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Summary record of the 2889th meeting

Topic:
Reservations to treaties

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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, 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. Candidoti, 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. Montaz, Mr. Niehaus, Mr. Opperi Badan, Mr. Pellet, Mr. Sreenivas Rao, Mr. Rodriguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


[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
object and purpose. He shared Mr. Gaja’s concern that the phrase “balance of the treaty” was suitable only for a certain category of treaties, and did not cover human rights conventions, for which by nature no balance needed to be sought.

3. With regard to the chapter on reservations incompatible with the object and purpose of the treaty and to draft guideline 3.1.6 on the determination of the object and purpose of the treaty, Mr. Momtaz was firmly in favour of deleting the square brackets around the words “and the subsequent practice of the parties”, at the end of paragraph 2. The subsequent practice of the parties to a treaty and its consequences for the scope of the treaty obligations entered into by those parties had been the subject of the Commission’s attention during the elaboration of the draft articles on the law of treaties, and a draft article had even been devoted to it. With a view to preserving the stability of treaty instruments, the Vienna Conference had unfortunately decided not to retain the draft article in question. That was particularly regrettable in view of the fact that the practice of the Human Rights Committee and the case law of the ICJ, in particular the Court’s advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and its recent judgment in Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), had clearly shown that the subsequent practice of the parties had greatly expanded the temporal and spatial scope of States parties’ obligations under the International Covenant on Civil and Political Rights. In his view, the subsequent practice of parties to a treaty could not only change the scope of a treaty but also, as a knock-on effect, influence the definition of its object and purpose. However, it was not his intention to challenge the Special Rapporteur’s approach: the examples cited to illustrate the use of the criterion of the object and purpose of the treaty were well chosen.

4. According to draft guideline 3.1.12 (Reservations to general human rights treaties), account should be taken of the indivisibility of the rights set out in human rights treaties. Should that be interpreted to mean that a reservation concerning one of the rights in such a treaty would be contrary to the object and purpose of the treaty because the rights to which the treaty referred formed an indivisible whole? In his view, such an interpretation would be going too far.

5. He particularly welcomed paragraph 2 of draft guideline 3.1.8 (Reservations to a provision that sets forth a customary norm), because it discouraged States from making reservations to such provisions in the hope of freeing themselves from obligations based on customary norms.

6. With regard to the section on determination of the validity of reservations and consequences thereof and to draft guideline 3.2 (Competence to assess the validity of reservations), he was in favour of deleting the reference in the first indent to domestic courts, for the reasons set out in paragraph 168 of the report. As to the last indent, he wondered whether, in the interests of clarity, it might not be preferable to refer to treaty implementation monitoring bodies that might be established “within the framework of”, rather than simply “by”, the treaty.

7. Draft guideline 3.2.1 (Competence of the monitoring bodies established by the treaty) did not pose any difficulties, but it would gain in precision if specific reference was made to monitoring by the depositary of the treaty, since that was one of the achievements of the Guide to Practice.

8. In draft guideline 3.2.2 (Clauses specifying the competence of monitoring bodies to assess the validity of reservations), he was opposed to the reference to “protocols to existing treaties [which] could be adopted to the same ends”, because of the risk that States parties to such a treaty might use such a possibility to denounced the past activities of the monitoring bodies which had interpreted their mandate in a broad manner. It would be a retrograde step and would certainly not help promote human rights in the world.

9. On draft guideline 3.3.1 (Non-validity of reservations and responsibility), he thought that only the first sentence should be retained. It was not for the Commission to say that a non-valid reservation did not engage the responsibility of its author, as such an assertion might encourage States to make non-valid reservations in the belief that they did not engage their responsibility at international level. On the contrary, the draft guideline should alert States to the consequences, in terms of their international responsibility, of their failure to comply with the provisions of a treaty to which they had formulated an invalid reservation.

10. On draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), he noted, first, that the title was not in line with its content: it referred to a collective acceptance, whereas in reality, the issue was the collective lack of objection to an invalid reservation. It might perhaps be better for the title to read: “Effects of the absence of objections by States parties to an invalid reservation”. Secondly, the reference to express consultation by the depositary was unclear: in point of fact, the role of the depositary in such circumstances would be, not to “consult” the parties, but to draw their attention to the invalidity of the reservation.

