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Chairperson: Ms. Picco . . . . . (Monaco)
later: Mr. Nega (Vice-Chairperson) . . . . . (Ethiopia)

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10-60324 (E)

The meeting was called to order at 10.05 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. **The Chairperson** announced that three main topics had been proposed for the interactive dialogue to be held with the members of the International Law Commission: reservations to treaties with a particular focus on sections 4.2 and 4.5 of the draft guidelines and the question of impermissible reservations; the future of codification and progressive development of international law with a particular focus on the future role and mandate of the Commission and its relationship and interaction with Member States in the Sixth Committee; and effects of armed conflicts on treaties.

2. **Mr. Šturma** (Czech Republic) said that his delegation welcomed as a major achievement the provisional adoption of Part 4 of the Guide to Practice on Reservations to Treaties, which covered the legal effects of reservations and interpretative declarations, including the effects of acceptances and objections. With regard to guideline 4.1.2 (establishment of a reservation to a treaty which has to be applied in its entirety), his delegation shared the view that the concept of a plurilateral treaty had shifted towards that of a treaty the integrity of which must be ensured. The guideline and commentary thereto seemed to reflect adequately the importance of the object and purpose of treaties. As regards guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty), although the exception allowed in paragraph 2 represented progressive development of the law of treaties, the provision was justified by the predominant practice of depositaries and balanced by the safeguard phrase "if no contracting State or contracting organization is opposed in a particular case".

3. On the controversial issue of the effect of an objection, his delegation supported the distinction made between the effects of an objection and those of an acceptance. It also maintained the view that "minimum-effect" objections should be the rule and "maximum-effect" objections should be the exception. That position was reflected in the wording of the guidelines. His delegation also supported the approach adopted in section 4.5 of the Guide to Practice dealing with the consequences of an invalid reservation, which filled one of the most serious gaps in the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Guideline 4.5.1 spelled out the basic principle that a reservation that did not meet the conditions of permissibility and formal validity set out in Parts 2 and 3 of the Guide to Practice was devoid of legal effect.

4. Modern practice regarding objections and some decisions of human rights treaty bodies and regional courts supported the so-called "super-maximum" effect. According to that approach, reflected in guideline 4.5.2, the reserving State or organization was considered a contracting State or contracting organization without the benefit of the reservation. The advantage of that approach was that it maintained the framework of the Vienna Conventions and did not seek to establish an exception for certain categories of treaties such as human rights treaties. The "super-maximum" effect was reserved for invalid reservations only. An objection to a valid reservation could not produce such an effect.

5. The Commission had pointed out that the requirement that the treaty must be implemented in its entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author. Consequently, guideline 4.5.3 provided that the nullity of an invalid reservation did not depend on the objection or the acceptance by a contracting State or a contracting organization. It nonetheless recommended that a State or international organization which considered that the reservation was invalid should formulate a reasoned objection as soon as possible. His delegation found that recommendation helpful, since there were only a few international bodies competent to assess the validity of a contested reservation. Although the first paragraph of guideline 4.5.3 reflected the logical consequence of the distinction between the objective test of the validity of a reservation and its subjective assessment by other contracting parties, it did not cover the situation where the assessment of the incompatibility of a reservation did depend on the reaction of the parties, as was the case under article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, which provided that "a reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention

object to it". In order to cover such situations, his delegation suggested adding the phrase "unless the treaty so provides", at the end of paragraph 1 of guideline 4.5.3.

6. **Mr. Marrapodi** (Italy) recalled that his delegation had previously suggested that, instead of making slow progress on a large number of topics, the Commission should concentrate on one or two subjects in its work each year, so as to allow for in-depth discussion within the Commission and more focused deliberations in the Sixth Committee. Whether as the result of a deliberate policy or not, at its sixty-second session the Commission had made unprecedented progress on the topic of reservations to treaties, which showed the advantage of the method. At its next session the Commission might devote much of its time to the topic of the immunity of State officials from foreign criminal jurisdiction.

7. Although it might be said that the work on reservations to treaties had taken too long, or that the guidelines were too detailed and the commentaries too lengthy, the result was an in-depth analysis that would no doubt have a great influence on future practice and judicial and arbitral decisions. The Commission maintained that the time period for making objections to impermissible reservations was not restricted by the time limit set out in article 20, paragraph 5, of the Vienna Conventions. That was consistent with the view that articles 20 and 2l of the Conventions did not cover impermissible reservations. A policy argument could be advanced in support of that position. As States dealt with a large number of treaties and reservations to them, it was difficult always to react promptly to statements made by other contracting States, especially when those statements were couched in ambiguous language. Moreover, the impermissible character of a reservation might become clear to a State only after a certain time had elapsed.

8. While it was understandable that, when a reservation was permissible, the need for certainty in treaty relations required States to react within the deadline set out in the Vienna Conventions, when the reservation was impermissible, certainty in treaty relations could not be the only element to be taken into account. There was some merit to the practice followed by a number of States to react to impermissible reservations without regard to the deadline for objections set out in the Vienna Conventions.

9. With regard to the effects of impermissible reservations, the International Court of Justice had noted in its landmark advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide that, in the absence of an objective binding method for assessing the permissibility of reservations, each contracting State was left to make its own assessment. That assessment was relative and applied only to relations between the assessing State and the reserving State. Some States might consider a reservation impermissible while other States had a different view. State practice seemed to confirm that in relations with the latter the treaty would operate with the reservation. Nonetheless, guideline 4.5.1 seemed to point to a different solution, namely that if a reservation was considered to be impermissible it must be regarded as such by all the contracting States. That solution should apply only when the impermissibility had been assessed by a third party in a decision that was binding on all the contracting States.

