

Document:-
A/CN.4/3010

Summary record of the 3010th meeting

Topic:
Reservations to treaties

Extract from the Yearbook of the International Law Commission:-
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*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

helpful to learn about the practice of international organizations and to hear the views of States on the subject.

89. Her second question had to do with draft article 43, paragraph 2, which the Special Rapporteur had not proposed to refer to the Drafting Committee. Although he had noted that opinions had been fairly evenly divided on whether to retain that paragraph (paras. 96–97 of the report), the Special Rapporteur had ultimately concluded that a slight majority was opposed to doing so. She was not contesting that conclusion, even though she would have preferred to have the article referred to the Drafting Committee, but she nevertheless wondered what would become of the paragraph or, for that matter, of Mr. Valencia-Ospina's alternative proposal to it, which had been included in a footnote to the article.¹³¹ Her own preference would be to place the proposed paragraph 2 in a footnote to draft article 43 in the list of draft articles.

90. Mr. DUGARD, referring to Ms. Escarameia's comments, said that the Special Rapporteur had discussed submitting a number of very important questions to States and international organizations for their comments. Although such questions were not normally considered by the Drafting Committee, in view of their unusual significance, he wondered whether, subject to the opinion of the Special Rapporteur, those questions might be formulated by the Drafting Committee in order to ensure that they reflected a more collective viewpoint.

91. Sir Michael WOOD said that he was in total agreement with the Special Rapporteur's excellent summary and proposals but would appreciate clarification about what action the Special Rapporteur suggested the Commission should take regarding the proposals he himself had made in connection with draft article 61 (3007th meeting above, para. 28). As to the Special Rapporteur's recommendation that the implications of the text should be clarified, he wished to make it clear that he had merely intended to state expressly what was perhaps implicit, which was that, in applying the rules of the organization, any special considerations that resulted from the characteristics or rules of a particular organization should be taken into account. Given that his proposal had received a certain amount of support, he hoped that it would be considered by the Drafting Committee.

92. Mr. GAJA (Special Rapporteur) reiterated that, in its consideration of draft article 61, the Drafting Committee should consider Sir Michael's proposal or some variation thereof. The Committee had enough flexibility to determine what form the new text should ultimately take.

93. It was not the usual role of the Drafting Committee to draft questions for inclusion in chapter III of the Commission's annual report, and while there was no harm in advancing ideas, such questions were usually considered by the plenary during the second part of the session. If international organizations, which had tended not to reveal much of their practice with regard to individuals, were in future willing to disclose more, then the

time might indeed be ripe to pose the question proposed by Ms. Escarameia. The practice of international organizations in respect of individuals had a bearing on their practice in respect of States or international organizations, and there was a kind of continuity in the law that made such information relevant. Having said that, however, he urged the Commission to refrain from drafting questions on chapter III at present; it would perhaps be wise first to discuss the delicate matters concerned, and the Chairperson could hold consultations about how best to handle the issue of the lacunae.

94. The Commission had followed an unusual procedure in respect of draft article 43 in that it had gone along with the Drafting Committee's decision to place an alternative provision both in a footnote and in the commentary to the draft article itself. In 2007, the Commission had invited States to indicate whether they preferred the text provisionally adopted by the Commission or the alternative text continued in the footnote.¹³² Since the prevailing view in the Sixth Committee had been that the actual text of draft article 43 was preferable to the alternative text contained in the footnote,¹³³ the Commission should probably not go back on the matter by retaining the text in the footnote, which he assumed would now be deleted.

95. The CHAIRPERSON said he took it that the Commission wished to refer the draft articles indicated by the Special Rapporteur to the Drafting Committee.

It was so decided.

96. The CHAIRPERSON said that, as proposed by the Special Rapporteur, the Drafting Committee would also be entrusted with the task of reorganizing the draft articles into six parts.

The meeting rose at 1 p.m.

3010th MEETING

Tuesday, 26 May 2009, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermúdez, Sir Michael Wood, Ms. Xue.

¹³² *Ibid.*, p. 14, para. 29.

¹³³ Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session, prepared by the Secretariat (A/CN.4/588, mimeographed; available on the Commission's website, documents of the sixtieth session), para. 152–156, especially para. 154.

¹³¹ *Yearbook ... 2007*, vol. II (Part Two), p. 85, footnote 441. For the commentary to this draft article, see *ibid.*, pp. 91–92.

Reservations to treaties (continued)* (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur, Mr. Pellet, to introduce his fourteenth report on reservations to treaties (A/CN.4/614 and Add.1–2).

