

Document:-  
**A/CN.4/2917**

**Summary record of the 2917th meeting**

Topic:  
**Reservations to treaties**

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Although it would be out of the question to oblige States to give reasons for the reservations which they formulated, even if they did so relatively often, nothing prevented the Commission from recommending that they should indicate the reasons for their reservations, out of a concern for transparency which would be to their credit. He acknowledged that he had not given any thought to that point during the consideration of the question of the formulation of reservations, and he would be pleased if the members of the Commission expressed their views on the matter during the debate and indicated whether they deemed it useful to add a draft guideline along those lines. If that suggestion met with support, he would submit a formal note so that the omission could be addressed.

*The meeting rose at 1.05 p.m.*

## 2917th MEETING

*Thursday, 10 May 2007, at 10.10 a.m.*

*Chairperson:* Mr. Ian BROWNLIE

*Present:* Mr. Al-Marri, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

### Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

#### ELEVENTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. PELLET (Special Rapporteur), introducing draft guidelines 2.6.11 and 2.6.12 presented in his eleventh report,<sup>83</sup> said that, with respect to the confirmation of reservations, according to article 23, paragraph 2, of the 1986 Vienna Convention, a reservation formulated at the time of the signature of a treaty subject to ratification, in other words, one that would enter into force only after that ratification, had to be formally confirmed when the State or international organization in question expressed its consent to be bound by the treaty. Conversely, paragraph 3 of the same article stated that confirmation was not required in the case of objections to a reservation made prior to confirmation of the reservation.

2. The report of the Commission to the General Assembly on the work of its eighteenth session did not explain the obvious reasons for the difference in treatment of

objections and reservations,<sup>84</sup> namely, as he had indicated in paragraph 114 of his eleventh report, that the formulation of a reservation concerned all contracting States or contracting international organizations, or those entitled to become parties to the treaty, whereas objections mainly or exclusively affected bilateral relations between the reserving State and the objecting State. Once the reserving State had been notified of the objecting State's intention, which happened as soon as the objection had been formulated and communicated in accordance with article 23, paragraph 1, of the Vienna Convention, the reserving State knew that an objection had been, or would be, entered to its reservation which displeased the objecting State. The commonsensical rule set forth in article 23, paragraph 3, should be incorporated as it stood in the Guide to Practice, but should be confined to objections, as acceptance would be dealt with at a later date. Draft guideline 2.6.11 would thus read:

#### **“2.6.11 Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation**

“An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.”

3. Although the Commission had always hitherto incorporated the pertinent provisions of the 1986 Vienna Convention in the Guide to Practice, draft guideline 2.6.11, which was unlikely to give rise to any difficulties, called for two comments. First it was self-evident that, while an objection made before the formal confirmation of a reservation did not require confirmation, that formality, albeit superfluous, was not prohibited. In fact, there were instances in which States had confirmed such objections even though that confirmation was unnecessary. The wording he proposed for draft guideline 2.6.11, which was calqued on article 23, paragraph 3, of the Vienna Convention, allowed full scope for that possibility.

4. His second comment was that, while the draft guideline concerned solely the non-requirement of confirmation of an objection made prior to formal confirmation of a reservation, neither the draft guideline nor article 23, paragraph 3, of the Vienna Convention answered the question whether a State which had formulated an objection before becoming a party to the treaty in question had to confirm that objection on acceding to that treaty. The Vienna Convention was silent on that issue despite the fact that, during the United Nations Conference on the Law of Treaties, the delegation of Poland had put forward a proposal with a view to filling that gap.<sup>85</sup> State practice was all but non-existent, although, as he pointed out in paragraph 118, the United States, which was not a party to the Vienna Convention, had announced its intention

<sup>84</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 208, para. (5) of the commentary to article 18.

<sup>85</sup> Comments and amendments to the final draft articles on the law of treaties submitted in 1968 in advance of the Conference in accordance with General Assembly resolution 2287 (XXII) (A/CONF.39/6/Add.1), mimeographed, pp. 17–18.

<sup>83</sup> Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

to confirm at least one of its objections to certain reservations to the Convention if or when it became a party thereto.

5. The ICJ, in a passage of its advisory opinion of 1951 on the question concerning *Reservations to the Convention on Genocide* cited in paragraph 119, had apparently taken the view that objections made by States not parties to a treaty would become final on ratification. Hence, on the grounds he had outlined in paragraph 120, it would seem necessary to interpret the 1969 Vienna Convention's deliberate silence on the matter as being indicative of the absence of a confirmation requirement. Moreover, objections could perform their warning function more effectively if no formal confirmation was required in such cases.

6. For all those reasons, he believed that the idea underlying draft guideline 2.6.11 should be echoed in draft guideline 2.6.12, which would therefore read:

**“2.6.12 Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty**

“If an objection is made prior to the expression of consent to be bound by the treaty, it does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound.”

7. He would present the remaining draft guidelines on the withdrawal and modification of objections to reservations once what would undoubtedly be a somewhat technical debate on the nine draft guidelines he had already introduced had been completed.

8. Mr. GAJA said that, in the statement he had made at the 2915th meeting, he had drawn a distinction between objections concerning the validity of reservations and other objections. He had termed the latter “minor objections” since, although he was not implying that they had little political significance, their consequences were normally minor in comparison with those of objections relating to the validity of reservations. That distinction also had implications for some aspects of the procedure for formulating objections and therefore for the subject matter of some of the draft guidelines under discussion, in particular the one dealing with the question of the period of time within which an objection might be raised. In that connection, it could be submitted that article 20, paragraph 5, of the Vienna Convention, which provided that objections had to be raised by the end of a period of 12 months after notification of the reservation, did not apply to objections relating to the validity of reservations, because articles 20 and 21 of the Convention had not been intended to cover objections to the reservations mentioned in article 19.

