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Summary record of the 2857th meeting

Topic:
Reservations to treaties

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69. It had been his original intention to provide a brief overview of section D of his report, which addressed two questions relevant to the entire exercise: first, who could assess the validity of reservations, and in particular, their compatibility or non-compatibility with the object and purpose of a treaty; and second, the consequences of their possible non-validity. As that section was currently available in French only, he would refrain from introducing it at the present juncture; however, he reserved the right to change his mind if, during the discussion, it appeared necessary to make a few clarifications in order better to convey the underlying logic that had guided him in his inquiry into the fundamental characteristics of the validity of reservations to treaties.

The meeting rose at 1 p.m.

2857th MEETING

Tuesday, 26 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Candiotti, Mr. Chee, Mr. Comisário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/549 and Add.1, sect D, A/CN.4/558 and Corr.1 and Add.1 [and Corr.1]–2, and A/CN.4/L.665)

[Agenda item 6]

TENTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the tenth report on reservations to treaties (A/CN.4/558 and Corr.1 and Add.1 [and Corr.1]–2) submitted by the Special Rapporteur.

2. Mr. KOLODKIN commended the Special Rapporteur, whose well-thought-out tenth report had provided him with great intellectual satisfaction, even if he did not always agree with its author. The report called for comments, first of all, on the terms and concepts of permissibility/admissibility and validity of reservations. Reading the document was in fact a stimulating intellectual effort in which a comparison of the various language versions revealed that the terms had different meanings in different languages. For example, in paragraph 5 of his report the Special Rapporteur wrote that the word “validity” was fairly neutral in comparison with the word “permissibility”; yet, in Russian at least, the word “validity” was not entirely neutral. It referred specifically to legal

consequences. To be legally valid meant to entail legal consequences, to be in force, and to be invalid meant the opposite.

3. He agreed with those members of the Commission and States in the Sixth Committee of the General Assembly who objected to the use of the word “inadmissible”. The word carried above all the connotation of responsibility, yet introducing the notion of responsibility in the context of the formulation of reservations was a doomed enterprise. The word currently used to qualify reservations in the English text of the draft guidelines, namely “permissible”, seemed perfectly appropriate. Most representatives in the Sixth Committee had said that they preferred the words “permissible/impermissible” (A/CN.4/549, para. 103). In draft guideline 1.6, the word “permissibility” referred to the stage of formulation of reservations,¹ and in draft guideline 2.1.8, the word “impermissible” applied to the attributes of the depositary.² It should be noted in that connection that the depositary did not as a general rule have the right to express an opinion, either on the validity or non-validity of reservations, or on their permissibility or impermissibility. The depositary must remain neutral.³

4. He would further note that the idea advanced in paragraph 8 of the report, namely that the words “admissible” and “inadmissible” should be replaced by the words “valid” and “invalid” in draft guidelines 1.6 and 2.1.8, did not apply to the Russian and English texts, since the words used there were not “admissible” and “inadmissible” and their equivalents, but “permissible” and “impermissible”. On the whole, it would appear that an act or a document was generally characterized as valid or invalid only *a posteriori*. Such judgements were made on the basis of criteria applicable only once the act had been completed or the document adopted. That value judgement applied to the existence or absence of legal consequences of the act or document in question and not to the process of its execution or formulation. In that connection, paragraph 103 of the topical summary of the discussion held in the Sixth Committee (A/CN.4/549) set out several arguments against the use of the word “validity” to qualify reservations. If one ultimately had to use the terms and concepts of “validity” and “invalidity” in connection with reservations, it would be best to do so only in assessing the legal consequences of reservations formulated, rather than for making a judgement about those that possessed the right to formulate them, in particular States or courts. It was precisely in that sense that the provisions in the 1969 Vienna Convention concerning the validity of international agreements appeared to have been elaborated.

5. Secondly, the concept of presumption of validity of reservations described in the report was not very convincing. The Special Rapporteur based his arguments on article 19 of the 1969 and 1986 Vienna Conventions, but that article, common to both Conventions, seemed merely to

¹ See *Yearbook ... 1999*, vol. II (Part Two), p. 126, para. (4) of the commentary.

² See *Yearbook ... 2002*, vol. II (Part Two), pp. 45–46, paras. (3)–(6) of the commentary.

