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Summary record of the 3021st meeting

Topic:
Reservations to treaties

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objecting State. As the Special Rapporteur had pointed out, it remained to be seen whether an objection with an intermediate effect could produce the effect intended by its author. That question would be tackled in the future and the Special Rapporteur would then give his opinion on whether the objecting State might unilaterally exclude the application of a whole section of a treaty to a reserving State, or whether there had to be at least tacit acceptance by the reserving State before an objection with an intermediate effect could produce its intended effect.

29. Mr. PELLET said that he had understood the first and second, but not the third objection of Mr. Gaja, who appeared to be saying that, while one could not rule out the possibility of the reservations regime being amended in the course of time, one could certainly not infer from unanimous tacit acceptance that a reservation had been accepted. He was fully in agreement with that statement and did not think that he had said anything to the contrary.

30. Mr. GAJA said that he was delighted to hear that. His impression on hearing the Special Rapporteur's presentation at the beginning of the meeting had been that the absence of a reaction from any State could have been taken to mean that the reservations regime had been amended, or that an otherwise invalid reservation had been accepted. His substantive objection mainly concerned the application of article 20, paragraph 5, of the Vienna Conventions.

The meeting rose at 11.05 a.m.

3021st MEETING

Wednesday, 15 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, 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.

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 to resume his introduction of the second part of his fourteenth report on reservations to treaties (A/CN.4/614/Add.1).

2. Mr. PELLET (Special Rapporteur) said that the question of the validity of interpretative declarations had to be approached somewhat differently from that of reservations. For one thing, the 1969 and 1986 Vienna Conventions were silent on interpretative declarations; indeed, that was one of the major lacunae in the Conventions. For another, the question of the validity of interpretative declarations was bound up with their definition, in other words, with the distinction between a reservation and an interpretative declaration. As recalled in paragraph 129 of his report, the definition of interpretative declarations in no way prejudged the validity or the effect of such declarations. Moreover, reclassifying an interpretative declaration as a reservation, using the method set out in draft guidelines 1.3 and 1.3.1, on the grounds that the declaration purported to exclude or modify the legal effect of certain provisions of the treaty, did not mean that the unilateral statement was invalid, merely that its validity must be assessed on the basis of the criteria for the validity of reservations, which were contained in draft guidelines 3.1 to 3.1.13. That requirement was covered by draft guideline 3.5.1, which read as follows:

“3.5.1 Conditions of validity applicable to unilateral statements which constitute reservations

“The validity of a unilateral statement which purports to be an interpretative declaration but which constitutes a reservation must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.15.”

3. While it might seem obvious that, when a statement constituted a reservation, the criteria to be applied were those for the validity of reservations, he believed that it would be useful to state that point explicitly, since the Commission was drafting a Guide to Practice, not a treatise for scholars. Indeed, the problem often arose in practice. For example, in the *English Channel* case referred to in paragraph 135 of the report, the United Kingdom had claimed that a reservation by France was actually an interpretative declaration. In concluding that it was in fact a reservation, the Court of Arbitration had considered its purported effects without questioning the validity of the reservation as such. On the other hand, in the case of *Belilos* referred to in paragraph 137 of the report, the European Court of Human Rights, after having reclassified the declaration of Switzerland as a reservation, found it to be invalid. In paragraph 136 of the report, and in the footnote thereto, other examples were given, outside of the content of disputes, of “false” interpretative declarations being reclassified as reservations, the validity of which had then been challenged.

4. The central issue was whether it was possible for true interpretative declarations, in other words, those that matched the definition given in draft guideline 1.2, to be invalid. It was important to bear in mind that, just because a declaration was valid, it did not necessarily mean that it was “right”; similarly, just because it was invalid, it did not mean that it was “wrong”. The interpretation of treaties was not an exact science: one person's truth was not necessarily another's. Even Kelsen had acknowledged that there might be several correct interpretations of a statute, which were all

of equal value.²⁴⁴ An interpretative declaration was a point of view concerning the interpretation of the meaning of a treaty, and was only authentic if given and understood by all parties. Whether interpretative declarations were wrong, however, was a completely subjective matter.

5. In the absence of an authentic interpretation, the interpretative declarations of parties might not coincide, and might be opposed by other parties. However, one could not say that one was valid and another was not. All that could be deduced was that two States did not agree on their interpretation. It was difficult to see how the principle of article 19 (c) of the Vienna Conventions, relating to the invalidity of reservations incompatible with the object and purpose of the treaty, could be transposed to that situation. The process of interpretation itself was governed by the object and purpose of the treaty, as was clear from article 31, paragraph 1, of the Vienna Conventions. Moreover, differences of interpretation often concerned the very definition of the object and purpose of the treaty, and there was therefore no way to decide between the parties until a competent body had ruled on the interpretation of the treaty. If an interpretative declaration was objectively incompatible with the object and purpose of a treaty, it was no longer a true interpretative declaration, but a reservation; a State making a declaration potentially calling into question the object and purpose of a treaty was in reality seeking to modify the application of the treaty with respect to itself.

