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Topic:
**Reservations to treaties**

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[Agenda item 3]

FOURTEENTH* (continued) AND FIFTEENTH REPORTS OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the members of the Commission to resume the debate on the agenda item on reservations to treaties.

2. Mr. PELLET (Special Rapporteur), resuming the debate on draft guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3 in his fourteenth report, thanked those members, unfortunately few in number, who had taken the floor on this part of his fourteenth report. As to those members who had not spoken, he interpreted their silence as approval. If that was the case, the referral of the draft guidelines to the Drafting Committee should not pose a problem, since all speakers had favoured doing so.

3. That said, he had taken due note that that agreement had been accompanied, at least for one speaker, by a condition: that the debate on the existence of a specific category of reservations, namely established reservations, remain open.

4. He was very committed to the idea that it was for the Commission, meeting in plenary, to take decisions on questions of principle (both for his topic and for the others) and that the Drafting Committee should restrict itself to questions of drafting or purely technical matters (which already constituted a considerable amount of work). In the current case, however, he did not think that any problem of principle had really been raised during the discussions, even if the speaker to whom he had alluded had somewhat exaggerated the differences between them.

5. Leaving the debate open, he wished to make a number of remarks, especially since several speakers had expressed serious concern about what they had called the “concept” of “established reservations”.

6. To start with, he was not convinced that “established reservation” was a concept. In his opinion, it was above all a convenient expression, the advantage of which was that it avoided a long paraphrase: it designated a permissible reservation, from the point of view of both form and substance, which had been the subject of at least one acceptance. The idea of an “established reservation” was not of his own making: article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions referred to the consequences of the “establishment” of a reservation pursuant to articles 19, 20 and 23 by specifying that a “reservation established with regard to another party in accordance with articles 19, 20 and 23” (and the effects followed). He noted that the most sceptical of the participants in the debate on the relevance of the notion of established reservation had admitted that it was not sufficient for a reservation to be permissible for it to produce effects: it must also have been the subject of an acceptance. For that reason as well, he did not believe, contrary to what had been said by another speaker, that this was an artificial problem which would create unnecessary confusion. He was relieved to hear that a number of members had made comments along those lines.

7. However, although a majority in the Drafting Committee concurred with the four members who had expressed doubts about, and even some hostility towards, a systematic use of the expression “established reservation”, he thought that the wording could be modified by placing emphasis on the acceptance of a permissible reservation. In any case, he endorsed the comments by two other speakers (who favoured the idea that a reservation must be “established” in order to produce effects), namely that a distinction should be made between permissible and non-permissible reservations and that in any event the acceptance of a reservation—the express or tacit consent to the reservation—played an essential role.

8. That led him to reassure one speaker who was worried about whether the establishment of a reservation was to be seen in absolute or in relative terms. His reply to that question was clear: if a reservation was only established if it was accepted and if acceptance was individual (except, perhaps, if one was to consider the exceptions introduced by the first three paragraphs of article 20 of the Vienna Conventions), then normally it could only concern a relative concept (or relative effects).

9. The second point which had been the subject of a rather firm objection by speakers had to do with the reference to treaties “with limited participation” in the title and body of draft guideline 4.1.2. He entirely accepted the criticism; the phrase was deceptive in that it was only a very partial reflection, in both spirit and substance, of the underlying intention of article 20, paragraph 2, of the Vienna Conventions. Thus, he was in complete agreement with speakers who had argued that what was important was not the limited participation, but the intention of the negotiators to preserve in full the integrity of the treaty. He freely admitted that he had been carried away by the tortuous history of the provision, but if all the members of the Commission did not object, he would not venture to propose another formulation, that being the task of the Drafting Committee and one which, he had no doubt, it would discharge satisfactorily.

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* Resumed from the 3038th meeting.
* See footnote 9 above.
10. He also agreed that an effort should be made to reintroduce the notion of the object and purpose of the treaty in the second paragraph of draft guideline 4.1.2. Perhaps the whole first part of article 20, paragraph 2, of the Vienna Conventions could be used. However, he continued to believe that the idea of the object and purpose of the treaty was puzzling, and he recalled that the Commission had tried to define it in draft guidelines 3.1.5 and following, but he was not certain that those laudable efforts had made it any clearer.

11. As noted during the debates, draft guideline 4.1.1, on expressly authorized reservations, could not be read separately from the guidelines on specified reservations. Just because a treaty authorized reservations to some of its provisions did not mean that any reservation to those provisions was authorized. The English Channel case had rectified that somewhat simplistic view, and the Commission had endorsed the position of the ICJ in guidelines 3.1.2 and, above all, 3.1.4, which ruled out the idea that the authorization to formulate reservations allowed any reservation to be formulated. As to the wording of draft guideline 4.1.1, he had indicated in his introduction that he would accept in advance any simplification that the Drafting Committee might suggest; he recalled that at least one speaker had termed the wording “convoluted”.

12. He had taken due note of the recommendation to base the commentary to draft guideline 4.1.1 to a greater extent on the 1982 advisory opinion of the Inter-American Court of Human Rights on The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (arts. 74 and 75); that would also be useful for the commentary to draft guideline 4.2.7.

13. On draft guideline 4.1.3, some speakers had criticized the fact that he had mixed elements from article 20 and article 21 of the Vienna Conventions. That was probably true, but it was also the case for draft guideline 4.1.2, among others, and was justified by the structure of the Guide to Practice and the distinction which it drew (in conformity with a long-standing decision of the Commission) between the permissibility of reservations (third part of the Guide) and their effects (fourth part).

14. He regretted that the native English speakers in the Commission did not consider the English translation of his fourteenth report to be satisfactory; he had not had the time to review it. If they were prepared to address the problem, the corrections could appear in a corrigendum.

