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Summary record of the 3043rd meeting

Topic:
Reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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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. Caffisch, Mr. Candiotti, 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. Vas-ciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*) (A/CN.4/620 and Add.1, sect. B, A/CN.4/624 and Add.1–2, A/CN.4/626 and Add.1, A/CN.4/L.760 and Add.1–3)

[Agenda item 3]

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,

⁹⁵ See footnote 9 above.

⁹⁶ See footnotes 89 and 90 above.

⁹⁷ *Yearbook ... 2007*, vol. II (Part Two), p. 42.

4.4.1 and 4.4.3 to the Drafting Committee and to shift paragraph 2 of draft guideline 3.1.8 from the third to the fourth part of the Guide to Practice.

6. The CHAIRPERSON invited the Commission to resume its consideration of draft guidelines 4.2 to 4.2.7 reproduced in the fourteenth report of the Special Rapporteur.

7. Mr. NOLTE recalled that at the previous meeting consideration had been given to the question of whether article 20, paragraph 4 (c), of the 1969 Vienna Convention should be reaffirmed or whether practice contrary to it had been established. He noted that it was the practice of both the Council of Europe and the Swiss Confederation as depositaries to accept and regard declarations of accession as immediately effective rather than wait for the 12-month period specified in article 20, paragraph 5, of the Vienna Convention to elapse. He was not certain what conclusion to draw from that practice, but he believed it was significant.

8. Accordingly, the Commission should either reaffirm a clear rule of the 1969 Vienna Convention, which meant that the entry into force of many treaties would then be called into question because the depositaries had given a different date of entry into force than the one prescribed in article 20, paragraph 5, and thus reaffirmation would not necessarily clarify the situation but would make it more uncertain; or it should recognize that a rule of the Vienna Convention had been modified by uncontested practice. His personal preference would be to follow Sir Michael's suggestion and find some way of asking States and depositaries to clarify their practice.

9. Mr. DUGARD maintained that the guidelines should not be modified to take account of the Secretary-General's practice, which, as he understood it, was largely a rule of convenience. The Secretary-General had not declared it to be a rule of principle, and there was no suggestion that he intended to introduce a practice that was in conflict with article 20, paragraph 4 (c). He therefore agreed with the Special Rapporteur in respect of draft guideline 4.2.1.

10. On the subject of draft guideline 4.2.5, the Special Rapporteur was correct in saying that it was difficult to distinguish between excluding reservations and modifying reservations, but he had nevertheless succeeded in explaining the difference by citing examples of excluding reservations in paragraphs 263 to 265 and of modifying reservations in paragraphs 268 and 269 of his fourteenth report. Although he agreed with the Special Rapporteur that draft guidelines 4.2.5 and 4.2.6 were necessary, he was not certain that it was necessary to include paragraphs 2 and 3 in either provision: in both cases paragraph 1 clearly elaborated the principle, while the subsequent paragraphs merely detracted from that clarity.

11. He had already commented briefly the previous day on the subject of reservations to human rights treaties and the principle of reciprocity, but he wished to amplify his earlier remarks. Unfortunately, General Comment No. 24 of the Human Rights Committee⁹⁸ had become something

of a red flag to many States, which saw it as an attempt to curb their sovereign right and in particular to allow a human rights body to monitor their reservations. Admittedly, some aspects of General Comment No. 24, such as the issue of severability, were controversial, but that did not detract from the validity of much of the text. The passage quoted in paragraph 285 of the fourteenth report was eminently sensible and correct, as was the Special Rapporteur's comment. Clearly, in most cases human rights treaties did not establish reciprocal obligations but simply provided rules for the benefit of persons within the jurisdiction of the individual States parties. The principle of inter-State reciprocity had no place where most human rights treaty provisions were concerned. In recent years, attempts had been made to invoke the dispute-settlement procedures set out in human rights conventions, but it was interesting to note that States continued to refrain from invoking inter-State procedures that would give jurisdiction to monitoring bodies in connection with inter-State disputes. The general dispute-settlement provision must be seen as an exception to the rules set out in most human rights treaties.

