

Document:-
A/CN.4/2888

Summary record of the 2888th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2006, vol. I

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

guiding principles 10 and 11 could possibly be placed at an earlier point in the draft, perhaps before draft guiding principle 5.

44. Once the Commission adopted those and possibly other guiding principles, they should be set out in its report on its current session, if possible accompanied by commentaries. In concluding, he supported the reconstitution of the Working Group under the chairpersonship of Mr. Pellet.

45. Mr. MANSFIELD said he agreed with others that the Commission's work had taken a useful turn when the Working Group and the Special Rapporteur had turned their attention to specific case studies. It had been instructive to see that there were very few such cases, and that there were many differences between them. What they revealed was that the unilateral actions of States could undoubtedly produce legal effects, and that in some, probably unusual, circumstances, States could end up being bound by those actions, even when such had not been the intention of those responsible. What the cases also illustrated very clearly, however, was that unlike the situation with treaties, unilateral acts raised two considerations of policy or public good between which there was some degree of tension. Clearly, it was desirable for Government ministers to be able to make political statements and carry out actions that contributed to international peace and security without being concerned about being legally bound by some aspect of such statements or actions. It was equally important, however, that they should not lightly make statements or undertake actions on which other States might reasonably be expected to rely: they should do so only in good faith and abide by those statements or actions.

46. The Working Group had made a useful start at the previous session by preparing broad conclusions or comments on the basis of the case studies, which took some of those competing policy considerations into account. Like Mr. Gaja, he believed that the way forward was for the Working Group to carry on that work and complete some general comments, based on the case studies, that would provide useful guidance for foreign ministries and others involved in dealing with statements made by Government ministers. The work should now focus, not on the draft principles, which were far too detailed and took the Commission back to a dubious analogy with the law of treaties, but rather on the broad conclusions mentioned in the report of the Working Group at the fifty-seventh session.¹⁹⁴

47. Mr. GALICKI said that the Special Rapporteur's ninth report summed up both the positive and negative aspects of the work done over a period of nearly 10 years. Discussion of the content of the report in the Working Group would be an extremely useful exercise. One aspect of the topic that should be taken into consideration was the interrelationship between the draft guiding principles and the 1969 Vienna Convention. The Commission remained too dependent on the Convention, and the Working Group should elaborate a more independent position. The Special Rapporteur sometimes seemed to be

a slave to the provisions of the Convention, transposing certain phrases into the draft that did not fit comfortably in that context. For example, the term used in the title of draft guiding principle 8, "Termination of unilateral acts", should perhaps be reconsidered. On the other hand, one of the grounds cited for the termination or revocation of a unilateral act was a fundamental change of circumstances. In paragraph 115 of his report, the Special Rapporteur explained his reasons for departing from the "negative and conditional" wording of article 62 of the 1969 Vienna Convention; however, in his own view, that wording should be retained in draft guiding principle 8.

48. In conclusion, he would be in favour of referring the draft guiding principles to the Working Group for further consideration.

The meeting rose at noon.

2888th MEETING

Wednesday, 5 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.

Unilateral acts of States (*continued*) (A/CN.4/560, sect. F, A/CN.4/569 and Add.1, A/CN.4/L.703)

[Agenda item 6]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur, Mr. Rodríguez Cedeño, to summarize the debate on his ninth report.
2. Mr. RODRÍGUEZ CEDEÑO thanked the members of the Commission for their comments and recalled that at the previous meeting they had discussed how to proceed in order to move the work on the topic forward and had made comments on the substance of the report, some of a general nature and others relating to the draft principles presented in A/CN.4/569.
3. With regard to the procedure to be adopted, Mr. Pellet had proposed reconstituting the 2005 Working Group to consider the draft guiding principles introduced by the Special Rapporteur. The Working Group, which would be open-ended in composition, could consider the draft guiding principles and adopt those that they thought had the broadest support for submission to the plenary Commission. They might also adopt other draft guiding

¹⁹⁴ *Yearbook ... 2005*, vol. II (Part Two), p. 62, paras. 327–332.

principles if they saw fit. The Working Group would also act as a drafting group so that the wording could be better honed before presentation to the plenary Commission. Mr. Gaja, however, had proposed that the Working Group should study a number of cases and present general conclusions. The majority of the members had expressed support for the reconstitution of the Working Group, to be chaired once again by Mr. Pellet, and for the mandate that the latter had outlined. It seemed appropriate for the draft guiding principles adopted by the Working Group to be accompanied by general comments, which would not constitute commentaries in the strict sense of the term like those that normally accompanied the draft articles elaborated by the Commission, but would be more in the nature of an introduction or brief explanation. In his view, the establishment of a working group with a clear mandate would make it possible to arrive at substantial conclusions during the current session, thus fulfilling the request expressed by the majority of the States members of the Sixth Committee.