15. Mr. GAJA agreed with the Special Rapporteur that article 20, paragraph 4, of the 1969 and 1986 Vienna Conventions required the acceptance of the reservation by at least one contracting State for the reserving State to become a contracting State and thus a party to the treaty. Some depositaries, including the Secretary-General of the United Nations, advanced the date of the entry into force of the treaty with regard to the reserving State for pragmatic reasons. It was unlikely, as the Special Rapporteur had noted, that all the other contracting parties would formulate an objection to the reservation and would also oppose the entry into force of the treaty for the reserving State. However, that practice could not stem from the 1969 Vienna Convention, to which the Commission must remain faithful, as the Special Rapporteur had recalled in paragraph 249 of his fourteenth report.

16. In his view, it should be mentioned, at least in the commentary, that pursuant to article 20, paragraph 4 (b), of the Vienna Conventions, an objection to a reservation on the part of a contracting State could play the same role as its acceptance that the reserving State become a contracting State and, where applicable, a party to the treaty. That would hold true, to employ the text of the provision, “unless a contrary intention is definitely expressed by the objecting State”. That situation might seem paradoxical: if there was neither acceptance nor objection, it was necessary to wait for 12 months to elapse as set out in article 20, paragraph 5; otherwise, the treaty entered into force for the reserving State immediately.

17. In draft guideline 4.2.4, the Special Rapporteur departed from article 21, paragraph 1 (a), of the Vienna Conventions, but only in order to follow the definition of reservation contained in article 2, paragraph 1. He thus rightly envisaged that a reservation did not modify the provisions of a treaty, but rather the legal effects of those provisions. The Special Rapporteur was right to proceed in that fashion, particularly since he remained faithful to the Convention. However, the title of the draft guideline (Content of treaty relations) gave the impression that the subject was covered in full therein, whereas in reality it was developed in draft guidelines 4.2.5, 4.2.6 and 4.2.7. Perhaps another title should be found.

18. On the whole, he agreed with the Special Rapporteur’s opinion, but he wished to make two remarks regarding the draft guidelines.

19. First, when a reservation concerned a modification of the legal effects of the provision of a treaty, a reserving State might simply replace its obligation with a different one, as the Special Rapporteur put it. That was on the contrary the case for the reservation of Finland81 referred to in paragraph 269 of the fourteenth report: Finland wanted to use symbols instead of road signs, but did not claim that other States parties to the Convention on road signs and signals must adopt similar measures. However, another possibility should also be contemplated, namely when a reserving State wanted to change the application of provisions of a treaty in such a way that States which accepted the reservation also had to replace their obligations by other obligations in their treaty relations with that State. One such example was the reservation formulated by the Union of Soviet Socialist Republics on article 9 of the Convention on the High Seas in order to broaden the immunity of government vessels. The reservation had read: “The Government of the Union of Soviet Socialist Republics considers that the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships.”82 Clearly, that reservation had aimed to establish a treaty regime which would have committed all States accepting the reservation to confer unlimited immunity on all government vessels.

82 Ibid., chap. XXI.2.
in their relations with the reserving State. In Mr. Gaja’s view, the text of the draft guidelines should reflect those two possibilities with regard to the effects of reservations aimed at modifying the legal effects of a provision of a treaty.

20. Secondly, on reservations to human rights treaties or other treaties for which reciprocity did not appear to apply, the text of draft guideline 4.2.7 did not clearly reflect the legal situation resulting from a reservation to such treaties. Treaty relations between a reserving State and other States parties were affected by a reservation, since the reserving State could not invoke a provision of the treaty within the limits of the reservation. Similarly, within the same limits, other States did not have obligations vis-à-vis the reserving State. It was true that the content of the obligations of the other States parties was not modified, because they were bound with regard to the non-reserving States, but could it be said that the content of treaty relations with the reserving State was not modified by the reservation?

21. On a last point, he said that the questions which he had raised concerning the use of the expression “established reservation” could be addressed by the Drafting Committee.

22. Mr. FOMBA said that the approach adopted by the Special Rapporteur in paragraph 238 of his fourteenth report to define and set out the consequences of the establishment of a reservation was logical and consistent.

23. Draft guideline 4.2.3, whose wording he endorsed, did in fact contain a lacuna with regard to the issue of the date on which the author of the reservation might be considered to have joined the group of contracting States or contracting international organizations. In paragraph 244 of the report, the criticism of Sir Humphrey Waldock was well founded. In paragraph 249, the position taken by the Special Rapporteur in favour of the Vienna regime, despite the existence of practice to the contrary, was acceptable in the absence of any good reason to change it.

24. With regard to draft guideline 4.2.1, the proposal made in paragraph 250 to express the idea contained in article 20, paragraph 4 (c), of the Vienna Conventions was useful in that it respected the Vienna regime, at least in part, and it avoided the confusion in depositary practice. The wording of the draft guideline was acceptable.

25. The justification for draft guideline 4.2.2 given in paragraph 252 was clear and persuasive, and the wording was equally clear and acceptable. Concerning the question of the modification of provisions of the treaty or their legal effects, he concurred with the Special Rapporteur’s conclusion in paragraph 258 that a reservation, as an instrument external to the treaty, could not modify a provision of that treaty, but rather its application or effect.

26. On draft guideline 4.2.4, he agreed for the most part with the remarks in paragraphs 259 to 261. The wording did not call for any particular comment, except that the use of the sole word “modifies” appeared to raise the question of whether it was to be taken “strictly” or “broadly”, since the Special Rapporteur seemed to have enlarged its meaning to include “excluding reservations”. Admittedly, there was no longer any reason to be concerned about that, because the specific question of exclusion and modification was covered later in draft guidelines 4.2.5 and 4.2.6. The Special Rapporteur rightly noted that the distinction between “modifying effect” and “excluding effect” was not always easy to draw. The illustration which the Special Rapporteur had provided was instructive and his conclusion was pertinent.

