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Summary record of the 2891st meeting

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Special Rapporteur was proposing to the vague or general character of a reservation, namely that it became incompatible with the object and purpose of the treaty.

60. As for draft guideline 3.3.1, a text that had elicited very distinct views, he felt that the second sentence enunciated a widely recognized principle, but that it should be emphasized that the formulation of an invalid reservation might be an indicator that a State might take a potentially unlawful position in the future.

The meeting rose at 1.05 p.m.

2891st MEETING

Tuesday, 11 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Reservations to treaties (concluded) (A/CN.4/560, sect. G, A/CN.4/558 and Add.1–2, A/CN.4/572, A/CN.4/574, A/CN.4/L.685 and Corr.1)

[Agenda item 7]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on reservations to treaties.

2. Mr. PELLET (Special Rapporteur) said that the debate had been rich and had afforded him a number of insights. The length of his tenth report on reservations to treaties and the late submission of parts thereof accounted for the Commission's failure to complete its discussion of the report at its fifty-seventh session in 2005.²⁰⁷ Of the 24 draft guidelines proposed, only 5 had been referred to the Drafting Committee and had subsequently been adopted on first reading.²⁰⁸ In his remarks, he would take account of comments made at both the previous and the current sessions on draft guidelines 3.1.5 to 3.1.13, contained in the third section of the report. Draft guidelines 3.2 to 3.3.4, contained in the last section of the report had been discussed only at the current session.

3. He was grateful to all those members who had spoken and disappointed that some had not. The task of a Special

Rapporteur was often a thankless one, and the best recompense he could hope to receive was for members to show an interest in the reports submitted. If that interest was expressed in the form of criticism, all well and good, especially if the criticism was constructive. When special rapporteurs and other members of the Commission engaged in real dialogue, leading to rapid and often vigorous exchanges of views within the Drafting Committee, the Commission did its best work; the resulting drafts were the fruit of collective efforts that must be respected. Hence his annoyance with recent statements that had again raised what was in his view the purely terminological question of the "validity" of reservations. The Commission had resolved that question and he hoped that those who had already had an opportunity to express their views on the matter would not revert to it.

4. He had been surprised to hear some members complain of not having had enough time to consider the tenth report. True, it was voluminous and covered some thorny issues, but it had been distributed a year previously, which seemed to allow sufficient time for reading, reflection and reaction. It had also been alleged that insufficient time had been set aside for discussion of the report, yet that time had not been used to best advantage, as most speakers had chosen to delay making their statements until the last meeting devoted to the topic. While most statements had been constructive, others had given the impression that speakers had read the draft guidelines without consulting the report that introduced and explained them. He would confine his remarks to questions not answered in the report.

5. Turning to the draft guidelines proposed in the tenth report, which were also grouped in its annex, he noted that draft guidelines 3.1.5 and 3.1.6 formed a whole. The first, also addressed in the Special Rapporteur's note on it (A/CN.4/572), in which he proposed two new alternative wordings that were more precise than the formulation proposed at the previous session, aimed at defining the concept of object and purpose of the treaty. The second sought to indicate, albeit very concisely, how the object and purpose were to be determined in respect of a specific reservation in a given situation. Despite the lingering doubts expressed by some members, a substantial majority now seemed to favour referring the two draft guidelines to the Drafting Committee. Most members acknowledged that the two draft guidelines were complementary, even though some considered that draft guideline 3.1.5 was unworkable and of no obvious usefulness, while others had found it necessary and indeed essential, and one member had somewhat optimistically suggested that a so-called "magic formula" might be found by combining the three alternative versions. In all honesty he was not convinced, since the very concept of object and purpose of the treaty conserved, not some element of mystery, as in practical terms it was not as enigmatic as had been claimed, but an element of subjectivity that was inherent in such concepts, extremely frequent in law and by no means exceptional, as had been suggested. Many speakers seemed to agree that it might be useful to try to capture that subjectivity. That did not mean, however, that there was agreement as to the best wording. A majority had expressed a preference for the first of the two new alternatives in the note, at least one member had opted for

²⁰⁷ See footnote 197 above.

²⁰⁸ For the study of the report of the Drafting Committee (A/CN.4/L.685 and Corr.1), see the 2883rd meeting above.

the second, one had chosen the version proposed in the tenth report, and one wanted a mix of all three. The Commission should leave it to the Drafting Committee to look into the matter, bearing in mind that the discussion had been fairly general. The three versions did not actually differ substantially in spirit.

6. While a majority of members wanted something along the lines of draft guideline 3.1.5 to be included in the Guide to Practice, few clear-cut proposals for substantive changes had been made. Four, however, did deserve mention, either because other members had supported them or because they offered food for thought for the Drafting Committee, even though he himself did not necessarily endorse them.

7. First, he agreed, at least on an analytical plane, with the view expressed at the previous session that States could hold differing opinions on what was essential in a treaty. That was precisely why an effort should be made to identify the point of equilibrium, which he had expressed in the idea of the “general architecture of the treaty” or “balance of the treaty”. He was aware that that idea had not commanded popular support, especially as not all treaties, particularly human rights treaties, were grounded in a balance between the rights and duties of parties. He would not press for the use of the expression “general architecture of the treaty”, although the idea behind it had been viewed as generally acceptable. A reference to “rules, rights or obligations”—rather than “and obligations”—had been seen as preferable to the phrase “essential provisions”, a central feature of the proposal he had made at the previous session.

8. Secondly, some speakers had wrongly interpreted his position as opposed to the idea that a treaty represented a balance among the sum total of the reciprocal concessions made by the negotiators. He by no means opposed that idea. Moreover, he agreed on the need to acknowledge that a reservation could not disappoint the legitimate expectations of other parties, that what mattered was the underlying purpose of the treaty, and that the context in which the treaty was adopted had to be taken into account. However, he rather doubted whether those ideas could or should be expressed in the body of the Guide to Practice, and thought it might be more realistic to develop them in the commentary, although he would have no objection if the Drafting Committee managed to include them in the text of the Guide itself.

