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Chairman: Mr. Gómez Robledo . . . . . (Mexico)

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The meeting was called to order at 10.10 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. Hmoud** (Jordan) said that, in the light of the scarcity of international practice, the Commission should take a cautious approach in developing rules on responsibility of international organizations, especially in modelling draft articles on the corresponding articles on responsibility of States for internationally wrongful acts. The draft articles should be formulated in a manner that reflected the distinct character of an international organization. Unlike a State, an international organization was not sovereign, and the aspects of a State's responsibility that were linked to its sovereignty might not carry over to an international organization.

2. Under chapter V on circumstances precluding wrongfulness, draft article 17 concerned consent. The issue of valid consent by an international organization was complex, especially when the organization had organs with overlapping functions, as was the case with the United Nations. Some of the questions to be answered were which organ or individual had the authority to express consent; could there be implicit consent by the international organizations; and what were the consequences to the international organization when two or more of its organs held conflicting positions towards the act. Draft article 18 concerned self-defence, which was an inherent right of the State emanating from its sovereignty. A State exercised self-defence against armed attack to protect its territorial integrity and political independence. That was not the case with an international organization, which had no sovereignty over territory. The examples provided in the commentary were in fact not examples of the self-defence doctrine. Defence of a mission was a mandate, not an inherent right, and the defence of life or property under a specific mandate was subject to different conditions than self-defence under international law. If the intention was to preclude the wrongfulness of an act of defence carried out in the context of a mandate, the draft article should be reformulated accordingly.

3. On the other hand, his delegation considered it appropriate to include force majeure (draft article 20) and distress (draft article 21) among the circumstances precluding wrongfulness for an international organization. There were examples of international practice concerning force majeure, and, despite the lack of international practice, distress could also be contemplated as a circumstance precluding wrongfulness. Similarly, there was no reason not to include necessity (draft article 22) in that category, even though the example provided in the commentary related to a breach of an obligation towards an employee of the organization rather than a breach of an international obligation. However, his delegation would welcome clarification from the Commission concerning the meaning of the phrase "an essential interest of the international community as a whole" in paragraph 1 (a).

4. Under the chapter on responsibility of a State in connection with the act of an international organization, his delegation viewed aid or assistance by a State in the commission of an internationally wrongful act by an international organization (draft article 25) as grounds to trigger that State's responsibility. However, the commentary did not elaborate on the form or threshold of such aid or assistance that would give rise to the State's responsibility, which was crucial to understanding the impact of the draft articles, particularly in relation to member States. It was not clear, for instance, whether a financial contribution to the annual budget of the organization would constitute aid or assistance in the commission of the wrongful act, or whether it would make a difference if such a contribution financed the act directly or indirectly. Further elaboration was also needed as to the extent of direction and control (draft article 26) that would trigger the responsibility of a member State. The constituent instrument and rules of the organization would help in determining whether a State or States had direction and control over a wrongful act, but other indicators should also be examined. Coercion (draft article 27), if exercised by a State member of an international organization, could also be characterized as direction and control over the wrongful act committed by the organization.

5. His delegation supported draft article 28 on international responsibility in case of provision of competence to an international organization. A State should not be able to rely on transferring competence to an international organization in relation to an international obligation to relieve itself of responsibility. Such immunity might create a gap if the act was not wrongful for the international organization itself. With regard to draft article 29 on responsibility of a State

member of an international organization for the internationally wrongful act of that organization, it should be borne in mind that the State and the international organization were entities with separate legal personalities. As a consequence, membership in the organization did not per se trigger international responsibility. However, the constituent instrument and the rules of the organization would play an important role in determining whether membership would result in responsibility for a wrongful act of the organization. Joint management by all member States would necessarily result in responsibility to varying extents, whether on the grounds of direction and control (draft article 26) or the grounds of acceptance (draft article 29, paragraph 1 (a)). The question of compensation to an injured party, should the international organization not be in a position to provide it, would again depend on whether member States had assumed responsibility for the acts of the organization under the constituent instrument and the rules of the organization. Member States would also be jointly responsible to provide compensation if the injured party relied on such responsibility. Lastly, his delegation saw no reason why States should not be under an obligation to cooperate to bring to an end a breach of the international organization of an obligation under a peremptory norm of international law.

6. **Mr. Vijayan** (India) said that the work of the Commission on shared natural resources was important, since it was an area in which international practice was still evolving. In particular, considerable growth in practice and scientific knowledge concerning transboundary aquifers had taken place in recent years. His delegation therefore welcomed the Commission's view that it was still premature to reach a conclusion on the final form the draft articles on the law of transboundary aquifers should take. It also supported the inclusion in draft article 3 of an express affirmation of the principle of the aquifer State's sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. Draft articles 4 and 5 needed to be considered together for an understanding of the principle of equitable and reasonable utilization. The phrase "accrual of benefits" in draft article 4, subparagraph (a), required clarification, since the titles of draft articles 4 and 5 both referred to "utilization".

7. In draft article 11, his delegation supported the use of the term "precautionary approach". However, the principle needed to be more clearly stated, and the clause beginning "in view of uncertainty ..." should be deleted as unsuitable for inclusion in a legal text. Although draft article 16 dealt with the obligations of States in responding to actual emergency situations, the commentary recognized that there was a lack of adequate knowledge concerning the types and extent of emergencies that might occur or the response actions that might be taken. India supported the general obligation to cooperate set out in the draft articles. However, there appeared to be some overlap, as the obligation to cooperate was alluded to in various ways in draft articles 4, 7, 13 and 19. The interrelationship among the various mechanisms of cooperation needed to be more clearly defined.

8. With regard to the draft articles on responsibility of international organizations, his delegation had in the past sounded a note of caution about assuming that the circumstances precluding wrongfulness applicable to States were equally applicable to international organizations. The attributes of a State and an international organization were not the same. Moreover, given the diversity of international organizations and the differences in their objectives and functions, it would be difficult to assess which circumstances precluding wrongfulness applicable to States were applicable to international organizations, especially given the absence of definitive practice in that area. Draft article 18 on self-defence was a good example; self-defence, by its nature, was applicable only to the actions of a State. Moreover, it could be questioned whether the international obligations usually incumbent on international organizations were such that they could reasonably lead to a breach of a peremptory norm of general international law.

9. In the same vein, his delegation was not sure whether the concept of necessity (draft article 22) should be extended to international organizations. States were entitled to invoke necessity to safeguard their essential interests, but in the absence of specific practice it was difficult to envisage under what circumstances the same right should be extended to international organizations. The application of the concept to peacekeeping missions also raised difficulties, as such missions followed very clear rules of engagement. His delegation would therefore prefer to see the draft article deleted, so that it could not be invoked as a pretext for non-compliance with international obligations or for infringement of the rights of any third State.