4. The possibility had been broached, moreover, that the result of the work of the current session need not be final and that the Commission could take up the topic again the following year and perhaps consider casting it in the form of a work of codification and progressive development. In that regard, he wished to stress that, to begin with, the Commission should adopt a set of non-binding guiding principles that might be useful to States in their international legal relations. It was, of course, necessary to strike a balance between the freedom of action of States and legal certainty in international relations, so that the conclusions drawn by the Commission would be acceptable to States. But if it did not adopt substantial conclusions, the Commission would seem to be casting doubt on the existence and importance of unilateral acts of States, which had always been recognized by most legal writers and in case law, the most recent example being the judgment handed down in February 2006 by the ICJ with regard to the application filed by the Democratic Republic of the Congo against Rwanda in *Armed Activities on the Territory of the Congo*, a case in which the Court had taken into account a domestic statute and a statement made by a high-level official before the United Nations Commission on Human Rights (para. 45 of the judgment). Moreover, as had been demonstrated in earlier sessions, there was a sufficient body of practice on which to base the elaboration of principles. In any case, the Commission had in the past elaborated highly important conclusions or drafted articles on topics that it had considered to be appropriate for codification and progressive development without necessarily being able to draw upon clearly established practice, a plentiful legal literature or a wealth of international court decisions or arbitral awards.

5. With regard to the substance, some Commission members felt that there was too much reliance on the Vienna regime. As Special Rapporteur he had immediately perceived the need to maintain a flexible parallel with the 1969 and 1986 Vienna Conventions, for, although the acts concerned differed, particularly with respect to their formulation, they had some very important points in common, chiefly the fact that they constituted expressions of will formulated, unilaterally or in concert, with the intention of producing certain legal effects. Naturally, it

was not merely a matter of transposing the rules of treaty law, *mutatis mutandis*, to unilateral acts. On the contrary, it was important to maintain focus on the characteristics specific to each type of act.

6. Several members had made specific comments on the draft principles submitted by the Special Rapporteur, which would no doubt be considered by the Working Group. Some had thought that the proposed definition could serve as a good working basis. One member had been of the view that unilateral acts essentially consisted of unilateral declarations by which a State assumed international obligations and that the expression “producing certain legal effects” was too broad. Opinion was divided regarding the two options offered concerning the addressees of unilateral acts in draft guiding principle 1; some members proposed combining certain of the draft guiding principles and reorganizing the whole.

7. The majority of the members had felt that it was appropriate for the Working Group to adopt a set of principles, not necessarily those appearing in the Special Rapporteur’s ninth report, and to send them back to the plenary Commission with a view to their submission for consideration by the General Assembly as part of the Commission’s annual report.

8. The CHAIRPERSON thanked the Special Rapporteur and said that there appeared to be a consensus in the Commission to reconstitute the 2005 Working Group on Unilateral acts of States and to ask Mr. Pellet to chair it. He would suggest the following formula for the mandate of the Working Group: “The open-ended Working Group chaired by Mr. Alain Pellet is charged with preparing the Commission’s conclusions on the topic ‘Unilateral acts of States’, taking into account the guiding principles proposed by the Special Rapporteur, as well as its previous work.”

9. Mr. KOSKENNIEMI, recalling that several members, himself included, were disturbed by the close parallel with the Vienna regime adhered to in the draft guiding principles proposed by the Special Rapporteur, said that the formula the Chairperson had just suggested did not reflect those concerns.

10. The CHAIRPERSON, judging Mr. Koskenniemi’s concerns to be reasonable, suggested that the formula could be amended by inserting the phrase “in the light of the plenary debate” before the words “taking into account the guiding principles”.

11. Mr. CANDIOTI said that he supported the formula suggested by the Chairperson and felt that it was important that the Working Group should be asked to prepare, not articles or principles, but general conclusions, as had been decided at the previous session, a decision reflected in paragraph 332 of the report on that session.¹⁹⁵

12. Mr. MATHESON said that he fully endorsed Mr. Candiotti’s remarks. With regard to Mr. Koskenniemi’s statement, it should be noted that the mandate of the Working Group as framed by the Chairperson referred

¹⁹⁵ *Ibid.*

not only to the draft guiding principles proposed by the Special Rapporteur but also to the previous work of the Commission, which, he presumed, also included the provisional conclusions distributed by the Chairperson of the Working Group at the previous session.

13. The CHAIRPERSON confirmed that Mr. Matheson's assumption was correct.

14. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he was somewhat surprised by Mr. Koskeniemi's statement, since the Commission had been considering the topic of unilateral acts of States for nearly 10 years with constant reference to the Vienna regime. He supported Mr. Candioti's proposal but would prefer to speak of "preliminary" conclusions. At the previous meeting several members had implied that in his ninth report the Special Rapporteur had departed from his mandate. However, he wished to point out that it was stated in the Commission's report on the work of its fifty-seventh session that "it would in any event be difficult to agree on general rules, and the Commission should therefore aim in the direction of guidelines or principles which could help and guide States while providing for greater certainty in the matter".¹⁹⁶ Based on those reflections, he had taken the liberty of proposing draft principles. Naturally, the Working Group could cast its conclusions in whatever form it deemed appropriate.

