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Summary record of the 3066th meeting

Topic:
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view had not been supported by all Commission members in the past. He expressed support for all the draft articles proposed by the Special Rapporteur with the exception of draft guideline 4.7.2, regarding which he shared the concerns expressed by Sir Michael. The draft guideline purported to prevent the author of an interpretative declaration from asserting an interpretation contrary to the one set forth in the declaration. Although it was not explicitly stated in the draft guideline, it was implicit in the report that the author could withdraw or modify the interpretative declaration at any time. He failed to understand why the author was unable to retract the declaration without formally withdrawing or modifying it, and he did not follow the Special Rapporteur's reasoning in that regard.

106. In paragraph 255 [545], the Special Rapporteur justified the approach "as a corollary of the principle of good faith", claiming that it was not necessarily based on estoppel; yet in paragraph 257 [547], he asserted that the author had created an expectation in the other contracting parties who, acting in good faith, might take cognizance of and place confidence in it, and that sounded very much like estoppel. The draft guideline was too broad in scope. There might well be circumstances in which parties to a treaty had relied on an interpretative declaration by a State and, without expressly accepting it, adapted their behaviour in accordance with that declaration. In such circumstances, the author should not be able to express a contrary view and might in fact be bound by it, although probably as a result of subsequent practice under the treaty and not because of the binding nature of the declaration itself. The author of the interpretative declaration could always withdraw it, but it could still be bound as a result of the behaviour it had generated among the treaty partners.

107. However, where a State made an interpretative declaration and there was no evidence of reliance on it, and indeed subsequent events, such as a judicial decision, made the interpretation proposed in the declaration less plausible, he wondered why that State, which many years later might have forgotten about its original interpretative declaration, should be prevented from adopting a contrary position. The approach adopted in draft guideline 4.7.2 had a somewhat perverse outcome in the sense that an act which had no legal effect for other States had a boomerang-like legal effect for its author. Although in paragraph 256 [546] the Special Rapporteur denied that the author of an interpretative declaration was bound by the interpretation it put forward, implicitly that was what happened.

108. Notwithstanding the title of the draft guideline, in paragraph 258 [548] the Special Rapporteur explained that the limitation applied not only to the author, but also to any State or organization that approved the interpretation put forward in the interpretative declaration, which must also refrain from invoking a different interpretation. The provision went too far in the absence of a case of estoppel, and, even if there was estoppel, it might apply only between the author and the approving State, not even to third States. He did not agree with Sir Michael that the draft guideline should be deleted, but would suggest that its scope should be limited by adding the following phrase at the end of the provision: "where other contracting parties have relied on that interpretation and acted accordingly".

109. Mr. PELLET (Special Rapporteur) said that, in order to forestall any further debate on draft guideline 4.7.2, he declared himself convinced that the current version of the provision was too broad in scope and should be amended. He would not, however, be in favour of its deletion.

The meeting rose at 1 p.m.

3066th MEETING

Friday, 16 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Expulsion of aliens (continued) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to resume the debate on his sixth report on expulsion of aliens (A/CN.4/625 and Add.1–2).
2. Mr. KAMTO (Special Rapporteur) said that before summarizing the debate itself, he would first touch on several comments of a general nature made by members of the Commission, then respond to methodological and substantive questions raised by certain States and referred to by several members of the Commission, and lastly address the proposal to restructure the draft articles.
3. Two members of the Commission had reiterated their well-known view that the Commission should not consider the topic of expulsion of aliens: one had argued that there were no general rules of international law in the area and that therefore the subject was a matter for the domestic law of States, and not for international law, and the other had contended that the subject was dealt with in diplomatic negotiations and thus was unrelated to the technical work expected of the Commission. Those two members echoed the position expressed in that regard by two or three delegations in the Sixth Committee.
4. In response to the persistence of that opinion, he pointed out, first, that all topics considered by the Commission were, without exception, subject to negotiation. He was not aware of a sole case in which draft articles elaborated by the Commission, however admirable they

might have been, had immediately become treaty provisions without first going through a diplomatic conference. If that had been the case for treaty law, of which it could be said that it concerned general rules and legal techniques, and not a concrete, factual subject, then it certainly should be true for other topics. After all, the work of the Commission on international crimes²⁹⁸ had helped with the elaboration of the Rome Statute of the International Criminal Court, and its work on international watercourses²⁹⁹ had also been subject to negotiation.

5. Secondly, was it really correct to say that the only existing rules on the expulsion of aliens were those established in international law and that the draft articles proposed until now were merely a collection of *lex ferenda*? In accordance with Article 38 of the Statute of the International Court of Justice, there were four sources of codifiable rules: international conventions; custom; general principles of international law recognized by nations; and judicial decisions and doctrine. He was proceeding on the basis of those four sources, and it was only when a rule did not stem from a universal or regional treaty source, an unquestionable customary source or international jurisprudence that he proposed a rule for progressive development—either because it was based solely on a few examples of converging national practice, or because it derived from regional jurisprudence not confirmed in other regions or at a universal level.

6. The second comment of a general nature made by some members concerned methodology. Methodological questions underlay the statements of certain States in the Sixth Committee and the comments of a number of members of the Commission. During the consideration of the annual report of the Commission to the General Assembly, one State in the Sixth Committee had criticized him for codifying European law,³⁰⁰ because he had relied heavily on the jurisprudence of the European Court of Human Rights and because he had drawn on what was called the “jurisprudence” of the Human Rights Committee³⁰¹ and other United Nations treaty bodies. The same State and several others had asked that greater attention be given to the comparative study of national law in the area.

7. He was surprised by that criticism, because in his fifth report,³⁰² which had essentially been devoted to the protection of the human rights of the person being expelled, he had started out each time with an analysis of the relevant international conventions before considering how a particular provision of those conventions had been interpreted by the Human Rights Committee and other treaty bodies as well as by regional human rights jurisdictions, in the current case the European Court of Human Rights, but also the Inter-American Court of Human Rights and, occasionally, the African Commission on Human and Peoples’ Rights. The study of national law

had played only a very limited role in that area, because rules were concerned that were well established in international treaty law and had been confirmed by international jurisprudence. Another member of the Commission had expressed the view that, given the difficulty of consulting all relevant legislation of States, and developing States in particular, the *travaux préparatoires* of international conventions, for example those relating to migrant workers, should be employed. He had taken due note of that proposal, and he asked that member of the Commission whether, in the course of his studies, he had been able to identify, in statements by representatives of States, any elements concerning the *travaux préparatoires* in question which could be used.

8. In any case, the sixth report, as could be seen, gave much greater attention to the study of national practice as reflected in legislation and jurisprudence. It should be noted, however, that national practice only served as the basis for proposed draft articles for progressive development if the question raised was not regulated by international legal instruments or international jurisprudence and if the practice of States was convergent. Two members of the Commission had also criticized the working method; one had argued that the sources used were very old, and even outdated, and the other had criticized that unreliable sources had been cited and that selective use had been made of information concerning a particular country.

9. With regard to the age of the sources, he was not aware that there was a time limit at the expiry of which research studies should no longer be used. If there was such a time limit, he would appreciate it if someone told him what it was, at least for the future. More specifically, he failed to see how a study on the expulsion of aliens could be criticized for being based on work carried out at the end of the nineteenth century, a period in which the subject had witnessed a boom in national legislation and had given rise to a rich arbitral jurisprudence that had laid down the first principles of international law in the area. It was in that period that the topic had first become the focus of major studies. Even the Institute of International Law had devoted a resolution to it, in 1892.³⁰³ Arbitral awards, for example in the *Ben Tillett* and *Daniel Dillon* cases, should also be borne in mind. Evoking the facts and rules of a past period did not mean that they were used to propose draft articles. It served to show the evolution of the subject and to establish either that the proposed rule had already been recognized and was clearly of a customary nature or, on the contrary, that it had become outdated. For example, expulsion on grounds recognized at the end of the nineteenth and the beginning of the twentieth century, such as public health, begging, vagrancy or disorderliness, were no longer accepted today because of fundamental changes in the area of human rights.

