

Document:-  
**A/CN.4/3045**

**Summary record of the 3045th meeting**

Topic:  
**Reservations to treaties**

Extract from the Yearbook of the International Law Commission:-  
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to expel an alien from its territory, that right was not unlimited or unconfined under international law. Draft article A did not, however, adequately distinguish between what was permissible and what was prohibited by international law. The term “forcible departure” seemed to exclude the possibility that lawful expulsion might also be compulsory and accompanied by enforcement measures under certain circumstances. The term “actions and omissions of the State” might require complex interpretation. Furthermore, individual acts that provoked the involuntary departure of an alien should likewise be regarded as omissions on the part of the State, and the latter should offer appropriate remedies to redress such a situation, or intervene actively, depending on the circumstances. It would therefore be preferable to speak of acts “not in conformity with the relevant laws and legal procedure”.

17. In the event of disguised extradition, the legal implications were more complex, as it involved the much wider field of mutual judicial assistance, which was not confined to extradition. Many other legitimate measures of judicial cooperation, such as the transfer of prisoners or the handing over of fugitives, did not require the consent of the person concerned. The new version of draft article 8, which made no reference to consent, was welcome. As in draft article A, it was, however, necessary to make it clear what acts were prohibited by international law when a State was trying to remove an alien from its territory as part of international cooperation in combating terrorism.

18. The Special Rapporteur had made a thorough examination of State practice and legislation with regard to grounds for expulsion, the subject of draft article 9. A State could rely on various grounds in order to expel an alien. The most frequently used ground was a threat to public order and public security, but some practices had become obsolete and others tended to be regional. In any event, a distinction should be drawn between an alien holding a residence permit and an alien who was unlawfully present in the territory of a State. Expulsion as a criminal penalty was lawful and many countries had recourse to it; the problem was that the procedure was not always accompanied by the requisite guarantees. The Special Rapporteur had rightly drawn attention to the fact that begging, vagrancy, debauchery and disorderliness should not constitute grounds for expulsion; if they were very serious in nature they might be qualified as a breach of public order. As for economic grounds, it was hard to see what professional restrictions on foreign nationals had to do with expulsion. A State could reserve the exercise of certain professions for its nationals and refuse to grant visas to foreign nationals who wished to work in such protected sectors, but if an alien who had found a job in that sector then had his or her lawful residence permit taken away, that should be regarded as disguised expulsion.

19. Draft article B on detention conditions was very important. The examples given amply demonstrated that it was necessary to remind States of their obligation to respect the dignity and human rights of detained aliens. The draft article seemed to refer mainly to cases of illegal immigration. That should be explained in the commentary.

20. In conclusion, she was of the opinion that the four draft articles could be sent to the Drafting Committee

so that it might improve their wording. Speaking as the Chairperson, she announced that the Commission would pursue its debate on the expulsion of aliens during the second part of the session.

*The meeting rose at 10.50 a.m.*

### 3045th MEETING

*Monday, 17 May 2010, at 3.10 p.m.*

*Chairperson:* Ms. Hanqin XUE

*Present:* Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Mr. Wako, 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]

FOURTEENTH REPORT OF THE SPECIAL  
RAPPORTEUR<sup>101</sup> (*concluded*)\*

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the draft guidelines relating to the effects of an established reservation (4.2.1 to 4.2.7) contained in the fourteenth report of the Special Rapporteur.
2. Mr. PELLET (Special Rapporteur) said that while the draft guidelines had elicited some interesting comments, there had been no objections to their referral to the Drafting Committee. Nevertheless, it was important to decide what guidance the Drafting Committee should be given on the wording of draft guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty). As he had observed in paragraphs 246 to 248 of his fourteenth report, the practice of the Secretary-General of the United Nations and other depositaries seemed to conflict with article 20, paragraphs 4 (c) and 5, of the 1969 and 1986 Vienna Conventions. Further research done by Mr. Nolte had confirmed that the prevailing practice seemed to be for the immediate inclusion of a reserving State when the treaty required acceptance by a minimum number of States or international organizations for its entry into force.
3. Many Commission members had expressed their views on whether it was advisable to confirm that practice in the Guide to Practice or to abide by the clear but

\* Resumed from the 3043rd meeting.