9. The third noteworthy point was that some speakers considered that the first alternative wording of draft guideline 3.1.5, preferred by the majority, indeed by themselves in some cases, was too rigid and offered too much scope for the formulation of reservations. The phrase “*raison d'être*” had been viewed as misleading, because a treaty could have a number of *raisons d'être*. He was not unsympathetic to that argument. He was less convinced by the suggestion that the word “seriously” in the second alternative wording should be deleted, because the essence of a reservation was that it affected the integrity of the treaty; if the effect was innocuous, the object and purpose of the treaty were not threatened. Thus, if “seriously” was to be deleted, a way must be found of making it clear that the

essential elements must be preserved, whereas secondary elements could be set aside by a reservation.

10. Fourthly, and lastly, he was in favour of the suggestions to amend the title of draft guideline 3.1.5, for instance by adopting the title of the second alternative, “Incompatibility of a reservation with the object and purpose of the treaty”, even if the Drafting Committee based its discussion on the text of the first alternative.

11. Turning to draft guideline 3.1.6, he noted that it had given rise to no objections overall, but that some important comments had been made on its wording. Concern had been expressed that it did not include all the elements contained in articles 31 and 32 of the 1969 and 1986 Vienna Conventions, and in particular, that there were no references to agreements concluded subsequently. That idea raised the same type of problem as did the reference to subsequent practice, which he had placed in square brackets. Although a majority of members had advocated deletion of the square brackets, and hence the inclusion of such a reference, he remained in two minds. He agreed that a reference to practice should be retained in the body of the Guide, that a treaty was not graven in stone, and that the interpretation of its provisions evolved over time. However, he was also sympathetic to the argument that a reservation was made upon accession to a treaty and thus usually, although not always, at the start of the treaty's life, and that practice therefore had little relevance. While the scope of some treaty obligations could evolve over time, it was not clear whether the same was true of the object and purpose of the treaty. The object and purpose were what the negotiators had been aiming at, but the means of achieving them could evolve significantly. Still, he was not sure that that evolutionary perspective was entirely appropriate to the concept of object and purpose. Having listened to other members, he still thought it would be better not to mention practice in the Guide itself, and instead to refer to various possibilities in the commentary; that, however, was a matter on which the Drafting Committee could decide.

12. One member had questioned the use of the phrase “basic structure” in paragraph 2 of draft guideline 3.1.6. He continued to think it was a useful idea. In any event, none of the remarks he had just outlined would militate against the referral of the pair of draft guidelines 3.1.5 and 3.1.6 to the Drafting Committee, which was the outcome he ardently desired.

13. The same should be true, on the whole, for draft guidelines 3.1.7 to 3.1.13. Some speakers had simply expressed their support for those draft guidelines, which were merely illustrations of draft guideline 3.1.5. Others had been more critical but, with one notable exception, had not called into question the general, pragmatic approach he had adopted. One member, Ms. Escarameia, had proposed the addition of a category of reservations, on the basis of the Special Rapporteur's entirely empirical observation that it was in those areas that the main difficulties arose. The new category was to be reservations on the application of treaties in domestic law. While he had no objection in principle to that proposal, he was unsure precisely what reservations were meant and how they differed in practice from those addressed in draft guideline 3.1.11. Furthermore, he could not see what specific

problems such reservations might raise. While any number of draft guidelines could be proposed on any number of subjects, the point was to develop general guidelines in response to problems that actually arose. Nevertheless, the Commission should not rule out the possibility that, on the basis of a note to be prepared by the author of the proposal, and if it became convinced that there was a specific problem to be resolved, the Drafting Committee might propose an additional draft guideline. Such an approach would not set a precedent, as the plenary would have the last word, and in any case the new draft guideline would only be yet another illustration of draft guideline 3.1.5.

14. Between them, draft guidelines 3.1.7 to 3.1.13 had elicited a number of comments that he would now review. With one exception, no member had objected to those draft guidelines as a whole. A single member had objected to draft guidelines 3.1.7 and 3.1.8, and another to draft guidelines 3.1.12 and 3.1.13, deeming them to be unnecessary. But no other member had opposed their referral to the Drafting Committee.

15. On draft guideline 3.1.7, many speakers had expressed satisfaction with the text proposed. One had merely pointed out that it was drafted in very general terms, and another had stated that “vague” and “general” were not synonymous. While he agreed, he thought that the matter could be discussed in the commentary. Many speakers had said that the vague and general nature of a reservation could cause it to be invalid, but not necessarily on grounds of being incompatible with the object and purpose of the treaty. That remark, which he entirely endorsed, would result in a significant modification to the draft guideline’s wording and perhaps to a change in its location and numbering. The Drafting Committee would have to look into the matter, which would probably be the most complicated problem it would have to resolve. Further, some speakers said that a vague reservation to a subsidiary provision did not bring the reservation into conflict with the object and purpose of the treaty. While he agreed, he again thought that such a reservation should nevertheless be considered invalid. Its invalidity arose, however, not from its being contrary to the object and purpose of the treaty, but instead, as indicated in the *Belilos* case by the European Court of Human Rights, because it was drafted in a way that prevented other States from identifying its scope, thus enabling its author to modify arbitrarily the scope of the obligations undertaken, with no control by other parties or, where applicable, by treaty monitoring bodies.

16. One speaker had opposed draft guideline 3.1.8 on the grounds that a reservation must always be in writing. He failed to see the relevance of that remark. Another speaker had proposed reversing the order of paragraphs 1 and 2. That proposal had not been taken up, although one or two other speakers had wished it to be more clearly indicated that a customary norm set forth in the treaty but set aside by the reservation continued to apply. The current wording had been explicitly endorsed by a good many speakers, although nothing prevented the Drafting Committee from returning to it.

