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Chairperson: Ms. Picco .... (Monaco)

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10-60543 (E)

The meeting was called to order at 10.15 a.m.

Agenda item 79: Report of the International Law Commission on the work of its sixty-second session (*continued*) (A/65/10 and A/65/186)

1. **Mr. Sarkowicz** (Poland) said that the Commission's provisional adoption of the Guidelines on reservations to treaties, was a valuable achievement that he hoped would be helpful to States in their practical application of the rules set forth in the 1969 Vienna Convention on the Law of Treaties. Among the other important steps taken at the Commission's most recent session were the start of the consideration on second reading of the draft articles on the effects of armed conflicts on treaties and the progress made on the topic of protection of persons in the event of disasters. On the other hand, Poland feared that some of the changes proposed by the Special Rapporteur might cause unnecessary delay in the work on the critical topic of expulsion of aliens.

2. Turning to the topic of reservations to treaties, and specifically to part 4 of the Guide to Practice, he said he agreed with the Special Rapporteur and the Commission that the invalidity of a reservation was an objective factor that did not depend on the reactions of any of the contracting parties. His delegation endorsed the title of section 4.5, "Consequences of an invalid reservation," and the rule on nullity of an invalid reservation set out in guideline 4.5.1. In the latter, however, the phrase "does not meet the conditions of formal validity and permissibility" suggested that a reservation was invalid only if it did not meet the conditions of both formal validity and permissibility. The word "and" should be replaced with "or" to make it clear that reservations were invalid either because they did not meet the formal and procedural requirements set out in part 2 of the Guide or because they were deemed impermissible according to the provisions of part 3.

3. Poland shared the view of the Special Rapporteur and the Commission that guidelines 3.3.2 and 3.3.3 should be included in part 3 of the Guide to Practice relating to the permissibility of reservations, and not in part 4 concerning their consequences, because it was a question of identifying, not the effect of acceptance of an impermissible reservation, but rather the effect of acceptance on the permissibility of the reservation itself. To underline that point, some changes might be made to the text. The title of guideline 3.3.2, "Effect of individual acceptance of an impermissible reservation", should read "Effect of individual acceptance on the permissibility of a reservation", and in the text, the phrase "the nullity of the reservation" should be replaced by "its impermissibility". The title of guideline 3.3.3, "Effect of collective acceptance of an impermissible reservation", should be changed to "Effect of unanimous acceptance on an impermissible reservation", to bring it more closely into line with the content.

4. His delegation endorsed the rule that unanimous acceptance by the contracting States or organizations of a reservation that was contrary to the object and purpose of the treaty or was prohibited by the treaty's provisions could have the effect of "permitting" the reservation. However, the application of the procedure proposed in guideline 3.3.3 might pose practical problems. The requisite timing for the objection was not entirely clear, and the very meaning given to the term "objection" might raise questions in comparison with the sense in which it was used in article 20 of the 1969 Vienna Convention.

5. Guideline 3.4.1 should be formulated more precisely in the light of the content of guideline 3.3.3: it should begin with the words "Subject to the procedure set forth in guideline 3.3.3" or "Subject to the provisions of guideline 3.3.3".

6. **Mr. Delgado Sánchez** (Cuba) welcomed the decision to continue the discussion of "Settlement of disputes clauses" and the efforts with regard to the long-term planning of the Commission's work. His delegation endorsed the concern expressed about the provision of greater support for the Commission's research work, particularly that of the special rapporteurs, and took due note of the specific issues on which comments would be of particular interest to the Commission, as listed in chapter III of the report.

7. Concerning chapter IV, on reservations to treaties, he said that the Guide to Practice would make an important contribution to the Vienna regime on the law of treaties. However, efforts to set boundaries for the formulation of reservations must in no way impinge on the principles of sovereignty of States and consensualism in which the law of treaties was grounded, nor could the guidelines modify the existing legal regime on treaties established by the Vienna Convention.

8. **Mr. Joyini** (South Africa) said that his delegation welcomed the provisional adoption of the Guide to Practice and concurred with the Commission that a reservation established within the meaning of guideline 4.1 produced all the effects purported by its author: in other words, it excluded or modified the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects. At that point, the object of the reservation as desired or purported by its author was achieved. However, by that very act, the author of the reservation became a party to the treaty, as and when it came into force, in relation to contracting States and organizations in respect of which the reservation was established.

9. His delegation endorsed guideline 4.5.1, which addressed a question of great practical importance and was in line with the positions of well-known international legal scholars, the practice of States and the logic of the Vienna Conventions. A reservation formulated in spite of either a prohibition arising from the provisions of a treaty or its incompatibility with the treaty's object and purpose was null and void; hence, there was no need to distinguish among the consequences of the grounds for invalidity. The question, however, was whether a ratification accompanied by an invalid reservation remained standing, or whether the entire treaty applied to the State concerned. His delegation took the view that the entire treaty applied, including those provisions on which the State had made the invalid reservation. Given that the State had the right to withdraw from the treaty, if it did not exercise that right it must be deemed to have the bona fide intention to be bound by the treaty.