6. On the other hand, it could happen that a treaty contained provisions prohibiting or restricting the possibility of formulating interpretative declarations. Only when such provisions existed could an interpretative declaration be considered to be invalid, if it was formulated despite the prohibition or restriction provided for in the treaty. That would be in line with article 19, paragraphs (a) and (b), of the Vienna Conventions, relating to the invalidity of reservations that were expressly or implicitly prohibited by the treaty itself. If a treaty prohibited the formulation of interpretative declarations, or permitted interpretative declarations only to some of its provisions, the situation was clearly analogous to that covered by article 19, paragraphs (a) and (b), of the Vienna Conventions. There was a slight nuance to be borne in mind, however, as discussed in paragraph 148 of the report: the concept of specified reservations should not be transposed to interpretative declarations, since it would complicate matters unnecessarily. In any event, it was difficult to imagine what a “specified” interpretative declaration might be, and he did not think that it would be useful to include the concept in a draft guideline on the validity of interpretative declarations. In addition, since an interpretative declaration could be formulated at any time, a temporal limitation like that contained in article 19 of the Vienna Conventions was not appropriate. Therefore draft guideline 3.5 read as follows:

“3.5 *Substantive validity of interpretative declarations*

“A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is expressly or implicitly prohibited by the treaty.”

²⁴⁴ H. Kelsen, *Pure Theory of Law*, translation from the second (revised and enlarged) version by Max Knight, Clark (New Jersey), The Lawbook Exchange, 2005, p. 351.

As could be seen, the draft guideline was a simplified version of article 19, paragraphs (a) and (b), of the Vienna Conventions, transposed to interpretative declarations.

7. As the Commission had seen during its consideration of the thirteenth report on reservations to treaties,²⁴⁵ interpretative declarations could generate three types of reactions: approval (covered in draft guideline 2.9.1); opposition (covered in draft guideline 2.9.2), or reclassification (covered in draft guideline 2.9.3). The question arose whether those different unilateral statements were subject to substantive conditions for validity. Since the problem was more theoretical than practical, he had not addressed the matter in detail in the report under consideration.

8. In brief, however, approvals would follow the same rules as the interpretative declarations they were approving; if a State approved an invalid interpretative declaration, its declaration could in turn be considered to be invalid. However, because that situation involved two concordant interpretative declarations, he did not believe that a specific draft guideline on the matter was necessary. In practice, the conclusion was that approval of an interpretative declaration was not subject to any conditions for validity. Opposition to an interpretative declaration simply constituted a different point of view; there was no issue of validity involved. When it came to reclassification, though, a State was not calling into question the content of the declaration itself but invoking the rules of validity applicable to reservations. Whether the reclassification was justified or not, the issue was not one of validity but of applicable law. Draft guideline 3.6 therefore read as follows:

“3.6 *Substantive validity of an approval, opposition or reclassification*

“Approval of an interpretative declaration, opposition to an interpretative declaration and reclassification of an interpretative declaration shall not be subject to any conditions for substantive validity.”

Draft guideline 3.6 was based on draft guideline 3.4, presented earlier, on the substantive validity of acceptance of reservations and objections to reservations. He acknowledged that the inclusion of “negative” draft guidelines 3.6 and 3.4, which simply stated that the validity of certain reactions to reservations or to interpretative declarations was not an issue, might seem odd. He recalled, however, that the Commission was drafting, not a convention, but a Guide to Practice. Practitioners might well wonder whether such reactions to reservations or to interpretative declarations were valid or not. In his view, it would be helpful for them to be shown that the issue was not one of validity at all, but rather one of effects. In addition, inclusion of draft guidelines 3.6 and 3.4 in the Guide to Practice was the only way to enable the Commission’s thinking on the important and intriguing matter of the validity of such unilateral reactions to reservations and interpretative declarations to be reflected in the Guide to Practice. While the Commission was not preparing a draft convention, neither was it producing a technical treatise, which meant that all commentary must be based on the draft guidelines themselves.

²⁴⁵ See footnote 137 above.

9. With regard to conditional interpretative declarations, the Commission's position was that the rules applying to such declarations would most probably be aligned with those applying to reservations, it being understood that if the effects of conditional interpretative declarations were found to be exactly the same as the effects of reservations, all specific provisions on conditional interpretative declarations would be deleted at the close of the first reading and replaced by a general draft guideline indicating that the legal regime was identical to that for reservations.

