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Summary record of the 2734th meeting

Topic:

Extract from the Yearbook of the International Law Commission:-
2002, vol. I

49. Mr. MANSFIELD said that he shared the Chair's concern in that regard and that further thought should be given to the question whether it would be useful to permit disguised reservations. The issue was an important one.

The meeting rose at 4.45 p.m.

2734th MEETING

Tuesday, 23 July 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Tomka, Mr. Yamada.

Tribute to the memory of José Sette Câmara

1. The CHAIR said he had sad news to announce: José Sette Câmara, Brazilian scholar, diplomat and international lawyer, had passed away a month ago. He had served his country as ambassador, as permanent representative to the United Nations and in many other posts and would be remembered as the author of various publications on international law. He had been a member of the International Law Commission from 1970 to 1978 and a judge at the International Court of Justice from 1979 to 1987. His passing away was a great loss for international law and for all who had known him personally.

At the invitation of the Chair, the members of the Commission observed a minute of silence.

2. Mr. BAENA SOARES thanked the Commission for the sentiments expressed and undertook to convey them to the family of José Sette Câmara.

Reservations to treaties[1] (*continued*) (A/CN.4/526 and Add.1–3,[2] A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)[3]

3. Mr. YAMADA (Chair of the Drafting Committee) said that, pursuant to the Commission's instructions at the previous meeting, the Drafting Committee had held informal consultations to consider a number of issues raised. First, it had considered the Special Rapporteur's proposal for the addition of a phrase to draft guideline 2.1.7 (Functions of depositaries). The Committee had felt that the addition was thoroughly justified and therefore recommended the adoption of guideline 2.1.7 in its amended form as set out in the Special Rapporteur's note on paragraph 1 of draft guideline 2.1.7 adopted by the Committee (A/CN.4/L.623).

4. Second, the Drafting Committee had considered guideline 2.1.6 (Procedure for communication of reservations) in the light of proposals regarding clarification of the period of time during which an objection could be made and the precise moment at which a communication was considered to have been made. The Committee thought the proposals had the merit of further clarifying and refining a few difficult issues pertaining to the communication procedure. It therefore recommended the adoption of guideline 2.1.6 with some amendments. After paragraph 2, ending with the phrase "upon its receipt by the depositary", a new paragraph 3 would be added, to read: "The period during which an objection to a reservation may be formulated starts at the date on which a State or an international organization received notification of the reservation." The current paragraph 3 would become paragraph 4, and the following final sentence would be added: "In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile." That wording conformed to the majority view, although one member would have preferred the communication to be considered as having been made on the date of the diplomatic note or depositary notification.

5. The Drafting Committee recommended the adoption of the draft guidelines with the amendments he had read out.

6. Mr. BROWNLIE, referring to the proposal for a new paragraph 3 in guideline 2.1.6, said that the word "formulated" sounded somewhat abstract. The word "made", used elsewhere in the text, would be preferable.

7. Mr. PELLET (Special Rapporteur) drew attention to article 20, paragraph 5, of the 1969 Vienna Convention, in which the English term used was "raised" and the French *formulé*. Since the Commission's objective was to achieve alignment with that Convention, he proposed that that wording should be adopted.

8. Mr. YAMADA (Chair of the Drafting Committee) said he fully endorsed that proposal.

Draft guideline 2.1.6 as a whole, as amended, was adopted.

The titles and texts of draft guidelines 2.1.1 to 2.4.3 were adopted as amended.

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[1] For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

[2] Reproduced in *Yearbook ... 2002*, vol. II (Part One).

[3] See 2733rd meeting, para. 2.

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

9. The CHAIR invited the Special Rapporteur to continue the presentation of his seventh report (A/CN.4/526 and Add.1–3).

10. Mr. PELLET (Special Rapporteur), recalling that in the first part of the session he had presented the introduction to his seventh report and the consolidated text of the draft guidelines adopted by the Commission or proposed by him in the annex thereto, drew attention to section C of the report, "Recent developments with regard to reservations to treaties" (paras. 48–55), and appealed to colleagues to bring to his attention any new material that might be relevant. Two new developments of particular interest involved reservations to human rights instruments, a phenomenon that had been in the spotlight for the past 10 or 12 years. The first was the important report prepared by the Secretariat in 2001 at the request of the Committee on the Elimination of Discrimination against Women at its twenty-fourth session, which contained a section entitled "Practices of human rights treaty bodies on reservations".[4] It conveyed the impression that the bodies in question were much more pragmatic, less dogmatic, than the text of General Comment No. 24 of the Human Rights Committee suggested.[5] They were more inclined to encourage States to withdraw certain reservations than to censure them. It was of relevance to the Commission's preliminary conclusions on reservations to normative treaties that, in practice, human rights treaty bodies did not always follow General Comment No. 24.

