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INTERNATIONAL LAW COMMISSION

Sixty-first session  
(First part)

PROVISIONAL SUMMARY RECORD OF THE 3011th MEETING

Held at the Palais des Nations, Geneva,  
on Wednesday, 27 May 2009, at 10 a.m.

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Present:

Chairman:

Mr. PETRIČ

Members:

Mr. CAFLISCH

Mr. CANDIOTI

Mr. COMISSÁRIO AFONSO

Mr. DUGARD

Ms. ESCARAMEIA

Mr. FOMBA

Mr. GAJA

Mr. GALICKI

Mr. HASSOUNA

Mr. HMOUD

Ms. JACOBSSON

Mr. KOLODKIN

Mr. McRAE

Mr. MELESCANU

Mr. MURASE

Mr. OJO

Mr. PELLET

Mr. PERERA

Mr. SABOIA

Mr. VALENCIA-OSPINA

Mr. VARGAS CARREÑO

Mr. VASCIANNIE

Mr. WISNUMURTI

Sir Michael WOOD

Ms. XUE

Secretariat:

Mr. MIKULKA

Secretary to the Commission

*The meeting was called to order at 10.05 a.m.*

TRIBUTE TO THE MEMORY OF SIR DEREK BOWETT, FORMER MEMBER OF  
THE COMMISSION

The CHAIRMAN said that he had received the sad news that Sir Derek Bowett, a member of the Commission from 1991 to 1996, had passed away several days previously. A disciple of Sir Hersch Lauterpacht, Sir Derek had enjoyed an illustrious career in international law, both as a scholar and practitioner. His outstanding achievements, which were recognized by the international academic community, included his unrivalled experience in international litigation, his active involvement in solving boundary disputes and his contribution to the development of a regime for the mineral resources of the deep sea floor of the world's oceans.

In the International Law Commission his wisdom and experience had been greatly appreciated by all who had worked with him, and his contribution to the Commission's work on international relations had been instrumental. His sharp legal mind, enthusiasm for international law and courteousness would be remembered by all.

*At the invitation of the Chairman, the members of the Commission observed a minute of silence.*

Mr. VARGAS CARREÑO said that, as a member of the Commission from 1992 to 1996, he could testify to Sir Derek's intellectual and moral qualities. He had been a great academic, international civil servant and litigant. Of his many writings that had had a major impact on international law, those on the subjects of self-defence in international law and the International Court of Justice in particular reflected his vast practical experience of international litigation at the highest level.

Sir Derek was noteworthy for his good judgement and his ability to sum up an important debate in a clear and concise way, as exemplified by his contribution to the debate on the 1996 draft Code of Crimes against the Peace and Security of Mankind and on the topics of succession of States and State responsibility. Through his teaching, publications, participation in the Commission and other activities Sir Derek had left a great legacy for international law.

Mr. PELLET said that he had first met Sir Derek in 1988, during the oral pleadings at the International Court of Justice in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, where he, a newcomer, had represented Nicaragua and Sir Derek, a respected litigant before the Court, had represented Honduras. Sir Derek had not taken umbrage at some of the rather impertinent remarks he had made during the pleadings, but had in fact encouraged him in his career, and they had subsequently worked together on many cases. Sir Derek had always been open and straightforward, ready to listen and to give advice without imposing it.

As a member of the Commission, Sir Derek had been discreet but extremely effective, a man of few words that nonetheless often tipped the balance. Many key decisions had been made under his chairmanship of the Working Group on the Long-term Programme of Work; the review of the Commission's working methods spearheaded by him had also proved successful. A great internationalist, a great lawyer and a dear friend, he would be sadly missed.

Mr. FOMBA said that from 1992 to 1996 he had been honoured to work on the Commission alongside Sir Derek. Above all, he had been an extraordinary lawyer who had made a colossal contribution to doctrine and jurisprudence in international law. He had also provided valuable input to the work of the Commission in its selection of topics, both as Chairman of the Drafting Committee when important topics such as State responsibility were under consideration, and as Chairman of the Working Group on the Long-term Programme of Work.

