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Summary record of the 2856th meeting

Topic:
Reservations to treaties

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with a definition of such acts. That question had given rise to a number of controversies ever since work on the topic had begun in 1997, and some common ground would have to be found. Likewise, some members felt that the conduct of States must be included, while others thought that it had nothing to do with the topic. Yet State conduct could not be overlooked entirely, since it produced indisputable legal effects that were often similar to those of unilateral acts. In any event, the Commission's definition should not be too precise. The definition proposed by one member seemed to be sufficiently flexible: "an act emanating from the authority of a State that produces legal effects in international law" (2853rd meeting, above, para. 4).

61. It appeared from the debate that the 1969 Vienna Convention could not be transposed to unilateral acts but could serve as a useful reference, particularly in establishing the competence of the authors of unilateral acts, provided, of course, that the relevant criteria were expanded.

62. With regard to his eighth report, he had voluntarily limited his conclusions, as it had seemed to him preferable for the Commission to draw its own conclusions at the close of the debate. In addition, as some members appeared to have found a contradiction as to the irrelevance of form in identifying a unilateral act, he wished to note that he himself drew a distinction between form and formalism: a statement delivered before the General Assembly of the United Nations, for example, was surely not comparable to a press statement.

63. In conclusion, he proposed that work should continue within the Working Group with a view to drawing up the outlines of a new report. In 2006 the Commission should be in a position to submit a document containing preliminary conclusions, or rather general guidelines that would allow States to determine when and how they might become legally bound by the formulation of an act, and what the consequences under international law would be.

64. Mr. Sreenivasa RAO said that any examples he gave in his earlier statement were referred to only by way of raising some underlying issues and not for opening up any discussion on their merits.

65. The CHAIRPERSON thanked the Special Rapporteur for his summary. He believed that the Commission should continue its work on unilateral acts of States and suggested that the Working Group, chaired by Mr. Pellet, should consider the elements that would be discussed during the debate.

It was so decided.

The meeting rose at 1.05 p.m.

2856th MEETING

Friday, 22 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Marri, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*)* (A/CN.4/549 and Add.1, sect. D, A/CN.4/558 and Corr.1 and Add.1 [and Corr.1]-2, and A/CN.4/L.665)

[Agenda item 6]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to comment on sections A and B of the Special Rapporteur's tenth report on reservations to treaties.
2. Mr. GAJA said that the tenth report on reservations to treaties was a remarkable work which covered an important area of the topic of reservations. Mr. Pellet's analysis was in many respects more far-reaching than any that could be found in the extensive literature on the question.
3. On the problem of terminology, he had no objection to the choice of terms proposed. In French, the term "*invalide*" (invalid) clearly indicated that a reservation did not have the necessary character to achieve the result intended by the State that formulated it, namely, as stated in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention on the Law of Treaties, "to exclude or to modify the legal effect of certain provisions of the treaty in their application to [the reserving] State". However, it must be made clear that if the fact that a reservation was invalid prevented the reservation from producing the effects intended by the State formulating it, that invalidity also affected the ratification or equivalent act that the reservation accompanied, which in principle should then also be regarded as invalid. Only in exceptional cases could just the invalid reservation be regarded as null and void. If that point was not highlighted, the term "invalid" might suggest that the reservation could be disregarded and that the treaty was accepted *in toto*, which was probably not what the Special Rapporteur had in mind.
4. With regard to draft guideline 3.1 (para. 20 of the report), his preference would be to indicate only those conditions for validity which had to do with the content of reservations. There was little point in reproducing the entire text of article 19 of the 1969 Vienna Convention in the draft. Article 19 also dealt with the moment at which a reservation could be formulated, which, as the Special

* Resumed from the 2854th meeting.

Rapporteur had pointed out, was superfluous, as that matter was already covered in the definition in article 2, paragraph 1 (*d*). However, the repetition in the 1969 Vienna Convention was to some extent justified, whereas it was less so in the draft guidelines, because in the Convention, article 19 was the first article to address the question of reservations, the section on reservations having begun at that point. Thus, it was perhaps useful to recall that there was a temporal problem. In contrast, draft guideline 3.1 was preceded by a whole part concerning procedure, which dealt with the temporal problem in detail, and it therefore seemed rather strange to reopen the temporal question at that point in the draft.

5. Turning to draft guideline 3.1.1 (para. 32), he noted that the title contained the word “expressly”, which was not found in article 19 (*a*) of the 1969 Vienna Convention. It was probably unusual for a treaty to implicitly prohibit the formulation of a reservation in cases other than those considered in article 19 (*b*). However, the existence of other implicit prohibitions could not be categorically ruled out. Thus, the implicit prohibition in subparagraph (*b*) was not the only one, and some cases might also arise under subparagraph (*a*). To cite one example, the Charter of the United Nations did not have any provisions on reservations, but there was an implicit prohibition in Article 4, which required that States seeking admission should accept the obligations contained in the Charter. That indicated that total acceptance was required and thus that reservations could not be formulated. Draft guideline 3.1.1 should therefore not confine itself to making provision for express prohibitions but should also include implicit prohibitions not covered in subparagraph (*b*).

6. On a drafting matter, the words “prohibiting reservations to specified provisions” in draft guideline 3.1.1 could be misconstrued as suggesting that a prohibition concerning specified provisions invalidated all reservations. That was clearly not what the Special Rapporteur had had in mind. The reservation in question was not prohibited unless it was in the list of such prohibited reservations. Needless to say, the fact that a provision of a treaty prohibited reservations to specified provisions did not mean that all reservations to the treaty were prohibited.

7. On draft guideline 3.1.2 (para. 49), noting that article 19 (*b*) referred to the case in which a treaty “provides that only specified reservations, which do not include the reservation in question, may be made”, he said that the word “only” was vital, because it meant that a valid reservation could not be made with regard to any other part of the treaty. It was a problem of interpretation of treaties to see whether that exclusive element was or was not present. In respect of a treaty which provided that only specified reservations could be made, it was necessary to decide whether a reservation which had been formulated could be included among the sole valid specified reservations, or whether, on the contrary, it could not and thus was implicitly (or indirectly) prohibited. To that end, one would have to determine the category of reservations which the treaty considered to be the only valid reservations. In draft guideline 3.1.2, the definition of the words “specified reservations” in article 19, subparagraph (*b*), was accompanied by additional elements which were not essential and should be deleted. He did not think that the

proposed definition was supported by the arbitral ruling in the *English Channel* case. The Arbitral Tribunal had pointed out that article 12 of the Convention on the Continental Shelf, which allowed reservations to articles other than articles 1 to 3, did not make it possible “to contest the right of the French Republic to be a party to the Convention on the basis of reservations the making of which is authorized by that Article”. Thus, the validity in principle of the French reservation, which had concerned article 6 of the same Convention, had not been at issue. The Arbitral Tribunal had then ruled out the possibility that the French reservation could be regarded as accepted in advance, emphasizing that “[o]nly if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance”.