27. As to the point made by the Special Rapporteur in paragraph 265 to the effect that, logically, the other States or international organizations with regard to which the reservation was established had, through their acceptance, waived their right to demand performance of the obligation (even if it was of a customary nature) stemming from the treaty provision in question, that interpretation was correct from a logical point of view, but the fact remained that in any case, a customary rule continued to be of general application.

28. With regard to draft guideline 4.2.5, the concern to specify the effect of exclusion produced by the reservations covered under draft guideline 4.2.4 seemed legitimate. The wording of the three paragraphs of draft guideline 4.2.5 did not call for any particular observations.

29. Concerning draft guideline 4.2.6, he agreed with the analysis of the mechanism of the modifying effect in paragraph 270. The first two paragraphs did not pose any particular problem, and the third was particularly relevant in that it reflected well the logical dialectical link between obligation and right. He agreed for the most part with the remarks made on the principle of reciprocity, notably in paragraphs 280, 281 and 285. The reference in paragraph 289 to the model clause on reciprocity of the effects of reservations, proposed in the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe adopted by the Committee of Ministers of the Council of Europe in 1980 was useful.

30. The explanation given by the Special Rapporteur in paragraph 290 for draft guideline 4.2.7 was acceptable. The wording of the draft guideline would provide a better indication of the scope of article 21 of the Vienna Conventions: after the general rule was enunciated, the draft guideline specified the main exceptions. On the whole, the wording of subparagraphs (a), (b) and (c) did not call for any particular comment, although he wondered whether, from a logical point of view, there was not a link between subparagraphs (c) and (a).

31. In closing, he said that he was in favour of referring draft guidelines 4.2.1 to 4.2.7 to the Drafting Committee.

32. Mr. McRAE (Chairperson of the Drafting Committee) said that the expression “established reservation” in the first sentence of article 21, paragraph 1, of the Vienna Conventions was used as a linking device to indicate that reservations had certain effects. However, his concern was that it then became applicable to article 20 and article 21. Although that did not really introduce a new concept, it certainly caused some confusion in the interpretation of the provisions of the Vienna Conventions, a confusion which was evident in the draft guidelines on the
effects of an established reservation. Draft guideline 4.2.1 specified that the author of a reservation was considered a contracting State as soon as the reservation was established, but article 20, paragraph 4, provided that a reserving State was a party when a reservation was accepted. In other words, under article 20, paragraph 4, the constituent act was acceptance, whereas under the draft guideline, the constituent act was establishment. Thus, the concept of establishment, which had only a linking function in article 21, paragraph 1, acquired a constituent function under article 20. The same problem arose in draft guidelines 4.2.2 and 4.2.3, in which the constituent act was establishment, and not acceptance as under article 20, hence the confusion in the reading of the guidelines in the light of article 20. On the other hand, the subsequent draft guidelines did not raise that difficulty, because they dealt with effects, and the concept of establishment played the same role there as in article 21, paragraph 1, namely to indicate the reservations to which the effects of article 21, paragraph 1, were applicable. He fully understood why the Special Rapporteur had used the idea of establishment in a broader sense than under the Vienna Conventions, the point being to make it explicit that a reservation that had a constituent effect under article 20, paragraph 4, must be permissible and must meet the requirements as to form and procedure—what was referred to in article 21, paragraph 1, as a “reservation established with regard to another party in accordance with articles 19, 20 and 23”. He was concerned that this might inevitably create a new separate concept of “established” reservation. In his view, it would be preferable to retain the word “acceptance” in article 20, paragraph 4, and to explain in the commentary that article 20 contemplated that, to be accepted, a reservation must be permissible and must follow the correct forms and procedure. That problem could perhaps be resolved in the Drafting Committee.

33. He also wished to make three minor remarks on the other draft guidelines. Concerning draft guideline 4.2.5, he wondered whether the last two paragraphs were really necessary. As stated in the first paragraph, a reservation that excluded the legal effect of a treaty provision rendered that provision inapplicable between the parties; was it necessary to expand on that any further? The two following paragraphs simply indicated that “inapplicable” meant “inapplicable”. If something had legal effects, there was some benefit in spelling it out, but in the current case, if the provision of the treaty was inapplicable, then the subsequent paragraphs appeared to be repetitive. On the practice of the Secretary-General, who accepted as a party a State that had accompanied its instrument of accession with a reservation before any other State had accepted that reservation, the Special Rapporteur’s comment that this practice was contrary to the Vienna Conventions was certainly true in terms of the provisions of those instruments, but it was an open question whether that meant that such practice was incorrect or should be criticized, because that viewpoint presupposed that it was up to the depositary to interpret the Convention, whereas it might be argued that it was up to the parties to do so. It did not seem that the parties to the Convention had objected to the practice of the Secretary-General. It might be useful for Mr. Nolte, as suggested by the Special Rapporteur, to give his opinion on the question before the Commission took a decision. Lastly, in paragraphs 268 and 269, the Special Rapporteur had given examples of reservations in which, in his view, the authors rejected an obligation under the treaty and replaced it with a different one. Those examples, in particular the one cited in paragraph 269, were not very convincing. It might be asked whether Finland had really undertaken a new obligation through that reservation or whether it was simply stating its practice in respect of road signs, without committing itself not to change that practice in the future. Given that Mr. Gaja seemed to agree with the Special Rapporteur on that point, he was prepared to recognize that some aspect had perhaps escaped him, but he wondered whether the example given really showed that a State had undertaken a new obligation or whether it simply indicated its practice. However, he did not have any difficulty with the proposition set out in 4.2.6 concerning the modification of the legal effect of a treaty provision. As he saw it, the draft guidelines as a whole should be referred to the Drafting Committee.

