

Document:-  
**A/CN.4/SR.2739**

**Summary record of the 2739th meeting**

Topic:

Extract from the Yearbook of the International Law Commission:-  
**2002, vol. I**

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

two would be most useful. She endorsed Mr. Momtaz's request that the AALCO report should be circulated to members of the Commission. As for the question of joint seminars, while she saw merit in Mr. Yamada's suggestion, she also wondered whether AALCO might consider inviting members of the Commission to the seminars that it already held on its own account. A joint seminar could have difficult financial implications. She herself would be glad to help in any way.

72. Mr. SIMMA pointed out that AALCO was the only intergovernmental organization in the world solely concerned with the development of international law; all other bodies existing for that purpose were subsidiaries of larger bodies. Cooperation between it and the Commission should therefore be pursued. He had observed, at the forty-first session of AALCO, that a number of French-speaking African States had experienced difficulty in participating, and he wondered whether there was any possibility of their being helped by the International Organization of La Francophonie. As for the suggestion regarding joint seminars, he endorsed the proposals by Mr. Yamada and Ms. Xue. Many members of the Commission attended the Sixth Committee, and any meeting between them and the AALCO representatives need not be excessively formal. Finally, he echoed the request for the report of the AALCO session to be distributed to members of the Commission, at least insofar as it concerned topics being dealt with by the Commission.

73. Mr. DUGARD expressed his appreciation of the fact that AALCO had commented on future possibilities for the topic of diplomatic protection, which, for him as Special Rapporteur, was more useful than the criticism of draft articles already adopted. He was, however, glad to have received support on the need to retain the broad principles of the *Barcelona Traction* case.

74. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) said that he would gladly grant the request by Mr. Momtaz and others that the report of the AALCO session, at least insofar as it concerned the Commission's work, be made available. On the question of joint seminars, he was inclined to suggest combining both possibilities: the legal advisers' meeting could be used to discuss topics of concern to both the Commission and AALCO; and AALCO would make every effort to invite members of the Commission to seminars held during intersessional periods.

75. Mr. PELLET said that, although he regretted injecting a negative note into the discussion, he was slightly uneasy at the thought of the independent members of the Commission working jointly with the States which made up AALCO. It could be a volatile mixture.

76. Mr. Sreenivasa RAO said that, if debate was engaged in all honesty, the results would be worthwhile. He thanked AALCO for its support for the Commission and urged it to find new approaches and techniques for coordination in the interests of the ultimate aim of the codification of international law.

77. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) said that the contribution of

members of the Commission would be that of experts, whose knowledge of certain topics could only enrich AALCO's proceedings.

*The meeting rose at 1 p.m.*

---

## 2739th MEETING

*Wednesday, 31 July 2002, at 10 a.m.*

*Chair:* Mr. Robert ROSENSTOCK

*Present:* Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Ms. Xue, Mr. Yamada.

---

### Cooperation with other bodies (*continued*)

[Agenda item 11]

#### VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIR welcomed Mr. Gilbert Guillaume, President of the International Court of Justice, with whom the Commission was pleased to be able to hold its traditional exchange of views.

2. Mr. GUILLAUME (President of the International Court of Justice) said he welcomed the fact that, in the past few years, it had become the custom for the President of ICJ to come to the Commission to speak to its members about the Court's current situation and activities. Referring to the Court's composition, he said that when Mr. Bedjaoui had resigned, Mr. Elaraby had been elected on 12 October 2001 to replace him, and that the next triennial elections would be held in autumn 2002. Owing to the growing number of cases submitted to the Court, the number of judges *ad hoc* had risen to 19, creating certain administrative problems. In terms of recognition of the Court's jurisdiction, 63 States now accepted the optional provision on compulsory jurisdiction contained in Article 36, paragraph 2, of its Statute.

3. There were now 24 cases before ICJ concerning States from all parts of the world: 5 involving African States; 1, Asian States; 12, European States; 2, Latin American States; and 4, States from different regions. The Court's activities thus had a truly international dimension, something which had not been true in its early days, when most cases had involved Europe and Latin America. The subjects of the disputes varied widely. Five cases were territorial disputes: one brought by Cameroon against Nigeria (*Land and Maritime Boundary between Cameroon and Nigeria*), one, submitted by special agreement, between Indonesia and Malaysia (*Sovereignty over Pulau Ligitan and Pulau Sipadan*), two brought by Nicaragua, against Honduras and against Colombia (*Maritime Delimitation between Nicaragua and Honduras* and *Territorial and Maritime Dispute*) and a case brought by special agreement between Benin and Niger (*Frontier Dispute (Benin/Niger)*). Another classic cause of dispute, the status of foreigners, had given rise to a case brought by Guinea against the Democratic Republic of the Congo (*Diallo*) and to a case brought by Liechtenstein against Germany (*Certain Property*). More and more cases were closely linked to current diplomatic and even military affairs: the two cases brought by the Libyan Arab Jamahiriya against the United States and the United Kingdom (*Lockerbie*); two cases brought by Bosnia and Herzegovina and Croatia against Yugoslavia (*Application of the Convention on Genocide*) and an application for revision submitted by Yugoslavia concerning the case brought against it by Bosnia and Herzegovina, eight cases in which Yugoslavia was contesting the actions in Kosovo of the member States of NATO (*Legality of Use of Force*) and two applications submitted by the Democratic Republic of the Congo, against Uganda in one instance and Rwanda in another (*Armed Activities on the Territory of the Congo*). Even taking into account the fact that some of those cases were part of a series, such as the two involving Lockerbie and the eight concerning Kosovo, it could be seen that the Court was currently hearing 16 separate cases. In addition, there had been many procedural motions, and they slowed down the Court's work still more. In addition to preliminary objections on grounds of inadmissibility and lack of jurisdiction and requests for interpretations, there had been an increase in the number of counter-claims and applications for permission to intervene.

