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Summary record of the 2914th meeting

Topic:
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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-NINTH SESSION

Held at Geneva from 7 May to 5 June 2007

2914th MEETING

Monday, 7 May 2007, at 3.10 p.m.

Acting Chairperson: Mr. Giorgio GAJA

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Opening of the session

1. The FIRST VICE-CHAIRPERSON OF THE FIFTY-EIGHTH SESSION declared open the fifty-ninth session of the International Law Commission, the first session of a new quinquennium, and welcomed the members of the Commission. In view of the fact that about half the members were new and were not necessarily conversant with the Commission's methods of work, he gave a brief outline of how the Commission functioned and how the Bureau was made up. He then invited the members of the various regional groups to consult regarding the candidates they might wish to put forward.

The meeting was suspended at 3.15 p.m. and resumed at 3.35 p.m.

Election of officers

Mr. Brownlie was elected Chairperson by acclamation.

Mr. Vargas Carreño was elected first Vice-Chairperson by acclamation.

Mr. Comissário Afonso was elected second Vice-Chairperson by acclamation.

Mr. Yamada was elected Chairperson of the Drafting Committee by acclamation.

Mr. Petrič was elected Rapporteur of the Commission by acclamation.

Mr. Brownlie took the Chair.

2. The CHAIRPERSON, after extending a welcome to all members, especially the new members, said that the strength of the Commission lay in the contribution brought to it by its members, their intellectual rigour and capacity, their technical knowledge, their vision, their respect for each other's views, their ability to engage in dialogue with one another and their discipline and hard work in bringing the programme of work to a successful conclusion. He hoped that, with the valuable assistance of the Secretariat, the Commission would once again show how effective and productive it could be.

3. Under its Statute, the Commission's general mandate was the progressive development of international law and its codification, but the fact that it concerned itself primarily with public international law should not preclude it from considering questions of private international law. It observed certain tacitly accepted limits, however; thus, for example, some considered that the question of the expropriation of foreign property had been tacitly left aside. The question of human rights was more troubling, since some groups extraneous to the Commission had at times indicated that it was not appropriate for it to deal with legal questions relating to human rights. Of course, no such limitation appeared in the Statute of the International Law Commission and no other United Nations body had a mandate to codify human rights standards. It might be useful, in that connection, to recall the Commission's earliest projects, such as the draft Declaration on Rights and Duties of States.¹ In 1996, the Commission had carried out a detailed survey of its long-term programme of work, including a general scheme of classifications² and an analysis of its work methods.³ The criteria for the selection of topics to be included in the long-term programme of work appeared in the recommendation

¹ *Yearbook ... 1949*, p. 287.

² *Yearbook ... 1996*, vol. II (Part Two), Annex II, pp. 133 *et seq.*

³ *Ibid.*, chap. VII, pp. 85–97, paras. 149–243.

adopted by the Commission in 1997, which stated that a topic should reflect the needs of States with regard to the progressive development and codification of international law; it should be sufficiently advanced to enable it to be codified; and it should be concrete and suitable for progressive development.⁴ In addition, the Commission should not restrict itself to traditional topics but should also consider those that reflected new developments in international law and the pressing concerns of the international community. The consolidated list of the long-term programme of work since the forty-fourth session in 1992 included the law and practice of the following topics: reservations to treaties;⁵ nationality of natural and legal persons in relation to the succession of States;⁶ diplomatic protection;⁷ ownership and protection of wrecks beyond the limits of national maritime jurisdiction;⁸ unilateral acts of States;⁹ responsibility of international organizations;¹⁰ shared natural resources of States;¹¹ fragmentation of international law: difficulties arising from the diversification and expansion of international law;¹² effects of armed conflicts on treaties;¹³ expulsion of aliens;¹⁴ the obligation to extradite or prosecute (*aut dedere aut judicare*);¹⁵ the immunity of State officials from foreign criminal jurisdiction;¹⁶ jurisdictional immunity of

international organizations;¹⁷ protection of persons in the event of disasters;¹⁸ protection of personal data in trans-border flow of information;¹⁹ and extraterritorial jurisdiction.²⁰ Agreement had not emerged on the inclusion of the topic of “The most-favoured-nation clause” and the Commission had decided to seek the views of Governments as to the utility of the topic.²¹

