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Summary record of the 3047th meeting

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47. As was explained in paragraphs 26 *et seq.* of the sixteenth report, when one thought about it carefully, the solution rested on less-than-Cartesian logic. It did not fit in with the type of succession to treaties that seemed to be appropriate to the factor triggering the process, namely notification of succession by the successor State. Even though the solution was not very logical, however, it was wise, consistent with practice (itself quite varied, as indicated in paragraph 29 of the sixteenth report) and had to be accepted for practical reasons.

48. There was therefore no compelling reason to depart from the substance of article 20 of the 1978 Vienna Convention, even though it could not be incorporated verbatim in draft guideline 5.1 (Newly independent States), because it referred to other provisions of the 1978 Vienna Convention that had no counterpart in the Guide to Practice. To do so would be fairly pointless anyway, since, as he had already said, the whole of Part 5 of the Guide to Practice was based on the assumption that in matters of succession, the rules of the 1978 Vienna Convention were to be respected.

49. As pointed out at the start of his introduction, article 20 of the 1978 Vienna Convention concerned only States that had newly gained their independence as a result of decolonization. It was interesting to see that the drafters of the Convention had been aware of that gap but had not filled it. It was now up to the Commission to do so by means of the Guide to Practice, whose purpose was to clarify and supplement the Vienna rules on reservations.

50. The principle of maintaining the predecessor State's reservations in the case of newly independent States was all the more necessary in the case of the uniting or separation of States, for at least two reasons. First, whereas a clean break was the rule in the case of decolonization, the principle of succession in the most literal sense of the term applied in the event of the separation or uniting of States. Secondly, the prevailing practice, especially in the context of succession to the former Yugoslavia, tended more towards continuity and therefore towards the maintenance of reservations, as shown in paragraphs 41 to 46 of the sixteenth report.

51. It seemed reasonable to embody that practice in paragraph 1 of draft guideline 5.2 (Uniting or separation of States) which, in the case of the separation or uniting of States, was the counterpart to draft guideline 5.1 for newly independent States, it being understood that the principle of maintenance or of continuity was not immutable and must yield to an express or implied contrary intention of the successor State.

52. Despite that element of flexibility, the principle of continuity could not be fully applied to the uniting of States if one of the two predecessor States had been a party to the treaty, and the other, only a contracting State. In that rather special case, the unified State became a party to the treaty as the successor to the State party, and there was no reason to preserve the reservation of the contracting predecessor State which, by definition, was no longer bound by the treaty. That was the rather special eventuality covered by draft guideline 5.3 (Irrelevance of certain reservations in cases involving a uniting of States), found in paragraph 58 of the sixteenth report.

53. Draft guideline 5.2 reinforced that exception by beginning with the phrase "Subject to the provisions of guideline 5.3".

54. In his opinion, although the presumption of continuity did not seem, in principle, to give rise to any objections in respect of either newly independent States or other successor States (in the case of separation or uniting), the transposition to those cases of the other principle applicable to the succession to reservations of newly independent States seemed much more problematic. He did not think it could be contended in those other cases that successor States might freely formulate new reservations. In those cases, succession was not a matter of choice—which newly independent States could make by notification of succession—it was automatic and came about *ipso facto*. In those circumstances, it seemed difficult to say that a successor State might avoid its obligations or alleviate them by formulating reservations. For the sake of intellectual honesty, he drew attention to an extremely interesting article, published in 1975,[126] in which Mr. Gaja had taken the opposite view and had argued that partial withdrawal from the treaty would achieve the same result and make it possible to avoid automatic continuity. He regretted to say that he disagreed; apart from the fact that partial withdrawal was not the same as a reservation (and would therefore lie outside the scope of the Guide to Practice), it was not always feasible—far from it. The possibility likewise did not appear to be confirmed by the scant practice available, to which reference was made in paragraph 50 of the sixteenth report.

55. It would seem, then, that with regard to situations where succession occurred *ipso facto*, paragraph 2 of draft guideline 5.2 should establish the principle that a successor State might not formulate a new reservation at the time of succession. On the other hand, the position was different when, instead of being automatic, succession occurred through notification of succession, as was the case of reservations made by a successor State to a treaty that had not been in force in respect of the predecessor State (which was only a contracting State at the time of succession). In that situation, there was no reason not to transpose the solution applying to newly independent States and to give successor States the freedom to formulate new reservations. Paragraphs 2 and 3 of the draft guideline were intended to embody those rules, which might appear to be extremely complex but which were ultimately just simply logical.

The meeting rose at 11.40 a.m.

3047th MEETING

Wednesday, 19 May 2010, at 10.10 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki,

[126] G. Gaja, "Reservations to treaties and the newly independent States", *The Italian Yearbook of International Law*, vol. I (1975) pp. 52–68, especially pp. 64–65.

Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*) (A/CN.4/620 and Add.1, sect. B, A/CN.4/624 and Add.1–2, A/CN.4/626 and Add.1, A/CN.4/L.760 and Add.1–3)

[Agenda item 3]

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PELLET (Special Rapporteur), continuing with the introduction to his sixteenth report on reservations to treaties (A/CN.4/626 and Add.1), said that the fundamental principle governing the status of reservations to treaties in the context of succession of States, and more particularly, in relation to newly independent States and States formed by unification or separation, was that of continuity. That was clear from article 20 of the 1978 Vienna Convention. According to the principle of continuity, any reservation formulated by one of the uniting States to a treaty that had been in force in respect of that State at the date of unification continued in force in respect of the State subsequently formed through unification, unless the latter expressed a contrary intention. However, if one of the uniting States had been a party to the treaty, but another had been simply a contracting State in respect of which the treaty had not yet entered into force, then the reservation was maintained exclusively for the State that had been a party to the treaty, and the unified State became a party to the treaty in its capacity as successor to that State. That was the somewhat unusual situation covered by draft guideline 5.3 (Irrelevance of certain reservations in cases involving a uniting of States).

2. Draft guideline 5.4 (Maintenance of the territorial scope of reservations formulated by the predecessor State) established the fairly self-evident principle that the territorial scope of reservations formulated by the predecessor State was retained. Despite the superb simplicity of that principle, it was necessary to provide for an exception in cases where, in the event of State unification, a treaty became applicable to part of the unified territory to which it had not applied at the date of succession. Draft guideline 5.5 (Territorial scope of reservations in cases involving a uniting of States), an ostensibly complex provision, dealt with that eventuality. The wording was complex because a distinction had to be drawn between two possible situations. The first was where, following a uniting of two or more States, a treaty had been in force in respect of only one of the uniting States, and after unification, it became applicable to other parts of the territory of the unified State. The second was where a treaty in force at the date of the succession of States in respect of part of the territory of two or more of the uniting States became applicable to another part of the territory of what would become the unified State. Initially he had harboured doubts about the need for such a distinction, considering that the crucial factor was not the number of uniting States whose territory was concerned, but the fact that the treaty did not apply to the whole of the unified State. The secretariat had provided the following explanations, however, that had convinced him of the viability of the distinction.

3. In the first case, where the treaty was in force for only one of the uniting States, there was no danger of a contradiction between the reservations of the uniting State and those of the unified State, and all the reservations of the uniting State that was a party to the treaty could be presumed to extend to the whole of the new State, unless the unified State excluded such an extension, a situation for which provision was made in draft guideline 5.5, paragraph 1 (*a*), or unless by its very nature the reservation was of limited territorial scope, the eventuality covered in paragraph 1 (*b*) of that guideline.

4. In the second case, where two or more of the uniting States had been bound by the treaty and had formulated reservations, the position was much more complicated, because the reservations might be mutually incompatible and it was sometimes difficult, impossible even, to determine the unified State's intention unless the reservations formulated by the uniting States were identical or similar. Actually, the fairly restrictive wording he had chosen for draft guideline 5.5, paragraph 2 (*a*), which spoke solely of "an identical reservation", might need to be reconsidered. The presumption that the territorial scope could not be extended could be overturned: as envisaged in paragraph 2 (*b*) and (*c*) of the draft guideline, the unified State could expressly announce or implicitly indicate a different intention, provided that, as explained in paragraph 3, the reservations that would thus be extended to the entire territory did not contradict one another.

5. Paragraph 4 of the same draft guideline proposed to extend the provisions in paragraphs 1 to 3 when the treaty to which reservations had been made had not been in force for any of the uniting States at the date of succession, yet one or more of those States had been contracting States of the treaty at that date.

6. The text of draft guideline 5.6 (Territorial scope of reservations of the successor State in cases of succession involving part of a territory) was designed to cover the circumstances addressed in article 15 of the 1978 Vienna Convention, which ruled out succession to treaties when that succession concerned only part of a territory. In such cases, the treaties of the successor State extended to the territory in question to which the treaties of the predecessor State had ceased to apply, one State literally being replaced by another in full concordance with the definition of "succession of States". In addition, a reservation made by the successor State applied to the territory in question unless the successor State expressed a contrary intention, which could be likened to a partial withdrawal of the reservation, or unless the reservation did not lend itself to extension of its territorial scope. The wording proposed also covered circumstances in which the reserving State was only a contracting State of the treaty.

7. Moving on to the effects *ratione temporis* of a reservation in the context of a succession of States, something that had scarcely been touched on in the 1978 Vienna Convention, save in article 20 concerning newly independent States, he said that the solutions proposed in draft

guidelines 5.7 to 5.9 were simply a matter of logic. The underlying principle was that the non-maintenance by a successor State of a reservation formulated by the predecessor State could be treated as the withdrawal of the reservation.

8. Draft guideline 5.7 (Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State) stated, logically enough, that non-maintenance became operative only when the contracting States or contracting international organizations had received notice thereof. Similarly, draft guideline 5.8 (Timing of the effects of a reservation formulated by a successor State) stated that the reservations of a successor State became operative as from the date of their notification. Of course, the successor State's capacity to formulate reservations, when it possessed such capacity, ought not to be unlimited over time.

9. Draft guideline 1.1 containing the definition of reservations, which was modelled on article 2, paragraph 1 (*j*), of the 1978 Vienna Convention, established that a reservation meant a unilateral statement made by a successor State when making a notification of succession to a treaty. Naturally that implied that successor States could make reservations at the time of succession. If the reservation was not made at that time, it seemed legitimate to regard it as a late reservation and to apply to it the legal regime for late reservations. That was what draft guideline 5.9 (Reservations formulated by a successor State subject to the legal regime for later reservations) did, while differentiating between three possible situations: when succession resulted from a notification of succession by a newly independent State (subpara. (*a*)) or by a successor State of a contracting State which was not a party to the treaty (subpara. (*b*)) or when a reservation was formulated by a successor State other than a newly independent State in respect of which the treaty remained in force (subpara. (*c*)).

