

Provisional

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International Law Commission

Sixty-second session (first part)

Provisional summary record of the 3037th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 4 May 2010, at 10 a.m.

Contents

Tribute to the memory of Sir Ian Brownlie, former member of the Commission (*continued*)

Reservations to treaties (*continued*)

Programme, procedure and working methods of the Commission and its documentation

* Reissued for technical reasons.

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Present:

<i>Chairman:</i>	Mr. Xue
<i>Members:</i>	Mr. Caflisch
	Mr. Candioti
	Mr. Comissário Afonso
	Mr. Dugard
	Mr. Fomba
	Mr. Gaja
	Mr. Galicki
	Mr. Hassouna
	Mr. Hmoud
	Ms. Jacobsson
	Mr. Kamto
	Mr. McRae
	Mr. Murase
	Mr. Niehaus
	Mr. Nolte
	Mr. Pellet
	Mr. Perera
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Valencia-Ospina
	Mr. Vargas Carreño
	Mr. Vázquez-Bermudez
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Mikulka	Secretary to the Commission
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The meeting was called to order at 10.05 a.m.

Tribute to the memory of Sir Ian Brownlie, former member of the Commission
(continued)

The Chairman recalled that at the previous meeting, members of the Commission had observed a minute of silence in memory of Sir Ian Brownlie, who had served on the Commission from 1997 to 2008 and had chaired it in 2007. In his many appearances before the International Court of Justice, he had helped to shape its jurisprudence; as lead counsel for Nicaragua, he had played a crucial role in Court's historic Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. His scholarly writings addressed a wide range of topics, including African boundaries, State responsibility and human rights; his *Principles of Public International Law* was a classic text on that subject.

In the International Law Commission, he had made a substantial contribution as Special Rapporteur on the effects of armed conflicts on treaties. He would be remembered for his sound judgement, formidable integrity and independent mind.

Mr. Pellet said he had been devastated to hear of the passing of a mentor, accomplice – and sometime adversary. As a junior member of the team headed by Sir Ian in the *Nicaragua* case, he had been impressed by his intimate knowledge of the Court and its proceedings. When they had subsequently worked on the same or opposing legal teams, he had always had great respect for Sir Ian, even when they disagreed. Within the Commission, while they had sometimes differed on the substance of legal matters, they had still been good friends. Sir Ian had been an excellent companion, a good-natured man, with a wonderful sense of humour.

Mr. Hassouna said that in his work entitled *International Law and the Use of Force by States*, Sir Ian had gained the admiration of African legal experts for his defence of the small, fragile States of that region. His *African Boundaries: A Legal and Diplomatic Encyclopaedia*, was a much valued text. *Basic Documents on Human Rights*, which he had edited, attested to his profound belief in the need to defend human rights.

As a member and Chairman of the Commission, he had combined academic depth with a barrister's experience. He had been able to forge compromise, sometimes using his British sense of humour to defuse tension. He would be remembered for his achievements by academics, as well as by practitioners of international law.

Mr. Vargas Carreño noted that Sir Ian had consistently enriched the Commission's debates through his profound knowledge of international law. His efforts as Special Rapporteur on the effects of armed conflicts on treaties had culminated in the adoption on first reading of the relevant draft articles. His writings were essential texts for the teaching of international law, noteworthy for their clarity.

Mr. Galicki said he had first met Sir Ian through his published works, which were recognized worldwide as valuable research guides. Sir Ian had had a very classical approach to public international law, sparked with originality and intellectual independence, a mixture that was especially visible in his conception of the effects of armed conflicts on treaties. Among his outstanding traits were linguistic precision, great optimism and deep devotion to his family.

Though sorrow was the legacy of his passing, Sir Ian had also left another legacy in his writings. *Principles of Public International Law* and his other works would ensure that he would not be forgotten.

