

Document:-
A/CN.4/2915

Summary record of the 2915th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2007, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

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.

to treaties,⁶² recalled that the texts of the 76 draft guidelines on reservations to treaties adopted so far, together with the footnotes referring the reader to the commentaries thereto, were to be found in the Commission's report to the General Assembly on the work of its fifty-eighth session.⁶³ Draft guideline 2.6.1 (Definition of objections to reservations), adopted on first reading after lengthy deliberations by the Commission and its Special Rapporteur, provided a definition of objections which should remain unaltered until the draft was considered on second reading.⁶⁴ The crucial part of that definition was the reference to statements whereby a State or organization purported to exclude or to modify the legal effects of the reservation, or the application of the treaty as a whole, in relations with the reserving State or organization. Draft guideline 2.6.2 (Objection to the late formulation or widening of the scope of a reservation), likewise immutable until it came up for consideration on second reading, identified a completely different category of statements which, to his profound regret, the Commission had decided to describe as also being objections, namely statements whereby a State or international organization opposed the late formulation of a reservation or the widening of the scope of a reservation.⁶⁵

2. The four new draft guidelines, 2.6.3 to 2.6.6, concerned what he had called, after some hesitation, the freedom (“*faculté*”) to make objections, not to the late formulation of a reservation, but to the reservation itself. His hesitation regarding the title was attributable to the fact that, like Sir Humphrey Waldock in the 1960s, he had wondered whether the formulation of reservations was not in fact a right, and an unlimited one at that, rather than a simple “*faculté*”.⁶⁶ That view was all the more justifiable in that the Commission, in its consideration on second reading of the draft articles on the law of treaties, had declined to make the freedom to formulate objections to a reservation contingent upon the reservation's being incompatible with the object and purpose of the treaty.⁶⁷ The ICJ, in its advisory opinion of 1951 on the question concerning *Reservations to the Convention on Genocide*, had appeared to take the view that objections could be made to a reservation only if the reservation was incompatible with the object and purpose of the treaty [see page 18 of the advisory opinion]. The Commission, however, had done away with that linkage, and the United Nations Conference on the Law of Treaties had upheld that stance, despite the doubts voiced by some delegations.

3. That approach had been the sole means of remaining faithful to the spirit of consensualism that permeated the entire law of reservations. As Sir Humphrey Waldock

had affirmed during the Vienna Conference in 1968, the answer to the question whether a contracting State could lodge an objection other than on the grounds of incompatibility with the object and purpose of the treaty was surely in the affirmative,⁶⁸ since a State could not impose unilaterally on other contracting States a modification to a treaty that was binding upon them.

4. As Daniel Müller had pointed out in his commentary on article 20 of the 1969 Vienna Convention, in a remarkable work edited by Olivier Corten and Pierre Klein, *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, limiting the freedom to make objections to reservations to those that were incompatible with the object and purpose of the treaty would render the mechanism of acceptances and objections provided for in article 20 null and void.⁶⁹

5. While States had the discretionary freedom to make objections to reservations, “discretionary” did not mean “arbitrary”, and that freedom was subject to procedural and form-related constraints covered in draft guidelines that he would introduce at a later meeting. As for the statement of reasons, dealt with in draft guideline 2.6.10, the freedom to make objections was unlimited, and the reasons could be legal in nature, for example alleged incompatibility of a reservation with the object and purpose of the treaty, or might be purely political or opportunistic reasons that the State was free to assess at its discretion. The State was not obliged to cite incompatibility with the object and purpose of the treaty in order to make an objection. He was thus at a loss to understand why States persisted in justifying their objections on the often far-fetched grounds of incompatibility of the reservation with the object and purpose of the treaty. Perhaps States or their legal advisers were simply unaware that the freedom to make objections was entirely discretionary, in which case the Commission should remind them of that fact.

6. To repeat: no State could unilaterally impose upon another contracting State a modification to a treaty that the latter had signed of its own free will, and to limit in any way the freedom to raise objections to reservations would be to permit just such a unilateral imposition of modifications. Hence the need for draft guideline 2.6.3 on the freedom to make objections, which read: “A State or an international organization may formulate an objection to a reservation for any reason whatsoever, in accordance with the provisions of the present Guide to Practice.”