11. Mr. Sreenivasa RAO, having commended the Special Rapporteur for his scholarly, courageous and sometimes controversial tenth report, said that in his view, the new proposals for draft guideline 3.1.5 set forth in the Special Rapporteur’s note (A/CN.4/572) were no improvement on the earlier version to be found in the tenth report and its annex. The Special Rapporteur had himself noted that the object and purpose of a treaty were something of an enigma, that it was by no means easy to put together in a single formula all the elements to be taken into account, and that such a process undoubtedly required more “esprit de finesse” than “esprit de géométrie”, like any act of interpretation, for that matter—into which category the process fell. The Special Rapporteur had introduced new elements, such as “rules”, “rights” and “obligations”, and

204 Ibid., p. 181, article 27, paragraph 3.
new language, all of which, while well taken, could create problems of interpretation in the commentary. Moreover, whether such rules, rights and obligations were “indispensable to the general architecture of the treaty” had yet to be determined. The Special Rapporteur had further complicated matters by introducing, by way of explanation, the phrase “the balance of the treaty”, which once again could give rise to confusion and differing interpretations: as Mr. Gaja had noted, it could refer to the balance of rights and interests of the parties, or, as the Special Rapporteur himself had pointed out, it could also refer to the rights and obligations incorporated in the treaty itself. The category to which it belonged was ultimately a matter to be assessed and interpreted in the particular context of a given treaty. Regardless of the formulation used, that process could not be avoided. Accordingly, he preferred the earlier version of draft guideline 3.1.5; the commentary could explain the main difficulties involved and how to tackle them.

12. The next question was whether the Guide to Practice should distinguish between the consequences of invalidity of reservations as a result of their incompatibility with article 19 (a) and (b), on the one hand, or with article 19 (c), on the other, of the 1969 Vienna Convention. The Special Rapporteur had rightly noted that regardless of whether article 19 (a) and (b) or article 19 (c) was applied to judge the validity of a reservation, it should result in the same conclusions: if a reservation was incompatible with them, it was invalid. The question of who was to judge was the crux of the matter, because there was in fact a difference: if a reservation was incompatible with them, the validity of a reservation, it should result in the same conclusions: if a reservation was incompatible with them, it was invalid. The question of who was to judge was the crux of the matter, because there was in fact a difference: under article 19 (c), no third party or authoritative forum was designated to assess its validity, assessment being left to individual States. Thus, a dual regime had emerged over the years: it was first and foremost for the State formulating the reservation to assess whether its reservation was or was not compatible with the object and purpose of the treaty. Once a State had decided that it was, it formulated the reservation. However, since the reservation affected its relations with others, other States also had the right to decide whether or not the reservation was compatible. An inevitable consequence and a well-established practice was that a State which had made a reservation was considered to be a party to the treaty by those States that regarded such a reservation as compatible with the object and purpose of the treaty, and considered not to be a party by those other States that regarded the reservation as incompatible with the object and purpose of the treaty. That duality of regimes was a fact, and the normative gap in the 1969 Vienna Convention had been deliberate; the question was whether the Commission needed to fill it in the Guide to Practice. In his own view, the gap should be left. There was good reason not to unravel an existing, functioning regime, not only because it would be difficult to promote a compromise on the matter in a guideline, but also because the Guide to Practice should not risk diminishing its authority in the eyes of States by including material of a controversial nature. Accordingly, the Commission should perhaps suspend consideration of draft guidelines 3.3 and 3.3.1 to 3.3.4.

13. At the outset, there had been a strong feeling in the Commission that the treaty bodies were overstepping their authority in assessing the validity of reservations. However, following interaction between the Commission and various human rights treaty bodies, it had become clear that, in appropriate circumstances, they were perfectly justified in making such assessments.

14. The Special Rapporteur had noted that the legal validity of such assessments could not exceed the limits of the competence assigned to them under the treaty; it was thus only logical to provide in draft guideline 3.2.2 for clauses specifying the limits of the treaty body’s competence. The Special Rapporteur seemed to be suggesting that if only a few parties objected, a reservation which was otherwise incompatible with the object and purpose of the treaty, and thus null and void, was permissible, whereas, in cases involving a large number of parties, there was room for consultation. There appeared to be a contradiction in claiming that if one or two States objected, the reservation was null and void, whereas when several objected, it was not. He sought clarification in that regard.

15. Mr. CANDIOTI, after commending the report’s outstanding qualities, said he supported the approach adopted by the Special Rapporteur and his important contribution to establishing a definitive understanding of the object and purpose of a treaty, thus filling out what had been left unstated in the 1969 Vienna Convention with regard to important considerations such as the obligation not to defeat the object and purpose of a treaty prior to its entry into force. Of the alternative proposals contained in the Special Rapporteur’s note on draft guideline 3.1.5 (A/CN.4/572), his preference would be for the latter formulation, to be found in paragraph 8, which was a great improvement on the previous version and should be referred to the Drafting Committee.

16. Turning to the question of validity, he said he had long been uneasy about the use of the term “null and void” in relation to reservations. The 1969 Vienna Convention referred to reservations being “prohibited” or “authorized”; and to refer to nullity or invalidity would be to introduce a confusion of categories. He would prefer the use of the words “authorized”, “permissible” and “impermissible”.