17. On draft guideline 3.1.9, opinions had been more divided. While many speakers had endorsed the text, others had echoed the doubts he himself had expressed at the previous session, namely that a reservation to treaty provisions setting forth a rule of *jus cogens* raised the same problems as a reservation to a provision setting forth a customary norm and was invalid only if, in modifying the legal effect of the provision in question, the reserving State intended to leave open the possibility of conducting itself in a manner that violated *jus cogens*. That was quite logical and in no way impaired the non-derogable and peremptory nature of the norms in question, since those peremptory norms were not breached. What might happen, however, was that where, for example, the *jus cogens* provision covered the competence of the ICJ to interpret and apply the treaty, the Court would no longer have such competence. Nevertheless, the *jus cogens* norm would continue to apply to the reserving State in the most indisputable, non-derogable and peremptory manner possible.

18. He agreed with the comment that draft guideline 3.1.9, however it was worded, was grounded in article 53 of the 1969 Vienna Convention, not in article 19 (c). With all due respect, however, he did not understand how one could assert that the draft guideline was superfluous because a treaty could not be contrary to *jus cogens*. That seemed to betoken a somewhat hasty reading both of the draft guideline and of his report.

19. On draft guideline 3.1.10, no one had opposed the underlying principle, which differed from the principle underlying draft guidelines 3.1.9 and 3.1.10, but several members had expressed concern that it was fairly permissive, whereas reservations to provisions on non-derogable rights should constitute exceptions and be rigorously circumscribed. He was not insensitive to that concern and wondered whether a negative formulation might be used, along the lines of “A State or an international organization may formulate a reservation to a treaty provision relating to non-derogable rights only when ...”, in order to underline how dangerous such reservations were. One member had suggested that, in order to assess whether such reservations were compatible with the object and purpose of the treaty, it was the treaty as a whole, rather than the provision regarding which the reservation was formulated, that should be analysed. He had no firm views on that point, for which no reasons had been adduced by the speaker, but the Drafting Committee might usefully discuss it.

20. On draft guideline 3.1.11, the fundamental principle had not been disputed, even though some members had had difficulty distinguishing it from the principle underlying draft guideline 3.1.7. In fact, there were very few clear-cut cases: often a single reservation raised issues covered in draft guidelines 3.1.7, 3.1.8 and 3.1.11, for example. In practice, all one could do was to propose general solutions which the interpreters of the law, be they judges, diplomats or academics, would have to combine as best they could. Certainly, a vague, general reservation was not at all the same thing as a reservation relating to domestic law, even though reservations justified by domestic law were often also vague and general, something that doubly justified considering them to be invalid.

21. One member had proposed that the Commission should revert to the text of the amendment submitted by Peru at the Vienna Conference, the text of which was reproduced in paragraph 109 of the tenth report. It was debatable whether the Guide to Practice could incorporate an amendment that had been rejected, and the Commission generally sought not to go back to the wording of the Vienna Convention. Nevertheless, it might be useful to look into the reasons for the amendment's rejection. If the Vienna Conference had merely considered that the point made was self-evident or that the wording was too detailed for inclusion in the Convention, as had often been the case during the *travaux préparatoires*, nothing would prevent the Commission from reproducing it. It certainly had the merit of being extremely clear.

22. In a similar attempt to make the text more exacting, another member had considered that States should be required to cite a specific provision of their domestic law in their reservation. He had no firm views on that suggestion, but having re-read the proposed provision, he had to concede that it was indeed fairly "soft"; the Drafting Committee could perhaps give it more muscle. A secondary question was whether the phrase "domestic law" could also refer to the internal rules of international organizations. Personally he thought that went without saying and that a paragraph in the commentary would suffice to make the point; there again, the Drafting Committee could decide.

23. Turning to draft guideline 3.1.12, he said that, as was usual when human rights were at issue, the draft guideline had been the subject of many comments and considerable criticism. The criticism had focused mainly on drafting, although one or two members had found the draft guideline pointless, which to his mind was odd, given the countless problems which reservations to *general* human rights treaties continued to pose—and his stress on the word "general" was intentional. Some of the comments suggested a hasty reading of his tenth report, and even of draft guideline 3.1.12. As he had sought to explain in paragraph 100 of the report, the draft guidelines were *not* about human rights treaties in general, still less about human rights provisions which might be included in broader treaties. Instead, they were about general human rights treaties *only*. He noted, and the Drafting Committee would no doubt do so as well, that some members had criticized the proposed wording as being somewhat too general, and that there had been a number of more specific proposals, for example to replace the phrase "the right which is the subject of the reservation" by "the provision which is the subject of the reservation", a proposal which seemed harmless enough, but which could well be important and should be given some thought. There had also been a proposal to refer more specifically to the interrelationship between the various rights set out in the treaties, although that was precisely what he had in mind in using the words "the basic structure of the treaty". According to one member, it was important to proceed on the assumption that reservations to general human rights treaties were not valid, although he personally had serious doubts about that position, which seemed even more radical than the one taken by the Human Rights Committee in its extremely exacting General Comment No. 24.²⁰⁹

24. Aside from the isolated opinion of one member who had raised a general objection to the entire group of draft guidelines, draft guideline 3.1.13 had given rise to conflicting comments, because, of the few members who had commented on it, one or two had found it too rigorous or restrictive, whereas one or two others had considered it to be too broad. He felt that he must have found the golden mean, especially since, as he had pointed out when introducing his report, the February 2006 judgment of the ICJ in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* case confirmed the draft guideline's main thrust. He was not in favour of the proposal by one member to divide the draft guideline into two separate guidelines, one on the provisions relating to dispute settlement, and the other on treaty implementation monitoring mechanisms, because the problem was the same in both cases.

25. In sum, with a very few exceptions, draft guidelines 3.1.7 to 3.1.13 had not prompted any objection in principle, and it should be possible to refer them to the Drafting Committee.

