United Nations A/CN.4/614

General Assembly

Distr.: General
2 April 2009
English
Original: French

International Law Commission
Sixty-first session
Geneva, 4 May-5 June and 6 July-7 August 2009

Fourteenth report on reservations to treaties

By Alain Pellet, Special Rapporteur

Contents

09-29068 (E) 010609 220609

I. Introduction

1. The eleventh report on reservations to treaties (A/CN.4/574), submitted at the fifty-eighth session of the Commission, contained a brief summary of the work of the Commission on the subject (paras. 1-43). In a continuation of this tradition, deemed helpful by the members of the Commission, this year's report summarizes briefly the lessons to be drawn from the completion of the consideration of the tenth report in 2006, and from the consideration of the eleventh, twelfth and thirteenth reports in 2007 and 2008 by the Commission and by the Sixth Committee of the General Assembly. These last three reports constitute a single text, all three of them relating to the procedure for the formulation of reactions to reservations (acceptance and objection) and to interpretative declarations (approval, opposition, reclassification and silence).[1] This summary is supplemented by a presentation of the main developments concerning reservations that have occurred in recent years and have come to the attention of the Special Rapporteur.

A. Tenth report on reservations to treaties and the outcome

1. Completion of consideration of the tenth report by the Commission

2. At its fifty-eighth session the Commission completed its consideration of the second part of the tenth report on reservations to treaties[2] which, owing to a lack of time, had not been discussed in depth at the preceding session.[3] This part of the tenth report, devoted entirely to the question of the validity of reservations, related to the concept of the object and purpose of the treaty, competence to assess the validity of reservations and the consequences of the invalidity of a reservation. The Commission also had before it a note by the Special Rapporteur on draft guideline 3.1.5 (Definition of the object and purpose of the treaty)[4] in which he proposed two alternative formulations, taking into account the preliminary discussion that had taken place at the fifty-seventh session (2005).[5]

3. The discussion of the definition of the object and purpose of a treaty was fruitful and productive.[6] The idea of formulating a definition was favourably received, although the wording gave rise to questions and doubts. Nevertheless, the Commission and the Special Rapporteur considered that the three alternative versions of draft guideline 3.1.5 served as a basis for a definition, bearing in mind the element of subjectivity inherent in the concept.

4. Draft guidelines 3.1.7 to 3.1.13, which provide specific examples of reservations that are incompatible with the object and purpose of the treaty, generally met with support among the members of the Commission and the pragmatic approach they represented was deemed judicious.

---

[1] See the thirteenth report on reservations to treaties (A/CN.4/600), para. 282.

[2] A/CN.4/558/Add.1 and Corr.1 and 2 and Add.2.

[3] See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 143, para. 345. See also the eleventh report on reservations to treaties (A/CN.4/574), para. 28.

[4] A/CN.4/572 and Corr.1.

[5] See A/CN.4/SR.2856, pp. 8-27, A/CN.4/SR.2857, pp. 15-18 and A/CN.4/SR.2858, pp. 1-31.

[6] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 144.

5. The Commission welcomed draft guidelines 3.2 and 3.2.1 to 3.2.4, on competence to assess the validity of reservations, including that of dispute settlement bodies and treaty monitoring bodies.[7]

6. With regard to the effects of the invalidity of a reservation, the Commission referred draft guidelines 3.3 and 3.3.1 to the Drafting Committee, indicating that there was no reason to distinguish between the different types of invalidity in article 19 of the Vienna Conventions and that invalidity applied only within the restricted context of treaty law and did not involve engaging the international responsibility of its author. However, the Commission preferred to defer its consideration of draft guidelines 3.3.2 to 3.3.4 pending its consideration of the effect of reservations, objections to reservations and acceptances of reservations.[8] The Special Rapporteur supported this position.[9]

7. The Commission decided to refer draft guidelines 3.3.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.[10]

8. In addition, the Commission adopted seven draft guidelines[11] and their commentaries which had been referred to the Drafting Committee at the preceding session.[12]

2. Consideration of chapter VIII of the 2006 report of the Commission by the Sixth Committee

9. Chapter VIII of the Commission's report on the work of its fifty-eighth session[13] deals with reservations to treaties. As is customary, a very brief summary of it is given in chapter II[14] and the "specific issues on which comments would be of particular interest to the Commission" are set out in Chapter III. In the perspective of the meeting it was planning to have with experts in the field of human rights in order to hold a discussion on issues relating to reservations, the Commission wished to know the views of Governments are necessary or useful adjustments to the "Preliminary conclusions" of 1997.[15]

---

[7] Ibid., paras. 130-136 and 153-155.

[8] Ibid., para. 139.

[9] Ibid., para. 157.

[10] Ibid., para. 103.

[11] Draft guidelines 3.1 (Permissible reservations), 3.1.1 (Reservations expressly prohibited by the treaty), 3.1.2 (Definition of specified reservations), 3.1.3 (Permissibility of reservations not prohibited by the treaty) and 3.1.4 (Permissibility of specified reservations). In addition, the Commission provisionally adopted draft guidelines 1.6 (Scope of definitions) and 2.1.8 [2.1.7 bis] (Procedure in case of manifestly invalid reservations). For the text and commentary on these draft guidelines, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 324-361, para. 159.

[12] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), p. 143, para. 345. See also the eleventh report on reservations to treaties (A/CN.4/574), para. 30.

[13] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), paras. 92-159.

[14] Ibid., para. 17.

[15] Ibid., para. 29. For the preliminary conclusions, see *Yearbook of the International Law Commission*, 1997, Vol. II, second part, p. 57, para. 157.

10. The idea of exchanging views with human rights experts, including the monitoring bodies, met with wide support in the Sixth Committee.[16] It was maintained that the establishment of a special regime relating to reservations to human rights treaties was not desirable.[17] Other delegations wished the preliminary conclusions to be reviewed by the Commission, particularly with respect to the role, functions and powers of the monitoring bodies. In the view of some delegations, views consistently expressed by those bodies regarding the validity of a certain category of reservations could become authoritative.[18]

11. On the whole, the work of the Special Rapporteur was favourably received.[19] However, in one view the work of the Commission and its Special Rapporteur was too far advanced in relation to the actual practice followed by States, and could lead to amendment of the Vienna Conventions.[20]

12. A number of delegations felt that the question of reservations incompatible with the object and purpose of a treaty was the most important aspect of the topic.[21] Nevertheless, it was maintained that the proposed definition, which was too loose, would hardly contribute to clarifying the definition of that concept.[22] According to another view, definition of the object and purpose of a treaty was necessary,[23] but must be sufficiently broad that it could be applicable on a case-by-case basis in accordance with the rules of treaty interpretation.[24] Few delegations commented on draft guidelines 3.1.7 to 3.1.13 designed to provide more specific examples of reservations incompatible with the object and purpose of a treaty.[25]

13. Regarding the draft guidelines on competence to assess the validity of reservations, some delegations pointed out that although their overall approach was commendable,[26] they lacked consistency.[27] It was recalled that the competence of monitoring bodies could stem only from the functions assigned to them in the treaty that itself established them.[28] Some States expressed doubts as to the competence of monitoring bodies. in that respect, and asserted that it was not their task to assess

---

[16] Sweden (A/C.6/61/SR.16, para. 44) Austria (ibid., para. 48); Netherlands (ibid., para. 57); Portugal (ibid., para. 83); Japan (ibid., para. 87); Chile (A/C.6/61/SR.19, para. 6); New Zealand (ibid., para. 11). See, however, United Kingdom (A/C.6/61/SR.16, para. 91).

[17] Sweden (A/C.6/61/SR.16, para. 46); Belgium (ibid., para. 69); Romania (A/C.6/61/SR.19, para. 61).

[18] Netherlands (A/C.6/61/SR.16, para. 57). See, however, Canada (ibid., para. 58).

[19] Japan (A/C.6/61/SR.16, para. 86); Germany (ibid., para. 88); Russian Federation (A/C.6/61/SR.18, para. 72); New Zealand (A/C.6/61/SR.19, para. 11).

[20] Portugal (A/C.6/61/SR.16, paras. 76 and 78).

[21] Sweden (A/C.6/61/SR.16, para. 42).

[22] Sweden (A/C.6/61/SR.16, para. 42); Netherlands (ibid., para. 55); United Kingdom (ibid., para. 92); Israel (A/C.6/61/SR.17, para. 16).

[23] Spain (A/C.6/61/SR.16, para. 73).

[24] Mexico (A/C.6/61/SR.16, para. 47).

[25] See for example United Kingdom (A/C.6/61/SR.16, para. 92).

[26] Spain (A/C.6/61/SR.16, para. 74); Romania (A/C.6/61/SR.19, para. 61).

[27] Austria (A/C.6/61/SR.16, paras. 51-53); Spain (ibid., para. 74); Israel (A/C.6/61/SR.17, para. 20).

[28] France (A/C.6/61/SR.17, para. 2); United States of America (ibid., para. 8); Israel (ibid., paras. 17-19). Although the Special Rapporteur does not wish to start an argument with the States which held this view, he does wish to state as clearly as possible that they are implicitly attributing to him intentions he did not have and that he never claimed that the competence of those bodies with respect to reservations could be based on a legal foundation other than the treaty establishing them (see tenth report on reservations to treaties, A/CN.4/558/Add.2, paras. 169-171; second report on reservations to treaties, A/CN.4/477/Add.1, paras. 209 and 234; and *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 111).

the validity of reservations.[29] In one view, only the States parties concerned possessed such competence.[30] Greater caution was also urged with regard to the functions of the depositary and its role with respect to manifestly invalid reservations,[31] particularly because of the vagueness of the concept of object and purpose of a treaty.

14. With regard to the consequences of the non-validity of a reservation, it was said that this was an issue central to the study.[32] According to some delegations, such reservations must be regarded as null and void,[33] but the view was expressed that the specific consequences of that nullity should be specified.[34] Doubts were expressed regarding the desirability of draft guideline 3.3.4 regarding the unanimous acceptance of an invalid reservation.[35]

B. Eleventh and twelfth reports on reservations to treaties and the outcome

1. Consideration of the eleventh and twelfth reports by the Commission

15. The eleventh report on reservations to treaties had been submitted at the fifty-eighth session, but the Commission decided to consider it at its fifty-ninth session, owing to a lack of time.[36] Therefore in 2007, the Commission had before it the eleventh report on reservations to treaties which "in fact constitutes the second part of the eleventh report (A/CN.4/574), from which it carries on".[37]

16. The majority of the draft guidelines relating to the formulation of objections and the withdrawal and modification of objections proposed in the eleventh report were approved without objection by the Commission.[38]

17. However, there were major divergences of views among members of the Commission as to the author of an objection (draft guideline 2.6.5), including as to whether any State or international organization that was entitled to become a party to the treaty might also formulate an objection to a reservation. The view was expressed that such States and international organizations did not have the same rights as contracting States and contracting international organizations and might therefore not formulate objections in the strict sense of the term. Therefore, the statements formulated by States and international organizations which were only

---

[29] China (A/C.6/61/SR.16, para. 63). See also Russian Federation (A/C.6/61/SR.18, para. 73) or Australia (A/C.6/61/SR.19, para. 17).