9. Even if, contrary to the argument he had put forward at the 2915th meeting, it were to be held that articles 20 and 21 of the Vienna Convention applied to all objections and therefore to “minor” objections, the distinction between the two categories of objections should not be systematically disregarded. For cases in which it

was impossible to determine from the text of an objection whether it concerned the validity of the reservation, an additional draft guideline should specify that, in the absence of any express or tacit indication to the contrary, an objection was presumed not to relate to the validity of the reservation. Since that presumption was true in most cases, a draft guideline along the lines he had suggested would be the most reasonable solution.

10. Apart from the distinction between the two categories of objections, most of the draft guidelines presented in the eleventh report called for little comment and he therefore had only two remarks to make on the guidelines currently being examined.

11. The first remark pertained to pre-emptive objections, which draft guideline 2.6.14 deemed admissible. While there was merit in allowing a State to announce its stance on certain reservations in advance, it was hard to maintain that a pre-emptive position would produce legal effects after the subsequent formulation of a reservation, as envisaged in the draft guideline. Such a position could not automatically be transformed into an objection; a State would have to react to an actual, rather than a hypothetical, reservation before one could speak of an objection. The 1969 Vienna Convention presupposed the communication of a reservation before an objection was raised. Article 23, paragraph 3, of the Convention referred to objections relating to reservations made or formulated at the time of signature of a treaty and subject to ratification, acceptance or approval. It went no further than that. A State which had adopted a pre-emptive position had ample time and opportunity to react once the reservation had been notified. On receiving notification of a reservation, it would be free not to make the objection of which it had given notice if it had changed its mind or did not wish to raise an objection with respect to certain States, to make the objection, or to widen the scope of that objection. He noticed in passing that, although the Special Rapporteur had not yet introduced his draft guideline on that subject, it would be strange if a State, having given notice of a particular objection, were unable to widen the scope thereof when the reservation was actually formulated, as currently provided for in draft guideline 2.7.9.

12. His second comment was more in the nature of a reply because paragraph 127 of the eleventh report suggested that he had been responsible for persuading the Special Rapporteur to add a third paragraph to draft guideline 2.1.6 as adopted by the Commission in 2002.<sup>86</sup> That paragraph had not lost its *raison d'être* in the long intervening period. Obviously its purpose had not been to settle the question of the deadline for formulating an objection—most of the language of the third paragraph of the guideline had been drawn from article 20, paragraph 5, of the 1986 Vienna Convention. Its purpose had been to prevent the conclusion being drawn from paragraph 2 of the draft guideline that notification of the reservation by a State to the depositary had the same value as a communication to the other contracting States and international organizations. Paragraph 2, which stated

<sup>86</sup> See the text of this draft guideline and the commentary thereto in *Yearbook ... 2002*, vol. II (Part Two), pp. 38–42; see in particular paragraph 24 of the commentary, p. 42.

that “[a] communication related to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted, or as the case may be, upon its receipt by the depositary”, might have created the impression that, in the absence of a depositary, a reservation would be transmitted directly to the other contracting States and international organizations but that, in the converse case, it was sufficient to transmit the reservation to the depositary. In fact, the purpose of paragraph 3 was to make it clear that communication of a reservation by its author to the depositary was one thing and that communication of a reservation to the other contracting States or international organizations was another and that the time period for raising an objection began only from the communication of a reservation to the contracting States or international organizations. While the author State had done all that was necessary by communicating the reservation to the depositary, in order that the other States might be in a position to raise an objection within the requisite 12 months, the depositary would have to fulfil its duty of notifying the contracting States and international organizations of the reservation.

13. It went without saying that the Commission could re-examine draft guideline 2.1.6, not simply in order to delete paragraph 3, as the Special Rapporteur had proposed, but rather in order to amend paragraph 2 with a view to removing the ambiguity to which he had just drawn attention and to make it quite plain that the mere transmission of a reservation to the depositary did not mark the start of the period for raising an objection. The same idea could also be expressed in the draft guideline currently under examination, which did not sufficiently elucidate the distinction between the two moments in time, namely that of the communication being made to the depositary and that of the receipt of the communication by each contracting State or international organization.

14. Mr. KOLODKIN said that, as far as draft guideline 2.6.15 on late objections was concerned, he was not prepared to divide objections to reservations into major and minor objections, as proposed by Mr. Gaja. He agreed with the Special Rapporteur’s view that objections to reservations formulated after the end of the prescribed period did not produce all the legal effects of an objection that had been made within that time period. However, the phrase “does not produce all the legal effects” was extremely vague: the reader could gather only that there were such effects, and that they were not identical with those of an objection made within the specified period, but what precisely those effects were could be conjectured only after reading the commentary.

15. In his own view, late objections as such did not produce legal effects; the fact that they might possibly be taken into consideration by treaty monitoring or dispute settlement bodies was not a basis for regarding this as the legal effects of late objections. Moreover, in general the statements that the Special Rapporteur called “late objections” were not objections within the meaning of the term as defined in the Guide to Practice.

