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Summary record of the 2598th meeting

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the treaty as a whole. Also, the very fact that “certain provisions” and “certain specific aspects” embodied different notions meant that there was no question of tautological use. Finally, the second “certain” obviated the need to include “but” as Mr. Al-Baharna had proposed.

97. Mr. PELLET (Special Rapporteur) said he also regarded “certain specific” as tautological, but could go along with the Commission’s decision. However, he now realized with some regret that the use of the indefinite and definite articles before “treaty” in the current version echoed the wording of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, and he therefore wondered whether it should be retained after all.

98. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt draft guideline 1.1.1 [1.1.4] as orally revised by the Chairman of the Drafting Committee.

It was so agreed.

Guideline 1.1.1 [1.1.4], as orally revised, was adopted.

The meeting rose at 1.05 p.m.

2598th MEETING

Wednesday, 7 July 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

Tribute to the memory of Doudou Thiam, member of the Commission

1. The CHAIRMAN announced the death of Doudou Thiam, member of the Commission since 1970.

2. Doudou Thiam had chaired the Commission at its thirty-third session, in 1981, and had been the Special Rapporteur for the topic of the draft Code of Crimes against the Peace and Security of Mankind from the thirty-fourth session (1982) to the forty-seventh session (1995). He had thus participated in the efforts to establish

the International Criminal Court.¹ A distinguished lawyer and active statesman, Doudou Thiam had made a significant contribution to the codification and development of international law, the promotion of international cooperation and greater understanding among nations. He had also rendered invaluable service to his country, Senegal, where he had held a number of important positions and ministerial portfolios, and he had headed the Senegalese delegation to numerous sessions of the General Assembly and the Security Council.

3. On behalf of the Commission, he offered his condolences to Doudou Thiam’s widow, present in the conference room, and to his entire family.

At the invitation of the Chairman, the members of the Commission observed a minute of silence in memory of Doudou Thiam.

4. Mr. Sreenivasa RAO recalled the man of culture, the statesman, the African sage and the humanist that Doudou Thiam had been. He had marked the history of law through his thoughts on the subject with which the Commission had entrusted him, the draft Code of Crimes against the Peace and Security of Mankind. The Commission would remember him as one of its warmest and most generous members.

5. Mr. PAMBOU-TCHIVOUNDA evoked the happy moments which the members of the Commission had shared with Doudou Thiam. A brilliant lawyer whose theory of African federalism had set a milestone, Thiam had from the outset taken very firm positions at the time of African decolonization. His subsequent contribution to the construction of a modern Senegal attested to his intellectual and human qualities. Africa had lost a herald, law a champion and the Commission one of its most outstanding members.

6. Mr. SEPÚLVEDA, speaking on behalf of the members of the Commission of Latin American origin, saluted the memory of Doudou Thiam. He recalled his human qualities, his cordiality to all and his exceptional generosity as a colleague and a lawyer. Doudou Thiam had been the very example of a man of talent who had dedicated himself to public service, notably during the construction of an independent Senegal. He was mourned not only by his country and Africa, but also by Latin America, with which he had had close affinities.

7. Mr. LUKASHUK, expressing his most heartfelt condolences to Mrs. Thiam and her son, said that the death of Doudou Thiam was also an irreparable loss for the members of the Commission, who for years to come would feel the absence of his wisdom, his practical experience and his humanity. Doudou Thiam had been an extraordinarily lucky man because few people had the chance to make such an important contribution in all their areas of endeavour. Doudou Thiam left behind many models; the history books would not fail to record that it was he who had prepared the Rome Statute of the International Criminal Court.

8. Mr. ROSENSTOCK joined others in expressing his condolences to the family of Doudou Thiam. It had been

¹ See 2575th meeting, para. 30.

an enormous privilege for the members of the Commission to have known such an extraordinary human being, a person of great warmth and friendship and also a man of character. Doudou Thiam had contributed enormously to the draft Code of Crimes against the Peace and Security of Mankind, showing a willingness to compromise if necessary in order to complete the work. He would live in the memories of all those who had known him, in the work he had done and in the wonderful family he had left.

Reservations to treaties² (continued) (A/CN.4/491 and Add.1-6,³ A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,⁴ A/CN.4/L.575)

[Agenda item 5]

DRAFT GUIDELINES PROPOSED BY THE DRAFTING COMMITTEE⁵ (continued)

9. The CHAIRMAN invited the members of the Commission to continue their consideration of the titles and texts of the draft guidelines proposed by the Drafting Committee (A/CN.4/L.575).