10. Draft guideline 5.9 was the last in the set that concerned the status of reservations in the event of succession of States, yet there remained the question of the status of other unilateral declarations with regard to treaties, namely acceptances of and objections to reservations—the subject of Part II of the report, and interpretative declarations—to be covered in paragraphs 151 to 158 of the sixteenth report.

11. Concerning objections to reservations in the case of succession of States (paras. 102–138), he proposed draft guidelines 5.10 to 5.16 for referral to the Drafting Committee. While that might be seen as more in line with the progressive development of international law than with its codification, he would argue that it constituted a third approach, one that might be called logical development of the law. Despite some attempts to raise the issue of objections during the *travaux préparatoires* to the 1978 Vienna Convention, the latter remained completely silent on the matter, and practice was virtually non-existent. That made it difficult to identify any general practices or rules amenable to progressive development or codification. But the provisions he was proposing were the logical and almost ineluctable extension of other rules whose existence could not be disputed.

12. The part of the report on the status of acceptances of and objections to reservations in the case of succession of States (paras. 99–150) attempted to answer some relatively simple questions. First, what happened to objections made by the predecessor State to reservations formulated by other States or international organizations that were parties or contracting States or contracting organizations? Second, what of objections made by such other States or international organizations to reservations of the predecessor State? Third, what happened to the reservations of the predecessor State to which no objections had been made before the date of the succession of States? Fourth, could the successor State itself object to existing reservations at the time of the succession? Fifth, could the other States and international organizations object to reservations formulated by a successor State at the time of the succession and, if so, under what conditions?

13. Although the first question had not been addressed in the 1978 Vienna Convention, it had been tackled on several occasions during the *travaux préparatoires*. The general position had been that the predecessor State's objections should be deemed to be maintained. Recent practice was rare and the few examples he had been able to find also seemed to suggest that a successor State should be deemed to maintain its objections. It therefore seemed reasonable to lay down that principle in draft guideline 5.10 (Maintenance by the successor State of objections formulated by the predecessor State). The practical grounds for doing so were the same ones he had put forward in respect of the presumption that the reservations of the predecessor State were maintained, reflected in draft guidelines 5.1 and 5.2. In addition, it was difficult to ask a newly independent State to give high priority to examining reservations and objections; it was easier for such a State to withdraw a reservation or an objection than to formulate new ones within the requisite time limits.

14. The principle should be qualified by two exceptions. First, the presumption that the predecessor State's objections were maintained should not be immutable: the successor State, irrespective of whether it was a newly independent State or a State formed by the separation or uniting of States, must be able to discard the objections made by the predecessor State. Draft guideline 5.10 specified that a contrary intention could be expressed at the time of succession. However, article 22, paragraph 2, of the 1969 and 1986 Vienna Conventions stipulated that an objection to a reservation could be withdrawn at any time, hence his preference for the deletion of the final phrase of draft guideline 5.10, "at the time of the succession", although he would like to hear the views of members of the Commission on that point.

15. The second set of exceptions to the principle of the maintenance of the predecessor State's objections in the event of State unification applied in two different cases of State unification and was covered in draft guideline 5.11 (Irrelevance of certain objections in cases involving a uniting of States). Paragraph 1 specified that objections to a reservation formulated by a uniting State which, at the date of succession, had been a contracting State in respect of which the treaty had not been in force, were not maintained. Paragraph 2 stated that when, following a uniting of two or more States, the unified State was a party or a

contracting State to a treaty to which it had maintained reservations, objections to a reservation made by another contracting State or contracting international organization or by a State or international organization party to the treaty were not maintained if the reservation was identical or equivalent to a reservation which the unified State itself had maintained.

16. With regard to objections made by other States or international organizations to the reservations of a uniting State, the presumption that those objections were maintained was all the stronger. Not only was it consistent with the few positions expressed on the subject during the *travaux préparatoires* for the 1978 Vienna Convention, but it also made good sense since, in the event of State succession, there was no cause to oblige States to renew an objection for which a reason still existed, and after all, objections could be withdrawn at any time. As that was not a rule that fell into the realm of the succession of States, however, there was no point in spelling it out in draft guideline 5.12, which established the principle of the maintenance of objections formulated by another State or international organization to reservations of the predecessor State.

17. The third question was what happened if a contracting State or international organization or a State or international organization party to the treaty had failed to object to a reservation of the predecessor State within the requisite time limit. The logical reply was that there was no reason whatsoever to consider that the succession of States had altered the situation. If the time limit had expired, no objection could be formulated, and succession of States could not be used as a pretext for such an objection. The position was different if the time limit had not yet expired at the date of the succession of States, in which case an objection remained possible until the time limit expired. That was the principle laid out in draft guideline 5.13 (Reservations of the predecessor State to which no objections have been made).

18. The fourth question was whether a successor State could object to reservations formulated in respect of a treaty to which it became a party as a result of the succession of States. In that context, there were two categories of situation: those of automatic or *ipso jure* succession by a State to a treaty of its predecessor, and those in which the succession to a treaty resulted from the successor State's decision established by making a notification to that effect. In the first case, the successor State had inherited the treaty and had to accept it as it stood, without having the capacity to formulate new objections unless the time period for formulating an objection had not expired at the date of the succession of States and the objection was made within that time period. That eventuality was covered by draft guideline 5.15 (Objections by a successor State other than a newly independent State in respect of which a treaty continues in force).

