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Summary record of the 3048th meeting

Topic:
Reservations to treaties

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strengthen the independence of the judiciary seemed to him an essential task to which the IAJC might wish to give priority.

54. Lastly, he suggested that it would be useful to organize a working session during which the International Law Commission and the Inter-American Juridical Committee could set parameters for distinguishing between the topics suitable for codification and progressive development at the regional level and those that represented a duplication of efforts.

55. Mr. CASTILLO CASTELLANOS (Inter-American Juridical Committee) said that the IAJC had, in fact, encountered some difficulties in approaching the Charter from a technically correct standpoint while also taking political considerations into account. Mr. Vargas Carreño's suggestion that the IAJC might wish to view those efforts as paving the way for decisions by the General Assembly of the OAS was a practical solution that would advance the work to enhance the applicability of the Charter.

56. He agreed that strengthening the independence of the judiciary was an essential task, despite a certain tendency to avoid it because it gave rise to controversy. As a technical juridical body, the IAJC was obliged to address the issue in depth and to examine historical examples, some of which had had a devastating impact in some countries of the Americas.

57. Lastly, he was certain that the IAJC would be receptive to the idea of organizing a working session with the Commission in order to seek common themes and to determine the desirability of codifying them at the regional level. Thanks to modern communications, the IAJC remained in permanent contact with the activities of the International Law Commission and was ever-ready to interact with it.

58. The CHAIRPERSON expressed appreciation to Mr. Castillo Castellanos for his remarks, which had facilitated a valuable exchange between the Commission and the IAJC.

The meeting rose at 1.10 p.m.

3048th MEETING

Thursday, 20 May 2010, at 10.10 a.m.

Chairperson: Ms. Hanqin XUE

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

SIXTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their debate on the first part of the Special Rapporteur's sixteenth report (A/CN.4/626 and Add.1).

2. Mr. GAJA said that the sixteenth report on reservations to treaties addressed a complex subject which was only partially regulated by the 1978 Vienna Convention. The practice of States and depositaries was not always consonant with the provisions of that Convention. He commended the Special Rapporteur on shedding light on the subject on the basis of the outstanding memorandum prepared by the Secretariat.¹²⁸

3. Article 20 of the 1978 Vienna Convention established the presumption that reservations made by the predecessor State were maintained when a newly independent State declared, by a notification of succession, that it intended to become a party to the treaty. The same article allowed a newly independent State to accompany its notification of succession with new reservations. Although the Special Rapporteur considered that practice to be "less than Cartesian" (para. 30 of the report), it nevertheless seemed to be consistent with the principle underpinning the Convention, namely that succession to treaties for newly independent States was not automatic, but depended on an expression of intention in the form of either accession or notification of succession. It therefore seemed logical that such an expression of intention could be accompanied by new reservations.

4. Like article 20 of the 1978 Vienna Convention, draft guideline 5.1 referred to the criteria which had to be met if those reservations were to be valid. It did not, however, tackle the question of when a reservation formulated by a newly independent State became what the Special Rapporteur called an "established reservation". Unless he was mistaken, nowhere in the report—or in the addendum which had yet to be presented—was there any mention of the acceptance by other contracting States of new reservations formulated by a newly independent State. The rule laid down in article 20, paragraph 4, of the 1969 Vienna Convention should also apply when a newly independent State formulated a new reservation in its notification of succession.

5. The timing of the effects of such a notification when accompanied by reservations warranted more in-depth examination. Draft guideline 5.8 in paragraph 92 stipulated that a "reservation formulated by a successor State ... when notifying its status as a party or as a contracting State to a treaty becomes operative as from the date of such notification". One could employ the wording of article 22, paragraph 3 (b), of the 1978 Vienna Convention in order to specify the date on which the notification

¹²⁸ See footnote 12 above.

of succession was deemed to have been made, except that a reference to the period of time needed to establish the reservation should be added.

6. His comments regarding new reservations made by a newly independent State also applied to the cases covered in draft guideline 5.2, entitled “Uniting or separation of States” (para. 54). Those were exceptional cases where a new reservation could be made by successor States other than newly independent States. A reference to the conditions governing the permissibility of reservations should be added to that draft guideline.

7. Under the 1978 Vienna Convention, successor States other than newly independent States automatically became parties to a treaty which had been in force for the predecessor State and they could not make reservations. Attention should be drawn to the fact that practice in that connection was not always consistent, because States that were not newly independent also sometimes made notifications of succession. The latter generally proved to be declarations confirming a succession which had already taken place automatically, and that was not therefore a situation in which the successor State could formulate a new reservation.