10. As to the seriousness of the information used in the sixth report and the “selective” nature of the approach, suffice it to say that the information in question came from recognized NGOs active in the defence of the rights of aliens and had been cited each time with complete references.

²⁹⁸ *Yearbook ... 1996*, vol. II (Part Two), Draft code of crimes against the peace and security of mankind, p. 17, para. 50.

²⁹⁹ *Yearbook ... 1994*, vol. II (Part Two), Draft articles on the law of the non-navigational uses of international watercourses, p. 89, para. 222.

³⁰⁰ *Official Records of the General Assembly, Sixty-fifth Session, Sixth Committee, 25th meeting (A/C.6/65/SR.25)*, para. 7.

³⁰¹ *Ibid.*, para. 11.

³⁰² See footnote 26 above.

³⁰³ “Règles internationales sur l’admission et l’expulsion des étrangers proposées par l’Institut de droit international et adoptées par lui à Genève, le 9 septembre 1892”, *Annuaire de l’Institut de droit international*, vol. XII (1892–1894), p. 218.

He had not been aware that a Special Rapporteur was only allowed to use official information when he wrote about the practice of a State. The accusation of the supposed selective nature of his approach was serious and in bad faith. It was serious because it suggested that he had something special or personal against the State in question, which obviously was not the case. It was in bad faith for two reasons: first, because in paragraph 214 he had taken the precaution of indicating that the examples of detention conditions of aliens who were being expelled had been cited purely as illustrations and solely because of their availability—one member of the Commission had in fact drawn attention to that point; and second, because, with regard to the State concerned, namely Germany, he had referred to the historical facts, but also to recent legislation (1990 and 1993). He had also taken care to say that “[i]t has not been possible, however, to gain access to information on the conditions in those centres” [para. 215]. Apparently his precautions had been to no avail. On such a complex subject, errors were inevitable, and he would always welcome any correction or additional information which States and members of the Commission might contribute, but he rejected the accusation that he had been selective.

11. The third comment of a general nature concerned the proposal by one member of the Commission to restructure the draft articles, whereupon an informal working group had been established. The proposal was certainly well-founded, but a restructuring at the current stage would be premature, which the informal working group had had to concede, because it had not succeeded in producing anything specific in that regard. However, he had taken due note of the proposal and would undertake to propose a restructuring at the beginning of the 2011 session.

12. Turning to the actual summary of the debate on the sixth report on expulsion of aliens, he noted that draft article A (Prohibition of disguised expulsion) had given rise to two main comments. The first concerned the title of the draft article. Some members had thought that the words “disguised expulsion” were unclear and imprecise, that the phrase was used in journalism but not in law, and that it would be preferable to employ words in line with the English formulation “constructive expulsion”. However, as indicated in paragraphs 37 and 38 of the sixth report, the Eritrea–Ethiopia Claims Commission and the Iran–United States Claims Tribunal in the *Short v. Iran* case had both referred to disguised expulsion. He worked in French and thus had difficulty finding a good translation of the English; he was open to suggestions.

13. The second general comment concerned the relationship between draft article A and the definition of expulsion in draft article 2 (Definitions). He agreed that draft article A, paragraph 2, reproduced that definition and that it could be deleted as necessary. On the other hand, it was absolutely essential to retain paragraph 1, because although draft article 2 defined that form of expulsion, nowhere in the draft articles was it specified that it was prohibited. Yet it was in fact prohibited, because it violated all procedural rules and did not allow any protection of the human rights of the expelled person.

14. With regard to draft article 8 (Prohibition of extradition disguised as expulsion), several members of the

Commission had pointed out that, as worded, the draft article did not fall within the scope of the topic and that in any case, it did not take into consideration the case in which expulsion was carried out on the basis of a cooperation agreement. More importantly, they had argued that nothing prohibited a State from expelling a person who was the subject of an extradition request if the conditions required for expulsion had been met. He had thus reformulated draft article 8 to take those useful comments into account, and it had been agreed that the draft article could be referred to the Drafting Committee. The title would be amended accordingly and would read: “Expulsion in relation to extradition” (*L’expulsion en rapport avec l’extradition*).

15. One member of the Commission had asked whether he intended to include in draft article 8 a provision relating to the competence of national jurisdictions in cases of disguised extradition, on the basis of the jurisprudence of a number of countries, notably that of South Africa, which had cited decisions of British Israeli and United States jurisdictions in the *Eichmann* case, or that of the Supreme Court of Zimbabwe. He did not think that it was necessary to draft a normative provision on that question, but he would reflect that concern in the commentaries.

16. On draft article 9 (Grounds for expulsion), one member of the Commission had said that the only two grounds which should be retained were public order and public security, because all grounds were related to them in one form or another. He had thought so too at first, but further study had shown that it would be unwise to reduce everything to those two grounds, and several members of the Commission had also argued along those lines. Consequently, the formulation of draft article 9 left an opening by specifying that a State could invoke any other ground provided that it was not contrary to international law. However, he took note of the information provided by the member in question on the contribution of the jurisprudence of the ICJ concerning the concept of “national security”, which would add to the commentary on draft article 9.

17. On the other hand, it was incorrect to say, as that same member had, that on that point he had followed too closely the grounds enunciated in the memorandum by the Secretariat on expulsion of aliens.³⁰⁴ One need only reread the two documents to see what his report had contributed in that regard.

18. On draft article B (Obligation to respect the human rights of aliens who are being expelled or are being detained pending expulsion), he recalled that he had proposed the deletion of paragraph 1, which seemed to be redundant with draft article 8 (recast in the Drafting Committee together with draft article 9). Some members had found draft article B to be too detailed, in particular when it said in paragraph 2 (a) that the detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty were detained. He conceded that this might in fact be too detailed, but the rule stemmed from jurisprudence, and it was that detail or indication which made it possible to highlight the fact that the expulsion decision was not punitive in nature and that

³⁰⁴ A/CN.4/565 and Corr.1 (see footnote 42 above).

the person who was the subject of the expulsion decision was not being punished. It would be up to the Drafting Committee to decide whether a more general formulation could be found.

19. Only draft article 8 had raised very clear reservations among the majority of members of the Commission. Those reservations had been dispelled after the draft article had been formulated, and the Commission had decided that all the draft articles contained in the first part of the sixth report, namely draft article A, draft article 8 in its new version, draft article 9 and draft article B, would be referred to the Drafting Committee.

20. Concerning the comments on the second part of his sixth report, on expulsion proceedings, the Special Rapporteur noted that all the members of the Commission who had spoken on the subject had approved the overall thrust of the document and the effort to draw a distinction between aliens lawfully in the territory of the expelling State and those who were there unlawfully. In actual fact, that distinction was more subtle, because within the category of unlawful aliens it was still necessary to distinguish between recent and long-term illegal aliens.

21. He drew attention to those distinctions because it had been criticized that no specific procedural guarantees had been provided for aliens unlawfully in the territory of the expelling State; he had amended draft article A1 (Procedural guarantees for the expulsion of illegal aliens in the territory of the expelling State) to respond to that point. Paragraph 1 sought to take into account the situation of illegal aliens who had entered the territory at a recent date; the guarantee was minimal in that it simply referred to the law. The other category of unlawful aliens in the expelling State could benefit from greater protection, the difficulty being to find the right balance when drawing a distinction between the procedural guarantees provided for lawful aliens and those provided for recent illegal aliens. Draft article A1, as modified, thus read:

“1. The expulsion of an alien who entered illegally [at a recent date] the territory of the expelling State [or within a period of less than six months] takes place in accordance with the law.