³ *Ibid.*

reinforce the right of States and international organizations to formulate reservations, while making it subject to certain conditions. He agreed with the Special Rapporteur that it was, more properly speaking, a “right to ‘formulate’ reservations” than a “right to reservations”, a matter covered in paragraphs 12 and 13 of the report. Even if one replaced permissibility with validity, it was still not very clear why the notion of presumption of validity of reservations was being introduced, and the Special Rapporteur might need to provide further justification for doing so. Draft guideline 3.1 as proposed in paragraphs 16 and 20 of his report reproduced the provisions of article 19 of the Vienna Conventions, confirming that the text referred simply to the right to formulate reservations and to the corresponding restrictions. In his view, to entitle the provision “Presumption of validity of reservations” (para. 16) would be to go too far, and the word “freedom” (para. 20) should be replaced by the word “right”, since that was actually what was meant. It was precisely the right to formulate reservations, subject to certain conditions, that constituted the essence of the Vienna regime. He questioned whether it was necessary to introduce a new concept, “presumption”. Surely it was sufficient to enunciate and define the right, and not the “freedom”, to formulate reservations.

6. In that regard, and thirdly, the question of language had once again to be addressed. Perhaps the word “*faculté*” had several meanings in French, including “right”, but paragraphs 12 and 13 of the report contained the word “*droit*” (“right”), whereas the title of draft guideline 3.1 employed the word “*faculté*” (“freedom”). In the English version of paragraphs 12 and 13, the word “right” was used, whereas in the title of draft guideline 3.1, one found the word “freedom”. In Russian, the word used in the title of draft guideline 3.1 (“*sposobnost*”) referred not so much to the right or prerogative with which the subject of the phrase was endowed as to the subject itself, something that did not conform to the thrust of draft guideline 3.1 as currently proposed. That was why, since it was in fact a right that was at issue, it would be more accurate to use the word “*pravo*” (“right”) in Russian. As to the proposal in paragraph 20 of the report concerning draft guideline 3.1, the task could be entrusted to the Drafting Committee.

7. The question of the “validity”, or more precisely the “invalidity”, of reservations should be considered in conjunction with that of the legal consequences of invalid reservations. The crux of the matter was whether or not invalid reservations could be dissociated from the expression by a State of its consent to be bound by a treaty to which reservations had been formulated; basically, that was the question raised in paragraph 53 of the report. Thus it must be determined what happened when a State expressed its consent to be bound by a treaty to which a reservation that appeared to be invalid had been formulated. Did the treaty remain in force or not? What was its legal effect during the period when an objection to the reservation could still be formulated? The whole question of validity of reservations and whether it was appropriate to use the concept of validity in the draft guidelines must be considered from the standpoint of the consequences arising from the characterization of reservations as invalid.

8. Fourthly, he agreed with the Special Rapporteur that article 19 (a) of the 1969 and 1986 Vienna Conventions related solely to reservations whose formulation in respect of a treaty was expressly prohibited. Moreover, as was rightly pointed out in paragraph 26 of the report, that interpretation “is the only one compatible with the great liberalism that pervades all the provisions of the Convention that deal with reservations”. He therefore supported draft guideline 3.1.1.

9. Fifthly and lastly, the arguments put forward by the Special Rapporteur in paragraphs 45 to 49 of his report seemed entirely logical and well founded, hence the potential usefulness of draft guideline 3.1.2, “Definition of specified reservations”, proposed in paragraph 49.

10. Mr. PAMBOU-TCHIVOUNDA joined all previous speakers in expressing satisfaction with the work done by the Special Rapporteur. As he had done with definitions and elaboration techniques, the Special Rapporteur had remained faithful to the methodology adopted by the Commission when the topic of reservations to treaties had been included in the programme of work: in keeping with the expectations of States, the Guide to Practice must refrain from challenging the rules codified in the Vienna Conventions, its purpose being to explicate those rules in order to fill in any areas on which they were silent. That methodological standard, adopted once again by the Special Rapporteur and applied to examining the problems underlying conditions of validity and effects of reservations, had its drawbacks, namely that it might hold back the process of progressive development. It must thus be used with caution.

11. The Special Rapporteur’s tenth report elicited comments primarily on two points: the question of validity and the typological analysis of reservations.

