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**Summary record of the 3106th meeting**

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84. On the other hand, if an affected State rejected or failed to consider an offer of assistance from an NGO, the requirement for it to notify all NGOs of its decision, or worse, provide them with the reasons for its decision, would place too heavy a burden on it. One of the most difficult problems encountered in disaster situations was the coordination of humanitarian aid and assistance, which was why international guidelines for such coordination had been established. Accordingly, any requirement that affected States provide reasons for the arbitrary rejection of an offer of assistance should be balanced by an effort to avoid placing unreasonable administrative obligations on them. She was not convinced that establishing a list of suitable organizations, as suggested by Mr. Hassouna and Mr. Murase, was practical, since flexibility was of crucial importance. Perhaps, indeed, it was not for the Commission to draw up such a list. Mr. Hmoud had touched on a possible solution: to exclude NGOs from the list of organizations entitled to offer assistance. The goal was simple: to prevent an affected State from circumventing its primary responsibility to ensure the protection of persons on its territory. However, it was also necessary to provide for a situation in which an affected State that was unable or unwilling to provide assistance consented to receiving assistance but subsequently withdrew its consent. Such a situation could pose considerable practical problems.

85. In conclusion, Ms. Jacobsson was in favour of referring draft articles 10, 11 and 12 to the Drafting Committee.

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

[Agenda item 1]

86. Mr. MELESCANU (Chairperson of the Drafting Committee) said that the Drafting Committee on the protection of persons in the event of disasters would consist of Mr. Valencia-Ospina (Special Rapporteur), Mr. Dugard, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood, with Mr. Perera (*ex officio*).

*The meeting rose at 1 p.m.*

### **3106th MEETING**

*Friday, 15 July 2011, at 10 a.m.*

*Chairperson:* Ms. Marie G. JACOBSSON  
(Vice-Chairperson)

*Present:* Mr. Adoke, Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### **Reservations to treaties (continued)\* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)**

[Agenda item 2]

#### **SEVENTEENTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)\***

1. The CHAIRPERSON invited the Commission to continue its consideration of the addendum to the seventeenth report of the Special Rapporteur on reservations to treaties (A/CN.4/647 and Add.1).

2. Sir Michael WOOD said that the draft introduction to the Guide to Practice set out in paragraph 105 of the report would be of valuable assistance to users, and he hoped that the plenary could consider and adopt it at an appropriate stage as part of the Guide. The title of the chapter on dispute settlement in the context of reservations of the seventeenth report was a little misleading, as the Special Rapporteur had indicated, and he rightly concluded that there was no reason to propose a new dispute settlement mechanism specifically for disputes concerning reservations. If two or more States or international organizations had a dispute or a difference of legal views about a reservation which one or more of them wished to resolve, they had at their disposal all the means of dispute settlement set out in Article 33 of the Charter of the United Nations. The most interesting part of the report began at paragraph 78, entitled “Advantages of a flexible assistance mechanism for the resolution of disputes concerning reservations”. The idea was not to recommend the creation of a new dispute settlement body, but rather the establishment of a small panel of government experts with a dual function: to assist in the resolution of differences of opinion on reservations, and to provide technical assistance to States that referred such questions to it. The details of how such a mechanism would function had not been worked out, which was intentional, but it seemed clear that its mandate would be broad and potentially quite sensitive. In proposing that mechanism, the Special Rapporteur referred “to existing precedents and, specifically, to the one established by ... CAHDI”, and also to COJUR. However, neither CAHDI nor COJUR had the functions proposed by the Special Rapporteur for a new panel. CAHDI was not a body that assisted in dispute settlement, it did not give technical assistance in the drafting of reservations, and while occasionally it might consider the terms of an objection, there were very different views on reservations, legal and political, among the member States of the Council of Europe, although that might pose less of a problem when the Guide to Practice was available. For now, the objective of CAHDI was not really “to present as united as possible a ‘front’ with respect to reservations formulated by other States” (para. 93), because a lot of its time was devoted to the consideration of reservations made by States represented in it, whether as member States or observers. Its main activity involved the exchange of views on those reservations and reservations made by other States. From time to time, that might lead to coordinated reactions by several participating States,

\* Resumed from the 3097th meeting.

\* Resumed from the 3104th meeting.

but that was not the principal aim. Often, views or explanations were sought from a reserving State, and, where appropriate, that State might be encouraged to withdraw or modify its reservation. Thus, he saw CAHDI as an important example of the reservations dialogue, but not as a dispute settlement mechanism. It should further be remembered that CAHDI was an intergovernmental body. Its members exchanged views on reservations, rather efficiently for 30 minutes or so, as part of its twice-yearly meetings.

3. Within the European Union, the role of COJUR in relation to reservations was similar. It was a smaller group and met four times a year, which gave it certain advantages. In addition to examining new reservations that had been made over the past year or so, CAHDI sometimes considered reservations in a specific field, especially with regard to terrorism conventions. It could also focus on a particular convention. For example, he had recently attended a conference on reservations and interpretative statements under the Convention on the Rights of Persons with Disabilities.