34. Sir Michael WOOD said that he was in agreement with the substance of draft guidelines 4.2.1 to 4.2.7 and had no objection to their being referred to the Drafting Committee, with the exception of the draft guideline reflecting article 20, paragraph 4 (c), of the Vienna Conventions, which dealt with the date on which the reserving State’s consent to be bound took effect. Given the absence of any practice of “express acceptance” of reservations, that subparagraph, if applied to the letter, would lead in almost every case to a 12-month delay before the reserving State’s consent to be bound became effective. The Special Rapporteur had pointed out that some depositaries, in particular the Secretary-General, did not apply that provision, a practice which States had not challenged. It was, however, important to have a clear rule in view of the potential consequences, including in litigation. The Commission could decide to follow the Special Rapporteur, who said that the practice of the Secretary-General was “entirely open to criticism” (para. 246) and that the rule expressed in article 20, paragraph 4 (c), of the Vienna Conventions “has not lost its authority” (para. 249), and thus maintain the rule. Throughout the exercise, the Commission had rightly judged it essential to respect the regime of the Vienna Conventions. However, that might call into question years of practice, which had been described as pragmatic, and cast doubt on actions taken by depositaries and others under numerous treaties, with unforeseen consequences. The other possibility would be for the Commission to be bold and to follow what seemed to be established practice or even a subsequent practice in the application of the Vienna Conventions which establishes the agreement of the parties regarding their interpretation, or perhaps even a modification of the treaty by subsequent practice. He had an open mind regarding both possibilities, although he preferred the second, which would be to accept what seemed to be the practice not only of the depositaries, but of all States. In any event, the issue needed to be explained fully in the commentary, and it would be useful for the Commission to seek the views of States and organizations between the first and second readings.

35. On the other hand, he had considerable reservations about the analysis in paragraphs 285 to 288 concerning the nature of a State’s rights and obligations under human rights treaties, and he encouraged the Special Rapporteur...
to reflect further on that question before presenting the Commission with a draft commentary. In particular, the Special Rapporteur should reconsider the apparent endorsement in paragraph 285 of passages from the controversial General Comment No. 24 of the Human Rights Committee. He did not believe that it was generally accepted that human rights instruments formed a special category for the purposes of the regime of reservations, or even, as the Special Rapporteur indicated in paragraphs 286 and 287, that they were part of a wider category of treaties “that do not lend themselves to reciprocity”. Nor was it generally accepted that the account given in the General Comment was satisfactory. It was not the postulate on which the ICJ had based its advisory opinion of 1951 on Reservations to the Convention on Genocide, nor was it the approach of other bodies, such as the European Court of Human Rights, which had held in Ireland v. the United Kingdom that the European Convention on Human Rights “comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bipolar understandings, objective obligations” [p. 90]. In practice, the substantive provisions of human rights instruments did create a “network of mutual, bilateral obligations”. That was clear, for example, in the inter-State dispute settlement provisions which they often contained, and in practice States reacted to reservations to human rights instruments in the same way as in the case of other treaties. The Special Rapporteur probably agreed that, at the very least, the wording of draft guideline 4.2.7, subparagraph (b), needed to be carefully considered.

36. The Drafting Committee should perhaps also address the question of the use of the new term “contracting party”, which was both unnecessary and ambiguous. The Vienna Conventions were consistent in their use of the terms “contracting State” and “contracting organization” to mean a State or international organization that had consented to be bound by a treaty, whether or not the treaty had entered into force. They used the term “party” to mean a State or international organization which had consented to be bound by a treaty and for which the treaty was in force. They did not use the term “contracting party”. It was important to use the terms found in the Vienna Conventions in the same meaning throughout the draft guidelines and commentaries, as had already been done in draft guideline 4.2.1.

37. Mr. PELLET (Special Rapporteur) said that he did not want the draft guidelines to be referred to the Drafting Committee before the Commission had expressed its opinion in plenary on whether the practice of the Secretary-General had modified the Vienna Conventions. For his part, he was prepared to admit that it had in fact done so, but not that it had allowed the Vienna Conventions, whose wording was crystal clear, to be interpreted differently. The practice of the Secretary-General went in the other direction for good reasons, and no one had objected, but in his view, that was a complete departure from the meaning of the Vienna Conventions, which were unambiguous, whereas practice was not. Although the practice of the Secretary-General was important, other bodies that were depositaries of many treaties, notably the Food and Agriculture Organization of the United Nations, waited one year before a treaty entered into force. Consequently, although he remained open to the position that was the opposite of his own, he urged those speakers who would take the floor after him to give their opinion on the question. If a clear majority emerged, the Drafting Committee would follow it, and if not, he would ask for a vote and would abstain.

38. The CHAIRPERSON said that, in her opinion, the point was not to choose between two possibilities, but simply to describe the situation, taking into consideration both the terms of the Vienna Conventions and subsequent State practice.

39. Mr. DUGARD, noting that the Special Rapporteur had emerged as a “droits-de-l’homme” in paragraphs 285 to 287 of his report, said that he agreed that human rights instruments required special treatment. Sir Michael had argued that they were not different from other treaties because they provided for inter-State dispute mechanisms, but everyone knew that, with the exception of the European Convention on Human Rights, concerning which there had been a small number of inter-State disputes, the inter-State dispute procedures under international human rights conventions had never been invoked. It would be going too far to infer from the mere existence of those procedures that international human rights instruments could not be qualified as non-reciprocal.

40. Mr. GAJA said that 20 years earlier, he had written that the practice of depositaries was pointing to a new rule of general international law. Perhaps the commentary could indicate that, although the practice deviated from the Vienna Conventions, it might have some substance in general international law because of the attitude that States had taken in reaction to that of the depositaries. On the other hand, it could not be said that subsequent practice was to some extent relevant for interpreting the Vienna Conventions, which were very clear on this point and did not need to be interpreted in the light of practice. Moreover, practice in the area of reservations deviated from the Vienna Conventions in many other aspects. It might therefore be time for the Commission to take practice into consideration and perhaps identify a new rule of general international law. As he saw it, the Special Rapporteur’s view should be followed, and something should perhaps be said to justify the Secretary-General’s practice from a different perspective, one that moved away from the Vienna Conventions.

