

Document:-
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Summary record of the 2940th meeting

Topic:
Reservations to treaties

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of the 1969 Vienna Convention, she doubted whether the problems could be resolved in the Drafting Committee, although she was willing to engage in a discussion on the matter.

28. Several members had suggested that draft guideline 2.8.12 should be reformulated. She too could foresee situations in which the irreversible nature of acceptances of reservations could do more harm than good where preserving the integrity of treaty relations was concerned. Moreover, there was a slight imbalance in that the reserving State could withdraw its reservation but the accepting State could never withdraw its acceptance. However, in the light of the arguments of the Special Rapporteur and other members, she was in favour of retaining the current wording of the draft guideline for the time being, but suggested that the text should be the subject of further discussion in the Drafting Committee.

The meeting rose at 10.40 a.m.

2940th MEETING

Friday, 20 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, 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. Wisnumurti, Mr. Yamada.

Reservations to treaties (concluded) (A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur on reservations to treaties to sum up the debate on his twelfth report (A/CN.4/584). He informed the members of the Commission that the Enlarged Bureau had recommended the appointment of Mr. Kolodkin as Special Rapporteur on the topic entitled “Immunity of State officials from foreign criminal jurisdiction”. He took it that the Commission agreed to that recommendation.

It was so decided.

2. Mr. PELLET (Special Rapporteur) said that, as he had feared, only a few members of the Commission had expressed their views on the first part of his twelfth report, which dealt with a very technical and dry subject. He was thus all the more grateful to those who had

taken the trouble to read the report carefully and comment on it. A number of other members had let him know informally that they had not taken the floor because the proposed draft guidelines had not posed any particular problems for them, apart from possible drafting questions. Although doubts had been expressed as to the utility of draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), all speakers had been in favour of referring draft articles 2.8 to 2.8.12 to the Drafting Committee. Two points, however, had given rise to criticism or suggestions that went beyond simple drafting problems. He wished to stress that, notwithstanding the recent misguided practice of the Commission, which, when unable to take a decision, had often left it to the Drafting Committee to do so, the Drafting Committee’s role was to draft and not to decide questions of principle. The Commission should therefore put an end to that regrettable practice. If any members were opposed to drawing conclusions from the debate, which they had every right to do, then he would ask the Chairperson to take a vote—at least an indicative one—to ensure that the Drafting Committee did not yet again replace the plenary in deciding questions of principle.

3. He would first address the suggestions of Commission members which he felt were primarily of a drafting nature and on which the Drafting Committee was competent to decide. The clumsy wording of the draft articles concerned might have suggested that there had been disagreement, although no principle had been at issue and it should be possible to find a solution that satisfied all members. For example, it had been noted that the English translation of draft guideline 2.8 (Formulation of acceptances of reservations) posed problems. That was certainly true for the translation of the French word “*objection*”, which appeared in the plural in the English text although it should be in the singular, since it was in the singular in the sole authentic, authoritative version of the draft guideline, namely the French. If there were other problems, whether in the English or in the other language versions, the Drafting Committee could easily deal with them, too.

4. Another question raised did not concern the draft guideline itself but the explanation of it given in paragraph 17 [197] of the report, where he had written that “tacit acceptance [was] the rule and express acceptance the exception”. He had had a purely quantitative statement in mind and did not think that, legally speaking, express acceptance was an exception to a principle of tacit acceptance that was obligatory for States. He thus believed that he could fully reassure those who had expressed concern in that regard; once again, the problem seemed to be one of translation.

5. With one exception, all speakers had been in favour of including the phrase that had been left in square brackets in the text of draft guideline 2.8. One member of the Commission had made a useful proposal for new wording which would surely make it possible to incorporate the words “tacit acceptance” and “express acceptance” more harmoniously in the second paragraph of draft guideline 2.8, which would then read: “Express acceptance arises from a unilateral statement in this respect and tacit acceptance from silence kept ...”. Yet again, the problem was mainly one of drafting.

6. The same could be said of the problem posed by draft guideline 2.8.1 (Tacit acceptance of reservations), and in that connection he noted that, despite the divergent positions expressed by speakers, it would appear that the variant proposed in draft guideline 2.8.1 *bis* was preferred. In any event, the two draft guidelines were intended to mean the same thing, and the Drafting Committee might decide the question, which did not raise any issue of principle. If it adopted draft guideline 2.8.1 *bis*, the question of whether all the draft guidelines from 2.6.1 to 2.6.14 or only draft guideline 2.6.13 should be referred to the Drafting Committee would no longer arise, which was an additional reason to retain that variant.