10. States had the sovereign right freely to enter into treaties and to make reservations that were consistent with them; if a reservation was invalid, however, and that invalidity had been brought to the State's attention, then it could not rely upon the reservation in its conduct. The approach adopted in draft guideline 4.5.2 was therefore correct, in that it held the author of an invalid reservation to be bound by a treaty, without the benefit of the reservation, unless a contrary intention of the author could be identified. That underscored the fact that States must take care when drafting reservations to treaties and be clear with regard to their intentions and the legal obligations that bound them.

11. **Ms. Baza** (Spain) said that the Commission had made tangible progress in fulfilling certain tasks it had set itself for the current quinquennium. Her delegation noted with particular satisfaction the work done on the effects of armed conflicts on treaties, treaties over time and protection of persons in the event of disasters. She welcomed the Commission's decision to give more structured analysis to settlement of dispute clauses. On the other hand, she expressed concern over the slow progress on the topic of immunity of State officials from foreign criminal jurisdiction, especially as it was becoming a matter of considerable practical concern.

12. On reservations to treaties, the Commission's provisional adoption of the entire Guide to Practice was an achievement for which it, and in particular the Special Rapporteur, deserved heartfelt praise. Nevertheless, her delegation was still concerned about the use of the term "*reserva establecida*" in Spanish, rather than "*reserva que sea efectiva*"; the new term had been adopted in order to avoid confusion between the "establishment" of a reservation and the "effects" of a reservation, on the basis of a fairly literal alignment between English and French. Objectively speaking, however, there was very little likelihood that "*efectividad*" (existence of an actual fact) might be confused with "*eficacia*" (effectiveness, or production of results from the fact). More importantly, replacing "*efectiva*" with "*establecida*" in Spanish was controversial from a legal standpoint, given that the two terms had entirely different connotations, both in the vernacular and in legal discourse. The Commission should give greater consideration to such terminological problems, which might have legal implications, not to mention that the terms diverged in Spanish from the text of the Vienna Convention.

13. In general, her delegation endorsed guidelines 4.2.1 to 4.2.5, which reflected the remarkable work done by the Special Rapporteur and the Commission to develop a complex model of relations among States over time. The result of that work could help States in their future practice with regard to reservations.

14. Her delegation also endorsed the basic criteria for the structure of guidelines 4.5.1 to 4.5.3 and found the use of the term "consequences", as opposed to "effects", particularly apt. The fact that the Commission had chosen to separate the nullity of a reservation from the reserving State's status in relation to the treaty, which was subject to an assessment of the State's intention, struck a good balance, preserving the principle of consensualism underlying the international treaty regime.

15. **Ms. Sulaiman** (Malaysia) said that despite some unresolved issues, the Guide to Practice promised to be useful to States in their formulation of reservations to treaties.

16. Draft guidelines 3.4, 3.4.1 and 3.4.2, which were to be read together, seemed intended to give legal effect to reservations through the test of permissibility of an acceptance or objection. So, however, the guidelines would seem to curtail the sovereign right of States to express their opinions. The matter required further clarification.

17. Concerning draft guideline 3.5, she said that the conditions of permissibility of interpretative declarations should be imposed only when such declarations were expressly prohibited by a treaty, so as to avoid broad interpretations by States, and should be applied with caution, particularly where a treaty prohibited the formulation of a reservation. In such circumstances, unless it was conclusively determined that the statement was a reservation, the conditions of permissibility under draft guidelines 3.5.1 and 3.5.2 should not be imposed.

18. Draft guideline 3.5.3 was intended to enable a treaty monitoring body to give guidance to States in crafting their interpretative declarations, so as to ensure the validity thereof. However, the scope and legal effect of conclusions or assessments by the treaty monitoring body should be clearly explained and agreed to by all the States parties to the treaty.

19. Regarding draft guideline 3.6, Malaysia considered that reactions to interpretative declarations should not be subjected to conditions of permissibility: States should be able to maintain their freedom to express their views. Interpretative declarations should be viewed as agreements between States exclusively in their relations with each other. While an opposition made by way of proposing an alternative interpretation was treated as an interpretative declaration by itself, a simple opposition to interpretative declarations should not be treated as such.

20. A universally acceptable set of draft guidelines could be developed only if States played their part by providing comments and practical examples of the text's impact on their practice, as requested by the Commission in chapter III of its report.