12. The question of validity had been addressed in previous reports, but the Special Rapporteur had been quite right to highlight it once again, as it was to some extent the foundation that ensured that the building under construction was solid. Yet however pertinent it might be, the concept of validity was by no means a kind of intellectual operation to determine whether a reservation was capable of producing the effects sought by its author. That procedural operation was external to or independent of validity. Validity was a feature inherent in the reservation itself, signalled by its concordance with, or at least correspondence to, a standard of reference. Validity fulfilled a need for consistency *vis-à-vis* the legal system set up by that standard of reference, in the present instance the Vienna Conventions. It derived from an assessment made by the author of a reservation or a determination made by a third party. Validity could be presumed from an assessment made by the author of a reservation, but it could also be deduced after the reservation had been formulated, based on acceptance by other States parties to the treaty community or a third party, for example a judge or arbitrator. However, “objecting” States also had a role to play in the determination of validity or invalidity.

13. As a concept, validity had to comprise just three variables in order to be operational. The first was the standard of reference, which was the whole range of

premises offered by international law itself. In the present instance, the standard of reference was the Vienna Conventions. The second variable was the factual situation, namely the reservation formulated by a State or international organization. The third and last variable was either the objections formulated by other parties to the treaty, which could in fact relate to the validity of the reservation, or an assessment by a third party, judge or arbitrator of the reservation's conformity or lack thereof with the standard of reference.

14. The concept of validity gave rise to three sets of comments. First, the validity of reservations was not fundamentally a linguistic issue: rather, it tapped into a problem of substance, namely whether the situations contemplated in article 19, subparagraphs (a), (b) and (c) of the 1969 Vienna Convention, which set out conditions limiting *ratione materiae* the freedom to formulate reservations, were interrelated or, conversely, distinct in terms of their scope. That was a major problem, and it arose in particular with regard to specified reservations, permitted reservations, and even implicitly prohibited reservations in terms of their performance on the test of compatibility with the object and purpose of the treaty.

15. Second, the dual controversy that pitted the partisans of validity against those of admissibility on the one hand and the proponents of permissibility against those of opposability on the other was not in itself decisive in determining the legal regime of reservations. One of the fundamental requirements for a legal act to be legal was validity. The concepts of validity and admissibility were thus in a relationship of exact equivalence. The concept of opposability, meanwhile, had more of a causal relationship to the concept of validity, since it was its conformity, or assumed conformity, with the conditions set by article 19 of the 1969 Vienna Convention that made a reservation opposable against those that had accepted it. Thus he fully endorsed the Special Rapporteur's choice of the more neutral option (see paragraphs 5 and 8 of the report).

16. Turning to his third set of comments, Mr. Pambou-Tchivounda remarked first of all that the Special Rapporteur had written that “[t]he principle of freedom to formulate reservations undoubtedly constitutes a key element of the Vienna regime” (para. 16). He himself was in favour of devoting a draft guideline to that principle, although he questioned the advisability of elevating the freedom in question to the level of a principle (para. 17). Draft guideline 3.1 was intended as the point of departure for all the guidelines in which the problems inherent in validity were to be addressed—problems of competence, but also of form and substance. Moreover, if it was accepted that third parties (from an objecting State to a declaring third party) were involved in the determination of validity, then there must be draft guidelines on that subject. He wondered whether moving all the draft guidelines on objections to the third part of the Guide to Practice might be appropriate; he himself was not sure.

17. The second point on which he wished to comment had to do with the Special Rapporteur's typological analysis of reservations. The Special Rapporteur deserved praise for his effort to clarify the limitations *ratione materiae* on the freedom to formulate reservations, and particularly for

his success in underpinning certain theoretical categories of reservations with examples of international practice. While such practice was abundant, however, it varied in significance, and that raised questions about the relevance of the categories outlined. Unless practice was taken into account, some categories of reservations bordered on mere intellectual constructs. Such was the case, *inter alia*, with implicitly prohibited reservations, whose very existence might be questioned and which were defined, one might say *a contrario*, in relation to permitted reservations (paras. 34–39). It could be concluded that whereas authorization, specified or conditional, was conducive to determination, a concept with which it was identified, that was not always the case, particularly when the authorization was of a general nature. One had to wonder, then, how reservations that were by definition indeterminate because they were not subject to any limitations *ratione materiae* could be categorized as “specified”.

