

Document:-
A/CN.4/2858

Summary record of the 2858th meeting

Topic:
Reservations to treaties

Extract from the Yearbook of the International Law Commission:-
2005, vol. I

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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.

5. The debate on application of the criterion of object and purpose had been particularly interesting, but far more time was needed to do justice to the subject. For that reason she welcomed the proposal for a joint seminar with treaty monitoring bodies. On reservations to dispute settlement clauses and clauses concerning the monitoring of the implementation of a treaty, she considered that the threshold was once again too high. It was too much to require that the provision to which the reservation was made should be the “*raison d’être*” of the treaty: it might be only one of the essential provisions. In draft guideline 3.1.13, subparagraph (i), therefore, she would replace the words “constitutes the *raison d’être*” with “constitutes an essential provision” (para. 99 of the report).
6. In draft guideline 3.1.12 on reservations to general human rights treaties, the Special Rapporteur focused on rights embodied in such treaties, but a reservation could also be made to a provision that did not enunciate a right (para. 102). Many essential provisions had to do with such issues as the implementation of rights and the way they were modified. Provisions on non-discrimination were a case in point. She would therefore replace the word “right” with “provision” in draft guideline 3.1.12.
7. Reservations relating to the application of domestic law often met with negative reactions, not on the grounds that they concerned domestic law, but because they were framed in vague and general terms. Yet when States invoked domestic law to justify a reservation, that reservation was necessarily vague and general. States were not required to refer to any specific provision, and they cited domestic law generally precisely so that their reservation could remain vague and they could retain some degree of control. Draft guideline 3.1.11, as currently worded, did not cover that point. It seemed to refer to the whole of domestic law when it spoke of “preserv[ing] the integrity of its domestic law” (para. 106 of the report). A more precise formulation was required, indicating that reservations could be accepted if they were made with reference to a specific provision of domestic law. She also found it odd to speak of the domestic law of international organizations and would prefer the phrase “internal rules”, which had been used in the topic of responsibility of international organizations.
8. Draft guideline 3.1.7 referred to vague, general language which did not allow the scope of the reservation to be determined (para. 115 of the report). But various actors might be called upon to make that determination: other States, treaty monitoring bodies or courts, for instance. The problem was not that the scope could not be determined, but rather, that it might be determined differently by different actors.
9. She had some difficulty with the Special Rapporteur’s reasoning on reservations to provisions embodying customary norms. He appeared to be saying that customary law continued to apply between the reserving State and the other parties to the treaty, but not as a treaty norm, because States might wish to exclude supervision by monitoring or other mechanisms provided for in the treaty. It seemed to her, however, that it should be made clearer in draft guideline 3.1.8 that customary law always applied between the reserving State and other parties because of its nature as customary law, not by virtue of the treaty (para. 129 of the report).
10. She strongly endorsed draft guideline 3.1.9 on “Reservations to provisions setting forth a rule of *jus cogens*” and was in favour of referring it to the Drafting Committee (para. 146). On draft guideline 3.1.10, if a treaty considered a right to be non-derogable, then it was certainly an essential part of the treaty and a reservation that went against it would go against the object and purpose of the treaty (*ibid.*). However, reservations could also be made, not with respect to a right, but regarding some aspect of the relevant regime. That should be made clearer in the draft guideline.
11. To sum up, she thought that draft guidelines 3.1.3, 3.1.4 and 3.1.9 could be referred to the Drafting Committee, but that a working group was needed to give further consideration to the remaining draft guidelines proposed. Some additional categories could be considered, for example, reservations to provisions on implementation of treaties in domestic law.
12. Mr. KOSKENNIEMI said that the report was comprehensive, well argued and balanced, a real *tour de force*, but also paradoxical. Precisely because it was exhaustive and balanced, it demonstrated the impossibility of achieving the goals it set itself. He fully subscribed to the Special Rapporteur’s statement in paragraph 91 of his report that the object and purpose of the treaty was to be ascertained in good faith, in accordance with the techniques laid down in articles 31 and 32 of the 1969 and 1986 Vienna Conventions. Yet once the object and purpose test was defined as a task of treaty interpretation, one had to conclude that, as was the case with treaty interpretation in general, it could not be controlled by pre-established rules or definitions.
13. Interpretation, as countless textbooks had pointed out, was an art and not a science. It could not be captured in methods, rules, techniques or illustrations. Any attempt to do so would automatically lead to a vicious circle in which ambiguous or open-ended words were replaced by other, equally open-ended words. The Special Rapporteur was undoubtedly right when, in paragraph 77, he said that the object and purpose of the treaty referred to the “essence” or the “mission” of the treaty. But what, in turn, did those notions mean? New expressions, “*raison d’être*” and “fundamental core”, emerged in paragraph 89 of the report. Those expressions were apt, but infected with the same uncertainty that attended the meaning of “object and purpose”.
14. He was not saying that the exercise of seeking synonyms for “object and purpose” was wholly pointless. On the contrary, it needed to be carried out—and the Special Rapporteur had done so, quite brilliantly—in order to demonstrate that the use of open-ended language was not a mistake by the drafters or an inadvertency that could be corrected by replacing one set of words by another. No: the problems lay deeper, in the nature of treaty interpretation and the role of treaties in the international legal system as transformers of State party intent into formal obligations. Treaties expressed intent: their point was the point that States wished to give them, and where States themselves did not spell out what they intended as the

mission of the treaty, their intent could not be replaced by speculation on the part of interpreters or the Commission about what that intent might be.

15. That was evident from the 1951 advisory opinion of the ICJ on *Reservations to the Convention on Genocide*. The problem the Court had faced was how to limit the subjectivity involved in a fully consensual treaty system that threatened to create chaos by allowing every State to make whatever reservation it wished to the Convention on the Prevention and Punishment of the Crime of Genocide, and every State to object to every reservation that was made, for any reason whatsoever. Such subjectivity, indeed politicization, of the Convention would have wholly undermined its mission. The Court had needed to find a foothold or standard other than the intent of States for determining which reservations might and might not be held to be valid. It had accordingly opted for the object and purpose test: a reservation was invalid if it was contrary to the object and purpose of the treaty. A non-subjective standard had thus been created against which reservations could be assessed.

16. That, of course, had not been the end of the matter. When the Court had gone on to ask itself what the object and purpose of the Convention actually was, it had only been able to say that that was for each State party to decide and that each State party exercised the right to do so individually and from its own standpoint. That led back to where one had started: the meaning and applicability of the objective standard was determined by reference to what States subjectively wanted it to mean. In seeking to escape from the anarchy of unlimited reservations, the ICJ had fallen into the anarchy of unlimited interpretations. The same structure was repeated again and again in treaty law, from *jus cogens* to the operation of *rebus sic stantibus*. On the one hand, there must be a standard other than the will of the party that determined what the parties could legitimately will; on the other hand, what that standard was and how it should be applied could be determined only by recourse to the will of the parties. Such was the liberal voluntarism of international law.