4. Describing the Court's activities in the past year, he referred to the first case in which a decision on the merits had been handed down (*Arrest Warrant*). When a Belgian investigating judge had issued an international arrest warrant against the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo for crimes against humanity and war crimes, the latter State, believing that action to be a violation of international law, had instituted proceedings against Belgium with ICJ. The case had been handled with dispatch, in part because Belgium had agreed to submit the objections it intended to raise regarding jurisdiction and admissibility together with its responses on the merits of the Congolese Memorial, and the Court had thus been able to hand down its judgment in just over a year. Having rejected Belgium's objections, the Court had then had to deal with two issues: first, the immunity from the jurisdiction of a foreign court of a minister for foreign affairs; and, second, the jurisdiction of the Belgian court, in so far as the alleged offences had

been committed outside Belgian territory, no Belgians had been alleged to have been injured, and the accused was not Belgian and had not been on Belgian territory. That issue having been initially raised by the Democratic Republic of the Congo, but not pursued, the Court had ruled only on the first issue. It had found that, throughout the duration of his or her office, a minister for foreign affairs enjoyed full immunity from criminal jurisdiction for acts performed before he or she had assumed office and acts committed during the period of office as well as for acts performed in an official capacity and in a private capacity. The Court had emphasized that that did not mean that such persons enjoyed impunity, since they could be tried in their own countries or before a competent international court. In addition, their immunity could be waived, and, when an incriminated minister for foreign affairs ceased to hold office, his or her immunity applied only to acts committed in an official capacity. The decision, adopted by a large majority, had clarified the issue of immunity from criminal jurisdiction.

5. In the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case, ICJ had handed down a judgment in relation to an application by the Philippines for permission to intervene. In that case, which related to sovereignty over two islands east of Borneo, the Philippines had asked to intervene, since the Court's reasoning could have an effect on its claim to another territory (North Borneo), over which it was involved in a dispute with Malaysia. The Court had been required to determine whether the Philippines had a legal interest that justified its intervention. While acknowledging that the legal interest that must be adduced by a State requesting permission to intervene could relate not only to the subject matter of the judgment but to the reasoning behind it, the Court had found that, in the case at hand, such an interest had not been demonstrated. It had accordingly rejected the application for permission to intervene.

6. In a third case brought by the Democratic Republic of the Congo against Uganda (*Armed Activities on the Territory of the Congo*), the Court had ruled on the admissibility of counterclaims by Uganda to which the Congo had submitted objections and had found that two of them had a sufficient connection with the main claim to be admissible, while a third was not admissible. In a fourth case, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court had ruled on a request by the Congo for the indication of provisional measures. Finding that it did not have *prima facie* jurisdiction, the Court had rejected the request for the indication of provisional measures. Rwanda had also requested that the case be removed from the list because the Court manifestly had no jurisdiction, citing decisions adopted along those lines in the Kosovo cases involving the United States and Spain. The Court had rejected that request, and hearings in the case were continuing. All those decisions had been adopted by a large majority or unanimously.

7. Other cases were currently under deliberation. The *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* case, which had been on the docket for a long time, had given rise to a number of procedural motions: Nigeria

had filed eight preliminary objections, of which seven had been rejected and one joined to the merits, plus a request for an interpretation of the initial judgment, which had been rejected, and finally counter-claims, which had been declared admissible. In addition, Equatorial Guinea had submitted a request for permission to intervene, which had also been declared admissible. The Court was now debating the merits of the case. Five weeks of public hearings had been devoted to that very thick case file, and the judgment was to be handed down in the second half of 2002. In a second case under deliberation, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, hearings had lasted a week and a half, and the judgment would also be forthcoming in late 2002. Counting the application for the indication of provisional measures submitted by the Democratic Republic of the Congo (*Armed Activities on the Territory of the Congo (New Application: 2002)*), the Court had had three cases simultaneously under deliberation in June 2002, and that was probably the most it could handle.