<sup>101</sup> See footnote 9 above.

contrary rule established in the 1969 and 1986 Vienna Conventions. With the possible exception of Mr. McRae, there had been no expressions of support for the former solution. The debate had focused on two options: to defer any decision until States had been consulted on the matter or to reaffirm the rule enunciated in the Vienna Conventions, even if that meant attempting to reconcile practice with the rule.

4. There had been little support for the first option, which had been proposed by Sir Michael. In brief, members had wondered what the Commission stood to gain by consulting States; the problem was not one that could be resolved by compiling a few statistics. Moreover, he was not certain that it would be good practice to consult States at the present juncture—midway through the development process. The members of the Commission were independent experts and, as such, must assume their responsibilities. Member States were called upon to provide input on the Commission's draft texts, and their comments would be duly taken into account; at any rate, they had the final word on the subject.

5. Furthermore, as Mr. Kamto and several other members had emphasized, the Commission needed conclusive reasons for taking action that was contrary to the 1969 and 1986 Vienna Conventions. Mr. Hmoud and Ms. Xue had rightly observed that the absence of any objection to the Secretary-General's practice could be taken either as endorsing such practice or, conversely, as upholding the rule enunciated in the two Conventions. It was important to allow for the possible future application of that rule in the exceptional situation where the inclusion of a reserving State or international organization to ensure the entry into force of a treaty might pose a problem. However, as he had explained in paragraph 249 of his fourteenth report, such an obstacle could easily be overcome if one other contracting State accepted the reservation in question.

6. In addition, while the practice of the Secretary-General and other depositaries might seem to conflict with the 1969 and 1986 Vienna Conventions, the Secretary-General was very anxious that it should not be interpreted thus, as was borne out by the extracts from the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*<sup>102</sup> reproduced in paragraph 246 of the fourteenth report.

7. All those considerations and the overwhelming majority of views expressed during the debate seemed to argue in favour of maintaining the rule enshrined in article 20, paragraph 4 (c), of the 1969 and 1986 Vienna Conventions. As agreed at an earlier meeting, he had drafted two (four, counting the bracketed text) alternative formulations for draft guideline 4.2.2 (Effect of the establishment of a reservation on the entry into force of a treaty).<sup>103</sup> While upholding the principle of not including a reserving State or international organization in the number of contracting States required for the entry into force of a treaty, the alternative formulations showed that the Commission would not go against current practice, which

seemed convenient, on the understanding that such practice would be described in the commentary.

8. If members were in agreement with that principle, and in view of the general consensus that had emerged during the debate, he suggested that the Commission did not need to discuss the matter any further in plenary meeting. Instead, it should refer the original version of draft guideline 4.2.2 along with the alternative formulations set out in the conference room paper to the Drafting Committee and allow that body to decide on the matter.

9. He had felt it important to deal with that question of principle at the outset, since most of the other comments made during the debate concerned the wording of the draft guidelines. One exception was the point raised by Mr. Gaja, not covered in his fourteenth report, that there were in fact two categories of modifying reservations, which could produce quite different effects when objections were made thereto. Although Mr. Nolte had stressed that the line between excluding and modifying reservations was not always clear, he himself believed that such a distinction was useful, if only to show that objections did not always have the same effects as acceptances of reservations.

10. Yet it must be admitted that their effects were not unambiguous, even where the two categories of modifying reservations were concerned. While some modifying reservations were intended to modify the effect of the treaty *vis-à-vis* the author of the reservation only, other modifying reservations were intended to establish what Mr. Gaja had referred to as "a counter-treaty regime". Examples of the first category were contained in paragraphs 268 and 269 of the fourteenth report. Mr. Gaja had given an example of the second category—the reservation of the former Union of Soviet Socialist Republics to article 9 of the Convention on the High Seas, which 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."<sup>104</sup> In other words, the immunities to which warships were entitled should apply to all government vessels. Another good example of a modifying reservation was the reservation by Israel to the Geneva Conventions for the protection of war victims, to the effect that Israel would replace the distinctive signs and emblems of the Convention with the Red Shield of David.<sup>105</sup> In the case of all those modifying reservations, their acceptance had a reciprocal effect.