8. Those statements seemed to suggest a distinction between, on the one hand, the question whether the treaty excluded or allowed a reservation, and, on the other, the question of the acceptance of a valid reservation. In principle, a reservation to article 6 was valid, and it had to be decided whether any subsequent acceptance was necessary, because article 20 of the 1969 Vienna Convention provided that it was sufficient for the reservation to be authorized by the treaty. It was only with regard to the latter effect that, according to the Arbitral Tribunal, the content of the reservation must be identified in the treaty in a sufficiently specific manner. In other words, if the treaty had stated that any reservation could be made with regard to the delimitation of the continental shelf, it would be a reservation already allowed for in all its details, and a State which formulated it would merely be doing what was expressly and specifically authorized in the treaty; there would therefore be no need to accept the reservation later, because acceptance was already provided for in the treaty. If a more general reservation was allowed, it would have to be ascertained whether it was compatible with the object and purpose of the treaty and whether it had been accepted by the relevant contracting State. By contrast, under article 19 (*b*), a general indication was sufficient to establish that the reservation was specified and therefore in principle valid.

9. Mr. KAMTO said that in paragraph 2 of his tenth report, the Special Rapporteur explained why he had decided to revert to the notion of “validity” in preference to the term “permissibility” (“*licéité*”), a term which was of relevance in the area of State responsibility but hardly appropriate in connection with reservations. According to the Special Rapporteur, the expression “validity of reservations” described “the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization [was] capable of producing the effects attached in principle to the formulation of a reservation”. It was the last part of the sentence that posed problems. If that definition was accepted, the question of validity would be assessed in terms of the power or capacity of the act to produce legal effects. Such an approach took account of only one aspect of the notion of validity, with consequences for the title of draft guideline 3.1 (para. 16). It was generally agreed that validity was the quality of those elements of a legal

system, whether legal acts or legal events, that fulfilled all the conditions relating to form and content necessary for them to produce legal effects therein. It followed from that definition of validity that the conformity of an act with those conditions made it possible to decide whether it was valid or invalid. Thus, if the Commission focused solely on the capacity to produce legal effects, it would lose sight of the conditions relating to form and content.

10. In its judgment in the *Fisheries* case (*United Kingdom v. Norway*), the ICJ had stressed that “[a]lthough it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law” (p. 132 of the judgment). He took that passage, and also the definition of validity to which he had just referred, to mean that a State was free to formulate a reservation, but must comply with the conditions relating to form (e.g. capacity to formulate, time of formulation) and content (e.g. compatibility with the object and purpose of the treaty, absence of conflict with a rule of *jus cogens*) which enabled it to produce legal effects. Draft guideline 3.1 had to do with the freedom to formulate reservations, not with the presumption of validity, and the title “Presumption of validity of reservations” did not reflect its content. The alternative title “Freedom to formulate a reservation” should be the one retained.

11. Furthermore, if one accepted the Special Rapporteur’s line of reasoning, the amendment to draft guideline 1.6 proposed in footnote 16 to paragraph 8 was incomplete, because it would also be necessary to delete the words “and effects”: if validity was the capacity of the reservation to produce legal effects, it would be tautological to say “without prejudice to the validity and effects”, because validity was precisely the capacity to produce such effects.

12. Mr. Sreenivasa RAO paid tribute to the Special Rapporteur for his tenth report, which contained an extraordinary wealth of information and detail. The task of making sense out of the obvious sometimes demanded extraordinary communication skills.

13. The Special Rapporteur was clearly in favour of States’ freely expressing limitations, conditions and individual situations by way of reservations when becoming parties to a treaty. He himself also endorsed that approach, because in a diverse world it was important for as many States as possible to become parties to treaties and, as long as their basic object and purpose were promoted, States must be allowed some flexibility in that regard. That policy was at the core of the concept and institution of reservations.

14. Turning to details, he thought it a good idea to reproduce article 19 of the 1969 Vienna Convention and to indicate the parameters within which it could be used by States. On the terminology, he would go along with the proposals by the Special Rapporteur, who had rightly suggested reverting to the term “validity”, as long as its meaning was set out clearly and did not prejudice the issue of the rival claims of the permissibility school and the opposability school. Validity was certainly a neutral term.

15. There were good grounds for concluding that reservations expressly permitted other categories of reservations that were implicitly excluded. However, that point should be made clear in the draft guidelines. He also endorsed the Special Rapporteur’s point that reservations neither expressly permitted nor implicitly prohibited must be compatible with the object and purpose of the treaty, and looked forward to further information in that regard.

16. In response to a comment by Mr. Kabatsi, he concluded by saying that over the years the subject matter had been so thoroughly researched and so many conclusions had been drawn that the complexity of the process was not necessarily obvious to those unaware of the background. For that reason the report would be of great value to all those with an especial interest in the technicalities of treaty-making. The Special Rapporteur’s careful sifting of the material had unravelled many knots that in other hands would have proved inextricable.

17. The CHAIRPERSON invited Mr. Pellet to introduce section C of his tenth report on reservations incompatible with the object and purpose of the treaty.

18. Mr. PELLET (Special Rapporteur) said it was regrettable that the beginning of his report had elicited statements from only three members. He was grateful to those members, but preferred to respond to them at a later stage. He had taken particular note of the issues raised by Mr. Gaja, some aspects of which were not absolutely clear. Admittedly, sections A and B of his report did not make for very exciting reading, but he would have thought, given the amount of information it contained, that it warranted fuller discussion. He was tempted to interpret the silence of the other members as unanimous approval, but feared that would be too good to be true. He therefore hoped that section C of his report would arouse greater interest and lead to a constructive exchange of views.

19. The task of a special rapporteur was a thankless one, particularly where such a dry and technically difficult subject was concerned, but when the general reaction to his work was a polite silence he sometimes felt rather frustrated. He always appreciated any constructive criticism: indeed, the main merit of the Commission lay in the collective approach it took to its work, and while a special rapporteur must not allow himself simply to bend with the prevailing wind, the debate should nonetheless point the way forward. He could quite easily take a wrong turn, and the draft guidelines he was proposing could be improved upon both in their form and substance. It was his responsibility as Special Rapporteur to provide members with the factual and legal materials necessary to stimulate discussion. However, he was not infallible, and could change his views, sometimes radically, in the light of the Commission’s debates, as had happened recently in connection with the definition of objections.

