in question was ICJ. Be that as it might, the State or international organization was obliged to withdraw its reservation, not because of the finding that it was impermissible, but simply because of its impermissibility under international law; for, in the absence of any implementing mechanisms, international law was binding but unenforceable. The fact that the treaty-monitoring bodies did not have the power to oblige States to do something did not mean that they were not obliged to do it. Thus, a State could contest the validity of a finding; what it could not do was to treat that finding with contempt. As a minimum, it must react by contesting it in good faith.

21. As to Mr. Tomka's proposal, his initial reaction was that, if the second sentence of paragraph 2 of draft guideline 2.5.4 were to be deleted, then the provision would no longer have any place in the section relating to withdrawal of reservations.

22. The CHAIR, speaking as a member of the Commission, said the Commission must not lose sight of the fundamental role of consent: if a State filed a treaty together with a reservation which was deemed unacceptable, the State did not become a party to the treaty. That did not, however, obligate the State to withdraw its offer to become a party, with the reservation, pending the day when it was found that that reservation was a cheap price to pay for the State's accession to the treaty. To suggest that rejecting a reservation obligated a State to withdraw it was very different from stating that rejecting a reservation was an indication that an entity was not in treaty relations with that State.

23. Mr. TOMKA said it seemed unfortunate that, according to the Special Rapporteur, the reference to a monitoring body was intended to cover judicial and other institutions. In international practice, treaty-monitoring bodies were those created by the relevant instruments, particularly in the field of human rights. ICJ, however, could not be considered a monitoring body: it did not receive reports on how States were fulfilling their obligations under a given treaty. The European Court of Human Rights handled complaints by individuals that States had violated their obligations under the European Convention on Human Rights, and it, too, could not be considered a treaty-monitoring body.

24. He agreed that there was a distinction between a finding by a treaty-monitoring body and a finding by a judicial body. If ICJ found a reservation inadmissible, that meant it was null and void and the State remained bound by the treaty provision to which the reservation had been addressed. The reservation itself did not have legal effect; it was up to the State to draw the appropriate conclusions from the finding. If, on the other hand, one of the treaty-monitoring bodies found a reservation inadmissible, that did not give rise to any obligation for the State to withdraw the reservation.

25. Mr. PELLET (Special Rapporteur), responding to the Chair's remarks but referring also to Mr. Gaja's statement at the previous meeting, said he was surprised to see that guideline 2.5.4 was being made to say things it did not say. The second sentence of paragraph 2 read "[The State] *may* fulfil its obligations", not "[The State] *must* fulfil…". Nowhere in the draft was it indicated that the State was obliged to withdraw a reservation; rather, it "must act accordingly" in response to the impermissibility of the reservation, it must put an end to that impermissibility, and the obvious way to do so was to withdraw the reservation.

26. As to Mr. Tomka's comments, he admitted that he had been wrong in saying that ICJ could be considered a monitoring body, though he thought a case could be made for identifying the European Court of Human Rights in that way, and he had said as much when the Commission

had reviewed the Court's decisions in preparing its preliminary conclusions. He also agreed that monitoring bodies could not annul a reservation: the Court's decision in the *Belilos* case had always seemed totally unacceptable to him, but the fact remained that it existed. The discussion so far on guideline 2.5.4 appeared to confirm the preliminary conclusions adopted by the Commission at its forty-ninth session on reservations to normative multilateral treaties, including human rights treaties.

27. Mr. TOMKA asked what was the source of the obligations to withdraw an impermissible reservation which, according to guideline 2.5.4, the State "may" fulfil. Surely, since they were mentioned in a legal text, such obligations were legal, not moral or political. Were they part of international law or enshrined in the Vienna Conventions? They were certainly not imposed on the State by any treaty-monitoring body.