21. **Mr. Tang** (Singapore) said that his delegation had significant concerns regarding guideline 4.5.2. The guideline, provided for a positive presumption that the author of an invalid reservation would be bound by the treaty without the benefit of the reservation unless the author's contrary intention could be identified. While acknowledging that the guideline represented the Commission's efforts to achieve a balanced compromise between the "permissibility school", which held that the validity of a reservation was objectively determined, and the "opposability school", which premised the validity of a reservation on the reactions of other parties to the treaty, he did not think that the solution was the right one.

22. His delegation fully agreed with the Commission that the author's consent to be bound by the treaty was necessarily conditioned by the reservation, as reflected in the reality of State practice in relation to a Government's participation in an international treaty. The inclusion of a reservation and its terms were an inextricable part of any Government's consent to be bound by the treaty, unless otherwise indicated. It would therefore be better to use the negative presumption in guideline 4.5.2, to the effect that the consequence of an invalid reservation was that its author would not be bound by the treaty.

23. His delegation also wished to make a suggestion on the form of the finalized Guide to Practice. As the commentaries to many of the guidelines had shown, much of the Guide was in fact progressive development. Consequently, as a way of helping future users of the Guide, the Commission might indicate clearly, against the text itself, which elements of the Guide represented codification and which represented progressive development.

24. **Mr. Gouider** (Libyan Arab Jamahiriya) said that his country would submit in writing any comments and proposals that it wished to make after completing its examination of the valuable work achieved by the International Law Commission on various topics. It also looked forward to progress on such other topics as "The obligation to extradite or prosecute (*aut dedere aut judicare*)", "The most-favoured-nation clause", "Treaties over time" and "Settlement of disputes clauses", in addition to further improvement of the Commission's website and continuation of the annual Geneva International Law Seminar. The development of fruitful cooperation with the African Union Commission on International Law would also be welcome.

25. Regrettably, the Commission had not yet addressed the topic “Immunity of State officials from foreign criminal jurisdiction”, a matter of immediate practical significance and ongoing concern to African Union States that had already been taken up in numerous regional and international forums of note. His delegation had also looked forward to the Commission’s consideration of the oil and gas aspects of the topic “Shared natural resources”. As stated in the working paper on the feasibility of future work on those aspects (A/CN.4/621), transboundary oil and gas issues were complex, not least in view of their link with such particularly delicate subjects as boundary delimitation and continental shelves, and the codification of general rules was likely to involve matters best dealt with by States on a case-by-case basis. His country nonetheless held that consideration of the topic by the Commission would help to alleviate the growing number of difficulties faced in that context. He therefore expressed the hope that the option of collecting and analysing information about State practice concerning oil and gas would be re-evaluated with a view to devising general guidelines applicable to all cases.

26. Efforts to strengthen the rule of law in international relations would be advanced by addressing the backlog relating to the *Yearbook of the International Law Commission* and operationalizing General Assembly resolution 64/114 concerning the establishment of a trust fund for that purpose. Moreover, the progress achieved by the Commission was dependent on the ongoing research work of its special rapporteurs, which should be taken into account accordingly in setting their honoraria. Their attendance in the General Assembly during the consideration of the Commission’s report was also supported by his delegation in the interest of enhancing dialogue between the Commission and the Sixth Committee.

27. **Mr. Horváth** (Hungary) noted with satisfaction the provisional adoption of the guidelines but expressed regret that almost no progress had been made with regard to the immunity of State officials from foreign jurisdiction and the obligation to extradite or prosecute. On the topic of shared natural resources, however, his delegation agreed that the Commission should not proceed with the codification work on oil and natural gas.

28. The extensive nature of the Guide could render its use difficult for States. He therefore encouraged the Commission to make a serious effort to streamline it as much as possible. For example, although he agreed with the content of section 4.2 (Effects of an established reservation), he felt that paragraph 2 of guideline 4.2.2 was unnecessary, since its content could be addressed by simply inserting the phrase “unless the parties otherwise agree” at the end of the first paragraph.

29. In guideline 4.5.2, he did not agree with the Drafting Committee’s decision to delete “inter alia” after the word “including”, because the inclusion of that wording would better reflect the Commission’s efforts to make the list in paragraph 2 non-exhaustive and would ensure that no specific point was given more weight than another in establishing the author’s intention. In the second bullet point, moreover, the word “declarations” should be used instead of “statements”, as the latter term was too vague. The Commission was correct, however, to exclude a reference to a right of withdrawal from the treaty by the author of an invalid reservation in order to avoid adding any new provision that might be inconsistent with the Vienna Conventions.

30. In connection with the expulsion of aliens, his delegation drew attention to the recent relevant developments in Europe and elsewhere and wished to align itself with the statement to be delivered by the European Union on that topic. While the Commission should be careful not to draft articles that contained rules contrary to existing human rights conventions or customary law, it must also refrain from tying the hands of States by attempting to regulate strictly domestic subject matters.

31. Future work on the topic should focus on drafting new articles, reconsidering the structure at a later stage, if necessary. His delegation also supported the introduction of a saving clause to the effect that it was not the purpose of the draft articles to reduce the protection afforded by special regimes.