7. A number of members had pointed out that after explaining the doctrinal difference between “implicit acceptance” and “tacit acceptance” in paragraphs 9 [189] to 11 [191], he had used the two terms indiscriminately in the rest of the report and had at times confused the two. It was unfortunate that those speakers had not cited the paragraphs concerned; those passages would have to be carefully identified when the new version of the commentary to the future guidelines was drafted, although the problem related only to paragraphs of the report and not to the draft guidelines themselves.

8. A more important substantive question had been vigorously argued by another speaker, who had contended that the words “whichever is later” in article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions necessarily implied that the contracting States and international organizations had at least one year to react. He fully agreed with that assertion, but just as he considered that it would certainly be useful to place greater emphasis on the scenario in which the contracting State or international organization became a party by the end of the 12-month period following notification, he also wondered whether such a scenario must or even could have an impact on the wording of the draft guideline. In any event, the Drafting Committee might give the question some thought.

9. The comment made with a certain insistence by several speakers on draft guideline 2.8.2 (Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations), which, they had argued, posed problems as currently worded, was an entirely different matter. He could endorse that view, even though on reflection he thought that the criticism was sometimes rather muddled. Having reread the draft guideline, he admitted that it posed a real problem which the Commission should try to address. In that connection, he was not at all certain that he had really succeeded in categorizing the problems raised. However, he had eventually concluded that it was necessary to differentiate between a number of scenarios, which would probably lead to different solutions, yet those solutions were none other than the ones contained in draft guidelines 2.8.1 and 2.8.2. Thus, the problem was not one of principle, and it was for the Drafting Committee to settle it.

10. All told, there were four scenarios. In the first, if a treaty made its own entry into force subject to unanimous ratification by the signatories, or even to ratification by a specific number of signatories, the principle set out in article 20, paragraph 5, of the 1969 and 1986 Vienna

Conventions clearly applied, because the treaty could not enter into force until all the signatories had ratified it without objecting to the reservation, which could occur at any time until ratification. That should probably be expressly stated so as not to continue giving the impression that the Guide to Practice was incompatible with the text of the Vienna Conventions on that point, as some members seemed to think. It would perhaps be enough to spell that out in the commentary to draft guideline 2.8.1.

11. The other scenarios were more difficult. What happened if for some other reason the reservation had to be accepted by all the parties? If the treaty was in force, there was no problem, because it was a simple matter to identify the parties: those that had expressed their consent to be bound and that had 12 months in which to raise an objection after they had been notified, as stipulated in draft guideline 2.8.2. What happened, however, with States or international organizations that intended to become parties? To remain faithful to the spirit of article 20, one would have to conclude that they had 12 months to ratify, starting from notification, and that upon notification or during the 12-month period they might decide not to accept—and that was the principle set out in draft guideline 2.8.1.

12. In the last scenario, the treaty was not in force and the parties could react to the reservation at any time between notification and the end of the subsequent 12-month period or until entry into force, whichever came later. Thus, a number of scenarios existed for which either draft guideline 2.8.1 or draft guideline 2.8.2 was always applicable, and he could not imagine that an additional draft guideline was necessary. On the other hand, those scenarios needed to be formulated in a way that made it clear when draft guideline 2.8.2 had to be applied. That might seem rather convoluted, but on reflection he had concluded that he had no real difference of opinion with the members of the Commission. Accordingly, it would be up to the Drafting Committee to verify which of the possibilities, i.e. draft guideline 2.8.1 or 2.8.2, should be applied to each scenario, on the understanding that there was probably no reason to retain the reference to States or international organizations that “are entitled to become parties to the treaty”, and it would also be necessary to decide whether to speak of “parties”, as was the case in article 20, paragraph 2, of the 1969 Vienna Convention, or of “contracting parties”, as was done later on in article 20. When giving its opinion on that rather technical question, the Drafting Committee should probably review the wording of draft guideline 2.8.2, bearing in mind the need to safeguard treaty relations.

13. The problems posed by draft guidelines 2.8.3 to 2.8.10 were much less complicated. Agreement seemed to be unanimous on draft guideline 2.8.3 (Express acceptance of a reservation), including on its wording, although one Commission member continued to contend that the illustration given in paragraph 49 [229] was not a good example, since a late reservation, in that member’s view, was not a reservation. Such a position undermined the Commission’s carefully considered decision, adopted by a formal vote, that late reservations must be treated as reservations, although they could be objected to later and should be discouraged. As Special Rapporteur, it was

his job firmly to oppose such undertakings, which would only destabilize the draft guidelines and make them less coherent. On the other hand, the Drafting Committee would probably want to take account of the suggestion to insert the word “contracting” before the phrase “State or an international organization” (and to delete the word “an”) in draft guideline 2.8.3 in order to avoid any inconsistency with article 20 of the 1969 Vienna Convention.