16. The Special Rapporteur had noted that the definition of “objection” contained in draft guideline 2.6.1 was

incomplete, especially as it did not specify the time at which an objection might be made. Consequently draft guideline 2.6.1 had been supplemented by draft guideline 2.6.13 and it had now been made clear that an objection was a statement made within the specified period. The question was whether it was possible to regard late objections, in other words statements which had not been made within the specified period and which did not therefore fall within the definition of an objection, as genuine objections.

17. The Russian Federation’s so-called late objections to which the Special Rapporteur referred in footnote 265 had been deliberately formulated in such a way that they could not be deemed formal objections to the reservations in question. Those statements had been intentionally formulated late. Moreover, when transmitting those statements to the United Nations Secretariat, the Permanent Representative of the Russian Federation had specifically drawn the Secretariat’s attention to the fact they were not formal objections intended to produce legal effects. The Secretary-General, acting in his capacity as depositary, was therefore right to circulate so-called late objections not as objections but as communications, thus retaining an absolutely neutral attitude. Should the Commission not take the same path and abandon the term “late objections”? In any event, it was necessary to indicate in draft guideline 2.6.15 that such “objections” did not produce legal effects.

18. The Guide to Practice offered alternatives to reservations. It said that a State might make a variety of political or interpretative declarations which did not constitute reservations. Would it not be advisable to formulate a guideline which would reflect the right of a State to react to a reservation in a manner other than by raising an objection? Such a guideline would mirror current practice.

19. Mr. McRAE said that broadly speaking he endorsed the draft guidelines under discussion. Concerning the recommendation that Governments should provide reasons for their objections, it was obviously desirable to encourage Governments to explain their objections to a reservation, even though there was clearly no legal requirement under the 1969 Vienna Convention to do so. The Special Rapporteur had said that, on reflection, he felt that perhaps the Commission should go further and encourage Governments to provide reasons for their reservations as well, something which the draft guidelines had so far not done. In fact, however, he was not sure there was really a parallel between reservations and objections when it came to providing reasons. A reservation was in a sense self-explanatory: provided that it was not expressed in vague and general language, it was clear which provisions of the treaty it addressed. While it might be interesting to know what the domestic motivation had been for making the reservation, understanding those reasons would not necessarily help one to understand the ambit, scope or meaning of the reservation; indeed, in many instances there was no relationship between the reasons and the meaning of the reservation itself.

20. Objections were different. An objection could be something as opaque as a simple statement by a State that it objected to a reservation, in which case a statement of

reasons could help to provide an insight into what the State believed to be the legal problem with the reservation: for example, why it was perceived to be contrary to the object and purpose of the treaty. Such reasons might make it easier for the appropriate authority or interpreting body to make the necessary determination as to compatibility. The case for giving reasons for objecting to a reservation was therefore much stronger than the case for giving reasons in respect of the reservations themselves. States might be reluctant to provide reasons for their reservations, viewing them as individual or domestic considerations which gave no insight into the meaning of the reservation. By contrast, they might be more ready to disclose their reasons for an objection, which often derived from a legal analysis of the provisions of the treaty. A guideline calling for an indication of reasons for reservations might thus be less likely to be observed than one calling for an indication of reasons for objections, and accordingly, for both practical reasons and reasons of principle, he was not convinced that the Commission should add to the draft guidelines a recommendation that States should give reasons for their reservations.

21. As drafted, draft guideline 2.6.10 encouraged States to provide reasons for their objections, but was right not to impose an obligation on them to do so, since in his view there was no such obligation. He was not sure, however, that the phrase “whenever possible” was the best formulation; that was perhaps a matter for the Drafting Committee.

22. On the confirmation of objections, addressed in draft guideline 2.6.11, the proposition that an objecting State did not need to confirm its objection to a reservation after confirmation of the reservation itself was simply a consequence of the Vienna Convention rule, and seemed appropriate. On the other hand, draft guideline 2.6.12, which provided that confirmation by an objecting State was not required at the time that this State expressed its consent to be bound by the treaty, might need further consideration. It raised the same concern that members of the Commission had voiced regarding draft guideline 2.6.5, namely that the rights of States that were entitled to become parties to the treaty were assimilated with the rights of contracting parties.

23. To recognize that States that were entitled to become parties to the treaty could make objections was a corollary of article 23, paragraph 1, of the 1969 Vienna Convention, and the Special Rapporteur had pointed out the practical benefits of such recognition, but as Mr. Kolodkin had pointed out at the previous meeting, the practice of depositaries other than the Secretary-General of the United Nations was not to do so. Thus, the basis in practice for granting objecting rights to States entitled to become parties to a treaty might be less strong. However, even if one accepted the freedom of such a State to object to reservations, he wondered whether absolving it of any need to confirm objections was perhaps going too far. When a State that had signed the treaty objected to a reservation and then shortly afterwards became a party to the treaty, the case for not having to confirm the objection was very strong. But what happened when a State entitled to sign a treaty had not done so, and was in fact hostile to the treaty? Draft guideline 2.6.5 gave

that State the right to object to reservations. If it did so, and then 20 years later decided to become a party to the treaty, would the objections it had originally formulated, which had remained dormant, automatically become effective? Was there not a case for saying that there was an obligation to confirm such objections, or at least that objections made more than a specified number of years previously had to be confirmed? The matter seemed to require further consideration.

24. The final issue he wished to address was late objections. Draft guideline 2.6.15 stated that late objections did not produce all the legal effects of timely objections, but he shared Mr. Kolodkin’s doubts as to what legal effects they produced. The Special Rapporteur had pointed out that they had certain practical effects, such as leading to a reservations dialogue or assisting consideration by an interpretative body, but those were not legal effects. It was not clear that the late objection had any of the legal consequences of a timely objection.

