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Summary record of the 3023rd meeting

Topic:
Reservations to treaties

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against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, but pronounced that it did not consider certain, very harsh interrogation techniques in an isolation cell to be torture. It might be said that such a declaration conflicted with a *jus cogens* norm. He therefore thought that the Special Rapporteur should seriously consider mentioning *jus cogens* in draft guideline 3.5, for example by adding the words “or is incompatible with a peremptory norm of international law”. The draft guidelines contained in the report under consideration should be sent to the Drafting Committee.

50. Mr. McRAE said that when the Special Rapporteur had introduced the report under consideration, he had clearly laid out the parameters of the debate; no attempt should be made to go back on draft guidelines that had already been sent to the Drafting Committee, even if they were quoted in the report, and the Commission should not ask whether it could deal with validity before knowing what the Special Rapporteur was going to say about effects, although he had stated that responses to reservations raised issues relating to effects, but not to validity. At an earlier meeting, Mr. Gaja, supported by Mr. Nolte and Ms. Escarameia (3021st meeting, paras. 25 and 44–46, respectively), had, however, contended that issues of validity did arise, at least in respect of objections to reservations with an intermediate effect (3020th meeting, para. 25). At least in the abstract they seemed to be right; if an objection to a reservation with an intermediate effect had an impact on the treaty relationship between the reserving and the objecting parties, it could, at least in principle, be characterized as a valid or invalid objection.

51. He wondered, however, if there was any substance to that debate. If the Special Rapporteur said that there was no point in characterizing the objection as valid or invalid and that the real issue was that of the effect of the objection, then what Mr. Gaja, Mr. Nolte and Ms. Escarameia called “invalidity” might in practice be no different from what the Special Rapporteur meant by “effects”. But of course it was impossible to know that for certain, because the Special Rapporteur had not yet spelled out those effects. The debate had therefore taken on a somewhat surreal quality. Hence, he was inclined to agree with Ms. Escarameia that the Commission should not be talking about validity at all, but just about effects. Mr. Hmoud had made some pertinent comments in that respect. Perhaps it was necessary to wait until the following year and to hear what the Special Rapporteur had to say about effects, before reaching a decision.

52. Even though reactions to reservations and interpretative declarations supposedly involved no validity issues, the Special Rapporteur asked whether there should be a draft guideline on the matter. There were already a large number of draft guidelines, but if the Special Rapporteur had needed several pages of closely reasoned argument to convince the Commission that there was no issue of validity, perhaps the readers of the Guide to Practice might need some guidance in order to reach the same conclusion. A draft guideline on the subject, accompanied by a commentary, therefore seemed necessary, assuming that the Commission did not decide, after the debate on effects the following year, to abandon any reference to validity. Those comments obviously applied to draft guideline 3.4

on the substantive validity of acceptances and objections, but they were equally applicable to draft guideline 3.6 on the substantive validity of an approval, opposition or reclassification, except for the points made by Mr. Gaja the previous day and Mr. Hmoud at the current meeting. If the validity of an interpretative declaration depended on the terms of a treaty, that must also be true of the validity of any approval of an interpretative declaration. That meant that the phrase “subject to the terms of the treaty”, or words to that effect, should be added at the end of draft guideline 3.6.

53. Lastly, the Special Rapporteur requested the opinion of the Commission members with regard to conditional interpretative declarations and noted in paragraph 167 of his fourteenth report that “[i]t is clear from the definition of a conditional interpretative declaration that it does not purport to modify the treaty, but merely to interpret one or more of its provisions in a certain manner”. With all due respect to the Special Rapporteur, that was a distinction without a difference. If a State made its acceptance of a treaty conditional on a particular interpretation of it, it was seeking to modify what would be its meaning if the interpretation were not adopted, and that was a reservation. Of course, if the interpretation proved to be correct, there was no problem; the situation was comparable to that of a reservation accepted by all the other parties to a treaty. Perhaps there was a difference in the way a conditional interpretative declaration and a reservation were formulated, but in substance there was no distinction between them. For that reason, the content of draft guideline 3.5.2 was already encompassed in draft guideline 3.5.1. He therefore urged the Special Rapporteur to do as he had suggested and to explain at the following session that the effects of conditional interpretative declarations were the same as those of reservations, so that conditional interpretative declarations no longer led a twilight existence between simple interpretative declarations and reservations.

54. He was in favour of sending the draft guidelines contained in the Special Rapporteur’s fourteenth report to the Drafting Committee.

The meeting rose at 12.25 p.m.