Mr. Caflich said that the Commission had lost a great friend and the academic and professional worlds had suffered a great loss. Sir Ian had espoused and

enjoyed the Commission's work. As Special Rapporteur, he had tackled one of the most thorny topics in international law, one that had long defied codification. He himself was both pleased and apprehensive about pursuing that codification effort, having succeeded him as Special Rapporteur on the effects of armed conflict on treaties.

Principles of Public International Law and Sir Ian's other works revealed him to be not only a gifted scholar but also an able practitioner of international law. A formidable opponent as a barrister, he had never let disagreements poison friendly relations. His sense of humour and of humanity, as well as his ferocious intolerance of intellectual posturing, would be much missed.

Mr. Dugard said that Sir Ian had taught and supervised many African students who today played a prominent role in international law. His seminal work on African boundaries was essential for an understanding of the political map of the continent. He had appeared before the International Court of Justice in over 40 cases, many of them involving African countries. The Nicaragua case, in which he had been lead counsel, had emboldened countries in the developing world, and in Africa in particular, to bring cases before the Court.

In the Court, Sir Ian had repeatedly taken on unpopular causes that had not been espoused by his own Government and on a number of occasions had even appeared against the United Kingdom. Sir Ian had been an expert in many fields and had made a major contribution in many areas, particularly State responsibility and diplomatic protection.

As a member of the Commission, he had been entertaining, humorous, light-hearted and at times confrontational. He had above all been someone to whom every member of the Commission had listened with great interest.

Mr. Singh said that Sir Ian had been as successful in his practice before the courts as in the academic community. He had been widely respected for his integrity and his knowledge of international law. His books were read by students, practitioners and judges the world over.

He had represented India in a case before the International Court of Justice in 1999 and 2000 and had been made an honorary member of the Indian Society of International Law. His loss would be deeply felt by all in the international community, especially by those who had known and worked with him.

Sir Michael Wood said that he had never worked on the same legal team as Sir Ian, but had sometimes been on the opposing side – which was, arguably, where one learned best to appreciate another advocate's merits. The fact that Sir Ian had often represented parties against his own Government had probably enhanced rather than diminished his reputation among international lawyers, and even with his Government, which had twice honoured him for his contribution to international law.

Sir Ian had strongly believed that everyone, however unattractive their cause, should have access to a lawyer. He had been an unashamed positivist, but at the same time had had the mix of idealism and realism so necessary for the practising lawyer. It would be a fitting tribute if Sir Ian's memory inspired the Commission to even greater achievements in the remainder of the quinquennium and beyond.

The Chairman said that it had been a great honour and privilege to have worked with Sir Ian in the International Law Commission. She had learned much from him and had been impressed by his dedication to the cause of international law. In 2009, Sir Ian had visited China for the first time, and had promised to return. Although that would no longer be possible, she was certain his great contributions in the field of international law would always be remembered by Chinese lawyers.

Reservations to treaties (agenda item 2) (*continued*) (A/CN.4/614/Add.2)

Mr. Gaja said that the Special Rapporteur's general approach was convincing, although the Guide to Practice seemed to be more akin to a Critique of Practice.

In draft guideline 4.1, the Special Rapporteur introduced a new category of reservation, that of established reservations. It was new because in State practice and international jurisprudence, whether or not a reservation was "established" was not usually a matter for consideration. The category did not appear in either of the 1969 and 1986 Vienna Conventions on the law of treaties, common article 21, paragraph 1, of which merely spoke of a "reservation established with regard to another party in accordance with articles 19, 20 and 23" with reference to reservations that met certain substantive and procedural criteria and that had been accepted. While the category of established reservations might facilitate the elaboration of certain draft guidelines, for example draft guideline 4.2, the Commission could also dispense with it to focus directly on the effects which the reservations produced when they met the same substantive and procedural conditions, including acceptance.