25. Perhaps a late objection’s significance was that it served as an indication by the objecting State of how it interpreted the treaty. The objection had no legal effect in the present, because it was late, but it did provide some guidance for the future. The closest parallel to a late objection would then be an ordinary—rather than a conditional—interpretative declaration.

26. Mr. CAFLISCH said that the Special Rapporteur’s clear and thorough eleventh report would facilitate the Commission’s arduous task, which resembled a mathematical exercise as much as an exercise in the codification of practice on reservations.

27. Concerning draft guideline 2.6.15, he had no problem either with the text or with the comments on it in the report or even with the use of the word “formulated”. The important point was that practice tended to attribute either no effect or else only a limited one to late expressions of opposition to a reservation. He agreed with the Special Rapporteur that some effect must be attributed to them, particularly with regard to the views—and they were only views—that the State might express about the reservation’s validity or lack thereof. Members would have noted that he was carefully avoiding the term “late objections” because such expressions of opposition did not have the effects of objections and accordingly did not deserve that denotation. The draft guideline should be worded so as to indicate that an objection to a reservation formulated after the end of the time period specified in draft guideline 2.6.13 was to be treated as a communication that did not produce all the legal effects of an objection made within that time period. The term “communication” was appropriate, and was to be found in paragraph 139 of the report. The point made by Mr. McRae about interpretative declarations was interesting: that might indeed be a good description of the effect of a late objection (see the 2914th meeting, above, para. 19).

28. Draft guideline 2.6.14, on pre-emptive objections, differed from draft guideline 2.6.15 in that the objections covered were true objections, had all the effects of objections and consequently deserved to be described as such.

They differed from normal objections in that they became operational only once the prerequisites cited, namely formulation and notification of the reservation, had been fulfilled. The practice might be useful for its deterrent effect on potential reserving States; for that reason the draft guideline should be retained.

29. Draft guideline 2.6.13 was described by the Special Rapporteur as duplicating the third paragraph of draft guideline 2.1.6, and two avenues were open to the Commission: either to delete that paragraph and the relevant portion of the commentary,<sup>87</sup> or to retain both provisions and delete one on second reading. While in principle, texts that had already been adopted should be left untouched, no principle should be regarded as immutable. That was why he favoured resolving the matter straightaway if that was possible.

30. It was a good thing that the Special Rapporteur had had belated second thoughts regarding draft guideline 2.6.10. Notwithstanding what Mr. McRae had just said, he thought it appropriate to invite States to give reasons not only for their reservations but also for their objections thereto. The draft guideline, being simply a recommendation, seemed acceptable.

31. Drawing a distinction, as Mr. Gaja wished to do, between objections to the validity of reservations and other objections was undoubtedly useful, but care should be taken with the language to be used. He was not sure it was appropriate to speak of minor and major reservations, or of primary and secondary reservations. What was important, and what secondary, in that context? The merits of the terms “freedom” (*liberté* or *faculté*), “possibility” (*possibilité*) and “right” (*droit*) to formulate reservations and objections thereto had been hotly debated. The French texts were perfectly acceptable: it was essentially a right, rather than a freedom, that was involved. On the other hand, he was not sure that the distinction between “making” and “formulating” objections was a useful one. Would that terminological nuance make the draft guidelines clearer, or simply create confusion in the reader’s mind? Perhaps it would be best to use the term “formulate” throughout.

32. Subject to those remarks, he was in favour of referring draft guidelines 2.6.7 to 2.6.15 to the Drafting Committee.

33. Mr. PELLET (Special Rapporteur) drew attention to an error in the mimeographed French version of his eleventh report: the draft guideline numbered 2.6.9 (para. 111) was in reality draft guideline 2.6.10.

34. Ms. XUE said that in general she agreed with the analysis in the eleventh report concerning the draft guidelines under discussion. The report made clear the Special Rapporteur’s intention with regard to the requirement of confirmation of an objection, but the ordinary reader of draft guideline 2.6.12 might find the language misleading. The phrase “prior to the expression of consent to be bound” was fairly vague, since it might be construed as referring to any time before the treaty entered into force

for the party; yet according to treaty law and practice, the period of negotiation prior to signature could not be taken into account. There were two ways for a treaty to enter into force for States: either through definitive signature, or through signature subject to ratification, approval or acceptance. In the former case, mere signature would be sufficient for the treaty to enter into force for the State; in the latter case, the treaty entered into force only subject to subsequent ratification, approval or acceptance. In the former case, if a State made an objection to a reservation at the time of signature and the treaty then entered into force, the objection was acceptable; but if it did so only prior to signature, then there was a legal requirement for the State to repeat that objection at the time of signature. But in a situation in which signature was subject to ratification or approval, if a State made an objection prior to signature and at the time of signature did not repeat its objection, then it must confirm its objection at the time of submission of the instrument of ratification, approval or acceptance.

35. The purpose of draft guideline 2.6.14 was not clear; the text provided no real guidance to States parties regarding treaty practice and it might create confusion between two categories of action: political or policy positions on legal matters relating to a treaty, and the legal procedures to be observed by the potential State party.