[30] Ethiopia (A/C.6/61/SR.14, para. 94).

[31] Ethiopia (ibid.); Canada (A/C.6/61/SR.16, para. 60); Spain (ibid., para. 72); United Kingdom (ibid., para. 93); South Africa (ibid., para. 96); France (A/C.6/61/SR.17, para. 1); Poland (ibid., para. 13); Russian Federation (A/C.6/61/SR.18, para. 72); Australia (A/C.6/61/SR.19, para. 17). See also China (A/C.6/61/SR.16, para. 64).

[32] France (A/C.6/61/SR.17, para. 5).

[33] Sweden (A/C.6/61/SR.16, para. 43); Austria (ibid., para. 51); France (A/C.6/61/SR.17, para. 7). See, however, China (A/C.6/61/SR.16, paras. 65-67).

[34] Canada (A/C.6/61/SR.16, para. 59).

[35] Portugal (A/C.6/61/SR.16, para. 79) and Austria (A/C.6/61/SR.16, para. 54).

[36] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 43.

[37] Twelfth report on reservations to treaties, A/CN.4/584.

[38] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 102-105.

entitled to become parties to the treaty, should not be referred to as objections. According to that view, to provide for such a possibility would create a practical problem for, where an open treaty was concerned, the parties thereto might not have been aware of some objections.

18. However, according to the majority opinion, the provisions of article 20, paragraphs 4 (b) and 5, of the Vienna Conventions not only in no way excluded, but indeed implied, the entitlement of States and international organizations that were entitled to become parties to the treaty to formulate objections. Article 21, paragraph 3, of the Vienna Conventions on the effects of objections on the application of the treaty in cases where the author of the objection had not opposed the entry into force of the treaty between itself and the reserving State provided for no limitation on the potential authors of an objection. Furthermore, as article 23, paragraph 1, of the 1986 Convention clearly states, reservations, express acceptances of and objections to reservations must be communicated not only to the contracting States and contracting organizations but also to "other States and international organizations entitled to become parties to the treaty". Such notification had meaning only if those other States and other international organizations could, in fact, react to the reservation by way of an express acceptance or an objection. In the opinion of the Commission, that approach alone was consistent with the letter and spirit of draft guideline 2.6.1, which defined objections to reservations not on the basis of their legal effects but according to the effects *intended* by the objecting States or international organizations.

19. Concerns were also expressed as to whether pre-emptive or late objections could be formulated (draft guidelines 2.6.14 and 2.6.15). The view was expressed that such objections did not have the effects of an objection per se. Therefore, such phenomena, which did occur in State practice, should be referred to differently.

20. The draft guidelines on procedure did not raise any concerns and were widely endorsed by members of the Commission.[39] In particular, the introduction of a guideline on the statement of reasons for objections and the suggestion by the Special Rapporteur that a similar draft guideline should be proposed on the reasons for reservations[40] were welcomed.

21. Few concerns were raised with respect to the draft guidelines concerning acceptance of reservations. Such concerns were often of an editorial nature or related to the translation of the draft guidelines into languages other than French.[41]

22. The Commission decided to refer draft guidelines 2.6.3 to 2.6.6, 2.6.7 to 2.6.15, 2.7.1 to 2.7.9, 2.8 and 2.8.1 to 2.8.12 to the Drafting Committee, and to review the wording of draft guideline 2.1.6.[42]

---

[39] Ibid.

[40] See note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations", A/CN.4/586.

[41] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 141.

[42] Ibid., para. 45.

23. The Commission also adopted nine draft guidelines[43] that had been referred to the Drafting Committee in 2006[44] together with commentaries thereto.[45]

24. Pursuant to General Assembly resolution 61/34 of 4 December 2006, the Commission convened a meeting with representatives of United Nations human rights treaty bodies. The meeting took place on 15 and 16 May 2007. The following bodies were represented: the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee against Torture; the Committee on the Rights of the Child; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on Migrant Workers; the Council of Europe (European Court of Human Rights and the Committee of Legal Advisers on Public International Law (CAHDI)); and the Subcommission on the Promotion and Protection of Human Rights. The meeting provided an opportunity for a fruitful exchange of views that was welcomed by all participants.[46] There was consensus among representatives of human rights treaty bodies and some members of the Commission on the lack of a special regime applicable to reservations to human rights treaties which, like all other treaties, continued to be governed by the Vienna Conventions on the law of treaties and by individual norms and rules provided for under a particular treaty. However, there might arise under human rights treaties specific issues calling for specific solutions, such as whether treaty monitoring bodies had the power to rule on reservations formulated by States parties.

2. Consideration of chapter IV of the 2007 report of the Commission by the Sixth Committee

25. Chapter IV of the Commission's report on the work of its fifty-ninth session[47] deals with the topic of reservations to treaties. As is customary, a very brief summary is given in chapter II[48] and "specific issues on which comments would be of particular interest to the Commission" are set out in chapter III. In 2007, the Commission posed the following four questions on the invalidity of reservations and the effects thereof:

> "(a) What conclusions do States draw if a reservation is found to be invalid for any of the reasons listed in article 19 of the 1969 and 1986 Vienna Conventions? Do they consider that the State formulating the reservation is still bound by the treaty without being able to enjoy the benefit of the reservation? Or, conversely, do they believe that the acceptance of the

---

[43] Draft guidelines 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty), 3.1.6 (Determination of the object and purpose of the treaty), 3.1.7 (Vague or general reservations), 3.1.8 (Reservations to a provision reflecting a customary norm), 3.1.9 (Reservations contrary to a rule of *jus cogens*), 3.1.10 (Reservations to provisions relating to non-derogable rights), 3.1.11 (Reservations relating to internal law), 3.1.12 (Reservations to general human rights treaties) and 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty).

[44] See para. 7 above.

[45] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 154.

[46] For a more detailed account of this meeting, see the annex to the present report.

[47] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 34-154.

[48] Ibid., para. 13.

reserving State is flawed and that that State cannot be considered to be bound by the treaty? Or do they favour a compromise solution and, if so, what is it?

"(b) Are the replies to the preceding questions based on a position of principle or are they based on practical considerations? Do they (or should they) vary according to whether the State has or has not formulated an objection to the reservation in question?

"(c) Do the replies to the above two sets of questions vary (or should they vary) according to the type of treaty concerned (bilateral or normative, human rights, environmental protection, codification, etc.)?

"(d) More specifically, State practice offers examples of objections that are intended to produce effects different from those provided for in article 21, paragraph 3 (objection with minimum effect), or article 20, paragraph 4 (b) (maximum effect), of the Vienna Conventions, either because the objecting State wishes to exclude from its treaty relations with the reserving State provisions that are not related to the reservation (intermediate effect), or because it wishes to render the reservation ineffective and considers the reserving State to be bound by the treaty as a whole and that the reservation thus has no effect ("super-maximum" effect). The Commission would welcome the views of States regarding these practices (irrespective of their own practice)."[49]

26. Some States replied in writing to these questions[50] while others responded to them in greater[51] or less[52] detail during the debates of the Sixth Committee.

27. Delegations reiterated their support for the work of the Commission and for its Special Rapporteur[53] although some expressed concern that the draft guidelines and the commentaries thereto[54] were too complex.

28. The difficulty of defining the object and purpose of a treaty was stressed once again.[55] Some States generally endorsed the Commission's approach, as reflected in draft guidelines 3.1.5 and 3.1.6[56] and in the draft guidelines intended to provide

---

[49] Ibid., para. 23

[50] The Czech Republic, Mauritius and South Africa.

[51] Germany (A/C.6/62/SR.19, paras. 21-27); Sweden (A/C.6/62/SR.22, paras. 27-30); France (A/C.6/62/SR.23, paras. 64-67); Romania (A/C.6/62/SR.24, paras. 16 and 17); Japan (ibid., paras. 88-90); Belgium (A/C.6/62/SR.25, paras. 20-22); Greece (ibid., paras. 28 and 29).

[52] India (A/C.6/62/SR.22, para. 37); Austria (ibid., para. 50); Egypt (ibid., para. 66); Hungary (A/C.6/62/SR.23, para. 38); Belarus (ibid., para. 43).

[53] Canada (A/C.6/62/SR.19, para. 53); Sweden (A/C.6/62/SR.22, para. 27); India (ibid., para. 37); Germany (ibid., paras. 78 and 79); Hungary (A/C.6/62/SR.23, para. 37); Czech Republic (ibid., para. 52); Cuba (ibid., para. 72); New Zealand (A/C.6/62/SR.25, para. 11).

[54] Italy (A/C.6/62/SR.22, para. 85); Hungary (A/C.6/62/SR.23, para. 37); Poland (A/C.6/62/SR.26, para. 17).

[55] Austria (A/C.6/62/SR.22, para. 40). See also United Kingdom (A/C.6/62/SR.24, para. 56) and New Zealand (A/C.6/62/SR.25, para. 11).