7. Logically, the objecting State could conclude that by objecting to the reservation, it was conveying the message that it did not intend to be bound by the treaty *vis-à-vis* the reserving State. To establish any other rule would be to accept that the reserving State could oblige the author of the objection to be bound by a treaty different from the one it had signed. Indeed, the Commission's Special Rapporteurs had initially considered that an objection had the automatic effect of preventing the treaty from entering into force as between the objecting

⁶² Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

⁶³ *Yearbook ... 2006*, vol. II (Part Two), pp. 138–158, paras. 158–159.

⁶⁴ See the commentary to this draft guideline in *Yearbook ... 2005*, vol. II (Part Two), pp. 77–82, para. 438. For the report of the Drafting Committee and the adoption of this draft guideline, *ibid.*, vol. I, 2842nd meeting, pp. 88–89, paras. 51–62.

⁶⁵ *Idem.*

⁶⁶ *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 60, art. 17, para. 1 (a) and pp. 62–66, paras. 1–12 of the commentary.

⁶⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 202–208, paras. 1–23 of the commentary of the section on reservations to multilateral treaties.

⁶⁸ *United Nations Conference on the Law of Treaties, First session...* (see footnote 46 above), 25th meeting, 16 April 1968, p. 133, para. 3.

⁶⁹ *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, vol. I, O. Corten and P. Klein (eds.), Brussels, Bruylant, 2006, p. 837.

and the reserving States. That was logical for advocates of the time-honoured system of unanimity, but illogical in a flexible system. It was accordingly understandable that Mr. Waldock, who had initially been in favour of an automatic effect, had subsequently taken the line adopted by the ICJ, which in its advisory opinion of 1951 had considered that an objecting State was free to draw its own conclusions regarding the consequences of its objection for the continuance or severance of its treaty relations with the reserving State [see page 15 of the advisory opinion]. In that respect, the 1951 advisory opinion constituted an advance that had often been overlooked.

8. Even if one accepted the reasoning in the advisory opinion, however, what was the presumption if the objecting State or international organization said nothing about the consequences of its objection? In the draft article adopted in 1966, the Commission, in keeping with previous practice, had retained the principle that unless a contrary intention had been expressed by the objecting State, an objection precluded the entry into force of the treaty as between the objecting and the reserving State.⁷⁰ The presumption, therefore, was that the treaty did not enter into force as between the two States. That presumption was all the more logical in that it applied only in cases in which the objection was based on the incompatibility of the reservation with the object and purpose of the treaty. If, in the view of the objecting State, a reservation vitiated the treaty, it made no sense for that State to continue to be bound *vis-à-vis* the reserving State by a treaty that it deemed to have been emasculated. Under the 1966 system, States could draw whatever conclusions they wished from objections, but if they remained silent yet considered the reservation to be incompatible with the object and purpose of the treaty, then the two States were no longer bound thereby.

9. While the 1966 system may have been logical, that had not prevented the then-Soviet Union from pressing for a reversal of the presumption at the Vienna Conference. It had ultimately achieved that goal with the adoption of a thoroughly illogical amendment that established the presumption that even though the reservation was deemed to be incompatible with the object and purpose of the treaty, the treaty, minus the reservation, nevertheless entered into force as between the reserving State and the objecting State.⁷¹ Article 20, paragraph 4 (b), and article 21, paragraph 3, of the 1969 Vienna Convention, which reflected that new presumption, were arguably the most unsatisfactory provisions of the Vienna Conventions where reservations were concerned—so much so that he had even wondered whether that logical aberration might justify the application of the exception that the Commission had envisaged to its general principles of 1985, by proposing an amendment of the Vienna Conventions in that regard.⁷²

⁷⁰ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 207, para. 21 of the commentary to article 17.

⁷¹ See *United Nations Conference on the Law of Treaties, First and second sessions ...* (footnote 46 above), document A/CONF.39/L.3, pp. 265–266.

⁷² *Yearbook ... 1985*, vol. II (Part Two), p. 35, para. 198.

