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Summary record of the 3024th meeting

Topic:
<multiple topics>

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10. He supported the inclusion of the draft guidelines contained in the second part of the report, which represented an important step in the sequence leading to the examination of the legal effects of reservations and interpretative declarations. Regarding the validity of objections to reservations, he considered that States had the right, not merely the freedom, to object to reservations. The power to make treaties was one of the most important prerogatives that States enjoyed under international law, and objecting to a reservation was a corollary of the right to make treaties. He basically agreed with the analysis of the validity of objections and with the conclusion that the Commission should not deal with the substantive validity of objections. He had some doubts, however, about objections contrary to the object and purpose or to a fundamental provision of a treaty. How did such objections differ from invalid reservations under article 19, subparagraph (c), of the Vienna Convention and should they be admissible?

11. With regard to the validity of acceptances of reservations, the Special Rapporteur had stressed two basic points: acceptance of an invalid reservation did not make the acceptance itself *ipso facto* invalid, but the legal effects of acceptance of an invalid reservation were curtailed by the invalidity of the reservation concerned. Draft guideline 3.4 reflected only the first point, however, and a second paragraph should perhaps be added to state that acceptance of an invalid reservation would have no legal effects. That clarification could also be made in the commentary to draft guideline 3.4. It would remind States that accepting invalid reservations had legal consequences and induce them to give more serious consideration to reservations.

12. In connection with the validity of interpretative declarations, the question arose whether interpretative declarations were permissible when the treaty was silent on the matter. Clarification on that point was important, since the Vienna Convention overlooked the issue of interpretative declarations. A draft guideline on the question might be necessary, but the commentary to draft guideline 3.5 could also analyse that point of law in detail and, he would suggest, provide several concrete examples of treaties that implicitly prohibited interpretative declarations.

13. Lastly, on the validity of approval, opposition and reclassification of interpretative declarations, he supported the inclusion of draft guideline 3.6 in the Guide to Practice. Since the legal regime of declarations currently lacked clarity and precision, it was important for the Commission's work to be thorough and comprehensive, tackling all the issues pertaining to interpretative declarations. In the commentary to the draft guideline, all the points made by the Special Rapporteur in that context could be restated. Particular mention could be made of the fact that international law did not establish criteria for assessing the validity of approval, opposition and reclassification of interpretative declarations, but merely created methods for their interpretation.

14. He agreed with other members of the Commission that the draft guidelines should be referred to the Drafting Committee, in anticipation of the submission of the final draft articles at the Commission's next session.

The meeting rose at 10.30 a.m.

3024th MEETING

Tuesday, 21 July 2009, at 10.10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Corr.1 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Special Rapporteur on reservations to treaties to present a summary of the debate on the topic.

2. Mr. PELLET (Special Rapporteur) said that the members of the Commission who had spoken on the subject had managed to convince him that some of their criticisms were well founded. He would take those criticisms into consideration in the Guide to Practice, which would undoubtedly be improved thereby. Before analysing the various criticisms and proposals, he would take up two points of procedure, one more important than the other. First, he would not comment on the points raised by Mr. Hassouna at the previous meeting on the first part of the fourteenth report, because it seemed inappropriate to discuss a draft that had already been discussed by the Commission, referred to the Drafting Committee and formally adopted by the Commission. Secondly, a number of speakers had emphasized the importance of the chapter on the effects of reservations and interpretative declarations (paras. 179–290), and had asked the Special Rapporteur to inform them of the timetable of future debates. He was not sure that he would finish the third part of the fourteenth report before the end of the sixty-first session, but he anticipated completing over the summer the preliminary version of the part relating to effects of a valid reservation, which the Secretariat could then distribute. In that connection, he wished to congratulate the Secretariat on the excellent study that it had published on the question of reservations to treaties in the context of the succession of States (A/CN.4/616), on which he would draw in preparing the draft guidelines and commentaries thereto that would make up the first part of the fifteenth report, which he intended to submit well before the deadline of March 2010. Thirdly, he would in due course submit the two annexes on the reservations dialogue and dispute settlement, respectively, which he had over-optimistically

expected to have completed for the current session. He might also, although he had not yet taken a definitive decision, put forward proposals for a formal revision of the Commission's preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.²⁵⁵

3. If the Commission and the Drafting Committee adhered to that timetable, the Guide to Practice could be adopted on first reading at the sixty-second session. Theoretically, two years should pass between the first and second readings, but given the particular nature of the Guide to Practice, it might be possible to adopt a two-stage procedure and request States to begin commenting on the first two parts of the Guide at once and then, between the sixty-second and sixty-third sessions, on the three following parts, relating to validity, effects and succession. The Commission could thus move on to the second reading in 2011, which would coincide with the end of his mandate. By extending the normal procedure in that way, the Commission could avoid appointing a new special rapporteur to work on the topic. In any case, he had finished the draft commentary to the second part of the Guide to Practice, and the Commission would need to adopt it in its report on the current session, together with draft guidelines 3.1, 3.2 and, perhaps, 3.3.

4. With regard to the substantive questions relating to the six draft guidelines contained in document paragraphs 80 to 178, draft guideline 2.6.3 (Freedom to make objections), set out in paragraph 96 of the report, had already been discussed in plenary meeting and referred to the Drafting Committee, so it should not be debated again. The Drafting Committee had decided, for reasons that he found unconvincing, to defer consideration of draft guidelines 2.6.3 and 2.6.4 (Freedom to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation), which meant that the texts had not come before the plenary Commission, making it impossible to complete the second part of the Guide to Practice. He considered that, since the question of the validity of objections had been debated, there was no longer any reason why the Drafting Committee should not address the two draft guidelines again.