20. Turning to section D, he said that it dealt with the validity of reservations, a concept he had explained at length during his presentation of sections A and B of his report (see 2854th meeting, above). Members’ comments on those sections made him think that perhaps his definition of the validity of reservations was somewhat too restrictive, and that he had not made it sufficiently clear

that validity applied both to the form and substance of reservations. He would, however, revert to that matter at a later stage.

21. Issues relating to validity were essentially governed by article 19 of the 1969 and 1986 Vienna Conventions, according to which reservations might be formulated, not made, under two conditions. First, the reservation that the State intended to formulate must not be expressly prohibited (art. 19 (a)), or implicitly prohibited (art. 19 (b)) by the treaty, and in that connection he took note of Mr. Gaja's comment that subparagraph (a) might also cover some cases of implicit prohibition. Such issues were dealt with under paragraphs 22 to 49 of the report.

22. Second, subparagraph (c) provided that in cases not falling under subparagraphs (a) and (b), the reservation must be compatible with the object and purpose of the treaty. Section C of his report focused on that fundamental condition, which was an essential element of the "flexible system" stemming from the ICJ advisory opinion of 1951 on *Reservations to the Convention on Genocide* (p. 24 of the advisory opinion) and the 1969 Vienna Convention. By virtue of that clarification, the "right" of States to make reservations was balanced by the requirement, not to preserve "the integrity" of the treaty—it being argued that reservations undermined that integrity—but rather to preserve the core contents or *raison d'être* of the treaty. It was worth noting that the criterion of compatibility with the object and purpose of the treaty applied to the formulation of reservations but not to that of objections, which was contrary to the position taken by the ICJ in its advisory opinion of 1951 (p. 24 of the advisory opinion) and to the view of States, which often felt it necessary to justify their objections to the reservation on grounds of its incompatibility with the object and purpose of the treaty. Article 20 of the 1969 Vienna Convention made no such requirement: States could object to a treaty for whatever reason they pleased, and, on careful reflection, their justification that the reservation was not compatible with the object and purpose of the treaty was often seen to be unconvincing.

23. Mr. Sreenivasa Rao seemed to be under the impression that he was in favour of States entering reservations. He had no strong views on the matter. Reservations were a fact of international life, a necessary evil that allowed States to become parties to treaties, and that option should not be foreclosed. On the other hand, he attached great importance to the concept of the object and purpose of the treaty, which was the decisive factor in preventing States from voiding treaties of their substance. Subparagraph (c) of article 19 of the 1969 Vienna Convention was therefore an essential provision that prevented States from abusing reservations as a means of stating their will at the international level. It set forth a rule that was now regarded as a customary norm to be taken into account by all States and international organizations irrespective of whether they were parties to the Vienna Conventions. However, it was a customary norm and not a peremptory norm—if States so wished they could indeed authorize reservations that voided treaties of their substance. Moreover, a cursory reading of article 20, paragraphs 2 and 3, made it clear that the framers of the Vienna Conventions had not had that in mind, and that the principle of compatibility

with the object and purpose of the treaty did not apply in practice to treaties with limited participation or to the constituent acts of international organizations, since those provisions reintroduced the concept of unanimity. Moreover, if the treaty expressly prohibited certain reservations, it was pointless to ask whether they might be compatible with the object and purpose of the treaty—they were prohibited, and that was all.

24. The same was true when a specified reservation was authorized (he was not persuaded by Mr. Gaja's argument in that regard (paras. 7–8 above)): in their collective wisdom, the parties had decided that a specified reservation could be made irrespective of whether it was compatible with the object and purpose of the treaty, and even if that was an exception to subparagraph (c), it was quite acceptable because the latter was not a peremptory norm.

25. He then turned to two other cases, which he had already examined under section B, that were also covered by article 19, subparagraphs (a) and (b), of the 1969 and 1986 Vienna Conventions, where the question of whether reservations permitted *a priori* under the treaty were subject to the test of compatibility outlined in subparagraph (c) was not resolved directly by the Vienna Conventions. The first case was that of reservations that were implicitly authorized because they were not expressly prohibited; the second was that of reservations that were expressly authorized but not specified in the terms he had endeavoured to explain in draft guideline 3.1.2. In both those cases, where what was authorized was somewhat vague, it seemed that a State or an international organization could formulate a reservation only where it did not leave the treaty devoid of substance, in other words, where it was not contrary to the object and purpose of the treaty.

26. With regard to reservations that were implicitly authorized because they were not prohibited under article 19 (a) of the 1969 and 1986 Vienna Conventions, Sir Humphrey Waldock had very sensibly observed, as Special Rapporteur on the law of treaties in 1962, that it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations.¹ To his knowledge, there were no precedents to illustrate that point, but there seemed to be no reason to treat reservations that were implicitly authorized any differently from those that were expressly authorized but not specified. With regard to the latter, Sir Humphrey Waldock's rational inference was substantiated on two grounds. One was based on the *travaux préparatoires* for article 19 (b), of the 1969 Vienna Convention. The current wording of the provision was the result of a Polish amendment adopted by the United Nations Conference on the Law of Treaties, which provided for the insertion of the word "only" before "specified reservations".² Its adoption had required a consequential amendment to subparagraph (c): in place of the original text which had reserved the application of the compatibility crite-

¹ *Yearbook ... 1962*, vol. II, document A/CN.4/144, commentary to article 17, pp. 65–66, para. (10).

² See *Official Records of the United Nations Conference on the Law of Treaties...*, document A/CONF.39/11 (2854th meeting above, footnote 7), p. 415, para. 16. See also document A/CONF.39/14 (*ibid.*), p. 134.

tion to treaties that contained no provisions regarding reservations, the Conference had adopted the current text whereby the criterion concerning compatibility with the object and the purpose of the treaty was extended to all cases not falling under subparagraphs (a) and (b).³ In the light of that amendment, subparagraph (b) clearly referred to specified reservations only, and in other cases subparagraph (c) applied. Therefore, authorized reservations that were not specified were clearly subject to the compatibility criterion. The second ground was the 1977 ruling of the Arbitral Tribunal in the *English Channel* case.

27. Since the problem arose in the same terms in the two situations mentioned (implicitly authorized reservations; reservations expressly authorized but not specified), it would probably make sense for it to be the subject of a single draft guideline 3.1.3/3.1.4, whose text was reproduced in paragraph 70 of the report. Nevertheless, given that the first of the cases he had mentioned referred implicitly to subparagraph (a), whereas the second referred to subparagraph (b), his preference would be for the adoption of two separate draft guidelines (3.1.3 and 3.1.4 respectively) to clarify matters for the users of the Guide to Practice.

