

Document:-
A/CN.4/3030

Summary record of the 3030th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2009, vol. I

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3030th MEETING

Monday, 3 August 2009, at 3.05 p.m.

Chairperson: Mr. Ernest PETRIČ

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. Kolodkin, Mr. McRae, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/606 and Add.1, sect. I, A/CN.4/L.759²⁸⁹)

[Agenda item 12]

REPORT OF THE PLANNING GROUP

1. Mr. WISNUMURTI (Chairperson of the Planning Group) said that the Planning Group had held three meetings which had been devoted, *inter alia*, to the following items: the Working Group on the long-term programme of work; consideration of General Assembly resolution 63/128 of 11 December 2008 on the rule of law at the national and international levels; documentation and publications; the dialogue between the Commission and the Sixth Committee; the proposal to stagger the elections of the Commission; the date and place of the sixty-second session of the Commission; and other matters. The report of the Planning Group, which was self-explanatory, had been organized to reflect the outcome of discussions on those items.

2. He wished to highlight three issues. First, on the basis of a proposal by Mr. Pellet, the Planning Group had held an extensive discussion on procedures and criteria applicable to elections of the Commission. It had been unable to reach any specific conclusions on the matter at the present stage of its work, however, and had accordingly decided not to keep the item on its agenda.

3. Secondly, under “Other matters”, the Planning Group had considered a proposal by Sir Michael Wood concerning settlement of disputes clauses, which had been inspired by the Commission’s discussion of the rule of law in its report of the previous year,²⁹⁰ by the statement of the President of the ICJ to the Commission on 7 July 2009 (3016th meeting above, paras. 2–47) and by other developments. The Planning Group had held a debate on the proposal, including on the Commission’s policy in relation to such clauses. It recommended that, at its sixty-second session, under “Other business”, the Commission devote at least one meeting to a discussion of settlement of disputes clauses. In order to facilitate the discussion, the Secretariat had been requested to prepare a note on the Commission’s past practice in relation to such clauses, taking into account the recent practice of the General Assembly.

4. Thirdly, also under “Other matters” and at the request of Ms. Escarameia, who considered it useful for the Planning Group to keep on its agenda an item on the methods of work of the Commission, the Planning Group had exchanged views on that matter. Among the issues it had addressed were the importance of reports of Special Rapporteurs for the functioning of the Commission and the relationship between the plenary Commission and its subsidiary bodies. It had been recommended that an open-ended working group of the Planning Group on the Commission’s methods of work should be convened early in the sixty-second session, subject to availability of time and space.

5. If approved by the Commission, the Planning Group’s recommendations would be incorporated, with the necessary adjustments, in the Commission’s report to the General Assembly, in the chapter entitled “Other decisions and conclusions of the Commission”.

6. It was understood that the three issues he had just highlighted would not appear in the report of the Commission.

7. The CHAIRPERSON invited members of the Commission to adopt the report of the Planning Group (A/CN.4/L.759) on the understanding that, as the Chairperson of the Planning Group had pointed out, paragraphs 10, 11 and 12 had been drafted for information purposes only and would not appear in the report of the Commission to the General Assembly.

8. Mr. PELLET said that even if those paragraphs did not appear in the Commission’s report, the discussion relating to them would be reflected in the summary record of the current meeting. Consequently, and with reference to paragraph 12, he said that he would prefer that the Planning Group itself, and not a working group established by it, consider the methods of work of the Commission, as that was an integral part of its responsibilities.

9. The phrase “in the form prior to typesetting and publication” in paragraph 6 of the report was unclear. In paragraph 7, the amount of voluntary contributions made to the trust fund to address the backlog in publication of the *Yearbook of the International Law Commission* should be mentioned. Lastly, in paragraph 14, there was no reason to qualify as “immediate” the research work required for the drafting by Special Rapporteurs of their reports.