14. Some members thought that the wording of draft guideline 2.8.4 (Written form of express acceptances) might pose practical problems. He did not really understand why that was—on the contrary, he would have thought that the requirement of an acceptance in writing would avoid practical problems—and he did not see how the Commission could reconsider the point without calling into question one of the fundamental postulates upon which the draft guidelines were based, namely compliance with the Vienna text, unless there was a very important reason, which was not the case.

15. There had been no criticism, not even as to form, of draft guideline 2.8.5 (Procedure for formulating express acceptances) or draft guideline 2.8.6 (Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation), except in connection with a purely technical mistake in the title of 2.8.6. On the other hand, a proposal had been made by one member and supported by another which, if adopted, would have a considerable impact: to distinguish between the institutional provisions and the substantive provisions of the constituent instrument. He was not at all in favour of that idea, for both the theoretical and practical reasons set out at length in paragraphs 73 [253] to 78 [258]. Could one really apply to reservations to Articles 1 and 2 of the Charter of the United Nations the ordinary rules applicable to the acceptance of reservations without the General Assembly or the Security Council having something to say about it? He did not think so, because to do so would not be in keeping with practice: regardless of their object, reservations to constituent instruments were always submitted to an organ of the organization.

16. Draft guideline 2.8.8 (Lack of presumption of acceptance of a reservation to a constituent instrument) had not given rise to much discussion either, apart from the comment that reference should be made to the rules of the organization. Although that suggestion was valid for draft guideline 2.8.9 (Organ competent to accept a reservation to a constituent instrument), he did not think that it should be followed for 2.8.8, where it was not the rules of the organization that were important but the transparency of the process and the certainty that should result from it. The problem was one of certainty and not of the pre-eminence or constitutionality of the rules of the organization. One Commission member had contended that there was a contradiction between draft guideline 2.8.8 and the end of paragraph 71 [251] of the report. He disagreed: that was a drafting problem, because the purpose of draft guideline 2.8.8 was precisely to avoid the situation described in the last sentence of paragraph 71 [251].

17. The more numerous criticisms of draft guideline 2.8.9 had partly convinced him, in that the organ competent to accept a reservation to a constituent instrument

was first and foremost the organ so designated, expressly or implicitly, in the constituent instrument of the international organization. That principle should be embodied in the draft guideline from the outset, as several members of the Commission had suggested. However, he did not think that this was sufficient. The current wording retained its eminently practical interest as a “safety net” for cases in which the constituent instrument said nothing or nothing clear could be deduced from it. It might in fact be useful to specify what the practice was if the constituent instrument was silent.

18. With regard to draft guideline 2.8.10 (Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established), he recalled that he had been the first to express confusion at his own drafting. The phrase “the acceptance of all the States and international organizations concerned” was in fact odd; to resolve the problem, it would probably suffice to replace it with the more appropriate phrase “the acceptance of all the contracting States and international organizations”.

19. In that connection, one Commission member had raised an interesting legal question: what happened in the case of reservations formulated by the last State that ratified? The problem did in fact arise, but it was more closely linked to the question of the effect of reservations and acceptances than that of their formulation. However, if the words “contracting States and international organizations” were replaced with “States and international organizations concerned”, that might pose procedural problems not for the last State to ratify, but for the first. What would happen if the first State to ratify, wanted to formulate a reservation to the constituent instrument and there was no one to react? Would it simply be necessary to wait for the second ratification, or did something more complicated have to be found? If there was any need for a discussion of what was after all a rather academic problem, it should take place only in the commentary. In any event, it might be preferable to refer to the “signatory” States and international organizations in order, as had been pointed out, to prevent conditions from becoming increasingly stringent as the number of contracting parties rose.

20. Turning to draft guideline 2.8.11 (Right of members of an international organization to accept a reservation to a constituent instrument), he pointed out that the French word “*faculté*” had been incorrectly translated—and that was a recurring problem—into English as “right”; that should be corrected. The draft guideline had given rise to two other criticisms which must be taken seriously. The less serious was the fact that its title was inconsistent with its content: the draft guideline concerned not only acceptance, but also the reaction to the reservation in the broad sense, whether it was an acceptance or an objection. That criticism was absolutely right, and some thought needed to be given to the wording on that basis.