11. However, that was not the case with the reservation by Finland<sup>106</sup> to article 18 of the 1968 Convention on road signs and signals (para. 269 of the fourteenth report): even if Finland reserved the right not to use certain road signs, its reservation could not produce reciprocal effects, since a contracting party that had accepted the reservation and undertook to use the signs in question *vis-à-vis* the other parties to the Convention could not use certain signs for

<sup>102</sup> See footnote 84 above.

<sup>103</sup> Session document ILC(LXII)/RT/CRP.1 (distribution limited to the members of the Commission).

<sup>104</sup> *Multilateral Treaties* ... (see footnote 81 above), chap. XXI.2.

<sup>105</sup> United Nations, *Treaty Series*, vol. 75, Nos. 970–973, pp. 436–438.

<sup>106</sup> *Multilateral Treaties* ... (see footnote 81 above), chap. XI.B.20.

some parties and different signs for others. The reservations by the former Soviet Union, on the other hand, had a permissive effect for the parties that accepted them, and not only for the parties that had entered the reservation.

12. In summary, while he agreed that there were two categories of modifying reservations that had different effects, he believed that the current wording of draft guideline 4.2.6 (Modification of the legal effect of a treaty provision) covered both categories and did not need to be amended. If any slight adjustments were deemed necessary to cover the second category, they could be taken care of by the Drafting Committee, with input from Mr. Gaja. On the other hand, it would be necessary to draw a distinction between the two subcategories of modifying reservations should the Drafting Committee decide to delete the last two paragraphs of draft guidelines 4.2.5 and 4.2.6, as suggested by Mr. Dugard, Mr. Hmoud and Mr. McRae. As the substance of those paragraphs was not covered elsewhere, the Drafting Committee might wish to consider incorporating it in a new draft guideline, possibly placed after draft guideline 4.2.4 (Content of treaty relations).

13. A number of comments had been made on draft guideline 4.2.4. In response to Mr. Fomba's query as to why the verb "modifies" had been used instead of "excludes", Mr. Gaja had explained that article 21 of the 1969 and 1986 Vienna Conventions only used the term "modifies". Nevertheless, in order to address Mr. Fomba's concern, he suggested that it might be a good idea to base the text of the draft guideline on the definition of reservations contained in article 2, paragraph 1 (*d*), of the Vienna Conventions, according to which a reservation was a unilateral statement purporting "to exclude or to modify the legal effect of certain provisions of the treaty".

14. Mr. Nolte had observed that a reservation modified not the provisions of the treaty but rather the obligations arising under those provisions, and had proposed that the draft guideline be amended to reflect that idea. While he agreed with Mr. Nolte in principle, his preference would be to retain the original wording and to address the point in the commentary, so as to avoid departing from the wording of article 21, paragraph 1, and article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions.

15. Mr. Gaja had suggested that the title of the draft guideline was too broad but had not proposed any alternative title. Perhaps "Effects of an established reservation on treaty relations" might be appropriate.

16. Mr. McRae had questioned the appropriateness of the words "reservation established" in draft guidelines 4.2.1 to 4.2.7, but there was no reason not to use the term, since it was in keeping with article 21 of the Vienna Conventions. Furthermore, it was not enough, as Mr. McRae had suggested, simply to refer to "acceptance of reservations". Of course, the reservations in question had been accepted, otherwise they would not be established; however, such reservations needed to be accepted, valid in conformity with the procedure laid down in the second part of the Guide to Practice and permissible in accordance with the guidelines in the third part of the Guide to Practice. While he would not insist on the term,

he requested the Drafting Committee to bear those three criteria in mind and to ensure consistency between the draft guidelines under sections 4.1 and 4.2 of the Guide to Practice.

17. With regard to draft guideline 4.2.3 (Effects of the entry into force of a treaty on the status of the author of an established reservation), Mr. Fomba had asked why there was no reference to the time of the entry into force of the treaty. The Drafting Committee might decide otherwise, but he did not consider it good policy to refer in each draft guideline to all the rules that might be relevant to the guideline in question. In his view, it would be difficult to refer to all the rules governing the entry into force of treaties, which were set forth in article 24 of the Vienna Conventions, in draft guideline 4.2.3.