28. Having thus clarified the applicability of the criterion of the reservation's compatibility with the object and purpose of the treaty, he wished to turn to the most sensitive issue not only of his tenth report, but of the entire legal regime of reservations and, perhaps, of the law of treaties as a whole, namely the definition of the concept of the object and purpose of a treaty. He saw that issue in very broad terms, since he had linked a question which was central to the law of treaties to others which could have been separated from it. While such a course of action might have simplified matters, a distinction of that nature would have been artificial. He had therefore cast his net wide in order to gain as general an idea as possible of an issue which was central both to the law on reservations to treaties and to the law of treaties itself.

29. Article 19 of the 1969 Vienna Convention on the Law of Treaties was by no means the only provision of the Vienna Conventions to have recourse to the notion of the object and purpose of the treaty; there were six others, which he mentioned in footnote 169 to paragraph 77 of the report. It did not seem possible to claim that the words "object and purpose of the treaty" contained in those other six provisions differed in meaning from the same expression as it appeared in the context of article 19 (c). When presenting the draft text of what was to become article 19 to the Commission in 1962, Sir Humphrey Waldock had expressly relied on the expression, which the Commission had already included in what was to become article 31 of the Vienna Convention, in order to justify its inclusion in article 19 (c). That clearly showed that the term "object and purpose of a treaty" had the same meaning throughout the 1969 Vienna Convention. That said, none of the seven provisions employing that enigmatic expression shed any particular light on its meaning, and article 19 certainly did not do so. Legal writers were unanimous in emphasizing the term's subjectivity, which had already

been denounced in the joint dissenting opinion which Vice-President Guerrero and Judges McNair, Read and Hsu Mo had appended to the 1951 advisory opinion on *Reservations to the Convention on Genocide*.

30. Admittedly, it was inevitable that the subjective view of the interpreter would strongly influence any appreciation of a reservation's compatibility with the object and purpose of a treaty. That was why, in section D of his tenth report, the Special Rapporteur devoted much space to a discussion of the question of competence, which was of great significance when it came to determining the validity of a reservation and, more specifically, to assessing its compatibility with the object and purpose of the treaty. It was vital to know who could express an opinion on that matter, because that body would have to make a subjective assessment of the object and purpose of the treaty, since there was no magic formula for determining them.

31. That reference to the subjectivity of the notion was not, however, sufficient reason for holding the concept up to obloquy. It was not the first time—nor would it be the last—that an eminently legal notion had appealed to the subjective view of the body interpreting and giving effect to it. What was more subjective than the notion of "public morals"? Not only was it subjective, it evolved with time. Obviously, the public morals of the past were not those of the modern world. Yet national courts adapted to such notions and managed to draw a distinction between what was or was not contrary to public morals. The notions of "reasonableness" and "good faith" which were all-pervasive and omnipresent in international law and which had very real consequences, or of "proportionality", "necessity" or "abuse of a right" could not be defined in an objective manner either, but they were legal notions nonetheless. They permeated States' foreign legal policy and Government action. They were constantly present in the minds of the legal advisers of Governments and international organizations. They constituted the basis of numerous rulings by international courts and arbitral awards, which were certainly accepted as the law by the parties to whom those rulings or awards were addressed. The same was true of pornography, for which the usual criterion was "I know it when I see it". Although in some borderline cases something that one person might define as pornographic might appear erotic to another, on the whole any person of good faith would arrive at an identical or very similar conclusion, in any case (and this was the important factor) in a given cultural context. Given that legal norms were meant to be interpreted in a special context and did not belong to some Platonic heaven of ideas, the object and purpose of a treaty were no different from public morals or pornography in that, in a specific international context, interpreters acting in good faith ought to find it relatively easy to agree subjectively or intuitively on what constituted the object and purpose of a treaty.

32. He provided some examples in paragraphs 93 and 94. But, not unsurprisingly, he had found few examples of precedents, because States naturally refrained from formulating reservations which would be manifestly incompatible with the object and purpose of a treaty. For example, although a number of reservations had been formulated to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, it would never

³ See *Official Records of the United Nations Conference on the Law of Treaties...*, document A/CONF.39/11 (2854th meeting above, footnote 7), p. 415, para. 17.

occur to a State to ratify that Convention while reserving the right to commit genocide, since that would plainly conflict with the Convention's object and purpose. Admittedly the intolerable colonial clause (article XII of the Convention) did raise some problems in that respect, but that was another matter.

33. Even though the subjectivity of the notion of the object and purpose of a treaty was not a dramatic problem in itself and although in most cases, the problem could be avoided by simply interpreting that notion in good faith, it would be useful to try to guide the subjective view of the body interpreting the term by endeavouring to define it and the means of giving effect to it. That was what he had striven to do in paragraphs 79 to 85 on the basis of case law and legal doctrine, but the result would definitely not satisfy those enamoured of certainty. No matter what the French school of legal doctrine might suggest, it would be futile to try to distinguish between the two terms "object" and "purpose", for the reasons he had explained in paragraphs 82 and 83. They were one and the same notion and not a combination of two concepts. His task might have been simpler if he had been able to break them down into two elements, as that would have afforded the prospect of an objective analysis. He had, however, been unable to do so and he failed to see why French legal writers insisted on separating the concepts of the object and the purpose of a treaty. The rather disappointing result he had produced after racking his brains was set out in draft guideline 3.1.5 in paragraph 89, and read: "For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its *raison d'être*".

34. He recognized that that wording constituted a very general guideline, but in view of international practice and precedents and the literature, he did not honestly believe it was possible to go much further. He would nevertheless be open to suggestions from members on ways of adding to the draft guideline, since he was deeply convinced that law was not about providing magic solutions or confining the interpreter within rigid formulae. Such a process decidedly required more "*esprit de finesse*" than "*esprit de géométrie*". His proposal for draft guideline 3.1.5 was certainly better than nothing because, if the Commission agreed with him, users would henceforth know that a reservation could not void a treaty of its substance. Thus the guideline would somewhat strengthen the meaning of the expression the "object and purpose of a treaty".

35. Moreover, the disadvantages which the general and very vague character of draft guideline 3.1.5 (para. 89 of the report) might present were limited in two ways. First, the vague nature of the draft text was offset by the method of determining the object and purpose of a treaty which he suggested in draft guideline 3.1.6 (para. 91), which was prompted by, but was not an exact copy of, the method of interpreting treaties set forth in articles 31 and 32 of the 1969 and 1986 Vienna Conventions, for the precedents he had analysed in his report did indeed deal with the question of interpretation and hence the question of the determination of the object and purpose of a treaty.