17. The Special Rapporteur himself recognized as much: in paragraph 91 he modestly suggested that while the various alternatives proposed to the “object and purpose” test would not resolve all problems, they could certainly contribute to a solution if they were “applied in good faith and with a little common sense”. That might perhaps be the case, though not in a manner that was immediately obvious. The new words did not solve the interpretation problem, but the experience of an endless accumulation of new words might, with “good faith” and “a little common sense”, lead the interpreter to a sound assessment of what might seem acceptable for any given audience. In the end, everything depended on good faith and common sense, and nothing on a particular set of words, methods or rules. He agreed with Mr. Gaja that no definition of the object and purpose test seemed necessary.

18. The bulk of the report, paragraphs 93 to 146, aimed to go beyond purely linguistic considerations, pinpointing typical cases of contested reservations in order to draw conclusions from them. That effort gave an excellent overview of the state of play with regard to the formulation of

reservations and objections thereto by reference to three types of cases: first, specific types of treaty provisions; second, specific types of reservations; and, third, specific types of treaties, namely human rights treaties.

19. Regarding the first category, the Special Rapporteur suggested that there were some types of treaty provisions to which, judging from the object and purpose test, reservations would sometimes, perhaps always, be inappropriate. He had singled out three: dispute settlement and implementation provisions; provisions embodying customary rules; and provisions setting forth *jus cogens* or other non-derogable rules.

20. While a reservation to the first category of provisions might be contrary to the object and purpose of the treaty, why should that particular category be singled out? There might be other types of provisions—even institutional provisions—regarding, for example, the funding of common activities or the establishment of panels or technical cooperation committees, which might be equally or more relevant for some of the parties to a treaty. On the other hand, provisions on dispute settlement were often included in a treaty as part of the legal formalities, but were of little interest to the signatories. What was of interest to the parties to treaties on economic cooperation, development assistance or technology transfer were the substantive provisions, rather than provisions on dispute settlement and implementation. He saw no reason to single out such provisions from among the many that might be deemed essential to the mission of the treaty. Indeed, he suspected that highlighting the importance of such clauses reflected an unwarranted bias in favour of legal activities, one that might not be widely shared outside the Commission. It was impossible to know in advance which provisions of a treaty were crucial to its object and purpose. As the advisory opinion on *Reservations to the Convention on Genocide* had revealed, that had to be assessed by individual States from their own standpoint, and there was little reason to suppose that dispute settlement and implementation provisions would be given pride of place.

21. Mr. Koskeniemi’s second objection to the singling out of specific provisions was that very often a treaty simply had no single object and purpose at all. States entered into treaties, especially multilateral ones, with differing hopes and expectations, and with differing views on what was essential. In the case of the United Nations Convention on the Law of the Sea, some States had become parties because they were keen on its provisions on navigation, others because of its maritime delimitation aspects, and others because of the rules on deep seabed mining or technology transfer. That was precisely why the Convention permitted only specified reservations.

22. But what of similar instruments that had no such provisions? Most multilateral treaties emerged as a *quid pro quo*. They had, not a single object and purpose, but a cluster of purposes that emerged out of a process involving a trade-off between conflicting considerations. In an environmental treaty that provided for financial assistance for developing countries, for example, it was the provisions on environmental protection that reflected its object and purpose from the perspective of environmental groups, whereas for the developing States the object and

purpose was the provision of funding or technology transfer. States often became parties to multilateral treaties in situations where only a part of the treaty concerned them, but concerned them vitally.

23. Thus, it was not possible to ascertain which provisions of a treaty reflected its object and purpose and should therefore not be subject to reservations, without some knowledge of the *travaux préparatoires* and the expectations and policies that had led States to subscribe to the treaty, and those provisions might and did in the case of many “trade-off” treaties differ for different States. Any unilateral, *a priori* determination that one provision could not be the subject of a reservation while another could was simply illegitimate interference in the balance created by the trade-off that the treaty represented.

24. On treaties embodying custom or *jus cogens*, he endorsed Mr. Gaja’s point that not every reservation to such a treaty was a prelude to a breach of the relevant custom or *jus cogens* rule.

25. Human rights treaties were the most controversial group, the one in which the interplay of reservations and objections had been the most intensive. However, like Mr. Gaja, he was doubtful about the value of singling them out, for two reasons. First, it was not clear what constituted a human rights treaty. When the European Economic Community had been set up in the 1950s, for example, its object and purpose had been to establish a customs union. Some time in the 1970s or 1980s, however, the Court of Justice of the European Communities had decided to re-interpret the four freedoms in the Treaty of Rome as establishing fundamental rights. Such rights had now become an integral part of the European Union’s treaty framework. Was the Treaty establishing the European Economic Community therefore a human rights treaty, although initially it had not been thought of in those terms? The designation of particular treaties as human rights treaties was not only arbitrary but also limited the degree to which any treaty provision conferring rights or benefits on individuals might be classified as a human rights treaty provision. The Commission’s own draft articles on diplomatic protection were a case in point.¹

26. What justified the separate treatment of reservations to human rights treaties was the fact that the idea of the treaty as a trade-off was almost totally inapplicable in such cases. What lent an objection to such reservations its cogency was not so much the fact that a human rights treaty was involved, as the fact that such a treaty was conceived by the parties as a common undertaking for a single purpose. However, other treaties—on environmental protection, protection of a natural resource, development assistance, social welfare, labour rights and the movement of individuals, to name but a few—were also conceived as common undertakings. Furthermore, there was no reason to suppose that human rights treaties might not sometimes be the result of conflicting considerations, bargains and expectations. One could not rule out the possibility that accession to a human rights treaty was premised, not on its human rights provisions, but upon the desire to obtain some (usually economic) benefit, provision of

which was made conditional on accession to the treaty in question. Why should a State not be allowed to invoke the object and purpose criterion to object to a reservation made to such a provision? Why should a benefit that one party wished to receive from the treaty be immune to challenge, while benefits received by another party were open to challenge?

27. In the final analysis, the assessment of the object and purpose remained dependent on such considerations. That did not mean it was impossible to imagine treaties in which all parties were genuinely motivated by a common undertaking, and in such cases a reservation to a provision that was essential to the realization of that undertaking must not be shielded from the challenge that it was contrary to the object and purpose of the treaty. Treaties involving a common undertaking were not limited to the human rights field—a field that could not be delimited by any clear criterion, since any international arrangement involving benefits (bilateral investment treaties, for example) could be described as having to do with protection of the private rights of the beneficiaries.