5. With regard to the "semi-guideline" 3.4 (Substantive validity of acceptances and objections), it seemed to have been generally accepted that a simple objection or a maximum-effect objection did not give rise to any issues of validity. All speakers agreed that it was impossible to lay down a hard and fast rule that an objection aimed at producing a "super-maximum" effect was *ipso facto* not valid and that the problems posed by such an objection were problems not of validity but of effect. The criticisms and suggestions focused on the extremely sensitive question of the validity of objections with intermediate effect, namely those whereby the objecting State agreed to be associated through the treaty with the author of the reservation while excluding from their treaty relations the application of certain provisions of the treaty not covered by the reservation. It had been suggested that, with regard to such objections with intermediate effect, the author of an objection could at the same time introduce conditions

to be associated with the author of the reservation that would not be valid under international law. One speaker had given the example of an objecting State that could introduce a discriminatory clause by such means. Another had put forward the example of a person being expelled to a State where that person risked being tortured. A third had considered that, by means of an objection restricting the territorial application of the treaty, a State could establish a form of discrimination that ran counter to *jus cogens*. While he shared the righteous indignation that prompted such comments, he remained doubtful as to whether they were well founded in law. Such problems might arise in the case of reservations themselves but not in the case of objections. The example that had been cited most often was that of a State that refused to include in its relations with the reserving State the principle that expulsion was prohibited where there was a risk of torture. Regardless of whatever might have been said, such a course of action could never legitimize or render lawful an act contrary to *jus cogens*, since its only effect was to exclude the clause in question from the treaty relations between the two States concerned. The peremptory norm enshrined in the treaty was once again excluded from the treaty, but it remained totally and absolutely applicable between the two States. Contrary to what had been said, it was not the case that their treaty relations could be isolated from the totality of the legal relations between the States in question. Indeed, such reasoning diminished *jus cogens*, because it amounted to claiming that, simply by objecting to a reservation, the objecting State could avoid its obligations under *jus cogens*. It had been pointed out that, according to draft guideline 3.1.9, "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law"²⁵⁶ and that there was no reason to treat objections any differently. Apart from the fact that the draft guideline had been the result of a laborious compromise, he was far from persuaded that the question applied in the same way to reservations and objections. A reservation excluded the application of certain provisions of the treaty, while an objection excluded the full application of the reservation in the relations between the two States. As indicated in paragraphs 110 to 114 of the report, objections were not in fact "counter-reservations". He still failed to see—and some other members of the Commission seemed to share his bewilderment—how a State could, by making an objection, exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law. The mere act of making an objection with intermediate effect in order to exclude a provision prohibiting expulsion to a State that practised torture would not have the effect of authorizing such expulsion if the expulsion was considered prohibited by a peremptory norm of general international law. Similarly, a State that included, in an objection with intermediate effect, a provision prohibiting a given form of discrimination, would not be in a stronger position to engage in such discrimination itself and would therefore not alter the legal effects of the treaty in a manner contrary to a peremptory norm of general international law. None of the examples given justified transposing draft guideline 3.1.9 to the case of objections.

²⁵⁵ See footnote 140 above.

²⁵⁶ For the commentary to this guideline, see *Yearbook ... 2007*, vol. II (Part Two), pp. 46–48.

6. Several speakers had taken a different position, however, holding that unconditionally accepting the validity of such objections undermined the very principle of consensualism. One speaker had said that such objections would be valid only if they were accepted by the reserving State. The idea that an objection with intermediate effect was conditional upon acceptance by the reserving State would create a vicious circle: if State A made a reservation excluding the application of article 3 of a treaty and if State B reacted by making an objection with intermediate effect whereby it added the exclusion of article 5, State A could, in turn, respond to State B's exclusion by excluding article 8, and so forth. That position was intellectually untenable for several reasons. First, the two States were not in the same situation, since it was State A that had taken the initiative in refusing to apply the treaty in full, and not State B. Secondly, although the reservations dialogue could be protracted indefinitely, the law of the interplay between reservations and objections was, under the 1969 and 1986 Vienna Conventions, subject to precise time limits, which could not be met in the case referred to above. Thirdly, even if there was a problem of validity—and he did not believe there was—it would in any case not be a question of substantive invalidity, but of adding a procedural condition to the applicability of the objection. Fourthly, the suggestion that the reserving State should accept an objection with intermediate effect was inadmissible, since it was, after all, up to the author of the reservation to withdraw the reservation, thereby resulting in the withdrawal of the objection, as provided for in draft guideline 2.5.7 (Effect of withdrawal of a reservation). That final point had been duly noted by one speaker, who had been concerned at the respect shown for the will of the reserving State and not only of the objecting State and had therefore considered the Special Rapporteur's proposals unbalanced in that respect, although the speaker had admitted that the matter could be dealt with in the fourth part of the Guide to Practice relating to the effects of objections with intermediate effect. He himself shared that view, although he admitted that he could have easily held the opposite view, since, as a number of speakers had noted, the borderline between validity and effect was often unclear. At the same time, the author of an objection did not have unlimited freedom to give that objection an intermediate effect. As he had shown in paragraphs 116 to 118 of the report, and as he had attempted to explain during his presentation, limited practice—perhaps restricted to the 1969 Vienna Convention—showed that there were limits that did not affect the validity of an objection but merely allowed it to have an effect.

7. He had, however, taken on board a comment made by a number of speakers, which had led him to change his mind. He was not sure, upon reflection, that paragraph 103 of the report was altogether convincing. Although he still believed that an objection had no potential effect other than to suspend the treaty in the bilateral relations between the author of a reservation and the author of an objection, and that the author of the objection, in formulating the objection, exercised a right and not simply a freedom to do so, he recognized that he had perhaps been mistaken in claiming that, by means of an objection with intermediate effect, a State could undermine the object and purpose of the treaty in its relations with the reserving State. The provisions whose application could be excluded by means

of an objection with intermediate effect should be related to the reservation itself. Since a reservation was not valid if it was incompatible with the object and purpose of the treaty, it was mistaken to consider that a State could deprive the treaty of its object and purpose by means of an objection with intermediate effect, because the necessary link between the exclusion of certain provisions by the reservation and that of other provisions by the objection with intermediate effect undermined the validity of that argument. Moreover, as had been suggested, it should be recognized that the phrase “the provisions to which the reservation relates”, used twice in article 21 of the Vienna Conventions, could be helpful in restricting the acceptable scope of objections with intermediate effect.