32. Turning to the chapter on effects of armed conflicts on treaties, he endorsed the inclusion of non-international armed conflicts within the scope of the draft articles. In draft article 2, however, the expression “organized armed groups” was too broad and might include even armed criminal groups. Similarly, the phrase “resort to armed force” was not widely accepted in military terminology; as an alternative, the expression “use force against” might be

used. As for draft article 5, although the categories of treaties as listed in the annex would continue to remain in force during armed conflicts and were generally acceptable to his delegation, treaties on friendship and those relating to commercial arbitration seemed hardly to belong in that category.

33. With regard to the protection of persons in the event of disasters, his delegation agreed that the principle of non-discrimination should be added to the three principles, namely, humanity, neutrality and impartiality, listed in draft article 6. He was not convinced, however, that the draft article on human dignity (art. 7) should be included, as it was not clear whether the principle of dignity should have an additional meaning beyond human rights. As for the role of the affected State, his delegation agreed that the primary responsibility for the protection of persons and provision of humanitarian assistance on an affected State's territory lay with that State, and that external assistance could be provided only with its consent. Recent developments with regard to non-intervention, such as the widely accepted principle of the responsibility to protect, should be kept in mind, however.

34. With regard to Treaties over time, his delegation fully supported the Study Group's intention to complete its discussions on the introductory report prepared by the Chair of that Group by 2011 and to start the second phase of its work. In response to the Commission's request for specific examples of "subsequent agreements" or "subsequent practice" that were relevant to the interpretation and application of treaties, he referred to the *Case concerning the Gabčíkovo-Nagymaros Project* (*Hungary* v. *Slovakia*), in which those topics played an important role.

35. In relation to subsequent practice, he noted that the Hungarian authorities, in interpreting certain treaty provisions, had also had to take into account events that took place after the entry into force of a given treaty. Examples of such events included rapid technological development or even changes in domestic law and practice aimed at the clarification of a given matter.

36. **Ms. Telalian** (Greece) said that her delegation looked forward to the Commission's adoption at its sixty-third session of the final version of the Guide to Practice on reservations to treaties, which would be of great practical value for Governments and practitioners alike. Specifically, the guidelines on the legal effects and consequences of impermissible reservations on treaty relations provided much-needed clarification and filled existing gaps in the 1969 Vienna Convention.

37. While reference to guidelines 4.1 to 4.1.3 in guideline 4.2.1 was useful, clarification was needed regarding the effects of the establishment of a reservation on treaty relations between the reserving State and the objecting State or organization, particularly in view of guideline 4.3, which dealt with the effect of an objection to a valid reservation. With regard to paragraph 2 of guideline 4.2.2, which at first glance appeared to constitute an exception to the rule of article 20, paragraph 4 (c), of the Vienna Conventions, she welcomed the inclusion of the phrase "if no contracting State or contracting organization is opposed in a particular case", which made the guideline consistent with that rule. The practical application of guideline 4.2.5 would result in a more advantageous position for the reserving State than for the other contracting States in the case of treaties of a non-reciprocal nature. Clarification was needed as to whether the reserving State could invoke the obligation referred to in the reservation and require the other parties to fulfil it.

38. The lack of clear rules on the consequences of invalid reservations in the Vienna Convention on the Law of Treaties had led to divergent State practice and the emergence of opposing doctrines. Her delegation welcomed the balanced approach taken in guidelines 4.5.1, 4.5.2 and 4.5.3 to deal with that issue. Indeed, an incompatible or invalid reservation should be considered null and void and the reserving State should continue to be bound by the treaty in its entirety without the benefit of the reservation. That position found support in recent State practice and regional jurisprudence. Many States, including her own, had the practice of formulating objections to reservations on the legal basis of their incompatibility with the object and purpose of the treaty and therefore applied the severability principle. Such practice helped to preserve the integrity of treaties, in particular human rights treaties, for the benefit of persons under the jurisdiction of the reserving State.

39. The first paragraph of guideline 4.5.2 struck the right balance by, on the one hand, introducing the presumption of the continuity of the treaty for the reserving State, and on the other, recognizing that that presumption could be reversed if a contrary intention

of the reserving State could be identified. It was important to stress, in respect of the second paragraph of the guideline, that the reserving State was free to make expressly known its intention not to continue to be bound by the treaty if its reservation was an absolute condition for its consent to be bound by it. That State also had the option of either withdrawing or modifying an invalid reservation. Her delegation therefore supported the suggestion made by the delegation of Austria to modify the wording of the guideline to make it clear that such an intention should be expressly indicated by the author of the reservation.