28. Mr. GAJA said a distinction had to be drawn between a finding of impermissibility by a treaty-monitoring body and the effects of such a finding, and the impermissibility of the reservation itself. That distinction was very well outlined in the preliminary conclusions adopted by the Commission at its forty-ninth session on reservations to normative multilateral treaties, including human rights treaties. He agreed with the Chair that withdrawal of a reservation that had been found inadmissible was not the sole course of action open to a State: it could, as was indicated in paragraph 10 of the preliminary conclusions, forgo becoming a party to the treaty or modify the reservation so as to eliminate its inadmissibility. If paragraph 2 of the guideline mentioned all three possibilities, and not simply withdrawal, he would be able to go along with it. In its present wording, however, he thought withdrawal was too closely linked to a finding by a treaty-monitoring body.

29. Ms. ESCARAMEIA, recalling the problem she had raised at the previous meeting, said the first sentence of guideline 2.5.4 gave rise to ambiguity in that it mentioned "a body" that was monitoring the implementation of a treaty. That meant, not necessarily the human rights treaty bodies, but others as well, including judicial bodies, as the Special Rapporteur had suggested in his comments. She did agree that such bodies engaged in monitoring when dealing with problems under a treaty, and that was particularly true of regional judicial bodies. An additional difficulty was that some future treaty might expressly establish a body with competence to determine whether reservations were permissible or not. The ambiguity she had mentioned extended to the wording of paragraph 2: the State "must act accordingly", but what did that mean? It would depend on whether the State accepted the findings made by the body in question and whether the body had mandatory or recommendatory powers.

30. Mr. BROWNLIE said that, if he were the Special Rapporteur, he would point out that the Commission was preparing a Guide to Practice, not engaging in legal codification. On the point under discussion, there was an awkward mix of genres, since the Guide to Practice outlined the political or moral duty of a State to review its position if it had made an impermissible reservation. He agreed that there was a wide diversity of monitoring bodies. The paradigm in Europe, prior to the creation of the European Court of Human Rights, had been the European Commission of Human Rights, which had had a reporting role, not mandatory powers, having been primarily concerned with achieving friendly settlement of disputes. Thus, not all findings were those of full-fledged judicial bodies that engaged in dispute settlement on the model of ICJ, and not all were self-executing. That gave a reserving State a moral duty to review its position in the light of the fact that an authoritative but not binding decision maker had taken a certain view of its reservation.

31. Mr. Sreenivasa RAO said he agreed with Mr. Brownlie and Mr. Gaja: the draft guideline put together too many ideas in too abbreviated a fashion and needed further work. He had understood from the Commission's earlier discussions that a finding by a treaty-monitoring body that a reservation was impermissible was merely a recommendation for the State to give due consideration to the matter: the finding did not have binding force. He also agreed that a distinction must be drawn between judicial bodies and treaty-monitoring bodies and their respective powers.

32. Mr. MANSFIELD said the Commission should bear in mind the original purpose of the exercise, which was to develop guidelines that would be helpful to States in actual practice. Guideline 2.5.3 was very helpful, in his view although he was still somewhat concerned about paragraph 2. Guideline 2.5.4, however, was obscure and even misleading, an attempt to combine too many elements in too small a package. The fact that a treaty-monitoring body found a reservation impermissible did not obligate a State to withdraw it: this was blindingly obvious, although it might be better not to spell that out.

33. Mr. CHEE said that guideline 2.5.4 raised a number of questions. Was there a distinction between a legal obligation under a guideline and under a treaty? Were ICJ and the European Court of Human Rights adjudicatory bodies or advisory bodies? It should be made clear in the guideline whether a treaty-monitoring body had the power to enforce a finding of impermissibility.

34. Mr. BROWNLIE said that, at the risk of complicating matters, he would point out that, even if a monitoring body had mandatory powers, the question of whether they were self-executing or not remained undecided.