26. The same conclusion could be drawn with regard to draft guidelines 3.2 to 3.2.4, on which he wished to make a number of general remarks before considering them one by one. As with draft guidelines 3.3 to 3.3.4, the criticisms voiced on a number of points were mutually incompatible: he had been taken to task, on the one hand, for brushing aside the 1969 and 1986 Vienna Conventions and existing law, and on the other, for being overcautious and excessively faithful to that same law. Be that as it might, he drew the line at contradicting the provisions of the Vienna Conventions. That said, he also sought to encourage the Commission, within those limits, not to lag behind the evolution of ideas or cling to conservative positions. If those States most attached to the notion of State sovereignty criticized the Commission in the Sixth Committee and convinced a majority that it was wrong to propose new ideas, then so be it, but it was not for members of the Commission, as independent experts, to anticipate the decisions of States, just as members must not systematically espouse every exotic theory that surfaced in non-governmental organizations or universities. The Commission's job was to try to find the golden mean, which would result in coherent drafts that served the international community as a whole.

27. With regard to the competence to assess the validity of reservations and the consequences of the non-validity of a reservation, he had had the impression that old, pointless discussions had re-emerged between the proponents of the absolute integrity of treaties, for whom reservations were an absolute evil, and those who advocated total freedom for States with regard to reservations, who considered that States could do whatever they saw fit, because a State could always be found that did not object to a reservation. He did not identify with either of those two extreme positions, which, fortunately, were not supported by many members. Reservations were not necessarily an evil, regardless of what some thought. They made it possible to increase participation in multilateral treaties. They should not, however, render treaties devoid of substance. For example, it would be disastrous if the treaty regime were to be broken up and replaced by a multitude of

²⁰⁹ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

bilateral relations modulated by States, acting unilaterally without regard for others. As provided under the 1969 and 1986 Vienna Conventions, account must be taken of the object and purpose of the treaty, a notion that the Commission was struggling to pin down. With particular regard to the competence to assess the validity of reservations, no member contested that contracting States and international organizations had competence to do so, in keeping with the principle referred to in the first indent of draft guideline 3.2. He had listened with interest to the comments of a number of members on the relation between that very general principle and article 20 of the 1969 and 1986 Vienna Conventions. He would not dwell on those stimulating comments, which should be taken up when the Commission addressed the question of the effect of reactions to reservations, i.e. acceptance and objections. Likewise, it was when it came to discuss the substance of article 20 that the Commission should consider the legal significance of an objection based expressly on the incompatibility of a reservation with the object and purpose of the treaty, even though the objecting State agreed to enter into a treaty relationship with the reserving State. The practice of States in that respect was most disturbing. The Commission had put the question to the Sixth Committee the previous year, but he was not sure that the very vague responses received were of much use in resolving the problem.

28. The comments of members on draft guideline 3.2 had focused mainly on the second and third indents. Leaving aside drafting questions, he thought that the basic problems posed by the two indents could be addressed together, since the main problem also had to do with the three draft guidelines which followed. A number of members had been concerned about the competence which he supposedly conferred—or refused to confer—on those dispute settlement or monitoring bodies. He stressed that he neither conferred nor refused to confer anything, and that it was neither his role nor that of the Commission, at any rate in the framework of the draft guidelines, to confer or to refuse to confer any competence whatsoever on the bodies in question to assess the validity of reservations. All that the Commission could do, in the light of practice and the general competence conferred on those bodies by the treaties that established them, was to note, first, that those bodies could assess such validity, as stated in the second and third indents of draft guideline 3.2 and the first paragraph of draft guideline 3.2.1: that was the practice, as the Commission had clearly stated in 1997 in its preliminary conclusions.²¹⁰ Secondly, it could also note that, in any case, that assessment did not in any way bind States if the bodies in question did not have competence under their statute to take mandatory decisions. That clearly emerged from the second paragraph of draft guideline 3.2.1 and the last sentence of draft guideline 3.2.3, and he did not understand why some members accused him of asserting the contrary, especially since, thirdly, even if a monitoring body was not vested with decision-making power, States must consider in good faith the position which that monitoring body took on the validity of the reservation to the treaty in respect of which it was competent and which conferred its competence on it. That did not mean that this assessment was binding, as made clear in the first

sentence of draft guideline 3.2.3. Fourthly and lastly, draft guideline 3.2.4 took the precaution to spell out that in any case, the existence of parallel mechanisms did not in any way exclude the competence of States to assess the validity of reservations. That clearly emerged from the text of the draft guideline, and also in the report, which made the point more forcefully still. The content of the draft guidelines was not only strictly in conformity with the Commission's preliminary conclusions of 1997, with one slight nuance, which he had discussed at length at the outset of the debate, but was based on the competence—existing by virtue of the treaties which conferred that competence—of dispute settlement bodies or monitoring bodies, a competence which he did not propose to expand. If some members had the opposite impression, then either they had misread the text or he had not made himself clear.

29. On draft guideline 3.2, he agreed with the proposal by a number of members to bring the *chapeau* into line with the title by replacing the words “competent to rule on” with “competent to assess”. That would be a useful clarification. On the other hand, he was not persuaded that the same should be done in the second indent, as one member had proposed. The dispute settlement bodies referred to were those which could, if they had competence, settle disputes on the interpretation and application of the treaty. He had in mind bodies such as the ICJ or an arbitration tribunal. Clearly, in the framework of that competence to settle disputes, if it existed (and it was not a question of conferring it), such bodies could assess the validity of the reservation, but it was important not to confuse their general competence and their competence to assess, even if in a given case their general competence gave them competence to assess. Likewise, notwithstanding a number of suggestions, he did not think that it would be desirable for the second and third indents to specify the limits of the competence of those bodies, as those limits were set out in the three draft guidelines that followed. On another proposal, he saw only merit in replacing the phrase “that may be established by the treaty”, in the third indent, by “that may be established within the framework of the treaty”, if only with reference to the Committee on Economic, Social and Cultural Rights, which had not been established by the International Covenant on Economic, Social and Cultural Rights, but had been a subsequent creation.