12. In principle, then, the Special Rapporteur's statement must be accepted in the sense that human rights treaties did not impose reciprocal obligations. One could imagine the chaos that would result if the interpretation proposed by the Special Rapporteur were not followed. He therefore approved of draft guideline 4.2.7: it might seem a bit repetitive, but it was important to spell out the various issues in detail.

13. He was pleased that the Special Rapporteur had made no attempt to provide a guideline for the point discussed in paragraph 288. For a reserving State to call on a non-reserving State to honour obligations that it had provided for in its reservations would be hypocritical, and he did not think it necessary to address that situation in a guideline.

14. In conclusion, he favoured referring the draft guidelines proposed in the report to the Drafting Committee.

15. Mr. KAMTO said that draft guideline 4.2.1 (Status of the author of an established reservation) could be viewed as an attempt to facilitate the implementation of article 20, paragraph 4 (c), of the 1969 and 1986 Vienna Conventions. While he could understand the concerns of Commission members who had suggested that States be consulted as to whether precedence should be given to the practice of the Secretary-General of the United Nations in his capacity as the depositary of multilateral treaties⁹⁹ or, conversely, whether the provisions of article 20, paragraph 4 (c), should prevail, he shared the views expressed by the Special Rapporteur in his report regarding both the analysis and formulation of draft guideline 4.2.1. The problem with consulting States was that if they favoured giving precedence to the Secretary-General's practice or to practice in general, the Commission would have to decide how to respond. If it drafted a guideline embodying the practice, it would be proposing a change that contradicted—and did so surreptitiously, by means of a guideline—a clearly established provision of a nearly universal instrument that was widely

⁹⁸ See footnote 83 above.

⁹⁹ See footnote 84 above.

regarded as being declaratory of customary law. He was not convinced that the Commission should take such a step or even suggest such a possibility to States, and for that reason he was uncomfortable with the proposal to consult States on the matter.

16. While it was true that a tendency to “sanctify” practice had emerged in the past few years, the danger of according more weight to practice than to a clear and explicit provision of a treaty having the stature of the 1969 Vienna Convention, which was sometimes referred to as the “treaty of treaties”, was that the Commission might be opening the door to abuse. It had to be sure when codifying “practice” that it was dealing with more than the practice of only a few States. It was one thing to codify a practice that reflected a general trend in international law, but quite another to give precedence to a practice that opposed an established rule of international law, and he cautioned members to bear in mind the principle of *ex injuria jus non oritur*. Although there were those who considered actions of large, powerful States that violated the rules of international law to constitute practice that could be embodied in law, it was not the role of the Commission or of jurists to adopt such an approach. Rather, their role was to point out whenever necessary that an established rule existed and that any conduct departing from the rule constituted a violation, not a contrary practice. While contrary practice did, of course, exist, it was necessary to determine its extent and to limit its scope considerably.

17. He was in favour of referring all the draft guidelines to the Drafting Committee.

18. Mr. HMOUD said that draft guidelines 4.2 to 4.2.7 reflected the rules of the 1969 and 1986 Vienna Conventions and provided a sound basis for the concept of the effects of established reservations. The establishment of a reservation had the effect of modifying or excluding the legal effect of one or more provisions of a treaty if the reservation was accepted by at least one other contracting party, met the requirements for permissibility and was formulated in accordance with the form and procedures specified for the purpose. At the same time, the establishment of a reservation had the effect of making the author of the reservation a contracting party to the treaty, again provided that those three requirements were met. For example, in the case where a reservation was found by a dispute-settlement body to be incompatible with the object and purpose of the treaty to which it related, such a reservation would, according to the Guide to Practice, fail to meet the criteria for an established reservation, and consequently no treaty relationship would be established for the author of the reservation.