10. While drafting the relevant part of the fourteenth report, however, he had wondered, together with Daniel Müller, to whom he again paid tribute, whether the regime applying to conditional interpretative declarations, as defined in draft guideline 1.2.1, did not in fact differ from that of reservations precisely when it came to the issue of validity. By definition, conditional interpretative declarations were purely aimed at interpreting the treaty, not at modifying the treaty's provisions. Even if conditional interpretative declarations were considered to be "androgynous" instruments, neither one thing nor the other, their indeterminate nature would ultimately have no effect on their validity. If the interpretation given in a conditional interpretative declaration was not contested, or was found to be correct by a competent body ruling on the interpretation, the State was bound by its interpretation, all States were bound to accept it and there was no issue of validity at all. On the other hand, if the interpretation given in the conditional interpretative declaration was contested, and the intended effects of the declaration were the same as those of a reservation, then the rules on the validity of reservations must apply. The only difference was that the applicability of those rules was subject to the declaration's being contested.

11. The interchangeability of the rules applying to both reservations and conditional interpretative declarations were illustrated by an interesting example, given in paragraph 171 of the report, concerning the reservations of the Netherlands to the International Covenant on Civil and Political Rights. The Netherlands had stated that it preferred to formulate reservations rather than interpretative declarations in all cases, since if the latter form were used doubt might arise concerning whether the text of the Covenant allowed for the interpretation put upon it. By using the reservation form, the Netherlands wished to ensure in all cases that the relevant obligations arising out of the Covenant would not apply to it, or would apply only in the way indicated.²⁴⁶

12. In his view, that was a remarkable example of the way in which reservations and interpretative declarations could be interchanged. The Netherlands knew that it had not always formulated true reservations, but since the applicable rules were the same, it had considered it safer to call its statements reservations, not interpretative declarations. It would clearly be incongruous, therefore, to dissociate the regimes, including in terms of validity. In view of the Commission's position described above, he believed that it would be judicious to adopt draft

guidelines 3.5.2 and 3.5.3 which, *mutatis mutandis*, aligned the applicable rules for conditional interpretative declarations with those relating to reservations, on the understanding that they would be in square brackets and would probably be deleted from the final text. Those draft guidelines read as follows:

"3.5.2 *Conditions for the substantive validity of a conditional interpretative declaration*

"The validity of a conditional interpretative declaration must be assessed in accordance with the provisions of draft guidelines 3.1 and 3.1.1 to 3.1.15.

"3.5.3 *Competence to assess the validity of conditional interpretative declarations*

"Guidelines 3.2, 3.2.1, 3.2.2, 3.2.3 and 3.2.4 apply, *mutatis mutandis*, to conditional interpretative declarations."

13. He hoped that the Commission would agree to refer draft guidelines 3.4, 3.5, 3.5.1, 3.5.2, 3.5.3 and 3.6 to the Drafting Committee. The third part of the report, which would deal with all the effects of reservations and related declarations, should be ready by the end of the session, or in any event by the end of 2009. He awaited with interest questions from other members.

14. Mr. GAJA said that the Special Rapporteur, in paragraph 152 of his report, had stated that it was difficult to see how approval of simple interpretative declarations could be subject to conditions for validity that were different from those applicable to the initial act. Simple interpretative declarations were generally not subject to conditions for validity, and the same should therefore apply to the approval of such declarations. There were, however, according to the Special Rapporteur, treaty provisions that prohibited contracting States, wholly or in part, from making even simple interpretative declarations, although in his own view such clauses could be understood differently. But assuming that to be the case, such treaty-based prohibitions should apply also to approvals of interpretative declarations, where the latter were made in spite of the prohibition, as well as to objections to interpretative declarations, where such objections were expressed in the form of an alternative interpretation, since that would amount to making an interpretative declaration. Naturally, a statement of objection that simply pointed out that interpretative declarations were prohibited should not be deemed invalid.

15. Draft guideline 3.5 (Substantive validity of interpretative declarations) provided that a State or an international organization could formulate an interpretative declaration unless the interpretative declaration was expressly or implicitly prohibited by the treaty. The proviso of that formulation should also appear in draft guideline 3.6 (Substantive validity of an approval, opposition or reclassification). Accordingly, draft guideline 3.6 should be amended by adding the words "unless the interpretative declaration is expressly or implicitly prohibited by the treaty" with reference to approval of or objection to an interpretative declaration.

²⁴⁶ *Multilateral Treaties Deposited with the Secretary-General* (available from <http://treaties.un.org>), chap. IV.4.