11. The second development he wished to report was that, despite the continuing opposition of the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights had, at its fifty-third session, by its resolution 2001/17 of 16 August 2001, again entrusted Ms. Françoise Hampson with the preparation of an expanded working paper on reservations to human rights treaties.[6] In this resolution, the Sub-Commission stated that the study would not duplicate the work of the International Law Commission. Ms. Hampson might have been expected to get in touch with him for that purpose, but she had not, and that presented him with a problem. Should he himself take the initiative? Personally he would be inclined to do so, but he also hoped there would be fuller consultations between the International Law Commission, the Sub-Commission on the Promotion and Protection of Human Rights and the major human rights treaty bodies with a view to the re-examination in 2004 of the preliminary conclusions adopted by the International Law Commission at its forty-ninth session on reservations to normative multilateral treaties, including human rights treaties.[7] He would welcome guidance from members of the Commission on how to proceed.

12. Quite a number of draft guidelines were set out in his seventh report, and he proposed to introduce them in three groups rather than all at once, in order to facilitate discussion. He was now submitting for the Commission's consideration draft guidelines 2.5.1 to 2.5.4, on the form and procedure for withdrawal of reservations.

13. Draft guideline 2.5.1 (Withdrawal of reservations) was set out in paragraph 85 of the report and was fairly straightforward. It simply reproduced article 22, paragraph 1, of the 1986 Vienna Convention, which itself was virtually identical to article 22, paragraph 1, of the 1969 Vienna Convention. The background for the draft guideline was given extensively in paragraphs 67 to 79 of his report, in which he summed up the *travaux préparatoires* of article 22, paragraph 1, of the 1986 Vienna Convention. Those *travaux*, together with article 22 itself, had put an end to the controversy that had raged in the literature as to whether the withdrawal of a reservation was an agreed instrument, a treaty or a unilateral act.

14. Article 22, paragraph 1, of the Vienna Conventions clearly indicated that a reserving State or international organization might withdraw its reservation without the agreement of the other contracting States; a reservation was, in other words, a unilateral act. There was a case to be made, as he stated in paragraph 80 of the report, for the principle that a reservation not expressly provided for by a treaty was effective only for the parties which had accepted it. That argument, however, was not only formalistic but provided no real challenge to the provision of the Vienna Conventions, which presented no practical difficulties and could fairly be said to have become a customary rule. In any case, as the Commission had previously agreed, any change to the Vienna Conventions should be made only for extremely compelling reasons. In that regard, he drew attention to paragraphs 31 and 32 of the report. For the same reason, he was not in favour of deleting the phrase "unless the treaty so provides" found in article 22, paragraph 1, of the Vienna Conventions, even though he felt strongly that it was quite superfluous: all the Vienna rules relating to reservations—or other issues—depended on the will of States. It would, however, be both complicated and unhelpful to change what was ultimately a matter of detail.

15. On the same principle, draft guideline 2.5.2 (Form of withdrawal) reproduced the text of article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions: "The withdrawal of a reservation or of an objection to a reservation must be formulated in writing." It was a matter of simple common sense, as was explained in paragraph 89 of the report. He would therefore not linger over the guideline, except to point out the clear implication that the withdrawal of a reservation could not be implicit. In paragraphs 93 to 101 of the report, he had sought to list a number of situations in which it appeared that a reservation had been withdrawn, although no formal withdrawal had been made. On closer examination, however, it could be seen that in fact that had never been the case. He could not agree with the distinguished specialist Pierre-Henri Imbert that the non-confirmation of a reservation at the time of signature or ratification of a treaty could be described as withdrawal of the reservation. The acceptance of or objection to a reservation might have been formulated but not "made"; it was, in that sense, "virtual". On purely logical grounds, it was impossible to withdraw what had not previously been made. By the same token, the expiry

* Resumed from the 2721st meeting,

[4] CEDAW/C/2001/II/4, paras. 20–56.