18. The last important question of principle raised during the debate had been that of reciprocity, which was dealt with in draft guideline 4.2.7. He rejected Sir Michael's accusation that he sought to place human rights treaties in a special category and challenged him to find any evidence in his reports or other written contributions to that effect. He had taken great care not to mention human rights *per se* in draft guideline 4.2.7. Human rights treaties were taken into account in the far more general category of treaties or treaty provisions that did not lend themselves to reciprocal application, under which the three subcategories listed in draft guideline 4.2.7 were subsumed: human rights treaties came under the second subcategory. In that connection, Mr. Hmoud had rightly observed that draft guideline 4.2.7 did not concern human rights treaties only, although he was not convinced by Mr. Hmoud's other example, namely commercial treaties which, on the contrary, seemed to be the typical example of bilateral treaties that did have reciprocal effects.

19. Moreover, he urged Sir Michael to take a close look at paragraphs 84 *et seq.* and 148 *et seq.* in his second report on reservations to treaties,<sup>107</sup> in which he had sought to convince the Commission, contrary to Sir Michael's assertion, that human rights treaties did not constitute a specific category of treaty. He believed that he had done so rather successfully, for in its preliminary conclusions of 1997 on reservations to normative multilateral treaties, including human rights treaties, adopted by the Commission in 1997,<sup>108</sup> the Commission had made it very clear that no particular category of treaty was at issue for the purposes of the application of reservation law. In paragraphs 2 and 3 of the preliminary conclusions, the Commission had considered that the Vienna "regime is suited to the requirements of all treaties, of whatever object or nature" and "achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty", including "in the area of human rights". He regretted that the Commission had revived an old religious war between the Human Rights Committee and certain States with regard to General Comment No. 24.<sup>109</sup> It was precisely because he was far from agreeing with the conclusion

<sup>107</sup> *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

<sup>108</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

<sup>109</sup> See footnote 83 above.

of General Comment No. 24 that he had urged the Commission to take a position on the issue in its preliminary conclusions of 1997.

20. He could hardly be suspected of “human rightism”, despite Mr. Dugard’s comments to the contrary, but he did not believe that the voice of a handful of powerful States should smother that of human rights bodies. It was important to find balanced and reasonable solutions, and it could not be reasonably denied that there were elements in human rights treaties that did not lend themselves to reciprocity, including with regard to reservations. Moreover, he had not said anything different in his explanations on the subject or in draft guideline 4.2.7. However, the Commission should not allow itself to be drawn into another dogmatic debate. He did not disagree with Mr. Hmoud or Mr. Nolte when they stressed that human rights treaties did contain elements of relevance to reciprocity. He had said as much in his second report when he had concluded that it “must also be admitted that the concept of reciprocity is not totally absent from normative treaties, including those in the area of human rights”;<sup>110</sup> even more explicitly, he had noted in paragraph 85 of the same report that it “is, however, necessary to beware of taking an overly straightforward and simplistic view of things. While, as a rule, provisions that protect human rights have a marked normative character, human rights treaties also include typically contractual clauses.”<sup>111</sup> It did not seem to him that draft guideline 4.2.7 was contrary to such an analysis. It merely stated that whenever a reservation did not, for one of the reasons set out in the guideline’s three subparagraphs, lend itself to reciprocity, the mutuality of effects was not a factor. The draft guideline did not set out a position with regard to specific cases and was not intended to do so. In any event, if ambiguity persisted, he had no objection to asking the Drafting Committee to dispel it.

21. Referring to a comment by Sir Michael cautioning against the use of the term “contracting party”, he noted that the term was in common usage, and it might seem convenient to use it to cover both contracting States and contracting international organizations. However, use of that term was not compatible with a reading of the definitions of the terms “contracting State” and “contracting organization” in article 2, paragraph 1 (f), or of the term “party” in article 2, paragraph 1 (g), of the Vienna Conventions, and he was thus in favour of abandoning the words “contracting party”, which the Commission had used in a number of draft guidelines already adopted. Consequently, it would need to replace the term when it put the final touches on the Guide to Practice.