36. The only really knotty problem in that connection was whether the time chosen was that when the treaty was

concluded, or that when the attempt was made to identify its object and purpose. That was a question of interpretation which was often described as a choice between the method of a fixed or mobile point of reference, to which he had alluded, perhaps all too briefly, in paragraphs 83 and 86. Like Sir Gerald Fitzmaurice, he was inclined to the idea that law evolved, that there was no inherent object or purpose and that it might therefore be necessary to bear in mind the subsequent practice of the parties in order to determine the object and purpose of the treaty. As there might be pros and cons to that approach, he had left the expression "and the subsequent practice of parties" in square brackets in draft guideline 3.1.6 and he would be grateful to receive the views of the other members of the Commission on that matter.

37. The second factor mitigating the disadvantages of the very general definition of the notion "object and purpose of the treaty" related to the large number of guidelines he was proposing for adoption in paragraphs 93 to 146 of the report on "Application of the criterion". On reflection, that title might be rather ambiguous and inaccurate because in proposing the draft guidelines he had tried to analyse the problems raised by particular kinds of reservations. A detailed study of the object and purpose of the treaty would make it possible to break the subject matter down into a number of subsidiary questions which would facilitate the quest for an answer to the main issue.

38. In fact it was not so much a matter of describing the methods of applying the criterion of the object and purpose of a treaty as of attempting to give States, courts and interpreters generally some guidelines as to the conduct to be followed in the main circumstances in which the problem of the validity of reservations arose. In that connection, he would commence his introduction of paragraphs 83 *et seq.* with four general preliminary comments. First, he had certainly not thought of all the possible cases; although the Guide to Practice had attempted to be fairly detailed on the whole, it was not the purpose of a codification text to cover absolutely every conceivable case. While he had endeavoured not to omit anything vital, he would supplement draft guidelines 3.1.7 (para. 115) to 3.1.13 (para. 99) if other members of the Commission were to suggest additional situations that arose with relative frequency. The more reasonable hypotheses were covered, the more the Commission's clients, in other words, States and international organizations as well as their legal services and international courts, would appreciate the assistance which the Guide tried to offer.

39. Secondly, there would always be some situations which were not covered and, in those cases, it would be necessary to refer only to draft guidelines 3.1.5 (para. 89) and 3.1.6 (para. 91), even if that meant proceeding by analogy with the situations envisaged in the subsequent guidelines.

40. Thirdly, the six or seven situations considered in paragraphs 96 to 146 were fairly heterogeneous. The first two concerned reservations to particular kinds of treaties or clauses: reservations to dispute settlement clauses and to clauses on the monitoring of the application of treaties, or reservations to general human rights treaties. The next two categories covered reservations which were

problematic on account of their content, namely, those relating to the application of internal law on the one hand, and vague or general reservations on the other. The last two headings pertained to reservations to “androgynous” treaty provisions, in that they were provisions embodied in a treaty but which enunciated customary rules or *jus cogens* norms.

41. Admittedly his method had not been very Cartesian, but his aim had been to take a useful rather than a highly theoretical or abstract approach. He had pondered the difficulties which States would really face when assessing the validity of reservations, both those they wished to formulate themselves and those formulated by their peers. He had then tried to outline positive solutions based on practice or, failing that, on the literature, or, failing even that, by attempting to think as logically as possible.

42. Of course, it could happen that a particular reservation could fall under several of the headings envisaged. For example, a reservation to a general human rights treaty, such as the 1966 International Covenant on Economic, Social and Cultural Rights and the 1966 International Covenant on Civil and Political Rights or regional human rights conventions, might affect a customary law rule or an imperative norm and purport to preserve the application of internal law. Obviously, in such cases, it would be necessary to combine the rules he had outlined.

43. The order he had followed in his report was not the one he proposed to follow for the numbering of the draft guidelines. In the report, he proceeded from specific to general considerations, whereas he suggested proceeding in the reverse order for the draft guidelines. In the remainder of his presentation, he would follow the order of his report. The numbering of the draft guidelines was not completely arbitrary or haphazard, but was fairly logical.

44. Turning to the different categories of reservations and the specific issues raised by them, he recalled that reservations to dispute settlement clauses or clauses concerning the monitoring of the application of a treaty formulated by the former “Eastern bloc” countries had given rise to a major debate leading to the adoption of the flexible system. The General Assembly had seized the ICJ in the matter of those countries’ reservations to article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which provided that disputes relating to the interpretation or application of the Convention must be submitted to the ICJ. In response thereto, the Court had rendered its advisory opinion of 28 May 1951, which was justifiably famous, despite the fact that it was of an abstract nature and did not deal with the specific question which had prompted the request for an opinion.

45. Against the background of the cold war, Western writers, including Sir Gerald Fitzmaurice, at the time Special Rapporteur of the Commission on the law of treaties, had affirmed that such reservations were contrary to the object and purpose of the Convention on the Prevention and Punishment of the Crime of Genocide. That position had been rejected by the ICJ in its orders of 1999 in two cases concerning *Legality of Use of Force*, namely those of *Yugoslavia v. Spain* and *Yugoslavia v. United States of America*. More recently, in its order of 2002 in

the case concerning *Armed Activities on the Territory of the Congo*, the ICJ had clearly stated that “whereas the reservation does not bear on the substance of the law, but only on the Court’s jurisdiction [...] it therefore does not appear contrary to the object and purpose of the Convention” (p. 246 of the judgment).

46. Human rights bodies had apparently adopted a different stance. That held good for the Human Rights Committee in its General Comment No. 24⁴ and in its decision on Communication No. 845/1999, *Kennedy v. Trinidad and Tobago*, and for the European Court of Human Rights in the *Loizidou v. Turkey* case. Both bodies had maintained that monitoring rules constituted guarantees for securing the rights set forth in the treaties and were thus essential to the object and purpose of the treaty in question.

47. It might appear hard to reconcile those two relatively firm stances. It was not, however, impossible, and he had tried to do this in paragraph 99 of the report, which contained draft guideline 3.1.13 stating the principle that, in keeping with the case law of the ICJ, “A reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty”. He had however indicated that the position would be different if the provision to which the reservation related was the *raison d’être* of the treaty or if “[t]he reservation [had] the effect of excluding the author from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that the author [had] previously accepted, if the very purpose of the treaty or protocol [was] to put such a mechanism into effect”.