8. He thus found himself in a difficult position, since, according to his own logic, that final point related more to the validity than to the effects of an objection. Indeed, an objection was in the same situation as a reservation prohibited under article 19, subparagraph (c), of the Vienna Conventions and it would undoubtedly be logical if the foregoing appeared in the third rather than the fourth part of the Guide to Practice. He was still not sure how he should improve his text, but he intended to make some specific proposals at the end of his statement. In any case, he had concluded from the debate that an objection with intermediate effect could produce such effect only if the provisions to which it related were linked to the provisions to which the reservation itself related—which meant that it did not matter whether the topic was covered in the third or the fourth part of the Guide to Practice—but also that the objection could not have the effect of depriving the treaty of its object and purpose in the relations between the two States concerned, which was purely a problem of validity. Thus, even if he proposed a text for a draft guideline 3.4.1 along those lines, it would also be necessary to amend draft guideline 3.4 accordingly in order to take account of the limits to the validity of an objection, and that would raise a problem of internal procedure for the Commission, to which he would ultimately return.

9. As for acceptances, he said that the debate held the previous week had led him to change his mind on a point that was of limited importance, but that had editorial and procedural consequences. According to draft guideline 3.4, acceptance was not subject to any condition of substantive validity. He still believed that such was the case, for the reasons given in paragraphs 121 to 126 of the report. Those reasons had been generally accepted, but he had come to think that he ought to draw a distinction between tacit acceptances and express acceptances. Everything that he had written seemed correct insofar as tacit acceptances were concerned, but a number of doubts regarding express acceptances had been raised in his mind by some speakers. Certainly, as he had already said, he by no means considered that the parties' agreement as to the validity of a reservation could be assumed from their unanimous silence concerning a reservation during a period of twelve months or that the general acceptance of a reservation was sufficient to make it valid. When it came specifically to express acceptances, however, he had been convinced by the arguments put forward the previous week that it was not correct to say that such acceptances produced no effect on the validity or invalidity of a reservation, in that they would at least have to be taken

into consideration by the interpreter in order to assess their validity or invalidity. He had also been persuaded that an express acceptance, which was a voluntary act, could not be deprived of certain effects—which would make it relevant to the fourth part of the Guide to Practice, dealing with effects—but that it could produce no effect, which was the case with invalidity. If the Commission agreed, draft guideline 3.4 should also be reviewed from that point of view to reflect the potential invalidity of express acceptances.

10. As for interpretative declarations, the “peremptory norms brigade” had once again expressed their view that interpretative declarations contrary to *jus cogens* were not valid. He had changed his mind on that point, too, or at least partially, having been convinced by an example given by one speaker of a hypothetical interpretation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that might, on the pretext of interpretation, seek to legitimize certain forms of torture. It would certainly be a case of interpretation and not a reservation, in the sense that the author of the declaration would not be aiming to exclude the application of certain provisions of the treaty but rather—to use the wording of draft guideline 1.2—“to specify ... the meaning ... attributed by the declarant to a treaty or to certain of its provisions”. He thought that, for that reason alone, he ought to add a clarification along those lines at the end of draft guideline 3.5, the nature of which would be substantially changed thereby.

11. He was not, however, convinced by the other criticisms of draft guideline 3.5. For example, it really did not seem possible to claim that a mistaken interpretation “violated” article 31 of the Vienna Conventions, as that would have the effect of reinventing a sort of law of responsibility exclusive to reservations to treaties. True, if an impartial third party with the power to decide ruled that an interpretation advanced by a State was false, that falseness would be duly established; but the fact remained that the State in question could formulate such an interpretation and, in the vast majority of cases, the interpretation would produce all its effects indefinitely, for the good reason that, as another member of the Commission had pointed out when commenting on paragraphs 139 and 140 of the report, international law and society were essentially decentralized and were so constituted that they relied on self-interpretation. A State could be mistaken in advancing a given interpretation, but it did not follow that its erroneous interpretation was not valid. He could not quite understand how draft guidelines 3.5 and 3.5.1 could be said in that regard to leave a void that could be rectified only if one held that an interpretative declaration could be invalid because it was contrary to the object and purpose of the treaty. That approach confused cause and effect: an interpretation must be made in the light of the object and purpose of the treaty and, if it was based on a misapprehension of that object and purpose, it was erroneous, incorrect or false, but not invalid. Indeed, it was a repetition of the previous problem.

12. During the debate, two members of the Commission had complained that he had not given concrete examples of a treaty-based prohibition against formulating interpretative declarations and had asked him to provide some

in the commentary. While he had no examples of such provisions, he considered that the examples that he had given of bilateral treaties and an abortive multilateral convention showed that the problem could arise, which justified its treatment in the Guide to Practice. He had also taken note of the proposed simplification of the text of draft guideline 3.5 and was in favour; he would leave it to the Drafting Committee and the Secretariat to produce a suitable text.

13. With regard to draft guideline 3.5.1, the title of which, at least, would need to be reviewed by the Drafting Committee, it had been proposed that greater emphasis should be placed on the idea that interpretative declarations that were “reclassified” as reservations must be treated as such. In his view, the problem was purely one of drafting, and the Drafting Committee could deal with it, although he was not convinced that it was necessary, since the reference to draft guidelines 3.1 to 3.1.15 meant precisely that such alleged interpretative declarations should be treated as reservations.