10. Guideline 4.5.2 implied that when a State considered a reservation to be impermissible, that State might regard the reservation as depriving the reserving State of the benefit of the reservation. If that were stated as a general proposition, it would run counter to the basic principle that a State could not be party to a treaty without its consent. Therefore, guideline 4.5.2 only set out a general presumption that the reserving State would be willing to be party to the treaty without the benefit of the reservation. However, while it might be possible for a State to accept that if its reservation was regarded as impermissible the treaty would apply without the benefit of the reservation, it would be more reasonable to presume that a State would rather not regard itself as being bound towards other contracting States that considered the reservation to be impermissible.

11. The guidelines in Part 5 of the Guide to Practice relating to reservations in the case of succession of States were based on the provisions of the 1978 Vienna Convention on Succession of States in respect of Treaties. However, only a limited number of States had ratified the Convention and very few States, other than newly independent States (those originating from decolonization), followed it in practice, especially in relation to the general principle of continuity set out in the Convention. The value of the guidelines, which were drafted on the premise that that Convention

corresponded to general international law, was inevitably affected by the wide variety of State practices in that area.

12. **Mr. Serpa Soares** (Portugal) said that his delegation was disappointed that for the second consecutive year, the Commission had not considered the topic of immunity of State officials from foreign criminal jurisdiction at its session. With regard to the Commission's future work, among the topics worthy of consideration were hierarchy in international law and related issues such as *jus cogens* building on the work done on fragmentation of international law. His delegation welcomed the Commission's decision to continue the discussion on the settlement of disputes clauses.

13. On the topic of reservations to treaties, his delegation commended the quality and value of the work done and was pleased that the Commission was close to completing the Guide to Practice. With regard to guideline 4.2.2, the 1969 and 1986 Vienna Conventions both stated that the author of a reservation did not become a contracting State or contracting organization until at least one other contracting State or contracting organization had accepted the reservation, either expressly or tacitly, a process that could take up to 12 months. The practice of depositaries was, however, was often different. The Secretary-General of the United Nations, for instance, did not wait for an acceptance to be received before accepting the definitive deposit of an instrument of ratification or accession accompanied by a reservation. The Guide should take a stance on the correctness of that practice, to ensure that the effects of the Vienna Conventions were not voided in favour of a divergent practice. The Guide should also specify at what moment the author of a reservation became a contracting State or contracting organization, whether upon the establishment of the reservation or retroactively to its formulation. The commentaries might provide some guidance in that regard.

14. Guideline 4.5.1 (Nullity of an invalid reservation) was important because it filled an existing gap in the Vienna Conventions. The Commission could fill yet another gap by addressing the consequences of acts performed in reliance on a reservation that was null and void. With regard to guideline 4.5.2 (Status of the author of an invalid reservation in relation to the treaty), his delegation concurred with the view that the nullity of the reservation also affected its author's consent to be bound by the treaty. That conclusion derived from the Vienna Conventions, which stated that the author of a reservation did not become a contracting State or contracting organization until at least one other contracting State or contracting organization accepted the reservation. Establishment of the reservation was thus presumed to be an essential condition for consent to be bound by a treaty. Therefore, the initial assumption should be that a treaty did not enter into force for the author of an invalid reservation because the principle of consent — and consequently intention — remained the key consideration.

15. His delegation welcomed the Commission's encouragement to States and international organizations in guideline 4.5.3 to react to invalid reservations. However, such a reaction would not amount to an actual objection, because an invalid reservation was devoid of legal effects. Hence, a reaction to an invalid reservation would also not have any direct legal effects. Furthermore, the wording of guideline 4.5.3 was overly directive and was not consistent with the complete freedom to formulate such objections. He therefore suggested changing the wording from "should ... formulate a reasoned objection" to "may react ... by making a corresponding reasoned statement".

16. **Mr. Chushev** (Belarus) said that his delegation welcomed the provisional adoption by the Commission of the Guide to Practice on Reservations to Treaties and the efforts made to render the guidelines as clear, focused and unambiguous as possible. Turning to specific questions raised by the Special Rapporteur in his reports to the Commission at its sixty-second session, he observed that, in theory, a reservation did not necessarily have to be accepted by another State before it could be deemed established, since the very possibility of that acceptance was conditional on the formulation of a valid reservation, which, as such, already had some legal effect. The approach proposed by the Commission in that regard presented no difficulties.

17. The issue of the effect of an objection to a valid reservation was key to determining the precise scope of the reciprocal rights and obligations of the reserving State and the objecting State, and in that regard his delegation welcomed the wording of guideline 4.3. However, it favoured modifying the guideline with a view to ensuring that the author of a reservation was able, when formulating the reservation, to spell out what the consequences would be on its side in the

event of an objection. That would be more in keeping with the principle of sovereign equality.

18. A consideration of the character and legal effects of interpretative declarations was indispensable to a determination of the actual intention of parties to the treaty. To that end, interpretative declarations should be examined in the context of article 31, paragraph 2, of the Vienna Convention on the Law of Treaties. The purpose of an interpretative declaration was to remove any ambiguity in the interpretation of an international treaty, but without affecting its legal force. When consenting to be bound by the provisions of an international treaty, States had the inalienable right to make declarations indicating how they understood the obligations that they were assuming, without modifying or setting aside the legal effect of any of those provisions. Interpretative declarations made unilaterally by States or international organizations about the meaning or content of treaties were one of the elements of the interpretation of the treaty provisions.

19. His delegation commended the Commission and the Special Rapporteur on their efforts to fill lacunae in that area. To do so, the Commission would need to engage in both codification and progressive development of the legal regime for interpretative declarations. In particular, approval of or opposition to an interpretative declaration should themselves be seen as independent declarations, and that more detailed guidelines should be elaborated on that issue. An interpretative declaration that had been approved by all contracting States and organizations represented the most authoritative means of determining the intention of parties. Where there was unanimity on the interpretation of a treaty, the word “may” should not be used, as it introduced a subjective criterion. Lastly, he drew attention to the problems posed by the issue of reservations to and interpretative declarations on the succession of States, due in large measure to the inconsistent practice of States in that area.