2. Mr. PELLET (Special Rapporteur) said that his fourteenth report on reservations to treaties should, in principle, be the last report for purposes of the first reading on the topic. Unfortunately, he could not introduce the report in full, since only the first part had been translated in time. The introduction and the annex, which constituted the bulk of the report so far, were available only in French. The introduction (paras. 1–66) was divided into five sections, A to E. Sections A, B and C discussed the reception accorded the tenth,¹³⁴ eleventh,¹³⁵ twelfth¹³⁶ and thirteenth reports¹³⁷ in the Commission and in the Sixth Committee and the written comments that the Special Rapporteur had received from some States. In his view, however, they did not justify reworking the draft guidelines that the Commission had already provisionally adopted. The purpose of the three sections was to take note of the positions of States with a view to the second reading. The important thing was to put before them a coherent draft adopted on first reading.

3. Section D (paras. 47–64) summarized recent developments with regard to reservations and interpretative declarations. In that regard, the Special Rapporteur would like to call attention in particular to the judgment rendered by the ICJ on 3 February 2009 in the case concerning *Maritime Delimitation in the Black Sea*. In that dispute, which turned on whether, from a legal standpoint, a certain isolated island should be considered an island in the general sense of article 121 of the United Nations Convention on the Law of the Sea or a rock in the sense of paragraph 3 of that article. Romania had invoked the interpretative declaration it had made upon signing the Convention and had confirmed upon ratifying it in order to convince the Court that the island in question should be considered a rock. The Court, however, dismissed that argument, stating: “Romania’s declaration as such has no bearing on the Court’s interpretation” [para. 42 of the decision]. That position would tend to discourage one from formulating interpretative declarations or even from taking an interest in them.

4. For their part, the human rights treaty bodies had continued to take a pragmatic interest in reservations to their constituent instruments. In its 2007 report,¹³⁸ the sixth inter-committee meeting of the human rights treaty

bodies noted with appreciation the report of the working group on reservations.¹³⁹ The working group, in its report, recognized that the general reservations regime was applicable to reservations to human rights instruments. It also recognized that permitted reservations could contribute to the attainment of the objective of universal ratification, and it reaffirmed that treaty bodies were competent to assess the validity of reservations, a view shared by the Special Rapporteur. The working group appeared to look favourably on the Commission’s attempts to identify criteria for determining the compatibility of reservations with the object and purpose of the treaty. It was in agreement with the proposal of the Special Rapporteur, later accepted by the Commission, according to which an invalid reservation was null and void. The working group also recommended that the treaty bodies should question States about the nature and scope of their reservations or interpretative declarations, which might weaken observance of the conventions.

5. In paragraph 54 of his fourteenth report, the Special Rapporteur called attention to an important development in the views of the human rights treaty bodies, which had earlier taken an inflexible position as to the consequences of the invalidity of a reservation, asserting that the author of an invalid reservation would be bound by the treaty in its entirety. They had come around to the more nuanced position that “a State will not be able to rely on such a reservation and, unless its contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation” (para. 53, recommendation 7). Thus the State could be deemed not to be bound by the treaty if its reservation was essential to its consent. The Special Rapporteur was of the view that, although the above formulation was somewhat too restrictive, it represented a significant step towards the position he himself had arrived at following a fruitful dialogue with the treaty bodies.

6. The Special Rapporteur drew the attention of the Commission to the annex to his fourteenth report, which contained the report he had prepared on the Commission’s meeting with human rights treaty bodies in May 2007. He said that the encounter had been fruitful and useful; the question arose whether the Commission wished to hold another with a view to finalizing the preliminary conclusions it had adopted in 1997 on reservations to normative multilateral treaties, including human rights treaties.¹⁴⁰ He might point out in that regard that in the context of the Universal Periodic Review, the Human Rights Council had urged a number of States to withdraw, or at any rate to explain, their reservations to some of the international human rights instruments (para. 55).

7. Among the new developments at the regional level, the Inter-American Court of Human Rights had had to address the issue of reservations in *Boyce et al. v. Barbados*. In that case, Barbados had argued that its reservation to the American Convention on Human Rights: “Pact of San José, Costa Rica” prevented the Court from ruling on the question of

* Resumed from the 3000th meeting.

¹³⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

¹³⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574.

¹³⁶ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584.

¹³⁷ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/600.

¹³⁸ A/62/224, annex, paras. 20–22.

¹³⁹ Report of the meeting of the working group on reservations (HRI/MC/2007/5 and Add.1). The recommendations of the working group on reservations are reproduced in paragraph 53 of the fourteenth report of the Special Rapporteur.