36. With regard to draft guideline 2.6.15, she agreed with the concerns expressed by a number of members, and Mr. Kolodkin in particular. Article 20, paragraph 5, of the 1986 Vienna Convention, laid down a strict time period for the submission of objections in order to provide certainty in treaty relations. If the Commission wished to give States some leeway to raise late objections, it should specify what legal effects that could produce. The reference to “all the legal effects” of an objection, and, in paragraph 144, the indication of its not producing the “normal” effects, were extremely vague; what needed to be made clear was whether a late objection was allowed. If it was, it had to produce all the legal effects, and if it was not allowed, it did not produce legal effects. To allow States to make late objections would create additional legal rights for them. She was unaware of any provision to that effect in the Vienna Convention. As the practice showed, if late objections to a reservation were allowed to prevent the entry into force of a treaty, enormous difficulties might ensue.

37. Mr. GALICKI said that while draft guidelines 2.6.14 and 2.6.15 were very important from a practical point of view, he agreed with Ms. Xue that they could not be treated in the same way as the other draft guidelines. The Commission should consider how it might reflect the more political nature of those two draft guidelines. Both went beyond the temporal boundaries laid down for formulating or making reservations under the Vienna Convention, and both were to a large extent justified. They were not simply an invention of the Special Rapporteur, as the inconsistent practice of States showed. The Commission must take note of State practice, but should make it clear that such practice did not have a legal basis stemming from the Vienna Convention. Otherwise, the false impression would be given that the Commission supported such practice.

<sup>87</sup> See footnote 86 above.

38. Mr. CANDIOTI, endorsing Mr. Galicki's comments, said that the Commission should bear in mind the philosophy underlying the topic. The point was not to provide rules to supplement the 1969 and 1986 Vienna Conventions in the area of reservations or a restatement of what could or could not be done pursuant to those instruments, but to produce a Guide to Practice and promote better practice in the future. The issue of reservations was very complex and at times chaotic. The Special Rapporteur had rightly raised a number of aspects of reservations which the Guide to Practice should address. He agreed that pre-emptive and late objections were actually communications, but those communications were useful and might well be included in the Guide to Practice because they contributed to facilitating the dialogue on reservations, promoting wider participation in treaties and dealing with reservations and objections in a more orderly manner. The same applied to the Special Rapporteur's recommendation about giving reasons for objections, which would help the Guide to Practice specify how reservations should be made. Likewise, it would be useful if at a later stage a guideline on providing reasons for reservations could also be elaborated.

39. Mr. PELLET (Special Rapporteur), summing up the debate on draft guidelines 2.6.3 to 2.6.6, said he was pleased to note that there seemed to be a broad consensus for referring those draft guidelines to the Drafting Committee. However, before addressing the comments made on those provisions, he would like first to respond to two points which Ms. Escarameia had raised in connection with his introductory remarks. Ms. Escarameia had argued that, contrary to what was stated in paragraph 48 of his eleventh report, the judgment of the ICJ of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)* did not confirm draft guideline 3.1.13, which he had proposed in his tenth report on reservations to treaties;<sup>88</sup> Mr. Saboia had endorsed her viewpoint. The Special Rapporteur had some difficulty in understanding Ms. Escarameia's argument. Paragraph 67 of the Court's judgment in *Armed Activities on the Territory of the Congo (New Application: 2002)*, cited in paragraph 47 of the report, clearly confirmed the position it had taken in the orders of 2 June 1999 concerning the *Legality of Use of Force (Yugoslavia v. Spain)* and *Legality of Use of Force (Yugoslavia v. United States of America)* cases cited in footnote 103. The Court had concluded in 2006 that, in the circumstances of the case, Rwanda's reservation to the jurisdictional clause in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide was not incompatible with the object and purpose of that Convention [*Armed Activities on the Territory of the Congo (New Application: 2002)*, para. 67 of the judgment]. That confirmed what was stated in draft guideline 3.1.13. He found it hard to imagine that things should be any different with regard to the lower monitoring threshold exercised by human rights bodies, or that the joint separate opinion of five judges should reach a different conclusion. Paragraph 21 of the joint separate opinion stressed that "the fact that a reservation relates to jurisdiction rather than substance [does not] necessarily\* [result] in its compatibility with the object and purpose

of a convention". It followed *a contrario* that a reservation relating to a jurisdictional clause or a monitoring clause was not necessarily incompatible with the object and purpose of the treaty; that, too, was exactly what draft guideline 3.1.13 stated. In introducing that consideration, the five judges had in fact cited his tenth report, which contained draft guideline 3.1.13 [see paragraph 14 of the joint separate opinion].

40. Ms. Escarameia had also asked how he interpreted recommendation 7 of the report of the working group on reservations, established by the fourth inter-committee meeting of chairpersons of the human rights treaty bodies,<sup>89</sup> in light of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties, adopted by the Commission at its forty-ninth session.<sup>90</sup> In the view of the working group, there was a rebuttable presumption that the author of an invalid reservation would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded. It was clear that this presumption was incompatible with the preliminary conclusions of 1997, because at that time, the Commission had taken the view that there was no such presumption, and that it should be left to the reserving State to decide.<sup>91</sup> At the most recent meeting with the human rights treaty bodies, he had indicated that he had changed his mind on that question, and the position which he had put to the human rights treaty bodies had been precisely the one which the working group had adopted in January 2006 in its conclusions. The recommendation in paragraph 7 of the report of the working group was perfectly acceptable to him, and he intended to reiterate it at the meeting with the human rights treaty bodies scheduled to take place the following week.