40. Guideline 4.5.3, which considered that the absence of a reaction by the other contracting States to an invalid reservation did not affect its invalidity, was also fully acceptable to her delegation. Articles 20 and 21 of the Vienna Convention were not applicable in the case of invalid or impermissible reservations. Her delegation also agreed with the second paragraph of guideline 4.5.3: notwithstanding the first paragraph, objections to invalid reservations could still be useful in interpreting the position of the objecting party with regard to the validity of such a reservation and could bring pressure to bear on the reserving State to eventually modify or withdraw its reservation.

41. She welcomed part 5 of the Guide to Practice, which filled existing gaps in the Vienna Convention in respect of the status of reservations for the succession of States other than newly independent States.

42. **Mr. Yola** (Nigeria) said that his delegation regretted the Commission's failure to consider the topic "Immunity of State officials from foreign criminal jurisdiction" during the period under review and hoped that the Commission and its special rapporteur would give priority to that issue in the near future. He welcomed the survey prepared by the Secretariat on the multilateral conventions relevant to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", which would ultimately assist efforts to strengthen the international rule of law and promote a rules-based international order. His delegation supported the Commission's view that special rapporteurs required assistance beyond that which could currently be provided to them by the Secretariat.

43. He welcomed the provisional adoption of the Guide to Practice on reservations to treaties, but suggested that the Guide's user-friendliness should be further reviewed before its expected final adoption at the Commission's sixty-third session. Furthermore, the terminology used in the Guide should be clearly defined so as to ensure consistent usage: specifically, a clear distinction should be made between the terms "impermissible reservation" and "invalid reservation".

44. The ability to formulate a reservation to a treaty, insofar as it did not seek to undermine the object or purpose of the treaty or a part thereof, was a principle of State sovereignty. States used reservations to demonstrate their intention to be bound only to those provisions of a treaty that were either possible to implement or not inimical to or at variance with the peculiarity of the reserving State at the national level. It was therefore a violation of the fundamental principle of the consent of States to treaty obligations to consider that a reserving State was bound by the treaty and became a party to that treaty without the benefit of the reservation.

45. **Mr. Phan Duy Hao** (Viet Nam) said that his delegation supported the suggestion that the Commission should select, for each session, certain topics as priorities. While welcoming the provisional adoption of the Guide to Practice on reservations to treaties, he stressed that the guidelines therein were not meant to modify currently accepted rules or to create new norms of treaty law, especially in respect of the 1969 Vienna Convention. Furthermore, the consent or intention of States to be bound by a treaty should remain the most important criterion on the basis of which a treaty could create legal rights and obligations for the concerned States upon its entry into force. In that connection, the presumption set out in guideline 4.5.2 on the status of the author of an invalid reservation in relation to the treaty needed further discussion.

46. **Mr. Fife** (Norway), responding to the criticisms concerning the length and usefulness of the Guide to Practice, said that the Nordic countries believed it would be clearly useful to States and international organizations. The Guide filled known lacunae in articles 20 and 21 of the 1969 and 1986 Vienna Conventions and was irreproachable in the intellectual honesty of its analysis. Both guidelines 4.5.1 and 4.5.2 were firmly grounded in State practice and took account of divergence of use while remaining consistent with the logic of the Vienna Conventions regime. The guidelines would motivate States to clarify their intentions when issuing reservations, expressing

the premises for their consent to be bound by treaty where relevant.

47. As noted by a number of representatives, the Guide to Practice offered sufficient clarification and could help States in their future practice concerning reservations. The text provided States with a solid basis for consideration and final adoption of the Guide to Practice in 2011.

48. **Mr. Martinsen** (Argentina) noted with satisfaction that the Commission had decided to take up the topic of settlement of disputes clauses and urged it to make further progress on the topic of immunity of State officials from foreign criminal jurisdiction. He was also pleased that the Commission had stressed the importance of the International Law Seminar, which enabled young lawyers — especially from developing countries — to familiarize themselves with the Commission's work, and he agreed with the recommendation that the General Assembly should again appeal to States to make voluntary contributions in order to ensure the holding of the Seminar in 2011 with the broadest possible participation.

49. With regard to the Guide to Practice, he noted that one of the Commission's greatest achievements had been to systematize State practice with regard to objections to, and acceptances of, reservations submitted by States, while also dealing with issues relating to the progressive development of international law that might require deeper consideration, such as the purpose of reservations or the succession of States in relation to reservations. Also praiseworthy was the Commission's work on clarifying State practice with regard to interpretative declarations.

50. His delegation would be submitting written comments on, among other things, the effect of the establishment of a reservation on the entry into force of a treaty (guideline 4.2.2) and the status of the author of an invalid reservation in relation to the treaty (guideline 4.5.2). Bearing in mind that the determination of the invalidity of a reservation was generally a controversial issue and was normally confirmed only on the basis of a court decision, continued evaluation of existing legal relations was required as long as the "invalidity" of the reservation was still a matter of dispute.