GUIDELINE 1.1.5 [1.1.6] (Statements purporting to limit the obligations of their author)

10. Mr. ADDO said that the phrase “purports to limit the obligations imposed on it by the treaty” should be replaced by “purports to limit some of the obligations imposed on it by the treaty” because, if a State purported to limit all the obligations imposed on it by a treaty, that would be tantamount to undoing the entire instrument, and strictly speaking that would not be a reservation.

11. Mr. PELLET (Special Rapporteur) said that basically he agreed with Mr. Addo that a State could not, by means of a reservation, refuse to accept any of the obligations stemming from a treaty. However, the word “limit” in itself implied that the treaty was not being undone. In fact, the purpose of the draft guideline was to explain the word “modify” in draft guideline 1.1 (Definition of reservations) and in that of the 1969, 1978 and 1986 Vienna Conventions, where, precisely, it was in contrast to the word “exclude”. Some of the modifications purported to “limit” the obligations, and the Vienna definition itself did not contain the word “some”; it therefore seemed odd to introduce it in the draft guideline, even though the question deserved to be developed in the commentary.

Guideline 1.1.5 [1.1.6] was adopted.

GUIDELINE 1.1.6 (Statements purporting to discharge an obligation by equivalent means)

Guideline 1.1.6 was adopted.

² For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

³ See *Yearbook ... 1998*, vol. II (Part One).

⁴ Reproduced in *Yearbook ... 1999*, vol. II (Part One).

⁵ See 2597th meeting, para. 1.

GUIDELINE 1.2 (Definition of interpretative declarations)

Guideline 1.2 was adopted.

GUIDELINE 1.2.1 [1.2.4] (Conditional interpretative declarations)

12. Mr. PAMBOU-TCHIVOUNDA proposed two changes to the French text to make it easier to read. The Commission should adopt wording that was closer to the one which appeared in draft guideline 1.1.5 [1.1.6], so that the text would read *au moment de la signature, de la ratification*. After the words *un traité*, the comma should be replaced by the word *et*. However, he left it to the Special Rapporteur and the Chairman of the Drafting Committee to decide.

13. Mr. PELLET (Special Rapporteur) explained that, since the text had been purely and simply borrowed from article 2 of the 1969 and 1986 Vienna Conventions, he could not accept that redrafting proposal.

14. Mr. Sreenivasa RAO said that he had no objections to the substance of the draft guideline. However, he proposed that, in the English text, the phrase “subordinates its consent”, which was a Gallicism, should be replaced by “subjects its consent”.

15. Mr. CANDIOTI (Chairman of the Drafting Committee) said that that wording did seem preferable in the English text.

It was so agreed.

Guideline 1.2.1 [1.2.4] was adopted with a minor drafting change in the English text.

GUIDELINE 1.2.2 [1.2.1] (Interpretative declarations formulated jointly)

Guideline 1.2.2 [1.2.1] was adopted.

GUIDELINE 1.3 [1.3.1] (Distinction between reservations and interpretative declarations)

16. Mr. KABATSI, supported by Mr. GOCO, said that there was a discrepancy between the title of the draft guideline, which seemed to announce a definition of the distinction between reservations and interpretative declarations and the body of the text, which merely indicated a method for drawing that distinction.

17. Mr. GAJA, said he noted that the texts of draft guidelines 1.3 [1.3.1] and 1.3.1 [1.2.2] were littered with references to the purpose of the declaring State and to the intention of that State. In order to better coordinate both texts, he proposed that in draft guideline 1.3 [1.3.1], the phrase “to ascertain the purpose of its author by interpreting” should be replaced by “to interpret”, which would not significantly change the substance of the text, but would streamline it and bring it closer to the model of the 1969 Vienna Convention.

18. Mr. PELLET (Special Rapporteur) said that he generally agreed with the comments of Mr. Goco and Mr. Kabatsi, explaining that he had himself proposed two

alternative titles, one of which referred to “methods”. He left it to the Chairman of the Drafting Committee to make any changes in the title along those lines. He was, however, less sure about Mr. Gaja’s proposal. While he did not wish to make an issue of it, he thought that, if that proposal were to be accepted, it would remove most of the substance from the draft guideline, the aim of which was to state that the distinguishing feature was the author’s purpose. If the proposed deletion were to be accepted, that criterion would disappear. Having carefully weighed up all aspects of the matter, he thought that the problem was one of content, not one of form. The crucial concern of the draft guideline was to ascertain the author’s purpose, and that was consistent with the definition proposed in draft guidelines 1.1 and 1.2. He was therefore against Mr. Gaja’s proposal.