21. On a more fundamental matter, the question had been raised whether any purpose was served by having a guideline that confined itself to stating that the conduct to which it referred had no legal effect. He conceded that such wording was somewhat unusual for a positivist jurist, and it ought to be reconsidered, as had been suggested, to

avoid giving the impression that the members of the international organization could reconsider the position taken by the competent organ, which was binding on all, and to abandon the current wording in favour of an approach that was not so heavily negative. It might be possible to say, as had been proposed, that the right was “without prejudice to the effects that might be produced by its exercise”.

22. Draft guideline 2.8.12 (Final and irreversible nature of acceptances of reservations) was surely the most controversial. Some members had asserted that it was too categorical and that it should stipulate that within the 12-month time period a State or international organization which had given its acceptance was always free to change its position, and that once it had expressly formulated its acceptance it could still withdraw and make a reservation.

23. Other members, meanwhile, had vigorously defended the draft guideline, and he thanked them, for it was very important that the draft guideline should stress the categorical nature of the rule. First, he saw no reason that the legal regime for express acceptances should be brought into line with the regime for tacit acceptances, as had been recommended as a justification for altering the draft guideline. He did not see why, if a State took the initiative—which nothing compelled it to do—of formally declaring before the end of the 12-month period that it accepted the reservation, that this should be the same as if the State had done nothing and had simply let the time period elapse. That was not supported by the text of the 1969 Vienna Convention and was quite simply at variance with the principle of good faith, which was essential in relations between States. Secondly, the proposal was particularly troublesome in that while the Commission had not yet taken up the question of the effects of reservations and acceptances, it was aware that, under articles 20 and 21 of the 1969 and 1986 Vienna Conventions, acceptance was necessary for a treaty to enter into force in respect of the reserving State, and that if the first express acceptance was formulated before the end of the 12-month period, it produced fundamental effects for the respective situation of the States concerned. The possibility of withdrawing the acceptance would thus be highly destabilizing from the standpoint of the security of legal relations.

24. Thirdly, to affirm, as had been done during the debate, that such withdrawals of acceptance were quite rare was not convincing. The question was what to do if they did occur. The reply must be very clear, and a State that had taken the initiative of committing itself unilaterally should not be able to go back on an acceptance which produced legal effects. Nor was he any more convinced by another suggestion, supported by several members, to make it possible to withdraw an express acceptance if it had been made on the basis of a particular treaty interpretation which was contradicted, perhaps much later, by a judicial interpretation. Quite apart from the fact that, legally speaking, the interpretation concerned had only the relative authority of *res judicata*, the correct response to such a situation, as one member had put it so well, was certainly not withdrawal of the acceptance but rather the formulation of an interpretative declaration, which, unlike an acceptance and in conformity with draft guideline 2.4.3, could be

formulated at any time. That should be specified in the commentary or else in the draft guideline itself. To go back on the principle reflected in draft guideline 2.8.12 would constitute a grave danger for the security of legal relations and would lead to a result that was contrary to the fundamental principle of good faith. That was not a drafting problem, and the Commission should not rely on the Drafting Committee, as it had done too often in the recent past, because the question was one of principle that must be decided in plenary meeting.

25. Noting that a narrow majority of Commission members had supported draft guideline 2.8.12, he asked the Chairperson to hold an indicative vote on the question so as to avoid having the Drafting Committee decide on a question of principle that was not within its competence.

26. The CHAIRPERSON suggested that the Commission should indicate by show of hands whether it agreed with the principle expressed in draft guideline 2.8.12 that when express acceptance was given, such acceptance bound the State or international organization that gave it without any possibility of reversing the acceptance, even during the 12-month period that might follow it.

27. By means of a vote by show of hands, the Commission expressed its approval of draft guideline 2.8.12 in principle.

28. Mr. PELLET (Special Rapporteur) said that a second problem of principle also arose. In his statement at the previous meeting, Mr. Gaja, commenting on draft guidelines 2.8, 2.8.1 and 2.8.2, had said that it would be preferable to speak of “presumption of acceptance” rather than “tacit acceptance”. Personally, he was firmly convinced that this distinction, although hardly reflected in the report, was very important and that the point was not simply one of drafting. In defence of his proposition that silence maintained for 12 months or until ratification created a simple presumption of acceptance, Mr. Gaja had argued that the reservation could prove impermissible for several reasons, above all on account of its incompatibility with the object and purpose of the treaty. One might object that this had nothing to do with the question of the formal validity of the reservation, which was dealt with in the second part of the Guide to Practice, but rather concerned the issue of substantive validity, which was addressed in the third part. However, the point of that observation was sufficiently important for the attention of States to have been drawn to it already in the second part. Moreover, it might also help dispel the fears of those members of the Commission for whom draft guideline 2.8.12 was too inflexible. Not only was Mr. Gaja’s position of principle compatible with article 20, paragraph 5, of the 1969 Vienna Convention, which indicated that the consequence of the silence of the State or international organization was not that the reservation was accepted but that it was “considered to have been accepted”: it was its inescapable consequence.