48. Quite apart from reservations concerning monitoring mechanisms, reservations to general human rights treaties posed other problems that gave rise to the liveliest controversy. The Commission had considered the subject at length when, in 1997, after examining his second report,⁵ it adopted its preliminary conclusions on multilateral normative treaties, including human rights treaties.⁶ Given that it was hoped that, in 2006, it would be possible to hold a seminar with human rights bodies in order to consider the issue, he had briefly returned to the question in his tenth report and had merely pondered whether it was necessary to contend that a reservation to one of the rights guaranteed by general human rights treaties, in other words the two Covenants of 1966, the three main general conventions and other comprehensive human rights instruments, was in principle or by its very nature incompatible with the object and purpose of those treaties. It would seem, on a reading of certain passages of General Comment No. 24 of the Human Rights Committee, that such might well be the case. Yet a perusal of the whole text would lead to a more qualified conclusion, since in practice two things were clear: first, that States formulated many reservations to provisions guaranteeing a specific right in general treaties; secondly, that other States did not systematically object to such reservations.

⁴ *Official Records of the General Assembly, Fiftieth session, Supplement No. 40 (A/50/40)*, volume I, annex V, p. 119.

⁵ *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

⁶ See 2854th meeting, footnote 1. *Yearbook ... 1997*, vol. II (Part Two), chap. V, sect. B and C, pp. 44–58.

49. Since the relevant practice was unclear and ambiguous, it would be wise to spare the feelings of “human rights-ists”, within the bounds of reason, by adopting a fairly flexible draft guideline. The one he proposed as draft guideline 3.1.12 in paragraph 102 of the report simply indicated that to assess the compatibility of a reservation to a general human rights treaty with the object and purpose of such a treaty, “account should be taken of the indivisibility of the rights set out therein, the importance that the right which [was] the subject of the reservation [had] within the general architecture of the treaty, and the seriousness of the impact the reservation [had] upon it”. To his mind, that meant that a reservation concerning a fundamental right was incompatible with the object and purpose of a general human rights treaty, but that not all the rights safeguarded in such treaties necessarily constituted fundamental rights, and that even in the case of fundamental rights, one could not reasonably exclude the possibility of reservations targeting particular or marginal aspects of the implementation of such rights.

50. Another question that frequently arose in the area of human rights, and not only there, was whether a State could formulate a reservation to safeguard the application of its internal law. Reading the objections he reproduced in paragraph 103, one might think that the reply could only be in the affirmative. Objecting States sometimes adduced what was allegedly a general principle prohibiting States from invoking their internal law as justification for refusing to apply a treaty. In his opinion, that begged the question. True, article 27 of the 1969 and 1986 Vienna Conventions provided that a State or international organization could not invoke the provisions of its internal law as justification for its failure to perform a treaty. But—and it was a huge but—that presupposed that the provision that the State or organization failed to apply was already applicable to it. The problem, however, arose at an earlier stage: could a State prevent a provision from applying to it by making a reservation thereto and, for that purpose, could it invoke its internal law? The question was not whether a State could refuse an obligation incumbent upon it, but whether it could refuse to accept that obligation in the first place. It was thus an entirely different situation from the one covered by article 27 of the 1969 Vienna Convention, and in that sense, the States whose objections he cited in paragraph 103 were seriously mistaken in their reasoning.

51. If the question was put properly, the response would have to be much more finely nuanced than it usually was. First, there was a general presumption of the validity of reservations. Second, States were not obliged to justify their reservations, although it would be useful if they did, and perhaps the Guide to Practice should include a recommendation to that effect, even though it was not a legal obligation. It would be absurd to consider that a reservation with no explanation accompanying it was valid, whereas the same reservation was invalid if it was ascribed to the difficulties its author faced on account of its existing internal law. Third, in practice, it was most often considerations of internal law that led States to formulate reservations. The only reservations authorized by as emblematic a treaty as the European Convention on Human Rights were precisely those that were justified by the requirements of the internal law in force at the time the State ratified that Convention.

52. It therefore seemed to him impossible to affirm categorically that as a matter of principle a State could not formulate a reservation in order to preserve the integrity of its internal law. In so doing, however, the State must not undermine the object and purpose of the treaty. Internal law or no internal law, it had to respect the general precepts set out in draft guidelines 3.1.5 and 3.1.6. That might seem self-evident, but it could benefit from being spelled out, which was precisely what he did in draft guideline 3.1.11, contained in paragraph 106 of his report.

53. The problem of reservations prompted by the desire of their author to preserve the application of its internal law was often confused with that of vague and general reservations, but was in fact an entirely different matter. What was unacceptable was not that a State should invoke its internal law to justify a reservation, but that it should try to seek shelter behind its internal law in general, without further specification, in order to claim that its provisions took precedence over those of the treaty. The invalidity of such a reservation was attributable, not to the invocation of internal law, but rather to the fact that it was impossible for other States to assess the true scope of the reservation and, in particular, its compatibility with the object and purpose of the treaty. Indeed, the reason for the reservation’s invalidity did not necessarily derive from the fact that the State invoked its national law; it could also derive from the fact that the reservation was formulated in a general and vague manner or invoked national policies of the State in question. Whenever it was impossible to understand the effective scope of a reservation, that reservation was invalid.

54. By not permitting other parties to assess the scope of its reservation, the reserving State rendered the entire reservations mechanism inoperative and deprived the other contracting parties of the possibility of reacting that must be available to them under article 20 of the 1969 Vienna Convention. As he indicated in paragraph 109 of his report, it was not the reference to internal law in itself that was the problem but rather the frequent vagueness and generality of the reservations, which made it impossible for the other States parties to take a position concerning them. As the Human Rights Committee had indicated in its General Comment No. 24, reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and the other States parties might be clear as to what obligations of human rights compliance had or had not been undertaken. Reservations could thus not be general, but must refer to a particular provision of the convention in question and indicate in precise terms its scope in relation thereto. As the European Commission of Human Rights had stated, a reservation was of a general nature when it was worded in such a way that it did not allow its scope to be determined. The European Court of Human Rights had taken a similar position in the famous *Belilos* case.

55. It therefore seemed legitimate to propose a draft guideline 3.1.7, to read: “A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty” (para. 115 of the report).