[56] Austria (A/C.6/62/SR.22, paras. 40 and 41); Belarus (A/C.6/62/SR.23, para. 46); Cuba (A/C.6/62/SR.24, para. 72); New Zealand (A/C.6/62/SR.25, para. 11); Slovakia (A/C.6/62/SR.26, para. 15). See, however, United States of America (A/C.6/62/SR.22, para. 87); United Kingdom (A/C.6/62/SR.24, paras. 57-59); Republic of Korea (A/C.6/62/SR.26, para. 2).

examples of the types of reservations that were incompatible with the object and purpose of the treaty,[57] despite some of the criticisms and suggestions made.[58]

29. The draft guidelines on objections and the formulation of objections were welcomed by the delegations which spoke on that issue. It was also stated that, while a State might raise an objection for any reason whatsoever,[59] such reason must be in conformity with international law.[60]

30. Concerning draft guideline 2.6.5 ("Author of an objection"), several delegations were of the view that the phrase "any State and any international organization that is entitled to become a party to the treaty" referred to signatory States and international organizations, since a State or international organization that had no intention of becoming a party to a treaty should not have the right to object to a reservation made by a State party.[61] It was also argued that such objections should be subsequently confirmed because of the considerable time which would have elapsed between when the objection was formulated and when the author of the objection expressed its consent to be bound by the treaty.[62]

31. The draft guidelines on the formulation of reservations were endorsed.[63] It was pointed out, however, that the provision for written form should also take account of modern means of communication.[64] Draft guideline 3.1.10 recommending that reservations should be justified[65] was also endorsed. Support was also expressed for the suggestion that a similar draft guideline should be elaborated for reservations, since a statement of reasons for reservations and objections to reservations promoted dialogue between the parties directly concerned.[66] However, some delegations found pre-emptive objections unacceptable.[67]

32. The Commission's general approach to late objections (draft guideline 2.6.15) was endorsed,[68] although it was suggested that late objections could be equated

---

[57] Italy (A/C.6/62/SR.22, para. 86); Slovakia (A/C.6/62/SR.26, para. 16).

[58] Austria (A/C.6/62/SR.22, paras. 40-42); China (ibid., para. 60); Belarus (A/C.6/62/SR.23, paras. 47-50); Australia (A/C.6/62/SR.25, para. 9).

[59] Argentina (A/C.6/62/SR.22, para. 56); Malaysia (A/C.6/62/SR.23, para. 1); Slovakia (A/C.6/62/SR.26, para. 13). See, however, Egypt (A/C.6/62/SR.22, para. 66).

[60] Argentina (A/C.6/62/SR.22, para. 56); China (A/C.6/62/SR.22, para. 60); Islamic Republic of Iran (A/C.6/62/SR.25, para. 41).

[61] Malaysia (A/C.6/62/SR.23, para. 2); Canada (ibid., para. 15); Russian Federation (A/C.6/62/SR.24, paras. 57 and 58); Portugal (ibid., para. 101); Greece (A/C.6/62/SR.25, para. 31); Islamic Republic of Iran (ibid., para. 42). See, however, Mexico (A/C.6/62/SR.24, para. 12).

[62] Malaysia (A/C.6/62/SR.23, para. 2); Greece (A/C.6/62/SR.25, para. 12).

[63] Mexico (A/C.6/62/SR.24, para. 12).

[64] Belarus (A/C.6/62/SR.23, para. 45).

[65] Argentina (A/C.6/62/SR.22, para. 56); Czech Republic (A/C.6/62/SR.23, para. 52); Democratic Republic of the Congo (A/C.6/62/SR.24, para. 26); Portugal (ibid., para. 101). See also Mexico (A/C.6/62/SR.24, para. 14); New Zealand (A/C.6/62/SR.25, para. 13).

[66] Argentina (A/C.6/62/SR.22, para. 56). For the action taken on this proposal, see paras. 34 and 35 below.

[67] Malaysia (A/C.6/62/SR.23, para. 4). See also Czech Republic (A/C.6/62/SR.23, para. 54); France (ibid., para. 61); Portugal (A/C.6/62/SR.24, para. 101); Greece (A/C.6/62/SR.25, para. 31); Islamic Republic of Iran (ibid., para. 43). For an opposing view, see Slovakia (A/C.6/62/SR.26, para. 14).

[68] Mexico (A/C.6/62/SR.24, para. 15).

with simple interpretative declarations.[69] It was suggested that the legal effects, if any, of late objections should be further clarified.[70]

33. Few comments were made on the draft guidelines on acceptance. In general, delegations expressed support for them. However, several delegations were of the view that the distinction between tacit acceptance and implicit acceptance was superfluous and should be deleted.[71] There was support for the view that acceptance was irreversible.[72]

C. Thirteenth report on reservations to treaties and the outcome

1. Consideration of the thirteenth report by the Commission

34. At its sixtieth session, the Commission had before it the thirteenth report on reservations to treaties,[73] which was devoted entirely to the subject of interpretative declarations. The Commission also considered the note by the Special Rapporteur on the statement of reasons for reservations,[74] which had been submitted in 2007 but had not been discussed owing to lack of time.

35. The Special Rapporteur's proposal to include, in the Guide to Practice, a guideline on the statement of reasons for reservations was received positively by the members of the Commission. Draft guideline 2.1.9 was referred to the Drafting Committee, and later was provisionally adopted.

36. There was no major opposition to the Special Rapporteur's thirteenth report. The majority of Commission members approved the various categories of reactions to interpretative declarations and the terminology proposed by the Special Rapporteur.[75] The Commission also agreed that it would be useful to include, in the Guide to Practice, guidelines on the formulation of, reasons for and communication of responses to interpretative declarations.

37. Generally speaking, the most vexatious problem was that of silence as a response to an interpretative declaration, as addressed in draft guidelines 2.9.8[76] and

---

[69] Czech Republic (A/C.6/62/SR.23, para. 53).

[70] France (A/C.6/62/SR.23, para. 61); Portugal (A/C.6/62/SR.24, para. 101); Australia (A/C.6/62/SR.25, para. 9).

[71] Argentina (A/C.6/62/SR.22, para. 56); France (A/C.6/62/SR.23, para. 62).

[72] Argentina (A/C.6/62/SR.22, para. 56); El Salvador (A/C.6/62/SR.23, para. 33).

[73] A/CN.4/600.

[74] A/CN.4/586.

[75] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 94.

[76] Draft guideline 2.9.8 reads as follows:

2.9.8 *Non-presumption of approval or opposition*

Neither approval of nor opposition to an interpretative declaration shall be presumed.

2.9.9.[77] While the majority of Commission members approved the language used in draft guideline 2.9.8, whereby silence is not to be interpreted as either approval of or opposition to an interpretative declaration, the wording of draft guideline 2.9.9, particularly paragraph 2, was challenged. In stating that "in certain specific circumstances", silence could be construed as consent to an interpretative declaration, the draft guideline is intended solely to allow greater flexibility in applying the principle of neutrality set out in draft guideline 2.9.8; nevertheless, a number of members expressed reservations regarding the validity of the expression "in certain specific circumstances", which they considered too general, and suggested providing specific examples of such circumstances.

38. With regard to draft guideline 2.9.10[78] on reactions to conditional interpretative declarations, members voiced doubts about the relevance of such a distinction, given that, according to a majority of Commission members, the legal regime of conditional interpretative declarations was indistinguishable from that of reservations.[79] Nevertheless, in line with the proposal of the Special Rapporteur — who shares that position a priori — it was decided that it would be premature to do away with the intermediate category of conditional interpretative declarations as the Commission had not yet considered the effects of such declarations.[80]

39. At its 2978th meeting, the Commission decided to refer all the draft guidelines proposed in the thirteenth report, that is, draft guidelines 2.9.1 (including the second paragraph of draft guideline 2.9.3) to 2.9.10, to the Drafting Committee, while emphasizing that draft guideline 2.9.10 was without prejudice to the subsequent retention or otherwise of the draft guidelines on conditional interpretative declarations.

---

[77] Draft guideline 2.9.9 reads as follows:

2.9.9 *Silence in response to an interpretative declaration*

Consent to an interpretative declaration shall not be inferred from the mere silence of a State or an international organization in response to an interpretative declaration formulated by another State or another international organization in respect of a treaty.

In certain specific circumstances, however, a State or an international organization may be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct, as the case may be.

[78] Draft guideline 2.9.10 reads as follows:

2.9.10 *Reactions to conditional interpretative declarations*

Guidelines 2.6 to 2.8.12 shall apply to reactions of States and international organizations to conditional interpretative declarations.

[79] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 108.

[80] Ibid., paras. 109 and 110.

40. The Commission also provisionally adopted 23 draft guidelines and the commentaries thereto.[81] In addition, it took note of draft guidelines 2.8.1 to 2.8.12 as provisionally adopted by the Drafting Committee.[82]

2. Consideration of chapter VI of the 2008 report of the Commission by the Sixth Committee

41. Chapter VI of the Commission's report on the work of its sixtieth session[83] deals with reservations to treaties. As usual, a very brief summary is provided in chapter II[84] and the "specific issues on which comments would be of particular interest to the Commission" are dealt with in chapter III. The Commission asked several questions regarding the role of silence as a reaction to an interpretative declaration[85] as well as the potential effects of interpretative declarations.[86] The Secretariat has received written responses to the questions from Germany and Portugal.

42. Regarding the role of silence, the views expressed by the Sixth Committee supported the general approach of the Special Rapporteur appointed by the Commission. Several delegations argued that mere silence could not be considered as either approval of or opposition to an interpretative declaration and that, in theory, the consent of a State or international organization to an interpretative declaration should not be presumed.[87] The argument that silence can, in certain specific circumstances, be interpreted as consent was also approved.[88] Therefore, although it would seem that the principle has been accepted, the specific circumstances in which mere silence may be interpreted as acquiescence or consent have yet to be determined. Some members contended that it was not possible to

---

[81] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 75, 76 and 78: draft guidelines 2.1.6 (Procedure for communication of reservations) (as amended), 2.1.9 (Statement of reasons [for reservations]), 2.6.5 (Author [of an objection]), 2.6.6 (Joint formulation [of objections to reservations]), 2.6.7 (Written form), 2.6.8 (Expression of intention to preclude the entry into force of the treaty), 2.6.9 (Procedure for the formulation of objections), 2.6.10 (Statement of reasons), 2.6.11 (Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation), 2.6.12 (Requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty), 2.6.13 (Time period for formulating an objection), 2.6.14 (Conditional objections), 2.6.15 (Late objections), 2.7.1 (Withdrawal of objections to reservations), 2.7.2 (Form of withdrawal of objections to reservations), 2.7.3 (Formulation and communication of the withdrawal of objections to reservations), 2.7.4 (Effect on reservation of withdrawal of an objection), 2.7.5 (Effective date of withdrawal of an objection), 2.7.6 (Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation), 2.7.7 (Partial withdrawal of an objection), 2.7.8 (Effect of a partial withdrawal of an objection) and 2.7.9 (Widening of the scope of an objection to a reservation) and 2.8 (Forms of acceptance of reservations).

[82] Ibid., para. 77.

[83] Ibid., paras. 67 to 124.

[84] Ibid., paras. 16 to 18.

[85] Ibid., para. 26.

[86] Ibid., paras. 27 and 28.