20. **Mr. Mubarak** (Egypt) said that, given the importance of the topics covered therein, the report of the International Law Commission should be made available to all delegations at least one month before it came up for consideration by the Sixth Committee. The Commission’s report on the work of its sixty-second session lent weight to that suggestion; it was a voluminous document with many new guidelines on reservations to treaties, on which delegations had only one year in which to present their comments and remarks before the final adoption of the guidelines in 2011. Moreover, at the Commission’s sixty-second session, the Special Rapporteur had submitted several extremely important reports, which required more time for review.

21. His delegation supported the consensus decision taken by the Commission to ensure that the guidelines did not depart from the provisions of the Vienna Conventions. Section 4.2 of the Guide to Practice (Effects of an established reservation) could have far-reaching consequences on the modification and acceptance of the legal effects of one or more provisions of a treaty. Section 4.5 (Consequences of an invalid reservation) raised the question as to whether the reserving State would become a party to the treaty if its reservation was invalid, especially since the Vienna Conventions did not address the issue explicitly. His delegation would be submitting written comments on those two sections of the guidelines in due course.

22. Based on its current wording, guideline 4.5.2 (Status of the author of an invalid reservation in relation to the treaty) risked putting the reserving State in the unintended position of being bound by a treaty without the benefit of its reservation. The guideline dealt with the intention of the reserving State in an arbitrary and selective manner. The presumption should be that the reserving State would not have ratified the treaty if its reservation was not going to be accepted. The Commission should amend the language in guidelines 4.5.2 in order to indicate clearly that the invalidity of the reservation would have the effect of nullifying the ratification.

23. With regard to chapter XIII (Other decisions and conclusions of the Commission), his delegation urged the Commission to seek information from regional bodies on their handling of dispute settlement issues and supported the Commission’s effort to reconstitute the Working Group on the Long-term Programme of Work and to develop procedures and methods for improving the Commission’s efficiency.

24. The Commission had made a unique contribution to the maintenance of peace and security through its work to promote the progressive development and codification of international law in accordance with the principles of the United Nations. His delegation welcomed the Commission’s effort to work in close

cooperation with other international organizations in the field of international law; and encouraged it to strengthen its coordination with other United Nations legal bodies and independent experts as it deemed necessary.

25. **Mr. Duray** (Belgium) said that his delegation understood the reason for the two-part structure of guideline 4.2.2; in order to avoid having treaties enter into force while doubt remained as to the validity and acceptance of formulated reservations, it was preferable that only States that had not formulated a reservation or that had formulated an established reservation should be counted when deciding whether the threshold for entry into force had been reached.

26. However, Belgium also supported the thrust of paragraph 2 of the guideline whereby States that had formulated a reservation that was not yet established could nevertheless be counted for the purpose of entry into force of the treaty provided that none of the other States were opposed. Paragraph 2 accorded with the practice of some depositaries, notably the Secretary-General of the United Nations. The opposition contemplated in paragraph 2 was not, however, equivalent to non-acceptance of the reservation; rather it signalled that a State wished to consider the reservation further before taking a position on it. Moreover, the contracting States could waive their right to oppose, either in the treaty itself or in a related instrument, thus making the work of the depositary easier.

27. With regard to the wording of paragraph 2, however, neither the general context of the provision nor the commentary made it clear whether the paragraph related to an established reservation or which "earlier date" was meant. For the sake of clarity his delegation therefore proposed replacing the words "the reservation" with the words "a reservation not established in accordance with guideline 4.1" and replacing the words "at an earlier date" by the words "at a date prior to the entry into force of the treaty".

28. Although his delegation fully supported the basic principle of automatic reciprocity reflected in guideline 4.2.4, reservations modifying the legal effect of certain provisions of a treaty did not necessarily have a reciprocal effect, as was implied in paragraph 3. Such reservations might instead fall under guideline 4.2.5, which dealt with exceptions to reciprocity. It might be helpful to clarify that point in the commentary. In paragraph (14) of the commentary to guideline 4.2.4, the phrase in brackets in the fifth sentence seemed to imply that a State could not make a reservation to a treaty norm that enunciated a customary obligation or that such a reservation would have no effect, but guideline 3.1.8 provided that in some circumstances a reservation could be made to a provision reflecting a customary norm. To reconcile the discrepancy, the phrase "to the extent provided by guideline 3.1.8" could be added to the matter in brackets.

29. His delegation supported the position expressed in guideline 4.2.5 that there were exceptions to reciprocity. In the commentary, however, the Commission rightly pointed out that elements of reciprocity remained in the treaty relations. In the example given of human rights treaties, non-reciprocity applied only with respect to the content of the obligations: the human rights obligations of the non-reserving States towards individuals were unaffected by the reservation. However, there was still reciprocity at the procedural level: while the other States parties could not invoke the obligation of the reserving State under the provisions to which the reservation related, neither could the reserving State invoke the obligations of the non-reserving States in that regard.

30. Since the Vienna Convention on the Law of Treaties did not regulate the effects of acceptance of an invalid reservation, his delegation welcomed the Commission's efforts to fill the gap. In its view, guideline 4.5.1 (Nullity of an invalid reservation) was well-founded in State practice. The absence of legal effects did not depend on the reactions of other States. Nonetheless, it was common practice for States to formulate objections to invalid reservations, a practice the Commission encouraged in guideline 4.5.3. Although the Commission itself said that guideline 4.5.2, according to which a State that had formulated an invalid reservation was presumed to be bound by the treaty without the benefit of the reservation unless a contrary intention could be identified, was not based on customary law, his delegation thought that the question should be studied further to see whether the Commission's severability theory was not, in fact, of a customary law nature. Lastly, in guideline 4.5.3, the Commission reiterated the principle that the nullity of an invalid reservation did not depend on the reactions to it. However, since it was generally difficult to judge *in abstracto* whether a reservation was or was not

incompatible with the object and purpose of the treaty, it was desirable, as the Commission had done, to indicate that objections to the reservation could help to clarify the point. The role of the treaty bodies in assessing the validity of reservations, currently discussed in the commentary, should perhaps be included more explicitly in the guidelines in section 4.5.