19. The other possibility, envisaged in draft guideline 5.14 (Capacity of a successor State to formulate objections to reservations), was more complicated. It arose when the successor State freely agreed to remain bound by the treaty. It would then be logical for the successor State to be able freely to modify its commitments by formulating new reservations—as envisaged in the first paragraphs of draft guidelines 5.1 and 5.2—or to formulate objections to reservations made by other contracting States or States parties. That option should be open to all States that established their succession to treaties of the predecessor State by notification, irrespective of whether they were newly independent States or other successor States in respect of treaties to which the predecessor State had been a contracting State but not a party. The two situations were envisaged in paragraphs 1 and 2, respectively, of draft guideline 5.14.

20. Paragraph 3 provided for an exception in cases where a reservation required unanimous acceptance by States which were parties or were entitled to become parties to the treaty. It would be unfortunate if the new State's objection were to upset long-standing treaty relations by compelling the reserving State to withdraw from the treaty. Lastly, there was the question of objections to reservations formulated by the successor State itself in conformity with draft guidelines 5.1, paragraph 2, and 5.2, paragraph 2. It went without saying that any such objections must be formulated in accordance with the principle of consent and subject to the usual conditions. Sometimes what went without saying went even better when said, however, and that was why he was proposing draft guideline 5.16 (Objections to reservations of the successor State).

Fifteenth report of the Special Rapporteur (*continued*)

21. He wished now to sum up the debate on his fifteenth report (A/CN.4/624 and Add.1–2), containing draft guidelines 4.3 to 4.4.3, on the effects of an objection to a valid reservation, and subsection 4.4, on the effect, or absence of effect, of a valid reservation on extraconventional obligations. The statements on the report had been of limited quantity, but of high quality, and members of the Commission who had not spoken had told him to interpret their silence as consent. He welcomed the fact that the general approach he had adopted had been generally well received: indeed, as one speaker had pointed out, there had been so little disagreement that it was almost frustrating.

22. The English text of draft guideline 4.3 apparently needed to be better aligned with the French, and although that was a job for the Drafting Committee, he wished to register his slightly reluctant acceptance of the proposal to add the word "already" in the final portion of the text. On the other hand, replacing the words "established reservation" with "accepted reservation" would cause a problem of concordance with the draft guidelines already adopted by the Drafting Committee. In the light of a number of comments, he had realized that the correlation between draft guidelines 4.3.1 and 4.3.4, wrongly numbered 4.3.3 in the English text, needed to be improved. One speaker had pointed out a possible solution by suggesting that draft guideline 4.3.1 might be left with its negative wording, "does not preclude … except in the case…", whereas draft guideline 4.3.4 could be worded in a positive manner, stating that when an objecting State so indicated clearly, the objection precluded the entry into force of the treaty in the relations between the two States. He did not agree with the proposals to delete one of the two

draft guidelines, to combine them or to invert their order, however. The two served two different purposes: draft guideline 4.3.1 dealt with objections that had minimum or normal effect, whereas draft guideline 4.3.4 covered those that had maximum effect.

23. With regard to draft guideline 4.3.1, Mr. Gaja had maintained that a simple objection would have the same effect as acceptance with respect to the establishment of the reservation between the reserving State and the objecting State. He himself maintained the opposite viewpoint, for reasons set out in paragraphs 22 to 24 [312–314][127] of his fifteenth report. Mr. Gaja agreed, however, that the phrase "does not preclude", in article 20, paragraph 4 (*b*), of the 1969 and 1986 Vienna Conventions, was not easy to interpret. When in doubt, one must favour any interpretation that maximized the differences between objection and acceptance. Accordingly, an objecting State must be regarded as having intended its objection to produce all the effects that were not incompatible with the Vienna Conventions. The problem was not really with the wording of draft guideline 4.3.1, which was based on article 20, paragraph 4 (*b*), but rather with the commentary, which would outline the two opposing viewpoints. After having listened to Mr. Gaja's remarks, he was now thinking of making the text of the draft guideline even more explicit, rather than relegating the doctrinal quarrel to the commentary. The Drafting Committee would thus have to change the text to indicate that an objection did not have the same effect as acceptance and did not result in the entry into force of the treaty between the two States.

24. Unless he was much mistaken, draft guideline 4.3.2 had not elicited any comments, save for an editorial amendment with which he did not agree, but that would be a matter for the Drafting Committee to decide. Draft guideline 4.3.3 had been regarded by one speaker as saying the same thing as draft guideline 4.3.4, but that was a misreading of the texts, the former relating to cases when an objection automatically precluded the entry into force of a treaty between the reserving State and the objecting State, and the latter dealing with objections with maximum effect resulting from a clearly expressed contrary intention.

25. In draft guideline 4.3.5, according to two speakers, the phrase "or parts of provisions" might cause confusion and should be deleted. He was inclined to agree, but for an even simpler reason: a provision need not be an entire article or paragraph: it could even be a phrase or clause within them. In seeking maximal precision, he had thus inadvertently complicated matters.