41. On a further comment concerning his introductory remarks, he said he found Mr. Saboia's point regarding constructive ambiguity persuasive. However, it must be borne in mind that States expected the Commission to dispel the ambiguities in the 1969 and 1986 Vienna Conventions regarding reservations, which had been shown to have a number of drawbacks.

42. Turning to the individual draft guidelines, he said he wished to begin with the most difficult problem, one which had been raised by Mr. Gaja concerning draft guidelines 2.6.3 and 2.6.4, but which went well beyond the scope of those two provisions. Mr. Gaja had drawn a distinction between major objections, based on the incompatibility of the reservation with the object and purpose of the treaty, and minor objections, which basically concerned matters of political expediency. The distinction clearly existed, at least on an intellectual plane. In its 1951 advisory opinion on *Reservations to the Convention on Genocide*, the Court had touched on minor objections in passing and had alluded briefly to the possibility of a separate legal regime for such objections [see page 13 of the advisory opinion]. However, he did not think that was decisive: neither the Vienna Conventions nor their

<sup>89</sup> Report of the meeting of the Working Group on Reservations (HRI/MC/2006/5), para. 16.

<sup>90</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

<sup>91</sup> *Ibid.*, p. 57, para. 10 of the preliminary conclusions.

<sup>88</sup> *Yearbook ... 2005*, vol. II (Part One), A/CN.4/558 and Add.1–2, para. 99.

*travaux préparatoires* contained the slightest indication of two separate regimes. That stood to reason. Certain States, which had eventually succeeded in exercising a predominant influence at the United Nations Conference on the Law of Treaties, at least where reservations were concerned, had been obsessed with the idea of making it as easy as possible to formulate reservations, thereby limiting the effects of objections as much as possible and placing major and minor objections on an equal footing. The result was not very cogent, because the unfortunate decision to reverse the presumption in article 20, paragraph 4 (b), had been wrested from the Conference at the eleventh hour, and the consequences of that reversal for the remainder of the text had not been taken into account. Mr. Galicki and Mr. Kolodkin had alluded to these problems of consistency. The fact remained that the 1969 Vienna Convention made no distinction between major and minor objections, and in particular it contained no correlation between objections with a maximum effect and “major” objections, on the one hand, and normal objections with a minimum effect and “minor” objections on the other. Moreover, Mr. Gaja had later acknowledged that this distinction had no basis in State practice either.

43. Nor was he personally convinced by the article by Bruno Simma in the *Liber Amicorum* in honour of Professor Seidl-Hohenveldern,<sup>92</sup> cited by Mr. Gaja. The only relevant passage, which was very brief, read:

Regarding these very consequences, we encounter a major gap in the Vienna Convention regime. The Convention does provide rules on acceptance of and objections to reservations as well as on the legal effects of such acceptances or objections (art. 20 *ff.*). But what it does not say is whether these rules are then applicable to all reservations, be they admissible or inadmissible, or only to those which in the view of other States parties have passed the ‘object and purpose’ test ...<sup>93</sup>

What Simma had qualified as a “major gap” was either a major silence, no doubt in order to maintain the constructive ambiguity dear to Mr. Saboia, or else it simply resulted from the undue haste with which a major change in the presumption had taken place. Although that justified the Commission’s raising questions in that regard, it did not justify making a distinction between major and minor objections. The Vienna Convention made a distinction between objections, but in terms of the effect sought by their author, and not in terms of the author’s analysis of the reservation.

44. He had the impression that Mr. Gaja was testing the water, because even though the distinction he suggested was intellectually well founded, the question of whether it had concrete effects would not arise until the Commission examined the effects of reservations on that point. He agreed fully with Ms. Escarameia in that regard. Moreover, as Mr. Kolodkin had clearly shown, doubts were warranted as to the actual scope of the distinction. The presumption in article 20, paragraph 4 (b), could come into play only in the case of a minor objection. If the objection was major, the reservation could not in any event enter into force, on account of article 19 (c). In other words, in

such cases a reservation would not be established and the distinction would not work, even when the Commission took up the question of effects. Although he did not rule out the possibility that it might do so, his instinct was to endorse Mr. Kolodkin’s view. He did not think that the Commission would be able to construct positive rules on that distinction, intellectually attractive though it was.

45. He fully agreed with the point made by Mr. McRae on draft guideline 2.6.3, one to which attention had also been drawn by Mr. Galicki and Mr. Kolodkin, and he confessed to being guilty as charged: it was of course unacceptable that the title should refer to the freedom to *make* objections, whereas the body of the text spoke of *formulating* objections. The title should be brought into line with the text, and not the other way round, because even though in most cases—namely those in which a contracting State objected to a confirmed reservation—the objection was made and not simply formulated, occasionally there had been instances in which the objection had not produced its full effects at the time of the formulation, and in such instances, the objection was formulated before being made.

46. He acknowledged the validity of the argument put forward by Mr. McRae—and a similar point made by Ms. Xue—that the freedom to formulate objections was restricted not only by procedural requirements but also by the terms of the treaty itself, where it authorized certain specified reservations. He wondered, however, whether there was any need to say as much in the text, since the Guide to Practice was no more than a set of voluntary guidelines. States were free to include in any given treaty provisions on reservations that diverged from the recommendations of the Guide to Practice. Although the exception was merely implied, it might justify Mr. McRae’s concern.