29. It was for the Drafting Committee to propose wording to render the idea that silence was tantamount to presumption of acceptance rather than to tacit acceptance, but the subtle distinction was important enough that the matter should be decided in plenary meeting.

30. In concluding his remarks, he requested the Commission to refer the draft guidelines contained in his twelfth report to the Drafting Committee.

31. The CHAIRPERSON said he took it that the Commission considered, with Mr. Gaja and the Special Rapporteur, that the words “presumption of acceptance” should be used rather than “tacit acceptance” in draft guidelines 2.8, 2.8.1 and 2.8.2 and that it decided to refer the draft guidelines proposed by the Special Rapporteur in his twelfth report to the Drafting Committee.

It was so decided.

32. The CHAIRPERSON said that the Commission had thus concluded its consideration at the current session of the topic of reservations to treaties and that he would adjourn the meeting to enable the Drafting Committee on responsibility of international organizations to meet.

The meeting rose at 11.05 a.m.

2941st MEETING

Tuesday, 24 July 2007, at 10.05 a.m.

Chairperson: Mr. Ian BROWNLIE

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (*continued*)* (A/CN.4/577 and Add.1–2, sect. E, A/CN.4/581)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. KAMTO (Special Rapporteur), introducing his third report on expulsion of aliens (A/CN.4/581), said that, having defined the scope of the topic and the key terms in his second report,²⁸¹ he was now embarking on a consideration of the general principles of the law governing expulsion of aliens and proposing five new draft articles. Upon close examination, the expulsion of aliens was seen to involve, on the one hand, the fundamental principle of State sovereignty in the international order and the territorial jurisdiction that flowed from that principle, and, on the other hand, the fundamental principles underpinning

* Resumed from the 2926th meeting.

²⁸¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573. For the discussion of this report by the Commission, see the 2923rd to 2926th meetings above.

the international legal order and basic human rights which all States must respect.

2. The right to expel could thus be seen to be a right inherent in the sovereignty of the State, not one granted by an external rule of customary law. It was, so to speak, a natural right of the State emanating from its full authority over its territory. That had never raised serious doubts in the literature and was confirmed by State practice and ample international case law. That right, which existed irrespective of any special provision in internal law, was nevertheless not absolute: it must be exercised within the limits of international law—first, limits inherent in the international legal order that formed the basis of the international legal system and existed independently of other constraints relating to special areas of international law; and second, those derived from international human rights law, since expulsion affected human beings who enjoyed certain non-derogable rights under contemporary international law.

3. Draft article 3, entitled “Right of expulsion”, proposed a rule on the right of the State to expel an alien and stated that this right was restricted by the fundamental principles of international law, thereby dissociating the requirement of respect for those principles from the requirement of respect for fundamental human rights, something that would be addressed in other provisions. It was to be found in paragraph 23 of the third report and read:

“1. A State has the right to expel an alien from its territory.

“2. However, expulsion must be carried out in compliance with the fundamental principles of international law. In particular, the State must act in good faith and in compliance with its international obligations.”

4. Independently of the general rules of international law, the exercise of the right to expel foreigners was limited by a number of principles specifically governing that right. Some of those limits related to the person to be expelled. Even though the topic did not at first sight appear to cover nationals of an expelling State, since they could not be aliens in their own country, it had seemed important to begin by recalling the principle of non-expulsion by a State of its own nationals, especially as historically there had been some—albeit not many—exceptions to that principle, a few of which still persisted. Those exceptions justified addressing the expulsion of nationals under the topic.

5. It would be recalled that, following its consideration of his second report, the Commission had decided to use the terms “*ressortissant*” and “national” as synonyms; anything in the third report that might seem to indicate the contrary should be disregarded. The distinction crept in at certain points and was to some degree pertinent in the context of expulsion of nationals, but he had endeavoured to respect the general trend in the Commission away from making such a distinction.

6. The principle of non-expulsion of nationals was far from absolute. Certain individuals or categories of