15. Mr. ECONOMIDES said that all members seemed to agree that the 1969 Vienna Convention, while constituting an indispensable reference, should be followed only where necessary. Moreover, after 10 years of work on the topic, the conclusions could be nothing else but guiding principles.

16. The CHAIRPERSON recalled that the Working Group would decide what form the conclusions on unilateral acts of States should take. If he heard no objection, he would take it that the Commission approved the mandate of the Working Group.

It was so decided.

Reservations to treaties (continued)* (A/CN.4/560, sect. G, A/CN.4/558 and Add.1–2, A/CN.4/572, A/CN.4/574, A/CN.4/L.685 and Corr.1)

[Agenda item 7]

TENTH REPORT OF THE SPECIAL RAPPORTEUR¹⁹⁷

17. Mr. PELLET (Special Rapporteur) recalled that his tenth report on reservations to treaties, which consisted of four sections (A/CN.4/558 and Add.1–2) and had been introduced at the fifty-seventh session in 2005, had not been considered in depth for lack of time. Section C on reservations incompatible with the object and purpose

* Resumed from the 2883rd meeting.

¹⁹⁶ *Ibid.*, p. 61, para. 314.

¹⁹⁷ For the discussion of the first sections of the report of the Special Rapporteur, see *Yearbook ... 2005*, vol. I, 2854th and 2856th–2859th meetings, p. 160 and pp. 177–208, and *Yearbook ... 2005*, vol. II (Part Two), pp. 64–71, paras. 343–436.

of the treaty addressed a particularly delicate matter, namely, the definition of the object and purpose of the treaty set forth in draft guideline 3.1.5 (paras. 72–89) and supplemented by draft guideline 3.1.6 on determination of the object and purpose of the treaty. That definition had been heavily criticized as too vague, and he acknowledged that not much was gained by saying that the object and purpose of the treaty meant the essential provisions of the treaty, which constituted its *raison d'être*. He had therefore sought to formulate a new definition of the object and purpose of the treaty. In paragraphs 7 and 8 of the note on draft guideline 3.1.5 (A/CN.4/572) he had proposed two alternatives, which took account of the debate at the fifty-seventh session and were not different in general meaning, although he tended to prefer the first, since the second was more ambiguous and less precise. In thinking about how to sharpen the definition of the concept of object and purpose, so fundamental not only to the law of reservations but also to the law of treaties as a whole, he had taken into account a comment by Mr. Gaja,¹⁹⁸ who had suggested borrowing some ideas from draft guideline 3.1.12 on reservations to human rights treaties, to be found in paragraph 102 of the tenth report. It had seemed to the Special Rapporteur that the sense of that draft guideline could, in fact, be generalized and that the crux of the matter was probably the impact that the reservation might have on what he had called the "balance of the treaty" in the new version of draft guideline 3.1.5. He was not particularly attached to the expression, which one might think could be made more explicit by saying, for example, that the reservation should not disturb the "balance of the rights and obligations contemplated by the treaty", but the problem there was that the formulation involved the assumption that every treaty struck a balance between the rights and obligations of the parties, which was not the case, from a strictly legal perspective, for treaties that were not based on the principle of reciprocity. Therefore he had referred to "the balance of the treaty", with the idea in mind that treaties constituted a whole and that if a reservation seriously disturbed that balance it was not compatible with the object and purpose of the treaty. For that reason he would prefer to retain the expression "balance of the treaty" and have the meaning made more explicit in the commentary.

18. With regard to draft guidelines 3.1.6 to 3.1.13, which he had introduced at length at the previous session, the comments, sometimes critical, of the members of the Commission had not been sufficiently convincing to persuade him to undertake a major rewrite. He did indeed recognize the pertinence of some of the comments, but felt that they concerned matters that, while far from trivial, could be dealt with by the Drafting Committee, when, as he hoped, those draft guidelines were referred to it. The inevitable looseness of any definition of the notion of the object and purpose of a treaty was offset to some extent by draft guideline 3.1.6, which proposed a method for determining the object and purpose of the treaty that seemed useful, indeed indispensable, in setting limits on the subjectivity of the interpreter. The method was based quite closely on articles 31 and 32 of the 1969 Vienna Convention and had not been criticized in principle; some members had merely felt that it was necessary to

¹⁹⁸ *Yearbook ... 2005*, vol. I, 2857th meeting, p. 192, para. 46.

overhaul rather thoroughly the wording and components of the provision. The somewhat loose and vague nature of the definition of the object and purpose of the treaty—even in its new version—was also offset by the 11 draft guidelines that followed, which adapted and specified the criteria to be followed in relating to particular categories of treaties or treaty provisions or particular categories of reservations. The attempt at a definition had been criticized for its empiricism, but he wished to emphasize that he had not been attempting a work of legal doctrine but had merely tried to make an inventory of the chief problems that tended to arise in practice and propose ways of viewing them that he thought would aid users of the Guide to Practice to deal with those problems when they arose in concrete situations. That approach seemed to him to be in keeping with the spirit of the Guide to Practice that the Commission should eventually adopt.