8. Faced with that increase in its caseload, ICJ had sought to improve its procedures. It had decided to publish practice directions, simple recommendations that had the advantage of being easier than the Rules of the Court to amend when necessary. There were nine. The first invited the parties to cases brought by special agreement to deposit pleadings in order, not simultaneously; it had not always been followed. The second recommended that, in drawing up written pleadings, each of the parties should try not only to reply to the arguments of the other party but also to present clearly its own submissions and arguments. The third proposed strict selection of annexed documents, since their translation was costly. The fourth invited the parties that had translations of documents to provide them. The fifth reduced the time limit for presentation of preliminary objections to four months from the date of deposit of the Memorial. The sixth urged that brevity should be observed in the oral statements made at hearings, although it was obvious that the length of the hearings would depend on the nature of the cases being heard. The seventh and eighth directions indicated that certain functions, such as that of judge *ad hoc*, were incompatible with the functions of agent, counsel or advocate in another case before the Court. It was worth noting that those directions had immediately been followed. The ninth direction established stricter rules for the submission of new documents after the closure of the written proceedings.

9. He had stated the year before that ICJ lacked sufficient financial resources. The budget for 2000–2001 had provided additional resources for language staff. For the biennium 2002–2003, the creation of many new posts in the Registry had been authorized. The Court had likewise requested that a research assistant should be assigned to each judge; that request had been partially met. The number of Registry staff, which had remained unchanged since the Court's establishment, had grown from 63 to 91, with 28 in the Professional category. The biennial budget totalled US\$ 23.8 million, representing a 7 per cent increase. However, the General Assembly's decision to freeze 10 per cent of the budgets of all bodies in the United Nations system was creating difficulties. Last, he mentioned the workshops which were offered for students

at the advanced level and which were financed by their home universities.

10. In conclusion, he emphasized that ICJ's activities were expanding and its budgetary situation improving and that it would try to continue to improve its procedures.

11. The CHAIR, speaking as a member of the Commission, said that he recalled the time when ICJ had had only one case on its docket, and he was interested to see that the Court was trying to reduce the length of oral proceedings to one or two weeks. In that respect, the time that the supreme court in certain countries allowed for pleadings could be counted in hours or even minutes.

12. Mr. Sreenivasa RAO said he hoped that reducing the amount of time available to the parties for their pleadings and also the number of annexes that they could attach to their memorials would not deprive them of the possibility of stating their position thoroughly.

13. Mr. GUILLAUME (President of the International Court of Justice) said that the parties obviously needed to be able to state their positions as completely as possible, and that ICJ itself should be able to examine the cases with all the facts in hand. It was simply a matter of balancing written proceedings and oral proceedings. The Court had never objected to the length of the documents submitted by the parties during written proceedings, because it considered that such documents should be as complete as possible. However, it had, at times, complained about the number of annexes attached to the documents and about the length of counsels' pleadings.

14. Mr. PELLET said he did not think that the supreme court of any given State and ICJ could be compared, as Mr. Rosenstock had done; sovereign States pleaded before the Court, and all cases could therefore be considered "sensitive". The way in which the President of the Court had emphasized the reduction of the length of oral proceedings had disturbed him. There had, of course, been abuses, but, above all, the length of such proceedings should be adapted to each case. He asked how the practice directions referred to by the President of the Court were drafted, how they could be amended and whether the Court accepted outside opinions, for example, from counsel who were used to pleading before it and who, like himself, might wish that a particular direction could be amended.

15. Mr. GUILLAUME (President of the International Court of Justice) said he did not think that the length of oral proceedings before ICJ could be reduced to that of proceedings before the Supreme Court of the United States, for example, or even before the European Court of Justice. Matters would not come to that. Oral proceedings served two purposes: first, from a technical point of view, they allowed the parties to summarize their positions and refine their final conclusions; and, second, they enabled States to show public opinion and parliament that they had fully defended the national cause. The length of the oral proceedings should be adapted to the nature of the case; in some legally and politically important cases, such as the *LaGrand* case or the *Arrest Warrant* case, the oral proceedings had been quite short, and the parties had been satisfied. The problem was that the time allotted was not

always well used, particularly during the second round of pleadings, which was often repetitive.

16. The practice directions were prepared first by the Rules Committee and then by ICJ in plenary; that two-fold examination ensured that problems were examined carefully. Official comments were not necessary, but there were more discreet ways by which counsel who were accustomed to pleading before the Court could make their views known. The advantage of the practice directions was that they could be amended easily, in the light of experience.

17. Mr. DUGARD said that the length of oral proceedings could be reduced if the members of ICJ were allowed to question counsel, as was done in the supreme courts of some States.