[5] *Official Records of the General Assembly*, *Fiftieth Session*, *Supplement No. 40* (A/50/40), vol. I, annex V, p. 122.

[6] E/CN.4/Sub.2/2001/40.

[7] *Yearbook ... 1997*, vol. II (Part Two), p. 56, para. 157.

of a reservation was not the same as withdrawal, as was shown by some treaty reservation clauses, which drew a clear distinction between withdrawal and expiry.

16. The same applied to "forgotten" reservations. Typically, a State would make a reservation because a given treaty provision did not correspond with its internal law; but when—perhaps some years later—internal legislation was amended or repealed in order to comply with the treaty, the State omitted to withdraw its reservation. His own country had, it seemed, been particularly given to such omissions, although admittedly he was better acquainted with the situation in France than elsewhere. In that context, he noted that the coexistence of reservations and the new provisions of internal legislation could give rise to problems, particularly in countries where international law was being incorporated into the internal legislation: it was often difficult for courts to decide whether to apply the internal law or international law as affected by the reservation, even if the latter was superseded. That, however, was up to the State in question. The fact remained that a forgotten reservation had not been withdrawn; it remained valid at the international level. The notion of an implicit withdrawal made no sense in either law or logic.

17. The existence of forgotten or obsolete reservations gave rise to another problem. It was often said that reservations had some advantages, particularly in that they encouraged wider acceptance of a given treaty. On the other hand, they were harmful to the unity or integrity of the treaty. The opposing claims of universality and integrity had long been recognized, but the General Assembly, the Council of Europe and bodies concerned with human rights and, indeed, with other issues, such as disarmament or environment, were increasingly urging States to reconsider their reservations to treaties. He therefore suggested that it might be useful to include in the Guide to Practice a guideline 2.5.3 (Periodic review of the usefulness of reservations) that would urge States to adopt a review of their reservations, emphasizing the timeliness of withdrawing those that were no longer justified in view of developments in their internal legislation. Although the guideline—the text of which was to be found in paragraph 103 of the report—was more tentative than the other guidelines, using the conditional mood and adopting emollient language, he noted that the guidelines as a whole would not, in any case, be binding; they were, to borrow wording used by the Government of Sweden in 1965, a "code of recommended practices".[8] Hence there would be no harm in including guideline 2.5.3 in response to current concerns. He himself, however, was not opposed to reservations in principle, as many activists—particularly "human rightists"—were; he regarded them as a necessary evil. At the same time, it would clearly be preferable if they could be withdrawn.

18. Guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty) had been drafted before the Commission's discussions during the first part of the session, in which—rightly, in his view—the use of the words "impermissible" and "inadmissible" had been challenged. His remarks at the 2733rd meeting, therefore, applied also to guideline 2.5.4. It would be premature to deal with the question of impermissibility before there had been a thorough discussion about article 19 of the 1969 and 1986 Vienna Conventions. Meanwhile, he suggested that the words "impermissible" and "inadmissible" should be placed in square brackets throughout the text until the whole concept of the permissibility of reservations could be examined at the next session. As far as the substance of the guideline was concerned, the Commission should nonetheless provide an answer to the basic question of what the effect should be if a treaty-monitoring body found a reservation to be impermissible. Obviously, such a finding by a third party was not equivalent to a withdrawal, which was a unilateral statement made by the reserving State or international organization, although naturally the reserving State or international organization could withdraw its reservation once it became aware of its impermissibility. That was the thinking behind paragraph 1 of the guideline. The impermissibility finding, however, should not, in all justice, be devoid of consequences: the reserving State or international organization was, after all, party to the treaty which had set up the very monitoring body that had made the finding. The question was what those consequences should be.

19. There were two possible solutions. To put them at their simplest, the first was to adopt the course preferred, at least in theory, by the human rights bodies as exemplified by General Comment No. 24 of the Human Rights Committee, and applied by the European Court of Human Rights, whereby the reservation was neutralized: it was considered not to have been withdrawn but never to have been made at all. The second option was to adopt the Commission's own approach, as expressed in the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, that it had adopted at its forty-ninth session, whereby the reserving State (or international organization) had the responsibility for taking action. That approach would be reflected in paragraph 2 of guideline 2.5.4. He had to admit to some unease regarding the introduction of the guideline, since he believed that it would be unwise to reproduce the Commission's lengthy and serious discussions at its forty-ninth session. He would prefer to start from the position that the Commission had already reached a conclusion on the general policy, by a large majority if not unanimously. He drew attention to the discussions in that session, a reference to which was contained in the footnote of the report corresponding to the text of the guideline.