“2. The expulsion of an illegal alien who has a special legal status in the country or has been residing in the country for some time [at least six months?] takes place in pursuance of a decision taken in conformity with the law and the [respect] of the following procedural rights:

“(a) the right to receive notice of the expulsion decision;

“(b) the right to challenge the expulsion [the expulsion decision];

“(c) the right to a hearing;

“(d) the right of access to effective remedies to challenge the expulsion decision;

“(e) the right to consular protection.”

22. There then followed procedural guarantees for the expulsion of aliens lawfully in the territory of the expelling State: draft article B1 (Requirement for conformity with the law) and draft article C1 (Procedural rights of the alien facing expulsion). Some members of the Commission had proposed the deletion in draft article B1 of the word “lawfully” so that the question of conformity with the law would cover both illegal and lawful aliens, but it was perhaps unwise to adopt that approach, because the phrase “in conformity with the law” appeared in the International Covenant on Civil and Political Rights, and the deletion of the word “lawfully” might create confusion. It was therefore preferable to have repetition.

23. Draft article B1 had received virtually unanimous support from the members of the Commission.

24. The principle of draft article C1 had not been contested, but rather the legal appropriateness of some of its provisions in promoting progressive development. That was the case, for example, with the right to legal aid and even, for some members, the right to interpretation and translation services. The members who had raised the latter objection had referred to the costs that such services would incur for the expelling State. However, the right to interpretation and translation was well established in international law and could even be codified as a general principle of law, because it was recognized in the legislation of virtually all States. With regard to legal aid, he had made it very clear that progressive development was concerned. Noting that one member had proposed the principle of the suspensive effect of an appeal against an expulsion measure, he said that he had examined the question at great length in the report to be considered by the Commission at its 2011 session and had concluded that the rule on suspensive effect essentially stemmed from European law, notably the jurisprudence of the European Court of Human Rights, as it had emerged in the judgments rendered in the *Jabari v. Turkey* (2000) and *Mamatkulov and Askarov v. Turkey* (2005) cases on the basis of an interpretation of article 13 of the European Convention on Human Rights. In 2001, the Council of Europe’s Commissioner for Human Rights had made recommendations to its member States in favour of that procedural guarantee. It should be noted, however, that this guarantee, which was well established in European regional law, was not recognized in general international law. The Institute of International Law had been opposed to it in its 1892 resolution. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families merely created the possibility, for the migrant worker being expelled, to request a suspension of the decision; it did not introduce a rule for the suspensive nature of the request. He had not made the above points in order to oppose the wishes of the members of the Commission on the subject but to stress that he had not lost sight of the question and that if the Commission retained the rule, it would of course be with a view to promoting the progressive development of international law. One member of the Commission had proposed the codification of a rule drawn from the interpretation by the Human Rights Committee of article 13 of the International Covenant on Civil and Political Rights; according to that interpretation, the procedural guarantees provided for by that article should also be applied if the person concerned contested the expulsion

decision itself. He had taken due note of that proposal but thought that it would be preferable to reflect the idea in the commentary to draft article A1 or draft article C1. He hoped that the reformulation of draft article A1 addressed the objection of principle raised by some members and that the Commission would agree to refer the set of draft articles to the Drafting Committee.

25. Mr. SABOIA said that he much preferred the original version of draft article 8 on the prohibition of extradition disguised as expulsion, which the Special Rapporteur had said that he had reformulated in response to observations made during the debate. Extradition was usually a legal procedure involving the participation of both parties: if the executive power decided to expel a person to the State requesting that person's extradition, it would be committing an act contrary to the procedural guarantees under that procedure. With regard to draft article A1, he was pleased to note that the Special Rapporteur had taken into account the objections raised during the debate, but in accordance with the new version of the draft article, which drew a distinction between recent and long-standing unlawful aliens, only the latter had the right to consular protection. That right should be extended to all unlawful aliens, not only because of legal considerations, but also because it was above all during the short period of time when the authorities were deciding whether to expel an alien that consular protection was needed to protect the rights of the person concerned.

26. Mr. NOLTE said that he was in favour of referring the new draft article A1 to the Drafting Committee. He wished to point out that he had not intended to say that the Special Rapporteur had deliberately made a selective use of information concerning one country, but that the description given had not provided a full picture of the situation. He had certainly not intended to cast doubt on the Special Rapporteur's good faith.

27. Mr. HASSOUNA said that, clearly, none of the criticism voiced by members of the Commission had been at a personal level and that neither the Special Rapporteur's competence nor his dedication had been called into question. Noting that some of the debate had taken place in the first part of the session, he hoped that in the future, the Commission would allow for enough time so that the Special Rapporteur could give his summary of any debate immediately following the discussions, when the proposals made and criticism expressed were still fresh in everyone's mind.

28. Mr. VÁZQUEZ-BERMÚDEZ, thanking the Special Rapporteur for so quickly preparing a new draft article A1 enunciating procedural guarantees for the expulsion of illegal aliens in the territory of the expelling State, said that, for the sake of consistency, the words "illegal aliens" in the title of the English version should be replaced by "aliens unlawfully". Unlike Mr. Hassouna, he thought that the Special Rapporteur should be given time after the debate to reflect on the observations, criticisms and proposals made so that he could summarize them and respond.

29. Mr. CAFLISCH said that it was impossible to summarize a debate right after it had finished, because it took

time to digest the statements made and to prepare any proposals. Ideally, one day was needed to do so.

30. Mr. GAJA agreed with Mr. Hassouna that it would have been preferable if the debate in the first part of the session had been summarized right away and not several weeks later. Needless to say, that was a simple question of organization of work and not a criticism of the Special Rapporteur. He noted with satisfaction that the Special Rapporteur had elaborated two new draft articles to take into account some of the concerns voiced, but found it a bit strange for members to be asked to consider an entirely new text and to be requested to refer it to the Drafting Committee without opening a debate. Draft article A1 posed a major practical problem: illegal aliens were rarely in possession of documents establishing the exact moment when they entered the territory, and thus it was very difficult to know whether someone had been in a State for a long time or not, unless the person's identity papers had been checked shortly after crossing the border. It would therefore be useful for the Commission to be able to have a substantive discussion before referring the text to the Drafting Committee. Like Mr. Saboia, he had doubts about whether the new draft article 8 should be referred to the Drafting Committee. The proposed text, upon which the Commission had not had the opportunity to comment, provided in substance that expulsion must take place in conformity with international law, i.e. in accordance with the rules concerning expulsion, whereas it should reflect the particular situation of the persons who were the subject of an extradition order—but not in the form of a prohibition, as in the initial version of the draft article. The Commission should be able to have a substantive discussion on draft article 8 as well before referring it to the Drafting Committee.

31. Mr. KAMTO (Special Rapporteur) said that he had not taken the comments personally, but regarded them as methodological criticism. Some critical remarks had concerned the treatment, or lack of treatment, of the subject by the Commission—there was nothing personal about that—and others, on selectivity, had caused a misunderstanding, which Mr. Nolte had dispelled. Of course, it was always possible to have endless discussions on any draft article. In preparing the first version of draft article 8, he had started with the jurisprudence of the European Court of Human Rights in its *Bozano v. France* and *Öcalan v. Turkey* judgments. The Court had come to different conclusions in the two cases, the reason being that in the latter case, it had considered an accusation of terrorism and thus had placed itself on a different plane. In reality, however, the facts had not been very far from those in the *Bozano v. France* case, and thus the impression had arisen that the jurisdiction of the Court had prohibited disguised extradition. The Commission had reminded him that the subject had not been disguised extradition, but the expulsion of aliens, and that to continue with that approach would be tantamount to saying that even when the conditions had been met for the expulsion of a person who had been the subject of an extradition request, that person could not be expelled. That point had been well taken, and he had reversed the logic to ensure that the topic had a stronger focus on the expulsion of aliens and dealt with expulsion only in relation to a person who was the subject of an extradition request.