26. Like draft guidelines 4.2.5 and 4.2.6, which had already been referred to the Drafting Committee and concerned the effects of established reservations, draft guidelines 4.3.6 and 4.3.7 were based on what seemed to him an indispensable distinction between reservations that had an excluding effect and those that had a modifying effect. The member of the Commission who had misread draft guidelines 4.3.3 and 4.3.4 had also been mistaken about draft guidelines 4.3.6 and 4.3.7. While it was true that the distinction tended to simplify the issues and should not be viewed as being an absolute—reservations that had an excluding effect could also have modifying effects—the point should be taken into account in the commentary, not incorporated into a new draft guideline. In addition, the Drafting Committee should be careful to ensure that the same treatment was given to draft guidelines 4.2.5 and 4.2.6 as to draft guidelines 4.3.6 and 4.3.7.

27. Turning to draft guideline 4.3.8 on objections with intermediate effect on treaty relations, he said he was not averse to the Drafting Committee's attempting to strengthen in the text itself the idea of a balance in treaty relations between the reserving State and the objecting State. He was less enthusiastic, however, about the idea that the objecting State must, in its objection, engage in a legal and historical analysis of the link among the provisions whose effects it wished to exclude. It was stated elsewhere in the Guide to Practice that, to the extent possible, reasons had to be given for objections, and that ought to suffice. The reference to a "sufficiently close link" was actually not as vague as some had suggested. It was very hard to strike the proper balance between the right of the reserving State not to be bound by the provisions in question, as long as they were not essential to the object and purpose of the treaty, and the objecting State's right to have its view of the treaty relationship respected. That lent substance to the proposal by one speaker that the draft guidelines should permit the reserving State to say whether or not it accepted the objection with intermediate effect—a kind of counter-reservation. In other words, a State could say, "All right, you do not want A, but in that case, in my relations with you, I refuse to accept B, which for me is intrinsically related to A". It was perfectly consistent with the fundamental principle of consent that the reserving State should then be able to indicate whether it accepted that condition or whether it preferred not to be bound by the treaty with the objecting State that had excluded certain provisions from the future treaty relations between the States. That was clearly not envisaged in the 1969 and 1986 Vienna Conventions, but neither did it run counter to them, and it was the logical extension of the reservations dialogue that the Commission had always sought to foster. Hence, hoping that he had properly gauged the Commission's mood, he had prepared a new paragraph 2 to be added to draft guideline 4.3.8. The new text had been circulated in an informal document available in the meeting room and read:

> "The treaty shall apply between the author of the reservation and the author of the objection to the extent of the reservation and the objection, unless the reserving State or international organization has opposed, by the end of a period of 12 months [one year] following the notification of the objection, the entry into force of the treaty between itself and the objecting State or international organization."

He was well aware that the Commission's adoption of such a text would be an act, not of codification, but of progressive development, but that, too, was its role. He was in no way wedded to the wording he had just read out, but he would like the Commission to accept the underlying principle so that the Drafting Committee could embark on a search for the proper wording.

[127] See footnotes 89 and 90 above.

28. Draft guideline 4.3.9 was undoubtedly the text that had provoked the most, albeit generally favourable, discussion, no speaker save one having opposed its referral to the Drafting Committee. Admittedly, he had failed to find examples of valid reservations that had given rise to objections with maximum effect, since objecting States always used the reservation's invalidity as a screen to hide behind, yet the sole subject of the draft reservation was objections to a reservation that were presumed to be valid.

29. When the Commission came to address the effects of invalid reservations, in the discussion of paragraphs 96 to 236 [386–514] of the fifteenth report, he intended to ask it to depart from the principle of consent and focus on the will of the author of the reservation. He would also ask it to accept the position of the human rights bodies that if—and only if—there was any doubt as to the intention of the State that had made an invalid reservation, the will to be bound by the treaty as a whole must be deemed to take precedence over the will to make a reservation. Thus, in the context of invalid reservations, the problem was posed not from the standpoint of the objection, but from that of the reservation: the question was not whether the objection could produce "super-maximum" effects but, rather, whether the invalidity of the reservation could permit the treaty as a whole to be implemented.

30. With regard to draft guideline 4.3.9, he would revert to the basic position that an objecting State could not force a reserving State to renounce a valid reservation. Yet a number of speakers had raised the question as to whether, if an objection with "super-maximum" effect did not produce the effect desired by its author—which by definition was the application of the treaty as a whole—it should be regarded as a simple objection; as an objection with "super-maximum" effect; or even as null and void, producing no effect whatsoever. The latter was, as he understood it, the position of one speaker, who had suggested that the problem be addressed from the standpoint of the validity of the objection, something with which he was inclined to agree.

31. That put him in an awkward position: in preparing his fifteenth report, he had almost automatically assumed that objections with "super-maximum" effect should be brought down to the level of simple objections. Few remarks had been made on that point, and they were fairly divergent. One speaker had said—and upon reflection, he agreed—that it would be hard to invent an effect for an objection that was unable to produce the effect desired by its author. It would also be bizarre to assume that an objection with "super-maximum" effect must produce maximal effects, whereas what the objecting State wanted was the widest possible application of the treaty. Accordingly, he felt that the draft guideline should be referred to the Drafting Committee, with instructions that the text itself was not to address the consequences of the principle that was being laid down and that the arguments for and against the various possibilities were to be incorporated in the commentary.