16. The other point he wished to make related to paragraphs 167 and 168 of the report, which said, if he had understood them correctly, that the question of the validity of conditional interpretative declarations depended on whether the proposed interpretation corresponded to the interpretation of the treaty established by agreement between the parties. Thus, an interpretation that had been determined to be correct because it had not been contested or because a dispute settlement body had found it to be accurate constituted a valid interpretation, even where interpretative declarations were prohibited, because what the State was in effect proposing was a correct interpretation, and it could just as easily have not made any declaration at all. True, it would not be known for some time whether the interpretation was correct and whether the conditional interpretative declaration was therefore valid. However, that was not the point with which he took issue.

17. What he found to be unconvincing in the report was the suggestion that when a conditional interpretative declaration proposed an interpretation that was ultimately determined to be correct, it was possible for such a declaration not to be regarded as equivalent to a reservation. The fact was that States making a conditional interpretative declaration made their acceptance of a treaty conditional upon a certain interpretation of one or more treaty provisions, thereby excluding all other interpretations, whether correct or incorrect, and not allowing a dispute settlement body to define the scope of the provision in question in another manner insofar as it applied to them. The issue of the actual meaning of the treaty did not arise, since the declaring State was bound by the treaty only to the extent that the conditional interpretative declaration imparted a certain meaning to a particular provision of the treaty. The validity of conditional interpretative declarations should be assessed using the same criteria as those applicable to the validity of reservations. Whether or not a conditional interpretative declaration was contested or approved, even if by a majority of other States parties, did not appear to alter its nature.

18. When, for example, the United Nations Convention on the Law of the Sea, in article 309, prohibited reservations, it also prohibited conditional interpretative declarations, irrespective of the correctness of the proposed interpretation. If, upon ratifying the Convention, a State wished, for instance, to specify that one island was, in its view, actually a rock, it could do so by means of a simple interpretative declaration, but it could not subject its consent to be bound by the Convention to such an interpretation.

19. Thanking the Special Rapporteur for the work he had completed so far, he said that he looked forward to further developments of this. While he agreed that the Commission was not producing a technical treatise, the Special Rapporteur's work had delved more deeply into the subject of reservations and interpretative declarations than the relevant literature and had even injected some passion into the consideration of a theoretical issue not normally associated with that sentiment.

20. Mr. NOLTE said that it appeared from the summary of the discussions in the Commission and in the Sixth Committee on the role of silence as a reaction to

interpretative declarations, which appeared in paragraphs 37 and 41 to 43 of the fourteenth report, that States, while accepting the general approach of the Commission, were open to the possibility that silence could constitute approbation or acquiescence in certain circumstances. In his view, the legal consequences of silence in response to an interpretative declaration could not be assessed solely in the light of the general rule stated in article 31, paragraph 3 (a), of the 1969 Vienna Convention, since the declarations in question were unilateral in nature and were framed in a specific formalized context in which the expectations of the parties to a multilateral treaty were typically such that, in order to preserve the meaning given to the terms of the treaty, States could not actively insist on a different position. The judgment of the ICJ in the case concerning *Maritime Delimitation in the Black Sea* supported that point of view.

21. He wished to make two observations concerning the recommendations contained in the latest report of the Working Group on reservations to the sixth inter-committee meeting of human rights treaty bodies²⁴⁷ and reproduced in paragraph 53 of the Special Rapporteur's report. First, in recommendation 3, the working group's recognition of the applicability of the Vienna Convention regime to reservations to human rights treaties was rather limited, since, in two different places in the same recommendation, it stressed the specificity of the human rights regimes.

22. Second, in recommendation 7, the working group asserted that a State could not rely on an invalid reservation, and unless its contrary intention had been "incontrovertibly established", it remained a party to the treaty without the benefit of the reservation. The Special Rapporteur had no doubt carefully weighed his words when mildly characterizing that expression as perhaps going a bit too far, but in his own view that remarkable sentence clearly went too far. It could require human rights treaty bodies to compel a reserving State to remain bound by a human rights treaty in cases where that might not be appropriate. In addressing the question of the consequences of invalid reservations to human rights treaties, it might be helpful to postulate presumptions; however, such presumptions should be more balanced and allow greater margin for the will of the State concerned, the nature of the particular treaty and the related circumstances.

23. On a point relating to a decision by the Inter-American Court of Human Rights in the case of *Boyce et al. v. Barbados*, described in paragraphs 56 to 60 of the report, he agreed with the Special Rapporteur that the Commission should address the question of the interpretation of reservations. In his view, the decision in *Boyce et al. v. Barbados* suggested that the Commission should remind States, courts and treaty monitoring bodies that the interpretation of a reservation was not limited to a strictly textual analysis, since reserving States might otherwise feel compelled in the future to formulate longer and more extensive reservations in order to avoid the risk that their intentions were not adequately taken into account.