35. Mr. PELLET (Special Rapporteur) recalled, in response to Mr. Chee's comments, that the Guide to Practice was recommendatory rather than binding in nature. He endorsed the comments made by Mr. Gaja and others. As for Mr. Tomka's question concerning the basis for a State's obligations, the answer would probably turn out to be article 19 of the 1969 and 1986 Vienna Conventions; but that remained to be settled at the next session, when the soap opera continued. Meanwhile, there were clearly different categories of obligation: it made no sense to establish a monitoring body and then not accept any findings it might make. A State or international organization was obliged to take some action if it wished to make any claim to good faith. Admittedly, some powerful States paid no attention to the findings of monitoring bodies, but such an approach was in contravention of international law.

Perhaps he had been at fault in using the word "monitoring" (*contrôle*), given the variety of bodies in existence. It might have been preferable to use a phrase such as "body empowered to rule on the permissibility of reservations", which would cover ICJ, the European Court of Human Rights, the old European Commission of Human Rights, the Inter-American Court of Justice and the Committee against Torture, among others. He saw no point, however, in distinguishing between the various categories of monitoring body in the guideline, although he would have no objection to doing so in the commentary. As for the objections to the phrase "act accordingly", in both French and English it clearly implied, without saying so in so many words, that withdrawal of the reservation was the most appropriate course of action—since that was the surest way for a State to fulfil its obligations—but it was not necessarily the only one. He would nonetheless draft a new text which, he hoped, would take account of the various points raised.

36. Mr. COMISSÁRIO AFONSO commended the Special Rapporteur's report, which was comprehensive and clear and put forward a number of innovative proposals. Draft guidelines 2.5.1 and 2.5.2, which were in full conformity with the Vienna Conventions, were wholly acceptable. Indeed, the only question was whether they should adhere so closely to the Conventions. The object of the Guide to Practice was, after all, to operationalize the Conventions rather than merely to quote them. He took it that the Guide would indicate the sources of the guidelines, so as to ensure that the text of the Conventions was as widely known as possible.

37. It was completely impossible to reconcile the concept of implicit withdrawals with the principle that a withdrawal must be formulated in writing. The reason was clear: the requirement of a written withdrawal served the important purpose of bringing certainty into the relations between States parties. Admittedly, what could be interpreted as implicit withdrawals did take place in State practice, but they could not take legal effect until the withdrawal was made in duly written form.

38. Guideline 2.5.3 was also very useful and should be included in the Guide to Practice. He fully shared the Special Rapporteur's view as to the difference between withdrawn and expired reservations, as expressed in paragraph 98 of the report. He also endorsed the opinion that a guideline encouraging States to withdraw obsolete or superfluous reservations should be drafted. As to draft guideline 2.5.4, he agreed with comments made by Mr. Gaja at the previous meeting. He would only add— without wishing to renew the discussion on impermissibility—that paragraphs 108 to 113 of the report referred to "admissibility" and "inadmissibility", which he himself preferred to "permissibility" and "impermissibility". The guideline itself, however, reverted to the word "impermissible", and he wondered whether that was simply to maintain consistency with guidelines that had already been adopted.

39. Finally, paragraph 2 of guideline 2.5.4 should be harmonized with the preliminary conclusions adopted by the Commission at its forty-ninth session on reservations to normative multilateral treaties, including human rights treaties, as was indicated in paragraph 109 of the report.

40. Mr. KABATSI said that, along with other members, he found guidelines 2.5.1 and 2.5.2 perfectly acceptable. They should be referred to the Drafting Committee. With regard to the concept of implicit withdrawals, he believed that, since the Commission's aim was to give guidance to States and international organizations, certainty was of paramount importance. If a State withdrew a reservation, it was essential for the other parties to be informed and for the withdrawal to be in writing.