[87] France (A/C.6/63/SR.19, para. 19); Belarus (ibid., para. 51); Argentina (ibid., para. 74); Netherlands (A/C.6/63/SR.20, para. 9); Portugal (ibid., para. 21); New Zealand (A/C.6/63/SR.22, para. 7); Japan (A/C.6/63/SR.23, para. 45); Greece (A/C.6/63/SR.24, para. 2).

[88] Argentina (A/C.6/63/SR.19, para. 74); Qatar (A/C.6/63/SR.24, para. 77). See, however, China (A/C.6/63/SR.19, para. 67); Netherlands (A/C.6/63/SR.20, para. 9); Sweden (A/C.6/63/SR.19, para. 40); United Kingdom (A/C.6/63/SR.21, para. 18).

identify in the abstract those situations in which the silence of a State or international organization constituted acquiescence or consent to an interpretative declaration. Because an enumeration of such situations would be difficult and possibly futile, the circumstances of a State's reaction of silence should be examined on a case-by-case basis.[89] Another view was that the legal consequences of such silence should be assessed in the light of article 31, paragraph 3 (a), of the Vienna Convention; consequently, the general rules for entering into an agreement were sufficient to resolve the issue.[90] It was also agreed that silence had a legal effect in cases where a protest against the interpretation given in an interpretative declaration would be expected from the State or international organization directly concerned. The arbitral award in the *North Atlantic Coast Fisheries Case (Great Britain, United States)*[91] was cited as an example. It was further argued that silence on the part of a contracting party must be considered to play a role in the event of a dispute between that party and the author of the interpretative declaration.[92] Likewise, one delegation maintained that consent could be inferred from silence in the case of treaties the subject matter of which would require a prompt reaction to any interpretative declaration.[93]

43. The second question, which dealt with the legal effects of an interpretative declaration on its author and on a State or an international organization having approved or objected to the declaration, produced a wide range of reactions and positions. It was generally stressed that a distinction must be drawn between the legal effect of interpretative declarations and that of reservations, and that that distinction should be borne in mind when considering the question of reactions to declarations and to reservations and their respective effects.[94] It was stated that the general rules governing the interpretation of treaties were sufficient to establish the effects of an interpretative declaration and the reactions it may prompt. According to the same view, a reference to those customary rules could resolve the issue within the framework of the Guide to Practice[95] without prejudice to the flexibility of those rules or to the essential role played by the intention of the parties. Some delegations specifically referred to article 31, paragraph 3 (a), of the Vienna Convention.[96] According to another point of view, the consequences of an interpretative declaration should be considered in the light of the principle of estoppel.[97] Thus, the author of an interpretative declaration was bound by the interpretation expressed only if another contracting party came to rely on the declaration.[98] It was also suggested that interpretative declarations could act as an aid to interpretation.[99] As far as reactions of opposition were concerned, it was stressed that although they could limit the potential legal consequences of interpretative declarations, they

---

[89] Spain (A/C.6/63/SR.22, para. 4). See, however, New Zealand (ibid., para. 7); Japan (A/C.6/63/SR.23, para. 45).

[90] Sweden (A/C.6/63/SR.19, para. 39); Germany (ibid., para. 80).

[91] Arbitral award of 7 September 1910, United Nations, vol. XI, pp. 173-226.

[92] France (A/C.6/63/SR.19, para. 19).

[93] Romania (A/C.6/63/SR.21, para. 55).

[94] France (A/C.6/63/SR.19, para. 18); Romania (A/C.6/63/SR.21, para. 54).

[95] Austria (A/C.6/63/SR.18, para. 79); France (A/C.6/63/SR.19, para. 20); Belarus (ibid., para. 49); Belgium (A/C.6/63/SR.21, para. 46); Greece (A/C.6/63/SR.24, para. 1).

[96] Sweden (A/C.6/63/SR.19, para. 39); Germany (A/C.6/63/SR.19, paras. 81 and 83).

[97] Belarus (A/C.6/63/SR.19, para. 52); Germany (ibid., para. 81).

[98] Austria (A/C.6/63/SR.18, para. 79); Germany (A/C.6/63/SR.19, para. 81).

[99] United Kingdom (A/C.6/63/SR.21, para. 19).

could not in any way exclude application of the provision in question in the relationship between the author of the declaration and the party having expressed opposition.[100]

44. Aside from the suggestions and criticisms made with regard to the wording of the draft guidelines already approved by the Commission that the Special Rapporteur and the Commission would consider during their second reading, it was suggested more generally that the subject of reactions to interpretative declarations was not sufficiently ripe for codification and that, therefore, drafting guidelines in that respect would go beyond the mandate of the Commission.[101] Other delegations, however, expressed support for the inclusion of such draft guidelines in the Guide to Practice.[102]

45. Several delegations expressed reservations about the concept of "reclassification", which they believed did not reflect reality. According to that view, it was pointless to change the classification of a declaration, since it could be assessed objectively according to criteria already agreed by the Commission.[103] Other delegations expressed support for the draft guideline presented by the Special Rapporteur.[104]

46. Other reservations were expressed with regard to the issue of "conditional interpretative declarations" and the separate treatment given to them in the study. Like the majority of Commission members,[105] several delegations argued that there was no reason to distinguish such declarations from reservations, since they obeyed the same rules.[106] According to another view, the pure and simple assimilation of conditional interpretative declarations with reservations nevertheless remained premature as long as the specific legal effects of those declarations had not been analysed by the Commission.[107]

D. Recent developments with regard to reservations and interpretative declarations

47. On 3 February 2009, the International Court of Justice rendered a unanimous Judgment in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. In that dispute, Romania invoked paragraph 3 of its interpretative declaration made upon signature and confirmed upon ratification of the United Nations Convention on the Law of the Sea of 1982.[108] That declaration concerns article 121 of the Convention and reads as follows:

---

[100] Germany (A/C.6/63/SR.19, para. 82).

[101] United States of America (A/C.6/63/SR.21, paras. 4-6; United Kingdom (ibid., para. 16). See also Islamic Republic of Iran (A/C.6/63/SR.24, para. 32).

[102] France (A/C.6/63/SR.19, para. 18); Sweden (ibid., para. 35); Spain (A/C.6/63/SR.22, para. 2); Greece (A/C.6/63/SR.24, para. 1). See, however, Poland (A/C.6/63/SR.21, para. 31).

[103] Austria (A/C.6/63/SR.18, para. 80); Sweden (A/C.6/63/SR.19, para. 36). See also Portugal (A/C.6/63/SR.20, para. 19); Greece (A/C.6/63/SR.24, para. 3). For another critical view on "reclassifications", see Republic of Korea (A/C.6/63/SR.19, para. 62).

[104] Mexico (A/C.6/63/SR.20, para. 4); Romania (A/C.6/63/SR.21, para. 54).

[105] See para. 38 above.

[106] Belarus (A/C.6/63/SR.19, paras. 49 and 50); Republic of Korea (ibid., para. 62); Estonia (ibid., para. 88); Netherlands (A/C.6/63/SR.20, para. 8); Spain (A/C.6/63/SR.22, para. 2).

[107] Portugal (A/C.6/63/SR.20, para. 22).

[108] United Nations, *Treaty Series*, vol. 1834, No. 31363.

"1. As a geographically disadvantaged country bordering a sea poor in living resources, Romania reaffirms the necessity to develop international cooperation for the exploitation of the living resources of the economic zones, on the basis of just and equitable agreements that should ensure the access of the countries from this category to the fishing resources in the economic zones of other regions or subregions.

"2. The Socialist Republic of Romania reaffirms the right of coastal States to adopt measures to safeguard their security interests, including the right to adopt national laws and regulations relating to the passage of foreign warships through their territorial sea.

"The right to adopt such measures is in full conformity with articles 19 and 25 of the Convention, as it is also specified in the Statement by the President of the United Nations Conference on the Law of the Sea in the plenary meeting of the Conference on April 26, 1982.

"3. The Socialist Republic of Romania states that according to the requirements of equity — as it results from articles 74 and 83 of the Convention on the Law of the Sea — the uninhabited islands and without economic life can in no way affect the delimitation of the maritime spaces belonging to the main land coasts of the coastal States."[109]

48. According to Romania, Ukraine accepted the applicability of article 121, paragraph 3 of the Montego Bay Convention in the delimitation of the continental shelf and exclusive economic zones, as interpreted by Romania when signing and ratifying it, and therefore Serpents' Island, which lies off the coasts of Romania and Ukraine, could not affect the delimitation between the two States.[110]

49. For its part, Ukraine stated, invoking the Commission's work on interpretative declarations, that its silence could not amount to consent to Romania's declaration because there is no obligation to respond to such a declaration.[111]

50. The Court seems to have admitted that point of view:

"Regarding Romania's declaration, quoted in paragraph 35 above, the Court observes that under Article 310 of UNCLOS, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of UNCLOS in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of UNCLOS as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation."[112]

---

[109] Ibid., vol. 1835, No. 31363.

[110] ICJ Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, para. 35; CR 2008/18, 2 September 2008, paras. 39-41 (M. Aurescu); CR 2008/20, 4 September 2008, paras. 73-79 (M. Lowe).

[111] ICJ Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, para. 39. See also CR 2008/29, 12 September 2008, paras. 63-68 (Mme Malintoppi).

[112] ICJ Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, para. 42.

51. The concrete implications of that Judgment will be discussed in the study of the effects of an interpretative declaration and the responses to which it might give rise.

52. For their part, the bodies created within the United Nations or by international human rights conventions have continued to develop and harmonize their approaches to this issue at inter-committee meetings. Those meetings provide a forum for the bodies to exchange their views on the subject of their experiences in reservations. Their respective practices in the field were presented and discussed at the meeting between the Commission and the representatives of human rights bodies, held in May 2007 pursuant to General Assembly resolution 61/34 of 4 December 2006.[113] At the meeting the practice of human rights bodies was said to be relatively uniform and characterized by a high level of pragmatism.[114]

53. At the December 2006 meeting of the Working Group on Reservations to examine the report on the practice of human rights treaty bodies with respect to reservations to international human rights treaties and report on its work to the inter-committee meeting, the recommendations adopted in June[115] were modified. The sixth inter-committee meeting welcomed the report of the working group on reservations[116] and accepted the recommendations thus modified:[117]

> "1. The working group welcomes the report on the practice of human rights treaty bodies with respect to reservations to international human rights treaties (HRI/MC/2005/5) and its updated version (HRI/MC/2005/5/Add.1) which the secretariat had compiled for the fourth inter-committee meeting.
>
> "2. The working group recommends that while any statement made at the time of ratification may be considered as a reservation, however it was termed, particular care should be exercised before concluding that the statement should be considered as a reservation, when the State party has not used that term.
>
> "3. The working group recognizes that, despite the specific nature of the human rights treaties which do not constitute a simple exchange of obligations between States but are the legal expression of the essential rights that each individual must be able to exercise as a human being, general treaty law remains applicable to human rights instruments; however, that law can only be applied taking fully into account their specific nature, including their content and monitoring mechanisms.
>
> "4. The working group considers that when reservations are permitted, whether explicitly or implicitly, they can contribute to the attainment of the objective of universal ratification. Reservations which are not permitted, including those that are incompatible with the object and purpose of the treaty, do not contribute to attainment of the objective of universal ratification.
>
> "5. The working group considers that for the purpose of discharging their functions, treaty bodies are competent to assess the validity of reservations

---

[113] See, in the annex to the present report, the account of the meeting prepared by the Special Rapporteur. See also para. 24 above.