4. During the past quinquennium, the Commission had been particularly productive. It had completed the second reading of draft articles on diplomatic protection and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles.²² On 8 August 2006, it had also recalled that, at its forty-ninth session, it had decided to divide its consideration of the topic “International liability for injurious consequences arising out of acts not prohibited by international law” into two parts.²³ At its fifty-third session, in 2001, it had completed the first part of its work on that topic and recommended to the General Assembly the elaboration of a convention on the basis of the draft articles on prevention of transboundary harm from hazardous activities,²⁴ since, in view of existing State practice, it was a topic that lent itself to codification and progressive development. It had then completed the second part of its work on the topic by adopting the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. It had recommended that the General Assembly endorse the draft principles by a resolution and urge States to take national and international action to implement the resolution.²⁵

5. The Commission had first taken up the topic of unilateral acts of States in 1998²⁶ and work on the topic had continued until 2006, with the assistance of a working group. Following its consideration of the report of the Working Group at its fifty-eighth session, in 2006, the Commission had adopted a set of 10 guiding principles applicable to unilateral declarations of States capable of creating legal obligations and had commended the guiding principles to the attention of the General Assembly.²⁷

6. The Commission had worked on the topic “Fragmentation of international law: difficulties arising from the diversification and expansion of international law” since 2002. In 2006, the Study Group on the topic had submitted its final report, which contained 42 conclusions that had to be read in conjunction with the analytical study

⁴ *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238.

⁵ The Commission included the topic in its programme of work under the title “The law and practice relating to reservations to treaties” at its forty-fifth session (1993), see *Yearbook ... 1993*, vol. II (Part Two), pp. 96–97, paras. 427–430 and 440, and in its agenda in 1994, *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 386. The title of the topic was amended in 1995 to read “Reservations to treaties”, *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (a).

⁶ See *Yearbook ... 1993*, vol. II (Part Two), pp. 96–97, paras. 427 and 431–440. The topic was on the agenda of the Commission in 1994, see *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 386. The title of the topic was later amended to read “Nationality in relation to the succession of States”, *Yearbook ... 1996*, vol. II (Part Two), p. 75, para. 83.

⁷ See *Yearbook ... 1995*, vol. II (Part Two), p. 110, para. 501. See also *Yearbook ... 1996*, vol. II (Part Two), Annex II, addendum 1. The topic was included in the Commission’s agenda at its forty-ninth session (1997), *Yearbook ... 1997*, vol. II (Part Two), p. 60, paras. 169–171.

⁸ See *Yearbook ... 1996*, vol. II (Part Two), pp. 97–98, para. 248, and Annex II, addendum 2.

⁹ *Ibid.*, p. 133 and Annex II, addendum 3. The Commission included this topic in the agenda at its forty-ninth session (1997), *Yearbook ... 1997*, vol. II (Part Two), p. 64, paras. 191–194.

¹⁰ See *Yearbook ... 2000*, vol. II (Part Two), p. 131, para. 729 and Annex. The Commission included this topic in the agenda at its fifty-fourth session (2002), *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 517 (b).

¹¹ *Yearbook ... 2000*, vol. II (Part Two), para. 729 and Annex. The Commission included this topic in the agenda at its fifty-fourth session, *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 518 (a).

¹² *Yearbook ... 2000*, vol. II (Part Two), para. 729 and Annex. The Commission included this topic in the agenda at its fifty-fourth session (2002), *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 518 (b). The title was later amended to read “The fragmentation of international law: difficulties arising from the diversification and expansion of international law”, *ibid.*, para. 494.

¹³ *Yearbook ... 2000*, vol. II (Part Two), para. 729 and Annex. The Commission included this topic in the agenda at its fifty-sixth session (2004), *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

¹⁴ *Yearbook ... 2000*, vol. II (Part Two), para. 729 and Annex. The Commission included this topic in the agenda at its fifty-sixth session (2004), *Yearbook ... 2004*, vol. II (Part Two), p. 120, para. 364.

¹⁵ *Ibid.*, paras. 362–363 and Annex. The Commission included this topic in the agenda at its fifty-seventh session (2005), *Yearbook ... 2005*, vol. II (Part Two), para. 20.

¹⁶ *Yearbook ... 2006*, vol. II (Part Two), para. 257 and Annex I. See also *Yearbook ... 2007*, vol. II (Part Two), para. 376.

¹⁷ *Yearbook ... 2006*, vol. II (Part Two), para. 257 and Annex II.