Mr. HASSOUNA, recalling Sir Derek as a lecturer at the University of Cambridge, said that he had been a modest man, always accessible to students and popular with them because of his balanced and practical approach to problems. His many publications included *Law of International Institutions* and *United Nations Forces: A Legal Study of United Nations Practice*.

His experience in the United Nations had given him a good understanding of the international community, and as a legal adviser to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) he had had a firm grasp of issues in the Middle East. He had worked with Sir Derek at the time of the *Taba* arbitral decision, when

Sir Derek had been the Egyptian Government's main legal adviser, while his friend and sometimes foe, Sir Elihu Lauterpacht, had been the adviser to the Israeli Government. That case, which had eventually been won by the Egyptian Government, was a good example of how a contentious international case could be settled through legal means. However, he wished to note that Sir Derek had not only been a prominent member of the Commission and an excellent teacher but had been a wonderful human being as well.

Sir Michael WOOD said that he had been introduced to international law by Sir Derek at the University of Cambridge. Sir Derek had possessed that combination of idealism and realism which was so important for an academic and practising lawyer, and which had been exemplified by his work for UNRWA during very difficult times in Beirut.

Mr. DUGARD said that when he had been a student at the University of Cambridge it had been Sir Derek's writings and above all his personality that had influenced his decision to pursue a career in international law. Sir Derek had been both a realist and idealist who had made people aware of the important role played by international law in modern society.

The CHAIRMAN said that he would send a letter conveying the Commission's condolences to Sir Derek's family.

#### RESERVATIONS TO TREATIES (agenda item 3) (*continued*) (A/CN.4/614)

The CHAIRMAN invited the Commission to resume its consideration of the fourteenth report of the Special Rapporteur on reservations to treaties (A/CN.4/614).

Ms. ESCARAMEIA thanked Mr. Pellet for his fourteenth report and in particular for the section containing a summary of recent developments with regard to reservations and interpretative declarations in various international and regional human rights courts and mechanisms. She had two questions regarding the information contained in the summary. First, according to paragraph 64 of the report, the European Observatory of Reservations to International Treaties was reviewing the validity of reservations to anti-terrorism treaties, including some reservations that had been formulated more than 12 months previously. The Special Rapporteur concluded that the European Observatory considered that objections to reservations could still be raised even after 12 months had elapsed, which confirmed the need for

draft guideline 2.6.15 (Late objections). She did not understand the relevance of the reference to the draft guideline, since it merely stated that a late objection did not produce the legal effects of an objection made within a period of 12 months. If the European Observatory was suggesting that if States formulated late reservations, those reservations might produce some legal effect that would contradict draft guideline 2.6.15. She therefore requested clarification of that point.

Her second question concerned the recommendations made by the working group on reservations at the Sixth Inter-Committee Meeting of the human rights treaty bodies. In its recommendation No. 5 the working group had affirmed the competence of the treaty bodies to assess the validity of reservations. It had also endorsed the Special Rapporteur's proposal to the effect that an invalid reservation should be considered null and void, and had concluded that unless a State's contrary intention was incontrovertibly established, it would remain a party to the treaty without the benefit of the reservation (recommendation No. 7). She expressed surprise at the Special Rapporteur's comment at the end of paragraph 54 of his report that that conclusion did not reflect his position, and she requested him to provide some further explanation. Recommendation No. 7 was based on the presumption that a State would prefer to remain party to a treaty even when its reservation was considered invalid. In her view that was a logical position, and one that was supported by paragraph 18 of the report of the working group on reservations (HRI/MC/2007/5).

Concerning draft guideline 2.40, she agreed that, whenever possible, an interpretative declaration should be made in writing, for the reasons given in paragraph 75 of the fourteenth report. However, the commentary to the draft article should reflect the idea that interpretative declarations could be formulated orally, and that even though a formal communication procedure might not exist, such declarations could still have probative value, as the International Court of Justice had found in its 1950 advisory opinion on *International status of South-West Africa*. Furthermore, she suggested that the word "written" should be deleted from the title of the draft guideline.