10. The CHAIRPERSON said that if there was no objection, Mr. Pellet’s comments would be taken into consideration.

11. Ms. ESCARAMEIA expressed surprise that paragraph 10, containing proposals on the elections of the Commission, was to be omitted from the Commission’s report to the General Assembly, in contrast to what had been done in previous years.

12. She recalled that there had been two salient issues in connection with elections to the Commission: gender balance and the staggering of the elections. The decision of the Planning Group that this item “should not be kept on its agenda” dealt only with the second issue.

²⁸⁹ Mimeo graphed; available on the Commission’s website.

²⁹⁰ *Yearbook ... 2008*, vol. II (Part Two), pp. 146–147, paras. 341–346.

13. Mr. VASCIANNIE, Mr. SABOIA, Mr. CANDIOTI, Mr. HASSOUNA and Ms. JACOBSSON (Rapporteur) confirmed that such had been the case.

14. Ms. ESCARAMEIA, supported by Mr. CANDIOTI, proposed that, in order to avoid any confusion, the final sentence of paragraph 10 should be deleted.

15. Mr. HASSOUNA said that the most important thing now was to decide whether paragraphs 10, 11 and 12 of the report of the Planning Group were to appear in the report of the Commission to the General Assembly. If they were not, then, he would like to know why.

16. Mr. VALENCIA-OSPINA said that it was important to differentiate among the various stages of the procedure. The Planning Group had adopted a report that did not address the issue of gender balance among the members of the Commission. It was up to the Commission, meeting in plenary, not to reopen consideration of the report, as it was in the process of doing, but simply to take note of it. When it came to adopt chapter XII of its report to the General Assembly, the Commission could then decide to state that the issue of gender balance remained open.

17. Ms. JACOBSSON (Rapporteur) endorsed the comment just made by Mr. Valencia-Ospina.

18. Mr. PELLET said that the Commission would make its task much more difficult if it adopted the report of the Planning Group without taking a position now on whether to include paragraphs 10, 11 and 12 of that report in its own report, as the question would no doubt arise again at a later meeting. It should therefore decide without further delay whether the Secretariat should include the three paragraphs concerned in the Commission's report on the work of its sixty-first session. If an indicative vote was taken on the matter, he would vote in favour of their inclusion, since there was no reason to conceal the contents of a report of the Planning Group.

19. Ms. ESCARAMEIA supported Mr. Pellet's proposal: the Commission should decide at once whether to include paragraphs 10, 11 and 12 of the report of the Planning Group in its own report. It had already done something similar at its 2001 session by reflecting in its report the discussion on staggering its elections:²⁹¹ there was thus a precedent for such a procedure. In any case, as Mr. Pellet had rightly pointed out, the main question was whether the Commission wished the important issues that had been considered by the Planning Group to be brought to the attention of the Sixth Committee. For the sake of transparency, she personally would reply to that question in the affirmative.

20. Mr. KOLODKIN said that, as he recalled it, the Planning Group had felt that paragraphs 10, 11 and 12 of its report were not user-friendly, unlike the rest of its report, and should therefore not appear in the report of the Commission.

21. The CHAIRPERSON suggested that an indicative vote should be taken on whether to include paragraphs 10,

11 and 12 of the report of the Planning Group in the report of the Commission on the work of its sixty-first session.

22. Mr. VALENCIA-OSPINA said that since paragraphs 10, 11 and 12 of the report of the Planning Group each dealt with separate issues, a separate vote should be taken on each of them.

23. Mr. PELLET said that, logically, the Commission should begin by determining whether the paragraphs should be included in its report and only then decide whether to amend them.

24. Mr. VALENCIA-OSPINA said that he had suggested, not that the paragraphs should be amended, but simply that a separate vote should be taken on whether each of them should be incorporated in its report.

25. The CHAIRPERSON announced that an indicative vote would be taken on whether to include each of the paragraphs in the report of the Commission on the work of its sixty-first session.

Following an indicative vote, it was decided to include paragraph 10 of the report of the Planning Group in the report of the Commission on the work of its sixty-first session.