18. Mr. GUILLAUME (President of the International Court of Justice) said that ICJ had been discussing the matter for some time and three factors had to be taken into account. First, the Court was dealing with sovereign States, and, most of the time, counsel could not respond immediately to the questions they had been asked, if only because their answer had to be discussed by the team or even the Government concerned. Second, if the Court questioned counsel, it would have to deliberate in order to determine which questions it should ask, and some judges were not prepared to take a decision on the questions to be asked before having heard the pleadings. Third, some judges had been trained in the Romano-Germanic tradition and others in the Anglo-Saxon tradition, and there were thus two different approaches to the proceedings. Judges trained in the latter tradition customarily asked questions that might reveal, at least in part, what their thinking was, while, in other countries, such as France, that would be a violation of the proceedings. In countries with a Romano-Germanic tradition, questions must be purely factual or relate to a point of law. Within the Court there were diverging opinions on the issue, and in the past some judges had objected to questions that other judges had wanted to ask counsel.

19. Mr. MOMTAZ, referring to the *Arrest Warrant* case cited by the President of the Court, said he believed that one of the arguments that had led the Court to decide that a minister for foreign affairs enjoyed absolute immunity was that his functions required him to travel abroad frequently. Since nowadays all ministers were required to travel abroad in the exercise of their functions, he would like to know whether all ministers enjoyed absolute immunity from jurisdiction in the same way as the minister for foreign affairs.

20. Mr. GUILLAUME (President of the International Court of Justice) said that that question had not been decided by the Court and it was not for him to answer it.

21. Mr. BROWNLIE said that, like Mr. Pellet, he considered the analogy between the supreme courts of States and ICJ inappropriate. Given the financial pressure that the Court was experiencing and its current workload, it was difficult for an outside observer to say whether a particular change in the Court's working methods was the result of a decision of principle or an empirical reaction to

a financial imperative. The Court's judgments were more concise than they had been, and that was a matter of concern to some jurists, who deplored the fact that, while the States concerned had put forward very detailed written and oral arguments, the Court had responded briefly.

22. Mr. GUILLAUME (President of the International Court of Justice), referring to the more concise nature of ICJ's decisions, said that, while it appreciated counsel's covering all aspects of a case in their briefs, that did not mean that it was obliged to rule on every one of the grounds put forward by the parties. Its only obligation was to rule on all the submissions. However, States did not always make a clear distinction between the submissions, to which the Court must respond in the operative parts of its judgment, and the grounds for the claim, which the Court might or might not examine in its findings.

23. ICJ tried to be more concise in its judgments for two reasons. The first was that, like all courts throughout the world, it applied the principle of cost-effectiveness. In that respect, the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case provided a good example: having considered that the border for which it had been requested to establish the boundary line had been defined in the 1955 Treaty of Friendship and Good-Neighbourliness between France and the United Kingdom of Libya,<sup>1</sup> the Court had stated in three lines that it was not necessary to consider the thousands of pages of arguments submitted by the parties on other issues. He understood the frustration of counsel in such a case, but, while it was normal that they should have prepared such lengthy arguments, it was also normal for the Court not to consider them. Second, since the Court had less time owing to the increase in the number of cases on its docket, the principle of cost-effectiveness was even more relevant because the Court needed to rule rapidly, while replying to all the submissions of the parties. Third, the judges came from different national backgrounds and, in particular, from countries where supreme court decisions could cover more than 100 pages and from other countries where such decisions were only one or two pages long. The Court tried to strike a balance between these differing traditions.

24. Ms. ESCARAMEIA said that it seemed that ICJ's decisions were now taken by a broader majority than in the past and that there were fewer dissenting opinions and thus greater unity within the Court. She asked whether that phenomenon, which was remarkable in itself, since the world and its legal assessment were changing so noticeably, was a result of the methods used by the Court to reach its decisions and of its working methods in general.

25. Mr. ADDO said that he wished to know what the legal effect was if a party did not comply with the practice directions. He asked whether the party would be afforded the opportunity to comply or whether ICJ would decline to hear the case on its merits because of the party's non-compliance.

26. Ms. XUE asked the President of ICJ whether he could make any comments that might help the Commis-

<sup>1</sup> United Nations, *Treaty Series*, vol. 1596, No. 27943, p. 151.

sion in its consideration of the topic that it had just taken up, the fragmentation of international law.

27. Mr. CHEE, noting that his question was similar to Ms. Xue's, recalled that the President of ICJ had spoken on the subject of the fragmentation of international law in the Sixth Committee. He wondered whether the President had changed his opinion on the topic since the previous year.

28. Mr. GUILLAUME (President of the International Court of Justice), replying to Ms. Escarameia, said that making decisions more concise meant that it was easier to obtain a larger majority. That had been the effect in, for example, the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, on which ICJ had unanimously—with the exception of the Libyan judge *ad hoc*—ruled that, according to the Treaty of Friendship and Good-Neighbourliness, the Aouzou strip formed part of Chadian territory. If the Court had had to delve into all the events preceding the Treaty of Friendship and Good-Neighbourliness, the range of views might have been wider. There was thus a clear link between the principle of cost-effectiveness and the unanimity of decisions.