8. The commentary should deal with those terminological niceties and, above all, indicate that, especially in the event of the separation of States, the practice of States and depositaries was anything but clear and uniform and did not necessarily tend towards automatic succession to the treaties in force for the predecessor States.

9. In conclusion, he thought that draft guidelines 5.1 to 5.16 could be referred to the Drafting Committee.

10. Mr. FOMBA thought that, for the reasons put forward by the Special Rapporteur in paragraphs 3 and 4 of his sixteenth report, it was advisable to include in the Guide to Practice guidelines on the problems posed by reservations, acceptances of reservations and objections to reservations in the context of succession of States. The footnote in brackets to paragraph 4, which made reference to the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, showed that there was still one unanswered question, namely that of whether and to what extent States resulting from dissolution could be purely and simply likened to newly independent States. He had no set ideas on the subject and he noted that the Special Rapporteur suggested that the issue be left aside.

11. He wondered why the term “new States” could not be applied, at least in the wider sense, to the uniting or separation of States, rather than being confined to instances of dissolution. With regard to method, the choice seemed to be one of either the codification or the progressive development of international law, and it was therefore a matter of assessing and ascertaining if and to what extent it was necessary to propose rational solutions to problems that had not been resolved by the 1978 Vienna Convention.

12. He endorsed the idea that the rules and principles established by the 1978 Vienna Convention should not be called into question and that, whenever possible, the Convention’s terminology should be reproduced, as the Special

Rapporteur proposed in paragraph 6. He agreed *a priori* with the initial premise which formed the point of departure of the logic of paragraph 7, although the fact that some aspects of the situation were not to be examined might be a source of concern. Similarly, in paragraph 8 it was proposed that the Commission should confine its consideration to reservations formulated by the predecessor State that had been a contracting State or a State party to the treaty at the date of the succession of States. That seemed to be a suitable approach. He was in favour of examining the situations which had not been dealt with in article 20 of the 1978 Vienna Convention and of clarifying the territorial (*ratione loci*) and temporal (*ratione temporis*) scope of the reservations in question (para. 10). He likewise concurred with the opinion in paragraph 30 of the report that there was no good reason not to include, as a guideline, article 20 of the 1978 Vienna Convention in the Guide to Practice, and he approved of the idea of covering reservations to treaties between States and international organizations.

13. In the footnote to paragraph 31, the Special Rapporteur rightly indicated that a reservation was not “applicable” as stated in article 20, paragraph 1, of the 1978 Vienna Convention, but “established” in respect of a territory, even though he concluded that it would be inappropriate to “retouch” the text of the Vienna Convention.

14. With regard to paragraph 32 of the report, it would be useful to mention in the title of guideline 5.1 the limitation of that provision to reservations in cases where a newly independent State made a notification of succession, and to consider the advisability of extending that solution to other modalities of State succession in other draft guidelines, an approach which he favoured.

15. As for the question of the internal linkage between the provisions of the 1978 Vienna Convention, especially the relationship between article 20 and articles 17 and 18, and the linkage between the 1978 and 1969 Vienna Conventions, he agreed with the approach suggested in paragraphs 33 and 34 of the report.

16. Draft guideline 5.1 (Newly independent States), paragraph 1 of which repeated almost word for word article 20, paragraph 1, of the 1978 Vienna Convention, the sole difference being the omission of any reference to articles 17 or 18, did not call for any comments. The same was true of paragraph 2, which reproduced paragraph 2 of article 20 of the 1978 Vienna Convention without the reference to articles 17 or 18 and which replaced the mention of article 19 of the 1969 Vienna Convention with a reference to guideline 3.1 of the Guide to Practice, which corresponded to it. As for paragraph 3, which reproduced paragraph 3 of the 1978 Vienna Convention, except that it replaced the phrase “the rules set out in articles 20 to 23 of the Vienna Convention” with “the relevant rules set out in the second part (Procedure) of the Guide to Practice”, his only comment was that it might be helpful to mention the relevant rules in question in the commentary for the convenience of users of the Guide to Practice.

17. As far as draft guideline 5.2 (Uniting or separation of States) was concerned, paragraph 1 did not raise any problems. Paragraph 2 was important in that it was a provision designed to fill a substantial gap in the 1978 Vienna

Convention. Paragraph 3 did not pose any difficulties, although the word “Procedure” in parentheses could be deleted.

18. The wording of draft guideline 5.3 (Irrelevance of certain reservations in cases involving a uniting of States) did not call for any particular comments. The scope of that guideline seemed wide enough to cover the cases for which specific provision was made in the 1978 Vienna Convention and for other cases, which was most sensible. Draft guideline 5.4 (Maintenance of the territorial scope of reservations formulated by the predecessor State) did not call for any particular comment either. The same could not be said of draft guideline 5.5 (Territorial scope of reservations in cases involving a uniting of States), because it was obviously long and at first sight rather complex. After a thorough perusal of it, he had, however, reached the conclusion that it reflected some fairly clear, logical, coherent and convincing ideas. It therefore merited closer examination, on the understanding that, if necessary, it might be quite substantially recast by the Drafting Committee. Its current wording was going in the right direction, for it did not seem to raise any questions of principle.