10. After much hesitation, he had decided that it should not do so. Unfortunately, Cartesian logic was not a rule of *jus cogens*, and even though article 20, paragraph 4 (b), was an inane provision, it nevertheless reflected contemporary practice. States regularly objected to reservations by declaring them to be contrary to the object and purpose of the treaty, yet almost always indicated that this did not prevent the treaty from entering into force as between themselves and the reserving State. The Soviet Union's presumption regarding article 20, paragraph 4 (b), was thus consistently reaffirmed. The explanation by States that reservations were contrary to the object and purpose of the treaty but that the latter nevertheless entered into force was totally superfluous, since article 20, paragraph 4 (b) incorporated that presumption. The fact that States confirmed the presumption revealed, however, that the provision was useful to them, since it opened the door to the famous "reservations dialogue", in other words, to discussions with the reserving State. A number of States had in fact defended the presumption, despite the criticisms that might be levelled against it, during the debates in the Sixth Committee in 2005.⁷³

11. All things considered, therefore, it seemed reasonable for the Commission to endorse that practice by reproducing the principle set out in article 20, paragraph 4 (b), and article 21, paragraph 3, which allowed the author of an objection to state that the objection did not prevent the treaty from entering into force as between it and the reserving State, without its having to justify that decision. Such was the purpose of draft guideline 2.6.4, which read:

"2.6.4 Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation"

"A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the reserving State or international organization for any reason whatsoever, in accordance with the provisions of the present Guide to Practice."

12. One important question that draft guideline 2.6.1 on the definition of objections to reservations had deliberately not resolved was who had the freedom to make objections. The draft guideline stated that an objection could be formulated by a State or an international organization, but failed to specify which categories of States or international organizations could do so. Article 20, paragraph 4 (b), of the 1986 Vienna Convention provided some guidance on that matter: it referred to "an objection by a contracting State or by a contracting organization". One might conclude that contracting States or organizations were entitled to formulate objections, yet the phrase could not be construed to mean that only contracting States or contracting international organizations could do so.

13. Account must, however, be taken of the context and the object of the provision, which concerned the effect of an objection by a contracting State or a contracting international organization, the "effect" of an objection meaning

⁷³ See the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session, prepared by the Secretariat (A/CN.4/560, mimeographed, available on the Commission's website), paras. 213–225.

that it was assumed that the objection would immediately produce consequences. Nonetheless, that did not rule out the possibility that other States or international organizations could also object. Article 21, paragraph 3, of the Vienna Conventions did not incorporate such a limitation. In particular, he did not see why article 23, paragraph 1, should require the communication of reservations to contracting States *and* to “other States [and international organizations] entitled to become parties to the treaty”, if those States were unable to react to them. If all States entitled to become parties to a treaty must be notified of the reservations, that implied that those States or international organizations had the power to react, and thus were entitled to object.

14. In his view, not only contracting States and contracting international organizations, but also all other States or international organizations entitled to become parties to the treaty, could *formulate*—as opposed to *make*—an objection to a reservation, the difference being that to “formulate” was to state a proposal or a position, whereas to “make” meant that the formulation of a reservation or objection had immediate effects and consequences. Thus, contracting States could make an objection to a reservation, whereas States entitled to become parties to the treaty could formulate such an objection. As long as the objecting State or international organization had not become a party to the treaty, its objection was merely a declaration of intent and would not produce effects until it became a party.

15. Those were the considerations which had led him to propose, in his eleventh report (para. 84), draft guideline 2.6.5, which read:

“2.6.5 Author of an objection

“An objection to a reservation may be formulated by:

“(a) any contracting State and any contracting international organization; and

“(b) any State and any international organization that is entitled to become a party to the treaty.”

16. In the absence of practice, draft guideline 2.6.6, on joint formulation of an objection, fell within the realm of progressive development of international law. It took account of a growing trend and was the counterpart, in the area of objections, to draft guidelines 1.1.7 (Reservations formulated jointly) and 1.2.2 (Interpretative declarations formulated jointly).⁷⁴ States increasingly consulted before making a reservation, and especially before making an objection. It was sensible to anticipate that development and to provide that objections could be formulated jointly, on the understanding, as pointed out by the Special Rapporteur in paragraph 86 of his eleventh report, that the unilateral nature of the objection was not called into question. A joint objection would be a kind of unilateral declaration by several parties directed at the author of the

reservation. In such a case, the objecting States would be acting unilaterally, even though they did so together. With that presentational trick, draft guideline 2.6.6 would safeguard the definition of objections to reservations in draft guideline 2.6.1. The text read: “The joint formulation of an objection by a number of States or international organizations does not affect the unilateral nature of that objection.”