Following an indicative vote, it was decided to include paragraph 11 of the report of the Planning Group in the report of the Commission on the work of its sixty-first session.

Following an indicative vote, it was decided to include paragraph 12 of the report of the Planning Group in the report of the Commission on the work of its sixty-first session.

The report of the Planning Group contained in document A/CN.4/L.759 was adopted.

Draft report of the Commission on the work of its sixty-first session

CHAPTER VI. *Expulsion of aliens* (A/CN.4/L.750 and Corr.1 and Add.1)

26. The CHAIRPERSON invited the Commission to take up chapter VI of its draft report, beginning with paragraphs 1 to 7.

27. Mr. PELLET, noting that Ms. Jacobsson was referred to as “rapporteur” in the French version of document A/CN.4/L.750 and “rapporteuse” in that of A/CN.4/L.750/Corr.1, said that, regardless of which of the two forms it adopted, the Commission should strive to ensure consistency. Personally, he was in favour of using the feminine form of titles.

28. Following an exchange of views in which Mr. CAFLISCH, Ms. ESCARAMEIA, Mr. HASSOUNA and Ms. JACOBSSON took part, the CHAIRPERSON suggested that the Secretariat should use the same wording as in the previous year, 2008, when Ms. Escarameia had served as Rapporteur.

It was so decided.

²⁹¹ Yearbook ... 2001, vol. II (Part Two) and corrigendum, p. 206, para. 258, and *ibid.*, vol. I, 2695th meeting, p. 193, paras. 62–63.

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 6

29. The CHAIRPERSON said that as he understood it, the text in square brackets should be deleted.

Paragraph 6, as amended, was adopted.

Paragraph 7

30. The CHAIRPERSON announced that the following sentence should be added at the end of the paragraph: “At its 3028th meeting, on 28 July 2009, the Commission decided to postpone its consideration of the revised draft articles to its sixty-second session.”

31. Mr. PELLET asked how the sentence just read out related to the version of paragraph 7 contained in document A/CN.4/L.750/Add.1.

32. Mr. MIKULKA (Secretary to the Commission) said that paragraph 7 was to begin with the following sentence: “At its 3006th meeting, the Special Rapporteur undertook to present to the Commission a revised and restructured version of draft articles 8 to 14, taking into account the plenary debate.” Next would come the following text, contained in document A/CN.4/L.750/Add.1: “The Special Rapporteur then submitted to the Commission a document containing the draft articles on protection of the human rights of persons who have been or are being expelled, restructured in the light of the plenary debate (A/CN.4/617). He also submitted a new draft workplan with a view to restructuring the draft articles (A/CN.4/618).” The paragraph would end with the sentence read out by the Chairperson.

33. Mr. VALENCIA-OSPINA said that for the sake of consistency, in the first sentence of the part of paragraph 7 contained in document A/CN.4/L.750/Add.1, the word “restructured” should be replaced by “revised”.

Paragraph 7, as amended, was adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS FIFTH REPORT

Paragraph 8

Paragraph 8 was adopted.

Paragraph 9

34. Mr. PELLET proposed that, at least in the French version of the text, the phrase “*dont la situation juridique créait une fragilité de condition*”—which made little sense—should be replaced by “*que leur situation juridique rendait vulnérables*”.

Paragraph 9, as amended, was adopted.

Paragraphs 10 to 16

Paragraphs 10 to 16 were adopted.

Paragraph 17

35. The CHAIRPERSON said that paragraph 17 should be replaced by the following text:

“In his future reports, the Special Rapporteur intended to discuss the problems of disguised expulsion, expulsion on grounds contrary to the rules of international law, conditions of detention and treatment of persons who have been or are being expelled, before turning to procedural questions.”

Paragraph 17, as amended, was adopted.