24. Turning to the second part of the Special Rapporteur's fourteenth report, he wished to state at the outset

²⁴⁷ HRI/MC/2007/5 and Add.1, para. 18.

that he agreed with nearly all of the proposed draft guidelines, as well as with the Special Rapporteur's conclusions concerning the validity of acceptances, the validity of interpretative declarations and the validity of reactions to interpretative declarations. His main concern had to do with the question of the validity of objections. In that regard, he agreed with the Special Rapporteur's point of departure, which was that the validity of an objection must be assessed independently of that of the validity of a reservation. He also agreed that, as a general rule, objections could be formulated for any reason whatsoever, since the principle of consent in treaty relations held that no State could impose a particular treaty arrangement on another party against its will. That meant that it was indeed difficult to conceive of a situation in which an objection that had the usual effects ascribed to it by the Vienna Conventions—minimum effect or maximum effect—could ever be invalid. He also agreed that the question of whether an objection could have super-maximum effect did not concern the validity of such objections but rather their potential effects.

25. Like Mr. Gaja, however, he had doubts as to whether the same was true for objections that were intended to have intermediate effect. In paragraph 105 of his report, the Special Rapporteur stated that “[i]t is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible”. In the same paragraph the Special Rapporteur noted that “[i]t is extremely difficult—and, in fact, impossible under these circumstances—to imagine an ‘objection’ that would violate a peremptory norm”.

26. Such statements represented a challenge to lawyers, and in particular to law professors. He would therefore describe a hypothetical situation in an attempt to demonstrate that it was indeed conceivable for an objection with intermediate effect to create treaty relations that could lead to the violation of a peremptory norm of international law. For the sake of argument, one might assume that a group of States had concluded a convention aimed at eliminating terrorism and that the convention was based on three understandings: first, that any State party would extradite a terrorist suspect at the request of another State party that had issued an arrest warrant; second, that States parties would exchange any information they had concerning persons designated as terrorist suspects by another State party; and third, that the convention would contain a clause stipulating that the obligation to extradite did not apply in cases in which there were reasonable grounds for believing that the person to be extradited risked being subjected to torture.

27. It might further be assumed that State A, upon acceding to the convention, had formulated a reservation, according to which it would not provide information that it considered might threaten its national security; and that State B had formulated an objection to that reservation, according to which it did not consider itself bound by the provision that limited the duty to extradite in the case where the person to be extradited risked being subjected to torture.

28. A determination establishing the validity of that objection could lead to the following situation: if State B had subsequently requested the extradition of a person from State A, and it was well known that terrorist suspects were tortured on a regular basis in State B, State A would be obliged under the terms of the treaty to extradite the person, without being able to invoke the torture exception. That was because the provision containing it had been excluded by the objection with intermediate effect formulated by State B. Yet an obligation to cooperate in the commission of torture violated a norm of *jus cogens*. Such an absolute duty to extradite was partially invalid insofar as it applied to cases in which the extradited person risked being subjected to torture.

29. That hypothetical situation demonstrated several points. First, it was too simplistic to invoke the maxim cited by the Special Rapporteur in paragraph 103: “He who can do more, can do less.” While it was true that State B could have formulated its objection in such a way as to exclude all treaty relations, it should not be able to exclude certain provisions of the treaty if doing so would have the effect of enlarging the scope of the treaty obligations and leading to a *jus cogens* violation. Perhaps the Special Rapporteur might object, arguing that objections with intermediate effect could never have the effect of enlarging the scope of treaty obligations, but such a statement would pose difficulties of its own. Treaty obligations were typically an interrelated mix, so that taking one out did not necessarily imply that fewer obligations remained.

30. Second, the issue was not about the possible effects of an objection. In paragraphs 117 and 118 of his report, the Special Rapporteur assumed that objections could have an intermediate effect if they were aimed at safeguarding the package deal on which the treaty was based or if there was an intrinsic link between the provision that gave rise to the reservation and the provisions whose legal effect was affected by the objection. In his own example, the obligation to extradite could well be considered an element of a package deal between one group of States that typically had an interest in receiving terrorist suspects and another group of States whose interests lay more in receiving information. The link between the two kinds of obligations in his example was admittedly not as close as in the case of an objection to a reservation concerning the dispute settlement procedures of the *jus cogens* regime under the 1969 Vienna Convention, to which the Special Rapporteur referred in paragraphs 116 to 118 of his report. But despite the relatively more remote nature of that link, it nevertheless existed and, arguably, was sufficiently strong. Even if the Special Rapporteur could demonstrate that the link was not sufficiently strong, the mere fact that it could exist must be taken seriously, and one could not simply redefine the issue solely in terms of the effects that an objection with intermediate effect could produce.

