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Summary record of the 3099th 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/>)*

article. During the debate on the sixth report, when the Commission had studied the grounds for expulsion and the practice of inflicting a “double punishment”, it had considered that that practice was open to criticism, because the fact of giving a person a prison sentence and then expelling him or her was the equivalent of imposing a double penalty, even if expulsion was not a criminal sentence, because it was not necessarily handed down by a court after a breach of the law, but could be ordered by an administrative authority. The commentary should therefore indicate that it was essential to avoid an expellee having to undergo “double punishment”. That was where a reference to recent Swiss practice could be relevant when drafting the commentary to the grounds for the expulsion of aliens.

15. The CHAIRPERSON said that she took it that the Commission wished to refer the restructured summary contained in the Special Rapporteur’s seventh report on the expulsion of aliens to the Drafting Committee.

It was so decided.

The meeting rose at 3.45 p.m.

3099th MEETING

Wednesday, 6 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (*continued*)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

SEVENTEENTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his seventeenth report on reservations to treaties (A/CN.4/647 and Add.1).

2. Mr. PELLET (Special Rapporteur) said first of all that he deeply regretted the passing of two former members of the Commission. Constantin Economides had been a man of deep convictions and an excellent jurist, and Francis Mahon Hayes had been an elegant thinker and a distinguished diplomat.

3. Turning to the introduction of his seventeenth—and final—report, he expressed gratitude to the translation services for their great efficiency and hard work in translating it, as well as all the draft commentaries in the Guide to Practice. In the seventeenth report, he had dispensed with the traditional introductory remarks in which he outlined new developments with regard to reservations to treaties and took stock of reactions to previous reports and to the Commission’s latest work. Instead, he had gone straight to the heart of the matter by devoting the first section of the report to the reservations dialogue. He owed a debt of gratitude to Daniel Müller for his help in drafting that section.

4. The phrase “reservations dialogue” was not a term of art but an expression that he had coined in his eighth report,²⁵⁵ although he had outlined the underlying notion in his third report.²⁵⁶ The term “reservations dialogue” simply meant that, irrespective of the substantive and procedural rules applicable to reservations in the absence of specific provisions in a given treaty, contracting States or contracting international organizations could, and in many cases did, engage in an informal dialogue concerning the permissibility, scope and meaning of another party’s reservations or objections to a reservation.

5. While those were informal practices that it would be difficult to transpose to a legal context, they had many advantages that deserved to be highlighted. The Guide to Practice was a suitable context in which to do so because it was an informal “soft law” tool that combined *de lege lata* and *de lege ferenda* provisions with actual recommendations.

6. As the reservations dialogue was intended to take place outside the normal channels, he had preferred not to include guidelines on it in the body of the Guide to Practice but rather to touch on it in an annex, which could take the form of a recommendation, a resolution, conclusions or some other instrument linked to the Guide, but separate from it.

7. An important general point was that the reservations dialogue between States and international organizations was conducted in many different forms, using a wide variety of methods. It could take place well before reservations were formulated, when a treaty was still being negotiated. At that stage, a State or an international organization was at liberty to draw attention to any language that it found problematic and to indicate that it might enter a reservation. Its partners were also free to react to those concerns by expressing any reservations they might have to the reservation being contemplated. The dialogue could also take place, at a later stage, once the State in question had formulated its reservations, either on signing the treaty or when expressing its consent to be bound by it, if those steps occurred at different times. At that juncture, the other contracting States could react by formally accepting or objecting to the reservation, but they could also react informally by expressing their concerns, seeking

²⁵⁵ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, pp. 42–50, paras. 70–106.

²⁵⁶ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6.

* Resumed from the 3090th meeting.

clarification or endeavouring to persuade the author of the reservation to refrain from making it, or to reduce its scope. There was nothing to prevent the partners of the reserving State from contacting or resuming contact with that State even after the end of the 12-month period prescribed for formal reactions. The reservations dialogue covered all those eventualities and was extremely beneficial in that it prevented positions from becoming entrenched, fostered greater understanding among the partners and was likely to encourage them to take their treaty obligations seriously.

8. Of course, the reservations dialogue was not restricted to registering a protest against a reservation seen as questionable: it also provided an opportunity for the author of the reservation to explain and defend or modify its viewpoint. The dialogue should never be reduced to a monologue, although unfortunately, all too often it was. The reservations dialogue could likewise take the form of collective or coordinated reactions, a possibility discussed in paragraphs 21 to 27 of the report.