14. As for conditional interpretative declarations, no speaker had been opposed in principle to referring draft guidelines 3.5.2 and 3.5.3 to the Drafting Committee as a precautionary measure, even though they might subsequently be deleted if the Commission decided that conditional interpretative declarations were subject to the same regime as reservations. According to one point of view, however, a distinction should be drawn between a case in which a conditional interpretation was deemed correct and one in which it turned out to be incorrect, if, for example, a competent, impartial third party so ruled. He had difficulty accepting that view.

15. He invited the Commission to consider the example given of a hypothetical interpretative declaration by Romania at the time it ratified the United Nations Convention on the Law of the Sea, under the terms of which Romania agreed to be bound by the Convention on condition that article 121 was interpreted as including Serpents’ Island among the “rocks” referred to in paragraph 3. There could be one of two consequences: the ICJ, in hearing a subsequent dispute with Ukraine, for example, either accepted that interpretation or it rejected it. In either case, the Court would have ruled on whether or not the declaration was well founded; however, if conditional interpretative declarations were to be equated with reservations, it was not because they were reservations but because, owing to their conditionality, they behaved like reservations and the same rules could be applied to them. As another member of the Commission had said, if the interpretation proved correct, the problem of the validity of the conditional interpretative declaration did not arise. If it proved incorrect, the question of its validity arose, but it did so by virtue of the fact that it was conditional and, in his view, that was what draft guidelines 3.5.2 and 3.5.3 stated.

16. He had, however, reached that conclusion only with considerable hesitation and, if it turned out that a majority of the Commission held the opposite view—that the conditions for the validity of conditional interpretative declarations were different, even if only in one detail, from those of reservations—he would go along with them. In

that case, however, it would be necessary to delete the square brackets from all the draft guidelines relating to conditional interpretative declarations. In other words, if the Commission decided to refer draft guidelines 3.5.2 and 3.5.3 to the Drafting Committee without any further instructions, that would mean that it accepted the principle set out in them and that conditional interpretative declarations were thus subject to the same conditions of validity or invalidity as reservations. Alternatively, the full Commission would need to give the Drafting Committee precise instructions in order to sidestep the principle of assimilation that underlay the draft guidelines and that one member at least had found too rigid.

17. Two suggestions had been made about draft guideline 3.6 (Substantive validity of an approval, opposition or reclassification). The first had been to add at the end of the draft guideline the phrase that appeared at the end of draft guideline 3.5, namely “unless the interpretative declaration is expressly or implicitly prohibited by the treaty”, since such reactions might, like interpretative declarations themselves, come up against a prohibition set out in the treaty. He was in favour of that proposal, but it had consequences only for approval or opposition, since it was hard to see how a reclassification as a reservation could be affected by a prohibition. Nevertheless, he supported the proposal, which he thought the Drafting Committee could adopt. The second proposal relating to draft guideline 3.6 seemed fairly similar to the first, at least in spirit, since it was to insert the phrase “Subject to the terms of the treaty” at the beginning of the draft guideline. That seemed more ambiguous and, in his view, every guideline in the Guide to Practice should be read subject to any contrary provision in the treaty. He was not, however, opposed to the Drafting Committee considering the proposal.

18. Two members had also raised the question of the function, and indeed the very nature, of the Guide to Practice, and he felt bound to repeat what he had already had occasion to say, namely, that the term “Guide to Practice” did not mean that the text, which was a flexible legal instrument, was based on past State practice, but rather that it was intended to guide States in their future practice. Another reproach levelled at the Guide was that it was too complicated. Certainly, the draft guidelines were often complex, as was the commentary, but that was no accident, given that it had taken over 15 years to bring the enterprise to a successful conclusion, and that was simply due to the fact that the legacy of the Vienna Conventions with regard to reservations to treaties, combined with practice that was also difficult to understand, was indeed extremely complicated. The Commission was not producing an introductory handbook to the law of reservations—such a handbook already existed, in the form of articles 19 to 23 of the Vienna Conventions—but rather a treatise on reservations that attempted to give the user all the replies to questions that might arise, and that precluded any gross simplification. At the same time, he wondered whether the Commission might not ultimately consider producing some kind of digest of the law of reservations that would set out, in a form to be decided, the basic principles on which the Guide to Practice was founded or would facilitate the use of the Guide, bearing in mind the difficulties that might be involved, since users should not be led to

believe that such matters were simple when they were not. The Commission should not make a hasty decision in that regard, but it did have to decide what it wanted to do with the draft guidelines proposed in paragraphs 80 to 178 of the fourteenth report.

19. With one small exception, the members of the Commission who had spoken had said that they were in favour of referring the draft guidelines to the Drafting Committee, so the most convenient solution for him would be to support that proposal. However, he rejected that solution, which he saw as the easy way out, since on at least three points, and perhaps four, he had been convinced by the debates during the session that he had taken a wrong turn. After listening to what members had said and giving it some thought, he had come to believe that, first, an objection could neither result in the exclusion of the application of provisions of the treaty unconnected with the reservation to which the objection related, nor deprive the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection. That meant that draft guideline 3.4 must be thoroughly overhauled and doubtless split up into two separate guidelines. Secondly, again in the context of draft guideline 3.4, if a reservation itself was not valid, the express acceptance of it was likewise not valid. Thirdly, the members who believed that a situation could arise in which an interpretative declaration was contrary to a peremptory norm of general international law were right and, that being the case, such a declaration should be considered invalid and draft guideline 3.5 redrafted accordingly. Fourthly, although it was a point on which he was less sure, it was worth considering whether conditional interpretative declarations could really be subject to the same conditions of validity as reservations. If they could not, draft guidelines 3.5.2 and 3.5.3 should also be redrafted.