17. Once the Commission had concluded its discussion of draft guidelines 2.6.3 to 2.6.6 and they had been referred to the Drafting Committee, as he hoped they would be, he would be ready to begin consideration of draft guidelines 2.6.7 to 2.6.15, which covered the form and procedure for the formulation of reservations.

18. Mr. GAJA said that the Special Rapporteur’s eleventh report contained a thorough analysis of relevant practice, a wealth of interesting points and a number of proposals, most of which did not call for further comment. He would like, however, to make a few critical remarks regarding the part of the report currently under discussion.

19. In his view, the letter and spirit of the 1969 Vienna Convention justified draft guideline 2.6.3, according to which a State or an international organization could formulate an objection to a reservation for any reason whatsoever. That was also confirmed by most State practice. Moreover, contrary to what was stated in paragraph 63 of the report and by the Special Rapporteur in his introductory remarks, the 1951 advisory opinion of ICJ concerning *Reservations to the Convention on Genocide* acknowledged the possibility of making objections which did not necessarily relate to compatibility with the object and purpose of the treaty. The advisory opinion noted that “[f]inally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it” [p. 16 of the advisory opinion]. Later in the same passage, the Court seemed to suggest that the effects of what might be called a “minor” objection were not necessarily the same as those provided for in the case of objections concerning the compatibility of a reservation with the object and purpose of the treaty. The Court envisaged that, in the case of a “minor” objection, the reserving State and the objecting State could allow the treaty to enter into force in their mutual relations, “except for the clauses affected by the reservation” [*ibid.*].

20. Admittedly, the Vienna Convention did not explicitly distinguish between, on the one hand, objections concerning the compatibility of a reservation with the object and purpose of the treaty and, on the other, minor objections, namely those which did not relate to the “validity” of the reservation, to use the term agreed on by the Commission at its fifty-seventh session.⁷⁵ However, the regime of objections which had emerged from the Vienna Convention was not necessarily uniform. It could be argued, as had Judge Bruno Simma in his 1998 article in the *Festschrift* for Ignaz Seidl-Hohenveldern entitled “Reservations to human rights treaties—some recent

⁷⁴ See the commentaries to these draft guidelines in *Yearbook ... 1998*, vol. II (Part Two), pp. 106–107, and *Yearbook ... 1999*, vol. II (Part Two), pp. 106–107, respectively.

⁷⁵ See *Yearbook ... 2005*, vol. II (Part Two), p. 64, paras. 353–358 and pp. 70–71, paras. 430–431.

developments”, that the Vienna Convention did not regulate objections relating to the validity of reservations.⁷⁶ Articles 20 and 21 thus referred only to minor objections. If objections relating to compatibility with the object and purpose of the treaty had the same effects as objections which did not call into question the validity of a reservation, it might be asked what purpose was served by a provision such as article 19 of the Convention, which set out three cases in which a reservation could not be formulated and was thus invalid.

21. The distinction between the two types of objections might raise questions as to the very purpose of objections when they related to the validity of reservations, a matter that would be dealt with at a later stage, when the question of the consequences of a reservation that had been perceived as incompatible with the object and purpose of a treaty was discussed. For present purposes, the distinction between the two types of objections would appear to have consequences for the regime governing objections and the effects of such objections.

22. It might be doubted whether the presumption in article 20, paragraph 4 (b), of the 1969 Vienna Convention applied to any objection. According to that provision, an objection “does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State”. That solution seemed justifiable only in the case of a minor objection, i.e., one that did not relate to validity.

23. That diversity of regimes for objections could also help explain, at least in part, the somewhat contestable practice of some States, which declared that an objection formulated because a reservation was incompatible with the object and purpose of the treaty did not preclude the entry into force of the treaty *vis-à-vis* the reserving State. That practice might seem odd, as was noted in paragraph 74 of his eleventh report, but it probably reflected the conviction that the presumption set forth in article 20, paragraph 4 (b), did not apply when an objection concerned the validity of the reservation. If the objection affected the validity of the treaty, and the objecting State nevertheless intended the treaty to enter into force in its relations with the reserving State, it could not rely on that presumption and should say so. That was perhaps the reason why States did not simply refer to the presumption in the Vienna Convention, but specified that the objection did not have the effect of preventing the entry into force of the treaty *vis-à-vis* the reserving State.