9. Thanks to its polymorphous nature, the reservations dialogue also had the advantage that it could take place both within and outside the Vienna regime. In paragraphs 4 to 7 of the report, he showed that it had occurred even under the traditional regime of unanimous acceptance of reservations by all contracting States and that it still occurred under such unanimity regimes as remained and in the context of reservations to the constituent instruments of international organizations that had to be accepted by the organization itself.

10. Acceptance and objection, as defined implicitly in the Vienna Conventions—it was the Guide to Practice that had filled the gaps in that area—often set off a reservations dialogue in the manner described in paragraphs 8 to 27. Objections, irrespective of whether they were designed to have a maximum or “super-maximum” effect, often offered their authors an opportunity not only to explain why they were against a reservation, but also to try to persuade the reserving State to modify or withdraw it. Reserving States were sometimes receptive to such suggestions. Unfortunately, that was all too seldom the case, although several examples of such receptiveness were given in the report. Alternatively, the reserving State could explain why it was keeping to the original wording of its reservation. Again, such explanations were not provided often enough.

11. The fact that, in a reservations dialogue, the States in question talked to one another and explained the reasons for their positions, thus providing some vital pieces of information, proved very useful when a dispute arose or when treaty monitoring bodies had to adopt a position on the permissibility or scope of a reservation.

12. The reservations dialogue was even more interesting when it took place outside the Vienna system, as he had tried to show in paragraphs 28 to 53 of the report. The dialogue could come in the guise of reactions to reservations that were neither acceptance nor objection but *sui generis* comments that were nonetheless taken into consideration by the author of the reservation, dispute settlement bodies or treaty monitoring bodies. For example, in its award of 30 June 1977 in the *English*

Channel dispute, referred to in paragraph 30 of the report, the arbitral tribunal had noted, with regard to article 12 of the 1958 Convention on the Continental Shelf, that

article 12, as the practice of a number of States ... confirms, leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation. Whether any such action amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned. (para. 39)

That passage confirmed the idea that outside the Vienna mechanisms for acceptance and objection, States could react in a less formal and more flexible manner. Some very sophisticated examples of such informal reactions were given in paragraphs 32 to 37. As paragraph 38 indicated, he was convinced that the examples given constituted only the tip of the iceberg and that some reservations dialogues were conducted in an even more informal manner.

13. The other form of reservations dialogue outside the Vienna system took place under the auspices of treaty monitoring bodies, above all those monitoring human rights treaties. For the past several years, those bodies had emphasized the benefits of the reservations dialogue, as paragraphs 40 to 45 made clear. The Human Rights Council of the United Nations also strove to encourage States that had made questionable reservations to withdraw or modify them, using persuasion rather than condemnation. In that connection, he drew attention to paragraphs 45 to 48 of the report. Paragraphs 49 to 52 contained a brief description of the relevant practice developed in European forums such as the Working Party on International Public Law (COJUR) and CAHDI.

14. In short, the reservations dialogue took many different forms, employed a wide variety of methods and had little in the way of a formal basis. It was therefore difficult to define, despite the existence of abundant practice that was fast expanding, principally under the impetus of European countries but with growing support on other continents. The Commission must not only address the practice but indeed encourage it, because of its patent advantages. At the same time, it was vital not to asphyxiate such a useful practice in legal formalism that might undermine its flexibility and spontaneity, and hence its effectiveness. The Guide to Practice was not characterized by an overly formalistic approach and, as he had indicated in paragraphs 58 to 61, it contained guidelines that tended to encourage the reservations dialogue. That was especially true of those that recommended that States and international organizations express the reasons for their reservations and objections whenever possible, or that they should react to reservations which they regarded as impermissible, despite the fact that the impermissibility of a reservation *ipso facto* prevented it from producing its effects. Such reactions did not change the legal situation or the legal status of the reservation in any way, but it was useful for States other than the reserving State to make their positions known. Guideline 2.5.3, which invited States and international organizations to undertake a periodic review of their reservations and to consider whether they still served their purpose, was fully in line with efforts to foster the reservations dialogue.