19. Mr. PAMBOU-TCHIVOUNDA said he was also of the opinion that the title of draft guideline 1.3 [1.3.1] should be amended to read either, “Method of distinguishing between reservations and interpretative declarations” or “Criteria for a distinction ...”, depending on what the Commission decided. If the word “criteria” were incorporated in the title, only the first part of the first sentence up to “the purpose of its author” should be retained in the text of the draft guideline. In that way, a simple, lucid guideline would be obtained.

20. Mr. TOMKA, referring to the English version, said he thought that the phrase “the purpose of its author” was a solecism and proposed that it should be replaced by the words “the purpose sought by its author”, which would be closer to the French version (*le but visé par son auteur*).

21. Mr. HAFNER said he doubted that Mr. Gaja’s proposal could be accepted and endorsed Mr. Pellet’s arguments. The aim sought had to be the decisive criterion. He agreed with what Mr. Tomka had said about the English version and shared the concerns expressed about the frequent use of the words “purpose” and “intention” in draft guidelines 1.3 [1.3.1] and 1.3.1 [1.2.2]. An attempt should be made to amalgamate them or at least to shorten draft guideline 1.3.1 [1.2.2], so that it would not duplicate draft guideline 1.3 [1.3.1].

22. Mr. GOCO said that draft guideline 1.3 [1.3.1] pertained to interpretation with a view to ascertaining the aims and intentions of the author of the statement so as to determine whether that statement was a reservation or an interpretative declaration. The text itself was flawless and could be accepted as it stood. The title, however, did not “rhyme” with the content of the provision. Perhaps the wording “purpose and intent of the author State” would be more in harmony with the content of the draft guideline.

23. Mr. SEPÚLVEDA noted that two criteria for distinguishing between reservations and interpretative declarations were mentioned in draft guideline 1.3 [1.3.1]: the purpose of the author and the intention of the author. Those subjective notions should preferably be replaced by objective criteria, which, in point of fact were to be found in draft guideline 1.3.1 [1.2.2], where the objective criterion of the legal effect which the statement purported to produce had been introduced. Nevertheless, the last sentence of draft guideline 1.3.1 [1.2.2] was somewhat confusing, in that it stated that the unilateral declaration

which had been formulated would be designated as a reservation in some cases and as an interpretative declaration in others. But no institution had been made responsible for deciding the matter. Perhaps the legal effects which the statement purported to produce should therefore be used as the basis for ascertaining whether the declaration in question was an interpretative declaration or a reservation, without endeavouring to establish what the author’s intention had been.

24. Mr. PELLET (Special Rapporteur) said that he fundamentally disagreed with Mr. Sepúlveda, as he considered that the distinguishing feature was precisely the aim sought by the author of the statement, but he did not wish to reopen what had been a lengthy debate on the subject.

25. As far as Mr. Hafner’s observation was concerned, he thought that there were indeed grounds for wondering whether the reading of draft guideline 1.3 [1.3.1] in conjunction with draft guideline 1.3.1 [1.2.2] did not disclose repetition. An elegant solution might be to make the first sentence of draft guideline 1.3.1 [1.2.2] the text of a new draft guideline 1.3, which would still be entitled “Distinction between reservations and interpretative declarations”. A new draft guideline 1.3.1 would comprise the text of draft guideline 1.3 [1.3.1], but it would be entitled “Method of operating the distinction between reservations and interpretative declarations” in order to satisfy Mr. Goco and Mr. Kabatsi and only one amendment would be made to the text, that proposed by Mr. Gaja, which consisted in replacing the phrase “to ascertain the purpose of its author by interpreting” by “to interpret”. Draft guideline 1.3.1 [1.2.2] would become a new draft guideline 1.3.2 without any change in its title (“Phrasing and name”). The first sentence of the guideline would be deleted because that sentence would become new draft guideline 1.3 and the only amendment to be made to the text would be to replace the words “the statement” by the words “a statement” in the existing second sentence. He thought that it would be pointless to refer those amendments to the Drafting Committee and that a decision could be taken during the current meeting.

26. Mr. CANDIOTI (Chairman of the Drafting Committee) said that he supported the last proposal by the Special Rapporteur, which was an excellent response to the various issues raised during the discussion. The three new provisions contained rules of interpretation of unilateral statements that needed to be codified because they did not fully coincide with the rules in the 1969 Vienna Convention. What was being interpreted in the present instance was unilateral expressions of will, and that was why the emphasis must be placed on the criterion of intention, which was entirely relevant.

27. Mr. AL-BAHARNA requested that the amendments should be submitted in writing so that they could be considered in more detail.