10. **Ms. Pino Rivero** (Cuba) noted that the consultation with experts in the field of hydrogeology had resulted in draft articles on the law of transboundary aquifers that were in keeping with the depth and seriousness that the topic required. The draft articles should help States to utilize the aquifers in their territory, over which they had sovereign control, and to cooperate in protecting and using them properly. It was of vital importance that that principle should be expressly stated in the draft articles, since water was a natural resource vital to the existence of humankind. Its scarcity had become a global problem, and indiscriminate use, lack of protection and pollution could lead to a future crisis in international relations.

11. Whereas draft articles 4 and 5 stipulated that utilization of aquifers must be "equitable and reasonable", environmental law had increasingly adopted the term "sustainable", as for example in the Convention on Biological Diversity, which had a bearing on the draft articles in that an aquifer was part of an ecosystem. Her delegation therefore suggested that the term "sustainable" should be used in place of "reasonable". In draft article 6, the word "*prevenir*" in the Spanish version should be changed to "*evitar*" wherever it appeared in order to render the concept of "prevent" more accurately. Furthermore, the article should incorporate the polluter-pays principle and set forth a rule on compensation by the State causing the harm. In addition, the Commission should clarify the meaning of the term "significant adverse effect" in draft article 14 and the term "serious harm" in draft article 16, so that interpretation was not left to individual States when they applied the articles.

12. Concerning the draft articles on responsibility of international organizations, her delegation generally supported the approach of taking as a model the articles on responsibility of States for internationally wrongful acts. However, in view of the differences in structure and interests between States and international organizations, not all aspects of the articles on responsibility of States could be transposed to the current text. It would require further thought, for example, to determine when and how an international organization might invoke self-defence (draft article 18) as a circumstance precluding wrongfulness, since self-defence was not part of the function and practice of international organizations. Her delegation agreed that an international organization could invoke necessity (draft article 22) as a circumstance precluding responsibility for a wrongful act, though only if the wrongful act was the only way to safeguard an essential interest of the organization against a grave and imminent peril. However, the formulation must be properly balanced in order to prevent indiscriminate use of the concept to justify wrongful acts.

13. In response to the question whether members of an international organization that were not responsible for an internationally wrongful act of that organization had an obligation to provide compensation to the injured party should the organization not be in a position to do so (A/61/10, para. 28 (a)), her delegation considered that an international organization and a State each possessed a different and independent legal personality. The international organization must be held primarily responsible for providing compensation to the injured party, and responsibility should not fall on a member State that had had no part in the act or the decision leading to the act that had caused the harm. The international organization should seek an alternative way when not in a position to provide compensation, but the solution should definitely not be that the member States should assume responsibility.

14. **Mr. Paasivirta** (Observer for the European Commission), speaking on behalf of the European Community on responsibility of international organizations, said that the commentary to draft article 17 on consent mentioned the example of consent by a State to the verification of the electoral process. In addition to the European Union's civil crisis instruments, there was considerable European Community practice in the field of election observation. Under two regulations of 1999 the Community provided support for electoral processes by supporting independent electoral commissions, providing material, technical and legal assistance in preparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, and training observers. Community election observation missions were usually led by a member of the European Parliament upon the invitation of the host Government.

15. With regard to the draft articles on responsibility of a State in connection with the act of an international organization, draft articles 25 to 27 and 30 did not call for particular comment, except to warn that such direct borrowing from the articles on responsibility of States deserved close scrutiny. However, the new draft articles 28 and 29, which were without precedent,

caused particular problems for the European Community in the light of the Community's special character. Draft article 28 put forward the new idea that a State member of an international organization might be held responsible for bestowing competence on it; as currently drafted, the article implied that a State could be liable for the mere fact of transferring competence to an international organization, even if the organization acted lawfully, if the State thereby circumvented one of its international obligations. From the European Community's standpoint the approach was difficult to understand. He would also recall the criticism expressed by the Commission during the previous session with respect to the concept of circumvention as used in draft article 15.

16. The example given by the Special Rapporteur in his report (A/CN.4/564/Add.1, para. 68) — States bound by the Treaty on the Non-Proliferation of Nuclear Weapons which could be held responsible if they established an international organization that acquired or developed nuclear weapons — seemed far-fetched. However, the more relevant examples cited in the commentary concerning the jurisprudence of the European Court of Human Rights did not support the broad language of the draft article. While the Court had emphasized that States parties to the European Convention on Human Rights could not evade their obligations by transferring powers to an international organization not a party to the Convention, it had also underlined that State responsibility for an act of that organization did not arise where the organization offered a level of protection of human rights equivalent to that to which member States were held by the Convention. That criterion of equivalence between the formal obligations of the member States and the obligations inherently respected by the organization was missing from draft article 28. As the term "circumvents" did not require a specific intention to evade obligations, the draft appeared to be over-inclusive. At the very least, in order for the article to be acceptable to the European Community, it would have to be clarified that there was no circumvention if the State transferred powers to an international organization which was not bound by the State's own treaty obligations but whose legal system offered a comparable level of guarantees.

17. Draft article 29 also raised questions. Although the European Community might be able ultimately to accept the principle that the responsibility of a State member of an international organization for the internationally wrongful act of that organization could be presumed to be at best subsidiary, the conditions set forth in paragraph 1 were potentially very far-reaching. Under paragraph 1 (a) a State was responsible if it had accepted responsibility for a particular act. In some international organizations, such as the European Community, such explicit acceptance of responsibility was severely curtained by the constitutional law of the organization. Under paragraph 1 (b), a State was responsible if it had led the injured party to rely on its responsibility. That principle could be problematic with regard to mixed agreements of the European Community and its member States with third States, in which the Community and its member States were parties "of the one part" and the third State was the party "of the other part"; it might be held that the third State had thus been led to believe that the member States were responsible under international law for the implementation of the whole agreement, even though large parts of it might fall within exclusive Community competence. While the Community could seek its own solutions to such complications, it did not find the wording of draft article 29 helpful.

18. **Mr. Pambou-Tchivounda** (Chairman of the International Law Commission), introducing chapter VIII, on reservations to treaties, said that the Commission had adopted five draft guidelines on the validity of reservations and had reconsidered two previously adopted draft guidelines in the light of the new terminology on which it had decided at its fifty-eighth session. It had also debated the second part of the Special Rapporteur's tenth report (A/CN.4/558/Add.1 and Corr.1 and Add.2) and had referred 16 draft guidelines to the Drafting Committee.