4. In paragraph 94, the Special Rapporteur drew a number of general conclusions on CAHDI and then proposed something rather different, namely that the Commission recommend the establishment of a new panel, but he did not say who would create it or how it would be funded. The panel would be small, composed of "government experts" serving only at need and would have "a very small secretariat". The proposal that the members of the panel be government experts was rather curious. The members of CAHDI spoke for their Governments and on instructions. Given the functions proposed, it was not clear that the members of the panel would do the same or what kind of body it would be. The Special Rapporteur seemed to think that all those questions would be decided by the General Assembly, but he personally doubted whether the General Assembly would want to set up a new body for that purpose. One of the reasons given by the Special Rapporteur for his proposal was the need to compensate for the lack of resources and competence that handicapped some Member States, but in his own view, lack of competence was not the problem, because no particular State or group had a monopoly of competence, whereas all countries lacked sufficient resources to perform the task by themselves. The real advantage of the CAHDI process was that it forced States to focus on reservations and assisted them through a collective discussion. Even if only one or two States had found time to study a particular reservation, all participating States would benefit through the division of labour, whereas that would not be the case under the mechanism proposed by the Special Rapporteur, which would not involve such collective discussion.

5. He did not see why the CAHDI and COJUR experience could not be followed elsewhere. Other regional organizations, such as AALCO, the Inter-American Juridical Committee (IAJC) or ASEAN, could conduct a similar exercise if they so wished. Specialized agencies could do likewise for treaties adopted under their auspices, and the Sixth Committee could perhaps set up a subcommittee or working group to meet for a day once or twice a year, like CAHDI did.

6. He hoped that the Commission would consider and adopt the proposed introduction in plenary as part of the Guide to Practice, but he was not in favour of it recommending the establishment of a panel as suggested by the Special Rapporteur. Quite apart from the budgetary implications, which could not be ignored, he questioned the usefulness of the proposed mechanism. The Commission should perhaps decide to draw some ideas to the attention of the General Assembly and through it to States, regional organizations and specialized agencies, such as engaging, in the context of regular meetings, in some form of collective consideration of reservations, as was done in CAHDI.

7. Mr. NOLTE said that he was no more convinced than Sir Michael by the Special Rapporteur's proposal that the Commission recommend, as part of the Guide to Practice, the establishment of a mechanism to assist in the area of reservations and objections to reservations. As a general consideration, he was concerned that any dispute settlement mechanism which the Commission might recommend as part of the Guide to Practice might undermine the Guide's authority if the recommendation was not acted upon. That was because users might consider that the Guide to Practice presupposed the existence of such a mechanism, regardless of any protestations to the contrary by the Commission, and States might conclude that if the dispute settlement mechanism was not implemented or did not work as envisaged, then the Guide itself did not have to be taken too seriously. That was why the Commission should not propose a specific mechanism, but should limit itself to making a general recommendation pursuant to which States should consider establishing a mechanism for the assessment of reservations and related declarations, bearing in mind the experience at the regional level, such as that of CAHDI. Such a recommendation might trigger a reflection process among States on how to improve the treatment of reservations, a process that should take place after States had had a chance to digest the Guide to Practice as a whole and to assess its significance. It was not until after the significance of the Guide to Practice, and in particular some of its key elements, had become clear that the time might be ripe for elaborating a tailor-made mechanism. Perhaps States would then refer the matter back to the Commission and ask it to make more specific suggestions.

8. The Special Rapporteur described his proposal for a mechanism as being flexible and he emphasized its quality as an instrument for providing technical assistance to smaller or less developed States, although the proposal was not so limited or technical. Of course, as an international lawyer, he personally supported and welcomed in general the establishment of third-party mechanisms; otherwise, opposing subjective assessments might lead to differences of opinion in international relations. However, the situation at issue was more complicated. The stated purpose of the mechanism was to resolve the question of whether a reservation was invalid because it was incompatible with the object and purpose of the treaty. Often that was more than a mere technical question and could involve very difficult assessments based on value judgments and political considerations. Who would make such an assessment? The Special Rapporteur suggested that a committee of 10 government experts would do so. That raised a number of difficulties. Would those government experts

come from States that had signed the treaty concerned or that were at least entitled to become parties to the treaty? After all, why should a government official of a State that had nothing to do with a treaty be qualified to assess its object and purpose? Should such a body take decisions in the form of recommendations, and, if so, on the basis of what procedure? Would it take decisions by a majority vote, and, if so, by what majority? Would all 10 members discuss a reservation with the reservation's author? Would the membership of such a body be determined by an election in the General Assembly, or elsewhere? Would membership be *ad personam*, or would membership be held by a particular State? A larger question, above and beyond those of a practical nature, was whether the CAHDI model lent support to the proposal to establish an assistance mechanism at the universal level. The comments by Sir Michael, who knew CAHDI well, confirmed his own doubts in that regard. The question of what the CAHDI model meant and whether it was transferable to the universal plane required more discussion, for which the Commission did not have time at the current session. Thus, the Commission should not make specific suggestions, but should merely recommend that States should start an exchange of views on the possible establishment of a mechanism for the assessment of reservations and related declarations, bearing in mind the experience in that respect at the regional level. He was open to discussing in the Working Group whether the Commission should formulate a general recommendation along those lines, but he was not in favour of referring the proposed mechanism to the Working Group on the assumption that the Working Group would confine itself to making drafting changes.