[114] See para. 7 of the annex to the present report.

[115] HRI/MC/2006/5, para. 16; see also the eleventh report on reservations to treaties, A/CN.4/574, para. 55.

[116] HRI/MC/2007/5 and Add.1.

[117] See the report of the nineteenth meeting of chairpersons of human rights treaty bodies, A/62/224, annex, subpara. 48 (v).

and, in the event, the implications of a finding of invalidity of a reservation, particularly in the examination of individual communications or in exercising other fact-finding functions in the case of treaty bodies that have such competence.

"6. The working group considers that the identification of criteria for determining the validity of reservations in the light of the object and purpose of a treaty may be useful not only for States when they are considering making reservations, but also for treaty bodies in the performance of their functions. In this regard, the working group notes the potential significance of the criteria contained in the draft guidelines included in the tenth report of the Special Rapporteur of the International Law Commission on reservations to treaties (A/CN.4/558/Add.1). The working group appreciated its dialogue with the International Law Commission and welcomes the prospect of further dialogue.

"7. As to the consequences of invalidity, the Working Group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be considered null and void. It follows that a State will not be able to rely on such a reservation and, unless its contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation.

"8. The working group welcomes the inclusion of a provision on reservations in the draft harmonized guidelines on reporting under the international human rights treaties, including the common core document and treaty-specific reports (HRI/MC/2006/3).

"9. The working group recommends that:

(a) Treaty bodies should request in their lists of issues information, especially when it is provided neither in the common core document (where available), nor in the treaty-specific report, about:

(i) the nature and scope of reservations or interpretative declarations;

(ii) the reason why such reservations were considered to be necessary and have been maintained;

(iii) the precise effect of each reservation in terms of national law and policy;

(iv) any plans to limit the effect of reservations and ultimately withdraw them within a specific time frame.

(b) Treaty bodies should clarify to States parties their reasons for concern over particular reservations in light of the provisions of the treaty concerned and, as relevant, its object and purpose.

(c) Treaty bodies should in their concluding observations:

(i) welcome the withdrawal, whether total or partial, of a reservation;

(ii) acknowledge ongoing reviews of reservations or expressions of willingness to review;

(iii) express concern for the maintenance of reservations;

(iv) encourage the complete withdrawal of reservations, the review of the need for them or the progressive narrowing of scope through partial withdrawals of reservations.

(d) Treaty bodies should highlight the lack of consistency among reservations formulated to certain provisions protected in more than one treaty and encourage the withdrawal of a reservation on the basis of the availability of better protection in other international conventions resulting from the absence of a reservation to comparable provisions.

"10. The working group recommends that the inter-committee meeting and the meeting of chairpersons decide whether another meeting of the working group should be convened taking into account the reactions and queries of treaty bodies on the recommendations of the working group, the outcome of the meeting with the International Law Commission and any further developments in the International Law Commission on the subject of reservations to treaties."[118]

54. The most remarkable change relates to paragraph 7, on the consequences the formulation of an invalid reservation has for the convention obligation of the author of the reservation. The previous text placed the emphasis on the intention of the State "at the time it enters its reservation", an intention which must be determined "during a serious examination of the available information, with the presumption, which may be refuted, that a State would prefer to remain a party to the treaty without the benefit of the reservation".[119] The new formulation of paragraph 7 places the emphasis solely on the presumption that the State entering an invalid reservation has the intention to remain bound by the treaty without the benefit of the reservation as long as its contrary intention has not been "incontrovertibly" established — which perhaps goes a little far (and in any case does not reflect the Special Rapporteur's position).

55. In the context of the Universal Periodic Review mechanism, the Human Rights Council has raised the issue of reservations with States under review, and a number of them have been urged to withdraw their reservations to international human rights instruments.[120]

56. At the regional level, the Inter-American Court of Human Rights has again had to face the issue of reservations. In *Boyce et al. v. Barbados*, the Court had to rule on the effects of the respondent State's reservation to the Inter-American Human Rights Convention.[121] This reservation reads:

"In respect of 4(4), the criminal code of Barbados provides for death by hanging as a penalty for murder and treason. The Government is at present reviewing the whole matter of the death penalty which is only rarely inflicted but wishes to enter a reservation on this point in as much as treason in certain

---

[118] HRI/MC/2007/5, para. 19.

[119] See HRI/MC/2006/5, para. 16.

[120] HRI/MC/2008/5, para. 3. See the reports of the Working Group on the Universal Periodic Review, Bahrain (A/HRC/8/19, para. 6 (2)), Tunisia (A/HRC/8/21, para. 83 (3)), Morocco (A/HRC/8/22, para. 75 (3)), Malaysia (A/HRC/8/23, para. 76 (2)), United Kingdom (A/HRC/8/25, para. 56 (24) to (26)), India (A/HRC/8/26, para. 86 (9)), Algeria (A/HRC/8/29, para. 69 (10)) and Netherlands (A/HRC/8/31, para. 78 (10)).

[121] Judgement of 20 November 2007, *Series C, No. 169*, paras. 13-17.

circumstances might be regarded as a political offence and falling within the terms of section 4(4).

"In respect of 4(5) while the youth or old age of an offender may be matters which the Privy Council, the highest Court of Appeal, might take into account in considering whether the sentence of death should be carried out, persons of 16 years and over or over 70 years of age may be executed under Barbadian law."[122]

57. Barbados maintained inter alia that its reservation to the Convention prevented the Court from ruling on the question of capital punishment, on the one hand, and the means of carrying it out, on the other.

58. Citing its advisory opinions of 1982 and 1983,[123] the Court recalled:

"Firstly, in interpreting reservations the Court must first and foremost rely on a strictly textual analysis. Secondly, due consideration must also be assigned to the object and purpose of the relevant treaty which, in the case of the American Convention, involves the 'protection of the basic rights of individual human beings'. In addition, the reservation must be interpreted in accordance with Article 29 of the Convention, which implies that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself."[124]

59. Having considered the reservation of Barbados from this standpoint, the Court concluded that:

"the text of the reservation does not explicitly state whether a sentence of death is mandatory for the crime of murder, nor does it address whether other possible methods of execution or sentences are available under Barbadian law for such a crime. Accordingly, the Court finds that a textual interpretation of the reservation entered by Barbados at the time of ratification of the American Convention clearly indicates that this reservation was not intended to exclude from the jurisdiction of this Court neither the mandatory nature of the death penalty nor the particular form of execution by hanging. Thus the State may not avail itself of this reservation to that effect."[125]

60. The Court emphasizes, moreover, that it "has previously considered that 'a State reserves no more than what is contained in the text of the reservation itself'".[126] These findings relate to the interpretation of reservations, an issue hitherto neglected in the work of the Commission, and the effects of reservations; they are very useful, and should be taken into consideration when the Committee considers these issues.

---

[122] United Nations, *Treaty Series*, vol. 1298, p. 441 (No. A-17955).

[123] Advisory opinion OC-2/82, 24 September 1982, *Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, *Series A, No. 2*, para. 35; advisory opinion OC-3/83, 8 September 1983, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4)) American Convention on Human Rights, Series A, No. 3*, paras. 62-66.

[124] Judgement cited in note. 121, para. 15 (footnotes omitted).

[125] Ibid., para. 17.

[126] Ibid. See also advisory opinion OC-3/83, note 123 above, para. 69.

61. The European Court of Human Rights, for its part, has also had occasion to rule on the extent of the effects of a valid reservation. In two cases against Finland, the Court referred to and considered the application of the Finnish reservation to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[127] The reservation reads as follows:

> "For the time being, Finland cannot guarantee a right to an oral hearing insofar as the current Finnish laws do not provide such a right. This applies to:
>
> "1. proceedings before the Supreme Court in accordance with Chapter 30, Section 20, of the Code of Judicial Procedure and proceedings before the Courts of Appeal as regards the consideration of petition, civil and criminal cases to which Chapter 26 (661/1978), Sections 7 and 8, of the Code of Judicial Procedure are applied if the decision of a District Court has been made before 1 May 1998, when the amendments made to the provisions concerning proceedings before Courts of Appeal entered into force;
>
> "and the consideration of criminal cases before the Supreme Court and the Courts of Appeal if the case has been pending before a District Court at the time of entry into force of the Criminal Proceedings Act on 1 October 1997 and to which existing provisions have been applied by the District Court;
>
> "2. proceedings, which are held before the Insurance Court as the Court of Final Instance, in accordance with Section 9 of the Insurance Court Act, if they concern an appeal which has become pending before the entry into force of the Act Amending the Insurance Court Act on 1 April 1999;
>
> "3. proceedings before the Appellate Board for Social Insurance, in accordance with Section 8 of the Decree on the Appellate Board for Social Insurance, if they concern an appeal which has become pending before the entry into force of the Act Amending the Health Insurance Act on 1 April 1999."

62. According to the Court, the application of this reservation deprives the applicant of the right, otherwise guaranteed in the context of article 6 of the Convention, to be heard:

> "In view of the above and having regard to the terms of Finland's reservation, Finland was under no Convention obligation to ensure in respect of the Court of Appeal that an oral hearing was held on count 9. While it is true that the effect of the reservation was to deny the applicant a right to an oral hearing as to the charge in dispute before the Court of Appeal, this result must be considered compatible with the Convention as a consequence of the operation of a valid reservation" (see *Helle v. Finland*, Judgment of 19 December 1996, *Reports 1997*, pp. 2925-2926, §§ 44 and 47).[128]

63. Nevertheless — and on this point the decisions of the European Court are reminiscent of the decision of the Inter-American Court[129] — the application of the reservation does not release Finland from the obligation to respect the other

---

[127] *Treaty Series of the Council of Europe*, No. 005.