31. In conclusion, his delegation urged the Commission to resume its work on the immunity of State officials from foreign criminal jurisdiction, which would offer States in general, but in particular those who frequently received foreign representatives, the benefit of the Commission's expertise in clarifying the rules of customary law in that area. His delegation welcomed the establishment of a working group on the obligation to extradite or prosecute (*aut dedere aut judicare*) and encouraged the Commission to pursue its efforts to clarify the scope of the obligation in the context of international law.

32. **Ms. Silkina** (Russian Federation) said it was regrettable that many of the draft documents prepared by the Commission did not become legally binding international instruments; that was notably the case with the articles on the responsibility of States for internationally wrongful acts and the articles on diplomatic protection. The topics currently under consideration by the Commission were also of interest to all States and international entities, particular reservations to treaties, the effects of armed conflicts on treaties, protection of persons in the event of disasters and expulsion of aliens.

33. Since the work of the special rapporteurs was the key element in the functioning of the Commission, the Russian Federation called upon States to reconsider the possibility of providing adequate financial compensation. The Secretary-General should be requested to provide more detailed and elaborated options of assistance than those contained in his report on assistance to special rapporteurs of the International Law Commission (A/65/186).

34. Her delegation welcomed the provisional adoption of the full set of draft guidelines on reservations to treaties, in particular those on the effects of reservations, which was undoubtedly the issue of key importance to the whole regime of reservations and was barely addressed in the Vienna Conventions. The Commission had been able to provide satisfactory, detailed solutions regarding the way in which an established reservation affected relations between the parties to a treaty and what the consequences were of a reservation that did not meet the conditions for validity. Many of those provisions could be deduced from the Vienna Conventions but were not explicitly spelled out in them. It was significant that the guidelines clearly distinguished between valid and invalid reservations; although some held the view that the effects were the same, if that were the case all the provisions in the Vienna Conventions dealing with reservations would be meaningless.

35. The Russian Federation agreed with the position that invalid reservations were null and void and therefore devoid of legal effect, and that the nullity could not be cured by acceptance by other parties. That approach clarified the regime of reservations and the options open to reserving States, and it protected the treaty itself from unpredictable and undesirable changes. The Commission had taken an important step forward in the drafting of guideline 4.5.2, in which it presented a balanced approach to the notion of severability. Since the consent of a State to be bound was basic to engagement in treaty relations, the Commission had avoided turning the presumption of severability into an axiom. However, further thought should be given to where to place the greater stress, whether on the State's desire not to be bound by the treaty without the benefit of its reservation or on its intent to become a party to the treaty.

36. **Mr. Zidar** (Slovenia) said that, with regard to chapter XIII (Other decisions and conclusions of the Commission), his delegation supported the Commission's decision to continue the discussion of settlement of disputes clauses under "Other matters" at its next session. It also welcomed the Commission's reiteration of its commitment to the rule of law in all its activities. Coherent development of international law could only be achieved through enhanced cooperation among international courts, tribunals and institutions and between those bodies and States. In that regard, the symbiotic relationship between the Commission and the International Court of Justice was of great significance. Cooperation between the United Nations and regional organizations should also be encouraged. On the subject to the Commission's methods of work, his delegation would like to stress the necessity of ensuring adequate time for the

important work of the special rapporteurs. It was also pleased to note the improvements made to the Commission's website, in particular the early publication of documents through the website.

37. With the provisional adoption of the full Guide to Practice on Reservations to Treaties, a topic once narrowly defined in the Vienna Conventions was treated in thoroughly prepared guidelines that reflected the complexity of the subject. The Commission's work at its sixty-second session had focused on the central question of the effects of reservations and interpretative declarations and reactions to them. Since the Vienna Conventions were silent on interpretative declarations and the effects of invalid reservations, the Commission was to be commended for its progressive development of the law in those areas, in particular as regards the nullity of an invalid reservation. The presumption of severability of the invalid reservation represented an innovative attempt to contribute to legal stability. The emphasis on formulating reasoned objections to invalid reservations was valuable; although the nullity of an invalid reservation did not depend on the reactions it might elicit, objections to invalid reservations were important both for promoting a reservations dialogue and for bringing the matter to the attention of treaty bodies and courts competent to assess the validity of reservations.

38. His delegation welcomed the addition of guidelines 4.4.1 to 4.4.3 on the absence of effect of a reservation on rights and obligations under another treaty, customary international law and a peremptory norm of general international law (*jus cogens*), respectively, and was pleased that the phrase "which are bound by that rule" at the end of guideline 4.4.3 as originally proposed had been deleted, thus eliminating the implication that some States or international organizations might not be bound by a *jus cogens* rule.

39. The guidelines relating to succession of States rightly differentiated between newly independent States and a successor State formed from a uniting or separation of States. The guidelines covered a broad spectrum of possible situations resulting from succession *ipso jure* or by notification. Since there were few rules applicable to those situations, the Commission, although basing some of its solutions on the 1978 Vienna Convention on Succession of States in respect of Treaties, had largely engaged in progressive development of international law. The guidelines should make a useful contribution in the future to the settlement of succession issues. His delegation looked forward to the adoption of the final version of the Guide to Practice at the Commission's sixty-third session.

40. On the topic of protection of persons in the event of disasters there were two competing tendencies: the duty to ensure that protection and the need to respect fundamental principles of sovereignty and non-intervention. Further study was required in order to strike an appropriate balance. However, the basis for the Commission's further deliberations should be the contemporary understanding of State sovereignty, which focused not only on a State's prerogatives but also on its duties towards its population. The topic of the obligation to extradite or prosecute was of great current interest, and his delegation would encourage the Commission to devote further attention to it. Slovenia also looked forward to further progress on the topic of immunity of State officials for foreign criminal jurisdiction and welcomed the Commission's decision to reconstitute the Study Group on treaties over time.