20. The most elegant way forward seemed to him to be the adoption of draft guideline 2.5.X (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), which appeared in paragraph 216 of the report. It would have the same wording as draft guideline 2.5.4, but with the addition of the sentence "[The reserving State or international organization] may fulfil its obligations in that respect by totally or partially withdrawing the reservation." The rationale was that, although withdrawal was obviously the most appropriate response to a finding of impermissibility, in some cases the reserving State or international organization might find a full withdrawal too radical. In that case, modification or partial withdrawal of the reservation might suffice. The

[8] See the fourth report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2), p. 47.

solution presented by the wording of draft guideline 2.5.X seemed to cover all eventualities.

The meeting rose at 11 a.m.

2735th MEETING

Wednesday, 24 July 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Tomka, Mr. Yamada.

Reservations to treaties[1] (*continued*) (A/CN.4/526 and Add.1–3,[2] A/CN.4/521, sect. B, A/CN.4/L.614, A/CN.4/L.623)

[Agenda item 3]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GAJA congratulated the Special Rapporteur on the very detailed analysis in his seventh report (A/CN.4/526 and Add.1–3). It sometimes happened, however, that he asked the Commission to take a position on proposals that were too obvious or to enter into areas that it would be wiser to leave aside. Such was the case, for example, with draft guideline 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), paragraph 1 of which stated the obvious. It was for the reserving State to withdraw a reservation, and a finding of impermissibility could therefore never constitute withdrawal. A finding of impermissibility could either have the effect of requiring the reserving State to withdraw the reservation or of recommending that it should withdraw it. The text seemed to favour the first possibility. It was by no means certain, however, that a monitoring body had the inherent competence to require the reserving State to withdraw its reservation. The Commission had dealt with the competence of monitoring bodies in a very different way in the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, it had adopted at its forty-ninth session.[3] At that time, it had considered that, where treaties were silent, the monitoring bodies established thereby were competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States.

2. In his view, whether such bodies had the competence to create obligations or to make recommendations depended on the interpretation of the treaty in question. Any general rule on the subject would thus be of limited value. Hence there was no need to spell out the consequences of a finding of impermissibility, at least as far as the withdrawal of reservations was concerned. A question that might arise in some cases, however, related to competence to invalidate a reservation that had been found impermissible.

3. He did not think that draft guideline 2.5.4 as a whole should be referred to the Drafting Committee, because the first paragraph was self-evident and the second was unnecessary.

4. Ms. ESCARAMEIA, congratulating the Special Rapporteur on the approach adopted in his report, said that she especially appreciated his explicit presentation of his doubts.

5. Referring to section C of the report, which focused on the Commission's relations with the human rights treaty bodies, among others, she said that the Commission should have as many contacts as possible with the other bodies that were dealing with the issue of reservations. That was all the more important in that the fragmentation of international law had been recognized by all as a primary concern. It would be undesirable for the Commission to adopt a regime for reservations that differed from the one that would be arrived at by the Sub-Commission on the Promotion and Protection of Human Rights. She therefore thought the Commission should seek the views of other bodies working in the same field.

6. Turning to the draft guidelines on withdrawal of reservations proposed by the Special Rapporteur in his seventh report, she said that she favoured the retention in draft guideline 2.5.1 (Withdrawal of reservations) of the words "Unless the treaty otherwise provides", even if they might seem superfluous. They did serve a purpose in the Guide to Practice, and in the present instance it was better to err on the side of excess than on that of insufficiency. She fully endorsed draft guideline 2.5.2 (Form of withdrawal), since the written form provided the certainty that was necessary in international law. Concerning draft guideline 2.5.3 (Periodic review of the usefulness of reservations), she welcomed the creative approach adopted by the Special Rapporteur and endorsed the draft guideline, although wondering whether there was any need for expired reservations to be withdrawn since they did not apply anyway. In paragraph 2, it might be useful to refer also to appeals by treaty-monitoring bodies, since internal legislation was sometimes rather ambiguous and scholars did not always agree.

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[1] For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2001*, vol. II (Part Two), chap. VI, p. 177, para. 156.

[2] Reproduced in *Yearbook ... 2002*, vol. II (Part One).

[3] See 2734th meeting, footnote 7.