19. While the proposition that the establishment of a reservation necessarily produced the effect of making the author of the reservation a contracting State or contracting international organization *vis-à-vis* the treaty and was in accordance with articles 19, 20, 21 and 23 of the Vienna Conventions, it did not necessarily follow that the reverse was true. An unestablished reservation, by virtue of its inconsistency with the object and purpose of a treaty, might or might not result in the constitution of a treaty relationship for the author of the reservation. As the Vienna Conventions

did not address that question, the Guide to Practice should clearly indicate whether an author of a reservation could be a party to a treaty even if the reservation had been declared null and void. The answer to that question might well be negative, but that would have serious practical consequences for the application of the treaty from the time the impermissible reservation was formulated to the time it was determined to be null and void. In short, he agreed with the concept that an established reservation produced legal effects, including in relation to the treaty’s entry into force; however, a decision had to be made on the effects of unestablished reservations, especially with regard to the question of entry into force.

20. Regarding the departure by some depositaries from the rule set out in article 20, paragraph 4 (c), namely that an act expressing a State’s consent to be bound by a treaty and containing a reservation was effective as soon as at least one other contracting State had accepted the reservation, he pointed out that the Secretary-General of the United Nations had provided solid justification for the practice of the Secretariat, described in paragraph 246 of the fourteenth report, including the fact that no objection had ever been received from any State concerning the entry into force of a treaty that included States making reservations. The Secretary-General had also stated that the preclusion of the entry into force of a treaty for a reserving State might conceivably require that all other contracting States definitely express their intention that their objection preclude the entry into force of the treaty as between them and the objecting State. The Commission thus needed to decide whether it should amend the requirement for acceptance of a reservation by one other contracting State or contracting international organization in order for the treaty to enter into force for the reserving State, or whether more than one rule should coexist.

21. In his view, there should be only one rule. In the unlikely event that all contracting States objected to a reservation before the 12-month period specified in article 20, paragraph 5, had elapsed, there was no reason to assume that all the negative consequences such a scenario might have for treaty relations, such as a change in the date of entry into force, would not arise. Such an exceptional scenario warranted an exceptional outcome, even though the Secretary-General had noted that such a situation had never occurred as long as he had served as a depositary. There was no justification for contradicting the 1969 and 1986 Vienna Conventions with regard to the consent requirement, which was a pillar of treaty relations. Moreover, no practice existed which had amended that requirement. What did exist was a presumption that it was highly improbable that a reservation would be rejected by all the contracting States or organizations of a treaty. On that basis, then, he considered draft guidelines 4.2.1 to 4.2.3 to be acceptable.

22. With regard to the modifying or excluding effects of established reservations, he agreed with the Special Rapporteur that it was more precise to describe them as modifying or excluding the legal effects of treaty provisions rather than the treaty provisions themselves, although that distinction had few practical consequences for the author of the reservation in its relationship with the other contracting States or international organizations.

23. Draft guideline 4.2.4 (Content of treaty relations), which reproduced article 21, paragraph 1 (a), of the Vienna Conventions, was acceptable as it currently stood. However, he saw no reason that the guideline should not also mention the excluding effect contained in paragraph 3 of that article, as such effects were included in the definition of a reservation in article 2, paragraph 1 (d), of the Vienna Conventions.

24. With regard to draft guideline 4.2.5 (Exclusion of the legal effect of a treaty provision), he questioned whether the second and third paragraphs were necessary. It went without saying that when a treaty provision was inapplicable between the author of the reservation and another contracting party, the author of the reservation was not bound by the provision, and the other contracting party could not claim the right contained in the relevant provision in the context of its treaty relations with the author of the reservation.

25. Although he agreed with the content of draft guideline 4.2.6 (Modification of the legal effect of a treaty provision), he suggested that the phrase “required to comply” in the second paragraph be replaced by the words “bound by”. He further suggested that the phrase “the right under” in the third paragraph should be replaced with the words “implementation of”.

26. Concerning the reciprocal nature of reservations, he agreed with the general premise that the party with regard to which a reservation had been established was exempt from the obligation to apply the provision or provisions covered by the reservation in its relations with the author of the reservation. Nevertheless, he shared the concerns expressed by other Commission members regarding the emphasis placed on General Comment No. 24 of the Human Rights Committee. The Committee’s opinion that the reciprocity principle was not applicable to reservations to human rights treaties stemmed from its doubts concerning the permissibility of such reservations. A human rights treaty remained a contractual relationship, and the obligations flowing from it were always towards the other parties, irrespective of whether its content might benefit individuals or entities other than the contracting parties. Therefore, the principle of reciprocal obligations should be preserved. If an obligation was owed under general international law, then neither the reserving State nor the other contracting parties should be relieved from that obligation.