19. Draft guidelines 3.1.7 to 3.1.13 had elicited interesting reactions in 2005 from the members of the Commission. The Special Rapporteur looked forward to receiving any criticisms and any additional proposals regarding both wording and substance. As he had said earlier, the draft guidelines merely represented examples of the types of provisions or types of reservations that in practice most frequently posed the most difficult problems. If members of the Commission thought that other categories of reservations or treaty provisions posed problems of that kind and could offer concrete examples in support of the proposition, he would have no objection to extending or amending the list of examples he had chosen. However, he was by no means willing to forego illustrating the general guidance given in draft guidelines 3.1.5 and 3.1.6 through guidelines relating to specific issues. On the one hand, it would be absurd for the Commission not to try to provide a definition, however vague and general, of the concept of the object and purpose of a treaty, which was so central to the topic of reservations. That position had been supported, with only one or two exceptions,¹⁹⁹ by nearly all the members of the Commission at the previous session and by the delegations in the Sixth Committee. On the other hand, the Commission should not limit itself to such generalities. To be sure, if the Commission were elaborating a draft convention on reservations to treaties, it probably would not proceed to give examples, but since its aim was to adopt a guide to practice, it would be absurd if users of the guide could not find in it some guidance on how to view, for example, vague, general reservations, which raised so many problems in the practice of reservations to treaties, or on reservations to dispute settlement clauses, or on how to deal with reservations to treaty provisions setting forth customary norms or rules of *jus cogens*. Since, moreover, the opposite position had been taken only by a few members of the Commission, he would be resolutely opposed to the Commission's contenting itself with the generalities in draft guidelines 3.1.5 and 3.1.6, although he hoped that the draft guidelines in question would emerge from the plenary debate and the labours of the Drafting Committee in improved form.

¹⁹⁹ See the positions expressed by the United Kingdom and Sweden (speaking on behalf of the five Nordic countries), *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting (A/C.6/60/SR.14)*, p. 2, para. 5, and pp. 4–5, para. 21, respectively.

20. He recalled that the year before, Mr. Gaja had found fault with the logic of draft guideline 3.1.9. On reflection, he himself agreed that the problem of reservations to a provision setting forth a rule of *jus cogens* paralleled that of reservations to customary norms, at least from a purely logical standpoint. Only if a State intended by such a reservation to introduce or reserve the right to apply a rule contrary to *jus cogens* should the reservation be considered null and void or invalid. Technically that was correct and convincing, but the Commission was not obliged to adhere solely to logic and technical legal considerations. It could consider whether it was advisable, from the standpoint of the progressive development of international law, to go further and express a more radical vision by saying that reservations to treaty provisions setting forth rules of *jus cogens* were prohibited, which is what the draft guideline proposed. He would be pleased to hear what other members of the Commission had to say on the matter, since it was important for the Commission to give the Drafting Committee rather clear instructions on the point, which involved an issue of principle. As a last point in connection with the section of his tenth report on reservations incompatible with the object and purpose of the treaty, he would like to draw attention to the judgment of 3 February 2006 rendered by the ICJ in *Armed Activities on the Territory of the Congo*, in which the Court had confirmed its previous jurisprudence concerning the validity of reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. That ruling, which essentially represented a recent illustration of the principle underlying draft guideline 3.1.13 on reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty, reinforced his conviction that the draft article rested on a solid basis. He assured the members of the Commission that he would take into account the comments made at the previous session, as well as those that would be made at the current session.

21. Section D of his tenth report, entitled “Determination of the validity of reservations and consequences thereof”, which the Commission had not been able to consider in 2005 because of its late submission, it also contained an annex recapitulating all the draft guidelines proposed in the tenth report. The heading of this section was somewhat misleading, because the question of consequences had not been gone into completely; he had been obliged to limit himself to the conclusions that it had been possible to draw at the current stage of the work, since the questions of objections to and acceptance of reservations had yet to be considered. In that last part of the tenth report, he had tried to answer two very important and difficult questions: who was competent to assess the validity of reservations and what were the consequences of an invalid reservation. It was not altogether impossible to answer those questions if one took a pragmatic approach and showed good sense by leaving aside abstract doctrinal considerations, which on that issue tended to obscure the matter more than they clarified it. He had therefore opted for the pragmatic approach and had not yielded to the temptation, however great, to try to construct a system.