28. On the face of it, to regard reservations relating to domestic law and vague and general reservations as being always contrary to the object and purpose of the treaty seemed reasonable. Mr. Koskenniemi had a nagging doubt, however, that one perceived them as objectionable only where they reflected one of the two criteria he had identified as relevant, namely, that they undermined either the very basis on which a State had entered into an agreement, or else the common undertaking that the treaty had been intended to establish. A vague reservation to an incidental provision was surely not against the object and purpose of the treaty. He could therefore not see the point of singling out vagueness or non-specific references to domestic law as decisive criteria, irrespective of their effect on the common undertaking or the expectations of the parties.

29. While the Special Rapporteur’s tenth report was one of the best he had encountered in his time on the Commission, its special value lay—as he had already noted—in the way it undermined its own conclusions. Guiding the Commission through a dense thicket of arguments and considerations in an effort to pin down the meaning of “object and purpose”, it had highlighted the nature of that assessment as treaty interpretation. In so doing, however, it had shown that no general rules or methods could have an authority independent of an assessment of the nature of the common understanding that the treaty was intended to serve or the expectations of the parties. Object and purpose were what they were, as assessed by a reading of the treaty and an attempt to understand what the parties might have wished to achieve by it.

30. That effort had led the Special Rapporteur to highlight certain typical cases. His analyses were relevant and illustrative, but they demonstrated not so much the relevance of his classifications as the impossibility of making such classifications without tackling the underlying rationales that affected, and should affect, the conclusion and interpretation of treaties. Those rationales were, in his own view, twofold. First, a party should not be allowed to opt out of a treaty that involved what he had called

¹ See 2844th meeting, footnote 1.

“a common undertaking”, whether in the field of human rights, the economy, environmental protection, technical cooperation or elsewhere. Anything less would seem lacking in good faith. Second, a party should not be able to frustrate the legitimate expectations of another party by making a reservation to a provision that had been the condition of that party’s joining the treaty in the first place. Again, that seemed called for by the same criterion of good faith. Beyond those two considerations, he submitted that all the Commission could provide, and all the Special Rapporteur had provided, was a set of illustrations of how those two considerations came into play. Without an express mention of those rationales, however, the illustrations would remain incomprehensible, and doubt would remain as to where their authority as examples lay.

31. For all those reasons, he did not think that the illustrations were needed in the guidelines. All that could be said was that “object and purpose” was what it was, and the interpreter must turn to the Special Rapporteur’s report to understand that it was impossible to give clear criteria and guidance for its determination.

32. Mr. FOMBA noted that paragraph 61 of the report stated that the aim of the Guide to Practice was “to provide States with coherent answers to all questions which they [might] have in the area of reservations”. That statement should dispel some groundless fears which had been expressed. The purpose of the Guide to Practice was to facilitate the process of formulation, interpretation and implementation of reservations which were an important instrument in international legal life. That was what the Special Rapporteur had sought to do, particularly in the tenth report, and, all things considered, the undertaking had been very successful.

33. With regard to draft guideline 3.1.3 (para. 63 of the report), it was logical and important to specify that reservations which were implicitly permitted must be compatible with the treaty’s object and purpose. As for draft guideline 3.1.4 (para. 69), on non-specified reservations authorized by the treaty, the reasoning in paragraphs 65 and 68 was well founded, namely, that such reservations must be subject to the same general conditions as reservations to treaties which did not contain specific clauses and that their validity should be assessed in the light of their compatibility with the object and purpose of the treaty. Thus, the spirit and letter of the draft guideline were acceptable.

34. On the joint draft guideline 3.1.3/3.1.4 (para. 70), it was his view that, given the nature and purpose of the Guide to Practice, and for the reasons adduced by the Special Rapporteur in paragraph 71, two separate draft guidelines would be preferable. As to draft guideline 3.1.5 (“Definition of the object and purpose of the treaty”), subject to any difficulties which might exist on the interpretation of the phrases “essential provisions” and “*raison d’être*”, the wording seemed to be a step in the right direction (para. 89).

35. Draft guidelines 3.1.5 and 3.1.6 (para. 91) read in combination provided a general—albeit not ideal—definition of the object and purpose and explained how it was to be determined. In his view, it was legitimate to

transpose the principles set forth in the Vienna Conventions. With regard to the reference in square brackets to the subsequent practice of the parties, all factors, criteria and parameters that might be relevant should be taken into account, including practice. That approach was justified by the words “where appropriate”.

36. Draft guideline 3.1.13 established the principle of the presumption of compatibility, together with two clearly relevant exceptions, and, again, seemed to be on the right track (para. 99). Draft guideline 3.1.12 (“Reservations to general human rights treaties”) concerned a difficult subject which posed problems of approach and interpretation (para. 102). However, for lack of a better solution, and given that the wording was sufficiently flexible to leave scope for interpretation, it was acceptable.

37. With regard to draft guideline 3.1.11, what was important was that the State or international organization formulating the reservation should not use its domestic law as a pretext for evading a new international obligation (para. 106). On the “proper law” of international organizations, he agreed with the parallel drawn with the domestic law of States. The Special Rapporteur was right to stress that domestic law must be at the service of international law, and not vice versa, that national rules were “merely facts” with regard to international law (para. 105), and that the very object of a treaty could be to lead States to modify them. Interestingly, the media had recently reported on a case involving Germany and the European Union, in which Germany had argued that domestic law was applicable, whereas the European Union had contended that Germany must bring its domestic legislation into line with European Union law.

38. Draft guideline 3.1.7 (“Vague, general reservations”) relied on the practice of the European Court and the European Commission of Human Rights (para. 115). Its underlying idea was that when a reservation was couched in terms too vague for it to be possible to determine their meaning and scope, there was a presumption of incompatibility with the object and purpose of the treaty, always supposing that the assessment of the object and purpose did not pose difficulties of the same nature. Subject to that observation, he endorsed the draft guideline.

39. With regard to draft guideline 3.1.8, he agreed that there was no watertight separation between treaty sources and customary sources of international law (para. 129); rather, there was a dialectical link between those two categories. A convention could contain customary norms, which by their very nature had the particular virtue of linking all States, whether or not they were parties to the treaty. It therefore seemed appropriate to draw attention to two fundamental principles: first, the customary nature of the rule set forth in a treaty provision did not in itself constitute an obstacle to the formulation of a reservation; second, such a reservation must not call into question the binding nature of the rule in question in relations between the reserving State or international organization and other States or international organizations, whether or not they were parties to the treaty.

40. Lastly, draft guideline 3.1.10 had its place in the Guide to Practice (para. 146), given that the category of

non-derogable rights was well established in international human rights law, and in view of the importance of non-derogable rights and the need to preserve their legal effect.