28. Mr. SEPÚLVEDA said that the new wording met one of his concerns, namely, that the strongest emphasis should be on the legal effect which the statement purported to produce. That objective criterion would be transposed to new draft guideline 1.3. But to do away with the link between that provision, formerly the first sentence of draft guideline 1.3.1 [1.2.2], and the last

sentence of that guideline, which had become the last sentence of new draft guideline 1.3.2, might result in confusion about the meaning of the latter phrase.

29. Mr. PELLET (Special Rapporteur) said that Mr. Sepúlveda's concern was unnecessary, since the idea of the "purported legal effect" was not being removed from the first sentence of new draft guideline 1.3.2. The deletion of the first sentence of draft guideline 1.3.1 [1.2.2] thus changed absolutely nothing in the meaning of the third sentence of that guideline, which had become the second sentence of new draft guideline 1.3.2 and which remained connected to the second sentence of draft guideline 1.3.1 [1.2.2], which had become the first sentence of new draft guideline 1.3.2. There was no need to alter that guideline any further.

30. Mr. KABATSI said that he endorsed the changes made by the Special Rapporteur, but believed that a more audacious approach should be taken and that it should be indicated more firmly that the determining element was not the phrasing or name of the unilateral statement, but the legal effect it purported to produce, without minimizing the importance of the phrasing or name as indicative of the purported legal effect.

31. The CHAIRMAN said he took it that the Commission wished to redraft current draft guidelines 1.3 [1.3.1] and 1.3.1 [1.2.2] on the basis of existing elements in order to create three new guidelines. He suggested that consideration of the matter be postponed in order to give the secretariat time to provide a written text, as proposed by Mr. Al-Baharna, and that, in the meantime, the Commission should take up the consideration of draft guideline 1.3.2 [1.2.3].

GUIDELINE 1.3.2 [1.2.3] (Formulation of a unilateral statement when a reservation is prohibited)

32. Mr. PAMBOU-TCHIVOUNDA recalled that the problem with the last part of draft guideline 1.3.2 [1.2.3] had now been solved by the outcome of the discussion at the preceding meeting on draft guideline 1.1.1 [1.1.4].

33. Mr. CANDIOTI (Chairman of the Drafting Committee) said it was true that, in accordance with what had been decided for draft guideline 1.1.1 [1.1.4], the last part of the last sentence of draft guideline 1.3.2 [1.2.3] should be amended through the replacement of the phrase "or of specific aspects of the treaty as a whole" by the phrase "or of the treaty as a whole with respect to certain specific aspects".

34. Mr. HAFNER said that the wording of draft guideline 1.3.2 [1.2.3] created the problem of the negative presumption inherent in the phrase "shall be presumed not to constitute a reservation". If the unilateral statement was not a reservation, nothing in the text indicated what it was.

35. The phrase "when it is established" gave rise to a second difficulty: it usually meant that a certain procedure had to be followed in order to determine what the reservation purported to exclude or to modify, who was obliged to do so and how that should be done. In draft guideline 1.2.3 as proposed by the Special Rapporteur, there had been no mention of the need to follow such a pro-

cedure. He had doubts about the practicability of inserting the phrase and would like to have clarification on what its purpose was and how it should be interpreted.

36. Mr. CANDIOTI (Chairman of the Drafting Committee) said the presumption was that, when a treaty prohibited reservations, a statement made in respect of the treaty was not a reservation. That presumption was nothing more than an application of the principle of good faith. States were presumed to take into account the prohibition contained in the treaty. If, nevertheless, a statement that had the characteristics of a reservation was made, then it was a reservation, even though it was not a legitimate or permissible reservation. It was thus a simple presumption, the idea being that the other State was confronted with an impermissible reservation. As to who would establish that that was so, in the current situation, there was no supranational or other entity. It was for each State, when confronted with such a statement, to establish whether it was a reservation or something else. If it was a reservation and it was prohibited by the treaty, then it was an impermissible reservation.

37. Mr. AL-BAHARNA said he endorsed the remarks made by Mr. Hafner and was not convinced by the explanation given by the Chairman of the Drafting Committee. The draft guideline should not establish a presumption. He therefore proposed that the phrase "shall be presumed not to constitute" be replaced by the words "shall not constitute".

38. Mr. GOCO said the text could indeed be improved and he would not oppose its reformulation.

39. Mr. GAJA said that the draft guideline illustrated the *effet utile* (useful effect) theory. The phrase "it is established that" was used quite frequently in the 1969 Vienna Convention and, in the current context, its purpose was to show that the presumption was rebuttable.

40. Mr. CANDIOTI (Chairman of the Drafting Committee) pointed out that the presumption had to be retained, since what was presumed was the good faith of the State making the statement and the useful effect of the statement. In the current case, the question was not whether a reservation was permissible or not.