He agreed with the distinction drawn between an expressly authorized reservation, whose content must be sufficiently predetermined in the treaty, and a specified reservation, whose content could be enunciated less precisely, simply by reference to specific articles of a convention. It would, however, be useful to include in the commentary some mention of the 1982 Advisory Opinion of the Inter-American Court of Human Rights on the Effect of Reservations on the Entry into Force of the American Convention on Human Rights, which took a stance that differed from the one chosen by the Special Rapporteur.

Article 20, paragraph 2, of the Vienna Convention on the Law of Treaties described a situation in which the application of a treaty in its entirety between all the parties was an essential condition of the consent of each one to be bound by the treaty. Such treaties were referred to in draft guideline 4.1.2 as treaties "with limited participation". However, the scope of that term extended beyond the type of treaty described in article 20, paragraph 2, which in fact referred to a sub-category of treaties with limited participation. There were treaties with limited participation to which the requirement of unanimous acceptance of reservations did not apply, such as those that had first emerged under the flexible regime of the Pan American Union. It would be useful to cite examples of State practice illustrating the category of treaties described in article 20, paragraph 2; however, a more appropriate name for them than "treaties with limited participation" should be sought.

The commentary to draft guideline 4.1.3 could perhaps elucidate the reasons underlying an idea brought up in the report and implicit in draft guideline 4.1.3, namely that a reservation to a constituent instrument of an international organization needed to be accepted only by the competent organ of the organization and not necessarily by its members. An explanation should also be provided as to why elements had been added to draft guideline 4.1.3 that did not appear in the relevant text of the Vienna Conventions. The commentary could explain, for example, that it had been necessary to find a uniform solution applicable to all members of the organization. While another uniform solution might be to require, in addition, that reservations must be accepted by all the members of the organization, that solution would ultimately render acceptance of the reservations by the competent body of the organization completely superfluous.

In conclusion, he was in favour of referring draft guidelines 4.1, 4.1.1, 4.1.2 and 4.1.3 to the Drafting Committee, provided that the question of whether the category of "established reservations" was to be included was left pending, subject to further consideration in the Drafting Committee.

Mr. Nolte said that the Commission had arrived at a crucial stage in its work on reservations to treaties: the effects of reservations and interpretative declarations were probably the most difficult and controversial aspect of the whole endeavour. It was therefore particularly commendable that the Special Rapporteur had delved back into the *travaux préparatoires* of the Vienna Convention on the Law of Treaties in order to identify the ideas and objectives underlying its reservations regime.

He fully endorsed the Special Rapporteur's suggestion that a clear distinction should be drawn between the effects of permissible and impermissible reservations, as the lack of such a distinction was one of the recognized weaknesses of the Vienna Convention. On the other hand, the usefulness and possible implications of such a distinction depended on how clearly it could be drawn, as had been illustrated by the Commission's discussion of draft guideline 3.3 (Consequences of the non-permissibility of a reservation). It was therefore worrying that the Special Rapporteur had described as "far from clear-cut" and even "enigmatic" the most important criterion for determining the permissibility of a reservation, namely its compatibility with the object and purpose of a treaty. Although he agreed that that criterion was far from clear-cut, he did not believe that its application was any more enigmatic than that of the many other criteria in which the object and purpose of a rule or a treaty came into play. The Commission should accordingly assume that the criterion was applicable, but when spelling out the various effects of permissible and impermissible reservations, it should refrain from attributing greater clarity to the distinction between those effects than was warranted, given the lack of clarity of the criteria on which they were based.

As to the effects of permissible reservations, he admitted feeling somewhat confused by the Special Rapporteur's use of the term "established reservation". While the purpose was to distinguish between permissible reservations that had been accepted by other parties and those to which an objection had been made, that implied that the establishment of a reservation was essentially a relative concept: a reservation was "established" *vis-à-vis* those States that had accepted it and was not "established" *vis-à-vis* those States that had formulated an objection to it. However, elsewhere in the report, the Special Rapporteur had used language suggesting that the establishment of a reservation was an absolute concept, or a concept with *erga omnes* effect. In paragraph 201, for example, he stated that "a reservation to which an objection has been made is obviously not established within the meaning of article 21, paragraph 1".