[128] Judgement of 12 April 2007, *Laaksonen v. Finland* (Application No. 70216/01), para. 24 — the Judgement is available only in English. See also Judgement of 24 April 2007, *V. v. Finland* (Application No. 40412/98), para. 61.

[129] See paras. 56-60 above.

guarantees associated with the right to a fair trial. As the reservation relates only to the issue of the right to an oral hearing before certain courts, Finland remains bound by its obligation to ensure a fair trial. The Finnish reservation could thus not exclude the applicability of article 6 as a whole, and the Court remains competent to rule on the obligations that are not covered by the reservations.[130]

64. In the context of the Council of Europe (in the Committee of Legal Advisers on Public International Law), the member States are continuing to consider and, where necessary, react collectively or at least in a concerted manner to invalid reservations, in conformity with Recommendation No. 12 (99) 13 on responses to inadmissible reservations to international treaties.[131] Since 2004, the European Observatory of Reservations to International Treaties has been considering from a more sectoral standpoint the reservations and declarations to the international treaties relating to the fight against terrorism. It is interesting to note in this respect that the list submitted periodically by the European Observatory to the Committee containing the reservations and declarations to international treaties that are likely to give rise to objections not only reproduces reservations formulated less than 12 months previously, the limit set by article 20, paragraph 5 of the Vienna Conventions, but also draws the attention of Member States to certain reservations formulated more than 12 months earlier.[132] This practice appears to suggest that the Observatory does not consider that these reservations whose validity it deems to be open to dispute can no longer be the subject of objections, and that a response, belated though it may be, remains not only possible but also desirable. This confirms that draft directive 2.6.15 (late objections), adopted in 2008, probably meets a need.[133]

E. Plan of the fourteenth report on reservations[134]

65. Following a rapid presentation of certain additional points relating to the procedure with respect to the formulation of interpretative statements in accordance with the wishes of the Commission,[135] the present report will deal with the third and fourth parts of the Guide to Practice, that is to say with issues relating to the validity of reservations,[136] interpretative declarations and reactions to reservations and interpretative declarations, on the one hand, and the effects of reservations, acceptances of reservations, objections to reservations, interpretative declarations and the reactions to them, on the other hand. If possible, a fourth part will deal with

---

[130] Judgement of 12 April 2007, *Laaksonen v. Finland* (Application No. 70216/01), para. 25; Judgement of 24 April 2007, *V. v. Finland* (Application No. 40412/98), para. 61.

[131] See also the third report on reservations to treaties, A/CN.4.491, paras. 28 and 29, the eighth report, A/CN.4/535, para. 23, and the eleventh report, A/CN.4/574, para. 56.

[132] See, for example, the United States reservation to the United Nations Convention against Corruption, formulated in 2003, CAHDI (2008) 5, 19 February 2008, No. C.5.

[133] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 124.

[134] The Special Rapporteur wishes to express his most profound gratitude to Daniel Müller, doctoral student and researcher at the International Law Centre (CEDIN) of the Université Paris-Ouest, Nanterre-La Défense, for the decisive role he played in drafting the present report.

[135] See para. 36 above.

[136] One part of this problem has already been the subject of the tenth report on reservations (A/CN.4/558 and Corr.1, Add.1 and Corr.1 and 2, and Add.2). A number of draft guidelines in the third part have already been provisionally adopted by the Commission (see para. 23 above).

the draft guidelines that might be adopted by the Commission on the basis of the valuable study drawn up by the Codification Division on "reservations in the context of the succession of States".

66. Furthermore, the Special Rapporteur has decided to propose to the Commission the addition to the Guide to Practice of two annexes. The first of these might consist of a recommendation relating to the "reservations dialogue", since, upon reflection, it seems difficult to incorporate provisions relating to this in the body of the Guide: it is more, however, a state of mind that is reflected in a desirable diplomatic practice than an exercise in codification, flexible. As for the second annex, it could deal with the implementation mechanism that might be incorporated in the Guide to Practice. These two draft annexes will be the subject of two separate parts of the present report.

II. Procedure for the formulation of interpretative declarations (continuation and conclusion)

67. At its sixtieth session, the Commission asked the Special Rapporteur to prepare draft guidelines on the form, statement of reasons for and communication of interpretative declarations in order to fill a gap in the second part of the Guide to Practice.[137]

68. The Commission has already adopted a set of rules on the procedure for the formulation of interpretative declarations, contained in section 2.4 of the Guide to Practice. These draft guidelines concern the authorities competent to formulate an interpretative declaration (draft guideline 2.4.1[138]), formulation of an interpretative declaration at the internal level (draft guideline 2.4.2 [2.4.1 bis][139]), time at which an interpretative declaration may be formulated (draft guideline 2.4.3[140]), non-requirement of confirmation of interpretative declarations made when signing a treaty (draft guideline 2.4.4 [2.4.5][141]), late formulation of an interpretative declaration (draft guideline 2.4.6 [2.4.7][142]) and modification of an interpretative declaration (draft guideline 2.4.9[143]). This section also includes other draft guidelines on conditional interpretative declarations.[144]

69. There is no draft guideline on the form of interpretative declarations, on their communication (contrary to what has been decided in the case of conditional

---

[137] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), paras. 74 and 117; see also the position taken by the Special Rapporteur in his thirteenth report on reservations to treaties (A/CN.4/600), para. 321. See para. 36 above.

[138] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), para. 103.

[139] Ibid.

[140] Ibid., *Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 157.

[141] Ibid.

[142] Ibid.

[143] Ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 295.

[144] Draft guidelines 2.4.5 [2.4.4], 2.4.7 [2.4.2, 2.4.9], 2.4.8 and 2.4.10.

interpretative declarations[145]) or on modification of interpretative declarations. This is not an oversight, but a deliberate decision on the Special Rapporteur's part.[146] As he explained in his sixth report:

> There seems to be no reason to transpose the rules governing the communication of reservations to simple interpretative declarations, which may be formulated orally; it would therefore be paradoxical to insist that they be formally communicated to other interested States or international organizations. By refraining from such communication, the author of the declaration runs the risk that the declaration may not have the intended effect, but this is a different problem altogether. It does not seem necessary, therefore, to include a clarification of this point in the Guide to Practice.[147]

70. There is no reason to reconsider this conclusion. There would be no justification for requiring a State or an international organization to follow a given procedure in giving its interpretation of a convention to which it is a party or a signatory or to which it intends to become a party. It would thus be incongruous to propose draft guidelines that made the formal validity of an interpretative declaration condition upon respect for such a procedure.[148]

71. Nevertheless, while there is no legal obligation in that regard, it seems appropriate to ensure, to the extent possible, that interpretative declarations are publicized widely. Their influence will, in practice, depend to a great extent on their dissemination. Without discussing, at this stage, the legal implications of these declarations for the interpretation and application of the treaty in question, it goes without saying that such unilateral statements are likely to play a role in the life of the treaty; this is their raison d'être and the purpose for which they are formulated by States and international organizations. The International Court of Justice has highlighted the importance of these statements in practice:

> Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value

---

[145] See draft guideline 2.4.7 [2.4.2, 2.4.9] on the formulation and communication of interpretative declarations. This draft guideline reads:

> 2.4.7 [2.4.2, 2.4.9] *Formulation and communication of conditional interpretative declarations*
>
> A conditional interpretative declaration must be formulated in writing.
>
> Formal confirmation of a conditional interpretative declaration must also be made in writing.
>
> A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.
>
> A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

[146] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 154.

[147] Sixth report on reservations to treaties (A/CN.4/518/Add.1), para. 130.

[148] See also M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* ("Unilateral Interpretative Declarations to Multilateral Treaties") (Berlin, Duncker & Humblot, 2005), p. 117.

when they contain recognition by a party of its own obligations under an instrument.[149]

72. Mr. Rosario Sapienza also underlined the importance of reactions to interpretative declarations, which:

> forniranno utile contributo anche alla soluzione [of a dispute]. E ancor più le dichiarazioni aiuteranno l'interprete quando controversia non si dia, ma semplice problema interpretativo.[150]
>
> [will contribute usefully to the settlement [of a dispute]. Statements will be still more useful to the interpreter when there is no dispute, but only a problem of interpretation].

73. In her study, *Einseitige Interpretationserklarungen zu multilateralen Verträgen* (Unilateral Interpretative Declarations to Multilateral Treaties), Ms. Monika Heymann has rightly stressed:

> Dabei ist allerdings zu beachten, dass einer schriftlich fixierten einfachen Interpretationserklärung eine größere Bedeutung dadurch zukommen kann, dass die übrigen Vertragsparteien sie eher zur Kenntnis nehmen und ihr im Streitfall eine höhere Beweisfunktion zukommt.[151]
>
> [In that regard, it should be noted that a simple written interpretative declaration can take on greater importance because the other contracting parties take note of it and, in the event of a dispute, it has greater probative value.]

74. Moreover, in practice, States and international organizations endeavour to give their interpretative declarations the desired publicity. They transmit them to the depositary and the Secretary-General of the United Nations, in turn, disseminates the text of such declarations[152] and publishes them in *Multilateral Treaties Deposited with the Secretary-General*.[153] Clearly, this communication procedure, which ensures wide publicity, presupposes that declarations are made in writing.

75. If the authors of interpretative declarations want their position to be taken into account in the treaty's application, particularly when there is a dispute, it would doubtless be in their interest to:

(a) Formulate the reaction in writing to meet the requirements of legal security and to ensure notification of the declaration; and

(b) Follow, in making such statements, the same communication and notification procedure applicable to the communication and notification of other declarations in respect of the treaty (reservations, objections or acceptances).

---

[149] Advisory opinion of 11 July 1950, *International status of South-West Africa*, I.C.J. Reports 1950, pp. 135-136.

[150] *Dichiarazioni interpretative unilaterale e trattati internazionali* (Milan, A. Giuffrè, 1996), p. 275.

[151] M. Heymann, note 148 above, p. 118.

[152] United Nations, *Summary of practice of the Secretary-General as depositary of multilateral treaties* (ST/LEG/7/Rev.1), para. 218.

[153] To give just one example, while article 319 of the United Nations Convention on the Law of the Sea does not explicitly require its depositary to communicate interpretative declarations made under article 311 of the Convention, the Secretary-General publishes them systematically in Chapter XXI (No. 6) of *Multilateral Treaties Deposited with the Secretary-General* (http://treaties.un.org).