41. Mr. ROSENSTOCK said that he endorsed the comments by Mr. Candiotti and Mr. Gaja, but had no objection to the deletion of the words "it is established that".

42. Mr. AL-BAHARNA said he feared that those words, like the presumption made in the draft guideline, would cause problems. They would have differing effects depending on whether the treaty prohibited reservations to all of its provisions or only to certain provisions, the latter case being that of a treaty specifically listing the provisions on which reservations were prohibited. It would therefore be preferable to delete the words "shall be presumed" and to redraft the guideline accordingly.

43. Mr. LUKASHUK said that he found the general idea expressed in draft guideline 1.3.2 [1.2.3] to be very clear and fully in line with State practice. Nevertheless, he could understand the doubts expressed by Mr. Al-Baharna and Mr. Hafner and felt that they could be resolved by splitting the guideline into two paragraphs. The first

would end with the word “reservation” and the second would begin “If the statement purports to exclude”, the words “except when it is established that it” should be deleted. However, it was important to retain the presumption which was entirely in keeping with State practice.

44. Mr. HAFNER said he feared that the effect of retaining the words “when it is established”, would be to encourage States to make statements, with those wishing to formulate reservations to them having to “establish” that they purported to exclude or modify the legal effect of certain provisions of the treaty. That was not what the Commission intended.

45. Mr. GOCO said that it was also possible to reverse the presumption: a statement would be held to constitute a reservation “except when it is established that it does not purport to exclude or modify the legal effect of certain provisions of the treaty”.

46. Mr. SEPÚLVEDA said that two questions arose: who should establish that a statement purported to exclude or modify the legal effect of certain provisions of the treaty and, if that was established, what were the consequences? It might be assumed that such a statement would be invalid, but perhaps it would be useful to clarify in the guideline that it should not be accepted.

47. Mr. ROSENSTOCK said that it was not possible to summarize all of the law on reservations in one guideline and, although Mr. Sepúlveda’s comment on the consequences of establishing that a statement purported to exclude or modify the legal effect of certain provisions of the treaty was correct, it was inappropriate to say so in the draft guideline under discussion. The latter provided for a reasonable process which began with the presumption that the State was acting in good faith, namely, that it did not intend to formulate a reservation under cover of a statement. As to the words “it is established that”, they could certainly be deleted, but, as Mr. Gaja had explained, their retention did not pose a problem either.

48. Mr. TOMKA said he thought that it was important not to reopen the debate on the issue of presumption, which had already been discussed at length. He felt that the last sentence of draft guideline 1.3.2 [1.2.3] should reflect the amendments made to draft guideline 1.1.1 [1.1.4] at the preceding meeting.

49. The CHAIRMAN said that the last sentence of draft guideline 1.3.2 [1.2.3] certainly would be aligned with draft guideline 1.1.1 [1.1.4] as it had been amended. With regard to the presumption, it was his understanding that the majority of members considered that it should be retained. By contrast, the expression “it is established that” had not attracted enthusiastic support and no one seemed disposed to argue against its deletion, which had been requested by several members. It therefore seemed that the Commission was willing to adopt draft guideline 1.3.2 [1.2.3] with the amendments he had mentioned.

50. Mr. AL-BAHARNA said he hoped that the word “thereof” in the draft guideline would not lead to confusion. He would like the Special Rapporteur to explain what that word referred to.

51. The CHAIRMAN said that the Special Rapporteur would include explanations in the commentary to the draft guideline in reply to the comments made by members, in particular by Mr. Al-Baharna.

Guideline 1.3.2 [1.2.3], as amended, was adopted.

52. The CHAIRMAN drew the attention of the Commission to the document which had just been distributed containing the Special Rapporteur’s proposal concerning draft guidelines 1.3 [1.3.1] and 1.3.1 [1.2.2], the content of which now formed three guidelines, 1.3, 1.3.1 and 1.3.2 [1.2.2], which read:

“1.3 *Distinction between reservations and interpretative declarations*

“The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

“1.3.1 *Method of implementation of the distinction between reservations and interpretative declarations*

“To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

“1.3.2 [1.2.2] *Phrasing and name*

“The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.”

53. He said that, if he heard no objection, he would take it that the Commission wished to adopt draft guidelines 1.3, 1.3.1 and 1.3.2 [1.2.2] and renumber accordingly draft guideline 1.3.2 [1.2.3], which would become draft guideline 1.3.3 [1.2.3].

It was so agreed.

Guidelines 1.3, 1.3.1 and 1.3.2 [1.2.2] were adopted.

The meeting rose at 1.10 p.m.