As he understood the Special Rapporteur's argument, particularly in paragraph 205 of the report, the "establishment" of a reservation was to be seen in relative terms. If that was the case, then he agreed with the Special Rapporteur's substantive points concerning the effects on the entry into force of the treaty. However, the term "established" reservation was somewhat misleading, since it simply described a reservation that was fully effective *vis-à-vis* those States that had accepted it.

It was also confusing that a reservation that was not established *vis-à-vis* an objecting State could nevertheless have the limited effects on that State described in article 21, paragraph 3, of the Vienna Conventions. In his fifteenth report (A/CN.4/624), the Special Rapporteur used the term "valid" reservations, thereby increasing the confusion: a reservation could be both permissible and valid, while still not being "established". Perhaps the *erga omnes partes* effect suggested by the term "establishment" could be clarified in the course of the drafting process.

With regard to expressly authorized reservations, described in paragraphs 207 to 222, the question was whether they precluded the formulation of objections. While that might be true in most cases, in some instances the possibility of formulating an objection might depend on the interpretation of the treaty in question. Perhaps the parties, by authorizing specific reservations, were merely emphasizing that such reservations were not

contrary to the object and purpose of the treaty, while giving other contracting parties the opportunity to object to those reservations. In contrast to Derek Bowett's reasoning cited in paragraph 222, he did not consider it a logical necessity that by making the permissibility of a reservation "the object of an express agreement", the parties renounced any right to object to such a reservation. The arbitral award in the *case concerning the Delimitation of the Continental Shelf of the Mer d'Iroise*, to which the Special Rapporteur referred in paragraph 215 of his report, did not exclude that possibility either.

The parties to a treaty might have a variety of reasons for allowing reservations, as evidenced by the discussion in the report of clauses that permitted the general authorization of reservations, which the Special Rapporteur rightly did not wish to treat as *a priori* acceptance that would exclude objections. The existence of treaty clauses that explicitly permitted reservations but that also allowed objections would require that draft guideline 4.1.1 be reformulated, since an expressly authorized reservation against which an objection could be formulated could not be deemed to be "established" as the Special Rapporteur used the term. The point was not whether the content of the reservation was sufficiently predetermined by the treaty, as suggested by the Special Rapporteur in paragraph 218 of his report, but whether the purpose of the authorization to formulate reservations that had been incorporated in the treaty was to anticipate their acceptance by all the other parties.

He wished to make a similar point with regard to reservations to treaties "with limited participation". The most conspicuous difference between draft guideline 4.1.2 and article 20, paragraph 2, of the Vienna Convention, was that the latter's explicit reference to the "object and purpose of the treaty" had not been included in draft guideline 4.1.2. Although the criterion of object and purpose, like that of number, was far from clear-cut, it should be, not downplayed by being subsumed in the general condition of permissibility, but rather highlighted. On the other hand, he had no objection to the reference to "other contracting parties", contained in draft guideline 4.1.2, whose purpose was to clarify the requirement of unanimous consent.

He was in favour of referring draft guidelines 4.1 to 4.1.2 to the Drafting Committee.

Mr. McRae said that the report showed evidence of the usual meticulous research, but was in some places overly meticulous, resulting in unnecessary confusion. The attempt to generate the concept of an "established reservation" from the chapeau to article 21, paragraph 1, of the Vienna Convention on the Law of Treaties was somewhat problematic. He did not find the concept of a "reservation established with regard to another party in accordance with articles 19, 20 and 23" to be particularly complicated, nor did he agree with the Special Rapporteur's assessment in paragraph 199 of his report that the chapeau contained "many uncertainties and imprecisions". The Special Rapporteur himself, in formulating draft guideline 4.1, had incorporated precisely the requirements set out in articles 19, 20 and 23, albeit not in that order. The tortuous history recounted by the Special Rapporteur of how article 21 had been formulated made one expect complexity, yet draft guideline 4.1 itself was actually a simplified and clearer restatement of the chapeau of article 21, paragraph 1. He supported it, and that support extended to draft guideline 4.1.1 as well, though he endorsed the Special Rapporteur's request that the Drafting Committee should make the third paragraph more readable.