32. Turning to draft guidelines 4.4, 4.4.1 and 4.4.2, he said that of the few comments made, one had been particularly interesting: clearly, reservations had no effect on the extraconventional obligations by which the parties to the treaty were bound, but they could nevertheless reveal the *opinio juris* of their authors on the existence or development of customary norms. There was every advantage to be gained, therefore, if the Drafting Committee were to add language to the effect that the absence of effects was attributable solely to the reservation as such, thereby preserving the role that the reservation played in the overall context of the development of custom.

33. With one outstanding but, fortunately, isolated exception, no speaker had advocated the deletion of draft guideline 4.4.3. He was delighted, as he was with the remark that the text did not duplicate the rather bizarre draft guideline 3.1.9, which, as had rightly been pointed out, was not one of his favourites. Many speakers had requested the deletion of the phrase "and other States or international organizations which are bound by that norm" in the final part of draft guideline 4.4.3, since it implied the possibility that not all States were bound by a norm of *jus cogens*. He could go along with that, even though the situation was not quite so simple, for the deletion of the phrase would exclude the possibility that regional peremptory norms might apply.

34. No real opposition had been expressed to referring the entire set of draft guidelines to the Drafting Committee, which should, however, be given the instructions he had already outlined with regard to draft guideline 4.3.8, including the new paragraph that had been circulated to members in an informal paper, and on draft guideline 4.3.9.

35. Replying to a question by Mr. Nolte, he said that draft guideline 4.3.8 should be referred to the Drafting Committee on the understanding that it must incorporate the new paragraph, subject to possible drafting changes.

36. The CHAIRPERSON said she took it that the Commission wished to refer draft guidelines 4.3 to 4.4.3, together with the new paragraph proposed for draft guideline 4.3.8, to the Drafting Committee.

It was so decided.

Cooperation with other bodies

[Agenda item 14]

Statement by the representative of the Inter-American Juridical Committee

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

38. Mr. CASTILLO CASTELLANOS (Inter-American Juridical Committee) said it was an honour to represent the Inter-American Juridical Committee before the International Law Commission for the purpose of furthering the customary dialogue between two institutions that shared a common legal heritage in pursuing the codification and progressive development of international law.

39. One important topic on the IAJC agenda, on which he himself was Rapporteur, was innovative forms of access to justice in the Americas. The topic had been

under consideration since 2005, initially in relation to the principles of legal ethics. At the seventy-second regular session of the IAJC, held in Rio de Janeiro in March 2008, it had been decided to focus on new or alternative forms of access to justice in many countries of the Americas, such as conciliation mechanisms that avoided litigation and saved the judiciary time and money. As Rapporteur on the topic, he had proposed 10 basic principles.

40. First, access to justice, although an inalienable human right, should also be regarded as a social right. Second, equal access to justice was integral to the rule of law; the legal exclusion of large segments of the population delegitimized democratic institutions. Third, the State had the duty to guarantee access to justice for all and must work to achieve maximum equity in its provision of services, functioning and results. Fourth, policies to make access to justice more equitable must not be limited to a sort of "judicial charity"—free legal aid or tax exemption, for example—actions which, although positive, were insufficient. Instead, such policies must aim to ensure authentic, not simulated, protection of the weakest. That presupposed a break with practices and norms that had made the justice system vulnerable to the laws of the market. Fifth, the democratization of the judicial system was not limited to equal access, but also implied greater social participation in how it was handled. A State monopoly on justice was not incompatible with forms of social or community dispute settlement.

41. Sixth, many decisions to correct injustices could be taken rapidly at administrative level, provided they were subject to judicial control. Seventh, a legal culture must be promoted to open the way to harmonizing forms of conciliation in cases where there was no need to go to the courts. Even when cases, including criminal matters, did reach the courts, an attempt must be made to reach outside settlements or compensation agreements. Eighth, the effective independence of the judiciary must be ensured. That meant independence not only from other branches of power but also from powerful groups that used all kinds of pressure to influence court decisions. Better training of judges and proper monitoring could help to strengthen judicial autonomy. Ninth, the legal and ethical training of judges should be of ongoing concern for society and the State. Today, universities basically trained lawyers, not judges. More advanced legal training was not acquired until after graduation from law school; that failing had been noted throughout the Americas. The training of judges must begin at the undergraduate level. Tenth, reform of the judicial system to achieve full access to justice called for urgent political decisions that should be given priority in all areas of international law, since access to justice was a fundamental right that permeated all aspects of human life.

42. The IAJC had adopted a report on the prospects for a model law on State cooperation with the International Criminal Court and a guide to general principles and criteria for such cooperation. Steps had now been taken in many countries of the Americas to promote cooperation with the Court. At its thirty-ninth regular session, held in 2009, the General Assembly of the Organization of American States (OAS) had requested the IAJC to use the relevant OAS guide to promote the adoption of national legislation on cooperation with the International Criminal Court and to assist States in training administrative and judicial officials and academics to that end. The General Assembly had also instructed the IAJC to draft model legislation on implementation of the Rome Statute of the International Criminal Court containing a definition of crimes within the Court's jurisdiction. At the seventy-fifth regular session of the IAJC, in 2009, the elaboration of a model law concerning the three relevant crimes covered by the Statute, namely genocide, crimes against humanity and war crimes, had been proposed.