32. Mr. DUGARD, speaking on a point of order, said that the purpose of the current meeting was for the Commission to hear the summary of the debate on the expulsion of aliens and to decide whether to refer the draft articles to the Drafting Committee, and not to reopen the debate, even if a new draft article had been submitted.

33. The CHAIRPERSON said that all the members had taken note of the comments made by members, including by Mr. Saboia and Mr. Gaja, and he asked whether the Commission wished to refer draft articles A, 9, B1 and C1, contained in the sixth report of the Special Rapporteur, draft articles B and 8, as revised by the Special Rapporteur,³⁰⁵ and draft article A1, as revised by the Special Rapporteur at the current meeting (document without a symbol, circulated at the meeting), to the Drafting Committee.

34. Sir Michael WOOD wondered whether, from a procedural point of view, the Commission should not refer all the draft articles contained in the Special Rapporteur's reports to the Drafting Committee and leave it to the Drafting Committee to consider the new draft articles submitted at the current meeting and on which the Special Rapporteur had made proposals to take into account the comments by members of the Commission.

35. Mr. KAMTO (Special Rapporteur) said that he was not in favour of proceeding in that manner. Draft article 8 had been made available to the members of the Commission at the first part of the current session, and everyone had had time to make substantive comments.

36. Mr. GAJA recalled that there had not been any debate on the new draft article 8.

37. The CHAIRPERSON said that the Commission must indicate whether it decided to refer to the Drafting Committee those draft articles that had not given rise to substantive objections. He therefore proposed that the Commission should refer all the draft articles to the Drafting Committee, with the exception of draft article 8 and the new draft article A1. If he heard no objection, he would take it that this proposal was accepted.

It was so decided.

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]

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

38. The CHAIRPERSON invited the members of the Commission to resume the debate on the last sections of the Special Rapporteur's fifteenth report on invalid reservations and effects of interpretive declarations, approvals, oppositions, silence and reclassifications (A/CN.4/624 and Add.1–2).

39. Ms. JACOBSSON said that the crucial question was how to deal with the application of a treaty in the case of an impermissible reservation, at the same time taking due account of State practice and the absence of rules in the 1969 and 1986 Vienna Conventions. The Special Rapporteur attempted to strike a balance between, on the one hand, the presumption of acceptance of an objection, with the automatic consequence of “super-maximum” effect, which “apparently purports to require that the author of the reservation should be bound by the treaty without benefit of its reservation simply because the reservation is impermissible” (para. 189 [479]) and, on the other hand, the presumption of consent. To that end, he had removed the automatic nature of the consequence of presumption and had retained consent, which he had associated with the intention of the author of the objection; that was an intelligent and elegant solution. The Special Rapporteur had provided a large number of recent examples of State practice—and there were many others, both modern and older—and in paragraph 162 [452] he set out majority practice, which was so extensive that it could not be neglected. Some members had proposed that the presumption of entry into force in draft guideline 4.5.3 be reversed, but without clearly indicating how the draft guideline would then be worded, and she therefore did not see how it would apply in practice: should the intention of the reserving State first be established before the objecting State drew its own conclusions on the effects of the reservation, or should the objecting State ask the reserving State directly? In either case, the reversal of presumption would place the obligation to act on the reserving State, which was certainly not the best way of achieving stable treaty relations. A State could have various reasons for making what was considered to be an impermissible reservation while at the same time expressing its intention to be bound by a treaty, notably for domestic reasons. The last thing that a State would want to do was to have to spell out the consequences. Rather, it might prefer to live with the uncertainty until a real case arose. It was the intention to be bound that was the driving force for the reserving State. By reversing the presumption, the Commission would disrupt what could be stable treaty relations and would prevent a constructive dialogue, and it would also disregard the practice of States, court judgments and decisions by treaty bodies. Moreover, as noted by the Special Rapporteur, a presumption of entry into force provided legal certainty, particularly against the background of draft guideline 2.1.9 (Statement of reasons). In addition, how would a reverse presumption relate to existing State practice? If the presumption were reversed, the Commission would introduce a new procedure which, to her knowledge, had not been used by States. None of the States concerned was likely to be willing to accept to have that practice declared unacceptable by the Commission's draft guidelines, particularly since experience showed that States subject to the severability doctrine had never protested, even if they were not required to do so; that was an important point. The objective of the Commission was to elaborate a Guide to Practice to assist States in their treaty relations, and such guidelines must reflect State practice and the *opinio juris* of the States concerned. State practice demonstrated that the criterion of intention and the will of the author was part of the assessment. Admittedly, regional jurisdictions such as the European Court of Human Rights and the Inter-American Court of Human

³⁰⁵ Documents ILC (LXII)/EA/CRP.1–2, distribution limited to the members of the Commission.

Rights had taken into consideration the specific nature of the instruments that they were mandated to enforce, but although that was understandable and justified, it was not a decisive argument in elaborating the draft guidelines. Moreover, nothing justified a treatment of human rights instruments as a separate case, because other treaties, such as disarmament treaties or treaties regulating the laws of armed conflict, were also of a specific nature.

40. The decisive factor was the intention of the State that was the author of an impermissible reservation, and she agreed with the statement by the Special Rapporteur in paragraph 189 [479] of his fifteenth report that “the requirement that the treaty must be implemented in its entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author”. She was in favour of referring all the draft guidelines to the Drafting Committee.

41. Mr. DUGARD, referring first to the section on invalid reservations, said that the Special Rapporteur began with an introduction that set out the problems arising from the failure of the Vienna Convention to contain any provision on the effects of invalid reservations. Draft guideline 4.5.1 (Nullity of an invalid reservation) was an obvious starting point for chapter IV, as was draft guideline 4.5.2 (Absence of legal effect of an impermissible reservation). The two draft guidelines laid the foundation for draft guideline 4.5.3, which was perhaps the most important provision of all and which dealt with the most controversial issue, one which had divided lawyers ever since 1994, when the Human Rights Committee had issued its General Comment No. 24.³⁰⁶ Draft guideline 4.5.3 contained a masterly compromise between the severability approach and the consent approach. The difficulty for the Special Rapporteur was that State practice was inconsistent, uncertain and confusing. It was uncertain in that the position of most States towards impermissible reservations, with the exception of the European and Latin American States, was unknown. In Europe and Latin America, the regional courts had given “super-maximum” effect to objections, but it was not clear what the attitude was of States in other regions. There was also uncertainty about the position of most reserving States as well as that of States which formulated objections, because they did not indicate what the consequences of those objections were. There were also inconsistencies because, as pointed out by the Special Rapporteur, States sometimes adopted both positions, as shown by the example of the Netherlands, cited in paragraphs 148 [438] and 161 [451] of the report. Those uncertainties and inconsistencies had created confusion, and the Special Rapporteur had cited the dissenting opinion of Judge Hersch Lauterpacht in the *Interhandel* case. That opinion had guided the thoughts of many jurists, but it must be borne in mind that the question at issue there had not concerned reservations to treaties but reservations to the optional clause on the compulsory jurisdiction of the ICJ, which, despite similarities, could not be described as a treaty.