17. Mr. ECONOMIDES said that the drawback to the version of draft guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty), preferred by Mr. Candioti, was that the phrase “serious impact” would make the provision extremely restrictive, since it seemed to exclude any lesser degree of impact. That wording surely ran counter to the provisions of the 1969 Vienna Convention.

18. Mr. PELLET (Special Rapporteur) said that, by definition, a reservation had an impact on the rules of a treaty, by virtue of article 2, paragraph (d), of the 1969 Vienna Convention. The threshold for reservations incompatible with the object and purpose of the treaty needed to be higher. As for the proposal by Mr. Momtaz that, in draft guideline 3.2 (Competence to assess the validity of reservations), the phrase “established by the treaty” should be replaced by the phrase “established within the framework of the treaty”, he had no objection to the proposed change but questioned the need for it.
19. The CHAIRPERSON noted that the phrase “within the framework of the treaty” would apply to a body such as the Committee on Economic, Social and Cultural Rights, which had been established, not by the International Covenant on Economic, Social and Cultural Rights, but at a later date.

20. Mr. MOMTAZ said that his intention had been to highlight the fact that the provision would apply equally to treaty monitoring bodies that had not yet come into being. However, the existing version covered that situation.

21. Ms. ESCARAMEIA said she was disappointed to hear Mr. Momtaz play down the importance of his proposal. As the Chairperson had said, there were situations in which a monitoring body was established not by the treaty itself but, for instance, by a subsequent protocol. Still more pertinent was the question of powers: several human rights treaty monitoring bodies had been granted additional powers by protocols, especially in the area of considering claims from individuals. Given that the Human Rights Council had a mandate, at the moment, to negotiate a protocol to enlarge the powers of the Committee on Economic, Social and Cultural Rights, the phrase “within the framework of” was surely more comprehensive than the word “by”.

22. Mr. Sreenivasa RAO said that the question was of little account. The protocols associated with a treaty, granting a given body further powers, became part of the totality of the treaty; accordingly, fears that the existing wording would be restrictive were unfounded.

23. Mr. MOMTAZ said that while he shared Ms. Escarameia’s view as to the importance of the issue, he was satisfied that the existing wording would adequately cover the problem. The issue would have been more contentious if the phrase in question had been worded “established by a treaty”.

24. Mr. CHEE said it seemed to him that the “treaty implementation monitoring bodies” were a subject of the dispute settlement bodies referred to in the second indent of draft guideline 3.2.

25. Mr. ECONOMIDES sought reassurance that the phrase “dispute settlement bodies that may be competent to interpret or apply the treaty”, in the second indent of draft guideline 3.2, covered the ICJ, which might be competent pursuant, not to a treaty, but to a specific undertaking to that effect.

26. Mr. GAJA, speaking in his capacity as a member of the Commission, said that the section of the tenth report on determination of the validity of reservations and consequences thereof was a valuable contribution to the consideration of a number of fundamental questions relating to reservations. Although the Special Rapporteur’s conclusions were acceptable in the main, the question of how to assess the validity of reservations covered by article 19 of the 1969 Vienna Convention gave rise to some difficulties, as Mr. Sreenivasa Rao had also noted. As stated in paragraph 181 of the report, nothing in the text of the 1969 Vienna Convention indicated how article 18 related to article 20, concerning acceptance of reservations and objections. Owing to the “normative gap” thus created, it was by no means certain—and nothing in the text of article 20 of the 1969 Vienna Convention gave any indication in that direction—that the rules of article 20 applied also to invalid reservations or that the presumption in article 20, paragraph 4, as to the effects of an objection applied also, for example, in the case of reservations prohibited by a treaty. In other words, the question was not the distinction between subparagraphs (a), (b) and (c) of article 20, paragraph 4, but whether article 20 as a whole applied only where there was already a valid reservation, which a State could accept or not, or whether, on the contrary, it was a general provision, applying to any reservation, whether or not permissible.

27. With regard to reservations covered by article 19 of the 1969 Vienna Convention in its advisory Opinion concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ had found that it was for each State party to assess the validity of a given reservation, with the result that, if that reservation was held invalid, no contractual relationship existed between the State that made the reservation and the State that objected to it. If that was the regime established by the 1969 Vienna Convention, it was essential that it should be reflected in the draft guidelines. If, on the other hand, it was the provisions of article 20 that should be applied in assessing the validity of reservations, that should also be spelled out in a draft guideline. That normative gap in the wording of article 19 needed to be filled. While the approach he advocated could give the regime of reservations greater coherence, it should also be borne in mind that, in practice, contracting States often relied on article 20 when objecting to a reservation that they considered incompatible with the object and purpose of the treaty, while explicitly stating that contractual relations nevertheless existed between themselves and the State that had made the reservation. That State practice should be accorded fuller consideration in what set out to be a guide to practice. It was too important to be overlooked. If the Commission wished that practice to change—thereby ruling out the possibility of regarding as valid a reservation considered incompatible with the object and purpose of the treaty—it should draw States’ attention to the fact that it was not in line with the 1969 Vienna Convention and should be abandoned.