As far as draft guideline 2.4.3 was concerned, she believed that reference should be made not only to draft guidelines 2.1.5 to 2.1.7 but also to draft guidelines 2.1.8 (Procedure in case of manifestly invalid reservations) and 2.1.9 (Statement of reasons). The Special Rapporteur held

that there was no need to mention draft guideline 2.1.8, since the validity or invalidity or an interpretative declaration was far from clear (para. 77). However, she considered that there were at least two cases in which a treaty could indicate the invalidity of an interpretative declaration: one in which a treaty stated that no interpretation of the text was possible and a State chose to interpret it; and one in which a treaty contained definitions of certain concepts or situations yet a State interpreted differently. In such cases, the procedure for manifestly invalid reservations set out in draft guideline 2.1.8 should apply.

She took issue with the views expressed by the Special Rapporteur in paragraph 78 of the report: he had previously held that it would be useful and desirable to supply a statement of reasons for interpretative declarations, yet in the report he contended that such a statement was out of the question because it was “not necessary, or even possible, to provide explanations of explanations”. That about-turn was rather confusing, especially as paragraph 78 seemed to assume that there was some sort of explanation behind every interpretative declaration. In reality, States often merely indicated the interpretation they wished to give without providing any reason for it. For example, in its interpretative declaration in respect of the Convention on the Prevention and Punishment of the Crime of Genocide, the United States of America had merely specified, without further elucidation, that it understood “intent” to mean “specific intent” and that “acts in the course of armed conflicts committed without the specific intent required by article II are not sufficient to constitute genocide as defined by this Convention”. She failed to comprehend why the Commission should not recommend that States should provide an explanation of the intent of their declarations. Moreover, she would be grateful if the Special Rapporteur could confirm that many such statements, which were often called “understandings”, were in fact the same thing as interpretative declarations.

She was unhappy with the drafting of draft guideline 2.4.3 *bis*, which stated that, whenever possible, an interpretative declaration should be made in accordance with the procedure established in three other draft guidelines, since she was uncertain whether an interpretative declaration should be made by using the procedure that was employed for the communication of reservations. If that was the proper procedure, the draft guideline should be recast to read “Whenever possible, draft guidelines 2.1.5, 2.1.6, 2.1.7, 2.1.8 and 2.1.9 should apply *mutatis mutandis* to interpretative declarations.”

Draft guidelines 2.4.0 and 2.4.3 *bis* should be sent to the Drafting Committee together with the changes that had been suggested in the plenary discussion.

Mr. GAJA said that when the Special Rapporteur had introduced his fourteenth report he had offered the Commission a wonderful menu, but so far he had provided no more than an appetizer. The current discussion should in fact be confined to paragraphs 67 to 79 of the report, as they were the only ones currently available in all languages of the Commission. A single language, even if it was the language of Voltaire, should not be given more favourable treatment.

Simple interpretative declarations bore little similarity to reservations. While that was not a recent discovery, it was significant that the International Court of Justice had confirmed that fact in its Judgment of 3 February 2009 in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*.

Draft guidelines 2.4.0 and 2.4.3 *bis* were quite acceptable, although their wording was still amenable to improvement. They had been submitted rather late, given that similar draft guidelines on statements approving an interpretative declaration had been sent to the Drafting Committee the previous year. Now the Special Rapporteur maintained that not only approvals but also interpretative declarations should be made in writing. While it would therefore have been more logical to present the draft guidelines in the reverse chronological order, the two guidelines in question could, nevertheless be sent to the Drafting Committee.

Draft guideline 2.4.3 *bis* contained no reference to draft guideline 2.1.8 because it was “far from clear that an interpretative declaration can be ‘valid’ or ‘invalid’”. The same conclusion should be drawn in respect of draft guideline 2.9.7 (Formulation and communication of an approval, opposition or reclassification), which had already been sent to the Drafting Committee.

He understood from the Special Rapporteur’s explanations to the Drafting Committee that validity might be at issue when a treaty prohibited any interpretative declaration. Such cases were rare, however. He was personally unconvinced that the consequence of prohibiting an interpretative declaration was that if such a declaration was made by a State or an international



organization it should be deemed invalid. If an interpretative declaration was held to have no legal effect, he failed to see what purpose could be served by raising the question of its validity.