15. Since the guidelines to which reference was made in paragraphs 58 to 61 were only a part of the reservations dialogue, he was proposing a more systematic approach: to encourage States and international organizations to engage in the reservations dialogue whenever possible, and in whatever form they deemed appropriate. That was the purpose of the draft recommendation or conclusions proposed in paragraph 68 of the report. The text was comparable to the text of the Commission's preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties,²⁵⁷ adopted in 1997. The new text had been drafted very cautiously in order not to hem in the reservations dialogue by confining its form and modalities, but instead to preserve the flexibility and spontaneity which ensured its effectiveness. He was not asking the Commission to accept the draft recommendation or conclusions without discussing the text, but a plenary sitting did not appear to be the right place to examine it in detail. He therefore suggested that, if a majority of members agreed, the text should be referred to the Working Group on reservations to treaties, which had done excellent work in revising the Guide to Practice.

16. Sir Michael WOOD said that he supported the Special Rapporteur's proposal to refer the draft recommendation or conclusions contained in paragraph 68 of the report to the Working Group on reservations to treaties.

17. Mr. NOLTE said that he also supported referral of the text in paragraph 68 to the Working Group on reservations to treaties. He had been surprised to see that the terms "key players" and "stakeholders" had been used in the report. They had not been employed so far, and it would be advisable to avoid such jargon.

18. On a more substantive point, he said that the reference in paragraph 15 of the report to "objections to an invalid reservation" suggested clarity as to whether a reservation was invalid. However, the very purpose of the reservations dialogue was to clarify this. He proposed that that phrase should read "objections to reservations which are considered to be invalid", thereby, in addition, aligning it with draft guideline 4.5.3, paragraph 2.

19. In paragraph 21, the Special Rapporteur referred to the many objections formulated to a reservation by Libya to the Convention on the Elimination of All Forms of Discrimination against Women on the grounds that the reservation was too imprecise and therefore invalid. Five years later, the Libyan Arab Jamahiriya had modified the reservation, making it more specific. The Special Rapporteur considered that this case was an example of a successful reservations dialogue. But if the reservation had indeed been invalid because it was incompatible with the object and purpose of the Convention, how could the Libyan Arab Jamahiriya modify that reservation five years later? The modification appeared instead to be a late reservation, the formulation of which was impermissible under guideline 2.3. He requested clarification of that point.

20. That apparent discrepancy raised the wider issue of the wisdom of guidelines 4.5.1, regarding the nullity of an invalid reservation, and 3.3.1, according to which there was no need to distinguish among the consequences of the

different grounds for non-permissibility. Although it was too late to change those general principles, the Commission should at least make it clear that States had the opportunity to modify reservations that were deemed by one or more objecting States to be invalid so as to preserve what might be their valid core. The Special Rapporteur seemed to acknowledge that possibility when he said in paragraph 33 of his seventeenth report that "[f]ull or partial withdrawal of a reservation that is considered invalid is unquestionably the primary purpose of the reservations dialogue". That understanding also seemed to underlie the State practice described in paragraph 34. Generally speaking, in paragraphs 30 *et seq.* and in the draft recommendation, more emphasis should be placed on dialogue to ascertain whether a particular reservation was valid.

21. While the examples of the reservations dialogue given in paragraphs 39 to 53 were certainly of great significance, they concerned two specific areas, namely human rights treaty monitoring bodies and coordination among European States. He wondered if there were any pertinent examples of the participation of international organizations, including their secretariats, in such a dialogue. The examples of CAHDI and COJUR were not the best, because they really illustrated the coordination of the views of States within an international organization and not the organization acting as such.

22. He fully agreed with the Special Rapporteur that the Commission should not try to formulate a legal framework or a "soft-law" instrument to regulate the reservations dialogue. Perhaps States could be reminded of the legal principles of *bona fides* and cooperation in treaty law, however.

23. He had the impression that the draft recommendation in paragraph 68 of the report primarily addressed the reservations dialogue from the viewpoint of the bodies monitoring human rights treaties, focusing on the validity of reservations. But the reservations dialogue went much further, in that it concerned permissible reservations and the withdrawal of impermissible reservations. The Commission should couch the draft recommendation in language that was suitably general and less oriented towards human rights issues.

24. Mr. SABOIA said that the seventeenth report dealt with a subject that had important consequences for the stability and optimal functioning of international instruments. The reservations dialogue provided supplementary guarantees to States and encouraged them to overcome their disagreements about reservations. He found the text of the draft recommendation or conclusions on the reservations dialogue, as contained in paragraph 68 of the report, to be perfectly acceptable. He endorsed the Special Rapporteur's proposal that it be referred to the Working Group on reservations to treaties.