30. The great majority of members who had spoken on the bracketed reference to domestic courts had been in favour of its deletion, several suggesting that the question should be taken up in the commentary. He saw no problem with that, but thought that domestic courts might, after all, be called upon to assess the validity of a reservation formulated by their own State, as the precedent of the Swiss Federal Supreme Court in *F. v. R. and the Council of State of Thurgau Canton* had shown. Accordingly, it would be preferable to delete the word “other” before “contracting States” and “contracting organizations”, to cover the case of an assessment of validity by the courts of the reserving State. He was not in favour of including a reference to the competence of the depositary, as at least one member had suggested, because, as he had pointed out in connection with draft guideline 3.3.4, depositaries did not have competence in that area. Needless to say, his general comments also applied to the individual draft guidelines.

²¹⁰ See footnote 201 above.

31. Only two members had commented on draft guideline 3.2.1. One member, who presumably had had the Human Rights Committee in mind, had asked about quasi-judicial bodies. As with judicial bodies, the positions which quasi-judicial bodies could take on the validity of reservations had the same legal value as the other positions which they took on the merits of questions which they considered. If one believed—and he did not—that they had mandatory competence, then their conclusions on the validity of reservations would be binding, whereas if one felt—as he did—that such was not the case, then they merely made recommendations. At any rate, it was not for the Commission to express an opinion on the matter in the present context: it was sufficient to conclude that such bodies did not have more competence to assess the validity of reservations than they had in general. He had no objection to the proposal of another member to specify that the competence of such bodies was limited by the treaty that established them, although that seemed to go without saying and he saw no need to repeat it *ad infinitum*.

32. Although two members had considered draft guideline 3.2.2 unnecessary, it had been criticized by only two other members, one of whom had suggested relegating the last sentence to the commentary, whereas the other had been more fundamentally opposed to it, arguing that a reference to protocols to existing treaties might constitute an excuse to criticize the past or current behaviour of monitoring bodies. While that might be true, monitoring bodies were not above criticism. The proponents of “human rightsism” might think so, but that was certainly not his own view.

33. On draft guideline 3.2.3, he wondered whether, as had been suggested, it was necessary once again to spell out that monitoring bodies must act within the limits of their competence. He did not see the need, since that went without saying, and such a reference would be very repetitive. If the Commission insisted, he would not object, but it should be noted that the idea was already implicit in the phrase in square brackets “provided that it is acting within the limits of its competence”, at the end of the paragraph. Only one member had commented on the phrase in square brackets, suggesting that it be consigned to the commentary. Another member had proposed that the word “fully” should be deleted. That was reasonable, and in any case he was not certain that such adverbs added anything of value. On the other hand, he did not think that there was any need for two separate draft guidelines covering the differing cases in which the body in question was and was not vested with decision-making power. The solution was different in each case, but the underlying principle was the same: the competence of monitoring bodies to assess the validity of reservations could not differ from their general competence. Perhaps that might be spelled out in a general guideline, in order to avoid repeating the point *ad nauseam*.

34. There had been little comment on draft guideline 3.2.4. One member had, however, proposed specifying that the draft guideline applied only “in principle”. He wondered why, since the rule was very clear and well established in both theory and practice. However, it had rightly been pointed out that divergent assessments might

result from the coexistence of bodies competent to decide on the validity of reservations. That also posed another problem, to which another member had alluded, noting that, in practice, monitoring bodies did not take into account the assessments made by States. Those two comments led him to think that there was a gap in the draft guideline and that, just as draft guideline 3.2.3 provided in principle that States must take into account the assessment of the monitoring bodies, in the same way the monitoring bodies must take into account—and that did not mean that they were bound thereby—any assessment by States of the validity of a reservation formulated by another State. He would have liked to have heard members’ reactions on that point, but it was too late to reopen the discussion. Perhaps the Drafting Committee could address the question and consider whether the Guide to Practice should include a draft guideline parallel to draft guideline 3.2.3 which specified that monitoring bodies should take into account the assessment of States. With that proviso, it should be possible to refer draft guideline 3.2.4, together with draft guidelines 3.2, 3.2.1, 3.2.2 and 3.2.3, to the Drafting Committee.

35. On draft guidelines 3.3 to 3.3.4, which he had hoped to propose in 2005, Mr. Matheson had drawn a distinction between draft guidelines 3.3 and 3.3.1, which he had proposed referring to the Drafting Committee, and draft guidelines 3.3.2, 3.3.3 and 3.3.4, on which he had suggested deferring a decision. Other members had supported that proposal, arguing that although they could endorse the main thrust of the draft guidelines (with the exception, for some members, of draft guideline 3.3.4), it would be preferable to consider those draft guidelines in the light of the positions which would be taken on the effect of objections to and acceptance of reservations. He agreed, and he would not ask the Commission to refer draft guidelines 3.3.2, 3.3.3 and 3.3.4 to the Drafting Committee.

36. Draft guideline 3.3 had attracted broad support, except from one member, who thought that it was unclear, although he was not opposed to it. Another member had proposed deleting the last part of the sentence. Personally, he endorsed the suggestion that the words “express” and “implicit” should be deleted to bring the draft guideline into line with the ones just adopted, which did not make such a distinction.