19. The five draft guidelines adopted by the Commission were set out in the third part of the Guide to Practice and covered the validity of reservations and interpretative declarations. After a lengthy debate, the Commission had opted for the terms "validity" and "invalidity" of reservations instead of permissibility (*licéité*) and impermissibility (*illicéité*), since most of the members of the Commission had been of the opinion that "validity" was more neutral and did not prejudge the doctrinal controversy between proponents of the notion of "permissibility" and supporters of the term "opposability". The term "permissibility" had been retained in the English text to denote the substantive validity of reservations fulfilling the

requirements of article 19 of the Vienna Conventions. That term was rendered in French by the expression "*validité substantielle*".

20. The third part of the Guide to Practice dealt successively with the permissibility of reservations, competence to assess the validity of reservations and the consequences of the invalidity of a reservation.

21. Draft guideline 3.1 faithfully reproduced the wording of article 19 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which was itself patterned on the corresponding provision of the 1969 Vienna Convention on the Law of Treaties, with just two additions, which had been needed in order to cover treaties concluded by international organizations. The draft guideline was concerned with the power to make reservations and the cases in which that power was limited. As the principle of freedom to formulate reservations could not be separated from the exceptions to the principle, the Commission, which generally avoided modifying the wording of the provisions of the Vienna Conventions that it had carried over into the Guide to Practice, had decided against elaborating a separate draft guideline dealing only with the principle of the presumption of the validity of reservations. In draft guideline 3.1, it had therefore retained a reference to the different moments when a reservation might be formulated, even though such a reference was superfluous since it was to be found in the actual definition of reservations.

22. The validity of reservations depended not only on the substantive conditions set forth in article 19 of the Vienna Conventions, but also on compliance with conditions of form and timeliness. As the latter had been dealt with in the second part of the Guide to Practice, the third part placed greater emphasis on substantive validity.

23. Draft guideline 3.1.1 listed cases where reservations were expressly prohibited and was intended to clarify the scope of draft guideline 3.1, subparagraph (a), which did not indicate what was meant by "reservation prohibited by the treaty". The prohibition could be clear and precise or more ambiguous. More often the prohibition was partial and related to one or more specified reservations or to one or more categories of reservations. In more complicated situations, the treaty did not prohibit reservations, but excluded certain categories of them. Article 19, subparagraph (a), of the Vienna Conventions covered all three situations.

24. The purpose of draft guideline 3.1.2 was to clarify the meaning of the expression "specified reservations", which had not been defined in the Vienna Conventions, even though it could have important consequences for the applicable legal regime, because reservations which were not "specified" must pass the test of compatibility with the object and purpose of the treaty. In practice, some reservation clauses authorized reservations to particular provisions which were expressly and restrictively listed either affirmatively or negatively, others authorized specified categories of reservations and a very few authorized reservations in general.

25. A general authorization of reservations did not necessarily resolve all the problems, because it left unanswered the two questions of whether the other Parties might still raise objections and whether the authorized reservations were subject to the test of compatibility with the object and purpose of the treaty.

26. Most Commission members had held that a reservation should be considered to be specified if a reservation clause indicated the provisions of a treaty to which a reservation could be entered, or if it stated that reservations were possible to the treaty as a whole in respect of certain specific aspects.

27. Draft guideline 3.1.3 made explicit what the Vienna Conventions had left implicit, namely that every reservation must satisfy the basic condition set forth in article 19, subparagraph (c), of not being incompatible with the object and purpose of the treaty. That principle was one of the fundamental elements of the flexible system established by the Vienna regime. While there was, however, no doubt that that requirement represented a rule of customary law, its content remained vague and there was some uncertainty as to the consequences of incompatibility. That draft guideline made it clear that reservations which were "implicitly authorized", because they were not formally excluded by the treaty, must be compatible with the object and purpose of the treaty.

28. Draft guideline 3.1.4 explained that, when the treaty did not define the content of specified reservations, they were still subject to the compatibility test. Of course, *a contrario*, when the content of a specified reservation was indicated in the reservation

clause, a reservation consistent with that provision was not subject to the compatibility criterion.

29. Draft guidelines 1.6 and 2.1.8 had been modified to bring them into line with the new terminology adopted by the Commission. Lastly, he drew attention to the fact that the Commission would appreciate receiving Governments' views on the adjustments they deemed necessary, or useful, to introduce in 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, as it intended to hold a meeting with United Nations human rights experts at its fifty-ninth session.

30. Introducing chapter IX of the report, on unilateral acts of States, he said that, at its fifty-eighth session, the Commission had had before it the Special Rapporteur's ninth report (A/CN.4/569 and Add.1), and it had decided to re-establish the open-ended Working Group under the chairmanship of Mr. Alain Pellet. It had requested the Working Group to prepare the Commission's conclusions on the topic of unilateral acts of States, taking into consideration the various views expressed, the draft Guiding Principles drawn up by the Special Rapporteur and its previous work on the topic. After examining the Working Group's report, the Commission had adopted a set of 10 Guiding Principles applicable to unilateral declarations of States which were capable of creating legal obligations and it had commended the Guiding Principles to the attention of the General Assembly.

31. The Commission had adopted the Guiding Principles in the belief that it was important for States to be in a position to judge with reasonable certainty whether and to what extent their unilateral conduct might legally bind them on the international plane. The Commission was aware that the concept of a unilateral act was not uniform and could encompass a very wide spectrum of conduct. It had accorded priority to the study of formal declarations embodying an express manifestation of the will of the author State to be legally bound. The Commission realized, however, that States could enter into a commitment by engaging in unilateral behaviour other than making a formal declaration.

32. The definition of unilateral acts *stricto sensu* contained in Guiding Principle 1 rested on two criteria: the public nature of the declaration and the manifestation of the author's will to be legally bound. The binding character of such declarations was based on good faith. Guiding Principle 1 was well illustrated in international practice and was likewise predicated on the case law of the International Court of Justice, which also recognized the decisive role played by the intention of the State in question.

33. Guiding Principle 2 merely asserted that any State possessed the capacity to undertake legal obligations through unilateral declarations. Guiding Principle 3 was prompted by the judgments of the International Court of Justice. It listed the factors which must be taken into account in order to determine the legal effects of such declarations. Many examples drawn from international practice illustrated the pertinence of those factors.

34. Guiding Principle 4 concerned the capacity of a State authority to commit the State through an international declaration. It was clear from State practice and the jurisprudence of the International Court of Justice that that power was indisputably held by heads of State, heads of Government and ministers for foreign affairs. In its most recent judgments, the International Court of Justice had, however, acknowledged that other persons might be authorized by a State to bind it legally in matters falling within their purview.