24. Article 20, paragraph 4 (b), was not consistent with article 19 unless it referred solely to minor objections. The same applied to the presumption set out in article 21, paragraph 3, according to which, if the objecting State did not oppose the entry into force of the treaty in its relations with the reserving State, “the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation”. That was a provision which, if it did not presuppose the validity of the reservation,

would scarcely be consistent with the regime established in article 19. Accordingly, he agreed with Judge Simma’s view that articles 20 and 21 could not have as general a scope as might seem at first glance to be the case, and that it might be possible to generalize by saying that articles 20 and 21 concerned reservations which had overcome the initial hurdle and thus were deemed to be valid.

25. If the idea that the effects of objections were not uniform was accepted, the fact that such a distinction between two types of objection existed should be specified in the draft guideline concerning their formulation. Above all, the Commission should not adopt texts which appeared to imply the existence of a uniform regime, as draft guideline 2.6.4 did in its current form.

26. Mr. PELLET (Special Rapporteur) said that the distinction drawn by Mr. Gaja between minor objections and objections relating to validity had its attractions. If retained, it would be of great importance for future work on the topic. However, he remained sceptical, because ultimately that opposition was based on scanty and superfluous practice, which consisted—for States that considered that a reservation was incompatible with the object and purpose of the treaty—in not basing themselves on the presumption in article 20, paragraph 4 (b). That was not a very weighty justification for a distinction of such importance. Moreover, it was a practice which States did not always apply; usually, they deemed a reservation to be incompatible but nevertheless remained bound by the treaty. Nothing in article 20, paragraph 4 (b), in the *travaux préparatoires* of the United Nations Conference on the Law of Treaties or in the Soviet Union’s proposals to reverse the presumption seemed to justify that opposition. He would not object if the Commission decided that it could use such flimsy criteria. That would be an elegant solution to the problems posed by the effects of objections. However, he was not certain whether there was sufficient legal basis for introducing a distinction which he personally did not see in the Vienna Convention.

27. Mr. GAJA said that perhaps further thought should be given to what decision should be taken. His suggestion had been based not only on practice but also, more decisively, on the logic of the Vienna Convention and the fact that article 19 set out categories of reservations which were not valid and that articles 20 and 21 were not suited to those reservations. Article 20, paragraph 5, with its presumption of acceptance, could be accepted for reservations which overcame the hurdle of validity, but it would be difficult to claim that the presumption applied even where validity was at issue.

28. Mr. McRAE congratulated the Special Rapporteur on his monumental contribution to the understanding of reservations and, more broadly, to the law of treaties.

29. Generally speaking, he was in agreement with the four draft guidelines presented, but wished to reflect further on Mr. Gaja’s comments on distinctions between objections and, in particular, on objections that appeared to have no consequences.

30. The Special Rapporteur distinguished between reservations, whose effect depended on the response to the

⁷⁶ B. Simma, “Reservations to human rights treaties—some recent developments”, in G. Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday*, The Hague, Kluwer Law International, 1998, pp. 659 *et seq.*, at p. 663.

reservation, and objections, which took effect simply by virtue of the State making them, so that on that basis a reservation was “formulated”, whereas an objection was “made”. It was not clear, however, why the draft guidelines on reservations referred to the *formulation* of reservations and the title of draft guideline 2.6.3 spoke of the freedom to *make* objections, whereas the body of the draft guideline addressed the *formulation* of objections, which was also the term used throughout the draft guidelines on objections. The Special Rapporteur had contended that in the case of States or international organizations not yet parties to a treaty, it was inappropriate to use the word “make”, since such objections could only be “formulated” and could not be “made” until the State or international organization became a party to the treaty. The Special Rapporteur recognized that objections were made by a unilateral act of their authors if they were already parties to the treaty. If the wording “make an objection” were to be used consistently, draft guideline 2.6.5 would have to be divided between objections “made” by parties to the treaty and those “formulated” by potential future parties. In any event, it would be useful to have some clarification from the Special Rapporteur on that terminological question.