41. In closing, he said he was in favour of referring the draft guidelines to the Drafting Committee, which should take into account the main areas of disagreement that had emerged in the debate. However, he would not object if the majority favoured setting up a working group on the topic, with a clear mandate.

42. Mr. Sreenivasa RAO congratulated the Special Rapporteur on his extraordinary effort to go to the heart of the problem and provide the best possible guidance to decision makers and practitioners. The fact that so little time was available to debate what was already a complex topic had made the Commission's task even more difficult.

43. The problem of definition discussed in paragraph 84 was at the heart of the issue. Despite close consideration of various options, it had to be concluded that it would be difficult to pinpoint the full meaning and scope of what exactly constituted the object and purpose of a treaty. It had been, and would remain, an enigma, one to which the guidelines, useful as they were, would not provide a definitive solution.

44. Draft guideline 3.1.5 on the definition of the object and purpose of the treaty was reasonable (para. 89), but it was not always easy to decide what was essential and what was not. It could even be argued that non-essential provisions sometimes became essential, because they helped to give effect to or implement essential provisions. In such cases, an absurd situation might arise in which the entire text could be said to be the object and purpose of the treaty and no reservations would be permitted. The solution lay in identifying, not the letter, but the spirit of the treaty provisions.

45. In paragraph 2 of draft guideline 3.1.6, on the determination of the object and purpose of the treaty, the words in square brackets should be omitted and the matter dealt with in the commentary, in the interests of ensuring a clear and readily comprehensible text (para. 91).

46. Draft guideline 3.1.12, on reservations to general human rights treaties, posed a host of problems, and the Special Rapporteur could probably have done little more than simply citing the importance that the right which was the subject of reservations had within the general architecture of a treaty and the seriousness of the impact of a reservation upon it as criteria for assessing the validity of a particular reservation (para. 102). However, those criteria were very general, and he wondered whether, in practice, anything other than the context and specific situations would be of much help in coming to any conclusions on the validity of such a reservation.

47. As to draft guidelines 3.1.11, on domestic law, and 3.1.7, on vague, general reservations, it simply bore noting that once again context was the ultimate guide, and that each party to the treaty must enable its object and purpose to be achieved in good faith and should desist from such reservations as they themselves knew to be contrary

thereto. In the event of conflicting views, dispute settlement procedures would of course be available.

48. He had no problem with the Special Rapporteur's observations on customary law. The distinction between customary law incorporated in a treaty provision and reservations made to it would not absolve the party from any rights or obligations otherwise stemming from treaty law. He thus endorsed draft guideline 3.1.8.

49. With regard to draft guideline 3.1.9, on *jus cogens*, his initial reaction was to say that no guideline was needed: it was a matter of general law that no treaty could be concluded which was in violation of *jus cogens*; likewise, any provision of the treaty or reservation to it which was in violation of *jus cogens* was *ipso facto* rendered inoperable by virtue of that very concept. It could also be claimed that *jus cogens* principles were of a higher order, in which case the Commission should not link them to a discussion of reservations. While he personally could live without draft guideline 3.1.9, he would be prepared to defer to the majority view if other members thought differently.

50. Mr. KEMICHA paid tribute to the Special Rapporteur for his tenth report, which constituted the cornerstone of the draft Guide to Practice, proposing no fewer than 14 draft guidelines. The Special Rapporteur's discussion of terminological points was most convincing, as was his decision to revert to the term "validity", which had the virtue of being neutral and did not prejudice the Commission's replies to a number of unresolved questions. Having noted that the validity of reservations should be studied in the light of article 19 of the Vienna Conventions (para. 9), the Special Rapporteur wisely reproduced article 19 of the 1986 Vienna Convention in draft guideline 3.1 (para. 20).

51. Although he could follow the reasoning which had led the Special Rapporteur to his proposed definition of specified reservations in draft guideline 3.1.2 (para. 49), he found the actual wording somewhat ambiguous, and in particular the phrase "reservations that are expressly authorized by the treaty to specific provisions". The Special Rapporteur's explanation in paragraph 49 that "reservations that are specified [...] must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty" was clearer.

52. The section of the tenth report on reservations incompatible with the object and purpose of the treaty was extraordinarily rich, and constituted, along with the draft guidelines contained therein, a major contribution to the work of the Commission. As the Special Rapporteur rightly pointed out in paragraph 55 of the report, the concept of the object and purpose of the treaty was "the pivot between the need to preserve the nature of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States". Furthermore, although that criterion now reflected a rule of customary law that was unchallenged, its contents remained vague and there was still some uncertainty as to the consequences of the incompatibility of a reservation therewith.

53. Draft guideline 3.1.3 was clearly of the utmost importance (para. 63), in that it set up a last barrier which protected the treaty from the ingenuity of States that wished to make certain reservations to evade an obligation set forth in a treaty to which they felt the need to accede. As to the question posed by the Special Rapporteur in paragraph 71, it seemed preferable, for the sake of clarity, to have two separate draft guidelines, rather than combining draft guidelines 3.1.3 and 3.1.4 into a single guideline.

54. In paragraphs 72 to 88 the Special Rapporteur conceded the essentially subjective nature of the concept of the object and purpose of the treaty, before singling out the key notion of the treaty's *raison d'être* in the very concise draft guideline 3.1.5 (para. 89). Draft guideline 3.1.6 transposed the principles of interpretation contained in articles 31 and 32 of the Vienna Conventions. While those principles certainly had their place in the Guide to Practice, the bracketed reference to the subsequent practice of the parties should probably be consigned to the commentary (para. 91).

55. Draft guidelines 3.1.7 to 3.1.13 covered the problems that might arise concerning the compatibility with the object and the purpose of the treaty of six categories of reservations listed in paragraph 95. Draft guideline 3.1.13 showed that reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty were not in themselves incompatible with the object and purpose of the treaty except under the two conditions specified in subparagraphs (i) and (ii) (para. 99).

56. Some authors held that the reservations regime was wholly incompatible with human rights treaties. In draft guideline 3.1.12, the Special Rapporteur had adopted a more moderate approach, but some might feel that such phrases as "the general architecture of the treaty" and "the seriousness of the impact" were still too vague and did not afford such human rights treaties sufficient protection (para. 102).

57. Reservations relating to the application of domestic law were also complex, and one might be tempted to apply the regime provided for under article 27 of the 1969 and 1986 Vienna Conventions. In paragraph 105 the Special Rapporteur rejected that approach in favour of one that was less categorical, albeit expressed in rather ambiguous terms. Moreover, the syntax of draft guideline 3.1.11, in which a restriction was followed by a double negative, made it rather difficult to read (para. 106).