22. Mr. Hmoud had rightly noted that the fourteenth report said nothing about the case of reservations that were not established or not permissible for one reason or another. He wished to assure Mr. Hmoud that the guidelines falling under draft guideline 4.3 in the fifteenth report (A/CN.4/624 and Add.1–2) covered the effects of an objection and that those falling under draft guideline 4.5, to be discussed during the second half of the

current session, concerned impermissible reservations. Thus the omission was only temporary.

23. He was in complete disagreement with Mr. Gaja’s suggestion that the commentary on the draft guideline that would reproduce article 20, paragraph 4 (b), of the Vienna Conventions should specify that an objection would have the same effect on the entry into force of a treaty as an acceptance, and he drew attention in that regard to paragraphs 22 [312]<sup>112</sup> to 26 [316] of his fifteenth report, which introduced draft guidelines 4.3.1 and 4.3.2. There was, in fact, a fundamental difference between an acceptance of a reservation and an objection to a reservation. Mr. Gaja had made his comment before he had seen the fifteenth report, and it was to be hoped that he would change his mind once he had read it.

24. There was little doubt that the Commission wished to refer all the draft guidelines under section 4.2 to the Drafting Committee, but he insisted that the final version of draft guideline 4.2.2, however reformulated, must remain faithful to the letter of article 21, paragraph 4, of the Vienna Conventions.

25. Sir Michael WOOD agreed with the Special Rapporteur that if that was the general wish, the Commission should proceed on the basis that it should adhere to the rule established in the Vienna Convention, on the understanding that the commentary would make it clear that by adopting a draft guideline which followed the Vienna Convention, the Commission was not questioning the Secretary-General’s practice. To do otherwise would give the impression that the Commission was somehow establishing, 50 years after the rule had been adopted, that this practice was now customary international law, although that might not be the case. On a more general point, it had been his impression that the issue brought up by the Special Rapporteur actually arose in connection with draft guideline 4.2.1.

26. He did not think that he differed with the Special Rapporteur with regard to the question of human rights treaties. In his statement the previous week, he had been careful not to imply that the Special Rapporteur was endorsing a special category of human rights treaties. He had pointed out that it was not generally accepted that human rights treaties formed a special category or even, as the Special Rapporteur suggested, that they were part of a broader category of treaties that did not lend themselves to reciprocity. His own concern had been with the Special Rapporteur’s quotations from General Comment No. 24, which reflected too rigid a view. For example, the statement that “the principle of inter-State reciprocity has no place” in paragraph 17 of the General Comment was too absolute and should not be reproduced in the commentary.

27. The CHAIRPERSON said that she took it that the Commission wished to refer draft guidelines 4.2 to 4.2.7, together with the alternative proposals for draft guideline 4.2.2, to the Drafting Committee.

*It was so decided.*

<sup>110</sup> *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478, p. 65, para. 151 (c).

<sup>111</sup> *Ibid.*, p. 56.

<sup>112</sup> See footnotes 89 and 90 above.

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)\*

28. The CHAIRPERSON invited the Commission to continue its debate on the fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2), and more specifically on draft guidelines 4.3 to 4.4.3.

29. Sir Michael WOOD commended the Special Rapporteur on his fifteenth report and observed that the effect of objections to reservations was one of the central points of the whole topic. He agreed with the Special Rapporteur's overall approach: he was right to emphasize, in paragraph 2 [292], the importance of the cardinal principle which the ICJ had enunciated in its 1951 advisory opinion on *Reservations to the Convention on Genocide* that “no State can be bound by a reservation to which it has not consented” [p. 26]. Treaty relations were based upon consent. He also shared the view expressed in paragraph 47 [337] that it “is highly doubtful whether article 21, paragraph 3, of the Vienna Conventions is applicable to objections to reservations that do not satisfy the conditions of articles 19 and 23”. Indeed, he would have thought that this was the natural interpretation of article 21, paragraph 3, when read together with paragraph 1 of the same article, which dealt only with valid reservations. In any event, at the current stage of its work the Commission was concerned only with valid reservations.