47. There was another reason why such cases should not appear in draft guideline 2.6.3. Ms. Escarameia had suggested that the phrase “for any reason whatsoever” should be toned down by the addition of a statement that the freedom—or right—to formulate an objection could be exercised only within the framework of the 1969 and 1986 Vienna Conventions, and/or general international law and/or the Guide to Practice itself. That suggestion had been supported by several speakers, including perhaps Mr. Kolodkin and Mr. Nolte, and certainly Mr. Saboia, Mr. Vázquez-Bermúdez and Mr. Hmoud. He fully supported the spirit of the suggestion, but with one important caveat.

48. With regard to the question raised by Mr. Yamada, he had no absolutely no doubt that an objection could serve purely political ends: a State could simply inform another that it objected to a reservation. As he indicated in paragraph 67 of his eleventh report, however, the freedom to formulate an objection, though “discretionary”, was not arbitrary, inasmuch as it was circumscribed by law. The suggestion made by Ms. Escarameia and others had the great merit of emphasizing that legal framework. He was therefore all in favour of the Drafting Committee giving some thought to working out a text that would indicate that objections must be formulated in accordance with general international law or, better still, with the provisions of the

<sup>92</sup> B. Simma, “Reservations to human rights treaties—some recent developments”, in G. Hafner *et al.* (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday*, The Hague, Kluwer Law International, 1998, pp. 659 *et seq.*

<sup>93</sup> *Ibid.*, at p. 663.

Guide to Practice. However, he was resolutely opposed to including any reference to the Vienna Conventions in the Guide to Practice. Although it systematically reflected all the provisions of the Vienna Conventions on reservations, the Guide must be capable of standing alone. Direct references to the Vienna Conventions would fly in the face of that approach.

49. He hoped that this would help allay the fear expressed by Mr. Nolte that the expression “for any reason whatsoever” could lead to the formulation of unlawful objections that were contrary to *jus cogens*. He found Mr. Nolte’s reasoning hard to understand. Although there was a risk of unlawful reservations, the same was not true of objections, as Mr. Gaja had pointed out. Mr. Nolte had also criticized the first sentence of paragraph 65 of the report, which stated that: “A State (or an international organization) is, therefore, never bound by treaty obligations that are not in its interests.” The choice of words was indeed unfortunate and he suggested that the final phrase should be replaced by the phrase “to which it has not given its consent”. However, that change did not affect the wording of draft guideline itself.

50. Mr. Wisnumurti had suggested including in draft guideline 2.6.3 a link with the validity of the reservation concerned, with a text indicating that the freedom or right to formulate a reservation could be exercised whether or not the reservation was compatible with the object and purpose of the treaty, or whether or not the reservation was valid. The idea underlying that suggestion was perfectly acceptable, but he feared that any such addition would either lead the Commission into uncharted waters or else prove tautological. The Drafting Committee could, however, give the question some thought.

51. With regard to the title of the draft guideline, Mr. Kolodkin, Mr. Nolte and Mr. Wisnumurti had followed Ms. Escameia in criticizing the expression “freedom to make objections”. As Mr. Candioti had pointed out, however, the problem was largely a matter of translation: the word “freedom” did not convey all the nuances of the French “*faculté*”. The same strictures applied to draft guideline 3.1; Mr. Kolodkin had rightly drawn attention to the fact, noted in paragraph 40 of the eleventh report, that the United Kingdom had expressed the view that the term “freedom” should be changed to the term “right”. Clearly, it would be desirable to find a more satisfactory term for the English text; Mr. Hmoud’s suggestions at the 2916th meeting should be taken into account. As several speakers had said, the mere fact that such a possibility was not unlimited did not prevent one from speaking of a right, since the exercise of a right was invariably limited by legal rules.

52. As Mr. Kolodkin had pointed out, the problem relating to objections was, in general terms, the same as that relating to reservations. In paragraphs 10 to 16 of his tenth report,<sup>94</sup> he had explained in some detail why Sir Humphrey Waldock, had—rightly, in his view—preferred the word “freedom” to the word “right”, bearing in mind that that freedom was the freedom to formulate reservations

as opposed to making them. In the title of draft guideline 2.6.3, therefore, the word “make” should be replaced by the word “formulate”. As for the word “*faculté*”, it was for English-speakers to find the right term. The Drafting Committee might also wish to discuss the question.

53. On the subject of corrections, he also wished to draw attention to a mistake in the French version of the report of the Commission to the General Assembly on the work of its fifty-eighth session, where the title of section 3 of the draft guidelines and the title of draft guideline 3.1 had become conflated.<sup>95</sup> The French text should be brought into line with the English.

54. Much of what he had said about draft guideline 2.6.3 applied also to draft guideline 2.6.4, especially as concerned the distinction between “minor” and “major” objections. He was less sure, however, that his remarks about the word “*faculté*” applied equally to draft guideline 2.6.4, since there was no similar link with the notion of formulating an objection. The Drafting Committee should give careful consideration to the title of draft guideline 2.6.4. On the other hand, everything that he had said concerning the phrase “for any reason whatsoever”, and the associated safeguards, applied equally to both draft guidelines; and to delete the phrase, as suggested by Mr. Hmoud, would vitiate both provisions. Draft guideline 2.6.4, which was, as Ms. Xue had pointed out, a faithful reflection of the corresponding provision in the Vienna Conventions, had not given rise to any particular comment. Mr. Kolodkin had expressed interest in the practical consequences of the draft guideline, but it was premature to take up that point, which should be discussed in the section of the Guide to Practice relating to the effects of reservations, acceptances and objections.