9. Turning to the proposed introduction to the Guide to Practice (para. 105 of the report), the text of which had been considered by the Working Group, he noted, in the second sentence of paragraph 1, that the Special Rapporteur was of the view that the commentaries had the same force and authority as the guidelines themselves. While it was true that, as was usually the case, the Commission would adopt every part of the commentary, it had spent infinitely more time on the elaboration of the guidelines themselves than on the formulation of the commentaries, and thus the input of members was much more significant in the former case than in the latter. It was a general understanding that commentaries did not carry the same weight as the provisions themselves; otherwise, there would be no point in differentiating between the two. He therefore suggested inserting a new phrase at the beginning of the second sentence of paragraph 1, which would then read: "Although they do not have the same weight as the guidelines themselves, the commentaries are an integral part of the Guide to Practice and an indispensable supplement to the guidelines, which they expand and explain."

10. With regard to paragraph 9 of the proposed introduction, which stated that "reading the commentaries will be useful only where the answer to a question is not provided in the text of the guidelines", he did not think that the paragraph should be adopted as it stood, because as a lawyer, he had often had the experience that a provision which seemed to be clear at first sight turned out not to be so clear on further reflection or upon consultation of the commentary. As a matter of technique of interpretation, *acte clair* theories, which suggested that

there was no further need to explain what appeared to be clear at first glance, had also been abandoned. More generally, although he agreed with the substance of the proposed text, except for the two points just made, he found its tone unnecessarily defensive. The same thing could be said in shorter form and more confidently, for example in paragraph 1, the third sentence of which did not appear to be necessary. He hoped that the Commission would have the possibility of revising the provisions of the introduction and would take his comments into account.

11. Mr. DUGARD said that on past occasions, he had opposed dispute settlement mechanisms, notably following the adoption of the draft articles on State responsibility for internationally wrongful acts,<sup>319</sup> and the Commission had generally taken the view that it was not necessary to include dispute settlement provisions in "orthodox" draft articles. However, it must be acknowledged that the Guide to Practice contained innovative provisions, and thus an innovative dispute settlement mechanism was needed. If the Commission did not recommend such a mechanism, who would? Since the Sixth Committee did not usually innovate, it was up to the Commission to do so. On the merits of the issue, the Special Rapporteur had pointed out that the Vienna Conventions were silent on the subject, yet there was a need for a dispute settlement mechanism. The second preambular paragraph of the draft recommendation (para. 101) rightly stated that the Commission was "[a]ware of the difficulties faced by States and international organizations in the interpretation, assessment of the permissibility, and implementation of reservations and objections thereto". Some special informal mechanism was required in order to deal with the problems that States encountered in respect of reservations to treaties. Surely everyone would agree that the ICJ was not the appropriate body for the kind of work that the Special Rapporteur contemplated. The Court had considered the question of reservations in a number of cases, but that had been very expensive for the parties, and it would be preferable if such disputes could be settled quietly and amicably, rather than sending them to the Court or an arbitral tribunal.

12. He agreed with the Special Rapporteur that any mechanism that was established should not be compulsory, unless the parties so agreed. Perhaps the most innovative feature of the proposal related to the granting of technical assistance to States, of which there was clearly a need, especially for developing States. For that reason, he approved paragraph 4 of the annex. An examination of the reservations made to many multilateral treaties, particularly by developing States, gave the impression that the authors of those reservations were not really aware of the general legal context in which the reservations had been made. For example, Mauritius had recently made a reservation to the Convention on the Rights of Persons with Disabilities which provided that it would not fulfil its obligations in the case of a natural disaster.<sup>320</sup> Was Mauritius aware of the work of the Commission on the subject? Thus, a

<sup>319</sup> General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

<sup>320</sup> *Multilateral Treaties Deposited with the Secretary-General* (available from <https://treaties.un.org>), chap. IV.15.

body was needed to advise States on the general legal framework relating to reservations. One of the problems which the Commission had faced in elaborating the guidelines concerned the monitoring of the application of human rights treaties. There had been a major dispute and debate over the power of monitoring bodies such as the Human Rights Committee to decide whether a reservation was permissible or not. Such problems could be avoided if a mechanism was established of the kind proposed by the Special Rapporteur, which would make it unnecessary to resort to treaty bodies for that purpose.