30. It was perhaps not surprising that States and their advisers sometimes misunderstood or misapplied the Vienna Convention rules on reservations, particularly those on the effect of objections. The Vienna rules were not a model of clarity on that point. It should be borne in mind that the drafters of the Vienna Convention had been working only some 15 years after the ICJ had issued its 1951 advisory opinion on *Reservations to the Convention on Genocide*. The Court of Arbitration had recognized in the *English Channel* case, cited by the Special Rapporteur in paragraph 188 of the fourteenth report, “that the law governing reservations to multilateral treaties was then undergoing an evolution which crystallized only in 1969 in Articles 19 to 23 of the Vienna Convention on the Law of Treaties” [para. 38 of the opinion]. One result of the current exercise should be to clarify matters and thus to assist States in adopting a more uniform and consistent approach. That would help to give stability to treaty relations, which in turn would promote the purposes of the United Nations as described in the preamble to the Vienna Conventions.

31. There was not a great deal that needed to be said about draft guidelines 4.3 to 4.3.9. However, as the Special Rapporteur himself recognized, an effort should be made to simplify some of the drafting.

32. Guideline 4.3 read quite oddly, at least in English, and the Drafting Committee might wish to consider restructuring it—for example, by reversing the order, adding the word “already” and speaking of “acceptance” rather than of “establishment”. The opening words of the guideline might then read: “Unless the reservation has already been accepted by that State or international organization”.

33. He had no problem with guideline 4.3.4 in paragraph 18 [308], which in the English text was incorrectly numbered 4.3.3. However, read together with the explanation and with guideline 2.6.8, it raised the question as to how, or whether, the time limit “before the treaty would otherwise enter into force” for the two States in question applied in the many cases in which the practice of the Secretary-General was followed. Draft guidelines 4.3.4 and 2.6.8 were entirely in line with the current logic of the draft Guide to Practice, but perhaps the commentary might draw attention to the issue that could arise if the Secretary-General's practice was followed.

34. As to draft guideline 4.3.2, the Drafting Committee should consider whether it would be clearer if the text specified that the treaty entered into force as soon as both the reserving State and the objecting State had become parties.

35. In guideline 4.3.5, contained in paragraph 56 [346] of the report, the Special Rapporteur suggested inserting the words “or parts of provisions”, but he was not sure that that was really helpful. The notion of “the extent of the reservation” was more complex than the addition seemed to imply. For example, the reservation by France to article 6 of the Convention on the Continental Shelf,<sup>113</sup> at issue in the *English Channel* case, had modified the scope of application of the article by excluding certain geographical situations, not by modifying any particular parts of the provision or individual words. Moreover, if the words “parts of provisions” were inserted, they might need to be added elsewhere, which would complicate the already complex drafting.

36. He agreed in substance with the other draft guidelines in the 4.3 cluster.

37. Turning to the draft guidelines on the effect of reservations on “extraconventional rules”, guidelines 4.4.1 to 4.4.3 (and he hoped the Drafting Committee could find a simpler English term than “extraconventional”), he noted that in those provisions—and indeed elsewhere in the draft Guide to Practice—the perfectly clear French word “*règle*” had been translated by the obscure and ambiguous English word “norm”. The Drafting Committee should try to find a more appropriate word; the term “norm” could then be left for the field of *jus cogens*.

38. The first two guidelines in cluster 4.4 stated the obvious, which in the current context was the right thing to do: it was somewhat surprising to see that States had occasionally tried to argue that reservations to one treaty could affect the position under another treaty or under customary international law.

39. Draft guideline 4.4.3, on *jus cogens*, was not really necessary, since the matter was already covered in general terms by the two preceding guidelines, and especially by draft guideline 4.4.2. If, however, the Drafting Committee decided to retain it, it might wish to consider whether it ought to include the final words “which are bound by that norm”, which appeared to have been based on the concluding words of draft guideline 4.4.2, dealing with

\* Resumed from the 3043rd meeting.