41. Sir Michael WOOD said that there had to be a clear rule, because one could not say that the Secretary-General was acting in conformity with international law but that he was not acting in conformity with the Vienna Conventions. He had an open mind on what the rule should be, but he did think that the Commission should explain the two possibilities in detail in the commentary and seek the views of States at the end of the first reading to see whether they expressed a preference for one reading or another of the draft guidelines. On the point raised by
Mr. Dugard, he had not been suggesting, of course, that human rights instruments were bilateral treaties only. In reality, inter-State mechanisms (although perhaps not so much in dispute settlement mechanisms) were invoked bilaterally all the time in diplomatic correspondence, in which States reminded each other of their obligations. Moreover, the dispute settlement mechanisms under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under the International Convention on the Elimination of All Forms of Racial Discrimination had been invoked in two cases currently before the IJC.\footnote{Questions relating to the Obligation to Prosecute or Extradite and Application of the International Convention on the Elimination of All Forms of Racial Discrimination.} He hoped that, when he drafted the commentary, the Special Rapporteur would not unre- servedly endorse General Comment No. 24 of the Human Rights Committee.

42. Mr. SABOIA said that, like Mr. Gaja, he thought that the draft guideline should follow the letter of the Vienna Conventions, and the commentary should reflect the practice of some depositaries which seemed to be emerging. He also agreed with Mr. Dugard with regard to human rights instruments and the non-application of the principle of reciprocity. Notwithstanding Sir Michael’s comments, the fact that States reminded each other of their obligations was not sufficient to establish the principle of reciprocity for human rights instruments in the same way as for other treaties.

43. Mr. KAMTO recalled that the Commission had rightly decided to take a dogmatic position on the Vienna Conventions, in particular when their provisions were clear. One might ask how subsequent practice, which was not common to all depositaries, could lead to the modification of an established rule. More generally, the question arose as to the methodology of codification work. Should the Commission, on the basis of a few elements of practice, ask States whether they had a preference? As he saw it, the Commission should instead reaffirm the rules of the Vienna regime and indicate in the commentary that contrary practice existed, but remained insufficient.

44. Mr. NOLTE said that he had a few comments on draft guidelines 4.2.3 to 4.2.7. The Special Rapporteur had evoked the practice of depositaries that deviated from the provisions of article 20, paragraph 4 (c), of the Vienna Conventions, which required the acceptance of a reservation by at least one other State for the State which had formulated the reservation to become a party to the treaty. The Commission should look at the significance and the intention of such practice. His impression was that the motivation behind the practice of the depositaries and its acceptance by States was not to deviate from the Vienna Conventions, but rather to apply them less strictly so as not to pass judgement on the substantive effects of reservations. While that was sound, it perhaps went too far, because waiting for acceptance was not tantamount to making such a judgement. Thus, it could not be concluded that subsequent practice implied an informal modification of the Vienna regime. On the other hand, important practice existed and could not be ignored. Sir Michael had rightly stressed that there could not be two rules, one stemming from international law and the other from the Vienna Conventions, because that would lead to different dates of entry into force for the same treaty. The wisest solution would probably be for the Commission to focus its attention solely on practice and to ask States whether they wished to make it a rule.

45. Turning to the effects of a reservation on the content of treaty relations (draft guideline 4.2.4), he said that the problem was more one of terminology than of substance. As article 21, paragraph 1 (a), suggested, a reservation could not modify the text of a provision, but he wondered whether the best way to make that clear was to say that a reservation modified “the legal effects”. That expression was ambiguous, and it would therefore be preferable to speak of “obligations”, as recommended by Professor Imbert\footnote{P.-H. Imbert, Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l’avis consultatif donné par la Cour internationale de Justice le 28 mai 1951, Paris, Pedone, 1978, p. 15.} and as the Special Rapporteur had done in draft guideline 2.6.2. Draft guideline 4.2.4 would then read: “A reservation … modifies … the obligations arising out of the provisions of the treaty to which the reservation relates, to the extent of the reservation.”

46. With regard to excluding reservations and modifying reservations, he wondered whether it was necessary to formulate two separate draft guidelines (4.2.5 and 4.2.6). As pointed out by the Special Rapporteur, the difference between those two categories was not necessarily clear in all cases, and the same reservation could have both an excluding and a modifying effect. The risk was that in practice, by trying to place the reservation in one category or the other, one might overlook complex effects or even use the category of excluding reservations to deny the more indirect modifying effects which reservations had on treaty obligations as a whole. Consequently, if the distinction was maintained, a safeguard clause should be included to remind the parties concerned of the additional modifying effect which excluding reservations might have.

47. Finally, on draft guideline 4.2.7, the Special Rapporteur had been right to pose as general rule the reciprocal application of the effects of reservations, but the exceptions that he had proposed were perhaps stated too categorically. Of course, a reciprocal application of a reservation might not be possible because of the nature or content of the reservation (subpara. (a)), but it must always be verified whether a reciprocal application was really impossible. For example, the reservation formulated by Canada\footnote{Multilateral Treaties … (see footnote 81 above), chap. VI.16.} to the Convention on psychotropic substances, in order to allow the consumption of peyote for religious purposes, was not specific to Canada. The United States Supreme Court had rendered a similar decision, and members of such groups might wish to continue practising their religious ceremonies after emigrating to other countries.