3023rd MEETING

Friday, 17 July 2009, at 10.05 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. Sir Michael WOOD welcomed the submission of the part of the fourteenth report on validity of reservations and interpretative declarations (A/CN.4/614 and Add.1–2, paras. 80–178) and said that he awaited with great interest the third part of the report, dealing with what promised to be the centrepiece of the whole project, the effects of reservations and interpretative declarations and reactions thereto (paras. 179–290). He hoped the Commission would receive that part early enough in advance of its next session to be able to give it the full consideration that it would deserve. Perhaps, once the full picture was visible, the relationship between the various parts of the Guide to Practice would become clearer, enabling its structure to be somewhat simplified and its length reduced. If it was to be a practical tool, read and understood by busy—and unimaginative—government officials, and by busy practitioners, judges and arbitrators, then it needed to be user-friendly. Perhaps at some stage, the number of guidelines might be reduced and those that were central highlighted.

2. The second part of the fourteenth report provided an indication of how the draft guidelines might be shortened. If the Special Rapporteur was correct and the question of the substantive validity (or permissibility) of reactions to reservations, of interpretative declarations (except in the case of treaty-based restrictions or conditional interpretative declarations) and of reactions to interpretative declarations did not arise, and solely the effects of those acts had to be dealt with, then to refer to the question of substantive validity would be to include something simply for the sake of completeness rather than for the practical implications.

3. The commentaries would be an essential part of the project, as they were with almost all of the Commission's work. The Special Rapporteur might wish to consider whether they should be comprehensive, picking up much or most of the very interesting material from his 14 reports, or whether they should be selective and only highlight the most important issues.

4. On the substance of the second part of the fourteenth report, he said that if the distinction between substantive validity and effects was accepted, he basically agreed with the Special Rapporteur's analysis and conclusions and would be happy to see the draft guidelines referred to the Drafting Committee. Specifically, he agreed with the Special Rapporteur's analysis in paragraph 105 of the report of whether an objection to a reservation could be invalid because it produced a result that was contrary to *ius cogens*. He also agreed that one could not simply equate objections with intermediate effect to reservations, as explained in paragraph 114. The example of the reservations and objections to part V of the 1969 Vienna Convention was a rather special case. It raised the question of

whether the Guide to Practice should acknowledge, perhaps in the commentary, that the practice described was without prejudice to the application of different practice in special cases. On the other hand, like other objections with intermediate effect, the example given might simply raise the question of the meaning of the expression “the provisions of the treaty to which the reservation relates” in article 21, paragraph 1 (a), of the 1969 Vienna Convention—perhaps a matter worth consideration in the next part of the fourteenth report.

5. The Special Rapporteur had asked for views on the treatment of conditional interpretative declarations. That was an important matter on which he hoped the Special Rapporteur would accept a conditional response. Although the approach suggested, namely to treat such acts as conditional reservations, was logical, he would prefer to reserve his final position until the third part of the fourteenth report was available.

6. Lastly, he would find it helpful if the Special Rapporteur could indicate what he saw as the timetable for concluding the Commission's work on the topic, both on first reading and on second reading.

7. Mr. HASSOUNA said that the Special Rapporteur had once again presented the Commission with a document based on thoughtful legal analysis coupled with concrete suggestions, but had also raised unanswered questions. He had reminded the Commission that the question of validity of reservations and interpretative declarations was merely a prelude to the real core of the subject, namely the legal effects of reservations and interpretative declarations, to be discussed at the Commission's next session. The Commission was thereby forewarned that the next session would be heavily burdened with work on the final section of the Guide to Practice, as a prelude to the completion of a valuable tool on the technical and complex subject of reservations to treaties. At last, there was light at the end of the tunnel.

8. He would like to comment on the first part of the fourteenth report (paras. 1–79), something he had not yet had an opportunity to do. With regard to the draft guidelines on competence to assess the validity of reservations, he subscribed to the view that human rights monitoring bodies had such competence. Since their task was to ensure that States implemented human rights treaties, they should also deal with reservations, especially those which severely undermined the effectiveness of human rights conventions. In that regard, questions to be examined further were the extent to which the views on reservations of human rights monitoring bodies were authoritative, whether States should comply with those views and whether invalid reservations were severable.

9. Another issue raised in the first part of the report was that of silence in response to an interpretative declaration. He shared the view that the Commission should specify the circumstances in which silence could be interpreted as consent to an interpretative declaration. The point could be made either in the commentary or by rephrasing draft guideline 2.9.9. Specificity was required in order to ensure coherence between draft guideline 2.9.9, paragraphs 1 and 2, and between draft guidelines 2.9.9 and 2.9.8.

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

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

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

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

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

The meeting rose at 10.30 a.m.

3024th MEETING

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

Chairperson: Mr. Ernest PETRIČ

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

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

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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