27. Subparagraph (b) of draft guideline 4.2.7 (Reciprocal application of the effects of an established reservation) appeared to exclude reciprocity when the treaty obligation in question was owed to more than just the author of the reservation. If that was the case, then the draft guideline might be applied to a wide range of treaties other than human rights treaties, such as trade treaties in which the beneficiary was an individual as opposed to a State. Such may not have been its intended effect. Accordingly, he suggested that subparagraph (b) should be given further consideration. He had no problem with the other two exceptions contained in subparagraphs (a) and (c).

28. In paragraph 288 of his fourteenth report, the Special Rapporteur indicated that where an exception to the

principle of reciprocity applied, the reserving State could not require the other contracting States to comply with the obligations in respect of which the reservation had been made, even if the State or international organization accepting the reservation was required to discharge them. He agreed with that proposal and suggested the inclusion of language to that effect in draft guideline 4.2.7.

29. Lastly, he agreed that draft guidelines 4.2.1 to 4.2.7 should be referred to the Drafting Committee.

30. Mr. PETRIČ said that the discrepancy between the practice of the Secretary-General as treaty depositary and article 20, paragraph 4 (c), of the 1969 Vienna Convention posed a serious problem. It was true that the Vienna Convention was 41 years old; however, it was also true that the practice of the Secretary-General, the Council of Europe, the Swiss Confederation and several other treaty depositaries had never been contested. As a permanent, general and undisputed practice, it could be said to constitute an *opinio juris*. If the Commission opposed that practice, it might in effect be saying that treaties were eternal and could never be changed (except by a formal amendment), irrespective of the behaviour of States, which, ultimately, was the crucial factor in international law. Such an approach would defeat the purpose of the Commission’s work on the topic of treaties over time.

31. While there was no doubt that the Vienna Convention was an important instrument, the Commission could not simply ignore practice. Given that the problem could have significant consequences, the Commission should follow the suggestion of Sir Michael and consult States and international organizations between the first and second readings of the draft guidelines.

32. He was in favour of referring the draft guidelines to the Drafting Committee.

33. The CHAIRPERSON, speaking in her capacity as a member of the Commission, said that the cluster of draft guidelines 4.2 to 4.2.7 was in line with the 1969 Vienna Convention and with general international practice. The Special Rapporteur’s analysis of the draft guidelines was clear and convincing, and she was in favour of referring them to the Drafting Committee for further editorial improvement.

34. She wished to respond to the Special Rapporteur’s request to Commission members to state their views as to how the Commission should deal with the discrepancy between article 20, paragraph 4 (c), of the 1969 Vienna Convention and the treaty practice of depositaries, in particular the United Nations, which was a major depositary of multilateral conventions. To begin with, she did not find the current practice of the Secretary-General of the United Nations as a depositary to be problematic, nor did it deviate from the terms of the Convention. The practice of international organizations as treaty depositaries had been in existence for a long time and actually predated the Convention. Sir Humphrey Waldock had been right in stating that the point was not purely one of drafting; rather, it was a matter of substance. Yet one might well ask why the Commission had not addressed or corrected that practice when drafting the 1969 Vienna Convention, why that practice

had persisted even after the Convention had entered into force and why no State had ever seriously challenged it. Other questions that the Commission should address were whether existing practice worked to the detriment of the treaty system or, conversely, to its advantage and, if the Commission chose to submit the question to States, what kind of answer it expected to receive from them. After having reflected on those questions, she wished to share some of her thoughts on the matter.

35. According to article 16 of the Vienna Convention, submission by a State of its instrument of ratification, acceptance, approval or accession to the depositary signified consent to be bound by the treaty. Even if the depositary chose to remain neutral on the question of reservations, it would definitely facilitate the ratification process of a treaty if the depositary included the State that was the author of a reservation among the parties to the treaty rather than excluding it from the group of parties which had expressed their consent to be bound. If the reservation was deemed impermissible under the terms of a treaty, it would be incumbent upon the other States parties to raise objections and reject the entry into force of the treaty between them. Until that moment, the author State remained bound by virtue of its consent. Thus a general policy consideration lay behind the depositary's practice, which was designed to encourage more States to accede to the treaty.