¹⁸ *Ibid.*, and Annex III. See also *Yearbook ... 2007*, vol. II (Part Two), para. 375.

¹⁹ *Yearbook ... 2006*, vol. II (Part Two), para. 257 and Annex IV.

²⁰ *Ibid.*, and Annex V.

²¹ *Ibid.*, para. 259. See also *Yearbook ... 2007*, vol. II (Part Two), para. 377.

²² *Yearbook ... 2006*, vol. II (Part Two), pp. 24 *et seq.*, paras. 43–46 and 49. See also *ibid.*, vol. I, 2909th meeting, pp. 289–290, paras. 36–41.

²³ *Yearbook ... 2006*, vol. I, 2910th meeting, para. 22. See also *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 165.

²⁴ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 145–148, paras. 91 and 94–97.

²⁵ *Yearbook ... 2006*, vol. II (Part Two), pp. 57, paras. 63 and 66.

²⁶ *Yearbook ... 1998*, vol. II (Part Two), pp. 50–59, paras. 111–201.

²⁷ *Yearbook ... 2006*, vol. II (Part Two), pp. 160 *et seq.*, paras. 170 and 173–176.

finalized by the Chairperson of the Group. The Commission had taken note of the conclusions and commended them to the attention of the General Assembly.²⁸

7. In addition to the work completed during the quinquennium, other projects were continuing. In 2006, the Special Rapporteur on reservations to treaties, Mr. Pellet, had submitted the second part of his tenth report.²⁹ The text of the guidelines provisionally adopted to date appeared in paragraphs 158 to 159 of the report of the Commission on the work of its fifty-eighth session.³⁰ Work was also continuing on the topic of shared natural resources. At its previous session, the Commission had adopted on first reading 19 draft articles on the law of transboundary aquifers.³¹ It had also provisionally adopted draft articles 17 to 30 on responsibility of international organizations,³² following its adoption of the first 16 draft articles between 2003 and 2005.³³

8. The second report of the Special Rapporteur on the effects of armed conflicts on treaties³⁴ had been considered in 2006. No new draft articles had been presented. The third report (A/CN.4/578 and Corr.1) had recently been distributed. Together with the first two reports, it was intended to prepare the ground for future work, possibly with the assistance of a working group.

9. Lastly, in 2006, the Commission had considered the preliminary report of the Special Rapporteur on the obligation to extradite or prosecute (*aut dedere aut judicare*).³⁵ It had also had before it the second report of the Special Rapporteur on the expulsion of aliens³⁶ and a memorandum on the subject by the Secretariat,³⁷ which it hoped to consider during the current session.

10. After briefly recalling the procedural modalities of the Commission's debates, the Chairperson informed the Commission of the death of Mr. Igor Ivanovich Lukashuk, a member of the Commission from 1995 to 2001.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence in memory of Mr. Lukashuk.

11. On behalf of the Commission, the CHAIRPERSON wished a speedy recovery to Mr. Dugard, who had

²⁸ *Ibid.*, pp. 176 *et seq.*, paras. 239 and 241–251. See also the report of the Study Group (A/CN.4/L.682 [and Corr.1] and Add.1, mimeographed, available on the Commission's website; the final text will appear as an addendum to *Yearbook ... 2006*, vol. II (Part One).

²⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2. The eleventh report of the Special Rapporteur is reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

³⁰ *Yearbook ... 2006*, vol. II (Part Two).

³¹ *Ibid.*, para. 75.

³² *Ibid.*, para 91.

³³ Draft articles 1–3 were adopted at the fifty-fifth session of the Commission (*Yearbook ... 2003*, vol. II (Part Two), p. 18, para. 49), draft articles 4–7 at the fifty-sixth session (*Yearbook ... 2004*, vol. II (Part Two), p. 46, para. 69), and draft articles 8–16[15] at the fifty-seventh session (*Yearbook ... 2005*, vol. II (Part Two), p. 40, para. 203).

³⁴ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/570.

³⁵ *Ibid.*, document A/CN.4/571.

³⁶ *Ibid.*, document A/CN.4/573.