58. As indicated in draft guideline 3.1.7, vague, general reservations were incompatible with the purpose and object of the treaty (para. 115). When a reservation was of unlimited scope and undefined character, other States would be unable to determine to what extent the reserving State accepted its obligations under the treaty.

59. In connection with draft guideline 3.1.8, the Special Rapporteur's convincing analysis of the judgment of the ICJ in the *North Sea Continental Shelf* case led him to suggest that the customary nature of the rule set forth in a treaty provision did not in itself constitute an

obstacle to the formulation of a reservation to that provision (paras. 128–129).

60. Draft guideline 3.1.9 made it clear that no reservations to provisions setting forth a rule of *jus cogens* were permitted (para. 146). It would be useful to indicate in the commentary that the prohibition did not result from article 19 (c) of the 1969 Vienna Convention but, *mutatis mutandis*, from the principle set out in article 53 of that Convention. The Special Rapporteur was right to treat reservations to provisions relating to non-derogable rights in a separate draft guideline 3.1.10 (*ibid.*).

61. In conclusion, he said that the fact that his comments on the report had been more descriptive than critical reflected the high quality and thoroughness of the Special Rapporteur's brilliant discussion and analysis of the issues. He therefore recommended that the draft guidelines should be referred to the Drafting Committee forthwith.

62. Mr. ECONOMIDES said that the decision taken to draw up a separate list of those members who wished to comment on the beginning of Mr. Pellet's report effectively penalized those members, as they had not been allowed to make their statements until the very end of the debate, although some of them had asked to be placed on the list of speakers several days previously.

63. The CHAIRPERSON said that the decision to have separate lists had been taken at the request of the Special Rapporteur and endorsed by the Commission as a whole.

64. Mr. PELLET (Special Rapporteur) said that Mr. Economides and other members were not being penalized; indeed, it was better to speak towards the end of a debate, having heard the views of others. He would certainly pay equal attention to all comments in his summary, irrespective of when they had been made.

65. On what he regarded as a more serious matter, he noted that, once upon a time, the Special Rapporteurs' proposals had been discussed one by one. The recent fashion for dealing with everything at the same time did not allow for any real debate to take place. That was why he had proposed that, at the very least, the first sections of his report, which dealt with very different issues, should be discussed separately. He found it regrettable that so many members had wished to comment on the beginning of the report together.

66. Mr. ECONOMIDES thanked Mr. Pellet for his masterly presentation of his tenth report on reservations to treaties. The section of the report concerning incompatibility with the object and purpose of the treaty was undoubtedly the best study of the doctrine in international law currently available. He wished to preface his comments on the report as a whole with two general remarks. First, the Special Rapporteur had not done enough to pave the way for the progressive development of law, nor had he drawn all the requisite conclusions concerning the codification of existing law. Second, there was also the problem of objections to reservations. Admittedly, the report made several references to the fact that States rarely objected to reservations. Nonetheless, it was

his experience that an absence of objections was usually attributable to political rather than legal considerations. It would therefore be mistaken to use the absence of objections as a criterion.

67. Turning to specific comments on the report in its entirety, he said that a decision on whether to use the term “validity” or “permissibility” should be deferred, pending consideration of the legal effects of reservations that were not compatible with treaty law. In the meantime, he could agree to the provisional use of the term “validity”, a concept that Mr. Pambou-Tchivounda had analysed in great depth.

68. Secondly, it was not appropriate for the Commission to take a stance on the international responsibility of States that formulated impermissible reservations. That question should be taken up on the basis of the topic on responsibility of States for internationally wrongful acts.² He therefore did not endorse the views expressed in paragraphs 6 and 7 of the report.

69. Like the Special Rapporteur, he preferred the second version of draft guideline 3.1 (para. 20), which reproduced the full text of article 19 of the 1986 Vienna Convention. As to the title, neither “Freedom to formulate a reservation” nor “Presumption of validity of reservations” seemed appropriate (para. 16). Perhaps “Limits on the formulation of reservations” would be more apt, particularly since the word “limits” was used in the 1951 advisory opinion of the ICJ and its judgment in the *North Sea Continental Shelf* case, cited in paragraphs 55 and 117 of the report respectively. The term “limits” was also more in keeping with the considerable circumspection regarding the whole question of reservations that could be inferred from a close reading of article 19.

70. With regard to draft guideline 3.1.1 (para. 32), he had only some minor editing amendments to suggest that could be taken up in the Drafting Committee, which might also consider simplifying the wording of draft guideline 3.1.2 (para. 49). However, an additional draft guideline, on the subject of implicitly prohibited reservations, was also required, to expand on article 19 (b) of the Vienna Convention and other treaty provisions, including the Charter of the United Nations, as mentioned by Mr. Gaja.

71. He had greater difficulty with draft guidelines 3.1.3 and 3.1.4 (paras. 63, 69 and 70), firstly because of the Special Rapporteur’s interpretation of article 19 (b), namely that, “*a contrario*, if a reservation [did] not fall within the scope of subparagraph (b) (because it [was] not specified), it [was] subject to the test of compatibility with the object and purpose of the treaty” (para. 66). He considered that such a reservation was, quite simply, implicitly prohibited by subparagraph (b). Secondly, any reservation permitted by a treaty, whether specified, not clearly specified or not specified at all, could not in principle be considered as incompatible with the object and purpose of the treaty. For those reasons he proposed that draft

guideline 3.1.3/3.1.4 should be amended to read: “When the treaty does not prohibit reservations, expressly or implicitly, or when it makes no mention of reservations, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.”

72. He was not in favour of the idea of dispensing with draft guidelines 3.1.5 and 3.1.6 (paras. 89 and 91). The Drafting Committee could undoubtedly improve upon the current wording, and in an area where total uncertainty reigned, it would be preferable to have some guidelines on the definition and determination of the object and purpose of the treaty than none at all.

73. Draft guideline 3.1.13 was too strict (para. 99), far more restrictive than the rule set forth in article 19 (c). It was possible that in some treaties such clauses could be essential provisions within the meaning of draft guideline 3.1.5. It should either be broadened in scope or else deleted so as to rely solely on the general rule. However, it would be ill-advised for the Commission to open the floodgates to reservations concerning dispute settlement.

74. Draft guideline 3.1.12 needed to be recast to include a real presumption against such reservations and allow them only in limited, exceptional circumstances when they were of secondary importance within the overall architecture of the treaty (para. 102).

