Summary record of the 3074th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:
2010, vol. I
He also had some concerns about the last sentence, in particular the reference to the exceptions cited in guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates), which he would address in connection with that guideline.

Paragraph (24), as amended, was adopted.

Paragraph (25) was adopted.

Paragraph (26)

85. Mr. NOLTE wondered whether the principle of reciprocity was correctly described in the paragraph, which spoke of the right to require the fulfillment of an obligation. A similar statement about the loss of the right to invoke an obligation appeared in the third sentence of paragraph (7) of the commentary to draft guideline 4.2.5. There, in a context of human rights treaties, which dealt with obligations for the benefit of the individual, the concept of invocation of an obligation was appropriate, but in the context of guideline 4.2.4, where inter-State relations were concerned, the parties were released from the obligation itself. He therefore proposed that paragraph (26) be redrafted as follows:

“It follows that the author of the reservation is not only released from compliance with the treaty obligations which are the subject of the reservation, but also that the State or international organization with which the reservation is established is released from the obligation to which the reservation relates with regard to the author of the reservation.”

86. Mr. GAJA said that, although he shared Mr. Nolte’s concerns, he was not entirely satisfied with the wording of his proposal. The Commission needed more time to consider how to explain in the commentaries the distinction between guidelines 4.2.4 and 4.2.5, in other words, the fact that, in certain cases, the content of the obligation changed and the State or international organization was released from the obligation, whereas, in other cases (guideline 4.2.5), the obligation still existed, but only towards States other than the author of the reservation. That distinction seemed fairly clear in the guidelines, less so in the commentary.

87. The CHAIRPERSON said that the Commission would continue its consideration of paragraph (26) at the next plenary meeting.

The meeting rose at 1 p.m.

3074th MEETING
Tuesday, 3 August 2010, at 3:05 p.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-second session (continued)

CHAPTER IV. Reservations to treaties (continued) (A/CN.4/L.764 and Add.1–10)

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (continued) (A/CN.4/L.764/Add.2–10)

2. Text of the draft guidelines with commentaries thereto provisionally adopted by the Commission at its sixty-second session (continued) (A/CN.4/L.764/Add.3–10)

1. The CHAIRPERSON invited the members of the Commission to continue with the adoption of section C.2 of chapter IV by considering document A/CN.4/L.764/Add.6 paragraph by paragraph.

Commentary to guideline 4.2.4 (Effect of an established reservation on treaty relations) (concluded)

Paragraph (26)

2. Mr. NOLTE said that paragraph (26) defined in general terms the principle of reciprocal application, which meant that one party was released from compliance with a treaty obligation and another party could not invoke that obligation. Paragraph (7) of the commentary to 4.2.5 specified that a State or international organization that had made a reservation could not invoke the obligation excluded or modified by that reservation. He proposed to simplify paragraph (26) by not raising the issue of invocation and merely to refer to the reciprocal application of the obligation. The text would then read:

“It follows that not only the author of the reservation is released from compliance with the treaty obligations which are the subject of the reservation, but that the same is true for the State or international organization with regard to which the reservation is established.”

3. Mr. PELLET (Special Rapporteur) said that the point made by Mr. Nolte was correct, but insofar as a non-reciprocal obligation was concerned, the reserving State also lost the right to require other States to apply it. He did not see how paragraph (7) of the commentary to draft guideline 4.2.5 supported Mr. Nolte’s position.

4. Mr. GAJA said that he had no objection to the initial text of paragraph (26), but had a problem with Mr. Nolte’s proposal: the State or international organization with regard to which the reservation was established was released from its treaty obligations towards the reserving State, but there might be a parallel obligation towards other States or international organizations. That aspect should be included.

5. Sir Michael WOOD proposed to retain the current text of paragraph (26) and to add the following sentence to take Mr. Nolte’s concern into account:
“In addition, the State or international organization with regard to which the reservation is established is released from compliance with the obligation which is the subject of the reservation with respect to the reserving State.”

Paragraph (26), as amended, was adopted.

Paragraph (27)

6. Mr. VÁZQUEZ-BERMÚDEZ said that the words “principle of reciprocity” in the first sentence should be replaced by the words which the Drafting Committee had used elsewhere in that part of the commentary, namely “principle of reciprocal application”.

Paragraph (27), as amended, was adopted.

Paragraphs (28) to (34)

Paragraphs (28) to (34) were adopted.

The commentary to draft guideline 4.2.4, as amended, was adopted.

Commentary to guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates)

Paragraph (1)

7. Mr. VÁZQUEZ-BERMÚDEZ said that the words “principle of reciprocity” should be replaced by “principle of reciprocal application” for the same reasons as in paragraph (27) of the commentary to draft guideline 4.2.4.

Paragraph (1), as amended, was adopted.