At all events, it was vital that the Commission should adopt a consistent position on the validity of interpretative declarations in the draft guidelines dealing with the communication and approval of such declarations, which were already before the Drafting Committee.

Mr. McRAE, commenting on draft guideline 2.4.3 *bis*, said that his starting point was different from that of Ms. Escameia in that he had misgivings about including a reference to draft guideline 2.1.7 in it, partly because he considered that it was inappropriate to term an interpretative declaration either valid or invalid. Such declarations might offer an incorrect or wrong interpretation, but a depositary had very little scope for determining if they were valid or invalid, except in the highly unusual case in which interpretative declarations were deliberately prohibited. For the same reason, he was against including a reference to draft guideline 2.1.8. Moreover, the inclusion of a reference to draft guidelines 2.1.7 and 2.1.8 raised the difficult question of whether an interpretative declaration was in fact a reservation. If mention was made of draft guideline 2.1.7, the commentary to draft guideline 2.4.3 *bis* would have to provide a thorough explanation of the reason for doing so.

He was not entirely convinced by the Special Rapporteur's arguments against the inclusion of a draft guideline on statements of reasons for interpretative declarations. Although two years earlier he himself had questioned the need for requiring that reasons should be given in a number of circumstances, because doing so seemed to impose an unnecessary burden on States, he had since been won over by the idea of a reservations dialogue, because the content of a reservation would be better understood if the reasons underpinning it were specified. If one accepted the idea of a reservations dialogue, the corollary was that it would be helpful to know the reasons for interpretative declarations, and that they should therefore be supplied. In many cases the explanation for an interpretative declaration might be self-evident, but in others it might not be so obvious. For example, a State could add a comment to the effect that it was making an interpretative declaration because it thought that that action was consistent with the legislative history or *travaux préparatoires* of a treaty. Alternatively, a State might believe that making an

interpretative declaration was consistent with State practice. In both cases, the explanation of the reasons for the interpretative declaration would contribute to any subsequent reservations dialogue when other States approved or opposed the declaration.

The Special Rapporteur should therefore revisit the idea that in some instances it would be useful and appropriate to supply a statement of reasons. The provision in question could be worded “An interpretative declaration shall, where appropriate, be accompanied by reasons.” The Commission could then explain in the commentary why that might not happen in many cases.

Mr. MELESCANU endorsed the Special Rapporteur’s request that the Secretariat study on the effects of the succession of States with respect to reservations should be circulated to members even if was unavailable in all languages.

The Judgment of the International Court of Justice in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* had dealt a serious blow to the idea of closely aligning the draft guidelines on interpretative declarations with those on reservations. Such an approach had been proposed in the knowledge that, in practice, States sometimes preferred to make interpretative declarations that were in fact reservations, especially in cases where a treaty prohibited the entering of reservations. Draft guideline 2.8.1, which read “Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.13”, suggested that it might take a long time before a reservation could be deemed to have been accepted, in which case it might be preferable for States to make an interpretative declaration.

Mr. Gaja had raised the interesting question of the distinction between the validity and effectiveness of an interpretative declaration, but a declaration which was valid but not effective was worthless. Serious thought should therefore be given to deciding how to align the guidelines on interpretative declarations to which there were no objections with the guidelines on reservations; otherwise the regime of interpretative declarations would be of little interest to States parties to treaties, save as a means of expressing a political position.

Although he was not dissatisfied by the outcome of the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, he was concerned by the way in which the International Court of Justice had disregarded the Romanian declaration on the delimitation of maritime spaces, particularly as one of the most significant conclusions reached by the working group on reservations at the Sixth Inter-Committee Meeting of the human rights treaty bodies had been that reservations and interpretative declarations could contribute to the attainment of the objective of universal ratification of treaties (HRI/MC/2007/5, para. 16).

He supported the proposal made in paragraph 66 of the Special Rapporteur's report to accompany the Guide to Practice with two annexes, and he agreed with the proposed content thereof.