13. With regard to the composition of the proposed mechanism, he was not quite sure whether the Special Rapporteur envisaged that the 10 experts would sit together or that they would operate in panels of 3 or 5 members. Like Sir Michael, he did not think it necessary to call on government experts. Referring to a comment by Mr. Nolte, he did not believe that the members of the panel should necessarily be officials of one of the States involved. The idea was to establish a small group of experts who would assist States in the preparation of reservations and would settle disputes between States relating to reservations. Of course, the annex did not deal with all the details of the mechanism, but in the normal course of events, that would be done by the institution itself when it adopted its rules of procedure. In sum, he endorsed the draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, and he congratulated the Special Rapporteur on his innovative proposal.

14. Mr. NOLTE said that he had been speaking on the assumption that the proposed mechanism would be a panel of government experts, as indicated by the Special Rapporteur, in which case the question of whether a State was or was not party to a treaty would be relevant, whereas if the mechanism was composed of independent experts, of course it would not be. That said, Mr. Dugard's proposal seemed to go even further than the Special Rapporteur's.

15. Mr. McRAE said he was pleased that the draft introduction would be included in the Guide to Practice and would be sent to the plenary for final approval. With respect to dispute settlement, he wished to make several comments on the proposed mechanism. In principle, he thought it useful to establish a group of experts to provide advice on reservations and objections or to give assistance to countries that wished to have help in the formulation of reservations and objections, because he saw it as a logical progression in the process identified in the Guide to Practice. However, a consideration of the practical reality of what was proposed revealed a number of gaps and problems. Essentially, the mechanism proposed by the Special Rapporteur was nothing more than what had been said: it was the establishment of a group of experts and the possibility of States empowering them to do certain things. As pointed out by Sir Michael and Mr. Nolte, it was not clear how the group of experts would operate, what terms of reference it would have, who it would report to and so forth. Nor was it apparent to what extent CAHDI and COJUR provided any guidance, because even after reading the Special Rapporteur's report, he still was not sure what CAHDI and COJUR did in relation to reservations—but perhaps members who were familiar with those bodies

had a better understanding in that regard. Thus, for the moment, it seemed that all the Commission had was an idea, not a mechanism, but if all that was being suggested was an idea, he was not sure that it needed the trappings of a formal resolution or an acronym. Equally, if the Commission had to make a recommendation to the General Assembly or States, it should be done as a proposal within its report on the work of its sixty-third session, and not as a special resolution.

16. What, then, should the Commission do? As he saw it, there was some value in suggesting to States that they could set up a group of experts to assist countries in assessing the validity of reservations and objections and in formulating their own reservations and objections, but the idea needed to be developed, and the resulting mechanism could be included in an annex dealing with the reservations dialogue or another annex to the Guide to Practice. The Commission should produce a sort of model mechanism that might be adopted by States parties to a particular treaty regime or by States to operate a cross-treaty regime. That said, it would be necessary to go beyond the idea proposed in the Special Rapporteur's report before the Commission obtained a result that could be included in an annex to the Guide to Practice.

17. In short, he was in favour of referring the question to the Working Group, which could elaborate on the idea of a model mechanism to assist in resolving disputes over reservations through a group of experts and could then submit a more detailed proposal for consideration in plenary.

18. Mr. PETRIČ said that he fully agreed with the changes proposed by Mr. Nolte concerning the draft introduction to the Guide to Practice. With regard to the proposed mechanism, it was not yet sufficiently elaborated for the Commission to be able to adopt it, but that did not mean that it should be rejected, and he would strongly oppose any decision along those lines, since such a mechanism would promote respect for the principle of the rule of law. The Commission should therefore consider how to follow up the project, and the proposal which Mr. McRae had just made seemed very reasonable. For the smallest States and their Ministries of Foreign Affairs, disputes concerning reservations were always a source of great difficulty. Such States needed assistance, whether in formulating or withdrawing their reservations or in objecting to the reservations of others. Although many points still had to be clarified, the idea of a mechanism that provided technical assistance to States must not be abandoned.

19. Mr. VASCIANNIE said he hoped that the Commission would adopt the draft recommendation proposed by the Special Rapporteur on technical assistance and assistance in the settlement of disputes on reservations. The general idea was sound. The mechanism must be advisory; in other words, the parties to disputes on reservations must be free to address it, and its decisions must not be binding. In the 1990s, reservations to the International Covenant on Civil and Political Rights had been made by States of the Caribbean region,<sup>321</sup> which had prompted strong objections by a number of European countries and had ultimately led to considera-

<sup>321</sup> *Ibid.*, chap. IV.4.

tion by the Human Rights Committee of the issue of reservations,<sup>322</sup> which had simply informed those States that their reservations had been wrong.<sup>323</sup> With the proposed mechanism, matters would not go all the way to the Human Rights Committee. That was an additional illustration of the need for technical assistance in the area of reservations. Such assistance could encompass the drafting and interpretation of reservations, the preparation of objections and responses to objections.