Paragraph (2)

8. Mr. GAJA said that the first sentence of the paragraph was confusing, because the general rule enunciated in the Vienna Conventions, which was at issue, did not provide for any exceptions: the situation which prevailed between the reserving State and the State which had accepted the reservation did not presuppose any change in the content of the obligations that the latter might have towards other entities. His suggestion was to delete the first sentence.

9. Mr. PELLET (Special Rapporteur) said that he was opposed to that suggestion, but agreed not to speak of exceptions and proposed the following wording: “... guideline 4.2.5 emphasizes that the principle of reciprocity is not absolute” [...] la directive 4.2.5 souligne que le principe de réciprocité n’est pas absolu].

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

10. Mr. GAJA proposed the insertion of the word “only” after “apply not” in the fourth line. That did not seem to be controversial.

11. Mr. PELLET (Special Rapporteur) said that, on the contrary, that was the heart of the problem, because paragraph (4) concerned non-reciprocal obligations. The text could specify that the measure of reciprocity accompanying those obligations was not affected by draft guideline 4.2.5, but it certainly could not mix up reciprocal and non-reciprocal obligations. If the word “only” was inserted, it would mean that draft guideline 4.2.5 might be applicable to non-reciprocal obligations, which was simply impossible.

12. Mr. GAJA said that human rights treaties imposed obligations on States with regard not only to individuals but also to other States parties. The non-reciprocal element of some obligations did not mean that treaties did not impose obligations on a State party towards another State party.

13. Mr. PELLET (Special Rapporteur) said that the problem was that Mr. Gaja was talking about treaties, whereas he himself was speaking of an obligation towards others. That obligation was always either reciprocal or non-reciprocal. In the current case, obligations were at issue which were not reciprocal vis-à-vis certain entities. Consequently, insofar as they were not reciprocal (as indicated by the first words of draft guideline 4.2.5), they could not be considered to be reciprocal in part, which Mr. Gaja was saying with his proposal.

14. Mr. GAJA said that although those obligations did not apply between the reserving State and the State which had accepted the reservation, they did apply in relation to other States parties and thus they still existed.

15. Mr. PELLET (Special Rapporteur) proposed to move paragraph (7), which dealt with that point, and to insert it as a new paragraph (4) bis after paragraph (4), which could be amended to read:

“(4) A typical example is afforded by the human rights treaties. The fact that a State formulates a reservation excluding the application of one of the obligations contained in such a treaty does not release a State which accepts the reservation from respecting that obligation, insofar as the obligation concerned is non-reciprocal. Also insofar as it is non-reciprocal, that obligation applies not in an inter-State relationship between the reserving State and the State which has accepted the reservation, but simply in a State–human being relationship. The Human Rights Committee ... within their jurisdiction.

“(4) bis Qualifying that absolute formulation, the phrase ‘insofar as’, with which guideline 4.2.5 begins, aims to show that even if the nature of the obligation or the object and purpose of the treaty as a whole exclude the reciprocity of reservations, elements of reciprocity may nevertheless remain in the relations between the author of the reservation and the other parties to the treaty. Thus, for example, ... at the end of the first sentence of guideline 4.2.5.”

[4) Un exemple typique est constitué par les conventions relatives à la protection des droits de l’homme[1–3]. Le fait qu’un État formule une réserve
excluant l’application d’une des obligations contenues dans une telle convention ne libère pas l’État l’acceptant de respecter cette obligation, dans la mesure où il s’agit d’une obligation non réciproque. Toutefois, dans cette mesure, une telle obligation n’est en effet pas appliquée dans la relation interétatique entre l’État réservataire et l’État qui a accepté la réserve, mais simplement dans relation État–être humain, où il s’agit d’obligations non réciproques. Le Comité des droits de l’homme […] de la juridiction des États.1

(4) bis Nuançant cette formulation absolue, l’expression [dans la mesure où qui introduit la directive 4.2.5 tend à montrer que même si la nature de l’obligation ou l’objet et le but du traité dans son ensemble excluent le jeu réciproque des réserves, des éléments de réciprocité peuvent néanmoins subsister dans les relations entre l’auteur de la réserve et les autres parties au traité. Ainsi par exemple, […] à la fin de la première phrase de la directive 4.2.5.] 1

16. Mr. GAJA said that the new paragraph (4) bis addressed non-reciprocal elements of a treaty. In the area of non-reciprocal elements, obligations existed between States that had not made a reservation but had accepted the reservation and other States parties to the treaty. The third sentence of paragraph (4) seemed to be saying that when the obligation was not reciprocal, it only existed in a State–human being relationship; that posed a problem.

17. Sir Michael WOOD said that it would suffice to delete the word “simply” in the third sentence of paragraph (4).

18. The CHAIRPERSON said he took it that the Commission wished to approve the proposals by Mr. Pellet (Special Rapporteur) and Sir Michael.