25. Mr. McRAE asked whether the draft recommendation or conclusions were intended as a text for adoption by the General Assembly or by the Commission.

26. Mr. PELLET (Special Rapporteur), replying to that very astute question, said that for historical reasons dating back to 1997, he thought it prudent not to prejudge the form to be taken by the text in paragraph 68. Depending on what

²⁵⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 157.

course of action the General Assembly decided to adopt on the 180 guidelines plus commentaries in the Guide to Practice, the text in paragraph 68 could be appended to the Guide or remain separate from it. Thus, while the draft recommendation in paragraph 68 was couched in terms similar to a draft resolution and he hoped the Commission agreed with the contents and that the General Assembly itself would adopt it as a draft resolution, he had deliberately left the question of the final form open.

27. The CHAIRPERSON said he took it that the Commission wished to refer the text in paragraph 68 of the report to the Working Group on reservations to treaties for further consideration.

It was so decided.

28. Mr. PELLET (Special Rapporteur) made a number of suggestions about how the Commission should approach its discussion of chapter IV, on reservations to treaties, of its draft report to the General Assembly on the work of its sixty-third session. The text ran to several hundred pages, so an orderly approach and economy of time were of the essence. He thanked all those who had helped to finalize the voluminous and complex text of chapter IV, including the members of the translation services who had drawn attention to certain problems of concordance.

29. After a procedural discussion in which Sir Michael WOOD, Mr. PELLET (Special Rapporteur) and Mr. NOLTE took part, the CHAIRPERSON suggested that the Working Group on reservations to treaties should convene immediately in order to consider the text in paragraph 68 of the Special Rapporteur's report that had been referred to it earlier in the meeting.

The meeting rose at 11.20 a.m.

3100th MEETING

Thursday, 7 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies

[Agenda item 13]

STATEMENT BY THE PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Owada, President of the International Court of Justice, and gave him the floor.

2. Judge OWADA (President of the International Court of Justice) said that he was delighted to address the Commission on the occasion of its sixty-third session. It was the third time that he had had the privilege of addressing that august body, an occasion which provided an opportunity for fruitful interaction between two key legal institutions of the United Nations, one working towards the codification and progressive development of international law, and the other adjudicating upon existing international rules and principles. He wished to take the opportunity to congratulate the members of the Commission who had been recently elected and the newly elected Chairperson, Mr. Maurice Kamto. As had become the custom, he would start his presentation with a report on the judicial activities of the Court over the past year. He would then discuss in more detail some salient legal points likely to be of particular interest to the Commission. Since July 2010, the Court had rendered eight decisions altogether: one judgment on the merits, one advisory opinion, one judgment on preliminary objections, two judgments on applications for permission to intervene, one order on an application for permission to intervene, one order on the admissibility of a counterclaim and one order on a request for the indication of provisional measures. As in previous years, those cases had involved States from all regions of the world and the subject matter had been wide-ranging. Despite the variety in the types of decisions, they all contained issues of substantive importance which shed interesting light on the jurisprudence of the ICJ.

3. On 6 July 2010, the Court had handed down its order on the admissibility of a counterclaim submitted by Italy in the case concerning *Jurisdictional Immunities of the State*. The principal case, filed by Germany in December 2008, concerned a dispute over whether Italy had violated the jurisdictional immunity of Germany by allowing civil claims against it in Italian courts based on violations of international humanitarian law by the German Reich during the Second World War. In its counter-memorial, filed on 22 December 2009, Italy had presented a counterclaim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich".²⁵⁸ In its order of 6 July 2010, the Court had concluded that the dispute that Italy intended to bring before the Court by way of its counterclaim related to facts and situations existing prior to the entry into force as between the parties of the European Convention for the peaceful settlement of disputes, the compromissory clause of which formed the basis of the Court's jurisdiction on the principal claim. For that reason, the Court had ruled that the counterclaim did not come within its jurisdiction *ratione temporis* as required by article 80, paragraph 1, of the Rules of Court, and was thus inadmissible (paras. 30–33 of the order).

4. On 22 July 2010, the Court had rendered its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, in response to a request made by the United Nations General Assembly, in its resolution 63/3 of

²⁵⁸ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, "Counter-memorial of Italy", vol. I, p. 128, para. 7.1 (available from www.icj-cij.org).