56. In paragraphs 110 and 111 he gave several examples of reservations to which that provision seemed relevant and which had been the subject of objection for that reason. Some reservations entailed the invocation by States of their constitutions or internal law with no explanation of the effect of those provisions on the treaty; some of those based on Islamic sharia did not cite specific provisions of the treaty and failed to indicate why sharia prohibited the application of the treaty in question. Other types of reservation were that of the Holy See to the Convention on the rights of the child, which it had ratified on the understanding that the application of the Convention should be compatible in practice with the particular nature of the Vatican City State and the sources of its objective law, and that of the United States, which had reserved the general right to have its Constitution prevail over the Convention on the Prevention and Punishment of the Crime of Genocide. In such cases, the States or other entities confined themselves to saying that they could not apply the convention because it was contrary to its constitution or, in the case of the Holy See, to the “sources of its objective law”, and it was absolutely impossible to know what precise provision of the convention was the object of the reservation and what the scope of the reservation was. Other States were thus unable to react. Such reservations, it must be clearly indicated in the Guide to Practice, were unacceptable—not on grounds of ideology, but because of the mechanism for reservations.

57. The issues addressed in paragraphs 116 *et seq.* were of a different type. There, it was not the reservations as such that were questionable, but rather the provisions to which they related, either because those provisions embodied customary rules or because they set forth norms of *jus cogens* or rules defined in the treaty itself as non-derogable. At first sight, one might think the three categories of problems were similar, and when he had started to write his report, that had been his working hypothesis. Upon reflection, however, he now thought that each case should be analysed and treated differently.

58. First, an analysis of reservations to provisions embodying customary rules must begin with the 1969 judgment of the ICJ in the *North Sea Continental Shelf* case. However, it was the judgment itself that must be considered, as writers on the subject had frequently misunderstood what the Court had been trying to say. His brief analysis of the issue could be found in paragraphs 117 to 119 of his report. Essentially, the Court said three important things in its judgment. First, it had said that article 12, on reservations, of the 1958 Convention on the Continental Shelf indicated that in prohibiting reservations to certain provisions and not to others, the negotiators had presumably considered that those provisions on which reservations were not prohibited did not have the force of customary rules. Second, the Court had found that it was possible to formulate a reservation to a provision embodying a customary rule (paras. 64–65 of the judgment). Although that could only be deduced *a contrario* from some of the phraseology in the judgment, there seemed to be no doubt whatsoever on that point. It was perhaps precisely because the deduction had to be made *a contrario* that writers often committed errors of interpretation.

59. Third, the Court had recalled that even if such a reservation was made, the customary rule continued to apply to the reserving State, on the basis not of treaty law but of custom. As the Court said,

speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. (para. 63 of the judgment)

60. If that was so, despite a minority of doctrinal opinions to the contrary and despite the sometimes slightly ambiguous nature of the relevant practice, one might ask what a State or international organization could achieve by formulating a reservation to a conventional rule, since in any event, the substance of the rule remained opposable in the form of custom. The answer was that it achieved the not very laudable purpose—States not needing to be laudable but simply compliant with international law—of avoiding the consequences of “conventionalization” of the rule. When a treaty contained a provision on compulsory dispute settlement, for example, by making a reservation to one of those substantive provisions, the author prevented the judge designated by the treaty from hearing disputes relating to possible breaches of the rule in question. In addition, such a reservation provided an opportunity for a “persistent objector” to manifest the persistence of its objection. That was certainly true of treaties that reflected customary rules but even so were not codification treaties.

61. What, then, of treaties whose very purpose was to standardize the application of customary law? As he indicated in paragraphs 124 and 125 of his report, it did not seem appropriate to prohibit *ipso facto* any and all reservations to any provision whatsoever of a codification convention, if only because all the rules therein did not necessarily reflect a rule that had been customary in nature at the time of its adoption. Indeed, the so-called “codification conventions” set out customary rules and simultaneously engaged in progressive development of international law. At what level of codification or progressive development would it no longer be possible to formulate reservations? Such a question was impossible to answer.

62. In any event, practice was clear and indisputable: States often formulated reservations to codification conventions—in fact most reservations were in respect of such conventions—and other parties did not systematically object. When they did, it was only occasionally on the grounds that it was impossible to formulate reservations to such conventions. That being the case, and in conformity with the 1969 judgment of the ICJ, which it had repeated in its famous 1984 dictum in the case concerning *Military and Paramilitary Activities in and against Nicaragua*,

[t]he fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. (para. 73 of the judgment)

63. It was those two fundamental principles that he sought to enunciate in draft guideline 3.1.8 (para. 129 of the report). First, the customary nature of a norm set forth in a treaty provision did not in itself constitute an obstacle to the formulation of a reservation to that provision; but second, a reservation to a treaty provision which set forth a customary norm did not affect the binding nature of the customary norm in question in relations between the reserving State or international organization and other States or international organizations which were bound by that norm. He was convinced that those principles applied in all areas, irrespective of the object of the treaty in question. They applied in particular in respect of human rights, even though the Human Rights Committee had seemed to dispute that fact in its famous but sometimes debatable General Comment No. 24. The Human Rights Committee was certainly right in considering that the formulation of a reservation to the International Covenant on Civil and Political Rights did not release the reserving State from the obligation not to engage in slavery or not to subject human beings to cruel, inhuman or degrading treatment. In any event, however, the State was subject to those obligations under the rules of customary law. In addition, and perhaps most importantly, virtually all—and probably all—the obligations cited by the Human Rights Committee to illustrate its thesis were not only customary but also peremptory in nature.⁷

64. The situation was different with reservations to provisions setting forth norms of *jus cogens* as opposed to provisions simply embodying customary rules. Whereas a reservation to the latter type of treaty provisions could be envisaged, even if its effects were limited, the same was not true of a reservation to a provision setting forth a peremptory norm. The difference was not self-evident and even if it could be sensed intuitively, it was difficult to explain. He had had first to set aside explanations given by a number of authors, often very eminent ones, which, upon reflection, had turned out to be unconvincing. The Human Rights Committee and others postulated that one could not make a reservation to a provision setting out a peremptory norm, but justified that categorical assertion only with the very vague affirmation that reservations that offended peremptory norms would not be compatible with the object and purpose of the treaty. It seemed to him, nevertheless, that some further explanation was called for.

65. One could maintain that, as in the case of reservations to a provision embodying a customary rule, reservations to a peremptory norm left intact the obligation to respect the norm itself, with all the consequences that that entailed, independently of the treaty. The difference resided in the fact that customary rules were of benefit to society, whereas peremptory rules were indispensable to society. As a result, reservations to peremptory norms would be prohibited only if one acknowledged that *jus cogens* produced its effects outside the realm of the law of treaties and of the strict confines of articles 53 and 64 of the 1969 and 1986 Vienna Conventions. He was deeply convinced of that, but had not seen the need to demonstrate it in his report, since that would have involved going into the whole theory of *jus cogens*. In that regard, he could, however, cite no less an authority than the Chairperson

of the Commission, who at a previous meeting, speaking of unilateral acts of States, had said that States must respect the peremptory norms of general international law (2854th meeting, above, para. 38). If that was so, and he had no doubt whatsoever that it was, then reservations must also respect such rules. They constituted a particularly common example of unilateral acts. Accordingly, any reservation that sought to avoid the application of a peremptory rule was contrary to that rule and must be considered null and void.