35. Turning to Guiding Principle 5, he noted that, on several occasions, the International Court of Justice had held that the question of form was not decisive, a finding which was supported by State practice. In the *Nuclear Tests* cases, the International Court of Justice had taken the view that even a series of declarations which, in isolation, would not have bound the State could, together, constitute a legal commitment.

36. As for Guiding Principle 6, State practice supplied several examples of unilateral declarations made in a purely bilateral context and others of declarations addressed to a limited group of States or to the international community in its entirety. In the latter case, such declarations contained *erga omnes* undertakings.

37. The tenor of Guiding Principle 7 was in keeping with the judgments of the International Court of Justice and with article 31 of the 1969 Vienna Convention on the Law of Treaties, which applied to unilateral declarations by analogy.

38. As far as Guiding Principle 8 was concerned, most of the members of the Commission had considered that it was appropriate to apply the principle set forth in article 53 of the 1969 Vienna Convention on the Law of Treaties to unilateral declarations. In its Judgment in the *Armed Activities on the Territory of the Congo* case, the International Court of Justice had not excluded the possibility that a unilateral declaration made by a State could be invalid.

39. Guiding Principle 9 simply applied to unilateral declarations a well-established principle of international law which had been laid down in article 34 of the 1969 Vienna Convention on the Law of Treaties. Moreover, a unilateral declaration which aimed to impose obligations on other States, or to limit their rights, even if it was not accepted in the strict meaning of the term, could prompt analogous declarations and thus constitute the starting point of a rapid process of development of customary law, one example being the 1945 Truman Proclamation on the American continental shelf.

40. In the context of Guiding Principle 10, the fundamental change in circumstances referred to in subparagraph (c) had to be understood within the strict limits of the customary rule enshrined in article 62 of the 1969 Vienna Convention on the Law of Treaties.

41. In closing, he drew attention to the contents of paragraphs 171 and 172 of the Commission's report.

42. **Ms. Hammarskjöld** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the question of reservations incompatible with the object and purpose of a treaty was the most important aspect of the topic of reservations to treaties. She could understand why the Special Rapporteur believed that a Guide to Practice must necessarily contain a definition of the object and purpose of a treaty. However, the result of including such a definition might merely be to replace one elusive concept by another, or to introduce cumbersome criteria that might disturb established terminology used in the Vienna Convention on the Law of Treaties. The two alternative texts of draft article 3.1.5 carried a risk of confusing rather than clarifying the matter.

43. The eleventh report of the Special Rapporteur was expected to comment on the consequences of a reservation found to be incompatible with the object and purpose of a treaty. A growing number of States, including her own, were developing the practice of severing such a reservation from treaty relations between the countries concerned. Since ratification of a treaty expressed the consent of the ratifying State to be bound by its rules, a State that nullified key provisions of a treaty by means of a reservation should not be permitted to accede to it.

44. Article 19 of the Vienna Convention made clear that reservations incompatible with the object and purpose of a treaty should not be part of treaty relations between States. An invalid reservation should therefore be considered null and void. Since an objection to an invalid reservation served to draw attention to its nullity, the Nordic countries supported the intermediate solution suggested by the Special Rapporteur in draft guideline 2.1.8.

45. The practice of severing reservations incompatible with the object and purpose of a treaty was fully in conformity with article 19 of the Vienna Convention, which made clear that such reservations were not to form part of the treaty relationship. If, instead of objecting to impermissible reservations, States could exclude bilateral treaty relations with the reserving State, the option of separating out such reservations would serve to keep the treaty relationship in being and would preserve the possibility of dialogue within the treaty regime. However, in so doing account must be taken of the intention of the reserving State regarding the relationship between the ratification of a treaty and the reservation.

46. The Nordic countries welcomed the proposal for a meeting between the Commission and human rights experts, including representatives of treaty monitoring bodies, to discuss issues relating to reservations to human rights treaties. A similar conference had been held in 2002 at the Raoul Wallenberg Institute for Human Rights and Humanitarian Law in Lund, Sweden, attended by several representatives of treaty bodies, and the proceedings had been reproduced in a book. In the view of the Nordic countries, great care should be exercised when deciding whether to allow the development of a separate regime for dealing with the specific effects of invalid reservations to human rights treaties. The preliminary conclusions presented by the Special Rapporteur in 1997 (A/52/10, para. 157) should not be allowed to result in unwarranted effects in that regard. As for paragraph 10 of the conclusions, if the option of severability was available there might be no need for the reserving State to modify or

withdraw its reservation, or to forgo becoming a party to the treaty.

47. **Mr. Alday** (Mexico) said that the reports on reservations to treaties prepared by the Special Rapporteur gave a clear and objective picture of the problems surrounding application of the existing treaty and customary rules on the subject. His delegation's view was that, in judging the validity of a reservation, its compatibility with the object and purpose of the treaty was a fundamental criterion, not a secondary one. He agreed with the Special Rapporteur that the definition of "object and purpose" must be broad enough to permit the application of that criterion on a case-by-case basis, and in conformity with the rules of treaty interpretation. Even so, it was not a straightforward process, and it was important to have a defining clause in treaties, for the sake of identifying the rights and obligations of the parties. His delegation was therefore satisfied with the first draft of guideline 3.1.5 proposed by the Special Rapporteur.

48. **Mr. Hafner** (Austria) said that the issue of reservations to human rights treaties was of such significance that a meeting between the Commission and United Nations human rights experts, including representatives of treaty-monitoring bodies, would be extremely helpful. The meeting could also discuss possible adjustments to the 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. Before any adjustments were made to the substance of those conclusions, it would, however, be wise to wait for the outcome of the discussion of the current draft guidelines, since the two texts were interrelated.

49. Although the term "specified reservations" could be found in article 19 of the 1969 Vienna Convention on the Law of Treaties, and its origin could be traced back to the words "specific reservations" employed by Fitzmaurice and Waldock in their early drafts of articles for the Convention, it was questionable whether those epithets really had the same meaning. In any case, the adjective "specified" clearly posed some problems in the subsequent draft guidelines, as draft guideline 3.1.3 referred to "certain reservations", although the commentary did not explain whether that expression also covered "specified reservations".

50. Even though the object and purpose of a treaty was indeed central to the reservation regime, draft guideline 3.1.4 raised some questions. While he noted the Commission's opinion, as set out in paragraph (13) of the commentary to draft guideline 3.1.2, namely that a reservation was specified if a reservation clause indicated the treaty provisions in respect of which a reservation was possible, he wondered why reservations made under such conditions still had to pass the object-and-purpose test. Surely a reservation clause indicating precisely to which treaty provisions a reservation could be made already implied that those provisions did not affect the object and purpose of the treaty. It was a different matter if the reservation was not prohibited under article 19, paragraph (b) of the 1969 Vienna Convention on the Law of Treaties, or if it was explicitly envisaged. In the former case, the passing of the compatibility test was necessary, in the latter case it was not.