He did have a problem, however, with draft guideline 4.1.2, which, rather than focusing on treaties with limited participation, should be about the establishment of a reservation in the case of a treaty whose application in its entirety was an essential condition of the consent of each party to be bound by the treaty. The limited participation referred to in article 20, paragraph 2, was a criterion for determining whether the treaty constituted such a case – not the main object of the provision. Moreover, contrary to draft

guideline 4.1.2, no definition of the term “treaty with limited participation” was given in article 20, paragraph 2.

Problems relating to the concept of an established reservation were starting to become evident in draft guideline 4.1.3, and he anticipated those problems to affect several of the draft guidelines that would follow it. The main difficulty had to do with the fact that the word “established” was in article 21, paragraph 1, where its purpose was to define which reservations had the effects set out in the article. Yet draft guideline 4.1.3 reflected an attempt to take the concept of an established reservation from article 21 and to extend it back to article 20. Nevertheless, if the matters he and others had raised could be addressed in the Drafting Committee, and if the Drafting Committee could give further consideration to the concept of an established reservation, then he would have no problem with referring those draft guidelines to the Drafting Committee.

Mr. Fomba noted that in the second addendum to his fourteenth report, the Special Rapporteur continued to seek to ascertain as accurately as possible the level of certainty or uncertainty inherent in the regime established by the Vienna Conventions and, if necessary, to make up for any lacunae or shortcomings. Plainly, that was not an easy task. Dilemmas were posed by the very definition of the terms “permissible reservation”, “non-permissible reservation”, “purported effects”, “effects actually achieved”, “established reservation”, “expressly authorized reservations”, “impliedly authorized reservation” and “specified reservation”. The Special Rapporteur had already analysed those terms with sufficient clarity.

At first sight, the new draft guidelines seemed to be apt and were acceptable, although their wording was possibly amenable to improvement. The third paragraph of guideline 4.1.1 (Establishment of a reservation expressly authorized by the treaty), for example, seemed rather convoluted and would certainly benefit from recasting. He had no fundamental objections to the wording of draft guideline 4.1, although it might be possible to find a more felicitous phrase than “formulated in accordance with the form”.

He was in favour of sending all the draft guidelines to the Drafting Committee.

Sir Michael Wood thanked the Special Rapporteur for sharing his thinking on how the Commission should proceed in order to comply with States’ demands that it should conclude its work on reservations to treaties by the end of the current quinquennium. He fully agreed with the Special Rapporteur on the need to complete the first reading of the Guide to Practice at the current session and to conduct the second reading the following year. States and international organizations must be given a proper opportunity to comment on the first reading draft, since the final product would be of considerable practical importance to them. They should feel that they had been fully involved in the preparation of the Guide. For obvious reasons, they would have only one year, instead of the traditional two years, to examine the text. Such a procedure was exceptional, but unavoidable, if the Commission were to complete its work in an orderly manner. It should be acceptable, because many States had already had an opportunity to comment on many of the draft guidelines over the years.

He approved of the Special Rapporteur’s basic approach to the legal effects of reservations and objections thereto. He concurred with the basic distinction between permissible and non-permissible reservations and endorsed the view that the relevant provisions of the Vienna Conventions concerned permissible reservations and that consent lay at the heart of the reservations regime. The establishment of reservations was indeed an important notion. It was clearly present in the Vienna Conventions, even if it was not spelled out there in any detail. He was therefore in general agreement with the new draft guidelines proposed by the Special Rapporteur and would be happy to see them all referred to the Drafting Committee.