It was so decided.

Paragraph (4), as amended, and paragraph (4) bis were adopted.

Paragraph (5)

19. Mr. PELLET (Special Rapporteur), referring to the French version, proposed the insertion of the words “Au demeurant” at the beginning of paragraph (5) in order to have a smoother transition from paragraph (4) bis.

Paragraph (5), as amended, was adopted.

Paragraph (6)

20. Mr. GAJA proposed that the wording of the second sentence should be amended to read: “A party owes an obligation towards all the other parties to the treaty.”

Paragraph (6), as amended, was adopted.

Paragraphs (8) to (10) were adopted.
methods of work of the Commission, notably the work of
the special rapporteurs, on the basis of a memorandum
which he had prepared. Following discussion, the text
had been revised. The revised text of the memorandum
concerning the work of the special rapporteurs would be
transmitted to the Working Group in 2011. The minutes of
the debate had been circulated and sent to all members of
the Commission.

26. The Planning Group had also addressed issues relat-
ing to its working methods and had agreed that, in order
to better organize plenary debates and make full use of
available resources, the members of the Commission
should speak on the topic as early as possible after the
introduction by the Special Rapporteur of the relevant
report. The Planning Group had noted that it would be
only in exceptional circumstances and for valid reasons
that the plenary should only take note of draft articles
adopted by the Drafting Committee during a given ses-
sion and that every effort should be made to ensure that
such draft articles were adopted and included in the report
of the Commission, together with the commentaries pre-
pared by the Special Rapporteurs. The Planning Group
also recommended that when the Commission took note
of draft articles, they should appear in a footnote in the
Commission’s report.

27. It was his understanding that the other recommen-
dations of the Planning Group, if approved by the Com-
mision, as was customary, would be incorporated into
the report of the Commission under the chapter entitled
“Other decisions and conclusions of the Commission”,
with the necessary adjustments.

28. Mr. PELLET said that, with regard to taking note of
the draft articles adopted by the Drafting Committee, he
was not radically opposed to the Commission’s reproduc-
ing them in its report, but expressed a word of caution in
that regard: there had been only one precedent, that of
the draft articles on responsibility of States, which the
Drafting Committee had adopted in 2000 and which the
Commission had been so imprudent as to reproduce in its
report. The result had been disastrous, because States had
thought that they were expected to comment on the draft
articles without really knowing, in the absence of com-
mentary, what had motivated them.

29. Concerning the draft guidelines on reservations to
treaties, he would like the Commission to discuss the
future of the draft Guide to Practice, a first version of
which had a good chance of being adopted by the end of
the current session. Regardless of its fate, the Guide
would need to be reviewed in its entirety by the Com-
mision at the 2011 session. To that end, the Commission
might envisage setting up a working group to meet for
a week to put the final touches on all the commentaries
to the draft guidelines, an enormous and rather technical
task, since the Guide to Practice would be approximately
800 pages long.

30. Finally, he recalled that the Chairperson of the
Human Rights Committee had written a letter to the
Chairperson of the Commission. It would be useful for
the Commission to have a brief exchange of views on how
to reply.

31. The CHAIRPERSON said that the Enlarged Bureau
would meet to discuss the three questions raised by
Mr. Pellet. He took it that the Commission wished to
adopt the report of the Planning Group (A/CN.4/L.775).

The report of the Planning Group was adopted.

The meeting rose at 4.30 p.m.

3075th MEETING

Wednesday, 4 August 2010, at 10.10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário
Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Gal-
cki, Mr. Hassouna, Mr. Mhoud, Mr. McRae, Mr. Nolte,
Mr. Pellet, Mr. Perera, Mr. Petrić, Mr. Singh, Mr. Valen-
cia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie,
Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission
on the work of its sixty-second session (continued)

CHAPTER XIII. Other decisions and conclusions of the Commission
(A/CN.4/L.773 and Add.1)

1. The CHAIRPERSON invited the Commission to
begin its consideration of chapter XIII of the report with
sections C, D and E of that chapter contained in docu-
ment A/CN.4/L.773/Add.1 and to adopt them paragraph
by paragraph.

C. Cooperation with other bodies
Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Section C was adopted.

D. Representation at the sixty-fifth session of the General
Assembly

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

2. Mr. GAJA proposed that the Commission should
decide at the current plenary meeting which special rap-
porteur it would request to attend the sixty-fifth session of
the General Assembly, under the terms of paragraph 5 of
General Assembly resolution 44/35 of 4 December 1989.

3. The CHAIRPERSON said that the Bureau had dis-
cussed the matter and had agreed to recommend that
Mr. Pellet, Special Rapporteur for the topic “Reservations
to treaties”, should be requested to attend the forthcoming
session of the General Assembly.