41. Guideline 2.5.3 was also very useful. Circumstances often changed within a State or international organization, yet it might not take timely action on withdrawing its reservations. It might, indeed, have simply forgotten that they existed. Or the personalities in government might change and with them the State's views. Or other parties might be persuaded by the actions of still other parties to withdraw their own reservations. As for guideline 2.5.4, he could not agree with the view that it might cause problems. It laid out, most usefully, what a State should do if a monitoring body found a reservation to be impermissible. It was a simple recommendation, particularly if the reserving State or organization did not contest the finding. The difficulties that other members had found seemed insignificant. Without being binding, the guideline gave the State the opportunity to review and perhaps withdraw its reservations. The Drafting Committee might find appropriate wording to indicate the precise course of action a State should take. The Commission had, after all, the choice between giving useful advice and remaining silent on the matter.

42. Mr. GALICKI said the draft guidelines dealt with some substantial problems that could arise in connection with reservations. Specifically, he was in favour of guidelines 2.5.1 and 2.5.2. His only caveat concerned the phrase "Unless the treaty otherwise provides" in guideline 2.5.1: either the phrase should be deleted or it should be inserted into a guideline of a general character. Otherwise, the impression might be created that the guideline was to be applied differently from other guidelines. As for the form of withdrawal, he agreed that the only acceptable form was in writing, although he was attracted by Mr. Momtaz's suggestion that a facilitated procedure for withdrawal of reservations, similar to that proposed for reservations themselves, should be established. Just as there was a uniform set of obligations for making reservations, so there should be one for their withdrawal.

43. He did not share the views of those who criticized guideline 2.5.3, which was most useful: it went further than the narrow provisions of the 1969 and 1986 Vienna Conventions and took full account of the reality of treaty relations, including the fact that States often paid little attention to the importance of preserving the integrity of treaties. Moreover, it was sometimes difficult, as in his own country, to obtain information on the position regarding internal legislation in relation to reservations made to international treaties a long time previously. He would, however, prefer to see alternative wording for the phrase "internal legislation", which was inappropriate in relation to international organizations.

44. He had given much thought to guideline 2.5.4. Undoubtedly, the withdrawal of reservations should be re-

flected in the Guide to Practice, but perhaps the guideline should be placed elsewhere. There were other problems, too—with the inconsistent use of the words "impermissible" and "inadmissible", the Commission was planting a time bomb for itself. Another point was that, as Mr. Brownlie had said, there were different kinds of monitoring bodies, some with judicial powers and some without. For example, the Human Rights Committee had power but not binding power. The Special Rapporteur was not, of course, aiming to spell out a State's obligations, but the phrase "act accordingly" seemed so vague as to add even more doubt as to the course of action a State should take. Another element was that of timing: it was strange that a monitoring body could find a reservation impermissible even though the treaty was already operative and the other parties had presumably accepted the reservation. The Drafting Committee should consider the wording very carefully, because, despite some deficiencies, there was much of merit in the guideline. It might be useful to devote a separate guideline to the role that should be played by monitoring bodies and the weight to be given to their findings.

45. Finally, with regard to the approach used in guideline 2.5.5, he doubted whether it was useful or necessary to repeat the same or very similar formulas. The Special Rapporteur had given the Commission a choice of shorter and longer versions. Some members might indeed prefer the longer version, repeating the formula used in the Vienna Conventions, but that implied using the same wording for the formulation and withdrawal of reservations, and also for the formulation and withdrawal of objections. The shorter version should be used, with particular attention paid to highlighting the differences.

46. Mr. PELLET (Special Rapporteur) requested that what Mr. Momtaz and Mr. Galicki specifically proposed should be added to draft guideline 2.5.2.

47. Mr. MOMTAZ said that he had nothing to add to the guideline. He considered the current text to be entirely pertinent.

48. Mr. GALICKI said that he did not wish to rewrite guideline 2.5.2. He had merely suggested that all opportunities should be used to create conditions that facilitated withdrawal of reservations, and that the members of the Drafting Committee could identify such opportunities. When discussing implicit withdrawals, it might be possible to resort to certain technicalities to find a formula consistent with that notion, without conflicting with the general rule that the withdrawal of a reservation must be formulated in writing.