29. Turning to Mr. Addo's question, he said that practice directions were in the nature of recommendations. If the parties failed to heed those recommendations, they were entitled to do so, although in practice they usually did heed them.

30. As to the fragmentation of international law, it could occur in relation to both rules and courts. He had not yet had occasion to adopt a position on the subject of the fragmentation of rules, but it seemed clear to him that, in view of the involvement of international law in an ever wider variety of topics, the risk of conflict between rules became ever greater. As to the fragmentation of courts, he had already spoken on the matter before the General Assembly on several occasions, as Mr. Chee had recalled. The proliferation of courts was one consequence of the extension and specialization of international law, which was not in itself a bad thing. Indeed, all developed systems of internal law had specialized courts. The problem was to maintain the unity of the law, since the proliferation of courts could both give rise to "forum shopping" by States and lead to perversity in the grounds for judgements. The phenomenon had been apparent over the past few years in the *Tadić* case and the *Swordfish Stocks* case involving a dispute between Chile and the European Union.

31. One solution he had suggested was that international courts be able to submit preliminary questions to ICJ. Thus, the International Tribunal for the Former Yugoslavia had recently proposed that the Security Council request an advisory opinion from the Court. In the event, the Council had decided that it would be easier to amend the statute of the Tribunal without asking for the Court's opinion, but the case was interesting in that it showed that the machinery existed and could be used.

**Reservations to treaties<sup>2</sup> (concluded) (A/CN.4/526 and Add.1–3,<sup>3</sup> A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)**

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)

32. Mr. PELLET (Special Rapporteur) said that he wished to sum up what had been said about the draft guidelines contained in his seventh report (A/CN.4/526 and Add.1–3).

33. Draft guidelines 2.5.7 and 2.5.8, which related to the effect of withdrawal of a reservation, had not aroused any passionate debate; the only comment made related to the question whether the word "effect" should be used in the singular or the plural. Article 21 of the 1969 and 1986 Vienna Conventions used the plural, but the article concerned the legal effects of reservations and objections to reservations. In the case of the withdrawal of a reservation, the singular would be more accurate, but he would leave it to the Drafting Committee to settle the question.

34. He wondered whether the extremely pertinent comments made by Mr. Galicki on the subject of draft guideline 2.5.12 (Effect of a partial withdrawal of a reservation) should not be applied also to draft guideline 2.5.7 (Effect of withdrawal of a reservation). Mr. Galicki had noted that the partial withdrawal of a reservation left some of the reservation in place and that that should be taken into account in the wording of draft guideline 2.5.12. In the case of draft guideline 2.5.7, the withdrawal might well be complete, but it was probably excessive to claim that the withdrawal of a reservation entailed the application of the treaty as a whole. Draft guideline 2.5.7 should therefore be reworded to indicate that the withdrawal of a reservation entailed the application of the treaty provisions affected by the reservation in the relations between the State or organization withdrawing the reservation and all the other parties, whether they had accepted or objected to the reservation. Ms. Xue's comment on draft guideline 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization), on the other hand, seemed to him to have less substance, given that the provision related only to objections to the withdrawn reservation.

35. Turning to draft guidelines 2.5.9 and 2.5.10, which related to the effective date of withdrawal of a reservation, he said that the draft guidelines had evoked almost as few comments as the previous ones. Mr. Daoudi, however, had reproached him with having written, in paragraph 173 of the report, that article 22, paragraph 3 (a), of the 1969 Vienna Convention, from which the text of draft guideline 2.5.9 was taken, "departs from ordinary law", on the grounds that the provisions of the Convention constituted the ordinary law on reservations. He himself considered

<sup>2</sup> For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

<sup>3</sup> Reproduced in *Yearbook ... 2002*, vol. II (Part One).

that it depended on how the question was viewed. Although draft guideline 2.5.9 (Effective date of withdrawal of a reservation) used the wording of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, it could hardly be called ordinary law, since article 20 of the Conventions set out slightly different rules with regard to the effective date of reservations themselves. If one looked at the larger picture of the law of treaties as a whole, the rule in article 22, paragraph 3 (a), of the Conventions was contradicted by that in article 16, subparagraph (b), or article 24, paragraph 3. Last, if a still wider view was taken, to cover international law in general, and specifically the system of the optional clause in Article 36, paragraph 2, of the Statute of ICJ, the opposite applied. It could be inferred from the above that perhaps there was no general rule. He conceded, however, that, in paragraph 173 of the report, he probably should have referred to article 78, subparagraph (c), of the 1969 Vienna Convention rather than to article 78, subparagraph (b).

36. He was grateful that those who had spoken on the draft model clauses had been in favour of their being referred to the Drafting Committee.