31. For those reasons, he was not yet convinced that objections with intermediate effect could never be invalid. Consequently, it was necessary to formulate a draft guideline that either specified the grounds for establishing the non-validity of an objection with intermediate effect or excluded objections with intermediate effect.

32. Irrespective of whether it was possible for an objection to a reservation to violate a *jus cogens* norm, he tended to agree with Mr. Gaja that any partial objection that modified the content of a treaty in relation to a reserving State to an extent that exceeded the intended effect of the reservation, in other words, any objection with intermediate effect in the sense understood by the Special Rapporteur, required the acceptance or acquiescence of the reserving State. That followed from the very same principle that the Special Rapporteur had invoked, namely, the principle of consent, according to which no treaty obligation could be imposed on a State against its will. It was true that exposing States to the risk that they might encounter objections that had the effect of creating a different set of treaty obligations than that contemplated in both the treaty and the reservation might deter a State from formulating a reservation. However, such an advantage did not justify the sacrifice of the principle of consent, on which the Special Rapporteur himself had placed so much emphasis.

33. Moreover, he was not persuaded that the Commission should attribute to the mere formulation of a reservation the unsatisfactory result whereby an objection was capable of excluding the application of an essential provision of a treaty. It turned the system on its head to use an objection that excluded an essential provision or that led to a violation of *jus cogens* as an inducement for a State to withdraw a reservation.

34. In his opinion, Mr. Gaja's approach, as described in paragraph 110 and during his intervention at the previous meeting (para. 28), did not raise the uncertainties that characterized the regime of late reservations, as stated in paragraph 112. Rather, it was the fact that a reservation had been formulated and that objections with intermediate effect were considered acceptable that required a limited reopening of the possibility for an objecting State to formulate what amounted, in effect, to a reservation.

35. Apart from that particular point, he subscribed to the Special Rapporteur's suggestion that draft guidelines on the validity of reactions to reservations were unnecessary, except in respect of the question of the validity of objections to reservations. He also subscribed to the proposal that the draft guidelines should be referred to the Drafting Committee, due account being taken of Mr. Gaja's comments.

36. Mr. PELLET (Special Rapporteur) said that he was perplexed as to whether, apart from an academic perspective, it was reasonable to consider that a reservation with intermediate effect could lead to acts contrary to *jus cogens* norms. In his view, Mr. Nolte took too narrow a view of *jus cogens* and considered it as a sort of a trump card that could be played only in treaty relations, which was incorrect. According to the example he had provided, acceptance of the intermediate-effect objection by State A meant that it was compelled to allow the extradited person to be tortured in State B, which was an unacceptable result. In his view, the exclusion of the application of a treaty provision by State B did not change the fact that State A remained under an obligation not to extradite the person in question to State B, since that would contravene the *jus cogens* norm assumed to exist in the example. He was absolutely convinced that a State could make a reservation to a provision

related to *jus cogens*; however, the only thing that happened when it did so was that it deregulated that provision, but still remained bound by the *jus cogens* norm in question, which existed independently of the provision. Therefore the example provided by Mr. Nolte was inaccurate insofar as it assumed that, merely on the basis of the regime of reservations to treaties, State A could violate a norm of *jus cogens*, whereas the *jus cogens* norm continued to exist independently of the treaty. He therefore did not see where the problem of validity lay and was not convinced by Mr. Nolte's example.

37. Mr. NOLTE said that he did not deny that the rule of *jus cogens* would exist independently of his hypothetical treaty. If, however, a reservation could be said to violate *jus cogens*, even though *jus cogens* existed independently, he could not see why the same should not be said of an objection that had the effect of producing a treaty regime that violated *jus cogens*. He therefore failed to understand the Special Rapporteur's objection.

38. Mr. PELLET said that it was incorrect to say that a reservation violated *jus cogens*. What a reservation did was merely to deregulate the provision and take it out of the treaty context, but of course the obligation to respect *jus cogens* rules continued to apply.

39. Mr. NOLTE said that the Commission had already provisionally adopted draft guideline 3.1.9 (Reservations contrary to a rule of *jus cogens*), which stated: "A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law." He thought that the same principle should apply to an objection with intermediate effect.

40. Mr. HMOUD said that he had not yet made up his mind concerning objections with intermediate effect. However, he recalled that the Commission had discussed the issue and, although it had concluded that a treaty regime existed separate from the peremptory norm, it had nevertheless adopted the draft guideline.