20. As it was not up to the Drafting Committee to decide on questions of principle, and as the four questions that he had mentioned were questions of principle, he would prefer that the Commission not refer the draft guidelines contained in paragraphs 80 to 178 of his fourteenth report, as they stood, to the Drafting Committee. There were three possible solutions. The first was that the Commission could put off consideration of the draft guidelines by the Drafting Committee to the following year, although the Committee’s programme of work on reservations was already full, which was a considerable drawback. Secondly, he could prepare new draft guidelines on the basis of the principles that he had just set out and submit them to Commission members over the next few days. The third possibility was that the Commission could refer the draft guidelines to the Drafting Committee during the current session. If it did that, however, it would need to take a formal stand on the four questions of principle that he had raised, so that the Drafting Committee would know what approach to take with regard to the validity of objections with intermediate effect, the validity of express acceptances of invalid reservations, the validity of interpretative declarations that were contrary to peremptory norms of general international law and the question of aligning the conditions for the validity of conditional interpretative declarations with the reservations regime.

21. The CHAIRPERSON said that he took it that the Commission wished to adopt the second course of action suggested by the Special Rapporteur, namely to put off its decision on these draft guidelines and to wait until the Special Rapporteur had submitted new texts for draft guidelines 3.4, 3.5, 3.5.2, 3.5.3 and 3.6.

It was so decided.

Cooperation with other bodies (continued)*

[Agenda item 14]

STATEMENT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

22. The CHAIRPERSON invited Mr. Manuel Lezertua, Director of Legal Advice and Public International Law (Jurisconsult), to address the Commission.

23. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Committee of Legal Advisers on Public International Law) extended greetings to the Chairperson and members of the International Law Commission and said that he would like to inform the Commission of the major developments that had taken place in the Council of Europe over the past 12 months.

24. The Chairpersonship of the Committee of Ministers had been held by Sweden from May to November 2008 and by Spain from November 2008 to May 2009. It was currently held, since May, by Slovenia. The Chairpersonship by Sweden had been marked by the conflict that had broken out the previous summer in the Caucasus between the Russian Federation and Georgia. Sweden had quickly intervened to call on the Russian and Georgian authorities to put an end to the armed confrontation. It had aligned itself with the efforts of the Secretary-General and the Council of Europe Commissioner for Human Rights to reach a peaceful settlement of the crisis, in accordance with the commitments entered into by the two countries, which were both States members of the Council of Europe, and the obligations arising out of their membership of the Council. The conflict had constituted, and continued to constitute to a certain extent, a serious challenge to the Council's credibility and the values that it upheld.

25. Sweden had also attached great importance to the potential of the Council of Europe to strengthen the rule of law. The Council secretariat had conducted a study that had been considered and welcomed by the Committee of Ministers which sought to identify the key elements characterizing the concept of the rule of law as well as the type of activities that the Council might undertake in that regard.

26. With a view to promoting international justice, the Council of Europe had organized an international conference in London in October 2008, entitled "International Courts and Tribunals—the Challenges Ahead", attended by presidents, prosecutors and clerks of international courts and tribunals, together with the legal advisers of the ministries of foreign affairs of the States members of the Council. The conference had considered the practical challenges facing such courts and tribunals.

27. In the area of relations with the United Nations, the Swedish Chairpersonship had managed to secure the adoption by consensus of a General Assembly resolution on cooperation between the United Nations and the Council of Europe.²⁵⁷ That cooperation continued to develop actively in a number of fields, including human rights, particularly children's rights, as well as abolition of the death penalty and efforts to combat terrorism.

28. The Chairpersonship by Spain (November 2008–May 2009) had then concentrated on the question of the provisional application of certain provisions of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, which was intended primarily to speed up the processing of applications pending before the European Court of Human Rights. Until the entry into force of the Protocol, which had been delayed owing to non-ratification by one member State, it had been decided to find temporary solutions so that some of the Protocol's provisions could be implemented. The Chairpersonship by Spain had also devoted considerable attention to efforts to combatting terrorism.

29. Lastly, the current Chairpersonship by Slovenia had announced its desire to continue the process of reforming the European Court of Human Rights by proactively seeking ways in which cases could be heard more efficiently and gradually eliminating the backlog of cases, to the extent possible. In addition to the question of the entry into force of the Protocol, it sought to think of solutions that would ease the work of the Court, which had over 100,000 applications pending.

30. Slovenia was also active in promoting and developing the rule of law at the national and international levels. In particular, it planned to organize a conference of experts on the decisions of international tribunals and their contribution to strengthening the rule of law at the national and international levels.

31. Turning to the high-level conferences organized by the Council of Europe over the past year, he mentioned first the session of the Committee of Ministers, attended by the Ministers for Foreign Affairs of member States, which had been held in Madrid in May 2009. In addition to adopting important decisions on the future of the European Court of Human Rights, the ministerial conference had provided an opportunity to assess the implementation of the Action Plan adopted at the Third Summit of Heads of State and Government in Warsaw in 2005. The Ministers had also adopted an important declaration, entitled "Making gender equality a reality", and considered questions relating to the election of the next Secretary General of the Council of Europe. They had, moreover, constituted themselves, for the first time, as the Conference of High Contracting Parties to the European Convention on Human Rights, with a view to addressing issues relating to the entry into force of Protocol No. 14.

32. The following conferences had been organized at ministerial level: the eighth Council of Europe Conference of Ministers responsible for Youth, held in Kyiv in

* Resumed from the 3016th meeting.

²⁵⁷ General Assembly resolution 63/14 of 3 November 2008.