In some parts of his report, the Special Rapporteur had been a little harsh in his criticism of those who had drafted the 1969 Vienna Convention on the Law of Treaties, both within the Commission and at the Vienna Conference. While some last-minute changes introduced at the Conference had not been followed through in an entirely consistent manner, all in all the drafters had done a pretty good job.

In order fully to understand the Special Rapporteur's thinking on some points, it was necessary to refer back to the original French text of the report. That comment should not be seen as criticism of the translators, who did a magnificent job under great time pressure. After all, they were not preparing literary translations of the works of Voltaire, Flaubert or Camus (although he believed that the Special Rapporteur preferred Sartre). Still, when the Commission reviewed the draft commentaries to the draft guidelines, it might need to pay attention not only to the substance of the text, but also to the translations thereof. One example was a reference to the "*Mer d'Iroise*" which in English was normally known as the "English Channel". Sufficient time should accordingly be set aside in 2011 to review the commentaries.

Mr. Pellet (Special Rapporteur) said that he preferred Voltaire to Sartre and that the Channel was shared by France and the United Kingdom. The official name of the case in question was the *case concerning the Delimitation of the Continental Shelf between the French Republic and the United Kingdom*.

Sir Michael had claimed that he had been harsh in his criticism of earlier members of the Commission, whereas in fact the target of his disapproval was the Vienna Conference. Sir Humphrey Waldock had been an exceptional Special Rapporteur who had persuaded the Commission to move away from the outmoded system of unanimity to a more flexible one. He had nothing against the Commission's draft text of 1969, but he did deplore the pressure exerted by the Eastern European countries, for purely ideological and political reasons, which had led to the reversal of the presumption set out in article 20, paragraph 4 (b), concerning entry into force of a treaty for the reserving State. He personally disagreed with that reversal, but one had to live with it. The Vienna Conference's subsequent lack of consistency had resulted in a bizarre final text. He had tried to navigate his way through it, since there should be no tampering with the text produced by the Conference, even though it really was exceedingly awkward.

In short, he rejected the criticism of his criticism.

Mr. Kamto, referring to established reservations, a new category of reservation derived from the chapeau of article 21, paragraph 1, of the Vienna Convention on the Law of Treaties, said that that text had probably not been intended to create a new category of reservations. The phrase "established reservation" referred to something much simpler and more limited than what the Commission envisaged: it merely meant a reservation that existed.

The purpose of the Guide to Practice was to propose as many elements as possible to help States to deal with reservations in practice. As Mr. Gaja had said, the commentaries would need to be extremely precise so as not to exaggerate the scope of the chapeau of article 21, paragraph 1. He actually wondered if a guideline or definition was really needed, especially as practice was extremely rare. The Special Rapporteur seemed to be engaging in an interpretation exercise rather than the identification of a rule stemming from State practice. It was a moot point whether the Guide to Practice should propose rules which did not yet exist as a means of steering practice, or whether it should merely codify existing practice.

While he was in favour of referral to the Drafting Committee, because the new draft guidelines did constitute a novel and original approach, he thought that the commentary should clearly explain their intended scope and the precise meaning of the terms used and

that established reservations should not be regarded as an entirely new category of reservations transcending the intentions behind the Vienna Convention.

Programme, procedures and working methods of the Commission and its documentation (agenda item 11)

Mr. Dugard (Chairman of the Planning Group) said that the Planning Group would be composed of the following members: Mr. Caflisch, Mr. Candiotti, Ms. Escameia, Mr. Gaja, Mr. Galicki, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Valencia-Ospina, Mr. Vasciannie and Ms. Xue. Other members of the Commission would be welcome to join the Planning Group.

Mr. Candiotti (Chairman of the Working Group on the Long-term Programme of Work) said that the Working Group consisted of Mr. Caflisch, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Ms. Xue.

The meeting rose at 12.35 p.m. to enable the Planning Group to meet.