51. The underlying concept of draft guidelines 3.1 to 3.3.2 corresponded to Austrian practice, which was predicated on the principle that invalid reservations were null and void. The different categories of reservations prohibited in article 19 of the Vienna Convention all had the same legal consequences. The draft guidelines on the status and competence of monitoring bodies were inconsistent. According to draft guideline 3.2.1, the competence of existing monitoring bodies to monitor the application of the treaty encompassed the competence to assess the validity of reservations, yet draft guideline 3.2.2 called on States to provide those bodies with that competence.

52. Draft guideline 3.2.3 raised the question whether that competence should cover all reservations. If a treaty provided for specified reservations and hence there were no doubts concerning their permissibility, should a State making such a reservation also be obliged to consult with the monitoring body? Such a procedure would not be very attractive to States.

53. He took it that draft guideline 3.3.2 did not exclude the possibility of inter se agreements, provided that they were compatible with the basic treaty. If a State made a reservation to a treaty which precluded all reservations and another State party accepted that reservation, why should that agreement not be regarded as an inter se agreement in conformity with article 41 of the Vienna Convention? Even if a treaty prohibited all reservations, that did not necessarily mean that all the treaty provisions served the effective realization of the object and purpose of the treaty as a whole.

54. Draft guideline 3.3.4 gave rise to grave concerns, because it even invited States to make reservations prohibited by a treaty. It was questionable whether that result was really intended. Furthermore, no deadline was set for the entering of objections, yet such a time limit would be vital in practice. The draft guidelines said nothing about the effect of silence. The conclusion that silence could not be equated with the acceptance of the reservation would be in accordance with draft guideline 3.3.3, according to which nullity could not be remedied by unilateral acceptance. It was, however, doubtful whether anything like a collective position of the States parties to general multilateral treaties could be said to exist, especially as the draft guidelines did not establish the time by which such position had to be established.

55. **Mr. Lammers** (Netherlands), commenting on the definition of the "object and purpose" of a treaty, said that his delegation had considered the two alternative texts suggested by the Special Rapporteur but doubted whether they would achieve the end he had in view. He urged caution in dealing with the idea that the notion of "object and purpose" could be defined at all, since the words already referred to the core obligation or *raison d'être* of a particular legal instrument. The notion of "the general architecture of the treaty", as suggested by the Special Rapporteur, seemed to refer to the structure or framework of a treaty, introducing a notion alien to the law of treaties proper and shifting the focus away from the substantive issues indicated by "object and purpose". States might interpret the words in different ways for a given treaty, just as they might have different reasons for wanting to become parties to it. Moreover, the phrase "object and purpose" was not unique to the subject of reservations. It appeared many times in the Vienna Convention on the Law of Treaties, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, and the Vienna Convention on Succession of States in respect of Treaties. It was also frequently used in case law and in dispute settlement procedures. Thus a definition of "object and purpose" should not take place in a vacuum, because it could have an impact in other situations and produce unexpected legal effects. His delegation would discourage the Commission from undertaking such a definition and would suggest that the efforts to arrive at one should be brought to an end. There was already a general sense of what the notion meant, and his own delegation had no objection to the earlier text presented by the Special Rapporteur.

56. Concerning reservations to normative multilateral treaties, including human rights treaties, and the preliminary conclusions on that subject (A/52/10, para. 157), he noted that, according to paragraph 2 of those conclusions, the flexibility of the law on reservations provided a "satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty". The preliminary conclusions then stated that the same was true of human rights instruments. Everyday treaty practice did not, however, achieve a "satisfactory" balance in that sense. Many would agree that the law on reservations seemed to favour participation at the expense of the integrity of the treaty. As for the role of the treaty-monitoring bodies with respect to reservations to human rights instruments, the conclusions were largely descriptive of the situation as it had been in 1997 and continued to be. The monitoring bodies certainly had the authority to address the issue of reservations in their discussions with States parties and to state whether they considered a particular reservation to be contrary to the object and purpose of the treaty. Their role was distinct from that of the States parties, which could react to reservations by submitting objections and by deciding, if necessary, that no treaty relationship would be established with the reserving State.

57. It would be desirable to review the preliminary conclusions to include a clearer statement of the intended meaning of the "legal force" of the findings of the monitoring bodies, mentioned in paragraph 8. The present text limited the legal force of those findings to the scope of the powers given to the monitoring bodies in their constituent instruments, thus ignoring their role in interpreting those instruments. His delegation believed that the views expressed by monitoring bodies could contribute to the development of legal opinion. If those bodies consistently expressed a particular view on the interpretation of a certain category of reservations, that view could become an authoritative interpretation. He challenged the Special Rapporteur to take his thinking one step further and attempt to describe what the "legal force" in that context could be. The legal effects of the work of the monitoring bodies, and a proper analysis of current practice, should be reflected in the future Guide to Practice on the topic of reservations. His delegation was concerned

that the Commission's work on the topic so far had focused on a description of the system and its theoretical intricacies, instead of providing tools for legal practitioners. It strongly supported the proposal that, during its fifty-ninth session, the Commission should hold a seminar on reservations to human rights treaties, with the participation of all the monitoring bodies of the human rights treaties.

58. **Ms. Harrington** (Canada) agreed with the view expressed by the Special Rapporteur in his previous reports on the topic that the question of reservations to human rights treaties represented an ambiguity or gap within the Vienna system of treaties as a whole. She also welcomed confirmation that the ability of a human rights treaty body to pronounce on the validity of a reservation did not extend the competence of that body beyond the scope provided in its constituent instrument. A human rights treaty body could not make binding pronouncements on reservations, or act as the sole judge of their validity. However, the terms "rule" or "ruling" should not be used in connection with the view of such a body on the validity of a reservation, which should preferably be described as an "assessment" or a "pronouncement".

59. The express retention of a role for contracting parties to a treaty to respond by means of objections to the invalidity of a reservation entered by another contracting party was gratifying. It would, however, be useful to spell out the consequences arising from a reservation that was null and void because it did not fulfil the conditions for validity in article 19 of the Vienna Convention on the Law of Treaties.

60. Her delegation urged caution about proposing a role for the depositary of a treaty in reviewing manifestly invalid reservation. Because of the difficulty in determining the true object and purpose of a treaty, such a role could cause further uncertainty.