2. SUMMARY OF THE DEBATE (A/CN.4/L.750/Add.1)

36. The CHAIRPERSON invited the Commission to consider document A/CN.4/L.750/Add.1, which contained the continuation of chapter VI, on a paragraph-by-paragraph basis, beginning with paragraph 18, since paragraph 7 had already been adopted.

Paragraphs 18 to 62

Paragraphs 18 to 62 were adopted.

Section B, as amended, was adopted.

Chapter VI, as a whole, as amended, was adopted.

CHAPTER IV. Responsibility of international organizations (A/CN.4/L.748 and Add.1–2 and Add.2/Corr.1)

A. Introduction**B. Consideration of the topic at the present session**

37. The CHAIRPERSON invited the Commission to consider chapter IV of its draft report, entitled “Responsibility of international organizations”. Only document A/CN.4/L.748 was available for its consideration at the current meeting.

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Paragraph 8

38. Mr. GAJA (Special Rapporteur) said that, in order to better reflect his own remarks, the following amendments should be incorporated in paragraph 8. In the first sentence, the term “generally” should be inserted before “positive”, and at the end of the second sentence, the text following the term “circumstances” should be replaced by “and to clarify the relation existing between the provision of competence to the organization and the commission of the act in question”.

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

Paragraph 12

39. Mr. GAJA suggested that the phrase “such as questions of legal personality,” should be deleted, as it gave rise to confusion.

Paragraph 12, as amended, was adopted.

Paragraphs 13 and 14

Paragraphs 13 and 14 were adopted.

Paragraph 15

40. Sir Michael WOOD expressed surprise that the Commission’s report gave no account of its discussion of the Special Rapporteur’s seventh report.

41. Mr. MIKULKA (Secretary to the Commission), supported by Mr. GAJA (Special Rapporteur), said that the Commission normally did not recount discussions that resulted in its adoption of draft articles accompanied by commentaries, since the latter, in essence, summed up its final position.

42. Sir Michael WOOD said that in that case, it was important for the summary records of the Commission’s meetings to be published at the earliest possible date.

Paragraph 15 was adopted.

Paragraphs 16 to 19

Paragraphs 16 to 19 were adopted.

Sections A and B of chapter IV, as amended, were adopted.

CHAPTER V. *Reservations to treaties (A/CN.4/L.749 and Add.1–7)*

43. The CHAIRPERSON invited members of the Commission to take up documents A/CN.4/L.749 and A/CN.4/L.749/Add.3, the only documents available at the current meeting.

A. *Introduction (A/CN.4/L.749)*

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

C. *Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission*

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTY-FIRST SESSION (A/CN.4/L.749/Add.3)

Paragraph 1

Paragraph 1 was adopted.

Commentary to guideline 2.4.0 (Form of interpretative declarations)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

44. Mr. PELLET (Special Rapporteur) said that in the French version of the text, the final sentence should read: “*Son influence effective dépend en effet en grande partie de la diffusion dont elle fait l’objet.*”

Paragraph (2), as amended, was adopted.

Paragraph (3)

45. Mr. PELLET (Special Rapporteur) said that, in the French version, the phrases “*Traduction du Rapporteur spécial*” and “*Traduction en vue du rapport*” should be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

The commentary to guideline 2.4.0, as amended, was adopted.

Commentary to guideline 2.4.3 bis (Communication of interpretative declarations)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

46. Ms. ESCARAMEIA proposed that, in the final sentence of the English version, the word “invalid” should be replaced by “impermissible”, since the subject was substantive validity, a concept that in English was conveyed by reference to permissibility. It might even be better simply to delete the phrase “and, on the other, an interpretative declaration can only be considered invalid in truly exceptional cases where the treaty itself excludes or circumscribes interpretative declarations”, since the Commission had decided that interpretative declarations were not permissible, not only in the exceptional cases mentioned in paragraph (4), but also when they were contrary to *jus cogens*.

47. Mr. PELLET (Special Rapporteur) proposed that, in the first sentence, the phrase “the depositary should be able to initiate a consultation procedure ... in which case” should be deleted, and that the second sentence should be retained.