¹⁴⁰ *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

capital punishment.¹⁴¹ In its judgement, the Court held that in principle reservations should be strictly interpreted and that, in the case at hand, it could not accept the contention of Barbados. The European Court of Human Rights had also had occasion, in April 2007, to rule on the extent of the effects of a valid reservation. In two cases against Finland (*Laaksonen v. Finland* and *V. v. Finland*), the Court had considered the application of the reservation of Finland to article 6 of the European Convention on Human Rights concerning the right to a hearing.¹⁴² The European Court had also adhered to a rather strict interpretation of the reservation of Finland, while acknowledging that the reservation, within the limits strictly defined by its wording, did exempt Finland from applying article 6 of the Convention. Moreover, the European Observatory of Reservations to International Treaties, a body of the Council of Europe with responsibility for drawing the attention of the Committee of Legal Advisers on Public International Law (CAHDI) to invalid reservations, considered, not only reservations formulated less than 12 months previously, to which in principle it was still possible to react, but older reservations as well (para. 64). In the view of the Special Rapporteur, that development confirmed the relevance of draft guideline 2.6.15 on late objections.

8. Section E (paras. 65–66) of the report set out the plan for the fourteenth report on reservations. The first addendum (paras. 80–178), which the Special Rapporteur had recently submitted to the secretariat for translation, would complete the study of the third part of the Guide to Practice and would deal with the validity of interpretative declarations and of reactions to reservations and interpretative declarations. It contained relatively few draft guidelines since, in order to take into account the Commission's reactions¹⁴³ to his tenth report, the Special Rapporteur had decided that some of the provisions that could have appeared in that part would be better placed in the third part of the report dealing with the effects of reservations and interpretative declarations, currently being drafted.

9. The Codification Division of the Secretariat had prepared a remarkable study on "Reservations to the treaties in the context of the succession of States" (A/CN.4/616). The Special Rapporteur approved the general approach taken, which meant that he did not need to draft a full report on that difficult topic. Therefore, based on that excellent study, he proposed to submit to the Commission, at its sixty-second session in 2010, draft guidelines on the issue, which would form his sixteenth report. Lastly, he planned to follow the report with two sections, one dealing with the "reservations dialogue" and the other with the settlement of disputes concerning reservations; they would be introduced in his seventeenth session at the sixty-third session in 2011.

10. Introducing paragraphs 67 to 79 of document A/CN.4/614, the Special Rapporteur noted that they constituted the first chapter of the fourteenth report. They concerned the procedure for the formulation of interpretative declarations and introduced draft guidelines 2.4.0

and 2.4.3 *bis*, relating to the form and communication of interpretative declarations. He had originally thought that there was no need for draft guidelines on those matters, but, since the Commission had regretted their absence, he had decided to provide them. With regard to the communication of interpretative declarations, he had always been of the opinion that formalism was not appropriate, since interpretative declarations could be made at any time, in any form their author wished. On the other hand, since the Commission had developed the habit of including recommendations to States and international organizations in the Guide to Practice, it might be useful to adopt a draft guideline recommending to States and international organizations that they should observe certain forms and follow certain procedures when formulating interpretative declarations. As he had pointed out in paragraph 75 of his report, if the authors of interpretative declarations wanted their positions to be taken into account, it would be in their interest to formulate their declarations in writing and to follow, *mutatis mutandis*, the same communication and notification procedure applicable to reservations and other declarations relating to treaties. Accordingly, the Special Rapporteur proposed the following two draft guidelines in paragraph 76 of his report:

"2.4.0 *Written form of interpretative declarations*

"Whenever possible, an interpretative declaration should be formulated in writing.

"2.4.3 *bis Communication of interpretative declarations*

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

11. The Special Rapporteur did not consider it useful to have a provision modelled on draft guideline 2.1.8 (Procedure in case of manifestly invalid reservations), chiefly because, as a matter of principle, he did not think that one could really speak of the validity or invalidity of an interpretative declaration, as he would show in paragraphs 128 to 150 of the fourteenth report. Moreover, he had decided not to propose a draft guideline on the statement of reasons for interpretative declarations. As he had explained in paragraph 78 of his report, an explanation of the reasons for an interpretative declaration did not appear to be necessary or logical, since the declaration itself already contained such an explanation. The situation was different with respect to reactions to interpretative declarations, which clearly should be explained. Therefore draft guideline 2.9.6 (Statement of reasons for approval, opposition and reclassification), proposed in the thirteenth report and referred to the Drafting Committee,¹⁴⁴ continued to be relevant. In conclusion, the Special Rapporteur asked the Commission to refer draft guidelines 2.4.0 and 2.4.3 *bis* to the Drafting Committee.

The meeting rose at 10.40 a.m.

¹⁴¹ United Nations, *Treaty Series*, vol. 1298, No. A-17955, pp. 441–442.

¹⁴² *Ibid.*, vol. 2158, No. A-2889, pp. 140–141.

¹⁴³ *Yearbook ... 2005*, vol. II (Part Two), pp. 68 and 70–71, paras. 398 and 430.

¹⁴⁴ *Yearbook ... 2008*, vol. II (Part Two), para. 74, and *ibid.*, vol. I, 2978th meeting, paras. 28–29.