61. Turning to the topic of unilateral acts of States, she welcomed the Guiding Principles as a helpful resource for States and a reliable summation of the international jurisprudence on the topic. She agreed with the Commission that there was no uniform concept of a unilateral act. It was therefore wise to restrict the Guiding Principles to formal unilateral declarations intended to produce obligations under international law. The Commission's focus on intention within the definition of a unilateral act was appropriate, as was the preambular confirmation that States might "find themselves bound by their unilateral behaviour on the international plane". She also noted that the Commission had expressly excluded reservations from the scope of the Guiding Principles and had endorsed the restrictive approach to the interpretation of obligations which might arise from unilateral acts. The question of capacity to make unilateral declarations on behalf of a State remained unsettled. Her delegation would welcome further discussion as to whether the same principles should apply to declarations addressed to specific States as to those addressed to the international community as a whole.

62. In the difficult topic of unilateral acts, there was a possibility of overlap between two sets of principles applying, respectively, to the framing of obligations by treaty and through declarations. The Guiding Principles should produce greater certainty as to the obligations arising from unilateral acts.

63. **Mr. Ma** Xinmin (China), commenting on the competence of treaty monitoring bodies to rule on the validity of reservations, said that the function attributed to them in that respect in the draft guidelines exceeded their normal function of assessment and went beyond the relevant provisions of the Convention on the Law of Treaties and State practice. The acceptance or otherwise of a reservation by contracting parties to a treaty had a substantive impact on the effect of the reservation. Treaty bodies, on the other hand, were concerned, not with the readjustment of the treaty relationship, but rather with the implementation of the treaty on the basis of the existing treaty relationship. Treaty monitoring bodies should not have competence to rule on the validity of reservations. He therefore proposed the deletion of the third subparagraph of draft guideline 3.2 and of draft guidelines 3.2.1, 3.2.2 and 3.2.3 in their entirety.

64. Draft guideline 3.2.4 provided that a ruling by a treaty-monitoring body neither excluded nor affected rulings by other contracting parties and dispute-settlement bodies. However, different entities with competence to rule might assess the same reservation differently. The conclusion contained in draft guideline 3.2.4 was over-subjective and did not help to resolve practical problems. Likewise, draft guidelines 3.3 to 3.3.4 were not fully thought out and required further discussion. No provision should be made, such as in draft guideline 2.1.7, for the treaty depositary to draw the attention of parties to the legal issues raised by a

reservation, because that would go beyond the procedural function of the depositary.

65. Concerning the provisions in draft guidelines 3.3.2 and 3.3.3, the pertinent question was not the validity or otherwise of a reservation, but whether a reservation could be made or not. Other contracting parties were free to decide whether to accept a reservation. If some contracting parties chose to accept and others to object to a reservation, it was difficult to conclude that the reservation was invalid from the outset.

66. Turning to the definition offered by the Special Rapporteur of the "object and purpose" of a treaty, he said further clarification was needed of the relationship between reservations, the *raison d'être* and essential provisions of a treaty, and its object and purpose.

67. The Commission should, he suggested, consider using different terms for the formulation of reservations and their validity. Using the terms "valid" and "validity" in both contexts confused the two issues. Whether or not a reservation could be formulated did not automatically raise the question of the validity of the reservation itself.

68. He congratulated the Commission on completing its consideration of the topic of unilateral acts of States. The Guiding Principles applied only to unilateral acts of States on the basis of the States' subjective intention to assume international obligations. They did not extend to unilateral declarations made under international law or to unilateral acts intended to create rights under international law. Their adoption did however contribute to the development of international law by clarifying the acts of States which could result in international obligations, thus improving the stability and predictability of international relations.

69. **Mr. Roelants de Stappers** (Belgium) said that the 1997 preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, were generally acceptable. When dealing with such treaties there was no reason to depart from the rules of the Vienna Convention on the Law of Treaties, which included a codification of the law on reservations, thereby obviating the need for *lex specialis*.

70. He endorsed paragraph 3 of the preliminary conclusions and reiterated the position of his delegation, expressed in the Committee in 2004 and 2005, concerning the invalidity of reservations contrary to the object and purpose of a treaty. His delegation also accepted paragraph 5 of the preliminary conclusions, on the understanding that that paragraph — on the competence of a treaty-monitoring body to comment upon and express recommendations with regard to the admissibility of reservations — had to be taken in conjunction with the other paragraphs of the text, and without prejudice to acceptance or rejection of reservations by States parties to a treaty.

71. **Ms. Escobar Hernández** (Spain) noted with satisfaction that in the draft guidelines on reservations to treaties the Commission had opted for the term "validity" rather than admissibility or opposability, a choice for which her delegation had expressed a preference at the past two sessions of the General Assembly. In the Spanish version of draft guideline 3.1, the term "*validez*" was qualified by the adjective "*material*", which helped to delimit the meaning of the term and distinguish it from any interpretation relating to the effects of the reservation. Her delegation endorsed the general thrust of draft guidelines 3.1.1 to 3.1.4, and especially the role of the object and purpose of the treaty as a yardstick for the validity of a reservation not expressly authorized by the terms of the treaty. However, draft guideline 3.1.1 referred to reservations "expressly prohibited" by a treaty, which left open the question of those implicitly prohibited.

72. Draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations), introduced an element of progressive development which warranted careful examination, since it was relevant to the definition of the status of the depositary.

73. With regard to the "object and purpose" of treaties, she believed that a guide to practice on reservations must necessarily include a definition. She preferred the first of the options set out in the note by the Special Rapporteur on draft guideline 3.1.5 (A/CN.4/572).

74. It did not seem logical that a monitoring body established for a specific treaty should lack all competence to decide on the validity of reservations to that treaty, and therefore the general intent of draft guidelines 3.2.1 to 3.2.4 merited support. However, the relationship between draft guidelines 3.2 and 3.2.4 should be further developed, because the effect of the provision in the latter did not solve the problem of

what to do in the event of contradictory findings by different bodies on the validity of the same reservation. That problem should be discussed within the framework of the meeting to be held during the Commission's fifty-ninth session with representatives of human rights treaty bodies.

75. Turning to the topic of unilateral acts of States, she welcomed the Guiding Principles and endorsed the approach taken with respect to the definition of unilateral acts, the conditions under which they could take legal effect and the representatives of a State who had capacity to bind the State through their declarations. However, some provisions in the Guiding Principles drew an undesirable parallel with treaties. She also had doubts about the use of the term "void" (*nulo*) in connection with unilateral acts.