22. With regard to competence to assess the validity of reservations, he should clarify one point at the outset: what he had said on that question in his tenth report and in

the draft guidelines he was proposing applied only when the treaty itself was silent on the matter. It went without saying that States and international organizations were completely free to include, in special reservations clauses, provisions specifying the mechanisms for assessing the validity of reservations. It was also clear that in such cases the rules contained in the treaty would prevail over the general rules that he had sought to elaborate. However, that was true of all the rules set out in the Guide to Practice, without exception, since there were no peremptory rules of international law regarding reservations to treaties.

23. As it happened, such clauses relating to the assessment of the validity of reservations were extremely rare, which was perhaps regrettable. Apart from the rather unconvincing article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966 and a handful of other provisions cited in the tenth report in footnote 354 whose reference was in paragraph 151, States generally refrained from taking an explicit position on the question of who could assess the validity of a reservation in the light of the provisions of article 19 of the 1969 and 1986 Vienna Conventions, reproduced in draft guideline 3.1.

24. The problem was not very difficult when the treaty did not set up a mechanism to monitor its implementation and the treaty was not the constituent instrument of an international organization. In such a case it was clear from articles 20, 21 and 23 of the 1969 and 1986 Vienna Conventions that each State or international organization could assess, insofar as it was concerned, the validity of reservations formulated to a treaty to which it was a party, or, more precisely, to which it was a “contracting party”. In his view, the term “State” meant the entire State apparatus including, as applicable, the domestic courts. He admitted that he was aware of only a single clear case in which a domestic court had declared invalid a reservation formulated by the State, and that was in the decision handed down in 1992 by the Swiss Federal Supreme Court in the case of *F. v. R and the Council of State of Thurgau Canton*, cited several times. He had provided for the possibility that domestic courts might rule on the validity of a reservation by including the material in brackets in draft guideline 3.2, although he wondered whether it would be better to mention it in the draft guideline itself or in the commentary. It was not a vital point, but any comments the members of the Commission might make in that regard would certainly be helpful to the Drafting Committee.

25. Again with regard to that first bullet point in draft guideline 3.2, he had had second thoughts. He had proposed saying that the other contracting States or other contracting international organizations were competent to rule on the validity of reservations, but on reflection he thought that he had been wrong to limit that competence to “other” contracting parties. The *F. v. R and the Council of State of Thurgau Canton* case showed that such an assessment could also be made by the courts of the reserving State. He therefore thought that the wording of the first bullet point should be changed accordingly; that task could be left to the Drafting Committee. Otherwise, he did not believe that the first bullet point would arouse controversy. Nor should the second bullet

point of draft guideline 3.2 be controversial. Clearly, if the ICJ, for example, was called upon to settle a dispute bearing on the validity of a reservation and was competent to do so, it could rule on the dispute submitted to it. It had done just that in its Judgment of February 2006 in the case bearing on Rwanda’s reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and had ruled that the reservation was valid. The same held for arbitral tribunals, as illustrated by the decision rendered in 1977 in the *English Channel* case between France and the United Kingdom.

26. The only real problem that arose in determining who was competent to assess the validity of a reservation had to do with the competence of treaty implementation monitoring bodies and how that competence, if any, could be reconciled with the more traditional competence of States and dispute settlement bodies. There were two aspects to the problem. For one thing, it was relatively new and had not fully emerged until after the adoption of the 1969 Vienna Convention, which thus could not take it into account. For another, the issue really only arose only in connection with the human rights treaties, for the time being, at any rate, although there was no reason why it should not arise in other contexts—and in fact that seemed to be happening, in a somewhat halting fashion, in the sphere of environmental protection. Nonetheless, the problem was well known, and he had had occasion to discuss it at some length in his second report in relation to the unity of the reservations regime.²⁰⁰ The question was how to determine whether a treaty implementation monitoring body could assess the validity of the reservations formulated with respect to that treaty. The Commission had already answered that question in the preliminary conclusions it had adopted in 1997 on reservations to normative multilateral treaties, including human rights treaties.²⁰¹ For the reasons stated in paragraphs 154 to 155, 164 to 167 and 169 to 180 of his tenth report, he believed that the considerations that had guided the Commission in 1997 were still relevant and that it was possible to carry over the pertinent conclusions, or at any rate their general thrust, into the Guide to Practice.

27. For those reasons he had proposed, first, to recognize in principle, in the third bullet point of draft guideline 3.2, the competence of monitoring bodies to rule on the validity of reservations. That would satisfy the human rights treaty monitoring bodies and reflect actual practice, and the principle had already been accepted by the Commission in paragraph 5 of the preliminary conclusions.

28. Secondly, draft guideline 3.2.1 could spell out the idea, at the same time indicating that, in assessing validity, the monitoring bodies could go no further than their general mandate authorized. If they had decision-making power, they could also decide as to the validity of reservations, and their decisions in that regard would be binding on States parties. If, on the other hand, they were not vested with decision-making power and could only make recommendations, then they could only make recommendations regarding the validity of reservations.