48. Sir Michael WOOD suggested that the current wording of the paragraph should be retained, but that in order to take into account Ms. Escarameia’s proposal, the phrase “where the treaty itself excludes or circumscribes interpretative declarations” should be deleted.

49. Mr. PELLET said he could accept that suggestion, but that, in the second sentence, the word “truly”, before “exceptional”, should then be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

50. Ms. ESCARAMEIA proposed the addition of the following sentence: "Some members, however, thought that the meaning of interpretative declarations was often ambiguous, and that therefore statements of reasons would clarify it."

51. Mr. PELLET (Special Rapporteur) said he could consent to that addition, provided that it was placed at the beginning of paragraph (5), in order to make it clear that that had not been the majority view.

Paragraph (5), as amended, was adopted.

The commentary to guideline 2.4.3 bis, as amended, was adopted.

CHAPTER X. *Immunity of State officials from foreign criminal jurisdiction* (A/CN.4/L.754)

52. The CHAIRPERSON invited the Commission to take up document A/CN.4/L.754.

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Chapter X, as a whole, was adopted.

The meeting rose at 5.40 p.m.

3031st MEETING

Tuesday, 4 August 2009, at 3.10 p.m.

Chairperson: Mr. Ernest PETRIČ

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. Kolodkin, Mr. McRae, Mr. Murase, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-first session (*continued*)

CHAPTER V. *Reservations to treaties (continued)* (A/CN.4/L.749 and Add.1-7)

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*continued*)

2. TEXT OF THE DRAFT GUIDELINES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS SIXTY-FIRST SESSION [A/CN.4/L.749/Add.4]

1. The CHAIRPERSON invited the Commission to continue its consideration of chapter V of its draft report and drew attention to the portion of chapter V contained in document A/CN.4/L.749/Add.4.

2. Mr. PELLET (Special Rapporteur) said that in such a lengthy document, despite his own attention to detail and the laudable efforts of his assistants, a few errors had slipped by. The cross references between footnotes were occasionally inaccurate or missing, but such details would be corrected in the final version of the text. References to *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005* (ST/LEG/SER.E/24), the last printed version available, would be replaced by references to the more recent electronic versions. Quotations would be given in the original languages, accompanied by translations into each of the language versions in which they appeared. Lastly, as reflected in the footnote to paragraph 123 of its report on the work of its sixtieth session,²⁹² the Commission had decided that to avoid endless repetition of the word "draft", the text of the draft guidelines and commentaries thereto should simply refer to "guidelines", without prejudice to their legal status.

3. The CHAIRPERSON, after consulting with Mr. MIKULKA (Secretary of the Commission), confirmed that the points raised by Mr. Pellet would be taken into account in the preparation of the final version of the report.

Commentary to guideline 2.8.1 (Tacit acceptance of reservations)

Paragraph (1)

Paragraph (1) was adopted.

New paragraph (1 bis)

4. Mr. GAJA proposed that the last two sentences of paragraph (2) of the commentary to guideline 2.8.3 be transferred to form a new paragraph (1 bis) of the commentary to guideline 2.8.1. His reasoning was that the two sentences dealt with tacit acceptance, covered in guideline 2.8.1, as well as express acceptance, the subject of guideline 2.8.3, and were better placed in the earlier commentary.

New paragraph (1 bis) was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

5. Mr. PELLET (Special Rapporteur) said that in the footnote before the quote, the reference should be to paragraph (10) below instead of to paragraph (7).

6. Sir Michael WOOD suggested that the phrase "almost useless clarification" should be replaced by "words".

7. Mr. PELLET (Special Rapporteur) said that he could agree to that proposal, provided that the above-mentioned footnote was deleted and the reference to paragraph (10) was inserted in the following footnote, at the end of the paragraph.

Paragraph (5), as amended, was adopted.

²⁹² Yearbook ... 2008, vol. II (Part Two), p. 69, footnote 227.