66. The invalidity of reservations to treaty provisions setting out peremptory norms must be seen as deriving not from the fact that they were contrary to the object and purpose of the treaty but, *mutatis mutandis*, from the principle set forth in article 53 of the 1969 Vienna Convention, namely, that a unilateral act was void if, at the time of its formulation, it conflicted with a peremptory norm of general international law. On the basis of that remark, he thought that draft guideline 3.1.9 on reservations to provisions setting forth a rule of *jus cogens* could very simply read: “A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law” (para. 146 of the report).

67. Turning to the seventh and last category of problems, that of reservations to non-derogable provisions in a treaty, he said the problem generally related to the human rights treaties which often, if not always, contained provisions which the parties undertook not to suspend, irrespective of the circumstances. There again, one might assume that the problem was similar to that of reservations to provisions setting forth peremptory norms, and that had indeed been his initial impression. In statistical terms it was true, since very often norms were non-derogable because they set out principles of *jus cogens*. The correlation was not always automatic, however, as the Human Rights Committee had stressed, in both General Comment No. 24 and in General Comment No. 29 (2001).⁸ The Human Rights Committee had acknowledged that, in contrast to reservations to provisions setting out a peremptory norm, reservations to provisions that were non-derogable but not *jus cogens* were possible under the usual conditions, namely, of not being incompatible with the object and purpose of a treaty. That had also been the position of the Inter-American Court of Human Rights in its 1983 advisory opinion on *Restrictions to the Death Penalty*.

68. One had to acknowledge, therefore, that where a non-derogable rule was not peremptory, a reservation could be formulated with respect to it, as long as it related only to certain limited aspects concerning the implementation of the right in question. On the other hand, if a reservation to such a provision was to void it of its substance, it would have to be considered as being incompatible with the object and purpose of the treaty, in accordance with draft guidelines 3.1.5 and 3.1.6. It was those complex and nuanced principles that he had sought to enunciate in draft guideline 3.1.10 (para. 146).

⁷ See footnote 4 above.

⁸ *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 40 (A/56/40)*, volume I, annex VI, p. 202.

69. It had been his original intention to provide a brief overview of section D of his report, which addressed two questions relevant to the entire exercise: first, who could assess the validity of reservations, and in particular, their compatibility or non-compatibility with the object and purpose of a treaty; and second, the consequences of their possible non-validity. As that section was currently available in French only, he would refrain from introducing it at the present juncture; however, he reserved the right to change his mind if, during the discussion, it appeared necessary to make a few clarifications in order better to convey the underlying logic that had guided him in his inquiry into the fundamental characteristics of the validity of reservations to treaties.

The meeting rose at 1 p.m.

2857th MEETING

Tuesday, 26 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Candiotti, Mr. Chee, Mr. Comisário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/549 and Add.1, sect D, A/CN.4/558 and Corr.1 and Add.1 [and Corr.1]–2, and A/CN.4/L.665)

[Agenda item 6]

TENTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the tenth report on reservations to treaties (A/CN.4/558 and Corr.1 and Add.1 [and Corr.1]–2) submitted by the Special Rapporteur.

2. Mr. KOLODKIN commended the Special Rapporteur, whose well-thought-out tenth report had provided him with great intellectual satisfaction, even if he did not always agree with its author. The report called for comments, first of all, on the terms and concepts of permissibility/admissibility and validity of reservations. Reading the document was in fact a stimulating intellectual effort in which a comparison of the various language versions revealed that the terms had different meanings in different languages. For example, in paragraph 5 of his report the Special Rapporteur wrote that the word “validity” was fairly neutral in comparison with the word “permissibility”; yet, in Russian at least, the word “validity” was not entirely neutral. It referred specifically to legal

consequences. To be legally valid meant to entail legal consequences, to be in force, and to be invalid meant the opposite.

3. He agreed with those members of the Commission and States in the Sixth Committee of the General Assembly who objected to the use of the word “inadmissible”. The word carried above all the connotation of responsibility, yet introducing the notion of responsibility in the context of the formulation of reservations was a doomed enterprise. The word currently used to qualify reservations in the English text of the draft guidelines, namely “permissible”, seemed perfectly appropriate. Most representatives in the Sixth Committee had said that they preferred the words “permissible/impermissible” (A/CN.4/549, para. 103). In draft guideline 1.6, the word “permissibility” referred to the stage of formulation of reservations,¹ and in draft guideline 2.1.8, the word “impermissible” applied to the attributes of the depositary.² It should be noted in that connection that the depositary did not as a general rule have the right to express an opinion, either on the validity or non-validity of reservations, or on their permissibility or impermissibility. The depositary must remain neutral.³

4. He would further note that the idea advanced in paragraph 8 of the report, namely that the words “admissible” and “inadmissible” should be replaced by the words “valid” and “invalid” in draft guidelines 1.6 and 2.1.8, did not apply to the Russian and English texts, since the words used there were not “admissible” and “inadmissible” and their equivalents, but “permissible” and “impermissible”. On the whole, it would appear that an act or a document was generally characterized as valid or invalid only *a posteriori*. Such judgements were made on the basis of criteria applicable only once the act had been completed or the document adopted. That value judgement applied to the existence or absence of legal consequences of the act or document in question and not to the process of its execution or formulation. In that connection, paragraph 103 of the topical summary of the discussion held in the Sixth Committee (A/CN.4/549) set out several arguments against the use of the word “validity” to qualify reservations. If one ultimately had to use the terms and concepts of “validity” and “invalidity” in connection with reservations, it would be best to do so only in assessing the legal consequences of reservations formulated, rather than for making a judgement about those that possessed the right to formulate them, in particular States or courts. It was precisely in that sense that the provisions in the 1969 Vienna Convention concerning the validity of international agreements appeared to have been elaborated.

5. Secondly, the concept of presumption of validity of reservations described in the report was not very convincing. The Special Rapporteur based his arguments on article 19 of the 1969 and 1986 Vienna Conventions, but that article, common to both Conventions, seemed merely to

¹ See *Yearbook ... 1999*, vol. II (Part Two), p. 126, para. (4) of the commentary.

² See *Yearbook ... 2002*, vol. II (Part Two), pp. 45–46, paras. (3)–(6) of the commentary.

³ *Ibid.*