²⁰⁰ *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 37.

²⁰¹ *Yearbook ... 1997*, vol. II (Part Two), p. 56, para. 157.

That was basically what paragraph 8 of the 1997 preliminary recommendations said and what he proposed to say, in a slightly different way, in the second paragraph of draft guideline 3.2.1.

29. Thirdly, draft guideline 3.2.2 could echo paragraph 7 of the preliminary conclusions in the form of a recommendation. He would remind those who might question whether it was appropriate to make recommendations to States in the Guide to Practice that the Commission had already answered that question in the affirmative in the past. In the case at hand, the idea was to encourage States and international organizations to insert clauses in treaties establishing monitoring bodies specifying the competence of those monitoring bodies in the matter of reservations.

30. Fourthly, draft guideline 3.2.3 could remind States and international organizations that when they had established monitoring bodies and when such bodies, acting within the limits of their competence, made a pronouncement as to the validity of reservations formulated, States and international organizations were required, depending on the type of competence, to give effect to the decisions of those bodies or to take their recommendations into account in good faith.

31. Fifthly and lastly, draft guideline 3.2.4, carrying forward the sense of paragraph 6 of the preliminary conclusions adopted in 1997, would “drive home” the point of draft guideline 3.2.1 by recalling that, when there were several mechanisms for assessing the validity of reservations, they were not mutually exclusive but reinforcing, and that would tend to enhance effective application of the provisions of article 19 of the 1969 and 1986 Vienna Conventions, provisions which had been repeated in guideline 3.1, adopted by the Commission during the first part of the current session.

32. The final section of the tenth report, paragraphs 181 to 208, dealt with the consequences of the non-validity of a reservation, one of the most serious *lacunae* in the matter of reservations in the 1969 and 1986 Vienna Conventions, which were silent on that point. It had been referred to as a “normative gap”, and the gap was all the more troubling in that the *travaux préparatoires* did not offer any clear indications as to the intentions of the authors of the 1969 Vienna Convention, but instead gave the impression that they had deliberately left the question open. However, what was acceptable in a general treaty on the law of treaties, in view of the disputes raised by the question, was not acceptable in a work whose purpose was precisely that of filling the gaps left by the 1969 and 1986 Vienna Conventions in the matter of reservations.

33. The first question to be addressed in that regard was whether the effects were the same or different if a reservation was contrary to subparagraphs (a) or (b) of article 19 of the 1969 and 1986 Vienna Conventions, on the one hand, or to subparagraph (c), on the other hand. In paragraphs 184 to 186 of his tenth report, he had indicated the reasons that had led some authors to conclude that the problem posed by subparagraphs (a) and (b) was different from that posed by subparagraph (c). However, he was of the view that such a conclusion was not justified.

First of all, the text of article 19 did not support such an interpretation and, on the contrary, showed that the three subparagraphs all served the same function; that view was confirmed by the *travaux préparatoires*, by practice, if properly analysed, and by case law. On that basis he was proposing draft guideline 3.3, which appeared in paragraph 187 of his tenth report. Members were fully at liberty to suggest improvements to the wording, but in his view the idea of the unity of article 19 was absolutely fundamental.

34. That said, it remained to determine the consequences of such invalidity. He was aware that at the current stage that question, clearly a crucial one, could not be answered exhaustively, because the consequences obviously depended to a great extent on the reactions of the other contracting parties and in particular on their acceptance of such reservations or on their objections to them. In draft guidelines 3.3.1 to 3.3.4 he had tried to answer three questions that he thought could be answered at the current stage.

35. First, he thought it was clear, for the reasons given in paragraphs 191 and 192 of his tenth report, that the formulation of a reservation that was invalid, either because it was contrary to the object and purpose of the treaty or because it was prohibited by the treaty, did not engage the responsibility of its author in the sense of the draft articles on responsibility of States for international wrongful acts,²⁰² that was the sense of draft guideline 3.3.1.

36. The second question was whether the other contracting parties could accept a reservation contrary to the provisions of article 19 of the 1969 and 1986 Vienna Conventions. That question went to the heart of the doctrinal dispute between the advocates of the theory of “opposability”—who viewed the validity of a reservation as a purely subjective matter, and the advocates of the theory of “permissibility”—who considered it an objective question and thought that validity depended solely on the criteria set out in article 19. He had tried to ignore the doctrinal quarrel and the sometimes doctrinaire, not to say “revanchist”, attitudes that it inspired, because it seemed to him that two arguments based on legal texts and one based on common sense showed that a reservation that did not fulfil the conditions for validity set forth in article 19 of the 1969 and 1986 Vienna Conventions, and repeated in draft guideline 3.1, was null and void. That was the sense of draft guideline 3.3.2.