October 2008; the World Conference on Constitutional Justice, with the theme “Influential Constitutional Justice—its influence on society and on developing a global jurisprudence on human rights”; the first Council of Europe Conference of Ministers responsible for Social Cohesion, held in Moscow in February 2009, with the theme “Investing in social cohesion—investing in stability and the well-being of society”; the first Council of Europe Conference of Ministers responsible for Media and New Communication Services, held in Reykjavik in May 2009; the Council of Europe Conference of Ministers responsible for Family Affairs, held in Vienna in June 2009, on the theme “Public Policies supporting the Wish to Have Children: societal, economic and personal factors”; and the twenty-ninth Conference of Ministers of Justice, held in Tromsø, Norway, in June 2009, the principal theme being “Breaking the Silence—united against domestic violence”, with particular reference to combating the silence and impunity that went hand in hand with such violence. In addition, on that occasion the Council of Europe Convention on Access to Official Documents had been opened for signature. Lastly, the fourth European Conference of Judges and Prosecutors had been held in Bordeaux, France, on 30 June and 1 July 2009, on the theme of relations between judges and prosecutors. The Conference had been organized jointly by the Consultative Council of European Judges and the Consultative Council of European Prosecutors, in cooperation with the French *École nationale de la magistrature*.

33. With regard to relations between the Council of Europe and other regional or international organizations, he said that the Council of Europe and the European Union enjoyed excellent relations, with the two engaging in numerous joint activities. Their relations had been governed since 2001 by a joint declaration on cooperation and partnership between the two organizations and since 2007 by a memorandum of understanding that established the objectives to be attained and identified the main areas for joint action. Relations between the two organizations were reinforced by quadripartite meetings made up of the Chairpersonship of the Council of Europe Committee of Ministers, the Chairpersonship of the Council of the European Union and the secretariats of the two bodies. The twenty-seventh Quadripartite meeting between the Council of Europe and the European Union, held in Brussels in November 2008, had been used to review joint activities to promote human rights, democracy and the rule of law in South-East Europe. Also on the agenda had been the implementation of the memorandum between the two organizations and follow-up to the situation in Belarus. At the twenty-eighth meeting, held in Madrid in May 2009, a major topic had been the European Neighbourhood Policy and the prospects for cooperation between the two organizations in that context.

34. Relations between the Council of Europe and the Organization for Security and Co-operation in Europe were organized on the basis of coordination meetings held since 2004. The ninth such meeting, held in Vienna in March 2009, had dealt with questions of relevance to both organizations, particularly efforts to combat terrorism, minority rights and efforts to combat trafficking in human beings.

35. Turning to legal news and the activities of the Treaty Office, he said that the Council of Europe had witnessed the adoption of three major conventions during the past year.

36. First, on 25 November 2008, the European Convention on the adoption of children (revised), an updated version of the 1967 European Convention on the adoption of children, had been opened for signature by the States members of the Council of Europe and by non-member States that had participated in its drafting. The object of the Convention was to take into account developments in society and the law, while respecting human rights and bearing in mind that the best interests of the child should always be paramount. The Convention introduced some innovations, such as the requirement of the father’s consent in all cases, even where the child was born out of wedlock.

37. On 27 November 2008, the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes had also been opened for signature. It would enter into force after five ratifications, of which at least four had to come from States members of the Council of Europe. The new Protocol defined the principles governing such matters as the quality of genetic services, information, prior consent and genetic counselling, and established general rules for the conduct of genetic tests.

38. Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms had been opened for signature in Strasbourg on 27 May 2009 and would enter into force on 1 October 2009, since it had already been ratified by six States, while another six had signed it. The Protocol, which concerned the processing of applications to the European Court of Human Rights, introduced a number of innovations: a single judge would be able to reject applications that were manifestly inadmissible, whereas previously such a decision could be taken only by a committee of three judges; and the competence of such committees had been extended so that the judges could declare an application admissible and render a judgment on the merits in cases where well-established case law of the Court existed. States could, if they so wished, provisionally apply the provisions of Protocol No. 14 *bis* prior to its entry into force.

39. The Council of Europe Convention on Access to Official Documents had been opened for signature on 18 June 2009, during the twenty-ninth Conference of Ministers of Justice. It had already been signed by 12 States. The Convention was the first binding international legal instrument that recognized a general right of access to official documents held by public authorities. Restrictions on such right of access were permitted only where they were intended to protect certain interests, such as national security, defence or privacy. The Convention set out the minimum standards to be applied in the processing of requests for access to official documents. A group of specialists on access to official documents would be set up once the Convention was operational.

40. The Council of Europe Convention on the avoidance of statelessness in relation to State succession, which

had been open for signature for three years, had entered into force on 1 May 2009. The Convention, which built on the European Convention on Nationality, set out more detailed rules for States to follow in order to prevent, or at least minimize, cases of statelessness resulting from State succession.

41. Lastly, he noted that the Group of Experts on Action against Trafficking in Human Beings had held its second meeting in June 2009. The Group's mandate was to monitor the Council of Europe Convention on Action against Trafficking in Human Beings of 2005, which had already been ratified by 25 member States. The Group, which was made up of 13 independent experts, would publish regular reports on compliance with the Convention.

STATEMENT BY THE REPRESENTATIVE OF THE COMMITTEE
OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

42. The CHAIRPERSON thanked Mr. Lezertua and invited the Head of the Public International Law and Anti-Terrorism Division of the Council of Europe, Secretary of the Committee of Legal Advisers on Public International Law, Mr. Alexandre Guessel, to address the Commission.

43. Mr. GUESSEL (Head of the Public International Law and Anti-Terrorism Division of the Council of Europe, Secretary of the Committee of Legal Advisers on Public International Law) said that CAHDI was a coordinating body but also a thinktank advising the Council of Europe Committee of Ministers and a body in which legislation was drafted.

44. CAHDI was made up of legal advisers of the ministries of foreign affairs of the 47 member States and a number of observer States and organizations: Australia, Canada, the Holy See, Israel, Japan, Mexico, New Zealand, the United States of America, the United Nations, the European Union, the ICRC and NATO. The strength of the Committee lay in the combination of high-level State representation and increasingly high attendance levels of delegations. CAHDI meetings enabled States' legal advisers to coordinate their approach on such sensitive topics as international jurisdictions, the implementation of United Nations sanctions, the peaceful settlement of disputes, State immunity and questions relating to humanitarian law. CAHDI, which also acted as the European observatory of reservations to international treaties, gave member States the opportunity to exchange information, to discuss the possibility of objecting to a given reservation and to provide more information on a reservation than members themselves had been able to put together. Every year, CAHDI—to which some members of the International Law Commission belonged—organized an exchange of views on the Commission's work.