³⁷ A/CN.4/565 and Corr.1, mimeographed, available on the Commission's website.

recently been taken ill. He also informed the Commission that Mr. Mikulka had relinquished his role as Secretary to the Commission, having been appointed Director of the Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs. Mr. Mikulka had been a member of the Commission from 1992 to 1998 and had served as Special Rapporteur on the topic "Nationality in relation to the succession of States", before becoming Director of the Codification Division and Secretary to the Commission. His deep knowledge of and commitment to the Commission had enabled him to guide its work most effectively over the years. He had been replaced by Ms. Arsanjani, previously Deputy Secretary to the Commission, who also had extensive experience with the Commission. It was heartening to know that the Secretariat, which played a crucial role in the Commission's work, would be in her capable hands.

Adoption of the agenda (A/CN.4/576)

The agenda was adopted.

The meeting was suspended at 4.10 p.m. and resumed at 4.53 p.m.

Organization of the work of the session

[Agenda item 1]

12. The CHAIRPERSON drew attention to the work plan for the following two weeks, which had been distributed. The Commission would begin by considering the topic "Reservations to treaties". In connection with that topic, four meetings would be held with experts from the human rights treaty bodies. Members interested in participating in the Drafting Committee on the topic were invited to contact the Chairperson of the Drafting Committee. Those members wishing to participate in the Planning Group should contact the first Vice-Chairperson.

The work plan for the first two weeks of the session was adopted.

Reservations to treaties³⁸ (A/CN.4/577 and Add.1–2, sect. C,³⁹ A/CN.4/584,⁴⁰ A/CN.4/586⁴¹ and A/CN.4/L.705⁴²)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR

13. The CHAIRPERSON invited the Special Rapporteur, Mr. Pellet, to present his eleventh report on reservations to treaties.⁴³

³⁸ For the text of the draft guidelines and the commentaries thereto provisionally adopted so far by the Commission, see *Yearbook ... 2006*, vol. II (Part Two), pp. 138 *et seq.*, para. 158.

³⁹ Mimeographed, available on the Commission's website.

⁴⁰ Reproduced in *Yearbook ... 2007*, vol. II (Part One).

⁴¹ *Idem.*

⁴² Mimeographed, available on the Commission's website. See also the summary record of the 2930th meeting, below.

⁴³ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

14. Mr. PELLET (Special Rapporteur) congratulated the Chairperson and the members of the Bureau on their election and also extended a welcome to the new members of the Commission. He felt obliged to point out, however, that some excellent former members had failed to be re-elected solely because of their nationality. Such unjustness exposed the defects of the system for electing the Commission and the fiction that the General Assembly voted for individuals and not for States. It was thus all the more important that the Commission should adhere to its obligation of independence from States.

15. The topic of reservations to treaties was far from new. The Commission had taken it up as far back as 1950, at the express request of the General Assembly, which had, at the same time, requested the ICJ to give an advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.⁴⁴ Those difficult questions had subsequently been the subject of detailed reports by successive special rapporteurs on the law of treaties⁴⁵ and long debates that had culminated in the adoption of articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the “1969 Vienna Convention”).⁴⁶ Those articles had been retained almost in their entirety in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the “1986 Vienna Convention”). Generally speaking, he used the provisions of the 1986 Convention as the reference text in his reports, since it had the advantage of relating both to States and to organizations.

⁴⁴ General Assembly resolution 478 (V) of 16 November 1950.

⁴⁵ For the reports of J. L. Brierly, see *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 222 ([preliminary] report); *Yearbook ... 1951*, vol. II, document A/CN.4/43, p. 70 (second report) and *Yearbook ... 1952*, vol. II, document A/CN.4/54, p. 50 (third report).

For the reports of H. Lauterpacht, see *Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 90 ([preliminary] report) and *Yearbook ... 1954*, vol. II, document A/CN.4/87, p. 123 (second report).

For the reports of G. G. Fitzmaurice, see *Yearbook ... 1956*, vol. II, document A/CN.4/101 p. 104 ([preliminary] report); *Yearbook ... 1957*, vol. II, document A/CN.4/107, p. 16 (second report); *Yearbook ... 1958*, vol. II, document A/CN.4/115, p. 20 (third report); *Yearbook ... 1959*, vol. II, document A/CN.4/120, p. 37 (fourth report) and *Yearbook ... 1960*, vol. II, document A/CN.4/130, p. 69 (fifth report).