43. The promotion and strengthening of democracy had been another important topic in the Americas of late. On 11 September 2001, the General Assembly of the OAS had adopted the Inter-American Democratic Charter, and the IAJC had subsequently been mandated to conduct a study on its applicability. The Charter was based on principles set forth in a treaty, namely the Charter of the Organization of American States, but it was not a treaty or a convention itself, and that made its practical application difficult. For some, it represented a moral commitment rather than a binding instrument. At the thirty-ninth regular session of the General Assembly of the OAS, the view had been expressed that the IAJC should not become involved in the matter, which was basically political, but the Secretary-General of the OAS had encouraged the IAJC to continue looking into it and into the somewhat controversial or ambiguous aspects of the Charter. One was the question of who could call for the application of the Charter by the OAS. Under the usual practice, that initiative was open to member States, but solely through their Governments and not through the judiciary, the legislature, civil society or other sectors of society. Some in the Americas believed that other entities should also be empowered to call for the Charter's application. The situation in Peru, with the confrontation between Congress and President Fujimori, had been cited in support of that decision. When adopting its resolution on collective action under the Inter-American Democratic Charter, the IAJC had made a detailed analysis of the principles and values that made up democracy, including the independence of branches of government. The item was still on the agenda; the current focus was on social aspects of strengthening democracy in the Americas.

44. The General Assembly of the OAS had also tasked the IAJC with proposing model laws to support efforts to implement treaty obligations concerning international humanitarian law on the basis of priority themes defined in consultation with member States and the International Committee of the Red Cross (ICRC). To that end, the IAJC had drawn up a questionnaire for member States, but many had yet to reply. On the basis of those replies that had been received from States and input from the ICRC, the IAJC was producing a list of the priorities identified by States in the area of international humanitarian law.

45. At its seventy-fourth regular session, in March 2009, the IAJC had placed on its agenda the topic of cultural diversity in the development of international law. One of the reasons for doing so was that, in October 2005, UNESCO had adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, thereby making cultural diversity the subject not of a

declaration, but of a binding instrument. The Convention had been well received and had been rapidly ratified by a large number of States. However, that posed a number of challenges, including the need to adapt domestic legislation and to exchange information in areas to be affected, such as trade. In advance of the Convention's adoption, the World Trade Organization (WTO) had raised a number of important points, including that the bulk of the issues addressed in the Convention fell exclusively within the sphere of its own competency. The response of UNESCO, incorporated in the Convention itself, was that while cultural activities, goods and services had an economic value, they were not solely commercial in nature. As such, they should be given special treatment in bilateral and multilateral trade agreements. In other words, the former "cultural exception" had been transformed into a positive rule binding on all States parties to the Convention.

46. A second reason for the inclusion of cultural diversity in the IAJC agenda was that it was a defining characteristic of the societies of Latin America. Included among the recommendations being developed by the IAJC was, first of all, that cultural diversity itself, and not only its expressions, should be recognized as part of the cultural heritage of mankind, and that as such, it should be granted effective legal protection. A second recommendation was that cultural expressions be promoted and protected in an equitable manner. That was not an easy task, given market forces as well as the historical predominance of certain cultural trends. Although such trends must be preserved, a way had to be found to ensure equality of treatment of other less prominent cultural expressions. A third recommendation was that, apart from their legitimate economic use, cultural goods be considered as products of the mind, and not merely as commodities. That potentially controversial notion has already been incorporated in the Convention but could benefit from further development by the IAJC. A fourth recommendation was that educational mechanisms to strengthen public awareness of cultural diversity be established and that interculturality should be seen as a viable path towards social cohesion. Since education in the Americas had, by and large, been monocultural, achieving interculturality would require real efforts to bring different cultural groups to a true understanding of one another. The fifth recommendation was that public and private initiatives to study the ramifications of cultural diversity and its impact on international law should be promoted and supported. Although anthropologists and sociologists had addressed the subject, its examination from the legal standpoint had not been carried out as rigorously as was warranted.

47. In recent years, the work of the IAJC had increasingly focused on public international law, which had emerged during the twentieth century as a fundamental and practical tool for peace, coexistence and respect for national sovereignty. It was the field in which the IAJC had made its first major contribution to law in the Americas, in the form of the Convention on Private International Law (Bustamante Code). Over the past several years, the IAJC had participated in the Inter-American Specialized Conferences on Private International Law, making contributions on such important topics as consumer protection and e-commerce, including through the input of its rapporteurs.

48. The IAJC had also focused its attention, and had made considerable progress, on the draft inter-American convention against racism and all forms of discrimination and intolerance. The elaboration of such a text had been mandated by the General Assembly of the OAS, overriding the argument advanced in some quarters that it would be superfluous, since various international instruments already condemned all forms of discrimination. The draft had been extensively debated and many parties consulted. For its part, the IAJC had decided to issue a resolution containing its views on the draft, including that the term "racism" was too narrow and that reference should be made to all forms of discrimination. It was significant that the draft convention addressed forms of discrimination that were not only new, but were perpetrated through new means or mechanisms.

49. On the topic of migration, in which the IAJC shared the Commission's interest, a recommendation had been issued and a manual produced to remind migrants of their human rights and how to exercise them when outside their country of origin and to remind States of their obligation to respect migrants' rights. The OAS had welcomed those efforts and had asked the IAJC to pursue them. The IAJC was currently working on the topic of migration in conjunction with that of refugees.