20. Sir Michael had rightly said that small States did not lack competence. However, such States did not have the capacity to address the entire range of issues of international law that might arise at any time. If the proposed mechanism allowed for small States to obtain assistance on a case-by-case basis, it would be of practical use. Moreover, it would be less expensive than referral to the ICJ. The fact that the details of the functioning of the mechanism had not yet been specified was not a problem: such questions would be addressed in due course by the General Assembly or a body instructed by it to do so.

21. In his view, experts from a State not party to a particular international convention should be allowed to express a judgment on reservations to that convention. Members of the Commission frequently evoked treaties to which their countries of origin were not parties, but that had not posed a problem. With regard to the composition of the mechanism, he thought that experts did not have to be representatives of their State, but that point could also be addressed when the time came. The funding of the mechanism was a matter for the General Assembly to decide. He was not opposed to taking regional bodies such as CAHDI as a model, although apparently it was not clear how CAHDI functioned with regard to reservations. The Commission might also follow the example of AALCO. However, those regional bodies, apart from CAHDI and IAJC, had not set up a mechanism for technical assistance or for the settlement of disputes concerning reservations, perhaps for financial reasons or because of the technical nature of the questions. That was all the more reason for the Commission to recommend the establishment of such a body in a draft resolution to be submitted to the General Assembly.

22. Mr. SABOIA said that initially he had been sceptical about the idea of filling all the gaps in the Vienna Conventions, since such gaps had been left open because of diplomatic ambiguities or to allow countries some political leeway. However, he had now changed his mind and realized the great usefulness of the Guide to Practice as well as of the proposed mechanism, which would provide technical assistance to all States, large and small. That said, the details needed to be specified, but such questions could be addressed by the Working Group.

23. Mr. HMOUD said that the mechanism proposed by the Special Rapporteur was all the more useful because it was a well-known fact that there was no really satisfactory dispute settlement mechanism in the area of reservations.

The mechanism would be very valuable in dealing with objections with “super-maximum” effect, a problem which only a body of that type could really help to address, apart from the Guide to Practice itself. It would be preferable for such a mechanism to be composed of independent experts rather than government experts. Referrals to the mechanism should be optional, and its decisions should be non-binding. There should be a strict separation of its two functions, namely technical assistance and dispute settlement, because a mechanism helping a State to formulate a reservation or an objection should not have to consider that same reservation or objection if it was subsequently disputed before it by another State party. The lack of details on how the mechanism would function was not problematic: the provisions of a number of international agreements and treaties setting out a dispute settlement mechanism were very brief and left it to the mechanism itself to decide its rules of procedure.

24. Mr. NOLTE said that, in their statements, the members of the Commission were proceeding on the assumption that the mechanism was designed to help States formulate reservations, whereas the report spoke of presenting a “front” with respect to reservations, which seemed to imply that the aim of the mechanism was to reduce the scope of reservations in order to preserve the integrity of treaties. He sought clarification on that point from the Special Rapporteur.

25. Mr. PELLET (Special Rapporteur) said that the very interesting mini-debate had suggested to him new proposals which he would present when the Chairperson allowed him. Replying to Mr. Nolte, he drew his attention to paragraph 93 of the report, in which it was stressed that, “whereas the objective of the European Observatory of Reservations to International Treaties was to present as united as possible a ‘front’ with respect to reservations formulated by other States, this would obviously not be the function of the assistance mechanism envisaged here”. As pointed out in that paragraph, “its purpose would be rather to provide technical assistance to States that wished to receive it; to help States (and international organizations) with differing views concerning reservations to resolve their differences by finding common ground; and to provide those countries or international organizations with specific information on the applicable legal rules”. The Commission could recommend that regional bodies other than European ones should attempt to establish a mechanism of the kind set up by CAHDI, but the CAHDI mechanism should not be imitated, despite its merits, because it could not be universalized. For his part, Mr. Hmoud had rightly stressed that the proposed mechanism had a dual function, technical assistance to countries and assistance in dispute settlement. He urged the members of the Commission to put forward ideas that might be endorsed by the General Assembly, while not losing sight of the ones he had just advanced.

26. Sir Michael WOOD noted that there were many ways in which technical assistance with regard to reservations could be provided to States. He doubted that it would be possible to appoint experts who were familiar with all areas of international law, and he wondered whether it might not be preferable to rely on the secretariats established by various international instruments or even on the Secretariat of the United Nations, which had an

<sup>322</sup> See, *inter alia*, General Comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant and the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

<sup>323</sup> See, *inter alia*, *Kennedy v. Trinidad and Tobago*.

excellent Treaty Section. He asked the Special Rapporteur whether he had considered that possibility.

27. Mr. PELLET (Special Rapporteur) said that the 10 experts referred to in the draft proposal—and they could be less numerous—would be experts in the law of treaties and the regime of reservations. They did not need to be specialists in all areas of international law to provide technical assistance to States.

28. Mr. GALICKI welcomed the Special Rapporteur's important work on reservations to treaties and endorsed the very useful introduction to the Guide to Practice proposed in the seventeenth report. He also firmly supported the draft recommendation on technical assistance and assistance in the settlement of disputes, which provided an excellent framework for the application of the Guide to Practice.