41. **Ms. Orosan** (Romania) said that her delegation commended the exceptional contribution made by the Special Rapporteur to the topic of reservations to treaties and welcomed the Commission's decision to conclude its work on the topic at its sixty-third session. Romania would strive to provide its comments in timely fashion, although a significantly longer deadline would have been appropriate for a thorough consideration of the subject.

42. The reports considered by the Commission at its sixty-second session dealt with matters of major importance, such as the legal effect of reservations and interpretative declarations and reactions to them and in particular the question of invalid reservations. Her delegation endorsed the approach taken in guideline 4.1, namely that, in addition to acceptance, the conditions of permissibility and formal validity must be fulfilled in order for a reservation to be established.

43. On the basis of a preliminary analysis, her delegation was in agreement with the guidelines in section 4.2 (Effects of an established reservation) and the commentaries thereto. The common tendency of depositaries to consider the author of a reservation a contracting State from the moment the instrument of ratification was deposited did, in fact, deviate from the provisions of the Vienna Convention on the Law of Treaties, perhaps because objecting States, in a desire

to ensure as broad a participation in the treaty as possible, rarely went so far as to exclude treaty relations with the reserving State. Romania therefore welcomed guideline 4.2.2, which took account of that practice by depositaries.

44. Again on the basis of a preliminary consideration, her delegation found section 4.5 helpful in clarifying the consequences of an invalid reservation. Although the nullity of an invalid reservation did not depend on the reactions of States, it was helpful for States to respond in order to clarify the legal relationship between the reserving State and the reacting State, a point correctly reflected in guideline 4.5.3 and the commentary thereto. The reactions of States in such circumstances were not subject to a deadline, but they should be formulated, as the Commission indicated, "as soon as possible". In the case of very late objections, however, there might be legal implications that could be considered in the commentary. The positive presumption expressed in guideline 4.5.2 led to clearer consequences for treaty relations than the opposite presumption; however, a more precise discussion of how "a contrary intention" was to be identified should perhaps be provided in the commentary.

45. *Mr. Nega (Ethiopia), Vice-Chairperson, took the Chair*.

46. **Mr. Minogue** (United Kingdom) said that his delegation commended the Commission on the progress made during its sixty-second session. It was grateful for the excellent work of the Codification Division in support of the Commission, particularly in maintaining its excellent website, which had become an important tool for facilitating research and engagement with its work.

47. The Planning Group on the methods of work of the Commission, which would be convened early at the Commission's sixty-third session, would constitute the first in-depth review of its kind since the forty-eighth session. His delegation approved of the trend towards a differentiated approach to the development of individual topics and away from the view that the Commission's work should be aimed solely at codification in the form of a convention. Two examples were the work on reservations, which took the form of guidelines, and the Study Group on the most-favoured-nation clause, which would examine specific issues in the developing practice and jurisprudence in that area rather than seeking to revise or replace the existing draft articles. He hoped that the Working Group would support such approaches.

48. The selection of new topics for the attention of the Commission would continue to be a challenge. The new quinquennium would provide an opportunity to consider new areas of work and to leave aside topics that were not progressing satisfactorily. Many structural issues had now been addressed, so that new topics of practical utility were becoming more difficult to identify. His delegation encouraged the Commission, in considering potential new topics, to assess their utility to States, in keeping with the Commission's mandate for codification and progressive development.

49. The success of individual topics depended on the engagement of States and the work of the Special Rapporteurs. His delegation would encourage the Working Group to consider how Government legal advisers might contribute to the Commission's work outside the more formal mechanisms. It was regrettable that the Commission had been unable to make progress on a number of topics owing to the absence of timely reports from Special Rapporteurs. In particular, his delegation hoped that the Commission would be able to resume work on the immunity of State officials from foreign criminal jurisdiction.

50. The Commission had requested comments concerning the topics of reservations to treaties and the responsibility of international organizations by January 2011. Although the wish to complete work on the topics was commendable, the time allowed was not adequate. In particular, it would be the first opportunity for States to comment on the guidelines on reservations to treaties as a whole and it would be imperative to have a longer period for reflection, something that the Commission should take into account when deciding how to proceed at its sixty-third session. Moreover, his delegation wished to take into consideration the comments of the Office of Legal Affairs concerning the practice of the United Nations in relation to the responsibility of international organizations, and it was not clear whether those comments would be ready before January 2011. The United Kingdom encouraged the Codification Division to circulate the comments of the Office at an early stage, and to extend the deadline for States in order to allow them to take those comments into consideration. The Commission should consider postponing work on that topic until the new quinquennium.

51. The reports of the Special Rapporteur on reservations to treaties had drawn together a wealth of material and practice, charting a practical course through complex legal issues. His delegation understood draft guideline 4.1 and the following guidelines on the establishment of reservations as applying only in respect of reservations permissible in accordance with article 19 of the Vienna Convention on the Law of Treaties. At first sight, the effects of such established reservations on treaty relations appeared to be correctly reflected in guideline 4.2.4. However, the moment when a reservation was established was clearly relevant in determining when a reserving State became a party to a treaty. In some cases, it could affect when the treaty entered into force. His delegation believed that, in accordance with article 20, paragraph 4 (c), of the Vienna Convention, those effects would depend on the acceptance, whether express or tacit, of other parties and would come into being as of the date of express acceptance or, failing that, 12 months from the notification of the reservation to the other contracting parties.