37. The first textual argument, which the legal literature generally overlooked, was based on article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions, which showed that a reservation could not be “established” unless it was in accordance with, in particular, article 19. It followed *a contrario* that if a reservation was not in accordance with article 19—in other words, if it did not fulfil one or another of the conditions set forth in that article, or in guideline 3.1—it was not established, which he believed was another way of saying that it was null and void and could not produce effects. The second textual argument was based on article 19 itself, which excluded even the *formulation* of such reservations for

²⁰² See footnote 8 above.

any of the three situations it contemplated. States could not formulate such reservations and, if they did, those reservations would have no effect. Lastly, the common sense argument was that only such an interpretation could make sense of article 19, since otherwise, if a reservation that did not fulfil the conditions of article 19 was not considered null and void, the article had no point and was devoid of meaning. It followed, moreover, that the other contracting parties, acting unilaterally, could not remedy that nullity. Otherwise, as explained in more detail in paragraphs 201 to 203 of the tenth report, States or international organizations acting independently could destroy the unity of the treaty regime, flying in the face of the collectively expressed will of the parties, which would be incompatible with the principle of good faith. That was the idea expressed in draft guideline 3.3.3, proposed in paragraph 202 of the report.

38. On the other hand, it was not at all clear to him that the contracting parties could not do collectively what they could not do unilaterally. If all the parties accepted a reservation, they could be considered to be amending the treaty by unanimous agreement, as article 39 of the 1969 and 1986 Vienna Conventions allowed them to do. That was one of the possible consequences of article 39 with respect to reservations. But such an amendment of the treaty could not come to pass in an underhanded fashion, and the absence of an express objection should not be sufficient to validate, for example, a reservation prohibited by the treaty or contrary to its object and purpose. In order for a State to be exempted from respecting a provision of the treaty or the object and purpose of the treaty, the contracting parties must be aware that they were agreeing to a fundamental amendment of the treaty. With that in mind, he had proposed draft guideline 3.3.4, which expressed that idea, but he acknowledged that, in the absence of clear practice, it partook more of the nature of progressive development of law than of codification *stricto sensu*.

39. In concluding the introduction of his tenth report, the Special Rapporteur expressed the hope that at the conclusion of its debate the Commission would wish to refer to the Drafting Committee the draft guidelines presented in his report that had not been able to be considered in detail at the fifty-seventh session in 2005, namely, draft guideline 3.1.5, as presented in his note (A/CN.4/572); draft guidelines 3.1.6 to 3.1.13; and draft guidelines 3.2 to 3.2.4 and 3.3 to 3.3.4, presented in his tenth report.

40. Mr. GAJA said that he appreciated the flexibility the Special Rapporteur had shown in striving for a formula that would better define reservations incompatible with the object and purpose of a treaty. However, he would like to make two remarks concerning the first of the proposed alternatives for draft guideline 3.1.5. First of all, he did not quite grasp why a reservation, in order to be incompatible, should have to disturb the balance of the treaty. The notion of balance, in the sense in which the term was being used in the draft guideline—namely, the balance between the positions of the different parties—was not necessarily applicable to all treaties, particularly those relating to human rights. Moreover, the object and purpose of a treaty meant not the essential rules, rights

and obligations, but the aim underlying those essential rules, rights and obligations. The object of a treaty might be, for example, the protection of human rights or of the environment, not the specific rules stipulating the way that aim should be pursued. That distinction between the object and purpose of the treaty and the provisions of the treaty could be seen in article 60, paragraph 3 (b), of the 1969 Vienna Convention.

41. Mr. MATHESON said that it was helpful that the members of the Commission had had the opportunity to reflect at length on the tenth report on reservations to treaties between the 2005 and 2006 sessions. He was pleased that the Special Rapporteur had emphasized that the use of reservations encouraged the participation of States in treaty regimes, that he had avoided any undue presumptions against the validity of reservations and that he had not created different legal regimes for specific types of treaties. His remarks would deal only with the wording of the draft guidelines that had not yet been referred to the Drafting Committee.

42. In the new version of draft guideline 3.1.5, the reference to the “essential rules, rights and obligations” was an improvement over the phrase “essential provisions” and was a better way to describe the *raison d’être* of a treaty, since the object and purpose was not necessarily defined in any particular set of articles but emerged from the treaty as a whole. He would prefer the first of the proposed alternatives, although better terms than “architecture” and “balance” might be found for the English text.

43. In draft guideline 3.1.6, paragraph 2, the reference to “the articles that determine [the] basic structure” of the treaty might give the impression that the object and purpose of a treaty was to be found in certain key provisions of the treaty, which was not necessarily the case. He would suggest deleting them and also favoured deleting the language in square brackets concerning subsequent practice, since the intention of the parties at the time of the conclusion of the treaty was the essential consideration.

44. With regard to draft guideline 3.1.7, even though reservations whose scope could not be determined because they were worded in vague, general language were undesirable, they were not necessarily incompatible with the object and purpose of the treaty. They might in fact affect only matters of lesser importance. The language should therefore be recast to say that such reservations were incompatible with the object and purpose if they vitiated the essential substance of the treaty.