29. Mr. KEMICHA also found the novel idea of a mechanism such as the one proposed by the Special Rapporteur to be very attractive, but like Mr. Hmoud, he thought that the functions of technical assistance and dispute settlement should be kept separate; it would be unwise for a single body or mechanism to have both. As for the modalities, it was likely to be very difficult for the Commission to take a final decision on the details of either technical assistance or dispute settlement or to formulate a recommendation without considering in depth the implementation of those two functions.

30. Mr. FOMBA said that the introduction proposed by the Special Rapporteur did not pose any problem for him. It should be considered as being part of chapter IV of the report of the Commission and should constitute the introduction to the Guide to Practice.

31. With regard to the proposed mechanism, he shared the view expressed by a number of members, and in particular Mr. Dugard, Mr. McRae, Mr. Petrič and Mr. Vasciannie, that the draft recommendation proposed by the Special Rapporteur should be referred to the Working Group, which should attempt to define its scope and modalities. Consideration should also be given to the point raised by Mr. Hmoud and supported by Mr. Kemicha.

32. Ms. ESCOBAR HERNÁNDEZ subscribed to the idea of creating a mechanism like the one proposed by the Special Rapporteur to help States resolve problems that they might encounter in the area of reservations. The proposed mechanism could not be compared to either CAHDI or COJUR, because although those two bodies were concerned with reservations, their functions were different and related primarily to the exchange of information and cooperation between the member States of the Council of Europe in the case of CAHDI and between the member States of the European Union in the case of COJUR. The mechanism as contemplated by the Special Rapporteur should be composed of experts in the international law of treaties and reservations. The Commission should reflect on the comments by Mr. Hmoud and Mr. Kemicha concerning the need to keep the functions of technical assistance and dispute settlement separate. She had no objection to the Special Rapporteur's draft recommendation being referred to the Working Group, but it was up to the General Assembly to

take a final decision, and the Commission should leave it to the General Assembly to decide on the details of the proposed mechanism's composition and functions.

33. Mr. PELLET (Special Rapporteur), summarizing the debate, said that general agreement seemed to be emerging with regard to his proposed introduction, namely that it should be regarded as forming part of chapter IV of the report of the Commission and as constituting the introduction to the Guide to Practice, with the incorporation of the proposals by Mr. Nolte, without it being necessary to refer it to the Working Group.

34. As to the proposed mechanism, the Commission could not and should not try to "sell" the General Assembly such a body in a completed form; the point was merely to launch the idea. The recommendation addressed to the General Assembly should be even less detailed than the one contained in paragraph 101 of the report and should include alternatives. It should simply retain the idea of technical assistance and dispute settlement assistance. The point was not to create a jurisdictional body but rather a mechanism which provided assistance in the settlement of disputes concerning reservations. Unlike the three members of the Commission who had spoken on that question, he thought that it might perhaps be preferable for the same persons to discharge both functions. He proposed that the questions envisaged in the draft recommendation be referred to the Working Group, which would not be bound by it. He would submit a revised draft recommendation, bearing in mind the comments made in the debate that had just taken place. Perhaps the draft recommendation could propose, along the lines envisaged by Sir Michael, that regional non-European bodies be encouraged to concern themselves with the problem of reservations, and it could also evoke the possibility that the Sixth Committee reflect on a system similar to CAHDI. Lastly, the Working Group should decide on the form that the recommendation should take: a recommendation addressed to the General Assembly; or conclusions of the Commission, as with the reservations dialogue, although personally he was not in favour of the latter choice for the proposed mechanism.

35. The CHAIRPERSON said that, if she heard no objection, she would take it that the Commission decided that the introduction proposed by the Special Rapporteur in paragraph 105 of the report under consideration would constitute the introduction to the Guide to Practice and would be adopted in plenary as part of chapter IV of the report of the Commission, and that the recommendation contained in paragraph 101 would be referred to the Drafting Committee.

*It was so decided.*

#### **Draft report of the International Law Commission on the work of its sixty-third session (*continued*)\***

##### **CHAPTER IV. *Reservations to treaties* (continued)\* (A/CN.4/L.783 and Add.1-8)**

36. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV of its draft report.

\* Resumed from the 3104th meeting.

**F. Text of the Guide to Practice on reservations to treaties, adopted by the Commission at its sixty-third session (continued)\***

2. TEXT OF THE GUIDE TO PRACTICE, COMPRISING AN INTRODUCTION, THE GUIDELINES AND COMMENTARIES THERETO, AN ANNEX ON THE RESERVATIONS DIALOGUE AND A BIBLIOGRAPHY (continued)\*

(b) *Text of the guidelines and the commentaries thereto* (continued)\* (A/CN.4/L.783/Add.3)

1.2.1 *Interpretative declarations formulated jointly*

*Guideline 1.2.1 was adopted.*

*Commentary*

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

*The commentary to guideline 1.2.1 was adopted.*

1.3 *Distinction between reservations and interpretative declarations*

*Guideline 1.3 was adopted.*

*Commentary*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

37. Mr. NOLTE said that the word “declarant” in the English text seemed unusual.

38. Sir Michael WOOD said that he agreed with Mr. Nolte and suggested replacing the word “declarant” by “author” both in paragraph (5) and throughout the Guide to Practice.