52. Guideline 3.3.2, which provided that acceptance could not cure the nullity of an impermissible reservation, was in line with the Vienna Convention regime. However, guideline 3.3.3, which provided that an impermissible reservation could be deemed permissible if no contracting State objected to it, was clearly *de lege ferenda*. Such a provision might have advantages in promoting legal certainty, but it was not clear that a lack of objections could cure the nullity of an impermissible reservation. The commentary suggested that in any event, lack of objections could not prevent the International Court of Justice or a treaty monitoring body from assessing the permissibility of a reservation. The guideline therefore appeared to set up a presumption that if no contracting party objected to an impermissible reservation, the reserving party should be considered bound by the treaty with the benefit of its reservation.

53. Section 4.5 dealt with the effects of an impermissible reservation where one or more contracting parties objected to it on those grounds. Guideline 4.5.1 rightly made it clear that an impermissible reservation was null and void, and therefore devoid of legal effect. However, the crux of the issue was whether the reserving State's consent to be bound was then also nullified.

54. In answer to those difficulties, the Commission had proposed a rebuttable presumption to the effect that the reservation could be severed and the reserving State should be considered a party to the treaty without the benefit of the reservation, unless a contrary intention of the reserving State could be established. That proposal appeared also to be *de lege ferenda*, but was not acceptable to his delegation. If a State had made an impermissible reservation, it had not validly expressed its consent to be bound, and treaty relations could not arise. Indeed, paragraph 33 of the commentary to guideline 4.5.2 made it clear that a negative presumption would more naturally reflect the principle of consent. Further clarifications on the proposal would be appreciated.

55. **Mr. Kittichaisaree** (Thailand) said that the conditions for the establishment of a reservation contained in guideline 4.1, namely, that it must be permissible, formally valid and accepted by another contracting State or organization, were solidly based on articles 19, 20 and 23 of the Vienna Convention. A valid reservation to which an objection had been made, or an invalid reservation accepted by another State, did not meet those criteria and therefore did not produce the same legal effects as an established reservation.

56. His delegation also agreed with the inclusion of guideline 4.2.1 (Status of the author of an established reservation). Despite the lack of uniformity in States' practice, the provisions contained in article 20, paragraphs 4 (c) and 5 of the Vienna Convention should apply as a matter of customary law. An act expressing consent to be bound by a treaty and containing a reservation was effective only when at least one other contracting State had accepted the reservation, or where there was no objection to the reservation by the end of a period of 12 months.

57. Guideline 4.5.2 contained the rebuttable presumption that a treaty applied in full to the author of an invalid reservation. It would be more reasonable to presume the opposite: that a State would rather not regard itself as bound towards a contracting State that considered the reservation to be invalid. That view better reflected the accepted principle that a State's consent to create legal obligations should be clear and should not be lightly presumed. His delegation proposed reversing the presumption and including the words "the reasons for the formulation of the reservations" as one of the factors listed in the second paragraph of guideline 4.5.2.

58. **Mr. Johnson** (United States of America) said that his delegation commended the Special Rapporteur's impressive scholarship and congratulated the Commission on its provisional adoption of a complete set of guidelines. Guideline 3.3.3 proposed that an invalid reservation would be deemed permissible if no party objected to it after having been expressly informed thereof by the depositary at the request of a party. The commentary explained that such tacit acceptance could constitute a subsequent agreement among the parties. However, if tacit acceptance was sufficient, it was difficult to understand why a second notice was necessary in order for the reservation to be deemed accepted. Moreover, the guideline seemed impractical. It was unlikely that another State would ask the depositary to bring attention to the fact that a reservation was invalid, but not object to it.

59. Guideline 4.5.2 provided that when an invalid reservation had been formulated, the reserving State was considered a party to the treaty without the benefit of the reservation, unless the reserving State had expressed a contrary intent. However, an attempt to assign an obligation expressly not undertaken by a country, even if based on an invalid reservation, was inconsistent with the fundamental principle of consent on which the law of treaties was based. It should be assumed that a State did not make reservations lightly. Any reservation should be considered an essential condition of the State's consent to be bound, unless it had expressly indicated that upon objection, it would effectively withdraw the reservation.

60. In addition, the presumption as currently set forth would be difficult to apply in practice, and could undermine the stability of treaty obligations. For example, a reserving State might consider its reservation valid despite an objection raised by another contracting State. If the objecting State decided on its own that the presumption had been overcome by the reserving State based on the factors listed in the guideline, there would then be no consensus regarding whether the reserving State was bound by the treaty at all. Moreover, in order to rebut the presumption most effectively, the reserving State would presumably indicate whether it was willing to be bound without the benefit of the reservation should it turn out to be invalid. But in so doing, the reserving State would in a sense be forced to concede that its actions might be impermissible. The guidelines left the State that had made an invalid reservation with only two choices: to become a party without the benefit of the reservation, or to refrain from becoming a party. However, the objecting State might, from a practical point of view, prefer to have a treaty relationship even with the invalid reservation rather than having no treaty relationship whatsoever. In view of the importance of the issues addressed in the guidelines, substantial caution was warranted, and more time should perhaps be devoted to the issue.

61. **Ms. Belliard** (France) said that the Guide to Practice was of a high standard and would become an essential tool for States and international organizations. However, guideline 3.4.1 seemed to be in conflict with guideline 3.3.3. It was difficult to understand why the express acceptance of an impermissible reservation was itself impermissible, when the contracting States collectively might accept a reservation considered invalid. Moreover, the latter possibility seemed out of line with the Guide's purely objective approach to validity, an approach which her delegation questioned in any case.

62. Clarification was needed with regard to guidelines 4.2.1 and 4.2.3. Article 2, paragraph 1 (f), of the 1969 Vienna Convention provided that "contracting State" meant a State which had consented to be bound by the treaty, whether or not the treaty had entered into force. Guideline 4.2.1 appeared to contradict that provision, since it implied that a reserving State did not become a contracting State until its reservation was established, which entailed its being accepted. That proposition was open to question. The establishment of a reservation affected the applicability of the treaty only between the reserving State and the accepting State; it had no effect on the entry into force of the treaty. Indeed, guideline 4.3.1 provided that an objection by a contracting State did not preclude the entry into force of the treaty as between the objecting State and the reserving State.