41. Ms. ESCARAMEIA, after thanking the Special Rapporteur for his fourteenth report and his introductory statements, which had clarified a number of difficulties in the report, said that she was still puzzled by the sharp distinction drawn in the report between validity and the production of effects, a distinction that had formed the basis of several of the Special Rapporteur's proposals. It seemed to contradict the idea of validity on which the Commission had originally agreed, namely the capacity to produce effects. She recalled that the report of the Commission on the work of its fifty-eighth session stated, in paragraph (2) of the general commentary on the validity of reservations and interpretative declarations, contained in paragraph 159:

After extensive debate, the Commission decided, ... to retain the term 'validity of reservations' to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation.²⁴⁸

²⁴⁸ *Yearbook ... 2006*, vol. II (Part Two), p. 143.

Meanwhile, paragraph (7) of the same commentary stated:

However, the term ‘permissibility’ was retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions, since, according to the English speakers, the term did not imply taking a position as to the consequences of non-fulfilment of those conditions. That term was rendered in French by the expression “*validité substantielle*”.²⁴⁹

42. She wondered whether the Commission should use a term for interpretative declarations that it had decided not to use for reservations. For the sake of consistency, perhaps the Commission should use the word “permissibility” wherever the term “*validité substantielle*” was used in French even when referring to interpretative declarations, although she noted that, in his oral introduction, the Special Rapporteur had said that the issue of validity was approached differently in the context of interpretative declarations than in the context of reservations.

43. Secondly, the Special Rapporteur had said that the principle of consent could not violate *jus cogens*. He had also said that reactions to reservations, interpretative declarations and reactions to interpretative declarations, by their very nature, could not violate *jus cogens*. In her view, however, such reactions could be contrary to *jus cogens*; she would give her reasons later. If her view was correct, however, she wondered what consequences that would entail. It might well be that conditions for substantive validity—if she might use the term—could apply to reactions to reservations, interpretative declarations and reactions to them.

44. More radically, if effects, on the one hand, and substantive validity, on the other, seemed, at least in a number of cases, to be separate issues, she wondered of what practical use for a user of the Guide to Practice it was to have an analysis of validity and not simply one of effects. The Special Rapporteur had said that the Commission should take the opportunity to explain the issue, but, in her view, it was controversial and might be confusing to practitioners. The question of validity was not important from the practical point of view. The only question was whether substantive validity or invalidity had consequences beyond that of the production or non-production of effects, and, if not, whether it was not better just to address the effects in the Guide to Practice.

45. Turning to specific points raised in the report, she endorsed the view expressed in paragraph 94 of the report that objections and acceptances were not the criteria for the validity of a reservation, the corollary being that general acceptance did not make a reservation valid.

46. With regard to the validity of objections, in his report the Special Rapporteur said that a State might object to both invalid and valid reservations, since no State could be bound against its will. He based his argument on the 1951 advisory opinion of the ICJ concerning *Reservations to the Convention on Genocide*. That opinion was, however, highly ambiguous, and could be used to argue the exact opposite. The Special Rapporteur went on to argue that, although an objection contrary to *jus cogens* would be unacceptable, such an eventuality was impossible. It was, however, possible to envisage cases in which objections

could be contrary to *jus cogens*. Mr. Nolte had provided a quite complex example, Mr. Gaja a simple one. It was not uncommon for reservations to exclude a particular region; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Prevention and Punishment of the Crime of Genocide offered some examples. Objections to such reservations might state, for example, that the objecting State agreed to the regional exclusion but not with respect to a certain group or population. In that case, the objection itself introduced a discriminatory element: it was not acceptable to say that some populations could not be subject to torture or genocide, while others could. Such an objection was contrary to *jus cogens* and should therefore not be accepted. She did not see why a provision similar to draft guideline 3.1.9 could not be drafted for objections.

47. She had difficulty in understanding the Special Rapporteur’s view that acceptances could not be characterized as valid or invalid. They produced effects, in the sense that they could reinforce an invalid reservation and thus be contrary to *jus cogens*. She could therefore not endorse draft guideline 3.4, according to which acceptances of reservations and objections to reservations were not subject to any conditions for substantive validity.

48. With regard to the validity of interpretative declarations, she concurred with the view that the question of validity was different from the question of whether a statement was a reservation or an interpretative declaration. She also agreed in part that, if a statement was incompatible with the object and purpose of the treaty, it constituted a reservation and not an interpretative declaration, a case in point being that of *Belilos*. She thus endorsed draft guideline 3.5.1, which stated that an interpretative declaration that was actually a reservation should be treated as such. She considered, however, that the draft guideline should spell out that a statement purporting to exclude or modify the application of certain provisions should be treated as a reservation, regardless of the name given to it.