For the reports of H. Waldock, see *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 27 (first report); *Yearbook ... 1963*, vol. II, document A/CN.4/156 and Add.1–3, p. 36 (second report); *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 5 (third report); *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 3 (fourth report); *Yearbook ... 1966*, vol. II, documents A/CN.4/183 and Add.1–4 p. 1 (fifth report); and *ibid.*, document A/CN.4/186 and Add.1–7, p. 51 (sixth report). For the final articles adopted by the Commission and the commentaries thereto, see *ibid.*, document A/6309/Rev.1, pp. 169–278, especially articles 16–20 (pp. 202–209), which became articles 19–23 of the 1969 Vienna Convention on the Law of Treaties.

⁴⁶ See *United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 21st–25th meetings, pp. 106–138; ibid., Second session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11/Add.1, United Nations publication, Sales No. E.70.V.6), 10th–11th meetings, pp. 26–44, and 85th meeting, p. 218. See also, *ibid.*, *First and second sessions, Vienna, 26 March–27 May 1968 and 9 April–22 May 1969, Official Records, Documents of the Conference (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), passim.**

16. In 1962, the last Special Rapporteur on the law of treaties, Sir Humphrey Waldock, had abandoned the overcautious position adopted by his predecessors and aligned himself with the view taken by the ICJ in its 1951 advisory opinion. As a result of that change of direction, the 1969 Vienna Convention had provided for a flexible regime on reservations.

17. The regime established by the 1969 and 1986 Vienna Conventions was both very satisfactory and deficient in many respects. It was very satisfactory in that it could apply to all situations and all treaties, as the Commission had recognized in its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, adopted at its forty-ninth session in 1997.⁴⁷ Indeed, the Commission had found the Conventions satisfactory from the outset of its work on the topic, in 1995, since it had decided that “there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions”.⁴⁸ The Vienna regime provided the basis for all the Commission’s work on reservations. It was therefore essential that no attempt should be made to change that approach: it was a sensible approach, to which the Commission had adhered rigorously, and to call it into question would cause the collapse of the whole edifice—admittedly incomplete, but already substantial—that had been patiently erected over the past 12 years, namely the set of provisions comprising the Guide to Practice.

18. The treatment of reservations to treaties under the Vienna Conventions, however, was by no means entirely satisfactory. States complained that it did not provide the necessary guidance on how to react to unilateral declarations formulated by the contracting parties, either because the 1969 and 1986 Conventions were silent on the subject or because they were open to contradictory interpretations. That was why, at the beginning of the 1990s, States had invited the Commission to take up the topic again in order to eliminate the ambiguities in the Vienna rules on reservations.

19. He would not enumerate all the uncertainties surrounding articles 19 to 23 of the 1969 and 1986 Vienna Conventions, since he had set them out in a detailed survey in his preliminary report in 1995,⁴⁹ but the fact was that they were very numerous and related to important points. For example, it was hard to see how article 19 of the Vienna Conventions, which set out the grounds for the invalidity of reservations, tallied with article 20, which stated the conditions under which a State or an international organization could object to a reservation and what the practical effects of an objection to a reservation were. Moreover, the Vienna Conventions contained no rule applicable to one particular category of unilateral declarations which were not, strictly speaking, reservations but which resembled them in many respects, namely, interpretative declarations. The Commission had included such declarations in its Guide to Practice, in which, taking its cue from an important

⁴⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 56, para. 157.

⁴⁸ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (d).

⁴⁹ *Ibid.*, vol. II (Part One), document A/CN.4/470, pp. 121 *et seq.*, especially pp. 142–150, paras. 96–149.

article published by Mr. McRae in 1978,⁵⁰ it distinguished between simple interpretative declarations and conditional interpretative declarations. The latter category of declarations had, however, given rise to some problems in cases where, practically speaking, they “behaved like” reservations. That had led a majority of the Commission to doubt whether it was necessary to formulate draft guidelines specifically relating to conditional interpretative declarations; members had deemed it sufficient to include a general provision stating that the rules on reservations applied also to conditional interpretative declarations. In principle, he shared that view but thought it premature to take a definitive position on the matter, since the Commission had not yet debated the fundamental question of the effects of reservations. Furthermore, that was what it had decided in 1999, in the commentary to draft guideline 1.2.1. Although the 1969 and 1986 Vienna Conventions, along with the 1978 Vienna Convention on succession of States in respect of treaties (hereinafter the “1978 Vienna Convention”)—where succession to reservations was concerned—must remain a sort of compass, they did not resolve all the problems, and the more deeply one delved into the topic, the more complex it appeared. Although he had already produced 11 reports on the topic of reservations to treaties,⁵¹ he recognized that his task was far from complete, particularly because he—and the Commission with him—had seriously underestimated the difficulties and the very specific problems involved. Despite criticisms of his slowness, he considered, however, that it was more worthwhile to conduct a meticulous, in-depth investigation leading to a complete and useful result for all future users of the Guide to Practice, than to do the job within an allotted time but leave various questions in abeyance. Nonetheless, he gave a solemn assurance that his study of the topic would be complete at the end of the current quinquennium.