18. In fact the Special Rapporteur had not lost sight of that phenomenon, for he wrote in paragraph 44 of his report that “a general authorization of reservations itself does not necessarily resolve all the problems. In particular, it leaves unanswered the question of whether the other Parties may still object to reservations and whether these expressly authorized reservations are subject to the test of compatibility with the object and purpose of the treaty”. He himself would answer those two questions in the affirmative—in the first case, because the capacity to object was preserved, given that the Vienna regime imposed no limitations on it, and in the second case, because submitting such reservations to the compatibility test was inevitable, given that that was a requirement implicit in the resolution's very validity. The Special Rapporteur confirmed as much in paragraph 46 of his report by stating that “reservations which are not ‘specified’ must pass the test of compatibility with the object and purpose of the treaty”.

19. In conclusion, Mr. Pambou-Tchivounda said that such typological analysis, the relevance of which was entirely relative, had served as the foundation for only two draft guidelines, 3.1.1 (para. 32) and 3.1.2 (para. 49). However, the two provisions were quite consistent with the situations contemplated in article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention, which, according to Paul Reuter, constituted “very simple cases”.⁴ There was perhaps no reason to complicate them.

20. Mr. KABATSI said that he had understood Mr. Pambou-Tchivounda to say that the draft guidelines were intended to fill in the gaps that existed in the Vienna regime. He himself was not so sure that that was the objective of the draft guidelines, since any addition to the Vienna regime would be tantamount to a modification of that regime. Moreover, he was not convinced that the Special Rapporteur had been engaged in such an enterprise throughout his various reports. Clarification from Mr. Pambou-Tchivounda would be appreciated.

21. Mr. PAMBOU-TCHIVOUNDA said he thought he had spoken of areas on which the Vienna Convention “was silent”, which was not the same thing as “gaps”. He had likewise suggested that the methodological standards

⁴ Reuter, *loc. cit.* (2854th meeting, footnote 6).

used might hamper progress. What he had meant was that the definition of reservations given by the Special Rapporteur combined certain elements of the 1969, 1978 and 1986 Vienna Conventions. However, that combined reading was not by any means a rethinking of the Vienna regime, even though draft guideline 3.1.2 contained what might be a first step towards progressive development.

22. Ms. ESCARAMEIA commended the Special Rapporteur on his tenth report, which was well researched and incisive. The Commission's lengthy disquisitions on terminology, on the other hand, were not always very helpful. She herself would favour using the word "permissible" in the English text, especially with reference to the formulation of reservations, because it was the most neutral term. The word "admissible" was not appropriate because it implied certain consequences. The Special Rapporteur said that he had chosen the word that seemed to him to be the most neutral, "validity", but it seemed to her that that word also implied that the act in question had certain consequences. At the same time, she did not favour replacing the word "validity" in the draft guidelines that had already been adopted, for the reasons given by Mr. Kolodkin.

23. With regard to the presumption of validity of reservations, she said that she, like other members of the Commission, had the impression that the Special Rapporteur had taken the formulation of reservations as being synonymous with reservations themselves. Article 19 of the Vienna Convention set out the general principle of the permissibility of formulating reservations, however, not that of the validity of reservations, and the two concepts must not be confused. She endorsed draft guideline 3.1 (para. 20), which corresponded to article 19 of the Vienna Convention, and agreed with the change of title, which had the merit of reflecting the process rather than the outcome.

24. As to prohibited reservations, she pointed out that in addition to reservations that were expressly prohibited there were reservations that could not be made because of the nature of the treaty. She was thinking in particular of the constituent instruments of international organizations: a State could hardly become a member of an organization while formulating reservations to the competence of its fundamental organs or its general mandate. In any event, the concepts of the "nature of the treaty" and the "object and purpose of the treaty" were very similar. Moreover, such a distinction would be necessary only if the Commission decided to create separate regimes for reservations under article 19, subparagraph (a), and those under article 19, subparagraph (c), of the 1969 Vienna Convention.

25. She endorsed draft guideline 3.1.1 (para. 32), even though it was not easy to distinguish among the various categories. Draft guideline 3.1.2 (para. 49) seemed more problematic, however. She did not understand what was meant by the phrase "and which meet conditions specified by the treaty". The wording was unclear; it would be preferable to say that only reservations that were permitted could be formulated. That provision should therefore be redrafted, particularly since some members had seen in it a development of the Vienna regime.