75. Draft guideline 3.1.11 (para. 106) added nothing to the general rule set forth in article 19 (c) and should be reformulated along the lines of the amendment submitted by Peru at the Vienna Conference to the effect that the reservation must not render the treaty inoperative by making its application subject, in a general and indeterminate manner, to national law (see paragraph 109 of the report). The draft guideline thus amended could be usefully supplemented by the finding of the European Commission of Human Rights in the *Temeltasch v. Switzerland* case that “[a] reservation is of a general nature [...] when it is worded in such a way that its scope cannot be defined” (para. 84 of the decision, p. 149). Draft guidelines 3.1.7 (para. 115) and 3.1.11 might be combined in some way, given the obvious similarities between them.

76. He was in favour of reversing the rule reflected in draft guideline 3.1.8, paragraph 1 (para. 129): the customary nature of a norm set forth in a treaty provision should constitute an obstacle to the formulation of a reservation to that provision. There were several arguments in favour of that rule, most of them put forward by the Special Rapporteur. Mention might also be made in the report of the fact that the rule belonged to the field of the progressive development of the law rather than of its codification. He also noted that the theory of a “persistent objector” (para. 120) no longer had any currency in modern international law.

77. He fully endorsed draft guideline 3.1.9 (para. 146). Any reservation, irrespective of its importance, must be rejected *in toto* if it related to a rule of *jus cogens*, for reasons of international public order. Lastly, draft guideline 3.1.10 (*ibid.*) should be dealt with in the same way as draft guideline 3.1.12 (para. 102). Such

² See *Yearbook ... 2002*, vol. II (Part Two), par. (7) of the commentary on draft guideline 2.1.8, p. 46. See also article 1 of the draft articles on State responsibility for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 32, paras. 76–77.

reservations should be permitted only in exceptional circumstances, when they were of secondary importance within the overall architecture of the treaty.

78. Ms. XUE said that the tenth report on reservations to treaties was of high intellectual quality, logically cogent, well researched and thoroughly analysed. The fairly large part of the report devoted to the history of the Commission's work on relevant provisions relating to reservations in the 1969 Vienna Convention helped to put the topic into perspective.

79. With regard to the terminology used, she noted that in Chinese the words for “permissibility” and “admissibility” had more neutral connotations than “validity”, which went closer to the substance of the matter. She therefore had no difficulty in accepting the Special Rapporteur's choice of words. Given that the first part of the report was intended to examine the conditions for the validity of reservations to treaties, it was appropriate to begin the third part of the Guide to Practice by reproducing the entire text of article 19 of the 1986 Vienna Convention in draft guideline 3.1. Since that was the substantive part of the restatement of the law on reservations, it was important to reaffirm the freedom or right of States to formulate reservations to treaties and, at the same time, the need to preserve the unity of treaty regimes.

80. Draft guideline 3.1.1 set out the three types of reservations expressly prohibited by the treaty (para. 32). The first case was clear-cut; and the second, too, posed no problem. In theory, Fitzmaurice might be right in saying in his first report on the law of treaties that “[i]n those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted”³ (cited in para. 35 of the report). In treaty practice, if the terms of the treaty were sufficiently clear to restrict reservations to a certain provision or provisions, they would be unlikely to give rise to any dispute between the contracting parties. However, there could be difficulties if the terms of the relevant provision were ambiguous or too general. The third case also gave rise to no difficulty in principle. She shared the views of some members that the current wording of draft guideline 3.1.1 differed from that of the Vienna Convention, article 19 (a) and (b). Subparagraph (a) referred to a categorical prohibition of all types of reservations to a treaty, whereas subparagraph (b) allowed reservations to be formulated on two conditions, namely: where the treaty provided that specified reservations could be made and that reservations could be made only to those specified provisions. Draft guideline 3.1.1 failed to make the second condition clear.

81. While in principle she had no difficulty with draft guideline 3.1.2, two minor points required clarification (para. 49). First, the term “authorized” might be appropriate in article 19 (b) of the Vienna Conventions, since the reservation was specifically permitted under the treaty provision. Under subparagraph (c), the situation was rather more subtle. As long as the reservation was not incompatible with the object and purpose of the treaty, it

was not prohibited. However, could it then be considered as being “authorized”, or should one simply say that it was “conditionally permitted”? The accuracy of the term “authorized” was questionable, for, as the title of draft guideline 3.1 indicated, the freedom of States to formulate reservations was not conferred, but inherent, and could be restricted only by law.

82. Second, in response to queries concerning the phrase “which meet conditions specified by the treaty”, the Special Rapporteur had explained that there was an inconsistency between the French and English texts (see 2857th meeting, above, paras. 37–38). However, despite his clarification, she considered the phrase still implied that for each specified reservation there were always conditions attached, which was not true of many treaties. Since those points were mainly of a drafting nature, she recommended that the three draft guidelines should be referred to the Drafting Committee.

83. The issues raised in section C were far more substantial and substantive. However, since the Commission had received the English version of the document only a few days previously, she would simply make a few general comments. Given the importance of that part of the report to the study as a whole, it should be given further consideration in plenary session.

84. As noted in paragraph 55 of the report, the issue of compatibility with the object and purpose of the treaty was “the pivot between the need to preserve the nature of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States”. The question how to define the criterion of compatibility required not only legal perception, but also political wisdom, as Mr. Sreenivasa Rao had pointed out.

85. She endorsed the statement in draft guideline 3.1.3 to the effect that reservations were permitted to treaty provisions other than those to which reservations were specifically prohibited by the treaty, as long as they were compatible with the object and purpose thereof (para. 63). Both draft guideline 3.1.4 (para. 69) and the alternative draft guideline 3.1.3/3.1.4 (para. 70) proposed seemed unnecessary and would tend to obscure the meaning of article 19 (c) of the Vienna Convention, by appearing to address a separate category of reservations.

86. Apparently there was a logical connection between the two guidelines 3.1.5 and 3.1.6 relating to the object and purpose of the treaty, but the current draft provided neither a workable definition of the concept, nor objective elements permitting its determination. Draft guideline 3.1.5 stated that “the object and purpose of the treaty means the essential provisions of the treaty...” (para. 89). The notion “essential” was not a standard term found in treaty law or legal terminology. If it was to “constitute its *raison d'être*”, it could be said that all the treaty's provisions, except its final clauses, might be deemed “essential provisions”. That interpretation would render the argument less meaningful. Likewise, in draft guideline 3.1.6, if the essential provisions indicated the object and purpose of the treaty, those provisions should be examined before anything else in determining the object and purpose. Instead, draft guideline 3.1.6 stated

³ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

that the object and purpose must be interpreted in the light of the context, which included ordinary meaning, the preamble, annexes and the preparatory work of the treaty, as well as the subsequent practice of States (para. 91). That approach was questionable. In saying that, she did not wish to imply that the rules on treaty interpretation could not be taken into account in determining the object and purpose of a treaty; on the contrary, they were highly relevant in that context. The problem was that, if the object and purpose of a treaty could be determined by applying interpretation rules, it was unclear why there was any need for a definition of the concept in the first place. Moreover, if interpretation rules could facilitate the determination of the object and purpose, why was no direct reference made to those rules, rather than applying them in a fragmentary fashion? Thirdly, technically speaking, some of the elements to which reference was made in the draft guideline might not be needed in order to determine the object and purpose; for example, in the phrase “subsequent practice of the parties”, the word “subsequent” covered the period of time between the date at which the State concerned had become a party and the time the problem arose. That term might have some bearing on the interpretation of the provisions of a treaty, but it should not be of any relevance in the event of a reservation, since reservations should be made only at the beginning of the implementation of the treaty and when there was a need for determination of its object and purpose. Of course, the Special Rapporteur was right in saying that it was by no means easy to put together in a single formula all the elements that had to be taken into account.