31. His second comment related to the scope of draft guideline 2.6.3, where the freedom to make an objection was expressed in terms of freedom to object to a reservation. As the Special Rapporteur had pointed out, that freedom must be exercised in accordance with the procedural and formal requirements of the draft guidelines. However, the question arose whether there were any other limitations on that freedom and, specifically, whether States were free to make an objection to a reservation which was in fact authorized by the treaty. He did not think that they were, and if that was the case, he wondered whether there might be a need to say so explicitly. The Special Rapporteur touched upon the matter in paragraph 65 of his eleventh report and had observed in his introductory remarks that a reservation was a proposal to modify the terms of the treaty and that the rationale for the freedom to make objections was that no State was obliged to accept that proposal for modification. However, in paragraph 65, he then qualified that remark by saying “except for those resulting from reservations expressly authorized by the treaty”. There, he seemed to be suggesting that States were not free to make an objection to a reservation expressly authorized by the treaty. To call derogations which were authorized by the treaty “reservations” caused some confusion. However, there were examples in State practice of such terminology being employed. For instance, the North American Free Trade Agreement (NAFTA) did not permit reservations as such; the three signatory States must apply all the provisions of the Agreement. However, NAFTA did make provision for specific derogations which States could make at the time of acceding to the Agreement, derogations which it referred to as “reservations”. It seemed to make no sense to think of those derogations as reservations to which objections could be made. Nor did it seem possible to consider that those expressly permitted reservations would ever be contrary to the object and purpose of the treaty, although in paragraph 65 the Special Rapporteur contemplated that eventuality. It would be useful to have some clarification on that point. The definition of reservations in draft guideline 1.1 did not seem on the face of it to exclude permitted reservations.

32. Regarding draft guideline 2.6.5, he endorsed the principle that an objection could be formulated by any State or international organization that was entitled to become a party to a given treaty. The report made a compelling case for the value of having advance warning of objections by States that might or would become parties to the treaty. Paragraph 81 of the eleventh report, however, related to the intention to become a party to the treaty, whereas draft guideline 2.6.5 related to the entitlement to become a party, regardless of whether a given State or international organization intended to do so. The formulation of the draft guideline, although it might be undesirable, was unavoidable: there was no realistic way of insisting that a State that had not yet become a party to the treaty should demonstrate its intention to do so. Moreover, the outcome of the domestic processes that would permit a State to ratify a treaty might not be predictable enough to indicate whether it intended to become a party to such a treaty. A change of government or political alignments within a State might subsequently enable the treaty to be ratified. For those reasons, entitlement was, on balance, preferable as a criterion to intention.

33. Mr. GAJA said that Mr. McRae’s concern about the conflicting criteria of entitlement or intention was based on a misapprehension: the French text made no reference to “intention”. A mistranslation might be to blame.

34. Mr. GALICKI said that draft guidelines 2.6.3 and 2.6.4 might contain inconsistencies, based, as they were, on article 20, paragraph 4 (b), of the 1969 Vienna Convention, the wording of which as originally proposed was preferable to the final version decided on by States.⁷⁷ In the case of draft guideline 2.6.3, the title was inconsistent with the content: the former referred to “making” objections, whereas the latter used the word “formulate”, which was a far weaker word. The inconsistency should be eliminated, or at least explained. The text as it stood left too much scope for interpretation.

35. The draft guideline was, moreover, inconsistent with draft guideline 2.6.4, according to which, in a clear reflection of article 20, paragraph 4 (b), of the Convention, a State or international organization that formulated an objection to a reservation could oppose the entry into force of the treaty as between itself and the reserving State or international organization for any reason whatsoever. That meant that an objection might be made on relatively minor grounds, with the result that an objection to a reservation deemed incompatible with the object and purpose of the treaty did not necessarily preclude the entry into force of that treaty as between the reserving and objecting States. He wondered whether the Special Rapporteur agreed with him that the original wording of article 20, paragraph 4 (b), under which an objection by a contracting State to a reservation automatically precluded the entry into force of the treaty concerned, was preferable to the current wording, and whether draft guideline 2.6.4 adequately covered all eventualities.