37. Very little had been said about draft guideline 2.5.10 (Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation). Mr. Gaja, however, had pointed out, with regard to article 78, subparagraph (b), that it was not the situation of the other contracting States or international organizations that should remain unaltered by a withdrawal, but the obligations of the withdrawing State or international organization in relation to those other States or organizations. The point was well taken, and the Drafting Committee would need to reformulate the provision accordingly.

38. Ms. Xue, too, had raised some problems with regard to partial withdrawals, but he believed he had addressed her concerns in his presentation of draft guidelines 2.5.11 and 2.5.12. Finally, he referred Mr. Fomba, who had asked about the specific effect of draft guideline 2.5.10, subparagraph (b), to paragraph 168 of the report, explaining that a question of “integral” obligations was involved, namely, those which bound States not so much among themselves as in relation to their nationals or to foreigners who were in their territory. There was therefore no disadvantage in leaving the reserving State to set the date of entry into force of the withdrawal; indeed, it could be advantageous, if the date was prior to that arising from the general principle stated in draft guideline 2.5.9.

39. Draft guidelines 2.5.11 and 2.5.12, which related to partial withdrawals, had elicited more comment. For example, Mr. Galicki had rightly suggested reversing the order of the two paragraphs of draft guideline 2.5.11 so as to give a definition of partial withdrawal before describing the form it should take or the procedure to be followed. He noted, however, that all the criticisms and suggestions had been directed exclusively at the second paragraph, namely, at the definition of partial withdrawal. Mr. Galicki, referring to a concern expressed by Ms. Xue, had mentioned the possibility that States might try to portray the aggravation of a reservation as a partial withdrawal. While he was fully aware of the possibility, he believed that it was for the courts to establish classifications and to determine, in

the case of a given modification, whether the reservation had been attenuated or aggravated, a judgement that was sometimes difficult to make. Either way, and contrary to what Mr. Momtaz thought, the word “modification” was an essential element of the provision, since a partial withdrawal related to an existing reservation, which would continue to exist. That was not the same as the withdrawal of a reservation followed by a new reservation, as in the case of an aggravated reservation.

40. Still on draft guideline 2.5.11, Mr. Fomba had urged him to choose between two expressions that appeared in the provision, following the words “ensuring more completely the application”: “of the provisions of the treaty” and “of the treaty as a whole”. He himself was anxious to retain both terms, since they were not synonymous. As was stated in paragraph 211 of the report, the text was closely modelled on the definition of reservations resulting from draft guidelines 1.1 and 1.1.1, which the Commission had already adopted and which were clearly directed at the two different situations.

41. With regard to draft guideline 2.5.12, Mr. Galicki had rightly pointed out that the guideline made no provision for the very possible situation in which an objection was expressly justified by its author on the grounds of its author’s opposition to the part of the reservation that had not been withdrawn. To cover that point, it would probably be enough to add a phrase at the end of the draft guideline along the lines of: “as long as the objection does not relate exclusively to the part of the reservation that has been withdrawn”. He thought that such a solution would also deal with one of the problems raised by one of the alternatives put forward at the preceding meeting by Ms. Xue.

42. When Mr. Momtaz had said that there could be cases in which contracting States could make an objection, even when a partial withdrawal had been made, he himself had at first been very sceptical, since, after all, if an existing reservation was attenuated there was no reason why the possibility of making objections should be reintroduced, at any rate after the expiry of the 12 months’ grace following the formulation of the reservation, as was provided for in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions. It had to be said, however, that he had been shaken by the example given by Mr. Gaja, in which a reservation, general though it was, became discriminatory against a specific State or group of States. In that case, it was completely understandable that the State or States that fell foul of such discrimination might legitimately wish to make an objection that they had not considered it necessary to make at the outset. Mr. Gaja and Mr. Momtaz had not, however, replied to the question whether the legitimacy of objections was restricted to the one case in which a reservation had become discriminatory or whether there were other cases of the same kind. It was an important question, particularly if a guideline was to be drafted to meet that specific point (or if a new paragraph were added to draft guideline 2.5.12), since the draft would be worded differently according to the reply he was given. In any case, the relevant situation or situations must be mentioned not only in the commentary but also in draft guideline 2.5.12 itself or in a guideline 2.5.12 *bis*. During the meeting, Mr. Gaja had given him a draft which had the advantage of leaving open all the possibili-

ties, with the following wording: “No new objection may be formulated in the case of the partial withdrawal of a reservation unless the reservation resulting from the withdrawal raises new questions and the objection relates to such a question.” It would thus be made clear that, in principle, it was not possible to formulate new objections, unless the general drift of the reservation was altered to the extent that such an objection would be reasonable. He was fully in favour of the addition and hoped that the Drafting Committee would consider it.