19. Draft guideline 5.6 (Territorial scope of reservations of the successor State in cases of succession involving part of a territory), which filled a gap in article 15 of the 1978 Vienna Convention, did not cause any special difficulties. The interpretation given to the scope of the verb “apply” (at the end of paragraph 79) seemed to be correct, as was the assumption contained in paragraph 80. It was right to acknowledge that the solutions provided for in draft guideline 5.2 applied *mutatis mutandis* to reservations formulated in respect of “territorial treaties” (para. 81).

20. Draft guideline 5.7 (Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State) did not pose any particular problems. The square brackets could simply be removed, or a reference could be made to the commentary. It appeared, however, as stated in paragraph 89, that two different legal regimes might be established with regard to temporal scope. He agreed with the reasoning in paragraphs 90 and 91.

21. Draft guideline 5.8 (Timing of the effects of a reservation formulated by a successor State) did not call for any particular comment; once again the square brackets could be removed or, failing that, a reference should be made to the commentary.

22. An editorial question arose in connection with references to specific articles or draft guidelines, namely whether there was any precise criterion for distinguishing between cases in which an express reference had to be made to articles or draft guidelines and those in which reference could simply be made to the commentary. Was not the guiding principle that of focusing on the user-friendliness of the Guide to Practice?

23. In conclusion, he proposed that draft guidelines 5.1 to 5.8 be referred to the Drafting Committee.

24. Sir Michael WOOD commended the Special Rapporteur on his presentation of his sixteenth report and said

that he looked forward to his introduction of the addendum thereto, which was unlikely to give rise to any additional problems. He also expressed his gratitude to the Secretariat for the excellent memorandum it had produced in 2009 and which the Special Rapporteur had described as the original report on which his sixteenth report had been based.

25. As the Commission approached the fifth and final part of the Guide to Practice, it had to bear in mind that it was not revisiting the rules on the succession of States in respect of treaties, but was solely concerned with questions of succession in respect of, *inter alia*, reservations and objections to reservations. It might be worth stressing, including in the commentary, that nothing in that exercise should be regarded in any way as passing judgement on the status as customary law, or on the appropriateness of the various rules set forth in the 1978 Vienna Convention, as far as succession to treaties was concerned. As the Special Rapporteur said in paragraph 7 of his sixteenth report, there was not even any need to ascertain whether the successor State’s status as a contracting State or State party had arisen by virtue of and in accordance with the rules laid down in the 1978 Vienna Convention or other rules of international law.

26. The 1978 Vienna Convention remained quite controversial. It had not been widely accepted and had only 22 parties. Unlike the 1969 and 1986 Vienna Conventions, its provisions were not widely thought to reflect rules of customary international law. But despite its imperfections, it constituted a useful starting point. Its terminology and the concepts underlying it were valuable and the Special Rapporteur and the Secretariat were right to have largely adopted them.

27. It was important to remember that the 1978 Vienna Convention was a creature of its age, more so than the 1969 and 1986 Vienna Conventions. The focus had been on a category of States termed “newly independent States” in relation to which the Convention had set special and distinctive rules for treaty succession. What had perhaps been understandable at the time might currently appear artificial and dated. In the 1978 Convention, the term “newly independent State” had what the rules on treaty interpretation of the 1969 Vienna Convention called a “special meaning”. It referred to “a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible”. As the Special Rapporteur pointed out in his rather cryptic last footnote to paragraph 4, which referred to the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, it would appear that the term as used in the 1978 Vienna Convention would not cover most of the new States that had emerged over the previous two decades.

28. In fact, it was not always possible to categorize cases of State succession in the same way as the 1978 Vienna Convention. They did not all fall neatly into the categories of newly independent States, newly independent States formed from two or more territories, separation of parts of a State or uniting of States. In order to grasp the complexity of the matter, it was sufficient to consider the history of much of Europe over the previous two centuries.

29. There was no treaty law on the status of reservations and objections to reservations (except for the provisions of the 1978 Vienna Convention concerning “newly independent States”, which applied to a fairly limited number of cases). State practice was sparse and essentially pragmatic. Logic was not necessarily a sound basis for the law, even if everyone agreed on what logic should dictate. Perhaps what the Special Rapporteur had in mind was the “less-than-Cartesian” logic to which he referred in paragraph 30 of his sixteenth report. In paragraph 47, he even seemed to have adopted a “common-sense” approach. In the 1970s, the Commission had endorsed a “pragmatic and flexible approach”. It should do so again and recognize that, in that part of the Guide to Practice, for most of the time it was not basing itself on either the Vienna Conventions or established State practice. As the Commission had little to go on, it should perhaps be rather cautious.