49. Mr. CHEE said that guideline 2.5.2, which stated that withdrawal of a reservation must be formulated in writing, and which therefore referred to an explicit withdrawal, was followed in the report by the heading "The question of implicit withdrawals". Consequently, there was a conflict between the two texts. The Special Rapporteur referred to the case of implicit withdrawal in paragraph 93, but the situation described was one of a later instrument superseding an earlier instrument. With regard to guideline 2.5.3, paragraph 111 of the report referred to the *Belilos* case and the fact that the reservation had been partially withdrawn by Switzerland. Was it possible to make a partial reservation?

50. He agreed with Mr. Tomka that the second sentence of paragraph 2 of guideline 2.5.4 should be deleted. If the Special Rapporteur wished to retain it, he could perhaps amend it to reflect the title of the guideline. Last, he fully endorsed guideline 2.5.6 *ter*, since it conformed to paragraph 1 (*d*) of article 77 of the 1969 Vienna Convention, on the functions of depositaries.

51. Mr. KEMICHA said that guidelines 2.5.1, 2.5.2 and 2.5.3 could be referred to the Drafting Committee. He shared the hesitation of some of his colleagues with regard to 2.5.4, on the withdrawal of reservations held to be impermissible, and preferred not to pronounce on it immediately, because he had some difficulty in understanding the ensuing obligations for a reserving State. The guideline stated that "the reserving State or international organization must act accordingly", which implied that there was an expectation, rather than an obligation, of the State. Perhaps the Special Rapporteur could offer some elements that provided a legal basis for the consequent obligations.

52. While he respected the Special Rapporteur's point of view, he preferred the longer versions of guidelines 2.5.5 and 2.5.6, as they added clarity, and it should be remembered that the finished text would be the Guide to Practice. Last, and for the same reason, he favoured inserting the model clauses.

53. The CHAIR called on the Special Rapporteur to introduce draft guidelines 2.5.11 and 2.5.12.

54. Mr. PELLET (Special Rapporteur) said that he proposed to present the last episode, but not the epilogue, because it set out only part of the development that he wished to devote to the modification of reservations. He had prepared the ensuing part which dealt with modifications that strengthened existing reservations, expanding their scope, but there had been insufficient time to translate it. Consequently, section B of the report dealt only with modifications that reduced the scope of reservations, in other words, partial withdrawals.

55. Mr. Chee had asked if there could be partial withdrawals, and his response was a categorical yes. Since strengthening and attenuating reservations posed different problems, it made sense to examine the question of partial withdrawals at the present session and to postpone examination of the strengthening of reservations until next year. Strengthening reservations resembled late formulation of reservations, because when a State strengthened its reservation, it added something to the reservation or subtracted something else from the text of the treaty. Therefore, it added to its refusal to implement the entire text. In contrast, the partial withdrawal of reservations was closely tied in with total withdrawal, because it was not adding to, but rather subtracting from, the reservation, thus increasing the State's obligations.

56. In that respect, he was proposing two principal draft guidelines: 2.5.11 (Partial withdrawal of a reservation) and 2.5.12 (Effect of a partial withdrawal of a reserva-

tion), as well as 2.5.11 *bis* (Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), which was the counterpart to guideline 2.5.4.

57. Guideline 2.5.11, set out in paragraph 210 of the report, consisted of two paragraphs, which it would be preferable to invert, since the definition should precede the rules on form and procedure applicable in the case of partial withdrawal, and the effects. The first of the present paragraphs referred to the rules in force in the case of complete withdrawal. The definition proposed in the second paragraph required little explanation, but it was a necessary point of departure and emphasized that one could speak of partial withdrawal only if the legal effects of the reservation were reduced so that the treaty would be implemented more completely. However, the definition also showed that it was a case of the modification of an existing reservation and not of a total withdrawal followed by a new reservation. That might appear obvious, but a review of the literature showed that what seemed obvious had been overlooked by several authorities on doctrine and practice. It was not clear that a partial withdrawal was a simple modification, because the practice of the Secretary-General of the United Nations was not absolutely consistent and was at times based on a different interpretation. In that respect, he drew the Commission's attention to the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, cited in paragraph 205 of the report, where the authors appeared to exclude the concept of partial withdrawal, which they considered to be total withdrawal followed by "the making of (new) reservations".[4]