50. All of the topics just mentioned were on the agenda for the seventy-seventh regular session of the IAJC, in August 2010. One additional—and controversial—issue to be discussed was the establishment of an inter-American court of justice: many were of the view that it was unnecessary, given the possibility of recourse to the ICJ. Another new topic, placed on the agenda at the request of the General Assembly of the OAS, was freedom of thought and expression.

51. The IAJC was aware of the need to enhance the role of consultative bodies, such as the IAJC itself and the International Law Commission, both of which had been entrusted with strengthening international law as a tool for world peace. He reiterated the willingness of the Inter-American Juridical Committee to continue the valuable institutional exchange that had become a tradition shared by the two bodies.

52. Mr. VARGAS CARREÑO said that the Inter-American Democratic Charter provided an important stimulus to representative democracy in the Americas. He encouraged the IAJC to pursue its study of the scope of the Charter with a view to laying the groundwork for the General Assembly of the OAS to pronounce legally binding interpretations of the Charter.

53. One of the most important topics that the IAJC dealt with was that of innovative forms of access to justice in the Americas, with a view to seeking amicable solutions to disputes before appealing to ordinary justice, especially in the areas of family law or employment. In that context, the independence of the administration of justice was a particularly important principle. Without an independent judiciary that had the power to punish abuses of authority, not only was democracy not possible, but grave violations of human rights could result, as evidenced by past events in Argentina and Chile. The development of measures to

strengthen the independence of the judiciary seemed to him an essential task to which the IAJC might wish to give priority.

54. Lastly, he suggested that it would be useful to organize a working session during which the International Law Commission and the Inter-American Juridical Committee could set parameters for distinguishing between the topics suitable for codification and progressive development at the regional level and those that represented a duplication of efforts.

55. Mr. CASTILLO CASTELLANOS (Inter-American Juridical Committee) said that the IAJC had, in fact, encountered some difficulties in approaching the Charter from a technically correct standpoint while also taking political considerations into account. Mr. Vargas Carreño's suggestion that the IAJC might wish to view those efforts as paving the way for decisions by the General Assembly of the OAS was a practical solution that would advance the work to enhance the applicability of the Charter.

56. He agreed that strengthening the independence of the judiciary was an essential task, despite a certain tendency to avoid it because it gave rise to controversy. As a technical juridical body, the IAJC was obliged to address the issue in depth and to examine historical examples, some of which had had a devastating impact in some countries of the Americas.

57. Lastly, he was certain that the IAJC would be receptive to the idea of organizing a working session with the Commission in order to seek common themes and to determine the desirability of codifying them at the regional level. Thanks to modern communications, the IAJC remained in permanent contact with the activities of the International Law Commission and was ever-ready to interact with it.

58. The CHAIRPERSON expressed appreciation to Mr. Castillo Castellanos for his remarks, which had facilitated a valuable exchange between the Commission and the IAJC.

The meeting rose at 1.10 p.m.

3048th MEETING

Thursday, 20 May 2010, at 10.10 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*) (A/CN.4/620 and Add.1, sect. B, A/CN.4/624 and Add.1–2, A/CN.4/626 and Add.1, A/CN.4/L.760 and Add.1–3)

[Agenda item 3]

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their debate on the first part of the Special Rapporteur's sixteenth report (A/CN.4/626 and Add.1).

2. Mr. GAJA said that the sixteenth report on reservations to treaties addressed a complex subject which was only partially regulated by the 1978 Vienna Convention. The practice of States and depositaries was not always consonant with the provisions of that Convention. He commended the Special Rapporteur on shedding light on the subject on the basis of the outstanding memorandum prepared by the Secretariat.[128]

3. Article 20 of the 1978 Vienna Convention established the presumption that reservations made by the predecessor State were maintained when a newly independent State declared, by a notification of succession, that it intended to become a party to the treaty. The same article allowed a newly independent State to accompany its notification of succession with new reservations. Although the Special Rapporteur considered that practice to be "less than Cartesian" (para. 30 of the report), it nevertheless seemed to be consistent with the principle underpinning the Convention, namely that succession to treaties for newly independent States was not automatic, but depended on an expression of intention in the form of either accession or notification of succession. It therefore seemed logical that such an expression of intention could be accompanied by new reservations.

4. Like article 20 of the 1978 Vienna Convention, draft guideline 5.1 referred to the criteria which had to be met if those reservations were to be valid. It did not, however, tackle the question of when a reservation formulated by a newly independent State became what the Special Rapporteur called an "established reservation". Unless he was mistaken, nowhere in the report—or in the addendum which had yet to be presented—was there any mention of the acceptance by other contracting States of new reservations formulated by a newly independent State. The rule laid down in article 20, paragraph 4, of the 1969 Vienna Convention should also apply when a newly independent State formulated a new reservation in its notification of succession.

5. The timing of the effects of such a notification when accompanied by reservations warranted more in-depth examination. Draft guideline 5.8 in paragraph 92 stipulated that a "reservation formulated by a successor State … when notifying its status as a party or as a contracting State to a treaty becomes operative as from the date of such notification". One could employ the wording of article 22, paragraph 3 (*b*), of the 1978 Vienna Convention in order to specify the date on which the notification

[128] See footnote 12 above.