48. The most important exceptions to the principle of reciprocity were those set out in subparagraphs (b) and (c) of draft guideline 4.2.7, namely when the treaty obligation to which the reservation related was not owed
individually to the author of the reservation or when the object and purpose of the treaty or the nature of the obligation concerned excluded any reciprocal application of the reservation, as was the case for human rights treaties or treaties protecting common goods. A more flexible formulation might be necessary. It was conceivable that certain treaty obligations were owed both to all the parties to the treaty or to individuals and individually to certain other States. In such cases, it was necessary to assess which aspect had priority, not only in the light of the nature of the treaty provision concerned, but also bearing in mind, to quote the Special Rapporteur, the “regulatory and even … deterrent role” which the principle of reciprocity played (para. 277 of the fourteenth report). For example, if a human rights treaty contained procedural guarantees in case of expulsion, and one State formulated a permissible reservation by virtue of which those guarantees did not apply for citizens of certain States, would it really be appropriate to exclude the reciprocal effect of such a reservation by referring to the undeniable fact that the procedural guarantees were not owed “individually to the author of the reservation”? In such instances, the “regulatory or even deterrent role” of the principle of reciprocity might be useful and even necessary for the attainment of the collective good pursued by the treaty. It was clear that the applicability of the principle of reciprocity in such cases, and in particular in the human rights context, must be explored very carefully and could only be recognized exceptionally, but it should not be excluded as categorically as had been done in General Comment No. 24 of the Human Rights Committee.

49. In closing, he said that in his opinion, draft guideline 4.2.3 to 4.2.7 could be referred to the Drafting Committee.

50. The CHAIRPERSON said that the Commission would continue the general debate on the draft guidelines in subsection 4.2 of the Guide to Practice contained in the fourteenth report at its next plenary meeting. She invited the Special Rapporteur to introduce his fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2).

51. Mr. PELLET recalled that the fifteenth report was the continuation of the fourteenth report, even though it had a different symbol. At the previous session, the Commission had considered the first two parts of the fourteenth report,88 on the procedure for the formulation of interpretative declarations and the permissibility of reservations. At the current session, it had examined the last part, namely draft guideline 4.1, on conditions for the establishment of a reservation, and had referred draft guidelines 4.1 to 4.1.3 to the Drafting Committee, and subsection 4.2, on effects of an established reservation; draft guidelines 4.2.1 to 4.2.7 were still under consideration. He proposed beginning with draft guideline 4.3 and subsection 4.4 of the Guide to Practice presented in the fourteenth report89 in order to conclude that part of the topic and then to move on to the sixteenth report (A/CN.4/626 and Add.1), which dealt with succession of States in relation to reservations.

52. Draft guideline 4.3 concerned the effects of an objection to a valid reservation. That was a central question to which States attached great importance and which was the subject of carefully ambiguous treatment in the Vienna Conventions. As the ICI had stated in its advisory opinion of 1951 on Reservations to the Convention on Genocide, “no State can be bound by a reservation to which it has not consented” [p. 26]. Only the acceptance of a reservation enabled it to have effects: that was what he had called the “establishment” of a reservation, although the Drafting Committee might decide not to retain that very convenient expression, to which some members of the Commission were opposed. A reservation excluded some of a treaty’s provisions or modified their application without prior negotiation (apart from the case of so-called negotiated reservations, which did not need to be accepted, because they were included in the treaty itself). Clearly, it would be contrary to the spirit of consensus for it to be possible for one party to be bound against its will by modifications wished by the author of a reservation. It followed from that principle that the other party could object to such modifications. However, as it was not possible both to accept and object, it was only possible to object to a reservation if it was not “established” or if the State which claimed to object had not already accepted it. That was reaffirmed in draft guideline 4.3 (para. 5 [para. 295]89). It went without saying that if the Drafting Committee did not retain the words “established” and “establishment” for draft guidelines 4.1 and 4.2, it would be necessary to bring those draft guidelines into line with draft guideline 4.3.

53. Draft guideline 4.3 posed the principle of the inapplicability of a reservation to which an objection had been made. However, that was not the only consequence of the objection. With the famous reversal of presumption which a number of States, notably the Union of Soviet Socialist Republics,90 had demanded at the Vienna Conference, it would become impossible, according to a number of eminent jurists, to distinguish between the effects of an objection to a reservation and the effects of the acceptance of a reservation, provided an objection with maximum effect was not concerned (see footnote 34 [489]). He did not agree with that view at all. In particular, contrary to acceptance, objection did not result ipso facto in the entry into force of the treaty between the reserving State and the objecting State, and that was a major difference. Although an objection did not preclude such entry into force (unless, as stated in article 20, paragraph 4 (b), of the Vienna Conventions, a contrary intention was expressed by the author of the objection), it did not result in entry into force either. A wording along those lines was proposed in draft guideline 4.3.1 (para. 24 [314]).


89 In the mimeographed version of the fifteenth report, the numbering of paragraphs and footnotes continues from the Special Rapporteur’s fourteenth report, reproduced in *Yearbook* ... 2009, vol. II (Part One), document A/CN.4/614 and Add.1–2. The paragraphs and footnotes were renumbered in *Yearbook* ... 2010, vol. II (Part One).

Once it was accepted that the objection was neutral with regard to the entry into force of the treaty as between the reserving State and the objecting State, the objection depended on an outside element: the establishment of the reservation, i.e. both its acceptance, by at least one State, as a valid reservation, and a meeting of the conditions for entry into force of the treaty itself. That was the principle posed in draft guideline 4.3.2 (para. 26 [316]). However, there were two exceptions. First, when the entry into force of a reservation required unanimous acceptance of the reservation: that case, already envisaged in draft guidelines 4.1.2 and 4.2.1, was evoked again in draft guideline 4.3.3 (para. 28 [318]), but from the perspective of the effects of the objection on the entry into force of the treaty, or rather the absence of such effects.