63. Guideline 4.4.3 referred to peremptory norms of general international law (*jus cogens*), the definition and scope of which had yet to be determined. With regard to guideline 4.5.2, her delegation wished to reiterate the crucial importance of the consensual basis underlying the law of treaties. A reserving State could not be obliged to comply with a treaty without the benefit of its reservation, unless it had expressed an intention to that effect. Only the reserving State could clarify exactly how the reservation affected its consent to be bound by the treaty.

64. Her delegation would submit written comments on part 5 of the Guide, which addressed a complex area involving both codification and the progressive development of international law.

65. The topic of the immunity of State officials from foreign criminal jurisdiction was an important one. France therefore regretted that the Commission had been unable to discuss it, and hoped that it would do so at its sixty-third session.

66. **Ms. Lijnzaad** (Netherlands), referring to the topic "Reservations to treaties", said that a guide to practice should represent actual practice and be useful in the daily work of Governments, lawyers and officials of international organizations. While her delegation was grateful to the Special Rapporteur for his work, which had greatly contributed to the understanding of the topic, it had some doubts regarding the practical applicability of the hundreds of guidelines presented over the previous 15 years, and had the impression that the Guide to Practice might have overshot the original mark of the study.

67. With regard to the guidelines on the effects of invalid reservations, the Special Rapporteur had compared two alternatives concerning the entry into force of a treaty for the author of such a reservation. The first alternative, the severability of an impermissible reservation from the reserving State's consent to be bound by the treaty, was supported by some State practice, as noted by the Special Rapporteur. The second alternative represented pure consensualism, as it emphasized the sine qua non character of the reservation and precluded the entry into force of the treaty for the author of the reservation. Her delegation agreed *grosso modo* that both alternatives found some support in practice and commended the Special Rapporteur for trying to find a middle path in formulating guideline 4.5.2. The criteria set out in the guideline were well considered and would be relevant in establishing the intentions of the reserving State, although the paragraph on the factors to be taken into account should be worded less restrictively. In addition, the questions raised by the representative of Germany in the 19th meeting (A/C.6/65/SR.19) regarding the general presumption introduced by the guideline merited consideration. Although her delegation did not necessarily agree with the conclusions reached by the German delegation, it considered those questions relevant to the ongoing debate on the topic and doubted that it was appropriate at the current stage to introduce the list of factors.

68. Concerning the status of reservations to treaties in the case of succession of States, her delegation noted that guideline 5.2 was intended to fill a lacuna in the 1978 Vienna Convention on the Succession of States in respect of Treaties concerning a succession of States resulting from the uniting or separation of States. Under the 1978 Vienna Convention, the main difference between the succession of newly independent States and that of States uniting and separating was that the clean-slate rule applied to the former, whereas a State in the latter category was subject *ipso jure* to continuity of the treaty obligations of its predecessor. The notion of *ipso jure* continuity had not been based on practice at the time that the 1978 Vienna Convention had been drafted, but had been, rather, an example of progressive development of international law. In the period following 1989 it had become apparent that a large number of separating territories in Eastern Europe had decided to ignore the 1978 Vienna Convention and apply the clean-slate rule, a practice that should have been reflected in the Guide to Practice. Her delegation did not propose a further study on the subject, but noted that the relevant draft guidelines, without so indicating, represented only a small number of recent cases of succession.

69. As to filling the lacuna with regard to reservations in cases of uniting and separation of States, there was not, in her delegation's view, a sufficiently well-established practice supporting the Special Rapporteur's proposals, which attached much weight to declarations by States that they accepted the reservations of predecessors. The few examples cited could not be considered evidence of a general rule that succeeding States automatically adhered to a treaty as it had applied to the State's predecessor. Similarly, an absence of objections to such declarations revealed little about a State's intentions. In addition to the scarcity of practice, her delegation had noted little study of the motives of the few States that had expressed their adherence to reservations of predecessors. Consequently, the guidelines did not have a basis for progressive development of international law, which was still unclear on the matter of State succession. Her delegation therefore suggested that the Commission should refrain from formulating guidelines on reservations in the context of State succession.

70. Another concern in relation to succession of States was the unification of States that had different treaty obligations owing to differences in reservations. While such a situation might arise, it would not be helpful to presume, as in guidelines 5.1.2 and 5.1.5, that maintenance of a reservation with a territorial scope limited to one of the predecessor States would be relevant to the future situation of the newly unified State. In the first place, reservations dealing specifically with territory were extremely rare. Moreover, in the case of the unification of States, maintenance of a reservation made by one of the predecessor States for part of the territory of the new State would be impracticable and would most likely also run counter to the political spirit that had led to the unification. Hence, more reflection was needed on whether there existed in law any specific rule on the legal consequences of unification with regard to the reservations of predecessor States, since that appeared not to be the case.

71. With regard to the topic of immunity of State officials from foreign criminal jurisdiction, her delegation regretted that the Commission had not been in a position to consider the second report of the Special Rapporteur and encouraged it to do so as a matter of urgency, as the Commission's participation in the debate on the topic was crucial.

72. **Mr. Sandoval** (Colombia) said that his delegation valued the work of the Commission and its Special Rapporteurs and urged that mechanisms for supporting that work be should be explored. With regard to the Commission's work on the responsibility of international organizations, both the topic itself and Member States' comments thereon should be considered in greater depth, taking into account the difficulties arising from the scarcity of practice in relation to the topic and the existence of organizations that represented a variety of interests and ideals. His delegation favoured further study of the discrepancies between the articles on responsibility of States for internationally wrongful acts and the draft articles on responsibility of international organizations with a view to achieving a proper balance between the two. Should that not be possible, the Commission should focus on concrete issues relating to the responsibility of international organizations.