87. In the section on the application of the criterion (paras. 93–146), it was unclear why the Special Rapporteur had singled out two categories of treaties—namely, dispute settlement and human rights treaties—for which he had provided separate guidelines. Both categories could be examined within the general framework of rules on reservations. The fact that more reservations tended to be made to such treaties did not signify that they presented a special or different type of legal issue which could not be handled by existing treaty law. When assessing the compatibility of reservations to a human rights treaty with the treaty’s object and purpose, the Special Rapporteur had focused on three elements: the indivisibility of the rights set out therein, the importance of the right within the general architecture of the treaty, and the seriousness of the reservation’s impact. Those criteria might perhaps be equally applicable to other treaties. The subsequent guidelines, on reservations relating to the application of domestic law, vague and general reservations and reservations relating to provisions embodying customary norms, and setting forth rules of *jus cogens* or non-derogable rights, would inevitably concern both types of treaties. It was really not necessary to formulate separate guidelines for them.

88. The Special Rapporteur categorically rejected reservations formulated in vague and general terms. But the notion of what constituted a vague or general reservation was itself vague and susceptible to subjective assessment. The draft guideline [3.1.7] therefore required further consideration (para. 115).

89. She endorsed draft guideline 3.1.11 on reservations relating to the application of domestic law, which indicated that such reservations should be compatible with the object and purpose of the treaty (para. 106). More thought should, perhaps, be given to the relationship between international obligations and domestic law.

90. The last two categories of reservations to provisions relating to customary norms, *jus cogens* and non-derogable rights and duties, were more complicated, since they involved broader legal issues such as relations between sources of law and the general principles of treaty law, for instance articles 43 and 53 of the 1969 Vienna Convention. Hence those draft guidelines [3.1.9 and 3.1.10] also required further examination and study (para. 146).

91. In sum, the tenth report offered a considerable intellectual challenge, and one to which more time needed to be devoted in plenary session.

92. Mr. YAMADA said that, regrettably, he had not been able to devote the requisite time to studying the first three sections of the tenth report on reservations to treaties. To comment on them without fully digesting the wealth of material they contained would not do justice to them. He therefore wished to defer his observations until the fifty-eighth session.

93. Progress must, however, be made on the draft text. He had no problems with the substance of draft guidelines 3.1, 3.1.1, 3.1.2, 3.1.3 and 3.1.4, which he had been able to review briefly. He hoped that the Commission would decide to refer those five guidelines to the Drafting Committee for consideration during the first week of the fifty-eighth session.

94. Mr. PELLET (Special Rapporteur), responding to Mr. Yamada’s statement, said that, in his own opinion, reference to the Drafting Committee of the five draft guidelines mentioned would be a good compromise solution. It would be wise for the Commission to refer some guidelines to the Drafting Committee for many reasons, not least that it would facilitate the Commission’s work at its next session. While he could understand the dissatisfaction of colleagues who felt that they had not had enough time to study the text and express their views on it, there was nothing to prevent the Commission from reopening the debate in 2006, provided that he had an opportunity to present the preliminary conclusions he had drawn from the deliberations thus far at the Commission’s 2859th meeting.

95. While he agreed that it was not a realistic proposition to refer all the draft guidelines to the Drafting Committee, he strongly supported Mr. Yamada’s suggestion that the five draft guidelines he had mentioned should be referred to it. There would, however, be no point in referring draft guideline 3.1.2 to the Drafting Committee without draft guidelines 3.1.1 and 3.1.4.

96. Mr. CHEE said that he required more time to study the end of the tenth report and reserved the right to speak on it in due course. His comments were therefore confined to the beginning.

97. The Special Rapporteur's reports were always challenging and offered a chance to learn more about the subject of reservations to treaties. The tenth report went to the heart of the reservations regime. However, like a number of previous speakers, he was unsure whether the use of the term "validity of reservations" was felicitous—a doubt that had been shared in 1993 by the delegation of the United Kingdom to the Sixth Committee, whose views were quoted *in extenso* by the Special Rapporteur in paragraph 4 of his report. It therefore seemed that the use of the term "validity" was inappropriate, since it denoted acceptance of the reservation by the parties. Moreover, the title of article 19 of the 1969 Vienna Convention referred to the "formulation of reservations", not to the "validity of reservations".

98. He supported draft guidelines 3.1, which simply reflected the content of article 19 of the Vienna Convention (para. 20); 3.1.1, in the light of the explanation set out in paragraph 33; and 3.1.2 (para. 49), which went somewhat further towards elucidating the meaning of article 19 (b) of the Vienna Convention. All three draft guidelines could be referred to the Drafting Committee.

99. Mr. RODRÍGUEZ CEDEÑO said that the term "validity" was not the most appropriate term in the context of reservations. "Validity" referred essentially to the conditions in which an authorized reservation was formulated. Some of those conditions were of a formal nature (such as those laid down in the Vienna Conventions, in article 19, relating to time of formulation, and in article 23, relating to procedure). For those reasons, draft guideline 3.1 was acceptable and the title "Freedom to formulate a reservation" was the correct one.

100. The Special Rapporteur had tackled the question of the object and purpose of a treaty very thoroughly and in great depth. He had endeavoured to provide a definition and the means of determining that object and purpose. Like other speakers, he personally believed that the two terms were complementary and together constituted one sole criterion to which reference was made in a number of provisions of the Vienna Conventions, such as articles 18, 31, 41, 58 and 60.

101. Draft guideline 3.1.5 defined the concept in terms of its relationship with the essential provisions of the treaty, which constituted its *raison d'être* (para. 89). It was vital to try to provide a definition and the reference to essential provisions was important, even if it was difficult to ascertain which provisions were essential and what the *raison d'être* was.

102. Draft guideline 3.1.6, concerning the determination of the object and purpose of the treaty, brought together the appropriate rules on interpretation and included a bracketed reference to the subsequent practice of States (para. 91). The object and purpose of a treaty could well evolve over time, but such practice had to be widespread, accepted by all States parties and clear enough to show exactly what evolution had taken place.