76. **Ms. Galvão Teles** (Portugal) observed that some of the proposals and solutions put forward by the Special Rapporteur in his work on reservations to treaties were too far advanced in relation to actual practice and, notwithstanding the enormous value of that work, could imply amendment of the Vienna Conventions.

77. Although the Commission had been initially uncertain whether to use the terms "validity/invalidity" or "permissibility/impermissibility", it had apparently decided, under the clear influence of the Special Rapporteur, to opt for the former. While her delegation understood why the Special Rapporteur might wish to define reservations as valid or invalid, it felt that such qualification was premature and might be too far-reaching. Moreover, it was questionable whether there was anything to be gained by using the terms "validity/invalidity". Practice appeared to indicate that the regime of the Vienna Convention on the Law of Treaties was sufficient in that respect and that emphasis should be placed on the scope of the effects of the reservation and of objections to reservations rather than on the qualification issue.

78. As noted in paragraph 95 of its report, the Commission's work on the subject of reservations to treaties was intended purely as a guide to practice, with a clear understanding that no changes should be made to the relevant provisions of the Vienna Conventions. Moreover, no single direction could be observed in the practice of States. It should be borne in mind that the Vienna Convention on the Law of Treaties was itself silent on the subject, although it included clear provisions on the validity and invalidity of treaties. Also, the institution of reservations had a specific and contractual nature, and the Vienna Conventions conferred a special role on States parties to a treaty to monitor reservations, in the absence of an independent third party. The fact that a State did not object to a reservation did not necessarily mean that it considered the reservation to be valid. Furthermore, if no State objected to a reservation, that did not necessarily mean that the reservation was valid. The converse argument was also true.

79. Silence on the part of States could not be transformed into an implicit system of validation of reservations. On the other hand, her delegation did not see how the supposed intrinsic invalidity of a reservation could prevent States from accepting it or what was the practical effect of preventing such acceptance from changing the nullity of the reservation. The approach taken by the Special Rapporteur seemed to transform the subjective, contractual system provided for in the Vienna Conventions into an objective system. Although her delegation might agree with his proposals *de lege ferenda*, his approach did not seem to be *de lege lata* and thus went beyond what was envisaged in the Vienna Conventions.

80. While her delegation generally agreed with draft guidelines 3.1, 3.1.1, 3.1.2, 3.1.3 and 3.1.4, it felt that certain comments were warranted. Draft guideline 3.1 did not appear to resolve the question of which word should be used to describe the act of presenting a reservation. It was not the term given in article 2 or article 19 of the Vienna Conventions that should characterize the act of presentation but instead the legal regime that governed the presentation. Moreover, States had the "freedom" rather than the "right" to present reservations. The question of the acceptance ("permissibility" or "validity") of the reservation was different.

81. While her delegation agreed with draft guideline 3.1.1, it felt that the drafters of the Vienna Conventions had envisaged much simpler reasoning and purpose. When States, in a given convention, stipulated that all, some or a certain category of reservations were prohibited, they were not creating an inconsistency with respect to article 19 of the Vienna Conventions or the purpose of the treaty. In so stipulating, States identified those reservations as being contrary to the purpose of the treaty. Moreover, what constituted a

"certain category" of reservations should be determined under the rules of articles 31 et seq. of the Vienna Conventions, on the interpretation of treaties.

82. Her delegation also found draft guideline 3.1.2 acceptable, but felt that a thorough analysis should be conducted into what constituted a "specified reservation". That which fell outside the scope of unspecified reservations should meet the criteria of the "object and purpose of a treaty". With respect to draft guidelines 3.1.3 and 3.1.4, her delegation agreed that "implicitly authorized reservations" and "permissible specified reservations" should also pass the test of compatibility with the object and purpose of a treaty.

83. She welcomed the Commission's recommendation that the Secretariat, in consultation with the Special Rapporteur, should organize a meeting, during its fifty-ninth session, with United Nations human rights experts to discuss issues relating to reservations to human rights treaties. The preliminary conclusions on reservations to normative multilateral treaties, adopted by the Commission in 1997, would constitute a good basis for such discussions.

84. Almost 10 years of work had demonstrated the difficulties of codifying international law on unilateral acts of States. As noted in paragraph 174 of the Commission's report, those difficulties were compounded by the fact that the concept of a unilateral act was not uniform. Her delegation therefore believed that the Commission should finish its work on that topic, with the adoption of the Guiding Principles applicable to unilateral declarations of States capable of creating objections, which essentially stressed that States could undertake legal obligations through unilateral declarations whose binding character was based on the fundamental legal principle of good faith. The Guiding Principles also put forward certain conditions which must be met for such declarations to produce legal obligations. Her delegation continued to believe that the role played by unilateral acts of States was very rich and full of varied effects and that it met the real needs of States and the international community. It would give careful consideration to the Guiding Principles and the related commentaries, bearing in mind that the binding force of a unilateral declaration depended on the circumstances of the case.

85. Lastly, she said that it would have been useful to characterize the different types of unilateral acts (recognition, promise, notification, waiver and protest) and to study other types of act in order to determine whether they should be included in that characterization. Since that approach had failed, however, her delegation was gratified to learn that the Commission proposed to end its consideration of the topic.

86. **Mr. Tajima** (Japan) said that, while his delegation agreed with the Special Rapporteur that the guidelines on reservations to treaties should be as detailed and comprehensive as possible, it noted that more than 10 years had passed since the Commission had begun to consider the topic and would therefore welcome a broad overview of the guidelines in the near future. It appreciated the Special Rapporteur's devotion to the issue of the object and purpose of the treaty, which was usually identified in the reservation and objection to each treaty. As the permissibility of a reservation differed according to the nature of each treaty, it might be difficult to agree upon a single general definition of that concept.

87. With regard to the articles on competence to assess the validity of reservations, his delegation felt that the competence of the monitoring bodies established by the treaty should be decided in accordance with the relevant treaties of those bodies. However, holding a meeting between the Commission and United Nations human rights experts would facilitate the elaboration of both substantive and procedural parts of the articles on that topic. Lastly, the Commission had rightly focused on a single category of unilateral acts of States, and there was no need to proceed to codification under the general heading "Unilateral acts of States".

88. **Mr. Fitschen** (Germany), referring to the topic of reservations to treaties, said that invalid reservations remained a major issue, particularly with regard to treaties that included human rights guarantees and treaties on combating international terrorism. Special vigilance was required to counteract attempts to undermine or call into question adopted standards by introducing exceptions via reservations. His delegation therefore noted with satisfaction that awareness of the issue had increased in recent years. It also very much appreciated that the Commission considered the topic to be of great relevance.