⁷⁷ For the discussion of article 17, paragraph 4 (b) of the draft articles adopted by the Commission at its eighteenth session and the changes thereto, see *United Nations Conference on the Law of Treaties, First and second sessions ...* (footnote 46 above), documents A/CONF.39/14, pp. 132–138, paras. 172–189, and A/CONF.39/15, pp. 239–240, paras. 50–57.

36. Mr. HASSOUNA asked whether, in view of the hope that the important and complex topic of reservations to treaties would be finalized by the end of the current quinquennium, the Special Rapporteur could give some indication of what could be achieved and within what time frame. Such a “road map” would be preferable to an open-ended agenda. He also wished to know how State practice or legal opinion relating to the formulation of objections to reservations had evolved over recent years. It would be useful to learn whether the procedure had become stricter or more flexible over the long term. Lastly, draft guideline 2.6.5 raised an interesting question regarding the rationale for giving the same legal rights to a State that had only signed a given treaty as to a State that had both signed and ratified it. He could identify no conclusive trend in State practice in that regard: some but not all States that had merely signed a treaty occasionally made objections to reservations.

37. The CHAIRPERSON, responding to proposals by Mr. PELLET (Special Rapporteur), said he would take it that the Special Rapporteur’s response to the points raised and his presentation of the next group of draft guidelines would be deferred to the next meeting.

Organization of the work of the session (*continued*)

[Agenda item 1]

38. Mr. YAMADA (Chairperson of the Drafting Committee) said that the following members had expressed their willingness to serve on the Drafting Committee on the topic of reservations to treaties: Mr. Candiotti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Singh and Ms. Xue. Mr. Petrič would participate *ex officio* in his capacity as Rapporteur. Mr. Yamada would welcome more volunteers, especially from the African and the Latin American and Caribbean States. All members of the Commission, however, were of course entitled to attend meetings of the Drafting Committee.

The meeting rose at 11.25 a.m.

2916th MEETING

9 May 2007, at 10.07 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, 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. The CHAIRPERSON invited the members of the Commission to resume consideration of the topic of reservations to treaties, and in particular draft guidelines 2.6.3 to 2.6.6 in the eleventh report of the Special Rapporteur.⁷⁸

2. Ms. ESCARAMEIA welcomed the eleventh report on reservations to treaties, which was well researched and highly analytical. The summary of past work and recent developments was very useful. She wondered, however, whether the reference to the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)* really supported draft guideline 3.1.13, as was stated in paragraph 48, because the reservation in question had referred only to dispute settlement mechanisms and not to treaty monitoring bodies, whereas draft guideline 3.1.13 covered both. Moreover, several judges of the ICJ had expressed the opinion that a reservation to dispute settlement clauses could be incompatible with the object and purpose of the treaty [see paragraph 21 of the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma]. In general, a reservation concerning the very existence of a treaty body was also contrary to the object and purpose of the treaty. Draft guideline 3.1.13 should therefore be reconsidered in the light of those points.

3. She then drew the Commission’s attention to recommendation No. 5 of the Working Group on Reservations set up at the request of the Fourth Inter-Committee Meeting of Human Rights Treaty Bodies to study the practice of treaty bodies in that area.⁷⁹ According to that recommendation, the treaty bodies were competent to assess the validity of reservations and the implications of a finding of invalidity of a reservation. Recommendation No. 7 gave the impression that the consequences of invalidity—that the State could be considered as not being a party to the treaty, or as a party to the treaty but that the provision to which the reservation had been made would not apply, or as a party to the treaty without the benefit of the reservation—could be determined by the treaty bodies (besides judicial organs). It would be useful to know whether the Special Rapporteur agreed with her interpretation of that recommendation.

4. Turning to the new draft guidelines presented in the eleventh report, she said that the word “freedom” in the title of draft guideline 2.6.3 (Freedom to make objections) seemed inappropriate. The Special Rapporteur justified his choice by saying that freedom was not unlimited, but a right was also subject to restrictions. The Special Rapporteur himself also used the word “right” several times, for example in paragraphs 63 and 66. Nor did the

⁷⁸ Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

⁷⁹ Report of the meeting of the Working Group on Reservations (HRI/MC/2006/5), para. 16.