45. He could support draft guideline 3.1.8, which offered a sensible treatment of the possibility of a reservation to a treaty provision that set forth a customary norm. He also supported draft guideline 3.1.9, but thought that the language needed some adjustment. As it stood, the draft guideline ruled out any reservation to a provision setting forth a rule of *jus cogens*, but it was possible to formulate a reservation to some aspect of such a treaty provision without contradicting the *jus cogens* norm itself. Therefore the guideline should merely say that such reservations were prohibited if they were inconsistent with the *jus cogens* norm in question.

46. Draft guideline 3.1.10 rightly recalled that account must be taken of the importance which the parties had conferred upon non-derogable rights. However, he would suggest saying that a reservation might be formulated to a treaty provision relating to non-derogable rights provided that it was not incompatible with the object and purpose of the treaty as a whole, rather than with the object and purpose of the provision in question or with the essential rights and obligations arising out of that provision.

47. He supported draft guideline 3.1.11 and also draft guideline 3.1.12, which treated the question of reservations to general human rights treaties in a flexible manner, but he would suggest that the wording should refer to the “relationship among” rather than the “indivisibility of” the rights set out therein, because not all rights in such treaties were necessarily indivisible.

48. The chapeau of draft guideline 3.1.13 properly stated that a reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty was not, in itself, incompatible with the object and purpose of the treaty. However, subparagraph (i) should make it clear that such a reservation was not incompatible unless it hampered the operation of the provision in question, even if the provision did constitute the *raison d'être* of the treaty. In subparagraph (ii), the reference to a treaty provision that the author had previously accepted seemed unnecessary and could be deleted.

49. With regard to draft guidelines 3.2 and following, which dealt with competence to assess the validity of reservations, the phrase “competent to rule on” in draft guideline 3.2 suggested that the bodies in question would have the right to make a conclusive determination as to the validity of a reservation. It would be better to say that they were “competent to comment upon” or at most “competent to assess”. Moreover, the chapeau should make it clear that competence was not automatically assumed where the treaty itself did not provide for it. Lastly, the reference in brackets to the domestic courts was unnecessary and the reference to monitoring bodies was superfluous, since they were dealt with in the next draft guideline.

50. In draft guideline 3.2.1, it should be specified that a monitoring body was competent “to the extent provided by the treaty in question”. A similar clarification should be added to both sentences of draft guideline 3.2.3, again in order to avoid giving such monitoring bodies competence that the parties may not intend. In draft guideline 3.2.2, the matter of the second sentence could be better addressed in the commentary.

51. Draft guideline 3.3 was correct in substance, but the words “express or implicit” in the first line should be deleted, since the Commission had already decided not to include references to implicit prohibitions in the earlier guidelines. The final clause could also be deleted.

52. Draft guideline 3.3.1 was also correct in substance, although the wording in English might be improved. Draft guidelines 3.3.2 and 3.3.3, which concerned the nullity of invalid reservations, raised questions that it would be premature to decide at the current stage of the

work. It would also be prudent to defer a decision on draft guideline 3.3.4, because it raised the question of whether an invalid reservation might nonetheless be accepted by the other parties. In any event, as currently formulated, the guideline might encourage the acceptance of reservations contrary to the object and purpose of the treaty.

53. In conclusion, he would propose referring draft guidelines 3.1.5 to 3.3.1 to the Drafting Committee and giving further thought to draft guidelines 3.3.2 to 3.3.4.

The meeting rose at 12.05 p.m.

2889th MEETING

Thursday, 6 July 2006, at 10 a.m.

Chairperson: Mr. Giorgio GAJA (*Vice-Chairperson*)

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/560, sect. G, A/CN.4/558 and Add.1–2, A/CN.4/572, A/CN.4/574, A/CN.4/L.685 and Corr.1)

[Agenda item 7]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. MOMTAZ said that the excellent study contained in the Special Rapporteur’s tenth report on reservations to treaties would convince not only those most sceptical about the usefulness of the exercise which the Commission had undertaken, but also those in the Sixth Committee who were of the view that it had lasted long enough and should be brought to a rapid close. The report not only cast scholarly light on the inadequacies of the 1969 Vienna Convention, which the Special Rapporteur rightly referred to as normative gaps, but also revealed the difficulties he had encountered in overcoming them by relying on State practice and that of monitoring bodies, especially since the issues raised were very sensitive and often controversial. The Special Rapporteur should be encouraged to continue in his task.

2. He would begin by focusing on the two new alternative versions of draft guideline 3.1.5 contained in paragraphs 7 and 8 of the note (A/CN.4/572) that the Special Rapporteur had produced in response to criticism of the initial version. Personally, he was in favour of the first option, entitled “Definition of the object and purpose of the treaty”, which was much clearer than the version presented in the tenth report, because it no longer referred merely to the *raison d'être* of the treaty in defining its