42. The Special Rapporteur had found a compromise between severability and consent on the basis of

inconsistent and uncertain practice, to which he had probably given more credit than it deserved, and had also taken account of applicable principles and legal decisions. Thus, the notion the Special Rapporteur had adopted, that of a rebuttable presumption, was the right one: it allowed States that really did not wish to continue as parties to a treaty without their reservations to withdraw, and it set out a number of sensible factors that should be considered in connection with that presumption. In his own view, the presumption should stay as it was and should not be reversed. In 1997, when the debate had started,³⁰⁷ he had been a hardliner in favour of severability, but he now believed that the Special Rapporteur’s approach was correct. The Special Rapporteur had taken some time to reach that conclusion, having consulted with the treaty monitoring bodies and considered the position of States, and his solution accorded with the advisory opinion of the ICJ in *Reservations to the Convention on Genocide* in that it encouraged as many States as possible to remain parties to multilateral treaties. It was also in keeping with the spirit of the 1969 Vienna Convention, and he wholeheartedly agreed with draft guideline 4.5.3. He also endorsed draft guidelines 3.3.3 (Effect of unilateral acceptance of an invalid reservation) and 3.4.1 (Substantive validity of the acceptance of a reservation). Draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation) had little State practice to support it, and although the Special Rapporteur cited the debate in the League of Nations on the reservation of neutrality formulated by Switzerland, that was an ancient precedent which had arisen at a time when reservations to treaties had not been accepted. Nevertheless, draft guideline 3.3.4 was acceptable. He also agreed to draft guideline 4.5.4 (Reactions to an impermissible reservation), which gave effect to the judgment of the ICJ in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case and the judgement of the European Court of Human Rights in the *Loizidou* case. With regard to draft guideline 4.6 (Absence of effect of a reservation on relations between contracting States and contracting organizations other than its author), he preferred the first option proposed by the Special Rapporteur, but could go along with the second one if necessary.

43. The last section, on the effects of interpretive declarations, approvals, oppositions, silence and reclassifications, enunciated interesting guidelines that concerned not only reservations to treaties but also the interpretation of treaties. He endorsed draft guidelines 4.7 (Effects of an interpretative declaration) and 4.7.4 (Effects of a conditional interpretative declaration), but was not quite sure about draft guideline 4.7.2 (Validity of an interpretative declaration in respect of its author) and agreed with the view of Bowett,³⁰⁸ set out in paragraph 256 [546], that States should not be bound by an interpretative declaration, as it was a question of law rather than a question of fact, and he wondered whether that was not a case for a presumption in favour of the State making such a declaration. Unfortunately, draft guideline 4.7.2 was framed in a rather categorical manner that did not allow for exceptions.

³⁰⁷ *Yearbook ... 1997*, vol. II (Part Two), chap. V, pp. 46–48, paras. 65–74.

³⁰⁸ D. W. Bowett, “Estoppel before international tribunals and its relation to acquiescence”, *BYBIL*, 1957, vol. 33, pp. 176–202.

³⁰⁶ See footnote 83 above.

44. He endorsed draft guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration), which simply gave effect to the general rule relating the interpretation of treaties, namely that treaties should be interpreted in the context of all relevant elements. He also agreed with draft guideline 4.7.3 (Effects of an interpretative declaration approved by all the contracting States and contracting organizations). In his opinion, all the draft guidelines contained in the two last sections under consideration should be referred to the Drafting Committee.

45. Mr. FOMBA, referring to the section on invalid reservations, said that he agreed with the points made in paragraphs 110 to 112 [400–402], namely that: the Vienna Conventions did not contain clear, specific rules concerning the effects of an impermissible reservation; the 1969 Vienna Convention had not frozen the law; that state of affairs did not mean, at the methodological level, that the Commission should enact legislation and create *ex nihilo* rules concerning the effects of a reservation that did not meet the criteria for permissibility; and State practice, international jurisprudence and doctrine could guide the Commission's work. During the debates on the question in 2006,³⁰⁹ he had argued with others that the nullity of an impermissible reservation was well founded, convincing and useful, and he continued to maintain that position of principle.

46. Draft guideline 3.3.3 did not pose any difficulties, and the point made in paragraph 199 [489] concerning its aim and its title was useful. As to draft guideline 3.3.4, he subscribed to the basic argument set out in paragraph 204 [494]. The wording was acceptable, and the second paragraph was important and useful in the framework of the reservations dialogue, which the Special Rapporteur had said would be the subject of a future report. Logically, the draft guideline should appear in Part 3 of the Guide, on the permissibility of reservations.

47. He endorsed the reasoning behind draft guideline 4.5.1, which was in line with his position in 2006. Its wording did not call for any particular comment. As to draft guideline 4.5.2, the distinction drawn in paragraph 130 [420] between nullity and the effects of nullity, which might seem somewhat difficult to grasp from a theoretical point of view, proved on closer analysis to be relevant and useful. Draft guideline 4.5.2 had a sufficient foundation in practice, and its wording did not pose any problem. For the sake of consistency, it could be inserted as a second paragraph of draft guideline 4.5.1, which it followed logically.

48. He agreed with the point made by the Special Rapporteur in paragraph 165 [455] to the effect that the principle of consent was the key to the problem. In paragraph 171 [461], the difference between the “normal” consequences and the “abnormal” consequences of an impermissible reservation was odd and difficult to apply, to say the least. He shared the doubts voiced by the Special Rapporteur in paragraph 176 [466] as to the nature of the presumption. Intellectually at any rate, it might very well mean one thing or the contrary: it might be presumed either that the treaty would enter into force or that it would not enter into force. The argument set out in

paragraph 181 [471] to the effect that a positive presumption could provide legal certainty was worth considering.

49. He endorsed the Special Rapporteur's recommendation in paragraph 182 [472] that the Commission support the idea of a relative and rebuttable presumption, because a positive presumption was consistent with the principle of consent and legal certainty. With regard to the criteria of intention, he agreed with the conclusion reached in paragraph 188 [478]. In that connection, the clarification provided in the following paragraph on the difference between a presumption and an objection with “super-maximum” effect was interesting and useful.

50. He approved the insertion in draft guideline 4.5.3 for the reasons explained by the Special Rapporteur. As to its title, the first alternative in square brackets could be retained, but since section 4.5 was entitled “Effects of an invalid reservation”, it was tempting, for the sake of consistency, to retain the second alternative, on the understanding that, in any case, the first paragraph dealt with the application of a treaty. At first glance, the first paragraph did not pose any problem; as to the second paragraph, the list of criteria was acceptable in that it defined the most relevant essential elements, its non-exhaustive nature having been clearly established by the words “including, *inter alia*”. As to the question of the date on which the treaty entered into force, the argument put forth in paragraph 192 [482] was pertinent and convincing.

51. Concerning reactions to an impermissible reservation, the analysis in paragraph 193 [483] of the dialectic or causal link between impermissibility, nullity and the absence of effect on the treaty was useful.

52. He agreed with the opinion expressed in paragraph 223 [513] on draft guideline 4.5.4. Paragraph 1 of that draft guideline was acceptable, as was paragraph 2, but a reference should perhaps be inserted at the end to the reservations dialogue; he therefore proposed that paragraph 2 should end with the words “in order to promote the reservations dialogue” (*afin de favoriser le dialogue réservataire*).

53. As to draft guideline 4.6, which simply repeated the wording of article 21, paragraph 2, of the 1969 and 1986 Vienna Conventions, he said that, to continue along the logic of the principle of consent and to make the point more completely and clearly, the draft guideline should provide for an exception to the principles set out in that joint provision of the Vienna Conventions by retaining the second alternative, in which case the square brackets would be removed.

54. Turning to the last section of the report, he said that the postulate according to which the effect of an interpretative declaration was essentially produced through the process of interpretation was correct, but there seemed to be a contradiction between the comment preceding the opinion of Mr. McRae,³¹⁰ cited in paragraph 247 [537], and the opinion itself. Moreover, it was surprising that the draft guidelines were not presented in a logical or chronological order.

³⁰⁹ *Yearbook ... 2006*, vol. I, 2890th meeting, p. 139, para. 10.

³¹⁰ D. M. McRae, “The legal effect of interpretative declarations”, *BYBIL*, 1978, vol. 49, pp. 155–173.

55. The wording of draft guideline 4.7 was acceptable and did not pose any particular problem.

56. The logic underlying draft guideline 4.7.1 was clear and relevant, its wording was acceptable and its structure was balanced; in its second sentence, the criteria for determining how much weight should be given to an interpretative declaration were very useful.