30. He drew three conclusions from that background. First, it would be rather odd, in that day and age, to regard the case of newly independent States, within the meaning of the 1978 Vienna Convention, as the paradigm. To make it the subject of the first guideline in that series simply because it was the only provision on the matter to appear in the 1978 Convention might even be misleading. That was why it would be preferable for the Drafting Committee to look carefully at the order of the guidelines and, as suggested by the Special Rapporteur, to align their numbering with that of the rest of the draft text of the Guide.

31. Secondly, the Commission should not be overprescriptive, for it could not predict all the various situations that might occur in the future. On the contrary, it should make it clear that it was not seeking to prescribe inflexible new rules in that area, but was simply offering tentative pointers to good practice. State practice might, or might not, crystallize along those lines.

32. Thirdly, in that context, it was especially necessary to acknowledge the residual nature of the guidelines. A successor State, or other States, might consider it appropriate to look for solutions tailored to a particular case of succession, or a given treaty.

33. Successor States did not necessarily succeed *ipso jure* to all the treaties of their predecessors and were not inevitably in the same position as their predecessors. That was true, for example, of the Treaty on the Non-Proliferation of Nuclear Weapons. That comment applied largely to succession to treaties, which was not the subject of the Commission’s work, but it could also apply to reservations. After all, the Commission was not considering day-to-day situations; almost by definition cases of succession were likely to be exceptional. The Special Rapporteur said that the principles laid down in article 20 of the 1978 Vienna Convention—and repeated in draft guideline 5.1—“are not overly rigid and are flexible enough to accommodate a wide variety of practices, as shown by a number of cases of succession to treaties deposited with the Secretary-General of the United Nations” (para. 29 of the sixteenth report). In his view, the same should apply to all of the guidelines in Part 5 of the Guide to Practice.

34. With those words of caution, he largely agreed with the approach adopted by the Special Rapporteur in his sixteenth report and with his overall conclusion in

paragraph 3 that “it seems appropriate to consider including, in the Guide to Practice, some guidelines” on the matter. He wished to make a few comments on the draft guidelines themselves, but they were only of a tentative nature as he was uncertain whether he had fully understood the Special Rapporteur’s intentions.

35. Draft guideline 5.1, which closely followed article 20 of the 1978 Vienna Convention, did not pose a problem. On the other hand, its placement should be altered and it might be wise to include a definition of the term “newly independent State” somewhere in the guideline itself.

36. In paragraph 1 of draft guideline 5.2, he wondered if the phrase “at the time of the succession” qualified both “formulates a reservation” and “expresses a contrary intention”. If the succession took place *ipso jure* at the moment of uniting or separation, was it realistic to expect the new State or States to act instantaneously, if that was indeed what the provision required?

37. As it stood, the wording of draft guideline 5.3 was rather dogmatic. It seemed to be based on the assumption that, in the words of paragraph 57 of the report, “a State ... can have only one status in respect of a single treaty”. That was no doubt true of a unitary State, but not necessarily of a State consisting of two or more separate units. The 1969 and 1986 Vienna Conventions themselves provided for cases where a treaty did not apply to the whole of the territory of a State. The idea that a treaty might apply in different ways to various parts of the territory of a State could not be excluded. The rule set out in draft guideline 5.3 perhaps needed to recognize that there might be exceptions to it.

38. Draft guidelines 5.4 and 5.5 were difficult to understand. Perhaps matters would become clearer in the Drafting Committee, where the Special Rapporteur would have more opportunity to explain the meaning of certain words and phrases. It was to be hoped that the text could be simplified, or that some of the complexities could be avoided.

39. Draft guidelines 5.8 and 5.9 seemed to assume that all successor States had to notify their status as a contracting State or State party, but it was hard to see how that would fit in with the notion of succession *ipso jure*.

40. With regard to draft guideline 5.10, he agreed with the Special Rapporteur that the last phrase “at the time of the succession” should be deleted.

41. Lastly, in draft guideline 5.15, the Special Rapporteur might consider the special case of a successor State formulating an objection to a reservation made by the predecessor State. Such a reservation might conceivably concern events in the territory of the successor State. The latter should perhaps be allowed to enter that kind of objection.

42. In conclusion, he would be happy to see all the draft guidelines contained in the sixteenth report and the addendum thereto sent to the Drafting Committee.

The meeting rose at 11.05 a.m.