76. The Commission has considered that it would be useful to include draft guidelines to that effect in the Guide to Practice.[154] However, these could consist only of recommendations modelled on those adopted, for example, with respect to statements of reasons for reservations[155] and objections to reservations.[156] Guidelines recommending the written form and the procedure for communication could draw upon those concerning the procedure for other types of declarations in respect of a treaty, as, for example, contained in draft guidelines 2.1.1[157] and 2.1.5 to 2.1.7[158] on reservations, although their wording cannot be fully aligned with these models. It is therefore proposed that these guidelines should be worded as follows:[159]

---

[154] See note 137 above.

[155] Draft guideline 2.1.9 (Statement of reasons [for reservations]) (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 124); see also the note by the Special Rapporteur on draft guideline 2.1.9, "Statement of reasons for reservations" (A/CN.4/586).

[156] Draft guideline 2.6.10 (Statement of reasons [for objections]) (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 124); see also the eleventh report on reservations to treaties (A/CN.4/574), paras. 110-111.

[157] This draft guideline reads:

2.1.1 *Written form*

A reservation must be formulated in writing.

[158] These draft guidelines read:

2.1.5 *Communication of reservations*

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 [2.1.6, 2.1.8] *Procedure for communication of reservations*

Unless otherwise provided in the treaty or agreed by the contracting States and international contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 *Functions of depositaries*

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

[159] The numbering of these guidelines will certainly need to be reviewed during the second reading.

2.4.0 Written form of interpretative declarations

Whenever possible, an interpretative declaration should be made in writing.

2.4.3 bis Communication of interpretative declarations

Whenever possible, an interpretative declaration should be made, mutatis mutandis, in accordance with the procedure established in draft guidelines 2.1.5, 2.1.6 and 2.1.7.

77. This raises the question of whether the depositary can initiate a consultation procedure in cases where an interpretative declaration is manifestly invalid, in which case draft guideline 2.1.8[160] should also be mentioned in draft guideline 2.4.3 bis. Since, on the one hand, draft guideline 2.1.8 has met with criticism[161] and, on the other, it is far from clear that an interpretative declaration can be "valid" or "invalid", it seems unnecessary to make such a mention.

78. Notwithstanding the position expressed by some members of the Commission at its sixtieth session, with which the Special Rapporteur had unwisely agreed in his thirteenth report,[162] statements of reasons for interpretative declarations does not appear to correspond to the practice of States and international organizations or, in essence, to meet a need. In formulating interpretative declarations, States and international organizations doubtless wish to set forth their position concerning the meaning of one of the treaty's provisions or of a concept used in the text of the treaty and, in general, they explain the reasons for this position. It is not necessary, or even possible, to provide explanations for these explanations. Thus, a guideline, even in the form of a simple recommendation, is not needed.

79. The situation is different with respect to reactions to interpretative declarations. In this case, the authors of an approval, opposition or reclassification may indeed explain the reasons that led them to react to the interpretative declaration in question, for example by explaining why the proposed interpretation does not correspond to the parties' intention, and it is doubtless useful for them to do so. Draft guideline 2.9.6 (Statement of reasons for approval, opposition and reclassification), proposed in the thirteenth report[163] and sent to the Drafting Committee in 2008,[164] is thus of continuing value.

---

[160] This draft guideline reads:

> 2.1.8 [2.1.7 bis] *Procedure in case of manifestly invalid reservations*
>
> Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.
>
> If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

[161] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 159, paras. 2 and 3 of the commentary on draft guideline 2.1.8. See also para. 36 above.

[162] See note 137 above.

[163] A/CN.4/600, para. 321.

[164] See para. 39 above.

Annex

Meeting with human rights bodies, 15 and 16 May 2007[a]

Report prepared by Alain Pellet, Special Rapporteur[b]

1. Pursuant to General Assembly resolution 61/34 of 4 December 2006, the International Law Commission convened a meeting with representatives of United Nations human rights treaty bodies and regional human rights bodies. The meeting took place on 15 and 16 May 2007 at the United Nations Office at Geneva and provided an opportunity for a fruitful exchange of views that was welcomed by all participants.

2. Mr. Ian Brownlie, Q.C., Chairman of the International Law Commission, chaired the meeting, the last segment of which was co-chaired by Sir Nigel Rodley, member of the Human Rights Committee and Chairperson-Rapporteur of the working group on reservations to treaties of the Meeting of chairpersons of the human rights treaty bodies. Mr Brownlie welcomed the participants and explained that the meeting offered a unique opportunity to pursue a dialogue with the human rights bodies on the issue of reservations to treaties. Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties, underscored the importance of such an exchange of ideas for strengthening mutual understanding between the Commission and the human rights expert bodies.

1. Introduction of the practice of the human rights bodies represented

3. The meeting began with brief presentations by the representatives of the human rights bodies participating in the meeting on the respective practice of each of the bodies represented, with the understanding that neither those presentations nor what was said during the meeting would in any way engage the responsibility of the bodies in question. The following bodies were represented: the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee against Torture; the Committee on the Rights of the Child; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on Migrant Workers; the Council of Europe (the European Court of Human Rights and the Committee of Legal Advisers on Public International Law (CAHDI));[c] and the Sub-Commission on the Promotion and Protection of Human Rights.

---

[a] The present report — which is not a "statement of conclusions" — was prepared on the sole responsibility of the Special Rapporteur on reservations to treaties. It was submitted for opinion to outside participants and to those members of the Commission who had made introductory presentations but in no way engages their responsibility. This annex is a very slightly revised version of the document that appears on the web site of the International Law Commission (http://untreaty.un.org/ilc/documentation/french/ilc(lix)_rt_crpl.pdf).

[b] I wish to extend warm thanks to Céline Folsché, intern from New York University (LLM) during the fifty-ninth session of the International Law Commission, who wrote the first draft of this report.

[c] The other regional bodies invited were unable to send representatives.

(a) Reservations to human rights treaties

4. The use of reservations in human rights treaties varied from treaty to treaty. For that matter, some conventions explicitly provided for the formulation of reservations (Convention against Torture, European Convention on Human Rights and Fundamental Freedoms). Two broad trends could be observed.

5. On the one hand, some treaties — in particular, those that had been widely ratified — had been the subject of numerous reservations. Significant examples included the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, but also the conventions against torture and the elimination of all forms of racial discrimination and the European Convention on Human Rights and Fundamental Freedoms. Conversely, few reservations had been made to the International Covenant on Economic, Social and Cultural Rights.

6. On the other hand, reservations were too frequently made to fundamental or substantive provisions of human rights treaties. In that connection, the representative of the Committee on the Elimination of Racial Discrimination pointed to the large number of reservations made to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, concerning the prohibition of incitement to hatred or to racial discrimination. The same comment was made with regard to the Convention on the Elimination of All Forms of Discrimination against Women.

(b) The practice of human rights bodies with respect to reservations

7. The practice of human rights bodies, as described by some representatives, was relatively uniform and was characterized by a high level of pragmatism. The question of reservations could arise in two situations: the consideration of periodic reports submitted by States and the examination of individual communications. However, the latter option was available only to bodies charged with receiving individual petitions or communications.

8. In considering the periodic reports submitted by States, nearly all the various committees had taken a somewhat pragmatic approach to the question of reservations. Their chief position was that the formulation of reservations by States should be strictly limited. In practice, however, they were relatively flexible and showed great willingness to establish a dialogue with States, to which the latter were generally amenable. While encouraging and recommending the withdrawal of reservations, the committees engaged in discussions with States about the justification and the scope of their reservations. Although the objective of the dialogue was the complete withdrawal of reservations, the committees' position was flexible, owing to their goal of achieving universal ratification of their conventions. Only very rarely had the committees taken a formal position to declare a reservation invalid.

9. Some committees had considered the scope and even the validity of reservations when considering individual communications or requests. However, that practice was limited, if only because few bodies received such communications or requests. Currently, only the Human Rights Committee and the European Court of Human Rights followed it. In the case of the Human Rights Committee, the risk

that the State whose reservation was declared invalid might withdraw from the Optional Protocol could not be overlooked.

2. Presentations

10. Presentations serving as a basis for the discussion were delivered by:

- Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties: "Codification of the right to formulate reservations to treaties";
- Ms. Françoise Hampson, member of the Sub-Commission on the Promotion and Protection of Human Rights: "Principal aspects of the problem";
- Mr. Enrique Candioti, member of the International Law Commission: "Grounds for the invalidity of reservations to human rights treaties";
- Mr. Alexandre Sicilianos, member of the Committee on the Elimination of Racial Discrimination: "Assessment of the validity of reservations to human rights treaties";
- Mr. Giorgio Gaja, member of the International Law Commission: "The consequences of the non-validity of reservations to human rights treaties".

(a) Codification of the right to formulate reservations to treaties

11. Mr. Alain Pellet, Special Rapporteur of the International Law Commission on reservations to treaties, described the history of the codification of the law of treaties. He began by recalling the Commission's mission of codification and presenting the Vienna Convention on the Law of Treaties as its most significant achievement. He went on to describe the process used by the Commission in drawing up draft conventions or draft guidelines. Lastly, he described the Commission's consideration of the topic of reservations.

12. Although flexible and relatively detailed, the Vienna regime was vague and ambiguous with respect to the legal regime of reservations to treaties. Efforts to draft a Guide to Practice that would complement the provisions of the Vienna Conventions had been initiated in 1996. The lack of specific rules governing reservations to human rights treaties had been considered by the drafters of the Vienna Convention. For one thing, human rights treaties had not been accorded the same importance at the time the Convention was drafted; for another, and most notably, the authors of the Convention, who had been cognizant of the specificity of certain types of treaties, including human rights treaties (see article 60, paragraph 5), had intended that the rules pertaining to reservations should be uniformly applied. However, as the Special Rapporteur had demonstrated in his second report (A/CN.4/478/Rev.1), the considerable extent of practice in respect of reservations to human rights treaties could not be ignored, and the International Law Commission was thus very interested in the practice of human rights bodies.

(b) Principal aspects of the problem

13. Ms. Françoise Hampson, member of the Sub-Commission on the Promotion and Protection of Human Rights, began by outlining those aspects of the problem on which there was general consensus. One point on which consensus had been reached

was the principle that reservations that were incompatible with the object and purpose of a treaty produced no effects. An invalid reservation was null and void. In such cases it was assumed that the other contracting parties did not have the option of accepting such a reservation. Moreover, articles 20 to 23 of the Vienna Convention on the Law of Treaties and, in particular, the rules concerning objections to reservations did not apply in the event of incompatibility. The "validity" or "effectiveness" of a reservation depended on an objective criterion and not on the potential acceptance or objection of States. Such a declaration of incompatibility could be made by the contracting parties — which were not compelled to take such action — or by any body whose functions required it to take such a decision.