45. The end of 2008 had been marked by the drafting of a report on the so-called "disconnection clause" and its impact on Council of Europe conventions containing such a clause. The report contained important recommendations on the implementation of such clauses, which would be extremely useful for bodies drawing up new conventions. At its thirty-seventh meeting, held in Strasbourg in March 2009, CAHDI had focused on drafting its advice on the provisional application of some of the procedural

provisions of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. Although the Protocol was intended to amend the Court's procedures in order to enable it to work more effectively, its entry into force continued to pose problems. The Committee of Ministers had therefore requested CAHDI to find ways of overcoming the obstacles raised by the delay in the Protocol's entry into force. Two solutions had been suggested. One had been to hold a conference of the High Contracting Parties to the European Convention on Human Rights with a view to reaching a consensus agreement on a decision to apply the two procedural elements of Protocol No. 14 on a provisional basis. The new procedures would, however, apply only to States that so wished. The other proposal had been to adopt a new legal instrument entitled "Protocol No. 14 *bis*", whereby the same two procedural elements of Protocol No. 14 could be implemented by States that wished to do so. Obviously, a State was free to choose the route that seemed to it the simplest, fastest and most appropriate, taking into account its constitutional requirements.

46. On the initiative of CAHDI, the Council of Europe Committee of Ministers had also adopted, in July 2008, Recommendation CM/Rec(2008)9 on the nomination of international arbitrators and conciliators. The recommendation encouraged States to nominate arbitrators and conciliators in accordance with major conventions, such as the 1969 Vienna Convention or the United Nations Convention on the Law of the Sea. CAHDI was responsible for following up that recommendation and, at each meeting, it reminded States of the practical benefits of keeping their lists of arbitrators and conciliators up to date. The recommendation, which promoted the rule of law at the international level, could also be seen as contributing to the implementation of the 2005 World Summit Outcome.

47. Lastly, he informed the Commission that, on 1 January 2009, Mr. Rolf Einar Fife, Legal Adviser to the Ministry of Foreign Affairs of Norway, had taken over the Chair of CAHDI, the Vice-Chairperson being Ms. Edwige Belliard, of the Ministry of Foreign Affairs of France.

48. The CHAIRPERSON thanked Mr. Guessel for his statement and invited the members of the Commission to put questions to the two speakers.

49. Mr. GAJA said that the difficulties facing the European Court of Human Rights, which was submerged by a large number of applications, were well known. In order to remedy the situation, two rather complicated procedures had been adopted. Protocol No. 14, which had not entered into force because one State had not ratified it, could nonetheless be provisionally applied with respect to States that made a declaration to that effect. Meanwhile, Protocol No. 14 *bis* could enter into force without the need for all member States to be party to it. The provision had, however, involved a major innovation in that, whereas previously there had been only one procedure that could be used, there were currently two. For some States, applications were still dealt with by a committee of three judges, while for others they were dealt with by a single judge. It was worrying that a single judge could decide to reject an application.

50. The point that interested him most was the subsequent agreement of the parties. Theoretically, amendment of the European Convention on Human Rights required the unanimous ratification of a protocol. In the case of Protocol No. 14, the procedure had been circumvented by means of an informal agreement between the States parties. While not criticizing the procedure, he did wish to point out that it involved a radical change in the European human rights protection system, and he requested further information on how such an informal agreement had been used to amend the European Convention on Human Rights.

51. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that Mr. Gaja had put his finger on the weak point of the system. The European Court of Human Rights currently had over 100,000 cases pending, and if nothing was done, there would be 300,000 in four years' time. Since Protocol No. 14 could not enter into force owing to the fact that one State had not ratified it, it had been absolutely essential to find a solution to the problem. CAHDI had been consulted in order to establish what might be done in that regard while having due regard for international law. The solution proposed had been to apply the treaty on a provisional basis.

52. The basic idea was that, since the negotiators of the original instrument had not provided for the possibility of a provisional application, there had to be an agreement, which should not, however, be termed informal, since it had been adopted by the Conference of Contracting Parties. It had thus been decided that, for those who accepted such a provisional application, the basic elements of Protocol No. 14 should apply. As Mr. Gaja had noted, there were thus currently two different procedures: applications lodged against States that had not made a declaration would continue to be dealt with in accordance with the former procedure under Protocol No. 11, while Protocol No. 14 *bis* would apply to all others. The situation was, of course, unfortunate, but the President of the Court, Mr. Costa, had recently informed the Council of Europe Committee of Ministers that the situation was so desperate that he was inclined to take the risk, in the knowledge that the vast majority of contracting parties would shortly be bound by the new procedure. Moreover, the fact that the solution had been approved by CAHDI meant that it was in conformity with international law. By the end of 2009, when most of the contracting parties would be bound by the procedures under Protocol No. 14, the two solutions proposed by CAHDI—namely, the provisional application of one part of Protocol No. 14 or else the provisional application of Protocol No. 14 *bis*, since, from the legal point of view, the two were separate instruments—would end up merging, since their consequences would be identical. All contracting parties would thus be subject to the same procedure, with the exception of those that had rejected both solutions.

53. CAHDI, the Committee of Ministers and the Steering Committee for Human Rights of the Council of Europe had all emphasized that the measure was valid only until the entry into force of Protocol No. 14, which remained the priority. When the Protocol received the ratification that it needed to enter into force, the two procedures he

had described would disappear and the situation would return to normal. In a few months' time, it would be little more than a footnote in the Court's history.