49. As far as genuine interpretative declarations were concerned, she concurred with the view that the value of an interpretation was based not on content but on authority, either the agreement of all parties to the treaty or the ruling of a competent body. Having the right to interpret a provision did not entitle a party to adopt whatever interpretation it wished, however. She therefore found it difficult to accept draft guideline 3.5, which stated that all interpretations were valid unless expressly or implicitly prohibited by the treaty, by analogy with article 19, subparagraphs (a) and (b) of the Vienna Conventions. That formulation could leave room for interpretative declarations incompatible with the object and purpose of the treaty, which was clearly not the Special Rapporteur’s intention. There should therefore be a guideline making it clear that a statement that purported to be an interpretative declaration but was incompatible with the object and purpose of the treaty should be treated as a reservation, perhaps not with regard to the entire regime of reservations, but as far as validity was concerned.

50. With regard to the validity of approval, opposition or reclassification, she noted that the Special Rapporteur had concluded that such reactions to interpretative declarations

²⁴⁹ *Ibid.*, p. 144.

could be “correct” or “incorrect” but not “valid” or “invalid”. Draft guideline 3.6 was based on that understanding. In her view, however, since interpretative declarations could be valid or invalid, reactions of approval or opposition could also be valid or invalid. She could not understand why the criteria of substantive validity that applied to the other unilateral acts should also not apply to reactions.

51. As for the validity of conditional interpretative declarations, she endorsed the view that the conditions for the validity of reservations applied (as expressed in draft guideline 3.5.2), as did the competence to assess such validity (draft guideline 3.5.3). However, if conditional interpretative declarations were substantially the same as reservations, the time of formulation might be an issue. Under the Vienna Conventions, the time element was part of the definition of a reservation, and reservations were subject to a number of formal requirements and the subsequent procedure of objections or acceptances. She wondered what the effect would be if a conditional interpretative declaration was made later than the time limit set for reservations and what regime of reactions would apply. Since articles 19 and 20 of the Vienna Conventions did not apply directly to conditional interpretative declarations, further elaboration might be required.

52. It was possible that the wealth of technical detail presented by the Special Rapporteur had caused her to misunderstand some points, and she would appreciate his clarification on the questions she had raised.

The meeting rose at 11.25 a.m.

3022nd MEETING

Thursday, 16 July 2009, at 10.20 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, 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. 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 members of the Commission to resume their consideration of the fourteenth report on reservations to treaties (A/CN.4/614 and Add.1–2).

2. Mr. FOMBA said that he would begin by making some general comments before giving his opinion on the draft guidelines proposed by the Special Rapporteur.

3. The goal set by the Special Rapporteur in paragraph 80 of his fourteenth report was legitimate. The opinions expressed in paragraph 81 were justified and should be endorsed. The approach recommended in paragraph 82 was acceptable, as were the viewpoints set out in paragraphs 83 and 84. The recapitulation of the position with regard to the validity of reservations in paragraph 85 was extremely useful, as the topic was highly technical and had been under consideration for many years. What counted in the Commission was the intellectual process comprising the understanding, definition, logical grounding and nexus of issues covered in the first, second and third parts of the Guide to Practice, as well as the exposition of the role and function of the various draft guidelines.

4. In the section on the validity of reactions to reservations (paras. 94–127), the Special Rapporteur, having first drawn attention to the lacunae in the 1969 and 1986 Vienna Conventions, was then at pains to clarify the nature, role and function of reactions. That clarification was very important and useful. In paragraph 95 he said that, while it might be appropriate to refer to the substantive validity of an objection to, or acceptance of, a reservation, although the term had a slightly different connotation, the main issue was whether the objection or acceptance could produce its full effects. He was personally unsure whether he had fully understood that statement, especially as *prima facie* there was a tendency to mix up substantive validity and effects.

5. Turning to the validity of objections, he approved of the idea that the fate of draft guideline 2.6.3 and, more precisely, the question of whether objections were a “freedom” or a “genuine right”, should be settled by the Drafting Committee. Without prejudice to any consensus which might emerge, at first sight he agreed that a right did exist and that it was rooted primarily in State sovereignty. He supported the idea put forward in paragraph 98 that the compatibility of a reservation with the object and purpose of the treaty must furnish the criterion for the attitude of a State, as the ICJ had found in its 1951 advisory opinion on *Reservations to the Convention on Genocide*. In paragraph 100, he endorsed the Court’s unambiguous position that “in its trade relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto” [p. 21 of the opinion]. He also supported the way in which the Special Rapporteur had construed the Court’s position when he wrote in the same paragraph that “a State may make an objection to any reservation, whether valid or invalid”.

6. The Special Rapporteur correctly interpreted the purpose and possible effect of objections in paragraph 102. In paragraph 103, he put forward a number of interesting ideas, but it was not always clear what he meant and there appeared to be a certain amount of contradiction in his reasoning when he wrote, on the one hand, that the purpose or possible effect of any objection did not necessarily render the objection invalid and, on the other, that an objection could undermine the object and purpose of