57. The basic substantive question in draft guideline 4.7.2 was how to reconcile the principles of consent and legal stability and certainty, on the one hand, with the limits posed on the principle of consent, on the other. At first glance, the draft guideline might seem acceptable, because it appeared to be based on a balanced application of the principle of good faith. However, in the course of the debate, it had given rise to a number of problems: Sir Michael had expressed serious doubts and had argued that the analysis in paragraphs 255 to 258 [545–548] was not convincing, and Mr. McRae had criticized the draft guideline for not being sufficiently nuanced and for producing distorted results. On closer examination, the scope of draft guideline 4.7.2 did not seem to be in line with that of draft guidelines 2.4.9 and 2.5.12 concerning modification and withdrawal of an interpretative declaration, respectively.

58. Draft guidelines 4.7.3 and 4.7.4 were both acceptable, the latter in that it proposed a clear answer to a long-standing unresolved question.

59. He was in favour of referring to the Drafting Committee all the draft guidelines in the sections of the fifteenth report on invalid reservations and effects of interpretative declarations, approvals, oppositions, silence and reclassifications. The proposal by Sir Michael to delete draft guideline 4.7.2 was too radical. Mr. McRae argued that it should be modified, and his proposal should be considered. The Special Rapporteur acknowledged that the criticism was well founded, but was opposed to the deletion of the draft guideline; for him, the solution would be to modify or limit its scope, as appropriate. That proposal was sensible and acceptable.

60. Mr. NOLTE said that he would focus in his comments on the most important question, namely whether there should be a positive or negative presumption with respect to the severability of an impermissible reservation from the consent of the reserving State to be bound by the treaty. Whereas he agreed with most of the Special Rapporteur's research and analysis, he was not fully persuaded by his conclusion of a positive presumption. One reason for his doubts had been articulated by Mr. Gaja and Sir Michael: the lack of an objective institution for most treaties for determining whether a reservation was actually contrary to the object and purpose of a treaty and was therefore impermissible.

61. He also wondered whether the logic of the human rights treaty bodies could be extended to the general law of treaties. After all, the reason why human rights treaty bodies had arrived at the conclusion that impermissible reservations were void and severable essentially lay in the special nature of human rights treaties. Such treaties had a double characteristic: they usually had a treaty body that

was able to a certain extent to make an objective determination, and they constituted an objective order of values or a special kind of community. Both characteristics spoke in favour of a presumption that a State which consented to be bound by them did not wish to make that consent dependent on the permissibility of its reservations.

62. However, most other treaties did not have that double characteristic of human rights treaties, which defined their nature. That was why he believed that the "nature of the treaty" should be included in any list of criteria for establishing whether a treaty was subject to a positive or negative presumption, as the Special Rapporteur suggested in paragraph 191 [481] of his report. A mere reference to "the object and purpose" of the treaty was insufficient. After all, a treaty might have different objects and purposes, and whereas the presence of an institution for an independent assessment was not always identified as being an essential part of the object and purpose of a treaty, it was clear that such an institution was an essential element that determined the nature of the treaty. He therefore proposed the inclusion of "the nature of the treaty" in any list which served to establish whether a positive or negative presumption of severability should apply. That would make it possible to carefully extend the positive presumption, as it was now recognized for human rights treaties, to other treaties of a similar nature, namely those treaties that protected other common goods or common values and where the permissibility of a reservation, in particular its compatibility with its object and purpose, could be determined objectively. Thus, referring to the nature of the treaty would have the advantage that neither a positive nor a negative presumption would be too strong, and it would leave some leeway for a differentiated development of practice.

63. Another important consideration which made him hesitate to accept a broad positive presumption was that it could have an inappropriate retroactive effect. Sir Michael had already hinted at that problem. A positive presumption that went beyond human rights treaties would be a new rule of international law, a progressive development. However, such a new rule should not necessarily be applied retroactively to reserving States, which could not reasonably expect that the rule would be applied to them. Indeed, the Special Rapporteur demonstrated in his report that the human rights treaty bodies had painstakingly explained, for example in the *Belilos* and *Loizidou* cases, why the reserving States had run the risk that their reservations would be considered to be severable from their consent to be bound by the treaty. Thus, if the Commission accepted that there was a positive presumption beyond human rights treaties, it should be made clear that this presumption did not apply retroactively.

64. A further reason for his doubts concerning a positive presumption had to do with the consequences that such a rule was likely to have in the reality of international relations. For example, if it was assumed that the positive presumption which the Special Rapporteur proposed now had already been adopted by the Commission in 1990, it was likely that the issue would have been raised in the United States during the ratification process, completed in 1992, of the International Covenant on Civil and Political Rights. Members of the United States Congress would probably

have insisted that the United States make it clear that its reservations were the conditions for its consent to be bound by the treaty. Such a clarification would have made it less likely that other States would have formulated objections to the permissibility of certain reservations made by the United States, as they had done. Thus, the effect of a positive presumption in that case would have been the opposite of what could have been expected, namely a more limited reservations dialogue and more reservations of doubtful permissibility which remained unchallenged because other States wanted the United States to be bound by that human rights treaty. In such a situation, a treaty body would have less *opinio juris* to rely on for a possible conclusion that the reservation was impermissible. He wondered whether such bodies always had enough authority to declare a reservation to be impermissible without the support of other States. In any event, such bodies would probably hesitate to declare a reservation impermissible if the reserving State had made it clear that its consent to be bound by the treaty was dependent on the reservation.

65. On the other hand, a positive presumption would probably have the opposite effect on States whose legislature was less determined than the one in the United States and which were more inclined, for various reasons, to accede to certain treaties. Such States would hesitate to expressly formulate the condition that their consent to be bound was dependent on their reservations. A positive presumption might incite other States to formulate objections, thus casting even more doubt on the validity of the reservations concerned. A positive presumption might have the—clearly unintended—effect of privileging powerful States and putting weak States under additional pressure. It would also raise the problem for independent decision makers and third parties of how to apply equal standards with respect to similar reservations, some of which were expressly considered to be conditions for consent to be bound, whereas others were not. A negative presumption had the virtue of not forcing such a question to be answered immediately and of leaving the situation somewhat ambiguous so that the reservations dialogue had time to resolve differences without an immediate confrontation.

66. He was aware that some of his arguments were not purely doctrinal, but since the Commission was confronted with the question of whether it should engage in progressive development, or at least in progressive clarification, it should also consider the consequences of a rule that seemed seductive for lawyers, with their inclination to favour legal security, and for international lawyers, who were inclined to promote the progressive development of international law by moving from subjective assessments by individual States to objective determinations by independent third party decision makers. He shared both inclinations, but cautioned against overburdening the consent of States to be bound by a treaty with “objective” considerations. Although he shared the Special Rapporteur’s declared intention to find a middle way between the two approaches, he thought that a true middle way would be to refer mainly to the “nature of the treaty” and to leave open the possibility of further development.

67. He agreed with Mr. Gaja and Sir Michael that draft guideline 4.7.2 went too far in formalizing a binding effect of an interpretative declaration. In his view, draft

guideline 4.7.2 was inconsistent with the limited effects which the Special Rapporteur attributed to interpretative declarations compared to reservations.

68. Mr. CANDIOTI said that it was not the task of the Commission to consider whether the rule set out in draft guideline 4.5.3 was retroactive. In the framework of its work on reservations to treaties, the Commission was not codifying rules of international law, nor was it promoting progressive development: it was enunciating guidelines, in other words, non-binding rules (“soft law”). It should be borne in mind that its objective was to produce a Guide to Practice.

69. Mr. MELESCANU said that with the fifteenth report on reservations to treaties, the Commission was at the heart of the matter. The previous reports had focused more on the development, clarification and drafting of guidelines based on the more or less explicit rules of the 1969 and 1986 Vienna Conventions. As these Conventions were silent on the questions under consideration, the aim at present was to elaborate rules—or rather guidelines, as noted by Mr. Candiotti.