43. Draft guidelines 2.5.4 and 2.5.11 *bis* or, alternatively, 2.5.X on the consequences of a finding of impermissibility of a reservation by a body monitoring the implementation of a treaty, had, in his view, aroused a rather excessive degree of concern among members. If the argument was based just on draft guideline 2.5.X, which was a combination of draft guidelines 2.5.4 and 2.5.11 *bis* and was the version preferred by members, it would be possible to agree with Mr. Koskenniemi and Mr. Gaja that paragraph 1 stated the obvious. On the face of it, they were right: however one looked at it, no monitoring body of any kind could withdraw a reservation. He had considered it important, however, to state that such bodies could never, in any circumstances, determine the treaty commitment of a State; in other words, they could neither withdraw nor cancel a reservation. The most they could do, as was set out in paragraph 1 of draft guideline 2.5.X, was to find a reservation impermissible (or inadmissible). In his view, however, it would be appropriate to state—or rather to restate—somewhere in the draft guidelines what the Commission had already said in paragraph 10 of its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, which it had adopted at its forty-ninth session, and which stated that “in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action”.<sup>4</sup> If that was the case, clearly the monitoring body itself could not take action. It could find a reservation impermissible, but the reservation itself, as an instrument, was left unaffected by the finding, whatever body had found it impermissible. Whatever Mr. Daoudi might say, he himself had never claimed anything to the contrary.

44. Ms. Escameia had considered, however, that some bodies had the power to withdraw or, at any rate, nullify a reservation and to act as if it did not exist. Although the European Court of Human Rights had wrongly arrogated that power to itself in the *Belilos* case and its subsequent case law, the International Court of Justice could neither withdraw nor nullify a reservation. At most, it might perhaps refuse to apply an impermissible reservation, but it would then have to decide whether the reservation was detachable from the treaty (in which case it would apply the treaty without the reservation in the case submitted to it) or whether the impermissibility of the reservation prevented it from applying the treaty as a whole. Either way, the authority of its judgement would be restricted to the case in hand, as Mr. Galicki had pointed out, and, in the relations between the reserving State and the States other than the defendant, the reservation would continue to exist, although still inadmissible (*illicite*) or impermissible (*non valide*): he did not take a position on the terminological problem.

45. It was at that stage of the reasoning that paragraph 2 of guideline 2.5.X entered into the picture. The first sentence of that paragraph was taken, almost word for word, from the first sentence of paragraph 10 of the preliminary conclusions. The first difference was that in the French version he had added the phrase *à la suite d'une telle constatation* (“Following such a finding”) to the beginning of the sentence. A State that was concerned to observe the law should certainly “take some action” to deal with an impermissible reservation, whether or not it had been found impermissible by a particular body. Unless the reserving State had acted in bad faith, before the finding, it had not been aware of the impermissibility of the reservation; hence the addition he proposed. The second difference was that, in guideline 2.5.X, he had written that the State “must” take action accordingly. Mr. Momtaz proposed the word “should”. Mr. Tomka proposed the wording “It is the reserving State that has the responsibility...”. Personally, he found the latter expression preferable, as it was also to be found in the preliminary conclusions. On the other hand, he could not accept the Chair’s comment to the effect that the State could do nothing. Such an attitude would have no basis in law. The State in question was party to a treaty; that treaty created a monitoring body, which, by definition, was competent to find the reservation impermissible; it seemed to him unacceptable to maintain that the State could, in good faith, “do nothing” if it was concerned to observe the law. On that point, he agreed with the comments made by Mr. Brownlie the previous week.

46. He was not forgetting paragraph 5 of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, to which Mr. Gaja had drawn the Commission’s attention. That paragraph stated that the monitoring bodies established in human rights treaties were “competent to comment upon and express reservations with regard, *inter alia*, to the admissibility of reservations by States”, which tended to confirm the comments made by the Chair and Mr. Gaja. But—a fact that Mr. Gaja had overlooked—that applied, again according to paragraph 5, “where these treaties are silent on the subject”, a situation that Ms. Xue seemed to regard as the only valid one in positive law. Yet that was inaccurate. Normative treaties or human rights treaties creating monitoring bodies were not always silent on the subject, and it sometimes happened that those bodies had much wider and more binding powers than the power to comment and express recommendations. A recommendation was not in any event devoid of legal force. Such was the case for the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples’ Rights and the International Court of Justice. It had been asserted that the latter was not a treaty-monitoring body. That did not seem to be true of cases where it was called upon by the parties to decide on the application of a treaty. Accepting, for the sake of argument, that it was true—in which case one must either overlook the expression “monitoring body” or replace it with the expression “body competent to find a reservation impermissible”—one could not in any case endorse the affirmation by Mr. Momtaz that the monitoring bodies were eminently political: they were not all political, they were not always political, they were not only political and they were never exclusively political. Nor could he

<sup>4</sup> See 2734th meeting, footnote 6.

understand how Mr. Yamada could claim to endorse the preliminary conclusions while in the same breath calling for the deletion of paragraph 2 of guideline 2.5.4, which, for the most part, simply reproduced paragraph 10 of the preliminary conclusions.