51. Since most Member States had scant resources to devote to keeping track of international practice with regard to reservations to treaties, the final version of the Guide should be easy for the treaty offices of foreign ministries to consult on a daily basis. A user-friendly Guide would make a valuable contribution to a more organized view of practice in the important field of treaty law.

52. **Mr. Pellet** (Special Rapporteur) said that while useful comments had been made on the topic of reservations to treaties, he was disappointed in the formalistic nature of the debate on the report of the Commission. While delegations had made interesting points in their statements, they could have submitted them in written form and focused their interventions on the principles considered in the report.

53. Acknowledging that the Guide to Practice had taken far too long to compile, he remarked that owing to the task's scale and extreme complexity, which had not been recognized at the outset, a few years would not have sufficed. The time frame had also made it possible for the Commission to gain perspective on its work and consult with experts and human rights bodies in order to find balanced solutions to difficult problems.

54. Responding to the criticism that the Guide to Practice was overly academic and, at the same time, insufficiently informed with respect to State practice in the case of succession of States, he welcomed any additional information that might have been overlooked. He noted that the Eastern European States, which had emerged from a process of succession, had not reproached section 5 of the Guide pertaining to the succession of States. The criticism that had been voiced by other delegations on that topic was also unjust because it stemmed from a misunderstanding of the objective of the Guide to Practice, which had not been to provide a complete inventory of existing practice but rather to conduct a survey of existing practice and jurisprudence in order to deduce generally applicable rules and produce a non-binding instrument to guide State practice with respect to reservations.

55. In response to the criticism that the Guide to Practice was overly complex and needed to be more user-friendly, he insisted that its complexity reflected that of the topic at hand, but agreed that some changes, such as the addition of an index, could make the Guide easier to use. The fundamental structure of the Guide would not change. From the outset, it had been decided that the Guide would not become a legally binding instrument, which was why it contained some

provisions that pertained to codification, in the strict sense of the word, and provisions that belonged under progressive development and even recommendations.

56. While the Commission's stance could be challenged, in particular with respect to its recommendations and *lex ferenda*, he disagreed with the suggestion that the Commission could not provide guidelines in areas where the law was vague, since that would negate its aim to resolve ambiguities and fill in gaps in the 1969, 1978 and 1986 Vienna Conventions. The Commission had to take debatable positions in areas of uncertainty in law, as it was not always possible to codify practices in those areas.

57. Section 4.2, on the effects of an established reservation, had been broadly welcomed, with delegates recognizing the utility of the phrase "established reservations", a term that did not designate a new category of reservations. The terminological issue in the Spanish-language version of the Guide, highlighted by the Spanish delegation, would be reviewed, but he assured delegates that there had been no divergence in principle from the Vienna Conventions with respect to that guideline.

58. With respect to section 4.5, on the consequences of an invalid reservation, the Special Rapporteur had sought to clarify the definitions of the terms used by the Commission. The notion of validity appeared to pose an issue particularly for English-speakers. He had also taken due note of the suggestion made by the Commission to further define the terms used in the Guide for the following year's report.

59. With respect to the rules applicable to invalid reservations, there had been significant disagreement among States. A few States had criticized a fundamental principle contained in guideline 4.5.1, on the nullity of an invalid reservation. The main objection stated that the guideline was impracticable due to the lack of an objective mechanism for determining the validity or invalidity of a reservation. International law was characterized by the absence of obligatory mechanisms, and therefore the Guide to Practice did not seek to fill in that fundamental lacuna. Guideline 4.5.1 served as a warning and was premised on the condition that if an impartial third party was called on to determine the validity of a reservation, it should take into consideration certain elements and their consequences. However, in the absence of an impartial third party, a State remained the judge of the validity of its own reservations and those of its partners, in line with a fundamental principle of international law.

60. As to the more common objection to the concept of positive presumption contained in guideline 4.5.2, he stressed that there was no customary law in that respect and it would therefore be useful to resolve that incertitude. However, there was State practice in that regard, as described in the commentary to the guideline, and practice by oversight bodies, which was not limited to the decisions of the European Court of Human Rights. Rather, it appeared to be generally supported by all human rights treaty bodies as demonstrated in general comment No. 24 of the United Nations Human Rights Committee (CCPR/C/21/Rev.1/Add.6).

61. One of the great advantages of positive presumption was that it struck a balance between the more rigid position of the treaty bodies and the intransigence of some States that were attached to an overly punctilious conception of consensualism. Questioning the balance that the Commission sought to strike would lead to renewed disputes between the human rights treaty bodies and representatives of Member States. He concluded that positive presumption was needed to bring some order to an area considered to be one of the most difficult in international and treaty law.

62. One radical and problematic solution would be to invert the positive presumption. Another option was to make more flexible the conditions under which a State would disclose its position with respect to the consequences of a potential invalidity. He was prepared to consider the issue further because he believed that the situation could not be left in its present state of uncertainty.