70. With regard to the effects of the nullity of the reservation on the consent of its author to be bound by the treaty, two alternatives were open to the Special Rapporteur: either severability of the impermissible reservation from the consent to be bound by the treaty, or the idea that if reservations were deemed incompatible with the object and purpose of the treaty, the consent of the reserving State was not valid, and that State was not party to the international instrument. The report had provided an impressive amount of information on those questions drawn from international practice: declarations of States, treaty provisions, decisions of international bodies and opinions of experts, all of which were arguments for or against one of the two options. Without favouring one or the other, the Special Rapporteur proposed a pragmatic approach by setting out a relative and rebuttable presumption according to which, in the absence of a contrary intention of the party concerned, the treaty applied to the State or the international organization that was the author of the impermissible reservation, notwithstanding the reservation. In that connection, the double compromise proposed by Mr. Nolte did not seem to be appropriate for a Guide to Practice, which must be pragmatic and functional. It would be preferable to retain the ingenious procedural solution proposed by the Special Rapporteur. Draft guideline 4.5.3 could be referred to the Drafting Committee and finalized on the basis of the text proposed in paragraph 191 [481] of the report.

71. With regard to draft guideline 4.7.2, he fully agreed that an interpretative declaration was a unilateral declaration expressing its author’s intention to accept a certain interpretation of the treaty or its provisions. In conformity with the principle of good faith, the expectation that the depositary had created with the other contracting parties must be respected. However, nothing prevented a sovereign State from changing its position, provided that it did so following the rules enunciated in the Guide to Practice. In view of the above, he proposed the insertion, at the end of draft guideline 4.7.2, of the following phrase: “until after officially withdrawing or modifying it in conformity with

draft guidelines 2.4.9 (Modification of an interpretative declaration) and 2.5.12 (Withdrawal of an interpretative declaration)” [qu’après l’avoir officiellement retirée ou modifiée en conformité avec les directives 2.4.9 (Modification d’une déclaration interprétative) et 2.5.12 (Retrait d’une déclaration interprétative)]. Finally, he agreed that draft guideline 4.7.1 was necessary, even more so since the judgment rendered by the ICJ in the *Maritime Delimitation in the Black Sea* case, which was not consistent with the logic of the Commission’s work on guidelines for reservations. An interpretative declaration must be assessed taking due account of the approval of and opposition to it by the other contracting parties. For that reason, it was absolutely scandalous to affirm, as the Court had done in that case, that an interpretative declaration had no effect on the interpretation of the Court. That was tantamount to depriving interpretative declarations of any usefulness. He was in favour of referring to the Drafting Committee the draft guidelines contained in the sections of the report on invalid reservations and effects of interpretive declarations, approvals, oppositions, silence and reclassifications.

72. Mr. KAMTO commended the Special Rapporteur for the excellent quality of the last sections of his fifteenth report on reservations to treaties; they did not pose any particular problem. He had just a few brief comments, essentially concerning draft guideline 4.5.3 and draft guideline 3.3.4. Draft guideline 4.5.3 introduced a particularly important rule in terms of its legal consequences. Although it did not give rise to any scientific objection, he agreed with those members who had contested the conclusions stemming from the theory of severability. In the area of treaties, it was the expression of consent to be bound that formed the basis of a State’s commitment or obligation. However, the wording of draft guideline 4.5.3 clearly showed that the assessment of the validity of the reservation and thus of its nullity depended on the other States parties or a competent third body. The other States could infer from that assessment that, as the contrary intention of the reserving State had not been established, the treaty was applicable to it in its entirety, notwithstanding its reservation; that would be a source of conflict.

73. However, even if the reservation was impermissible, it could not be ignored that at the time that it was formulated by the reserving State, the latter considered it to be permissible and that in any case the reservation was the condition of its consent to be bound by the treaty. The risk of the instability of the treaty could not be allowed to prevail over what constituted the cornerstone, the very basis of the existence of the treaty, namely the consent of the State to be bound. There was, of course, the safety net of the contrary intention, but who better than the author could determine its intention in a particular case? The safety net could be strengthened by modifying the phrase at the end of draft guideline 4.5.3 to read: “unless a contrary intention is affirmed by the reserving State or established by a competent body” [sauf si l’intention contraire est affirmée par l’État auteur de la réserve ou établie par une instance compétente]. That would rule out a self-assessment, and a third body would intervene in the event of a challenge. However, it was also conceivable—to continue in the logic of the foundation of treaty law, which was the expression of consent to be bound rather than self-assessment—that another State party to

the treaty might ask the reserving State whether that was in fact its intention and, if the reserving State declined to reply or in the event of a challenge, that other State might request that the matter be referred to an impartial body.

74. With regard to draft guideline 3.3.4, he noted that the title referred to acceptance, but the content had more to do with the formulation of a reservation. To bring the content into line with the title, he proposed that the draft guideline be amended to read:

“A reservation formulated by a State or an international organization that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and purpose is deemed to be valid if none of the other contracting States or contracting organizations objects to it after having been expressly consulted by the depositary.” [Une réserve interdite expressément ou implicitement par le traité, ou incompatible avec son objet et son but, formulée par un État ou une organisation internationale, est réputée valide si aucun des États contractants ou organisations contractantes n’y fait objection après consultation expresse par le dépositaire.]

75. Mr. HMOUD said that the last two sections of the fifteenth report on reservations to treaties were well researched. They detailed the history of the Vienna Conventions and scholarly work on the effects of invalid reservations and on interpretative declarations and provided practical and intellectually consistent draft guidelines. With the conclusion of consideration of those two questions, the Guide to Practice would be nearly finalized. It would be useful to governments, international organizations, lawyers and all those involved in elaborating and applying treaties. The Guide would clarify the rules of treaty reservations and assist in overcoming uncertainties.

76. It was clear from the *travaux préparatoires* of the Vienna Conventions (implicitly) that the Commission and the drafters had been unable to make a decision on the effects of invalid reservations. That was not surprising, given that the implementation of treaty relations had always been—and still was—dependent on the parties to the treaty themselves and not on a dispute settlement body for assessing the validity of a reservation. The parties themselves decided how to treat an invalid reservation in their treaty relations, including the effect that such a reservation had on the reserving State’s consent to be bound by the treaty. The silence of the Vienna Conventions on that point had led to divergent practice among States and international organizations, including the depositaries, with significant practical consequences. Objections with “super-maximum” effect had developed as a tool to deal with such reservations, even when the reservation was not actually against the object and purpose of the treaty or when the objecting State decided to determine what it considered to be the treaty’s object and purpose.

77. Treaty monitoring bodies were totally dependent on the concept of invalid reservation in dealing with reservations, insofar as the reserving State was left with no option but to accept that it was bound by the treaty without the benefit of its reservations and the Vienna Conventions strictly limited the possibility of withdrawal. The

principle of consent was central to treaty relations: the fact that reservations were only allowed when the reserving State consented to be bound by the treaty clearly showed that the reservation was an integral part of the notification by that State of such consent. That was a condition for the reserving State's acceptance of the treaty. The State should not be compelled to be bound by the treaty if it could not benefit from its reservation. At the same time, the stability of treaty relations required that, in the case of an invalid reservation, withdrawal from the treaty should not be encouraged. There was no easy solution to the problem; establishing a presumption of the consent of the reserving State to be bound by the treaty without the benefit of its invalid reservation was insufficient.

78. Addressing the problem was primarily a matter of policy. Putting forward concrete arguments, the Special Rapporteur proposed to act on the rebuttable presumption that a State had consented to be bound without the benefit of its reservations. However, that solution, although generally neutral, only reflected the position of some States and international organizations. According to the practice of other States and depositaries as well as judicial pronouncements at variance with that approach, the invalidity or invalidation of the reservation undermined the consent of the State to be bound by the treaty. It was one thing to read into the common intention of the drafters when interpreting a treaty, and another to read into the presumed intention of a single State. The consent to be bound, with or without the benefit of the reservation, was a matter that should be left for the reserving State to decide, not for a body which it had not entrusted with interpreting its will and certainly not for the other States parties to the treaty.