26. She expressed surprise that no other member of the Commission had referred to the seminar proposed by the Special Rapporteur (see 2854th meeting, above, para. 89). It was an excellent idea, and she supported it wholeheartedly. The seminar should bring together representatives of human rights treaty monitoring bodies and of the Sub-Commission on the Promotion and Protection of Human Rights; ideally, representatives of the Committee on the Elimination of Discrimination against Women should also take part, since the Convention on the Elimination of All Forms of Discrimination against Women was one of the instruments that had drawn the greatest number of reservations. It would therefore be a good idea if at least the Chairperson of that Committee could participate in the seminar. The work should focus on the tenth report on reservations to treaties, the final working paper prepared in 2004 by Ms. Françoise Hampson, a member of the Sub-Commission,⁵ and General Comment No. 24 of the Human Rights Committee.⁶ The seminar should last at least two days in order to permit a serious exchange of ideas.

27. Mr. MANSFIELD commended the Special Rapporteur for his thoughtful analysis of the question of reservations to treaties. He found the commentary to be more useful than the draft guidelines themselves in understanding article 19. Like the Special Rapporteur, he thought that it was not possible to separate the freedom to formulate a reservation from the exceptions to that principle and that it was therefore necessary to reproduce article 19 in its entirety. Mr. Gaja had nevertheless been right to draw attention to the fact that article 19 (a) did not speak of "expressly" prohibited reservations.

28. In relation to draft guideline 3.1.1, he pointed out that there was another type of reservation clause which the report did not discuss, namely one that prohibited all reservations other than those specifically permitted (for example, by other articles of the treaty). The Special Rapporteur would presumably regard such a clause as one that prohibited reservations to specified provisions rather than one that prohibited certain categories of reservation. On draft guideline 3.1.2, as Ms. Escarameia had suggested, the drafting needed to be made less elliptical.

29. As the Special Rapporteur stated in his conclusion in paragraph 52, the consideration of the effects of a reservation formulated in spite of a prohibition within the meaning of article 19 (c) should not be separated from that of the consequences of a reservation that was contrary to the object and purpose of the treaty. He saw no reason why the draft guidelines should not be referred to the Drafting Committee, and he supported the aforementioned proposal regarding a seminar.

30. Mr. FOMBA welcomed the report on reservations to treaties, a highly technical topic that had to be addressed from the standpoint of both the theoretician and the practitioner. Concerning the choice of terminology, he agreed that the word "validity" had the merit of being neutral

⁵ E/CN.4/Sub.2/2004/42. See also the first working paper presented by Ms. Hampson (E/CN.4/Sub.2/1999/28 and Corr.1) and the "Reservation Charts" in document E/CN.4/Sub.2/2002/34.

⁶ See 2856th meeting, footnote 4.

and of prejudging neither the Commission's stance on the opposability/permisibility dispute nor the effects of the formulation of a reservation contrary to the provisions of article 19. The presumption of validity of reservations flowed from the general principle that their formulation must be permitted, but the freedom to formulate was limited *ratione temporis*, *ratione materiae* and *ratione personae*. Thus one could not speak of a "right to reservations"; the introductory wording in article 19 accorded States only the right (the freedom) to "formulate" reservations. One might then ask what the difference was between the "right to reservations" and the "right to formulate reservations".

31. The principle of freedom to formulate reservations was a key element of the Vienna regime, and it should be the subject of a draft guideline reproducing article 19 in its entirety so as not to separate the principle from the exceptions to it. The Special Rapporteur proposed to deal separately with the three conditions for validity of reservations set out in article 19, taking up, on the one hand, the propositions posited in subparagraphs (a) and (b) and, on the other, those contemplated in subparagraph (c). That was perfectly logical. He seemed to have hesitated between "Freedom to formulate reservations" and "Presumption of validity of reservations" (para. 16 of the report) for the title of the draft guideline before finally choosing the first option, which established an implicit connection between the concepts of formulation and validity. If, on the other hand, it was felt that the connection should be made explicit, then it would be better to speak of the "Freedom to formulate a valid reservation" or of the "Formulation and validity of a reservation". Since those alternatives were likely to create difficulties, however, the Special Rapporteur's proposal seemed acceptable.

32. The Special Rapporteur rightly noted that the cases contemplated in subparagraphs (a) and (b) were not as simple as they appeared; aside from the fact that not all possibilities were explicitly covered, problems might arise as to the exact scope of a clause prohibiting reservations and the effects of a reservation formulated despite such a prohibition.