37. One member had been strongly opposed to draft guideline 3.3.1, arguing that the formulation of an invalid reservation was tantamount to violating the treaty and thus would engage the responsibility of its author. That was not the case, for the reasons set out in paragraphs 189 to 194 of the report, but also because, if an invalid reservation violated anything, it was not the treaty to which the reservation referred, but rather, article 19 of the 1969 and 1986 Vienna Conventions. The problem posed by article 19 was posed not in terms of permissibility but in terms of validity or—so as not to aggrieve those members who still contested the word “validity”—in terms of the establishment of the reservation, as indicated in article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions, a very important provision pursuant to which a reservation was not established unless it was in conformity with article 19. That was the whole point. It could be the case

that acts which were null and void in domestic law did not engage the responsibility of their authors, and that was the case with regard to reservations to treaties. An invalid reservation would be null, but did not engage responsibility. As to whether or not, as another member had said with regard to draft guideline 3.3.1, it was for the Commission to bridge the gaps in the 1969 and 1986 Vienna Conventions, he continued to think that that was a curious conception of the Commission's role. In any case, those opinions had not been shared, although one member had suggested retaining only the first sentence of draft guideline 3.3.1, whereas another wanted the Commission to retain only the second sentence. As he saw it, those two sentences clarified each other, although drafting improvements were of course possible. He had been interested by one criticism of the current wording, which had been deemed too categorical, in particular because, it was argued, a reservation contrary to *jus cogens* would engage the responsibility of its author. That was undoubtedly true, and the Commission could reflect on the matter in connection with draft guideline 3.1.9, but he wondered whether that comment was really relevant to draft guideline 3.3.1, and in any case he had had difficulty finding even a theoretical example. However, the question could be discussed further, and the Drafting Committee might consider whether any drafting changes were needed.

38. In sum, it would be preferable to defer a decision on draft guidelines 3.3.2, 3.3.3 and 3.3.4, even though draft guidelines 3.3.2 and 3.3.3 had not given rise to any major opposition in the Commission. It would nevertheless be a deferral, rather than an abandonment or a consignment to oblivion. For their part, draft guidelines 3.1.5 to 3.3.1 could be referred to the Drafting Committee.

39. Mr. ECONOMIDES said that the quality of the Special Rapporteur's clear and detailed conclusions was such as to serve as a model for all future conclusions of that type. He felt, however, that the Special Rapporteur had not paid due regard to the complexity of the question of the non-validity of reservations and responsibility of the State. The Commission needed more time to consider the effects of reservations in relation to international law. He therefore proposed that, since draft guidelines 3.3 to 3.3.4 formed a single unit, the Commission should defer consideration of those five draft guidelines, rather than referring draft guidelines 3.3 and 3.3.1 to the Drafting Committee, as the Special Rapporteur proposed.

40. Mr. PELLET (Special Rapporteur) said that, while superficially attractive, the proposal was not logical. Draft guidelines 3.3 and 3.3.1 concerned only the interpretation of article 19 of the 1969 and 1986 Vienna Conventions, whereas draft guidelines 3.3.2 to 3.3.4 needed to be considered in the light of the subsequent reactions of States. He was strongly opposed to reverting at a future session to proposals that had already been considered at great length and that had gained no support.

41. Mr. ECONOMIDES said he found the Special Rapporteur's arguments unconvincing. Even though there had been no objection to draft guidelines 3.3 and 3.3.1, there seemed no point in considering them in isolation from draft guidelines 3.3.2 to 3.3.4, since the five draft guidelines together formed an indivisible

whole. Moreover, even if only one member called for the consideration of one or more draft guidelines to be deferred, the Commission should accede to that request. He therefore requested that a vote be taken on his proposal.

42. Mr. PELLET (Special Rapporteur) said it was not true that the five draft guidelines all posed the same problems: draft guidelines 3.3 and 3.3.1 would not be further amended as to their substance. Furthermore, it was not true to say that the Commission must accede to a request by one member to delay its work. The more positive reason why he wished to see draft guidelines 3.3 and 3.3.1 referred to the Drafting Committee at the present session was that his work would be greatly facilitated if the Commission were to confirm its acceptance of the spirit of those guidelines. He needed to know whether he could take it for granted that subparagraphs (a), (b) and (c) of article 19 of the 1969 and 1986 Vienna Conventions were all to be accorded equal weight when it came to assessing the validity of reservations. That fundamental principle was posed in draft guideline 3.3, and its acceptance could not be postponed indefinitely merely because it was not to the liking of one member. He would not stand in the way of a vote on the matter.

43. Mr. ECONOMIDES said he still had serious difficulty with one of the provisions to be referred to the Drafting Committee. To suggest that the question of responsibility would be governed, not by the rules of international responsibility, but by the provisions of the treaty concerned, would be to call into question the whole corpus of rules on international responsibility. The Commission needed more time to consider that fundamental question of principle. He therefore requested an indicative vote on his proposal that the referral of draft guidelines 3.3 and 3.3.1 to the Drafting Committee should be postponed.

Following an indicative vote, the proposal by Mr. Economides was rejected.

44. The CHAIRPERSON said he would take it that the Commission wished to refer draft guidelines 3.1.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.

It was so decided.

Responsibility of international organizations (continued)* (A/CN.4/560, sect. C, A/CN.4/564 and Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

45. The CHAIRPERSON invited the Special Rapporteur to introduce the remainder of his fourth report, as contained in documents A/CN.4/564 and Add.1–2.

46. Mr. GAJA (Special Rapporteur) said that, during the first part of the current session, the Commission had

* Resumed from the 2884th meeting.

** Resumed from the 2879th meeting.

adopted eight draft articles on responsibility of international organizations, constituting the chapter on circumstances precluding wrongfulness.²¹¹ The commentaries to the draft articles would be available for consideration before the end of the present session. Unlike its predecessors, the section on responsibility of a State in connection with the act of an international organization did not have a parallel in the draft articles on responsibility of States for internationally wrongful acts,²¹² and was intended to fill a significant gap in those draft articles. As was well known, article 57 of those draft articles²¹³ was a “without prejudice” provision which left out the question of the responsibility “of any State for the conduct of an international organization”. The intention that the question should be considered in the present study was expressed by article 1, paragraph 2, of the current draft on responsibility of international organizations, which stated: “The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization.” While the issue was controversial, it was now time for it to be addressed.