73. With regard to reservations to treaties, the focus should be on the practice of States in order to ensure that the Guide to Practice was based on real situations. It was important to recognize the complexity of the topic "Expulsion of aliens" and the difficulty of identifying customary law that could be codified. The Commission, in coordination with States, should continue to study the topic, taking on difficult contemporary issues not previously addressed.

74. His delegation applauded the rigour of the work done by the Special Rapporteur on the topic "Protection of persons in the event of disasters", which had introduced important new concepts and contributed to the progressive development of international law. It was important to continue compiling and studying national legislation, international agreements and the practice of States and non-State actors in order to elucidate the legal and practical aspects of the topic, address any gaps identified and introduce new concepts, such as that of external assistance to an affected State as an international strategy for risk reduction. Disasters arising as a result of armed conflict should not be included in the scope of the draft articles.

75. With regard to shared natural resources, the Commission in conjunction with Member States should reflect further on the appropriateness of including transboundary oil and gas in the work on the topic. Because resource conditions differed, State practice in relation to the issue also differed, which could make study of the topic difficult. In his delegation's view, it would be premature for the Commission to take up the issue of oil and gas at the present time.

76. Concerning the obligation to extradite or prosecute (*aut dedere aut judicare*), the legal bases of the obligation should continue to be studied with a view to achieving broad consensus on the need for and means of its implementation, bearing in mind that it could be an effective tool for preventing impunity. The regime of obligation to extradite or prosecute should be consistent with the principles of international criminal law.

77. His delegation attached great importance to the topic "Immunity of State officials from foreign criminal jurisdiction", and urged the Commission to address it as a matter of priority. Regarding the most-favoured-nation clause, his delegation had noted the significant progress made and was of the view that such clauses were especially important for developing countries in their efforts to attract foreign investment. In considering the topic, it was essential not to lose

sight of the broad application of most-favoured-nation clauses and their effects on the development of States.

78. With regard to the topic "Treaties over time", his delegation supported the work of the Study Group and wished to underscore the importance of observing the principles of stability and continuity of treaty relations. His delegation also commended the Commission's work on the topic "Diplomatic protection" and looked forward to continued discussion of the desirability of developing a convention on the basis of the draft articles.

79. **Mr. Nagamine** (Japan), recalling the concerns expressed by his Government in 2009, said that his delegation continued to question whether the Commission's past and current work fully and effectively covered the mainstream issues of international law or, instead, focused narrowly on more specific and technical areas. It also questioned whether the Commission had been fully engaged with the crucial needs of the international community, and it had some reservations regarding the recent trend towards a proliferation of study groups. The Commission's main task, as in the past, should be to produce draft articles that would become the basis for future multilateral treaties, not merely to conduct studies. The study on fragmentation of international law (A/CN.4/L.682), for example, had been interesting from an academic point of view, but had perhaps not been an appropriate project for the Commission.

80. Protection of the environment was an issue requiring urgent and coordinated action by both States and non-State actors. However, apart from the adoption of the draft articles on the law of transboundary aquifers, which did include certain relevant rules of international environmental law, the Commission had not taken up any topic relating to international environmental law since concluding its work on international liability for injurious consequences arising out of acts not prohibited by international law. The Commission should explore the possibility of drafting or elucidating rules of international law addressing aspects of environmental protection, such as protection of the atmosphere, that remained to be codified.

81. His delegation would be submitting comments on the topic of reservations to treaties in due course.

82. **Ms. Back** Kyung-wha (Republic of Korea) said that, while the Commission should be cautious in adding new topics to its agenda, it should examine some issues that were critical in dealing with current problems in society. For example, as the Internet now permeated nearly every aspect of human life, it might be useful for the Commission to consider the issue of Internet-related international crime, which might be addressed either through feasibility studies conducted by the Secretariat or the establishment of an open-ended working group.

83. With regard to the topic "Reservations to treaties", caution should be exercised when considering the addition of new elements to the provisions of the 1969, 1978 and 1986 Vienna Conventions. Her delegation supported article 4.7.1 which distinguished interpretative declarations from reservations and characterized the former as an element to be taken into account in interpreting treaties. Concerning the draft guidelines on the consequences of an invalid reservation, a fundamental question remained unanswered: who would judge the validity of a reservation by one State when other States had differing views on the issue? Further thought should be given to how to decide on an impartial body to assess whether or not reservations were valid.

84. **Mr. Dwivedi** (India) said that the rule of law constituted the essence of the Commission's work. His delegation viewed the exchange of views between the Commission and Member States in the Sixth Committee as an important tool for both the progressive development of international law and promotion of the rule of law at the national and international levels. It had been rightly observed that the Commission had a symbiotic relationship with the International Court of Justice. Moreover, many other international and national courts and tribunals had relied on articles drafted by the Commission.

85. The draft guidelines on reservations to treaties would serve as a comprehensive manual that would provide useful guidance to States and legal advisers on the subject. However, although it had been decided early on in the Commission's work on the topic that the guidelines would serve to elucidate the relevant provisions of the Vienna Convention on the Law of Treaties, but would not introduce any changes therein, the proposed guidelines on impermissible reservations appeared to have done just that. Guideline 4.5.2, in particular, introduced a new presumption in the case of an impermissible reservation — namely, that the reserving State would become a party to the treaty in

question without the benefit of its reservation unless it clearly indicated that it did not wish to be bound by the treaty under those circumstances. His delegation was concerned that such a guideline might create uncertainty in international treaty relations. On the other hand, the guidelines relating to succession of States generally followed the 1978 Vienna Convention on Succession of States in respect of Treaties.

86. His delegation was pleased that edited summary records of the Commission's proceedings had been placed on the Commission's website, which would assist Member States and other parties in following its work. The preparation of summary records for the Commission should be expedited.

The meeting rose at 1 p.m.