79. With the inherent difficulty of interpreting the presumed intention of the State, resort would be more frequent to elements unrelated to the will of the State, such as the nature of the treaty and its object and purpose, in other words criteria taken into consideration in draft guideline 4.5.3 to determine whether the reserving State intended to be bound by a treaty without the benefit of its reservation. Those criteria were based on the pronouncements of certain treaty bodies which seemed to place emphasis on the nature of the treaty rather than on the intention of the author of the reservation. According to the presumption retained by the Special Rapporteur, a reserving State would be deemed to have accepted to be bound by a treaty unless it demonstrated otherwise; that would place it at an untenable disadvantage if its reservation was not in conformity with the object and purpose of the treaty. Although the Special Rapporteur argued that the presumption of consent to be bound of the State that was the author of the invalid reservation was not meant to encourage the practice of objections with "super-maximum" effect, it actually did, because States and bodies which resorted to it would have no reason not to do so.

80. That could be avoided by not making any presumption, one way or the other, and by determining the reserving State's intention on the basis of a set of criteria, including most of those listed in draft guideline 4.5.3. It should be stressed that the issue of the State's intention would not arise unless there was a dispute concerning the validity of a reservation, and provided that a body existed to interpret the will of that State. Such a body would interpret the

intention of the reserving State without proceeding from any presumption, but rather on the basis of the relevant criteria, such as the reserving State's acts in relation to its reservation, its declarations and its reactions, or lack thereof, to objections with "super-maximum" effect, or its practice with other treaties to which it had formulated similar reservations. If the body was not entrusted with interpreting the will of the State, it could only make a pronouncement on the validity of the reservation, not on the consent to be bound without the benefit of the reservation. In such a case, and with a view to promoting progressive development, the Commission could propose that a State whose reservation was declared invalid by a competent body was under an obligation to indicate, within a certain period of time, whether it intended to be bound by the treaty with or without the benefit of its reservation. That clarification would be taken into account by the other parties to the treaty, which could determine their treaty relations with that State accordingly.

81. The presumption enunciated in draft guideline 4.5.3 did not add much to the stability of treaty relations, because a reserving State could still show that it had intended to be bound by a treaty without the benefit of its reservation. In such a case, the treaty relations between that State and the other parties, from the moment it became a party until the moment it declared that its consent to be bound did not exist, would still be void, with all the undesired consequences that this entailed. The suggestion not to make a presumption but to determine the will of the reserving State on the basis of a set of criteria would not make much difference in terms of treaty stability if the consent to be bound was found to be contingent on the benefit of an invalid reservation. However, that option had the advantage of preserving the principle of consent in treaty relations. It did not privilege either the defence of the principle of severability of an invalid reservation from the reserving State's consent, or the argument that the invalid reservation was part of consent. If one purpose of the positive presumption was to encourage the reserving State to clarify its position on its consent to be bound once its reservation had been objected to or had been considered invalid, that would be achieved without the presumption by using the criterion of intention, which took into account the State's subsequent practice, its reactions to objections and its declarations. The proposed approach also encouraged the reservations dialogue, as the reserving State would have an interest in clarifying whether or not it consented to be bound by the treaty with or without the benefit of its reservation. Instead of treating all cases with one hypothetical solution until proof of the contrary, as was done with positive presumption, the proposed approach differentiated from the outset between different situations involving reservations.

82. In any event, if the Commission wanted to retain positive presumption, it should also consider granting the State whose reservation had been declared invalid by a treaty body the right to withdraw from the treaty. Withdrawal was limited under article 56 of the Vienna Conventions which, as had been seen, did not cover the effects of invalid reservations. Accordingly, it could not be argued that such a right was inconsistent with those instruments. The right to withdraw would definitely counterbalance the effect that positive presumption had on many treaty

regimes. It should also be noted that the object and purpose of the treaty was not an element that was independent of the reserving State's intention, and for the reasons explained earlier, it should not be used to judge intention. The intention of the State should be deduced from its conduct, its pronouncements and its acts, not from a regime that was distinct from its personality.

83. He had two brief points to make on the last section of the report. With regard to draft guideline 4.7.4 (Effects of a conditional interpretative declaration), he agreed that such declarations were reservations in terms of their effects and that draft guidelines 4.1 to 4.6 applied to them, with the exception, in his view, of draft guideline 4.5.3. Clearly, a State that formulated a conditional interpretative declaration was making its intention to be bound by the treaty conditional upon a certain interpretation of that treaty. If, for whatever reason, that interpretation was invalid, it could not be said that the State was deemed to be bound by the treaty of its own will or that a set of criteria must be applied to determine its intention. That intention had been clear from the outset, when it had formulated its interpretation: not to be bound without the benefit of its declaration. That was not a matter of acceptance by other States, but a condition for consent which, by its nature, undermined such consent.

84. On the validity of an interpretative declaration in respect of its author, it seemed logical that when a State was granted the right to modify or withdraw an interpretative declaration (draft guidelines 2.4.9 and 2.5.12), it had the right to invoke a contrary interpretation, provided that this right was not unrestricted. He did not see why the Commission should not adopt the approach taken in the 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,³¹¹ namely that the right to revoke a declaration was a function of the extent to which the other parties relied on the declaration. He therefore supported Mr. McRae's suggestion to amend the draft guideline concerned and to provide that the author of the declaration or the party approving it could not invoke a contrary interpretation *vis-à-vis* the party that had relied on it in its treaty relations with the interpreting State. He recommended that the draft guidelines should be referred to the Drafting Committee, pending a decision by the Commission on how to proceed with the content of draft guideline 4.5.3.

The meeting rose at 12.55 p.m.

3067th MEETING

Tuesday, 20 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, 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. Wako, 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]

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the last two sections of the fifteenth report on reservations to treaties (A/CN.4/624/ and Add.1–2).
2. Mr. VÁZQUEZ-BERMÚDEZ said that, in general, he endorsed the pragmatic and sound solutions proposed by the Special Rapporteur in the draft guidelines contained in the last two sections of his fifteenth report.
3. With reference to the section on invalid reservations, he endorsed the basic thrust of draft guidelines 4.5.1 and 4.5.2, which, as the Special Rapporteur had demonstrated, were supported by international jurisprudence and practice. He would suggest that the two draft guidelines be merged under the title "Nullity and absence of legal effects of an invalid reservation". The text of the new draft guideline might read:

"A reservation that does not meet the conditions of formal validity and permissibility set out in Parts II and III of the Guide to Practice is null and void and is therefore devoid of legal effects."

Furthermore, since the current title of section 4.5 of the Guide to Practice (Effects of an invalid reservation) seemed to contradict the content of the subsequent draft guidelines, which said that an invalid reservation had no effects, the title "Consequences of an invalid reservation" would be more appropriate. In connection with the material in this section, it should be recalled that the Commission had already adopted guideline 3.2 on assessment of the permissibility of reservations and paragraph (1) of the commentary thereto.

4. Following 15 years of in-depth analysis, during which time there had been important developments in jurisprudence and practice, the Special Rapporteur presented the Commission with draft guideline 4.5.4 (Reactions to an impermissible reservation) concerning treaty relations between the author of an invalid reservation and other contracting parties—a complex and important subject on which the 1969 and 1986 Vienna Conventions were silent. After a detailed and well-argued presentation of the facts, the Special Rapporteur proposed a solution, which he referred to as a middle ground between two irreconcilable positions: viewing the author of the invalid reservation as a contracting party without the benefit of the reservation or viewing the reservation as a condition *sine qua non* for

³¹¹ *Yearbook ... 2006*, vol. II (Part Two), p. 161, para. 176.