*It was so decided.*

*Paragraph (5), as amended, was adopted.*

*The commentary to guideline 1.3, as amended, was adopted.*

1.3.1 *Method of determining the distinction between reservations and interpretative declarations*

*Guideline 1.3.1 was adopted.*

*Commentary*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

39. Mr. NOLTE said that, in the third sentence, the phrase “only an analysis of the potential—and objective—effects of the statement can determine the purpose sought” should be replaced by “only an objective analysis of the potential effects of the statement can determine the purpose sought”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

40. Sir Michael WOOD, referring to the second sentence, suggested replacing the phrase “the normal rules of interpretation in international law” by “the applicable rules of interpretation”.

41. Mr. PELLET (Special Rapporteur) said that he was not very enthusiastic about that suggestion. The text intended to make the point that it was necessary to rely on the “general rule of interpretation” within the meaning of article 31 of the Vienna Convention. Merely to speak of “applicable rules” would be too vague.

42. Sir Michael WOOD suggested at least deleting the word “normal”.

43. Mr. KEMICHA proposed replacing the words “normal rules” by “usual rules”.

44. Mr. SABOIA said that he was opposed to the deletion of the words “in international law” as proposed by Sir Michael.

45. Mr. NOLTE suggested using the phrase “general rules of interpretation”.

46. Sir Michael WOOD said that he had no objection to retaining the words “in international law”, provided that the word “normal” was deleted.

47. Mr. VALENCIA-OSPINA said that it would be preferable to speak of “ordinary rules of interpretation”, as in the last sentence in paragraph (4).

48. Mr. PELLET (Special Rapporteur) proposed that the second sentence should simply read: “The problem is therefore a conventional one of interpretation.”

*Paragraph (4), as amended by the Special Rapporteur, was adopted.*

Paragraph (5)

49. Mr. NOLTE said that the part of the sentence following the first footnote marker should be deleted, since the Guide to Practice would state that reservations were in fact dissociable from the treaty to which they applied.

50. Mr. PELLET (Special Rapporteur) said that he had no objection to deleting that part of the sentence, but he disagreed with the reason given by Mr. Nolte. Regardless of whether it was valid, a reservation was not dissociable from the treaty.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

51. Mr. PELLET (Special Rapporteur) said that, at the end of the first sentence, the words “unilateral declarations” should be replaced by “interpretative declarations”.

*Paragraph (7), as amended, was adopted.*

\* Resumed from the 3104th meeting.

Paragraph (8)

52. Mr. NOLTE said that he was in favour of deleting the second paragraph of the quotation from advisory opinion OC-3/83 of the Inter-American Court of Human Rights on *Restrictions to the Death Penalty*. The paragraph suggested that the interpretation must be guided by the primacy of the text and that other means of interpretation were merely supplementary. That was not what the Vienna Convention said.

*Paragraph (8), as amended, was adopted.*

Paragraphs (9) to (14)

*Paragraphs (9) to (14) were adopted.*

*The commentary to guideline 1.3.1, as amended, was adopted.*

1.3.2 *Phrasing and name*

*Guideline 1.3.2 was adopted.*

*Commentary*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

53. Mr. PELLET (Special Rapporteur) said that, in the first sentence, the numbering “1.3.2” should be replaced by “1.3.1”.

54. Sir Michael WOOD said that, in the first bullet, the words “or scope” should be inserted after “the meaning”.

55. Mr. NOLTE said that, in the second bullet of the English text, the word “non-relevance” should be replaced by “irrelevance”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

56. Mr. PELLET (Special Rapporteur) said that the words “the analysis of” in the first footnote to the paragraph should be deleted.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

57. Mr. NOLTE said that, in the English text, the word “nullifying” should be replaced by “decisive”.

*Paragraph (4), as amended in the English text, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

58. Mr. PELLET (Special Rapporteur) said that he would replace all references to the *Mer d'Iroise (English*

*Channel)* case, in paragraph (6) and elsewhere, by the official title.

59. Sir Michael WOOD said that the words “Franco-British dispute” should also be replaced by the official title of the case.

*Paragraph (6), as amended, was adopted.*

Paragraphs (7) to (10)

*Paragraphs (7) to (10) were adopted.*

Paragraph (11)

60. Mr. PELLET (Special Rapporteur) suggested deleting, at the end of the sentence, the words “as the last phrase of guideline 1.3.2 emphasizes”.