20. In 1995, the Commission had adopted another fundamental decision, which he appealed to his colleagues to accept as it stood. That decision had been to adopt a practical guide on the subject of reservations, which would take the form of draft articles that could provide guidance for the practice of States and international organizations in that area.⁵² The Commission had thus determined from the start what the result of its work would be: not a treaty, nor even a protocol to the Vienna Conventions, but a set of guidelines that would not, in themselves, be binding in nature.

⁵⁰ D. M. McRae, “The legal effect of interpretative declarations”, *BYBIL*, 1978, vol. 49, p. 155.

⁵¹ First report: *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470; second report: *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478; third report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6; fourth report: *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/499 and A/CN.4/478/Rev.1; fifth report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4; sixth report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3; seventh report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3; eighth report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1; ninth report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544; tenth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2; and eleventh report: *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

⁵² *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (b).

21. On that basis, the Commission had, to date, adopted 76 draft guidelines, along with fairly detailed commentaries,⁵³ but only three draft model clauses, which accompanied draft guideline 2.5.8. The general plan of the Guide to Practice appeared in the second report, which he had presented to the Commission in 1996.⁵⁴ If the Commission continued to follow that plan, the Guide should comprise four parts: definition of reservations and interpretative declarations; formulation, withdrawal and acceptance of reservations and interpretative declarations, and objections thereto; effects of reservations, interpretative declarations, acceptances and objections; and the fate of reservations in the event of State succession. There might also be a fifth part relating to the settlement of disputes arising out of the reservations regime.

22. The first part—on the definition of reservations—had now been completed and, in his view, there was no need to reconsider it until the second reading of the Guide to Practice. The second part, although it already contained 41 draft guidelines, was not yet finished, but it should be completed during the current session. At the previous session, the Commission had also adopted five draft guidelines concerning, not the effects of reservations—the subject of the third part—but the validity of reservations and interpretative declarations.⁵⁵ In his view, that issue, which was a prerequisite for the consideration of the effects of reservations, was of sufficient importance to merit a separate part to itself, but that meant that in all likelihood the Guide to Practice would consist of not five but six parts. The five draft guidelines adopted in 2006, which reproduced or complemented subparagraphs (a) and (b) of the celebrated but highly obscure article 19 of the Vienna Conventions, related to the question of what was meant by the terms “prohibited” and “specified” reservations. All the draft guidelines already adopted, which would not be reviewed again before the second reading, appeared in paragraph 158 of the report of the Commission to the General Assembly on the work of its fifty-eighth session.⁵⁶

23. The hardest part of the task still lay ahead. In his tenth report (A/CN.4/558 and Add.1–2), he had proposed a definition of the object and purpose of the treaty, together with a set of draft guidelines relating to the competence to assess the validity of a reservation and the consequences of its non-validity.⁵⁷ The Commission had decided to defer a decision on draft guidelines 3.3.2 (Nullity of invalid reservations), 3.3.3 (Effect of unilateral acceptance of an invalid reservation) and 3.3.4 (Effect of collective acceptance of an invalid reservation) and not to refer them to the Drafting Committee, in principle until such time as the effect of objections to or acceptance of reservations had

⁵³ *Yearbook ... 2006*, vol. II (Part Two), pp. 138 *et seq.*, paras. 158–159.

⁵⁴ *Yearbook ... 1996*, vol. II (Part One), pp. 50–51, para. 37.

⁵⁵ Draft guidelines 3.1 (Permissible reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations), *Yearbook ... 2006*, vol. II (Part Two), p. 134, para. 104. The text of the draft guidelines and the commentaries thereto are reproduced in *ibid.*, pp. 143 *et seq.*, para. 159.