63. While the Commission was asking States to make a significant effort to agree on a definitive version of the Guide to Practice by the following year, he reminded delegates that the Guidelines were intended to guide State practice, not to impose it. The effective implementation of the Guide would determine the relevance of the recommended norms contained therein. He asked delegations to consider the text before them as a provisional version that would be finalized the following year and urged them to give the Commission the mandate to do so.

64. He assured delegates that comments sent before 31 January 2011 would be taken into account and an effort would be made to reflect all of them, whether voiced or submitted in writing, as accurately as possible in his last report on the topic in 2011.

65. **Mr. Wisnumurti** (Chairman of the International Law Commission), introducing chapter V of the report of the International Law Commission on the work of its sixty-second session (A/65/10), concerning the expulsion of aliens, said that the Commission had considered a set of draft articles (A/CN.4/617), as revised and restructured by the Special Rapporteur, Mr. Maurice Kamto; a new draft workplan presented by the Special Rapporteur (A/CN.4/618); the sixth report of the Special Rapporteur (A/CN.4/625 and Add.l); and comments and information received from Governments (A/CN.4/604 and A/CN.4/628).

66. The revised draft articles on the protection of the human rights of persons expelled or being expelled, had been restructured into four sections. Section A, on "General rules", comprised revised draft articles 8, 9 and 10, which dealt, respectively, with the general obligation to respect the human rights of persons expelled or being expelled; the obligation to respect the dignity of persons expelled or being expelled; and the obligation not to discriminate. Section B, on "Protection required from the expelling State", comprised revised draft articles 11, 12 and 13, which dealt, respectively, with the obligation to protect the lives of persons expelled or being expelled, the obligation to respect the right to family life, and the protection of vulnerable persons.

67. Section C, on "Protection in relation to the risk of violation of human rights in the receiving State", comprised revised draft articles 14 and 15 concerning respect for the right to life and personal liberty in the receiving State and the obligation not to expel a person to a country where there was a real risk that he or she would be subjected to torture or to inhuman or degrading treatment. Finally, section D, on "Protection in the transit state", contained a new draft article 16, purporting to extend the application of the draft articles on protection of human rights to the entire expulsion process and the whole of the journey from the expelling State to the receiving State.

68. During the debate in plenary, several members of the Commission had expressed their support for the revised draft articles. However, a call for caution had been made with regard to the level of protection that should be recognized in the draft articles, since the Commission's task was to set forth principles of general international law. A number of specific comments had also been made and were reflected in the report. Following the debate, the Commission had referred draft articles 8 to 15 to the Drafting Committee.

69. Turning to the Special Rapporteur's sixth report, he said that after revisiting briefly the issue of collective expulsion in situations of armed conflict, on which a draft article had already been proposed in the third report (A/CN.4/581), the sixth report addressed the issues of disguised expulsion, extradition disguised as expulsion, grounds for expulsion, detention pending expulsion and expulsion proceedings, on which seven draft articles had been proposed.

70. Draft article A set out the prohibition of disguised expulsion, defined as the forcible departure of an alien from a State resulting from the actions or omissions of that State, or from situations where the State supported or tolerated acts committed by its citizens with a view to provoking the departure of individuals from its territory. Several members had supported draft article A and shared the view that disguised expulsion was, by its nature, contrary to international law, because it violated all the procedural guarantees and impeded the protection of the expelled person's rights. However, some members had suggested that terms such as "constructive expulsion", "informal expulsion", "indirect expulsion" or "de facto expulsion" were more appropriate to describe the situations envisaged in the draft article. Some concerns had also been expressed about the proposed definition of disguised expulsion, in particular the notion of "forcible departure", the implications of the reference to "actions or omissions" of the State and the reference to situations where a State supported or tolerated acts committed by its citizens.

71. As an element of progressive development and on the basis of relevant case law, the Special Rapporteur had proposed a draft article 8 stating the prohibition of extradition disguised as expulsion. While some members had supported the draft article, others had questioned the advisability of including, even by way of progressive development, a provision that was more concerned with extradition than with expulsion. Moreover, according to some members, the scope of the prohibition as stated in the draft article was too

broad, in the light of the relevant case law, especially that of the European Court of Human Rights. It had been suggested that the scope of the provision should be restricted by a reference to the criterion of the intention of the State concerned, so as to prohibit the use by a State of an expulsion procedure with a view to circumventing the limitations on extradition resulting from that State's international obligations or its own laws. According to another view, the wording of the provision should be turned around to state that an alien could be expelled when the prerequisites for his or her expulsion were met, irrespective of the fact, or possibility, that the alien in question might be the subject of an extradition request. In the light of the debate, the Special Rapporteur had proposed a revised text for draft article 8.