*Paragraph (11), as amended, was adopted.*

*The commentary to guideline 1.3.2, as amended, was adopted.*

1.3.3 *Formulation of a unilateral statement when a reservation is prohibited*

*Guideline 1.3.3 was adopted.*

*Commentary*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

61. Sir Michael WOOD said that he did not understand the last sentence.

62. Mr. PELLET (Special Rapporteur) suggested replacing the words “Its sole aim is to draw” at the beginning of the last sentence by “This guideline draws”.

*Paragraph (4), as amended, was adopted.*

*The commentary to guideline 1.3.3, as amended, was adopted.*

1.4 *Conditional interpretative declarations*

*Guideline 1.4 was adopted.*

*Commentary*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

63. Mr. PELLET (Special Rapporteur) said that, at the beginning of the sentence, the words “The members of the Commission have unanimously recognized the existence” should be replaced by “The Commission has recognized the existence”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

64. Mr. VARGAS CARREÑO said that the example cited in the paragraph of the interpretative declaration which France had attached to its signature of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (“Treaty of Tlatelolco”) called for some clarification. Reviewing in detail the context of that declaration, he recalled that it had contained the following passage: “The French Government interprets the undertaking made in article 3 of the Protocol as being without prejudice to the full exercise of the right of self-defence confirmed by Article 51 of the Charter of the United Nations.”<sup>324</sup>

65. France had reiterated that declaration when it had signed Protocol I in 1979.<sup>325</sup>

66. The declaration by France had caused deep concern among the Latin American States parties to the Treaty, which had made it known to the Government of France. Their concern had stemmed above all from the fact that the right of self-defence did not emanate from a treaty instrument such as the Charter of the United Nations, which spoke of an “inherent” right, but had existed before it. The exercise of that right was subject to the principles of necessity and proportionality, which had a particular dimension in the case of nuclear weapons.

67. The representatives of the Latin American States had requested an audience at the French Ministry of Foreign Affairs with a view to urging France to withdraw its reservation. France had not acceded to that request, but it should be noted that the attitude of the Government of France had changed considerably over the years and, although it had not withdrawn its reservation, it considered itself to be firmly bound by the two Protocols. To take that reality better into account, he proposed either to delete the reference to the interpretative declaration by France or to add the following text: “However, the Latin American States, through the intermediary of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, have requested the Government of France to withdraw the part of the interpretative declaration of France referring to the possibility of the use of nuclear weapons in the case of armed attack. In the view of these States, such an interpretation does not fulfil the requirements of necessity and proportionality which are attached to the exercise of the right of self-defence under international law. France has not yet withdrawn this part of its interpretative declaration; however, it has repeatedly expressed its intention to remain a party to the Additional Protocols to the Treaty of Tlatelolco.”

68. Mr. SABOIA endorsed Mr. Vargas Carreño’s statement and his suggestion to delete the reference to the interpretative declaration of France.

69. Mr. PELLET (Special Rapporteur) said that he was firmly opposed to the idea of deleting that example and it would be shocking if he should be forced to do so, because that would amount to censorship. He failed to see why something that France had said should be censored. On the other hand, Mr. Vargas Carreño’s comments on the reaction of the Latin American States was very interesting, and he was in complete agreement that the proposed text should be inserted, although not in the body of the report itself, where it would be out of place, but in a footnote.

70. The CHAIRPERSON said that, if she heard no objection, she would take it that the members of the Commission wished to adopt Mr. Pellet’s proposal.

*It was so decided.*

*Paragraph (3), as amended, was adopted.*

*The meeting rose at 1 p.m.*

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### 3107th MEETING

*Monday, 18 July 2011, at 3 p.m.*

*Chairperson:* Ms. Marie G. JACOBSSON  
(Vice-Chairperson)

*Present:* Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Mr. Kemicha, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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#### **Tribute to the memory of Mr. Francisco Villagrán Kramer, former member of the Commission**

1. The CHAIRPERSON said that she had received the sad news that Mr. Francisco Villagrán Kramer, a member of the Commission from 1992 to 1996, had passed away on 12 July 2011. He would be remembered for his rich and exemplary career in the international legal field and his indefatigable support for human rights, justice, democracy and peace.

*At the invitation of the Chairperson, the members of the Commission observed a minute of silence.*

2. Mr. VARGAS CARREÑO said that he had had the privilege of counting Francisco Villagrán Kramer as a friend and serving with him as a member of the Commission from 1992 to 1996. Francisco Villagrán Kramer had been devoted to justice, peace and human rights. He had made outstanding contributions in the field of law as a university professor, the author of important publications and the representative of Guatemala at international conferences. At a time of great violence in Guatemala, he had agreed

<sup>324</sup> United Nations, *Treaty Series*, vol. 936, p. 419.

<sup>325</sup> *Journal officiel de la République française*, n° 243 du 18 octobre 1992, “Décret n° 92-1152 du 14 octobre 1992 portant publication du protocole additionnel I au traité du 14 février 1967 visant l’interdiction des armes nucléaires en Amérique latine, dit Traité de Tlatelolco, signé par la France le 2 mars 1979” (available from [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)).