103. Turning to draft guideline 3.1.13, on reservations to clauses concerning dispute settlement and the monitoring of the implementation of the treaty (para. 99), he maintained that the two types of clauses were quite different;

one dealt with potential disputes arising from the interpretation and implementation of a treaty, the other with monitoring States parties' compliance with, or respect for, the treaty. The mechanisms involved were also dissimilar. Reservations to a dispute settlement mechanism were not incompatible *per se* with the object and purpose of the treaty, but in some cases it might appear that they were if those mechanisms could be considered as essential provisions of the treaty. For example, the Agreement establishing the International Fund for Agricultural Development contained an arbitration clause (art. 11, sect. 2) whose inclusion had been opposed by some States, including his own.⁴ Its proponents had defended its inclusion on the grounds that the nature of the Fund, an international financial institution, called for the inclusion of dispute settlement machinery capable of adopting final and binding decisions which would completely resolve any disputes that might arise. Opponents had insisted that it was necessary to include an express provision permitting reservations in relation to that mechanism. It was therefore obvious that dispute settlement mechanisms could sometimes be closely linked to the object and purpose of the treaty and could thus be essential provisions. The text of the draft guideline could perhaps be improved by making it clear that not all such reservations were necessarily incompatible with the object and purpose of the treaty. Given the difference between the two mechanisms, it might even be possible to split the guideline into two separate guidelines.

104. As for reservations relating to the application of domestic law, such reservations could be formulated only when fundamental norms of domestic law were at stake. For constitutional reasons, for example, those invoked by the Bolivarian Republic of Venezuela in the case of International Fund for Agricultural Development, a State might be unable to accept recourse to an international arbitration mechanism and might formulate a reservation. Such a reservation might, however, be impermissible because it related to an essential provision of the treaty. Draft guideline 3.1.11 needed to be read in conjunction with draft guideline 3.1.13, because both situations could arise simultaneously.

105. In concluding, he said he was in favour of referring the draft guidelines to the Drafting Committee.

106. Mr. MANSFIELD said he did not intend to comment on section C until section D became available in English. It was not yet possible to give the issues under discussion the serious reflection they deserved. In view of the brief time allocated to the discussion of the topic at the current session, he would have to defer his observations until the Commission's next session.

107. He was, however, very pleased that the Commission was finally arriving at the core of the subject, which was of real practical significance. He greatly appreciated the excellent and scholarly basis for the Commission's consideration of the topic that the Special Rapporteur had provided. Even on a preliminary reading of section C, one could not but be impressed by the quality and quantity of the information and analysis it contained, and he looked forward to debating it further, along with the

⁴ United Nations, *Treaty Series*, vol. 1059, No. 16041, p. 323.

closely related matters covered in section D, in plenary session and in a working group. While he did not yet have a considered view on the issues, his preliminary reading led him to share some of the concerns raised by Mr. Gaja, Mr. Koskenniemi and others about the main guidelines proposed in the document. While he in no way questioned the value of the report, he felt that the Commission would have to give very careful consideration to the really quite fundamental underlying issues before referring any of the proposed guidelines other than the first two [3.1 and 3.1.1] to the Drafting Committee.

108. Mr. KOLODKIN said that, like many other members of the Commission who had spoken before him, he would very much have liked to extend the debate on section C in plenary. The subject matter really deserved more thorough analysis and he did not wish to limit his comments to a few sporadic remarks. He would welcome an opportunity to go over the very interesting material thoroughly and to comment on all aspects of it. The best time to do so would be at the Commission's fifty-eighth session in 2006.

109. The CHAIRPERSON noted that a number of members of the Commission had expressed the wish to have more time to digest the contents of section C of the report. He therefore suggested that the Special Rapporteur should sum up the debate thus far at the next plenary meeting. A decision could then be taken on whether to pursue the discussion of the report at the fifty-eighth session.

It was so agreed.

The meeting rose at 1.05 p.m.

2859th MEETING

Thursday, 28 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comisário 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. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Reservations to treaties (concluded) (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 (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the Commission's discussion on reservations to treaties.

2. Mr. PELLET (Special Rapporteur) thanked all the members of the Commission who had taken part in the discussion, first, because it was always enjoyable to hear compliments, guilty pleasure that it was; members had not been stingy with them and he was grateful for that. There was always something soporific in opening tributes, however, as if one was anaesthetizing the patient the better to operate, sometimes even removing the vital organs and confining the invalid to a wheelchair for life. He had sometimes had that feeling while listening to Commission members, because with the exception of the first five draft guidelines, total evisceration was apparently indicated. To cite the most extreme views expressed, some speakers thought that draft guidelines 3.1.5 and 3.1.6 had to be excluded because they were too general, focusing instead on those that followed, while others felt it was in fact draft guidelines 3.1.7 to 3.1.13 that were superfluous. Those extreme views were minority opinions, however, and before giving a detailed account of the debate and outlining his conclusions, he wished to explain why he did not share them.

3. It was certainly not because he thought he was always right: in the past, he had acknowledged that some of his draft guidelines should be given the axe, and he was still very open to constructive criticism. As a matter of fact, he intended to demonstrate the extent to which certain constructive suggestions seemed to him promising. Nevertheless, some members of the Commission seemed at times to lose sight of the very purpose of the exercise. As Mr. Fomba had pointed out at an earlier meeting in connection with paragraph 61 of the report, it was not a matter of elaborating an abstract doctrinal construct, but of helping States and international organizations to determine what their conduct should be in relation to reservations while staying on the "straight and narrow" of the 1969 Vienna Convention and trying to find realistic solutions that were reasonably coherent and as widely acceptable as possible.

4. That, to him, was a first stab at a response to the brilliant doctrinal exposé made the day before by Mr. Koskenniemi, a highly stimulating intellectual exercise that was nevertheless, to his mind, brilliantly useless. As was often the case with the "new school of criticism", the analysis that Mr. Koskenniemi had undertaken had brilliantly deconstructed not the report before the Commission but the entire set of draft guidelines he had proposed, without offering any alternative solution. In the end he himself had had to turn those criticisms to positive advantage. Furthermore, there was a major contradiction in Mr. Koskenniemi's remarks: after completing his "demolition", he had concluded, against all expectations, that what he called the interpreters, meaning diplomats, arbitrators or judges, would be obliged in future to use the report as a reference. That showed that it was extremely useful for States to be guided by something, obviously not in the precise terms he himself had proposed, but at least along the lines he had endeavoured to indicate. And the voice of the Commission, which made itself heard through the guidelines it adopted after collectively evaluating them and through the commentary it attached to those guidelines, was surely more authoritative than his voice alone.