47. Whatever Mr. Gaja, Mr. Pambou-Tchivounda, Ms. Escarameia, Mr. Tomka or Mr. Mansfield claimed, he had never said, written or believed that a State that had made a reservation which a body competent to do so had found impermissible was under an obligation to withdraw that reservation. Guideline 2.5.X said nothing of the kind. It simply reproduced verbatim paragraph 10 of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, pointing out that total or partial withdrawal of the reservation was one possible means, but not the only means, of fulfilling its legal obligations. He did not see how that differed from the statement in the second sentence of paragraph 10 of the preliminary conclusions: “This action may consist, for example, in the State’s either modifying its reservation so as to eliminate the inadmissibility [the case of partial withdrawal] or withdrawing its reservation ... [the case of total withdrawal].” Those were ways in which a State could fulfil its obligations in that regard, and he thanked Mr. Kateka for his endorsement of that interpretation, which, in his view, was the only correct one.

48. Several members of the Commission, including Ms. Escarameia, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao and Mr. Mansfield, had stressed the need to distinguish between the monitoring bodies on the basis of their differing powers. In that regard, he thanked Mr. Koskenniemi for his efforts to submit a categorization. Mr. Koskenniemi identified three possibilities. In the first case, the body might find the reservation “null and void in whole or in part”. The problem was, however, to know what action to take on the basis of such a finding, as no such body was ever entitled to find that a reservation was null and void. In a second case, the monitoring body might oblige the reserving State to withdraw its reservation in whole or in part. He accepted that hypothesis, but, while total or partial withdrawal was one form of action the State could take in the event of the impermissibility of its reservation, it was not the only form of action: according to paragraph 10 of the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, the reserving State could also forgo becoming a party to the treaty. Last came the third case, in which the monitoring body could recommend that the reserving State should withdraw its reservation in whole or in part. Broadly speaking, that did not seem to him to contradict what was stated in guideline 2.5.X; and, in any case, that was doubtless not what Mr. Koskenniemi was intending to assert. But such an attempt at elucidation seemed to belong more appropriately in the commentaries than in the guidelines themselves.

49. He had demonstrated that he was far from convinced by the criticisms made concerning paragraph 2 of guideline 2.5.X; however, he would not be asking the Commission to refer that draft guideline (or, consequently, draft guidelines 2.5.4 and 2.5.11 *bis*) to the Drafting Committee, despite several members’ support for such referral. He was very mindful of an objection which had been made with particular trenchancy by Mr. Tomka, Mr. Brownlie

and Mr. Mansfield (although their positions did not entirely coincide), but which also underlay several of the other comments made. Ultimately, the question of withdrawal was a secondary issue. Guideline 2.5.X had two central components: first, the powers of the treaty-monitoring bodies with regard to reservations; and, second, the consequences of the impermissibility of a reservation. During the debate, it had been asked under which of those two headings those points should appear. Opinions had differed. It seemed that no clear-cut answer could be given and that the Commission should revert to the matter at its next session, when the permissibility (or admissibility) of reservations would be discussed; it would also have to revert to the matter when it returned to consideration of the preliminary conclusions in two years’ time. On those two occasions, he would submit amended and, he hoped, more appropriate versions of those draft guidelines to the Commission, taking account of the discussions at the current session. Consequently, he was withdrawing draft guidelines 2.5.4, 2.5.11 *bis* and 2.5.X. For the rest, there seemed to be no very cogent reason why draft guidelines 2.5.1 to 2.5.3, 2.5.5 to 2.5.12 (including the *bis* and *ter* provisions) and the draft model clauses linked to guideline 2.5.9 should not be referred to the Drafting Committee, and he hoped that the Commission would take a decision to that effect at the present meeting to enable the Committee to consider those guidelines at the start of the next session.

50. The CHAIR thanked the Special Rapporteur for his recapitulatory statement and particularly for his gracious withdrawal of draft guidelines 2.5.4, 2.5.11 *bis* and 2.5.X. If he heard no objection, he would take it that the Commission agreed to refer all the draft guidelines appearing in the part of the Special Rapporteur’s seventh report to the Drafting Committee entitled “withdrawal and modification of reservations and interpretative declarations”, having regard to the oral comments made during the debate in plenary, with the exception of draft guidelines 2.5.4, 2.5.11 *bis* and 2.5.X.

*It was so decided.*

51. Ms. ESCARAMEIA said that she wished to correct the interpretation of her position made by the Special Rapporteur. She had not said that the fact that a monitoring body found a reservation to be inadmissible or impermissible automatically resulted in the withdrawal of that reservation. She had said that such a finding would entail an obligation for the State party to withdraw that reservation wholly or partially. She could have accepted draft guideline 2.5.4, but the phrase “it may fulfil its obligations” implied that the State was free to choose whether or not to fulfil its obligations. In her view, the State had the obligation to do so.

*The meeting rose at 12.50 p.m.*