33. Regarding the scope of clauses prohibiting reservations, he noted that a distinction was drawn between express prohibition, contemplated in subparagraph (a), and implicit prohibition, contemplated in subparagraph (b). Where the prohibition was clear and, in particular, where it was general, no problem arose (except that of deciding whether or not a statement constituted a reservation). The prohibition could, however, be ambiguous or partial. Subparagraph (a) should be assumed to cover three cases: clauses prohibiting all reservations, clauses prohibiting reservations to specified provisions and clauses prohibiting certain categories of reservations. There was no harm in spelling that out, and that was precisely the purpose of draft guideline 3.1.1.

34. Where implicit prohibitions were concerned, the question arose as to whether there should be a draft guideline concerning the scope of subparagraph (b). The Special Rapporteur proposed to define the phrase "specified reservations" in that subparagraph chiefly in order to reconcile the various and contradictory theories about how it should be construed: that was the purpose of draft

guideline 3.1.2 (para. 49). One could go along with his argument that "specified reservations" must relate to specific provisions and also fulfil certain conditions specified in the treaty, without going so far as to require that their content should be predetermined; moreover, one might well ask whether such a provision would ultimately do away with all interpretative difficulties.

35. Mr. MATHESON welcomed the excellent report by the Special Rapporteur, the basic thrust of which seemed to be that reservations were a valid means of encouraging the widest possible participation in treaties. That principle should be the basis for the Commission's treatment of the topic.

36. The choice of the words "valid/invalid" was satisfactory, at least in English, but if there were terminological difficulties with respect to the other languages, then those difficulties should be further explored. Draft guideline 3.1 was also satisfactory: although it might appear in a sense superfluous, it provided a useful framework for the guidelines that followed. Draft guideline 3.1.1 (para. 32) required some adjustment, as Mr. Gaja had suggested. It should be made clear in particular that when a treaty prohibited reservations to specified provisions, then only reservations to those provisions were expressly prohibited and, likewise, that when a treaty prohibited certain categories of reservations, then only reservations falling into those categories were expressly prohibited. He had doubts about the idea of including additional categories. Draft guideline 3.1.1 should deal exclusively with express prohibitions, which it did as currently worded.

37. On the other hand, he was not certain that draft guideline 3.1.2 was actually necessary. The definition therein was not clear: one might ask whether it applied where a treaty authorized a certain category of reservations but did not refer to specific provisions; moreover, the English text said literally that "specified" reservations were only those that met conditions "specified" by the treaty. Those matters needed clarification before a decision to retain the draft guideline was made.

38. Mr. PELLET drew attention to a translation problem with the definition in draft guideline 3.1.2. The English text did indeed speak of "specified reservations" that had to meet "specified" conditions, whereas the French original used two different terms: reservations that were "*déterminées*" ("specific") which needed to meet conditions that were "*spécifiées*" ("specified"). The Drafting Committee could surely solve the problem.

39. Mr. CANDIOTI said that he, too, welcomed the excellent report on reservations to treaties. Concerning the use of the word "validity", he thought that the problem was more a conceptual one than a terminological one, but that it must be resolved without delay in order to prevent even more confusion later on. In his view, article 19 referred only to one aspect of the validity of a reservation; in fact, it did not use the words "valid", "invalid" or "null" at all, but spoke only of prohibited reservations and those that could be made. The concept of "admissibility" seemed more appropriate, since a reservation that was permitted or accepted was not necessarily valid. It went without saying that prohibition entailed invalidity, but a

reservation acquired validity from many other factors, such as its formulation by a competent organ, having a specific object, having been made within the time allotted, having been formulated in writing, and so forth. It would thus be inaccurate to give a chapter that ultimately dealt only with prohibited and authorized reservations the title “Validity of reservations”.

40. Similarly, in the title of draft guideline 3.1 (para. 20), it would be preferable to avoid the word “freedom”, whose meaning was too broad, and to speak instead of “prohibited and authorized reservations”. On the whole, however, the text of the draft guidelines was acceptable and could be referred to the Drafting Committee, with the additional comments made by members of the Commission, in particular by Mr. Gaja.

41. Mr. Sreenivasa RAO said it was fairly self-evident that if a treaty prohibited reservations to specific articles, *a contrario* it authorized reservations to others. On the other hand, in seeking to determine what was implicitly prohibited or authorized by using criteria such as the nature of the treaty or the obligations that had to be performed or accepted by the parties or monitoring bodies established, one might be stretching the boundaries of interpretation to the point of excessive subjectivity. The intention of the parties upon becoming parties to the treaty was not necessarily clear. Indeed, that mystery must be preserved in order to leave States a certain margin of manoeuvre. Accordingly, implicit prohibitions or authorizations should be limited to situations that could logically and reasonably be deduced from the intention of the parties at the time they concluded the treaty.