The text of draft guideline 2.4.0 posed no major problems. An interpretative declaration should be made in writing whenever possible, since it was clearly in States' interest to publicize their point of view, even if the legal impact of the declaration was debatable. On the other hand, he would be reluctant to recommend that States should state the reasons for their interpretative declarations, since that was not normally done in practice and could greatly complicate the mechanism for making such declarations. Given that interpretative declarations were in any case of limited effectiveness, it did not seem worthwhile to create a complicated and highly restrictive system that would be of little value if the reasoning of the International Court of Justice in the *Maritime Delimitation in the Black Sea* case was accepted.

Draft guideline 2.4.3 *bis* was worded in suitably broad terms. He was quite prepared to discuss in the Drafting Committee Ms. Escameia's proposal to add a reference to certain draft guidelines and Mr. McRae's proposal to omit any reference to draft guidelines 2.1.7 and 2.1.8.

Draft guidelines 2.4.0 and 2.4.3 *bis* could therefore be sent to the Drafting Committee, provided that everyone agreed that the Committee could discuss whether to broaden or restrict the reference to other applicable draft guidelines.

Mr. FOMBA said that the first three sections of the fourteenth report provided a useful summary of the Commission's previous work on the topic. He welcomed the Special Rapporteur's intention to discuss the practical implications of the Judgment of the International

Court of Justice of 3 February 2009 in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* during the debate on the effects of interpretative declarations and reactions to them. The recommendations made by the working group on reservations at the Sixth Inter-Committee Meeting of the human rights treaty bodies were most enlightening. He commended the Special Rapporteur for the caution he displayed in paragraph 54 of the report. The approach taken by the Inter-American Court of Human Rights in identifying the criteria for interpreting reservations, which was outlined in paragraph 58, was rather original but most useful. Moreover, he agreed that the practice of the Council of Europe, through its Committee of Legal Advisers on Public International Law (CAHDI), in its capacity as the European Observatory of Reservations to International Treaties, tended to confirm the pertinence of draft guideline 2.6.15. He endorsed the Special Rapporteur's plan for his fourteenth report, especially his proposal to accompany the Guide to Practice with two annexes.

It was quite acceptable that the Special Rapporteur should reiterate the conclusion he had drawn in his sixth report regarding the procedure for the formulation of interpretative declarations, and that he should decide not to reconsider it. He agreed with the Special Rapporteur's recommendations in paragraph 75 and said that draft guidelines 2.4.0 and 2.4.3 *bis* did not pose any particular difficulties. It was unnecessary to mention draft guideline 2.1.8 in draft guideline 2.4.3 *bis* for the reasons set out in paragraph 77. He concurred with the Special Rapporteur that it was also unnecessary to state the reasons for an interpretative declaration because of the explanatory nature of the latter. However, he was in favour of supplying reasons for reactions to interpretative declarations and consequently thought that draft guideline 2.9.6 was of value.

The two draft guidelines contained in the fourteenth report should be referred to the Drafting Committee.

Mr. CAFLISCH said that he agreed with the view expressed at the Sixth Inter-Committee Meeting of the human rights treaty bodies by the working group on reservations in its recommendation No. 7, which was reproduced in paragraph 54 of the Special Rapporteur's report, although, like the Special Rapporteur, he could do without the word "incontrovertibly", as something was either established or it was not.

Turning to paragraph 69 of the report, he said that he fully agreed with the Special Rapporteur that there was no need to specify the form that an interpretative declaration should take, or the procedure by which it should be communicated, or to indicate the reason that it was made. However, he also concurred with the Special Rapporteur that interpretative declarations should be made in writing.

In draft guideline 2.4.0 he would prefer the deletion of “whenever possible”, since the use of the word “should” was sufficient to convey the idea that there was no legal obligation.

That said, he considered that draft guidelines 2.4.0 and 2.4.3 *bis* could be referred to the Drafting Committee.

*The meeting rose at 11.20 a.m. to enable the Drafting Committee  
on Responsibility of international organizations to meet.*