36. The wording of article 20, paragraph 4 (c), of the Vienna Convention indicated that a State that was the author of a reservation would not be considered to be bound effectively unless at least one State party expressed its acceptance of the reservation. From the standpoint of contractual relations, that was logical. Insofar as the treaty relations between contracting States were concerned, the date of effect should be the date when the minds of the States met. Both in theory and in practice, then, the depositary's action did not affect or change the actual contractual relationship between the States parties concerned, nor did it affect the principle of consent. As it was rare for a State to express acceptance of a reservation or reject the entry into force of a treaty between itself and the author of the reservation, the presumption appeared to support the depositary's practice.

37. She agreed with Mr. Gaja that it would be wiser for the Commission to deal with the matter in the commentary than to solicit States' views on it, since the practice of the depositary did not seem to conflict with or deviate from the Vienna Convention. The gap between the two allowed for positive flexibility and was unlikely to give rise to controversy between States.

38. Mr. HASSOUNA said that the inconsistency between article 20, paragraph 4 (c), of the Vienna Convention and the practice of the Secretary-General probably stemmed from policy considerations. He shared the concerns expressed about the possibility that Member States, if asked to comment on their practice, might express opinions that contradicted the rule enshrined in the Vienna Convention. It might therefore be wiser to deal with the situation regarding practice in the commentary and to uphold the rule established in the Vienna Convention.

39. That issue underscored the importance of the topic of treaties over time, as it illustrated the manner in which subsequent practice could affect the interpretation of treaties.

40. Mr. DUGARD asked the Special Rapporteur whether there were any other cases in which a conflict between the provisions of the Vienna Convention and State practice had arisen and where he had deferred to the practice of States or of senior officials.

41. Mr. VASCIANNIE said that the Commission should base its guidelines on the terms of the Vienna Convention. Then, in the commentary, it could note the possible discrepancy in practice and the fact that the discrepancy might have legal implications. It would be unwise to refer the matter to States for their opinion, as that would only make the marathon even longer.

42. Mr. SINGH said that the Secretary-General had been consistent in his practice and had clearly explained the reasons for it. Objections to reservations and opposition to a treaty's entry into force owing to such objections were matters for States parties or States that were entitled to become parties to the treaty. They were not something on which the Secretary-General could exercise his judgement. The Secretary-General's position was consistent with articles 76 and 77 of the Vienna Convention, which set out the functions of depositaries. Those functions were to inform the other parties to the treaty, or any States entitled to become parties thereto, of the instruments of signature and ratification and of any reservations. Those functions did not include passing judgement on any reservations.

43. Ms. JACOBSSON said that the Commission's guideline regarding the date on which the author of a reservation became a contracting party should be based on the provisions of the Vienna Convention, and the Secretary-General's practice should be elucidated in the commentary. That would obviate the problems that might arise if the Commission attempted to develop a new or special regime. She was disinclined to seek States' views on the matter, as that would hold up the Commission's work.

44. Mr. PELLET (Special Rapporteur) said that it was essential that the Commission as a whole should decide how to handle the problem he had faced. He thought that he ought to be able to propose a solution which preserved the text of the Vienna Convention without expressing clear disapproval of the Secretary-General's practice.

45. In response to Mr. Dugard, he said that to date there had been only a few situations in which there had been doubt as to whether practice was consistent with the Vienna Convention. The first case concerned late reservations, and there the Commission had accepted practice that constituted development of the provisions of the Vienna Convention so as not to stand in the way of progress. Another case was objections with a "super-maximum" effect. In his view, the latter clearly contradicted the letter and the spirit of the Vienna Conventions. The Commission would be confronted with that issue when it debated draft guideline 4.3, and he hoped that practice in that area would not be embodied in the guidelines, as it should not be encouraged.