42. Mr. GAJA said that section C of the Special Rapporteur’s tenth report represented a major contribution to the study of the problem of reservations. Nevertheless, it raised a number of difficulties. According to article 19 (c) of the 1969 Vienna Convention, the criterion of incompatibility of a reservation with the object and purpose of a treaty entered into play only in cases when a reservation was not prohibited under subparagraphs (a) and (b) of that article. The reservations concerned were thus those that were not prohibited, either explicitly or implicitly, by the treaty. Draft guideline 3.1.4 proposed by the Special Rapporteur aimed to make it clear that the question of compatibility did not arise if a reservation had specifically been authorized by the treaty (para. 69). If, on the other hand, the authorization was only general, or if the treaty contained no provisions relating to reservations, then the reservation was subject to the test of compatibility with the object and purpose of the treaty. If that was indeed what was meant, then it should be expressed more clearly. The phrase “[w]here the treaty authorizes certain reservations without specifying them” was infelicitous (para. 69). It would be better to speak of cases where a reservation was not specifically authorized by the treaty.

43. The Special Rapporteur went on to undertake the colossal task of listing certain criteria for determining the object and purpose of the treaty. Those two pivotal concepts were notoriously not defined in the 1969 Vienna Convention. In order to define the object and purpose of the treaty, draft guideline 3.1.5 referred to the “essential provisions of the treaty, which constitute its *raison d’être*”

(para. 89), something that was hardly instructive. If in order to speak of a material breach of a treaty (Vienna Convention, art. 60) one used that definition—proposed, it was true, solely “[f]or the purpose of assessing the validity of reservations”—the wording that resulted would be clearly inappropriate. According to article 60, paragraph 3 (b), of the Vienna Convention, a material breach of a treaty consisted in “the violation of a provision essential to the accomplishment of the object or purpose of the treaty”. Transposing the proposed definition, one would arrive at the following wording: “the violation of a provision essential to the accomplishment of the essential provisions of the treaty”. If the objective was to define the concepts of object and purpose, it should be done in a manner that was useful, not only for reservations, but also for the law of treaties in general. Still, nothing indicated that the Commission must elaborate such a definition.

44. As to the method advanced for determining the object and purpose of a treaty, the fact that draft guideline 3.1.6 was based on articles 31 and 32 of the Vienna Convention had the disadvantage of leaving aside the very important role that those two concepts played in the interpretation of treaties (para. 91). There again, it would be better to avoid setting out a general rule in a draft guideline.

45. The most substantial part of the report, paragraphs 93 *et seq.*, was aimed at what the Special Rapporteur called the “application of the criterion”, in other words, determining whether a reservation was compatible with the object and purpose of the treaty. The question could hardly be resolved using a general, rigid criterion, since compatibility depended on the content of the reservation. A reservation could be aimed at a minor modification of a given provision, in which case it might still be compatible, even if the provision in question was fundamental to the accomplishment of the object and purpose of the treaty.

46. In his view, it would be better to apply more generally the relatively flexible wording in the second part of draft guideline 3.1.12 concerning reservations to general human rights treaties, according to which the compatibility of a reservation with the object and purpose of a treaty depended, among other things, on “the importance that the right which is the subject of the reservation has within the general architecture of the treaty, and the seriousness of the impact the reservation has upon it” (para. 102). It would be prudent to stop there. In order to assess the seriousness of the reservation’s impact, it was obviously necessary to know the scope of the reservation. If the reservation was “worded in vague, general language”, as indicated in draft guideline 3.1.7, it might be incompatible with the object and purpose, but was not necessarily so (para. 115). It would thus be advantageous to adopt a different perspective, that of procedure. One could then ask whether a reservation worded in vague, general language “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application” to the reserving State, according to the definition set out in article 2, paragraph 1 (d) of the 1969 Vienna Convention.