47. The section on responsibility of a State in connection with the act of an international organization comprised four sections. Section A consisted of some general remarks. The subject of section B was relatively simple. The draft articles on responsibility of States contained a chapter on the responsibility of a State in connection with the act of another State,²¹⁴ but said nothing about the responsibility of a State in connection with the act of an international organization. For instance, they considered the case of a State aiding or assisting another State in the commission of an internationally wrongful act (draft article 16), but did not address the question of a State similarly aiding or assisting an international organization in the commission of such an act. It seemed clear that there could not be any difference between a rule concerning a State aiding or assisting another State and that concerning a State aiding or assisting an international organization in the commission of an internationally wrongful act. That was so evident that it could be held that there was no need to restate the rule. Articles 25 to 27 of the present draft articles had, however, been included because the vast majority of States that had responded to the specific question posed by the Commission in paragraph 26 of its report on its fifty-seventh session²¹⁵ had expressed a clear preference for the inclusion of such provisions. Moreover, it would seem odd to omit them from a chapter concerned with the responsibility of States in connection with the act of an international organization. He noted that, as stated in paragraph 62 of his report, a State that aided or assisted an international organization might or might not be a member of that organization. If it was, any aid or assistance, direction and control or coercion would have to consist in conduct by the State as a separate legal entity, not as a member of the organization.

²¹¹ See the 2884th meeting, above. Draft articles 17 to 24 are reproduced in *Yearbook ... 2006*, vol. II (Part Two), para. 90.

²¹² *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

²¹³ *Ibid.*, p. 30.

²¹⁴ *Ibid.*, p. 27, chap. IV, draft articles 16–19.

²¹⁵ *Yearbook ... 2005*, vol. II (Part Two) p. 13.

48. Section C addressed questions that were to some extent similar to those covered by draft article 15, which related to the case in which an international organization, in order to circumvent an international obligation, influenced a member State through its decisions or recommendations. It would be unusual for a State to be in a position to use similar methods with regard to an organization of which it was a member, but it was possible for States to take advantage of their separate legal personality in order to avoid compliance with one of their international obligations. The organization might or might not be bound by similar obligations. In practice, the most significant cases were those in which the organization was not bound. In those circumstances, one or more States could exploit the fact that the organization would not then be in breach of its obligations.

49. The most likely scenario was that of member States transferring certain functions to an international organization without limiting the exercise of those functions by the organization in order to ensure compliance with member States' obligations in respect of those functions. One example which sprang to mind was that of commitments under human rights treaties or the Rome Statute of the International Criminal Court. International organizations could not yet accede to any of those instruments. The question which then arose was whether a State that had transferred powers to an international organization could still be held responsible if, for some reason, the organization engaged in action which, if it had been taken by the member State, would have been a breach of its obligations. The European Court of Human Rights in the *Waite and Kennedy v. Germany* case had found that member States were not “absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution” (para. 67 of the judgement).

50. According to draft article 28, responsibility would arise for a member State if the organization committed an act that, if taken by that State, would have implied non-compliance with that obligation. In view of criticism voiced in the Sixth Committee with regard to the use of the term “circumvent” in draft article 15, different language had been employed in draft article 28. In his opinion, that difference could be justified, even from the point of view of coherency, because the situation covered by draft article 28 was not completely analogous with that envisaged in draft article 15. Draft article 28 referred to the use of a separate legal personality, but in opposite circumstances to those covered in draft article 15. The wording might be improved, but a provision on the subject was certainly needed, as the scenario contemplated in draft article 28 was more likely to arise than that addressed in draft article 15.

51. The final part of the chapter, section D, focused on the controversial issue of the responsibility that member States might incur in consequence of an internationally wrongful act of the organization to which they belonged. The first part of the section was devoted to an analysis of practice and doctrine, in particular the decisions in the *Westland Helicopters Ltd. v. Arab Organization for Industrialization* case and in proceedings involving the International Tin Council. While those decisions had not primarily considered the issue of member States'

responsibility under international law, they contained interesting views on that matter, which he had tried to collate. Most of those views and also the opinions expressed by States in other contexts appeared to suggest that member States were responsible only in exceptional cases for an internationally wrongful act of the organization to which they belonged. The Institute of International Law had reached the same conclusion in its resolution II that it had adopted in Lisbon in 1995 (hereinafter “resolution II/1995”),²¹⁶ from which he had quoted at length (para. 89), since it was part of doctrine and reference was frequently made to it. Some logical arguments existed in support of that conclusion, which was endorsed by the majority of legal writers who had dealt with the question of responsibility under international law in the two aforementioned cases.

52. Since the Commission was confining its attention to those cases in which an international organization had a legal personality, once it was admitted that an international organization had a legal personality separate from that of its members, the latter could not be deemed to share a common identity with the organization. If an organization assumed an obligation, it rested only with the organization and a breach thereof entailed only the responsibility of the organization. The organization could not generally be regarded as a common organ or agent of its member States, although it might occasionally act as such. In principle, member States were not therefore responsible for the act of a separate legal entity. That was the logical argument underlying the position that prevailed in practice.

53. Various policy reasons set forth in the report likewise supported that conclusion. For instance, if it were held that member States incurred responsibility if they had voted in favour of a decision entailing a wrongful act of the international organization, consensus would be more difficult to achieve, because member States would wish to distinguish their position in an attempt to avoid that responsibility. A second policy reason was that, if States thought they would incur responsibility when the international organization committed a wrongful act, they would then be prompted to intervene in the process of making any decisions which might possibly involve wrongfulness, thereby depriving the organization of the independence it was granted by its constituent instrument.

54. There were, however, some exceptions to the rule. Practice hinted at their existence and the Institute of International Law had enumerated several in its resolution II/1995. The first exception he had suggested in draft article 29 would apply if a member State had accepted that it could be held responsible with regard to an injured third party. Such acceptance would have to encompass not only responsibility, but also the legal effects it produced with regard to the third party; in other words it would have to have external relevance and not remain an internal understanding between the organization and the member State in question. The other exception concerned cases in which member States had led an injured third party to rely on their responsibility, indicating, for

instance, that they would provide any funds that might be required. In both cases, member States’ responsibility was linked to their specific conduct and not merely to membership. Not all members of the organization necessarily incurred responsibility, because not all of them might, through their conduct, have caused another State to rely on their responsibility in its dealings with the organization.