46. Mr. KAMTO asked why draft guideline 4.3.4 was discussed before draft guidelines 4.3.1, 4.3.2 and 4.3.3 in the Special Rapporteur's fifteenth report (A/CN.4/624 and Add.1–2). In addition, he believed that the heading of section (c) above paragraph 74 [364] of the report should read "Case of objections intended to produce a 'super-maximum' effect" rather than "Case of objections with 'super-maximum' effect", since the effect in question was not automatic. The objecting State did have an aim, but whether that aim was achieved depended on the subsequent reaction of the other party. Like the Special Rapporteur, he doubted that objections with a "super-maximum" effect were consistent with the Vienna Convention.

47. Turning to the draft guidelines themselves, he said that he did not fully grasp the difference between guidelines 4.3.1 and 4.3.4. Draft guideline 4.3.1 was entitled "Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of the reservation", whereas the title of draft guideline 4.3.4 referred to the non-entry into force of the treaty. The only real difference in the content of the draft guidelines was that the last phrase of draft guideline 4.3.4 spelled out the proviso "unless a contrary intention has been definitely expressed by the objecting State or organization". He wondered whether the two provisions should not be combined, since they both referred to cases where the aim of the objection was to prevent the entry into force of a treaty.

48. In draft guideline 4.3 the final phrase "unless the reservation has been established with regard to that State or international organization" seemed to mean "unless the reservation has already been accepted by that State or international organization". If that was the intended meaning, the phrase was redundant, since draft guideline 2.8.12 read "Acceptance of a reservation cannot be withdrawn or amended". The final phrase in draft guideline 4.3 should therefore be reconsidered and possibly deleted.

49. Drawing attention to the French version of draft guideline 4.4.3, he suggested that the words "*ne porte pas atteinte au*" (does not affect) should be replaced with "*n'a aucun effet sur*" (has no effect on), because that wording more clearly conveyed the idea that the reservation did not modify the provisions of a treaty, but rather the application of those provisions—in the case at hand, a treaty provision reflecting a peremptory norm of general international law.

50. He was in favour of referring draft guidelines 4.3 to 4.4.3 to the Drafting Committee.

51. Mr. PELLET (Special Rapporteur) said that he had discussed draft guideline 4.3.4 first in the fifteenth report because that guideline dealt with objections having a maximum effect, and his position *vis-à-vis* such objections was easy to explain. It had thus seemed logical to begin with those objections and then to highlight how the effect of simple objections differed. Pedagogical considerations had thus taken precedence over Cartesian logic. In the Guide to Practice, the general rule should naturally precede the special rule.

The meeting rose at 11.40 a.m.

3044th MEETING

Friday, 14 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Cafilisch, 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. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRPERSON invited the Commission members to resume the debate on the agenda item on expulsion of aliens.

2. Mr. NOLTE said that, although the Special Rapporteur's sixth report was rich and stimulating, he had doubts about some aspects of it. Generally speaking, the Special Rapporteur's very broad perspective of the topic took in a wide range of sources, some of which were more than a century old, and referred to specific situations in many different places. Given the factual and legal complexity of the topic, the adoption of such an approach, albeit desirable from a strictly methodological viewpoint, would make it difficult, or almost impossible, to avoid being taxed with selectivity. For example, in paragraph 215, Germany was the first country to be mentioned in the section on "Examples of detention conditions that violate the rights of aliens who are being expelled". That paragraph did not describe detention conditions in Germany after 1945, but referred to a note from a minister at the end of the nineteenth century in which the minister had proposed the setting up of an internment camp for unauthorized immigrants. The Special Rapporteur then associated those "internment ideas" with the Nazi regime and suggested that the legal texts underpinning them had remained in force long after the establishment of the Federal Republic. Although he did not wish to comment in detail on that paragraph, he personally found it selective and emphasized that in national or international discourse it was essential to ensure that any references to past Nazi crimes and their linkage to other periods or countries were appropriate. The Special Rapporteur's references to other, mostly African or European, countries, were often based on sources whose reliability he could not assess. While the treatment of aliens certainly posed serious problems in some places, if the Commission's role was to evaluate evidence of such practices, it would have to conduct a thorough investigation—and if it embarked on such an investigation, it would also have to study the history of

* Resumed from the 3041st meeting.