54. Mr. NOLTE said that the extremely important precedent that had been set was of particular interest to the International Law Commission, which had started considering the evolution of treaties over time. He fully understood the pragmatic considerations that had led the Council of Europe to make its decision but noted that CAHDI and Governments had acted on the assumption that the current European Convention on Human Rights could be interpreted as being divisible on the procedural level and perhaps even on the level of substantive rights, although it was to be hoped that such a precedent would never arise. The fact was that it was a case involving a subsequent agreement on the interpretation of the Convention, and the Court, which, in theory, should be the body determining the validity of the premise, found itself in the awkward position of being both judge and party.

55. It should also be borne in mind that, even if all member Governments accepted such an agreement, some parliaments might feel that they had been overridden, since, when they had ratified the original Convention, they had perhaps counted on there being a uniform procedure for all claimants. It was thus theoretically possible that, on the application of a national parliament, a national constitutional court could verify whether the new procedure conformed to the original legislation. There might then be new developments, but in any case, it was a fascinating example of the evolution of a treaty over time.

56. Mr. HASSOUNA asked Mr. Lezertua whether he thought that such a "creative" legal solution, whereby the unanimity rule set out in other instruments, including political documents, could be bypassed, was a one-off solution or whether it could be applied in other contexts. As for cooperation between the Council of Europe and regional organizations, such as the Organization of American States (OAS) or the European Union, he thought that it would be good to extend such cooperation to other organizations, such as the Asian–African Legal Consultative Organization. Meetings or other joint activities would undoubtedly be useful both for the organizations and the member States concerned.

57. Ms. ESCARAMEIA asked whether States that had ratified Protocol No. 14 *bis* had treated it as a new instrument and gone through all the stages of the usual ratification procedure laid down by their domestic law, such as parliamentary approval. If they had, it could be assumed that it would be much easier for them to choose the first option, namely the provisional application of the two procedural elements of Protocol No. 14. She would also like to know whether the monitoring mechanism provided for under the Council of Europe Convention on Access to Official Documents was similar to the mechanisms available to the United Nations human rights bodies. She asked what powers the mechanism had and what relationship it had with the European Court of Human Rights.

58. Mr. GALICKI was surprised that no information had been given on Council of Europe activities to combat terrorism.

59. Sir Michael WOOD asked whether Recommendation CM/Rec(2008)9 of the Committee of Ministers to member states on the nomination of international arbitrators and conciliators, adopted by the Council of Europe Committee of Ministers in July 2008, had been transmitted to the United Nations—through the Sixth Committee, for example—in the context of the current debate on the rule of law.

60. Mr. PELLET asked, with relation to Protocol No. 14, whether anyone had thought of a very simple solution, which would be to allow the Russian Federation—which, as everybody knew, was the only State member of the Council of Europe that had declined to ratify the Protocol—to make reservations. He did not believe that such reservations would be inadmissible under the law of reservations or the European Convention on Human Rights.

61. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI), replying to Mr. Nolte, said that to his knowledge there had been no decision by a national parliament or a national constitutional court declaring the solution adopted by the Council of Europe unconstitutional. The Council endeavoured to comply with international law. The principle of provisional application did not appear in the text of the Convention because no one had thought that a State would avoid ratification, but it did feature in the 1969 and 1986 Vienna Conventions. Meanwhile, the ratification of the new instrument—Protocol No. 14 *bis*—had taken place according to the normal procedures, with parliamentary approval, but that had presented few problems, since all the States concerned had already ratified Protocol No. 14, and Protocol No. 14 *bis* repeated only about one third of its provisions.

62. The solution adopted by the Council of Europe was indeed a one-off solution. It was not directly applicable to other organizations, such as the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights, which had their own procedures.

63. The solution suggested by Mr. Pellet had indeed been considered. CAHDI had expressly stated that the ratification of Protocol No. 14 by the Russian Federation—together with the formulation of reservations or interpretative declarations compatible with international law and the Convention, if necessary—remained a priority, but the Russian Federation was obviously free to decide for itself.

64. Mr. GUESSEL (Head of the Public International Law and Anti-Terrorism Division of the Council of Europe, Secretary of CAHDI) said that it was not the first time that the European Court of Human Rights had used two different procedures. The same thing had happened, for example, when some countries had refused to recognize the right of individual petition. With regard to efforts to combat terrorism, he noted that the ratification of the three most important Council of Europe conventions in that field—the Council of Europe Convention on the Prevention of Terrorism, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and the Convention on cybercrime—was moving

forward. Consultations between the parties to the first two of those conventions had begun recently, and reports relating thereto would shortly be published. The Committee of Ministers had reaffirmed that counter-terrorism efforts that respected human rights remained a priority for the Council of Europe.

65. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) confirmed that the First Consultation of the Parties to the Council of Europe Convention on the Prevention of Terrorism had been held in Madrid as part of the 119th session of the Committee of Ministers. In the declaration they had adopted, they had asked the Committee of Experts on Terrorism (CODEXTER) to monitor the implementation of the Convention.

66. Replying to Sir Michael Wood, he said that he had himself transmitted Recommendation CM/REC(2008)9 of the Committee of Ministers to member states on the nomination of international arbitrators and conciliators to the Ambassador of Sweden in New York, who had chaired the Committee of Ministers at that time, and had requested him to transmit it to the United Nations. Meanwhile, the follow-up mechanism provided for by the Council of Europe Convention on Access to Official Documents was not yet operational, but he emphasized that every mechanism under a convention was independent of other mechanisms and of the Court itself. However, that by no means precluded any application to the Court for an opinion on a human rights question, in the field of bioethics, for example.

The meeting rose at 1.15 p.m.

3025th MEETING

Wednesday, 22 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Cooperation with other bodies (*continued*)

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Aparicio, of the Inter-American Juridical Committee (IAJC), and invited him to address the Commission.