47. He agreed that a reservation could not be deemed to be prohibited solely on the grounds that it purported to safeguard the application of certain rules of domestic law

or related to a provision embodying a rule of customary law. Draft guideline 3.1.8 was useful in that it highlighted the need to distinguish between the lawfulness of a State's conduct in respect of customary law, on the one hand, and acceptance of a treaty obligation parallel to customary law, on the other (para. 129). In contrast to what was asserted by the Human Rights Committee in its famous General Comment No. 24, the relevant portion of which was cited in footnote 298 to paragraph 122 of the report, a State that formulated a reservation to a provision of a treaty that dealt with torture was not reserving the right to practise torture. It simply wished to avoid adding a treaty obligation to an obligation flowing from customary law or *jus cogens*. It was understandable that such a reservation might be puzzling and ultimately incompatible with the object and purpose of the treaty, but one could not say in general that all reservations to a provision corresponding to a rule of customary law were automatically invalid.

48. Similar reasoning should be brought to bear in order to prevent a reservation to a provision corresponding to a rule of *jus cogens* from being automatically qualified as invalid. A State making such a reservation was not trying to preserve the right to violate such a rule, much less asserting some obligation to do so. The prohibition of reservations to provisions setting forth a rule of *jus cogens* (draft guideline 3.1.9) should be categorical only if, by modifying the legal effect of such a provision, the reserving State purported to introduce a rule contrary to *jus cogens* (para. 146). Such would be the case if a State formulated a reservation to a treaty providing for the right of intervention by which it affirmed that such intervention could, where necessary, involve the use of force. As the Special Rapporteur pointed out, the invalidity of the reservation would then flow from article 53 of the 1969 Vienna Convention rather than from its incompatibility with the object and purpose of the treaty.

49. Even if it might be difficult for the Commission to enunciate certain rules in the form of draft guidelines, the extremely rich analysis of practice and the numerous observations contained in the Special Rapporteur's tenth report would surely serve as reference points for any future discussion on the compatibility of a reservation with the object and purpose of a treaty.

The meeting rose at 1 p.m.

2858th MEETING

Wednesday, 27 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/549 and Add.1, sect. D, A/CN.4/558 and Corr.1 and Add.1 [and Corr.1]–2, and A/CN.4/L.665)

[Agenda item 6]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCARAMEIA said that the tenth report was an extraordinary feat of scholarship, particularly in view of the short period of time in which it had been prepared. The report went to the heart of the issue, and for that reason merited far more time for debate than had been accorded to it in the Commission's programme of work.

2. Referring to section C, she said that codification was indeed feasible in the area of reservations incompatible with the object and purpose of the treaty: indeed, States in the Sixth Committee had been eagerly waiting for the Commission to address precisely that issue. Nor did she share the Special Rapporteur's view that the 1969 and 1986 Vienna Conventions set forth a liberal regime concerning reservations: on the contrary, she found the regime to be extremely strict.

3. In the interests of providing clear guidance to readers, draft guidelines 3.1.3 (para. 63 of the report) and 3.1.4 (para. 69) should not be combined in a single draft guideline 3.1.3/3.1.4 (para. 70). She endorsed their contents and was in favour of their referral to the Drafting Committee. On the concept of the object and purpose of the treaty, which was the centrepiece of the study, she would have liked to see a more extensive analysis of the two distinct terms "object" and "purpose". In her view, the object was the essential content of the treaty, and the purpose was the objective pursued. Any reservation that went against one or another should not be permitted. The two often went hand in hand, and in draft guideline 3.1.5 (para. 89) they were subsumed in the phrase "*raison d'être*". The draft guideline indicated that the yardstick against which the validity of reservations was to be measured was "the essential provisions of the treaty, which constitute its *raison d'être*", but that seemed an unduly high threshold. A reservation could go against a single provision which, in itself, was not a "*raison d'être*" of the treaty, but the effect of the reservation would nevertheless be extremely damaging. She would prefer the final phrase of the draft guideline to refer instead to essential provisions concerning the contents of the treaty and the objectives sought thereby.

4. Turning to draft guideline 3.1.6, she endorsed the Special Rapporteur's use of the interpretative techniques referred to in the Vienna Conventions but did not understand why some of those techniques had been omitted (para. 91). Why, for example, was no mention made of the related agreements and instruments referred to in article 31, paragraph 2, of the Vienna Conventions? Why the reluctance to use subsequent agreements and the subsequent practice of the parties, as provided for in article 31, paragraph 3 (b), of those Conventions? Reservations could be made not only at the time of ratification, but also at the time of accession, when subsequent practice of the parties was already available.