Secondly, article 20, paragraph 4 (b), of the Vienna Conventions left no doubt that a State could unilaterally produce the effect of exclusion with its objection. That was made crystal clear, a contrario, at the end of subparagraph (b), which read: “[a]n objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State.”

That was the text which he proposed to use in draft guideline 4.3.4 (para. 18 [308]), entitled “Non-entry into force of the treaty as between the author of the reservation and the author of an objection with maximum effect”, and which read:

“An objection by a contracting State or by a contracting international organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, unless a contrary intention has been definitely expressed by the objecting State or organization [in accordance with guideline 2.6.8].”

In paragraph 20 [310] of the report, he discussed whether it would be useful to refer to draft guideline 2.6.8, which the Commission had already adopted, on the procedure for a definite expression of that intention. He was not sure whether the phrase in square brackets should be included in the draft guideline; it would be up to the Drafting Committee to decide.

While not wishing to return to the history of the reversal of presumption obtained at the Vienna Conference ( paras. 9–16 [299–306]), he said that he had always considered such reversal of the traditional position, according to which a treaty did not enter into force between the two States concerned, rather odd, but he had been very careful not to question it. In any event, draft guidelines 4.3 to 4.3.4 were fully in line with the letter and spirit of the Vienna Conventions and merely added what he considered to be a few useful clarifications.

Nevertheless, the situation was somewhat bizarre. State A had formulated a reservation to which State B objected, and thus there were two contrary wishes with regard to the applicability of a part of the treaty, and yet the treaty entered into force “minus the reservation”. Those seemingly neutral words “the treaty minus the reservation” could cover very different scenarios, and the partisans of the absolute freedom to formulate reservations had defended, until the very end, the notion that in such cases an objection had the same effects as an acceptance of the reservation. The proposition which had ultimately been adopted by the Vienna Conference had reaffirmed that an objection was an objection and not an acceptance. It was that idea which was set out in article 21, paragraph 3, of the Vienna Conventions, which read: “When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.”

Draft guideline 4.3.5 (para. 56 [346]) reproduced the text of article 21, paragraph 3, of the 1986 Vienna Convention. However, it contained a small addition, because it specified that an objection could aim to prevent the application not only of “provisions [but also] parts of provisions to which the reservation relates”. The scope of that provision had been made more explicit in the 1977 decision of the Permanent Court of Arbitration in the English Channel case, which stated that:

the combined effect of the French reservations and their rejection by the United Kingdom is neither to render article 6 inapplicable in toto, as the French Republic contends, nor to render it applicable in toto, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent. [para. 61]

That did not really solve the problems. Rules of law often had to be kept somewhat general, and it was up to the beneficiary of the norms, and perhaps the judge, to use common sense in their application.

That said, it was quite possible to attempt to clarify matters a little, and that was what he had set out to do in draft guidelines 4.3.6 and 4.3.7 (paras. 57–64 [347–354]), which were based on a distinction between excluding reservations and modifying reservations. That distinction appeared in article 2, paragraph 1 (d), of the 1986 Vienna Convention, where “reservation” was defined as a unilateral statement designed “to exclude or to modify the legal effect of certain provisions of the treaty in their application to the reserving State”.

In the case of objections to excluding reservations, the provision in question was not applicable between the States concerned, namely the reserving State and the objecting State, and it was fair to say that, concretely and in that regard, but in that regard only, the objection to such a reservation produced the same effects as its acceptance. Regardless of whether the reservation was accepted or whether it was the subject of an objection, the application of the provision to which it referred was excluded between the two States, and relations between them must be governed either by an earlier treaty or by a customary rule.
On the other hand, when a reservation had a modifying effect, there could be no question of applying either the treaty obligation to which the author of the reservation had not consented or the modified obligation sought by the author of the reservation, because the author of the objection did not want that modification. Thus, in accordance with the principle of consensus, neither position could be accepted. An objection to a modifying reservation and an objection to an excluding reservation had the same result because both cases meant a return to the applicable law that had been in force before the entry into force of the treaty and which continued to be in force. However, in the case of a reservation with a modifying effect, the author of the reservation did not obtain what he or she wanted, because the modification that he or she sought to make to his or her treaty obligations did not produce any effect. It was those differences that draft guidelines 4.3.6 and 4.3.7 tried to reflect.

The two “subseries” of guidelines which he had just introduced concerned the effects of reservations as expressly envisaged by article 21, paragraph 3, together with article 20, paragraph 4(b), of the Vienna Conventions. At issue were what could be called, respectively, the minimum effects of the objection, i.e., the exclusion of the application of the reservation to the extent provided by the latter, and the maximum effect of the objection, namely the express and clearly worded refusal by the objecting State of the entry into force of the treaty as a whole between it and the reserving State. In practice, however, it had been observed that some States had attempted to produce two other types of effects with their objections. That was not unacceptable as such. After all, both reservations and objections were defined by the effects which the authors of those unilateral declarations sought to have them produce. However, having an objective and attaining it were two different matters. There again, those practices (or aspirations) must be examined in the light of the basic principle of consensus with a view to determining whether to include them in the Guide to Practice. To that end, a firm distinction must be drawn between objections “with intermediate effect” and objections “with maximum effect”.

At the previous session, he had proposed a draft guideline defining reservations “with intermediate effect”, namely draft guideline 3.4.2. The draft guideline had been referred to the Drafting Committee (which meant that the plenary had accepted the idea), which had adopted a draft guideline along those lines that could be approved soon by the Commission in plenary.

However, although the principle of objections with intermediate effect was accepted, it still had to decide within what limits they could produce their effects. In his view, the Commission should be guided in that regard by the principle of consensus, as expressed in particular by the ICJ in its advisory opinion of 1951 on Reservations to the Convention on Genocide, and which article 19 of the Vienna Conventions, on reservations, reflected in its subparagraph (c). The most relevant passage of the advisory opinion read: “It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application” [p. 27].