58. Some writers had analysed an important 1992 judgement of the Swiss Federal Supreme Court in the *F.* v. *R. and State Council of the Canton of Thurgau* case on that basis. In that case, the Federal Supreme Court had considered that Switzerland's interpretative declaration in the *Belilos* case, which the European Court of Human Rights had deemed invalid, did not exist, and that Switzerland could not partially withdraw or attenuate that reservation to take into account the reasons that had led the European Court to consider it invalid. The Federal Supreme Court had decided that Switzerland could only make a new reservation, which, in that case, would have been a late reservation and thus impermissible. It was an interesting although, in his opinion, erroneous ruling. As was shown in paragraph 206 of the report, in the case of the practice of the Secretary-General, and in paragraph 200 with regard to the *F.* v. *R. and State Council of the Canton of Thurgau* case, other interpretations were possible. For example, in its 1992 judgement, the Federal Supreme Court had expressly stated that "While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed" [p. 535]. Thus, in that phrase, the Federal Supreme Court appeared to admit that there was no reason why Switzerland could not make a partial withdrawal and attenuate its reservation, and that the Court had other reasons for considering that Switzerland's new reservation was invalid.

[4] *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties* (see 2735th meeting, footnote 5), para. 206.

59. As for the practice of the Secretary-General, in an important note verbale by the Legal Counsel of the United Nations (modification of reservations) of 2000,[5] which the Commission had discussed at length with respect to the time limits for objections to late reservations, a firm distinction was drawn between modification of an existing reservation and partial withdrawal of an existing reservation. The Secretary-General considered that the procedure used for late formulation of a reservation should be followed in the former case, while that was not necessary in the case of a partial withdrawal. That was correct, because a partial withdrawal was not the formulation of a new reservation but, on the contrary, a partial withdrawal of the substance of an existing reservation. Nevertheless, the note verbale contradicted the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*; and in that case, the note verbale was right and the *Summary of Practice* was wrong. As had previously been mentioned, the practice of the Secretary-General was at times inconsistent. Partial withdrawals were often treated as if they were a strengthening of the reservation, and attenuations of reservations were dealt with as if they were late reservations, which was unacceptable. Paragraphs 203 to 205 of the report attempted to illustrate that point. In contrast, the recent practice of the Council of Europe in the case of partial withdrawals appeared to be completely consistent and showed that a partial withdrawal was truly the modification of an existing reservation and not the formulation of a new reservation.

60. In short, the same procedure should be followed for both partial and total withdrawal of reservations, as had been envisaged by Sir Humphrey Waldock when he was Special Rapporteur on the law of treaties.[6] It was also confirmed by the various reservation clauses referred to in paragraph 188 of the report, which placed total and partial withdrawal on the same footing. That interpretation was to be recommended because States should be encouraged to withdraw reservations, and partial withdrawals should be allowed because that could lead to total withdrawal. Therefore, the rules for partial or total withdrawal should be designed to facilitate withdrawal. If the rules proposed in guideline 2.5.1 were transposed, withdrawal could take place at any time without the consent of the other parties being required, which was expressly provided for in article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions. In general, he saw no contraindications to transposing guidelines 2.5.2, 2.5.5, 2.5.6, 2.5.9 and 2.5.10 to the section on partial withdrawal, which spoke of the form of withdrawal, the competence to represent the State or the international organization, the communication of the withdrawal, the functions of depositaries and the effective date of withdrawal. The only problem appeared to be a matter of drafting. Was it appropriate to refer directly to the draft guidelines he had just mentioned, or was it possible to proceed in general as he had in the case of draft guideline 2.5.11, set out in paragraph 212 of the report? A third solution would be to insert the words "total or partial" in each guideline on withdrawal, instead of providing

[5] *Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2.