72. On the basis of relevant international instruments and jurisprudence as well as national legislation and case law, the Special Rapporteur had proposed a draft article 9, on grounds for expulsion. Paragraph 1 thereof set forth the requirement that grounds must be given for any expulsion decision. Paragraph 2 then referred, in particular, to public order or public security as grounds that might justify the expulsion of an alien, in accordance with the law. Paragraph 3 indicated that the ground for expulsion must not be contrary to international law, while paragraph 4 listed a number of requirements relating to the assessment of the ground by the expelling State.

73. While several members had supported draft article 9, some had been of the view that it should also refer to other grounds such as conviction of a serious offence, unlawful entry, violation of major administrative rules and public health considerations. According to another view, the grounds for expulsion should be limited to public order and national security, at least as a matter of progressive development. It had also been suggested that more specifics should be provided on the grounds for expulsion that were contrary to international law; reference had been made, in particular, to the unlawfulness of so-called "cultural" grounds, which served to limit the number of foreign workers in a country, and of expulsion for purposes of reprisal. Several members had stressed the importance of making a distinction between aliens lawfully and those unlawfully present in the territory of the expelling State. It had been observed that the unlawful nature of an alien's presence in the State's territory was a sufficient ground for expulsion under the legislation of many States, as long as the procedural guarantees envisaged under international and domestic law were observed.

74. Draft article B, as revised by the Special Rapporteur during the session, focused on the obligation to respect the human rights of aliens being detained pending expulsion. According to the Special Rapporteur, the rules stated in the draft article were established in international legal instruments, embodied in regional case law or widely recognized in national legislation. While some members had expressed their support for the draft article, others had been of the view that the rules set forth therein were either not flexible enough or too detailed. It had also been suggested that, in some cases, aliens unlawfully present in a State might need to be detained in order to establish the relevant facts, or even to ensure their protection.

75. Lastly, the addendum to the sixth report concerned expulsion proceedings. The proposed draft articles were based on a distinction between aliens lawfully and those unlawfully present in the territory of the expelling State. Since the procedures applicable to the expulsion of aliens unlawfully present varied considerably from one State to another, the Special Rapporteur had been of the view that it was preferable to leave those procedures to be regulated by national legislation, without prejudice to a State's right to provide such aliens with the same guarantees as those for aliens lawfully present on its territory. That was the meaning of draft article A1, which, subject to that proviso, restricted the scope of the subsequent draft articles to aliens lawfully present in the expelling State.

76. In relation to expulsion procedures, several members had favoured the distinction between aliens lawfully and those unlawfully present in the territory of the expelling State. However, while some members had supported draft article A1, others had considered that certain procedural guarantees must be afforded also to aliens unlawfully present. In that regard, some members had suggested that an additional distinction should be drawn between aliens unlawfully present for some time in the territory of the expelling State and aliens who had recently arrived. Another view had been that aliens unlawfully present should be granted the same procedural rights as those accorded to aliens lawfully present.

77. In response to such comments, the Special Rapporteur had submitted a revised draft article A1 proposing a different treatment based on either the enjoyment by the alien concerned of a special legal status in the expelling State or the duration of his or her presence in that State. Thus, whereas paragraph 1 granted all aliens who had illegally entered the territory at a recent date the minimum guarantee that expulsion must take place in accordance with the law, paragraph 2 offered certain specific guarantees to aliens who were unlawfully present in the expelling State but who had a special legal status in the country or had been residing there for some time (at least six months, for example).

78. The proposed draft articles B1 and C1 enunciated a number of guarantees for aliens lawfully present in the territory of the expelling State. Draft article B1 stated the requirement that expulsion should take place only pursuant to a decision reached in accordance with law, while draft article C1 listed several procedural rights, most of which had their source not only in national laws but also in treaty law. Those provisions had been supported by several members. Based on an interpretation of article 13 of the International Covenant on Civil and Political Rights, some members had proposed that the right to the suspension of the execution of an expulsion decision until that decision became definitive, absent compelling reasons of national security, should be added to the list. It had been further suggested that the non-exhaustive nature of the list of procedural rights contained in draft article C1 should be emphasized. However, some members had been of the view that certain rights, such as the right to legal aid, the right to a hearing, the right to counsel and the right to translation and interpretation in expulsion proceedings, were not well established in international law. Furthermore, according to some members, the national security exception contained in article 13 of the International Covenant on Civil and Political Rights should be incorporated in the draft article.

79. Following the debate, the Commission had referred draft articles A, 9, B1 and C1 as contained in the sixth report, and draft articles B and Al as subsequently revised by the Special Rapporteur, to the Drafting Committee. In contrast, given the divergence of views on the existence and scope of a prohibition of extradition disguised as expulsion, the Commission had not referred draft article 8 to the Drafting Committee.

Tribute to the memory of former Argentine President Néstor Kirchner

80. *At the invitation of the Chairperson, the members of the Committee observed a minute of silence.*

The meeting rose at 12.55 p.m.