89. The protection of human rights was one of the areas that was consistently relevant with respect to

issues relating to reservations. The European Convention on Human Rights had long accepted a role in determining the validity or invalidity of reservations similar to that of the United Nations treaty-monitoring bodies, and for some 20 years the competence of the European Court of Human Rights to rule on the validity of reservations had been an integral part of human rights under the Convention. In addition, the Court's case law had helped the severability doctrine achieve acceptance within the Council of Europe. Pursuant to that doctrine, a State that had made an invalid reservation would be considered to be fully bound by the treaty. That development had not yet been extended to the realm of the universal protection of human rights, but if it was decided to reopen the debate on the Commission's preliminary conclusions, some European countries would probably welcome the chance to revisit the issue.

90. It remained doubtful whether the efficacy of human rights guarantees was ensured if the parties to a human rights instrument were in principle given carte blanche to rewrite its provisions. Rather, it was the structure of normative treaties which set them apart from traditional reciprocal treaties and therefore justified their "constitutionalization", at least *de lege ferenda*. If the Commission was not ready to abandon the more conservative concept of a reservation system based on the rules of the Vienna Convention on the Law of Treaties, it should at least consider an adjustment during its discussions on both the preliminary conclusions and the draft guidelines. Under such an adjustment, where treaty-monitoring bodies had actually been given competence to determine whether reservations to treaties were valid, such competence should prevail over any other mechanism with the same purpose. In all other cases it would remain necessary to develop procedures and practices within the existing system which would entice even more States to respond to inadmissible reservations and, where necessary, object to them.

91. **Ms. Williams** (United Kingdom) said that, although her delegation generally supported a consultative approach to all topics within the Commission's programme, it questioned the need for a special meeting with United Nations human rights experts. Her delegation firmly believed that reservations to normative treaties, including human rights treaties, should be subject to the same rules as reservations to other types of treaties. Human rights treaty monitoring bodies were competent to rule on the status or consequences of a particular reservation solely when that power was provided by the treaty. In all other circumstances, such conclusions were not determinative. Ultimately, it was for the reserving State to take action to address any uncertainty.

92. With regard to the draft guidelines referred to the Drafting Committee, her delegation wished to reiterate its previous observations on draft guidelines 3.1.7 to 3.1.13. It remained sceptical as to whether it was possible, or even desirable, to clarify the concept of the object and purpose of a treaty in the abstract. The comments she had just made on the role of treaty-monitoring bodies were also of relevance to draft guidelines 3.2 to 3.4.

93. Turning to the guidelines provisionally adopted by the Commission, she said that draft guideline 3.1.1 clarified the meaning of article 19, subparagraph (a), of the Vienna Convention on the Law of Treaties. Her delegation agreed with the Commission that that subparagraph concerned only reservations expressly prohibited by the treaty. It did not accept that certain treaties, by their nature or purpose, implicitly prohibited reservations. While welcoming the flexible approach adopted by the Commission in draft guideline 3.1.2, which attempted to clarify the meaning of the term "specified reservations", her delegation remained concerned that the definition might not capture all circumstances in which a reservation might be "specified". It also agreed with the Commission's draft guidelines 3.1.3 and 3.1.4, which provided that any reservation not prohibited by the treaty, or not a "specified" reservation, must be compatible with the object and purpose of the treaty. However, it questioned the reference in the commentary concerning the applicability of article 20, paragraphs 2 and 3, of the Vienna Convention, which, in the view of her delegation, did not apply, or applied only by analogy, to impermissible reservations. Draft guideline 2.1.8 and the associated commentary were also of concern; they should indicate more clearly when a reservation was considered "manifestly valid", given that the provision purported to extend to all three categories of impermissible reservations in article 19. It was not clear why the depositary, rather than the States parties, was in a position to determine whether a particular reservation was incompatible with the object and purpose of the treaty. The guideline also failed to consider the possible implications of that change.

Many States held the view that the role of the depositary was to transmit the text of reservations to the treaty parties and remain neutral and impartial.

94. Lastly, her delegation hoped that the 10 Guiding Principles on the topic of unilateral acts of States would be the final product on that topic. She would not comment on the substance of the principles other than to state that the intention of the State was paramount in that context.

95. **Mr. Tladi** (South Africa) said that the draft guidelines on reservations to treaties were generally faithful to the text and spirit of the Vienna Convention on the Law of Treaties, especially its article 19. His delegation recognized the negative impact that too many reservations could have on the integrity of multilateral conventions. However, it also understood the need for reservations as a means to promote much greater participation by States in such conventions. That was why it encouraged Member States to heed the provisions and spirit of article 19 of the Vienna Convention, which served to limit the kinds of reservations that were acceptable under international law and thereby struck a delicate balance between the integrity of conventional law and the interest in greater participation.

96. The second part of draft guideline 2.1.8 was problematical in providing that if the author of a manifestly invalid reservation maintained that reservation, then the depositary, when communicating the text of the reservation to other States, would also indicate the nature of the legal problems raised by the reservation. In doing so, the draft guideline went beyond the role envisaged for the depositary in the Vienna Convention and raised a number of questions about the implications and status of the legal opinion of the depositary. Moreover, such an opinion might have the effect of prejudging a legal question and taking the initiative away from States. His delegation was not in favour of impermissible or invalid reservations and was not opposed to the practice of treaty-monitoring bodies' expressing an opinion as to the validity of reservations. However, it was concerned about the potential for transferring an adjudicatory role to depositaries.

97. **Mr. Astradi** (Italy) said that the Commission would soon consider some of the most controversial questions relating to reservations to treaties, concerning the way in which a reservation to a treaty was assessed. In the light of the answer given to those questions, the Commission should revise its preliminary conclusions on reservations to normative multilateral treaties. The few draft guidelines adopted by the Commission in 2006 did not raise difficulties for his delegation. However, it might be said that they added further complications to the text and commentary. The topic was growing increasingly complex, and the usefulness of the guidelines would seem to depend on the Commission's ability to provide an easily understandable text to which States could refer in their practice.

98. His delegation noted with appreciation the Commission's adoption of a set of Guiding Principles on unilateral acts. However, it was not entirely clear whether the Commission intended to conclude its examination of the topic or had produced a preliminary text before engaging in a more exhaustive examination of practice and eventually adopting draft articles. While the Guiding Principles dealt only with cases in which a State deliberately intended to undertake legal obligations unilaterally, they did not fail to acknowledge that legal effects were often linked to the expectations that a State's conduct might have raised among other States. Certain examples to which the commentaries referred might be understood to concern that type of situation or some implied agreement, rather than the unilateral assumption of legal obligations.

The meeting rose at 1 p.m.