28. Turning to the role of the monitoring bodies, he said that the basic problem to be addressed with regard to the assessment of the validity of a reservation by a monitoring body was—apart from the effect of its deliberations, which clearly depended on the treaty in question—whether such a body should take account of the positions adopted by the contracting States in respect of the validity of a reservation. According to paragraph 165 of the tenth report, it should indeed do so. Such an approach was perfectly tenable, but it ran counter to that taken by the human rights treaty monitoring bodies themselves, which had never set out to assess objections or the absence thereof by States parties with regard either to article 19 or to article 20 of the 1969 Vienna Convention. They considered the question of the validity of a reservation as if the contracting State in question had waived its prerogative and allowed the monitoring body to settle the matter.
29. Lastly, Mr. GAJA wished to support two concerns raised by Mr. Matheson. First, it seemed premature to say, in draft guideline 3.3.2 (Nullity of invalid reservations), that “[a] reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void”. Such a guideline could give the impression that the Commission considered that reservations not in conformity with article 19 of the 1969 Vienna Convention had no consequence for the participation in the treaty of the State making the reservation; in other words, that invalid reservations should be considered not to exist. The question should be considered further with a view to eliminating any ambiguities. Second, with regard to draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), he believed that, in the absence of relevant State practice, the draft guidelines should not countenance the possibility that States might derogate from the reservations regime of a treaty. It was nevertheless tacitly understood that a unanimous agreement could affect the reservations regime. It was important to spell out in the report or commentary that such agreement should be reached by the competent authorities of each State.

The meeting rose at 11.15 a.m.

2890th MEETING

Friday, 7 July 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOUT-TCIVOUNDA

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. Montaz, Mr. Niehaus, Mr. Opetti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.


[Agenda item 7]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Ms. ESCARAMEIA thanked the Special Rapporteur for his very detailed study on reservations to treaties. She was sorry that the Commission had allotted so little time for the consideration of such a complex topic, which was of considerable interest to the entire international community.

2. With regard to reservations that were incompatible with the object and purpose of a treaty, she said that there was an additional category of reservations that merited study, namely reservations to provisions concerning the implementation of treaties through domestic law. Many treaties, particularly human rights treaties, were non-self-executing and thus became inoperable if a reservation was formulated to the provision by which they were incorporated into national legislation.

3. As for the definition of the object and purpose of the treaty, discussed in the Special Rapporteur’s note (A/CN.4/572), she believed that the threshold of raison d’être was too high. Both versions of draft guideline 3.1.5 set far too many conditions. A reservation was made to a specific rule and not to the object and purpose of the treaty, which could only be discerned from the treaty as a whole. Yet a treaty often had more than one object, and if a particular provision concerned one of the objects without affecting the raison d’être of the treaty it might nevertheless affect a significant part by going against the object and purpose of the treaty. Such a reservation must therefore be excluded. As for the determination of the object and purpose of the treaty (draft guideline 3.1.6), she was in favour of keeping the bracketed reference to subsequent practice for the reasons given by Mr. Montaz at the preceding meeting.

4. In draft guideline 3.2 as proposed in the tenth report (para. 167), which dealt with competence to assess the validity of reservations, the reference to domestic courts should be retained. It was important to distinguish between bodies whose assessments were merely recommendations and those whose assessments had binding consequences, such as courts, including domestic courts. In discussing dispute settlement bodies, she thought that special reference should be made to judicial bodies because their decisions could have different consequences from those emanating from the decisions of other bodies.

5. Draft guideline 3.2.1, on competence of the monitoring bodies established by the treaty, stipulated that the findings made by such bodies in the exercise of such competence should have the same legal force as that deriving from the performance of their general monitoring role. However, several of those bodies had quasi-judicial functions in addition to their general monitoring role. Acting like courts, they could rule on complaints not only from States but also from associations and individuals. Although their decisions did not have the force of a sentence, they had often been enforced by States, including in cases where compensation had been ordered. It was also unclear whether such bodies with quasi-judicial functions were covered by the second sentence of draft guideline 3.2.3 (Cooperation of States and international organizations with monitoring bodies), or whether that sentence referred only to courts. As for draft guideline 3.2.4, she felt that when there was a plurality of bodies competent to assess the validity of a reservation, an indication should be given that some assessments were more binding than others. All such bodies should not be lumped together as if they were identical; instead, it should be determined what the effect would be on the reservation if the assessment was made by a judicial or a quasi-judicial body.

6. While she supported draft guideline 3.3, on the consequences of the non-validity of a reservation, she did not agree entirely with draft guideline 3.3.1, which stipulated that the formulation of an invalid reservation did not engage the responsibility of the State or international