<sup>113</sup> *Multilateral Treaties ...* (see footnote 81 above), chap. XXI.4.

customary international law, where they might have a place. Their inclusion in 4.4.3 raised an interesting question, one that the Commission probably did not wish to go into in the current context: whether only certain States might be bound by a peremptory norm of general international law. The Commission should avoid appearing to take a position on the matter, which belonged rather to the field of *jus cogens*, and it could do so by omitting the concluding words if it decided to keep the guideline at all.

40. In closing, he said that he was in favour of referring all the draft guidelines presented in the fifteenth report to the Drafting Committee.

*The meeting rose at 5.40 p.m.*

### 3046th MEETING

*Tuesday, 18 May 2010, at 10.05 a.m.*

*Chairperson:* Ms. Hanqin XUE

*Present:* Mr. Al-Marri, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, 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]

#### **FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)**

1. The CHAIRPERSON invited the members of the Commission to resume the debate on the draft guidelines in cluster 4, contained in the fifteenth report on reservations to treaties (A/CN.4/624 and Add.1–2). The Special Rapporteur would then introduce his sixteenth report on the topic (A/CN.4/626 and Add.1).

2. Mr. GAJA said he could go along with the Special Rapporteur's proposals on the effects of objections to valid reservations. However, he wished to revisit draft guideline 4.3.4 which, as Mr. Kamto had pointed out, duplicated draft guideline 4.3.1. It would be preferable to employ affirmative wording in that provision and to state that an objection to a valid reservation *precluded* the entry into force of the treaty as between the reserving State and the objecting State if the latter had clearly expressed an intention to that effect. While the differences compared to draft guideline 4.3.1 were minimal, they made it possible to distinguish between an objection that prevented a treaty from entering into force and a "simple" objection which did not have that effect.

3. According to draft guideline 4.3.1, on the other hand, a "simple" objection could not have the same effect as did the acceptance of a reservation on the entry into force of a treaty between the reserving and the objecting State. As the Special Rapporteur had rightly observed, stating that an objection "did not preclude" a treaty from entering into force was not the same thing as saying that it "resulted in" its entry into force. His subsequent conclusion that, in any event, another State then had to accept the reservation, tacitly or expressly, was mystifying, however, given that the treaty was intended to produce effects between the reserving State and the State formulating the simple objection.

4. The Special Rapporteur correctly noted that the effects of a simple objection on the application of the provisions of a treaty were not always the same as those of acceptance. They were most often the same when the reservation purported to exclude the full or partial application of a provision, but they were not the same in the case of a modifying reservation, especially when its purpose was to modify the content of the obligations of the other contracting States as well. A distinction had to be drawn in that context, because objecting to a reservation with a modifying effect was not the same thing as accepting it. Although the Special Rapporteur had ranked him among those who thought that the effects of an objection were identical to those of acceptance, he basically shared the Special Rapporteur's opinion. In fact, in his own article entitled "Unruly treaty reservations",<sup>114</sup> he had emphasized that when a reservation purported to extend or modify an obligation of other contracting States, their acceptance of or acquiescence to the reservation was essential if it were to produce its intended effect; in that case, a contracting State's objection certainly ruled out its acquiescence.

5. The objections that the Special Rapporteur termed "with intermediate effect" and which formed the subject of draft guideline 4.3.8 were an aspect of practice that had not been contemplated in the Vienna Conventions. They enabled the objecting State to exclude the application of provisions other than those to which the reservation related, provided that they had a "sufficiently close link" with it. Even if the objecting State abided by that condition, one might ask whether the principle of mutual consent among the parties would require that the reserving State could react against the objection. The reserving State might in fact prefer that there be no treaty relations. The reserving State had to accept or at least acquiesce to an objection with intermediate effect before the latter could produce all its intended effects. In practice, there was normally acquiescence, but whether a presumption should be established on the subject was a moot point.

6. The thrust of draft guideline 4.3.9 was that an objection to a valid reservation could not have "super-maximum" effect, a matter on which the Special Rapporteur was correct. What was less convincing, however, was his argument that an objection with "super-maximum" effect then became a simple objection. At least in some

<sup>114</sup> G. Gaja, "Unruly treaty reservations", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vol. I, Milan, Giuffrè, 1987, pp. 307–330.