14. There was also consensus that there was no special regime applicable to reservations to human rights treaties. Nevertheless, the possibility existed that certain specific situations might produce predictable results. In the case of human rights treaties, the bodies established by those instruments were competent to determine whether or not a reservation was compatible with the object and purpose of the treaty. That observation applied both to judicial bodies that were competent to hand down decisions having the authority of *res judicata* and to bodies whose monitoring of the implementation of treaties resulted in recommendations or opinions that were not legally binding.

15. Ms. Hampson next identified the areas in which problems remained. There were a number of unanswered questions with respect to the general regime of reservations and, in particular, with respect to the effects that a declaration of incompatibility of a reservation with the object and purpose of a treaty might have. In the case of human rights treaties, questions arose as to whether the treaty bodies were under an obligation to enter into a "reservations dialogue" with States or simply had the option of doing so. Moreover, given the diversity of human rights bodies, it was difficult to adopt a general method for assessing a reservation's compatibility with the object and purpose of the treaty. Lastly, in cases involving incompatibility, the question arose as to the severability of the invalid reservation and whether or not the author of the reservation retained the status of contracting party. The precedents established by the human rights bodies and the reactions of the States that had taken the floor in the Sixth Committee of the General Assembly would seem to indicate that the rule of severability could stand to be revised in certain areas of international law and, in particular, in the area of human rights.

(c) Grounds for the invalidity of reservations to human rights treaties

16. Mr. Enrique Candioti, member of the International Law Commission, emphasized that it was difficult to define objectively the grounds for the invalidity of reservations to treaties. He described the draft guidelines contained in the Guide to Practice that had been prepared by the Commission. The Special Rapporteur had proposed a general definition according to which a reservation was incompatible with the object and purpose of a treaty if it affected an essential element of the treaty. Another group of guidelines concerning non-derogable norms and human rights treaties were currently being considered by the Commission.

(d) Assessment of the validity of reservations to human rights treaties

17. Mr. Alexandre Sicilianos, member of the Committee on the Elimination of Racial Discrimination, generally approved of the principles contained in the tenth report on reservations to treaties (A/CN.4/558 and Add.1 and 2) and in particular the assertion that human rights bodies were competent to assess a reservation's compatibility with the object and purpose of a treaty. He particularly supported the draft guideline which indicated that there were various bodies that were competent to determine the validity of a reservation.

18. Human rights bodies — for which the issue of human rights was not necessarily paramount — assessed reservations through two distinct procedures: the consideration of periodic reports and the examination of individual complaints.

19. In considering reports, committees exercised a quasi-"diplomatic" function. In some instances, the assessment of reservations was clear-cut. There were, however, situations in which it was not necessarily useful or desirable for the committee to make a "yes" or "no" pronouncement. For that reason, Mr. Sicilianos recommended that the realities of the situation should be taken into account: it was essential to deal with political considerations as well as with practical problems (such as the amount of time available to committees for considering reports). He stressed the importance of dialogue with States and of studying States' internal law, since reservations could not be considered in the abstract and their scope was dependent on internal law. It was therefore necessary to establish priorities for the purpose of determining the validity of reservations during the consideration of reports.

20. The individual complaints procedures of the human rights bodies conferred a quasi-judicial function on those bodies. Although the bodies' decisions were not binding, the States concerned were required to draw the appropriate conclusions from the opinions expressed by the bodies. Mr. Sicilianos stressed that a distinction should be made between reservations to jurisdictional clauses and reservations to substantive provisions. He drew attention in that connection to the Judgment of the International Court of Justice of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*.

(e) The consequences of the non-validity of reservations to human rights treaties

21. Mr. Giorgio Gaja, member of the International Law Commission, shared the view expressed by Ms. Hampson that articles 20 to 23 of the Vienna Convention did not apply to invalid reservations, and particularly to those that were incompatible with the object and purpose of the treaty. Nevertheless, in practice it was generally considered that even invalid reservations were subject to the general regime of reservations and could therefore be accepted by other contracting States.

22. The treaty bodies made use of their authority to play an active role in respect of reservations they considered invalid. They relied on two techniques to accomplish that end. The first was the approach taken by the European Court of Human Rights in the case of *Belilos v. Switzerland*. The Court had concluded that the willingness of Switzerland to be a party to the Convention was "stronger" than its willingness to maintain the reservation in question. The invalidity of the reservation did not subsequently impair Switzerland's status as a State party to the Convention.

23. The second approach was the one adopted by the Human Rights Committee in its general comment No. 24. The Committee did not seek to verify a State's willingness to be bound by the Covenant. It maintained that reservations were severable from the treaty and produced no effects if they were incompatible with its object and purpose.

24. Mr. Gaja urged caution. A restrictive attitude towards the reserving State could lead to political difficulties, such as a State's withdrawal from the Optional Protocol concerning individual communications. He welcomed the spirit of openness to dialogue that existed between the human rights treaty bodies and States. Even though the question of the validity of reservations was a difficult one, a "gentle" approach was called for. The reservations dialogue should be encouraged by the Commission.

3. Summary of the discussion

25. The members of the International Law Commission and the representatives of the human rights bodies had an opportunity to participate in a general discussion following each of the presentations. Mr. Roman A. Kolodkin and Ms. Xue Hanqin, members of the Commission, summarized the discussions on grounds for and assessment of the validity of reservations and on the consequences of the non-validity of reservations, respectively. Their views are reflected in the present report, as are the conclusions of Sir Nigel Rodley, member of the Human Rights Committee and Chairperson-Rapporteur of the working group on reservations of the meeting of chairpersons of human rights treaty bodies.

(a) The specific nature of human rights treaties

26. Some participants emphasized the special nature of human rights treaties. That specific nature did not, however, imply that the law of treaties was not applicable to them. Human rights treaties continued to be governed by treaty law.

27. The special nature of human rights treaties was reflected in the test provided for in article 19 (c) of the Vienna Convention on the Law of Treaties, which concerned the incompatibility of a reservation with the object and purpose of the treaty. It was nevertheless pointed out that that specific feature was not unique and that environmental protection treaties and disarmament treaties also presented particular features that could have an impact in terms of reservations. The reason that human rights treaties were of special interest to the Commission was that they had treaty monitoring bodies. The representatives of the human rights bodies stressed the fact that it was not necessary to establish a separate regime governing reservations to human rights treaties. However, they did feel that the general regime should be applied in an appropriate and suitably adapted manner.

28. A number of participants highlighted the fact that the delicate balance between the integrity and the universality of the treaty lay at the heart of the debate on the specific nature of human rights treaties. According to some, the treaty bodies gave precedence to integrity; however, the opposing view was also expressed, i.e., that treaty bodies sought to work on the basis of reservations and to hold discussions with States, which showed a greater concern for universality.

(b) The use of the term "validity"

29. Several participants expressed uncertainty as to the terminology to be employed. All the members of the human rights bodies had used the term "validity". Nevertheless, notwithstanding the previous decision of the International Law Commission on the matter, some Commission members were once again specifically opposed to the use of that term, owing to its objectivistic connotation and lack of neutrality.

(c) Grounds for invalidity

30. The participants were in general agreement that article 19 of the Vienna Convention on the Law of Treaties set forth the conditions for the validity of a reservation. However, discussion focused on subparagraph (c), according to which a reservation was prohibited if it was "incompatible with the object and purpose of the treaty". While some participants were opposed to the use of the term "reservation" to designate a reservation that was prohibited under article 19 (c), others pointed to the practical problem that would arise if another term was used.

31. It was noted that because it was not possible to establish a standard criterion for the object and purpose, the draft guidelines of the International Law Commission had been limited to identifying typical problems and attempting to illustrate article 19 (c).

32. Many participants noted the problematic nature of general and vague reservations. Although they were not considered to be incompatible with the object and purpose of the treaty, it was impossible to assess the validity of such reservations.

33. Participants also discussed the issue of reservations to provisions setting forth a rule of *jus cogens*. Some were of the view that any reservation to that type of clause should automatically be considered invalid, since it would inevitably affect the "quintessence" of the treaty. Others observed that the problem arose in much the same way that it did for reservations to provisions setting forth a customary norm — which could not be considered to be invalid *ipso jure*.

(d) Assessment of validity

34. All participants agreed that the competence of the human rights bodies to assess the validity of reservations was unquestionable. Many welcomed their reliance on political means of persuasion rather than on legal imperatives in their interactions with States.

35. The discussion focused in particular on the issue of the "reservations dialogue". It was observed that, in practice, such an approach was extremely useful for understanding the political considerations underlying reservations and that the pragmatism and discretion exercised by the human rights bodies had already met with success.

(e) The consequences of non-validity

36. To date, the human rights bodies had endeavoured, insofar as possible, to avoid taking a position on the validity of reservations. Examples of assessments of validity or declarations of invalidity of reservations were the exception and had

occurred only in the rare cases in which such determinations were unavoidable. In any event, the consequences of the non-validity of a reservation were not obvious. The participants were unanimous in considering that a reservation that was incompatible with the object and purpose of a treaty was null and void. However, some disagreement was voiced as to whether there was any need for States to rule on that matter, and it was considered unnecessary for States to object to an invalid reservation. Conversely, several participants felt that States had an interest in taking a position owing both to a lack of monitoring bodies in certain areas or, where such bodies did exist, to the sometimes random manner in which they considered the matters referred to them.

37. The consequences of the non-validity of a reservation for the status of the treaty presented a major difficulty, one which was linked, more specifically, to the consent of the author of the reservation to be bound by the treaty. The problem lay in determining whether or not the invalid reservation was severable from consent to be bound by the treaty. The participants stressed that the human rights bodies must act with caution. Their approach consisted in determining the State party's intention. If intention could not be discerned, a presumption would have to be made. In the view of several speakers, such a presumption should be in favour of severing the invalid reservation from consent to be bound by the treaty and firmly maintained by the human rights bodies (with the understanding that it must not constitute a conclusive presumption). Other participants, however, believed that the principle of State sovereignty must prevail. A reservation that was declared invalid altered the scope of the treaty for the reserving State, which should then have the option of withdrawing its consent to be bound by the treaty. Some participants pointed to the dangers inherent in the severance of an invalid reservation and considered that there was a risk that the reserving State might withdraw its participation in the optional protocol, or even in the treaty. According to one opinion, however, experience had shown that risk to be quite small.