The assessment of “what is essential to the object of the Convention” was inevitably subjective and in some cases even relative. It was at that point that the notion of consensual balance came into play, which could cover a group of obligations considered as being interdependent of each other and whose inclusion as a package in the treaty had made it possible to reach an overall compromise, which the treaty confirmed. Clearly, that “package” of jus cogens and the competence of the ICJ (articles 53 and 66 of the Vienna Conventions) was the best reflection of the notion of treaty balance, and it was in that connection that the best, and even the sole, example was found of objections with intermediate effect, whose purpose (which in his view would not be unacceptable) was precisely to preserve that consensual balance. It was not unacceptable because, after all, the aim was merely to preserve the mutual consent of the two States or groups of States in question, provided that the object and purpose of the treaty were not undermined.

It was that balance which draft guideline 4.3.8, entitled “Non-application of provisions other than those to which the reservation relates”, sought to achieve. It read: “In the case where a contracting State or a contracting organization which has raised an objection to a valid reservation has expressed the intention, any provision of the treaty to which the reservation does not refer directly but which has a sufficiently close link with the provision or provisions to which the reservation refers is not applicable in treaty relations between the author of the reservation and the author of the objection, provided the non-application of this provision does not undermine the object and purpose of the treaty” (para. 72 [362]).

The case of objections with “super-maximum” effect was infinitely more questionable and uncertain. At issue were objections through which their authors sought to completely neutralize the reservation by claiming that the reserving State was bound by the treaty as a whole despite the reservation. Objections with “super-maximum” effect were often formulated by Nordic States and were almost always justified by the fact that the reservation in question was not valid because it was incompatible with the object and purpose of the treaty.

He did not contest at all that, in many cases, a reservation that was the subject of such objections did in fact seem to be contrary to the object and purpose of the treaty and thus was not valid. One example of that situation was afforded by the objection by Sweden to the reservation made by El Salvador to the Convention on the Rights of Persons with Disabilities (para. 75 [365]). However, that was not the problem. The problem was that even if the reservation was valid, an objection with “super-maximum” effect would in any case be contrary to the very principles of consensus. However, the problem could be resolved very easily: since no State could force another State to be bound against its will, objections with “super-maximum”...
effect could not have the desired effect, because that would be tantamount to imposing on the reserving State a provision to whose application it had not consented.

72. He did not wish to pass a moral or political judgement on all that. He simply asserted that, legally, an objection could not produce a “super-maximum” effect; otherwise, the entire structure of the law of reservations would crumble. That was why he strongly urged the Commission to adopt draft guideline 4.3.9, entitled “Right of the author of a valid reservation not to be bound by the treaty without the benefit of its reservation”, which read: “The author of a reservation which meets the conditions for permissibility and which has been formulated in accordance with the relevant form and procedure can in no case be bound to comply with all the provisions of the treaty without the benefit of its reservation” (para. 77 [367]).

73. Although that firm stance only concerned objections to valid reservations, the problem also arose in the same terms with regard to objections to non-valid reservations in the sense that, in any case, the objecting State could not force the reserving State to be bound by the treaty as a whole despite its reservation, whether valid or not. However, it needed to be stressed that, since the reservation itself was not valid, its author was not justified in demanding to benefit from it.

The meeting rose at 1 p.m.

3043rd MEETING

Wednesday, 12 May 2010, at 10.10 a.m.

Chairperson: Ms. Hanqin XUE

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


[Agenda item 3]

FOURTEENTH95 and FIFTEENTH reports of the SPECIAL RAPPORTEUR (continued)

1. Mr. PELLET (Special Rapporteur), continuing his introduction of the fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2), drew attention to draft guidelines 4.4.1 to 4.4.3, on the effects of a reservation and extraconventional obligations, an area that was much less problematic than the subjects introduced at the previous meeting.

2. As he had pointed out in paragraph 82 [372]96 of the report, several judges of the ICJ had stressed in a joint dissenting opinion on Nuclear Tests that:

in principle, a reservation relates exclusively to a State’s expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations. [p. 350]

That principle was very important because its aim was to ensure that a State could not use a reservation to a particular treaty to evade its obligations under another treaty or under general international law. The scope of that principle naturally encompassed acceptance of and objections to reservations.

3. Draft guidelines 4.4.1 and 4.4.2, set out in paragraphs 84 [374] and 90 [380] respectively, expressed that principle as it applied to pre-existing treaties and customary norms. As the ICJ had clearly recalled in the 1984 judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua, the adoption and entry into force of a treaty rule did not have the effect of causing pre-existing customary law to disappear. If the treaty provision was in conformity with a customary norm, it merely reaffirmed that norm; if it was contrary to a customary norm, the provision was applicable as a special norm, but the custom remained as lex generalis. Thus, a State could not evade the application of a customary norm by formulating a reservation to a treaty provision that enunciated that norm. That point was made in paragraph 2 of draft guideline 3.1.8, which had been adopted in 2007 and which read:

A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.97

He admitted that he had been wrong to propose that paragraph 2 of draft guideline 3.1.8 be placed in the third part of the Guide to Practice, which was devoted to the validity of reservations: it would be preferable to remove the paragraph from draft guideline 3.1.8 and make it draft guideline 4.4.2.

4. He saw no reason not to adopt an equivalent draft guideline covering reservations to a treaty provision enunciating a jus cogens norm, and he proposed that the Commission adopt a draft guideline 4.4.3, set out in paragraph 94 [384], which was drafted in a similar manner and concerned a reservation to a treaty provision reflecting a peremptory norm of international law.

5. In closing, he asked the Commission to consider whether it wished to refer draft guidelines 4.3 to 4.3.9,98

95 See footnote 9 above.

96 See footnotes 89 and 90 above.