[6] See paragraph 6 of draft article 17, which appears in the first report on the law of treaties by Special Rapporteur Sir Humphrey Waldock (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 61).

a set of guidelines on total withdrawal and two guidelines on partial withdrawal. He had considered the latter approach but did not favour it, since, as he had indicated, it was important to define what was understood by a partial withdrawal, and that was the role of guideline 2.5.11. Moreover, guidelines 2.5.7 and 2.5.8, on the effects of total withdrawal, could not be transposed, because partial withdrawals signified that the reservation subsisted and did not, *ipso facto*, evaporate the objections that other States or international organizations might have made, although it did suggest that they should re-examine whether they needed to maintain such objections. Guideline 2.5.12 defined the consequences of a partial withdrawal.

61. There remained the tricky matter of the consequences of a monitoring body's finding that a reservation was invalid, which he had discussed at length when presenting guideline 2.5.4. On that point, he wished only to draw the Commission's attention to the judgement of the Swiss Federal Supreme Court in the *F.* v. *R. and State Council of the Canton of Thurgau* case. In his opinion, the Federal Supreme Court's reasoning was based on an erroneous premise, because it accepted that the European Court of Human Rights was able to invalidate the Swiss interpretative declaration or reservation, which the European Court evidently believed it had the right to do. On that basis, the European Court considered that it was logical to think that Switzerland could not modify its reservation, but could only withdraw it. However, it was not so logical, because one could question whether Switzerland needed to do anything, since—according to that erroneous assumption—the reservation would have been invalidated by the judgement of the European Court of Human Rights in the *Belilos* case, something which he personally did not accept. While he did not propose to repeat the reasoning that was the basis for guideline 2.5.11 *bis*, he was entirely convinced that the premises of the reasoning of the European Court and the Swiss Federal Supreme Court were erroneous; that monitoring bodies, including the European Court, could only find that a reservation was impermissible; and that, following that finding, it was for the reserving State to act accordingly. The partial withdrawal of the reservation could be a way of acting accordingly, as was the more radical solution of a total withdrawal. That was what guideline 2.5.11 *bis* stated, and, as he had indicated in paragraph 216 of the report, it could be combined with guideline 2.5.4.

62. He awaited with interest the reactions of members to the numerous proposals, while freely acknowledging their technical nature. However, law was technical and it was not possible to continually gad about in the rarefied atmosphere of general ideas. Maybe the draft guidelines, which were a little pedestrian, provided an opportunity to develop real law.

The meeting rose at 1 p.m.

2737th MEETING

Friday, 26 July 2002, at 10 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. Escarameia, Mr. Fomba, 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 treaties[1] (*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. The CHAIR invited the members of the Commission to continue their consideration of the seventh report of the Special Rapporteur on reservations to treaties (A/CN.4/526 and Add.1–3).

2. Mr. YAMADA said that he endorsed most of the 11 guidelines proposed by the Special Rapporteur, only a few of which called for comment.

3. With regard to guideline 2.5.3 (Periodic review of the usefulness of reservations), he entirely shared the view expressed by the Special Rapporteur in paragraph 102 of his report that it would be appropriate to include in the Guide to Practice a draft guideline encouraging States to withdraw reservations that had become obsolete or superfluous; and also the view, stated in paragraph 105, that such a guideline should be regarded as no more than a recommendation and that States would remain absolutely free to withdraw their reservations or not. However, as currently formulated, at least in its English version, guideline 2.5.3 seemed to go further. It placed more emphasis on the integrity of treaties, thereby shifting the balance between integrity and universality. In his view, States should not formulate reservations lightly, and reservations made after careful consideration need not be subjected to review after a short span of time. Accordingly, he supported Mr. Tomka's suggestion that the guideline should be reformulated as a recommendation.

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[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).