⁵⁶ *Ibid.*

⁵⁷ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, pp. 160–189, paras. 72–208.

been considered. It had, however, decided at its previous session to refer to the Drafting Committee all the other draft guidelines that appeared in the tenth report, namely draft guidelines 3.1.5 to 3.1.9, relating to the object and purpose of the treaty; 3.2 to 3.2.4 on competence to assess the validity of reservations; 3.3 (Consequences of the non-validity of a reservation); and 3.3.1 (Non-validity of reservations and responsibility), which stated—although it probably went without saying—that an invalid reservation “shall not, in itself, engage the responsibility of the State or international organization which has formulated it”. Those were the draft guidelines that the Drafting Committee had been invited to consider without delay. It was therefore essential to establish the composition of the Committee. He also urged members who wished to take part in the Drafting Committee’s deliberations on reservations to treaties to acquaint themselves with the relevant passages in his tenth report, particularly paragraphs 72 to 92 and paragraphs 147 to 194, as well as the summary of the relevant debates, which appeared in paragraphs 375 to 388 and 411 to 428 of the report of the Commission to the General Assembly on the work of its fifty-seventh session,⁵⁸ and in paragraphs 108 to 157 of the report on the work of its fifty-eighth session.⁵⁹ The note by the Special Rapporteur contained in document A/CN.4/572 and Corr.1 contained a new alternative version of draft guideline 3.1.5, drafted in the light of the Commission’s discussions in 2005.⁶⁰

24. Lastly, he urged members of the 2007 Drafting Committee not to go back on the spirit of the 14 draft guidelines that the Commission had referred to the Drafting Committee in 2005 and 2006 but rather to concentrate entirely on the wording. It would be most regrettable—and, indeed, counterproductive—if, as a result of the change in the membership of the Commission, the Drafting Committee’s discussions were used as a pretext to reconsider the approach agreed by the plenary.

25. On a more general note, he commended the quality of a study on reservations to treaties in the context of State succession that the Secretariat of the Commission had recently placed at his disposal. In his view, however, it would be premature to broach that matter at the current session. He also noted that, following the General Assembly’s approval of the Commission’s recommendation to that effect, a meeting would be held on 15 and 16 May 2007 between the Commission and experts from the United Nations human rights treaty monitoring bodies to discuss reservations to human rights treaties.⁶¹

26. Turning to the presentation of his eleventh report on reservations to treaties (A/CN.4/574), he explained that he was in the process of completing the second part, which would, for administrative reasons, perhaps be issued as the twelfth report. The first part, which had already been distributed, contained a total of 24 draft guidelines and he would begin by discussing the first set, draft guidelines 2.6.3 to 2.6.6. In paragraphs 1 to 57, he described the reception given to his three latest reports and provided

some information on recent developments in international practice and case law with regard to reservations. As far as those three reports were concerned, there were several elements that would repay discussion during the current session. He had in mind factors such as the difficulties encountered in defining objections to reservations, in view of the fact that the definition in question (draft guideline 2.6.1, which appeared in paragraph 58 of the eleventh report) had been adopted only in 2006. Another matter was a terminological problem that had given rise to considerable debate, namely whether, in ascertaining whether a reservation met the conditions set out in article 19 of the Vienna Conventions, the French text should use the word *licéité*, *recevabilité*, *admissibilité* or *validité*, and the English text the word “permissibility”, *admissibility* or “validity”. In the end, the Commission had opted for the word “validity” (*validité*), at least for the purposes of the third part of the Guide to Practice. Lastly, he drew attention to paragraphs 44 to 56 of his eleventh report (“Recent developments with regard to reservations to treaties”) and, in particular, to the judgment by the ICJ of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo*, which contained some extremely interesting observations on reservations to treaties, as did the joint separate opinion by several judges of the Court in the same case (paras. 44–53). Members of the Commission would be well advised to have the texts concerned before them during the consideration of draft guideline 3.1.13. Lastly, paragraphs 53 to 55 of the eleventh report related to work on reservations to human rights treaties, which members should bear in mind at the forthcoming meeting with experts from the human rights treaty bodies.

The meeting rose at 6 p.m.

2915th MEETING

Tuesday, 8 May 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

ELEVENTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. PELLET (Special Rapporteur), continuing the general introduction to his eleventh report on reservations

⁵⁸ *Ibid.*, vol. II (Part Two), pp. 67–68 and 69–70.

⁵⁹ *Yearbook ... 2006*, vol. II (Part Two), pp. 134–138.

⁶⁰ *Ibid.*, vol. II (Part One).

⁶¹ General Assembly resolution 61/34 of 4 December 2006, para. 16.