55. On the other hand, responsible members of an international organization could be entities other than member States; the Commission’s definition of members had allowed for that possibility. The draft articles were intended to cover international organizations which were members of other international organizations. Although it would therefore seem logical that the draft articles should include a reference to the responsibility of an international organization as a member of another international organization in the event of either of those two exceptional situations arising, he was unsure where such a provision should be placed in the draft text. Perhaps the best course would be to add one or two provisions to chapter IV (Responsibility of an international organization in connection with the act of a State or another international organization).

56. Draft article 29 did not make it clear whether, when the exceptions applied, the responsibility of member States should be regarded as subsidiary. That would normally be the case, but member States could also accept joint and several responsibility. The same would apply when their responsibility was based on reliance.

57. In his report, he had tried to summarize the copious references in the legal literature to some of the most controversial issues raised by the responsibility of international organizations, in the hope that this would provide the Commission with a reasonable basis for its debate.

58. Mr. Sreenivasa RAO, stressing that his comments on the fourth report on responsibility of international organizations must be regarded as preliminary, commended the Special Rapporteur’s succinct, precise and logical presentation of the important issues it covered. The report treated two distinct sets of questions: the responsibility of States in connection with the acts of international organizations and the responsibility of members of an international organization. Since those were two sides of the same coin, he asked the Special Rapporteur to explain how the responsibility of an organization would be affected if a member was acting as a State, as opposed to the situation in which a State was acting as a member.

59. Recalling the opinion of Oliver Wendell Holmes, Jr., that the life of the law was not logic but experience,²¹⁷ he personally believed that, in the absence of practice, logic could help to move the debate forward and might even lead to the creation of practice. Yet while much of the Commission’s work in the area of the responsibility of international organizations was premised on logic,

²¹⁶ Institute of International Law, *Yearbook*, vol. 66, Part II, Session of Lisbon 1995, Paris, Pedone, 2000, p. 445.

²¹⁷ O. Wendell Holmes, *The Common Law*, Transaction Publishers, Rutgers (New Jersey), 2005, in Lecture 1: “Early form of liability”, p. 5.

many of the real problems did not fit neatly into a logical framework.

60. He endorsed the order in which concerns were discussed in this section of the report. Paragraph 62 dealt with an important criterion, namely that of whether the aid or assistance, direction and control, or coercion came from a State which was a legal entity separate from the organization. It was logical to take draft articles 16 to 18 on responsibility of States for internationally wrongful acts²¹⁸ as the basis for constructing articles on the responsibility of international organizations. In that light, articles 25, 26 and 27 of the present draft were well crafted.

61. A number of views had been expressed in the Sixth Committee with respect to the use by States as members of an international organization of the separate legal personality of that organization. The inclusion of a brief summary of those views in the report would have been useful. Turning to the reference in paragraph 67 of the report to the Treaty on the Non-Proliferation of Nuclear Weapons, he wondered how the provisions of that Treaty would affect the responsibility of non-nuclear States which were both parties to the Treaty and members of NATO, if those States availed themselves of the nuclear umbrella provided by other States which possessed atomic weapons. Would such States be infringing the Treaty on the Non-Proliferation of Nuclear Weapons?

62. In his opinion it would be wrongful for a State to transfer certain sovereign functions to an international organization if “the alternative means of legal process” of which mention was made in paragraph 69 were unavailable. Although the test of equivalence had been discussed in paragraph 70, it had not been included in draft article 28, nor had that article mentioned alternative means of legal process as a possible way of circumventing a potentially wrongful act. He supposed that the phrase “would have implied non-compliance”, in draft article 28, paragraph 1 (b), would also apply to the test of equivalence and alternative means of legal process. If that were so, it should be made clear in the commentary.

63. The last section of the chapter was thought-provoking, in that it contained a wealth of views and material and discussed two instances of practice in a very helpful manner. In his opinion, however, the references to the judgements concerning the International Tin Council were not entirely apposite (para. 79), since members’ responsibility had been incurred only because the Council itself had become bankrupt. The courts’ decisions did not provide any basis for concluding that member States should incur responsibility for a wrongful act of the organization to which they belonged.

64. In the Sixth Committee, the delegation of China had raised the very important question of the extent of member States’ responsibility when an organization adopted a wrongful decision.²¹⁹ The Special Rapporteur had rightly

concurred with a number of authoritative positions taken by bodies such as the International Institute of Law in its resolution II/1995 in contending that, because an international organization possessed independent legal personality and decision-making was open to all member States, and because once decisions had been taken, they were attributable only to the organization and not to the individual member States, the question of subsidiary, independent or several responsibility did not arise. The Special Rapporteur provided cogent policy reasons in support of that proposition in paragraph 94 of his report. Nevertheless the real policy reason why the Commission was debating that issue was that wrongful decisions were sometimes pushed through by a group of members of an organization despite fierce opposition from other members. Should the latter really be held responsible for decisions which were subsequently found to be wrongful? That was the crucial issue which had doubtless prompted China to state that only members that voted in favour of a decision should incur international responsibility for its consequences.²²⁰

65. While most of the propositions put forward in the report applied in the vast majority of cases, very careful thought would have to be given to the wording of draft article 29. Nevertheless, he was in favour of referring the text of the draft articles contained in the fourth report on responsibility of international organizations to the Drafting Committee.

66. Mr. GAJA (Special Rapporteur) explained that the comments by States in the Sixth Committee to which he had referred in paragraph 64 of his report had no bearing on the question currently being considered by the Commission. Those observations, which had been made in relation to draft article 15, had been listed in a footnote and would be examined at a later stage. The only comments directly relating to the question under examination had been quoted *in extenso* in paragraph 65 of the report.

The meeting rose at 1 p.m.

2892nd MEETING

Wednesday, 12 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

²¹⁸ See footnote 8 above.

²¹⁹ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 11th meeting (A/C.6/60/SR.11), pp. 9–10, paras. 51–53.

²²⁰ *Ibid.*, p. 10, para. 53.