55. Draft guideline 2.6.5 had been the subject of far more comment. The criticisms of subparagraph (b) had, he believed, again been based on a linguistic misunderstanding. English-speaking members, starting with Mr. McRae and including Ms. Xue, Mr. Nolte and Mr. Hmoud, had expressed concern at the suggestion in paragraph 81 of the eleventh report that intention to become a party to the treaty was a sufficient criterion for entitlement to formulate an objection to a reservation. The French text, however, contained no reference to intention, either expressly or by implication, as Mr. Gaja had pointed out. Nor was the French text a product of the Special Rapporteur’s own fertile imagination, as Mr. Hmoud seemed to think; it was based on article 23, paragraph 1, of the 1969 Vienna Convention and, as Mr. Candioti had said, it was hard to see why a State should accept a reservation if it had no means of reacting to it. Mr. Kolodkin’s observation that regional organizations did not communicate reservations to States outside the region, even if such States were entitled to become parties to the treaty, was interesting, but the only inference to be drawn was that depositary States did not, in that case, comply with the provisions of article 23, paragraph 1, of the Vienna Convention, which were well established and repeated in draft guideline 2.1.5. Such an omission did not, however, affect the entitlement of such

<sup>94</sup> *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

<sup>95</sup> *Yearbook ... 2006*, vol. II (Part Two), p. 143. For the Drafting Committee’s comments on this topic, see *Yearbook ... 2006*, vol. I, 2883rd meeting, pp. 105–106, paras. 2–4.

potential addressees to formulate an objection. An objection formulated by a non-contracting State was, as it were, a “proposed objection”, and he agreed with those members, including Ms. Escarameia, Ms. Xue, Mr. Saboia, Mr. Nolte and Mr. Vázquez-Bermúdez, who had said that such an objection would produce an effect only after the State in question had expressed its consent to be bound by the treaty concerned. Until that point, an objection could only be formulated, not made.

56. Accordingly, Mr. Fomba was surely right to have pointed out that the two categories of authors referred to in the draft guideline were not placed on an equal footing, and to have suggested highlighting the fact by replacing the word “and” between the two subparagraphs by the words “as well as” or “but also”. Such an amendment could be considered, but, in his view, it would be out of place in the draft guideline. It might be better to deal with the point in the commentary.

57. With regard to draft guideline 2.6.6, Mr. Fomba had also asked whether similar objections formulated by several States could not be considered to be objections formulated jointly. In his opinion, the answer was definitely in the negative. Undoubtedly, there was a need to accept objections formulated jointly, but current State practice was to regard them as separate, parallel objections, formulated separately by each objecting State.

58. The draft guideline had not aroused much other comment. Mr. Kolodkin had said that, rather than emphasizing the unilateral nature of objections formulated jointly, it was more important simply to indicate the existence of the freedom to formulate an objection. He endorsed that approach; the unilateral nature of such objections should merely be mentioned in the commentary. The Drafting Committee should, however, deliberate very carefully before taking any definitive decision on the wording, because, as it stood, the text was very similar to that of draft guidelines 1.1.7 and 1.2.2, dealing respectively with reservations and interpretative declarations formulated jointly, which had already been adopted by the Commission. Any change to draft guideline 2.6.6 must take that into account.

59. Apologizing for the length of his statement, he said he considered it a special rapporteur’s duty to respond fully to all comments. While it was not customary to reopen the debate after a special rapporteur had delivered his concluding remarks, any members to whose comments he had neglected to respond could console themselves with the knowledge that those comments had been fully reflected in the summary records. He presumed that there would be no objection to draft guidelines 2.6.3, 2.6.4, 2.6.5 and 2.6.6 being referred to the Drafting Committee, which would be able to give them due consideration and propose improvements.

60. The CHAIRPERSON said he took it that the Commission wished to refer draft guidelines 2.6.3, 2.6.4, 2.6.5 and 2.6.6 to the Drafting Committee.

*It was so decided.*

*The meeting rose at 12.50 p.m.*

## 2918th MEETING

*Friday, 11 May 2007, at 10.05 a.m.*

*Chairperson:* Mr. Ian BROWNLIE

*Present:* Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

### Reservations to treaties (*continued*) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

#### ELEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the topic of reservations to treaties, in particular draft guidelines 2.6.7 to 2.6.15 proposed by the Special Rapporteur in his eleventh report.<sup>96</sup>

2. Ms. ESCARAMEIA observed that the Special Rapporteur was suggesting that the procedural rules for the formulation of objections, which constituted the subject of draft guideline 2.6.9, should be the same as those for reservations set out in the 1969 Vienna Convention. However, she pointed out that the reference to draft guideline 2.1.6 might be problematic because the situations were not identical: whereas the date of notification of a reservation marked the beginning of a 12-month period during which objections could be formulated, the notification of an objection did not have that effect.

3. Like many other members of the Commission, she viewed draft guideline 2.6.10 (Statement of reasons) solely as a recommendation and consequently endorsed it.

4. While she likewise agreed with the contents of draft guideline 2.6.11 (Non-requirement of confirmation of an objection made prior to the formal confirmation of a reservation), the statement in paragraph 114 of the eleventh report that objections “affect primarily the bilateral relations between the author of a reservation and each of the accepting or objecting States or organizations” was too categorical: objections might affect the whole treaty and all parties, especially if they prevented the entry into force of the treaty between the reserving and the objecting State. Moreover, it might be important for the other parties to the treaty to know that an objection had been formulated and whether or not the treaty was in force between two States.

<sup>96</sup> Reproduced in *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.